UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

------------------------
------------------------

- - -
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
APPEARANCES:

On behalf of the United States Department of Agriculture:
Garrett Stevens, Esq.
Heather Pichelson, Esq.
of
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343 South Building
Washington, D.C. 20250
Phone: (202) 720-5707

On behalf of Continental Dairy Select Milk:
Benjamin F. Yale, Esq.
of
Yale Law Office, LP
527 North Westminster Street
P.O. Box 100
Waynesfield, Ohio 45896
Phone: (419) 568-5751

On behalf of AIDA:
Alfred William Ricciardi, Esq.
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
APPEARANCES CONT'D:

On behalf of AIDA:
Nancy S. Bryson, Esq.
ofHolland & Hart
Suite 900
975 F Street NW
Washington, DC  20004
Phone:  (202) 654-6921

On behalf of National Milk:
Kevin J. Brosch, Esq.
ofDTB Associates, LLP
Third Floor
901 New York Avenue, NW
Washington, D.C.  20001-4413
Phone: (202) 661-7097

On behalf of the Florida Milk Producers Federation and Dairy Farmers of America, Inc.:
Marvin Beshore, Esq.
ofLaw 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.
ofLatham & Watkins, LLP
Sears Tower, Suite 5800
233 South Wacker Drive
Chicago, Illinois
Phone: (312) 876-7700
APPEARANCES CONT'D:


Charles M. English, Esq.
ofOber KalerSuite 5001401 H Street NWWashington D.C. 20005-3324Phone: (202) 326-5009

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

John H. Vetne, Esq.ofLaw Office of John H. Vetne11 Red Sox LaneRaymond, New Hampshire 03077Phone: (603) 895-4849

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

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

Also Present:
Kate Fisher, USDA
Robert D. Yonkers, Ph.D., International Dairy Foods Association
Jack Rower, USDA
Clifford M. Carman, USDA
<table>
<thead>
<tr>
<th>INDEX</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>JOCK GIBSON</strong></td>
<td></td>
</tr>
<tr>
<td>Direct Examination</td>
<td>624</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Brosch</td>
<td>632</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Carroll</td>
<td>634</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Rower</td>
<td>637</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Miltner</td>
<td>639</td>
</tr>
<tr>
<td><strong>LEON BERTHIAUME</strong></td>
<td></td>
</tr>
<tr>
<td>Direct Examination by Mr. Beshore</td>
<td>642</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Vetne</td>
<td>650</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Yale</td>
<td>661</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Ricciardi</td>
<td>663</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Carroll</td>
<td>671</td>
</tr>
<tr>
<td>Cross-Examination by Mr. English</td>
<td>675</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Vetne</td>
<td>678</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Tosi</td>
<td>682</td>
</tr>
<tr>
<td><strong>BILL NEWELL, CINDY DAMM, JOHN TRAWEEK</strong></td>
<td></td>
</tr>
<tr>
<td>Direct Examination</td>
<td>688</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Carroll</td>
<td>711</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Vetne</td>
<td>715</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Miltner</td>
<td>736</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Ricciardi</td>
<td>755</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Brosch</td>
<td>771</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Miltner</td>
<td>775</td>
</tr>
<tr>
<td>Redirect Examination by Mr. Beshore</td>
<td>777</td>
</tr>
<tr>
<td><strong>RODNEY DANIELS</strong></td>
<td></td>
</tr>
<tr>
<td>Direct Examination by Mr. Beshore</td>
<td>790</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Miltner</td>
<td>796</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Ricciardi</td>
<td>801</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Tosi</td>
<td>807</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Carroll</td>
<td>808</td>
</tr>
<tr>
<td>Redirect Examination by Mr. Beshore</td>
<td>815</td>
</tr>
<tr>
<td>Cross-Examination by Mr. Yale</td>
<td>818</td>
</tr>
</tbody>
</table>
PAUL ROVEY

Direct Examination 833
Cross-Examination by Mr. Ricciardi 844
Cross-Examination by Mr. Carroll 859
Cross-Examination by Mr. Tosi 865
Redirect Examination by Mr. Brosch 869

JERRY DAKIN

Direct Examination 876
Cross-Examination by Mr. English 883
Cross-Examination by Mr. Carroll 886
Cross-Examination by Mr. Miltner 892

JAMES BUELOW

Direct Examination by Mr. English 897
Cross-Examination by Mr. Carroll 908
Cross-Examination by Mr. Ricciardi 919
Cross-Examination by Mr. Beshore 929
Cross-Examination by Mr. Tosi 931
Redirect Examination by Mr. English 932

GARY LEE

Direct Examination by Mr. English 937
Cross-Examination by Mr. Miltner 948
Cross-Examination by Mr. Beshore 957
Cross-Examination by Mr. Miltner 963
Cross-Examination by Mr. Beshore 967
Redirect Examination by Mr. English 968
Cross-Examination by Mr. Carroll 971
Cross-Examination by Mr. Vetne 974
Cross-Examination by Mr. Ricciardi 987
Redirect Examination by Mr. English 995

MARK KASTEL

Direct Examination 1055
<table>
<thead>
<tr>
<th>EXHIBITS</th>
<th>MARKED</th>
<th>ADMITTED</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exhibit 26</td>
<td>-</td>
<td>641</td>
</tr>
<tr>
<td>Exhibit 27</td>
<td>641</td>
<td>684</td>
</tr>
<tr>
<td>Exhibit 28</td>
<td>694</td>
<td>779</td>
</tr>
<tr>
<td>Exhibit 29</td>
<td>694</td>
<td>779</td>
</tr>
<tr>
<td>Exhibit 30</td>
<td>694</td>
<td>779</td>
</tr>
<tr>
<td>Exhibit 31</td>
<td>789</td>
<td>820</td>
</tr>
<tr>
<td>Exhibit 32</td>
<td>820</td>
<td>872</td>
</tr>
<tr>
<td>Exhibit 33</td>
<td>897</td>
<td>908</td>
</tr>
<tr>
<td>Exhibit 34</td>
<td>936</td>
<td>948</td>
</tr>
<tr>
<td>Exhibit 35</td>
<td>996</td>
<td>-</td>
</tr>
</tbody>
</table>

- - -
PROCEEDINGS

JUDGE CLIFTON: Let's go on the record.

We are now on record at 8:05. It's Wednesday, May 6, 2009. This is day three of the Milk Rulemaking Hearing. My name is Jill Clifton.

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

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

Now, those of you that need to testify this morning, please go to the court reporter's side of the podium. If you need to testify this morning.
Okay. It's helpful that we start with
two. Would each of you come to the microphone
and identify yourself and spell your name for
us?

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

JUDGE CLIFTON: Thank you.

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

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

MR. BERTHIAUME: That is correct.

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

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

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

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

MR. NEWELL: Bill, B-i-l-l, Newell,
N-e-w-e-l-l.

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

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

MR. TRAWEK:  Dairy Farmers of America,
Inc.

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

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

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

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

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

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

JUDGE CLIFTON:  Thank you.
MR. BESHORE: Your Honor, if I might?

JUDGE CLIFTON: Mr. Beshore.

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

JUDGE CLIFTON: Who is he?

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

JUDGE CLIFTON: Okay, good. And next?

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

JUDGE CLIFTON: Sir?

MR. BUELOW: I'm sorry.

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

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

But the first of the two that needs to testify today is Mr. James Buelow, B-u-e-l-o-w. He's standing next to me right now. He wasn't
in the room earlier because he was having his report copied, and I have it in my hand. I will put it in the back of the room as promptly as I'm able to get away from the lectern.

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

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

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

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

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

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

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

MR. BESHORE: Your Honor, the second of the witnesses who needs to testify today is not presently in the room. His plane must be delayed. Mr. Gary Lee should be on your list, from Prairie Farms Dairy. I apologize, he has
his statement with him. I don't have copies at this time. I will get them promptly as soon as he is here. He will be back in the room as well. So Gary Lee is G-a-r-y, last name Lee, L-e-e.

JUDGE CLIFTON: And your third person?

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

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

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

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

JUDGE CLIFTON: Thank you. Let's see. I have one, two, three, four, five, six, seven, eight, nine, ten. That's doable. All right. I know we don't want to work late. We'll do our
best to do this by 6:00. If we don't finish by
6:00, if the only one remaining is J.T. Wilcox,
then we'll talk about whether we should keep
going, given the fact that tomorrow will be
busy.

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

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

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

MR. BROSCH: Yes, your Honor.

JUDGE CLIFTON: So what would be ideal
for you is if cross-examination of Dr. Cryan took place on Monday and that all the data that any of us were going to have from the USDA were in our hands by then?

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

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

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

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

MR. STEVENS: Your Honor, Garret Stevens from the United States Department of Agriculture. They have continued to work
diligently on these information requests. I've been informed by them that the intention and every effort is being made to get these done by Thursday or Friday of this week, and that they will be in the hands of people by that time, either the documents or the reasons why not.

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

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

JUDGE CLIFTON: Okay.

MR. BROSCH: You know, I just want to
make it clear, I was simply inquiring about
this. I don't want this -- there's no
implication here at all, any criticism of the
government's efforts here. The government is
killing themselves to respond to what I think is
an overwhelming set of requests, and I
appreciate what they're doing.

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

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

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

JUDGE CLIFTON: I agree. I don't know
what the requests are. I don't know what's
required to bring in the data. But I do know
that on this kind of task, we do not know how
long it's going to take until you complete it.

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

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

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

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

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

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

JUDGE CLIFTON: As long as we don't keep pushing things over to the next day. Then we might have trouble.
MR. CARROLL: Thank you, your Honor.

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

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

JUDGE CLIFTON: Okay. Good.

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

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

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

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

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

(The witness was sworn.)

JOCK GIBSON

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

DIRECT EXAMINATION

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

We did not participate in the Federal Order hearings in 2005 because we were in agreement with the proposals being put forward. We agree with the assessment of the National Milk Producers Federation that when the category of producer-handler was instituted, the size of some of today's large producers and producer-handlers were not imagined. Had the early framers of the Federal Orders imagined the possibility of such large dairy complexes, they would simply have agreed on a cap, a cap such as
the 3 million pounds per month of Class I sales
that has been imposed on the Pacific Northwest
and Arizona orders. They would not have thrown
the baby out with the wash.

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

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

The National Milk Producers Federation
goes on to make the point that small
producer-handlers do not cause market --
disorderly marketing, because their small size
contributes to cost disadvantages. We have
firsthand knowledge of this cost disadvantage versus the combination of the large producers linked with the economies of scale enjoyed by large regional bottlers.

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

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

JUDGE CLIFTON: Read that one again.

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

JUDGE CLIFTON: I'm looking at a word
that looks like "620 milking heard."

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

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

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

JUDGE CLIFTON: Thank you.

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

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

MR. JOCK GIBSON: 40-mile radius.

JUDGE CLIFTON: Not 140-mile?

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

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

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

JUDGE CLIFTON: You are.

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

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

The Northwest -- the National Milk Producers Federation's statement that producer-handlers have been given special status overlooks the historical structure of the early distribution of fluid milk. My father began his special status as a producer-handler as a
teenager in Corvallis, Oregon, when he delivered milk from the family cow to his neighbors as he and his father made their way to school, he to high school and his father to his teaching duties at Oregon College.

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

Another miscalculation by the National Milk Producers Federation is their reference to a producer-handler's cost of milk. I would like to insert here that, first of all, our cost at
Lochmead Dairy in the last six months for producing 100 pounds of milk is $18.03. And that includes a small charge for the rent of the facility, but it includes all labor costs.

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

If the status of a producer-handler were to be removed and Lochmead Dairy were to become a regulated handler, we believe that our family business would no longer be economically viable. Obviously, our small bottling plant would not be cost competitive with the efficiencies of the large bottlers, even though their products are trucked into our market on 100 miles of freeway.
Of equal concern to us is the viability of a 600-cow dairy in western Oregon versus the new dairies of 10 to 20 times larger and located in the drier climate of eastern Oregon or Idaho. This concern is magnified by the recent construction of an additional bunker silo to deal with increased feed costs and the signing of a 20-year contract to supply manure to a methane digester now under construction at the dairy.

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

Therefore, we propose that the USDA set the limit for producer-handlers at 3 million pounds of Class I sales per month, as was done in the Arizona and Northwest market orders. We therefore ask and propose that the Pacific Northwest market, Federal Order 124, be excluded from the hearings requested by the National Milk Producers Federation and IDA. We feel that we
have had our hearing and the findings are fair
and balanced.

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

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

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

CROSS-EXAMINATION

BY MR. BROSCH:

Q. I'm Kevin Brosch for the National Milk
Producers Federation. Good morning, Mr. Gibson. As
your Honor mentioned, it's early. It's 8:00 here, but
it's 5:00 for you?
   A. Yes, it is. I'm usually up and bright, though, by 5:00 out there.
   Q. I'm not. You've got an advantage over me this morning, then.

   Mr. Gibson, have you read or are you aware of Proposal Number 26 in this proceeding?
   A. In general terms, yes.
   Q. Are you aware that National Milk has proposed actually to grandfather existing producer-handlers in at 3 million pounds per month?
   A. Yes.
   Q. Your testimony is that your farm has about, a little over a million per month?
   A. Correct.
   Q. So your farm is well below that particular limit, correct?
   A. Correct.
   Q. And I read your testimony to say that, basically, you're in line with the idea of limiting it at 3 million pounds?
   A. Correct.

MR. BROSCH: Thank you very much.

JUDGE CLIFTON: Who else? By the way, the way this will work, Mr. Gibson, if you now
have the feeling that you would like to say
another sentence or two about that topic, but
you didn't get the chance because Mr. Brosch
didn't ask any more questions, you get a chance,
when cross-examination is over, to redirect,
where you then can expand on the issues that
were raised by the cross-examination.

MR. JOCK GIBSON: Thank you, your Honor.

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

MR. CARROLL: Me.

JUDGE CLIFTON: Mr. Carroll.

CROSS-EXAMINATION

BY MR. CARROLL:

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

A. Yes. Howard.

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

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

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

A. Yes, that's correct.

Q. And you're his son?
A. That's correct.

Q. How many sons did he have?

A. There are three of us.

Q. And your names are?

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

Q. And do they have children?

A. Yes.

Q. And how many children do they have?

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

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

A. Yes, they are.

Q. Who are they?

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

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

A. Yes, they are.
Q. Now, do you think that anybody in the Department of Agriculture in Washington who wants you to leave that business and become a producer-handler has the right to do that?

A. We could use their help.

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

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

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

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

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

A. I believe that the true spirit of being a
producer-handler, that you should not try to balance your production with being a copacker of a brand that someone else also is a packer of, that allows you to balance your production in that way. I think the spirit of being a producer-handler is that you need to manage your production to your market, and that burden of balancing your supply needs to rest with the producer-handler.

Mr. Carroll: Thank you.

Judge Clifton: You have such clarity of expressing the issues. I'm very impressed.

Mr. Jock Gibson: Thank you.

Judge Clifton: Who else would like to cross-examine him?

Okay, go ahead, Mr. Rower.

CROSS-EXAMINATION

By Mr. Rower:

Q. Good morning, Mr. Gibson.

A. Good morning, sir.

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

Judge Clifton: And please move the microphone this way.

Mr. Rower: Can you hear me now?

Judge Clifton: I'm thinking it should be on the side of you towards the witness, so that
you can look at him and speak right into it.

Thank you.

BY MR. ROWER:

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

A. Under the regulations that we operate
under now?

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

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

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

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

MR. ROWER: Thank you very much.

JUDGE CLIFTON: Mr. Tosi? No.

Mr. Miltner.

CROSS-EXAMINATION

BY MR. MILTNER:

Q. Good morning, Mr. Gibson.
A. Good morning, sir.

Q. The $18.03 cost-of-production figure you
gave us, is that just your cash costs?
A. As I mentioned, those numbers include a
rent for the facility, but other than that, those are
cash costs, including all labor costs.

Q. Okay. And how does that compare with the
blend price in Order 124 right now?
A. The price that our other bottlers buy
their Class I sales for?

Q. Well, the --
A. It's priced below that. It's $12, in the
neighborhood of $12.

Q. That's the Class I price, right?
A. Yeah, yeah.

Q. How about the blend price or the uniform pricing?
A. It would be, obviously, below that. I don't know those numbers.

Q. So you acquire -- the milk you acquire is at a significantly higher cost than a regulated handler?
A. We don't acquire milk. We produce it.

Q. Okay. And the milk you produce is at a significantly higher cost compared to regulated handlers?
A. That's correct.

MR. MILTNER: Thank you.

JUDGE CLIFTON: Other questions for Mr. Gibson?

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

MR. JOCK GIBSON: Thank you, your Honor.

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

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

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

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

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

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

(Exhibit 27 was marked for identification.)

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

All right. Mr. Berthiaume, would you again state your full name and spell it for the record?
MR. BERTHIAUME: My name is Leon, L-e-o-n, Berthiaume, B-e-r-t-h-i-a-u-m-e.

(The witness was sworn.)

JUDGE CLIFTON: Mr. Beshore, you may proceed.

LEON BERTHIAUME

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

DIRECT EXAMINATION

BY MR. BESHORE:

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

A. I do.

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

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

St. Albans and the other major cooperatives in the Northeast are members of the Association of Dairy Cooperatives in the Northeast and the Greater Northeast Milk Marketing Agency. I
currently serve as chairman of both of those
organizations. St. Albans and these other Northeast
coopereatives are also members of the National Milk
Producers Federation.

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

The St. Albans Cooperative Creamery,
Inc., is a member-governed dairy cooperative serving
dairy farmers located in Vermont, New York and New
Hampshire, and has been in operation since 1919.
St. Albans Cooperative is based in St. Albans, Vermont,
in the northwest corner of the state, about 10 miles
from the Canadian border. We currently have 473 farms
in our cooperative: 404 in Vermont, 68 in New York and
one in New Hampshire. Our members' farms range in
production from less than 200,000 pounds annually to
more than 40 million pounds. However, our cooperative
consists largely of smaller size farms. Our average
farm has approximately 125 cows and an annual production of about 2.5 million pounds. 91 of our member farms are certified for organic milk production. In calendar year 2008, our members produced 1.282 billion pounds of milk, of which 83 million pounds, or 6.46 percent, was organic milk.

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

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

Since 2003, we have been a member/owner
in Dairy Marketing Services, LLC. Dairy Marketing Services is responsible for marketing the milk of St. Albans and a number of other large and small cooperatives, as well as some independent dairy farmers in the Northeast. The majority of our organic members hold a dual marketing agreement with CROPP, which is the Coulee Region Organic Producer Pool.

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

In 2008, the Class I utilization Order 1 was more than 10 billion pounds, which is approximately 22 percent of the total Class I use from the Federal
Order system. This Class I utilization was pooled amongst 13,584 producers, most of them small producers. Nearly 80 percent of those farms, more than 10,000 producers, delivered less than 150,000 pounds per month, which suggests a herd size of less than 100 cows.

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

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

The issues in this hearing are extremely important for the future of the Order 1 marketwide pool and Order 1 producers. This rulemaking will determine the extent to which producer-handlers and exempt plants will participate in the pool and the extent to which pool members will share in Class I revenues.
The organic milk market in the Northeast provides an example of the impact which large, unregulated producer-handlers can have on Federal Order pools. There are primarily three organizations that procure organic milk in our member service area: HP Hood, Horizon Dairies and CROPP Cooperative. HP Hood and Horizon are fully regulated handlers, and CROPP is an organization that markets to fully regulated handlers. In the case of all three of these organizations, the organic milk is fully priced and pooled under Order 1.

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

In recent years, large organic dairy operations have had a substantial impact on these small organic farm operations. For example, Aurora Organic Dairy in Platteville, Colorado, an exempt producer-handler, distributed Class I milk in Order 1 in
every month of 2008. These Class I sales were not pooled.

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

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

St. Albans Cooperative is a small cooperative which is committed to working with customers and plants of all sizes. We're also committed to represent and protect the interests of our member farms.
I strongly believe that, as an industry, we must anticipate change and ensure we have the systems in place to deal with difficult challenges before these challenges become significant problems for the members of our industry.

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

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

A. In New England, no.

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

A. Yes.

Q. Okay. Does CROPP have a recognized label under which its members' product is marketed?
A. Yes, the Organic Value brand.

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

JUDGE CLIFTON: Thank you.

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

CROSS-EXAMINATION

BY MR. VETNE:

Q. Good morning, Mr. Berthiaume.

A. Good morning.

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

A. Certainly. The cooperatives in the Northeast have come together to work collaboratively to address marketwide issues relative to the pricing of Class I milk, as well as addressing other challenges in the marketplace, whether it's relating to balancing, for example, to providing rbST-free milk to the market, would be another example where we focus a lot of our energies.
Q. You refer to -- so these are cooperatives beyond the cooperatives that market through Dairy Marketing Services?

