

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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

- - -
VOLUME III
- - -

Public Hearing Administrative Law Judge
Before: Jill S. Clifton

Date: May 6, 2009

Time: Commencing at 8:00 a.m.

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

Before: David W. Moxley, RMR, CRR, CMRS
Notary Public - State of Ohio

1 APPEARANCES:

2
3 On behalf of the United States Department of
4 Agriculture:

5 Garrett Stevens, Esq.
6 Heather Pichelson, Esq.

7 of

8 United States Department of Agriculture
9 Office of the General Counsel
10 Marketing Division
11 Room 2343 South Building
12 Washington, D.C. 20250
13 Phone: (202) 720-5707

14 On behalf of Continental Dairy
15 Select Milk:

16 Benjamin F. Yale, Esq.

17 of

18 Yale Law Office, LP
19 527 North Westminster Street
20 P.O. Box 100
21 Waynesfield, Ohio 45896
22 Phone: (419) 568-5751

23 On behalf of AIDA:

24 Alfred William Ricciardi, Esq.

25 of

Aiken, Schenk, Hawkins & Ricciardi
Suite 100
4742 North 24th Street
Phoenix, Arizona 85016
Phone: (602) 248-8203

Ryan K. Miltner, Esq.

of

The Miltner Law Firm, LLC
527 North Westminster Street
P.O. Box 477
Waynesfield, Ohio 45896
Phone: (419) 568-2920

1 APPEARANCES CONT'D:
2

3 On behalf of AIDA:

4 Nancy S. Bryson, Esq.
5 of
6 Holland & Hart
7 Suite 900
8 975 F Street NW
9 Washington, DC 20004
10 Phone: (202) 654-6921
11

12 On behalf of National Milk:

13 Kevin J. Brosch, Esq.
14 of
15 DTB Associates, LLP
16 Third Floor
17 901 New York Avenue, NW
18 Washington, D.C. 20001-4413
19 Phone: (202) 661-7097
2021 On behalf of the Florida Milk Producers
22 Federation and Dairy Farmers of America, Inc.:23 Marvin Beshore, Esq.
24 of
25 Law Office of Martin Beshore
130 State Street
P.O. Box 946
Harrisburg, Pennsylvania 17108
Phone: (717) 236-0781

On behalf of Aurora Dairy Corporation:

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

1 APPEARANCES CONT'D:

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

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

15 On behalf of Mallorie's Dairy, et al.:

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

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

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

Also Present:

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

	I N D E X	PAGE
1		
2		
3	JOCK GIBSON	
4	Direct Examination	624
	Cross-Examination by Mr. Brosch	632
5	Cross-Examination by Mr. Carroll	634
	Cross-Examination by Mr. Rower	637
6	Cross-Examination by Mr. Miltner	639
7	LEON BERTHIAUME	
8	Direct Examination by Mr. Beshore	642
	Cross-Examination by Mr. Vetne	650
9	Cross-Examination by Mr. Yale	661
	Cross-Examination by Mr. Ricciardi	663
10	Cross-Examination by Mr. Carroll	671
	Cross-Examination by Mr. English	675
11	Cross-Examination by Mr. Vetne	678
	Cross-Examination by Mr. Tosi	682
12		
13	BILL NEWELL, CINDY DAMM, JOHN TRAWEEK	
	Direct Examination	688
14	Cross-Examination by Mr. Carroll	711
	Cross-Examination by Mr. Vetne	715
15	Cross-Examination by Mr. Miltner	736
	Cross-Examination by Mr. Ricciardi	755
16	Cross-Examination by Mr. Brosch	771
	Cross-Examination by Mr. Miltner	775
17	Redirect Examination by Mr. Beshore	777
18	RODNEY DANIELS	
19	Direct Examination by Mr. Beshore	790
	Cross-Examination by Mr. Miltner	796
20	Cross-Examination by Mr. Ricciardi	801
	Cross-Examination by Mr. Tosi	807
21	Cross-Examination by Mr. Carroll	808
	Redirect Examination by Mr. Beshore	815
22	Cross-Examination by Mr. Yale	818
23		
24		
25		

1	PAUL ROVEY	
2	Direct Examination	833
	Cross-Examination by Mr. Ricciardi	844
3	Cross-Examination by Mr. Carroll	859
	Cross-Examination by Mr. Tosi	865
4	Redirect Examination by Mr. Brosch	869
5	JERRY DAKIN	
6	Direct Examination	876
	Cross-Examination by Mr. English	883
7	Cross-Examination by Mr. Carroll	886
	Cross-Examination by Mr. Miltner	892
8		
9	JAMES BUELOW	
	Direct Examination by Mr. English	897
10	Cross-Examination by Mr. Carroll	908
	Cross-Examination by Mr. Ricciardi	919
11	Cross-Examination by Mr. Beshore	929
	Cross-Examination by Mr. Tosi	931
12	Redirect Examination by Mr. English	932
13	GARY LEE	
14	Direct Examination by Mr. English	937
	Cross-Examination by Mr. Miltner	948
15	Cross-Examination by Mr. Beshore	957
	Cross-Examination by Mr. Miltner	963
16	Cross-Examination by Mr. Beshore	967
	Redirect Examination by Mr. English	968
17	Cross-Examination by Mr. Carroll	971
	Cross-Examination by Mr. Vetne	974
18	Cross-Examination by Mr. Ricciardi	987
	Redirect Examination by Mr. English	995
19		
20	MARK KASTEL	
	Direct Examination	1055
21		
22		
23		
24		
25		

	EXHIBITS	MARKED	ADMITTED
1			
2	Exhibit 26	-	641
	Exhibit 27	641	684
3	Exhibit 28	694	779
	Exhibit 29	694	779
4	Exhibit 30	694	779
	Exhibit 31	789	820
5	Exhibit 32	820	872
	Exhibit 33	897	908
6	Exhibit 34	936	948
	Exhibit 35	996	-
7			
8		- - -	
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

P R O C E E D I N G S

1
2 JUDGE CLIFTON: Let's go on the record.
3 We are now on record at 8:05. It's Wednesday,
4 May 6, 2009. This is day three of the Milk
5 Rulemaking Hearing. My name is Jill Clifton.

6 I would like this transcript volume to be
7 Volume III and the pages in it to be numbered
8 consecutively to those of yesterday. It's fine
9 with me if cover pages and certification pages
10 receive numbers, as well, to keep everything in
11 one consecutive order.

12 Now, I would actually like these people
13 to come forward if they're here now, and to be
14 accompanied by counsel if counsel will be
15 assisting them in their testimony: James
16 Buelow, Rod Daniels, John Hornstra, Paul
17 Rovey -- we'll get spellings of these later,
18 Court Reporter -- Jock Gibson, Steve Rowe -- no,
19 he's going to be Thursday now. Strike that.
20 Gary Lee, J.T. Wilcox, Leon Berthiaume, and
21 three DFA dairy farmers.

22 Now, those of you that need to testify
23 this morning, please go to the court reporter's
24 side of the podium. If you need to testify this
25 morning.

1 Okay. It's helpful that we start with
2 two. Would each of you come to the microphone
3 and identify yourself and spell your name for
4 us?

5 MR. JOCK GIBSON: Good morning. I'm Jock
6 Gibson. That's J-o-c-k, Gibson, G-i-b-s-o-n.

7 JUDGE CLIFTON: Thank you.

8 MR. BERTHIAUME: My name is Leon
9 Berthiaume, B-e-r-t-h-i-a-u-m-e.

10 JUDGE CLIFTON: And you say it so easily.
11 You just leave out the "i" and the "a,"
12 Berthiaume.

13 MR. BERTHIAUME: That is correct.

14 JUDGE CLIFTON: Good. All right. Of the
15 remaining people, I'm just going to ask it this
16 way: Who really, really, really wants to be
17 next? Would you go to the podium?

18 MS. DAMM: Hi, your Honor. I guess we
19 are the three dairy producers for DFA.

20 JUDGE CLIFTON: Excellent. If you would
21 each give me your names and spell them for the
22 record?

23 MS. DAMM: Cindy, C-i-n-d-y, the last
24 name is Damm, D-a-m-m.

25 MR. NEWELL: Bill, B-i-l-l, Newell,

1 N-e-w-e-l-l.

2 MR. TRAWEEK: John Traweek, J-o-h-n,
3 T-r-a-w-e-e-k.

4 JUDGE CLIFTON: Interesting spelling.
5 And, Mr. Traweek, would you identify, for the
6 record, what DFA stands for?

7 MR. TRAWEEK: Dairy Farmers of America,
8 Inc.

9 JUDGE CLIFTON: Thank you. And let's
10 see. We're going to wait, and I'm going to let
11 this young man know what the rules are here.
12 I'm determining the order --

13 MR. DANIELS: He's with me. He's one of
14 the names you called.

15 JUDGE CLIFTON: -- the order in which
16 people are called to testify today. So I
17 started with people who had to testify this
18 morning, and there are only two.

19 MR. DANIELS: I don't have to testify
20 until this afternoon.

21 JUDGE CLIFTON: Now, I would like to know
22 who --

23 SPEAKER: Rod Daniels, R-o-d,
24 D-a-n-i-e-l-s.

25 JUDGE CLIFTON: Thank you.

1 MR. BESHORE: Your Honor, if I might?

2 JUDGE CLIFTON: Mr. Beshore.

3 MR. BESHORE: Mr. Rovey is not in the
4 room yet. We would request that he be listed
5 next, Paul Rovey, R-o-v-e-y.

6 JUDGE CLIFTON: Who is he?

7 MR. BESHORE: He's a dairy farmer from
8 Arizona.

9 JUDGE CLIFTON: Okay, good. And next?

10 MR. ENGLISH: Charles English, your
11 Honor. Mr. Buelow is walking away from me.

12 JUDGE CLIFTON: Sir?

13 MR. BUELOW: I'm sorry.

14 JUDGE CLIFTON: I'm going to call on you
15 in a moment to speak in the microphone. This
16 will help the court reporter, as well as me.

17 MR. ENGLISH: Good morning, your Honor,
18 Charles English. We expect to have three
19 witnesses today, two really who need to testify
20 today. The third doesn't have to, but, boy,
21 given what's coming up tomorrow, I think if we
22 could get them on, we would be better off.

23 But the first of the two that needs to
24 testify today is Mr. James Buelow, B-u-e-l-o-w.
25 He's standing next to me right now. He wasn't

1 in the room earlier because he was having his
2 report copied, and I have it in my hand. I will
3 put it in the back of the room as promptly as
4 I'm able to get away from the lectern.

5 JUDGE CLIFTON: And please make sure the
6 court reporter has one, I have one and the USDA
7 has one.

8 MR. ENGLISH: I'm keeping separate copies
9 of that for a later time so they don't get
10 confused.

11 JUDGE CLIFTON: As long as you don't
12 forget.

13 MR. ENGLISH: I will not forget you, I
14 assure you.

15 JUDGE CLIFTON: Mr. Buelow, I would like
16 your name on tape here, too.

17 MR. BUELOW: My name is James Buelow,
18 B-u-e-l-o-w.

19 JUDGE CLIFTON: Thank you. And you may
20 be seated.

21 MR. BESHORE: Your Honor, the second of
22 the witnesses who needs to testify today is not
23 presently in the room. His plane must be
24 delayed. Mr. Gary Lee should be on your list,
25 from Prairie Farms Dairy. I apologize, he has

1 his statement with him. I don't have copies at
2 this time. I will get them promptly as soon as
3 he is here. He will be back in the room as
4 well. So Gary Lee is G-a-r-y, last name Lee,
5 L-e-e.

6 JUDGE CLIFTON: And your third person?

7 MR. BESHORE: The third person,
8 Mr. Wilcox, again a witness who doesn't
9 absolutely have to testify today, but again, I
10 really think with everything happening tomorrow,
11 probably Mr. Yonkers coming back and Dr. Cryan,
12 we really ought to try to get him on.

13 Mr. J.T. Wilcox, his statement is also in
14 the back of the room, and I've already kept
15 copies back for the government and for your
16 Honor and for the court reporter. His statement
17 is in the back of the room.

18 JUDGE CLIFTON: And, Mr. Wilcox, if you
19 would identify yourself?

20 MR. WILCOX: J.T. Wilcox, J-T,
21 W-i-l-c-o-x.

22 JUDGE CLIFTON: Thank you. Let's see. I
23 have one, two, three, four, five, six, seven,
24 eight, nine, ten. That's doable. All right. I
25 know we don't want to work late. We'll do our

1 best to do this by 6:00. If we don't finish by
2 6:00, if the only one remaining is J.T. Wilcox,
3 then we'll talk about whether we should keep
4 going, given the fact that tomorrow will be
5 busy.

6 All right. Mr. Brosch, you and I had a
7 discussion after we went off record yesterday.
8 I would like you to relay to the group your time
9 constraints.

10 MR. BROSCH: Well, your Honor, I'm
11 scheduled back to Washington this afternoon --
12 or leaving this evening. I can change that and
13 stay for the rest of this week if necessary.
14 Next week I am not going to be able to be here
15 after Monday, unfortunately, but I can make
16 arrangements to have my position covered, so to
17 speak, next week. And I was just inquiring
18 about where we stood with respect to
19 cross-examination of Dr. Cryan.

20 JUDGE CLIFTON: All right. And that's
21 the most important part of the hearing for you
22 to be here for, that's remaining, is that
23 correct?

24 MR. BROSCH: Yes, your Honor.

25 JUDGE CLIFTON: So what would be ideal

1 for you is if cross-examination of Dr. Cryan
2 took place on Monday and that all the data that
3 any of us were going to have from the USDA were
4 in our hands by then?

5 MR. BROSCH: Yes, your Honor, if that
6 were possible. But I don't want to -- you know,
7 I don't want to prejudice your schedule for me,
8 but that would be the best for me.

9 JUDGE CLIFTON: That would be the best.
10 And if we can't work it out for you, you will
11 rely on fellow counsel to assist you?

12 MR. BROSCH: Yes, your Honor. I'll find
13 somebody who can ably step in for me.

14 JUDGE CLIFTON: Good. Let's find out
15 what people think about that schedule. But,
16 before I call on counsel, I would like to know
17 from USDA whether it's feasible for us, for
18 example, to have all the USDA statistics that
19 have already been requested provided by Monday.
20 And we don't know that. So we may have to
21 revisit this issue, but I wanted to bring it out
22 so that we can begin to think about it.

23 MR. STEVENS: Your Honor, Garret Stevens
24 from the United States Department of
25 Agriculture. They have continued to work

1 diligently on these information requests. I've
2 been informed by them that the intention and
3 every effort is being made to get these done by
4 Thursday or Friday of this week, and that they
5 will be in the hands of people by that time,
6 either the documents or the reasons why not.

7 So that by Monday, I think we'll
8 certainly be in that position. I say, "we'll
9 certainly be," because every effort is being
10 made to get these done as quickly as possible,
11 as was described earlier. You know that's going
12 out to the MA's office, operations are being
13 run, things are taking place at the time, and
14 they can't be done in the blink of an eye. So,
15 every effort is being made. I guess we'll check
16 this day by day.

17 And I appreciate your Honor's attention
18 to this, to keep us on task. And they are on
19 task, and they are trying to get this done as
20 quickly as possible. I don't think Cliff is
21 here. That's the reason why I'm just sort of
22 trying to give a summary of where they are. And
23 that is the position that we have right now.

24 JUDGE CLIFTON: Okay.

25 MR. BROSCHE: You know, I just want to

1 make it clear, I was simply inquiring about
2 this. I don't want this -- there's no
3 implication here at all, any criticism of the
4 government's efforts here. The government is
5 killing themselves to respond to what I think is
6 an overwhelming set of requests, and I
7 appreciate what they're doing.

8 And I certainly don't feel that this
9 hearing has to bend around my convenience. I
10 don't want you to feel that way. We will make
11 accommodations for you, the schedule, and for
12 what the government has to do, and we appreciate
13 everything they're doing.

14 JUDGE CLIFTON: It sounds like it might
15 work out, that you may be able to leave here
16 tonight, come back, and we dedicate Monday to --

17 MR. BROSCHE: And I appreciate that, your
18 Honor. I appreciate your tending to this, and I
19 appreciate the government's efforts. I hope the
20 government doesn't think there's any criticism
21 intended at all, because there's not.

22 JUDGE CLIFTON: I agree. I don't know
23 what the requests are. I don't know what's
24 required to bring in the data. But I do know
25 that on this kind of task, we do not know how

1 long it's going to take until you complete it.

2 So okay. All right. Does anyone else
3 want to be heard on scheduling things or
4 suggestions for the good of the order in that
5 vein? Mr. Carroll.

6 MR. CARROLL: This morning at breakfast I
7 had a phone call, and I had one witness who may
8 have a problem if he can't appear Friday. I'm
9 just wondering if we've gotten far enough along,
10 your Honor, to have some idea of how Friday
11 looks.

12 JUDGE CLIFTON: Now, what I have on so
13 far for Friday, I have Mark Kastel in the
14 morning, I have Willard Stearns and John Rodney,
15 and I have -- who is from Dean Foods? Somebody
16 from Dean Foods.

17 MR. ENGLISH: We're working on that, your
18 Honor.

19 JUDGE CLIFTON: So Friday doesn't look
20 too bad for me.

21 MR. CARROLL: That's fine. That's what I
22 need to know.

23 JUDGE CLIFTON: As long as we don't keep
24 pushing things over to the next day. Then we
25 might have trouble.

1 MR. CARROLL: Thank you, your Honor.

2 JUDGE CLIFTON: All right. Anything else
3 as a preliminary scheduling item?

4 MR. STEVENS: Your Honor, Garrett
5 Stevens. I've just been informed that we
6 believe there's a farmer headed from Florida who
7 would like to testify today. I don't have his
8 name, but when he arrives -- Jerry Dakin.
9 D-a-k-i-n, is the last name.

10 JUDGE CLIFTON: Okay. Good.

11 MR. STEVENS: So he is in transit. I
12 believe he will be here, and when he arrives, I
13 guess we should make every effort to get him on
14 today so he can return to his farm.

15 JUDGE CLIFTON: Yes. Everyone here,
16 please help me make sure we get the dairy
17 farmers in and out as quickly as possible. Then
18 they're welcome to stay and participate, but I
19 just want to make sure we don't lose their
20 testimony.

21 All right. Good. Jock Gibson, would you
22 come forward, please?

23 If you have not already obtained a
24 statement from Mr. Gibson, he did prepare one.
25 Would you please state your name, and again

1 spell it?

2 THE WITNESS: Good morning. My name is
3 Jock, J-o-c-k, Gibson, G-i-b-s-o-n.

4 (The witness was sworn.)

5 JOCK GIBSON

6 of lawful age, being first duly sworn, was examined and
7 testified as follows:

8 DIRECT EXAMINATION

9 MR. JOCK GIBSON: I'm a producer-handler
10 in a family business in Junction City, Oregon.
11 That's J-u-n-c-t-i-o-n. We're south of
12 Portland, about 100 miles. Our volume as a
13 producer-handler Class I sales are about
14 1.3 million pounds a month.

15 We did not participate in the Federal
16 Order hearings in 2005 because we were in
17 agreement with the proposals being put forward.

18 We agree with the assessment of the
19 National Milk Producers Federation that when the
20 category of producer-handler was instituted, the
21 size of some of today's large producers and
22 producer-handlers were not imagined. Had the
23 early framers of the Federal Orders imagined the
24 possibility of such large dairy complexes, they
25 would simply have agreed on a cap, a cap such as

1 the 3 million pounds per month of Class I sales
2 that has been imposed on the Pacific Northwest
3 and Arizona orders. They would not have thrown
4 the baby out with the wash.

5 The National Milk Producers Federation
6 also mentioned the threat to orderly marketing
7 of the possibility of some large producers
8 becoming producer-handlers. We also agree that
9 this outcome, combined with the large
10 producer-handlers marketing through the large
11 national discount grocery chains, would be very
12 disruptive to the market.

13 Throughout their written comments, the
14 National Milk Producers Federation make numerous
15 references to large producer-handlers when
16 discussing market disruptions. The National
17 Milk Producers Federation has made the case for
18 eliminating the special status of large
19 producer-handlers. As we mentioned, we are in
20 agreement with this assessment.

21 The National Milk Producers Federation
22 goes on to make the point that small
23 producer-handlers do not cause market --
24 disorderly marketing, because their small size
25 contributes to cost disadvantages. We have

1 firsthand knowledge of this cost disadvantage
2 versus the combination of the large producers
3 linked with the economies of scale enjoyed by
4 large regional bottlers.

5 In our local market, the lowest priced
6 milk at retail is found at the box stores
7 supplied by the large out-of-town bottlers. The
8 local wholesale market's most competitive prices
9 come from a distributor whose milk comes from
10 the regional Safeway/Kroger milk plant.

11 Our family began farming in 1940 with the
12 dairy added in 1945. The milk bottling plant
13 was built and began operation in 1965, along
14 with the opening of the first five dairy stores.
15 Today, with seven members of the fourth
16 generation working in the family business,
17 Lochmead Farms is a diversified farming
18 operation, a 162-cow milking heard --

19 JUDGE CLIFTON: Read that one again.

20 MR. JOCK GIBSON: Lochmead Farms is a
21 diversified farming operation, and we have
22 farmland that we grow crops, crops other than
23 feed for the cows. We have a 162-cow milking
24 herd --

25 JUDGE CLIFTON: I'm looking at a word

1 that looks like "620 milking heard."

2 MR. JOCK GIBSON: I'm sorry, 620. The
3 milk --

4 JUDGE CLIFTON: I was wondering how you
5 got the 1.3 million pounds out of the 162 cows.

6 MR. JOCK GIBSON: I'm sorry. 620.

7 JUDGE CLIFTON: Thank you.

8 MR. JOCK GIBSON: Thank you. The milk
9 and ice cream plant and 42 Dari Mart stores. We
10 are the local dairy in our 140-mile radius of
11 the upper Willamette Valley, which encompasses
12 the urban areas of Eugene, Springfield,
13 Corvallis and Albany, Oregon.

14 JUDGE CLIFTON: Just to make sure, is it
15 a 40-mile radius?

16 MR. JOCK GIBSON: 40-mile radius.

17 JUDGE CLIFTON: Not 140-mile?

18 MR. JOCK GIBSON: I'm sorry. 40-mile
19 radius.

20 JUDGE CLIFTON: You see, there's a
21 disadvantage of going at 8:00 in the morning.

22 MR. JOCK GIBSON: Thank you. I'm putting
23 1s in there, aren't I?

24 JUDGE CLIFTON: You are.

25 MR. JOCK GIBSON: But I appreciate your

1 following along so closely. Okay. But that's
2 all we are, is the local dairy, as our 1 million
3 pounds -- and its, more accurately, 1.3 million
4 pounds per month, of Class I sales has very
5 little impact on this second largest market in
6 Oregon.

7 There is no one suggesting that we have
8 been disruptive to this market. I have not
9 found a store in our market where there is not
10 milk priced lower than what our customers pay to
11 buy Lochmead milk in a Dari Mart store. Our
12 customers have been paying the price we need to
13 maintain our small and inefficient operation,
14 because we are what they want in a local food
15 vendor: Local, green, and sustainable. For an
16 agency of the Federal government to change the
17 rules that have allowed our family business and
18 our customer's local dairy to survive would be a
19 reprehensible travesty.

20 The Northwest -- the National Milk
21 Producers Federation's statement that
22 producer-handlers have been given special status
23 overlooks the historical structure of the early
24 distribution of fluid milk. My father began his
25 special status as a producer-handler as a

1 teenager in Corvallis, Oregon, when he delivered
2 milk from the family cow to his neighbors as he
3 and his father made their way to school, he to
4 high school and his father to his teaching
5 duties at Oregon College.

6 The folks at National Milk Producers
7 Federation are forgetting that their special
8 status as an agriculture cooperative and the
9 Federal Order system were created by statute by
10 the New Deal legislation of the '30s. The
11 National Milk Producers Federation attempts to
12 make the case for drawing the line for permitted
13 producer-handlers in what should be
14 450,000 pounds Class I sales per month. We
15 think the USDA's agriculture marketing service
16 drew the line correctly in its December 4th,
17 2005, recommended decision for the Arizona and
18 Pacific Northwest markets. We again agree with
19 the National Milk Producers Federation that this
20 line should be set at the same level for all
21 markets.

22 Another miscalculation by the National
23 Milk Producers Federation is their reference to
24 a producer-handler's cost of milk. I would like
25 to insert here that, first of all, our cost at

1 Lochmead Dairy in the last six months for
2 producing 100 pounds of milk is \$18.03. And
3 that includes a small charge for the rent of the
4 facility, but it includes all labor costs.

5 Secondly, to simply say that a
6 producer-handler can pay the uniform price for
7 milk at the plant ignores completely the cost a
8 producer-handler occurs in balancing his own
9 milk supply. A producer-handler is left on his
10 own to market his balance of surplus production,
11 usually at a price below production cost, if he
12 can find a market at all. Whatever return is
13 realized is most certainly below uniform price,
14 and usually incurs extra freight costs. Another
15 cost factor in balancing for a producer-handler
16 is marketing the cream that's surplus in today's
17 fluid milk market.

18 If the status of a producer-handler were
19 to be removed and Lochmead Dairy were to become
20 a regulated handler, we believe that our family
21 business would no longer be economically viable.
22 Obviously, our small bottling plant would not be
23 cost competitive with the efficiencies of the
24 large bottlers, even though their products are
25 trucked into our market on 100 miles of freeway.

1 Of equal concern to us is the viability
2 of a 600-cow dairy in western Oregon versus the
3 new dairies of 10 to 20 times larger and located
4 in the drier climate of eastern Oregon or Idaho.
5 This concern is magnified by the recent
6 construction of an additional bunker silo to
7 deal with increased feed costs and the signing
8 of a 20-year contract to supply manure to a
9 methane digester now under construction at the
10 dairy.

11 We believe that a change in the rules of
12 the game as it has been played for our 43 years
13 as a producer-handler would be judged a taking
14 if aired in a different forum. Four generations
15 of our family have invested their life's work
16 under the rules and the spirit of our special
17 status.

18 Therefore, we propose that the USDA set
19 the limit for producer-handlers at 3 million
20 pounds of Class I sales per month, as was done
21 in the Arizona and Northwest market orders. We
22 therefore ask and propose that the Pacific
23 Northwest market, Federal Order 124, be excluded
24 from the hearings requested by the National Milk
25 Producers Federation and IDA. We feel that we

1 have had our hearing and the findings are fair
2 and balanced.

3 JUDGE CLIFTON: That's an excellent
4 statement, Mr. Gibson. We gave a copy of this,
5 and I marked it as Exhibit 26, to the court
6 reporters who were here yesterday. I don't know
7 whether they had a way to get it to you,
8 Mr. Moxley, so we'll get you one for any
9 assistance in editing what you took.

10 As I said at the beginning of the
11 hearing, a witness' testimony will not
12 necessarily be identical with his written
13 statement. His testimony will be as he gave it.
14 But these written statements are sometimes
15 helpful in editing what was heard. All right.
16 So all of that to say, Mr. Moxley, that I'm
17 going to ask Mr. Gibson to make sure that you
18 have a copy of this.

19 Now, cross-examination? Would you begin,
20 Mr. Brosch?

21 CROSS-EXAMINATION

22 BY MR. BROSCH:

23 Q. I'm Kevin Brosch for the National Milk
24 Producers Federation. Good morning, Mr. Gibson. As
25 your Honor mentioned, it's early. It's 8:00 here, but

1 it's 5:00 for you?

2 A. Yes, it is. I'm usually up and bright,
3 though, by 5:00 out there.

4 Q. I'm not. You've got an advantage over me
5 this morning, then.

6 Mr. Gibson, have you read or are you
7 aware of Proposal Number 26 in this proceeding?

8 A. In general terms, yes.

9 Q. Are you aware that National Milk has
10 proposed actually to grandfather existing
11 producer-handlers in at 3 million pounds per month?

12 A. Yes.

13 Q. Your testimony is that your farm has
14 about, a little over a million per month?

15 A. Correct.

16 Q. So your farm is well below that
17 particular limit, correct?

18 A. Correct.

19 Q. And I read your testimony to say that,
20 basically, you're in line with the idea of limiting it
21 at 3 million pounds?

22 A. Correct.

23 MR. BROSCH: Thank you very much.

24 JUDGE CLIFTON: Who else? By the way,
25 the way this will work, Mr. Gibson, if you now

1 have the feeling that you would like to say
2 another sentence or two about that topic, but
3 you didn't get the chance because Mr. Brosch
4 didn't ask any more questions, you get a chance,
5 when cross-examination is over, to redirect,
6 where you then can expand on the issues that
7 were raised by the cross-examination.

8 MR. JOCK GIBSON: Thank you, your Honor.

9 JUDGE CLIFTON: All right. Who else
10 would like to cross-examine?

11 MR. CARROLL: Me.

12 JUDGE CLIFTON: Mr. Carroll.

13 CROSS-EXAMINATION

14 BY MR. CARROLL:

15 Q. Mr. Gibson, good morning. Can you tell
16 me your father's name?

17 A. Yes. Howard.

18 Q. And was he employed by the United States
19 Department of Agriculture at one time?

20 A. He was for a short period of time in the
21 Soil Conservation Service.

22 Q. After he left that, did he at that time
23 begin to run this business?

24 A. Yes, that's correct.

25 Q. And you're his son?

1 A. That's correct.

2 Q. How many sons did he have?

3 A. There are three of us.

4 Q. And your names are?

5 A. Jock; Buzz, my brother that's with me;
6 and Mike.

7 Q. And do they have children?

8 A. Yes.

9 Q. And how many children do they have?

10 A. Well, they've got a bunch. I have three,
11 Buzz has three, and Mike has one.

12 Q. All right. Are any of them in the
13 business?

14 A. Yes, they are.

15 Q. Who are they?

16 A. I have three of my children in the
17 business. Our son Scott, running the farm with his
18 uncle, Mike. And I have two daughters, both working
19 with me at the milk plant. My brother buzz has a son
20 that works with him at the dairy and a daughter that
21 runs our Dari Mart stores. My brother Mike has a son
22 that also works at the Dari Mart.

23 Q. And they're all supported by this
24 business you're telling us about?

25 A. Yes, they are.

1 Q. Now, do you think that anybody in the
2 Department of Agriculture in Washington who wants you to
3 leave that business and become a producer-handler has
4 the right to do that?

5 A. We could use their help.

6 Q. And, therefore, are you against the
7 grandfathering restrictions that the national producers
8 are attempting to put on producer-handlers?

9 A. Sir, I look at it as though we were out
10 there living in a room with some elephants, and we let
11 the elephants lie down first. In this room, there's two
12 elephants, the co-ops and the government. I'm not here
13 to be a gladiator for others. I'm here to be a
14 survivor, and so I'm going to let those folks lie where
15 they want to lie, and we're trying to survive.

16 Q. I understand that. But, generally
17 speaking, do you think there should be a restriction on
18 entry into a producer-handler?

19 A. That's against my general beliefs, but
20 I'm not here to be a proponent of that.

21 Q. Do you believe that there should be a
22 restriction on how a producer-handler brands his
23 product, that he should brand only the way the
24 government tells him to brand it?

25 A. I believe that the true spirit of being a

1 producer-handler, that you should not try to balance
2 your production with being a copacker of a brand that
3 someone else also is a packer of, that allows you to
4 balance your production in that way. I think the spirit
5 of being a producer-handler is that you need to manage
6 your production to your market, and that burden of
7 balancing your supply needs to rest with the
8 producer-handler.

9 MR. CARROLL: Thank you.

10 JUDGE CLIFTON: You have such clarity of
11 expressing the issues. I'm very impressed.

12 MR. JOCK GIBSON: Thank you.

13 JUDGE CLIFTON: Who else would like to
14 cross-examine him?

15 Okay, go ahead, Mr. Rower.

16 CROSS-EXAMINATION

17 BY MR. ROWER:

18 Q. Good morning, Mr. Gibson.

19 A. Good morning, sir.

20 Q. I'm Jack Rower with AMS Dairy Programs.

21 JUDGE CLIFTON: And please move the
22 microphone this way.

23 MR. ROWER: Can you hear me now?

24 JUDGE CLIFTON: I'm thinking it should be
25 on the side of you towards the witness, so that

1 you can look at him and speak right into it.

2 Thank you.

3 BY MR. ROWER:

4 Q. Mr. Gibson, do you see a difference
5 between how producer-handlers that sell their products
6 at retail versus wholesale should be treated in
7 regulation?

8 A. Under the regulations that we operate
9 under now?

10 Q. Yes, sir. There's a proposal, Proposal
11 24, that would treat retailing producer-handlers
12 differently than those who sell their products at
13 wholesale.

14 A. I think that would be an unfair burden to
15 put on a producer-handler. We have both. We sell -- I
16 would guess 60 percent of our milk, our Class I sales,
17 are through our own stores, but the other 40 percent is
18 quite a mixture of coffee shops, restaurants, other
19 small stores, a few supermarkets where they've asked.

20 The supermarket chain has a sales profile
21 wanting to deal with local farmers, and they've asked us
22 to put milk in their stores. And we have a few schools.
23 So I don't see why -- part of a producer-handler profile
24 to us is that we're the local dairy, and the people that
25 would like to buy milk from the local dairy, I think,

1 should have an opportunity to do so.

2 Many areas, if others are like us, there
3 are not major bottlers in the area if it's more of a
4 rural area. And so I think people should be allowed to
5 have access to the local market and local dairy. And
6 having restrictions on only being able to sell to retail
7 or wholesale would be an unfair restriction.

8 MR. ROWER: Thank you very much.

9 JUDGE CLIFTON: Mr. Tosi? No.

10 Mr. Miltner.

11 CROSS-EXAMINATION

12 BY MR. MILTNER:

13 Q. Good morning, Mr. Gibson.

14 A. Good morning, sir.

15 Q. The \$18.03 cost-of-production figure you
16 gave us, is that just your cash costs?

17 A. As I mentioned, those numbers include a
18 rent for the facility, but other than that, those are
19 cash costs, including all labor costs.

20 Q. Okay. And how does that compare with the
21 blend price in Order 124 right now?

22 A. The price that our other bottlers buy
23 their Class I sales for?

24 Q. Well, the --

25 A. It's priced below that. It's \$12, in the

1 neighborhood of \$12.

2 Q. That's the Class I price, right?

3 A. Yeah, yeah.

4 Q. How about the blend price or the uniform
5 pricing?

6 A. It would be, obviously, below that. I
7 don't know those numbers.

8 Q. So you acquire -- the milk you acquire is
9 at a significantly higher cost than a regulated handler?

10 A. We don't acquire milk. We produce it.

11 Q. Okay. And the milk you produce is at a
12 significantly higher cost compared to regulated
13 handlers?

14 A. That's correct.

15 MR. MILTNER: Thank you.

16 JUDGE CLIFTON: Other questions for
17 Mr. Gibson?

18 Thank you. There are none. You may step
19 down.

20 MR. JOCK GIBSON: Thank you, your Honor.

21 JUDGE CLIFTON: And if you will just make
22 sure the court reporter has a copy of your
23 statement. Hopefully, there are some others
24 left.

25 Mr. Berthiaume?

1 MR. STEVENS: Your Honor, Garrett
2 Stevens. Did the last statement get admitted?

3 JUDGE CLIFTON: Oh, no. Thank you. Is
4 there any objection to the admission into
5 evidence of Exhibit 26?

6 There is none. Exhibit 26 is hereby
7 admitted into evidence.

8 MR. BESHORE: Your Honor, I would like to
9 request that a cover page -- a document that's
10 five pages in total, a cover page and four pages
11 of statement, be marked as the next consecutive
12 exhibit.

13 JUDGE CLIFTON: Thank you. It shall be
14 Exhibit 27.

15 (Exhibit 27 was marked for
16 identification.)

17 JUDGE CLIFTON: And I also want to alert
18 Mr. Moxley, the court reporter, that he is not
19 the custodian of any exhibits. All the record
20 copies are going to the USDA table up front.
21 And so any copy provided to him is just a
22 courtesy for use of that in editing.

23 All right. Mr. Berthiaume, would you
24 again state your full name and spell it for the
25 record?

1 MR. BERTHIAUME: My name is Leon,
2 L-e-o-n, Berthiaume, B-e-r-t-h-i-a-u-m-e.

3 (The witness was sworn.)

4 JUDGE CLIFTON: Mr. Beshore, you may
5 proceed.

6 LEON BERTHIAUME
7 of lawful age, being first duly sworn, was examined and
8 testified as follows:

9 DIRECT EXAMINATION

10 BY MR. BESHORE:

11 Q. Mr. Berthiaume, do you have a statement
12 of testimony to present?

13 A. I do.

14 Q. Okay. Would you proceed with that,
15 please?

16 A. Thank you. Again, my name is Leon
17 Berthiaume. I am the general manager and chief
18 executive officer of St. Albans Cooperative
19 Incorporated, which is located in St. Albans, Vermont.
20 I joined St. Albans in 1984 as controller, and have been
21 general manager and CEO since 1991.

22 St. Albans and the other major
23 cooperatives in the Northeast are members of the
24 Association of Dairy Cooperatives in the Northeast and
25 the Greater Northeast Milk Marketing Agency. I

1 currently serve as chairman of both of those
2 organizations. St. Albans and these other Northeast
3 cooperatives are also members of the National Milk
4 Producers Federation.

5 I'm here today to testify on behalf of
6 St. Albans, which supports Proposals 1, 2 and 26, which
7 have been submitted by the National Milk Producers
8 Federation. These proposals taken together would, one,
9 eliminate the producer-handler exemption except for
10 existing qualified producer-handlers who have fewer than
11 3 million pounds of Class I sales per month; and, two,
12 to increase the exempt plant volume limit from the
13 current 150,000 pounds per month to 450,000 pounds.

14 The St. Albans Cooperative Creamery,
15 Inc., is a member-governed dairy cooperative serving
16 dairy farmers located in Vermont, New York and New
17 Hampshire, and has been in operation since 1919.
18 St. Albans Cooperative is based in St. Albans, Vermont,
19 in the northwest corner of the state, about 10 miles
20 from the Canadian border. We currently have 473 farms
21 in our cooperative: 404 in Vermont, 68 in New York and
22 one in New Hampshire. Our members' farms range in
23 production from less than 200,000 pounds annually to
24 more than 40 million pounds. However, our cooperative
25 consists largely of smaller size farms. Our average

1 farm has approximately 125 cows and an annual production
2 of about 2.5 million pounds. 91 of our member farms are
3 certified for organic milk production. In calendar year
4 2008, our members produced 1.282 billion pounds of milk,
5 of which 83 million pounds, or 6.46 percent, was organic
6 milk.

7 The major outlet for our members' milk is
8 the New England market, although with consolidation in
9 plant operations in recent years, every outlet for milk
10 is valuable. 60 percent of our members' milk volume is
11 marketed directly from our farms to fluid and
12 manufacturing plants in the Northeast, primarily in the
13 New England states.

14 In fiscal year 2008, we moved
15 approximately 580 million pounds of milk to fluid milk
16 markets, which represented approximately 44 percent of
17 our member milk volume. We operate a manufacturing
18 facility in St. Albans, Vermont, that separates
19 approximately 40 percent of our milk volume to generate
20 cream and skim solids for various customers, including
21 Ben & Jerry's Homemade Ice Cream business, for which
22 St. Albans is the primary supplier. We also have the
23 capacity to produce nonfat dry milk powder at our
24 manufacturing plant.

25 Since 2003, we have been a member/owner

1 in Dairy Marketing Services, LLC. Dairy Marketing
2 Services is responsible for marketing the milk of
3 St. Albans and a number of other large and small
4 cooperatives, as well as some independent dairy farmers
5 in the Northeast. The majority of our organic members
6 hold a dual marketing agreement with CROPP, which is the
7 Coulee Region Organic Producer Pool.

8 The board of directors and management of
9 St. Albans strongly support the Federal Order system.
10 Because St. Albans is not located near the major
11 population centers in the Northeast, the Federal Order
12 marketwide pool is crucial to the economic survival of
13 our members. With the consolidation of the Federal
14 Orders in 2000, Federal Order 1 became one of the
15 largest Federal Orders, and is the order with one of the
16 largest Class I markets. The Northeast order includes
17 the Eastern Seaboard corridor. That includes the cities
18 of Boston, New York, Philadelphia, Baltimore and
19 Washington. Approximately 51.6 million people live
20 within the geographic boundaries of the marketing area,
21 which makes the Order 1 region the most populous Federal
22 Order in the United States.

23 In 2008, the Class I utilization Order 1
24 was more than 10 billion pounds, which is approximately
25 22 percent of the total Class I use from the Federal

1 Order system. This Class I utilization was pooled
2 amongst 13,584 producers, most of them small producers.
3 Nearly 80 percent of those farms, more than 10,000
4 producers, delivered less than 150,000 pounds per month,
5 which suggests a herd size of less than 100 cows.

6 For our dairy farmers in the Northeast,
7 and for these smaller farms in particular, the Federal
8 Order marketwide pool is the only assurance of the
9 opportunity to obtain a fair share of the region's Class
10 I proceeds. And without a viable marketwide pool, the
11 ability of these smaller farms to share in the Class I
12 marketplace would be placed seriously at risk.

13 Order 1 also has more producer-handlers
14 and exempt plants than any other order. The Order 1
15 Market Administrator's 2008 annual statistical bulletin
16 listed 15 producer-handlers and 46 exempt plants, most
17 of which are also producer-handlers. The Class I sales
18 from these producer-handlers and exempt plants are not
19 part of the Order 1 marketwide pool.

20 The issues in this hearing are extremely
21 important for the future of the Order 1 marketwide pool
22 and Order 1 producers. This rulemaking will determine
23 the extent to which producer-handlers and exempt plants
24 will participate in the pool and the extent to which
25 pool members will share in Class I revenues.

1 The organic milk market in the Northeast
2 provides an example of the impact which large,
3 unregulated producer-handlers can have on Federal Order
4 pools. There are primarily three organizations that
5 procure organic milk in our member service area: HP
6 Hood, Horizon Dairies and CROPP Cooperative. HP Hood
7 and Horizon are fully regulated handlers, and CROPP is
8 an organization that markets to fully regulated
9 handlers. In the case of all three of these
10 organizations, the organic milk is fully priced and
11 pooled under Order 1.

12 There are 623 organic farms in the Dairy
13 Marketing Service system: The 91 organic farms in
14 St. Albans and 532 other organic farms. The average
15 production volume of these organic farms is small, just
16 over 50,000 pounds per month. These organic farms
17 depend almost exclusively on demand for organic milk in
18 the Northeast region to maintain even this relatively
19 small volume production and to support the overall price
20 paid for their product.

21 In recent years, large organic dairy
22 operations have had a substantial impact on these small
23 organic farm operations. For example, Aurora Organic
24 Dairy in Platteville, Colorado, an exempt
25 producer-handler, distributed Class I milk in Order 1 in

1 every month of 2008. These Class I sales were not
2 pooled.

3 According to information posted on its
4 Website, Aurora has farms in Texas and Colorado with
5 12,500 cows. Because of its substantially larger size
6 and the advantage it has from its producer-handler
7 status, it is now competing with Order 1 organic
8 producers and fully regulated Order 1 plants packaging
9 organic milk. We need to establish a level playing
10 field in the interest of all farmers, particularly the
11 smaller farms.

12 This experience that Northeast organic
13 farmers have had with Aurora Dairy could easily be
14 repeated in the context of conventional milk in Federal
15 Order 1. There are currently farms in Order 1 with more
16 than 2,000 cows. Any large farm has the right to enter
17 into processing if it desires, but we think that they
18 should compete on equal terms with smaller farmers. It
19 is only fair that they also be subject to the same
20 pooling and pricing regulations as all other producers
21 and handlers.

22 St. Albans Cooperative is a small
23 cooperative which is committed to working with customers
24 and plants of all sizes. We're also committed to
25 represent and protect the interests of our member farms.

1 I strongly believe that, as an industry, we must
2 anticipate change and ensure we have the systems in
3 place to deal with difficult challenges before these
4 challenges become significant problems for the members
5 of our industry.

6 For St. Albans members, the emergence of
7 large producer-handlers has already become a problem for
8 our organic producers and is likely to become a problem
9 for our conventional producers if the current system is
10 not changed. For these reasons, we support National
11 Milk Producers Federation's proposals 1, 2 and 26.
12 Adoption of these proposals will assist our members, and
13 particularly our small members, to survive and go
14 forward in the future. Thank you.

15 Q. Mr. Berthiaume, I have just perhaps one
16 or two follow-up questions. The CROPP organization that
17 you've referred to, does it own any processing plants of
18 its own in New England?

19 A. In New England, no.

20 Q. So the marketing there is to plants owned
21 by -- fully regulated plants owned by other entities,
22 right?

23 A. Yes.

24 Q. Okay. Does CROPP have a recognized label
25 under which its members' product is marketed?

1 A. Yes, the Organic Value brand.

2 MR. BESHORE: Thank you. I have no
3 further questions for Mr. Berthiaume.

4 JUDGE CLIFTON: Thank you.

5 Cross-examination of Mr. Berthiaume? Who would
6 like to begin cross-examination? Mr. Vetne.

7 CROSS-EXAMINATION

8 BY MR. VETNE:

9 Q. Good morning, Mr. Berthiaume.

10 A. Good morning.

11 Q. I'm John Vetne of Raymond, New Hampshire.

12 My clients are producer-handlers in the Pacific
13 Northwest and New Mexico. I have a little feeling of
14 insecurity as a result of your testimony. I don't know
15 what the Greater Northeast Milk Marketing Agency is, and
16 I probably should, because that's where I'm from. Do
17 you want to tell me a little bit more about that?

18 A. Certainly. The cooperatives in the
19 Northeast have come together to work collaboratively to
20 address marketwide issues relative to the pricing of
21 Class I milk, as well as addressing other challenges in
22 the marketplace, whether it's relating to balancing, for
23 example, to providing rbST-free milk to the market,
24 would be another example where we focus a lot of our
25 energies.

1 Q. You refer to -- so these are cooperatives
2 beyond the cooperatives that market through Dairy
3 Marketing Services?

4 A. That is correct.

5 Q. And is that one of the functions, was to
6 reach out and embrace those that are not part of the DMS
7 system into a common decision-making and strategic
8 organization?

9 A. It was important, as the market was
10 moving towards the demand for rbST-free milk, to again
11 achieve the greatest level of premiums for the
12 marketplace, that we invite cooperatives to come
13 together to ensure that we get the largest amount of
14 dollars from the marketplace for our members, and so
15 we've extended the opportunity for cooperatives to come
16 together.

17 Q. So was that a yes to reaching out beyond
18 DMS?

19 A. Yes.

20 Q. Okay. And when was this organization
21 organized?

22 A. I think -- I believe it started in 2006.

23 Q. Does that organization actually market
24 milk as suggested in its name, in the same way that DMS
25 markets milk?

1 A. No.

2 Q. Okay. It has no direction or control
3 over where milk goes?

4 A. That is correct.

5 Q. It's primarily a price agreement agency?

6 A. Yes.

7 Q. And one of the reasons for that, getting
8 together for price, is to make sure that the premium
9 available to rbST-free milk is maximized?

10 A. Initially, yes.

11 Q. Initially, yes. And currently, it serves
12 a function of pricing beyond rbST-free milk, whether
13 other classes and qualities of milk?

14 A. There is discussion relative to, again,
15 Class I pricing and what's happening within the market.

16 Q. Thank you. In your testimony, you say
17 since 2003 you've been a member/owner of Dairy Marketing
18 Services. Dairy Marketing Services is by far the
19 largest marketer of farm milk in the Northeast, correct?

20 A. Yes.

21 Q. St. Albans is a member cooperative that
22 is a member of Dairy Farmers of America, is that
23 correct?

24 A. Yes.

25 Q. Does St. Albans have a member/owner

1 interest in Dairy Marketing Services that is in any way
2 other than its proportionate interest in DFA?

3 A. We are an equal owner into Dairy
4 Marketing Services.

5 Q. So by "equal owner," it means you're -- I
6 mean, your percentage of milk in the DFA organization is
7 fairly small as a whole. Is it a larger percentage of
8 DMS?

9 JUDGE CLIFTON: Let me hear the objection
10 before you respond. Mr. Beshore? Mr. Vetne,
11 would you move aside so he can reach the mic?
12 Thanks.

13 MR. BESHORE: My objection is to the
14 inquiry into the internal ownership interests
15 and the cooperative. It's got nothing to do
16 with this. Of course, Mr. Berthiaume doesn't
17 even have to respond to that kind of question,
18 as well. It's proprietary information, but it
19 certainly has no relevance. The relative
20 ownership interest in DMS has no relevance to
21 this proceeding whatsoever.

22 JUDGE CLIFTON: Don't go away yet. Your
23 response, Mr. Vetne?

24 MR. VETNE: The witness has spoken about
25 how milk is marketed and how milk is pooled and

1 what is fair and what is not fair. In order to
2 assess that in the system, we've got to find out
3 a little bit about how the system works. If the
4 purpose of this hearing is to look in isolation
5 at producer-handlers on one side of the ledger
6 and know nothing about how the rest of the
7 system markets on the other side of the ledger,
8 we can't make a decision. What are we doing
9 here?

10 JUDGE CLIFTON: Mr. Beshore?

11 MR. BESHORE: I heard no explanation for
12 what the ownership interests of Dairy Marketing
13 Service have to do with the issues in the
14 hearing.

15 MR. VETNE: My assumption is that we're
16 comparing revenue of some entities versus
17 others, that ownership in a dairy marketing
18 organization is something that eventually
19 generates into benefit, revenue, bottom line.
20 We're looking at producers' bottom line. And
21 assertions have been made by the proponents that
22 there's some unfairness in the bottom line
23 achievable -- or achieved by producers compared
24 to the bottom line of those other entities.

25 Ownership interest in a major

1 organization, I'm trying to find out, is a
2 bottom line function. Proprietary information
3 is not a valid or recognized legal objection.
4 It is -- in this proceeding, in this kind of
5 proceeding only, there's no compulsory process,
6 so a witness can elect to refuse to answer. It
7 doesn't make it an objection to a bad question.
8 It makes it a nondisclosing answer.

9 JUDGE CLIFTON: Well, you just did all my
10 work for me, Mr. Vetne. The objection is
11 sustained. Thank you.

12 MR. VETNE: I'm sorry. The objection is
13 sustained because?

14 JUDGE CLIFTON: Because the witness
15 doesn't have to answer the question.

16 MR. VETNE: Okay.

17 JUDGE CLIFTON: And his attorney doesn't
18 want him to answer.

19 MR. VETNE: If the attorney wants to
20 instruct a witness not to answer, your Honor, I
21 accept that. However, I have a problem with the
22 judge sustaining that as -- sustaining that as a
23 legal objection as a matter of law. The witness
24 does not have to answer, I agree with that, if
25 instructed.

1 However, proprietary information is not a
2 valid evidentiary objection recognized in any
3 court of law. Please, let the attorney instruct
4 the witness not to answer rather than your
5 Honor.

6 JUDGE CLIFTON: Than opposing the
7 counsel?

8 MR. VETNE: Well, rather than your Honor
9 saying that's a good reason, not because --

10 JUDGE CLIFTON: The reason I sustained
11 Mr. Beshore's objection is what you said in your
12 response. That's why I thanked you for doing my
13 work for me.

14 MR. VETNE: Okay.

15 JUDGE CLIFTON: Otherwise I had a
16 difficult decision to make.

17 MR. VETNE: We're losing the import here.
18 What I'm suggesting, your Honor, the Department
19 has, in the past, actually made some decisions
20 in which it has complimented and lauded
21 witnesses for providing information that was
22 helpful in making a decision, information that
23 is of a proprietary nature, okay?

24 What I'm suggesting is, rather than
25 sustaining an objection, your Honor, simply

1 acquiesce to the instruction, because by
2 sustaining an objection, you give an imprimatur
3 that the objection has a legal basis. It does
4 not. Maybe I'm just simply lost here in
5 academia.

6 JUDGE CLIFTON: I think you're a little
7 more sophisticated than I am. In both,
8 rulemaking and in other proceedings involving
9 milk, I protect proprietary information as a
10 matter of course.

11 MR. VETNE: Absolutely. You absolutely
12 have no compulsory process. If you don't want
13 to answer, Mr. Witness, you don't have to
14 answer. That's a different response.

15 JUDGE CLIFTON: The one reason you have a
16 lawyer to help you is to let you know you don't
17 have to answer that question.

18 MR. VETNE: Exactly. And I agree with
19 that.

20 JUDGE CLIFTON: Okay.

21 MR. VETNE: It's one thing coming from
22 the lawyer. It's another thing coming from the
23 bench, which adds a dignity to not disclosing
24 information to the record, that probably
25 shouldn't be there. I have a problem with that.

1 Maybe we're not reading on this from the same
2 page here.

3 JUDGE CLIFTON: Well, like I say, you're
4 a little more sophisticated than I am.

5 BY MR. VETNE:

6 Q. Mr. Berthiaume, you talked about -- let's
7 see if we can find out something beyond the base of your
8 statement here. "623 organic farms in the DMS
9 system" --

10 JUDGE CLIFTON: Which page are you on?

11 MR. VETNE: I'm on page 3, the last full
12 paragraph.

13 BY SPEAKER:

14 Q. The DMS system is a marketing agency that
15 includes cooperatives and independent producers that
16 operates in the Northeast and in the Mideast and in the
17 central part of the country and in California, is that
18 correct?

19 A. Yes. Dairy Marketing Services does
20 extend beyond the Northeast. We are strictly involved
21 with Dairy Marketing Services in the Northeast.

22 Q. Well, "we" being St. Albans?

23 A. Yes.

24 Q. But you've talked here about the DMS
25 system, the 623 organic farms in the DMS system. I

1 wanted to make sure that you're talking about the system
2 and not a little part of DMS.

3 A. I'm talking specifically of the
4 Northeast.

5 Q. Oh, okay. So this is just in the Order
6 1, and it doesn't extend to, say, the Mideast market,
7 Ohio, it's not part of that system, is that correct?

8 A. Correct.

9 Q. So it's the portion of the DMS system
10 that is managed by Dairylea as opposed to the rest,
11 which is managed by DFA, is that correct?

12 A. Managed by Dairy Marketing Services.

13 Q. I'm sorry. In the Northeast, Dairylea is
14 the managing partner? Or maybe that's no longer
15 correct.

16 A. Dairylea is a participant in Dairy
17 Marketing Services.

18 Q. That's true. Isn't it true that --

19 JUDGE CLIFTON: I'm sorry. How is
20 Dairylea spelled?

21 BY MR. VETNE:

22 Q. D-a-i-r-y-l-e-a?

23 A. That's correct.

24 JUDGE CLIFTON: Thank you.

25 BY MR. VETNE:

1 Q. Dairylea is a cooperative who is a member
2 of DFA like you, like St. Albans, correct?

3 A. Yes.

4 Q. Okay. And management responsibilities --
5 day-to-day management responsibilities for DMS in the
6 Northeast is undertaken by Dairylea employees for the
7 most part, isn't that correct?

8 A. The management of Dairy Marketing
9 Services involves individuals other than just Dairylea
10 representatives. St. Albans is also involved in the
11 day-to-day activities of Dairy Marketing Services.

12 Q. My question was primarily the day-to-day
13 management. The people listed as management on the DMS
14 Website are folks that are Dairylea employees? If you
15 don't know --

16 A. Well, the CEO of DMS is also an employee
17 of Dairylea.

18 Q. Okay. And that's DMS nationally or DMS
19 northeast?

20 A. No, DMS Northeast.

21 Q. Thank you. Do you know anything -- since
22 you've given information about organic farms in the DMS
23 system, do you know anything about organic farms in the
24 DMS system outside of the Northeast?

25 A. Not outside of the Northeast, no.

1 Q. You don't know whether there are any or
2 how they're treated or how they're marketed, is that
3 correct?

4 A. That's correct.

5 MR. VETNE: Okay. That's all I have.
6 Thank you.

7 JUDGE CLIFTON: Thank you, Mr. Vetne.
8 Who would like next to cross-examine? Mr. Yale.

9 CROSS-EXAMINATION

10 BY MR. YALE:

11 Q. Benjamin F. Yale for Continental Dairy
12 Products and Select Milk Producers. Good morning.

13 A. Good morning.

14 Q. I want to talk about the issue of the
15 grandfathering. And there hasn't been a lot of
16 discussion yet, in large part because the proponent
17 hasn't been on cross and we haven't developed that
18 record, but there have been, at least privately,
19 concerns raised about the ability of the department to
20 establish vested rights for existing people rather than,
21 you know, some kind of a general thing that anybody can
22 enter in or out. I don't know that you're aware of that
23 discussion or not. So that's my first question. Are
24 you aware of that discussion?

25 A. Not specifically.

1 Q. Okay. It wasn't a trick question. But,
2 the question I have in terms of St. Albans' position
3 would be in the event that to -- well, first of all, let
4 me back up. You are supporting the idea that those who
5 are currently the smaller PDs are able to continue in
6 that position, right?

7 A. Yes.

8 Q. All right. So if that has to be done in
9 a way other than vesting them rights, for example, just
10 setting a small cap, and there are suggestions of 1, 2
11 and 3 million pounds per producer and leaving -- or
12 for -- leaving it at that, what would St. Albans'
13 position be on that?

14 A. I guess just clarify the question again
15 for me.

16 Q. Well, the question would be, under the
17 grandfathering, you have to exist to get in?

18 A. Right.

19 Q. The other proposal would allow grandsons,
20 so to speak, it would allow new people to enter into the
21 system at up to the 2 or 3 million, whatever the cap
22 would be established as a separate issue?

23 A. Initially, St. Albans' position is to
24 support the proposals as submitted.

25 Q. Okay.

1 A. Which is the 1, 2 and 26 combined.

2 Q. Right. And you're aware that the state
3 of New Hampshire has got a proposal, I think, of
4 2 million or something like that for anybody new -- has
5 a proposal, some cap, that would allow for new entry?

6 A. I am aware that there's discussions
7 amongst the states to address the issue around
8 producer-handlers.

9 Q. All right. And St. Albans doesn't have a
10 position on that?

11 A. No.

12 MR. YALE: All right. That's all I have.
13 Thank you very much.

14 JUDGE CLIFTON: Thank you, Mr. Yale. Any
15 other cross-examination? Mr. Ricciardi.

16 CROSS-EXAMINATION

17 BY MR. RICCIARDI:

18 Q. Good morning. I am Al Ricciardi. I am
19 here on behalf of AIDA. And, Mr. Berthiaume, you are
20 here from my favorite state.

21 A. Thank you.

22 JUDGE CLIFTON: Mr. Ricciardi, were you
23 able to give a business card to the court
24 reporter?

25 MR. RICCIARDI: I was.

1 JUDGE CLIFTON: Good. Thank you.

2 MR. RICCIARDI: You're welcome.

3 BY MR. RICCIARDI:

4 Q. Mr. Berthiaume, you've been here since
5 the inception of this hearing on Monday, correct?

6 A. Yes.

7 Q. Do you intend to stay beyond the time of
8 your testimony today?

9 A. For a portion of the time, yes.

10 Q. Okay. Now, so that I am clear after all
11 the colloquy up here with Mr. Vetne, St. Albans, which
12 is who you're the general manager and chief executive
13 officer of, is part of DFA, is that right?

14 A. St. Albans is a member cooperative of
15 Dairy Farmers of America.

16 Q. And Dairy Farmers of America is the
17 largest, in size and member, co-op in the country,
18 correct?

19 A. Yes.

20 Q. You're also a member of National Milk, as
21 I understand it?

22 A. Yes.

23 Q. All right. You were here during the
24 testimony, then, of Messrs. Hatch and Dunajski, right?

25 A. Yes.

1 Q. They're not competing with you and
2 causing you or your members any disorder, correct?

3 A. They do not compete with St. Albans
4 Cooperative directly, no.

5 Q. And they're not causing you any kind of
6 problems or your members any problems, correct?

7 A. Not to my knowledge.

8 Q. And the same would be true with regard to
9 all of the producer-handlers currently in Order 1,
10 correct?

11 A. I would say that the statistics, you
12 know, showed that producer-handlers' share of the Class
13 I market is growing. Since 2005, we've seen, I think,
14 the increase move from a little over 66 million pounds
15 of milk to 131 million pounds of milk. So, again, I see
16 that becoming more of an issue within the Northeast
17 marketplace as it relates to Class I and Class I markets
18 and availability.

19 Q. That wasn't my question, so let's go to
20 mine. Currently, then, based upon the last portion of
21 your answer, you see this as a prospective potential
22 problem, not a current one, with regard to the
23 producer-handlers in Order 1, correct?

24 A. I believe that, potentially, that
25 exists -- the problem exists today from an organic

1 perspective in that we do have a producer-handler of
2 large size that is in our Northeast organic marketplace
3 that may create challenges for our existing organic
4 members.

5 Q. And I don't want to spend a lot of time,
6 but if you actually listen to some my questions, we'll
7 be able to get through this fast.

8 MR. BESHORE: Your Honor --

9 MR. RICCIARDI: I was talking about,
10 and --

11 JUDGE CLIFTON: Objection noted,
12 Mr. Beshore.

13 MR. BESHORE: Thank you.

14 JUDGE CLIFTON: Go ahead, Mr. Ricciardi.

15 MR. BESHORE: If he would just ask the
16 questions rather than lecturing the witness in
17 some didactic manner.

18 JUDGE CLIFTON: That didn't help,
19 actually. Go ahead, Mr. Ricciardi.

20 MR. RICCIARDI: I will see if I can
21 actually be clear. If I am unclear at all, sir,
22 let me know, because occasionally that happens.
23 And I'll try to straighten myself out.

24 JUDGE CLIFTON: Well, you're normally so
25 crisp. And you're losing me on your questions.

1 MR. RICCIARDI: Okay. Then, if I've lost
2 you, Judge, I'm going to get you back.

3 JUDGE CLIFTON: Okay.

4 BY MR. RICCIARDI:

5 Q. What I'm talking about specifically is
6 this, and if you need it, I'll give you Exhibit 13.
7 There's a list of producer-handlers in Order 1. My
8 question was related to those producer-handlers.

9 JUDGE CLIFTON: Let me hand to him that
10 exhibit. That will help.

11 MR. RICCIARDI: Good.

12 JUDGE CLIFTON: The witness has
13 Exhibit 13, which is statistical information
14 prepared by the USDA.

15 MR. RICCIARDI: Thank you, your Honor.

16 BY MR. RICCIARDI:

17 Q. The last page shows the current names of
18 the producer-handlers as prepared by the Department in
19 2009 for Order 1, which is where I was focusing my
20 attention. I did ask you about Mr. Dunajski already, I
21 asked you about Hatchland Dairy already. Now my
22 question encompasses the remaining producer-handlers in
23 Order 1. And my specific question is: Currently, there
24 is no issue with regard to competition between
25 St. Albans and these producer-handlers, that you're

1 aware of?

2 A. That is correct.

3 Q. So it's a prospective concern only, not a
4 current concern, in that order with regard to those
5 producer-handlers, correct?

6 A. Yes.

7 Q. Okay. Take a look at your statement for
8 me, if you would, Exhibit 27. I'm on page 2, and I have
9 some just clarifying questions, because I don't --
10 either I don't understand it or there's some information
11 that I need. You indicate that in the fiscal year
12 '08 --

13 JUDGE CLIFTON: Where on the page are
14 you?

15 MR. RICCIARDI: I apologize, Judge. I'm
16 on the top of page 2. It's about the third,
17 fourth sentence. "In fiscal year 2008" is where
18 I am.

19 JUDGE CLIFTON: Thank you.

20 MR. RICCIARDI: No problem.

21 BY MR. RICCIARDI:

22 Q. "We moved approximately 580 million
23 pounds of milk to fluid milk markets," et cetera. "We"
24 is St. Albans, correct?

25 A. Yes.

1 Q. And moving milk means what?

2 A. Marketing milk directly to processing
3 facilities.

4 Q. Okay. Did St. Albans move milk anywhere
5 outside of Federal Order 1?

6 A. No.

7 Q. Did DMS, on behalf of St. Albans, move
8 any of the St. Albans milk outside of Federal Order 1?

9 A. Not to my knowledge.

10 Q. Did anyone on behalf of St. Albans move
11 milk from St. Albans outside of that Federal Order?

12 A. Not to my knowledge.

13 Q. Okay. The other 56 percent of the milk
14 that you had in fiscal year 2008, where did that go?

15 A. Okay, the balance of the milk would
16 either move to manufacturing facilities or to our own
17 facility in St. Albans, Vermont.

18 Q. And in that own facility, what do you do
19 with the milk?

20 A. In our own facility, we are primarily a
21 cream generator to meet the needs of our key cream
22 customers, which I've stated is Ben & Jerry's is our
23 primary cream outlet.

24 Q. And the milk that goes to other
25 manufacturing outlets goes where?

1 A. Again, to manufacturing facilities as
2 cheese plants, which would be, for example, Via Cheese
3 in Swanton, Vermont, would be an example.

4 JUDGE CLIFTON: And Via is spelled how?

5 THE WITNESS: V-i-a.

6 JUDGE CLIFTON: Oh, Via.

7 THE WITNESS: Via.

8 JUDGE CLIFTON: Thank you.

9 BY MR. RICCIARDI:

10 Q. You expressed a concern about organic
11 milk in your statement and in questions that were
12 raised. That's on behalf of St. Albans you had that
13 concern?

14 A. Yes. We have 91 members that are
15 certified under organic practices.

16 Q. Now, you're aware of the volumes of
17 organic milk that were in Federal Order 1 in '06, '07
18 and '08?

19 A. I could not tell you exactly the volume
20 of milk that is.

21 Q. Can you tell me whether or not the
22 volumes of the milk in those years from '06 to '07 and
23 '07 to '08 has increased or decreased?

24 A. To my knowledge, it has increased.

25 Q. So, in fact, there has been an increase

1 in the pool in Federal Order 1 for organic milk from '06
2 to '07 and then from '07 to '08, right?

3 A. Yes.

4 Q. Notwithstanding whatever milk may come
5 into that system from another area of the country, the
6 fact is, in the pool, organic milk is increasing,
7 correct?

8 A. Correct.

9 MR. RICCIARDI: Thanks.

10 JUDGE CLIFTON: Who would next like to
11 cross-examine Mr. Berthiaume? Mr. Carroll.

12 CROSS-EXAMINATION

13 BY MR. CARROLL:

14 Q. Good morning, sir.

15 A. Good morning.

16 Q. I'm not sure I understood, but I think I
17 understand that you have said you have no problems with
18 the producer-handlers that are not engaged in organic
19 milk, that you're not presenting them as a problem?

20 A. We currently have, again, no direct
21 issues between St. Albans and producer-handlers at this
22 time.

23 Q. Okay. And I'm not sure that the record
24 shows it, but may I ask you again, if you've already
25 said it, what is the definition of organic milk?

1 A. Organic is milk that is produced under
2 specific standards as, I guess, outlined under the
3 organic -- the national organic standards that have been
4 established, I believe, under USDA.

5 Q. And is there some kind of a certification
6 procedure to obtain that name, or can anyone use it?

7 A. No, there is a certification process.
8 And there's various organizations that are accredited to
9 provide that certification.

10 Q. Can you tell us generally what those
11 requirements are?

12 A. To be organic?

13 Q. Yes.

14 A. They are certain practices as it relates
15 to the land in particular that are allowable under
16 organic production practices. For example, not being
17 able to use commercial fertilizers on the land for a
18 period of three years prior to becoming certified.

19 It's also a function of how you take care
20 of your animals. Prior to becoming organic you need to
21 feed your animals for a minimum of one year with organic
22 feed, for example. You're not allowed, unless it's in
23 emergency situations, to use any type of drug residues
24 or animal -- any type of antibiotics for treatment,
25 things of that nature.

1 Q. And that's at the production level, is
2 that correct?

3 A. That is correct.

4 Q. Are there any requirements at the
5 processing level?

6 A. Yes, in terms that even plants have to be
7 certified under organic practices in terms of making
8 sure -- if it's a plant that is strictly an organic
9 plant, it still needs to be looked at for certification
10 processes in terms of the types of cleaning or chemicals
11 that might be used within the facility. I'll give you
12 an example that would be looked at. If there's milk
13 that's being segregated, you need to identify the
14 process in which you segregate milk to ensure that you
15 maintain the validity of the organic milk that's being
16 processed.

17 Q. Is there inspection proceedings at all
18 for that section?

19 A. There aren't. Basically, a certification
20 process that has happened, that happens annually
21 relative to a facility.

22 Q. All right. Would those requirements have
23 some impact on costs of production and costs of the
24 processing?

25 A. Yes.

1 Q. Now, the public, from the standpoint of
2 the public, when the product is sold, how is it -- is it
3 allowed to be marked differently than other milk?

4 A. Organic milk is -- again, I would say is
5 identified as organic milk on the carton.

6 Q. The word "organic" is on there?

7 A. Yes.

8 Q. And that's a unique certification in
9 order to use that name on the label?

10 A. That is correct.

11 Q. I think you might be generally familiar
12 with this. If you're not, tell me.

13 A. Go ahead.

14 Q. Generally speaking, although there's been
15 some increase in the volume of producer-handler milk in
16 your order, that's Order Number 1, are you familiar with
17 the fact that that, compared to the blend, would have
18 very little effect, if any, on the blend? In other
19 words, it's a small volume compared to the volume of
20 milk being handled in that order?

21 A. I do recognize the size of Order 1 in
22 terms of the volume of milk, yes.

23 Q. And comparing that to this increase in
24 producer-handler milk that you talked about, is it so
25 that that's a relatively -- would have relatively little

1 effect on the blended, pennies perhaps?

2 A. It would be a small difference. But,
3 again, it is a difference, no less, to dairy farmers at
4 a point when right now every penny is of importance to
5 dairy farmers.

6 Q. And what do you mean by "small
7 difference"?

8 A. Meaning that any pennies today, given
9 that they are receiving lower than the cost of
10 production, has been, again, one of the major concerns
11 to dairy farmers.

12 Q. But it's in pennies, you say?

13 A. Oh, absolutely, absolutely.

14 MR. CARROLL: That's all. Thank you.

15 JUDGE CLIFTON: Thank you, Mr. Carroll.

16 Mr. English.

17 MR. ENGLISH: Thank you, your Honor.

18 Charles English.

19 CROSS-EXAMINATION

20 BY MR. ENGLISH:

21 Q. Mr. Berthiaume, you were asked a number
22 of questions that suggested that it somehow matters that
23 a producer-handler be located within New England to be a
24 competitive issue. Given your testimony on the organic
25 front, is that an accurate characterization of what the

1 competitive issue is in this market in the United States
2 today?

3 A. No. Again, it does not need to be
4 directly within the order.

5 Q. So a producer-handler could be located
6 outside the order, correct?

7 A. That's correct.

8 Q. Selling into the order, not regulated,
9 and have the same competitive impact, right?

10 A. Correct.

11 Q. And, in fact, looking at Exhibit 12, I
12 think you referenced for a moment, this is the marketing
13 administration statistics about producer-handlers, and I
14 think you talked about --

15 JUDGE CLIFTON: Let me get -- he may have
16 it. All right. Good.

17 BY MR. ENGLISH:

18 Q. You talked about the growth in 2000 to
19 2008 as doubling, and I just wanted to point out to you,
20 if you look at it, that, in fact, the number was
21 relatively stable from 2000 to 2005. 2005, you end up
22 with 66.5 million pounds. In 2000, you had 63.5 million
23 pounds. So, isn't it really correct that the doubling,
24 as it were, occurred in three years, from '05 to '08, in
25 the volume of producer-handler milk on this order?

1 A. That's what this would indicate.

2 Q. And whether an individual
3 producer-handler is having an impact, isn't it the case
4 as you just said, pennies on a pool, that the impact is
5 really the aggregate impact of nonregulated milk on the
6 pool ultimately?

7 A. Yes.

8 Q. And so an issue here is that if in three
9 years it's doubling from 6 to 6.5 to 131.1, if it
10 doubles every three years, you've got a significant
11 problem coming down your pike, don't you, sir?

12 A. Yes.

13 Q. To your knowledge, is there a
14 producer-handler in the New England, New York area that
15 is at 3 million pounds today, at or above 3 million
16 pounds?

17 A. Can you repeat the question?

18 Q. To your knowledge, in the New York, New
19 England area, is there a producer-handler at the
20 3 million pound or above per month level today?

21 A. That is located or --

22 Q. I'm sorry. That's a good point. Okay.
23 Let's go back to the location. Yes.

24 A. That is specifically located?

25 Q. Yes.

1 A. Again, not that I'm -- to my knowledge.

2 Q. Recognizing, again, it doesn't matter
3 whether it's located there, but some of the questions
4 were located, correct?

5 A. Correct.

6 Q. So one issue, of course, is, we've heard
7 testimony about people who say they've made investments
8 and it's somehow not fair to change the regulations. If
9 you wait and nothing happens, and then you end up with
10 producer-handler at 4 million, what's going to happen to
11 you?

12 A. Again, I think that's in my testimony in
13 terms that we need to anticipate the change that may be
14 transpiring and address those in advance.

15 Q. And that change that's transpiring is
16 actually expressed in Exhibit 12 in the doubling from
17 2005 to 2008?

18 A. That's correct.

19 MR. ENGLISH: Thank you, sir.

20 JUDGE CLIFTON: Thank you, Mr. English.

21 Other cross-examination for Mr. Berthiaume?

22 Mr. Vetne.

23 CROSS-EXAMINATION

24 BY MR. VETNE:

25 Q. A couple of follow-ups to other

1 examination. Mr. Berthiaume, you testified that it's
2 particularly important to get every penny, because
3 producers or dairy farmers are receiving less than the
4 cost of production today. Is it not the case that in
5 almost every period, dairy farmers receive less than the
6 cost of production? It's not unique to today?

7 A. It's not necessarily unique to today, but
8 there certainly have been challenges and cycles.

9 Q. In fact, whether -- cost of production is
10 the subject of controversial measure. It has cash
11 costs, which are pretty uniformly accepted, but then it
12 has imputed costs, which folks differ on, correct?

13 A. That is correct.

14 Q. And for every farm for which there's a
15 cost of production, there's also nonmilk revenue, at
16 least cold cow revenue?

17 A. That is correct.

18 Q. You provided some testimony on where your
19 milk goes or where it's directed or where it's marketed,
20 including manufacturing plants. Is it all pooled --

21 A. Yes.

22 Q. -- regardless of where it goes? Does
23 St. Albans supply a volume of milk to the Liberte Dairy
24 in Quebec that comes back as yogurt?

25 A. St. Albans does not provide milk

1 directly. It provides product from the plant for
2 Liberte, which is, again, an inspected plant under FDA.
3 And as long as the product that is used from our plant
4 is then redirected back into the States, there is no
5 issues.

6 Q. By "product," you mean boutique milk of
7 some kind?

8 A. No. It would be cream or skim or skim
9 condensed that they would use for their products.

10 JUDGE CLIFTON: Would you spell the name
11 of that yogurt?

12 THE WITNESS: Sure. It's L-i-b-e-r-t-e.

13 BY MR. VETNE:

14 Q. So coming from your plant, directed up to
15 Quebec, the Federal classified price would apply to
16 that?

17 A. Yes. It is pooled.

18 Q. Okay. And milk prices are much higher in
19 Canada. Is the extra revenue premiums available in
20 Canada also pooled?

21 A. Again, that volume of product that's
22 shipped to Liberte is part of our reports to the Federal
23 Order 1. So anything that we obtain from that is part
24 of the pool.

25 Q. If there are premiums, does that accrue

1 to St. Albans or does it go to DFA?

2 A. The premiums over and above the minimum
3 classified price, again, would be for St. Albans'
4 members.

5 Q. In New England, there are -- in addition
6 to some small producer-handlers that distribute milk,
7 there are small producer-manufacturers that make
8 specialty cheese, that are not in the pool, is that
9 correct?

10 A. Yes.

11 Q. And they're not in the pool because,
12 basically, they don't have access to the pool, is that
13 correct?

14 A. They made a decision not to participate
15 in the pool.

16 Q. Okay. A few years ago, St. Albans itself
17 was faced with a situation where it did not have
18 access -- it might not have access to pool revenue and,
19 for that reason, decided to join DFA, correct? You lost
20 the Class I accounts?

21 A. No, that's not correct.

22 Q. There was not a situation in which you
23 lost Class I accounts and you would not have been able
24 to pool some of your milk?

25 A. No, that is not correct.

1 MR. VETNE: Okay. That's all the
2 additional questions I have.

3 JUDGE CLIFTON: Thank you, Mr. Vetne.
4 Any other cross-examination before I ask if USDA
5 has questions?

6 There is none? Mr. Tosi.

7 MR. TOSI: Thank you, your Honor.

8 CROSS-EXAMINATION

9 BY MR. TOSI:

10 Q. I'm Gino Tosi with Dairy Programs and
11 USDA.

12 A. Good morning.

13 Q. Are you going to offer any positions
14 regarding any other proposals?

15 A. No.

16 Q. In your statement, you spoke quite a bit
17 about the importance of marketwide pooling. Are you
18 aware that there's a proposal that's been noticed to
19 eliminate marketwide pooling and, in its place, adopt
20 individual handler pooling?

21 A. Yes, I am aware of that through the
22 register.

23 Q. Do you have a -- does St. Albans have a
24 position about that proposal?

25 A. We would be opposed to the proposal

1 because of the impact that that would have, potentially,
2 to our members.

3 Q. What impact would that have on your
4 members?

5 A. Again, it's important that we maintain
6 access to the Class I market given the Class I
7 utilization within our region. That is really important
8 to the overall pay price that our farmers receive. And
9 so for any volume of milk that would not be part of what
10 might be proposed, would have a negative effect to the
11 members' income.

12 Q. In what way, then, would individual
13 producer-handler pooling limit your access to the Class
14 I market?

15 A. Again, it would be a function of
16 potentially the volume that would be procured by the
17 various outlets. And given our location, as well as our
18 proximity to close markets, I think we could be affected
19 by that, by not having the immediate access to some of
20 those class markets.

21 Q. But what you just said there, what you're
22 saying, if -- I think I understand you correctly, and
23 please correct me if I'm wrong. I think what you're
24 saying is that there are other producers who would be
25 more advantageously located to, for example, a

1 distributing plant versus a plant like -- such as yours?

2 A. That is correct.

3 Q. And your plant's utilization of milk
4 would be more along the lines of Class III and IV uses
5 versus Class I and II?

6 A. That is correct.

7 MR. TOSI: That's all I have. Thank you.
8 I really appreciate your appearance. Thank you.

9 THE WITNESS: Thank you.

10 JUDGE CLIFTON: Is there any other
11 cross-examination?

12 There is none. Any redirect?

13 MR. BESHORE: I do not have any questions
14 on redirect for Mr. Berthiaume, but I would move
15 the admission of Exhibit 27.

16 JUDGE CLIFTON: Is there any objection to
17 Exhibit 27 being admitted?

18 There is none. Exhibit 27 is admitted.
19 Thank you, Mr. Beshore. Mr. English.

20 MR. ENGLISH: Charles English. Before we
21 take up the next witness, your Honor, Mr. Lee
22 has arrived, and I have his testimony now. I
23 have held onto a number of copies for your
24 Honor, for the court reporter and for the
25 government. I have passed out to those most

1 obvious to me as interested persons, to make
2 sure that they got them as counsel
3 representatives, and I still have 14 or 15 I'm
4 putting in the back of the room right now.

5 JUDGE CLIFTON: Excellent. Now that's
6 Gary Lee of Prairie Farms?

7 MR. ENGLISH: Gary Lee of Prairie Farms,
8 plus the others I have coming.

9 JUDGE CLIFTON: Mr. Tosi.

10 MR. TOSI: Yes, your Honor, I may have
11 been mistaken before in informing you that
12 Mr. Mark Kastel from Wisconsin would probably be
13 appearing on Friday. He is here also now, and
14 would appreciate it if we could work him into
15 the schedule today.

16 JUDGE CLIFTON: That would make an even
17 dozen, which is very appropriate. I'm pleased
18 the way things are moving along. I think we can
19 do it.

20 Let me see what time it is before I
21 decide whether we take the next witness. I
22 think, you know, we've been at it an hour and a
23 half. Usually first thing in the morning,
24 that's a good time for a break. Mr. Beshore,
25 would you object to our breaking now for 15

1 minutes?

2 MR. BESHORE: I would not, but I would
3 like to address a procedural issue which I think
4 would be appropriate right before the break.

5 JUDGE CLIFTON: All right.

6 MR. BESHORE: The next witnesses are the
7 three dairy farmers who are members of Dairy
8 Farmers of America. We would like to request
9 that your Honor hear the witnesses as a panel
10 with all three being present and sworn at the
11 table at a time. If that is acceptable, the
12 break would be a good time to get the logistics
13 in place.

14 JUDGE CLIFTON: Excellent. I applaud the
15 idea. There will be some burden on the
16 witnesses. Each time before they speak, they
17 should say who they are so that the record will
18 be clear who's talking. That's all we need to
19 do. That's a great idea. All right. Please be
20 ready to go at 9:55. That gives you 15 minutes.
21 9:55.

22 (A recess was taken from 9:41 to 9:58.)

23 JUDGE CLIFTON: All right. Let's go back
24 on record. We're back on record at 9:58, and we
25 have seated in the witness box three people, and

1 they will testify as a panel. I ask that --
2 we're going to go off record for just a moment
3 while they practice getting close to the
4 microphone. We'll go off record.

5 (Off the record.)

6 JUDGE CLIFTON: All right. Let's go back
7 on record. We're back on record at 9:59. I
8 would like the witnesses in the witness stand to
9 identify themselves. Please state and spell
10 your name.

11 MR. NEWELL: I'm Bill Newell, B-i-l-l,
12 N-e-w-e-l-l.

13 MR. TRAWEEK: John Traweek, J-o-h-n,
14 T-r-a-w-e-e-k.

15 MS. DAMM: And I am Cindy Damm,
16 C-i-n-d-y. And the last name, D as in dog, a, m
17 as in Mary, m as in Mary.

18 JUDGE CLIFTON: Thank you. I'll swear
19 all of you in at once.

20 (The witnesses were sworn.)

21 BILL NEWELL, CINDY DAMM, JOHN TRAWEEK
22 of lawful age, being first duly sworn, were examined and
23 testified as follows:

24 JUDGE CLIFTON: Each of the three has
25 been sworn. Mr. Beshore?

1 MR. BESHORE: Yes. Thank you, your
2 Honor. There are -- the statements of Ms. Damm,
3 Mr. Newell and Mr. Traweek have been made
4 available to all persons here in the back of the
5 room since the beginning of the session this
6 morning.

7 And at this time I would like, starting
8 with Mr. Newell and then Ms. Damm and finally
9 Mr. Traweek, for each of these dairy farmers to
10 present their statements. Mr. Newell?

11 DIRECT EXAMINATION

12 MR. NEWELL: Thank you. I am Bill
13 Newell, a dairy farmer from Maysville, Kentucky.
14 My address is 6295 Key Pike, Maysville,
15 Kentucky, 41056. Maysville, Kentucky, is in
16 northeast Kentucky, approximately 75 miles
17 southeast of Cincinnati.

18 My son and I milk a small herd of
19 registered Holsteins on our 560-acre family
20 farm. There has been milk shipped from this
21 farm every day since 1928 when my grandfather
22 started milking cows. I have been doing the
23 majority of the milking since 1970. I am a
24 member of the Dairy Farmers of America
25 Incorporated, Mideast Area Council Board of

1 Directors. I also serve on the Kentucky Dairy
2 Development Council and am a past director of
3 the Kentucky Holstein Cattle Club.

4 I have provided leadership to young
5 people with 4-H and FFA dairy projects. There
6 was, at last count, 105 dairy farms in my
7 district. Many of them are small, similar to
8 mine, with the cows being milked and cared for
9 by their owners and very little hired labor.
10 Nearly 100 percent of the milk produced in my
11 district is processed at the Kroger bottling
12 plant in Winchester, Kentucky.

13 I am a member/owner of DFA and am here
14 today to offer support for proposals 1 and 2 as
15 offered by the National Milk Producers
16 Federation and the International Dairy Foods
17 Association, and Proposal 26 as offered by the
18 National Milk Producers Federation.

19 DFA is a cooperative owned by
20 approximately 18,000 members who operate farms
21 in 48 states. DFA members are supportive of
22 Federal Orders which we feel benefit all dairy
23 farmers. Many of my fellow dairymen are very
24 concerned about issues that affect milk prices,
25 including the issues under discussion here.

1 My knowledge of the Federal milk
2 marketing regulations is somewhat limited, but I
3 have reviewed the proposals in this hearing and
4 feel I have a working knowledge of the issue
5 under discussion. As a member of the Mideast
6 Area Council Board of Directors, I am familiar
7 with the marketing conditions in the area where
8 my farm is located. The issues in this hearing
9 have also been discussed in DFA publications to
10 the general membership, and I have had
11 discussions on this topic with my neighboring
12 dairy farmers.

13 I understand that producer-handlers are
14 not a part of the Federal Order pool. I realize
15 that most producer-handler milk volume is Class
16 I milk, which returns the highest price. So
17 when the returns from that volume of milk are
18 not part of the Federal Order pool, the
19 resulting blend price is lower for all pooled
20 farmers. Federal Order prices significantly
21 guide the actual pay prices received by all
22 dairy farmers in my area. The prices my
23 neighbor and I receive for milk will be lower
24 when producer-handler Class I sales are excluded
25 from the pool.

1 I physically reside in Federal Order 33,
2 and the milk from my area is marketed in both
3 Order 33 and Order 5. According to the data
4 presented here today, there's only one
5 producer-handler currently in operation in Order
6 33 and two in Order 5. There are 16 exempt
7 plants in Order 33 and two in Order 5, one of
8 which is North Carolina State University.

9 My biggest concern is that USDA corrects
10 the issues being raised by the National Milk
11 Producers Federation and International Dairy
12 Foods Association before they become
13 multimillion-pound problems. Federal Order
14 hearings are supposed to be where the secretary
15 listens to concerns from producers about the
16 Order system and decides if there is a problem
17 that needs to be resolved or if the Orders need
18 changes to keep up with the changes in the dairy
19 industry. I think this is one of these issues.

20 The dairy farm business is going through
21 one of the most difficult times in my existence
22 as a dairy farmer, and the most difficult in the
23 existence of my son as a dairyman. Last month,
24 the mailbox milk price on my farm was \$9.20 per
25 hundredweight, one of the lowest it has ever

1 been. And based on industry forecasts, it may
2 be just as low for the next two or three months,
3 if not longer.

4 Like any of you listening, I'm very
5 concerned about any issue that may cause my
6 business revenues to decline. This issue is
7 based on regulatory difference and not a
8 supply-demand driven cost factor. This is the
9 type of issue I think needs to be reviewed and
10 changed by the secretary.

11 The Order system does not exist to assure
12 a profitable milk price, but rather to provide a
13 level playing field for prices paid by --
14 processors and prices received by farmers. Once
15 this balance gets upset, the consequences may be
16 hard to correct. I think the Order system is
17 necessary to assure small producers like myself,
18 and those I represent, access to the market.

19 Were processing plants to close due to
20 changes in the competitive marketplace, the
21 processors to buy my milk may become fewer and
22 further away, resulting in increased hauling
23 costs. In that case, the producers in my area
24 would be negatively affected.

25 It is not the function of the Order

1 system to guarantee our existence, but we should
2 be able to request that Order provisions which
3 are causing or have the potential to cause
4 marketing problems for a majority of dairy
5 farmers be reviewed and modified if needed.

6 If this issue is not corrected, I am
7 concerned that the Order system, as we know it,
8 will be threatened. This would not be a
9 desirable result for dairy farmers in my
10 community.

11 I feel our proposals are fair, allowing
12 an existing producer-handler to retain their
13 status up to the 3 million-pound limit or an
14 existing exempt plant to be exempt up to a limit
15 of 450,000 pounds is reasonable. But if these
16 businesses get to a certain size, they should be
17 treated like other processors in the market.

18 Thank you for the opportunity to express
19 the opinion of my fellow DFA dairy farmers. I
20 will be glad to try to answer any questions you
21 may have about my testimony.

22 MR. BESHORE: Before we proceed with
23 Ms. Damm's statement, I neglected to request
24 that the statements be marked for identification
25 with exhibit numbers.

1 JUDGE CLIFTON: Mr. Newell's will be
2 Exhibit 28.

3 MR. BESHORE: Thank you, your Honor.

4 JUDGE CLIFTON: That's the one we just
5 heard read. Since the next witness will be
6 Ms. Damm, her statement will be Exhibit 29. And
7 Mr. Traweek's statement will be Exhibit 30.

8 (Exhibits 28 - 30 were marked for
9 identification.)

10 MR. BESHORE: Thank you, your Honor.
11 Now, Ms. Damm, you may proceed.

12 MS. DAMM: Thank you. I am Cindy Damm, a
13 dairy producer from Columbus, Wisconsin. My
14 address is W1860 Weiner Road, Columbus,
15 Wisconsin. Columbus is in south central
16 Wisconsin, approximately 20 miles northeast of
17 Madison.

18 My husband and I milk 140 cows, and Matt
19 is a fourth generation dairy farmer. A fire in
20 the summer of 2003 led us to purchase the herd
21 from his family and rebuild the dairy. We
22 purchase our feed through an agreement -- an
23 arrangement with Matt's father, who crops
24 approximately 400 acres.

25 On an average day, you will find the two

1 of us not only milking our cows, but we tend to
2 the daily chores and accordingly make all the
3 decisions, large and small, relating to the
4 farm. We are the labor pool on our farm.

5 We have four children who we hope someday
6 will desire to operate the family dairy
7 business. Our three daughters and one son are
8 ages 11 to 2. We're fully committed to the
9 dairy industry and made sizeable investments in
10 our farm in 2005.

11 Our milk is all marketed in Federal Order
12 30. We've been members of DFA since our
13 start-up in 2003. Prior to that, Matt's family
14 was a member of Mid America Dairymen. Our
15 cooperative is owned by approximately 18,000
16 members who operate farms in 48 states. DFA
17 members are supportive of Federal Orders and
18 feel farmers would be in a more difficult
19 economic position if they were weakened or
20 eliminated. All of my fellow dairymen are very
21 concerned about issues that affect milk prices.
22 And the issues being discussed here are
23 important to us.

24 Our family is involved in the dairy
25 industry off of our farm. We participate in the

1 DFA Young Cooperator program and are active
2 promoters of the dairy industry locally through
3 activities sponsored by the Columbia County
4 Dairy Promotion Committee. We view these types
5 of efforts as both promoting the industry and
6 our products to local consumers.

7 Wisconsin is home to almost 14,000 dairy
8 farms. DFA has 1,631 members in Wisconsin, and
9 the average herd size in Wisconsin is
10 approximately 90 cows. Farms in my community
11 range from 30 to 400 cows. Throughout the
12 state, though, we are seeing an increased number
13 of herds with 1,000 or more cows, and within 45
14 minutes of my farm, there is a dairy permitted
15 for 8,000 cows.

16 I'm here today to offer support for
17 Proposals 1 and 2 as offered by the National
18 Milk Producers Federation and the International
19 Dairy Foods Association, and Proposal 26 as
20 offered by the National Milk Producers
21 Federation. I'm not an expert in the field of
22 Federal milk marketing regulations, but I have
23 reviewed the proposals and have a general
24 understanding of what we are discussing here.

25 These proposals have been reviewed by the

1 corporate board of directors -- the corporate
2 board of DFA and the Central Area Council Board
3 of Directors who oversee the marketing
4 activities in the area where my farm is located.
5 This issue has also been discussed in DFA member
6 publications with the general membership, and I
7 had discussion on this topic with my neighboring
8 dairy farmers.

9 I understand that a producer-handler does
10 not pool the revenues from his farm with the
11 Federal Order. I understand that most
12 producer-handler milk volume is Class I milk,
13 and those volumes have the highest Federal Order
14 price. So when the returns from that volume of
15 milk are not a part of the Federal Order pool,
16 the resulting blend price is lower for all the
17 remaining producers.

18 The mailbox price for all dairy farmers
19 in my area is directly related to Federal Order
20 prices. To the extent that the monies from the
21 sales of milk are not included in the Federal
22 Order pool, the prices my neighbors and I
23 receive for milk will be lower.

24 As I mentioned earlier, near my farm
25 there is a dairy that has been permitted for

1 8,000 cows. If that farm had an average
2 production of 19,546 pounds, which is the 2008
3 average for Wisconsin, and chose to be a
4 producer-handler, it could account for just over
5 3 percent of an average month's Order 30 Class I
6 pounds.

7 More importantly, it would pull dollars
8 away from the blend price and cause financial
9 stress for all farms. I understand that the
10 Order system does not guarantee a profit to
11 dairy farmers, but it does guarantee a level
12 playing field for minimum prices to processors
13 in the form of class prices and to producers in
14 the form of blend prices. Once this balance
15 gets upset, the consequences may be hard to
16 correct.

17 It is my belief that without a
18 functioning Order system, smaller producers like
19 my neighbors and I may find it more difficult to
20 access the market. And if processing plants
21 were closed due to changes in the competitive
22 marketplace due to producer-handler competition,
23 processors to which to sell my milk may become
24 fewer and their locations farther away, costing
25 more to haul milk to market. Many of the

1 producers in my area would be in a similar
2 situation, and thus negatively affected.

3 We are not asking that the Order system
4 guarantee our existence. That's not the
5 function of the system. But we should be able
6 to request that Order provisions that are now
7 being used in a way differently from what we
8 think they were intended, and are causing or
9 have the potential to cause problems for the
10 majority of dairy farmers in the Order, be
11 reviewed and modified as needed. If this issue
12 is not corrected, I'm concerned that the
13 integrity of the Order system would be
14 undermined and its future jeopardized. This
15 would be a terrible outcome, and I would be
16 concerned that it would threaten the viability
17 of our farm.

18 I appreciate the hard work it must take
19 to be a producer-handler. It's difficult enough
20 to just be a dairy farmer. One of the points
21 about our proposal that I feel is fair is that
22 we still allow a small producer to test the
23 waters of being a processor without very much
24 potential damage to the competitive marketplace.
25 There are several small plants in my state.

1 Allowing an existing producer-handler to retain
2 their status up to the 3 million-pound limit or
3 an exempt plant to operate up to a limit of
4 450,000 pounds provides for this, but if the
5 business gets to a certain size, it seems very
6 reasonable that they be treated like other
7 processors in the market.

8 Thank you for the opportunity to express
9 the opinions of my fellow DFA members. And
10 after John's testimony, I would be glad to try
11 to answer any questions you may have.

12 MR. TRAWEEK: My name is John Traweek, a
13 dairy farmer from Stephenville, Texas. My
14 address is 103 Ben Hogan Drive, Stephenville.
15 Stephenville is in central Texas, located
16 approximately 90 miles southwest of Dallas/Fort
17 Worth.

18 I am a third generation dairy farmer with
19 my brother Ricky. My father, James Traweek,
20 began milking cows in our dairy in 1964 with
21 hopes and plans that his sons would continue
22 this proud tradition. It is with optimistic
23 hope that my son or my brother's sons will
24 choose to carry forth the family name in the
25 dairy business.

1 We currently milk 750 Holstein cows and
2 farm 950 acres in Erath County. I am a member
3 of the Dairy Farmers of America, Inc., Southwest
4 Area Council Board of Directors. I also serve
5 on the Dairymax Board of Directors, as well as
6 the Texas Agriculture Cooperative Council. To
7 serve my local community, I also serve on the
8 Erath County Farm Bureau Board, as well as the
9 Tri-County Agriculture Association. Erath
10 County is the number one county in Texas for
11 milk production, with the majority of the milk
12 being produced there being used to serve fluid
13 markets in the Austin, Dallas and Fort Worth
14 area.

15 I am a member/owner of DFA. I am here to
16 testify in support of Proposals 1 and 2 as
17 offered by the National Milk Producers
18 Federation and the International Dairy Foods
19 Association, and Proposal 26 as offered by the
20 National Milk Producers Federation.

21 DFA is a cooperative owned by
22 approximately 18,000 members who operate farms
23 in 48 states, including Texas where I live. DFA
24 members are supportive of Federal Orders and
25 feel that farmers would be in a more difficult

1 economic position if they were weakened or
2 eliminated.

3 I am not an expert in the field of
4 Federal milk marketing regulations, but I have
5 looked over the proposals and have a general
6 understanding of what is being discussed here.
7 These proposals have been reviewed by the
8 corporate board of DFA and by the Southwest Area
9 Council Board of Directors, who oversee the
10 marketing activities in the area where my farm
11 is located.

12 This issue has also been discussed in DFA
13 member publications and at general membership
14 meetings in my area. I've had discussions on
15 this topic with my neighboring dairy farmers,
16 and we feel this issue has a direct impact on
17 our mailbox milk prices, and that makes us
18 concerned.

19 I understand that a producer-handler does
20 not pool the revenues from the sale of his milk
21 with the Federal Order. I understand that most
22 producer-handler milk volume is Class I milk,
23 the highest price class. When the returns from
24 that volume of milk are not a part of the
25 Federal Order pool, the resulting blend price

1 will be lower. Dairy farmers pay prices in my
2 area that are determined by the Federal Order.
3 To the extent that the monies from the highest
4 valued sales of milk are not included in the
5 Federal Order pool, the prices my neighbors and
6 I receive for milk will be lower.

7 Milk prices are currently very low due to
8 many factors, and when combined with
9 historically high feed price -- feed cost, it
10 has produced significant losses at my dairy in
11 the past months, with the future prices not
12 looking very promising. In fact, the milk price
13 at my farm last month was \$10.96 per
14 hundredweight, one of the lowest since I've ever
15 been dairying. My farm faces the very real
16 possibility that this producer-handler issue
17 will lower that price even more if not
18 corrected.

19 In our council, the issue of regulating
20 producer-handlers has already had a price
21 impact. A large producer-handler operating in
22 El Paso, Texas, has caused our fluid milk
23 customers to press our cooperative for raw milk
24 price decreases. Our customers tell us that in
25 order to remain competitive, they must lower

1 their prices to meet the competition from this
2 producer-handler.

3 We know that this pricing problem is
4 caused by the producer-handler not being
5 regulated under the Federal Order. In short, we
6 can't see all the numbers that are calculated,
7 but we have already seen the results in
8 reductions in our sales premiums and in our
9 mailbox milk prices.

10 This problem began in the El Paso market
11 and has expanded into the rest of the New Mexico
12 market, and now has become a concern in certain
13 Texas markets. In our case, this is not
14 imaginary, not a theory to be debated, and
15 certainly not a minimal issue, but an actual
16 daily occurrence.

17 We think this issue needs to be reviewed
18 and are appreciative of this hearing. Our view
19 is that large producer-handlers can and do
20 affect the marketplace and exploit a price
21 difference in ways that are not intended. We
22 urge the secretary to change the Order rules as
23 suggested in Proposals 1, 2 and 26.

24 If the USDA cannot modify the Federal
25 Order system to address the producer-handlers in

1 our market, the possibility looms that the
2 producers who participate in the Federal Order
3 system could have to abandon the system in order
4 to survive.

5 Thank you for the opportunity to express
6 my opinions of my fellow DFA farmers. I will be
7 glad to try to answer any questions you have
8 about my testimony. Thank you.

9 MR. BESHORE: Thank you.

10 JUDGE CLIFTON: Mr. Beshore.

11 MR. BESHORE: Yes, your Honor. I have
12 one additional question for Ms. Damm, and then
13 one for Mr. Traweek.

14 Ms. Damm, farmers talk about concepts
15 involved in farms, like herd average production,
16 and those that are not dairy farmers may not
17 necessarily know what that means. Now, in your
18 testimony on page 4, you talked about a herd
19 average production of 19,546 pounds. What does
20 19,546 pounds represent?

21 MS. DAMM: The National Ag. Statistics
22 system puts out an average production per cow
23 per year for each state. And the 2008 statistic
24 for a cow in Wisconsin is 19,546 pounds of milk.

25 MR. BESHORE: Per cow per year?

1 MS. DAMM: Per cow per year.

2 MR. BESHORE: Very good. Thank you.

3 Mr. Traweek, you've talked in your
4 testimony about the current effects in your
5 market of a large producer-handler in El Paso,
6 Texas, correct?

7 MR. TRAWEEK: Yes, sir, that is correct.

8 MR. BESHORE: Now, that's a new plant, is
9 it not, in 2009, or a new producer-handler, at
10 least, in 2009?

11 MR. TRAWEEK: That is correct.

12 MR. BESHORE: Okay. And I think the
13 exhibits that the USDA has presented show that.
14 Can you quantify at all the effect, let's say,
15 on a per hundredweight basis in your area that
16 the entry of that producer-handler into the
17 market has had on your pay price?

18 MR. TRAWEEK: Yes. I believe --

19 JUDGE CLIFTON: Before you answer, just a
20 moment, I have an interjection. I don't know
21 for what reason. Mr. Ricciardi.

22 MR. RICCIARDI: I will give you a reason,
23 Judge. What I would like is that he lay the
24 foundation for the ability to give such a
25 computation. We have no idea, even given that

1 statement, how in the world he would know, one,
2 whether it has an effect; and, two, what the
3 effect would be. And to that extent, then we
4 need to find out if he can actually give such an
5 opinion.

6 JUDGE CLIFTON: You're really paying
7 attention over there. That's quite good.
8 Actually, I think a dairy farmer in an area can,
9 without foundation, talk about the impact of a
10 competitor. And then, on cross-examination, you
11 may inquire. So start again with your question.

12 MR. BESHORE: Okay. My question was,
13 Mr. Traweek, can you provide us any information
14 with respect to the amount of the impact of the
15 producer-handler in Texas upon pay prices, you
16 know, the revenues available for dairy farmers
17 in Texas? That's the question. And let me
18 just, for -- in light of Mr. Ricciardi's
19 comments, just so there's no question, let me
20 just ask you to call attention to some of the
21 comments you made in your testimony. First of
22 all, you are a member of the Southwest Area
23 Council Board?

24 MR. TRAWEEK: That is correct.

25 MR. BESHORE: Okay. And is that council

1 involved in administering and directing the
2 financial affairs of DFA in your area?

3 MR. TRAWEEK: Yes, that is correct. We
4 do review the financial activities of the
5 agency, as well as the Southwest Area Council.

6 MR. BESHORE: Okay. And when you talk
7 about the agency, to what does that refer?

8 MR. TRAWEEK: The agency GSA, Greater
9 Southwest Agency, is a marketing pool of six
10 different cooperatives that pool their money
11 together through the Federal Order to
12 redistribute that money back out to the
13 producers.

14 MR. BESHORE: And so as a member of this
15 Southwest Area Council Board of DFA, as well as
16 just a dairy farmer in your own right, do you
17 have some ability to evaluate and some knowledge
18 of the impact of the El Paso producer-handler
19 facility on your revenues?

20 MR. TRAWEEK: Yes. In our discussions in
21 our board meetings, we discuss what impact
22 through the changes with the producer-handler
23 going into the El Paso area, what loss of
24 revenue we've seen through the GSA, or Greater
25 Southwest Agency -- and we have seen those

1 numbers.

2 MR. BESHORE: Okay. And would those
3 revenues be at least in two parts? First of
4 all, is it a fact that that producer-handler has
5 made sales that would otherwise be pooled, that
6 are now not part of the pool?

7 MR. TRAWEEK: That is a fact, yes.

8 MR. BESHORE: And, therefore, the blend
9 price available to all producers in the
10 Southwest Order has been reduced by those
11 volumes?

12 MR. TRAWEEK: Correct. That is correct.
13 Due to the decrease in the blend price, we
14 have -- we can track our numbers to show what we
15 have seen in decrease in our blend price for the
16 producers in our area -- or agency, yes.

17 MR. BESHORE: And in addition to the
18 decreases in the Federal Order blend price,
19 you've testified that you've experienced
20 decreases in over-order revenues, as well,
21 because of the competitive factors?

22 MR. TRAWEEK: That is correct.

23 MR. BESHORE: Okay. Can you tell us,
24 just on a per hundredweight basis within DFA and
25 the agency, about what the impact has been?

1 MR. TRAWEEK: That impact to our mailbox
2 price has been about 20 cents per hundredweight
3 decrease in our agency in our area.

4 MR. BESHORE: Thank you very much,
5 Mr. Traweek. And the witnesses are available
6 for cross-examination, your Honor.

7 JUDGE CLIFTON: Thank you, Mr. Beshore.
8 Mr. Traweek, what is a mailbox price?

9 MR. TRAWEEK: Our mailbox price is what
10 we receive from our DFA. We're a DFA producer,
11 so I receive my check from DFA. And our mailbox
12 price is the price that we receive based on a
13 butterfat somatic sell count, and is equal level
14 for all producers in that area.

15 JUDGE CLIFTON: So it is actually what
16 the check said that came in the mail? That's
17 why you call it a mailbox price?

18 MR. TRAWEEK: We have our base price and
19 then we have premiums that -- and our handling
20 prices that are deducted off of that, or added
21 on top.

22 JUDGE CLIFTON: Okay. So are over-order
23 premiums included in the mailbox price?

24 MR. TRAWEEK: Yes. Those through the
25 agency, yes.

1 JUDGE CLIFTON: But there could also be
2 other over-order premiums not reflected in the
3 mailbox price for some?

4 MR. TRAWEEK: For some, yes.

5 JUDGE CLIFTON: Okay. Good. Thank you.
6 All right, cross-examination? Anyone who wants
7 to cross-examine may cross-examine one or all of
8 the witnesses at the same time.

9 Mr. Carroll, thank you.

10 CROSS-EXAMINATION

11 MR. CARROLL: Good morning, folks. You
12 know, just looking at you makes me happy over
13 America, because I know families back home just
14 like yours, and you're the heartbeat of this
15 country. And I congratulate you for becoming so
16 knowledgeable of your industry, and the lady for
17 working shoulder to shoulder with her husband,
18 because that's a pattern in American farming we
19 should all be proud of.

20 I only have a few short questions. I
21 take it, from what you said, since you would
22 agree with Proposal 26, that's the \$3 million
23 proposal, that you have no problem with that
24 figure at any rate, the \$3 million figure, that
25 would you accept that as a -- for a

1 producer-handler exemption? Is that so?

2 JUDGE CLIFTON: Before you answer, I
3 think there's an objection that I should hear.

4 MR. CARROLL: Sure.

5 MR. RICCIARDI: Your Honor, could we
6 clarify the record? I think Mr. Carroll meant 3
7 million pounds, not \$3 million.

8 MR. CARROLL: Oh, I'm sorry. 3 million
9 pounds. I didn't realize I said that. It just
10 seems like dollars to you, probably.

11 How about 3 million pounds? Do you
12 understand that's what that proposal says, and
13 you're agreeable, if that limitation is there,
14 that there be a producer-handler exemption? Is
15 that correct now?

16 JUDGE CLIFTON: Now, I want you to answer
17 one at a time. And, Mr. Traweek, the microphone
18 is closest to you, so would you answer first?
19 And then you can pass it down.

20 MR. TRAWEEK: Yes, I agree.

21 MR. NEWELL: Yes, we support the
22 proposals as they're presented.

23 MS. DAMM: And I concur with my fellow
24 two farmers up here.

25 MR. CARROLL: Now, do you also support

1 the right of a farmer to become a
2 producer-handler even if he had never been one
3 before? Any of you have any problem with that?

4 MS. DAMM: I am not opposed. As I said
5 in my testimony, I'm not opposed to farmers
6 entering as a smaller producer-handler, but as
7 the three proposals state, there are guidelines
8 by which we define those entities.

9 MR. NEWELL: I have no objection to
10 anybody becoming a producer-handler. I just
11 want for everybody to be playing by the same
12 rules and not be able to draw varying amounts of
13 revenues from the sale of milk just because of
14 the fact that they are a producer-handler. But
15 as far as anyone becoming a producer-handler,
16 no, I have no problem with that.

17 MR. TRAWEEK: I have no opposition to
18 producers becoming producer-handlers with the --
19 in the size that is stated in these proposals.
20 Once producer-handlers reach a certain size,
21 they do become disruptive and can take
22 advantages of economics due to scale. So, you
23 know, the smaller sizes, I believe, which are
24 geared toward family operations, which is what
25 my father intended when we started, and what

1 I've heard in testimony, I agree and support
2 those.

3 MR. CARROLL: Thank you very much. Now,
4 I want to ask you now if you're aware of any
5 problems presently with producer-handlers in
6 your area, other than the one gentleman who
7 described the problem in Texas. I understand
8 that's a corker for you. But the other two
9 people, do you have any problems with
10 producer-handlers in your marketing area?

11 JUDGE CLIFTON: Mr. Newell, why don't you
12 take that first.

13 MR. NEWELL: In my local area, we don't
14 have any problems with them at the moment.
15 There's what I see as a potential threat, that
16 it could happen, and we're looking at this as a
17 big proactive. But potential threat as opposed
18 to what's right now? Right now, in my area,
19 like I said, some of my milk goes into Federal
20 Order 33, some goes into Federal Order 5. I'm
21 not familiar with the marketing conditions all
22 over those two Federal Orders. That's a pretty
23 large geographic area.

24 MR. CARROLL: Sure.

25 MR. NEWELL: In my specific area we

1 currently do not have any problem with
2 producer-handlers.

3 MR. CARROLL: Thank you, sir.

4 MS. DAMM: And, as well, currently in my
5 area we do not have a producer-handler that is a
6 large impact. We do have farms that are growing
7 in size. In my testimony, I mentioned the farm
8 that is permitted for 8,000 cows. And so my
9 concern follows that of Bill's, that if those
10 farms were to become producer-handlers, they
11 have the ability to have a huge impact on the
12 Federal Order in our area.

13 MR. CARROLL: But with the 3 million-
14 pound exemption, that would be -- the problem
15 would be handled, do you think?

16 MS. DAMM: Yes. I'm -- yes.

17 MR. CARROLL: That's all. Thank you very
18 much.

19 JUDGE CLIFTON: Thank you, Mr. Carroll.
20 Other cross-examination? Mr. Vetne.

21 CROSS-EXAMINATION

22 MR. VETNE: My name is John Vetne. I'm
23 an attorney from Raymond, New Hampshire. I
24 represent two producer-handlers from the Pacific
25 Northwest and one in New Mexico.

1 Let me start with Cindy Damm. In
2 response to the last question to you, or maybe
3 the previous one, you said you don't have a
4 problem with the entry of smaller
5 producer-handlers. By your use of the term
6 "smaller producer-handlers," did you intend to
7 mean producer-handlers of 3 million pounds or
8 less, or less than 3 million pounds?

9 MS. DAMM: Let me clarify my statement.
10 Thank you. I don't have an issue with
11 producer-handlers entering the market. I am in
12 favor of the 450,000-pound and 3 million-pound
13 limits as a guideline by which producer-handlers
14 are exempt from the Federal Order. Does that
15 answer your question?

16 MR. VETNE: Not quite.

17 MS. DAMM: Okay. Go again.

18 MR. VETNE: 450,000 pounds is not a
19 proposed identification of a producer-handler.
20 It's a proposed identification of an exempt
21 plan.

22 MS. DAMM: Of an exempt plan, correct.

23 MR. VETNE: So my question related more
24 to the category of producer-handlers. Did you
25 intend, when you said "smaller

1 producer-handlers," to mean producer-handlers of
2 less than 3 million pounds?

3 MS. DAMM: That would be correct.

4 MR. VETNE: In your testimony, you talk
5 about -- mostly about potential, if not
6 exclusively about potential in your market,
7 correct?

8 MS. DAMM: Correct.

9 MR. VETNE: And one of the potentials is
10 having to haul milk farther to a processing
11 plant?

12 MS. DAMM: Correct.

13 MR. VETNE: Is it not the case in your
14 market that most producers don't -- the milk of
15 most producers is not hauled to a processing
16 plant; rather it's hauled to a manufacturing
17 plant?

18 MS. DAMM: I do not have the data to
19 specify which goes processing and which goes
20 manufacturing. And in addition, I can't say --
21 I don't have that data, so I apologize if I have
22 interchanged those words inaccurately. I don't
23 have the data to differentiate what portion goes
24 manufacturing and what goes processing.

25 MR. VETNE: Which wasn't quite my

1 question, so let me try to be a little bit
2 clearer.

3 MS. DAMM: Okay.

4 MR. VETNE: Most of the milk produced by
5 farmers in Wisconsin is transported by -- from
6 the farm to a manufacturing plant?

7 MS. DAMM: Correct. I would agree with
8 that statement.

9 MR. VETNE: So the what-if scenario that
10 you painted, what if a processing plant were
11 closed by the entry of a very large
12 producer-handler, would not affect milk that now
13 goes -- routinely goes from the farm to a cheese
14 plant, for example?

15 MS. DAMM: I'm understanding your
16 question to be -- I'm thinking and pausing so
17 that I interpret it in context of my farm versus
18 farms in my neighborhood. I'll ask you one more
19 time to repeat that, because now I've confused
20 myself in my own head as I'm sorting that answer
21 out.

22 MR. VETNE: Okay. The what-if scenario
23 that you painted, what if it's a large
24 producer-handler and it causes a pool
25 distributing plant to close, that scenario would

1 not affect transportation costs or the
2 availability of a market for those producers
3 whose milk is regularly delivered to a
4 manufacturing plant, a cheese plant, for
5 example?

6 MS. DAMM: I do think it has the
7 potential to change that. I do think it has the
8 potential to change that, depending on what
9 markets are available for our milk. I think it
10 has the potential to change that.

11 MR. VETNE: In what way? And so you're
12 saying -- let me start again.

13 You're saying that it might affect the
14 availability of a cheese plant market? Am I
15 correct?

16 MS. DAMM: I'm going to say that it's
17 going to affect -- how do I start this off? If
18 a large producer-handler comes into the market
19 and competes with where my milk is currently
20 going, my milk, through my cooperative, is
21 redirected. Depending on the availability of
22 milk in my area from my own cooperative, or
23 farmers' milk who are members of other
24 cooperatives, that supply needs to be rerouted
25 to other processors or manufacturers.

1 That said, there is potential that my
2 cost of hauling my milk is going to change. My
3 milk can travel farther in order to go to a
4 manufacturer or processor due to that larger
5 producer-handler taking my current, I'm going to
6 call it space, for lack of a better word off the
7 top of my head. Does that answer your question?

8 MR. VETNE: Almost. I think we're
9 getting there. Does milk from your farm
10 currently go predominantly to a distributing
11 plant?

12 MS. DAMM: On a given day, I don't know
13 where my milk goes. DFA has a lot of diversity
14 in where our milk is sent. Currently, a
15 majority of my milk is sent -- is sent for fluid
16 processing. However, because of my geographic
17 location, there are times where my milk can
18 easily go to cheese processing.