A. That is correct.

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

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

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

A. Yes.

Q. Okay. And when was this organization organized?

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

Q. Does that organization actually market milk as suggested in its name, in the same way that DMS markets milk?
A. No.

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

A. That is correct.

Q. It's primarily a price agreement agency?

A. Yes.

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

A. Initially, yes.

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

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

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

A. Yes.

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

A. Yes.

Q. Does St. Albans have a member/owner
interest in Dairy Marketing Services that is in any way other than its proportionate interest in DFA?

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

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

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

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

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

MR. VETNE: The witness has spoken about how milk is marketed and how milk is pooled and
what is fair and what is not fair. In order to assess that in the system, we've got to find out a little bit about how the system works. If the purpose of this hearing is to look in isolation at producer-handlers on one side of the ledger and know nothing about how the rest of the system markets on the other side of the ledger, we can't make a decision. What are we doing here?

JUDGE CLIFTON: Mr. Beshore?

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

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

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

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

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

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

MR. VETNE: Okay.

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

MR. VETNE: If the attorney wants to instruct a witness not to answer, your Honor, I accept that. However, I have a problem with the judge sustaining that as -- sustaining that as a legal objection as a matter of law. The witness does not have to answer, I agree with that, if instructed.
However, proprietary information is not a valid evidentiary objection recognized in any court of law. Please, let the attorney instruct the witness not to answer rather than your Honor.

JUDGE CLIFTON: Than opposing the counsel?

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

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

MR. VETNE: Okay.

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

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

What I'm suggesting is, rather than sustaining an objection, your Honor, simply
acquiesce to the instruction, because by
sustaining an objection, you give an imprimatur
that the objection has a legal basis. It does
not. Maybe I'm just simply lost here in
academia.

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

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

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

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

JUDGE CLIFTON: Okay.

MR. VETNE: It's one thing coming from
the lawyer. It's another thing coming from the
bench, which adds a dignity to not disclosing
information to the record, that probably
shouldn't be there. I have a problem with that.
Maybe we're not reading on this from the same page here.

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

BY MR. VETNE:

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

JUDGE CLIFTON: Which page are you on?

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

BY SPEAKER:

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

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

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

A. Yes.

Q. But you've talked here about the DMS system, the 623 organic farms in the DMS system. I
wanted to make sure that you're talking about the system and not a little part of DMS.

A. I'm talking specifically of the Northeast.

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

A. Correct.

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

A. Managed by Dairy Marketing Services.

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

A. Dairylea is a participant in Dairy Marketing Services.

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

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

BY MR. VETNE:

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

A. That's correct.

JUDGE CLIFTON: Thank you.
Q. Dairylea is a cooperative who is a member of DFA like you, like St. Albans, correct?
A. Yes.
Q. Okay. And management responsibilities -- day-to-day management responsibilities for DMS in the Northeast is undertaken by Dairylea employees for the most part, isn't that correct?
A. The management of Dairy Marketing Services involves individuals other than just Dairylea representatives. St. Albans is also involved in the day-to-day activities of Dairy Marketing Services.
Q. My question was primarily the day-to-day management. The people listed as management on the DMS Website are folks that are Dairylea employees? If you don't know --
A. Well, the CEO of DMS is also an employee of Dairylea.
Q. Okay. And that's DMS nationally or DMS northeast?
A. No, DMS Northeast.
Q. Thank you. Do you know anything -- since you've given information about organic farms in the DMS system, do you know anything about organic farms in the DMS system outside of the Northeast?
A. Not outside of the Northeast, no.
Q. You don't know whether there are any or how they're treated or how they're marketed, is that correct?

A. That's correct.

MR. VETNE: Okay. That's all I have.

Thank you.

JUDGE CLIFTON: Thank you, Mr. Vetne.

Who would like next to cross-examine? Mr. Yale.

CROSS-EXAMINATION

BY MR. YALE:

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

A. Good morning.

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

A. Not specifically.
Q. Okay. It wasn't a trick question. But, the question I have in terms of St. Albans' position would be in the event that to -- well, first of all, let me back up. You are supporting the idea that those who are currently the smaller PDs are able to continue in that position, right?
A. Yes.
Q. All right. So if that has to be done in a way other than vesting them rights, for example, just setting a small cap, and there are suggestions of 1, 2 and 3 million pounds per producer and leaving -- or for -- leaving it at that, what would St. Albans' position be on that?
A. I guess just clarify the question again for me.
Q. Well, the question would be, under the grandfathering, you have to exist to get in?
A. Right.
Q. The other proposal would allow grandsons, so to speak, it would allow new people to enter into the system at up to the 2 or 3 million, whatever the cap would be established as a separate issue?
A. Initially, St. Albans' position is to support the proposals as submitted.
Q. Okay.
A. Which is the 1, 2 and 26 combined.

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

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

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

A. No.

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

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

CROSS-EXAMINATION

BY MR. RICCIARDI:

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

A. Thank you.

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

MR. RICCIARDI: I was.
JUDGE CLIFTON: Good. Thank you.
MR. RICCIARDI: You're welcome.

BY MR. RICCIARDI:
Q. Mr. Berthiaume, you've been here since the inception of this hearing on Monday, correct?
A. Yes.
Q. Do you intend to stay beyond the time of your testimony today?
A. For a portion of the time, yes.
Q. Okay. Now, so that I am clear after all the colloquy up here with Mr. Vetne, St. Albans, which is who you're the general manager and chief executive officer of, is part of DFA, is that right?
A. St. Albans is a member cooperative of Dairy Farmers of America.
Q. And Dairy Farmers of America is the largest, in size and member, co-op in the country, correct?
A. Yes.
Q. You're also a member of National Milk, as I understand it?
A. Yes.
Q. All right. You were here during the testimony, then, of Messrs. Hatch and Dunajski, right?
A. Yes.
Q. They're not competing with you and causing you or your members any disorder, correct?
A. They do not compete with St. Albans Cooperative directly, no.
Q. And they're not causing you any kind of problems or your members any problems, correct?
A. Not to my knowledge.
Q. And the same would be true with regard to all of the producer-handlers currently in Order 1, correct?
A. I would say that the statistics, you know, showed that producer-handlers' share of the Class I market is growing. Since 2005, we've seen, I think, the increase move from a little over 66 million pounds of milk to 131 million pounds of milk. So, again, I see that becoming more of an issue within the Northeast marketplace as it relates to Class I and Class I markets and availability.
Q. That wasn't my question, so let's go to mine. Currently, then, based upon the last portion of your answer, you see this as a prospective potential problem, not a current one, with regard to the producer-handlers in Order 1, correct?
A. I believe that, potentially, that exists -- the problem exists today from an organic
perspective in that we do have a producer-handler of large size that is in our Northeast organic marketplace that may create challenges for our existing organic members.

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

MR. BESHORE: Your Honor --

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

JUDGE CLIFTON: Objection noted, Mr. Beshore.

MR. BESHORE: Thank you.

JUDGE CLIFTON: Go ahead, Mr. Ricciardi.

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

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

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

JUDGE CLIFTON: Well, you're normally so crisp. And you're losing me on your questions.
MR. RICCIARDI: Okay. Then, if I've lost you, Judge, I'm going to get you back.

JUDGE CLIFTON: Okay.

BY MR. RICCIARDI:

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

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

MR. RICCIARDI: Good.

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

MR. RICCIARDI: Thank you, your Honor.

BY MR. RICCIARDI:

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

A. That is correct.

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

A. Yes.

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

JUDGE CLIFTON: Where on the page are you?

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

JUDGE CLIFTON: Thank you.

MR. RICCIARDI: No problem.

BY MR. RICCIARDI:

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

A. Yes.
Q. And moving milk means what?
A. Marketing milk directly to processing facilities.

Q. Okay. Did St. Albans move milk anywhere outside of Federal Order 1?
A. No.

Q. Did DMS, on behalf of St. Albans, move any of the St. Albans milk outside of Federal Order 1?
A. Not to my knowledge.

Q. Did anyone on behalf of St. Albans move milk from St. Albans outside of that Federal Order?
A. Not to my knowledge.

Q. Okay. The other 56 percent of the milk that you had in fiscal year 2008, where did that go?
A. Okay, the balance of the milk would either move to manufacturing facilities or to our own facility in St. Albans, Vermont.

Q. And in that own facility, what do you do with the milk?
A. In our own facility, we are primarily a cream generator to meet the needs of our key cream customers, which I've stated is Ben & Jerry's is our primary cream outlet.

Q. And the milk that goes to other manufacturing outlets goes where?
A. Again, to manufacturing facilities as cheese plants, which would be, for example, Via Cheese in Swanton, Vermont, would be an example.

JUDGE CLIFTON: And Via is spelled how?


JUDGE CLIFTON: Oh, Via.

THE WITNESS: Via.

JUDGE CLIFTON: Thank you.

BY MR. RICCIARDI:

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

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

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

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

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

A. To my knowledge, it has increased.

Q. So, in fact, there has been an increase
in the pool in Federal Order 1 for organic milk from '06 to '07 and then from '07 to '08, right?
A. Yes.
Q. Notwithstanding whatever milk may come into that system from another area of the country, the fact is, in the pool, organic milk is increasing, correct?
A. Correct.
MR. RICCIARDI: Thanks.
JUDGE CLIFTON: Who would next like to cross-examine Mr. Berthiaume? Mr. Carroll.
CROSS-EXAMINATION

BY MR. CARROLL:
Q. Good morning, sir.
A. Good morning.
Q. I'm not sure I understood, but I think I understand that you have said you have no problems with the producer-handlers that are not engaged in organic milk, that you're not presenting them as a problem?
A. We currently have, again, no direct issues between St. Albans and producer-handlers at this time.
Q. Okay. And I'm not sure that the record shows it, but may I ask you again, if you've already said it, what is the definition of organic milk?
A. Organic is milk that is produced under specific standards as, I guess, outlined under the organic -- the national organic standards that have been established, I believe, under USDA.

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

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

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

A. To be organic?

Q. Yes.

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

It's also a function of how you take care of your animals. Prior to becoming organic you need to feed your animals for a minimum of one year with organic feed, for example. You're not allowed, unless it's in emergency situations, to use any type of drug residues or animal -- any type of antibiotics for treatment, things of that nature.
Q. And that's at the production level, is that correct?
A. That is correct.
Q. Are there any requirements at the processing level?
A. Yes, in terms that even plants have to be certified under organic practices in terms of making sure -- if it's a plant that is strictly an organic plant, it still needs to be looked at for certification processes in terms of the types of cleaning or chemicals that might be used within the facility. I'll give you an example that would be looked at. If there's milk that's being segregated, you need to identify the process in which you segregate milk to ensure that you maintain the validity of the organic milk that's being processed.
Q. Is there inspection proceedings at all for that section?
A. There aren't. Basically, a certification process that has happened, that happens annually relative to a facility.
Q. All right. Would those requirements have some impact on costs of production and costs of the processing?
A. Yes.
Q. Now, the public, from the standpoint of the public, when the product is sold, how is it -- is it allowed to be marked differently than other milk?
A. Organic milk is -- again, I would say is identified as organic milk on the carton.
Q. The word "organic" is on there?
A. Yes.
Q. And that's a unique certification in order to use that name on the label?
A. That is correct.
Q. I think you might be generally familiar with this. If you're not, tell me.
A. Go ahead.
Q. Generally speaking, although there's been some increase in the volume of producer-handler milk in your order, that's Order Number 1, are you familiar with the fact that that, compared to the blend, would have very little effect, if any, on the blend? In other words, it's a small volume compared to the volume of milk being handled in that order?
A. I do recognize the size of Order 1 in terms of the volume of milk, yes.
Q. And comparing that to this increase in producer-handler milk that you talked about, is it so that that's a relatively -- would have relatively little
effect on the blended, pennies perhaps?

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

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

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

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

A. Oh, absolutely, absolutely.

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

JUDGE CLIFTON: Thank you, Mr. Carroll.

Mr. English.

MR. ENGLISH: Thank you, your Honor.

Charles English.

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Mr. Berthiaume, you were asked a number of questions that suggested that it somehow matters that a producer-handler be located within New England to be a competitive issue. Given your testimony on the organic front, is that an accurate characterization of what the
competitive issue is in this market in the United States today?

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

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

A. That's correct.

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

A. Correct.

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

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

BY MR. ENGLISH:

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

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

A. Yes.

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

A. Yes.

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

A. Can you repeat the question?

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

A. That is located or --

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

A. That is specifically located?

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

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

A. Correct.

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

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

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

A. That's correct.

MR. ENGLISH: Thank you, sir.

JUDGE CLIFTON: Thank you, Mr. English.

Other cross-examination for Mr. Berthiaume?

Mr. Vetne.

CROSS-EXAMINATION

BY MR. VETNE:

Q. A couple of follow-ups to other
examination. Mr. Berthiaume, you testified that it's particularly important to get every penny, because producers or dairy farmers are receiving less than the cost of production today. Is it not the case that in almost every period, dairy farmers receive less than the cost of production? It's not unique to today?

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

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

A. That is correct.

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

A. That is correct.

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

A. Yes.

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

A. St. Albans does not provide milk
directly. It provides product from the plant for Liberte, which is, again, an inspected plant under FDA. And as long as the product that is used from our plant is then redirected back into the States, there is no issues.

Q. By "product," you mean boutique milk of some kind?
A. No. It would be cream or skim or skim condensed that they would use for their products.

JUDGE CLIFTON: Would you spell the name of that yogurt?
THE WITNESS: Sure. It's L-i-b-e-r-t-e.

BY MR. VETNE:

Q. So coming from your plant, directed up to Quebec, the Federal classified price would apply to that?
A. Yes. It is pooled.
Q. Okay. And milk prices are much higher in Canada. Is the extra revenue premiums available in Canada also pooled?
A. Again, that volume of product that's shipped to Liberte is part of our reports to the Federal Order 1. So anything that we obtain from that is part of the pool.
Q. If there are premiums, does that accrue
to St. Albans or does it go to DFA?

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

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

A. Yes.

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

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

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

A. No, that's not correct.

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

A. No, that is not correct.
MR. VETNE: Okay. That's all the additional questions I have.

JUDGE CLIFTON: Thank you, Mr. Vetne.

Any other cross-examination before I ask if USDA has questions?

There is none? Mr. Tosi.

MR. TOSI: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. TOSI:

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

A. Good morning.

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

A. No.

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

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

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

A. We would be opposed to the proposal
because of the impact that that would have, potentially, to our members.

Q. What impact would that have on your members?

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

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

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

Q. But what you just said there, what you're saying, if -- I think I understand you correctly, and please correct me if I'm wrong. I think what you're saying is that there are other producers who would be more advantageously located to, for example, a
distributing plant versus a plant like -- such as yours?

A. That is correct.

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

A. That is correct.

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

THE WITNESS: Thank you.

JUDGE CLIFTON: Is there any other cross-examination?

There is none. Any redirect?

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

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

There is none. Exhibit 27 is admitted.

Thank you, Mr. Beshore. Mr. English.

MR. ENGLISH: Charles English. Before we take up the next witness, your Honor, Mr. Lee has arrived, and I have his testimony now. I have held onto a number of copies for your Honor, for the court reporter and for the government. I have passed out to those most
obvious to me as interested persons, to make
sure that they got them as counsel
representatives, and I still have 14 or 15 I'm
putting in the back of the room right now.

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

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

JUDGE CLIFTON: Mr. Tosi.

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

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

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

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

JUDGE CLIFTON: All right.

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

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

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

JUDGE CLIFTON: All right. Let's go back on record. We're back on record at 9:58, and we have seated in the witness box three people, and
they will testify as a panel. I ask that --
we're going to go off record for just a moment
while they practice getting close to the
microphone. We'll go off record.

(Off the record.)

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

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

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

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

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

(The witnesses were sworn.)

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

JUDGE CLIFTON: Each of the three has
been sworn. Mr. Beshore?
MR. BESHORE: Yes. Thank you, your Honor. There are -- the statements of Ms. Damm, Mr. Newell and Mr. Traweek have been made available to all persons here in the back of the room since the beginning of the session this morning.

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

DIRECT EXAMINATION

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

My son and I milk a small herd of registered Holsteins on our 560-acre family farm. There has been milk shipped from this farm every day since 1928 when my grandfather started milking cows. I have been doing the majority of the milking since 1970. I am a member of the Dairy Farmers of America Incorporated, Mideast Area Council Board of
Directors. I also serve on the Kentucky Dairy Development Council and am a past director of the Kentucky Holstein Cattle Club.

I have provided leadership to young people with 4-H and FFA dairy projects. There was, at last count, 105 dairy farms in my district. Many of them are small, similar to mine, with the cows being milked and cared for by their owners and very little hired labor.

Nearly 100 percent of the milk produced in my district is processed at the Kroger bottling plant in Winchester, Kentucky.

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

DFA is a cooperative owned by approximately 18,000 members who operate farms in 48 states. DFA members are supportive of Federal Orders which we feel benefit all dairy farmers. Many of my fellow dairymen are very concerned about issues that affect milk prices, including the issues under discussion here.
My knowledge of the Federal milk marketing regulations is somewhat limited, but I have reviewed the proposals in this hearing and feel I have a working knowledge of the issue under discussion. As a member of the Mideast Area Council Board of Directors, I am familiar with the marketing conditions in the area where my farm is located. The issues in this hearing have also been discussed in DFA publications to the general membership, and I have had discussions on this topic with my neighboring dairy farmers.

I understand that producer-handlers are not a part of the Federal Order pool. I realize that most producer-handler milk volume is Class I milk, which returns the highest price. So when the returns from that volume of milk are not part of the Federal Order pool, the resulting blend price is lower for all pooled farmers. Federal Order prices significantly guide the actual pay prices received by all dairy farmers in my area. The prices my neighbor and I receive for milk will be lower when producer-handler Class I sales are excluded from the pool.
I physically reside in Federal Order 33, and the milk from my area is marketed in both Order 33 and Order 5. According to the data presented here today, there's only one producer-handler currently in operation in Order 33 and two in Order 5. There are 16 exempt plants in Order 33 and two in Order 5, one of which is North Carolina State University.

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

The dairy farm business is going through one of the most difficult times in my existence as a dairy farmer, and the most difficult in the existence of my son as a dairyman. Last month, the mailbox milk price on my farm was $9.20 per hundredweight, one of the lowest it has ever
been. And based on industry forecasts, it may be just as low for the next two or three months, if not longer.

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

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

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

It is not the function of the Order
system to guarantee our existence, but we should be able to request that Order provisions which are causing or have the potential to cause marketing problems for a majority of dairy farmers be reviewed and modified if needed.

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

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

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

MR. BESHORE: Before we proceed with Ms. Damm's statement, I neglected to request that the statements be marked for identification with exhibit numbers.
JUDGE CLIFTON: Mr. Newell's will be Exhibit 28.

MR. BESHORE: Thank you, your Honor.

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

(Exhibits 28 - 30 were marked for identification.)

MR. BESHORE: Thank you, your Honor.

Now, Ms. Damm, you may proceed.

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

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

On an average day, you will find the two
of us not only milking our cows, but we tend to the daily chores and accordingly make all the decisions, large and small, relating to the farm. We are the labor pool on our farm.

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

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

Our family is involved in the dairy industry off of our farm. We participate in the
DFA Young Cooperator program and are active promoters of the dairy industry locally through activities sponsored by the Columbia County Dairy Promotion Committee. We view these types of efforts as both promoting the industry and our products to local consumers.

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

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

These proposals have been reviewed by the
corporate board of directors -- the corporate board of DFA and the Central Area Council Board of Directors who oversee the marketing activities in the area where my farm is located. This issue has also been discussed in DFA member publications with the general membership, and I had discussion on this topic with my neighboring dairy farmers.

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

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

As I mentioned earlier, near my farm there is a dairy that has been permitted for
8,000 cows. If that farm had an average production of 19,546 pounds, which is the 2008 average for Wisconsin, and chose to be a producer-handler, it could account for just over 3 percent of an average month's Order 30 Class I pounds.

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

It is my belief that without a functioning Order system, smaller producers like my neighbors and I may find it more difficult to access the market. And if processing plants were closed due to changes in the competitive marketplace due to producer-handler competition, processors to which to sell my milk may become fewer and their locations farther away, costing more to haul milk to market. Many of the
producers in my area would be in a similar situation, and thus negatively affected.

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

I appreciate the hard work it must take to be a producer-handler. It's difficult enough to just be a dairy farmer. One of the points about our proposal that I feel is fair is that we still allow a small producer to test the waters of being a processor without very much potential damage to the competitive marketplace. There are several small plants in my state.
Allowing an existing producer-handler to retain their status up to the 3 million-pound limit or an exempt plant to operate up to a limit of 450,000 pounds provides for this, but if the business gets to a certain size, it seems very reasonable that they be treated like other processors in the market.

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

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

I am a third generation dairy farmer with my brother Ricky. My father, James Traweek, began milking cows in our dairy in 1964 with hopes and plans that his sons would continue this proud tradition. It is with optimistic hope that my son or my brother's sons will choose to carry forth the family name in the dairy business.
We currently milk 750 Holstein cows and farm 950 acres in Erath County. I am a member of the Dairy Farmers of America, Inc., Southwest Area Council Board of Directors. I also serve on the Dairymax Board of Directors, as well as the Texas Agriculture Cooperative Council. To serve my local community, I also serve on the Erath County Farm Bureau Board, as well as the Tri-County Agriculture Association. Erath County is the number one county in Texas for milk production, with the majority of the milk being produced there being used to serve fluid markets in the Austin, Dallas and Fort Worth area.

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

DFA is a cooperative owned by approximately 18,000 members who operate farms in 48 states, including Texas where I live. DFA members are supportive of Federal Orders and feel that farmers would be in a more difficult
economic position if they were weakened or eliminated.

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

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

I understand that a producer-handler does not pool the revenues from the sale of his milk with the Federal Order. I understand that most producer-handler milk volume is Class I milk, the highest price class. When the returns from that volume of milk are not a part of the Federal Order pool, the resulting blend price
will be lower. Dairy farmers pay prices in my area that are determined by the Federal Order. To the extent that the monies from the highest valued sales of milk are not included in the Federal Order pool, the prices my neighbors and I receive for milk will be lower.

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

In our council, the issue of regulating producer-handlers has already had a price impact. A large producer-handler operating in El Paso, Texas, has caused our fluid milk customers to press our cooperative for raw milk price decreases. Our customers tell us that in order to remain competitive, they must lower
their prices to meet the competition from this producer-handler.

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

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

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

If the USDA cannot modify the Federal Order system to address the producer-handlers in
our market, the possibility looms that the producers who participate in the Federal Order system could have to abandon the system in order to survive.

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

MR. BESHORE: Thank you.

JUDGE CLIFTON: Mr. Beshore.

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

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

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

MR. BESHORE: Per cow per year?
MS. DAMM: Per cow per year.

MR. BESHORE: Very good. Thank you.

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

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

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

MR. TRAWEEK: That is correct.

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

MR. TRAWEEK: Yes. I believe --

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

MR. RICCIARDI: I will give you a reason, Judge. What I would like is that he lay the foundation for the ability to give such a computation. We have no idea, even given that
statement, how in the world he would know, one, whether it has an effect; and, two, what the effect would be. And to that extent, then we need to find out if he can actually give such an opinion.

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

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

MR. TRAWEEK: That is correct.

MR. BESHORE: Okay. And is that council
involved in administering and directing the financial affairs of DFA in your area?

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

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

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

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

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

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

MR. TRAWEEK: That is a fact, yes.

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

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

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

MR. TRAWEEK: That is correct.

MR. BESHORE: Okay. Can you tell us, just on a per hundredweight basis within DFA and the agency, about what the impact has been?
MR. TRAWEEK: That impact to our mailbox price has been about 20 cents per hundredweight decrease in our agency in our area.

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

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

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

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

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

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

MR. TRAWEEK: Yes. Those through the agency, yes.
JUDGE CLIFTON: But there could also be other over-order premiums not reflected in the mailbox price for some?

MR. TRAWEEK: For some, yes.

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

Mr. Carroll, thank you.

CROSS-EXAMINATION

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

I only have a few short questions. I take it, from what you said, since you would agree with Proposal 26, that's the $3 million proposal, that you have no problem with that figure at any rate, the $3 million figure, that would you accept that as a -- for a
producer-handler exemption? Is that so?

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

MR. CARROLL: Sure.

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

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

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

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

MR. TRAWEEK: Yes, I agree.

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

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

MR. CARROLL: Now, do you also support
the right of a farmer to become a
producer-handler even if he had never been one
before? Any of you have any problem with that?

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

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

    MR. TRAWECK: I have no opposition to
producers becoming producer-handlers with the --
in the size that is stated in these proposals.
Once producer-handlers reach a certain size,
they do become disruptive and can take
advantages of economics due to scale. So, you
know, the smaller sizes, I believe, which are
geread toward family operations, which is what
my father intended when we started, and what
I've heard in testimony, I agree and support those.

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

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

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

MR. CARROLL: Sure.

MR. NEWELL: In my specific area we
currently do not have any problem with producer-handlers.

MR. CARROLL: Thank you, sir.

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

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

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

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

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

CROSS-EXAMINATION

MR. VETNE: My name is John Vetne. I'm an attorney from Raymond, New Hampshire. I represent two producer-handlers from the Pacific Northwest and one in New Mexico.
Let me start with Cindy Damm. In response to the last question to you, or maybe the previous one, you said you don't have a problem with the entry of smaller producer-handlers. By your use of the term "smaller producer-handlers," did you intend to mean producer-handlers of 3 million pounds or less, or less than 3 million pounds?

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

MR. VETNE: Not quite.

MS. DAMM: Okay. Go again.

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

MS. DAMM: Of an exempt plan, correct.

MR. VETNE: So my question related more to the category of producer-handlers. Did you intend, when you said "smaller
producer-handlers," to mean producer-handlers of
less than 3 million pounds?

    MS. DAMM: That would be correct.

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

    MS. DAMM: Correct.

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

    MS. DAMM: Correct.

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

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

    MR. VETNE: Which wasn't quite my
question, so let me try to be a little bit clearer.

    MS. DAMM: Okay.

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

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

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

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

    MR. VETNE: Okay. The what-if scenario that you painted, what if it's a large producer-handler and it causes a pool distributing plant to close, that scenario would
not affect transportation costs or the
availability of a market for those producers
whose milk is regularly delivered to a
manufacturing plant, a cheese plant, for
example?

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

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

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

    MS. DAMM: I'm going to say that it's
going to affect -- how do I start this off? If
a large producer-handler comes into the market
and competes with where my milk is currently
going, my milk, through my cooperative, is
redirected. Depending on the availability of
milk in my area from my own cooperative, or
farmers' milk who are members of other
cooperatives, that supply needs to be rerouted
to other processors or manufacturers.
That said, there is potential that my cost of hauling my milk is going to change. My milk can travel farther in order to go to a manufacturer or processor due to that larger producer-handler taking my current, I'm going to call it space, for lack of a better word off the top of my head. Does that answer your question?

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

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

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

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

MR. VETNE: In southern Wisconsin, there
are a number of fluid milk processing plants, and the northern tier of Illinois, that are close to you?

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

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

MR. TRAWEEK: Take your time.

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

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

MR. VETNE: Okay. Your testimony on the bottom of page 3, "This problem began in El Paso and has expanded to the rest of the New Mexico market, and now has become a concern in certain Texas markets." The rest of the New Mexico market, El Paso is not in New Mexico?
MR. TRAWEEK: It's in -- yes. It's in the west Texas market, that's correct.

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

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

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

MR. TRAWEEK: That's correct.

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

    MR. TRAWEEK: To my knowledge, no.

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

    MR. TRAWEEK: Not to my knowledge.

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

    MR. TRAWEEK: That is correct.

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

    MR. TRAWEEK: Yes, sir.

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

    MR. TRAWEEK: I would like to correct that. We started talking about this issue back in 2008 with our plants that we were supplying our milk to. And there was concern that they would be at an economic disadvantage with the
milk that was being produced at the producer-handler plant because, in their words, of their ability to produce their milk and distribute their milk cheaper than what they could distribute their milk at. So they were asking for concessions to be competitive with the producer-handler.

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

MR. TRAWEEK: There was discussions in late 2008.

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

MR. TRAWEEK: Correct.

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

MR. TRAWEEK: Other than this?

MR. VETNE: Other than this.
MR. TRAWEEK: No, not --

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

MR. TRAWEEK: Could you repeat that question?

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

MR. TRAWEEK: No increase, no.

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

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

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

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

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

MR. TRAWEEK: That's right.

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

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

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

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

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

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

MR. VETNE: And a question for all of
you. At the beginning, I asked Cindy Damm an
entry question for smaller producer-handlers.
Correct me if I'm wrong, Cindy, but if there was
no concern about smaller producer-handlers and
smaller producer-handlers existing, or entry, or
those under 3 million pounds, would that
correctly state the position of each of you with
Kentucky and Texas?

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

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

JUDGE CLIFTON: I really don't think I
like that coaching of the witnesses. I think an
issue here is the grandfathering-in that's
involved with the proposals they support, and I
think Mr. Vetne's question legitimately addresses, and what if they are small but are not grandfathered in. And I think it's a legitimate area of inquiry.

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

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

And I think Cindy Damm answered that question. And if you misunderstood my question, please come back and tell me so. But for each of you, do you see a problem with respect to entry of producer-handlers and continuation of producer-handlers that are 3 million pounds or
less? Let's start with Cindy Damm to see if you have any different answer than you gave before.
Do you?

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

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

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

MR. VETNE: Please.

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

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

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

MR. VETNE: Okay.

MS. DAMM: -- as stated.

MR. VETNE: Okay. Which is fair. Does that mean that you do not now express an opinion
as to whether for other purposes
producer-handlers up to 3 million pounds or less
are disruptive or should not be able to enter
the market?

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

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

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

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

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

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

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

MR. VETNE: Okay.

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

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

MS. DAMM: I do not have a belief today.
I support those three proposals as they're stated.

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

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

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

MR. VETNE: I understand your support of Proposals 1, 2 and 26. I also heard your response to questions by Mr. Ricciardi, that producer-handlers do not currently disrupt your market, although there are two or three in the two markets to which you deliver, and that exempt plants don't currently disrupt your market, they do not participate in the pool. My
question again is, at what level do you have a belief, if you have a belief, that producer-handlers are disruptive to your market?

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

MR. VETNE: I understand --

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

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

MR. NEWELL: Say that again.

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

MR. NEWELL: Yes, sir.

MR. VETNE: And that concern is for larger producer-handlers, correct, in the future?
MR. NEWELL: Since I currently don't have any in my immediate area, I suppose that any level of producer-handler who enters my marketing area could potentially be disruptive.

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

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

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

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

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

MR. TRAWEEK: I understand your question.

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

MR. TRAWEEK: That is correct.

MR. VETNE: Not supersized.

MR. TRAWEEK: Right. Well, in our situation, in our area, we're seeing that producer-handlers that are extremely large because of the size of dairies that are in west Texas, New Mexico and central Texas, the possibility of large producer-handlers have and
will continue to create disruptions.

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

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

MR. TRAWEEK: Producer-handlers?

MR. VETNE: No, no. Dairy farmers.

MR. TRAWEEK: Dairy farmers?

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

MR. TRAWEEK: That is correct.

MR. VETNE: Thank you.

JUDGE CLIFTON: Thank you, Mr. Vetne.

Who would next like to cross-examine the panel?
Mr. Miltney. I might have confused the court reporter there. I meant Miltner, not Miltney.

CROSS-EXAMINATION

MR. MILTNER: Thank you, your Honor.

JUDGE CLIFTON: Thank you, Mr. Miltner.

MR. MILTNER: Good morning.

MS. DAMM: Good morning.

MR. NEWELL: Good morning.

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

MR. NEWELL: Yes, sir.

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

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

JUDGE CLIFTON: Thank you. That's better.

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

MR. NEWELL: Not yet.
MR. MILTNER: Okay. Well stated. When you were growing up, were there more dairy farms in your part of Kentucky than there are now?

MR. NEWELL: Yes, sir.

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

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

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

MR. NEWELL: Yes, sir.

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

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

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

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

MR. MILTNER: That's not quite
microscopic, but it's small. The other 20 farms
in your area, how many cows do they have now?

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

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

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

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

MR. NEWELL: The herd size?

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

MR. NEWELL: That's correct.

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

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

        MR. MILTNER: Every farmer has to make a 
decision what they need to do to support their 
family and their farm, is that right?
        MR. NEWELL: That would be correct.
        MR. MILTNER: Now, you have a 560-acre 
farm, and with 20 cows, I would imagine you do 
more than just milk cows on your farm?
        JUDGE CLIFTON: It's 30, isn't it?
        MR. NEWELL: Please note --
        MR. MILTNER: I'm sorry. Did I misstate?
        30 cows?
        MR. NEWELL: 30, yeah. I'm in 
northeastern Kentucky. I don't know how 
familiar you are with the terrain there. Of 
that 560 acres, many of them are rather hilly
and covered with woods, and they're not hardly what would be considered prime farmland.

MR. MILTNER: Okay.

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

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

MR. NEWELL: No. We have other enterprises.

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

MR. NEWELL: That's correct.

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

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

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

MS. DAMM: I love Wisconsin.

MR. MILTNER: You've been operating your farm for a few years, but you certainly have background in the dairy industry in the state, is that right?
MS. DAMM: I'm going to answer that two part. I'm going to give you my husband's background on the farm, and then I will give you mine.

MR. MILTNER: Okay.

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

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

Matt attended UW, the University of Wisconsin farm and industry short course and
then returned to the farm to work, to work at the dairy. In 2003, he and I made the decision that he wanted to stay in, and I would support him. And we essentially started over. We rented a neighbor's barn, made the decision to build a new facility that we moved into in 2005. That's Matt's background, so that makes him a fourth-generation dairy farmer growing up on that farm with that herd.

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

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

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

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

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

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

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

    MS. DAMM: Yes, that's correct.

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

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

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

    MS. DAMM: Just clarifying.

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

MS. DAMM: Correct.

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

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

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

MS. DAMM: No.

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

MS. DAMM: Correct. There's numerous farms over 1,000 cows within, I'll just say 30, miles of me. There are some very large ones up toward the Green Bay area. There's one towards Sun Prairie that has 2,500 cows, so --
MR. MILTNER: Were you here for all of yesterday's testimony?

MS. DAMM: Yes, I was.

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

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

MR. MILTNER: Yes.

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

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

MS. DAMM: January of 2005.

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

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

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

MS. DAMM: Oh, yes, absolutely.
MR. MILTNER: Does the Federal Order blend price come even close to covering your out-of-pocket costs, your cost of production?

MS. DAMM: Currently, no.

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

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

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

MS. DAMM: Well over 90. Yes, I could see almost 100 percent, absolutely.
MR. MILTNER: Thank you. Mr. -- and I'm going to butcher your name. Mr. Traweek?

MR. TRAWEEK: That's close.

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

MR. TRAWEEK: Mr. Traweek.

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

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

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

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

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

MR. TRAWEEK: I believe our situation in central Texas is a little more extreme due to the fact that we rely on quite a bit of homegrown feed, as they do, but we were in
the -- well, we just now seem to be coming out of a long drought. We did not put up much feed. Last year -- and most dairies, 50 to 60 percent of your income goes directly back to feed costs. And due to the lack of rain, the drought that we encountered last year, there's a lot of dairies that are in dire straits at this time. For the last three-and-a-half, about the last four months, our dairy has been in a negative cash flow, extreme negative cash flow.

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

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

MR. MILTNER: Very stressful?

MR. TRAWEEK: Very bad.

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

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

MR. MILTNER: Yes.

MR. TRAWEEK: I have no role in the
Southwest Agency.

MR. MILTNER: Okay. So you get information about the agency's activities through your involvement with DFA?

MR. TRAWEEK: That is correct.

MR. MILTNER: Okay.

MR. TRAWEEK: I'm director of DFA Southwest Council.

MR. MILTNER: The 20-cent impact to you from the El Paso plant, you had said, in your direct examination with Mr. Beshore, that part of that was a result of the blend price change and part of it was as a result of loss of premiums, and then you said it was all blend price. And I want to make sure the record is clear. That 20 cents, what's your understanding of how much of that is a change in the blend price and how much of that is a change in the premiums?

MR. TRAWEEK: To my understanding, when we lost the premiums in that area, that affected our blend price. And with the loss of premiums blended through all the milk through the agency, it equated to 20 cents per hundredweight in my milk check.
MR. MILTNER: Okay. So that's the agency's super blend? That's not the Federal Order blend you're talking about, you're talking about the co-ops that are in the Southeast -- or Southwest Agency pooling all their returns and reblanding them among all the member cooperatives, right?

MR. TRAWEEK: I believe that's correct.

MR. MILTNER: Do you have any -- and they didn't -- you don't have information about how much of that 20 cents is from premiums or Federal Order minimum prices, you just have the total figure?

MR. TRAWEEK: That is correct. I just have the total figure.

MR. MILTNER: Do you discuss in your council meetings independent producers at all and the effect of independent producers on marketings in the area?

MR. TRAWEEK: Yes, we do.

MR. MILTNER: Are you familiar with the Hilmar Cheese Plant that was recently opened in Texas?

MR. TRAWEEK: Yes, I am.

MR. MILTNER: Who supplies, if you know,
the milk to that plant?

MR. TRAWEEK: Hilmar producers.

MR. MILTNER: Those are independent producers?

MR. TRAWEEK: That is correct.

MR. MILTNER: Those aren't DFA members, Select, Zia, Lonestar?

MR. TRAWEEK: That is correct.

JUDGE CLIFTON: I hate to interrupt, but Zia Lonestar is spelled how?

MR. MILTNER: I'm sorry. Zia is one cooperative, Z-i-a. Lonestar is another cooperative, L-o-n-e-s-t-a-r.

JUDGE CLIFTON: Thank you.

MR. MILTNER: And Zia and Lonestar and Select Milk Producers and DFA are members of the Greater Southwest Agency, right?

MR. TRAWEEK: As well as just Jersey producers, I believe.

THE COURT REPORTER: I'm sorry. As well as?

MR. TRAWEEK: Just Jersey producers, j-u-s-t, J-e-r-s-e-y, producers.

MR. MILTNER: And so most of those independent producers that supply Hilmar were
former members of a Greater Southwest Agency cooperative, right?

MR. TRAWECK: Most of -- most of those producers that have joined Hilmar Cheese are producers that have moved into west Texas and New Mexico out of California. They were producers in California that moved into the area. A majority of that milk is new production.

MR. MILTNER: And before Hilmar Cheese opened their plant, was there a significant amount of independent producer milk in your area?

MR. TRAWECK: Before they joined our -- before Hilmar, independent milk?

MR. MILTNER: Yes.

MR. TRAWECK: I'm not aware of any independent milk before Hilmar Cheese built their plant.

MR. MILTNER: All or virtually all of the farms in the area were members of cooperatives that were members of the GSA, right?

MR. TRAWECK: That is right.

JUDGE CLIFTON: Mr. Traweek, so that I get it right, how is Hilmar? Is it one word?
MR. TRAWEEK: Yes, ma'am. H-i-l-m-a-r.

JUDGE CLIFTON: Thank you.

MR. MILTNER: Do you discuss at your council meetings the activities of any other independent producers?

MR. TRAWEEK: Other than Hilmar?

MR. MILTNER: Yes.

MR. TRAWEEK: The only discussion we've had as far as any other producers, because of all the producers that are in the agency, would be just -- well, it would be coming into the El Paso area previous.

MR. MILTNER: You did not have any discussions about any farmers or individual farms agreeing to independent supply contracts with fluid bottling plants in Texas in the past six to nine months?

MR. TRAWEEK: The only thing that I can guess that you're referring to is there was a producer who broke ranks from the co-op to move and supply two loads of milk to Dean Foods. Dean Foods went outside the cooperatives to try to secure independent milk, and there was a producer who broke ranks.

MR. MILTNER: In the past, that Dean
Foods plant was supplied by cooperatives in the GSA?

MR. TRAWEEK: That is correct. I believe, from what I -- my understanding, the DFA had a 100 percent supply agreement with Dean Foods.

MR. MILTNER: And what happened with this producer?

MR. TRAWEEK: He resigned his membership from DFA and started shipping directly to Dean Foods.

MR. MILTNER: That's not the El Paso plant, right?

MR. TRAWEEK: That is correct.

MR. MILTNER: Did you guys have any discussion about what that did to your premiums in the Order?

MR. TRAWEEK: That has also caused extreme disruptive problems in the Order.

MR. MILTNER: Extremely disruptive to your premiums, wasn't it?

MR. TRAWEEK: I believe it has. Yes, it has.

MR. MILTNER: I don't have anything further.
JUDGE CLIFTON: Thank you, Mr. Miltner.

Other cross-examination of the panel?

Mr. Ricciardi. You want to yield to

Mr. Brosch? We haven't heard from him much, and

then I'll call on you.

MR. BROSCH: I'll yield to Mr. Ricciardi.

JUDGE CLIFTON: You see, you both want to

get the benefit of the other's

cross-examination. All right, Mr. Ricciardi.

CROSS-EXAMINATION

MR. RICCIARDI: Thank you, your Honor.