19 MR. VETNE: Are you located relatively
20 close, milagewise, to a distributing plant?

21 MS. DAMM: I think most of southern
22 Wisconsin -- in the context of nationwide milk
23 hauling, I think most of southern Wisconsin, the
24 answer to that question would be yes.

25 MR. VETNE: In southern Wisconsin, there

1 are a number of fluid milk processing plants,
2 and the northern tier of Illinois, that are
3 close to you?

4 MS. DAMM: Correct. I would say
5 within -- without a map and -- a map of those
6 locations, I would venture within 100 miles.

7 MR. VETNE: Thank you. And now I have a
8 question for Mr. Traweek -- actually, more than
9 one question.

10 MR. TRAWEEK: Take your time.

11 MR. VETNE: The 20 cents that you
12 referred to, impact -- I know you were asked
13 questions about blend price impact, and then you
14 were asked questions about competitive mailbox
15 price impact. And I'm not sure through which
16 category the 20 cents that you testified about
17 fit.

18 MR. TRAWEEK: It would be -- I said that
19 it would be 20 cents off the blend price.

20 MR. VETNE: Okay. Your testimony on the
21 bottom of page 3, "This problem began in El Paso
22 and has expanded to the rest of the New Mexico
23 market, and now has become a concern in certain
24 Texas markets." The rest of the New Mexico
25 market, El Paso is not in New Mexico?

1 MR. TRAWEEK: It's in -- yes. It's in
2 the west Texas market, that's correct.

3 MR. VETNE: Okay. When you say "the rest
4 of the New Mexico market," you didn't intend to
5 include El Paso as a part of that?

6 MR. TRAWEEK: Well, some of the milk
7 that's -- like I said, I'm not in the milk
8 Market Administrator where they pool from, that
9 services the El Paso market, but a lot of the
10 dairies located in El Paso are actually in
11 Anthony, New Mexico, in that direction. It
12 comes in that direction. So that does concern
13 the New Mexico producers because of the location
14 of El Paso to New Mexico.

15 MR. VETNE: And when you say -- when you
16 refer to that expansion, expansion into the rest
17 of the New Mexico market, and concern in Texas,
18 for both of those statements, you are, in turn,
19 referring to the activities of a plant in El
20 Paso exclusively, am I correct?

21 MR. TRAWEEK: That's correct.

22 MR. VETNE: Okay. You're not saying that
23 there are -- when you're referring to the
24 expansion, you're not saying that there are
25 other plants elsewhere that are creating this

1 problem?

2 MR. TRAWEEK: To my knowledge, no.

3 MR. VETNE: Okay. You understand I
4 represent a plant in Roswell. That plant is not
5 part of that problem, correct?

6 MR. TRAWEEK: Not to my knowledge.

7 MR. VETNE: You talked about, as part of
8 the competitive impact, distributing plant
9 purchasers coming to your cooperative and asking
10 for a price concession because of competition
11 from this El Paso plant. Did I get that
12 paraphrased correctly?

13 MR. TRAWEEK: That is correct.

14 MR. VETNE: And that has occurred -- that
15 occurred for the first time in 2009?

16 MR. TRAWEEK: Yes, sir.

17 MR. VETNE: Okay. Have there been -- the
18 purchasers -- the grocery store purchasers of
19 milk that are asking for a concession, did they
20 not routinely request concessions prior to 2009?

21 MR. TRAWEEK: I would like to correct
22 that. We started talking about this issue back
23 in 2008 with our plants that we were supplying
24 our milk to. And there was concern that they
25 would be at an economic disadvantage with the

1 milk that was being produced at the
2 producer-handler plant because, in their words,
3 of their ability to produce their milk and
4 distribute their milk cheaper than what they
5 could distribute their milk at. So they were
6 asking for concessions to be competitive with
7 the producer-handler.

8 MR. VETNE: Okay. So the request for
9 concessions came from -- let me see -- came from
10 the distributing plants purchasing from
11 Southwest agency cooperatives in 2008 in
12 anticipation of a competitive scenario that they
13 foresaw would take place in 2009, is that
14 correct?

15 MR. TRAWEEK: There was discussions in
16 late 2008.

17 MR. VETNE: It was an anticipatory --
18 there was discussion in anticipation of
19 competition, correct?

20 MR. TRAWEEK: Correct.

21 MR. VETNE: Were there other sources of
22 competitive pressure in the Southwest market for
23 which concessions were requested?

24 MR. TRAWEEK: Other than this?

25 MR. VETNE: Other than this.

1 MR. TRAWEEK: No, not --

2 MR. VETNE: There was no increase, for
3 example, in the supply of nonmember producer
4 milk marketed to distributing plants other than
5 through the Southwest -- Greater Southwest
6 Agency?

7 MR. TRAWEEK: Could you repeat that
8 question?

9 MR. VETNE: There was no increase in the
10 supply of nonmember milk to distributing plants
11 from sources other than the Southwest Agency?

12 MR. TRAWEEK: No increase, no.

13 MR. VETNE: Oh, about that agency. The
14 Greater Southwest Agency is the marketer of milk
15 in the Southwest market?

16 MR. TRAWEEK: The Greater Southwest
17 Agency is a pool of dairy co-ops that work
18 together, that all participate in the Federal
19 Order pool.

20 MR. VETNE: I understand that much. Let
21 me try to find out their functions. They pooled
22 revenue, correct?

23 MR. TRAWEEK: Correct, I believe so. But
24 I'm not an expert in the agency field, so, I
25 mean, I may not answer this question right, but

1 I'm trying.

2 MR. VETNE: You can only answer what you
3 know.

4 MR. TRAWEEK: That's right.

5 MR. VETNE: Does the agency also
6 collectively market the milk, or does everybody
7 just market as they want and share the money?

8 MR. TRAWEEK: I'm not quite clear on how
9 all that works. I couldn't answer that
10 correctly.

11 MR. VETNE: Okay. Does the agency
12 collectively set a price for milk to customers,
13 to distributing plants, and manufacturers that
14 purchase milk?

15 MR. TRAWEEK: The agency, they work on
16 collecting the monies, but I'm not quite for
17 sure who sets the market for the milk, other
18 than the milk Market Administrator.

19 MR. VETNE: Okay. But for purposes of
20 Class I premiums, you don't know whether it's
21 the agency that sets the price or Class II
22 premiums or III or anything else?

23 MR. TRAWEEK: I'm not an accountant, so
24 that's very difficult for me to grasp.

25 MR. VETNE: And a question for all of

1 you. At the beginning, I asked Cindy Damm an
2 entry question for smaller producer-handlers.
3 Correct me if I'm wrong, Cindy, but if there was
4 no concern about smaller producer-handlers and
5 smaller producer-handlers existing, or entry, or
6 those under 3 million pounds, would that
7 correctly state the position of each of you with
8 Kentucky and Texas?

9 JUDGE CLIFTON: Don't answer yet. Let me
10 hear the comment. I need you to be closer to
11 the mic.

12 MR. BESHORE: My objection to the
13 question is, Mr. Vetne is intentionally
14 attempting to mislead these witnesses, because
15 they've testified that they support Proposals 1,
16 2 and 26. Now, he's posed a question that very
17 neatly contradicts the details of those
18 proposals, and Proposal 26 in particular. And
19 it's a very neat attempt to confuse the
20 witnesses about the technical applications of
21 the proposals. I object.

22 JUDGE CLIFTON: I really don't think I
23 like that coaching of the witnesses. I think an
24 issue here is the grandfathering-in that's
25 involved with the proposals they support, and I

1 think Mr. Vetne's question legitimately
2 addresses, and what if they are small but are
3 not grandfathered in. And I think it's a
4 legitimate area of inquiry.

5 Now, to the extent the witness may miss
6 the subtlety of some of the contents of the
7 amendment, I think that's where you,
8 Mr. Beshore, utilize your redirect to
9 rehabilitate the testimony. But I think it's a
10 legitimate question, and I don't think there was
11 anything tricky about it. That's my opinion.
12 So start again, Mr. Vetne.

13 MR. VETNE: My question -- and the judge
14 is correct. My question had nothing to do with
15 Proposal 26. My question had to do with your
16 opinion as witnesses as to a line, whether it's
17 bright or fuzzy, as to what constitutes a small
18 producer-handler for purposes of entry or
19 continuing in the market.

20 And I think Cindy Damm answered that
21 question. And if you misunderstood my question,
22 please come back and tell me so. But for each
23 of you, do you see a problem with respect to
24 entry of producer-handlers and continuation of
25 producer-handlers that are 3 million pounds or

1 less? Let's start with Cindy Damm to see if you
2 have any different answer than you gave before.
3 Do you?

4 MS. DAMM: In light of our little
5 discussion here?

6 MR. VETNE: In light of counsel's
7 coaching.

8 MS. DAMM: Well, your interchange. And
9 forgive me for not recalling exactly how your
10 question was phrased the first time, so I'm
11 going to answer your question --

12 MR. VETNE: Please.

13 MS. DAMM: -- in terms of my support of
14 Proposals 1 and 2 as they are presented and
15 Proposal 26 grandfathering existing producers.
16 That is how I will respond to that question.

17 MR. VETNE: Okay. Please do. That is
18 how you're going to respond. What is your
19 response?

20 MS. DAMM: My response is that I am in
21 support of Proposals 1, 2 and 26 --

22 MR. VETNE: Okay.

23 MS. DAMM: -- as stated.

24 MR. VETNE: Okay. Which is fair. Does
25 that mean that you do not now express an opinion

1 as to whether for other purposes
2 producer-handlers up to 3 million pounds or less
3 are disruptive or should not be able to enter
4 the market?

5 MS. DAMM: If I implied that I was
6 defining -- and I apologize. I think this is
7 where you're going with this, and I apologize if
8 I did not interpret it this way previously. If
9 you are implying that I am in favor of a
10 definition of a small producer-handler -- a
11 small producer-handler as 3 million pounds, it
12 is not my place to set that definition. It is
13 my place to speak today in support of the three
14 proposals as they have been presented by
15 National Milk and the DFA.

16 MR. VETNE: And that is not what I was
17 implying, so maybe we're not done. What I was
18 asking, and don't infer anything, and I'm not
19 trying to imply --

20 MS. DAMM: Well, I just -- I'm --

21 MR. VETNE: I'm not trying to imply
22 anything.

23 MS. DAMM: I don't want to -- I'm not
24 trying to argue. I'm just want to make sure I
25 understand your question right and clarifying

1 what I spoke earlier.

2 MR. VETNE: I'm looking to you, and each
3 of you, for your belief as to, not a definition,
4 but a level at which you believe
5 producer-handlers are disruptive and should be
6 not allowed to enter the market or continue in
7 the market. And I'm asking you if, whatever
8 that definition is -- you can say 10 pounds for
9 sure. So I'm asking you, is it your belief that
10 producer-handlers less than 3 million pounds
11 will not disrupt in your market and should be
12 allowed to enter in your market, they should not
13 be precluded from continuing business in your
14 market? It's a disruption question, and it's a
15 your-belief question. And I'm not saying you
16 must have a belief. I'm asking, if you have
17 one, to give your testimony.

18 MS. DAMM: I do not have the data to
19 support an opinion on that either way --

20 MR. VETNE: Okay.

21 MS. DAMM: -- just based on that
22 criteria.

23 MR. VETNE: So you don't have a belief
24 now is your answer now?

25 MS. DAMM: I do not have a belief today.

1 I support those three proposals as they're
2 stated.

3 MR. VETNE: Do you understand the
4 question, sir, Mr. Newell?

5 MR. NEWELL: I'm trying. I'm trying.
6 Actually, I have to support those three issues,
7 and they've been discussed by myself and my
8 associates in the marketing of milk. And I'm
9 going to stand by that.

10 As far as producer-handlers entering the
11 market, to me, the issue is whether or not they
12 participate in the pool. My personal belief, I
13 would like to see all the money run through the
14 pool, but these proposals have an exemption in
15 them, and I think that they're a reasonable
16 compromise position that would be something that
17 could be lived with.

18 MR. VETNE: I understand your support of
19 Proposals 1, 2 and 26. I also heard your
20 response to questions by Mr. Ricciardi, that
21 producer-handlers do not currently disrupt your
22 market, although there are two or three in the
23 two markets to which you deliver, and that
24 exempt plants don't currently disrupt your
25 market, they do not participate in the pool. My

1 question again is, at what level do you have a
2 belief, if you have a belief, that
3 producer-handlers are disruptive to your market?

4 MR. NEWELL: Essentially, I don't have
5 any in my immediate market. They currently are
6 not disruptive. Currently. The potential for
7 them to come into my market is very real, and
8 they could be -- they could at some point in the
9 future be very disruptive.

10 MR. VETNE: I understand --

11 MR. NEWELL: Currently, in my immediate
12 area, we are not adversely affected by
13 producer-handlers.

14 MR. VETNE: Your belief as to what-if
15 future potential disruption is based on
16 producer-handlers greater than 3 million pounds
17 for which you've heard testimony from other
18 markets, is that correct?

19 MR. NEWELL: Say that again.

20 MR. VETNE: You testified about potential
21 future disruption, okay?

22 MR. NEWELL: Yes, sir.

23 MR. VETNE: And that concern is for
24 larger producer-handlers, correct, in the
25 future?

1 MR. NEWELL: Since I currently don't have
2 any in my immediate area, I suppose that any
3 level of producer-handler who enters my
4 marketing area could potentially be disruptive.

5 MR. VETNE: Now, are you talking about
6 your area as a farmer or your area as a
7 representative of DFA or do you mean --

8 MR. NEWELL: I'm talking about my local
9 market as a farmer.

10 MR. VETNE: Okay. Let me move over to
11 Mr. Traweek.

12 MR. TRAWEEK: Yes, sir. If you would
13 repeat the question.

14 MR. VETNE: Oh, for God's sakes.

15 MR. TRAWEEK: I understand your question.

16 MR. VETNE: My question is
17 producer-handlers under 3 million pounds.

18 MR. TRAWEEK: That is correct.

19 MR. VETNE: Not supersized.

20 MR. TRAWEEK: Right. Well, in our
21 situation, in our area, we're seeing that
22 producer-handlers that are extremely large
23 because of the size of dairies that are in west
24 Texas, New Mexico and central Texas, the
25 possibility of large producer-handlers have and

1 will continue to create disruptions.

2 The producer-handler number that you
3 equate to, the 3 million pounds or less, is --
4 in my opinion -- I have not dealt with any, but
5 in my opinion, it would be appropriate for them
6 to participate in the Federal Order. But in our
7 support of the Proposals 1, 2 and 26, I support
8 those producers under the 3 million-pound level,
9 the producer-handlers under the 3 million-pound
10 level who want to try and make a go at it in the
11 producer-handler area.

12 MR. VETNE: And in your region, by the
13 way, there are a number of producers, individual
14 producers, who are pooled, who produce more than
15 3 million pounds a month, correct?

16 MR. TRAWEEK: Producer-handlers?

17 MR. VETNE: No, no. Dairy farmers.

18 MR. TRAWEEK: Dairy farmers?

19 MR. VETNE: There are a number of dairy
20 farmers whose production is more than
21 3 million pounds?

22 MR. TRAWEEK: That is correct.

23 MR. VETNE: Thank you.

24 JUDGE CLIFTON: Thank you, Mr. Vetne.

25 Who would next like to cross-examine the panel?

1 Mr. Miltney. I might have confused the
2 court reporter there. I meant Miltner, not
3 Miltney.

4 CROSS-EXAMINATION

5 MR. MILTNER: Thank you, your Honor.

6 JUDGE CLIFTON: Thank you, Mr. Miltner.

7 MR. MILTNER: Good morning.

8 MS. DAMM: Good morning.

9 MR. NEWELL: Good morning.

10 MR. MILTNER: I want to talk a little bit
11 about the differences among the areas where you
12 each have your farms. Mr. Newell, I guess I'll
13 start with you since we've been in close
14 proximity most of the week, haven't we?

15 MR. NEWELL: Yes, sir.

16 JUDGE CLIFTON: Mr. Miltner, your voice
17 is very soft.

18 MR. MILTNER: Sorry. Okay. Is that
19 better?

20 JUDGE CLIFTON: Thank you. That's
21 better.

22 MR. MILTNER: Thank you. You've been
23 dairy farming in Kentucky your entire life, is
24 that correct?

25 MR. NEWELL: Not yet.

1 MR. MILTNER: Okay. Well stated. When
2 you were growing up, were there more dairy farms
3 in your part of Kentucky than there are now?

4 MR. NEWELL: Yes, sir.

5 MR. MILTNER: By about what factor, if
6 you have an idea?

7 MR. NEWELL: At the time I completed my
8 education and started milking, in my home county
9 there were 185 commercial dairies. The last
10 count I had here within the past month, we're
11 down to 21 in my home county.

12 MR. MILTNER: You're one of the few that
13 have remained?

14 MR. NEWELL: Yes, sir.

15 MR. MILTNER: And when there were that
16 180-some dairies, how many cows would they have
17 in their herd on average?

18 MR. NEWELL: They were very small, like I
19 am.

20 MR. MILTNER: And those that are left --
21 I understand your farm is still relatively
22 small, you stated. How many cows do you have?

23 MR. NEWELL: I'm more than small. I'm
24 microscopic. I'm milking 30 cows.

25 MR. MILTNER: That's not quite

1 microscopic, but it's small. The other 20 farms
2 in your area, how many cows do they have now?

3 MR. NEWELL: I think in my county, there
4 is one herd over 100. The vast majority of them
5 would fall in the 50 to 75 range.

6 MR. MILTNER: And throughout the state,
7 is that consistent?

8 MR. NEWELL: When you get into southern
9 and western Kentucky, the herds tend to get a
10 little larger. Still, the average size of a
11 herd in Kentucky is way below the national
12 average herd size.

13 MR. MILTNER: And even at that, though,
14 it's larger than it was in 1970 when you took
15 over the majority of the responsibility at your
16 farm?

17 MR. NEWELL: The herd size?

18 MR. MILTNER: The herd sizes in Kentucky
19 today, even though smaller than the national
20 average, the average herd size has grown since
21 then?

22 MR. NEWELL: That's correct.

23 MR. MILTNER: And is that a function of
24 the need to increase size to maintain some kind
25 of efficiency and ability to keep the farm in

1 operation?

2 MR. NEWELL: Whether or not to milk more
3 cows is each farmer's individual decision.
4 Whether that's driven by what they want to do or
5 economics or for whatever reason, I wouldn't
6 attempt to speak for every farmer who has
7 expanded his herd. I don't know the reasons at
8 all why they've expanded their herds. Everybody
9 made his own independent business decision to do
10 that.

11 MR. MILTNER: Every farmer has to make a
12 decision what they need to do to support their
13 family and their farm, is that right?

14 MR. NEWELL: That would be correct.

15 MR. MILTNER: Now, you have a 560-acre
16 farm, and with 20 cows, I would imagine you do
17 more than just milk cows on your farm?

18 JUDGE CLIFTON: It's 30, isn't it?

19 MR. NEWELL: Please note --

20 MR. MILTNER: I'm sorry. Did I misstate?
21 30 cows?

22 MR. NEWELL: 30, yeah. I'm in
23 northeastern Kentucky. I don't know how
24 familiar you are with the terrain there. Of
25 that 560 acres, many of them are rather hilly

1 and covered with woods, and they're not hardly
2 what would be considered prime farmland.

3 MR. MILTNER: Okay.

4 MR. NEWELL: So the actual usable size of
5 the farm is somewhat less than 560 acres.

6 MR. MILTNER: So dairy farming is all
7 that you do on your farm?

8 MR. NEWELL: No. We have other
9 enterprises.

10 MR. MILTNER: Which allows you to help
11 support your family with a relatively smaller
12 herd, because you're able to do other things
13 with your farm?

14 MR. NEWELL: That's correct.

15 MR. MILTNER: Mrs. Damm, can we talk
16 about Wisconsin for a few seconds?

17 MS. DAMM: Surely. I'd love to talk
18 about Wisconsin.

19 MR. MILTNER: Okay. I like Wisconsin.
20 It's a great place.

21 MS. DAMM: I love Wisconsin.

22 MR. MILTNER: You've been operating your
23 farm for a few years, but you certainly have
24 background in the dairy industry in the state,
25 is that right?

1 MS. DAMM: I'm going to answer that two
2 part. I'm going to give you my husband's
3 background on the farm, and then I will give you
4 mine.

5 MR. MILTNER: Okay.

6 MS. DAMM: Matt's great-grandfather --
7 Matt's great-grandfather started farming in the
8 Columbus area. His grandfather, in the '40s,
9 bought what we would refer to as the home farm
10 and grew that operation to be a cash cropping
11 and dairy farm.

12 In the early '90s -- late '80s, early
13 '90s, Matt's father and uncle took over that
14 farm from his grandfather, and it operated as
15 what was known as Damm Farms Incorporated. In
16 2003, a fire destroyed the dairy facility there,
17 and the scramble was on to make changes.
18 Ultimately, Damm Farms divided. The two
19 brothers, Matt's dad and uncle, each took their
20 part of the farm. Matt's dad, in that split,
21 got the dairy. And it was decided that the next
22 generation was going to take over, and that
23 would be Matt.

24 Matt attended UW, the University of
25 Wisconsin farm and industry short course and

1 then returned to the farm to work, to work at
2 the dairy. In 2003, he and I made the decision
3 that he wanted to stay in, and I would support
4 him. And we essentially started over. We
5 rented a neighbor's barn, made the decision to
6 build a new facility that we moved into in 2005.
7 That's Matt's background, so that makes him a
8 fourth-generation dairy farmer growing up on
9 that farm with that herd.

10 I grew up in the Columbus area. I
11 attended Carthage College. My degree is
12 actually business administration. And until
13 that fire in 2003, I had an off-the-farm job and
14 no involvement in the farm. That fall, I guess
15 it was winter, I lost my employment and made the
16 decision to stay on the farm to help him get
17 started.

18 Five-and-a-half years later, we have
19 built that herd back to 140 cows, and he and I
20 have the sole ownership of the dairy, and have
21 an arrangement with his father in hopes of
22 eventually purchasing the remainder of the farm
23 when appropriate.

24 MR. MILTNER: There are a significant
25 number of dairy farms in your part of the world,

1 correct?

2 MS. DAMM: Yes, there is. Wisconsin has
3 the most dairy farms. We do not have the most
4 cows, but we do have the most number of dairy
5 farms in the country.

6 MR. MILTNER: You and the Californians
7 can fight over it, right?

8 MS. DAMM: They have the cows, we have
9 the number of farms.

10 MR. MILTNER: But still the number of
11 farms in Wisconsin is dwindling, right?

12 MS. DAMM: Yes, that's correct.

13 MR. MILTNER: And the herds that are
14 remaining tend to be larger than they were in
15 the past, correct?

16 MS. DAMM: I would say that, yes, the
17 herd size is growing. I would not say that -- I
18 would not make a blanket statement that the
19 average size herd in Wisconsin is large.

20 MR. MILTNER: And if I stated it that
21 way, I did not intend to.

22 MS. DAMM: Just clarifying.

23 MR. MILTNER: You talk in your statement
24 about what is beyond any debate, a large farm
25 being built close to your facility, or within a

1 relatively close distance to your facility.

2 MS. DAMM: Correct.

3 MR. MILTNER: Is there any reason to
4 believe that that operation is going to be a
5 producer-handler operation?

6 MS. DAMM: I do not have any concrete
7 information that there is any immediate efforts
8 to become a producer-handler. In our
9 neighborhood, there is always suspicion of
10 larger dairies taking that route, but I have not
11 seen any information that leads me to think that
12 that is for sure happening. But we are keeping
13 our eyes open for the possibility that not
14 necessarily they are, but somebody else may come
15 in and want that role.

16 MR. MILTNER: And this isn't the first
17 large farm to be built in Wisconsin, is it?

18 MS. DAMM: No.

19 MR. MILTNER: Regardless of how we call
20 large, right?

21 MS. DAMM: Correct. There's numerous
22 farms over 1,000 cows within, I'll just say 30,
23 miles of me. There are some very large ones up
24 toward the Green Bay area. There's one towards
25 Sun Prairie that has 2,500 cows, so --

1 MR. MILTNER: Were you here for all of
2 yesterday's testimony?

3 MS. DAMM: Yes, I was.

4 MR. MILTNER: Was the farm you referred
5 to the same farm that was discussed yesterday?

6 MS. DAMM: No. That is not -- I believe
7 you're referring to Mr. Asbury's testimony?

8 MR. MILTNER: Yes.

9 MS. DAMM: I do not believe that is the
10 same farm. He is in Illinois, and I believe
11 there is a large operation in his -- within
12 proximity to his cooperative.

13 MR. MILTNER: You guys started milking on
14 your new facility in what year?

15 MS. DAMM: January of 2005.

16 MR. MILTNER: Okay. So you missed the
17 really bad times in 2003?

18 MS. DAMM: The barn burned at the bottom
19 of that milk price cycle, thus the decisions
20 that -- we assume the decisions to move on to
21 the next generation were part of that cycle.

22 MR. MILTNER: Okay. Nevertheless, now is
23 as bad a time for dairy farmers as most people
24 have seen? I think you would agree with that?

25 MS. DAMM: Oh, yes, absolutely.

1 MR. MILTNER: Does the Federal Order
2 blend price come even close to covering your
3 out-of-pocket costs, your cost of production?

4 MS. DAMM: Currently, no.

5 MR. MILTNER: Since you've started your
6 new facility in 2005, on average, how's your
7 mailbox price compared to your cost of
8 production?

9 MS. DAMM: Matt and I -- I don't want
10 to -- there is certain information Matt and I
11 consider confidential, so I'm going to be
12 careful how I phrase this. Matt and I were
13 fortunate to buy the herd as we were coming out
14 of that low milk cycle. So, obviously, we've
15 been fortunate to benefit from the increased
16 milk price, a small dip, the record high 2008 to
17 go along with the record high input cost. Our
18 farm has been profitable. This year's forecast,
19 like a tremendously large percentage of my
20 fellow dairymen, is not going to be profitable.

21 MR. MILTNER: I would say that percentage
22 is probably somewhere near 100 percent. Would
23 you?

24 MS. DAMM: Well over 90. Yes, I could
25 see almost 100 percent, absolutely.

1 MR. MILTNER: Thank you. Mr. -- and I'm
2 going to butcher your name. Mr. Traweek?

3 MR. TRAWEEK: That's close.

4 MR. MILTNER: Okay. It's close. How do
5 I say it correctly?

6 MR. TRAWEEK: Mr. Traweek.

7 MR. MILTNER: Traweek, thank you. You're
8 around Stephenville. Is your farm pretty
9 typical of the farms in Erath County?

10 MR. TRAWEEK: I would say it's pretty
11 close to average.

12 MR. MILTNER: And west of you, into west
13 Texas and New Mexico, still part of your same
14 marketing area, but the farms, they tend to be
15 larger over in that area?

16 MR. TRAWEEK: Quite a bit larger, that is
17 correct.

18 MR. MILTNER: Nevertheless, despite those
19 large herd sizes, larger, we'll call them, is
20 your situation similar to that that we were just
21 discussing, as far as profitability?

22 MR. TRAWEEK: I believe our situation in
23 central Texas is a little more extreme due to
24 the fact that we rely on quite a bit of
25 homegrown feed, as they do, but we were in

1 the -- well, we just now seem to be coming out
2 of a long drought. We did not put up much feed.
3 Last year -- and most dairies, 50 to 60 percent
4 of your income goes directly back to feed costs.
5 And due to the lack of rain, the drought that we
6 encountered last year, there's a lot of dairies
7 that are in dire straits at this time. For the
8 last three-and-a-half, about the last four
9 months, our dairy has been in a negative cash
10 flow, extreme negative cash flow.

11 MR. MILTNER: It's very difficult for all
12 the farmers in Order 126, isn't it?

13 MR. TRAWEEK: It's very, very, very
14 extreme.

15 MR. MILTNER: Very stressful?

16 MR. TRAWEEK: Very bad.

17 MR. MILTNER: And I reviewed your
18 statement again before I came up to the podium,
19 but I didn't see it, I may have skipped over it.
20 What is your role with the Greater Southwest
21 Agency?

22 MR. TRAWEEK: I'm a director -- the
23 Southwest Agency?

24 MR. MILTNER: Yes.

25 MR. TRAWEEK: I have no role in the

1 Southwest Agency.

2 MR. MILTNER: Okay. So you get
3 information about the agency's activities
4 through your involvement with DFA?

5 MR. TRAWEEK: That is correct.

6 MR. MILTNER: Okay.

7 MR. TRAWEEK: I'm director of DFA
8 Southwest Council.

9 MR. MILTNER: The 20-cent impact to you
10 from the El Paso plant, you had said, in your
11 direct examination with Mr. Beshore, that part
12 of that was a result of the blend price change
13 and part of it was as a result of loss of
14 premiums, and then you said it was all blend
15 price. And I want to make sure the record is
16 clear. That 20 cents, what's your understanding
17 of how much of that is a change in the blend
18 price and how much of that is a change in the
19 premiums?

20 MR. TRAWEEK: To my understanding, when
21 we lost the premiums in that area, that affected
22 our blend price. And with the loss of premiums
23 blended through all the milk through the agency,
24 it equated to 20 cents per hundredweight in my
25 milk check.

1 MR. MILTNER: Okay. So that's the
2 agency's super blend? That's not the Federal
3 Order blend you're talking about, you're talking
4 about the co-ops that are in the Southeast -- or
5 Southwest Agency pooling all their returns and
6 reblending them among all the member
7 cooperatives, right?

8 MR. TRAWEEK: I believe that's correct.

9 MR. MILTNER: Do you have any -- and they
10 didn't -- you don't have information about how
11 much of that 20 cents is from premiums or
12 Federal Order minimum prices, you just have the
13 total figure?

14 MR. TRAWEEK: That is correct. I just
15 have the total figure.

16 MR. MILTNER: Do you discuss in your
17 council meetings independent producers at all
18 and the effect of independent producers on
19 marketings in the area?

20 MR. TRAWEEK: Yes, we do.

21 MR. MILTNER: Are you familiar with the
22 Hilmar Cheese Plant that was recently opened in
23 Texas?

24 MR. TRAWEEK: Yes, I am.

25 MR. MILTNER: Who supplies, if you know,

1 the milk to that plant?

2 MR. TRAWEEK: Hilmar producers.

3 MR. MILTNER: Those are independent
4 producers?

5 MR. TRAWEEK: That is correct.

6 MR. MILTNER: Those aren't DFA members,
7 Select, Zia, Lonestar?

8 MR. TRAWEEK: That is correct.

9 JUDGE CLIFTON: I hate to interrupt, but
10 Zia Lonestar is spelled how?

11 MR. MILTNER: I'm sorry. Zia is one
12 cooperative, Z-i-a. Lonestar is another
13 cooperative, L-o-n-e-s-t-a-r.

14 JUDGE CLIFTON: Thank you.

15 MR. MILTNER: And Zia and Lonestar and
16 Select Milk Producers and DFA are members of the
17 Greater Southwest Agency, right?

18 MR. TRAWEEK: As well as just Jersey
19 producers, I believe.

20 THE COURT REPORTER: I'm sorry. As well
21 as?

22 MR. TRAWEEK: Just Jersey producers,
23 j-u-s-t, J-e-r-s-e-y, producers.

24 MR. MILTNER: And so most of those
25 independent producers that supply Hilmar were

1 former members of a Greater Southwest Agency
2 cooperative, right?

3 MR. TRAWEEK: Most of -- most of those
4 producers that have joined Hilmar Cheese are
5 producers that have moved into west Texas and
6 New Mexico out of California. They were
7 producers in California that moved into the
8 area. A majority of that milk is new
9 production.

10 MR. MILTNER: And before Hilmar Cheese
11 opened their plant, was there a significant
12 amount of independent producer milk in your
13 area?

14 MR. TRAWEEK: Before they joined our --
15 before Hilmar, independent milk?

16 MR. MILTNER: Yes.

17 MR. TRAWEEK: I'm not aware of any
18 independent milk before Hilmar Cheese built
19 their plant.

20 MR. MILTNER: All or virtually all of the
21 farms in the area were members of cooperatives
22 that were members of the GSA, right?

23 MR. TRAWEEK: That is right.

24 JUDGE CLIFTON: Mr. Traweek, so that I
25 get it right, how is Hilmar? Is it one word?

1 MR. TRAWEEK: Yes, ma'am. H-i-l-m-a-r.

2 JUDGE CLIFTON: Thank you.

3 MR. MILTNER: Do you discuss at your
4 council meetings the activities of any other
5 independent producers?

6 MR. TRAWEEK: Other than Hilmar?

7 MR. MILTNER: Yes.

8 MR. TRAWEEK: The only discussion we've
9 had as far as any other producers, because of
10 all the producers that are in the agency, would
11 be just -- well, it would be coming into the El
12 Paso area previous.

13 MR. MILTNER: You did not have any
14 discussions about any farmers or individual
15 farms agreeing to independent supply contracts
16 with fluid bottling plants in Texas in the past
17 six to nine months?

18 MR. TRAWEEK: The only thing that I can
19 guess that you're referring to is there was a
20 producer who broke ranks from the co-op to move
21 and supply two loads of milk to Dean Foods.
22 Dean Foods went outside the cooperatives to try
23 to secure independent milk, and there was a
24 producer who broke ranks.

25 MR. MILTNER: In the past, that Dean

1 Foods plant was supplied by cooperatives in the
2 GSA?

3 MR. TRAWEEK: That is correct. I
4 believe, from what I -- my understanding, the
5 DFA had a 100 percent supply agreement with Dean
6 Foods.

7 MR. MILTNER: And what happened with this
8 producer?

9 MR. TRAWEEK: He resigned his membership
10 from DFA and started shipping directly to Dean
11 Foods.

12 MR. MILTNER: That's not the El Paso
13 plant, right?

14 MR. TRAWEEK: That is correct.

15 MR. MILTNER: Did you guys have any
16 discussion about what that did to your premiums
17 in the Order?

18 MR. TRAWEEK: That has also caused
19 extreme disruptive problems in the Order.

20 MR. MILTNER: Extremely disruptive to
21 your premiums, wasn't it?

22 MR. TRAWEEK: I believe it has. Yes, it
23 has.

24 MR. MILTNER: I don't have anything
25 further.

1 JUDGE CLIFTON: Thank you, Mr. Miltner.
2 Other cross-examination of the panel?

3 Mr. Ricciardi. You want to yield to
4 Mr. Brosch? We haven't heard from him much, and
5 then I'll call on you.

6 MR. BROSCH: I'll yield to Mr. Ricciardi.

7 JUDGE CLIFTON: You see, you both want to
8 get the benefit of the other's
9 cross-examination. All right, Mr. Ricciardi.

10 CROSS-EXAMINATION

11 MR. RICCIARDI: Thank you, your Honor.
12 Al Ricciardi on behalf of AIDA. Mr. Newell, a
13 question for you initially. I have read all
14 three of the statements marked for
15 identification, 28, 29 and 30, and there is some
16 similarity among them. Did you get any
17 assistance in the preparation of your statement
18 from anyone?

19 MR. NEWELL: I wrote my statement. I had
20 it reviewed by members of the staff. We -- but
21 as far as the statement there, it's mine.

22 MR. RICCIARDI: You had someone from DFA
23 review it?

24 MR. NEWELL: Yes.

25 MR. RICCIARDI: That being --

1 MR. NEWELL: Mr. Beshore.

2 MR. RICCIARDI: Mr. Beshore did, and
3 provided some revisions?

4 MR. NEWELL: Actually, we -- I changed
5 some statements around two or three times. I
6 think that I did about all of the revision of
7 the form, the best I remember.

8 MR. RICCIARDI: Okay. With regard to
9 your time here, I know that you've been here
10 since the beginning. Do you intend to stay
11 throughout the course of these proceedings?

12 MR. NEWELL: I can stay here through
13 tomorrow. After that I'm going home --

14 MR. RICCIARDI: Okay. With --

15 MR. NEWELL: -- and tend the farm.

16 MR. RICCIARDI: I apologize. Sorry. I
17 understand. Did you have any assistance from
18 DFA with regard to your travel costs or hotel
19 costs or anything like that?

20 MR. NEWELL: Yes.

21 MR. RICCIARDI: Are they paying for that
22 for you?

23 MR. NEWELL: Yes.

24 MR. RICCIARDI: And with that, let me
25 switch over here, please, and pass the

1 microphone so I can do this this way. Ms. Damm,
2 is that true for you, also?

3 MS. DAMM: That is correct.

4 MR. RICCIARDI: And could you pass the
5 microphone over to Mr. Traweek? Would that also
6 be true for you, sir?

7 MR. TRAWEEK: That is correct.

8 MR. RICCIARDI: Okay. Thanks. Shoot
9 this back to Mr. Newell. Hopefully, I'll be
10 able to stop the microphone passing.
11 Mr. Newell, you were a dairy farmer in Federal
12 Order 5 in 2004?

13 MR. NEWELL: My milk was pooled in
14 Federal Order 5. My farm is physically located
15 in Federal Order 33.

16 MR. RICCIARDI: And you're correct, and
17 thank you for that correction. Your milk was
18 pooled in Federal Order 5 in 2004?

19 MR. NEWELL: That's correct.

20 MR. RICCIARDI: And it has been pooled in
21 Federal Order 5 from 2004 until now?

22 MR. NEWELL: That's correct.

23 MR. RICCIARDI: Were you aware that there
24 was a hearing in Federal Orders 5 and 7 in 2004
25 with regard to a proposal to limit

1 producer-handlers to 3 million pounds of Route 1
2 disposition?

3 MR. NEWELL: I was not.

4 MR. RICCIARDI: You were not aware, then,
5 that one of the arguments raised at that point
6 was that while no disruption existed, the
7 potential for disruption in those orders
8 existed?

9 MR. BESHORE: I object to the question.

10 JUDGE CLIFTON: Do not answer. Just a
11 moment. Mr. Beshore, come to the microphone,
12 please.

13 MR. BESHORE: My objection is Mr. Newell
14 said he wasn't aware of the hearing. Now he's
15 being asked whether he is aware of the contents
16 of the proceeding, and I think it's not a good
17 question. Frankly, it's a waste of time.

18 JUDGE CLIFTON: I'm not sure. You know,
19 I think we learn a lot of things after a hearing
20 takes place, even if we weren't there. So I
21 understand your objection, and I'll listen
22 carefully to what the witness bases his answer
23 on as he explains it, but he may answer it.
24 And, Mr. Ricciardi, would you repeat your
25 question?

1 MR. RICCIARDI: Can you read it back for
2 me, please?

3 (The record was read.)

4 JUDGE CLIFTON: All right.

5 MR. NEWELL: This question is, I was not
6 aware?

7 MR. RICCIARDI: Yeah. And that's a bad
8 question. I'm glad he read it back. Let me see
9 if I can do it better.

10 Were you aware, sir, that one of the
11 arguments raised in support of that proposal at
12 that particular Federal Order hearing was
13 essentially identical to some of the arguments
14 raised here, that the potential exists for
15 disruption?

16 MR. NEWELL: No, I was not.

17 MR. RICCIARDI: Would you agree with me
18 that, as you testified before, I believe, that
19 there is no current disruption that you are
20 aware of from any producer-handler in Order 5?

21 MR. NEWELL: Not that I'm aware of, no,
22 sir.

23 MR. RICCIARDI: I understand. And that's
24 the best that you can do. If you don't know
25 about it, then you can't tell us about it.

1 Can you tell me -- you answered in
2 response to a question from Mr. Miltner, that in
3 addition to your dairy farming, that you have
4 some other business. Can you tell me what that
5 is?

6 MR. NEWELL: We produce burley tobacco on
7 the farm.

8 MR. RICCIARDI: And like with your dairy
9 farm, you make certain investments in that
10 business?

11 MR. NEWELL: That's correct.

12 MR. RICCIARDI: Do you market your own
13 tobacco?

14 MR. NEWELL: No. The tobacco is
15 raised -- in Kentucky, we have a landlord/tenant
16 system that goes way back in history, and I have
17 a gentleman who produces tobacco on my farm. At
18 one time it was sold at auction with a Federal
19 program. That program has been done away with.
20 It is now raised under contract to the tobacco
21 companies. The gentleman who raises the tobacco
22 on my farm for me does so under contract to
23 Philip Morris.

24 MR. RICCIARDI: Do you have any other
25 businesses that you operate, other than the

1 dairy farm and the tobacco farm?

2 MR. NEWELL: No, sir. We produce hay and
3 corn on the farm, but those are utilized as feed
4 for the cows. And the Indian comb is the milk
5 that results from the use of the hay and the
6 corn.

7 MR. RICCIARDI: Okay. Thanks. Could you
8 pass the microphone to your right, please, to
9 Ms. Damm?

10 Your statement indicates, and I think in
11 questions from some other counsel, you stated
12 that essentially your farm, current dairy farm,
13 was a start-up in 2003, where you actually built
14 a new facility in 2005. Is that right?

15 MS. DAMM: That is correct. We consider
16 it a start-up, because we had no existing -- we
17 were not going in -- other than the cows, we
18 were not going in and buying an existing
19 property or renting a property from his family.
20 So we consider ourselves a start-up again in
21 '03, even though there was some carryover.

22 MR. RICCIARDI: There's been some
23 arguments raised by both national Milk and the
24 IDFA in their proposals that there is some
25 perceived benefit to producer-handlers for the

1 raw milk cost. And then my question is:
2 Assuming that for a moment, why then in 2003 or
3 2005, when you were starting up, did you not
4 become a producer-handler?

5 MS. DAMM: Why did we not become a
6 producer-handler in 2003?

7 MR. RICCIARDI: Yes, ma'am.

8 MS. DAMM: That is not my husband's
9 interest. My husband's interest is to run his
10 dairy farm. It is not to be either a processor
11 or a manufacturer. He knows his cows, and
12 that's where his love is. And that's the role
13 that we have chosen to take in the Wisconsin
14 dairy industry.

15 MR. RICCIARDI: I understand. And if you
16 flip to page 5, you anticipated where I was
17 headed. You state in the second paragraph that
18 you "appreciate the hard work it must take to be
19 a producer-handler. It is difficult enough just
20 being a dairy farmer"?

21 MS. DAMM: That's correct.

22 MR. RICCIARDI: Okay. And your husband,
23 obviously, from your last response, feels the
24 same way, right?

25 MS. DAMM: That's correct.

1 MR. RICCIARDI: You rely upon DFA to
2 market your milk, right?

3 MS. DAMM: Yes. That's correct.

4 MR. RICCIARDI: When you were deciding to
5 start the business, the start-up, you didn't
6 have to pay the investment costs to build a
7 processing plant by simply becoming a dairy
8 farmer and relying upon DFA to market your milk,
9 right?

10 MS. DAMM: That's correct. We did not
11 have the investment of a processing facility.
12 That's correct.

13 MR. RICCIARDI: And on a monthly basis,
14 you don't have to balance your milk if you're
15 short or have too much, because DFA takes
16 whatever milk you have, right?

17 MS. DAMM: That's correct.

18 MR. RICCIARDI: So if you're short and
19 you have a customer, you don't have to worry
20 about whether or not you are going to be able to
21 purchase the amount of milk you need in order to
22 stay within the 150,000 pounds, which is the
23 allowance for producer-handler, I believe, in
24 your Order? You don't have to worry about that?

25 MS. DAMM: Correct, because I am not

1 managing a producer-handler business.

2 MR. RICCIARDI: And you don't need to
3 worry about transportation costs or shipment
4 costs?

5 MS. DAMM: I do have to worry about
6 transportations costs.

7 MR. RICCIARDI: Transportation costs are
8 built into the price that you receive
9 ultimately -- or deducted from? Excuse me.

10 MS. DAMM: I would agree more with
11 "deducted from."

12 MR. RICCIARDI: I understand that part.
13 Yes. And you're correct.

14 MS. DAMM: But, yes. Hauling is a cost
15 that is incurred by dairy farmers and dairy
16 plants and is thus affecting our compensation.
17 It is a cost of business.

18 MR. RICCIARDI: Okay. And you also do
19 not have to worry about finding customers,
20 because the DFA truck comes and picks up your
21 milk and it goes where it goes?

22 MS. DAMM: Correct. That's why we're a
23 member of the cooperative.

24 MR. RICCIARDI: And you made that choice
25 to do that and to not make the additional

1 monetary investment to build a processing plant
2 and do all the things that I just described that
3 you don't have to do on a monthly basis, right?

4 MS. DAMM: That is correct.

5 MR. RICCIARDI: I appreciate that. Will
6 you pass the microphone over?

7 You've been asked a lot of questions,
8 Mr. Traweek. I'm going to try my best to get
9 through mine quickly.

10 MR. TRAWEEK: Thank you.

11 MR. RICCIARDI: Not a problem. Let me
12 make sure I know who you are and who you are
13 not. You're a dairy farmer, first and foremost?

14 MR. TRAWEEK: That is correct.

15 MR. RICCIARDI: Now, you are not an
16 expert in marketing of milk, correct?

17 MR. TRAWEEK: That is correct.

18 MR. RICCIARDI: You're not an accountant?

19 MR. TRAWEEK: By any means, no.

20 MR. RICCIARDI: You join me with that.
21 All right. And you have no role in GSA, which
22 is the marketing arm of DFA, in the area that
23 you reside, correct?

24 MR. TRAWEEK: That is correct. I have no
25 role in GSA.

1 MR. RICCIARDI: All right. Do you know,
2 then, what percentage of milk pooled on Order
3 126 comes from GSA?

4 MR. TRAWEEK: I would have to have those
5 notes in front of me. We review the notes from
6 GSA on a monthly basis through the Southwest
7 Agency, but I do not have those numbers in front
8 of me.

9 MR. RICCIARDI: Do you have a general
10 approximation? Is it 60 percent? 80 percent?
11 How much?

12 MR. TRAWEEK: How much milk is pooled?

13 MR. RICCIARDI: What percentage of the
14 milk that is in Order 126 is pooled from members
15 of GSA?

16 MR. TRAWEEK: What percentage of milk is
17 pooled from GSA?

18 MR. RICCIARDI: Of the total amount. If
19 I'm unclear, I'll see if I can be clearer.

20 MR. TRAWEEK: Right.

21 MR. RICCIARDI: Of the 100 percent that's
22 pooled in a particular month in Order 126, what
23 percentage of it comes from the GSA members?

24 MR. TRAWEEK: I would have to say of all
25 the fluid milk that's pooled in the GSA, it

1 would have to be nearly all the milk, if I'm
2 correct, because it's all pooled together in the
3 Federal Order 126.

4 MR. RICCIARDI: Okay. So now -- and I
5 don't mean to mix up the pools, so help me.
6 I'll try to see if I can help you out here.
7 What I'm talking about is the Federal Order
8 pool, which is Federal Order, in your area, 126?

9 MR. TRAWEEK: 126.

10 MR. RICCIARDI: How much of that milk --
11 and we'll talk about Class I for a moment,
12 because I think that's what you mentioned.

13 MR. TRAWEEK: Right.

14 MR. RICCIARDI: -- comes from GSA
15 members?

16 MR. TRAWEEK: I would have to say 90-plus
17 percent of it has to be.

18 MR. RICCIARDI: Because in that area in
19 Texas, in particular, essentially GSA and its
20 members have the lion's share of all that milk,
21 right?

22 MR. TRAWEEK: That is correct. That is
23 why GSA was formed.

24 MR. RICCIARDI: Okay. Next, you got --
25 and by "you" in that question, I'm sorry, I

1 mean -- I guess you're talking on behalf of GSA
2 or DFA. I wasn't sure about your answer, you'll
3 explain it if I misstate it. You were getting
4 requests for concessions on your over-order
5 premiums as early as 2008, correct?

6 MR. TRAWEEK: Late, late 2008, there was
7 discussions.

8 MR. RICCIARDI: And you're aware, by the
9 way, that the plant that you're talking about,
10 which is GH Dairy in El Paso, actually started
11 in 2008, and it wasn't a producer-handler at
12 that point, correct?

13 MR. TRAWEEK: Correct. The talk of this
14 facility being purchased is when we first
15 started talking about it, whenever the old Levi
16 factory, I believe, was purchased, and
17 discussion was made that it would be turned into
18 a processing plant, because at that time he was
19 trying to secure contracts in that area.

20 MR. RICCIARDI: And the fact is, what
21 happens always is, if a new processing plant
22 goes in, it's new competition and your customers
23 are going to try to negotiate the best price
24 that they can, right?

25 MR. TRAWEEK: I believe so, yes.

1 MR. RICCIARDI: Whether it's a
2 producer-handler operation or not, correct?

3 MR. TRAWEEK: That's correct.

4 MR. RICCIARDI: Which is what happened
5 here, even though it wasn't a producer-handler
6 operation, when you first started getting these
7 requests for concessions, correct?

8 MR. TRAWEEK: I'm not aware of when he
9 was a producer -- when he began as a
10 producer-handler.

11 MR. RICCIARDI: Well, Exhibit 13 at
12 least -- have you got that one, Judge?

13 JUDGE CLIFTON: I do.

14 MR. RICCIARDI: I can bring my copy up to
15 him.

16 JUDGE CLIFTON: No. You keep your copy.
17 Here we go. Let the witness know what that is.

18 MR. RICCIARDI: Yeah. And let's go
19 through it. And that's a fair question from the
20 judge. This is Exhibit 13, which has been
21 produced and admitted, entitled
22 "Producer-Handler Regulatory Status," which
23 lists for 2005 through 2009 the producer-handler
24 plants by order number. And to help you out on
25 this one, flip to the next to last page of

1 Exhibit 13, which shows 2008.

2 MR. TRAWEEK: Okay.

3 MR. RICCIARDI: Do you see -- and I'll
4 represent to you that you shouldn't, unless my
5 eyes are bad. Do you see the GH Dairy plant
6 listed in 2008 as a producer-handler?

7 MR. TRAWEEK: They are not listed, no.

8 MR. RICCIARDI: Flip over to the last
9 page. Do you see the GH Dairy plant listed as a
10 producer-handler operation for January, February
11 and March?

12 MR. TRAWEEK: Yes, I do.

13 MR. RICCIARDI: Does that help you in
14 terms of the discussions that you were having in
15 2008, and when?

16 MR. TRAWEEK: Yes.

17 MR. RICCIARDI: And do you recall, then,
18 specifically, was it as early as the summer of
19 2008?

20 MR. TRAWEEK: That the discussions --

21 MR. RICCIARDI: About concessions.

22 MR. TRAWEEK: No. It was December or
23 later --

24 MR. RICCIARDI: Okay.

25 MR. TRAWEEK: -- of 2008.

1 MR. RICCIARDI: Thanks. Would you agree
2 with me that in 2008, across the country, that
3 the pay prices -- mailbox prices or pay prices
4 for dairy farmers were basically at historic
5 lows?

6 MR. TRAWEEK: 2008?

7 MR. RICCIARDI: I'm sorry. I apologize.
8 Let me withdraw that question and state the
9 correct one. For 2009 --

10 MR. TRAWEEK: Historic low, yes, that is
11 correct.

12 MR. RICCIARDI: I think I'm now done.
13 Thank you.

14 JUDGE CLIFTON: Thank you, Mr. Ricciardi.
15 Mr. Brosch.

16 MR. BROSCH: Thank you, your Honor.

17 CROSS-EXAMINATION

18 MR. BROSCH: Good morning. I'm confused,
19 or I'm hoping that there's not confusion in the
20 record that was the result of some early
21 colloquy, so I would like to try to clarify
22 that, your Honor. Your Honor, could I have the
23 witnesses shown Exhibit Number 23, which is
24 Dr. Cryan's testimony from the other day?

25 JUDGE CLIFTON: I have sticky notes on

1 it.

2 MR. BROSCHE: Well, your Honor, I can show
3 them mine, but I think you're supposed to show
4 them the official one. And, oh, your Honor, I
5 hope you don't have sticky notes on page 15.
6 That's all I'm really concerned about.

7 JUDGE CLIFTON: I have none on that page.

8 MR. BROSCHE: Thank you, your Honor. If
9 you could hand that to the witnesses?

10 For the record, this is a copy of
11 Dr. Cryan's testimony from the other day. On
12 page 15 is a copy of the language that National
13 Milk proposes to -- for the regulation section,
14 1000.8 on noonpool plants that would result from
15 Proposals 1, 2 and 26. This is the specific
16 legal language that National Milk thinks needs
17 to be implemented.

18 If you could take a moment, each of you,
19 to just kind of take a look over that language
20 before I ask you these questions.

21 Sorry to try to make lawyers out of you
22 this morning, but I'm going to ask a series of
23 about four questions, and then I'm going to ask
24 for a response from each of you in turn, so that
25 we can expedite this thing.

1 So, first of all, are you aware that if
2 National Milk Producers Federation's Proposals
3 1, 2 and 26 were accepted, there would have to
4 be certain changes in the terminology used in
5 the language, Ms. Damm?

6 MS. DAMM: Sorry, microphone moving.
7 Yes, I'm aware that certain language will
8 change.

9 MR. BROSCHE: Mr. Newell?

10 MR. NEWELL: Say what now?

11 MR. BROSCHE: Are you aware that if
12 National Milk Proposals 1, 2 and 26 were
13 accepted by the government in this proceeding,
14 there would have to be certain changes in the
15 terminology used in the regulations?

16 MR. NEWELL: Yes.

17 MR. BROSCHE: And Mr. Traweek?

18 MR. TRAWEEK: Yes, I am.

19 MR. BROSCHE: Now, are you aware that the
20 references to the term "producer-handler" would
21 be deleted from this particular regulation?
22 Mr. Traweek?

23 MR. TRAWEEK: Yes, I am.

24 MR. BROSCHE: Mr. Newell?

25 MR. NEWELL: Yes.

1 MR. BROSCH: Ms. Damm?

2 MS. DAMM: Yes, I am.

3 MR. BROSCH: And are you aware that the
4 current 150,000-pound limit that currently
5 applies to exempt -- qualifies an exempt plant
6 would be raised to 450,000 pounds?

7 MS. DAMM: Yes, I am.

8 MR. BROSCH: Mr. Newell?

9 MR. NEWELL: Yes.

10 MR. BROSCH: Mr. Traweek?

11 MR. TRAWEEK: Yes, I am.

12 MR. BROSCH: And are you aware that
13 entities that currently exist as
14 producer-handlers, but whose -- and existed in
15 2008 as producer-handlers, but whose production
16 limits or sales limits were less than 3 million
17 pounds would now qualify as a type of exempt
18 plant under the new language?

19 MR. TRAWEEK: Yes, I am.

20 MR. NEWELL: Yes.

21 MS. DAMM: Yes.

22 MR. BROSCH: And aware of those facts, do
23 you still support National Milk's Proposals 1, 2
24 and 26?

25 MS. DAMM: Yes, I do.

1 MR. BROSCH: Mr. Newell?

2 MR. NEWELL: Yes.

3 MR. BROSCH: Mr. Traweek?

4 MR. TRAWEEK: Yes.

5 MR. BROSCH: Thank you, your Honor. I
6 have no further questions.

7 JUDGE CLIFTON: Thank you, Mr. Brosch.
8 Further cross-examination of the panel?

9 Mr. Miltner.

10 CROSS-EXAMINATION

11 MR. MILTNER: I will be brief.

12 Mr. Traweek, we talked about the independent
13 producers that supply Hilmar Cheese. To your
14 knowledge, those producers receive a full price
15 from the Federal Order? Are they pool
16 producers?

17 MR. TRAWEEK: I would assume they do.
18 I'm not for sure. I have not seen any of the
19 Hilmar Cheeses.

20 MR. MILTNER: You would assume they do or
21 do not?

22 MR. TRAWEEK: Do participate in the pool.
23 I'm pretty sure -- I'm pretty positive they do.

24 MR. MILTNER: Okay. Those producers, do
25 they seem to be faring any better or worse than

1 the other producers in the area?

2 MR. TRAWEEK: That area is a long way
3 from where I'm at, but I've talked with a few
4 producers around there, and they are all
5 extremely -- everybody is in extremely bad
6 shape, all producers are.

7 MR. MILTNER: You're all equally in
8 trouble right now?

9 MR. TRAWEEK: Yes, sir.

10 MR. MILTNER: Thank you.

11 JUDGE CLIFTON: Further cross-examination
12 of the panel?

13 Are there any questions from the USDA
14 table for the panel?

15 MR. TOSI: Your Honor, we have no
16 questions, but we sure do appreciate the
17 appearance of these three dairy farmers. Thank
18 you.

19 JUDGE CLIFTON: Thank you. I second
20 that. Thank you very much.

21 MR. BESHORE: If I --

22 JUDGE CLIFTON: Oh, Mr. Beshore, yes, we
23 have work to do.

24 MR. BESHORE: Well, I have one question
25 on redirect.

1 JUDGE CLIFTON: Certainly.

2 REDIRECT EXAMINATION

3 MR. BESHORE: You were asked on
4 cross-examination, perhaps by Mr. Ricciardi, I'm
5 not sure, but you were asked whether there was
6 any -- you chose to have the services --
7 Ms. Damm, in particular, chose to have the
8 services that your cooperative Dairy Farmers of
9 America provides as opposed to investing in a
10 producer-handler operation, for instance. Do
11 you recall that?

12 MS. DAMM: Yes, I recall the question.

13 MR. BESHORE: My question for you first,
14 and for each of you, are you required to invest
15 in your cooperative in order to receive the
16 services which it provides?