Al Ricciardi on behalf of AIDA. Mr. Newell, a

question for you initially. I have read all

three of the statements marked for

identification, 28, 29 and 30, and there is some

similarity among them. Did you get any

assistance in the preparation of your statement

from anyone?

MR. NEWELL: I wrote my statement. I had

it reviewed by members of the staff. We -- but

as far as the statement there, it's mine.

MR. RICCIARDI: You had someone from DFA

review it?

MR. NEWELL: Yes.

MR. RICCIARDI: That being --
MR. NEWELL: Mr. Beshore.

MR. RICCIARDI: Mr. Beshore did, and provided some revisions?

MR. NEWELL: Actually, we -- I changed some statements around two or three times. I think that I did about all of the revision of the form, the best I remember.

MR. RICCIARDI: Okay. With regard to your time here, I know that you've been here since the beginning. Do you intend to stay throughout the course of these proceedings?

MR. NEWELL: I can stay here through tomorrow. After that I'm going home --

MR. RICCIARDI: Okay. With --

MR. NEWELL: -- and tend the farm.

MR. RICCIARDI: I apologize. Sorry. I understand. Did you have any assistance from DFA with regard to your travel costs or hotel costs or anything like that?

MR. NEWELL: Yes.

MR. RICCIARDI: Are they paying for that for you?

MR. NEWELL: Yes.

MR. RICCIARDI: And with that, let me switch over here, please, and pass the
microphone so I can do this this way. Ms. Damm, is that true for you, also?

MS. DAMM: That is correct.

MR. RICCIARDI: And could you pass the microphone over to Mr. Traweek? Would that also be true for you, sir?

MR. TRAWEEK: That is correct.

MR. RICCIARDI: Okay. Thanks. Shoot this back to Mr. Newell. Hopefully, I'll be able to stop the microphone passing.

Mr. Newell, you were a dairy farmer in Federal Order 5 in 2004?

MR. NEWELL: My milk was pooled in Federal Order 5. My farm is physically located in Federal Order 33.

MR. RICCIARDI: And you're correct, and thank you for that correction. Your milk was pooled in Federal Order 5 in 2004?

MR. NEWELL: That's correct.

MR. RICCIARDI: And it has been pooled in Federal Order 5 from 2004 until now?

MR. NEWELL: That's correct.

MR. RICCIARDI: Were you aware that there was a hearing in Federal Orders 5 and 7 in 2004 with regard to a proposal to limit
producer-handlers to 3 million pounds of Route 1 disposition?

MR. NEWELL: I was not.

MR. RICCIARDI: You were not aware, then, that one of the arguments raised at that point was that while no disruption existed, the potential for disruption in those orders existed?

MR. BESHORE: I object to the question.

JUDGE CLIFTON: Do not answer. Just a moment. Mr. Beshore, come to the microphone, please.

MR. BESHORE: My objection is Mr. Newell said he wasn't aware of the hearing. Now he's being asked whether he is aware of the contents of the proceeding, and I think it's not a good question. Frankly, it's a waste of time.

JUDGE CLIFTON: I'm not sure. You know, I think we learn a lot of things after a hearing takes place, even if we weren't there. So I understand your objection, and I'll listen carefully to what the witness bases his answer on as he explains it, but he may answer it. And, Mr. Ricciardi, would you repeat your question?
MR. RICCIARDI: Can you read it back for me, please?

(The record was read.)

JUDGE CLIFTON: All right.

MR. NEWELL: This question is, I was not aware?

MR. RICCIARDI: Yeah. And that's a bad question. I'm glad he read it back. Let me see if I can do it better.

Were you aware, sir, that one of the arguments raised in support of that proposal at that particular Federal Order hearing was essentially identical to some of the arguments raised here, that the potential exists for disruption?

MR. NEWELL: No, I was not.

MR. RICCIARDI: Would you agree with me that, as you testified before, I believe, that there is no current disruption that you are aware of from any producer-handler in Order 5?

MR. NEWELL: Not that I'm aware of, no, sir.

MR. RICCIARDI: I understand. And that's the best that you can do. If you don't know about it, then you can't tell us about it.
Can you tell me -- you answered in response to a question from Mr. Miltner, that in addition to your dairy farming, that you have some other business. Can you tell me what that is?

MR. NEWELL: We produce burley tobacco on the farm.

MR. RICCIARDI: And like with your dairy farm, you make certain investments in that business?

MR. NEWELL: That's correct.

MR. RICCIARDI: Do you market your own tobacco?

MR. NEWELL: No. The tobacco is raised -- in Kentucky, we have a landlord/tenant system that goes way back in history, and I have a gentleman who produces tobacco on my farm. At one time it was sold at auction with a Federal program. That program has been done away with. It is now raised under contract to the tobacco companies. The gentleman who raises the tobacco on my farm for me does so under contract to Philip Morris.

MR. RICCIARDI: Do you have any other businesses that you operate, other than the
dairy farm and the tobacco farm?

MR. NEWELL: No, sir. We produce hay and corn on the farm, but those are utilized as feed for the cows. And the Indian comb is the milk that results from the use of the hay and the corn.

MR. RICCIARDI: Okay. Thanks. Could you pass the microphone to your right, please, to Ms. Damm?

Your statement indicates, and I think in questions from some other counsel, you stated that essentially your farm, current dairy farm, was a start-up in 2003, where you actually built a new facility in 2005. Is that right?

MS. DAMM: That is correct. We consider it a start-up, because we had no existing -- we were not going in -- other than the cows, we were not going in and buying an existing property or renting a property from his family. So we consider ourselves a start-up again in '03, even though there was some carryover.

MR. RICCIARDI: There's been some arguments raised by both national Milk and the IDFA in their proposals that there is some perceived benefit to producer-handlers for the
raw milk cost. And then my question is:

Assuming that for a moment, why then in 2003 or
2005, when you were starting up, did you not
become a producer-handler?

MS. DAMM: Why did we not become a
producer-handler in 2003?

MR. RICCIARDI: Yes, ma'am.

MS. DAMM: That is not my husband's
interest. My husband's interest is to run his
dairy farm. It is not to be either a processor
or a manufacturer. He knows his cows, and
that's where his love is. And that's the role
that we have chosen to take in the Wisconsin
dairy industry.

MR. RICCIARDI: I understand. And if you
flip to page 5, you anticipated where I was
headed. You state in the second paragraph that
you "appreciate the hard work it must take to be
a producer-handler. It is difficult enough just
being a dairy farmer"?

MS. DAMM: That's correct.

MR. RICCIARDI: Okay. And your husband,
obviously, from your last response, feels the
same way, right?

MS. DAMM: That's correct.
MR. RICCIARDI: You rely upon DFA to market your milk, right?

MS. DAMM: Yes. That's correct.

MR. RICCIARDI: When you were deciding to start the business, the start-up, you didn't have to pay the investment costs to build a processing plant by simply becoming a dairy farmer and relying upon DFA to market your milk, right?

MS. DAMM: That's correct. We did not have the investment of a processing facility. That's correct.

MR. RICCIARDI: And on a monthly basis, you don't have to balance your milk if you're short or have too much, because DFA takes whatever milk you have, right?

MS. DAMM: That's correct.

MR. RICCIARDI: So if you're short and you have a customer, you don't have to worry about whether or not you are going to be able to purchase the amount of milk you need in order to stay within the 150,000 pounds, which is the allowance for producer-handler, I believe, in your Order? You don't have to worry about that?

MS. DAMM: Correct, because I am not
managing a producer-handler business.

MR. RICCIARDI: And you don't need to worry about transportation costs or shipment costs?

MS. DAMM: I do have to worry about transportation costs.

MR. RICCIARDI: Transportation costs are built into the price that you receive ultimately -- or deducted from? Excuse me.

MS. DAMM: I would agree more with "deducted from."

MR. RICCIARDI: I understand that part. Yes. And you're correct.

MS. DAMM: But, yes. Hauling is a cost that is incurred by dairy farmers and dairy plants and is thus affecting our compensation. It is a cost of business.

MR. RICCIARDI: Okay. And you also do not have to worry about finding customers, because the DFA truck comes and picks up your milk and it goes where it goes?

MS. DAMM: Correct. That's why we're a member of the cooperative.

MR. RICCIARDI: And you made that choice to do that and to not make the additional
monetary investment to build a processing plant
and do all the things that I just described that
you don't have to do on a monthly basis, right?

MS. DAMM: That is correct.

MR. RICCIARDI: I appreciate that. Will
you pass the microphone over?

You've been asked a lot of questions,
Mr. Traweek. I'm going to try my best to get
through mine quickly.

MR. TRAWEEK: Thank you.

MR. RICCIARDI: Not a problem. Let me
make sure I know who you are and who you are
not. You're a dairy farmer, first and foremost?

MR. TRAWEEK: That is correct.

MR. RICCIARDI: Now, you are not an
expert in marketing of milk, correct?

MR. TRAWEEK: That is correct.

MR. RICCIARDI: You're not an accountant?

MR. TRAWEEK: By any means, no.

MR. RICCIARDI: You join me with that.

All right. And you have no role in GSA, which
is the marketing arm of DFA, in the area that
you reside, correct?

MR. TRAWEEK: That is correct. I have no
role in GSA.
MR. RICCIARDI: All right. Do you know, then, what percentage of milk pooled on Order 126 comes from GSA?

MR. TRAWEEK: I would have to have those notes in front of me. We review the notes from GSA on a monthly basis through the Southwest Agency, but I do not have those numbers in front of me.

MR. RICCIARDI: Do you have a general approximation? Is it 60 percent? 80 percent? How much?

MR. TRAWEEK: How much milk is pooled?

MR. RICCIARDI: What percentage of the milk that is in Order 126 is pooled from members of GSA?

MR. TRAWEEK: What percentage of milk is pooled from GSA?

MR. RICCIARDI: Of the total amount. If I'm unclear, I'll see if I can be clearer.

MR. TRAWEEK: Right.

MR. RICCIARDI: Of the 100 percent that's pooled in a particular month in Order 126, what percentage of it comes from the GSA members?

MR. TRAWEEK: I would have to say of all the fluid milk that's pooled in the GSA, it
would have to be nearly all the milk, if I'm correct, because it's all pooled together in the Federal Order 126.

MR. RICCIARDI: Okay. So now -- and I don't mean to mix up the pools, so help me. I'll try to see if I can help you out here.
What I'm talking about is the Federal Order pool, which is Federal Order, in your area, 126?

MR. TRAWEEK: 126.

MR. RICCIARDI: How much of that milk -- and we'll talk about Class I for a moment, because I think that's what you mentioned.

MR. TRAWEEK: Right.

MR. RICCIARDI: -- comes from GSA members?

MR. TRAWEEK: I would have to say 90-plus percent of it has to be.

MR. RICCIARDI: Because in that area in Texas, in particular, essentially GSA and its members have the lion's share of all that milk, right?

MR. TRAWEEK: That is correct. That is why GSA was formed.

MR. RICCIARDI: Okay. Next, you got -- and by "you" in that question, I'm sorry, I
mean -- I guess you're talking on behalf of GSA or DFA. I wasn't sure about your answer, you'll explain it if I misstate it. You were getting requests for concessions on your over-order premiums as early as 2008, correct?

MR. TRAWEEK: Late, late 2008, there was discussions.

MR. RICCIARDI: And you're aware, by the way, that the plant that you're talking about, which is GH Dairy in El Paso, actually started in 2008, and it wasn't a producer-handler at that point, correct?

MR. TRAWEEK: Correct. The talk of this facility being purchased is when we first started talking about it, whenever the old Levi factory, I believe, was purchased, and discussion was made that it would be turned into a processing plant, because at that time he was trying to secure contracts in that area.

MR. RICCIARDI: And the fact is, what happens always is, if a new processing plant goes in, it's new competition and your customers are going to try to negotiate the best price that they can, right?

MR. TRAWEEK: I believe so, yes.
MR. RICCIARDI: Whether it's a producer-handler operation or not, correct?

MR. TRAWEEN: That's correct.

MR. RICCIARDI: Which is what happened here, even though it wasn't a producer-handler operation, when you first started getting these requests for concessions, correct?

MR. TRAWEEN: I'm not aware of when he was a producer -- when he began as a producer-handler.

MR. RICCIARDI: Well, Exhibit 13 at least -- have you got that one, Judge?

JUDGE CLIFTON: I do.

MR. RICCIARDI: I can bring my copy up to him.

JUDGE CLIFTON: No. You keep your copy. Here we go. Let the witness know what that is.

MR. RICCIARDI: Yeah. And let's go through it. And that's a fair question from the judge. This is Exhibit 13, which has been produced and admitted, entitled "Producer-Handler Regulatory Status," which lists for 2005 through 2009 the producer-handler plants by order number. And to help you out on this one, flip to the next to last page of
Exhibit 13, which shows 2008.

    MR. TRAWEEK: Okay.

    MR. RICCIARDI: Do you see -- and I'll represent to you that you shouldn't, unless my eyes are bad. Do you see the GH Dairy plant listed in 2008 as a producer-handler?

    MR. TRAWEEK: They are not listed, no.

    MR. RICCIARDI: Flip over to the last page. Do you see the GH Dairy plant listed as a producer-handler operation for January, February and March?

    MR. TRAWEEK: Yes, I do.

    MR. RICCIARDI: Does that help you in terms of the discussions that you were having in 2008, and when?

    MR. TRAWEEK: Yes.

    MR. RICCIARDI: And do you recall, then, specifically, was it as early as the summer of 2008?

    MR. TRAWEEK: That the discussions --

    MR. RICCIARDI: About concessions.

    MR. TRAWEEK: No. It was December or later --

    MR. RICCIARDI: Okay.

MR. RICCIARDI: Thanks. Would you agree with me that in 2008, across the country, that the pay prices -- mailbox prices or pay prices for dairy farmers were basically at historic lows?

MR. TRAWEK: 2008?

MR. RICCIARDI: I'm sorry. I apologize. Let me withdraw that question and state the correct one. For 2009 --

MR. TRAWEK: Historic low, yes, that is correct.

MR. RICCIARDI: I think I'm now done. Thank you.

JUDGE CLIFTON: Thank you, Mr. Ricciardi. Mr. Brosch.

MR. BROSCH: Thank you, your Honor.

CROSS-EXAMINATION

MR. BROSCH: Good morning. I'm confused, or I'm hoping that there's not confusion in the record that was the result of some early colloquy, so I would like to try to clarify that, your Honor. Your Honor, could I have the witnesses shown Exhibit Number 23, which is Dr. Cryan's testimony from the other day?

JUDGE CLIFTON: I have sticky notes on
MR. BROSCH: Well, your Honor, I can show them mine, but I think you're supposed to show them the official one. And, oh, your Honor, I hope you don't have sticky notes on page 15. That's all I'm really concerned about.

JUDGE CLIFTON: I have none on that page.

MR. BROSCH: Thank you, your Honor. If you could hand that to the witnesses?

For the record, this is a copy of Dr. Cryan's testimony from the other day. On page 15 is a copy of the language that National Milk proposes to -- for the regulation section, 1000.8 on noonpool plants that would result from Proposals 1, 2 and 26. This is the specific legal language that National Milk thinks needs to be implemented.

If you could take a moment, each of you, to just kind of take a look over that language before I ask you these questions.

Sorry to try to make lawyers out of you this morning, but I'm going to ask a series of about four questions, and then I'm going to ask for a response from each of you in turn, so that we can expedite this thing.
So, first of all, are you aware that if National Milk Producers Federation's Proposals 1, 2 and 26 were accepted, there would have to be certain changes in the terminology used in the language, Ms. Damm?

MS. DAMM: Sorry, microphone moving.

Yes, I'm aware that certain language will change.

MR. BROSCH: Mr. Newell?

MR. NEWELL: Say what now?

MR. BROSCH: Are you aware that if National Milk Proposals 1, 2 and 26 were accepted by the government in this proceeding, there would have to be certain changes in the terminology used in the regulations?

MR. NEWELL: Yes.

MR. BROSCH: And Mr. Traweek?

MR. TRAWEEK: Yes, I am.

MR. BROSCH: Now, are you aware that the references to the term "producer-handler" would be deleted from this particular regulation?

Mr. Traweek?

MR. TRAWEEK: Yes, I am.

MR. BROSCH: Mr. Newell?

MR. NEWELL: Yes.
MR. BROSCH: Ms. Damm?

MS. DAMM: Yes, I am.

MR. BROSCH: And are you aware that the current 150,000-pound limit that currently applies to exempt -- qualifies an exempt plant would be raised to 450,000 pounds?

MS. DAMM: Yes, I am.

MR. BROSCH: Mr. Newell?

MR. NEWELL: Yes.

MR. BROSCH: Mr. Traweek?

MR. TRAWEEK: Yes, I am.

MR. BROSCH: And are you aware that entities that currently exist as producer-handlers, but whose -- and existed in 2008 as producer-handlers, but whose production limits or sales limits were less than 3 million pounds would now qualify as a type of exempt plant under the new language?

MR. TRAWEEK: Yes, I am.

MR. NEWELL: Yes.

MS. DAMM: Yes.

MR. BROSCH: And aware of those facts, do you still support National Milk's Proposals 1, 2 and 26?

MS. DAMM: Yes, I do.
MR. BROSCH: Mr. Newell?

MR. NEWELL: Yes.

MR. BROSCH: Mr. Traweek?

MR. TRAWEEK: Yes.

MR. BROSCH: Thank you, your Honor. I have no further questions.

JUDGE CLIFTON: Thank you, Mr. Brosch.

Further cross-examination of the panel?

Mr. Miltner.

CROSS-EXAMINATION

MR. MILTNER: I will be brief.

Mr. Traweek, we talked about the independent producers that supply Hilmar Cheese. To your knowledge, those producers receive a full price from the Federal Order? Are they pool producers?

MR. TRAWEEK: I would assume they do.

I'm not for sure. I have not seen any of the Hilmar Cheeses.

MR. MILTNER: You would assume they do or do not?

MR. TRAWEEK: Do participate in the pool. I'm pretty sure -- I'm pretty positive they do.

MR. MILTNER: Okay. Those producers, do they seem to be faring any better or worse than
the other producers in the area?

MR. TRAWEEK: That area is a long way from where I'm at, but I've talked with a few producers around there, and they are all extremely -- everybody is in extremely bad shape, all producers are.

MR. MILTNER: You're all equally in trouble right now?

MR. TRAWEEK: Yes, sir.

MR. MILTNER: Thank you.

JUDGE CLIFTON: Further cross-examination of the panel?

Are there any questions from the USDA table for the panel?

MR. TOSI: Your Honor, we have no questions, but we sure do appreciate the appearance of these three dairy farmers. Thank you.

JUDGE CLIFTON: Thank you. I second that. Thank you very much.

MR. BESHORE: If I --

JUDGE CLIFTON: Oh, Mr. Beshore, yes, we have work to do.

MR. BESHORE: Well, I have one question on redirect.
JUDGE CLIFTON: Certainly.

REDIRECT EXAMINATION

MR. BESHORE: You were asked on cross-examination, perhaps by Mr. Ricciardi, I'm not sure, but you were asked whether there was any -- you chose to have the services -- Ms. Damm, in particular, chose to have the services that your cooperative Dairy Farmers of America provides as opposed to investing in a producer-handler operation, for instance. Do you recall that?

MS. DAMM: Yes, I recall the question.

MR. BESHORE: My question for you first, and for each of you, are you required to invest in your cooperative in order to receive the services which it provides?

MS. DAMM: Am I required? Am I required to invest?

MR. BESHORE: To invest.

MS. DAMM: I'm required to invest in the cooperative if I want the services. Am I required -- can I choose which cooperative I join?

MR. BESHORE: Well, that wasn't the question I asked, but you can choose which
cooperative?

MS. Damm: We can choose which one, but if I wanted to receive the benefits, yes, I have to be a member.

Mr. Beshore: Do you know what the investment is that's required to be DFA members?

MS. Damm: I can't give you that off the top of my head. I would have to go back home and pull that.

Mr. Beshore: It's an amount per hundredweight?

MS. Damm: Yeah, it is a per hundredweight contribution, yes, I would agree with that.

Mr. Beshore: Mr. Newell?

Mr. Newell: Yes, I'm aware that I need to make an investment in my cooperative.

Mr. Beshore: In order to get the services, you've go to --

Mr. Newell: That's correct.

Mr. Beshore: Do you know what the investment is?

Mr. Newell: $1.75 a hundredweight.

Mr. Beshore: Mr. Traweek?

Mr. Traweek: Yes, I'm aware of the
investment that we make in our co-op, which is $1.75. And, also, we do have to make other investments in our co-op, the DFA Southwest Agency. We participated in 10 cents a hundredweight deduction from my milk check to build the Southwest Cheese Plant, and so those are investments that we've made to secure markets, you know, markets for our milk.

MR. BESHORE: Thank you. That's all I have. Thank you to each of you for your time and efforts and testimony.

JUDGE CLIFTON: This panel presentation was excellent.

MR. BESHORE: I would move the admission of the statements which have been -- of each of the witnesses, which have been marked as Exhibits 28, 29 and 30.

JUDGE CLIFTON: Is there any objection to the admission into evidence of Exhibits 28, 29 or 30?

There is none. Those exhibits are hereby admitted, 28, 29 and 30. Thank you. You may step down.

MR. BESHORE: Thank you.

JUDGE CLIFTON: Mr. Beshore.
MR. BESHORE: The next witness that is prepared to testify is Mr. Daniels, who is a dairy farmer from Michigan, Rodney Daniels.

JUDGE CLIFTON: All right. What I would like to do before we call him -- please stay right where you are, Mr. Beshore -- has Jerry Dakin arrived?

MR. DAKIN: Yes.

JUDGE CLIFTON: Would you come forward, please? I want to determine your availability for testimony. You're also a dairy farmer, as I understand it.

MR. DAKIN: Yes, ma'am.

JUDGE CLIFTON: If you will come to the podium and say and spell your name and tell us a little bit about you as a dairy farmer.

MR. DAKIN: Jerry Dakin, J-e-r-r-y, Dakin, D-a-k-i-n, a dairy farmer from Myakka City, Florida.

JUDGE CLIFTON: How do you spell that?

MR. DAKIN: M-y-a-k-k-a.

JUDGE CLIFTON: And what are you near in Florida, Myakka City?

MR. DAKIN: I'm 60 miles south of Tampa.

JUDGE CLIFTON: Oh, okay. And you
haven't been here for the rest of the proceeding until recently, is that correct?

MR. DAKIN: I just walked in two seconds ago.

JUDGE CLIFTON: All right. It might be that you would like to see some of the others testify before you testify.

MR. DAKIN: Yes. That would be great.

JUDGE CLIFTON: Is it all right with you if I put you at the end of today's witnesses, which might mean 6:00, 7:00?

MR. DAKIN: I've got a flight out at 6:30.

JUDGE CLIFTON: We have to put you in fairly quickly, then.

MR. DAKIN: Yes.

JUDGE CLIFTON: All right. So you need to leave here no later than 4:00, about?

MR. DAKIN: Yes.

JUDGE CLIFTON: Okay. All right. After lunch would be good, but early afternoon.

MR. DAKIN: Okay.

JUDGE CLIFTON: Okay, good. Thank you.

And has Mark Kastel arrived?

MR. KASTEL: Yes, ma'am.
JUDGE CLIFTON: Would you come forward and give us like information?

MR. KASTEL: Okay. Thank you, your Honor. Mark Kastel. M-a-r-k, K-a-s-t-e-l. I own and operate a small farm in Wisconsin, which is engaged cooperatively in a dairy enterprise, although I'm here today to represent the Cornucopia Institute. I serve as its codirector and senior farm policy analyst. We are believed to represent more organic farmers, primarily dairy farmers, than any other public charity in the United States or MGO. And I have a letter that I will be reading into the record representing about 80 farmers, including 13 producer-handlers who would like to have input into this hearing.

JUDGE CLIFTON: Now, you're a charitable organization in organic milk?

MR. KASTEL: We act as an organic industry watchdog, not specifically to organic dairy, but that's been one of our prime issue areas since we were founded.

JUDGE CLIFTON: Okay. Now, I should have asked Mr. Dakin, and I'll ask him in just a moment, do you have a prepared written statement
that you want people to have besides what you just present from the witness stand?

MR. KASTEL: I have -- other than what I'm presenting as testimony, I have no written statement.

JUDGE CLIFTON: All right.

MR. KASTEL: But I have a written copy of that.

JUDGE CLIFTON: Okay. Well, it's easier if you do not have one that you want marked as an exhibit, because if you want it marked as an exhibit, I need everyone to have copies, which means you need to reproduce it.

MR. KASTEL: Yes. I have that available, your Honor.

JUDGE CLIFTON: You have reproduced copies?

MR. KASTEL: Yes.

JUDGE CLIFTON: Okay. And what I would like you to do, so that people can look at that ahead of time, is put some on the back table, but save enough so the court reporter will have one for use in editing what you testify, I'll have one, the people at the USDA table will have a few, including the record copy. They're
keeping all the record copies.

MR. KASTEL: Right. I believe I made enough copies to accommodate those requirements.

JUDGE CLIFTON: I think people have found they need somewhere between 30 and 50. Is that about what people are making? Does that work, Mr. English? What do you think?

MR. ENGLISH: We've been making 50.

JUDGE CLIFTON: 50. Okay.

MR. KASTEL: Okay. I have 20 copies. I'll make some more, your Honor.

JUDGE CLIFTON: Okay. That would be great. And if you knew that you were going to testify today, what would be your preferred time of day?

MR. KASTEL: As early as possible. I drove here from Wisconsin. It's a 20-hour round trip, and I have some obligations in Indiana on the way back to visit two farms.

JUDGE CLIFTON: So you will make the copies during lunch, and then you could go soon after lunch?

MR. KASTEL: Yes, your Honor.

JUDGE CLIFTON: We might as well do it while you're still awake.
MR. KASTEL: That would be wonderful.
JUDGE CLIFTON: Okay. Thank you.
MR. KASTEL: If I'm awake after lunch.
JUDGE CLIFTON: Don't eat. Just copy.
If you go to use the Kinko's downstairs, that
would be great, but you might have to stand
there while they make the copies to make sure
they're working on them.
MR. KASTEL: They made me my 20 copies
very efficiently, and I'll make sure we have
adequate copies.
JUDGE CLIFTON: They were trained by the
USDA staff.
MR. KASTEL: That's why it worked out.
Any other questions?
JUDGE CLIFTON: No. Thank you very much.
MR. KASTEL: Thank you.
JUDGE CLIFTON: All right. Back to
Mr. Dakin.
MR. STEVENS: Your Honor, could I just --
JUDGE CLIFTON: I just want to find out
if Mr. Dakin has a written statement.
MR. DAKIN: No, I do not.
JUDGE CLIFTON: No. Okay, Mr. Dakin does
not have a written statement.
Mr. Stevens.

MR. STEVENS: Your Honor, I just want to make sure that, in terms of the statements of witnesses, it is their choice in the end. I mean dairy farmers, other witnesses who may not have a prepared statement, on the other hand who may even want to read from a written statement. It isn't a requirement that they make copies of that available to the parties. It is for the use of the parties, certainly, if they want to do that, but if a farmer gets up there and wants to read from a piece of paper, he doesn't have to make copies for everyone to go with him.

JUDGE CLIFTON: My thought was, if we didn't have copies, I wouldn't make it an exhibit. We would just rely on the testimony.

MR. STEVENS: Absolutely.

JUDGE CLIFTON: Is that your thinking, as well?

MR. STEVENS: Absolutely. But when they read a statement from the stand into the record, they present it. It can be put in the record as a written statement marked as an exhibit. It can also be received in that form.

And the point I'm making, just in terms
of the ease, for the convenience of the
witnesses, that they not be forced to make
copies of all the statements unless -- unless
they want it entered into the record as an
exhibit, the statement.

           JUDGE CLIFTON:  Thank you.

           MR. STEVENS:  I just want to make that
point.

           JUDGE CLIFTON:  Thank you.  I appreciate

           MR. STEVENS:  Thank you so much.

           JUDGE CLIFTON:  Mr. English.

           MR. ENGLISH:  Charles English, your
Honor.  Obviously, I want to accommodate every
witness as possible.  We had a schedule, we've
been discussing this schedule throughout the
week, and we have a number of witnesses who have
to be on the stand today or, frankly, we lose
them.  Some of those are also dairy farmers who
have been on the list for today, such as Paul
Rovey.  Some of them are plant operators who
also drove here and have to leave, such as Jim
Buelow.  Some of them are co-op entities, such
as Gary Lee.  And I guess, in the worst case
scenario, while it's far from ideal, Mr. Lee
told me today he could come back next week, but that's a little unfair to him since he flew in today and it was announced he was coming in today. Mr. Wilcox, as I said yesterday and this morning, there's some flexibility there. I have some concerns.

And I actually don't know much about the subject except the whispering in the hallways, but I suspect it's going to turn out to be the case that Mr. Kastel's testimony could be lengthy in the sense of cross-examination, and I just am concerned of what that does to people like Mr. Rovey, Rod Daniels who we'll get to right now, Jim Hulow, and Gary Lee.

Mr. Dakin, a little different since he's a dairy farmer. On the other hand, I would point out that other dairy farmers have been here, so I don't know what to do with that, but I see that in a slightly different vein. It may not have a long cross. I don't know.

Again, I don't know exactly what's going to happen, I've been talked to by various people. I just think we at least need to think about it. Maybe we put Mr. Daniels on, have lunch, and come back and think about it some
more and see where things are then.

JUDGE CLIFTON: Another possibility --
and, Mr. Kastel, where did you go? Another
possibility, since Mr. Kastel will have a
written statement, is to take his direct exam
and defer his cross until some of the other
witnesses have been heard. Now, that keeps him
here longer, which is not good, but it's not
good for anybody to be -- to fail to be able to
get the testimony in today. So we'll see how it
goes. But I appreciate your letting me know.
Thank you.

All right. So, let's see. Mr. Beshore,
thank you for staying close to the podium. Your
next witness is Rod Daniels?

MR. BESHORE: Yes.

JUDGE CLIFTON: All right. You may call
him.

MR. BESHORE: Mr. Daniels.

JUDGE CLIFTON: I'm going to mark
Mr. Daniels' statement as Exhibit 31.

(Exhibit 31 was marked for
identification.)

JUDGE CLIFTON: Would you please state
and spell your name right into the microphone,
even if you're not looking at me?

MR. DANIELS: My name is Rod Daniels,
R-o-d, D-a-n-i-e-l-s.

JUDGE CLIFTON: Thank you.

(The witness was sworn.)

JUDGE CLIFTON: Thank you. Mr. Beshore,
you may proceed.

RODNEY DANIELS

of lawful age, being first duly sworn, was examined and

Testified as follows:

DIRECT EXAMINATION

BY MR. BESHORE:

Q. Mr. Daniels, you may proceed with your
testimony, your statement.

A. My name is Rodney Daniels. My address is
8189 West Prescott Road, Whittemore, Michigan, 48770.
My wife Anne and I have five beautiful daughters ranging
in age from 28 to 19 and one extremely cute
granddaughter, age one. We're on a roll. Each of my
girls have or are currently milking our cows or
otherwise helping out on our farm.

Our current business operation is an LLC
consisting of my two brothers Wallace and Lynn, their
sons Christopher and Luke, my daughter Laura, and
myself. We own and operate 1,280 acres and milk
approximately 300 Holsteins, with plans to expand to at least 400.

The farm was started in 1953 with 120 acres and eight cows by my parents Donald and Dorothy Daniels. They also were born and raised on dairy farms, both of which are still operating and are designated Michigan Centennial Farms. My mother's father, Peter Koelsch, served on the board of directors of the old Michigan Producers Co-op for over 30 years. We are not Johnny-come-lately's to this business.

I'm currently serving as a director-at-large for the Michigan Milk Producers Association. I was elected to this position in 2006. Before that, I served on various local, district and state committees, most notably over 20 years on the state resolutions committee. This committee is directly responsible for formulating the policies that guide our organization as voted on by delegates representing our membership.

I take my responsibility to represent our membership very seriously and can say, without hesitation, that our members are staunch supporters of the Federal Milk Order system and the formal hearing process used to amend its rules. We have long-standing resolutions in place that attest to this. In all my
years of involvement with MMPA, this commitment has never wavered.

The Federal Order system has brought all dairy farmers an orderly and fair marketing system out of what once was chaos and corruption. Uniform minimum pricing and equitable sharing of the value created by classified pricing has been instrumental in making the U.S. dairy industry the envy of the world.

As I stated before, my grandfather served on Michigan Producers' board from the early '30s to the mid '60s. I find it humbling that I sit here today trying to protect the integrity of a system that he and many others fought so hard to institute and maintain for so many years.

I'm here today to support the National Milk Producers Federation's and the International Dairy Foods Association's proposal to eliminate the producer-handler provision and to expand and qualify the size-based exempt plant provision in every Federal Order.

The producer-handler exemption provision was put in place originally to protect small farmers who bottled their own milk. These little farms had virtually no effect on the price of milk for other farmers. No one then could have considered the
situation we are faced with today. In Michigan alone, there are at least 100 farms producing more than 1 million pounds of milk per month, any or all of which are capable of taking advantage of this loophole in the rules. Some already are. This can amount to as much as 15 cents per gallon, more than enough to give them a significant advantage over regulated processors.

Not only does this money not get shared with other dairymen, it tends to drive down the overall Class I price, further aggravating an already bad situation.

How important is this money to an average dairyman? In the case of our own farm, it's very important. Federal Order 33 was amended in October of 2005 in order to discourage pool riding and to minimize depooling in order to prevent dilution of the PPD and to reward producers for their commitment to supplying and balancing the milk needs of local bottlers.

Since October of 2005, the milk check received by our farm has included a PPD that has averaged 48 cents a hundred. That's about $108 a day, or over $3,200 a month. And that will buy a lot of prom dresses around my place. Erosion of this pool sharing hurts the vast majority of producers while benefiting very few. This is exactly the kind of conditions that
made Federal Orders necessary in the first place.

Replacing the blanket producer-handler
exemption with a small processor exemption level of
450,000 pounds per month makes a lot of sense. It
allows relatively small processors to carve out niche
markets based on unique qualities and local patronage
without disrupting major markets. What the rest of us
lose in pool sharing, we gain in increased consumer
demand and product development. Our quarrel is not with
these people, only with those who would abuse the system
to compete unfairly.

The alternative is not a pretty picture.
Some markets are already experiencing the hardship that
large exempt producer-handler bottling plants can
create. Unless this rule is changed, there will be more
and more until we're right back where we were in the
1930s.

Everybody knows this can be an extremely
competitive business. Our profit margins are famously
tight and sometimes nonexistent. We work hard every day
to keep our cows -- costs down and our cows producing
well. The last thing we need is a growing situation
where a small minority cuts the vast majority of
producers out of the most lucrative portion of the
business. It is unethical and bad for the industry.
I have previously commented about the justification for exemption from pooling and pricing regulations for processors with less than 450,000 pounds of Class I sales per month. For those same reasons, MMPA and I personally do not support any of those proposals that would provide for a qualified exemption for current producer-handlers. Producer-handlers in excess of the 450,000 pounds have realized an unfair advantage for too long and have grown to their current size because of that advantage.

There are numerous proposals that advocate an exemption for current producer-handlers at various levels of volume. No matter where you set that limit, there will continue to be some number that will argue that they're being unfairly treated. We believe that Proposal 2, submitted jointly by NMPF and IDFA, is a suitable solution to a market disorder that has been allowed to exist for far too long.

I will make one additional comment on that. After listening to Mr. Gibson this morning, I think that a compromise is probably in the works -- or, you know, I can see his point. It doesn't exactly apply to our particular point, or our situation in Michigan, but in isolated cases I can see where it's not affecting anybody else. He has my sympathy.
Thank you for the opportunity to testify here today. I hope you find my thoughts on this issue useful.

JUDGE CLIFTON: Thank you very much, Mr. Daniels. Do you have any other questions for him, Mr. Beshore, before cross-examination?

MR. BESHORE: No, I do not, your Honor.

JUDGE CLIFTON: Thank you. Who would like to begin the cross-examination?

Mr. Miltner, please.

CROSS-EXAMINATION

BY MR. MILTNER:

Q. Good afternoon, Mr. Daniels.
A. Good afternoon.
Q. I want to ask you a question about the second page of your statement. It's in the second full paragraph.
A. "I am here today to support"?
Q. The second full paragraph, "The producer-handler exemption provision."
A. Yes.
Q. You say that there's an advantage to producer-handlers of as much as 15 cents a gallon. How did you get that number?
A. From literature that I wrote, read. And,
obviously, I'm on the MMPA board. We've discussed this. It's common knowledge.

Q. Okay. So you got it from other sources, though, you didn't calculate anything? You've taken it from what you believe to be reliable sources?
A. Yes.

Q. Thank you.

JUDGE CLIFTON: If I might inquire, is that just because they do not pay into the pool, or they do not share in pool revenue in the same way that the people who support the pool do?

THE WITNESS: I believe that's the inference. And I think, you know, obviously, if a producer-handler had a local market that was unregulated, the potential for profit would, you know, be greater than if he was moving it 300 miles. But that's why it says "as much as."

BY MR. MILTNER:

Q. At the end of that paragraph, you state that producer-handler activity "tends to drive down the overall Class I price." Can you explain that for us?
A. Well, obviously, it would. You know, if you're competing against an unregulated processor, and he undercuts you, if you want that business you have to match him. That brings the price down.
Q. But the minimum price, the Class I price, is set by Federal regulation, isn't it?

A. It is set by Federal regulation, but it's -- the unregulated farms are not included in that.

Q. So what you're saying is the competition brought by a producer-handler --

A. Would tend to drive the price down.

Q. -- would tend to change the premiums that your cooperative can negotiate?

A. That's another way of putting it, but yes.

Q. It's not the minimum Class I price, it's the Class I over-order premium that you're saying is affected, right?

A. Now you're getting technical with me. The bottom line is, I get less money.

MR. MILTNER: Judge, if you could, could you hand Exhibit 13 to Mr. Daniels?

JUDGE CLIFTON: Certainly.

MR. MILTNER: Thank you.

BY MR. MILTNER:

Q. Mr. Daniels, have you had a chance to see Exhibit 13 before?

A. No.

Q. Okay. This is an exhibit in the record,
and it shows the producer-handlers in each marketing area for different years. And it's listed by Federal Order for our ease of finding people. So if you look at the fourth column, which says "Order Number," and go down that list and get to order 33 --

A. Yes.

Q. And if you could look at --

A. Country Dairy. They are in Michigan. Is that what you're going for?

Q. Well, first of all, you're looking at 2005 at the top of the page, above "City"?

A. Yes, yes.

Q. Okay. And in 2005, Country Dairy is listed for Order 33?

A. Yes.

Q. Is it your testimony that the activities at Country Dairy are currently causing problems for your cooperative?

A. Yes.

Q. Okay. How so?

A. What started out as a small ice cream store in New Era has expanded into a bottling business and is now covering several outlets on the whole west side of Michigan.

Q. So their bottling activities, the fact
that they're covering a number of stores, is causing a
problem for your cooperative?

A. It's causing problems for the other
regulated processors and our customers, yes, who are --
MMPA is not in the bottling business.

Q. Is anyone from MMPA going to provide any
detail on why they believe their activity is disruptive,
other than what you've stated in your statement?

A. I'm not sure of that. You would have to
talk to Mr. Beshore or -- I know Carl Rasch had
considered coming up here, and he thought that he might
come next week, but -- and he would be the actual source
of that information.

JUDGE CLIFTON: Would you spell Carl Rasch's name for me so we get it right?

THE WITNESS: I don't know how to spell it.

MR. MILTNER: I believe it's R-a-s-c-h.

JUDGE CLIFTON: And do you know how he spells Carl?

MR. MILTNER: I believe it's with a C.

JUDGE CLIFTON: Good. Thank you all.

BY MR. MILTNER:

Q. In your discussions in your cooperative,
have you tried to -- have you assigned a number to the
effect on the producer pay price from the activities of producer-handlers in Order 33?

A. I haven't personally, no.

MR. MILTNER: Okay. Thank you.

JUDGE CLIFTON: Thank you, Mr. Miltner.

Who next would like to cross-examine Mr. Daniels?

Mr. Ricciardi.

CROSS-EXAMINATION

BY MR. RICCIARDI:

Q. Al Ricciardi on behalf of AIDA. Mr. Daniels, you have in front of you Exhibit 13. If you would, flip to the next to the last page, which would be for 2008. Do you have that?

A. Next to the last page? Yes, I do. Yes.

There it is.

Q. If you read down to --

A. 33.

Q. -- 33, which is where you're located, you will note that in 2008 there are two producer-handlers listed, correct?

A. Yes, that's correct.

Q. And for 2009, that has been reduced by one to Country Dairy, correct?

A. Yeah. And I can't tell you why either.
I'm pretty sure that's Doug Westondorp, who is the
MOO-ville Creamery. As far as I know, Doug is still in
business.

Q. I understand --

JUDGE CLIFTON: What's the name of his
creamery?

THE WITNESS: MOO-ville.

MR. RICCIARDI: M-O-O-v-i-l-l-e, your
Honor.

JUDGE CLIFTON: All right. And how is
his last name spelled? Doug West --

THE WITNESS: Again, he'll probably
crucify me for this. I think it's
W-e-s-t-o-n-d-o-r-p.

JUDGE CLIFTON: Westonvorp?