17 MS. DAMM: Am I required? Am I required
18 to invest?

19 MR. BESHORE: To invest.

20 MS. DAMM: I'm required to invest in the
21 cooperative if I want the services. Am I
22 required -- can I choose which cooperative I
23 join?

24 MR. BESHORE: Well, that wasn't the
25 question I asked, but you can choose which

1 cooperative?

2 MS. DAMM: We can choose which one, but
3 if I wanted to receive the benefits, yes, I have
4 to be a member.

5 MR. BESHORE: Do you know what the
6 investment is that's required to be DFA members?

7 MS. DAMM: I can't give you that off the
8 top of my head. I would have to go back home
9 and pull that.

10 MR. BESHORE: It's an amount per
11 hundredweight?

12 MS. DAMM: Yeah, it is a per
13 hundredweight contribution, yes, I would agree
14 with that.

15 MR. BESHORE: Mr. Newell?

16 MR. NEWELL: Yes, I'm aware that I need
17 to make an investment in my cooperative.

18 MR. BESHORE: In order to get the
19 services, you've go to --

20 MR. NEWELL: That's correct.

21 MR. BESHORE: Do you know what the
22 investment is?

23 MR. NEWELL: \$1.75 a hundredweight.

24 MR. BESHORE: Mr. Traweek?

25 MR. TRAWEEK: Yes, I'm aware of the

1 investment that we make in our co-op, which is
2 \$1.75. And, also, we do have to make other
3 investments in our co-op, the DFA Southwest
4 Agency. We participated in 10 cents a
5 hundredweight deduction from my milk check to
6 build the Southwest Cheese Plant, and so those
7 are investments that we've made to secure
8 markets, you know, markets for our milk.

9 MR. BESHORE: Thank you. That's all I
10 have. Thank you to each of you for your time
11 and efforts and testimony.

12 JUDGE CLIFTON: This panel presentation
13 was excellent.

14 MR. BESHORE: I would move the admission
15 of the statements which have been -- of each of
16 the witnesses, which have been marked as
17 Exhibits 28, 29 and 30.

18 JUDGE CLIFTON: Is there any objection to
19 the admission into evidence of Exhibits 28, 29
20 or 30?

21 There is none. Those exhibits are hereby
22 admitted, 28, 29 and 30. Thank you. You may
23 step down.

24 MR. BESHORE: Thank you.

25 JUDGE CLIFTON: Mr. Beshore.

1 MR. BESHORE: The next witness that is
2 prepared to testify is Mr. Daniels, who is a
3 dairy farmer from Michigan, Rodney Daniels.

4 JUDGE CLIFTON: All right. What I would
5 like to do before we call him -- please stay
6 right where you are, Mr. Beshore -- has Jerry
7 Dakin arrived?

8 MR. DAKIN: Yes.

9 JUDGE CLIFTON: Would you come forward,
10 please? I want to determine your availability
11 for testimony. You're also a dairy farmer, as I
12 understand it.

13 MR. DAKIN: Yes, ma'am.

14 JUDGE CLIFTON: If you will come to the
15 podium and say and spell your name and tell us a
16 little bit about you as a dairy farmer.

17 MR. DAKIN: Jerry Dakin, J-e-r-r-y,
18 Dakin, D-a-k-i-n, a dairy farmer from Myakka
19 City, Florida.

20 JUDGE CLIFTON: How do you spell that?

21 MR. DAKIN: M-y-a-k-k-a.

22 JUDGE CLIFTON: And what are you near in
23 Florida, Myakka City?

24 MR. DAKIN: I'm 60 miles south of Tampa.

25 JUDGE CLIFTON: Oh, okay. And you

1 haven't been here for the rest of the proceeding
2 until recently, is that correct?

3 MR. DAKIN: I just walked in two seconds
4 ago.

5 JUDGE CLIFTON: All right. It might be
6 that you would like to see some of the others
7 testify before you testify.

8 MR. DAKIN: Yes. That would be great.

9 JUDGE CLIFTON: Is it all right with you
10 if I put you at the end of today's witnesses,
11 which might mean 6:00, 7:00?

12 MR. DAKIN: I've got a flight out at
13 6:30.

14 JUDGE CLIFTON: We have to put you in
15 fairly quickly, then.

16 MR. DAKIN: Yes.

17 JUDGE CLIFTON: All right. So you need
18 to leave here no later than 4:00, about?

19 MR. DAKIN: Yes.

20 JUDGE CLIFTON: Okay. All right. After
21 lunch would be good, but early afternoon.

22 MR. DAKIN: Okay.

23 JUDGE CLIFTON: Okay, good. Thank you.
24 And has Mark Kastel arrived?

25 MR. KASTEL: Yes, ma'am.

1 JUDGE CLIFTON: Would you come forward
2 and give us like information?

3 MR. KASTEL: Okay. Thank you, your
4 Honor. Mark Kastel. M-a-r-k, K-a-s-t-e-l. I
5 own and operate a small farm in Wisconsin, which
6 is engaged cooperatively in a dairy enterprise,
7 although I'm here today to represent the
8 Cornucopia Institute. I serve as its codirector
9 and senior farm policy analyst. We are believed
10 to represent more organic farmers, primarily
11 dairy farmers, than any other public charity in
12 the United States or MGO. And I have a letter
13 that I will be reading into the record
14 representing about 80 farmers, including 13
15 producer-handlers who would like to have input
16 into this hearing.

17 JUDGE CLIFTON: Now, you're a charitable
18 organization in organic milk?

19 MR. KASTEL: We act as an organic
20 industry watchdog, not specifically to organic
21 dairy, but that's been one of our prime issue
22 areas since we were founded.

23 JUDGE CLIFTON: Okay. Now, I should have
24 asked Mr. Dakin, and I'll ask him in just a
25 moment, do you have a prepared written statement

1 that you want people to have besides what you
2 just present from the witness stand?

3 MR. KASTEL: I have -- other than what
4 I'm presenting as testimony, I have no written
5 statement.

6 JUDGE CLIFTON: All right.

7 MR. KASTEL: But I have a written copy of
8 that.

9 JUDGE CLIFTON: Okay. Well, it's easier
10 if you do not have one that you want marked as
11 an exhibit, because if you want it marked as an
12 exhibit, I need everyone to have copies, which
13 means you need to reproduce it.

14 MR. KASTEL: Yes. I have that available,
15 your Honor.

16 JUDGE CLIFTON: You have reproduced
17 copies?

18 MR. KASTEL: Yes.

19 JUDGE CLIFTON: Okay. And what I would
20 like you to do, so that people can look at that
21 ahead of time, is put some on the back table,
22 but save enough so the court reporter will have
23 one for use in editing what you testify, I'll
24 have one, the people at the USDA table will have
25 a few, including the record copy. They're

1 keeping all the record copies.

2 MR. KASTEL: Right. I believe I made
3 enough copies to accommodate those requirements.

4 JUDGE CLIFTON: I think people have found
5 they need somewhere between 30 and 50. Is that
6 about what people are making? Does that work,
7 Mr. English? What do you think?

8 MR. ENGLISH: We've been making 50.

9 JUDGE CLIFTON: 50. Okay.

10 MR. KASTEL: Okay. I have 20 copies.
11 I'll make some more, your Honor.

12 JUDGE CLIFTON: Okay. That would be
13 great. And if you knew that you were going to
14 testify today, what would be your preferred time
15 of day?

16 MR. KASTEL: As early as possible. I
17 drove here from Wisconsin. It's a 20-hour round
18 trip, and I have some obligations in Indiana on
19 the way back to visit two farms.

20 JUDGE CLIFTON: So you will make the
21 copies during lunch, and then you could go soon
22 after lunch?

23 MR. KASTEL: Yes, your Honor.

24 JUDGE CLIFTON: We might as well do it
25 while you're still awake.

1 MR. KASTEL: That would be wonderful.

2 JUDGE CLIFTON: Okay. Thank you.

3 MR. KASTEL: If I'm awake after lunch.

4 JUDGE CLIFTON: Don't eat. Just copy.

5 If you go to use the Kinko's downstairs, that
6 would be great, but you might have to stand
7 there while they make the copies to make sure
8 they're working on them.

9 MR. KASTEL: They made me my 20 copies
10 very efficiently, and I'll make sure we have
11 adequate copies.

12 JUDGE CLIFTON: They were trained by the
13 USDA staff.

14 MR. KASTEL: That's why it worked out.
15 Any other questions?

16 JUDGE CLIFTON: No. Thank you very much.

17 MR. KASTEL: Thank you.

18 JUDGE CLIFTON: All right. Back to
19 Mr. Dakin.

20 MR. STEVENS: Your Honor, could I just --

21 JUDGE CLIFTON: I just want to find out
22 if Mr. Dakin has a written statement.

23 MR. DAKIN: No, I do not.

24 JUDGE CLIFTON: No. Okay, Mr. Dakin does
25 not have a written statement.

1 Mr. Stevens.

2 MR. STEVENS: Your Honor, I just want to
3 make sure that, in terms of the statements of
4 witnesses, it is their choice in the end. I
5 mean dairy farmers, other witnesses who may not
6 have a prepared statement, on the other hand who
7 may even want to read from a written statement.
8 It isn't a requirement that they make copies of
9 that available to the parties. It is for the
10 use of the parties, certainly, if they want to
11 do that, but if a farmer gets up there and wants
12 to read from a piece of paper, he doesn't have
13 to make copies for everyone to go with him.

14 JUDGE CLIFTON: My thought was, if we
15 didn't have copies, I wouldn't make it an
16 exhibit. We would just rely on the testimony.

17 MR. STEVENS: Absolutely.

18 JUDGE CLIFTON: Is that your thinking, as
19 well?

20 MR. STEVENS: Absolutely. But when they
21 read a statement from the stand into the record,
22 they present it. It can be put in the record as
23 a written statement marked as an exhibit. It
24 can also be received in that form.

25 And the point I'm making, just in terms

1 of the ease, for the convenience of the
2 witnesses, that they not be forced to make
3 copies of all the statements unless -- unless
4 they want it entered into the record as an
5 exhibit, the statement.

6 JUDGE CLIFTON: Thank you.

7 MR. STEVENS: I just want to make that
8 point.

9 JUDGE CLIFTON: Thank you. I appreciate
10 that.

11 MR. STEVENS: Thank you so much.

12 JUDGE CLIFTON: Mr. English.

13 MR. ENGLISH: Charles English, your
14 Honor. Obviously, I want to accommodate every
15 witness as possible. We had a schedule, we've
16 been discussing this schedule throughout the
17 week, and we have a number of witnesses who have
18 to be on the stand today or, frankly, we lose
19 them. Some of those are also dairy farmers who
20 have been on the list for today, such as Paul
21 Rovey. Some of them are plant operators who
22 also drove here and have to leave, such as Jim
23 Buelow. Some of them are co-op entities, such
24 as Gary Lee. And I guess, in the worst case
25 scenario, while it's far from ideal, Mr. Lee

1 told me today he could come back next week, but
2 that's a little unfair to him since he flew in
3 today and it was announced he was coming in
4 today. Mr. Wilcox, as I said yesterday and this
5 morning, there's some flexibility there. I have
6 some concerns.

7 And I actually don't know much about the
8 subject except the whispering in the hallways,
9 but I suspect it's going to turn out to be the
10 case that Mr. Kastel's testimony could be
11 lengthy in the sense of cross-examination, and I
12 just am concerned of what that does to people
13 like Mr. Rovey, Rod Daniels who we'll get to
14 right now, Jim Hulow, and Gary Lee.

15 Mr. Dakin, a little different since he's
16 a dairy farmer. On the other hand, I would
17 point out that other dairy farmers have been
18 here, so I don't know what to do with that, but
19 I see that in a slightly different vein. It may
20 not have a long cross. I don't know.

21 Again, I don't know exactly what's going
22 to happen, I've been talked to by various
23 people. I just think we at least need to think
24 about it. Maybe we put Mr. Daniels on, have
25 lunch, and come back and think about it some

1 more and see where things are then.

2 JUDGE CLIFTON: Another possibility --
3 and, Mr. Kastel, where did you go? Another
4 possibility, since Mr. Kastel will have a
5 written statement, is to take his direct exam
6 and defer his cross until some of the other
7 witnesses have been heard. Now, that keeps him
8 here longer, which is not good, but it's not
9 good for anybody to be -- to fail to be able to
10 get the testimony in today. So we'll see how it
11 goes. But I appreciate your letting me know.
12 Thank you.

13 All right. So, let's see. Mr. Beshore,
14 thank you for staying close to the podium. Your
15 next witness is Rod Daniels?

16 MR. BESHORE: Yes.

17 JUDGE CLIFTON: All right. You may call
18 him.

19 MR. BESHORE: Mr. Daniels.

20 JUDGE CLIFTON: I'm going to mark
21 Mr. Daniels' statement as Exhibit 31.

22 (Exhibit 31 was marked for
23 identification.)

24 JUDGE CLIFTON: Would you please state
25 and spell your name right into the microphone,

1 even if you're not looking at me?

2 MR. DANIELS: My name is Rod Daniels,
3 R-o-d, D-a-n-i-e-l-s.

4 JUDGE CLIFTON: Thank you.

5 (The witness was sworn.)

6 JUDGE CLIFTON: Thank you. Mr. Beshore,
7 you may proceed.

8 RODNEY DANIELS

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

11 DIRECT EXAMINATION

12 BY MR. BESHORE:

13 Q. Mr. Daniels, you may proceed with your
14 testimony, your statement.

15 A. My name is Rodney Daniels. My address is
16 8189 West Prescott Road, Whittemore, Michigan, 48770.
17 My wife Anne and I have five beautiful daughters ranging
18 in age from 28 to 19 and one extremely cute
19 granddaughter, age one. We're on a roll. Each of my
20 girls have or are currently milking our cows or
21 otherwise helping out on our farm.

22 Our current business operation is an LLC
23 consisting of my two brothers Wallace and Lynn, their
24 sons Christopher and Luke, my daughter Laura, and
25 myself. We own and operate 1,280 acres and milk

1 approximately 300 Holsteins, with plans to expand to at
2 least 400.

3 The farm was started in 1953 with 120
4 acres and eight cows by my parents Donald and Dorothy
5 Daniels. They also were born and raised on dairy farms,
6 both of which are still operating and are designated
7 Michigan Centennial Farms. My mother's father, Peter
8 Koelsch, served on the board of directors of the old
9 Michigan Producers Co-op for over 30 years. We are not
10 Johnny-come-lately's to this business.

11 I'm currently serving as a
12 director-at-large for the Michigan Milk Producers
13 Association. I was elected to this position in 2006.
14 Before that, I served on various local, district and
15 state committees, most notably over 20 years on the
16 state resolutions committee. This committee is directly
17 responsible for formulating the policies that guide our
18 organization as voted on by delegates representing our
19 membership.

20 I take my responsibility to represent our
21 membership very seriously and can say, without
22 hesitation, that our members are staunch supporters of
23 the Federal Milk Order system and the formal hearing
24 process used to amend its rules. We have long-standing
25 resolutions in place that attest to this. In all my

1 years of involvement with MMPA, this commitment has
2 never wavered.

3 The Federal Order system has brought all
4 dairy farmers an orderly and fair marketing system out
5 of what once was chaos and corruption. Uniform minimum
6 pricing and equitable sharing of the value created by
7 classified pricing has been instrumental in making the
8 U.S. dairy industry the envy of the world.

9 As I stated before, my grandfather served
10 on Michigan Producers' board from the early '30s to the
11 mid '60s. I find it humbling that I sit here today
12 trying to protect the integrity of a system that he and
13 many others fought so hard to institute and maintain for
14 so many years.

15 I'm here today to support the National
16 Milk Producers Federation's and the International Dairy
17 Foods Association's proposal to eliminate the
18 producer-handler provision and to expand and qualify the
19 size-based exempt plant provision in every Federal
20 Order.

21 The producer-handler exemption provision
22 was put in place originally to protect small farmers who
23 bottled their own milk. These little farms had
24 virtually no effect on the price of milk for other
25 farmers. No one then could have considered the

1 situation we are faced with today. In Michigan alone,
2 there are at least 100 farms producing more than
3 1 million pounds of milk per month, any or all of which
4 are capable of taking advantage of this loophole in the
5 rules. Some already are. This can amount to as much as
6 15 cents per gallon, more than enough to give them a
7 significant advantage over regulated processors.

8 Not only does this money not get shared
9 with other dairymen, it tends to drive down the overall
10 Class I price, further aggravating an already bad
11 situation.

12 How important is this money to an average
13 dairyman? In the case of our own farm, it's very
14 important. Federal Order 33 was amended in October of
15 2005 in order to discourage pool riding and to minimize
16 depooling in order to prevent dilution of the PPD and to
17 reward producers for their commitment to supplying and
18 balancing the milk needs of local bottlers.

19 Since October of 2005, the milk check
20 received by our farm has included a PPD that has
21 averaged 48 cents a hundred. That's about \$108 a day,
22 or over \$3,200 a month. And that will buy a lot of prom
23 dresses around my place. Erosion of this pool sharing
24 hurts the vast majority of producers while benefiting
25 very few. This is exactly the kind of conditions that

1 made Federal Orders necessary in the first place.

2 Replacing the blanket producer-handler
3 exemption with a small processor exemption level of
4 450,000 pounds per month makes a lot of sense. It
5 allows relatively small processors to carve out niche
6 markets based on unique qualities and local patronage
7 without disrupting major markets. What the rest of us
8 lose in pool sharing, we gain in increased consumer
9 demand and product development. Our quarrel is not with
10 these people, only with those who would abuse the system
11 to compete unfairly.

12 The alternative is not a pretty picture.
13 Some markets are already experiencing the hardship that
14 large exempt producer-handler bottling plants can
15 create. Unless this rule is changed, there will be more
16 and more until we're right back where we were in the
17 1930s.

18 Everybody knows this can be an extremely
19 competitive business. Our profit margins are famously
20 tight and sometimes nonexistent. We work hard every day
21 to keep our cows -- costs down and our cows producing
22 well. The last thing we need is a growing situation
23 where a small minority cuts the vast majority of
24 producers out of the most lucrative portion of the
25 business. It is unethical and bad for the industry.

1 I have previously commented about the
2 justification for exemption from pooling and pricing
3 regulations for processors with less than 450,000 pounds
4 of Class I sales per month. For those same reasons,
5 MMPA and I personally do not support any of those
6 proposals that would provide for a qualified exemption
7 for current producer-handlers. Producer-handlers in
8 excess of the 450,000 pounds have realized an unfair
9 advantage for too long and have grown to their current
10 size because of that advantage.

11 There are numerous proposals that
12 advocate an exemption for current producer-handlers at
13 various levels of volume. No matter where you set that
14 limit, there will continue to be some number that will
15 argue that they're being unfairly treated. We believe
16 that Proposal 2, submitted jointly by NMPF and IDFA, is
17 a suitable solution to a market disorder that has been
18 allowed to exist for far too long.

19 I will make one additional comment on
20 that. After listening to Mr. Gibson this morning, I
21 think that a compromise is probably in the works -- or,
22 you know, I can see his point. It doesn't exactly apply
23 to our particular point, or our situation in Michigan,
24 but in isolated cases I can see where it's not affecting
25 anybody else. He has my sympathy.

1 Thank you for the opportunity to testify
2 here today. I hope you find my thoughts on this issue
3 useful.

4 JUDGE CLIFTON: Thank you very much,
5 Mr. Daniels. Do you have any other questions
6 for him, Mr. Beshore, before cross-examination?

7 MR. BESHORE: No, I do not, your Honor.

8 JUDGE CLIFTON: Thank you. Who would
9 like to begin the cross-examination?

10 Mr. Miltner, please.

11 CROSS-EXAMINATION

12 BY MR. MILTNER:

13 Q. Good afternoon, Mr. Daniels.

14 A. Good afternoon.

15 Q. I want to ask you a question about the
16 second page of your statement. It's in the second full
17 paragraph.

18 A. "I am here today to support"?

19 Q. The second full paragraph, "The
20 producer-handler exemption provision."

21 A. Yes.

22 Q. You say that there's an advantage to
23 producer-handlers of as much as 15 cents a gallon. How
24 did you get that number?

25 A. From literature that I wrote, read. And,

1 obviously, I'm on the MMPA board. We've discussed this.
2 It's common knowledge.

3 Q. Okay. So you got it from other sources,
4 though, you didn't calculate anything? You've taken it
5 from what you believe to be reliable sources?

6 A. Yes.

7 Q. Thank you.

8 JUDGE CLIFTON: If I might inquire, is
9 that just because they do not pay into the pool,
10 or they do not share in pool revenue in the same
11 way that the people who support the pool do?

12 THE WITNESS: I believe that's the
13 inference. And I think, you know, obviously, if
14 a producer-handler had a local market that was
15 unregulated, the potential for profit would, you
16 know, be greater than if he was moving it
17 300 miles. But that's why it says "as much as."

18 BY MR. MILTNER:

19 Q. At the end of that paragraph, you state
20 that producer-handler activity "tends to drive down the
21 overall Class I price." Can you explain that for us?

22 A. Well, obviously, it would. You know, if
23 you're competing against an unregulated processor, and
24 he undercuts you, if you want that business you have to
25 match him. That brings the price down.

1 Q. But the minimum price, the Class I price,
2 is set by Federal regulation, isn't it?

3 A. It is set by Federal regulation, but
4 it's -- the unregulated farms are not included in that.

5 Q. So what you're saying is the competition
6 brought by a producer-handler --

7 A. Would tend to drive the price down.

8 Q. -- would tend to change the premiums that
9 your cooperative can negotiate?

10 A. That's another way of putting it, but
11 yes.

12 Q. It's not the minimum Class I price, it's
13 the Class I over-order premium that you're saying is
14 affected, right?

15 A. Now you're getting technical with me.
16 The bottom line is, I get less money.

17 MR. MILTNER: Judge, if you could, could
18 you hand Exhibit 13 to Mr. Daniels?

19 JUDGE CLIFTON: Certainly.

20 MR. MILTNER: Thank you.

21 BY MR. MILTNER:

22 Q. Mr. Daniels, have you had a chance to see
23 Exhibit 13 before?

24 A. No.

25 Q. Okay. This is an exhibit in the record,

1 and it shows the producer-handlers in each marketing
2 area for different years. And it's listed by Federal
3 Order for our ease of finding people. So if you look at
4 the fourth column, which says "Order Number," and go
5 down that list and get to order 33 --

6 A. Yes.

7 Q. And if you could look at --

8 A. Country Dairy. They are in Michigan. Is
9 that what you're going for?

10 Q. Well, first of all, you're looking at
11 2005 at the top of the page, above "City"?

12 A. Yes, yes.

13 Q. Okay. And in 2005, Country Dairy is
14 listed for Order 33?

15 A. Yes.

16 Q. Is it your testimony that the activities
17 at Country Dairy are currently causing problems for your
18 cooperative?

19 A. Yes.

20 Q. Okay. How so?

21 A. What started out as a small ice cream
22 store in New Era has expanded into a bottling business
23 and is now covering several outlets on the whole west
24 side of Michigan.

25 Q. So their bottling activities, the fact

1 that they're covering a number of stores, is causing a
2 problem for your cooperative?

3 A. It's causing problems for the other
4 regulated processors and our customers, yes, who are --
5 MMPA is not in the bottling business.

6 Q. Is anyone from MMPA going to provide any
7 detail on why they believe their activity is disruptive,
8 other than what you've stated in your statement?

9 A. I'm not sure of that. You would have to
10 talk to Mr. Beshore or -- I know Carl Rasch had
11 considered coming up here, and he thought that he might
12 come next week, but -- and he would be the actual source
13 of that information.

14 JUDGE CLIFTON: Would you spell Carl
15 Rasch's name for me so we get it right?

16 THE WITNESS: I don't know how to spell
17 it.

18 MR. MILTNER: I believe it's R-a-s-c-h.

19 JUDGE CLIFTON: And do you know how he
20 spells Carl?

21 MR. MILTNER: I believe it's with a C.

22 JUDGE CLIFTON: Good. Thank you all.

23 BY MR. MILTNER:

24 Q. In your discussions in your cooperative,
25 have you tried to -- have you assigned a number to the

1 effect on the producer pay price from the activities of
2 producer-handlers in Order 33?

3 A. I haven't personally, no.

4 MR. MILTNER: Okay. Thank you.

5 JUDGE CLIFTON: Thank you, Mr. Miltner.

6 Who next would like to cross-examine

7 Mr. Daniels?

8 Mr. Ricciardi.

9 CROSS-EXAMINATION

10 BY MR. RICCIARDI:

11 Q. Al Ricciardi on behalf of AIDA.

12 Mr. Daniels, you have in front of you Exhibit 13. If
13 you would, flip to the next to the last page, which
14 would be for 2008. Do you have that?

15 A. Next to the last page? Yes, I do. Yes.
16 There it is.

17 Q. If you read down to --

18 A. 33.

19 Q. -- 33, which is where you're located, you
20 will note that in 2008 there are two producer-handlers
21 listed, correct?

22 A. Yes, that's correct.

23 Q. And for 2009, that has been reduced by
24 one to Country Dairy, correct?

25 A. Yeah. And I can't tell you why either.

1 I'm pretty sure that's Doug Westondorp, who is the
2 MOO-ville Creamery. As far as I know, Doug is still in
3 business.

4 Q. I understand --

5 JUDGE CLIFTON: What's the name of his
6 creamery?

7 THE WITNESS: MOO-ville.

8 MR. RICCIARDI: M-O-O - v-i-l-l-e, your
9 Honor.

10 JUDGE CLIFTON: All right. And how is
11 his last name spelled? Doug West --

12 THE WITNESS: Again, he'll probably
13 crucify me for this. I think it's
14 W-e-s-t-o-n-d-o-r-p.

15 JUDGE CLIFTON: Westonvorp?

16 THE WITNESS: Dorp.

17 JUDGE CLIFTON: Dorp, d as in David?

18 THE WITNESS: I said --

19 JUDGE CLIFTON: I just couldn't tell
20 whether you said d or v.

21 THE WITNESS: It's d as in dog.

22 JUDGE CLIFTON: D. Thank you.

23 MR. RICCIARDI: Thank you, your Honor.

24 BY MR. RICCIARDI:

25 Q. And I've got a couple of points of your

1 statement that I want to tie together, and hopefully
2 we'll do this very quickly. Your last page, page 3, the
3 third paragraph, second sentence, beginning "Our profit
4 margins." It's actually the second full paragraph, the
5 third paragraph on that page.

6 JUDGE CLIFTON: Oh, okay. So higher than
7 the middle of the page?

8 A. You said the third page, didn't you?

9 BY MR. RICCIARDI:

10 Q. Yes, I did.

11 A. Sorry about that. I'm on the wrong page.

12 Q. That's okay. Do you see the sentence
13 that reads, "Our profit margins are famously tight and
14 sometimes nonexistent"?

15 A. Yes.

16 Q. This is your statement, right?

17 A. That's true.

18 Q. Okay. So when you say "Our profit
19 margins," were you talking about the Michigan Milk
20 Producers Association?

21 A. No. I was talking about our farm's
22 profit margins.

23 Q. Okay. Were you talking about dairy farms
24 and dairy farmers --

25 A. Dairy farms in general.

1 Q. -- in general?

2 A. Yes.

3 Q. Okay. Taking that as an idea, and your
4 testimony, flip back with me, please, to the second
5 page. And now we're in the third paragraph, actually
6 the second full paragraph. And I think you talked about
7 this with Mr. Miltner, about this 15-cent per gallon
8 issue.

9 A. Uh-huh.

10 Q. You say that, in your opinion,
11 producer-handlers have a significant advantage over
12 regulated processors?

13 A. After a certain size, I believe they do,
14 yes.

15 Q. So you want to qualify your statement
16 now, after a certain size?

17 A. My personal opinion is anything up to
18 \$450,000 -- 450,000 pounds a month, virtually no effect
19 on anybody.

20 Q. And where --

21 A. When you get beyond that, then you're in
22 a gray area.

23 Q. They start to get competitive at that
24 point?

25 A. Yes. And my point is, if not being

1 regulated is the basis of their profit, then it actually
2 proves our point.

3 Q. Well, let's talk about it for a second,
4 because I want to tie in what you said. If your
5 business, as a dairy farmer, is -- pennies are
6 significant, you say in your last page, right, because
7 your margins are famously tight or nonexistent?

8 A. Yes.

9 Q. And your statement here that there is a
10 significant advantage to a producer-handler, then as a
11 rational person, which I know you are, you would assume
12 that there would be a large number of producer-handlers
13 that have proliferated over the last five years,
14 correct?

15 A. There's a number of smaller
16 producer-handlers that have proliferated, the organic
17 people and the smaller producers. But for the large --
18 you know, there have -- they -- in my mind, at least,
19 they survive on the quality of their product and their
20 particular location.

21 Q. Well, let's just take the number. We
22 know, based upon Exhibit 13, that the number of
23 producer-handlers from 2008 to 2009 has actually gone
24 down from two to one, correct?

25 A. I'm not -- I'm not going to -- I know

1 that's what's on this exhibit, but I never heard about
2 Doug going out of business.

3 Q. Okay. Well, then let's take it back to
4 2005, and we've got one in Order 33 in '05, correct? Am
5 I right?

6 A. 33, yeah. Yes.

7 Q. '06, we have one?

8 A. Yes.

9 Q. '07?

10 A. Actually, '07 is two.

11 Q. '07 we have two?

12 A. Yeah.

13 Q. '08 we have two, and '09 we have one?

14 A. Okay. But, again, I dispute that
15 information.

16 Q. Let's assume -- and I won't argue with
17 you, I'll give you your due on this one. Let's assume
18 that there are actually two in '08. So we have an
19 industry that's tight to the pennies, you say there's a
20 significant advantage up to 15 cents a gallon, and in
21 Order 33 we've had the growth of producer-handlers at
22 either zero or a negative number based upon Exhibit
23 Number 13, am I correct?

24 A. Okay. Well, now --

25 Q. Am I correct?

1 A. Yes.

2 MR. RICCIARDI: Thank you.

3 JUDGE CLIFTON: Mr. Daniels, you have an
4 explanation that you would like to follow up
5 with, I can tell. And you have a chance to do
6 that. After all the examination --
7 cross-examination is done, you will have an
8 opportunity to go back to that issue and add,
9 even though counsel didn't ask any more
10 questions. But the thing is, you've got to
11 remember to go back to that.

12 THE WITNESS: I will.

13 JUDGE CLIFTON: All right. And counsel
14 will help. Okay, continued cross-examination?

15 Oh, we can tell it's getting to be
16 lunchtime. Are there any -- okay. Are there
17 any questions from the USDA table? Mr. Tosi.

18 MR. TOSI: Thank you, your Honor.

19 CROSS-EXAMINATION

20 BY MR. TOSI:

21 Q. Mr. Daniels, my name is Gino Tosi. I'm
22 with the Dairy Programs at USDA in Washington, D.C. Are
23 you offering any other statements of support or
24 opposition to any of the other proposals that have been
25 noticed in the hearing notice?

1 A. No. But what I had to say, I said, as
2 far as our support for the proposals or argument with
3 one of them.

4 Q. Okay. In your statement, in your written
5 statement, you talked about uniform pricing, uniform
6 minimum pricing --

7 A. Uh-huh.

8 Q. -- and the equitable sharing of the value
9 created by classified pricing as being very important to
10 the development of the dairy industry in the U.S.?

11 A. Yes.

12 Q. In that regard, are you talking about
13 marketwide -- the marketwide pooling of revenue?

14 A. Yes.

15 Q. Are you familiar with the term
16 "individual" or "handler pooling"?

17 A. No.

18 MR. TOSI: That's all I have, your Honor.
19 Thank you.

20 JUDGE CLIFTON: Thank you, Mr. Tosi.

21 Mr. Carroll.

22 CROSS-EXAMINATION

23 BY MR. CARROLL:

24 Q. You have a statement on page 2 in your
25 next to last paragraph, in the middle, that talks about

1 the competitor you identified earlier as a PPD. Can you
2 tell me what that means in your Order?

3 A. A PPD? Basically, it's the premiums or
4 extra money that is generated from all the
5 classifications and then shared back to the individual
6 producers. I'm sure that's not the official definition,
7 but it's the one that makes a difference to me, yes.
8 It's the amount of money I get back out of the pooling.

9 Q. Does the Order itself use the words
10 "PPD"? Did you get that from them, from when you --

11 A. That's what's on my milk check.

12 Q. That's what's on your milk check?

13 A. Yes.

14 Q. Okay. I understand. Now, you stated
15 that this dairy -- you indicated, I think, it was
16 Country Dairy?

17 A. Country Dairy, Wendell Van Gunst and
18 family.

19 Q. Where are they located?

20 A. New Era, Michigan, just a little bit
21 north of Grand Rapids.

22 Q. And where are you?

23 A. I'm over on the northeast side of
24 Michigan, about 50 miles north of Bay City.

25 Q. Okay. Now, Country Dairy, do you know

1 how many cows they have?

2 A. I wish I did exactly. I was just there.
3 I went to the North Star annual meeting, and they did a
4 tour of the farm. It's an impressive place if you ever
5 get a chance to go there. I think they were in the
6 neighborhood of 700 cows, but I'm not going to swear by
7 that. And they were expanding.

8 Q. And the other person who the Market
9 Administrator is no longer calling a producer-handler,
10 how large was that producer-handler?

11 A. I think Doug was milking 200 or 300 cows
12 at the most. I believe -- I still believe he's still
13 milking. He may have shut down his creamery and went,
14 but that's news to me. And I think that would have been
15 news, I would have heard.

16 Q. Well, it's possible, I suppose, to change
17 classification and still be in business.

18 A. Yeah.

19 Q. Now, let me ask you if you know what the
20 volume of sales of Country Dairy are?

21 A. No, not exactly, no.

22 Q. Okay.

23 A. It would be good. They have a really
24 nice herd. I think they're in the range of 25,000
25 pounds of cow per day, per year.

1 Q. Is it a well-run farm?

2 A. Excellent, excellent-run farm. It's a --
3 the original premise, there was very -- a very good
4 deal. They're in a touristy-type area. They have a
5 store there to sell their ice cream. Their ice cream is
6 excellent ice cream. They have a, for lack a better
7 word, tourist farm, where they show off their high-end
8 registered cows. The place is very neat and well run.

9 Q. Does it speak well for the dairy industry
10 to --

11 A. Yes, it does.

12 Q. -- have a farm like that?

13 A. Yes, it does.

14 Q. Okay. Does it make a good impression on
15 the public in terms of the quality of milk that's
16 available --

17 A. Yes, it does.

18 Q. -- from your state?

19 A. Yes.

20 Q. Does it cost a little extra money to run
21 an operation that way?

22 A. I suppose it does, but I still don't
23 quite understand why you can't leave it at that and not
24 spread it. He's up north of that farm, I'm guessing
25 about 150 miles, and those people aren't visiting his

1 ice cream store.

2 Q. All right. Now, directing your attention
3 to his cost of production, do you have any idea what his
4 cost of production is?

5 A. I think it would be competitive, because
6 they are such excellent operators. You know, he also
7 has some registered cattle business, sells bulls and
8 pre-stock and whatnot.

9 Q. Does he have any other business that you
10 know about?

11 A. Not that I'm aware of, but it wouldn't
12 surprise me if he did. He also seems to have a very
13 close working relationship with Michigan State
14 University, and he's got research people there
15 working -- you know, working at the farm.

16 Q. Right. So I take it he's trying to
17 elevate the farm business, dairy business, as well as
18 his own?

19 A. Yeah, he is. Wendell is an excellent
20 businessman who knows how to put on a good show. I
21 mean, he's good at what he does.

22 Q. Right. Now, in business -- I guess I'm
23 going to pull back. Your cooperative doesn't actually
24 engage in the sale to the public of milk, does it?

25 A. Not bottled milk, no.

1 Q. No. And -- but are you familiar with the
2 fact that milk accounts can move back and forth pretty
3 rapidly in the milk business?

4 A. Oh, yes, yes.

5 Q. And everybody is trying the best they can
6 to get an account at any time?

7 A. Well, yeah. And our point is, do we
8 really need this thing thrown into that mix? We've got
9 enough competition without that.

10 Q. Yeah. But the fellow running Country
11 Dairy at least has a right to compete the best he can to
12 get business?

13 A. I have no quarrel with Wendell competing
14 for business. My quarrel comes when -- you know, he's
15 producing a quality product. If he wants to get bigger,
16 then he ought to be willing to survive on his own
17 merits, not on the advantage he gains by not pooling.

18 Q. But if he actually had cost of production
19 greater than the blend Class I differential, would he
20 really have any money to throw around?

21 A. I'm not -- say that again.

22 Q. Yes. If he had costs greater than the
23 blend Class I differential, in other words he had higher
24 production costs than the differential, would he have a
25 lot of money to throw around competitively?

1 A. Well, he must, because he's expanding it.
2 So if he's not making money -- I guarantee you Wendell
3 doesn't do anything that doesn't make money.

4 Q. Right. Yeah. That's your opinion?

5 A. Yes, that's my opinion.

6 MR. CARROLL: That's all. Thank you.

7 JUDGE CLIFTON: Thank you, Mr. Carroll.
8 I need a spelling. I know that you don't want
9 to do this, but Van Gunst? Wendell first, and
10 then Van Gunst.

11 THE WITNESS: Wendell is W-e-n-d-e-l-l
12 and Van Gunst is V-a-n-G-u-n-s-t.

13 JUDGE CLIFTON: Good. Thank you.

14 THE WITNESS: You're welcome.

15 JUDGE CLIFTON: Mr. Beshore.

16 MR. BESHORE: Thank you. Mr. Daniels --

17 JUDGE CLIFTON: Are you wanting to do
18 redirect?

19 MR. BESHORE: Yes.

20 JUDGE CLIFTON: Okay. Let me see if
21 there's any other cross. Any other
22 cross-examination?

23 They're going to let you go ahead.

24 MR. BESHORE: Thank you.

25 REDIRECT EXAMINATION

1 BY MR. BESHORE:

2 Q. Mr. Daniels, you referred to the PPD in
3 your testimony, and you were asked about that. Is that
4 the producer price differential?

5 A. Yes.

6 MR. BESHORE: Now, could he have
7 Exhibit 5, your Honor?

8 JUDGE CLIFTON: Sure.

9 BY MR. BESHORE:

10 Q. I want you to look at -- you were asked
11 about whether there were any other small
12 producer-handlers in your market or perhaps what
13 happened to MOO-ville on the list. On the third page of
14 Exhibit 5, there is a list of Order 33. This is the
15 exempt plant list, okay, and there are four or five
16 entities in Michigan here.

17 A. Yeah.

18 Q. And I wonder if you could tell us what
19 you know about them; that is, whether they are, for
20 instance, farm producer-handler type operations that are
21 small. Cook's Farm Dairy in Ortonville, Michigan, do
22 you know anything about them?

23 A. I do not. Some of these may be,
24 though -- we've had some proliferation of cow share
25 farms. I don't know where they fall in on this.

1 Q. I'm just asking what you may or may not
2 know about any of these. Cream Cup Dairy in Kaleva,
3 Michigan?

4 A. I don't know a thing about, really, any
5 of them.

6 Q. Crooked Creek Dairy?

7 A. I've never heard of them. I assume
8 they're really, really small.

9 Q. Okay. How about Shetler Dairy in
10 Kalkaska?

11 A. Where do you see that?

12 Q. Further down, further down the list.

13 A. Oh, okay. I'm looking at the wrong --
14 the whole 33. Let's see if I do recognize any of these.
15 Michigan State Industries, I think, is probably the
16 small bottling thing that Michigan State University has.

17 Q. How about, the last one I want to just
18 ask you about, Shetler Dairy?

19 A. Shetler, Kalkaska? No, I've never heard
20 of them.

21 MR. BESHORE: Okay. That's all. Thank
22 you very much, Mr. Daniels.

23 JUDGE CLIFTON: Was there anything else
24 you wanted to cover, Mr. Daniels?

25 THE WITNESS: Yes. And, again, it gets

1 into potential. Because of the proximity of
2 Michigan and our Detroit, Chicago markets,
3 nearly all the milk in Michigan, excess milk at
4 least, goes south. We've got Fair Oaks in
5 northern Indiana, we have a potential problem
6 with Tim den Dulk, who recently bought an
7 Oldsmobile plant in Coopersville. The latest
8 news we have on that is that he plans to build a
9 powdered plant there. But the bottom line is,
10 those guys have potential to create havoc if the
11 producer-handler thing is not addressed.

12 JUDGE CLIFTON: And can you help me with
13 Tim's last name? Van --

14 THE WITNESS: Den Dulk. It's d-e-n,
15 D-u-l-k. And I'm not criticizing Mr. den Dulk.
16 Again, he's a very smart businessman. He's made
17 great progress, runs some really first class
18 farms, but -- and, by and large, he's cooperated
19 with the other co-ops in the area and not
20 created a great deal of problem. But when
21 you're looking at \$10, \$11 milk, then peoples'
22 minds change in a hurry.

23 JUDGE CLIFTON: So your concern is that
24 he has the ability to grow large, and you would
25 like him to be in the pool?

1 THE WITNESS: Well, he already is large.

2 JUDGE CLIFTON: All right.

3 THE WITNESS: And there are several
4 others like him in the state. So once that
5 snowball starts down the hill, I don't know how
6 you're going to stop it.

7 JUDGE CLIFTON: Other cross-examination?
8 Mr. Yale.

9 CROSS-EXAMINATION

10 BY MR. YALE:

11 Q. Benjamin F. Yale on behalf of Continental
12 Dairy Products and Select Milk. Good afternoon. Are
13 you aware of what cooperative Mr. den Dulk and Fair Oaks
14 are a member of?

15 A. They are with Continental and Select, I
16 believe.

17 Q. And what position has Continental and
18 Select taken in this position?

19 A. You've -- they've said that they have
20 supported it.

21 Q. Doesn't that kind of resolve the issue of
22 whether they intend to be a PD? If they felt that that
23 was something they wanted to do, they wouldn't be here
24 supporting National Milk in this litigation?

25 A. The bottom line is, they've got us scared

1 with this Oldsmobile plant.

2 Q. Well, that has nothing -- you know, we
3 can talk about that some other time. That has nothing
4 to do with -- the powder is not a PD plant, right?

5 A. You're right.

6 MR. YALE: Very well. I have no other
7 questions.

8 THE WITNESS: And, again, I didn't mean
9 to blind Mr. den Dulk.

10 MR. YALE: I understand that, but I just
11 want to make the record clear that the
12 suggestion was that they may be thinking that.
13 And I think the record would reflect it's quite
14 the contrary.

15 THE WITNESS: You're quite right.

16 MR. YALE: Thank you.

17 JUDGE CLIFTON: Thank you, Mr. Yale.

18 Mr. Brosch.

19 MR. BROSCH: No, no questions.

20 JUDGE CLIFTON: Are you trying to escape?

21 MR. BROSCH: No. I'm trying to move the
22 thing along. I thought we were done. But go
23 ahead, your Honor.

24 JUDGE CLIFTON: All right. Mr. Beshore.

25 MR. BESHORE: Move Exhibit 31.

1 JUDGE CLIFTON: Mr. Beshore has moved the
2 admission of Exhibit 31. Is there any
3 objection?

4 There is none. Exhibit 31 is hereby
5 admitted into evidence.

6 Mr. Daniels, thank you. Your testimony
7 was very helpful.

8 THE WITNESS: Thank you.

9 JUDGE CLIFTON: Mr. Brosch.

10 MR. BROSCH: Your Honor, I think
11 Mr. Rovey is next. Is that correct?

12 JUDGE CLIFTON: That's correct.

13 MR. BROSCH: Your Honor, I would like to
14 introduce Mr. Paul Rovey. He is a farmer --
15 dairy farmer from Glendale, Arizona. He's the
16 president of United Dairymen of Arizona, and I
17 would like to have his testimony marked as -- I
18 believe we're on 32, your Honor?

19 JUDGE CLIFTON: Correct.

20 MR. BROSCH: I would like to have his
21 written testimony marked as Exhibit 32.

22 (Exhibit 1 was marked for
23 identification.)

24 JUDGE CLIFTON: All right. And I'm sure
25 the court -- Mr. Ricciardi?

1 MR. RICCIARDI: When he's done with that.

2 JUDGE CLIFTON: Oh, you just want to make
3 sure you get a copy?

4 MR. RICCIARDI: No, no, no. I've got a
5 copy. I have a preliminary issue.

6 JUDGE CLIFTON: Oh, a preliminary issue.

7 MR. RICCIARDI: Yes.

8 JUDGE CLIFTON: All right. We'll wait
9 until the copies are distributed.

10 MR. RICCIARDI: That's great. Thank you.

11 MR. BROSCH: Your Honor, I don't think --
12 your Honor, if anyone else would like copies of
13 Mr. Rovey's testimony --

14 JUDGE CLIFTON: The judge would.

15 MR. BROSCH: I'm sorry. I didn't give
16 you one, your Honor?

17 JUDGE CLIFTON: No.

18 MR. BROSCH: Excuse me. I'm sorry. Your
19 Honor, Mr. --

20 JUDGE CLIFTON: Who else needs a copy of
21 Mr. Rovey's statement? No more in the back?
22 Okay. If someone can share with someone who has
23 one next to you so that we can pass a couple up
24 to the front. I would like the Gibson brothers
25 to have one to look at. Thank you. Is that --

1 everybody can look on? We've got one more we
2 can give away. The USDA is willing to share.
3 Okay, good.

4 MR. BROSCHE: Thank you, your Honor.
5 Mr. Rovey is going to give his testimony
6 directly, and I may have some questions for him
7 at the conclusion.

8 JUDGE CLIFTON: You're welcome.
9 Mr. Rovey, would you state and spell your full
10 name for us?

11 THE WITNESS: Paul Rovey. That's
12 P-a-u-l, R-o-v-e-y.

13 (The witness was sworn.)

14 JUDGE CLIFTON: You may proceed.

15 MR. RICCIARDI: Your Honor?

16 JUDGE CLIFTON: Mr. Ricciardi. Yes, I'm
17 sorry, I forgot. You mentioned you had a
18 preliminary item.

19 MR. RICCIARDI: I do, Judge. And I will
20 try to make this brief. To try to put all of
21 this into a brief statement is difficult. I
22 read the proposed testimony of Mr. Rovey, and I
23 have two concerns.

24 By way of background, Judge, there was a
25 producer-handler hearing with regard to Orders

1 131 and 124 that actually commenced in 2003.
2 And ultimately, on the regulatory side, a
3 decision was made in '06. At the same time, as
4 referenced in Mr. Rovey's statement, there were
5 legislative efforts, i.e., lobbying by some of
6 the largest players in this industry, to try to
7 get Congress to pass a bill, which ultimately
8 became known as the Milk Regulatory Equity Act.

9 On that point, litigation has been filed
10 based upon the actions of Congress in passing
11 what we believe to be a bill of attainder with
12 regard to the Hettinga operations Sarah Farms
13 and GH in Arizona.

14 JUDGE CLIFTON: Now, I know how to spell
15 Hettinga, but I want you to spell it.

16 MR. RICCIARDI: H-e-t-t-i-n-g-a.

17 JUDGE CLIFTON: And what are the other
18 operations besides the --

19 MR. RICCIARDI: Sarah Farms and GH
20 Processing in Arizona.

21 JUDGE CLIFTON: So Sarah Farms is spelled
22 how?

23 MR. RICCIARDI: S-a-r-a-h.

24 JUDGE CLIFTON: Okay.

25 MR. RICCIARDI: And Farms.

1 JUDGE CLIFTON: And the initials, the
2 letters G and H?

3 MR. RICCIARDI: Correct.

4 JUDGE CLIFTON: Okay. Thank you.

5 MR. RICCIARDI: On the issue first of the
6 Milk Regulatory Equity Act, on April 3rd of this
7 year, the Court of Appeals reversed a decision
8 by the District Court requiring my clients to
9 exhaust administrative remedies in remanding
10 that case, which involves the whole bill of
11 attainder issue back to the District Court. I
12 haven't gotten remand yet. I'm awaiting it.

13 This statement does a couple of things:
14 One, it references all of that, the legislative
15 and administrative issues. It also -- and talks
16 about the Milk Regulatory Equity Act in the
17 fourth paragraph. On the second page, in the
18 second or third paragraph, it then talks about
19 the previous hearings.

20 So we've got at least a couple of
21 problems, one of which is, we're trying to get
22 in, through the back door in this statement,
23 information about the previous hearing.

24 JUDGE CLIFTON: Isn't it pretty common
25 knowledge, information about those previous

1 hearings? They were very noticeable.

2 MR. RICCIARDI: They were. And I was
3 there, and they were noticeable by most people.
4 But the question becomes, it's sort of like --
5 let's go back to the simple argument. You're
6 involved in an automobile accident in 2005. Now
7 there's litigation now in 2009 where you're
8 involved again. Do you allow testimony in with
9 regard to what occurred back then? Probably
10 not, because it's not relevant to anything that
11 occurs here.

12 JUDGE CLIFTON: Well, I would think if
13 you were injured in the first accident, then
14 whatever happened in the second accident may
15 have aggravated those injuries.

16 MR. RICCIARDI: Sure, if I was talking
17 about damages. But if I was talking
18 specifically about who caused what, and why it
19 occurred, it wouldn't come in, because that's
20 not relevant.

21 Secondly, we do have this pending
22 litigation regarding the Milk Regulatory Equity
23 Act, and whether or not it is a bill of
24 attainder, among other things.

25 The third point I want to make, and then

1 I will sit down, because I am trying to be
2 brief, is there's a legal issue that's out
3 there, also, as to whether or not, by Congress
4 stepping in and actually doing what it did with
5 regard to Arizona and making it different than
6 any other Federal Milk Marketing Order, whether
7 or not change can be effected by USDA even
8 through this hearing process. So --

9 JUDGE CLIFTON: Why is there a question
10 about that?

11 MR. RICCIARDI: There's a legal question,
12 Judge, and we can sit down and talk about it,
13 but I don't want to argue legal issues at this
14 point. I'm just bringing it to your attention.

15 JUDGE CLIFTON: Congress does statutes,
16 the Secretary does regulations, and I'm not
17 seeing the problem --

18 MR. RICCIARDI: The difference is, Judge,
19 and it will involve a long explanation, I'm not
20 going to go through it, but there's an argument
21 as to whether or not Congress acted differently
22 here and remanded it, through language in the
23 Milk Regulatory Equity Act, that the USDA has no
24 authority other than to mandate what Congress
25 stated.

1 JUDGE CLIFTON: Well, that would make no
2 sense.

3 MR. RICCIARDI: Well, you know, that's
4 why I've got a bill of attainder case that's
5 pending in the United States District Court now
6 in D.C.

7 MR. STEVENS: Your Honor, please, this
8 discussion is left for another day. I
9 appreciate the fact that counsel, very able
10 counsel, is representing his clients in this
11 hearing, but that matter, the MREA, all those
12 issues are in litigation, and they are being
13 litigated.

14 Here we have a proposal, a number of
15 proposals, and we're doing an administrative
16 rulemaking. As we started out in this matter,
17 this is not the place for legal argument. This
18 is -- I understand the arguments, but they're
19 not appropriate before your Honor.

20 This gentleman should be able to read his
21 statement. This gentleman should be able to
22 cross-examine on that statement and the
23 information should go in the record. After that
24 time, then all the parties can exercise any
25 rights that they have with respect to this

1 rulemaking.

2 But it is not a proper basis -- I'm
3 assuming an objection. This gentleman's
4 statement should go in as it appears here and
5 let the parties then deal with the statement in
6 the future with respect to this rulemaking; not
7 to the rulemaking in the past, but to this rule.

8 JUDGE CLIFTON: And, Mr. Brosch, did you
9 have something that would help me here?

10 MR. BROSCHE: Well, your Honor --

11 JUDGE CLIFTON: Come to the microphone,
12 please.

13 MR. RICCIARDI: And by the way, I'm going
14 to --

15 JUDGE CLIFTON: Don't leave.

16 MR. RICCIARDI: I'm not going to go
17 anywhere.

18 JUDGE CLIFTON: All right.

19 MR. BROSCHE: I don't think that
20 Mr. Ricciardi has made his objection yet, he's
21 just going on about some other proceedings. But
22 I would say that, obviously, this witness has
23 the right to appear and to petition his
24 government, under the constitution, to do
25 whatever he thinks the government ought to do

1 for him.

2 The fact that Mr. Ricciardi has filed a
3 suit somewhere for somebody else does not
4 deprive him of that right. He needs to be able
5 to testify.

6 MR. RICCIARDI: And, your Honor, you did
7 not hear me, and you will not here hear me now,
8 trying to deprive anyone of their ability to
9 testify. The only thing that I made a statement
10 about is, and I'm going to actually agree with
11 my learned counsel over there to the left, that
12 this is -- this hearing --

13 JUDGE CLIFTON: Just so the record is
14 clear, you agree with Mr. Stevens?

15 MR. RICCIARDI: I agree with Mr. Stevens
16 that this hearing -- and what I want to make
17 sure of is that we're not bothering this record
18 with statements or information from another
19 hearing.

20 JUDGE CLIFTON: Well, you know, history
21 is a continuum, and what happened in that
22 hearing, in fact, is part of this hearing in a
23 way.

24 MR. RICCIARDI: Your Honor, I made my
25 point. If you're making your ruling, I'm going

1 to sit down and wait for my chance to
2 cross-examine.

3 JUDGE CLIFTON: All right. But let me
4 tell you what I take from what you said. You
5 said we have not yet heard the end of the story.
6 And that is helpful. All right. Thank you,
7 Mr. Ricciardi.

8 MR. RICCIARDI: Thank you very much,
9 Judge, thank you. I appreciate it.

10 JUDGE CLIFTON: Mr. Brosch.

11 MR. BROSCH: Your Honor, I would just
12 note for the record, over the last few days
13 there has been all sorts of testimony about
14 other proceedings that have gone before here,
15 the Order reform proceedings, the Pacific
16 Northwest proceedings. There's been testimony
17 about that for days, so I don't know why this is
18 special.

19 JUDGE CLIFTON: Well, it's his case, for
20 one thing.

21 MR. BROSCH: Well, your Honor, I've got a
22 couple of cases pending, but I'm not going to
23 run up here and say that we should end this
24 proceeding because I've got cases pending.

25 MR. RICCIARDI: Your Honor --

1 JUDGE CLIFTON: Mr. Ricciardi, you may
2 respond, and then we'll get on with it.

3 MR. RICCIARDI: Let's get on with it.
4 Let's let -- as I said before, I'm not going to
5 object to this witness having the right to
6 testify today. I just have objections, and I
7 wanted them raised, and points I wanted the
8 Court to be aware of.

9 JUDGE CLIFTON: Thank you. I appreciate
10 it. Mr. Carroll, I'll hear you.

11 MR. ENGLISH: I have --

12 JUDGE CLIFTON: No, Mr. English. It's
13 okay. He's always brief.

14 MR. CARROLL: I have only a question on
15 the second page. I don't know if the witness is
16 going to be allowed to -- I just don't know how
17 he's going to testify, but I want to alert you
18 in advance that if he testifies or attempts to
19 incorporate in this hearing any hearing evidence
20 of the other hearing in Arizona, we would have
21 grave exception to that.

22 We have no -- we were not a party to it,
23 we have no idea what happened, and we have no
24 way of, in this particular proceeding,
25 protecting ourselves against an incorporation by

1 reference. The statement he makes is, "During
2 the hearings which led to a new provision in the
3 Arizona Order, UDA testified." Then he goes on
4 to say -- and if he's intending to incorporate
5 that testimony, I won't object. If he wants to
6 state, in his opinion, that that's a
7 recollection of what he thought was said, that's
8 fine. But he cannot urge the Secretary's action
9 based upon another hearing in another record.

10 MR. STEVENS: Your Honor, I would suggest
11 that that argument, able as it is, is an
12 argument that counsel would make on brief after
13 this hearing is closed, objecting to any
14 witness' testimony that should not be considered
15 by the Secretary. The Secretary will consider
16 that representation in legal argument, as he
17 does in every one of these rulemaking
18 proceedings.

19 JUDGE CLIFTON: Well, the matter of
20 evidence, though, do I take judicial notice of
21 what happened in the different rulemaking
22 hearing? If I'm asked, I'll rule on that.

23 MR. STEVENS: Well, on that point, in
24 terms of official notice of other rulemakings,
25 we have done this many times in the past

1 rulemakings. The parties have asked for
2 official notice, the government has asked for
3 official -- official notice is the fact -- you
4 know, is saying to the parties, here we want the
5 record to be knowledgeable about prior
6 activities of this, that or the other thing.

7 It doesn't, of itself, mean that the
8 Secretary, you know, is going to take that
9 information and base a decision on that,
10 assuming legal arguments are made that say you
11 should or you shouldn't. So it's all a matter
12 of making a record which the department will use
13 to determine if any amendments to regulations
14 need to be made.

15 JUDGE CLIFTON: Mr. Brosch.

16 MR. BROSCHE: Better stated than I could.

17 JUDGE CLIFTON: That's high praise,
18 indeed. All right. Now, the witness will have
19 an opportunity. You may proceed.

20 PAUL ROVEY

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

23 DIRECT EXAMINATION

24 MR. ROVEY: First, I apologize for being
25 so controversial. And I didn't even get to say

1 a word yet, other than, yes, I do.

2 My name is Paul Rovey. Our family has
3 dairied in Arizona since the 1920s. We milk
4 Jerseys and we also grow alfalfa and corn silage
5 for our cows. We've been members of the United
6 Dairymen of Arizona, the only dairy cooperative
7 in our state, since the early 1960s. I have
8 served on its board of directors since 1985 and
9 was elected UDA president in 2008.