THE WITNESS: Dorp.

JUDGE CLIFTON: Dorp, d as in David?

THE WITNESS: I said --

JUDGE CLIFTON: I just couldn't tell
whether you said d or v.

THE WITNESS: It's d as in dog.

JUDGE CLIFTON: D. Thank you.

MR. RICCIARDI: Thank you, your Honor.

BY MR. RICCIARDI:

Q. And I've got a couple of points of your
statement that I want to tie together, and hopefully we'll do this very quickly. Your last page, page 3, the third paragraph, second sentence, beginning "Our profit margins." It's actually the second full paragraph, the third paragraph on that page.

JUDGE CLIFTON: Oh, okay. So higher than the middle of the page?
A. You said the third page, didn't you?

BY MR. RICCIARDI:
Q. Yes, I did.
A. Sorry about that. I'm on the wrong page.
Q. That's okay. Do you see the sentence that reads, "Our profit margins are famously tight and sometimes nonexistent"?
A. Yes.
Q. This is your statement, right?
A. That's true.
Q. Okay. So when you say "Our profit margins," were you talking about the Michigan Milk Producers Association?
A. No. I was talking about our farm's profit margins.
Q. Okay. Were you talking about dairy farms and dairy farmers --
A. Dairy farms in general.
Q. -- in general?
A. Yes.

Q. Okay. Taking that as an idea, and your testimony, flip back with me, please, to the second page. And now we're in the third paragraph, actually the second full paragraph. And I think you talked about this with Mr. Miltner, about this 15-cent per gallon issue.
A. Uh-huh.

Q. You say that, in your opinion, producer-handlers have a significant advantage over regulated processors?
A. After a certain size, I believe they do, yes.

Q. So you want to qualify your statement now, after a certain size?
A. My personal opinion is anything up to $450,000 -- 450,000 pounds a month, virtually no effect on anybody.

Q. And where --
A. When you get beyond that, then you're in a gray area.

Q. They start to get competitive at that point?
A. Yes. And my point is, if not being
regulated is the basis of their profit, then it actually proves our point.

Q. Well, let's talk about it for a second, because I want to tie in what you said. If your business, as a dairy farmer, is -- pennies are significant, you say in your last page, right, because your margins are famously tight or nonexistent?
A. Yes.

Q. And your statement here that there is a significant advantage to a producer-handler, then as a rational person, which I know you are, you would assume that there would be a large number of producer-handlers that have proliferated over the last five years, correct?
A. There's a number of smaller producer-handlers that have proliferated, the organic people and the smaller producers. But for the large -- you know, there have -- they -- in my mind, at least, they survive on the quality of their product and their particular location.

Q. Well, let's just take the number. We know, based upon Exhibit 13, that the number of producer-handlers from 2008 to 2009 has actually gone down from two to one, correct?
A. I'm not -- I'm not going to -- I know
that's what's on this exhibit, but I never heard about Doug going out of business.

Q. Okay. Well, then let's take it back to 2005, and we've got one in Order 33 in '05, correct? Am I right?

A. 33, yeah. Yes.

Q. '06, we have one?

A. Yes.

Q. '07?

A. Actually, '07 is two.

Q. '07 we have two?

A. Yeah.

Q. '08 we have two, and '09 we have one?

A. Okay. But, again, I dispute that information.

Q. Let's assume -- and I won't argue with you, I'll give you your due on this one. Let's assume that there are actually two in '08. So we have an industry that's tight to the pennies, you say there's a significant advantage up to 15 cents a gallon, and in Order 33 we've had the growth of producer-handlers at either zero or a negative number based upon Exhibit Number 13, am I correct?

A. Okay. Well, now --

Q. Am I correct?
A. Yes.

MR. RICCIARDI: Thank you.

JUDGE CLIFTON: Mr. Daniels, you have an explanation that you would like to follow up with, I can tell. And you have a chance to do that. After all the examination -- cross-examination is done, you will have an opportunity to go back to that issue and add, even though counsel didn't ask any more questions. But the thing is, you've got to remember to go back to that.

THE WITNESS: I will.

JUDGE CLIFTON: All right. And counsel will help. Okay, continued cross-examination?

Oh, we can tell it's getting to be lunchtime. Are there any -- okay. Are there any questions from the USDA table? Mr. Tosi.

MR. TOSI: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. TOSI:

Q. Mr. Daniels, my name is Gino Tosi. I'm with the Dairy Programs at USDA in Washington, D.C. Are you offering any other statements of support or opposition to any of the other proposals that have been noticed in the hearing notice?
A. No. But what I had to say, I said, as far as our support for the proposals or argument with one of them.

Q. Okay. In your statement, in your written statement, you talked about uniform pricing, uniform minimum pricing --

A. Uh-huh.

Q. -- and the equitable sharing of the value created by classified pricing as being very important to the development of the dairy industry in the U.S.?

A. Yes.

Q. In that regard, are you talking about marketwide -- the marketwide pooling of revenue?

A. Yes.

Q. Are you familiar with the term "individual" or "handler pooling"?

A. No.

MR. TOSI: That's all I have, your Honor.

Thank you.

JUDGE CLIFTON: Thank you, Mr. Tosi.

Mr. Carroll.

CROSS-EXAMINATION

BY MR. CARROLL:

Q. You have a statement on page 2 in your next to last paragraph, in the middle, that talks about
the competitor you identified earlier as a PPD. Can you
tell me what that means in your Order?

A. A PPD? Basically, it's the premiums or
extra money that is generated from all the
classifications and then shared back to the individual
producers. I'm sure that's not the official definition,
but it's the one that makes a difference to me, yes.
It's the amount of money I get back out of the pooling.

Q. Does the Order itself use the words
"PPD"? Did you get that from them, from when you --
A. That's what's on my milk check.

Q. That's what's on your milk check?
A. Yes.

Q. Okay. I understand. Now, you stated
that this dairy -- you indicated, I think, it was
Country Dairy?

A. Country Dairy, Wendell Van Gunst and
family.

Q. Where are they located?
A. New Era, Michigan, just a little bit
north of Grand Rapids.

Q. And where are you?
A. I'm over on the northeast side of
Michigan, about 50 miles north of Bay City.

Q. Okay. Now, Country Dairy, do you know
how many cows they have?

A. I wish I did exactly. I was just there. I went to the North Star annual meeting, and they did a tour of the farm. It's an impressive place if you ever get a chance to go there. I think they were in the neighborhood of 700 cows, but I'm not going to swear by that. And they were expanding.

Q. And the other person who the Market Administrator is no longer calling a producer-handler, how large was that producer-handler?

A. I think Doug was milking 200 or 300 cows at the most. I believe -- I still believe he's still milking. He may have shut down his creamery and went, but that's news to me. And I think that would have been news, I would have heard.

Q. Well, it's possible, I suppose, to change classification and still be in business.

A. Yeah.

Q. Now, let me ask you if you know what the volume of sales of Country Dairy are?

A. No, not exactly, no.

Q. Okay.

A. It would be good. They have a really nice herd. I think they're in the range of 25,000 pounds of cow per day, per year.
Q. Is it a well-run farm?
A. Excellent, excellent-run farm. It's a --
the original premise, there was very -- a very good
deal. They're in a touristy-type area. They have a
store there to sell their ice cream. Their ice cream is
excellent ice cream. They have a, for lack a better
word, tourist farm, where they show off their high-end
registered cows. The place is very neat and well run.
Q. Does it speak well for the dairy industry
to --
A. Yes, it does.
Q. -- have a farm like that?
A. Yes, it does.
Q. Okay. Does it make a good impression on
the public in terms of the quality of milk that's
available --
A. Yes, it does.
Q. -- from your state?
A. Yes.
Q. Does it cost a little extra money to run
an operation that way?
A. I suppose it does, but I still don't
quite understand why you can't leave it at that and not
spread it. He's up north of that farm, I'm guessing
about 150 miles, and those people aren't visiting his
ice cream store.

Q. All right. Now, directing your attention to his cost of production, do you have any idea what his cost of production is?

A. I think it would be competitive, because they are such excellent operators. You know, he also has some registered cattle business, sells bulls and pre-stock and whatnot.

Q. Does he have any other business that you know about?

A. Not that I'm aware of, but it wouldn't surprise me if he did. He also seems to have a very close working relationship with Michigan State University, and he's got research people there working -- you know, working at the farm.

Q. Right. So I take it he's trying to elevate the farm business, dairy business, as well as his own?

A. Yeah, he is. Wendell is an excellent businessman who knows how to put on a good show. I mean, he's good at what he does.

Q. Right. Now, in business -- I guess I'm going to pull back. Your cooperative doesn't actually engage in the sale to the public of milk, does it?

A. Not bottled milk, no.
Q. No. And -- but are you familiar with the fact that milk accounts can move back and forth pretty rapidly in the milk business?

A. Oh, yes, yes.

Q. And everybody is trying the best they can to get an account at any time?

A. Well, yeah. And our point is, do we really need this thing thrown into that mix? We've got enough competition without that.

Q. Yeah. But the fellow running Country Dairy at least has a right to compete the best he can to get business?

A. I have no quarrel with Wendell competing for business. My quarrel comes when -- you know, he's producing a quality product. If he wants to get bigger, then he ought to be willing to survive on his own merits, not on the advantage he gains by not pooling.

Q. But if he actually had cost of production greater than the blend Class I differential, would he really have any money to throw around?

A. I'm not -- say that again.

Q. Yes. If he had costs greater than the blend Class I differential, in other words he had higher production costs than the differential, would he have a lot of money to throw around competitively?
A. Well, he must, because he's expanding it. So if he's not making money -- I guarantee you Wendell doesn't do anything that doesn't make money.

Q. Right. Yeah. That's your opinion?

A. Yes, that's my opinion.

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

JUDGE CLIFTON: Thank you, Mr. Carroll.

I need a spelling. I know that you don't want to do this, but Van Gunst? Wendell first, and then Van Gunst.

THE WITNESS: Wendell is W-e-n-d-e-l-l and Van Gunst is V-a-n-G-u-n-s-t.

JUDGE CLIFTON: Good. Thank you.

THE WITNESS: You're welcome.

JUDGE CLIFTON: Mr. Beshore.

MR. BESHORE: Thank you. Mr. Daniels --

JUDGE CLIFTON: Are you wanting to do redirect?

MR. BESHORE: Yes.

JUDGE CLIFTON: Okay. Let me see if there's any other cross. Any other cross-examination?

They're going to let you go ahead.

MR. BESHORE: Thank you.

REDIRECT EXAMINATION
BY MR. BESHORE:

Q. Mr. Daniels, you referred to the PPD in your testimony, and you were asked about that. Is that the producer price differential?

A. Yes.

MR. BESHORE: Now, could he have Exhibit 5, your Honor?

JUDGE CLIFTON: Sure.

BY MR. BESHORE:

Q. I want you to look at -- you were asked about whether there were any other small producer-handlers in your market or perhaps what happened to MOO-ville on the list. On the third page of Exhibit 5, there is a list of Order 33. This is the exempt plant list, okay, and there are four or five entities in Michigan here.

A. Yeah.

Q. And I wonder if you could tell us what you know about them; that is, whether they are, for instance, farm producer-handler type operations that are small. Cook's Farm Dairy in Ortonville, Michigan, do you know anything about them?

A. I do not. Some of these may be, though -- we've had some proliferation of cow share farms. I don't know where they fall in on this.
Q. I'm just asking what you may or may not know about any of these. Cream Cup Dairy in Kaleva, Michigan?

A. I don't know a thing about, really, any of them.

Q. Crooked Creek Dairy?

A. I've never heard of them. I assume they're really, really small.

Q. Okay. How about Shetler Dairy in Kalkaska?

A. Where do you see that?

Q. Further down, further down the list.

A. Oh, okay. I'm looking at the wrong -- the whole 33. Let's see if I do recognize any of these. Michigan State Industries, I think, is probably the small bottling thing that Michigan State University has.

Q. How about, the last one I want to just ask you about, Shetler Dairy?

A. Shetler, Kalkaska? No, I've never heard of them.

MR. BESHORE: Okay. That's all. Thank you very much, Mr. Daniels.

JUDGE CLIFTON: Was there anything else you wanted to cover, Mr. Daniels?

THE WITNESS: Yes. And, again, it gets
into potential. Because of the proximity of Michigan and our Detroit, Chicago markets, nearly all the milk in Michigan, excess milk at least, goes south. We've got Fair Oaks in northern Indiana, we have a potential problem with Tim den Dulk, who recently bought an Oldsmobile plant in Coopersville. The latest news we have on that is that he plans to build a powdered plant there. But the bottom line is, those guys have potential to create havoc if the producer-handler thing is not addressed.

JUDGE CLIFTON: And can you help me with Tim's last name? Van --

THE WITNESS: Den Dulk. It's d-e-n, D-u-l-k. And I'm not criticizing Mr. den Dulk. Again, he's a very smart businessman. He's made great progress, runs some really first class farms, but -- and, by and large, he's cooperated with the other co-ops in the area and not created a great deal of problem. But when you're looking at $10, $11 milk, then peoples' minds change in a hurry.

JUDGE CLIFTON: So your concern is that he has the ability to grow large, and you would like him to be in the pool?
THE WITNESS: Well, he already is large.

JUDGE CLIFTON: All right.

THE WITNESS: And there are several

others like him in the state. So once that

snowball starts down the hill, I don't know how

you're going to stop it.

JUDGE CLIFTON: Other cross-examination?

Mr. Yale.

CROSS-EXAMINATION

BY MR. YALE:

Q. Benjamin F. Yale on behalf of Continental

Dairy Products and Select Milk. Good afternoon. Are

you aware of what cooperative Mr. den Dulk and Fair Oaks

are a member of?

A. They are with Continental and Select, I

believe.

Q. And what position has Continental and

Select taken in this position?

A. You've -- they've said that they have

supported it.

Q. Doesn't that kind of resolve the issue of

whether they intend to be a PD? If they felt that that

was something they wanted to do, they wouldn't be here

supporting National Milk in this litigation?

A. The bottom line is, they've got us scared
with this Oldsmobile plant.

Q. Well, that has nothing -- you know, we can talk about that some other time. That has nothing to do with -- the powder is not a PD plant, right?

A. You're right.

MR. YALE: Very well. I have no other questions.

THE WITNESS: And, again, I didn't mean to blind Mr. den Dulk.

MR. YALE: I understand that, but I just want to make the record clear that the suggestion was that they may be thinking that. And I think the record would reflect it's quite the contrary.

THE WITNESS: You're quite right.

MR. YALE: Thank you.

JUDGE CLIFTON: Thank you, Mr. Yale.

Mr. Brosch.

MR. BROSCH: No, no questions.

JUDGE CLIFTON: Are you trying to escape?

MR. BROSCH: No. I'm trying to move the thing along. I thought we were done. But go ahead, your Honor.

JUDGE CLIFTON: All right. Mr. Beshore.

MR. BESHORE: Move Exhibit 31.
JUDGE CLIFTON: Mr. Beshore has moved the admission of Exhibit 31. Is there any objection?

There is none. Exhibit 31 is hereby admitted into evidence.

Mr. Daniels, thank you. Your testimony was very helpful.

THE WITNESS: Thank you.

JUDGE CLIFTON: Mr. Brosch.

MR. BROSCH: Your Honor, I think Mr. Rovey is next. Is that correct?

JUDGE CLIFTON: That's correct.

MR. BROSCH: Your Honor, I would like to introduce Mr. Paul Rovey. He is a farmer -- dairy farmer from Glendale, Arizona. He's the president of United Dairymen of Arizona, and I would like to have his testimony marked as -- I believe we're on 32, your Honor?

JUDGE CLIFTON: Correct.

MR. BROSCH: I would like to have his written testimony marked as Exhibit 32.

(Exhibit 1 was marked for identification.)

JUDGE CLIFTON: All right. And I'm sure the court -- Mr. Ricciardi?
MR. RICCIARDI: When he's done with that.

JUDGE CLIFTON: Oh, you just want to make sure you get a copy?

MR. RICCIARDI: No, no, no. I've got a copy. I have a preliminary issue.

JUDGE CLIFTON: Oh, a preliminary issue.

MR. RICCIARDI: Yes.

JUDGE CLIFTON: All right. We'll wait until the copies are distributed.

MR. RICCIARDI: That's great. Thank you.

MR. BROSCH: Your Honor, I don't think -- your Honor, if anyone else would like copies of Mr. Rovey's testimony --

JUDGE CLIFTON: The judge would.

MR. BROSCH: I'm sorry. I didn't give you one, your Honor?

JUDGE CLIFTON: No.

MR. BROSCH: Excuse me. I'm sorry. Your Honor, Mr. --

JUDGE CLIFTON: Who else needs a copy of Mr. Rovey's statement? No more in the back? Okay. If someone can share with someone who has one next to you so that we can pass a couple up to the front. I would like the Gibson brothers to have one to look at. Thank you. Is that --
everybody can look on? We've got one more we can give away. The USDA is willing to share.
Okay, good.

MR. BROSCH: Thank you, your Honor.
Mr. Rovey is going to give his testimony directly, and I may have some questions for him at the conclusion.

JUDGE CLIFTON: You're welcome.
Mr. Rovey, would you state and spell your full name for us?

(The witness was sworn.)

JUDGE CLIFTON: You may proceed.

MR. RICCIARDI: Your Honor?

JUDGE CLIFTON: Mr. Ricciardi. Yes, I'm sorry, I forgot. You mentioned you had a preliminary item.

MR. RICCIARDI: I do, Judge. And I will try to make this brief. To try to put all of this into a brief statement is difficult. I read the proposed testimony of Mr. Rovey, and I have two concerns.

By way of background, Judge, there was a producer-handler hearing with regard to Orders
131 and 124 that actually commenced in 2003. And ultimately, on the regulatory side, a decision was made in '06. At the same time, as referenced in Mr. Rovey's statement, there were legislative efforts, i.e., lobbying by some of the largest players in this industry, to try to get Congress to pass a bill, which ultimately became known as the Milk Regulatory Equity Act.

On that point, litigation has been filed based upon the actions of Congress in passing what we believe to be a bill of attainder with regard to the Hettinga operations Sarah Farms and GH in Arizona.

JUDGE CLIFTON: Now, I know how to spell Hettinga, but I want you to spell it.

MR. RICCIARDI: H-e-t-t-i-n-g-a.

JUDGE CLIFTON: And what are the other operations besides the --

MR. RICCIARDI: Sarah Farms and GH Processing in Arizona.

JUDGE CLIFTON: So Sarah Farms is spelled how?

MR. RICCIARDI: S-a-r-a-h.

JUDGE CLIFTON: Okay.

MR. RICCIARDI: And Farms.
JUDGE CLIFTON: And the initials, the letters G and H?

MR. RICCIARDI: Correct.

JUDGE CLIFTON: Okay. Thank you.

MR. RICCIARDI: On the issue first of the Milk Regulatory Equity Act, on April 3rd of this year, the Court of Appeals reversed a decision by the District Court requiring my clients to exhaust administrative remedies in remanding that case, which involves the whole bill of attainder issue back to the District Court. I haven't gotten remand yet. I'm awaiting it.

This statement does a couple of things: One, it references all of that, the legislative and administrative issues. It also -- and talks about the Milk Regulatory Equity Act in the fourth paragraph. On the second page, in the second or third paragraph, it then talks about the previous hearings.

So we've got at least a couple of problems, one of which is, we're trying to get in, through the back door in this statement, information about the previous hearing.

JUDGE CLIFTON: Isn't it pretty common knowledge, information about those previous
hearings? They were very noticeable.

MR. RICCIARDI: They were. And I was there, and they were noticeable by most people. But the question becomes, it's sort of like -- let's go back to the simple argument. You're involved in an automobile accident in 2005. Now there's litigation now in 2009 where you're involved again. Do you allow testimony in with regard to what occurred back then? Probably not, because it's not relevant to anything that occurs here.

JUDGE CLIFTON: Well, I would think if you were injured in the first accident, then whatever happened in the second accident may have aggravated those injuries.

MR. RICCIARDI: Sure, if I was talking about damages. But if I was talking specifically about who caused what, and why it occurred, it wouldn't come in, because that's not relevant.

Secondly, we do have this pending litigation regarding the Milk Regulatory Equity Act, and whether or not it is a bill of attainder, among other things.

The third point I want to make, and then
I will sit down, because I am trying to be brief, is there's a legal issue that's out there, also, as to whether or not, by Congress stepping in and actually doing what it did with regard to Arizona and making it different than any other Federal Milk Marketing Order, whether or not change can be effected by USDA even through this hearing process. So --

JUDGE CLIFTON: Why is there a question about that?

MR. RICCIARDI: There's a legal question, Judge, and we can sit down and talk about it, but I don't want to argue legal issues at this point. I'm just bringing it to your attention.