10 UDA has an in-depth understanding of the
11 producer-handler issue as a result of years of
12 efforts to address the inequity of the pool
13 exemption of large producer-handlers. When we
14 finally won that battle in the Arizona Market
15 Order on both legislative and administrative
16 levels, we and our allies knew that the outcome
17 would be of interest to other Orders.

18 And so I thank you for the opportunity to
19 share our experience with other Milk Marketing
20 Orders and how that experience influences our
21 support of three of the current proposals. A
22 deep commitment to fairness and clear-sighted
23 realism were the foundation of our efforts which
24 began in the mid 1960s to address the
25 producer-handler loophole. That foundation of

1 fairness and realism underpins my comments
2 today.

3 Members of our cooperative are suffering,
4 just like dairy producers all over this country,
5 from the devastatingly perfect storm of low milk
6 prices, high input costs and lack of exports.
7 In the Milk Equity Regulatory Bill that has --
8 if the Milk Regulatory -- that's a tough word.
9 If the Milk Equity Regulatory Bill had not
10 passed in 2006, our producers would be even more
11 devastated than they are right now.

12 The passage of that bill, coupled with
13 the administrative decision issued in February
14 of 2006, resulted in a \$3 million infusion into
15 Arizona, into the Arizona pool each year. I can
16 assure you that without that boost to dairy
17 mailbox prices, the ability of our Arizona dairy
18 industry to weather this storm would be severely
19 threatened.

20 The principle which guided our efforts
21 throughout the producer-handler hearings and the
22 legislative efforts was a fairness that a system
23 designed to ensure a consistent supply, milk
24 supply, should apply equally to all those who
25 are producing milk. UDA, along with other

1 processors and co-ops, successfully demonstrated
2 that producer-handlers who don't pay into the
3 pool ride on the backs of those who do. They
4 gain from the loophole in the law which exempted
5 producer-handlers on the grounds that most are
6 small mom-and-pop operations which do not affect
7 the market.

8 As we all know, producer-handlers who
9 ship more than 3 million pounds of milk a month
10 do not qualify for that exemption. Such large
11 producer-handlers gain at the expense of
12 family-owned dairy farms all across the country.
13 We argue for the level playing field, and both
14 the United States Congress and the Department of
15 Agriculture supported that call for an equitable
16 application of the marketing order regulations.

17 We support Proposal 1 in this proceeding,
18 the elimination of the producer-handler
19 provision as a preventive measure. A claim made
20 repeatedly by producer-handlers during the
21 hearing in 2003 and 2004 addressed the fact that
22 the existing plants represented substantial
23 investments. Those investments were based on
24 anticipated profits calculated on exemptions
25 from pool contributions. Proposal 1 would

1 eliminate any confusion, any miscalculation, any
2 doubt in the processor's mind moving forward
3 about costs. You build an operation that
4 produces more than 3 million pounds per month,
5 you'll be contributing to the pool.

6 During the hearings which led to a new
7 provision in the Arizona order, UDA testified
8 that our members lost between 10 to 14 cents per
9 hundredweight over the period of January 2000
10 through July 2003, amounting to a total loss,
11 over those 42 months, of over \$11.5 million. An
12 earlier Market Administrator computation for the
13 period of September 1997 through January of 1999
14 showed an average blend price loss for the
15 period of over 10 cents per hundredweight, and a
16 total loss to UDA members of approximately
17 \$3 million per year.

18 Since 2006, when the producer-handler in
19 our market began paying in the pool, the blend
20 price has gained that 10 to 14 cents per
21 hundredweight and that \$3 million per year.
22 Under Proposal 1, the individual family-owned
23 farms, which constitute 98 percent of the
24 dairies in the country, will finally have the
25 regulatory protection they should have been

1 experiencing since 1937. It seems appropriate
2 that during a time when the state efforts to
3 support dairy producers checkerboard our
4 country, that this hearing offers the
5 opportunity to bring a cohesive and equitable
6 approach to protect dairy producers' income.

7 We at UDA support Proposal 2, because we
8 are realists and we are business people.
9 Proposal 2 would expand the exempt plant size
10 limit from 150,000 to 400,000 pounds per month.

11 JUDGE CLIFTON: That was how many pounds,
12 the upper end?

13 MR. ROVEY: 150,000 to 450,000.

14 JUDGE CLIFTON: Thank you.

15 MR. ROVEY: Per month. Plants of this
16 size are too small to have a marketwide impact
17 as independent marketers. The dairy industry
18 has worked hard to have a marketplace where
19 small, medium and large dairies can thrive. The
20 same is true for the processing side of dairy
21 economy. The exemption of small plants, which
22 we suggest should be defined as producer-handler
23 manufacturers no more than 450,000 pounds per
24 month, allows them to operate in a sort of niche
25 market that such small plants typically serve,

1 without undue regulation.

2 We support Proposal 26 for similar
3 reasons. Proposal 26 would grandfather the
4 current existing producers between the
5 450,000 pounds and the 3 million-pound limit.
6 These are operations which have already made
7 their investments, and each represents a small
8 impact on the market. The producer-handler
9 exemption has outlived its usefulness, but this
10 grandfather exemption is an appropriate bit of
11 live and let live. We are here today primarily
12 to identify the proposals which we support and
13 to provide reasons and data and background for
14 that support.

15 There is, however, one additional
16 proposal which has drawn our attention, because
17 it merits our strong, unequivocal opposition.
18 Proposal 25 would create individual handler
19 pools. This, in our opinion, would be a
20 disaster. If this proposal was enacted,
21 bottling plants would pay their producers a
22 Class I price and manufacturing plants would pay
23 lower class prices depending on the product
24 line. This will result in chaos in the
25 marketplace, lead to the disintegration of many

1 dairy cooperatives, and destroy the Federal
2 Order system.

3 One of the primary functions of a dairy
4 co-op is to ensure a marketplace for its
5 members. The demand for fluid milk is much more
6 vulnerable to the marketplace and consumer
7 preference. When demand drops during school
8 holidays, for instance, the cows which produce
9 that milk are still productive. The other
10 classes of dairy products help to ensure there
11 is a home for all the milk that is produced.

12 The protection of a stable dairy market
13 is the purpose of the Federal Order system and
14 the blended milk price. The proposal would have
15 the same impact on the American dairy industry
16 as cavalier banking and investment practices
17 have had on the U.S. economy.

18 JUDGE CLIFTON: Now, that's interesting.
19 That is an interesting comparison.

20 MR. ROVEY: The members of the United
21 Dairymen of Arizona have strategically opted to
22 not bottle milk, as it would mean competing with
23 our long-time valued customers, and glut the
24 marketplace. However, only one-third of our
25 production goes to fluid milk, one-third goes to

1 a Class II facility, and the remainder to our
2 manufacturing plant, the third largest in the
3 country, and probably the most versatile in the
4 U.S --

5 JUDGE CLIFTON: Now, before you go on,
6 you read that as if it were written Class II
7 facility, one-third goes to a Class II facility.

8 MR. ROVEY: I'm sorry. It's a Class III
9 facility. I'm sorry.

10 JUDGE CLIFTON: All right. And you're
11 sure that the way -- read it again the way you
12 know it's supposed to be.

13 MR. ROVEY: Okay. However, one-third of
14 our production goes to fluid milk; one-third
15 goes to a Class III facility; and the remainder
16 to our manufacturing plant, the third largest in
17 the country, and probably the most versatile in
18 the U.S., is the -- for Class IV.

19 JUDGE CLIFTON: So roughly a third to
20 fluid, a third to Class III, and a third to the
21 manufacturing plant?

22 MR. ROVEY: Correct. Yes.

23 JUDGE CLIFTON: Thank you.

24 MR. ROVEY: It is UDA's strategy to be
25 creative, agile and diverse, so that when the

1 day comes when there is no government safety
2 net, we can say, fine, not a problem. Proposal
3 25 would be a jugular wound to such a long-term
4 strategy, and not just in our marketplace. The
5 unpredictability of prices would make the dairy
6 industry, already vulnerable to volatile price
7 fluctuations, even more of a rollercoaster.

8 I would like to conclude with a final
9 take-home lesson from our experience with Sarah
10 Farms, one of our largest former
11 producer-handlers in our Order. Hein Hettinga,
12 founder and owner of Sarah Farms, is a
13 remarkable dairyman, a shrewd businessman, a
14 capable competitor, who sells Class I milk to
15 Sams, Costco and Wal-Mart.

16 We buy milk from and sell milk to Sarah
17 Farms. Our relationship is extremely cordial.
18 We balance his excess milk and have traded
19 technical assistance with each other. We
20 communicate regularly, both formally and
21 informally. The relationship between Sarah
22 Farms, a former producer-handler, and UDA, the
23 cooperative whose members are finally getting a
24 fair blended price, could be the poster child
25 for this national hearing on producer-handlers.

1 We believe that the Department of
2 Agriculture owes it to every dairy farmer in
3 this country to do the right thing and level the
4 playing field with regard to large
5 producer-handlers.

6 JUDGE CLIFTON: Thank you very much.
7 This is a thoughtful statement and one that I'm
8 sure will prompt a lot of questions. It looks
9 to me like we need to have the school vacation
10 period coincide with the lowest production from
11 the cows.

12 All right. Who would like to begin
13 cross-examination? You know they're really
14 hungry.

15 Mr. Tosi, any cross-examination?

16 MR. TOSI: I have no specific questions
17 of Mr. Rovey. But, Mr. Rovey, we do appreciate
18 that you took the time to come here and offer
19 your very well-prepared statement. Thank you.

20 MR. ROVEY: Thank you.

21 MR. RICCIARDI: I wanted to ask Mr. Rovey
22 a question. I don't want him to feel bad, so
23 I'll ask him.

24 JUDGE CLIFTON: Mr. Ricciardi, you may.

25 MR. RICCIARDI: Thank you, your Honor.

CROSS-EXAMINATION

1
2 BY MR. RICCIARDI:

3 Q. I'm Al Ricciardi. I'm here on behalf of
4 AIDA. First of all, let me ask you some sort of general
5 questions. Flipping to page 2 of your statement, you
6 indicate in the second paragraph, and again you're
7 talking about another hearing, the 131-124 hearing that
8 occurred, and you state that UDA testified. Who is UDA
9 in that particular sentence? Who specifically
10 testified?

11 A. I don't know who testified. I didn't.

12 Q. You weren't there at the hearing?

13 A. (Shaking head.)

14 Q. You never attended the hearing?

15 A. Not to my recollection --

16 MR. STEVENS: Your Honor, we're not
17 getting a verbal response.

18 JUDGE CLIFTON: If you nod or in some
19 other way let him know, the court reporter
20 doesn't know.

21 THE WITNESS: Okay.

22 JUDGE CLIFTON: Start again. You asked
23 him was he there.

24 BY MR. RICCIARDI:

25 Q. Were you there, sir?

1 A. Not to my recollection.

2 Q. Not to mine either. You did not testify,
3 correct?

4 A. Correct.

5 Q. You did not attend any of the days of the
6 sessions of the hearing, correct?

7 A. Not to my recollection.

8 Q. And you were not involved at that point
9 in presenting any testimony or information at that
10 hearing, correct?

11 A. Correct.

12 Q. So all of the information set forth
13 herein is something that is based upon what someone
14 might have told you about what occurred a few years ago?

15 A. Correct.

16 Q. And who told you?

17 A. The CEO of our co-op.

18 Q. Who was that?

19 A. The CEO of our co-op.

20 Q. And what's his name?

21 A. It would be Keith Murfield.

22 THE COURT REPORTER: I'm sorry. Keith?

23 THE WITNESS: Keith Murfield. K-e-i-t-h,
24 M-u-r-f-i-e-l-d.

25 BY MR. RICCIARDI:

1 Q. He's still the CEO of your co-op?

2 A. Correct.

3 Q. He understands that there's a hearing
4 scheduled for now?

5 A. Yes.

6 Q. He was aware and was noticed that he
7 could provide potential testimony here?

8 A. Yes.

9 Q. And he instead decided to send you, who
10 doesn't have any personal knowledge about what occurred,
11 correct?

12 A. Yes.

13 Q. Okay. Who wrote this statement?

14 A. The staff at UDA and myself. The United
15 Dairymen and myself.

16 Q. Okay. And that would include the lawyers
17 for UDA?

18 A. I don't believe the lawyers were involved
19 at all in this.

20 Q. So -- and I'm sorry, Mr. Rovey. So the
21 staff would include whom?

22 A. Keith, our CFO. I'm trying to think of
23 his -- Mark Hocking, M-a-r-k, H-o-c-k-i-n-g, and Francis
24 Lechner, F-r-a-n-c-e-s, L-e -- I don't know exactly. I
25 would have to look her name up if you need that.

1 Q. Yeah, we would. Do you know their
2 respective positions at UDA?

3 A. Keith, CEO.

4 Q. Right.

5 A. Mark is our CFO. And Francis is the
6 producer-relations individual.

7 JUDGE CLIFTON: I don't want to interrupt
8 you, but I've got to get the best spelling we
9 can, even though it's a guess. Mark is spelled
10 how, your CFO?

11 THE WITNESS: M-a-r-k.

12 JUDGE CLIFTON: Okay. And his last name?

13 THE WITNESS: H-o-c-k-i-n-g.

14 JUDGE CLIFTON: All right. And how do
15 you say Francis' name?

16 THE WITNESS: I can give you a spelling
17 here in just a second.

18 JUDGE CLIFTON: Oh, great.

19 THE WITNESS: F-r-a-n-c-i-s and
20 L-e-c-h-n-e-r.

21 JUDGE CLIFTON: L-e-c-h-n-e-r, Lechner.

22 THE WITNESS: Lechner.

23 JUDGE CLIFTON: And Francis, even though
24 it's a she, she spells it c-i-s?

25 THE WITNESS: (Nodding head.)

1 JUDGE CLIFTON: Thank you.

2 BY MR. RICCIARDI:

3 Q. And so the information that's contained
4 in this statement came from those three individuals?

5 A. Yes.

6 Q. Can you point out to me a sentence in
7 here that you had input to?

8 A. The original part where I say, "My name
9 is Paul Rovey," and my family information and those
10 things.

11 Q. So the first paragraph you have personal
12 information, and you had input on, correct?

13 A. Correct.

14 Q. The rest of it was written by somebody
15 else?

16 A. Correct.

17 Q. And the rest of the knowledge came from
18 somebody else?

19 A. Correct.

20 Q. And the rest of the information that
21 you're trying to present is from third parties who
22 aren't here at this hearing, correct? Third people,
23 people at UDA, not you?

24 A. Correct.

25 MR. RICCIARDI: Your Honor, I move to

1 strike it.

2 JUDGE CLIFTON: Who wants to respond?
3 I'll start with Mr. Brosch.

4 MR. BROSCH: I'm sorry, your Honor.
5 Mr. Rovey is the president of United Dairymen of
6 America. The United Dairymen of America is an
7 institution, and their members have the right to
8 choose --

9 MR. STEVENS: Lean into the mic.

10 MR. BROSCH: I'm sorry. United Dairymen
11 of America is an institution and has the right
12 to choose who comes forward and speaks on their
13 behalf. This is an institutional decision, this
14 is institutional knowledge. He's the president,
15 he has as much ability to speak on behalf of
16 this organization as anybody, your Honor. This
17 is -- this is the position of United Dairymen of
18 America in the person of Mr. Rovey.

19 JUDGE CLIFTON: Let me hear the other
20 objections first, Mr. Ricciardi. Mr. English.

21 MR. ENGLISH: Your Honor, I don't have an
22 objection. I certainly join with Mr. Brosch.
23 The fact of the matter is, an institutional
24 statement --

25 JUDGE CLIFTON: No. I meant objections

1 to his motion to strike. That's what I meant.

2 MR. ENGLISH: Oh. Yes, I certainly
3 object to the motion to strike. I'm sorry, go
4 ahead.

5 MR. BROSCHE: For clarification, I think I
6 misspoke and said United Dairymen of America.
7 It's United Dairymen of Arizona. Excuse me.

8 JUDGE CLIFTON: Thank you. Mr. English.

9 MR. ENGLISH: Your Honor, different
10 businesses have different obligations, even as
11 many people are coming and going in this
12 proceeding. United Dairymen of Arizona is
13 certainly entitled to speak through its
14 president. It's an institutional statement.

15 I would point out that the Department of
16 Agriculture's summary of the testimony of United
17 Dairymen of Arizona found, in that proceeding,
18 precisely what this witness has testified to.
19 But the fact of the matter is that this witness
20 has appeared, he is who's available, and the
21 statement should be admitted.

22 JUDGE CLIFTON: Now, Mr. Ricciardi.

23 MR. RICCIARDI: Thank you, Judge. Yes, a
24 corporation, LLC, or other entity certainly has
25 the right to choose who it intends to bring in.

1 On the other hand, that person who's chosen must
2 have some basis and personal knowledge to be
3 able to give the statement.

4 My clients, AIDA and its representative
5 members, are entitled to a full, fair
6 opportunity to cross-examine the basis for any
7 statement. Tell me how in the world, when three
8 people who are not here, who aren't sworn under
9 oath, who I can't cross-examine, how can I
10 cross-examine a statement? My opinion would be,
11 Judge, you can let in the title, the testimony
12 of Paul Rovey, and the first paragraph, and
13 everything else should be stricken.

14 JUDGE CLIFTON: Mr. Beshore, did you want
15 to speak? And then I'll hear from Mr. Brosch.

16 MR. BESHORE: I did very briefly. I
17 mean, I join the objections and the motion to
18 strike. Were your Honor to prohibit
19 institutional testimony in this proceeding, we
20 would have very, very little, if any, testimony
21 to be brought here, because persons such as, for
22 instance, just Mr. Tonak -- he's the CEO of his
23 company. He testified to a lot of things, but
24 not all of which he personally, you know,
25 prepared or handled himself.

1 And I would say every witness --
2 virtually every witness, if not absolutely every
3 witness, is of the same nature in terms of
4 testifying to things that they didn't personally
5 prepare. The government witness -- of course,
6 not everybody from the government, from Dairy
7 Programs, is going to be required to come in
8 here -- who was involved in preparing exhibits,
9 is going to be required to come in here and
10 testify, but we have someone to testify about
11 that, and about the information that they take
12 from other people.

13 Representatives from cooperatives are
14 certainly capable of testifying to information
15 about their cooperatives. Mr. Ricciardi can
16 cross-examine him, and he can say, USDA, you
17 ought to toss it because he didn't personally
18 prepare it, but that goes to weight, not the
19 admissibility of the testimony.

20 JUDGE CLIFTON: Mr. Brosch.

21 MR. BROSCH: Your Honor, we have had a
22 lot of testimony today, and days before, and I
23 think we will have in future days --

24 JUDGE CLIFTON: It's very hard to hear
25 you. You're just too tall.

1 MR. BROSCHE: I know, your Honor. That's
2 what my daughter says all the time.

3 JUDGE CLIFTON: I didn't hear you, Dad.

4 MR. BROSCHE: We have had a lot of
5 testimony, your Honor, in the last few days
6 about institutional knowledge, people, things
7 that people know about their institutions that
8 go back before they were born, necessarily, or
9 they were involved in the institution. I was
10 just looking at Mr. Tonak's testimony, which is
11 admitted in the record. He, for example, says
12 that Manitowoc, Wisconsin's producer cooperative
13 was organized in 1933, that Brookfield -- that
14 the Milwaukee Cooperatives was formed in 1916.
15 These are things he didn't have any personal
16 knowledge of, your Honor. He has institutional
17 knowledge of those things.

18 If we were to start this charade, we
19 would be going back through the record moving to
20 strike all sorts of things in here. That's
21 useful information for the Department. This
22 goes to the weight of evidence, not to the
23 admissibility, your Honor. This gentleman is
24 speaking on behalf of his producers, on behalf
25 of his cooperatives, and he's entitled to make

1 this testimony.

2 MR. STEVENS: Your Honor.

3 JUDGE CLIFTON: Mr. Stevens.

4 MR. STEVENS: I think we're going off on
5 a track here that is not helpful to the creation
6 of a record for the Secretary to review. If
7 this becomes a standard, this motion to strike
8 becomes a standard, then I think we would have
9 to review all the testimony that has gone
10 before. And maybe the motions haven't been
11 made, but the same standard could be applied to
12 all that.

13 And I put to you, your Honor, that the
14 same standard would be applied to the testimony
15 of Mr. Ricciardi's witnesses, if that's the
16 case. I mean, in other words, if he's going to
17 make that kind of objection, then what's to
18 prevent any of counsel from making the same
19 objection to all of his testimony that is of the
20 same nature?

21 We weigh that testimony. It's not -- it
22 is something that is done in every one of these
23 proceedings. Institutional decisions are made,
24 references are made to prior rulemakings. The
25 prior rulemakings stand on the record. For this

1 gentleman to talk about what was said in a prior
2 rulemaking, he can say whatever he wants, but
3 the rulemaking itself is the best evidence of
4 that, the Secretary's summary of testimony or
5 that part of the Federal Register that puts that
6 forth. This gentleman can say whatever he
7 wants.

8 But let's not go down a road where
9 counsel can seek to limit the testimony of
10 witnesses on the basis that the witness did not
11 have personal knowledge of what the institution
12 that he is here representing is putting forth
13 for the use of the Secretary in deciding what
14 proposals should be amended or not.

15 JUDGE CLIFTON: Thank you all. I'm glad
16 Mr. Ricciardi asked the questions he did,
17 because I was quite surprised that Mr. Rovey had
18 authored so little of this document. When a
19 witness comes and says, this is my testimony,
20 without any explanation that we in the office
21 pulled this together, I am surprised when so
22 little of it is authored by the witness.

23 I agree, however, that the objection goes
24 to the weight rather than the admissibility.
25 Had I known that this was a common way of

1 putting these statements together, I would have,
2 from the very beginning, asked more questions
3 about who authored the statement. That would
4 have been my approach, Mr. Stevens. And I know
5 you look at me as if I'm unrealistic here, but I
6 believe most of the statements that we have
7 heard have been authored, for the most part, by
8 the people who delivered them.

9 Now, if someone comes from the Department
10 of Agriculture of a state, I know they relied on
11 their people. If someone comes from USDA, I
12 know they relied on their people. I didn't
13 realize how heavily Mr. Rovey had relied on his
14 people, but now I know, and it's fine with me.

15 I have looked through every paragraph,
16 and there is nothing here that surprises me,
17 knowing that it is the position of his
18 organization rather than just him personally.
19 And he did speak throughout -- what is it, the
20 United Dairymen of Arizona? That's his
21 organization.

22 Now, with many of the witnesses, we've
23 had to ask, now, in this paragraph, who does the
24 "we" mean? Is this "we" my family? Is this
25 "we" the dairy farmers in my milk marketing

1 Order? Or is this "we" all dairy farmers? And
2 I understand Mr. Rovey's statement to be "we,"
3 the United Dairymen of Arizona. And so it is
4 proper for it to be the statement that he
5 presents on behalf of that organization.

6 So I do -- well, has it been -- it hasn't
7 been moved? You moved to strike it, but we
8 haven't had it -- it hasn't been moved into
9 evidence yet, has it? Okay. I would entertain
10 a motion. Mr. Brosch.

11 MR. BROSCH: Your Honor, I move
12 Exhibit 32 into evidence.

13 JUDGE CLIFTON: Any objection?
14 Mr. Ricciardi.

15 MR. RICCIARDI: I do not intend to
16 restate, in my entirety, the basis for my
17 objection. All I will say is, to the extent
18 it's allowed into evidence, I reserve my
19 client's rights to cross-examine the basis for
20 any of these statements. If it's allowed in,
21 then the due process rights have been
22 implicated, and we do not waive them. And we
23 intend to reserve them to the fullest extent of
24 the law.

25 JUDGE CLIFTON: Do you mean you're going

1 to subpoena the people who contributed to its
2 production?

3 MR. RICCIARDI: I don't know what I'm
4 going to do yet, Judge, but I'm just reserving
5 my right with regard to that issue, because I
6 think it's significant.

7 JUDGE CLIFTON: Well, I think your only
8 opportunity to cross-examine is Mr. Rovey. Have
9 you done that sufficiently?

10 BY MR. RICCIARDI:

11 Q. Mr. Rovey, if I ask you questions about
12 everything other than the first paragraph of your
13 statement, would your answer be that the remainder was
14 prepared by three people at UDA that are not here today?

15 A. Yes.

16 MR. RICCIARDI: I've done what I can do,
17 Judge.

18 JUDGE CLIFTON: That doesn't mean he
19 can't speak to them.

20 MR. RICCIARDI: Judge, I'm not asking
21 another question, because I don't have -- let me
22 get back to the microphone.

23 Judge, to ask me to ask the witness, who
24 has no basis to respond to a statement he didn't
25 prepare, that's going to be given under oath, is

1 the height of absurdity. I have nothing further
2 I can ask, and I am done.

3 JUDGE CLIFTON: You can. You can ask
4 about everything in here.

5 MR. RICCIARDI: Your Honor, I'm not going
6 to ask a question.

7 JUDGE CLIFTON: All right. That's your
8 right.

9 MR. RICCIARDI: I know it is.

10 JUDGE CLIFTON: Okay. Good. Any other
11 questions of this witness?

12 Mr. Carroll.

13 CROSS-EXAMINATION

14 BY MR. CARROLL:

15 Q. Good afternoon. I'm John Benjamin
16 Carroll with the firm of Carroll & Carroll Lawyers, PC,
17 Syracuse, New York, and I've had some experience in your
18 market. I wanted to ask you if you remember a
19 producer-handler by the name of Rasmussen in your days.

20 A. I've heard of the name. That's it.

21 Q. Or Dades, Charles Dades?

22 A. No.

23 Q. They're all producer-handlers I
24 represented. Are those people in business today, to
25 your knowledge?

1 A. No.

2 Q. I don't believe they are. And isn't it
3 so, then, producer-handlers can come and go in business
4 just like any other business?

5 A. Yes.

6 Q. Now, directing your attention to the
7 Class I sales that were available in Arizona before
8 there was any change in Mr. -- I'm not even going to say
9 the last name, but the dairyman who was involved, can
10 you tell us the difference between the Class I sales in
11 the market before his regulation and the Class I sales
12 in the market after his regulation?

13 A. The Class I sales would have changed by
14 population, by consumption, per capita consumption.

15 Q. In other words, they're subject to a lot
16 of factors?

17 A. A lot of factors.

18 Q. Okay. Are you the only cooperative
19 dairyman's association in Arizona?

20 A. Yes.

21 Q. And if I were a farmer in Arizona, would
22 I have to belong to your organization in order to market
23 my milk or --

24 A. No.

25 Q. Okay. And I could draw -- I could join

1 another co-op?

2 A. You could market in some other co-ops in
3 California. We have those producers.

4 Q. Okay.

5 A. We don't have the producers as UDA.
6 Those producers exist.

7 Q. But they would have an opportunity to
8 market in California, you say?

9 A. Correct.

10 Q. But not in Arizona?

11 A. Correct.

12 Q. I'm interested in your comment that
13 you're trying to prepare a safety net as a matter of
14 policy. Can you tell me what you mean by "safety net"?

15 A. As I stated in there, it says that we
16 have a variety of products that are versatile and
17 different products that we can market.

18 Q. Well, what does "safety net" mean? I
19 think I know what the words mean, but how do you mean
20 them?

21 A. My explanation of safety net would be
22 that I would have opportunities to continue to market my
23 product.

24 Q. Right. And were you considering the fact
25 that your organization draws from the United States --

1 gets United States governmental support on its
2 manufactured products?

3 A. Indirectly.

4 Q. And can you tell us how much a year that
5 amounts to?

6 A. I don't have any idea.

7 Q. Have you ever heard or discussed it in
8 any way?

9 A. No.

10 Q. No one has ever bothered to tell you
11 that?

12 A. No.

13 Q. And what was your title again? I'm
14 sorry.

15 A. I'm president of the United Dairymen of
16 Arizona.

17 Q. Are you a farmer, yourself?

18 A. Correct.

19 Q. Okay. And you hire people to do work
20 like that, I take it?

21 A. Correct.

22 Q. Okay. And you never bothered to ask them
23 how much money the government was paying to keep you in
24 business?

25 A. No.

1 Q. Do you know the ratio between Class I and
2 Class III in your organization -- or in your market,
3 really? In other words, do you know what the percentage
4 is for manufactured as opposed to Class I sales?

5 A. As I stated, it's approximately 30
6 percent Class I, 30 percent Class III, and 30 percent
7 manufactured. It's 33 percent on all of those.

8 Q. Right. So your Class I is really,
9 roughly, one-third of the market?

10 A. Correct.

11 Q. Are you producing for Class I? I mean,
12 is that your main goal, and all this other is surplus to
13 that?

14 A. We have to have additional milk to
15 balance our customers' needs.

16 Q. I understand that. Do you need
17 two-thirds to balance their needs?

18 A. It's not balancing. The Class III is a
19 market, it's a viable market, as well as the
20 manufacturing is a viable market, of which we are
21 supplying that market.

22 Q. And what goods do you manufacture?

23 A. Milk protein concentrate, skim milk
24 powder, nonfat dry milk.

25 Q. And to whom do you sell that?

1 A. A variety of customers.

2 Q. Do you know who the major customers are?

3 A. I don't have those names.

4 Q. Okay. Do you sell it to the United
5 States government?

6 A. No.

7 Q. Okay. Now, can you tell me if your
8 safety net concept isn't related to the fact that
9 someday you may not have these governmental subsidies?

10 A. Your Honor, I don't understand that
11 question.

12 Q. Okay. Well, you said that, you know,
13 that you have a general idea that there's a -- your
14 program is a safety net, right?

15 A. (Nodding head.)

16 Q. And is it a safety net against the
17 possible change in the legislation in the future when
18 the American public gets tired of paying for all this
19 surplus and the government cuts the money? Are you
20 making preparations for that day?

21 A. We are making a variety of products that
22 will allow us the opportunity to market a variety of
23 those products.

24 Q. That is directly on your own?

25 A. Correct.

1 MR. CARROLL: All right. That's all.
2 Thank you, sir.

3 JUDGE CLIFTON: Thank you, Mr. Carroll.
4 Is there any other cross-examination?

5 Mr. Tosi.

6 CROSS-EXAMINATION

7 BY MR. TOSI:

8 Q. Hello again, Mr. Rovey. I'm kind of
9 confused after all of the what's your position and what
10 isn't. The first paragraph is personal information
11 about you?

12 A. Correct.

13 Q. The balance of this statement is you're
14 speaking on behalf as president of UDA?

15 A. Correct.

16 Q. And you're representing the opinions and
17 positions of UDA?

18 A. Correct.

19 Q. In some of your other work, does the UDA
20 staff prepare things for you because you're the
21 president, and you can ask them to do it, and you decide
22 whether you like it or not, if you're going to use
23 whatever they prepare?

24 A. Yes, sir.

25 Q. All right. I just wanted to make sure

1 that this is being offered as the position of UDA and
2 you were nice enough to tell us something about
3 yourself?

4 A. Correct.

5 Q. Okay. At the bottom of the first page of
6 your testimony, it continues on to page 2 at the very
7 top, and I'm left with the impression that you think
8 Proposal 1 is prosing to set a cap at 3 million pounds?

9 A. That's correct.

10 Q. Okay. If Proposal 1 said that they were
11 proposing to eliminate the producer-handler provision,
12 would you still be in support there of Proposal 1?

13 A. Maybe I read it wrong.

14 Q. Let me ask it a different way. Do you
15 support the proposal that seeks to eliminate the
16 producer-handler provision in all Federal Orders?

17 A. As we stated in here, if they had the
18 producer-handler provision, that their cap would be at
19 3 million pounds.

20 Q. Okay.

21 JUDGE CLIFTON: I agree with you,
22 Mr. Tosi. At the top of page 2, the statement
23 reads "Proposal 1 would eliminate any confusion,
24 any miscalculation, any doubt in a processor's
25 mind" going "forward about costs: You build an

1 operation that produces more than
2 3 million pounds per month," and "you'll be
3 contributing to the pool."

4 MR. TOSI: That's what causes the
5 confusion, your Honor. Part of the paragraph is
6 clear that it supports the elimination of the
7 provision, and in the next breath it seems to
8 suggest that the Federal Order program should
9 keep the producer-handler provision, or it may
10 even suggest that the exempt plan provision be
11 increased to 3 million pounds, however you want
12 to characterize some sort of limit that's going
13 to be placed on when the order -- you know, how
14 much the Federal Order program can tolerate
15 certain entities being exempt from pooling and
16 pricing provisions.

17 JUDGE CLIFTON: Yeah. Because of what
18 the paragraph about three paragraphs down, where
19 it directly evaluates Proposal 2, I don't think
20 it confuses Proposal 1. I think it says two
21 different things. It says eliminating the
22 producer-handler, and then it says knowing that
23 the producer-handler will be limited to
24 3 million pounds per month. It says both those
25 things.

1 So I agree with you that that's not
2 clear, that maybe perhaps what it meant is
3 Proposal 1 and Proposal 26 combined, but not
4 really, because it seems to address people who
5 might in the future become processor-handlers,
6 not just those grandfathered in. So it is not a
7 clear paragraph. And, Mr. Rovey, you should
8 have done it yourself.

9 THE WITNESS: Sorry.

10 MR. TOSI: I think at this point, I'm
11 just adding confusion that -- I think you can
12 just leave it as it is.

13 JUDGE CLIFTON: Mr. Brosch.

14 MR. BROSCH: Is everybody done on cross,
15 your Honor?

16 JUDGE CLIFTON: Yes. Everyone is done.

17 MR. BROSCH: May I do some redirect?

18 JUDGE CLIFTON: You may.

19 MR. BROSCH: I apologize, but Mr. Tosi
20 made me do it. There's no doubt about it. I'm
21 going to ask your Honor if your Honor would give
22 Mr. -- I want to clarify this question that
23 Mr. Tosi has asked. Could your Honor give him
24 Exhibit Number 23, please?

25 JUDGE CLIFTON: Yes. Page 15?

1 MR. BROSCHE: Page 15. We're going to go
2 through page 15 again.

3 REDIRECT EXAMINATION

4 BY MR. BROSCHE:

5 Q. I'm giving you a copy of Mr. --
6 Dr. Cryan's testimony that was given the other day. And
7 on page 15, you will see a copy of the legal language
8 that National Milk is proposing to implement, its three
9 proposals. That is Proposal 1, Proposal 2 and number
10 26. Those three are being offered as a package of
11 proposals. Now, does United Dairymen of Arizona support
12 National Milk's position with respect to Proposals 1, 2
13 and 26?

14 A. Correct.

15 Q. All right. If you would please look at
16 the language, I want to point out there, are you aware
17 that because of the proposals, there's going to have to
18 be some change in the terminology in the regulation?

19 A. Yes.

20 Q. And if you would please look at the copy
21 of the -- of that proposal, and look at the language of
22 the proposed regulation, and the strikes for a moment,
23 just study it for a minute, okay?

24 A. Okay.

25 Q. Okay. Having looked at that, are you

1 aware that National Milk's Proposal 1 is to strike in
2 this regulation the reference to the term
3 "producer-handler"?

4 A. Correct.

5 Q. Are you aware that as part of Proposal 2,
6 they're going to -- they propose to change the
7 definition for exempt plant, which currently exists at
8 150,000 pounds, and raise that to 450,000 pounds?

9 A. That's correct.

10 Q. And are you aware that with respect to
11 their Proposal 26, they propose to add an additional
12 definition of exempt plant, which would be defined as a
13 plant that had been a producer-handler during --
14 operated during the 2008 period under a Federal Order,
15 and which served -- which currently sells 3 million
16 pounds or less in a month under plant -- products that
17 are uniquely branded?

18 A. Correct.

19 Q. All right. And with that -- now, is
20 United Dairymen of Arizona in support of those three
21 proposals as presented by National Milk?

22 A. That is correct.

23 MR. BROSCH: Thank you, Mr. Rovey. No
24 further questions, your Honor.

25 JUDGE CLIFTON: All right. Please go to

1 the bottom paragraph on page 1 of your exhibit,
2 Mr. Rovey. And looking at that whole paragraph,
3 and as it continues on to page 2, read to me the
4 way you want that paragraph to be understood as
5 representing the position of your organization.

6 THE WITNESS: I'm going to say it in just
7 plain words, that we would change the wording of
8 the producer-handler wording to create it so
9 that an existing producer that was producing in
10 2008 would be able to produce up to
11 3 million pounds of milk.

12 JUDGE CLIFTON: So a producer-handler,
13 who was a producer-handler in 2008, would be
14 allowed to continue, though, with a new name?

15 THE WITNESS: Correct.

16 JUDGE CLIFTON: And would be able to keep
17 an exemption up to 3 million pounds per month?

18 THE WITNESS: Correct.

19 JUDGE CLIFTON: That clarifies it for me.
20 All right. Is there any objection to the
21 admission into evidence of Exhibit 32?

22 MR. RICCIARDI: Your Honor, do I have to
23 get up there to make my objection?

24 JUDGE CLIFTON: I can't hear you, but
25 yes, you do. That's why, because I can't hear

1 you.

2 MR. RICCIARDI: I'm sorry, Judge. I was
3 back there trying to get something. Yes, your
4 Honor, I do, I renew the objection that I made
5 as part of the motion to strike, without
6 articulating it again.

7 JUDGE CLIFTON: Thank you. That was very
8 efficient. Over objection, I do admit into
9 evidence Exhibit 32.

10 Mr. Rovey, thank you. You may step down.

11 THE WITNESS: Thank you.

12 JUDGE CLIFTON: And I need to retrieve
13 that if you will hand it to me.

14 Thank you. Good. Does everyone agree
15 this is a good time for a lunch break?

16 MR. MILTNER: Absolutely.

17 JUDGE CLIFTON: Absolutely. So, let's
18 see. It's 1:42. I hope you can still get
19 lunch. Mr. English.

20 MR. ENGLISH: I just want to say that
21 Mr. Buelow, I believe, is the next witness up.

22 JUDGE CLIFTON: I'm going to take Mr. --
23 I'm going to take the dairy farmer.

24 MR. ENGLISH: All right.

25 JUDGE CLIFTON: I'm going to take

1 Mr. Dakin.

2 MR. ENGLISH: I understand he's a dairy
3 farmer, although I would point out that
4 Mr. Buelow has been on the list since Monday,
5 but I understand. I'm just going to say that I
6 need to get Mr. Buelow on after that.

7 My next concern is what we have with
8 Mr. Kastel versus Mr. Gary Lee. It turns out
9 Mr. Lee has a restriction, because the pilot of
10 his plane is on a time restriction, so he can't
11 stay till 9:00 or even past 7:00. I'm trying to
12 find out. He has to be airborne by 7:00 p.m. if
13 he's going to go on. He can come back next
14 week. It's not ideal. He flew in especially
15 for today to handle this, so it's not ideal.

16 We are prepared to be somewhat flexible,
17 but we would like to know now, because with
18 thunderstorms, it may be easier for him to
19 leave. I just want to understand what the
20 issues are. I don't know how long Mr. Kastel's
21 statement is, I don't know how long the
22 cross-examination may be. Mr. Miltner may have
23 some idea of that.

24 MR. MILTNER: I don't have anything on
25 Mr. Kastel. But I did speak with Mr. Dakin, and

1 his flight is at 6:00. So we would
2 appreciate --

3 JUDGE CLIFTON: He has to leave by at
4 least 4:00.

5 MR. MILTNER: We would appreciate, your
6 Honor, if we did him right after lunch.

7 MR. ENGLISH: And I'm willing to concede.

8 MR. MILTNER: Thank you. And I think --

9 JUDGE CLIFTON: Let me ask, Mr. Kastel,
10 would you come forward, please? I know you must
11 be exhausted. Are you willing to yield to
12 Mr. Buelow? And I have known, from the
13 beginning of the hearing, that he would testify.

14 MR. KASTEL: Your Honor, I don't know
15 what the implication is. Is that the gentleman
16 who has the pilot waiting?

17 JUDGE CLIFTON: Yes. And --

18 MR. ENGLISH: No. Mr. Lee is the one
19 with the pilot.

20 JUDGE CLIFTON: Oh. So, I got that mixed
21 up.

22 MR. ENGLISH: I have two witnesses, your
23 Honor. I've already given away one.

24 JUDGE CLIFTON: You're not giving away
25 Mr. Wilcox. I can still call him. Don't give

1 him away. I want to do an even dozen.

2 MR. KASTEL: As I understand it, your
3 Honor, there's a dairy farmer that's up --

4 JUDGE CLIFTON: Mr. Dakin will be first.

5 MR. KASTEL: -- on deck here. I don't
6 have a pilot waiting. I pilot my own
7 automobile, and I don't have the flexibility of
8 coming back next week. And it would be a --
9 quite a disadvantage to extend this period over
10 today. So if I could testify after the next
11 witness, that would --

12 JUDGE CLIFTON: Let's see. If I did
13 that, it would Dakin, then Buelow, then Kastel,
14 then Lee.

15 MR. ENGLISH: And so you understand,
16 Mr. Lee has to be to the airport by 7:00 p.m.

17 JUDGE CLIFTON: Okay. We'll make sure it
18 happens. All right. Please, it's about 1:45.
19 Please come back at 2:45.

20 (A luncheon recess was take from 2:46 to
21 2:49.)

22 JUDGE CLIFTON: All right. Let's go back
23 on record. We're back on record at 2:49, and I
24 have a witness in the witness chair. And I'll
25 ask him to identify himself. Would you please

1 state your name and spell it?

2 MR. DAKIN: Jerry Dakin, J-e-r-r-y,
3 Dakin, D-a-k-i-n.

4 (The witness was sworn.)

5 JERRY DAKIN

6 of lawful age, being first duly sworn, was examined and
7 testified as follows:

8 DIRECT EXAMINATION

9 JUDGE CLIFTON: Now, speak that into the
10 microphone just like you did.

11 MR. DAKIN: Yes.

12 JUDGE CLIFTON: Thank you. The best way
13 to proceed, I think, Mr. Dakin, is to tell us
14 enough about yourself so we'll know how you fit
15 into the milk universe.

16 MR. DAKIN: Yes. I'm a third generation
17 dairy farmer, right now currently milking a
18 little over 1,400 cows. We're in southeast
19 Florida. We're one of the last farms to Miami.
20 We are raising about 1,000 heifers. Crops, we
21 do about 600 acres of corn. We have 2,000 acres
22 of grass for grazing, and hay that we do.

23 And then in 1997, I split off from my
24 brother and -- with 230 cows, and working at my
25 dad's place, built my herd up to 750 cows. In

1 2004, I built the new dairy I'm at, and I built
2 it a little bit at a time. When we had money,
3 we built, and we've been able to get to the
4 1,400 cows now.

5 In 2006, we started a compost, doing
6 composts and selling manure on the -- I mean,
7 selling our compost on our farm. Here in the
8 fall of October 2008, we started our ag. tour.
9 Since then, since the end of October, we've had
10 8,000 people come through our ag. tour, a new
11 venture we're doing. We built -- in 2006, we
12 built our processing plant, and we opened up in
13 March, a month-and-a-half ago in March. We are
14 bottling our own milk -- I mean bottling some of
15 our milk.

16 We're currently a DFA member. And, you
17 know, taking the milk to the bottler, it's
18 always been a dream of ours. I mean, it's
19 just -- you know, the day that that milk came
20 off that line, that was a proud day. I mean,
21 there was a lot that went into that. And, you
22 know, this is -- with producer-handler, it's
23 always been a thing for us.

24 You know, when we worked our business
25 plan, this was an opportunity for us to get into

1 this, to help pay to keep this, to process it.
2 And then -- you know, and the other thing is to
3 be able to control our destiny. That's one of
4 the biggest things we're looking at. We're the
5 last ones down there in the southeast, and, you
6 know, it's not easy farming down there. And
7 that was another reason, and for the younger
8 generation coming into this, you know, to be
9 able to create some niche markets.

10 In the past, the milk prices, you know,
11 with the yo-yoing, going up and down and
12 everything, it's tough to deal with this. I
13 mean, just here in the last four months, I mean,
14 that milk price dropped down. I mean, it was
15 \$170,000 lost income to our farm. I mean -- and
16 I'm right there with the farmers on this, but,
17 you know, it goes all back to marketing. I feel
18 like sometimes we can market these things better
19 ourselves, you know, with me having the ag.
20 tours and just being down in the community. I
21 mean, it's amazing the people we're bringing
22 into that farm now, I mean the education that
23 we're giving to people.

24 And, you know, to be able to milk that
25 cow and, in four to six hours, put it in a

1 bottle is pretty amazing. I mean, it's just --
2 people love it. And, you know, with it being
3 local, and the local sustainability, the
4 specialty markets. I mean, we're looking
5 into -- you know, and we're focusing on selling
6 a premium milk and a premium yogurt and other
7 products, but, I mean, we're just -- we're not
8 looking to being as just a cheap man just
9 throwing the stuff out there on the block. I
10 mean, we're taking pride in what we're doing.

11 And, you know, the thing -- one of the
12 things is, your average food travels 1,500 miles
13 to get to you. And with the energy costs going
14 up and everything, you know, we keep getting
15 this western milk and everything coming out all
16 the way. I mean, I'm looking at how we can stop
17 that and still keep our culture in our
18 community. You know, another thing we're
19 looking at is grazing, going into the grazing.
20 There's just a lot more opportunities.

21 And then the decrease in farmers, dairy
22 farmers. I mean, we keep losing them, you know,
23 and this is just another way for me to stay in
24 this. And, you know, we talk about the
25 producer-handler, I mean the producer-handlers

1 disrupting the milk market. Just in the last
2 week here, Winn-Dixie had their milk for 2.50,
3 Publix was 2.69, Wal-Mart 2.59. I'm selling it
4 for the distribution for 2.60, and I'm selling
5 it on my little farm still for 2.99. I don't
6 see where I am disrupting the milk market at
7 all.

8 And, you know, it's the -- and from my
9 plant -- from the plant -- from the dairy to the
10 plant, it's about a \$3 to \$4 spread. And that's
11 pretty much it.

12 JUDGE CLIFTON: Now, explain that part to
13 me, the \$3 to \$4 spread from the dairy to the
14 plant.

15 MR. DAKIN: From what -- from the check I
16 get as a farmer, and then I pump it 100 feet,
17 and then the plant pays a different price to the
18 co-op.

19 JUDGE CLIFTON: And that is a plant --
20 you're talking about a plant that is not your
21 plant?

22 MR. DAKIN: Yes, ma'am, it is my plant.

23 JUDGE CLIFTON: That's your plant? Okay.

24 MR. DAKIN: Yes, ma'am. It all sits on
25 320 acres, the farm.

1 JUDGE CLIFTON: All right. So the added
2 value by processing it yourself is \$3 to \$4?

3 MR. DAKIN: \$3 to \$4 is what I'm paying
4 the co-op for -- to -- just to handle this -- to
5 handle this. And I've only been in it for a
6 month-and-a-half, so I don't know exactly -- you
7 know, I don't know all the -- everything about
8 it right yet. I mean, I'm here to stand here
9 for the producer and the handler. I mean, this
10 has been an option for me just to keep open. It
11 may not be the best thing for me, but, I mean,
12 I'm here to just -- I mean, right now, I mean
13 we're looking at it being an option for us to be
14 able to have this.

15 JUDGE CLIFTON: So what was the
16 first month in which you were recognized as a
17 producer-handler?

18 MR. DAKIN: Right now, I'm not a
19 producer-handler yet.

20 JUDGE CLIFTON: Okay. But you said you
21 did start processing in March?

22 MR. DAKIN: Yes, ma'am.

23 JUDGE CLIFTON: Of 2009?

24 MR. DAKIN: Yes, ma'am.

25 JUDGE CLIFTON: All right. And what do

1 you have to do to gain producer-handler status?

2 MR. DAKIN: I would have to be able to
3 sell all my milk.

4 JUDGE CLIFTON: Okay. So your milk --
5 you don't have control over the eventual
6 disposition of your milk at this time?

7 MR. DAKIN: No, ma'am. Not at this time.

8 JUDGE CLIFTON: I see what you're saying.
9 So what you're in favor of is what?

10 MR. DAKIN: To be able -- a 3 million --
11 a 3 million-plus -- anything -- a
12 3 million-pound exemption, and anything over to
13 pay into the pool.

14 JUDGE CLIFTON: All right. Let's see
15 now. Do you have any other things that come to
16 mind right now before other attorneys, other --
17 whether attorneys and other parties begin to ask
18 you questions?

19 MR. DAKIN: I guess the other thing is,
20 you know, I was up there listening just -- and,
21 you know, they talk about the producer-handlers.
22 And, you know, it takes a special person to be a
23 producer-handler, to go out there and to build a
24 bottling plant there and to be able to go out
25 there in the marketplace and market the milk and

1 everything.

2 I mean, I look to producer-handlers as
3 some of the wisest people out there in the dairy
4 industry. I mean, they're promoting the
5 products out there. And, you know, sometimes,
6 to me, sometimes the producer-handler, they know
7 what the consumer needs. Sometimes we're
8 getting so big that the consumer doesn't have
9 any control over that.

10 JUDGE CLIFTON: The consumer doesn't have
11 any control over?

12 MR. DAKIN: Well, I mean, if we keep --
13 if we don't have any producer-handlers, there's
14 just -- how I guess -- I guess how would I say
15 it? I mean, there's just special niche markets
16 out there, and I think the producer-handlers can
17 handle -- would be able to handle the markets
18 better than the bigger industries.

19 JUDGE CLIFTON: I'll open the floor for
20 cross-examination.

21 Mr. English, would you begin?

22 CROSS-EXAMINATION

23 BY MR. ENGLISH:

24 Q. Good afternoon. My name is Charles
25 English. I represent a coalition of fluid milk

1 processors, all of whom are subject to the Federal milk
2 market regulation. I won't keep you very long, sir.
3 And if I ask you any questions you don't want to answer
4 for confidentiality reasons, you're certainly welcome
5 not to answer them.

6 I just want to be clear. Before March of
7 this year, you were not operating the processing plant,
8 is that correct?

9 A. Yes, sir.

10 Q. And in March of this year, did you
11 qualify as an exempt facility under the Federal Order?

12 A. No, sir.

13 Q. So does that mean that for the month of
14 March you were required to make a payment to the
15 producer settlement fund for Order 6 --

16 THE COURT REPORTER: I'm sorry. I lost
17 your question.

18 BY MR. ENGLISH:

19 Q. Were you required to make a payment to
20 the Producer Settlement Fund for Order 6 for the month
21 of March?

22 A. The DFA, my co-op, made the payment. I
23 think so. You know, to my knowledge, I mean, we paid
24 into the Federal Order, and DFA received the money. And
25 out of the processing, the check we sent as a processing

1 to the DFA, they took the Federal money out of that to
2 send to the Federal Order.

3 Q. So there's -- so I understand this
4 correctly, you sent a check to Dairy Farmers of America?

5 A. Yes, sir.

6 Q. And then your understanding is they sent
7 that on or accounted for it to the market industry?

8 A. Yes.

9 Q. But you literally had to write a check,
10 whether it was to DFA or the Market Administrator, but
11 your understanding, it was a check for the processing
12 charges, because you were operating a plant for the
13 month of March, correct?

14 A. Yes.

15 Q. And it is your understanding that if you
16 become a producer-handler, that you will no longer have
17 to write that check?

18 A. Yes.

19 Q. And that your model would like to not
20 have to pay that check, correct, that that money that
21 you're having to pay right now, you would just as soon
22 not have to pay, correct?

23 A. Yes.

24 MR. ENGLISH: That's all I have. Thank
25 you.

1 JUDGE CLIFTON: Mr. Carroll.

2 CROSS-EXAMINATION

3 BY MR. CARROLL:

4 Q. Is it Mr. Dirkin, is that right?

5 A. Dakin.

6 Q. Dakin, thank you. You and I have never
7 met. I think this is the first time I've seen you, and
8 I'm sure it's the first time you've seen me, but I've
9 represented producer-handlers all over the United States
10 for 40 years, and some in Florida. Do you remember
11 McArthur's Dairy? Were you in business then?

12 A. Yes, sir. My father was.

13 Q. And it was a large, large
14 producer-handler?

15 A. Yes, sir.

16 Q. All right. Now, what part of Florida are
17 you located in?

18 A. Myakka, Florida, 60 miles south of Tampa.

19 Q. And in that area, do you have a lot of
20 dairy farms?

21 A. No, sir. We're the last -- our family is
22 the last three dairies in the county. There used to be
23 38 dairies in that county.

24 Q. And what's the name of your county?

25 A. Manatee County.

1 Q. Manatee County?

2 A. Yes, sir.

3 Q. I just came back from Florida, and I
4 bought a book on manatees called The Flying Manatee.
5 Did you ever see or hear of that book?

6 A. No, sir.

7 Q. Yeah? Well, they're selling it. I want
8 to tell you, number one, that in our book, you're
9 welcome. But you're not welcome in the book of the milk
10 monopolists of this country, the big processors, the big
11 agricultural co-ops --

12 MR. ENGLISH: I object.

13 BY MR. CARROLL:

14 Q. -- that brought people -- they brought
15 people here --

16 MR. ENGLISH: Your Honor --

17 JUDGE CLIFTON: Mr. Carroll, let me hear
18 the objection.

19 MR. ENGLISH: Your Honor, I didn't even
20 begin to hear the question there. What I was
21 hearing was a speech that was intended in some
22 form as testimony, and that's not appropriate.
23 I object to the discussion that is in the form
24 of testimony by an attorney at the lectern.

25 MR. CARROLL: I'll withdraw the question,

1 your Honor.

2 JUDGE CLIFTON: Thank you.

3 BY MR. CARROLL:

4 Q. Do you understand that the proposals in
5 this hearing put out by the National Milk Producers
6 Federation and the milk dealers together, both together,
7 are to grandfather any producer-handler who had the
8 designation at the time of this hearing notice, but
9 everybody else, like you, can never be a
10 producer-handler? Do you know that?

11 A. Yes.

12 Q. And you approve of that?

13 A. No.

14 Q. And why do you object?

15 A. I object, because I think everybody ought
16 to have the opportunity to be able to go out there and
17 to be able to do this. I don't object to the big
18 companies going out there buying dairy cows and opening
19 dairies up. I mean, I'm not there to stop them from
20 doing that.

21 You know, the thing about it is, you
22 know, I'm out there selling my compost. I mean, is
23 there going to be one day where everybody is going --
24 all the compost people are going to be able to get
25 together and tell me that I won't be able to sell my

1 compost, I'm going to have to give them some money to be
2 able to sell my compost?

3 Q. And you came here from Florida on your
4 own?

5 A. Yes, sir.

6 Q. You don't have any attorney?

7 A. No, sir.

8 Q. And you don't have any milk market
9 expert?

10 A. No, sir.

11 Q. You know, these people hire milk market
12 experts?

13 A. Yes, sir.

14 Q. They pay them, I assume, good money?

15 A. Yes, sir.

16 Q. And you don't have that?

17 A. No. I pray a lot. I got God here.

18 Q. Well, I think you're doing pretty well.

19 I think you're doing pretty well. Now, how about this
20 plant that you just built? Did that cost you any money?

21 A. Yes, sir.

22 Q. How much did it cost you?

23 A. Right at \$2 million.

24 Q. Right. And the milk that you have, that
25 comes from your cows at the present time?

1 A. Yes, sir.

2 Q. And if you were a producer-handler, would
3 you largely operate that way, with your own milk going
4 through your own plant?

5 A. Yes, sir.

6 Q. Do you have a store on the farm?

7 A. A farm store.

8 Q. A farm store?

9 A. Yes, sir.

10 Q. How big is that store?

11 A. It would be probably 700 square feet.

12 Q. Okay. Did you make these investments on
13 the premise that you could be a producer-handler if you
14 otherwise qualified?

15 A. Yes.

16 Q. And if they grandfather only the existing
17 producer-handlers, and you're not a producer-handler,
18 what's going to happen to that investment?

19 A. It's going to be costly.

20 Q. I take it you borrowed to do it?

21 A. Yes, sir.

22 Q. And I take it the creditor doesn't want
23 to know whether you're a producer-handler or an
24 exemption or not, right?

25 A. No. They don't ask that question.

1 Q. Yeah. They don't. Now, I want to ask
2 you about your family. Do you have children?

3 A. Yes, sir.

4 Q. How many do you have?

5 A. I have one daughter and one grandbaby.

6 Q. And how old is your daughter?

7 A. My daughter is 21.

8 Q. Right. Do you have any hopes that she
9 could carry on your business?

10 A. Yes. I mean, I have -- there's 14
11 nephews. And the younger generation -- I keep seeing
12 it, the younger generation isn't getting into this
13 business, because it's tough. And if we don't make
14 opportunities where the younger generation can take an
15 opportunity to get into it, then, I mean -- I mean, I've
16 been fortunate and been blessed that I've been able to
17 do well in the dairy industry. But, you know, I want
18 the opportunity for them, too.

19 Q. Right. And you want it for everybody
20 else, too?

21 A. Yes.

22 MR. CARROLL: Okay. That's all. Thank
23 you.

24 JUDGE CLIFTON: Thank you, Mr. Carroll.

25 Next?

1 Yes, Mr. Miltner.

2 CROSS-EXAMINATION

3 BY MR. MILTNER:

4 Q. Good afternoon, Jerry. We had the
5 opportunity to have lunch together and talk a little
6 about your operation. And you mentioned a couple of
7 things to me, and I wanted to make sure that you had a
8 chance to talk about them here if you choose.

9 A. Yes.

10 Q. We were talking about the size of your
11 farm and the size of your family's farm that you grew up
12 on. Your farm now, I think you said, had about -- was
13 it 1,200 cows?

14 A. 1,400.

15 Q. 1,400 cows. That's a large farm, is it
16 not?

17 A. To people, it is, yes.

18 Q. But in relation to farms in Florida, how
19 is that farm?

20 A. The average size of the dairies in
21 Florida is about 686 cows.

22 Q. So it's bigger than average, but -- and I
23 wrote -- I jotted this down when you said it. You said
24 you've got to be big to make it down there?

25 A. Yes.

1 Q. How many cows do you think you have to
2 have to be a viable dairy farm in Florida in 2009?

3 A. The biggest trouble that we're having is
4 the environmental. I mean, the environmental costs,
5 it's eating us up so much, and it's costing so much to
6 pay into this. It used to be, you know, we could make
7 real good on 400 cows. And then it moved to -- I mean,
8 here, four or five years ago, the most money-making
9 dairy was about 800 cows. And that has moved up,
10 because our costs has gotten -- is costing so much more.

11 Q. So the expense of making sure you fully
12 comply with environmental regulations requires you to
13 have additional cows to offset those, the cost of
14 compliance?

15 A. Yes. I mean, with the CAFO -- I mean, we
16 have to have a CAFO, and then there's so much into it,
17 you know, to get the right number. I think that's a
18 loaded question. I don't -- everybody is different.

19 Q. I wasn't trying to load a question, but I
20 wanted to make sure that you had explained that, at
21 least in your experience, you need to have a larger farm
22 to be viable in Florida. Is that accurate?

23 A. Yes. I mean, with 1,600 cows, that's
24 gave me the time to come here today and testify.

25 JUDGE CLIFTON: What's a CAFO?

1 THE WITNESS: A confined animal.

2 MR. MILTNER: It's a CAFO, C-A-F-O.

3 JUDGE CLIFTON: Oh. It stands for
4 confined animal --

5 MR. MILTNER: Feeding operation.

6 JUDGE CLIFTON: Feeding operation?

7 MR. MILTNER: Yes.

8 JUDGE CLIFTON: And that's an
9 environmental requirement?

10 THE WITNESS: Yes, ma'am.

11 BY MR. MILTNER:

12 Q. One of the proposals that's offered here
13 would expand or increase the limit of any exempt plant
14 to 450,000 pounds per month. In other words, if your
15 volumes were below 450,000 pounds a month, you would be
16 exempt, just as a producer-handler is today. Do you
17 have an opinion, based on your experience in designing
18 your plant and being a dairy farmer in Florida for
19 better than 30 years, as to whether a plant of that size
20 is viable as a start-up?

21 A. It's not. I mean, 450,000 pounds -- I
22 mean, you've got to be efficient. I mean, that's why
23 we're milking more cows. We get more efficient all the
24 time. You know, it's just not an efficient size.

25 Q. Either as a farm or a plant?

1 A. As a farm or a plant.

2 Q. You also -- I wrote down another phrase
3 you had said. You said there's more milk to be sold out
4 there. What do you mean by that?

5 A. Being -- you know, at times, I get upset
6 with our promotion, because there is so much -- there's
7 just so much opportunity out there. And there's -- the
8 smaller niche market, the -- I mean, the big processors,
9 they're not going to go after them markets. I mean,
10 it's just -- the specialty products out there that can
11 be -- that could be sold.

12 It's like Latin yogurt. Miami is the
13 number one Latin market in the United States, and
14 there's nobody going after it. I mean, I pay into my
15 promotion board, and, you know, for my ag. tours, I
16 mean, I've gotten four posters, and I've paid in over
17 \$50,000 to this. And, I mean, it's just -- you know, I
18 mean, sometimes you got to stand up and get rid of these
19 politics.

20 Q. They're nice posters, though, aren't
21 they?

22 A. Yeah.

23 Q. I apologize. That was a side note.

24 Is it your vision for your plant to find
25 new customers for Class I products as opposed to

1 competing for existing Class I sales?

2 A. Yes. I mean, I'll give you an example.
3 A guy -- a lady was in the office yesterday, and her
4 husband hasn't drank milk in four years. And they were
5 doing a taste test, and he tried it. And his wife is
6 driving 14 miles out there to get milk from my farm. I
7 mean, it might be -- I mean, I think my milk is better.
8 You know, when you bought it -- when you can take it
9 from the cow in four hours and put it in a bottle,
10 that's a pretty neat niche.

11 MR. MILTNER: I don't have anything else.
12 Thank you. Thank you, Mr. Dakin.

13 JUDGE CLIFTON: Thank you, Mr. Miltner.
14 Who will go next?

15 Mr. Tosi.

16 MR. TOSI: We have no questions, your
17 Honor. Thank you, Mr. Dakin, for coming. I
18 always appreciate hearing you.

19 JUDGE CLIFTON: You made your point very
20 well. Thank you. You're welcome to add
21 anything else if there's anything else you've
22 thought of.

23 THE WITNESS: No, ma'am. I just
24 appreciate the opportunity to come here today.

25 JUDGE CLIFTON: Thank you.

1 MR. ENGLISH: Mr. Buelow.

2 JUDGE CLIFTON: Mr. Buelow will be next.
3 If you would approach, Mr. Buelow.

4 I'm going to mark Mr. Buelow's testimony
5 as Exhibit 33. That's 33.

6 (Exhibit 33 was marked for
7 identification.)

8 MR. ENGLISH: Thank you, your Honor. We
9 put these out this morning.

10 JUDGE CLIFTON: Mr. Buelow, would you
11 first state and spell your name?

12 MR. BUELOW: James Buelow, James,
13 J-a-m-e-s.

14 JUDGE CLIFTON: Talk right into that mic.

15 THE WITNESS: Sorry.

16 JUDGE CLIFTON: Thanks.

17 MR. BUELOW: Buelow, B-u-e-l-o-w.

18 JUDGE CLIFTON: Thank you.

19 (The witness was sworn.)

20 JAMES BUELOW

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

23 DIRECT EXAMINATION

24 BY MR. ENGLISH:

25 Q. Good afternoon, Mr. Buelow.

1 A. Good afternoon.

2 Q. You have a prepared statement?

3 A. Yes, I do.

4 Q. It's been marked as Exhibit 33?

5 A. (Nodding head.)

6 Q. Correct?

7 A. Correct.

8 Q. And it was put out in the back early this
9 morning, correct?

10 A. Correct.

11 Q. And we passed out other copies to the
12 court reporter, to your Honor, and to the government.
13 Mr. Buelow, would you proceed with your statement?

14 A. Yes. My name is James Buelow, and I
15 reside at 146 Clizbe Avenue in Amsterdam, New York,
16 12010. I have spent all my life, so far, in the dairy
17 industry. I was born and raised on a 40-cow Jersey farm
18 in western New York. At the age of 18, I purchased my
19 own dairy farm in western New York, and operated this
20 60-cow dairy farm for approximately 20 years.

21 Then I went to work for the National
22 Farmers Organization for the next 17 years. Most of
23 that time, I was responsible for marketing members'
24 milk, including overseeing the payment of the producers
25 and filing the monthly MA reports and other reports that

1 go along with it. My geographic area of responsibility
2 increased over the years until it included all the areas
3 of the Northeast, Ohio, Michigan, Indiana.

4 For the last 10 years, I've been employed
5 by a company named Worcester Creameries. Worcester
6 Creameries is a family-owned business. Worcester
7 Creameries is the supply arm for three major fluid
8 plants, all in New York state. Worcester Creameries has
9 about 200 producers and buys the rest of the milk needed
10 for our plants from cooperatives. These plants are
11 Elmhurst Dairy in Jamaica, New York, New York City,
12 which is the only surviving fluid milk plant in New York
13 City.

14 The second is Mountainside Farms in
15 Roxbury, New York, which is a unique plant in that it
16 operates as if there were three separate plants all
17 under one roof. The plant packages organic, kosher and
18 conventional milk. Obviously, none of those three
19 products can touch each other. That's why I say it
20 operates as three separate plants.

21 The third plant, owned by the Schwartz
22 family, is Steuben Foods in Elma, New York. Elma is
23 just a few miles south of Buffalo. This plant processes
24 many food items, including organic and conventional
25 extended shelf life milk.

1 Today I'm here to testify on behalf of
2 all four of these milk businesses. I might add, I am
3 also the vice president of Northeast Dairy Foods, Inc.,
4 which is a trade organization, primarily of milk plants
5 in the Northeast.

6 Before I get into the specifics of our
7 position today regarding producer-handlers and exempt
8 plants, I would like to state that myself and both of my
9 employers over the last 30 years have supported the
10 Federal Order system. I believe it has worked well,
11 serving dairy farmers, processors and our customers.
12 The overall effect has been to treat all three
13 businesses fairly and equally.

14 However, since Federal Order Reform in
15 2000, there has been an increasing amount of price
16 volatility, more and more inequities in the system.
17 Therefore, I would encourage the Department and all the
18 participants today in this hearing to make sure that any
19 decisions made to change the order now and in the future
20 are truly to the benefit of all producers, plants, and
21 consumers.

22 Regarding the proposed -- regarding the
23 proposal regarding producer-handlers, we are in favor of
24 eliminating the provisions exempt producer-handlers and
25 economic -- and commercial exempt operations for many

1 reasons. First, we believe all producers should be
2 treated equally. The current situation, as well as what
3 would result from many of the proposals, simply give a
4 small number of producers, somewhere between 100 and 130
5 or 140 throughout the country, an advantage over the
6 rest of the producers and other handlers. For each
7 producer who receives this exemption, all other
8 producers receive a lower blend price.

9 Also, on the plant side of this, each
10 producer-handler has an advantage in his milk cost
11 compared to a regulated cost of the other plants in the
12 country, therefore causing disruption in the
13 marketplace, which, in the end, causes all producers
14 that are pooled to receive a lower price for the milk.

15 In the early days of the Order, when the
16 producer-handlers were very small, it did not make much
17 difference to the rest of the industry. The
18 producer-handler sold their small amount of milk in a
19 very close area to the farmer. Today, producer-handlers
20 are much bigger, their marketing areas are much bigger.
21 In the Northeast, the Federal Order 1 fluid sales from
22 producer-handlers have more than doubled from 2000 to
23 2008, according to Exhibit Number 12. The larger a
24 producer-handler is allowed to grow, the more disruption
25 in the marketplace will occur.

1 Currently, Worcester Creameries has a
2 producer just north of Binghamton, New York, that has
3 two large farms. Together these farms produce over
4 4 million pounds of milk per month. If this producer
5 was to build a fluid milk plant and was exempt from the
6 order, or became a producer-handler under some of these
7 proposals, this new plant would have a tremendous
8 advantage in the Binghamton market.

9 The current pooled plant in that market,
10 serving that area, would certainly lose market share as
11 this new producer-handler broke into the business with a
12 price advantage. This would result in all the farmers
13 in the Northeast receiving less money, because if that
14 pooled handler was not paying into the pool for the
15 volume he is now, if his volume was reduced, there would
16 be less money in the pool, therefore farmers receiving
17 less money.

18 Now, this is only a hypothetical example
19 of what could happen under the proposal that would raise
20 exempt plant volumes. I can think of numerous examples
21 of farms that might consider building plants that were
22 exempt near many different metropolitan areas. If a
23 plant is allowed to pay only the competitive price for
24 his milk, quote/unquote, blend price, instead of the
25 announced Class I price, it certainly would have an

1 advantage over the plants required to pay the Class I
2 price.

3 The question becomes what the plant does
4 with the money it saves from not paying the Class I
5 price. However, there is only really two choices. The
6 first is to hang onto the money. The second is to use
7 the money to help their business gain a bigger market
8 share by reducing the price they sell their product for.
9 Again, this could cause disruption in the marketplace.

10 Now, if I would -- before I close my
11 testimony, I would like to add a couple more statements.
12 As the last person was testifying, what came to my mind
13 is, the young man is building a fluid milk plant -- has
14 built a fluid milk plant, and I think we all kind of pat
15 him on the back for having courage and so forth to go
16 ahead and start a new business. But I also thought, you
17 know, if he was not a dairy farmer, if he was just
18 another businessman, and he was building this new plant,
19 then he would have no ability to qualify as a
20 producer-handler, he would not have that ability.

21 And what crossed my mind is, as much as
22 we applaud this man for building a fluid milk plant,
23 promoting the sales of my product and so forth, why
24 should that individual have a price advantage of -- as
25 has been presented here over the last two or three days,

1 of maybe up to 15 cents a gallon compared to another
2 person who would like to do exactly the same thing, only
3 that person doesn't have a farm?

4 So, therefore, that's why the position
5 that we're taking of recommending that producer-handler
6 exemptions and exempt plant provisions be eliminated.
7 We just don't understand why one person should have an
8 exemption at the benefit -- or detracting from the
9 benefit of everyone else in the industry.

10 My last statement is that if this isn't
11 possible, to eliminate both, the exempt producer-handler
12 and exempt plants, it would be our position at this time
13 to put a solid cap of 150,000 pounds on exempt plants
14 and eliminate the producer-handler provision. That is
15 my testimony.

16 Q. Mr. Buelow, both with the added
17 statements that you went out of your way to say were
18 added statements, and I think fairly stated throughout
19 your statement, you deviated from the prepared statement
20 to some extent, correct?

21 A. To some extent, yes.

22 Q. And you intended to deviate?

23 A. Yes.

24 Q. And so that is the statement?

25 Notwithstanding Exhibit 33, your deviations were

1 intentional?

2 A. Yes.

3 Q. Early on in your testimony, on page 1,
4 you referenced that you were the vice president of
5 Northeast Dairy Foods, Inc.?

6 A. Yes.

7 Q. Will there be another witness testifying
8 on behalf of that organization?

9 A. Yes. I am not testifying on behalf of
10 that organization. I am part of it, and so forth.

11 Q. And Mr. Latta is here?

12 A. Gary Latta is here, yes.

13 Q. And he will, we hope, testify tomorrow
14 for that organization, correct?

15 A. Correct.

16 Q. Your testimony is -- or your proposals
17 are somewhat different from other proposals submitted by
18 IDFA and National Milk, correct?

19 A. Correct.

20 Q. And you are speaking with years of
21 knowledge about particular circumstances in Order 1,
22 correct?

23 A. Orders -- yeah, the current Order 1.

24 Q. Current Order 1. You dealt with --
25 before, it was Orders 1, 2 and 4, correct?

1 A. Correct.

2 Q. But now it's Order 1?

3 A. Correct.

4 Q. And whether or not any individual
5 entities are out there, you've certainly looked at the
6 aggregate data, correct?

7 A. Absolutely.

8 Q. And the aggregate data suggests to you
9 that both exempt facilities, that are the 150,000-pound
10 varieties of facilities, and producer-handlers, their
11 volumes have been growing?

12 A. Absolutely. Absolutely.

13 Q. And yet, can you compare that to the
14 overall volume of Class I distribution for package sales
15 as presented by the Market Administrator?

16 A. I certainly can. Class I sales in the
17 marketing area that I'm familiar with has been declining
18 for many, many, many years.

19 Q. So the overall number is going down;
20 producer-handlers and exempt plants are going up,
21 correct?

22 A. That's correct.

23 Q. What does that tell you about regulated
24 entities?

25 A. What that tells me about regulated

1 entities is they're losing market share.

2 Q. What's the difference between regulated
3 entities and exempt facilities? Every month, what do
4 your facilities get the privilege of doing?

5 A. The privilege? The privilege that we
6 have, being a regulated plant, is we pay into the
7 producer-settlement fund. And because of our size and
8 volume and so forth, we pay, most months, many, many,
9 many, many thousands of dollars and in some months well
10 over a million dollars into the producer-settlement
11 fund, which is shared with all producers in the order.

12 Q. And you have no protest of that
13 ultimately?

14 A. I have no protest to that. What I do
15 have is a protest of why some people don't have to do
16 that.

17 Q. When you have to?

18 A. When we have to.

19 Q. And that's ultimately the point of your
20 testimony?

21 A. That's the point of my testimony.

22 MR. ENGLISH: Your Honor, I move
23 admission of Exhibit 33, acknowledging that his
24 statement has deviated from it in some
25 significant respects. But, nonetheless, I move

1 admission of Exhibit 33, and the witness is
2 available for cross-examination.

3 JUDGE CLIFTON: Let me ask if there's any
4 objection to Exhibit 33 being admitted.

5 There is none. Exhibit 33 is hereby
6 admitted.

7 Before cross-examination of this witness
8 begins, I promised to have Mr. Lee out of here
9 by 4:00, didn't I? And it's 3:30.

10 All right. Good. Then we do have time.
11 I may have to -- I was hoping to have Mr. Kastel
12 go next. I may have to have Mr. Lee go next and
13 then Mr. Kastel. We'll just have to see.

14 All right. Cross-examination of
15 Mr. Buelow? Who would like to begin?

16 Mr. Carroll, thank you.

17 CROSS-EXAMINATION

18 BY MR. CARROLL:

19 Q. Good afternoon, sir.

20 A. Good afternoon.

21 Q. You reside where?

22 A. I reside in Amsterdam, New York.

23 Q. New York, which isn't too far from my
24 home.

25 A. Not too far from Syracuse.

1 Q. Not too far from Syracuse.

2 A. A couple of hours.

3 Q. A couple of hours. Worcester Creameries,
4 where is that located?

5 A. Worcester Creameries' address is
6 Worcester, New York, which is about 50 miles due south
7 of Amsterdam, New York, 20 miles due north of Coney
8 Island.

9 Q. Okay. It's big, big country there?

10 A. Big country. Not a lot of people, but
11 big country.

12 Q. Right, big country. Directing your
13 attention to the concerns that you sell to, I think you
14 said that one of them sell organic milk, or you said you
15 were selling milk that was used or bottled for organic
16 purposes?

17 A. We do not sell any organic milk, sir.

18 Q. Oh.

19 A. Let me explain.

20 Q. Sure.

21 A. We have a long-term relationship with an
22 organic distributor whereby we package milk for them.

23 Q. I see. You just do the processing, then?

24 A. We do the processing and packaging.

25 Q. Is the milk involved also your milk or is

1 it someone else's milk?

2 A. In some cases, it's our milk that we sell
3 to them. In other cases, it's their milk that they
4 deliver to --

5 Q. Right. And I take it you're familiar
6 with organic milk, what's required in production and
7 processing?

8 A. Oh, absolutely.

9 Q. And at the production end, what's
10 required, the best you know, of your knowledge? What
11 standards do you have to meet?

12 A. When you say "production end," you mean
13 production in the plant or you mean production on the
14 farm?

15 Q. I should have said that. Let's start
16 with the farm. Thank you.

17 A. The farm?

18 JUDGE CLIFTON: Excuse me. Mr. Carroll,
19 pause. You're not letting him finish before you
20 begin to talk.

21 MR. CARROLL: Okay.

22 JUDGE CLIFTON: Thank you.

23 A. The Federal government has set guidelines
24 that are available to anyone to read as far as how milk
25 has to be produced on the farm to be considered organic.

1 There's a certification process. One of the important
2 points is as far as land. The land has to have not had
3 any chemicals and certain things done to it for a period
4 of three years prior to the certification.

5 An animal, in order to become certified
6 organic, cannot be fed any -- used any antibiotics or
7 that type of thing on the animal for a year. There's
8 all sorts of regulations that would take an awful long
9 time to go through every one of them today, sir.

10 BY MR. CARROLL:

11 Q. All right. But those regulations incur
12 costs, I take it, to comply?

13 A. Oh, certainly.

14 Q. And then, at the plant, what are the
15 requirements for a plant to have the ability to package
16 organic products?

17 A. The main requirement is, obviously, to
18 keep that milk completely segregated. And the
19 processing of product is done according to any other
20 processing specifications or specifics requested by the
21 company we're doing it for.

22 Q. Is there some extra cost associated by
23 that requirement at the plant level?

24 A. There's probably some cost in that you
25 have to keep that product totally segregated.

1 Q. Right. Now, after it's packaged, are
2 there any further requirements between there and this
3 point of offering for sale and the transportation of the
4 product?

5 A. There's certainly requirements, but I
6 don't know if the requirements are any greater or any
7 less than they are for any other milk product.

8 Q. Right. And when it reaches the ultimate
9 wholesaler, are there any requirements on the
10 wholesalers as to how he handles or treats that product?

11 A. Oh, I'm sure. We live in a regulated
12 industry. There certainly is.

13 Q. Well, I mean on account of the fact that
14 it's organic.

15 A. On account that it's organic, not that
16 I'm aware of.

17 Q. They treat it the same way, then?

18 A. Treat it the same.

19 Q. Now, that's how the Schwartz family and
20 Steuben Foods, they do that process according to your
21 statement here?

22 A. The Schwartz family owns the businesses
23 that I've testified for today.

24 Q. And that would be --

25 A. And they include Elmhurst Dairy,

1 Mountainside Farms, Steuben Foods and the company --

2 Q. They own all of those?

3 A. They own all of those.

4 Q. Okay. And Elma, New York, where is that
5 located?

6 A. Elma, New York, as I said in my
7 testimony, is just a few miles south of Buffalo.

8 Q. Buffalo. And your farms are located
9 generally where?

10 A. Quite a wide geographic area, but for,
11 let's say within 100 miles, maybe 120 miles of
12 Worcester, New York, there's a big circle.

13 Q. Okay. So I take it that there has to be
14 transportation between the farm and plant of some
15 distance?

16 A. Oh, yes. When you own a plant in New
17 York City, you don't find many cows right in New York
18 City.

19 Q. I guess not. Now, ultrapasteurized, what
20 is that?

21 A. Ultrapasteurized milk is milk that's
22 pasteurized at a higher temperature and, therefore,
23 giving it an extended shelf life designation.

24 Q. Now, going back to organic milk, are
25 there consumers that look for organic milk? Are there

1 people that have an interest in buying that product as a
2 product?

3 A. My expertise is not in marketing the
4 finished product, but if we keep producing it, they've
5 got to be doing something with it, sir. So somebody is
6 interested.

7 Q. Okay. And ultrapasteurized, is that
8 something of a value to the product?

9 A. We believe so.

10 Q. Okay. Now, I want to ask you a question
11 about local milk, local supplying of milk to a local
12 market. Are you familiar with Byrne Dairy in Syracuse?

13 A. Yes, I am.

14 Q. And do you know, as I know, that their
15 milk is largely from the surrounding areas of the city
16 of Syracuse?

17 A. Yes.

18 Q. And do people go to their dairy stores to
19 buy that milk?

20 A. They're still in business, so I'm
21 assuming people are buying their product, okay?

22 Q. And do you think it's an asset to them to
23 have a local supply of milk with the public, the people
24 can come in?

25 A. I'm not sure I understand the question.

1 Do I think it's an asset?

2 Q. Yeah. Well, let me give you an
3 illustration. I'm a customer. When I finish my
4 shopping at Wegmans, I go over to Byrne and buy my milk
5 for the reason that I know -- I mean, I know two or
6 three of the major producers, and I know what good men
7 they are.

8 JUDGE CLIFTON: Mr. Carroll, I know
9 you're just setting up your question, but you
10 really are testifying again.

11 BY MR. CARROLL:

12 Q. I'm not testifying. I'm just stating
13 that there are people in the market, such as myself, who
14 have knowledge of local production and want to buy a
15 local product. That's a fact, isn't it?

16 A. There's people that feel that way, yes,
17 I'm sure.

18 Q. Right. And maybe I'm -- I or someone
19 like me might buy two quarts instead of one quart on
20 that theory, too?

21 A. I guess that's your choice.

22 Q. Okay. Now, I want to get to your
23 testimony. As I understand it, you haven't referred, I
24 don't think, to a specific proposal, but you just don't
25 want to see anything but the back side of a

1 producer-handler? That's about it, isn't it? I mean,
2 you don't see anyplace for them except this
3 150,000-pound exemption?

4 A. Our position is that everyone should be
5 on the same level playing field, and that if we increase
6 this volume limit, we're going to be encouraging more
7 people to start businesses like that, and we're going to
8 have a bigger and bigger unlevel playing field.

9 Q. All right.

10 A. Okay?

11 Q. Now, if the producer-handler's cost of
12 production just is farm cost, and added to that is plant
13 cost, if that's greater than any monies he would owe to
14 the pool, does he have any advantage over your
15 customers?

16 A. Well, these comparisons that have been
17 made the last three days confuse me, quite frankly.

18 Q. Surely.

19 A. We talk about cost of production and we
20 talk about cost of production on a producer-handler.
21 The cost of production on a dairy farm that's 100 cows
22 or 1,000 cows or 5,000 cows compared to the cost of
23 production of a producer-handler that's 100 cows, 500
24 cows, 1,000 cows, I'm sure they're different, just like
25 they're different from every farm to every farm.

1 But now we're talking about the
2 efficiencies and the ability of that individual farmer.
3 And I'm not sure that that should be part of this
4 hearing and part of this testimony. Farmers have the
5 ability to be efficient, farmers have the ability to be
6 inefficient. Obviously, most of them try to be
7 efficient, they try to be more efficient today than they
8 were yesterday.

9 Q. Right.

10 A. Okay?

11 Q. Right.

12 A. So I don't know if I've answered your
13 question directly, but I'm trying, sir.

14 Q. I understand you're making an effort.
15 Now, you worked a farm at one time?

16 A. Not only did I work a farm, I owned a
17 farm.

18 Q. Owned a farm. 20 years?

19 A. Approximately.

20 Q. So you know breeding cattle is important
21 to that business?

22 A. Oh, absolutely.

23 Q. And the timing of the breeding would be
24 important if you were trying to control your production
25 to your sales?

1 A. Certainly.

2 Q. And it would be because you would have to
3 incur some additional costs in order to get that
4 production coming in at a regular rate than if you just
5 let ordinary breeding occur?

6 A. I don't know if there's additional cost
7 as a dairy farmer who is not a producer-handler. I
8 needed year-round income. I needed to breed my cattle
9 and so forth to create that year-round income. So I
10 don't know that there's any real difference there.

11 Q. Right. But you recognize, don't you,
12 that if you were a producer-handler -- if you can
13 imagine that for a minute. If you were a
14 producer-handler and you had X number of sales upcoming,
15 you would try to tailor your production to those sales?
16 Don't you think that's a reasonable assumption?

17 A. I doubt it very much, sir, because if
18 you're talking about breeding cattle and creating
19 milking cycles like that, you're trying to plan nine
20 months ahead. I'm not sure there's too many of us in
21 this industry that know what sales are going to be
22 tomorrow, say nothing about nine months ahead.

23 MR. CARROLL: All right. Thank you very
24 much.

25 JUDGE CLIFTON: Thank you, Mr. Carroll.

1 Would anyone else like to cross-examine
2 Mr. Buelow?

3 Mr. Tosi, no one said yes. Would you?

4 MR. RICCIARDI: Your Honor, I do have
5 some questions.

6 JUDGE CLIFTON: Ah, Mr. Ricciardi has
7 awakened. No, I'm just teasing. I know you're
8 quite alert over there. It's all right to give
9 you a hard time, I hope.

10 MR. RICCIARDI: It assumes facts not in
11 evidence. And yes, of course.

12 CROSS-EXAMINATION

13 BY MR. RICCIARDI:

14 Q. Mr. Buelow, I'm Al Ricciardi. I
15 represent AIDA. You have been here throughout the
16 course of these proceedings?

17 A. I arrived Monday night. I've been in and
18 out of here yesterday and today, yes.

19 Q. You heard the testimony of Mr. Hatch?

20 A. Yes, I did.

21 Q. You stopped operating a dairy farm?

22 A. Uh-huh.

23 Q. Is that a yes?

24 A. Yes.

25 Q. Okay, thanks. You made the decision to

1 stop operating a dairy farm, and then you went to work
2 for National Farmers Organization, you said, for 17
3 years?

4 A. Yes.

5 Q. Being a dairy farmer is not easy?

6 A. Pardon?

7 Q. Being a dairy farmer is not easy, is it?

8 A. No, it's not easy.

9 Q. There are investment requirements for the
10 farm operation, cows, feed, et cetera, correct?

11 A. Certainly.

12 Q. And with regard to the processing side of
13 the business, there are costs associated with that, too?

14 A. Certainly.

15 Q. Let's talk for a moment, because this is
16 the first time it's come up during the course of this
17 hearing, you said that the plant that you're familiar
18 with packages, among other things, kosher milk, correct?

19 A. One of our plants packages kosher milk,
20 yes.

21 Q. Now, you buy that on behalf of that plant
22 from a kosher dairy?

23 A. Correct.

24 Q. Are you knowledgeable enough to tell me
25 the costs and requirements for being able to sell, as a

1 dairy farmer, kosher milk?

2 A. Well, as far as costs go, I feel that
3 that's proprietary information that I'm not willing to
4 share today. As far as requirements to become kosher,
5 I'm not a Jewish rabbi, but I do understand some of the
6 basics. And the kosher milk that we package and sell
7 has rabbinical supervision on the farm, which means
8 there is a rabbi present at all times during the milking
9 process.

10 It also means that the rabbi monitors the
11 diet of those animals, particularly at certain times of
12 the year with Jewish holidays and so forth. The rabbi
13 makes sure that there is no DA cow's milk being used.
14 And I'm sure there are some others that I've forgotten.
15 But, anyways, so there's rabbinical supervision on the
16 farm.

17 Then, when the milk is loaded on the
18 truck, there has to be a rabbi there to seal the truck.
19 When the milk gets to our plant, there is a rabbi there
20 to check the seal to make sure there's been no tampering
21 and so forth, and is present during the full processing
22 of that milk. Is that what you're referring to?

23 Q. That is exactly what I was referring to.
24 And let me take you back through some steps. Worcester
25 Creameries does not own the farm or farms where the

1 kosher milk is made, correct?

2 A. Correct.

3 Q. That is owned by someone else, an
4 unrelated farmer, company, entity, correct?

5 A. Correct.

6 Q. Are you actually familiar with the costs
7 associated with that farm and being able to provide
8 kosher milk?

9 A. Sir, no, I'm not privy to the financial
10 information of an independent private dairy farmer.
11 It's none of my business. Do I understand general farm
12 costs? Yes, I do, sir.

13 Q. Okay. And then --

14 A. In addition -- if you would let me
15 finish, please. In addition to having operated a dairy
16 farm, I've worked with farmers a good share of my life,
17 and I have a son that's currently a dairy farmer in
18 today's climate. So I'm very much aware of cost of
19 production.

20 Q. You know what, Mr. Buelow? I will
21 absolutely have made sure I attempt to allow you to
22 finish.

23 A. Okay.

24 Q. I would like the same courtesy in
25 listening to my questions. That would be great. Okay?

1 Have we got a deal?

2 A. Very good.

3 Q. All right. Good. Tell me, if you know,
4 the percentage of Federal Order route sales nationally
5 by producer-handlers.

6 A. I do not know that number.

7 Q. Would it surprise you that
8 producer-handlers would produce about 1.46 percent of
9 the milk nationally?

10 A. Are you testifying to that, sir?

11 Q. I'm asking you whether that would
12 surprise you. That's my question.

13 A. It would not surprise me, no.

14 Q. Do you have a different number than mine?

15 A. I already testified I didn't know the
16 number off the top of my head.

17 Q. But you think that my --

18 A. It's in that range, certainly.

19 Q. And that percentage of the milk
20 nationally is causing a major disruption, is that your
21 testimony?

22 A. Not exactly.

23 Q. Okay. Let's take the opposite side of
24 the way you approached your same level playing field
25 argument, and let's talk about it this way: You decided

1 to get out of being a dairy farmer for whatever reasons
2 you did?

3 A. Yes, uh-huh.

4 Q. Among other things, it's hard, as we
5 talked about before?

6 A. That's not the reason I got out, but it's
7 hard work, yes.

8 Q. Okay. The decision by a processing plant
9 or a co-op, processing plant to purchase, co-op to have
10 a number of members, that's a financial decision that's
11 made not to be a dairy farmer, to find the milk from
12 some other source, right?

13 A. Yes.

14 Q. One of the reasons is an investment
15 choice, correct?

16 A. Yes, I guess.

17 Q. You don't want to have the investment in
18 the farm, the investment in the cows, the investment in
19 the feed, the investment in the number of employees,
20 among other things?

21 A. Well, most milk plants have many
22 employees, but a different type of employees, I think
23 you're referring to.

24 Q. Yes. They process milk, they are dairy
25 farmers, and they actually get the milk to the

1 processing plant?

2 A. Sure.

3 Q. The producer-handler does all of that?

4 A. Yes.

5 Q. Dairy farm, processing plant, locating
6 the customers, transporting the milk, making sure that
7 they have enough customers for the milk that they have?

8 A. Yes.

9 Q. As a creamery, you don't do all of that,
10 right?

11 A. Certainly not.

12 Q. Instead, you look to the members to, in
13 fact, do that other portion of the work for you?

14 A. I'm not sure what you mean by "members,"
15 sir.

16 Q. I apologize. You've got 200 producers
17 who provide you with your milk for your plant for --

18 A. They're independent producers that decide
19 to sell their milk to us. They are not our members,
20 we're not a cooperative.

21 Q. You're correct, and I stand corrected.
22 Now, those independent producers, are they all paid,
23 every one of them, the identical amount monthly for
24 their milk?

25 A. Absolutely not.

1 Q. Well, shouldn't they be treated equally?

2 A. They are.

3 Q. By being paid different amounts?

4 A. Because they give us different volumes,
5 different components, and so forth. We've been down
6 this route in this hearing before, I think.

7 Q. Not with you. I haven't had a chance --

8 A. Not with me, no. But, I mean, milk
9 contains three major components that it's paid on. Each
10 farm, each drop of milk contains a different amount of
11 butterfat, a different amount of protein, a different
12 amount of other solids. Each farm is -- delivers to a
13 different plant -- or maybe not each farm, but many
14 farms do. Therefore, they're paid a different PPD as
15 prescribed by the Federal Order. But I believe that we
16 do our best to treat each farmer equally and fairly.

17 Q. Fairly and equally may be two different
18 things. Lets talk for a moment.

19 A. Okay.

20 Q. All farms, as you just said, are not
21 created equally, correct?

22 A. Yes.

23 Q. And all producers are not created
24 equally, correct?

25 A. Yes.

1 Q. And so when you say that we believe all
2 producers should be treated equally, Worcester doesn't
3 treat -- Worcester Creameries doesn't treat the 200
4 producers equally, because they're not equal, they
5 have --

6 A. I disagree with you. We treat them
7 equally, sir.

8 Q. Okay. What's an over-order premium?

9 A. It's a price paid over the regulated
10 Federal Order price.

11 Q. And who gets the over-order premium?

12 A. The person you're buying the milk from.
13 It could be an independent farmer, it could be a
14 cooperative.

15 Q. Does Worcester Creameries get over-order
16 premiums?

17 A. Does Worcester Creameries get over-order
18 premiums?

19 Q. Or does it get charged over-order
20 premiums?

21 A. We get charged over-order premiums by
22 cooperatives that we purchase milk from, yes.

23 Q. And do you ever -- by the way, what
24 co-ops do you purchase from?

25 A. We purchase primarily from DMS at the

1 current time. We purchase from Agri-Mark. We purchase
2 from other cooperatives, Lanco, a variety of
3 cooperatives available to us in the Northeast.

4 Q. Right. Do you think it's fair for the
5 co-ops to charge you an over-order premium?

6 A. Is it fair?

7 Q. That's the question.

8 A. Sometimes the amount they charge is fair,
9 sometimes the amount they charge, I feel, is unfair,
10 sir.

11 Q. And you try to negotiate the over-order
12 premiums if you think it's --

13 A. We try in negotiate a fair premium, yes.

14 MR. RICCIARDI: That's fair enough. I
15 don't have any further questions. Thank you.

16 JUDGE CLIFTON: Thank you, Mr. Ricciardi.
17 How do you spell Lanco?

18 THE WITNESS: L-a-n-c-o.

19 JUDGE CLIFTON: That's L-a-n?

20 THE WITNESS: L-a-n-c-o.

21 JUDGE CLIFTON: And Agri-Mark?

22 THE WITNESS: Agri-Mark is A-g-r-i,
23 hyphen, M-a-r-k.

24 JUDGE CLIFTON: And what was the other
25 entity you mentioned with those?

1 THE WITNESS: DMS, Dairy Marketing
2 Services.

3 JUDGE CLIFTON: Thank you. Who next will
4 cross-examine Mr. Buelow?

5 Mr. Beshore.

6 CROSS-EXAMINATION

7 BY MR. BESHORE:

8 Q. I have just one question for
9 clarification of the record. You used the phrase "DA
10 cow."

11 A. DA cow?

12 Q. Yeah. Do you remember that?

13 A. Yes, I do.

14 Q. Okay. Can you elaborate? I think you
15 should explain that for the record.

16 A. Completely and fully?

17 Q. Define it, say what --

18 A. A DA cow is a cow that had a twisted
19 stomach, has to be operated on to straighten that
20 stomach out.

21 Q. DA stands for displaced --

22 A. Displaced -- if I can say the word
23 correctly, abomasum.

24 Q. Abomasum?

25 A. Abomasum, something like that.

1 Q. Thank you.

2 JUDGE CLIFTON: Now I need a spelling.

3 THE WITNESS: I'm not going to do that.

4 JUDGE CLIFTON: Mr. Beshore, I hope
5 you --

6 MS. DAMM: Your Honor, a displaced
7 abomasum is a-b -- hold on, I've got to write it
8 down. I had it. A-b-o-m-a-s-u-m.

9 JUDGE CLIFTON: Abomasum?

10 MS. DAMM: Yes, abomasum.

11 JUDGE CLIFTON: Displaced stomach?

12 MS. DAMM: It's a displaced abomasum.

13 JUDGE CLIFTON: Oh, that's a part of the
14 anatomy?

15 MS. DAMM: An abomasum is one of four
16 compartments to a cow's stomach.

17 JUDGE CLIFTON: So it's not good?

18 MS. DAMM: It could be bad. It's a -- it
19 is, in a lot of situations, through operation,
20 it is a situation with a cow that can be
21 repaired so she can heal and continue producing.

22 THE WITNESS: Sometimes can be repaired
23 and sometimes cannot.

24 MS. DAMM: Sometimes can, sometimes
25 cannot. It's a decision we make on the farm.

1 JUDGE CLIFTON: All right. And just so
2 the court reporter has your name right, it is?

3 MS. DAMM: Oh, I'm sorry. It's Cindy
4 Damm, D, as in dog, a-m-m. Sorry for that
5 interjection.

6 JUDGE CLIFTON: No. I appreciate it very
7 much. Otherwise, Mr. Beshore would have had to
8 say all that.

9 MS. DAMM: That would have been
10 entertaining.

11 JUDGE CLIFTON: Other questions for
12 Mr. Buelow?

13 Mr. Tosi.

14 CROSS-EXAMINATION

15 BY MR. TOSI:

16 Q. Good afternoon, Mr. Buelow.

17 A. Good afternoon.

18 Q. Thank you for coming --

19 A. You're welcome.

20 Q. -- and offering your testimony. In your
21 testimony on behalf of the four entities that you
22 described in your statement --

23 A. Yes.

24 Q. -- as a spokesperson for those folks, do
25 they have any opinions as to support or opposition to

1 any of the other proposals that we've included in the
2 hearing notes?

3 A. I guess the answer is yes, but I came
4 prepared to testify as I testified. I'm assuming, from
5 other questions that you've asked, you're referring to
6 plant pools or -- maybe I should shut up.

7 Q. Well, that's all right. Are you familiar
8 with the term "individual handler pool"?

9 A. Yes, I am.

10 Q. Do any of your four organizations that
11 you're speaking on behalf of have an opinion about
12 marketwide pooling versus individual handler pooling?

13 A. We certainly have a position. I'm not
14 authorized today to testify on that subject.

15 MR. TOSI: All right. That's all I have
16 for you, sir. Thank you very much.

17 THE WITNESS: You're welcome.

18 JUDGE CLIFTON: Thank you, Mr. Tosi.

19 Mr. English.

20 MR. ENGLISH: Thank you, your Honor.

21 REDIRECT EXAMINATION

22 BY MR. ENGLISH:

23 Q. Mr. Buelow, you were asked questions
24 about organic milk and kosher milk --

25 A. Yes.

1 Q. -- and the costs sort of associated with
2 producing it. That organic milk that is packaged, since
3 you have to make a payment to the producer settlement
4 fund, are the producers who are producing that organic
5 milk pooled producers in Order 1?

6 A. Yes, they are.

7 Q. So they are effectively contributing to
8 the blend price of Order 1 producers?

9 A. Absolutely. Absolutely.

10 Q. The kosher milk that is produced --

11 A. Yes.

12 Q. -- do you make a producer -- is part of
13 your producer-settlement fund payment based upon the
14 milk that you receive from them?

15 A. Absolutely. The kosher milk we purchase
16 is pooled milk.

17 MR. ENGLISH: That's it. Thank you.

18 JUDGE CLIFTON: Thank you, Mr. English.

19 I believe that concludes your testimony,
20 Mr. Buelow. Thank you.

21 THE WITNESS: Thank you.

22 JUDGE CLIFTON: You may step down. Now,
23 with apologies to --

24 MS. KISER: Your Honor, may I be heard?

25 JUDGE CLIFTON: Yes, that one I didn't do

1 it the way I normally do. When Mr. English
2 moved its admission, I admitted it before cross,
3 but I do appreciate your checking, because
4 that's not the way I've been doing everything
5 else. Yes?

6 MS. KISER: Good afternoon, your Honor.
7 My name is Livia Kiser, L-i-v-i-a, K-i-s-e-r,
8 and I represent Aurora Organic Dairy, who is a
9 producer-handler who will be significantly
10 affected by the outcome of these proceedings.

11 We had understood that Mr. Kastel would
12 be testifying on Friday morning. I understand
13 that he's here. I understand this morning you
14 had directed him to provide his statement to
15 people to review when we came back from lunch.
16 That statement still has not been provided.

17 We have seen earlier copies of the
18 statement and we are extremely concerned about
19 things that are in there. Mr. Kastel has
20 instigated a series of lawsuits against Aurora
21 Dairy, and we believe that the statement he
22 intends to put in here is not actually evidence
23 in these proceedings. And so, based on the
24 earlier versions of it, we have significant
25 concerns, and so we would like to be able to see

1 that statement and be able to address those
2 concerns prior to any statement being put into
3 the record, certainly. So if Mr. Kastel would
4 be so kind as to provide that statement, we
5 would like to be able to see it now.

6 JUDGE CLIFTON: All right. Thank you,
7 Ms. Kiser. Mr. Kastel, will you come to the
8 podium, please? First, I know you've had a long
9 day and a half. I do want to insert Mr. Lee's
10 testimony before yours, with my apologies. Do
11 you want to provide copies of your statement to
12 participants?

13 MR. KASTEL: Yes, your Honor. I was
14 prepared, as you instructed after lunch, to have
15 them.

16 JUDGE CLIFTON: All right. And do you
17 have any on the back table?

18 MR. KASTEL: Not as of yet.

19 JUDGE CLIFTON: Okay. I would put them
20 there now, but reserve back one for the court
21 report, one for me --

22 MR. KASTEL: I've already given seven to
23 staff.

24 JUDGE CLIFTON: Good. Then if you would
25 put them on the back table, we'll let people get

1 them. Then they will be ready.

2 MR. KASTEL: Very good.

3 JUDGE CLIFTON: And then I hope this is
4 not too hard a burden on you, but I would like
5 to take Mr. Lee before you.

6 MR. KASTEL: I'll handle it. Thank you.

7 JUDGE CLIFTON: Thank you very much.
8 Let's take a stretch break. There's a phrase,
9 you know, with horses: If you work your horse
10 hard and put him away wet, it diminishes his
11 well-being. And I want to give the court
12 reporter a break. So let's take a 10-minute
13 stretch. Come back at 4:16.

14 (A recess was taken from 4:06 to 4:16.)

15 (Exhibit 34 was marked for
16 identification.)

17 JUDGE CLIFTON: All right, let's go back
18 on record. It's 4:16, we're back on record. I
19 have marked the statement of Gary Lee as
20 Exhibit 34.

21 Mr. Lee, would you please state and spell
22 your name?

23 THE WITNESS: Gary Lee, G-a-r-y, L-e-e.

24 (The witness was sworn.)

25 JUDGE CLIFTON: Mr. English, you may

1 proceed.

2 GARY LEE

3 a witness herein, being first duly sworn, was examined
4 and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. ENGLISH:

7 Q. Good afternoon, Mr. Lee.

8 A. Hi.

9 Q. You have a prepared statement that is
10 Exhibit 34, and then I have some questions afterwards.
11 Why don't you proceed with your testimony, sir.

12 A. Okay. My name is Gary Lee. I'm employed
13 by Prairie Farms Dairy, Inc., as the vice president of
14 procurement. I have been employed by Prairie Farms
15 since May 1973 and have served in my current position
16 since 2000.

17 Prairie Farms is a dairy farmer
18 cooperative headquartered in Carlinville, Illinois. At
19 the close of its most recent fiscal year on September
20 30, 2008, Prairie Farms had 743 farmer -- dairy farmer
21 member owners. The geographic breakdown of those 743
22 farms was as follows: 426 in Illinois, 152 in Indiana,
23 62 in Iowa, 89 in Missouri, 11 in Michigan, 3 in Ohio.

24 For the 2007-2008 fiscal year, Prairie
25 Farms member milk production was 1,387,347,510 pounds.

1 This equates to about 1,873,000 pounds of milk produced
2 per farm. All but two of Prairie Farms members could be
3 described as small family farms. By that, we mean that
4 a family unit provides most of the labor, management and
5 capital. The two exceptions to this term "family"
6 are -- "family farm" are university research farms.

7 Prairie Farms members' herd sizes range
8 from fewer than 20 cows to about 3,000 cows. We
9 estimate that the average Prairie Farms member milks 100
10 cows. This estimate is arrived at by dividing average
11 total production per farm of 1,873,000 pounds by USDA's
12 most recent estimate of milk production per cow in
13 Illinois of 18,700 pounds. That is the USDA's 2007
14 estimate. Most of the family farms who are members of
15 Prairie Farms qualify as small businesses under the
16 Regulatory Flexibility Act in that their annual gross
17 revenue is less than \$750,000.

18 Prairie Farms was founded in 1938, making
19 butter, condensed milk and nonfat dry milk. Prairie
20 Farms got into the fluid milk processing business after
21 World War II. The current company is the result of more
22 than 100 mergers, acquisitions and joint ventures, as
23 well as internal growth.

24 Through wholly-owned facilities and joint
25 ventures, Prairie Farms currently operates 35 milk and

1 dairy product processing plants. 26 of those plants are
2 regulated under five Federal Orders. Prairie Farms
3 plants regulated by Order 32 include a fluid plant in
4 Carlinville, Illinois and Olney, Illinois; a fluid
5 cultured -- a fluid and cultured plant in Hazelwood,
6 Missouri; a fluid, ice cream mix, and UHT plant in
7 Granite City, Illinois; a fluid plant in Peoria,
8 Illinois; and cultured plants in Quincy and Carbondale,
9 Illinois.

10 Prairie Farms plants regulated by Order
11 33 include fluid plants in Battle Creek, Michigan and
12 Anderson, Indiana; and a fluid and cultured plant in
13 Fort Wayne, Indiana. Prairie Farms plants regulated by
14 Order 5 include fluid plants in Holland, Indiana and
15 Somerset, Kentucky. Prairie Farms operates one plant
16 regulated by Order 7, a fluid plant in Kosciusko,
17 Mississippi.

18 A joint venture with Midwest Dairymen,
19 called Muller Pinehurst Dairy, operates one plant
20 regulated by Order 30 as a fluid plant in Rockford,
21 Illinois. A joint venture with DFA, called Roberts
22 Dairy, operates three plants regulated by Order 32: A
23 fluid plant in Iowa City, Iowa; a fluid and ice cream
24 plant in Omaha, Nebraska; a fluid plant in Kansas City,
25 Missouri.

1 A joint venture with DFA, called Hiland
2 Dairy, operates three plants regulated by Order 32 and
3 three plants regulated by Order 7. The Hiland plants
4 regulated by Order 32 are a fluid and cultured plant in
5 Wichita, Kansas; a fluid and cultured plant in Chandler,
6 Oklahoma; and a fluid plant in Norman, Oklahoma. The
7 Hiland plants regulated by Order 7 are a fluid and ice
8 cream plant in Springfield, Missouri; and fluid plants
9 in Fayetteville, Arkansas, and Fort Smith, Arkansas.

10 A joint venture between Prairie Farms and
11 Hiland Dairy, called Turner Dairy, operates three plants
12 regulated by Order 7. They are all fluid plants located
13 in Fulton, Kentucky; Memphis, Tennessee; and Little
14 Rock, Arkansas.

15 The unregulated plants are as follows: A
16 fluid, cultured and ice cream plant in Jefferson City,
17 Missouri; an ice cream plant in Decatur, Illinois; ice
18 cream and ice cream mix plant in O'Fallon, Illinois; ice
19 cream mix plant in Springfield, Illinois; a butter,
20 butter oil and anhydrous milkfat plant in St. Louis,
21 Missouri; an ice cream plant in Norfolk, Nebraska; a
22 cultured and ice cream plant in Kansas City, Missouri.
23 I would add that that is separate from the previous
24 mentioned plant in Kansas City. And ice cream novelty
25 plants in St. Louis, Missouri, and Lafayette, Indiana.

1 In the 2007-2008 fiscal year, sales for
2 Prairie Farms and joint ventures was about \$2.9 billion.
3 About 70 percent of those sales were in the fluid milk
4 category. Over 10 percent of the fluid sales are to
5 schools and institutions. I am here today to offer
6 Prairie Farms' support of Proposals 1 and 2.

7 Prairie Farms is not against
8 producer-handlers. In fact, Prairie Farms could be
9 described as a producer-handler, but instead of being
10 one dairy farmer who is vertically integrated, Prairie
11 Farms is 700-plus dairy farmers who have pooled their
12 resources to process and market their milk.

13 Because of this pooling of resources, the
14 vast majority of Prairie Farms -- of the plants Prairie
15 Farms operates are regulated by various Federal Orders
16 as indicated earlier in this testimony. This prevents
17 Prairie Farms from qualifying or using the
18 producer-handler provisions in Federal Orders.

19 Systemwide, Prairie Farms Class I
20 utilization is about 70 percent. This means that most
21 months, Prairie Farms pays more into the pool than it
22 draws out, the exception being those rare months when
23 the Class III or the Class IV price is higher than the
24 Class I price. In other words, Prairie Farms members
25 must share their Class I utilization with all dairy

1 farmers participating in a Federal Order pool each
2 month.

3 The U.S. dairy industry is large and
4 diverse. There is plenty of room for entrepreneurs and
5 innovators. When businesses offer unique products or
6 packaging or serve a small niche market, that is a good
7 thing and helps expand the product category.

8 Proposals 1 and 2 do nothing to harm most
9 dairy farmers who are trying to capture more of the
10 consumers' dairy dollar. Prairie Farms members
11 collectively do that every day. Proposals 1 and 2 would
12 preserve equity for those who operate under the
13 constraint of the Federal Order vis-a-vis
14 larger-than-average dairy farmers who vertically
15 integrate their operation, but use a loophole in the
16 Order to permit them to grow to sizes that allow them to
17 cherry-pick the fluid milk market.

18 While there are currently only a few
19 large-scale producer-handlers, failure to close this
20 loophole may encourage more to enter the fluid milk
21 business. Prairie Farms has no problem competing with
22 any fluid milk processor on an equitable basis. If a
23 processor offers products that are superior in quality
24 or packaging, or if that company provides better service
25 to its customers, it should be successful.

1 Likewise, if a milk processor operates
2 efficient processing plants that enable it to offer its
3 products at a lower price, the owners of that company
4 and its customers benefit. However, if the milk
5 processor's main advantage is exploiting a loophole in
6 Federal Orders, that is unfair to those who play by the
7 rules every day.

8 One of my biggest concerns with the
9 Federal Order hearing process is that quite often we
10 hold hearings to fix last year's problems. At this
11 hearing, we have a chance to address a concern before it
12 becomes a large problem. Adoption of Proposals 1 and 2
13 will simplify Federal Order language and close a
14 loophole that, while currently not widely exploited, may
15 be in the near future.

16 Failure to remove the producer-handler
17 definition from Federal Orders could lead to the
18 creation of business relationships that could not have
19 been anticipated not so long ago. It is quite possible
20 that fluid milk processing entities could be created
21 that involve farmers and retailers that fall completely
22 outside the current system.

23 Dairy farmers could be faced with two
24 different choices: They can keep the current system in
25 place, but be relegated to serving only the customers

1 that a new generation of producer-handler chooses not to
2 serve, or they could vote out the current system and
3 face the unknown of deregulation in the fluid milk
4 business.

5 Recent problems in financial markets show
6 that some parts of the American economic system need a
7 regulatory safety net. Prairie Farms believes that the
8 fluid milk industry is another industry that needs some
9 minimal level of regulation to protect dairy farmers and
10 consumers.

11 The situation that we are talking about
12 at this hearing is not about the big processor
13 exploiting the small dairy farmer. It's about larger
14 dairy farmers potentially using a regulatory loophole to
15 harm smaller dairy farms. As I said earlier, Prairie
16 Farms is not afraid to compete with any company on an
17 equitable regulatory basis, but if the present and
18 future competitors use regulatory loopholes as their
19 primary advantage, it amounts to institutionalized
20 unfair economic advantage.

21 Proposals 1 and 2 do nothing to harm
22 dairy farmers who want to process, package and sell
23 their own milk. At the same time, Proposal 2 recognizes
24 that after reaching a certain size, any processor can
25 use their regulatory advantage to negatively impact

1 dairy farmers and milk processors operating under the
2 Federal Order system. Failure to address the
3 producer-handler definition now has the potential to
4 cause serious financial harm to dairy farmers and
5 consumers.

6 Q. Thank you, Mr. Lee. Now, I know
7 initially that your testimony supports Proposals 1 and
8 2, which were originally submitted by both National Milk
9 Producers and International Dairy Foods Association,
10 correct?

11 A. Yes.

12 Q. Has Prairie Farms encountered any direct
13 impacts by the presence, in any of the markets that it
14 deals, of producer-handlers?

15 A. Our Roberts Dairy joint venture and our
16 plant in Peoria, Illinois, are currently competing with
17 a large producer-handler located in northeast Missouri,
18 who has used his regulatory advantage to his benefit.
19 And in order for Prairie Farms to maintain some retail
20 accounts, we have had to lower prices 30 to 40 cents per
21 gallon just to maintain our shelf space.

22 Q. Are you aware of any other entities
23 competing with that same producer-handler who have
24 actually lost shelf space?

25 A. I believe Anderson Erickson Dairy is

1 impacted by that, as well, perhaps Dean Foods at a
2 couple of plants.

3 Q. So that's a direct impact based upon a
4 reduction in the margins you are able to receive,
5 because in competition you had to lower your milk price
6 in order to meet competition?

7 A. The handler that I alluded to has even
8 been so bold as to go out and offer firm pricing to
9 customers for one year.

10 Q. Why is that a difficult issue for you?

11 A. They're not subject to the upward and
12 downward movements of the Class I price under the Order.

13 Q. And you are?

14 A. Yes.

15 Q. What about hedging that could be
16 available?

17 A. We have explored hedging with a couple of
18 different brokers. We've been told it's doable, but
19 it's not practical, particularly on the scale we would
20 have to get into the market to do some hedging.

21 Q. That is to say that you would be so large
22 in the hedge market, there isn't a flip side for it?

23 A. Correct.

24 Q. How about any indirect impacts that you
25 have experienced as a result of producer-handlers?

1 A. In March, Prairie Farms --

2 Q. Of this year?

3 A. Pardon me. I'm sorry. In March of 2009,
4 Prairie Farms lost some business with a large national,
5 even international retailer, who will remain unnamed.
6 The business was taken away from Prairie Farms and given
7 to a large national fluid milk processor, a competitor
8 of ours. The logic that we were given for the loss of
9 business was that because that large national processor
10 lost business in El Paso, Texas, that this retailer felt
11 an obligation to help them maintain their volume with
12 them, so they took business away from Prairie Farms.

13 Q. And where did the business get taken away
14 at Prairie Farms?

15 A. The business was located in north central
16 Illinois, about an hour south of Chicago.

17 Q. And was it your understanding that the
18 business in El Paso went to a producer-handler?

19 A. Yes.

20 Q. And so the impact of a producer-handler
21 in Order 126 is felt today how many miles away in
22 Illinois?

23 A. I would guess it's in excess of 1,000
24 miles from El Paso to one hour south of Chicago.

25 Q. Has Prairie Farms had any discussions

1 with any of its buyers that you would like to discuss
2 with regard to producer-handlers?

3 A. I would just say that the concept
4 intrigues large national retailers.

5 MR. ENGLISH: I move the admission of
6 Exhibit 34, and the witness is available for
7 cross-examination.

8 JUDGE CLIFTON: Thank you, Mr. English.
9 Is there any objection to the admission into
10 evidence of Exhibit 34?

11 There is none. Exhibit 34 is hereby
12 admitted into evidence.

13 Who will begin the cross-examination?
14 Mr. Miltner, thank you.

15 CROSS-EXAMINATION

16 BY MR. MILTNER:

17 Q. Good afternoon, Mr. Lee. I am looking at
18 what I think is the fourth page of your statement. Yes,
19 it is the fourth page.