JUDGE CLIFTON: Congress does statutes, the Secretary does regulations, and I'm not seeing the problem --

MR. RICCIARDI: The difference is, Judge, and it will involve a long explanation, I'm not going to go through it, but there's an argument as to whether or not Congress acted differently here and remanded it, through language in the Milk Regulatory Equity Act, that the USDA has no authority other than to mandate what Congress stated.
JUDGE CLIFTON: Well, that would make no sense.

MR. RICCIARDI: Well, you know, that's why I've got a bill of attainder case that's pending in the United States District Court now in D.C.

MR. STEVENS: Your Honor, please, this discussion is left for another day. I appreciate the fact that counsel, very able counsel, is representing his clients in this hearing, but that matter, the MREA, all those issues are in litigation, and they are being litigated.

Here we have a proposal, a number of proposals, and we're doing an administrative rulemaking. As we started out in this matter, this is not the place for legal argument. This is -- I understand the arguments, but they're not appropriate before your Honor.

This gentleman should be able to read his statement. This gentleman should be able to cross-examine on that statement and the information should go in the record. After that time, then all the parties can exercise any rights that they have with respect to this
rulemaking.

But it is not a proper basis -- I'm assuming an objection. This gentleman's statement should go in as it appears here and let the parties then deal with the statement in the future with respect to this rulemaking; not to the rulemaking in the past, but to this rule.

JUDGE CLIFTON: And, Mr. Brosch, did you have something that would help me here?

MR. BROSCH: Well, your Honor --

JUDGE CLIFTON: Come to the microphone, please.

MR. RICCIARDI: And by the way, I'm going to --

JUDGE CLIFTON: Don't leave.

MR. RICCIARDI: I'm not going to go anywhere.

JUDGE CLIFTON: All right.

MR. BROSCH: I don't think that Mr. Ricciardi has made his objection yet, he's just going on about some other proceedings. But I would say that, obviously, this witness has the right to appear and to petition his government, under the constitution, to do whatever he thinks the government ought to do
for him.

The fact that Mr. Ricciardi has filed a suit somewhere for somebody else does not deprive him of that right. He needs to be able to testify.

MR. RICCIARDI: And, your Honor, you did not hear me, and you will not here hear me now, trying to deprive anyone of their ability to testify. The only thing that I made a statement about is, and I'm going to actually agree with my learned counsel over there to the left, that this is -- this hearing --

JUDGE CLIFTON: Just so the record is clear, you agree with Mr. Stevens?

MR. RICCIARDI: I agree with Mr. Stevens that this hearing -- and what I want to make sure of is that we're not bothering this record with statements or information from another hearing.

JUDGE CLIFTON: Well, you know, history is a continuum, and what happened in that hearing, in fact, is part of this hearing in a way.

MR. RICCIARDI: Your Honor, I made my point. If you're making your ruling, I'm going
to sit down and wait for my chance to
cross-examine.

JUDGE CLIFTON: All right. But let me
tell you what I take from what you said. You
said we have not yet heard the end of the story.
And that is helpful. All right. Thank you,
Mr. Ricciardi.

MR. RICCIARDI: Thank you very much,
Judge, thank you. I appreciate it.

JUDGE CLIFTON: Mr. Brosch.

MR. BROSCH: Your Honor, I would just
note for the record, over the last few days
there has been all sorts of testimony about
other proceedings that have gone before here,
the Order reform proceedings, the Pacific
Northwest proceedings. There's been testimony
about that for days, so I don't know why this is
special.

JUDGE CLIFTON: Well, it's his case, for
one thing.

MR. BROSCH: Well, your Honor, I've got a
couple of cases pending, but I'm not going to
run up here and say that we should end this
proceeding because I've got cases pending.

MR. RICCIARDI: Your Honor --
JUDGE CLIFTON: Mr. Ricciardi, you may respond, and then we'll get on with it.

MR. RICCIARDI: Let's get on with it.
Let's let -- as I said before, I'm not going to object to this witness having the right to testify today. I just have objections, and I wanted them raised, and points I wanted the Court to be aware of.

JUDGE CLIFTON: Thank you. I appreciate it. Mr. Carroll, I'll hear you.

MR. ENGLISH: I have --

JUDGE CLIFTON: No, Mr. English. It's okay. He's always brief.

MR. CARROLL: I have only a question on the second page. I don't know if the witness is going to be allowed to -- I just don't know how he's going to testify, but I want to alert you in advance that if he testifies or attempts to incorporate in this hearing any hearing evidence of the other hearing in Arizona, we would have grave exception to that.

We have no -- we were not a party to it, we have no idea what happened, and we have no way of, in this particular proceeding, protecting ourselves against an incorporation by
reference. The statement he makes is, "During the hearings which led to a new provision in the Arizona Order, UDA testified." Then he goes on to say -- and if he's intending to incorporate that testimony, I won't object. If he wants to state, in his opinion, that that's a recollection of what he thought was said, that's fine. But he cannot urge the Secretary's action based upon another hearing in another record.

MR. STEVENS: Your Honor, I would suggest that that argument, able as it is, is an argument that counsel would make on brief after this hearing is closed, objecting to any witness' testimony that should not be considered by the Secretary. The Secretary will consider that representation in legal argument, as he does in every one of these rulemaking proceedings.

JUDGE CLIFTON: Well, the matter of evidence, though, do I take judicial notice of what happened in the different rulemaking hearing? If I'm asked, I'll rule on that.

MR. STEVENS: Well, on that point, in terms of official notice of other rulemakings, we have done this many times in the past
rulmakings. The parties have asked for official notice, the government has asked for official -- official notice is the fact -- you know, is saying to the parties, here we want the record to be knowledgeable about prior activities of this, that or the other thing.

It doesn't, of itself, mean that the Secretary, you know, is going to take that information and base a decision on that, assuming legal arguments are made that say you should or you shouldn't. So it's all a matter of making a record which the department will use to determine if any amendments to regulations need to be made.

JUDGE CLIFTON: Mr. Brosch.

MR. BROSCH: Better stated than I could.

JUDGE CLIFTON: That's high praise, indeed. All right. Now, the witness will have an opportunity. You may proceed.

PAUL ROVEY of lawful age, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

MR. ROVEY: First, I apologize for being so controversial. And I didn't even get to say
a word yet, other than, yes, I do.

My name is Paul Rovey. Our family has dairied in Arizona since the 1920s. We milk Jerseys and we also grow alfalfa and corn silage for our cows. We've been members of the United Dairymen of Arizona, the only dairy cooperative in our state, since the early 1960s. I have served on its board of directors since 1985 and was elected UDA president in 2008.

UDA has an in-depth understanding of the producer-handler issue as a result of years of efforts to address the inequity of the pool exemption of large producer-handlers. When we finally won that battle in the Arizona Market Order on both legislative and administrative levels, we and our allies knew that the outcome would be of interest to other Orders.

And so I thank you for the opportunity to share our experience with other Milk Marketing Orders and how that experience influences our support of three of the current proposals. A deep commitment to fairness and clear-sighted realism were the foundation of our efforts which began in the mid 1960s to address the producer-handler loophole. That foundation of
fairness and realism underpins my comments today.

Members of our cooperative are suffering, just like dairy producers all over this country, from the devastatingly perfect storm of low milk prices, high input costs and lack of exports. In the Milk Equity Regulatory Bill that has -- if the Milk Regulatory -- that's a tough word. If the Milk Equity Regulatory Bill had not passed in 2006, our producers would be even more devastated than they are right now.

The passage of that bill, coupled with the administrative decision issued in February of 2006, resulted in a $3 million infusion into Arizona, into the Arizona pool each year. I can assure you that without that boost to dairy mailbox prices, the ability of our Arizona dairy industry to weather this storm would be severely threatened.

The principle which guided our efforts throughout the producer-handler hearings and the legislative efforts was a fairness that a system designed to ensure a consistent supply, milk supply, should apply equally to all those who are producing milk. UDA, along with other
processors and co-ops, successfully demonstrated that producer-handlers who don't pay into the pool ride on the backs of those who do. They gain from the loophole in the law which exempted producer-handlers on the grounds that most are small mom-and-pop operations which do not affect the market.

As we all know, producer-handlers who ship more than 3 million pounds of milk a month do not qualify for that exemption. Such large producer-handlers gain at the expense of family-owned dairy farms all across the country. We argue for the level playing field, and both the United States Congress and the Department of Agriculture supported that call for an equitable application of the marketing order regulations.

We support Proposal 1 in this proceeding, the elimination of the producer-handler provision as a preventive measure. A claim made repeatedly by producer-handlers during the hearing in 2003 and 2004 addressed the fact that the existing plants represented substantial investments. Those investments were based on anticipated profits calculated on exemptions from pool contributions. Proposal 1 would
eliminate any confusion, any miscalculation, any
doubt in the processor's mind moving forward
about costs. You build an operation that
produces more than 3 million pounds per month,
you'll be contributing to the pool.

During the hearings which led to a new
 provision in the Arizona order, UDA testified
that our members lost between 10 to 14 cents per
hundredweight over the period of January 2000
through July 2003, amounting to a total loss,
over those 42 months, of over $11.5 million. An
earlier Market Administrator computation for the
period of September 1997 through January of 1999
showed an average blend price loss for the
period of over 10 cents per hundredweight, and a
total loss to UDA members of approximately
$3 million per year.

Since 2006, when the producer-handler in
our market began paying in the pool, the blend
price has gained that 10 to 14 cents per
hundredweight and that $3 million per year.
Under Proposal 1, the individual family-owned
farms, which constitute 98 percent of the
dairies in the country, will finally have the
regulatory protection they should have been
experiencing since 1937. It seems appropriate that during a time when the state efforts to support dairy producers checkerboard our country, that this hearing offers the opportunity to bring a cohesive and equitable approach to protect dairy producers' income.

We at UDA support Proposal 2, because we are realists and we are business people. Proposal 2 would expand the exempt plant size limit from 150,000 to 400,000 pounds per month.

JUDGE CLIFTON: That was how many pounds, the upper end?

MR. ROVEY: 150,000 to 450,000.

JUDGE CLIFTON: Thank you.

MR. ROVEY: Per month. Plants of this size are too small to have a marketwide impact as independent marketers. The dairy industry has worked hard to have a marketplace where small, medium and large dairies can thrive. The same is true for the processing side of dairy economy. The exemption of small plants, which we suggest should be defined as producer-handler manufacturers no more than 450,000 pounds per month, allows them to operate in a sort of niche market that such small plants typically serve,
without undue regulation.

We support Proposal 26 for similar reasons. Proposal 26 would grandfather the current existing producers between the 450,000 pounds and the 3 million-pound limit. These are operations which have already made their investments, and each represents a small impact on the market. The producer-handler exemption has outlived its usefulness, but this grandfather exemption is an appropriate bit of live and let live. We are here today primarily to identify the proposals which we support and to provide reasons and data and background for that support.

There is, however, one additional proposal which has drawn our attention, because it merits our strong, unequivocal opposition. Proposal 25 would create individual handler pools. This, in our opinion, would be a disaster. If this proposal was enacted, bottling plants would pay their producers a Class I price and manufacturing plants would pay lower class prices depending on the product line. This will result in chaos in the marketplace, lead to the disintegration of many
dairy cooperatives, and destroy the Federal Order system.

One of the primary functions of a dairy co-op is to ensure a marketplace for its members. The demand for fluid milk is much more vulnerable to the marketplace and consumer preference. When demand drops during school holidays, for instance, the cows which produce that milk are still productive. The other classes of dairy products help to ensure there is a home for all the milk that is produced.

The protection of a stable dairy market is the purpose of the Federal Order system and the blended milk price. The proposal would have the same impact on the American dairy industry as cavalier banking and investment practices have had on the U.S. economy.

JUDGE CLIFTON: Now, that's interesting. That is an interesting comparison.

MR. ROVEY: The members of the United Dairymen of Arizona have strategically opted not to bottle milk, as it would mean competing with our long-time valued customers, and glut the marketplace. However, only one-third of our production goes to fluid milk, one-third goes to
a Class II facility, and the remainder to our
manufacturing plant, the third largest in the
country, and probably the most versatile in the
U.S --

JUDGE CLIFTON: Now, before you go on,
you read that as if it were written Class II
facility, one-third goes to a Class II facility.

MR. ROVEY: I'm sorry. It's a Class III
facility. I'm sorry.

JUDGE CLIFTON: All right. And you're
sure that the way -- read it again the way you
know it's supposed to be.

MR. ROVEY: Okay. However, one-third of
our production goes to fluid milk; one-third
goes to a Class III facility; and the remainder
to our manufacturing plant, the third largest in
the country, and probably the most versatile in
the U.S., is the -- for Class IV.

JUDGE CLIFTON: So roughly a third to
fluid, a third to Class III, and a third to the
manufacturing plant?

MR. ROVEY: Correct. Yes.

JUDGE CLIFTON: Thank you.

MR. ROVEY: It is UDA's strategy to be
creative, agile and diverse, so that when the
day comes when there is no government safety net, we can say, fine, not a problem. Proposal 25 would be a jugular wound to such a long-term strategy, and not just in our marketplace. The unpredictability of prices would make the dairy industry, already vulnerable to volatile price fluctuations, even more of a rollercoaster.

I would like to conclude with a final take-home lesson from our experience with Sarah Farms, one of our largest former producer-handlers in our Order. Hein Hettinga, founder and owner of Sarah Farms, is a remarkable dairyman, a shrewd businessman, a capable competitor, who sells Class I milk to Sams, Costco and Wal-Mart.

We buy milk from and sell milk to Sarah Farms. Our relationship is extremely cordial. We balance his excess milk and have traded technical assistance with each other. We communicate regularly, both formally and informally. The relationship between Sarah Farms, a former producer-handler, and UDA, the cooperative whose members are finally getting a fair blended price, could be the poster child for this national hearing on producer-handlers.
We believe that the Department of Agriculture owes it to every dairy farmer in this country to do the right thing and level the playing field with regard to large producer-handlers.

JUDGE CLIFTON: Thank you very much. This is a thoughtful statement and one that I'm sure will prompt a lot of questions. It looks to me like we need to have the school vacation period coincide with the lowest production from the cows.

All right. Who would like to begin cross-examination? You know they're really hungry.

Mr. Tosi, any cross-examination?

MR. TOSI: I have no specific questions of Mr. Rovey. But, Mr. Rovey, we do appreciate that you took the time to come here and offer your very well-prepared statement. Thank you.

MR. ROVEY: Thank you.

MR. RICCIARDI: I wanted to ask Mr. Rovey a question. I don't want him to feel bad, so I'll ask him.

JUDGE CLIFTON: Mr. Ricciardi, you may.

MR. RICCIARDI: Thank you, your Honor.
CROSS-EXAMINATION

BY MR. RICCIARDI:

Q. I'm Al Ricciardi. I'm here on behalf of AIDA. First of all, let me ask you some sort of general questions. Flipping to page 2 of your statement, you indicate in the second paragraph, and again you're talking about another hearing, the 131-124 hearing that occurred, and you state that UDA testified. Who is UDA in that particular sentence? Who specifically testified?

A. I don't know who testified. I didn't.

Q. You weren't there at the hearing?

A. (Shaking head.)

Q. You never attended the hearing?

A. Not to my recollection --

MR. STEVENS: Your Honor, we're not getting a verbal response.

JUDGE CLIFTON: If you nod or in some other way let him know, the court reporter doesn't know.

THE WITNESS: Okay.

JUDGE CLIFTON: Start again. You asked him was he there.

BY MR. RICCIARDI:

Q. Were you there, sir?
A. Not to my recollection.

Q. Not to mine either. You did not testify, correct?

A. Correct.

Q. You did not attend any of the days of the sessions of the hearing, correct?

A. Not to my recollection.

Q. And you were not involved at that point in presenting any testimony or information at that hearing, correct?

A. Correct.

Q. So all of the information set forth herein is something that is based upon what someone might have told you about what occurred a few years ago?

A. Correct.

Q. And who told you?

A. The CEO of our co-op.

Q. Who was that?

A. The CEO of our co-op.

Q. And what's his name?

A. It would be Keith Murfield.

THE COURT REPORTER: I'm sorry. Keith?


BY MR. RICCIARDI:
Q. He's still the CEO of your co-op?

A. Correct.

Q. He understands that there's a hearing scheduled for now?

A. Yes.

Q. He was aware and was noticed that he could provide potential testimony here?

A. Yes.

Q. And he instead decided to send you, who doesn't have any personal knowledge about what occurred, correct?

A. Yes.

Q. Okay. Who wrote this statement?

A. The staff at UDA and myself. The United Dairymen and myself.

Q. Okay. And that would include the lawyers for UDA?

A. I don't believe the lawyers were involved at all in this.

Q. So -- and I'm sorry, Mr. Rovey. So the staff would include whom?

A. Keith, our CFO. I'm trying to think of his -- Mark Hocking, M-a-r-k, H-o-c-k-i-n-g, and Francis Lechner, F-r-a-n-c-e-s, L-e -- I don't know exactly. I would have to look her name up if you need that.
Q.  Yeah, we would.  Do you know their respective positions at UDA?
A.  Keith, CEO.
Q.  Right.
A.  Mark is our CFO.  And Francis is the producer-relations individual.

JUDGE CLIFTON:  I don't want to interrupt you, but I've got to get the best spelling we can, even though it's a guess.  Mark is spelled how, your CFO?
THE WITNESS:  M-a-r-k.
JUDGE CLIFTON:  Okay.  And his last name?
THE WITNESS:  H-o-c-k-i-n-g.
JUDGE CLIFTON:  All right.  And how do you say Francis' name?
THE WITNESS:  I can give you a spelling here in just a second.
JUDGE CLIFTON:  Oh, great.
THE WITNESS:  F-r-a-n-c-i-s and L-e-c-h-n-e-r.
JUDGE CLIFTON:  L-e-c-h-n-e-r, Lechner.
THE WITNESS:  Lechner.
JUDGE CLIFTON:  And Francis, even though it's a she, she spells it c-i-s?
THE WITNESS:  (Nodding head.)
JUDGE CLIFTON: Thank you.

BY MR. RICCIARDI:

Q. And so the information that's contained in this statement came from those three individuals?
A. Yes.

Q. Can you point out to me a sentence in here that you had input to?
A. The original part where I say, "My name is Paul Rovey," and my family information and those things.

Q. So the first paragraph you have personal information, and you had input on, correct?
A. Correct.

Q. The rest of it was written by somebody else?
A. Correct.

Q. And the rest of the knowledge came from somebody else?
A. Correct.

Q. And the rest of the information that you're trying to present is from third parties who aren't here at this hearing, correct? Third people, people at UDA, not you?
A. Correct.

MR. RICCIARDI: Your Honor, I move to
strike it.

JUDGE CLIFTON: Who wants to respond? I'll start with Mr. Brosch.

MR. BROSCH: I'm sorry, your Honor. Mr. Rovey is the president of United Dairymen of America. The United Dairymen of America is an institution, and their members have the right to choose --

MR. STEVENS: Lean into the mic.

MR. BROSCH: I'm sorry. United Dairymen of America is an institution and has the right to choose who comes forward and speaks on their behalf. This is an institutional decision, this is institutional knowledge. He's the president, he has as much ability to speak on behalf of this organization as anybody, your Honor. This is -- this is the position of United Dairymen of America in the person of Mr. Rovey.

JUDGE CLIFTON: Let me hear the other objections first, Mr. Ricciardi. Mr. English.

MR. ENGLISH: Your Honor, I don't have an objection. I certainly join with Mr. Brosch. The fact of the matter is, an institutional statement --

JUDGE CLIFTON: No. I meant objections
to his motion to strike. That's what I meant.

MR. ENGLISH: Oh. Yes, I certainly
object to the motion to strike. I'm sorry, go
ahead.

MR. BROSCH: For clarification, I think I
misspoke and said United Dairymen of America.
It's United Dairymen of Arizona. Excuse me.

JUDGE CLIFTON: Thank you. Mr. English.

MR. ENGLISH: Your Honor, different
businesses have different obligations, even as
many people are coming and going in this
proceeding. United Dairymen of Arizona is
certainly entitled to speak through its
president. It's an institutional statement.

I would point out that the Department of
Agriculture's summary of the testimony of United
Dairymen of Arizona found, in that proceeding,
precisely what this witness has testified to.
But the fact of the matter is that this witness
has appeared, he is who's available, and the
statement should be admitted.

JUDGE CLIFTON: Now, Mr. Ricciardi.

MR. RICCIARDI: Thank you, Judge. Yes, a
corporation, LLC, or other entity certainly has
the right to choose who it intends to bring in.
On the other hand, that person who's chosen must have some basis and personal knowledge to be able to give the statement.