20 A. Okay.

21 Q. In the third full paragraph, you note
22 that there are exceptions when Prairie Farms draws milk
23 from the pool, when there's a price inversion?

24 A. Yes.

25 Q. When that type of price inversion occurs,

1 is there also a depooling of milk from the Orders, in
2 your experience?

3 A. Yes.

4 Q. Is there a price, a negative financial
5 impact on Prairie Farms' members when that depooling
6 occurs?

7 A. There is the negative PPD under the
8 Order.

9 Q. Does the milk that is depooled from the
10 Order, not pooled as a result of that price inversion,
11 exacerbate that negative PPD?

12 A. Yes, it does.

13 Q. To the disadvantage of your members?

14 A. Yes.

15 Q. Does Prairie Farms calculate what that
16 negative impact is?

17 A. No. I'm sorry, we don't.

18 Q. You had attended, and I was also in
19 attendance at hearings that addressed curtailing that
20 incidence of depooling direct price inversions?

21 A. Yes.

22 Q. Since those rule changes took effect, has
23 depooling ceased?

24 A. No. It's still used by organizations
25 that can to the maximum of their ability to do so.

1 Q. Two paragraphs down, you say, "Proposals
2 1 and 2 do nothing to harm most dairy farmers who are
3 trying to capture more of the consumers' dairy dollar"?

4 A. Uh-huh.

5 JUDGE CLIFTON: Is that yes?

6 THE WITNESS: I'm sorry. Yes.

7 JUDGE CLIFTON: Okay.

8 BY MR. MILTNER:

9 Q. Does it, in fact, cause harm to those
10 larger dairy farmers that also trying to capture more of
11 the consumers' dairy dollar?

12 A. I don't understand the question.

13 Q. Well, you say that the proposals don't
14 harm most dairy farmers. The implication that I read
15 into that is that it actually does cause harm to larger
16 dairy farmers.

17 A. I would counter that by saying that
18 Proposals 1 and 2 recognize that after farmers reach a
19 certain scale, they can have a wide-ranging impact in
20 the marketplace if they take advantage of the
21 producer-handler exemption. Proposals 1 and 2 do
22 nothing to harm what I regard as a more traditional
23 producer-handler. I'm talking about a unit that is
24 milking 50 to 200 cows, that decides they want to
25 process and package and wholesale or resale their own

1 milk. But it recognizes that there is a point where
2 larger players can exploit the advantage of being a
3 producer-handler.

4 Q. And in many marketing areas, the average
5 farms are in that range of up to 200 cows, particularly
6 the upper Midwest, the Northeast, even portions of the
7 Mideast and Central Orders, right?

8 A. Yes.

9 Q. And in other marketing areas,
10 particularly in the south and southwest, those size
11 farms are almost nonexistent, correct?

12 A. I believe so.

13 Q. Is it your -- is it your -- or Prairie
14 Farms' position that we should adopt regulations on a
15 nationwide basis that afford opportunities to producers
16 in some regions, but not others?

17 A. If you're asking if I think that the
18 exemption ought to be based -- regionalized, no.

19 Q. Okay. But what you are saying is that
20 the cutoff should be set based on the farm size, that at
21 some point the farm becomes so big, they shouldn't be
22 entitled to have that exemption?

23 A. Yes.

24 Q. Does Prairie Farms have a position on the
25 proposal to adopt individual handler pools?

1 A. We do not have an official position, but
2 for Prairie Farms, with our high Class I utilization, it
3 would be wonderful.

4 Q. I thought you might say that.

5 A. Pardon me?

6 Q. I thought you might say that.

7 A. Yeah.

8 Q. Do you have a stated position on any of
9 the other proposals other than 1 and 2, including
10 National Milk's Proposal 26?

11 A. No. I only came prepared to testify on 1
12 and 2.

13 Q. So Prairie Farms would like to see the
14 elimination of producer-handlers as a regulatory option
15 and the expansion of the exempt plant limited to
16 450,000 pounds?

17 A. Correct.

18 Q. Of the plants you list that Prairie Farms
19 operates, you say they are regulated under five Federal
20 Orders. Are all of those plants fully regulated?

21 A. Yes.

22 Q. Do you have any partially regulated
23 plants?

24 A. The plant in Jefferson City, Missouri, is
25 a partially regulated plant, but I categorize it as

1 unregulated for the record.

2 Q. Does its volume exceed 450,000 pounds of
3 fluid milk?

4 A. Yes.

5 Q. Has it caused disruption in this area as
6 a result of being partially regulated at that level?

7 A. No, because the plant is located in the
8 donut hole in Order 32 that is unregulated, and its
9 sales area remains in that donut hole.

10 Q. Could you describe the donut hole as a
11 loophole?

12 A. I'm sorry. I thought you wanted me to
13 just describe the donut hole.

14 Q. No, no. I know what it looks like.

15 A. Or how we happened to end up with this.
16 Only the authors of Order reform know why it's there.
17 Is it a loophole?

18 Q. You can call it a donut or a loophole.
19 They look about the same. You don't have to answer it.

20 A. I'm thinking of the way I want to answer
21 you, but it does two things: It does provide that plant
22 with some advantage in the area in which it is located,
23 but it also prevents that plant from expanding its sales
24 area outside of the unregulated area -- or discourages.
25 I'll say that, it discourages.

1 Q. It's not in your statement, you had a
2 colloquy with Mr. English about some competitive -- I'll
3 call it competitive situations or account changes which
4 you attribute to producer-handlers, and I jotted down
5 the first one you discussed with the producer-handler in
6 Missouri. Was it Roberts Dairy?

7 A. The Roberts Dairy joint venture and our
8 plant in Peoria, Illinois, both compete with this
9 producer.

10 Q. For what type of account? Who is that?

11 A. One fairly substantial regional grocery
12 chain, and then a lot of small proprietor-type groceries
13 located in small towns in Missouri and Iowa and western
14 Illinois.

15 Q. Would you provide us the prices that you
16 were supplying the account at and that you lost the bid
17 at?

18 A. No, I will not.

19 Q. Will you supply us the volumes of those
20 accounts?

21 A. No.

22 Q. Who told you that this producer-handler
23 would offer firm prices for a year?

24 A. The general manager of the Roberts joint
25 venture and the sales manager for the Prairie Farms

1 division in Peoria.

2 Q. Those are employees of Prairie Farms
3 or --

4 A. Yes.

5 Q. -- Prairie Farms joint venture?

6 A. Yes. I'm sorry to interrupt, yes.

7 Q. So that's where you heard it. Where did
8 they hear it?

9 A. From the customers to whom the offer had
10 been made.

11 Q. Which customers?

12 A. Again, they will remain unnamed.

13 Q. Okay. Do you have any information at all
14 about the contract that was allegedly taken by the
15 producer-handler in El Paso, such as the price that was
16 being quoted by the previous supplier, the price that
17 was quoted by the producer-handler, the volumes, the
18 number of stores, or any of that information that you
19 will share with us?

20 A. The only specific information I have was
21 a news article out of an El Paso, Texas, newspaper that
22 talked about, with the arrival of this producer-handler
23 in the marketplace, that prices for milk had gone down
24 substantially.

25 Q. They were talking about retail prices in

1 that article?

2 A. Yes.

3 Q. So they didn't provide any information
4 about the quoted price for the stores?

5 A. No. That would have been proprietary
6 information.

7 Q. Somebody could have shared it with a
8 reporter, though. There's lots of stuff that gets into
9 papers, right?

10 A. Yes.

11 Q. But you don't have any information about
12 why that account changed hands or the prices at which it
13 changed hands?

14 A. We were told it changed hands over price,
15 but not at what price.

16 Q. Who told you that?

17 A. A spokesman for the large retailer.

18 Q. Will you tell us what retailer it is?

19 A. No. I think you can connect the dots in
20 my testimony and figure it out.

21 Q. I can, but the record can't.

22 A. No, I will not name that retailer.

23 Q. And the same retailer told you you lost
24 an account to make room for the account that was lost on
25 the basis that might have been price or might not be,

1 but we don't know?

2 A. Correct.

3 MR. MILTNER: Thank you.

4 JUDGE CLIFTON: Thank you, Mr. Miltner.

5 Mr. English -- oh, you just want your water?

6 Who else is ready to cross-examine?

7 Mr. Beshore.

8 MR. BESHORE: Thank you, your Honor.

9 Marvin Beshore.

10 CROSS-EXAMINATION

11 BY MR. BESHORE:

12 Q. Good afternoon, Gary.

13 A. Hi, Marvin.

14 Q. I'm interested in the testimony, first of
15 all, with respect to the competition from a
16 producer-handler located in Missouri, I think you said?

17 A. Yes.

18 Q. Did I understand your testimony
19 correctly, that because of competition from that
20 producer-handler, you were required to reduce your price
21 to certain accounts, to maintain them, by 30 to 40 cents
22 per gallon?

23 A. That is correct.

24 Q. Let's translate that into dollars per
25 hundredweight. 30 cents per gallon is --

1 A. It's in excess of \$3 per hundred.

2 Q. So they're what, 12 gallons?

3 A. 11.6 when you allow for shrinkage.

4 Q. Pardon?

5 A. 11.6 gallons per 100 pounds of milk when
6 you allow for shrink.

7 Q. Okay. So 30 cents a gallon means that
8 the gross revenues to the dairy farmers supplying those
9 Prairie Farms plants or joint venture plants went down
10 in excess of \$3 per hundredweight on those sales?

11 A. Correct.

12 Q. And if it was as much as 40 cents per
13 hundredweight, the reduction -- 40 cents per gallon, I'm
14 sorry. The reduction in gross revenues on those volumes
15 would be approximately how much?

16 A. Something between \$4 and \$5 per hundred.

17 Q. When you reduced -- and those reductions
18 would have been on the wholesale price per gallon,
19 wholesale and to-store price per gallon, I assume?

20 A. Correct.

21 Q. Can you impute a -- or did you, let me
22 ask you that. Did you impute a raw milk cost for those
23 wholesale gallon prices that you were competing with?

24 A. The difference would be approximately the
25 Class I differential and the over-order premium and fuel

1 surcharges and such, such as that, yes.

2 Q. So, in other words, the \$3 to \$4.50 range
3 was approximately the difference between -- the Class I
4 differential in those geographic areas?

5 A. The area where that plant is located
6 would be in the \$1.80 Class I differential zone in Order
7 32. We currently have a \$2.91 per hundred over-order
8 premium in that area. We have a fuel surcharge of
9 around 7 or 8 cents per hundred. We have an MA fee of a
10 nickel.

11 Q. So those amounts aggregate to --

12 A. Approximately the prices that the
13 processor was quoting.

14 Q. So in order for you to compete, you had
15 to, in essence, assume that you were purchasing the milk
16 at blend price, or actually Class III price, I guess?

17 A. We were competing against an unregulated
18 handler whose cost of milk was what he wanted it to be.
19 And he could very easily back into what our cost was and
20 use that as his apparent advantage.

21 MR. BESHORE: Okay. Thank you.

22 JUDGE CLIFTON: Did you have a question,
23 Mr. Miltner?

24 MR. MILTNER: I want to point out that
25 the line of questioning here assumes information

1 that the witness will not provide. We don't
2 have any information about the prices at which
3 these accounts were serviced, and so there's no
4 information about what kind of margin or markup
5 we're working back from.

6 We're assuming that we're working back
7 from an invoice price that Prairie Farms was
8 providing, that nobody knows. And so we're
9 assuming an awful lot that we have nothing in
10 the record to substantiate.

11 JUDGE CLIFTON: Before I hear from you,
12 Mr. Beshore, when you say that this
13 producer-handler's cost was whatever he wanted
14 it to be, my mind is saying, his price is
15 whatever he wanted it to be, but his cost is his
16 cost.

17 THE WITNESS: That would be a better
18 term, yes.

19 JUDGE CLIFTON: Okay. Go ahead,
20 Mr. Beshore.

21 MR. BESHORE: Well, I just want to --
22 that was -- I don't know. It wasn't an
23 objection. It was argument inserted in the
24 examination here. But I think it's completely
25 incorrect.

1 BY MR. BESHORE:

2 Q. Mr. Lee, isn't it correct that your
3 testimony, in terms of the reduction of your prices, the
4 amount they were reduced, that's factual? I mean, you
5 reduced your price 30 to 40 cents per gallon, correct?

6 A. Yes, we did.

7 Q. And regardless of whether you reduced it
8 from \$10 or \$9 or \$2 or \$1, you reduced it 30 to 40
9 cents per gallon, correct?

10 A. Yes.

11 Q. And that's your reduction, it's nobody
12 else's, correct?

13 A. Yes.

14 Q. And you have direct information and
15 factual knowledge of those price reductions?

16 A. Yes.

17 Q. And when you multiply -- when you convert
18 those price reductions into dollars per hundredweight,
19 it's simply arithmetic?

20 A. Correct.

21 Q. And you testified to your cost, that is
22 Prairie Farms' cost, of milk in terms of the Class I
23 differential required by the Federal Order, correct?

24 A. Correct.

25 Q. And the over-order premiums that prevail

1 in that market from your suppliers, correct?

2 A. Correct.

3 Q. Including fuel surcharges, correct?

4 A. Yes.

5 Q. Those are your charges, nobody else's?

6 A. Correct.

7 Q. I mean, there are -- other people have
8 the same charges applicable to them, but they're not --
9 they have nothing to do with the producer-handler's
10 operations, they have to do with Prairie Farms' actual
11 cost of milk, correct?

12 A. That's correct.

13 Q. And so when you were testifying with
14 respect to the difference, the 30 to 40 cents, you just
15 testified that it equals the Class I differential plus
16 the over-order premiums that apply in that marketplace?

17 A. I think I said approximately.

18 Q. Approximately, yes, you did. I didn't
19 mean to misstate your testimony. So when Mr. Miltner
20 comments that you're talking about information that you
21 won't provide, that's completely inaccurate with respect
22 to that testimony, is it not?

23 A. My response to him was, I was not going
24 to provide the names of the accounts and what our
25 original wholesale price was and what it had to be

1 adjusted to.

2 Q. Okay. Would you provide the name of his
3 client that you're competing with in that situation?

4 A. I am referring to Heartland Farms located
5 in Newark, Missouri.

6 Q. Okay. Now, with respect to -- and I know
7 you don't want to provide the identity of the account in
8 El Paso, and I'm not going to ask you to. But in terms
9 of connecting the dots, I want to make sure that I've
10 got your testimony correct. You described it as a large
11 national and even international retailer?

12 A. Correct.

13 JUDGE CLIFTON: Would you spell Heartland
14 for me?

15 THE WITNESS: H-e-a-r-t-l-a-n-d. I think
16 it's one word.

17 CROSS-EXAMINATION

18 BY MR. MILTNER:

19 Q. Now, one other area. You indicated, in
20 response to a question from Mr. English, that large
21 national buyers, if my notes are close, were, quote, I
22 think you used the word "intrigued" by the possibility
23 of purchasing milk from the producer-handlers.

24 A. That is correct.

25 Q. When you -- I wonder if you can provide

1 any more information with respect to what's involved in
2 that intrigue. Are they aware -- those large national
3 buyers aware of the fact that producer-handlers are not
4 required to make payments into the Federal Order pool?

5 A. Yes, they are.

6 Q. And are they aware of what that means on
7 a, you know, dollars-and-cents basis in terms of Federal
8 Order obligations?

9 A. They can certainly figure it out.

10 Q. Okay. And they're aware that those
11 producer-handlers would not be subject to the movements
12 of minimum federally regulated class prices?

13 JUDGE CLIFTON: Don't answer yet. Let me
14 hear the objections. First Mr. Ricciardi.

15 MR. RICCIARDI: Your Honor, I sat down
16 because I'm getting tired, but they, being
17 unidentified people, who may be two or three
18 sources away, we have no testimony at all that
19 there's a basis for what he just said on this
20 witness stand. We have raging hearsay problems.

21 And I realize we're letting a lot of
22 things in, but let's be fair. We've got to have
23 identification of the basis for this. And when
24 requested to get some of this information, we're
25 told, I know this, we're not going to tell you

1 about it. Let's at least give us an opportunity
2 to try to fairly cross-examine and make
3 Mr. Beshore ask a nonleading question once.

4 JUDGE CLIFTON: Mr. Vetne.

5 MR. VETNE: I concur. I might put it a
6 little bit differently. Administrative
7 proceedings have a bit looser standard for
8 receipt of evidence than do Federal courts.
9 However, I think that's measured by the kind of
10 thing that's also described in the rules of
11 practice, the type of evidence upon which a
12 responsible person is accustomed to rely.

13 And we do have the witness talking about
14 the state of mind of somebody else, or a number
15 of somebody else's. The universe of that
16 somebody else's or the identity of that somebody
17 else's is not identified. And what goes into
18 making that state of mind, or even the details
19 of it, we have no way of examining that. Are
20 they aware? You know, it could be five, it
21 could be 100. Who is "they"?

22 It doesn't -- you know, if the Secretary
23 were to rely on some version of this for any
24 part of a decision, this decision, hopefully,
25 wouldn't be able to stand by itself. It would

1 be arrested and taken off to dry out in a tank
2 someplace, because it wouldn't be able to walk
3 that straight line. Thank you.

4 JUDGE CLIFTON: Thank you, Mr. Vetne. Do
5 you remember the question, Mr. Lee? Starting
6 with, these large national retailers who are
7 intrigued. Do you have reason to know what
8 their state of mind is with regard to either
9 becoming producer-handlers or becoming the
10 buyers from producer-handlers? And if so --

11 THE WITNESS: I would simply say that
12 there are retailers who are not that familiar
13 with the history and the need for Federal
14 Orders, who question the need for any sort of
15 governmental regulation in the pricing of milk.
16 They may not understand why one group of milk
17 processors is subject to a different set of
18 regulations than perhaps another. And being
19 good businessmen, if they can get the same
20 quantity of milk, the same quality of milk, the
21 same delivery service at a lower price, they are
22 certainly going to look into that opportunity.

23 JUDGE CLIFTON: Have you had any
24 discussion with representatives from such firms?

25 THE WITNESS: No, I have not. I'll avoid

1 the Paul Rovey mistake from earlier. I will say
2 I am going on information from the CEO of
3 Prairie Farms and from sales and operations
4 people at Prairie Farms.

5 JUDGE CLIFTON: Mr. Beshore, I think you
6 got as much as you need from this witness when
7 he said, they can figure it out. If you want to
8 persist in your last question, you may.

9 MR. BESHORE: I have just one question.

10 CROSS-EXAMINATION

11 BY MR. BESHORE:

12 Q. The information that you received from
13 the CEO of Prairie Farms and from -- who were the
14 others?

15 A. I said operational-type management people
16 and salespeople.

17 Q. Okay. Did they indicate to you that the
18 buyers from the large national chains demonstrated, in
19 their actions, knowledge of the regulatory status of
20 suppliers of milk, including producer-handlers?

21 A. I think they had a limited knowledge --

22 MR. RICCIARDI: Judge.

23 JUDGE CLIFTON: Mr. Ricciardi.

24 MR. RICCIARDI: Judge, come on. We have
25 no basis for that statement. Now we have double

1 hearsay. He wants to testify, I understand
2 that. But Mr. Vetne is correct, this decision
3 has to be based upon what reasonable people rely
4 upon. Double and triple hearsay is not fair to
5 my clients or the Secretary. We need to have
6 personal knowledge or information that is
7 reliable, and Mr. Lee has already admitted he
8 doesn't have that.

9 JUDGE CLIFTON: That objection is
10 overruled. The witness' answer stands.

11 Mr. English.

12 MR. ENGLISH: I think this was my
13 witness, and I didn't really get a chance to
14 respond to a number of objections that were
15 made. And I want to point out, and maybe I can
16 ask a couple questions of the witness.

17 REDIRECT EXAMINATION

18 BY MR. ENGLISH:

19 Q. Maybe it's so basic that it's absurd,
20 but, unfortunately, apparently, some people think --

21 JUDGE CLIFTON: Don't go there. Just ask
22 the questions.

23 BY MR. ENGLISH:

24 Q. Is the dairy industry, in particular the
25 fluid milk market, extremely competitive?

1 A. We regard it as very competitive.

2 Q. Is it in your interest to anger or
3 otherwise upset your buyers by naming them by name in
4 this proceeding?

5 A. I'm on risky ground just alluding to
6 certain retailers. Certainly, it's very thin ice to
7 start naming the names of your largest customers.

8 Q. And so as a reasonable businessperson,
9 you are declining to name names for that purpose?

10 A. Correct.

11 MR. ENGLISH: I think that sets the
12 stage, your Honor, for why, as a reasonable
13 person, he's not disclosing the names. He has
14 said both the institution and from his own
15 knowledge, based upon the competition and the
16 reduction in price, that these are the things
17 that Prairie Farms has had to do in response to
18 competition.

19 JUDGE CLIFTON: But, Mr. English, weren't
20 there some companies that Mr. Lee did not want
21 to name that are not Prairie Farms' customers in
22 the course of these last few questions?

23 BY MR. ENGLISH:

24 Q. Would you like to clarify? Were they
25 customers?

1 A. I was only talking about Prairie Farms'
2 experience.

3 Q. With Prairie Farms' customers?

4 A. Yes.

5 MR. ENGLISH: So they are Prairie Farms
6 customers, your Honor.

7 JUDGE CLIFTON: Okay. That's helpful.

8 MR. MILTNER: Your Honor, I would like to
9 point out that in order to adequately prepare
10 our case and our evidence, we need to -- Mr. Lee
11 needs to make a decision, which he's made,
12 whether to provide the full information upon
13 which the Secretary can base a decision, and
14 upon which we can base a cross-examination and
15 an analysis of his assertions. And if he
16 chooses not to do that for competitive reasons,
17 he's certainly free to do so, but the record
18 ought to reflect that that decision has been
19 made, at the very least.

20 JUDGE CLIFTON: Thank you, Mr. Miltner.
21 Oh, Mr. Carroll, I hope this is productive.

22 MR. CARROLL: Oh, I do, too. I just want
23 to state, since everyone is stating their
24 position, that I join in the objection. I agree
25 that the witness has a right to keep proprietary

1 information, and I try, in all my questions, to
2 acknowledge that, and I acknowledge it here.

3 But that does not give him a right to
4 come to a hearing, assert that someone else
5 should be driven out of business, and make it
6 impossible to determine whether his statement is
7 accurate or inaccurate. Those are two different
8 things. I have a couple cross-examination
9 questions, also, when the time comes.

10 JUDGE CLIFTON: All right.

11 MR. CARROLL: Thank you.

12 JUDGE CLIFTON: Anything else on the
13 issue of the difficulty in getting at -- first
14 of all, let me say, I have been very benefited
15 by Mr. Lee's testimony. He is very
16 knowledgeable and his statement is very helpful.

17 That said, is there any other record that
18 anyone wants to make about what more you wish
19 you had to work with?

20 None. Then, Mr. Carroll, you may
21 cross-examine.

22 CROSS-EXAMINATION

23 BY MR. CARROLL:

24 Q. I'm sure, directly or indirectly, this
25 subject has been raised, but I want to, if I can,

1 crystalize it at one point in the record. It's so,
2 isn't it, that in the business that you're engaged, that
3 sometimes you cut prices?

4 A. Yes.

5 Q. And so does everybody else at one time or
6 another?

7 A. Yes.

8 JUDGE CLIFTON: I don't think he can
9 speak for everybody else.

10 BY MR. CARROLL:

11 Q. Well, I mean, in the trade, it's common
12 practice?

13 A. It's also common practice to raise
14 prices.

15 Q. Right. They can raise or they can be
16 lowered, and that's the freedom of competition that we
17 have in the sale of this product that you're involved
18 in?

19 A. Correct.

20 Q. So there's nothing about a price being
21 cut, by itself, that indicates anything except a desire
22 to please the customer, isn't that correct?

23 A. Would you restate that, please?

24 Q. There's nothing about the price -- the
25 fact a price is cut, by itself, that indicates anything

1 more than an attempt to get the customer?

2 A. I wouldn't agree with that completely.

3 Q. Well, let me ask you this --

4 A. When you say "get the customer," no.

5 Q. Well, to service. I should say service
6 the customer. Let me ask this: On occasion, haven't
7 you cut a price in order to establish a relationship
8 with a customer?

9 A. I would assume I have.

10 Q. Sure. And maybe you took a loss on that?

11 A. Perhaps.

12 Q. And maybe that's what happened in this
13 case? Thank you.

14 JUDGE CLIFTON: Do you want an answer,
15 Mr. Carroll? Don't walk away until he has a
16 chance to answer you, please.

17 MR. CARROLL: I don't know. He didn't
18 look like he was going to, but I'll be glad
19 to --

20 JUDGE CLIFTON: Give him a little minute
21 if he wants to think about it.

22 MR. CARROLL: If he wants to think about
23 it.

24 A. Prices were adjusted for competitive
25 conditions. In the short run, if you want to maintain

1 volume in your plants to keep them operating
2 efficiently, you do what you have to do in terms of
3 price. In the long run, you either walk away from the
4 business or you go broke.

5 MR. CARROLL: Thank you.

6 JUDGE CLIFTON: Mr. Vetne.

7 CROSS-EXAMINATION

8 BY MR. VETNE:

9 Q. John Vetne, representing Mallorie's, et
10 al., three plants in the Pacific -- two in the Pacific
11 Northwest and one in Roswell, New Mexico.

12 Mr. Lee, I'm looking at the list of 35
13 plants operated by Prairie Farms. There are a number of
14 joint venture plants with various other cooperatives.
15 In all cases, Prairie Farms is the operating partner in
16 those joint ventures, is that correct?

17 A. Prairie Farms provides the management of
18 the joint ventures. The partner has the obligation to
19 arrange for the milk supply.

20 Q. So you run the plant?

21 A. Yes.

22 Q. You're very good at running plants,
23 aren't you? You think you are?

24 A. We've done okay.

25 Q. I think you are. With respect to --

1 let's go to the Order 32 plants. There are a couple of
2 cultured plants there, Quincy and Carbondale?

3 A. Yes.

4 JUDGE CLIFTON: What page are you,
5 Mr. Vetne?

6 THE WITNESS: Page 2.

7 JUDGE CLIFTON: Thank you. Page 2.

8 BY MR. VETNE:

9 Q. Are there page numbers on here?

10 A. No, but it was the second page in.

11 Q. Those two cultured plants, are they
12 stand-alone cultured plants?

13 A. Yes, they are.

14 Q. And do those two cultured plants
15 occasionally have some product that is assigned to Class
16 I?

17 A. No. Well, perhaps. If it was excess
18 shrink, that would be the only Class I that either of
19 those plants would have.

20 Q. None of them make, concurrently or ever
21 have made, for example, like, a beverage yogurt or a
22 beverage cultured product?

23 A. We make a spoonable yogurt in Quincy, but
24 we do not make a drinkable yogurt.

25 Q. And you would not have had any occasion

1 for those plants to receive packaged products that would
2 otherwise be Class I for distribution?

3 A. There is no route distribution out of
4 either of those facilities.

5 Q. How is that product distributed, then?
6 Does it come to a common warehouse and get distributed
7 with food and milk that's packaged elsewhere?

8 A. It is delivered to the fluid plants
9 mentioned above, plus other fluid plants in our system,
10 where it is off-loaded into a cooler and then
11 order-loaded to go out to customers, fluid milk, the
12 cultured products, orange juice, various products that
13 we offer.

14 Q. Okay. And with respect to the
15 unregulated plants on page 3, with the exception for the
16 moment of Jefferson City, do any of those plants ever
17 use milk that ends up in any Class I product
18 consignment?

19 A. No.

20 Q. Again, there's no beverage cultured
21 product or anything produced by those plants?

22 A. None.

23 Q. And they never receive packaged -- ever
24 receive packaged --

25 A. They do not.

1 Q. You operate a number of fluid milk
2 plants. What are the size ranges of those plants, the
3 smallest to largest?

4 A. I'll give you a range, but I won't tell
5 you specifically about the size of the plants, again for
6 proprietary reasons.

7 Q. I didn't ask that yet.

8 A. The smallest plant runs about 5 million
9 pounds per month and the largest about 30 million pounds
10 per month.

11 Q. Okay.

12 A. The majority would be between 10 million
13 and 20 million pounds per month.

14 Q. All right. Can you share something about
15 the range of costs for your plants from receipt of milk
16 at the silo to placement of packaged fluid milk products
17 in the plant cooler?

18 A. The conversion cost at the plants?

19 Q. The costs, yeah, per gallon, to take milk
20 from your silo to --

21 A. Conversion costs are calculated on a
22 per-hundredweight basis.

23 Q. All right. Then I know how to do the
24 arithmetic. We got it in here earlier.

25 A. All of the plants have operating costs in

1 excess of \$2 per hundred and less than \$10 per hundred.

2 Q. Is that the range?

3 A. That's about as vague as I can be with
4 you, John, without making an asinine statement.

5 Q. Okay. My question is, can I reasonably
6 infer, yes or no, that you have some plants that can
7 package milk for \$2, as little as \$2, and some plants at
8 which the cost is as much as \$10, or is it somewhere
9 close --

10 A. It's somewhere greater than 2 and less
11 than 10.

12 Q. I see. Can you -- are you able to say
13 whether your experience is that of what appears to be
14 the rest of the universe, that it costs more to package
15 milk at your smaller plants than your larger plants on a
16 per-unit basis?

17 A. Yes.

18 Q. Okay. Do all of your plants produce
19 their own packages, either blow mold or cartons?

20 A. Any of the plants that have a gallon jug
21 filler mold them on-site. Some of the plants that are
22 filling plastic half gallons or plastic pints mold them
23 on site. Some buy them.

24 Q. The vast majority of the milk distributed
25 by the plants operated by Prairie Farms, however, blow

1 their own containers?

2 A. Yes.

3 Q. And that is more -- that is more
4 efficient and less expensive than buying them, correct?

5 A. Correct.

6 Q. The plant in Fulton, Kentucky, was that
7 plant at one time a partially regulated plant, or has it
8 always been fully regulated?

9 A. I can't answer that. For as long as it's
10 been a part of Prairie Farms, which is about three
11 years, it's been fully regulated.

12 Q. Okay. Do any of these fluid -- are any
13 of these fluid plants plants that are dedicated to
14 producing a specialty fluid milk product, such as, I
15 don't know, Slim-Fast or milk without lactose, or that
16 kind of thing?

17 A. No.

18 Q. They all produce the regular range of
19 white milk and flavored milks?

20 A. Specialty products are purchased from
21 third parties.

22 Q. Now, with respect to the plant in
23 Jefferson City, Missouri, that's the plant that was
24 formerly known as Central Dairy?

25 A. Correct.

1 Q. So it was owned by somebody else, and
2 they went out of business and sold it to Prairie Farms?

3 A. They never went out of business. There
4 was a smooth transition from private ownership one day
5 to Prairie Farms ownership the next.

6 Q. You acquired it from Central Dairy?

7 A. Yes.

8 Q. And you own it wholly?

9 A. Yes.

10 Q. Would it be fair to say that the
11 balancing means the surplus milk associated with the
12 Central -- former Central Dairy plant is dispooled for
13 the most part?

14 A. I can't answer that because that plant is
15 supplied almost entirely by another cooperative.

16 Q. Would you agree with me that it would be
17 in whatever supplier's best interest to pool the surplus
18 associated with the plant and not pool the milk
19 delivered to the plant?

20 A. If that were necessary, yes.

21 Q. That would generate the highest returns?

22 A. Yes.

23 Q. Okay. And a cooperative is under a
24 fiduciary obligation to its members to generate the
25 highest returns when -- within legal bounds, correct?

1 A. Agreed.

2 Q. Would it be fair to say that the Central
3 Dairy plant in Jefferson City -- is it still called
4 Central Dairy?

5 A. Yes.

6 Q. -- is among the smallest of the plants
7 that you operate?

8 A. Among them, but not the smallest.

9 Q. Does the Central Dairy plant package milk
10 in containers using labels that are also used in other
11 plants operated by Prairie Farms?

12 A. The plant in Jefferson City packages milk
13 in labels other than the Central Dairy label, but not
14 for delivery to other Prairie Farms plants, but to serve
15 Prairie Farms accounts located in that area.

16 Q. And aren't those Prairie Farm accounts
17 also served by pooled plants on occasion for some of
18 their milk?

19 A. Yes.

20 Q. So when the Central Dairy supply is
21 insufficient, milk under that label can come from one or
22 more of the other plants operated by Prairie Farms?

23 A. Theoretically.

24 Q. And that has actually happened, hasn't
25 it?

1 A. Yes.

2 Q. Does the supply to the plants that are
3 not wholly owned and wholly operated by Prairie Farms --
4 let's look at that. Milk that's used for Class I
5 commands a Class I premium, correct?

6 A. Yes.

7 Q. Does Prairie Farms make a decision of
8 what that premium will be?

9 A. No. The joint ventures are price takers.

10 Q. So whatever -- okay. So the supplying
11 for the joint ventures, Prairie Farms does not supply
12 that with its own producer member milk?

13 A. That is correct.

14 Q. Is it supplied by somebody else, and that
15 somebody else, or those somebody else, decide what the
16 Class I premium will be?

17 A. Either on their own or through the
18 umbrella of an agency, yes.

19 Q. Yes, okay. And what about the -- what
20 about the milk to the Prairie Farms plants that are
21 mostly on page 2? Is there a Class I premium attributed
22 to such milk, or actually charged between the operating
23 offices of Prairie Farms?

24 A. The plants mentioned at the top,
25 Carlinville, Olney, et cetera, their price of milk is

1 announced by the St. Louis Marketing Agency, which is an
2 agency that oversees the delivery of milk to Prairie
3 Farms and Dean Foods and I think one other small plant,
4 and it consists -- the members of the agency consist of
5 DFA, the MPI, Foremost, Land O'Lakes, Central Equity,
6 Michigan Milk Producers.

7 Q. Okay.

8 A. The next group of plants, Battle Creek,
9 their premium is announced by the southern Michigan
10 pricing agency. I forget the exact title. The other
11 two plants follow the Mideast Marketing Agency price.
12 And Holland, we follow the Mideast Marketing Agency
13 price. At Somerset, we follow the DFA price announced
14 out of Knoxville. In Rockford, we follow the CMPC
15 price.

16 Q. CMPC meaning?

17 A. Central Milk Producers Cooperative.

18 Q. And that's an organization of
19 cooperatives that operates throughout Federal Order 30?

20 A. Correct.

21 Q. For any of those, is there a particular
22 member cooperative of those agencies that is designated
23 as the managing agency? Say St. Louis, is there a
24 cooperative?

25 A. The St. Louis agency is managed by a

1 third party.

2 Q. Okay. And the prices are fixed what, at
3 a committee meeting, or how?

4 A. There is -- I would call it a board, for
5 lack of a better word, made up of the co-ops that I
6 mentioned a minute ago, AMPI, DFA, Foremost, Land
7 O'Lakes, Central Equity. I think currently, someone
8 from AMPI is president of the agency. They decide what
9 the premium is going to be.

10 Q. And southern Michigan, is there a third
11 party involved there, or is one of the partners --

12 A. Yes, it is. The price in southern
13 Michigan is announced by an agency. The pool is run by
14 an individual. I think there's a co-op in Michigan that
15 kind of acts as leader in announcing premiums for that
16 market.

17 Q. MMPA?

18 A. Yes.

19 Q. Let's see, Quincy and Carbondale was a
20 different organization?

21 A. No. Quincy and Carbondale -- we do have
22 premiums on Class II milk in the St. Louis agency, so
23 they follow the premium announced by that agency.

24 Q. I see. Good. Somewhere in the colloquy
25 or discussion on evidence, and objections after that,

1 you testified that your comments on competitor responses
2 and your knowledge of competition was limited to the
3 markets in which you operate?

4 A. Yes.

5 Q. Okay. So just to be clear, you did not
6 intend to imply any state of competition or any state of
7 mind to a seller or buyer, for example, in the Pacific
8 Northwest market?

9 A. Not at all.

10 Q. You're vice president of procurement. Is
11 there another vice president or somebody with a --
12 comparably up in the corporate organization that is in
13 charge of packaged products, sales, and plant -- or
14 plant management, or both?

15 A. There are two directors of operations.

16 Q. Okay.

17 A. And there's a chief operating officer.
18 The two directors of operations report directly to the
19 CEO, however.

20 Q. Okay. It would be the directors of
21 operation that would be most knowledgeable in customer
22 responses, competitor responses for milk sales, is that
23 correct?

24 A. No. It would be more under the VP of
25 sales.

1 Q. So there's a VP of sales?

2 A. Yes.

3 Q. And the VP of sales is a VP for finished
4 product sales?

5 A. Yes.

6 Q. Okay. Do you know enough about buyer
7 behavior, that is purchasers of packaged fluid milk
8 products, to know that sometimes they seek price
9 concessions based on rumors or even made-up things that,
10 gee, you know, Joe Blow is offering milk for, you know,
11 a dollar over, you're charging me \$1.50, and you don't
12 know, and so you make a concession based on that kind of
13 representation?

14 A. The simple answer to that would be what I
15 know there is what I've heard from other Prairie Farms
16 employees.

17 Q. Okay. So you don't know the practices of
18 buyers in trying to negotiate price concessions --

19 JUDGE CLIFTON: Excuse me. Mr. Vetne, I
20 promised to have this witness out of here by
21 5:00. I lost track of the time. It's 5:24.

22 MR. VETNE: Mr. Lee, I'm done. Thank
23 you. Did you answer the last question? You
24 don't know --

25 JUDGE CLIFTON: I didn't let you finish

1 asking.

2 A. I was just going to respond that, as a
3 rule, when I get the milk delivered to the operating
4 plants, I'm done with it. I turn it over to processing
5 and sales, and they take it from there. So anything I
6 know beyond delivery of the raw milk to the plant is
7 relayed to me by others.

8 MR. VETNE: Godspeed.

9 THE WITNESS: Thanks.

10 JUDGE CLIFTON: Mr. Ricciardi.

11 MR. RICCIARDI: Your Honor, I have not
12 had an opportunity to cross-examine Mr. Lee, and
13 I know that he has difficulties in scheduling.
14 I don't know whether or not he's available
15 another time. I don't know whether or not --

16 MR. ENGLISH: Why don't you just go. Go.
17 Why don't you ask questions. Go. Don't waste
18 time. Go.

19 JUDGE CLIFTON: Thank you, Mr. English.
20 You may cross-examine, Mr. Ricciardi.

21 CROSS-EXAMINATION

22 BY MR. RICCIARDI:

23 Q. Mr. Lee, Al Ricciardi on behalf of AIDA.
24 So I'll do the last point first, and I will try, as I
25 usually do, to get through this as quickly as I can.

1 With regard to customer actions or price concessions or
2 anything else, that is someone else that we would look
3 to for that information, such as the VP of sales?

4 A. Correct.

5 Q. You have been in this industry, since at
6 least '73 employed by Prairie Farms, and you are
7 familiar, in general, with the dairy industry, correct?

8 A. Yes.

9 Q. And you've been to a number of Federal
10 Order hearings?

11 A. Yes.

12 Q. Now, you're aware that back in the period
13 of time when you started at Prairie Farms around '73,
14 the number of producer-handlers throughout the country
15 was in excess of 400? Actually 421 if you want to --

16 A. I cannot agree or disagree with that
17 number.

18 Q. You don't know?

19 A. No, I don't.

20 Q. We do know, because we've got Exhibit 13,
21 that the current number of producer-handlers, at least
22 as of 2009, is now down to 37. Were you aware of that?

23 A. That is correct. I agree with that.

24 Q. So in terms of growth, at least by
25 numbers of producer-handlers, they've substantially

1 declined since you've been in the business, correct?

2 A. Yes.

3 Q. With regard specifically to Heartland
4 Creamery, you named them as the competitor, right?

5 A. Uh-huh, yes.

6 Q. Okay. You know nothing about the size of
7 their plant, correct?

8 A. I have not been in the facility.

9 Q. So you don't know how large it is,
10 correct?

11 A. Correct.

12 Q. You don't know the equipment?

13 A. Correct.

14 Q. You don't know when it was built?

15 A. I know approximately when it was built,
16 but I can't give you the date or the month.

17 Q. And you can't tell me what its cost of
18 processing is, because you don't have any of that
19 information, correct?

20 A. But, again, as I said in my testimony, I
21 think that's irrelevant.

22 Q. I understand that, but I'm not asking you
23 whether it's irrelevant or not. You're not objecting to
24 anything. I'm saying you don't know it?

25 A. I don't.

1 Q. Okay. With regard to this customer who
2 you haven't named, that supposedly had something to do
3 with Heartland Creamery, my assumption is that your VP
4 of sales would have invoices, purchase orders and other
5 documents if, in fact, what you told us that he told you
6 or somebody told you is actually true?

7 A. Yes.

8 Q. And you don't have those today?

9 A. No, I don't.

10 Q. And you won't even tell me the name of
11 the customer?

12 A. No, I won't.

13 Q. But you're willing to name our company?
14 That's okay.

15 A. The customer I'm referring to is the
16 Hy-Vee stores.

17 Q. Okay. The Hy-Vee stores. How many of
18 the Hy-Vee stores?

19 A. I can't say. I don't know exactly how
20 many. They divide their business up among several
21 customers -- I mean, I'm sorry, several suppliers. I
22 don't know in how many cases we had to lower prices to
23 maintain shelf space. I don't know in how many cases we
24 lost shelf space.

25 Q. When was that?

1 A. Pardon me?

2 Q. When was that?

3 A. I said I don't know in how many cases.

4 Q. And specifically what stores? In what
5 locations?

6 A. I don't know.

7 JUDGE CLIFTON: Would you spell Hy-Vee
8 for me? I'm not familiar with it.

9 THE WITNESS: Yes. H-y, V-e-e. If
10 you've heard Kurt Warner, the quarterback for
11 various teams, that's where he worked as a stock
12 boy in college.

13 BY MR. RICCIARDI:

14 Q. Well, you've heard of Kurt Warner, and he
15 doesn't play for various teams. He plays for the
16 Arizona Cardinals, and he should have won the Super
17 Bowl.

18 A. He's played for the St. Louis Rams, he's
19 played for the New York Giants.

20 Q. Yes, but he currently plays for the
21 Arizona Cardinals?

22 A. Correct.

23 Q. All right. Let's move on.

24 JUDGE CLIFTON: That's all one word,
25 H-y-V-e-e?

1 THE WITNESS: I think so.

2 BY MR. RICCIARDI:

3 Q. You list, on pages 2 and 3, some of the
4 plants which are joint ventures with DFA?

5 A. Correct.

6 Q. Are all of the Hiland plants DFA joint
7 ventures?

8 A. Yes.

9 Q. So wherever it says a Hiland plant,
10 that's a joint venture between Prairie Farms and DFA?

11 A. Yes.

12 Q. When you say the plants are unregulated,
13 and you list them at the bottom of page 3, and we've
14 talked about Jefferson City, why are the remainder of
15 the plants that you have there, from Decatur down to
16 Lafayette, unregulated?

17 A. In the case of O'Fallon; Springfield;
18 St. Louis; Norfolk, Nebraska; the novelty plants, they
19 don't use any milk. They use condensed or powder or
20 cream or nonfat dry -- when I said "powder," I mean
21 nonfat dry milk or whey powder. They don't use any
22 fresh milk. Decatur uses a limited amount of fresh
23 milk. The cultured plant in Kansas City uses a very
24 limited amount of fresh milk.

25 Q. So do those plants have to make a pool

1 payment?

2 A. No, they don't.

3 Q. When you have a plant, such as the Hiland
4 plant at the top of 3, that's fluid and cultured, if
5 that was a 50/50 plant, is there a pool payment that is
6 required?

7 A. It depends on the various class prices
8 that month. But yeah, they're going to pay in on their
9 Class I. They're going to pay in on all classes and
10 they're going to draw the uniform.

11 Q. Okay. And so in a situation on a month,
12 depending on pricing, it could be that those plants that
13 are split plants wouldn't have any real pool obligation,
14 because they put it in with one hand in one pocket and
15 take it out with another?

16 A. Yes.

17 Q. Okay. Lastly, so you can get moving, you
18 can refer to page 5 of your statement, although it's not
19 required that you do that, but I'm going to do the
20 jumping off point from the sentence you wrote. The
21 third paragraph up from the bottom, you say in that last
22 sentence, "Or they can vote out the current system and
23 face the unknown of deregulation in the fluid milk
24 business." That was your statement, right?

25 A. Yes.

1 Q. You're aware that the Western Order was
2 voted out a few years ago?

3 A. Yes.

4 Q. And, therefore, Idaho, for example, has
5 been unregulated for a number of years now?

6 A. Yes.

7 Q. And that, in actuality, since
8 deregulation or unregulation, that the dairy business in
9 Idaho has grown?

10 A. The business of manufacturing cheese in
11 Idaho has grown, yes.

12 Q. And that would be part of the dairy
13 business, right?

14 A. Yes.

15 Q. Okay.

16 A. My statement was primarily referring to
17 the fluid milk. I do not think the fluid milk industry
18 lends itself well to deregulation.

19 MR. RICCIARDI: Okay. I understand.

20 Thank you.

21 THE WITNESS: Okay.

22 JUDGE CLIFTON: Thank you, Mr. Ricciardi,
23 for keeping that brief. That was very succinct.
24 I can't believe you got the information from
25 Mr. Lee.

1 MR. RICCIARDI: I'm the nicest person in
2 the room, Judge.

3 JUDGE CLIFTON: I'm hoping there's no
4 more cross-examination, but I would ask if
5 Mr. Tosi has any questions for Mr. Lee.

6 MR. TOSI: Mr. Lee, we have no questions
7 for you, but I appreciate you coming here, and I
8 congratulate you on your endurance here. Thank
9 you.

10 JUDGE CLIFTON: Mr. English, redirect.

11 MR. ENGLISH: Very limited, your Honor,
12 just to clarify the record.

13 REDIRECT EXAMINATION

14 BY MR. ENGLISH:

15 Q. When you say that the Jefferson City,
16 Missouri, plant -- or you were asked if it was
17 unregulated. You said it's really partially regulated?

18 A. Yes.

19 Q. That's pursuant to section 1000.76,
20 correct?

21 A. Yes.

22 Q. So you either have to be paying the plant
23 blend on all the milk under 1000.76(B) or you're paying
24 into the pool under (A) for any milk sold in the
25 regulated areas, correct?

1 A. That is what that plant is doing. It is
2 paying into the pool on the sales or unregulated areas,
3 or keeping the sales under a level where they become
4 fully regulated. And their occasional sales into the
5 regulated areas are basically to help out another plant.

6 Q. So when they sell in competition with
7 regulated facilities in a regulated area, they are
8 contributing to the pool on those sales?

9 A. Yes, they are.

10 MR. ENGLISH: Thank you, sir.

11 JUDGE CLIFTON: Thank you, Mr. English.
12 Thank you so much, Mr. Lee. You may step down.

13 THE WITNESS: Thank you very much.

14 JUDGE CLIFTON: I want to take a
15 10-minute stretch break before we go on to the
16 next witness. It's 5:35. Please be ready to go
17 at 5:45.

18 (A recess was taken from 5:35 to 5:48.)

19 (Exhibit 35 was marked for
20 identification.)

21 JUDGE CLIFTON: All right, let's go on
22 record. We're back on record. It's now 5:48.
23 I would first like to take the pulse of those
24 who are still participating. We still have a
25 full room, which is wonderful. I'm thinking

1 perhaps this should be our last witness of the
2 day, unless there's strong objection.

3 If there's strong objection, then I would
4 ask J.T. Wilcox to testify yet tonight. If
5 everyone would be content that we end with
6 Mr. Kastel, then I'll work in Mr. Wilcox
7 sometime tomorrow. Okay. Is there anyone that
8 strongly objects to our taking Mr. Wilcox
9 tomorrow?

10 Nobody. That's good. Let me just
11 mention some of the names I have for tomorrow.
12 And if you're here tonight and I don't call your
13 name, but you want to testify tomorrow, please
14 identify yourself by coming forward. I know
15 about the people from Vermont, New Hampshire and
16 Wisconsin. I think their names are Roger Alby,
17 Diane Wallfield and Wil Hughes. I know about
18 Matt Shatto, S-h-a-t-t-o, John Hornstra, Steve
19 Rowe, Gary Latta, Mike Krueger and J.T. Wilcox.
20 Is there anyone else here now who would also
21 like to be heard from tomorrow?

22 All right. Tomorrow we may acquire some
23 more witnesses as, indeed, we did today. So
24 tomorrow morning I'll find out in what order
25 we'll proceed.

1 All right. Mr. Vilsack, this exhibit
2 that you've brought, this Exhibit 35 --

3 MR. KASTEL: I've already had a
4 promotion. It's Mr. Kastel. I've already had a
5 promotion to Secretary, and I haven't put my hat
6 in the ring.

7 JUDGE CLIFTON: I'm looking for a name on
8 here that's of the person, and that's the first
9 name I saw. With apologies to our Secretary of
10 Agriculture.

11 Mr. Kastel, this document is not signed
12 by just you. Tell me about this document, if
13 you will. And I'm speaking of Exhibit 35.

14 MR. KASTEL: Yes, your Honor. This
15 document I prepared myself, no one reviewed
16 this, no one edited this, and it was presented
17 to organic dairy producers with the option for
18 them to sign onto it, expressing that it would
19 be presented at this hearing. So this is my
20 testimony that's being supported by -- I
21 counted, and it's about 60 mostly dairy
22 producers. There are 13 producer-handlers, a
23 number of milk handler processors, and just a
24 couple of folks that are allied to the organic
25 dairy industry.

1 MS. KISER: Your Honor --

2 JUDGE CLIFTON: It looks to me -- just a
3 moment. I have a couple more questions, and
4 then I'll recognize you.

5 It looks to me like you've put them in
6 pretty much alphabetical order.

7 MR. KASTEL: That's correct, your Honor.

8 JUDGE CLIFTON: All right. And how did
9 you communicate with these members to ask them
10 if they supported this statement?

11 MR. KASTEL: Through e-mail, principally.

12 JUDGE CLIFTON: All right. I want to
13 swear you in first, and then I'll hear your
14 motion. All right. Please state and spell your
15 name for me.

16 MR. KASTEL: Mark Alan Kastel, M-a-r-k,
17 A-l-a-n, K-a-s-t-e-l.

18 JUDGE CLIFTON: Thank you. And what is
19 your relationship to the organization whose
20 members are on this Exhibit 35?

21 MR. KASTEL: I am the codirector of the
22 Cornucopia Institute. We're a 501(c)(3)
23 tax-exempt charity. And some of these
24 signatories are members of the Cornucopia
25 Institute.

1 JUDGE CLIFTON: All right. And how did
2 you have the names of those that are not
3 members?

4 MR. KASTEL: They responded to an
5 outreach alerting them that I would be
6 presenting testimony at this hearing, and
7 inviting them to sign on. And, obviously, we
8 will communicate -- subsequent to this
9 testimony, communicate this to the Secretary
10 directly.

11 JUDGE CLIFTON: All right. And I'll hear
12 your motion in just a moment.

13 (The witness was sworn.)

14 JUDGE CLIFTON: Now, if you would
15 identify yourself and tell me why you're here.

16 MS. KISER: Okay. Your Honor, as I
17 previously introduced myself, my name is Livia
18 Kiser, K-i-s-e-r. I represent Aurora Organic
19 Dairy, and I'm here because we are moving to
20 exclude the letter that Mr. Kastel has drafted,
21 because it is immaterial and irrelevant, because
22 it contains a lot of false statements about
23 Aurora, and it's inflammatory and slanderous.
24 And I'm happy to present to you the reasons why,
25 and they're set forth in my motion. If I may

1 approach, I can give you a written copy of that.

2 JUDGE CLIFTON: Would you, please? And,
3 also, the court reporter and the USDA officials,
4 if you have not yet approached them.

5 MR. KASTEL: And, your Honor, I'm not
6 represented by legal counsel, so I would
7 appreciate being able to be engaged in this
8 process and to respond.

9 JUDGE CLIFTON: Oh, my goodness.

10 MS. KISER: Those are just documentary
11 exhibits to support it.

12 JUDGE CLIFTON: Okay. So now have you
13 given Mr. Kastel a copy?

14 MS. KISER: I will give Mr. Kastel a copy
15 right now.

16 JUDGE CLIFTON: Okay.

17 MR. KASTEL: Obviously, your Honor,
18 there's no way that I can review this. I'm
19 under oath, so I'll just say that there is a
20 factual basis for all statements made in my
21 testimony. And I have brought with me some --
22 if -- I think we should be able to publicly
23 respond to any questions of my credibility or
24 the veracity of this testimony. And if those
25 questions do come up in cross-examination, I'm

1 prepared to respond to them.

2 JUDGE CLIFTON: All right. While you --
3 Mr. Kastel, I do not agree with you that because
4 you are not a lawyer, you cannot deal with this.

5 MR. KASTEL: No, I didn't say I couldn't
6 deal with it. I said I obviously don't have the
7 time right now to thoroughly review this
8 document.

9 JUDGE CLIFTON: Actually, you do, because
10 I need to, as well. So you and I will both read
11 this.

12 MR. KASTEL: Okay.

13 JUDGE CLIFTON: Before we read it,
14 though, I want to take advantage of Ms. Kiser's
15 knowledge of it. And, Ms. Kiser, if you will
16 summarize for me, roughly, what is objectionable
17 about Exhibit 35. If there are particular
18 paragraphs you can call to my attention, that
19 would be helpful.

20 MS. KISER: Absolutely. I can tell you
21 that -- so, for example, statements that Aurora
22 Organic Dairy has "caused catastrophic
23 marketplace disruption," statements that
24 Aurora --

25 JUDGE CLIFTON: You see, that may not be

1 slanderous or defamatory.

2 MS. KISER: I don't disagree, but I'm
3 getting to the worst of it. I thought you
4 wanted me to identify every statement that we
5 find objectionable.

6 JUDGE CLIFTON: I do.

7 MS. KISER: Okay. Right. Statements
8 that this corporation is "currently
9 disadvantaging family farmers nationwide." We
10 disagree. Characterizing Aurora as a "bad
11 actor." Characterizing Aurora as "milking
12 between 12,000 and 19,000 cows." But here's
13 where --

14 JUDGE CLIFTON: Where is that?

15 MS. KISER: That's the next paragraph,
16 right below characterizing Aurora as a "bad
17 actor."

18 JUDGE CLIFTON: I see it now.

19 MS. KISER: And here's where it really
20 gets offensive. "Aurora has gained their
21 enviable market share by operating illegally."
22 That is absolutely untrue. "Abusing the organic
23 standards." That is absolutely untrue. "And by
24 taking advantage of their exempt status,
25 undercutting the rest of the industry on price."

1 That is absolutely untrue.

2 The next sentence, "Prompted by a formal
3 industry complaint," that is false. It was
4 prompted by a complaint by Mr. Kastel, who is
5 not a member of the formal industry, of the
6 dairy industry.

7 "The USDA found Aurora Organic Dairy
8 'willfully' violated 14 tenets of the Federal
9 organic standards." That is not true. Stating
10 that Aurora has "damaged its neighbors'
11 environmental living conditions in Colorado," is
12 not true, "to the point where they have been
13 under supervision by local units of government."
14 That is absolutely not true.

15 You know, "The major equity control of
16 Aurora is held by Charlesbank in Boston." That
17 is not true. Charlesbank is an investor in
18 Aurora, but Aurora is owned by families.
19 "Aurora has competitively injured family farmers
20 and their processing/marketing partners around
21 the country by shipping milk that did not
22 qualify for organic labeling under the law."
23 That is absolutely not true.

24 Characterizing Aurora as exploiting
25 family farmers is absolutely false. And then,

1 of course, when he goes on to say, "Along with
2 organic industry participants who pay into the
3 pool, legitimate producer-handlers" --

4 JUDGE CLIFTON: Okay. You're on page 2,
5 in the second paragraph?

6 MS. KISER: Yes.

7 JUDGE CLIFTON: Okay. Go ahead.

8 MS. KISER: -- "are injured by Aurora and
9 other exploiters of the exemptions." Aurora is
10 not exploiting anything. They are a
11 producer-handler recognized by the USDA. They
12 are lawfully not participating in the pooling.
13 So to suggest that they're somehow doing
14 something improper is absolutely untrue.

15 He says that Aurora didn't obtain their
16 cattle legally. That is absolutely false. He
17 says, "One of the violations found by the USDA
18 at Aurora was their bringing conventional cattle
19 that did not qualify for organic production into
20 their operation." That is absolutely false.
21 The USDA never made any findings with respect to
22 Aurora.

23 Then the next -- oh, and this one, "We
24 seriously question whether Aurora's ownership
25 structure and management model...would qualify."

1 They plainly qualify. The USDA has recognized
2 that they qualify. And for Mr. Kastel to make
3 these statements, he has no inside information
4 into their business. These are just outrageous
5 and speculative, and they are totally
6 inappropriate.

7 Characterizing Aurora as exploiting
8 "dairy farmers around the country" is absolutely
9 inappropriate and untrue.

10 MR. KASTEL: She already mentioned that.
11 Do I have to respond to that twice when I rebut
12 this?

13 JUDGE CLIFTON: It's up to you.

14 MR. KASTEL: Okay.

15 MS. KISER: "Changing the regulation
16 would not put anyone out of business." He's
17 hoping that Aurora goes out of business. He's
18 on record repeatedly saying that one of his
19 great missions in life is to put Aurora out of
20 business. When he says, "Large
21 producer-handlers can obviously continue in
22 business while paying into the pool," that is
23 not true. There are many producer-handlers, and
24 we've already heard from some, who will be
25 driven out of business if the proposal that he

1 purports to the court is adopted. And, in fact,
2 he hopes, as I said, that Aurora is driven out
3 of business.

4 And then, finally, "The organic dairy
5 industry is in crisis due...to the marketplace
6 disruption caused by Aurora Organic Dairy."
7 That is false.

8 Now, your Honor, Mr. Kastel should not,
9 in my view, be able to "rebut" what I have to
10 say until I'm able to show you, through
11 evidence, why what he said is untrue. And my
12 motion sets forth, and I've given you the
13 documents that demonstrate, that what Mr. Kastel
14 has said, and continues to say in public forums
15 and other places, is just for the expressed
16 purpose of driving Aurora out of business, and
17 he finds no basis in fact. And this is
18 obviously a serious concern.

19 What he has said, and this is absolutely
20 on the record, and I've given the information to
21 you, he said that he wants to drive Aurora out
22 of business in order to drive up the price of
23 organic milk. He said that, and this is a
24 direct quote from him, the USDA might not have
25 done their job and shut Aurora down, but, along

1 with organic farmers, consumers are going to get
2 the job done.

3 He has said, quote, it is really
4 unfortunate that the USDA did not drum Aurora
5 out of the organic industry. We are working on
6 that right now. He is working with and
7 supporting plaintiffs' counsel in a series of
8 class action lawsuits that were filed against
9 Aurora and some of its customers. He has taken
10 credit for finding individuals willing to act as
11 named plaintiffs in those cases. And the
12 lawyers who filed those lawsuits openly admit
13 that they're working closely with Cornucopia and
14 Kastel. In fact, he posted on the Internet that
15 he, quote, helped organize the lawsuit by
16 reaching out to people who would be potential
17 plaintiffs.

18 The complaints that were filed against
19 Aurora were not filed by a formal industry
20 organization. They were filed by Mr. Kastel and
21 Will Fantle of Cornucopia. And they filed
22 complaints with the USDA against the Colorado
23 Department of Agriculture in Aurora and
24 requested an investigation.

25 The USDA dismissed their first complaint,

1 but in the spring of 2007, the USDA issued two
2 notices, largely patterned after Cornucopia's
3 complaint. Both notices ultimately resulted in
4 consent agreements. These consent agreements
5 have been fully resolved to the USDA's
6 satisfaction.

7 The alleged violations in the notices --
8 and they were alleged violations, they were not
9 findings, as Mr. Kastel should know, now that
10 he's actively involved in litigation. Just
11 because you file a complaint against someone
12 doesn't make it true. The paragraphs in the
13 complaint are not actually true unless they're
14 proven. And the USDA has decided to resolve its
15 differences with Aurora based on discussions
16 between the parties by continuing to hold valid
17 their organic certificate and they entered a new
18 consent agreement. I'm sure your Honor is
19 familiar with that process.

20 JUDGE CLIFTON: Oh, yes.

21 MS. KISER: And I'm sure that, as an ALJ,
22 you've dealt with these charging documents, and
23 the parties have come in and presented evidence,
24 and you've made findings.

25 JUDGE CLIFTON: Now, consent agreements

1 sometimes admit the allegations of the
2 complaint, or some of them.

3 MS. KISER: Right.

4 JUDGE CLIFTON: And some say the parties
5 do not admit the allegations of the complaint
6 except for the jurisdictional allegations.
7 Which kind were these two consent decisions?

8 MS. KISER: They were the latter. No,
9 there was no admission of anything. Basically,
10 what Aurora said was, and the USDA said, Aurora
11 has had and continues to have valid organic
12 certificates, and the parties desire to resolve
13 their differences, and here's what Aurora is
14 going to do going forward. So you have that in
15 your binder of exhibits, that you can look at if
16 you would like.

17 So the notices that were sent to Aurora
18 and the Colorado Department of Agriculture were
19 the subject of negotiations between the parties
20 and were conclusively resolved through the
21 consent agreements.

22 The Colorado Department of Agriculture,
23 just to be clear, is the certifying agent for
24 Aurora and the dairy that was at issue in that
25 case. So they were acting on behalf of the

1 USDA, they approved Aurora's OSPs, they
2 authorized everything Aurora did, and the USDA
3 acknowledged that.

4 And the USDA said with DEA and Aurora
5 going forward, here are some changes we would
6 like to see. And Aurora actually agreed to
7 things that were even more stringent than
8 required by the NOP regulations at that time.

9 JUDGE CLIFTON: Now, what are those
10 initials you've used? Did you say SOP?

11 MS. KISER: NOP.

12 JUDGE CLIFTON: NOP. What is NOP?

13 MS. KISER: I'm sorry. NOP is the
14 National Organic Program regulations. Aurora
15 holds certificates that are issued pursuant to
16 the Organic Foods Production Act, and organic
17 certificates are issued pursuant to Federal law
18 by duly accredited certifying agents operating
19 pursuant to the authority given to them by the
20 USDA. So --

21 JUDGE CLIFTON: And then you used another
22 acronym that started with an S?

23 MS. KISER: OSP?

24 JUDGE CLIFTON: Yes, OSP.

25 MS. KISER: An OSP is an organic systems

1 plan. And it's basically the plan that the
2 certified operation develops with the certifying
3 agent's authority and approval. And then they
4 have to follow their OSP on a foregoing basis.
5 So organic entity A, who may be in, let's say
6 Vermont, is going to have different issues, you
7 know, different things that will confront them.
8 Depending on the size of the dairy, depending on
9 the various issues, they will have a specific
10 OSP to that site, okay?

11 Aurora is in Colorado. It's a different
12 situation. They also will have a specific OSP
13 pursuant to their dairy and their particular
14 situation, okay?

15 The OFPA is scale neutral. It's also
16 geographically neutral. Obviously, Congress
17 wanted dairies to be able to be all over the
18 country. They didn't want to unfairly advantage
19 one location of the country over another. And
20 they wanted everybody who could develop an OSP
21 and ascribe to those standards be able to have
22 an organic dairy. It was pro commerce, it was
23 pro organic.

24 So the consent agreement with the CDA
25 affirmed the fact that the CDA has always been

1 accredited as a certifying agent and
2 acknowledged that the CDA's decisions regarding
3 Aurora's OSPs were based on reasonable
4 interpretation of the NOP. The consent
5 agreement with Aurora, likewise, resolved all
6 issues. It confirmed the validity of Aurora's
7 organic certifications and its operation at all
8 times under valid OSPs.

9 It required Aurora to take certain steps
10 to address issues relating to the CDA's
11 interpretation of the NOP. It required Aurora
12 to submit amended OSPs and it provided for the
13 dismissal of the notice upon implementation of
14 the amended OSPs. Aurora implemented everything
15 that the USDA asked them to do, and the USDA
16 subsequently confirmed that Aurora had fully
17 complied with the terms of the consent
18 agreement. And, in fact, the USDA sent a letter
19 to Aurora saying the USDA considers this matter
20 closed.

21 Everyone considers this closed but
22 Mr. Kastel. Mr. Kastel continues to say things
23 about Aurora that are just patently untrue. So
24 when he says that Aurora operates illegally by
25 abusing the organic standards, that's plainly

1 false.

2 If you look at what the USDA has said
3 about what Aurora has been doing, which they
4 have publicly published, and which have been on
5 their Website, the USDA said that the notice
6 contained only allegations, not findings, and
7 that Aurora's organic certifications have always
8 been valid.

9 So when Mr. Kastel says that the USDA
10 made findings, that is absolutely not true. And
11 when he says it was prompted by a formal
12 industry complaint, that is also not true,
13 because it was actually prompted by Mr. Kastel
14 himself.

15 And the Aurora consent agreement makes
16 clear that the parties were resolving the
17 allegations in the notice of proposed
18 revocation, and also reaffirmed that Aurora was
19 operating pursuant to valid OSPs.

20 MR. KASTEL: Can I interrupt?

21 MS. KISER: No, you cannot --

22 MR. KASTEL: Sorry, your Honor. If I had
23 counsel, the counsel would say she's basically
24 acting as a witness, and she's repeating over
25 and over again. I'm trying to protect my own

1 time and the time of everybody else here. She
2 said certain statements three to four times. I
3 think once was adequate. And I'm making careful
4 notes, so I'm paying attention to what you're
5 saying, as I'm sure you are, and other members
6 of your audience.

7 JUDGE CLIFTON: Well, I'm not making
8 careful notes, because I'm reading along with
9 the motion. But I'm going to allow counsel to
10 finish. She's about on page 9, I think.

11 MR. KASTEL: Okay.

12 MS. KISER: Thank you.

13 JUDGE CLIFTON: You're welcome.

14 MS. KISER: Thank you, your Honor. I'm
15 sorry, I lost my train of thought. Anyway, the
16 consent agreement makes clear that the parties
17 are resolving allegations. And that is the word
18 that is used in the notice of proposed
19 revocation.

20 Again, he said that "Aurora has
21 competitively injured family farmers...by
22 shipping milk that did not qualify for organic
23 labeling under the law." That is absolutely
24 false. The USDA has published on their Website
25 that Aurora's organic certificates are valid,

1 and have been valid at all times, and so does
2 the consent agreement affirm that.

3 Mr. Kastel, you know, is hoping that this
4 regulation that may be promulgated as a result
5 of this formal hearing will, in fact, put Aurora
6 out of business. And the individuals who signed
7 the Kastel letter, the letter that he has,
8 intending to send to the Secretary, did so, we
9 assume, believing that the false statements in
10 the letter are true.

11 So we feel that it's a very unfair and
12 prejudicial letter. And, you know, reading the
13 letter and assuming the contents were true,
14 people signed it. But, in fact, it's full of so
15 many false statements and defamatory and
16 inflammatory statements about Aurora, that it
17 really is of no probative value.

18 And I would just like to point out that
19 this -- that this court, these proceedings, you
20 know, you are vested with the authority to
21 provide for the exclusion of irrelevant or
22 immaterial evidence. In fact, the USDA has a
23 duty to do so. And that is pursuant to the
24 Administrative Procedure Act. That's 5 USC,
25 Section 556(D). Material that is false cannot

1 be reliable or prohibitive and is properly
2 excluded.

3 I think a case that is directly on point
4 is U.S. Steel v. Director, and the cite for that
5 is 187F.3rd 384, and that's from the Fourth
6 Circuit. And I'm going to read the quote,
7 because it is so relevant. The ALJ's duty to
8 screen evidence for reliability, probativeness
9 and substantially similarly -- and substantially
10 similarly ensures that final agency decisions
11 will be based on evidence of requisite quality
12 and quantity.

13 As the Supreme Court has observed in
14 enacting Section 556(D) of the Administrative
15 Procedure Act, Congress was primarily concerned
16 with the elimination of agency decision-making
17 premised on evidence which was of poor quality,
18 irrelevant, immaterial, unreliable and
19 nonprobative, and of insufficient quantity.
20 Material that is proffered for an improper
21 purpose with the intention to harm another is,
22 likewise, properly excluded.

23 We feel very strongly that Mr. Kastel is
24 here, as he said, as an activist. He is not a
25 producer, he is not a handler. He has no dog in

1 this hunt except for he wants to try to adopt a
2 rule that will run Aurora out of business. He
3 has no evidence that Aurora or anyone else has
4 caused catastrophic market disruption.

5 He claims that there are more
6 producer-handlers operating under the organic
7 rules than conventional producer-handlers, but
8 then admits there are no statistics available to
9 substantiate his claim. You know, his
10 sensational characteristic that dairy farmers
11 are being exploited by other dairy farmers like
12 Aurora has no support in the evidence, and, in
13 fact, he proffers none.

14 We believe that any testimony that he
15 might proffer in support of this letter, insofar
16 as it pertains to Aurora, will add nothing of
17 value to these proceedings.

18 Now, I realize that, you know, I've
19 raised a big problem, and I actually have a
20 solution I would like to propose. Mr. Kastel
21 has come a long way, he obviously believes that
22 he speaks for a number of people.

23 Certainly, he can speak to the proposal
24 that he supports, and the reasons why, without
25 having to say the things that -- the false and

1 untrue things that he wants to say about Aurora.
2 If he really has a passionate belief that a
3 450,000-pound, you know, cap on production is
4 appropriate, he can certainly make that
5 statement, and any other statements that he
6 believes supports that position without defaming
7 Aurora and bringing Aurora into this and making
8 the untrue statements that he has made in the
9 letter. So that's what we would propose.

10 Just like everybody else, he can state
11 his position on the merits, you know, because
12 this isn't a hearing about organic, it's not a
13 hearing about whether large-scale organic
14 dairies should be allowed to exist. It's a
15 hearing about what rule, if any, should the USDA
16 adopt concerning Federal milk market orders on a
17 forward-going basis.

18 So I would respectfully request that
19 Mr. Kastel be required to limit his testimony to
20 the issues at hand and pertaining to the
21 proposal, the one he supports, again without
22 making reference to Aurora or making the false
23 statements that he has made in the letter.

24 JUDGE CLIFTON: Will Aurora be testifying
25 about the proposals?

1 MS. KISER: They will, but I believe they
2 are intending to give very narrow testimony,
3 again, on the merits of the proposals.

4 JUDGE CLIFTON: And when would you like
5 to be scheduled?

6 MS. KISER: Well, we actually haven't --
7 haven't made an arrangement on that at this
8 point. I suspect it will be after Proposals 1
9 and 2 are considered and the subsequent
10 proposals. I mean, Aurora supports one of the
11 proposals, but that's not my bucket, so I'm not
12 sure which one it is. And I apologize to you.

13 JUDGE CLIFTON: That's all right.

14 MS. KISER: But we will certainly get
15 together with them and let you know.

16 JUDGE CLIFTON: Now, I do have a concern.
17 If I were to agree with you and I were to allow
18 the witness to testify, but reject Exhibit 35 as
19 an exhibit, Exhibit 35 would still go on the
20 Website as a rejected exhibit. Admitted
21 exhibits go there, rejected exhibits go there.

22 MS. KISER: Okay.

23 JUDGE CLIFTON: So if there is any
24 defamatory content, the only way I know of for
25 that to be cured is if the proponent of this

1 exhibit were to ask to withdraw it. So if
2 Mr. Kastel wanted to withdraw it and just wanted
3 to give me his testimony, then it would not be
4 on the Website. But if he wants it admitted as
5 an exhibit, and I decide to reject it as an
6 exhibit, it still goes on the Website.

7 MS. KISER: Well, obviously, I'm not his
8 counsel, but that's what I would recommend he
9 do. But it's certainly up to him. Obviously,
10 your Honor, I appreciate you raising that with
11 me, because that's a huge concern. And I
12 appreciate you giving Mr. Kastel a way out of
13 this uncomfortable and inappropriate situation.

14 We obviously, whether -- I just -- I
15 don't know what Mr. Kastel is going to do, but I
16 would certainly appreciate, and I think the
17 record would be much more appropriate, if
18 Mr. Kastel is not willing to withdraw it, if you
19 would reject it. And even if it goes on the
20 Website as a rejected exhibit, that would be --
21 that would be much preferable, because, as I
22 said, he's working with plaintiffs' counsel on
23 some class action lawsuits. And if that's
24 admitted into evidence and it's posted on a
25 Website, they're likely to print that out and

1 take it to a court and say, look, this is a
2 bunch of true stuff in here, this -- look at
3 this, this is true, it was on the USDA Website.
4 And that would be very, very harmful.

5 JUDGE CLIFTON: All right. Thank you,
6 Ms. Kiser.

7 Mr. Yale, do you have some wisdom for me?

8 MR. YALE: I don't know if I have any
9 wisdom. Benjamin F. Yale on behalf of
10 Continental Dairy Products and Select. I just
11 wanted to move that we join them in that, in
12 this motion. And I point the court to part 900,
13 the section that deals with evidence, and the
14 irrelevant and immaterial.

15 The issue has nothing to do with organic
16 in this hearing. I mean, there's no provision,
17 there's no proposal dealing with whether you're
18 organic or not, that you're qualified or not for
19 PPD status. So whether Aurora is organic or not
20 is immaterial to the issue of whether or not
21 these should be adopted.

22 I think that there's some comment that
23 they want to make, that they support 450,
24 450,000 or billion or gazillion. You know, I
25 mean, I think, I guess that they're citizens and

1 they have that right, but I don't want to do
2 that. But I don't think that, you know,
3 impertinent information should be permitted.

4 And I think that it's even appropriate
5 for the court, in some cases, or the judge, to
6 say that it is so impertinent that it can be
7 stricken. And I guess it does have to
8 accompany, but I think that there is provisions
9 for redaction of immaterial and destructive
10 information. It's not the purpose of this
11 hearing. I mean, we get into some bitter
12 arguments, but to present evidence that is just
13 not true, it demeans everything that we're doing
14 here and should not even be part of the record.

15 The other objection I have on Exhibit 35,
16 it appears to be signed by people that aren't
17 even here, and we don't have the ability to
18 cross-examine them. And we don't have in
19 evidence -- he said he made a request of people,
20 sent out a call for people to sign. I don't
21 know whether that's the letter they signed onto
22 or another one. And we don't have in evidence
23 the letter that he sent out. So we would move
24 to -- we would move, also, and join with them to
25 strike the exhibit.

1 JUDGE CLIFTON: Thank you, Mr. Yale.
2 Would anyone else like to weigh in on this
3 before I call on Mr. Kastel?

4 Mr. Carroll.

5 MR. CARROLL: With all due deference to
6 the proposed witness, who is not a lawyer, and
7 has used terms that have legal significance, I
8 can understand the frustration that's shown on
9 this, but, basically, our guide here is not what
10 Aurora might have done under another problem
11 with the Department of Agriculture, how that was
12 challenged and what happened and so forth. That
13 has nothing to do with a producer-handler dairy,
14 so it is irrelevant.

15 And all those references that are based
16 on that, I assume the witness would have the
17 right to state as a private citizen, or some
18 other way, that he doesn't like the proposals
19 we've made or that other people have made, or
20 that he's in favor of a different proposal, as
21 any citizen can say that, but Aurora's situation
22 that he's described here is utterly irrelevant.

23 JUDGE CLIFTON: Mr. Ricciardi.

24 MR. RICCIARDI: I was waiting to see if
25 anybody else was rushing behind me, Judge. We

1 would -- AIDA would join with my colleagues,
2 Messrs. Yale and also Carroll, for the reasons
3 that they already articulated. I'm not going to
4 expound on it any further.

5 I do, however, Judge, have a potential
6 solution for you on whatever concern you raise
7 regarding what goes on the Website. My thought
8 is, to the extent that you were going to allow
9 any portion of it, you would allow, obviously,
10 the date and the salutation to Secretary
11 Vilsack.

12 But if you go over on 35 to what is the
13 third page, you will see there's a paragraph
14 that begins, "We support a production cap." If
15 you take those three paragraphs, "We support a
16 production cap," "If officials deem this higher
17 level necessary," which is the next paragraph,
18 and then the last, next paragraph, "Large
19 producer-handlers," that essentially sets forth
20 the position: We support these particular
21 limitations that have been proposed, and they're
22 the reasons.

23 If you would redact the remainder of the
24 letter, so it cannot be read, and if you decide
25 to leave on the signatures, you leave on the

1 signatures, but at least the redaction would
2 allow the exhibit to come in for simply what is
3 here that would be relevant, which is, we
4 support a production cap, here are the reasons,
5 and large producer-handlers can continue in
6 business. So, to that extent, that's a
7 possibility, to just give you another option,
8 Judge.

9 JUDGE CLIFTON: Thank you, Mr. Ricciardi.
10 All right, does anyone else want to be heard on
11 this issue before I speak with Mr. Kastel
12 further?

13 MR. CARROLL: Your Honor.

14 JUDGE CLIFTON: Mr. Carroll.

15 MR. CARROLL: I wasn't aware what counsel
16 has just said, but my problem is broader now as
17 I look it over. There are innumerable people
18 listed as making this statement, and they are
19 represented to be in the dairy industry, one
20 kind or another. They've all been exposed to
21 the obviously irrelevant material. We have no
22 way of knowing whether that produced their
23 position or not, and I think that the entire
24 statement really should not be admitted.

25 But if the witness wants to testify that

1 his understanding of the situation -- as to his
2 understanding of the situation, and that he's in
3 favor of the various caps, that's fine, but I
4 don't think, based upon what's contained here,
5 that these signatures have any validity. And in
6 addition, we have no verification whatever as to
7 the matter of fact as to whether or not they
8 were in support of the basic restriction.

9 JUDGE CLIFTON: Mr. Kastel, I'm having
10 trouble finding where you are listed in the
11 people here.

12 MR. KASTEL: I'm not. Other than taking
13 the word of counsel for Aurora Dairy, this isn't
14 Mark Kastel against Aurora Dairy. I haven't had
15 a chance to introduce myself on the record yet.
16 I don't know if I should do that now, your
17 Honor.

18 But I'm here representing the Cornucopia
19 Institute. And the Cornucopia Institute has
20 over 3,000 members, as far as we understand,
21 more members than any other NGO representing
22 organic interests. We operate as an organic
23 industry watchdog group, and I'm here
24 representing the organic -- or the Cornucopia
25 Institute, which is a signatory to this letter.

1 I'm also under oath, so let's just talk
2 about the challenges that counsel brought up
3 concerning signing on here. We've heard from
4 other cooperatives that are testifying in front
5 of their -- on behalf of their members. These
6 were individuals who have all -- some interest
7 in the dairy industry, who wanted to represent
8 themselves here today and couldn't. They read
9 that same letter.

10 Quite frankly, I've heard this before,
11 and I take umbrage to the suggestion that we
12 have a bunch of dumb farmers that can be taken
13 advantage of. These are people who read that
14 letter, who understand this issue, your Honor,
15 which has been ruminating, no pun intended, for
16 four or five years. This has been covered in
17 The New York Times, National Public Radio, The
18 Wall Street Journal.

19 If this \$100 million corporation, Aurora
20 Dairy, thinks that I've used defamatory
21 language, that I've presented factually
22 inaccurate information that is injuring their
23 corporation, they should have sued us a long
24 time ago, your Honor, because there are few, if
25 any, statements, factual statements, contained

1 in that letter which we have not already made
2 publicly in some venue, either in testimony in
3 front of other USDA hearings or through the
4 media.

5 And so this is an attempt to intimidate a
6 citizen who is here today representing other
7 citizens who have standing. And counsel for
8 Aurora mentioned, on my count, about 14
9 different bullet points, not including the
10 repetition, in her presentation to you. About
11 half of those I would represent her challenging
12 our "opinion" and the other half challenging
13 factual evidence that we presented. And I am
14 more than willing -- if you need to decide
15 whether or not to admit this into testimony, I
16 am more than willing to, point by point, respond
17 to Aurora's concerns.

18 JUDGE CLIFTON: Well, let me ask you
19 this: A practical way to proceed would be for
20 me to do as two counsel suggested, and that is
21 to redact certain portions.

22 MR. KASTEL: I'm not willing to do that,
23 your Honor.

24 JUDGE CLIFTON: All right. Is there any
25 portion of Exhibit 35 that you would willingly

1 withdraw?

2 MR. KASTEL: No, ma'am. I am willing
3 to -- if we need to do this before I make the
4 presentation, again, I'm willing to respond,
5 point to point, to the concerns expressed by the
6 Aurora Dairy Corporation.

7 JUDGE CLIFTON: You may do so.

8 MR. KASTEL: Okay. Thank you. First of
9 all, again, there was a number of times where
10 counsel suggested that this was Mark Kastel
11 against Aurora Dairy, that we were not -- she
12 challenged the statement that this legal action
13 by the USDA was based on an industry complaint.

14 Again, I think we documented our
15 credibility in representing dairy farmers in
16 this matter. We filed a formal legal complaint
17 against Aurora Dairy alleging that they were
18 violating the organic law in January of 2005.
19 It was closed without explanation by the USDA in
20 August of 2005. Their letter informing us of
21 that stated that if we wanted to know why, we
22 had to file a Freedom of Information, FOIA,
23 request, which we did. We thought that was
24 unreasonable.

25 We received a couple hundred pages of

1 documents, with no summary document to indicate
2 why they were closed. There was one e-mail from
3 the head of compliance in the Agriculture
4 Marketing Service. I'm going to apologize to
5 everybody for having to go through the detail
6 here.

7 That document -- that e-mail suggested
8 that it was closed for political reasons, that
9 because the National Organic Standards Board was
10 considering rulemaking on the issue of whether
11 there was adequate pasturing of organic dairy
12 cows, the allegation was that Aurora Dairy was
13 running a confinement operation in conflict with
14 the Organic Foods Production Act and its
15 regulation.

16 And the statement in the e-mail was that
17 the -- it did not use her name, but used her
18 title, that the deputy administrator of TMP,
19 that acronym, I understand, stands for
20 Transportation Marketing Programs, that oversees
21 the NOP, requested them to close that because
22 rulemaking was taking place.

23 My analogy would be if you were on
24 Highway -- or Interstate 71 in Cincinnati and
25 you were pulled over for going 75 in a 65 zone,

1 and the local authorities were considering
2 changing the speed limit, that we would let you
3 off. The irony of this is that they were
4 considering rulemaking, your Honor, making the
5 rules more restrictive, not less restrictive.

6 After a visit to two facilities
7 associated with Aurora Dairy, we refiled that
8 complaint. The second time we refiled that
9 complaint, they said -- sent AMS sworn
10 investigators to interview Cornucopia staff.
11 This time they fully adjudicated the allegations
12 that were made by Cornucopia.

13 And now I want to read into the record,
14 if I may, the Notice of Proposed Revocation
15 issued by the USDA, which is a de facto finding
16 of fault. And it states -- it's dated April
17 16th, 2007 --

18 JUDGE CLIFTON: Before you read that, is
19 that one of the items that ended in a consent
20 decision?

21 MR. KASTEL: Yes, your Honor.

22 JUDGE CLIFTON: Okay. The most important
23 part of that case is the end of it.

24 MR. KASTEL: Yes. I have all the
25 documents here.

1 JUDGE CLIFTON: Was there any admission
2 of the allegations in the consent decision?

3 MR. KASTEL: I don't think so, your
4 Honor, but there was an agreement to change
5 certain practices that were out of compliance.
6 And so, you know, we call that a plea bargain --

7 MS. KISER: Your Honor, I'm sorry to
8 interrupt --

9 MR. KASTEL: -- and, obviously -- ma'am,
10 I don't want you to interrupt me --

11 MS. KISER: I just want to tell you --

12 JUDGE CLIFTON: Ms. Kiser --

13 MS. KISER: You --

14 JUDGE CLIFTON: Ms. Kiser, you can stand
15 there until I recognize you.

16 MS. KISER: I'm sorry.

17 JUDGE CLIFTON: I think the reason you're
18 there is that I probably have it. That does not
19 mean I cannot hear from Mr. Kastel before I
20 recognize you.

21 MS. KISER: I'm sorry, your Honor.

22 JUDGE CLIFTON: That's all right. Go
23 ahead, Mr. Kastel.

24 MR. KASTEL: Thank you. There are many
25 instances in our system of jurisprudence where

1 charges are filed and the penalty phase of our
2 justice system comes up with some kind of an
3 agreement. That does not mean that the factual
4 actions that took place by a party did not take
5 place. It doesn't change the record.

6 And so I'm -- I would like the Notice of
7 Proposed -- first of all, by the way, this is my
8 opportunity to respond to counsel for Aurora.
9 This directly refutes the accuracy of the
10 presentation she made to you, your Honor, the
11 language in this letter, Notice of Proposed
12 Revocation.

13 JUDGE CLIFTON: What you have is the
14 beginning of a case. What you have is the
15 beginning of a case.

16 MR. KASTEL: Yes, but she --

17 JUDGE CLIFTON: And in a moment, I'll
18 look at the end of the case.

19 MR. KASTEL: Yes. The document from the
20 USDA, at the beginning of the case -- well, I
21 wouldn't say it was the beginning of the case.
22 This was subsequent to them closing the
23 investigative stage.

24 JUDGE CLIFTON: I understand. But that's
25 not the document that I'm going to look at. So

1 go ahead to the next topic.

2 MR. KASTEL: Yes. I'm saying, your
3 Honor, that this document -- the language in
4 this document directly refutes statements that
5 counsel made.

6 JUDGE CLIFTON: I understand that.

7 MR. KASTEL: Yes.

8 JUDGE CLIFTON: And your next topic?

9 MR. KASTEL: I'm sorry?

10 JUDGE CLIFTON: Your next topic. I'm
11 asking you to go on to the next topic.

12 MR. KASTEL: Okay. So am I not being
13 allowed to read from this document?

14 JUDGE CLIFTON: Correct.

15 MR. KASTEL: Okay. So counsel used the
16 word "disadvantage." I would say that's my
17 opinion and the opinion of others in the
18 industry. And we have the right to express that
19 opinion. "Bad actor" is another term that you
20 would say is someone expressing an opinion.

21 "Illegal," that's a factual statement.
22 And, again, I would say that if someone accused
23 me, your Honor, of doing something illegal, that
24 I had never done, I might, in fact, take that
25 individual to court and try to defend my

1 reputation. I don't know why Aurora Dairy has
2 never chosen to do that, but I stand behind
3 every statement in my testimony. And I'm
4 willing to back that up, if challenged, with
5 factual readings from documents here.

6 JUDGE CLIFTON: Now, with regard to the
7 purpose of this hearing, is your main concern
8 with Aurora Organic Dairy that it is what you
9 call an industrial scale producer-handler and
10 that that in some way damages Cornucopia's
11 members?

12 MR. KASTEL: Your Honor, my presentation
13 is an integrated approach to the extreme market
14 disruption that has been caused in the organic
15 marketplace by Aurora Dairy, and they're a
16 combination of factors. And I would like the
17 opportunity to present them all in an integrated
18 manner.

19 JUDGE CLIFTON: Can you do it without
20 referring to culpability of Aurora Dairy?

21 MR. KASTEL: Your Honor, I have the right
22 to make that testimony, because it's accurate.
23 Now, if we want to debate, point by point, the
24 accuracy to my statements, I'm willing to do
25 that. If not, then I think you should allow me

1 to put the -- make my testimony as I had
2 proposed -- as I had intended. I'm sorry.

3 JUDGE CLIFTON: Let me ask you this:
4 Just assume for a minute -- now when I ask you
5 to assume something, that's hypothetically, and
6 it may not be true. But if you were to assume
7 that Aurora Organic Dairy was not a bad actor
8 and did nothing illegal, would the sheer size of
9 it still constitute -- and its activities in the
10 market still constitute disorderly marketing
11 that would hurt Cornucopia's members or the
12 people Cornucopia is interested in helping?

13 MR. KASTEL: I don't think that's the
14 issue at hand, their size. It's what their
15 activities have been in the marketplace and
16 vis-a-vis taking advantage of the
17 producer-handler exemption that we're discussing
18 here at this hearing.

19 JUDGE CLIFTON: I agree with that. I
20 agree that's what we want to talk about. I'm
21 hopeful that you can do it in such a way that --

22 MR. KASTEL: What I'm unwilling to do is
23 let this lawyer impugn my reputation, the
24 reputation of the organization I work for, and
25 its members, without the opportunity to refute,

1 one by one, the allegations. Now, we can
2 continue to go through this or you can let me
3 present my testimony. That's what I am
4 appealing to you for, your Honor, one or the two
5 of those avenues.

6 JUDGE CLIFTON: Okay.

7 MR. KASTEL: And I'm under oath and I'm
8 willing to take full responsibility for all
9 statements that I make here. It will, again,
10 not be the first time that I make any of these
11 statements. The Aurora Dairy folks who came up
12 and, you know, really wanted to see this bad,
13 and they needed a copy, obviously to prepare
14 this 16-page rebuttal to try to strip me of my
15 rights to speak here today, they've obviously
16 been cooking this for quite some time.

17 JUDGE CLIFTON: Well, I would imagine
18 that when you circulated this to half the world,
19 they got a copy.

20 MR. KASTEL: Yes, it was done quite
21 publicly, and it was not surprising to me that
22 they were aware of it.

23 JUDGE CLIFTON: Did you just give me the
24 choice to either let you defend yourself against
25 the motion or testify on the propositions that

1 are relevant to this hearing?

2 MR. KASTEL: No, no. I -- no. I said I
3 would like to present my testimony as I brought
4 it here today -- or I would like to, before you
5 make a decision on that, go through, point by
6 point, and defend the credibility of the
7 statement that I produced.

8 And I think that because the statements
9 that have been made by counsel are, in my
10 opinion, inaccurate, I have been exposed to the
11 same kind of defamatory behavior that they're
12 accusing us of. And I think that would be
13 unfair not to be able to both defend our
14 credibility and working in this industry, and
15 being able to refute the statements that she's
16 made, that we think are not accurate.

17 JUDGE CLIFTON: Mr. Yale.

18 MR. YALE: Yes. Your Honor, I'm going to
19 assume for the moment that -- and I don't say
20 this as a fact, but assume for the moment that
21 this counsel has said some untrue statements
22 about Cornucopia vis-a-vis this dispute over
23 organic qualification, okay?

24 JUDGE CLIFTON: All right.

25 MR. YALE: This is not the place to

1 settle this. The issue before the court, as you
2 were starting to lead, is whether there's
3 disorderly marketing conditions, and those are
4 marketing conditions dealing with milk, not
5 organic milk. It has nothing to do with
6 organic. It's disruptive marketing conditions.
7 And the rest of it is irrelevant. It has no
8 place in the Secretary's decision whatever, true
9 or not.

10 The only issue here is whether there's
11 disorderly marketing conditions. And we're all
12 being asked to stay late, and I'm willing to sit
13 there and listen to somebody tell me why that's
14 disorderly. If we want to cross him, we can.
15 But the issues of whether or not, you know, the
16 consent decree was really plea bargaining and
17 there's really an implied, you know, agreement,
18 that the facts were true, and that all -- who
19 cares for what we're here tonight? Who cares?

20 I mean, I'll assume that all that he says
21 is true. It's just plain irrelevant. We need
22 to get down -- he can say that 450,000 is a good
23 number, that anything bigger than that is
24 disruptive to the market, that's fine. But the
25 rest of it is irrelevant, and I think we just

1 need to move on to the relevant stuff.

2 And depending on the motion, he could
3 file responses, put it in the record, that's
4 fine, but we don't need to hear whether
5 organic -- whether organic or nitrogen. It
6 doesn't have any ruling. If you look at all the
7 parts, 1000, 101 through 131 has zip to do with
8 organic. I don't even think the word appears.

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

11 MR. KASTEL: Your honor, may I respond to
12 his statement?

13 JUDGE CLIFTON: In a moment.
14 Mr. Ricciardi.

15 MR. RICCIARDI: Your Honor, this is a
16 lengthy hearing. We have the issues that are
17 before us. We are now into what I was concerned
18 about when I started to read this information.
19 We're into a collateral matter.

20 You have the authority, under 7 CFR
21 900.8(D)(3), to determine the -- (i), to
22 determine what's irrelevant and what's not. And
23 I will leave with a quote from Oliver Wendell
24 Holmes, which I think says, with regard to
25 collateral matters, it is a concession to the

1 shortness of life.

2 MS. KISER: And, your Honor, I just
3 wanted to tell you that the consent agreement is
4 under Exhibit L. So if you want to look at
5 that, the first two pages just showed it was
6 posted on the USDA Website, and the consent
7 agreement itself is two pages after that. But I
8 have to completely agree with the counsel who
9 spoke in here.

10 JUDGE CLIFTON: Okay. I like his
11 suggestion. I think if you want to file a
12 written response to this motion --

13 MR. KASTEL: A written response to
14 counsel, the statement that they just made?
15 Your Honor --

16 JUDGE CLIFTON: Could I finish? And then
17 I'll let you go. A written response to this
18 motion to defend your dignity would be entirely
19 appropriate if you want to spend that time and
20 energy.

21 But what I have decided to do, and then
22 I'll hear you, is I have decided to accept
23 Exhibit 35 as a redacted document. So I will
24 mark out the paragraphs that I think are
25 irrelevant, immaterial and inflammatory. I will

1 also mark out the "Respectfully submitted"
2 names. I will allow you to sign it if you wish
3 on behalf of Cornucopia.

4 The unredacted document I'm going to
5 seal. I'm going to ask that USDA take custody
6 of it and not put it on the Website, but keep it
7 available for the Secretary's review. So that's
8 what I plan to do.

9 Now, let me hear, Mr. Kastel, anything
10 you want to say.

11 MR. KASTEL: Why does it matter now, your
12 Honor? I've sat here today, this is a long
13 hearing, and I'm only here for the one day. I
14 invested 20 hours of transportation time to get
15 here, and I sat here today hearing counsel talk
16 about how hard it is to milk cows. Is it a hard
17 job? Is that why you left dairying? I've heard
18 people talk about DAs. I've heard repetitive
19 questioning about the organic industry. What
20 does it mean to be organic? What does it mean
21 to be -- well, you know, we can't treat our land
22 with antibiotics, we have to refrain from using
23 certain banned pharmaceuticals.

24 We might -- someone might offer our view
25 that those lines of questions aren't germane

1 specifically to the producer-handler question,
2 as maybe they could argue whether the kosher
3 segregation rules, and one rabbi here and one
4 rabbi there. But I think that there must be a
5 logic to people wanting to put this issue in
6 context.

7 Aurora Dairy, your Honor, is paying for
8 legal counsel that has been actively engaged and
9 aggressively cross-examining every witness here,
10 virtually. I think that the process here
11 deserves to understand who all parties are. And
12 the organic industry, the people who get their
13 hands dirty for a living and crack a sweat, have
14 had their livelihoods materially injured to the
15 point where some of them are now losing their
16 farms.

17 And it's been because of the holistic
18 behavior of this corporation. And they have
19 leveraged their size and their ability to not
20 pay into the Federal Order, along with illegal
21 activities. And you don't have to take the word
22 of the Cornucopia Institute for that, because
23 there's a document right here. And so I take
24 great exception to counsel saying that Mark
25 Kastel of the Cornucopia Institute is being

1 untruthful, your Honor.

2 And I would like to -- if you say submit
3 this in the future, I don't -- you know, it
4 really makes this argument moot. The word
5 "willfully violating the law" was not cooked up
6 by the Cornucopia Institute. It was used in the
7 letter of proposed revocation by the USDA. The
8 career civil servants found that Aurora Dairy
9 had violated 14 tenets of the law that governs
10 organic food production in this country.

11 It was the decision of the political
12 appointees at the USDA to let them off with just
13 a slap on the wrist. And -- but that does not
14 make what they were doing -- it doesn't change
15 what they were doing factually, and it doesn't
16 make it legal.

17 And I believe that -- you know, we've
18 spent a lot of time here in order so we don't
19 discuss things that are on the record in other
20 venues already. And I'm just appealing to you,
21 on behalf of myself as a citizen, but also the
22 people who I work for, to be able to present our
23 testimony as we prepared it. And if someone
24 wants to invest a lot of money in trying to
25 impugn my reputation in a public forum, your

1 Honor, I would think that it would be reasonable
2 to let me, point by point, defend the factual
3 accuracy of the statement that I was prepared to
4 make.

5 JUDGE CLIFTON: I don't have time. I do
6 not have time for you to engage in that luxury.

7 MR. KASTEL: But she had time to make all
8 those points telling that Mark Kastel was not
9 telling the truth on the witness stand.

10 JUDGE CLIFTON: I'm not making a finding
11 one way or the other about that. It's 10
12 minutes till 7:00, we've got a lot of work to do
13 here. And what I propose to redact is, on
14 page 1, everything but the date, the salutation,
15 and the first two paragraphs. On page 2,
16 everything down through the two checked
17 paragraphs. So that page would begin with, "The
18 exploitation of dairy farmers around the
19 country." You would have that paragraph, the
20 next paragraph, and the paragraph that begins on
21 the bottom of that page, down through the
22 paragraph that says, "Large producer-handlers
23 can obviously continue in business while paying
24 into the pool. The proposed rule changes do
25 nothing more than level the competitive playing

1 field." Your statement will end there.

2 Then the "Respectfully submitted" will
3 not have any of these names, but if you wish to
4 sign it on behalf of Cornucopia, that will show.
5 Now, that's how I intend to proceed. And I
6 intend to let you testify about those relevant
7 items. Are you willing to proceed in that way?

8 MR. KASTEL: I have no choice, do I, your
9 Honor?

10 JUDGE CLIFTON: No, you don't.

11 MR. KASTEL: Okay. Then I'm going to
12 proceed. I also state, for the record, that if
13 the corporation has the right to challenge the
14 accuracy of statements that I'm making, I have
15 the right to another venue to challenge your
16 professional behavior.

17 JUDGE CLIFTON: Yes, you do.

18 MR. KASTEL: And I will investigate
19 looking at that. I'm sorry that I --

20 JUDGE CLIFTON: I'm licensed in the State
21 of Colorado. You may file it there.

22 MR. KASTEL: No, not you, your Honor.
23 The counsel. You didn't present anything that
24 would injure me. I hope not. I'm sorry, I hope
25 I didn't insult you.

1 JUDGE CLIFTON: Well, don't go after
2 professional licenses. There are fairer ways to
3 fight.

4 MR. KASTEL: She said that I was lying,
5 and she made statements that were factually
6 inaccurate about me. I told --

7 MR. STEVENS: Your Honor. Please, sir,
8 let's be respectful with each other.

9 MR. KASTEL: Yes.

10 MR. STEVENS: Are you an attorney, sir?

11 MR. KASTEL: No, I am not.

12 MR. STEVENS: All right. Well, you don't
13 need an attorney, you don't need to be an
14 attorney, and some attorneys are enough, but we
15 need to be respectful of each other.

16 MR. KASTEL: Right.

17 MR. STEVENS: You certainly have your
18 rights, sir. I think the judge has made a
19 ruling. I think we should proceed, and whatever
20 follows after that will not be involved in this
21 hearing.

22 MR. KASTEL: That's correct.

23 MR. STEVENS: So let's not belabor the
24 record with unnecessary discussion, please. And
25 I think we can move forward. Let's be

1 respectful, let's get done what needs to get
2 done, and let's move on.

3 MR. KASTEL: I want you to know that I
4 feel bad about this, and I feel bad because a
5 lot of people are emotionally invested in my
6 being here today. And I understand that you
7 have to make a hard decision on the fly based on
8 the information you have, but it doesn't mean
9 that I can't feel bad about it. Thank you.

10 MR. STEVENS: All right, sir. But
11 remember, you are a witness like every witness
12 here. Your testimony will be made a matter of
13 record. Your testimony will be considered by
14 the Secretary of Agriculture, and a decision
15 will be made based upon the record.

16 So your evidence, just like all the
17 evidence here, is subject to the weight to be
18 given to that evidence. Take it as it's
19 offered, present your evidence. And, please,
20 let's move on.

21 MR. KASTEL: Yes, sir.

22 MR. STEVENS: Thank you.

23 JUDGE CLIFTON: Thank you, Mr. Stevens.
24 For the USDA table, I want you to keep your
25 Exhibit 35 for the sealed copy. Tomorrow I will

1 present you with a redacted copy.

2 MR. STEVENS: Thank you, your Honor.

3 JUDGE CLIFTON: Now, for your signature,
4 will you want to sign what I have gutted, or
5 will you prefer not to sign that?

6 MR. KASTEL: Oh, I'll be happy to sign
7 that, your Honor. And then I'll need someone to
8 communicate to me how I can make a formal appeal
9 to you to reenter that into the record, the full
10 testimony.

11 JUDGE CLIFTON: All you would have to do
12 is -- now, you had mentioned that afterwards,
13 someone asked you, had you submitted this, and
14 you said, no, I will.

15 MR. KASTEL: Yes, ma'am.

16 JUDGE CLIFTON: Were you going to submit
17 it to Gino Tosi?

18 MR. KASTEL: No. I think the question
19 was whether it had been submitted to the
20 Secretary of Agriculture, because that's who
21 it's addressed to. And it has not been
22 submitted yet.

23 JUDGE CLIFTON: I see. And do you intend
24 to submit it to the Secretary of Agriculture?

25 MR. KASTEL: Yes, your Honor.

1 JUDGE CLIFTON: I see. All right. Then
2 I think when you submit it, that would be a good
3 time to submit whatever else it is that you
4 object to about the way this was handled.

5 MR. KASTEL: Okay. I assume staff -- so
6 we don't take time today, I assume staff can
7 advise me on how to submit those comments to
8 you?

9 JUDGE CLIFTON: Well --

10 MR. STEVENS: Sir, my name is Garret
11 Stevens. I'm with the office of General
12 Counsel. I will give you my card. Call me,
13 talk to me. We assist everyone in the conduct
14 of this hearing, and I will help you to the
15 extent I can. I am not your attorney, I cannot
16 represent you, but I --

17 MR. KASTEL: I only need to know how
18 to -- the judge said that she would consider
19 written comments.

20 MR. STEVENS: Right. And if you follow
21 these proceedings, as many of these people in
22 this room have, there is an opportunity for you
23 to submit copies. There is an opportunity for
24 you, through legal counsel, to file briefs at
25 some time during the course of this proceeding.

1 Follow the proceeding and do what you feel is
2 necessary.

3 All this will be considered by the
4 Secretary and will be given the weight, the due
5 consideration that it merits, as with every bit
6 of evidence and documentation that comes into
7 this hearing. It is a public hearing. You are
8 here, you are participating. Please, let's
9 complete your participation.

10 And I will give you my contact
11 information. If you have concerns, please
12 express them to me and we will see that you --
13 that you get the advice that will help you to
14 work through this proceeding.

15 MR. KASTEL: Thank you.

16 JUDGE CLIFTON: Thank you, Mr. Stevens.
17 All right. Do you need a little break before
18 you tell me about this support that you have of
19 some of the proposals?

20 MR. KASTEL: Are you saying to read my
21 redacted testimony at this point? I assume
22 that's what you're saying.

23 JUDGE CLIFTON: We can do that or you
24 might have additional comments.

25 MR. KASTEL: I might.

1 JUDGE CLIFTON: So do you need a little
2 break?

3 MR. KASTEL: Sure. If I could have just
4 a very short break, that would be nice.

5 JUDGE CLIFTON: Good. Let's take a
6 10-minute stretch break. I know it's late.
7 Please be back and ready to go at 7:10.

8 (A recess was taken from 6:57 to 7:18.)

9 JUDGE CLIFTON: All right. Let's go back
10 on record. We're back on record at 7:18. I'm
11 ready to proceed with the testimony.

12 Ms. Kiser, did you have something
13 additional that you wanted to --

14 MS. KISER: Actually, it's just a
15 clerical thing. These are the exhibits. And
16 should I provide them with that so they have a
17 copy of those in addition to the motion?

18 JUDGE CLIFTON: I don't want all that on
19 the Website. It's the tail wagging the dog.

20 MS. KISER: Okay.

21 JUDGE CLIFTON: So I appreciate your
22 giving us the opportunity to look at it, but
23 just as I didn't give the witness the
24 opportunity to explain himself, I'm not going to
25 give you the opportunity to prove your motion.

1 MS. KISER: Okay.

2 JUDGE CLIFTON: So if you would retrieve
3 these. And I appreciate your being prepared in
4 that way. That was excellent lawyering. It's
5 just not the issue we've got here.

6 MS. KISER: Okay. Thank you.

7 JUDGE CLIFTON: You're welcome. All
8 right. Mr. Kastel, how I would like you to
9 proceed is, I would like you to read the
10 redacted Exhibit 35. I have left it as I
11 described it on the record, even though,
12 arguably, some of the other paragraphs were not
13 inflammatory. But what I would like you to do
14 in that regard is just read the redacted 35, and
15 then, in your own words, explain what you have
16 perceived is true based on your observations in
17 the market you're familiar with.

18 And you may identify Aurora by name, and
19 you may say those factual items that you believe
20 are true about the size of their operation and
21 the impact that it has in the market.

22 All right. And I realize that you're
23 doing all this having objected to my insistence
24 on it, and that you feel an obligation to those
25 people who are counting on you to present it.

1 And I understand that. All right, you may
2 proceed.

3 MARK KASTEL

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

6 DIRECT EXAMINATION

7 MR. KASTEL: Thank you, your Honor. My
8 name is Mark Kastel, and I'm the codirector of
9 the Cornucopia Institute. We're based in
10 Cornucopia, Wisconsin. And I also act as their
11 senior farm policy analyst.

12 Cornucopia Institute acts as an organic
13 industry watchdog. We have approximately 3,000
14 members, the largest percentage being organic
15 farmers, a very large percentage of those being
16 certified organic dairy producers.

17 We've also redacted -- I'll say this on
18 the record. We redacted the signatories out of
19 this letter that will be submitted to the
20 Secretary of Agriculture. I'm presenting this
21 testimony today on behalf of the Cornucopia
22 Institute.

23 We wholeheartedly support the original
24 450,000-pound-per-month production cap
25 originally proposed by the National Milk

1 Producers Federation on behalf of their member
2 co-ops. This cap should accommodate every
3 legitimate family scale farmer who wants to
4 engage in processing and direct marketing, while
5 closing the loopholes for industrial scale
6 producer-handlers.

7 JUDGE CLIFTON: Now we've gone to page 2
8 and we're looking at the bottom of the page.

9 MR. KASTEL: The exploitation of dairy
10 farmers around the country by large corporations
11 taking advantage of loopholes in the current
12 regulations need to end. Just like tax
13 shelters, where American corporations have moved
14 their headquarters or subsidiaries to Bermuda or
15 other offshore venues, or played games like
16 transferring ownership of their goodwill or
17 other intellectual property to dummy
18 corporations, these regulations need to change.

19 Although lobbyists probably argued that
20 corporate tax reforms would have disadvantaged
21 those operating under the rules that were being
22 exploited, our Federal government, looking after
23 the welfare of the majority of citizens, decided
24 that these corporations knew very well that what
25 they were doing was violating the intent of the

1 law, and that it was only a matter of time until
2 regulators would catch up to them.

3 There's no reasonable argument for not
4 changing this dairy regulation now. Changing
5 the regulation would not put anyone out of
6 business, although maintaining the status quo is
7 squeezing margins so much for legitimate family
8 farmers that some are currently exiting the
9 industry. And let me qualify that by saying,
10 I'm saying organics right now, specifically
11 organics.

12 We support a production cap of
13 450,000 pounds per month as being reasonable.
14 Although an improvement, the alternative
15 proposal to bump this cap up to 3 million pounds
16 per month, opens up a potential for continued
17 and possibly expanded exploitation of the
18 nation's rank-and-file dairy producers.

19 If officials do deem this higher level
20 necessary to "grandfather" certain producers in,
21 and again we do not support that, we would
22 highly suggest that producer-handlers currently
23 operating in the 450,000 to 3 million-pound
24 range be prevented from expanding their
25 operations. In other words, the 3 million-pound

1 figure should not be a cap that current
2 producer-handlers exceeding 450,000 pounds could
3 grow into.

4 I'm a little unclear on the last two
5 paragraphs. Do I --

6 JUDGE CLIFTON: You have two more lines.

7 MR. KASTEL: Large producer-handlers can
8 obviously continue in business while paying into
9 the pool. The proposed rule changes do nothing
10 more than level the competitive playing field.

11 And I would like to add just a few more
12 comments here. We've heard some testimony today
13 from some that have been concerned, not just
14 from the current impacts that producers --
15 producer-handlers are having in terms of
16 marketplace disruption, but the potential for
17 growth, the potential for some of them to form
18 alliances, and an unqualified level of risk that
19 exists.

20 Let me tell you folks that there is a
21 perfect model for the type of marketplace
22 disruption that we might see more widespread in
23 the conventional marketplace, and that's in
24 organic dairy. To my knowledge, there's only
25 one entity that is exercising that amount of

1 market clout, and that is the Aurora Organic
2 Dairy Corporation. They represent possibly
3 10 percent or more of the market.

4 They have taken advantage -- we've talked
5 about the changing playing field, changing
6 technology, we've talked about the fact that
7 there's a lot fewer producer-handlers in
8 operation today. There are a lot fewer
9 producers in operation today than there were 10
10 or 20 years ago.

11 When I started working for farmers in
12 Wisconsin in the mid-1980s, we had 45,000
13 cows -- I'm sorry, 45,000 farms, averaging about
14 45 cows per dairy. Today I think the number is
15 13,000. So I did a great job in those
16 interceding years. And there's a lot of people
17 that have lost their livelihoods, and there are
18 some people that aren't with us anymore today,
19 because either their health so deteriorated or
20 they committed suicide. So these are not light,
21 light issues. So we have fewer
22 producer-handlers because we have fewer
23 producers.

24 But the technology, that's a little
25 different. You know, historically, milk has

1 been a local product and a regional product.
2 And we've had a lot of consolidation in this
3 industry, but processing, farms, consumers,
4 there's been a relationship geographically.

5 Aurora Dairy started a new model with the
6 help of UHT pasteurization and extended shelf
7 life. They ship milk from one plant in Colorado
8 supplied by four massive dairy farms to,
9 literally, we believe every state in the
10 country. Certainly we know it's shipped for
11 consumers in Portland, Maine and Portland,
12 Oregon, and close to where I live in Portland,
13 Wisconsin.

14 It's caused catastrophic market
15 disruptions. No matter where family scale
16 farmers ship their milk, whether it's Dean Foods
17 or Organic Valley or one of the regional
18 players, the price leader has been Aurora
19 Organic Dairy and their retail customers,
20 including Wal-Mart and Costco and Target and
21 Safeway, I believe a total of about 20 of the
22 largest supermarket chains.

23 And so the impacts in organics have
24 deteriorated the financial status of family
25 farmers in two ways: Not only, as we've heard

1 testimony today, does that affect pooling for
2 some of their market, some of their competitors,
3 but the -- it's handicapped them to the point
4 where they're losing market share.

5 And we now have the three largest players
6 in the organic dairy processing world, Dean, HP
7 Hood and Organic Valley, have all cut their
8 prices to their farmers recently. This is
9 unprecedented in the 20 years since we've seen
10 commercialization of organic dairy. They've
11 all -- in addition to cutting their prices, some
12 of them have put production quotas on their
13 farmers and some of them have fired their
14 farmers. In fact, all three companies have
15 released some of their farmers. And these are
16 some farmers who have literally built dairies
17 from scratch on the promise by processors that
18 they would have a market for their milk. And
19 they have not been able to competitively compete
20 in the marketplace with the major
21 producer-handler that's engaged in the industry
22 right now.

23 So although we stand in solidarity with
24 other dairy interests in the conventional
25 marketplace, we want to articulate how this

1 exploitation has advantaged the very largest
2 player in organics. And there's no guarantee.
3 We have a number of other major players.

4 We've heard reference to Fair Oaks with
5 18,000 cows. They have, I believe, managed
6 3,000 of those cows organically. There's no
7 guarantee that we might have more players on the
8 national scene, that we might have more players
9 on a regional scheme. If Fair Oaks that's in
10 conventional milk in the Chicago market decided
11 to put 3,000 cows' worth of milk at 50 to
12 70 pounds of milk a day on the marketplace in
13 Chicago, it would be a material disruption in
14 the marketplace. So that potential obviously
15 exists. And I'm sorry I'm rambling around a
16 little bit, but I've had to, obviously, edit my
17 comments.

18 So we know the history of this rule, and
19 it was promulgated when we had small family
20 farms ringing dairies and sometimes delivering
21 their own milk. So when we have a \$100 million
22 corporation vertically integrated, so we have
23 corporate-owned cows, and utilizing UHT
24 technology, they have the ability to undercut
25 the retail price everywhere in the country.

1 And we've seen the statistics that the
2 USDA has put out that looks like the range is
3 somewhere like 7 to 13 cents a gallon in pooling
4 costs, but I can tell you, from my past
5 experience in the marketing end, that you can
6 almost double that in certain markets based on
7 distribution margins and the retail margin.
8 That's going to mark that differential up. And
9 that's a -- if you're talking as much as 30
10 cents, that really makes a difference on the
11 store shelves. So I'll end there, your Honor,
12 and thanks for your patience in this matter.

13 JUDGE CLIFTON: Thank you, Mr. Kastel. I
14 know it's quite late, and you delivered that
15 very eloquently, and exactly as I asked you to
16 stay in the parameters of, and I appreciate it
17 very much.

18 All right. Cross-examination of
19 Mr. Kastel. Who would like to begin?

20 Mr. Tosi, do you have any questions of
21 Mr. Kastel?

22 MR. TOSI: No, your Honor. Mr. Kastel,
23 thank you for coming, and we appreciate your
24 testimony and explaining your views here. Thank
25 you.

1 MR. KASTEL: Thank you, Mr. Tosi. Thank
2 you, your Honor.

3 JUDGE CLIFTON: Thank you. I want you to
4 sign what I've got here, and I'm going to give
5 this to USDA staff. It did say "Respectfully
6 submitted," so if you want to say that again,
7 and then your initials.

8 (Witness complied.)

9 JUDGE CLIFTON: Thank you so much. All
10 right. I did already read who I thought would
11 be tomorrow, didn't I? So you have some idea.

12 Okay. Then let's go home. Which is the
13 first one? I don't know. We have to decide
14 tomorrow. We don't know when the state
15 officials are going to come. All right. So
16 good night. It's 7:33. See you at 8:00 in the
17 morning.

18

19

- - -

20

PROCEEDINGS ADJOURNED AT 7:33 P.M.

21

- - -

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, David W. Moxley, RMR, CRR, CMRS, 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.

David W. Moxley, RMR, CRR, CMRS