My clients, AIDA and its representative members, are entitled to a full, fair opportunity to cross-examine the basis for any statement. Tell me how in the world, when three people who are not here, who aren't sworn under oath, who I can't cross-examine, how can I cross-examine a statement? My opinion would be, Judge, you can let in the title, the testimony of Paul Rovey, and the first paragraph, and everything else should be stricken.

JUDGE CLIFTON: Mr. Beshore, did you want to speak? And then I'll hear from Mr. Brosch.

MR. BESHORE: I did very briefly. I mean, I join the objections and the motion to strike. Were your Honor to prohibit institutional testimony in this proceeding, we would have very, very little, if any, testimony to be brought here, because persons such as, for instance, just Mr. Tonak -- he's the CEO of his company. He testified to a lot of things, but not all of which he personally, you know, prepared or handled himself.
And I would say every witness --

virtually every witness, if not absolutely every

witness, is of the same nature in terms of
testifying to things that they didn't personally
prepare. The government witness -- of course,
not everybody from the government, from Dairy
Programs, is going to be required to come in
here -- who was involved in preparing exhibits,
is going to be required to come in here and
testify, but we have someone to testify about
that, and about the information that they take
from other people.

Representatives from cooperatives are
certainly capable of testifying to information
about their cooperatives. Mr. Ricciardi can
cross-examine him, and he can say, USDA, you
ought to toss it because he didn't personally
prepare it, but that goes to weight, not the
admissibility of the testimony.

JUDGE CLIFTON: Mr. Brosch.

MR. BROSCH: Your Honor, we have had a
lot of testimony today, and days before, and I
think we will have in future days --

JUDGE CLIFTON: It's very hard to hear

you. You're just too tall.
MR. BROSCH: I know, your Honor. That's what my daughter says all the time.

JUDGE CLIFTON: I didn't hear you, Dad.

MR. BROSCH: We have had a lot of testimony, your Honor, in the last few days about institutional knowledge, people, things that people know about their institutions that go back before they were born, necessarily, or they were involved in the institution. I was just looking at Mr. Tonak's testimony, which is admitted in the record. He, for example, says that Manitowoc, Wisconsin's producer cooperative was organized in 1933, that Brookfield -- that the Milwaukee Cooperatives was formed in 1916. These are things he didn't have any personal knowledge of, your Honor. He has institutional knowledge of those things.

If we were to start this charade, we would be going back through the record moving to strike all sorts of things in here. That's useful information for the Department. This goes to the weight of evidence, not to the admissibility, your Honor. This gentleman is speaking on behalf of his producers, on behalf of his cooperatives, and he's entitled to make
this testimony.

MR. STEVENS: Your Honor.

JUDGE CLIFTON: Mr. Stevens.

MR. STEVENS: I think we're going off on a track here that is not helpful to the creation of a record for the Secretary to review. If this becomes a standard, this motion to strike becomes a standard, then I think we would have to review all the testimony that has gone before. And maybe the motions haven't been made, but the same standard could be applied to all that.

And I put to you, your Honor, that the same standard would be applied to the testimony of Mr. Ricciardi's witnesses, if that's the case. I mean, in other words, if he's going to make that kind of objection, then what's to prevent any of counsel from making the same objection to all of his testimony that is of the same nature?

We weigh that testimony. It's not -- it is something that is done in every one of these proceedings. Institutional decisions are made, references are made to prior rulemakings. The prior rulemakings stand on the record. For this
gentleman to talk about what was said in a prior rulemaking, he can say whatever he wants, but the rulemaking itself is the best evidence of that, the Secretary's summary of testimony or that part of the Federal Register that puts that forth. This gentleman can say whatever he wants.

But let's not go down a road where counsel can seek to limit the testimony of witnesses on the basis that the witness did not have personal knowledge of what the institution that he is here representing is putting forth for the use of the Secretary in deciding what proposals should be amended or not.

JUDGE CLIFTON: Thank you all. I'm glad Mr. Ricciardi asked the questions he did, because I was quite surprised that Mr. Rovey had authored so little of this document. When a witness comes and says, this is my testimony, without any explanation that we in the office pulled this together, I am surprised when so little of it is authored by the witness.

I agree, however, that the objection goes to the weight rather than the admissibility. Had I known that this was a common way of
putting these statements together, I would have, from the very beginning, asked more questions about who authored the statement. That would have been my approach, Mr. Stevens. And I know you look at me as if I'm unrealistic here, but I believe most of the statements that we have heard have been authored, for the most part, by the people who delivered them.

Now, if someone comes from the Department of Agriculture of a state, I know they relied on their people. If someone comes from USDA, I know they relied on their people. I didn't realize how heavily Mr. Rovey had relied on his people, but now I know, and it's fine with me.

I have looked through every paragraph, and there is nothing here that surprises me, knowing that it is the position of his organization rather than just him personally. And he did speak throughout -- what is it, the United Dairymen of Arizona? That's his organization.

Now, with many of the witnesses, we've had to ask, now, in this paragraph, who does the "we" mean? Is this "we" my family? Is this "we" the dairy farmers in my milk marketing
Order? Or is this "we" all dairy farmers? And I understand Mr. Rovey's statement to be "we," the United Dairymen of Arizona. And so it is proper for it to be the statement that he presents on behalf of that organization.

So I do -- well, has it been -- it hasn't been moved? You moved to strike it, but we haven't had it -- it hasn't been moved into evidence yet, has it? Okay. I would entertain a motion. Mr. Brosch.

MR. BROSCH: Your Honor, I move Exhibit 32 into evidence.

JUDGE CLIFTON: Any objection?

Mr. Ricciardi.

MR. RICCIARDI: I do not intend to restate, in my entirety, the basis for my objection. All I will say is, to the extent it's allowed into evidence, I reserve my client's rights to cross-examine the basis for any of these statements. If it's allowed in, then the due process rights have been implicated, and we do not waive them. And we intend to reserve them to the fullest extent of the law.

JUDGE CLIFTON: Do you mean you're going
to subpoena the people who contributed to its production?

MR. RICCIARDI: I don't know what I'm going to do yet, Judge, but I'm just reserving my right with regard to that issue, because I think it's significant.

JUDGE CLIFTON: Well, I think your only opportunity to cross-examine is Mr. Rovey. Have you done that sufficiently?

BY MR. RICCIARDI:

Q. Mr. Rovey, if I ask you questions about everything other than the first paragraph of your statement, would your answer be that the remainder was prepared by three people at UDA that are not here today?

A. Yes.

MR. RICCIARDI: I've done what I can do, Judge.

JUDGE CLIFTON: That doesn't mean he can't speak to them.

MR. RICCIARDI: Judge, I'm not asking another question, because I don't have -- let me get back to the microphone.

Judge, to ask me to ask the witness, who has no basis to respond to a statement he didn't prepare, that's going to be given under oath, is
the height of absurdity. I have nothing further
I can ask, and I am done.

JUDGE CLIFTON: You can. You can ask
about everything in here.

MR. RICCIARDI: Your Honor, I'm not going
to ask a question.

JUDGE CLIFTON: All right. That's your
right.

MR. RICCIARDI: I know it is.

JUDGE CLIFTON: Okay. Good. Any other
questions of this witness?

Mr. Carroll.

CROSS-EXAMINATION

BY MR. CARROLL:

Q. Good afternoon. I'm John Benjamin
Carroll with the firm of Carroll & Carroll Lawyers, PC,
Syracuse, New York, and I've had some experience in your
market. I wanted to ask you if you remember a
producer-handler by the name of Rasmussen in your days.

A. I've heard of the name. That's it.

Q. Or Dades, Charles Dades?

A. No.

Q. They're all producer-handlers I
represented. Are those people in business today, to
your knowledge?
A. No.

Q. I don't believe they are. And isn't it so, then, producer-handlers can come and go in business just like any other business?

A. Yes.

Q. Now, directing your attention to the Class I sales that were available in Arizona before there was any change in Mr. -- I'm not even going to say the last name, but the dairyman who was involved, can you tell us the difference between the Class I sales in the market before his regulation and the Class I sales in the market after his regulation?

A. The Class I sales would have changed by population, by consumption, per capita consumption.

Q. In other words, they're subject to a lot of factors?

A. A lot of factors.

Q. Okay. Are you the only cooperative dairyman's association in Arizona?

A. Yes.

Q. And if I were a farmer in Arizona, would I have to belong to your organization in order to market my milk or --

A. No.

Q. Okay. And I could draw -- I could join
another co-op?

A. You could market in some other co-ops in California. We have those producers.

Q. Okay.

A. We don't have the producers as UDA. Those producers exist.

Q. But they would have an opportunity to market in California, you say?

A. Correct.

Q. But not in Arizona?

A. Correct.

Q. I'm interested in your comment that you're trying to prepare a safety net as a matter of policy. Can you tell me what you mean by "safety net"?

A. As I stated in there, it says that we have a variety of products that are versatile and different products that we can market.

Q. Well, what does "safety net" mean? I think I know what the words mean, but how do you mean them?

A. My explanation of safety net would be that I would have opportunities to continue to market my product.

Q. Right. And were you considering the fact that your organization draws from the United States --
gets United States governmental support on its manufactured products?

A. Indirectly.

Q. And can you tell us how much a year that amounts to?

A. I don't have any idea.

Q. Have you ever heard or discussed it in any way?

A. No.

Q. No one has ever bothered to tell you that?

A. No.

Q. And what was your title again? I'm sorry.

A. I'm president of the United Dairymen of Arizona.

Q. Are you a farmer, yourself?

A. Correct.

Q. Okay. And you hire people to do work like that, I take it?

A. Correct.

Q. Okay. And you never bothered to ask them how much money the government was paying to keep you in business?

A. No.
Q. Do you know the ratio between Class I and Class III in your organization -- or in your market, really? In other words, do you know what the percentage is for manufactured as opposed to Class I sales?

A. As I stated, it's approximately 30 percent Class I, 30 percent Class III, and 30 percent manufactured. It's 33 percent on all of those.

Q. Right. So your Class I is really, roughly, one-third of the market?

A. Correct.

Q. Are you producing for Class I? I mean, is that your main goal, and all this other is surplus to that?

A. We have to have additional milk to balance our customers' needs.

Q. I understand that. Do you need two-thirds to balance their needs?

A. It's not balancing. The Class III is a market, it's a viable market, as well as the manufacturing is a viable market, of which we are supplying that market.

Q. And what goods do you manufacture?

A. Milk protein concentrate, skim milk powder, nonfat dry milk.

Q. And to whom do you sell that?
A. A variety of customers.
Q. Do you know who the major customers are?
A. I don't have those names.
Q. Okay. Do you sell it to the United States government?
A. No.
Q. Okay. Now, can you tell me if your safety net concept isn't related to the fact that someday you may not have these governmental subsidies?
A. Your Honor, I don't understand that question.
Q. Okay. Well, you said that, you know, that you have a general idea that there's a -- your program is a safety net, right?
A. (Nodding head.)
Q. And is it a safety net against the possible change in the legislation in the future when the American public gets tired of paying for all this surplus and the government cuts the money? Are you making preparations for that day?
A. We are making a variety of products that will allow us the opportunity to market a variety of those products.
Q. That is directly on your own?
A. Correct.
MR. CARROLL: All right. That's all.

Thank you, sir.

JUDGE CLIFTON: Thank you, Mr. Carroll.

Is there any other cross-examination?

Mr. Tosi.

CROSS-EXAMINATION

BY MR. TOSI:

Q. Hello again, Mr. Rovey. I'm kind of confused after all of the what's your position and what isn't. The first paragraph is personal information about you?

A. Correct.

Q. The balance of this statement is you're speaking on behalf as president of UDA?

A. Correct.

Q. And you're representing the opinions and positions of UDA?

A. Correct.

Q. In some of your other work, does the UDA staff prepare things for you because you're the president, and you can ask them to do it, and you decide whether you like it or not, if you're going to use whatever they prepare?

A. Yes, sir.

Q. All right. I just wanted to make sure
that this is being offered as the position of UDA and you were nice enough to tell us something about yourself?

A. Correct.

Q. Okay. At the bottom of the first page of your testimony, it continues on to page 2 at the very top, and I'm left with the impression that you think Proposal 1 is prosing to set a cap at 3 million pounds?

A. That's correct.

Q. Okay. If Proposal 1 said that they were proposing to eliminate the producer-handler provision, would you still be in support there of Proposal 1?

A. Maybe I read it wrong.

Q. Let me ask it a different way. Do you support the proposal that seeks to eliminate the producer-handler provision in all Federal Orders?

A. As we stated in here, if they had the producer-handler provision, that their cap would be at 3 million pounds.

Q. Okay.

JUDGE CLIFTON: I agree with you, Mr. Tosi. At the top of page 2, the statement reads "Proposal 1 would eliminate any confusion, any miscalculation, any doubt in a processor's mind" going "forward about costs: You build an
operation that produces more than
3 million pounds per month," and "you'll be
ccontributing to the pool."

MR. TOSI: That's what causes the
confusion, your Honor. Part of the paragraph is
clear that it supports the elimination of the
provision, and in the next breath it seems to
suggest that the Federal Order program should
keep the producer-handler provision, or it may
even suggest that the exempt plan provision be
increased to 3 million pounds, however you want
to characterize some sort of limit that's going
to be placed on when the order -- you know, how
much the Federal Order program can tolerate
certain entities being exempt from pooling and
pricing provisions.

JUDGE CLIFTON: Yeah. Because of what
the paragraph about three paragraphs down, where
it directly evaluates Proposal 2, I don't think
it confuses Proposal 1. I think it says two
different things. It says eliminating the
producer-handler, and then it says knowing that
the producer-handler will be limited to
3 million pounds per month. It says both those
things.
So I agree with you that that's not clear, that maybe perhaps what it meant is Proposal 1 and Proposal 26 combined, but not really, because it seems to address people who might in the future become processor-handlers, not just those grandfathered in. So it is not a clear paragraph. And, Mr. Rovey, you should have done it yourself.

THE WITNESS: Sorry.

MR. TOSI: I think at this point, I'm just adding confusion that -- I think you can just leave it as it is.

JUDGE CLIFTON: Mr. Brosch.

MR. BROSCH: Is everybody done on cross, your Honor?

JUDGE CLIFTON: Yes. Everyone is done.

MR. BROSCH: May I do some redirect?

JUDGE CLIFTON: You may.

MR. BROSCH: I apologize, but Mr. Tosi made me do it. There's no doubt about it. I'm going to ask your Honor if your Honor would give Mr. -- I want to clarify this question that Mr. Tosi has asked. Could your Honor give him Exhibit Number 23, please?

JUDGE CLIFTON: Yes. Page 15?
MR. BROSCH: Page 15. We're going to go through page 15 again.

REDIRECT EXAMINATION

BY MR. BROSCH:

Q. I'm giving you a copy of Mr. -- Dr. Cryan's testimony that was given the other day. And on page 15, you will see a copy of the legal language that National Milk is proposing to implement, its three proposals. That is Proposal 1, Proposal 2 and number 26. Those three are being offered as a package of proposals. Now, does United Dairymen of Arizona support National Milk's position with respect to Proposals 1, 2 and 26?

A. Correct.

Q. All right. If you would please look at the language, I want to point out there, are you aware that because of the proposals, there's going to have to be some change in the terminology in the regulation?

A. Yes.

Q. And if you would please look at the copy of the -- of that proposal, and look at the language of the proposed regulation, and the strikes for a moment, just study it for a minute, okay?

A. Okay.

Q. Okay. Having looked at that, are you
aware that National Milk's Proposal 1 is to strike in this regulation the reference to the term "producer-handler"?

A. Correct.

Q. Are you aware that as part of Proposal 2, they're going to -- they propose to change the definition for exempt plant, which currently exists at 150,000 pounds, and raise that to 450,000 pounds?

A. That's correct.

Q. And are you aware that with respect to their Proposal 26, they propose to add an additional definition of exempt plant, which would be defined as a plant that had been a producer-handler during -- operated during the 2008 period under a Federal Order, and which served -- which currently sells 3 million pounds or less in a month under plant -- products that are uniquely branded?

A. Correct.

Q. All right. And with that -- now, is United Dairymen of Arizona in support of those three proposals as presented by National Milk?

A. That is correct.

MR. BROSCHE: Thank you, Mr. Rovey. No further questions, your Honor.

JUDGE CLIFTON: All right. Please go to
the bottom paragraph on page 1 of your exhibit, Mr. Rovey. And looking at that whole paragraph, and as it continues on to page 2, read to me the way you want that paragraph to be understood as representing the position of your organization.

THE WITNESS: I'm going to say it in just plain words, that we would change the wording of the producer-handler wording to create it so that an existing producer that was producing in 2008 would be able to produce up to 3 million pounds of milk.

JUDGE CLIFTON: So a producer-handler, who was a producer-handler in 2008, would be allowed to continue, though, with a new name?

THE WITNESS: Correct.

JUDGE CLIFTON: And would be able to keep an exemption up to 3 million pounds per month?

THE WITNESS: Correct.

JUDGE CLIFTON: That clarifies it for me. All right. Is there any objection to the admission into evidence of Exhibit 32?

MR. RICCIARDI: Your Honor, do I have to get up there to make my objection?

JUDGE CLIFTON: I can't hear you, but yes, you do. That's why, because I can't hear
you.

MR. RICCIARDI: I'm sorry, Judge. I was back there trying to get something. Yes, your Honor, I do, I renew the objection that I made as part of the motion to strike, without articulating it again.

JUDGE CLIFTON: Thank you. That was very efficient. Over objection, I do admit into evidence Exhibit 32.

Mr. Rovey, thank you. You may step down.

THE WITNESS: Thank you.

JUDGE CLIFTON: And I need to retrieve that if you will hand it to me.

Thank you. Good. Does everyone agree this is a good time for a lunch break?

MR. MILTNER: Absolutely.

JUDGE CLIFTON: Absolutely. So, let's see. It's 1:42. I hope you can still get lunch. Mr. English.

MR. ENGLISH: I just want to say that Mr. Buelow, I believe, is the next witness up.

JUDGE CLIFTON: I'm going to take Mr. -- I'm going to take the dairy farmer.

MR. ENGLISH: All right.

JUDGE CLIFTON: I'm going to take
Mr. Dakin.

MR. ENGLISH: I understand he's a dairy farmer, although I would point out that Mr. Buelow has been on the list since Monday, but I understand. I'm just going to say that I need to get Mr. Buelow on after that.

My next concern is what we have with Mr. Kastel versus Mr. Gary Lee. It turns out Mr. Lee has a restriction, because the pilot of his plane is on a time restriction, so he can't stay till 9:00 or even past 7:00. I'm trying to find out. He has to be airborne by 7:00 p.m. if he's going to go on. He can come back next week. It's not ideal. He flew in especially for today to handle this, so it's not ideal.

We are prepared to be somewhat flexible, but we would like to know now, because with thunderstorms, it may be easier for him to leave. I just want to understand what the issues are. I don't know how long Mr. Kastel's statement is, I don't know how long the cross-examination may be. Mr. Miltner may have some idea of that.

MR. MILTNER: I don't have anything on Mr. Kastel. But I did speak with Mr. Dakin, and
his flight is at 6:00. So we would appreciate --

    JUDGE CLIFTON: He has to leave by at least 4:00.

    MR. MILTNER: We would appreciate, your Honor, if we did him right after lunch.

    MR. ENGLISH: And I'm willing to concede.

    MR. MILTNER: Thank you. And I think --

    JUDGE CLIFTON: Let me ask, Mr. Kastel, would you come forward, please? I know you must be exhausted. Are you willing to yield to Mr. Buelow? And I have known, from the beginning of the hearing, that he would testify.

    MR. KASTEL: Your Honor, I don't know what the implication is. Is that the gentleman who has the pilot waiting?

    JUDGE CLIFTON: Yes. And --

    MR. ENGLISH: No. Mr. Lee is the one with the pilot.

    JUDGE CLIFTON: Oh. So, I got that mixed up.

    MR. ENGLISH: I have two witnesses, your Honor. I've already given away one.

    JUDGE CLIFTON: You're not giving away Mr. Wilcox. I can still call him. Don't give
him away. I want to do an even dozen.

MR. KASTEL: As I understand it, your Honor, there's a dairy farmer that's up --

JUDGE CLIFTON: Mr. Dakin will be first.

MR. KASTEL: -- on deck here. I don't have a pilot waiting. I pilot my own automobile, and I don't have the flexibility of coming back next week. And it would be a -- quite a disadvantage to extend this period over today. So if I could testify after the next witness, that would --

JUDGE CLIFTON: Let's see. If I did that, it would Dakin, then Buelow, then Kastel, then Lee.

MR. ENGLISH: And so you understand, Mr. Lee has to be to the airport by 7:00 p.m.

JUDGE CLIFTON: Okay. We'll make sure it happens. All right. Please, it's about 1:45. Please come back at 2:45.

(A luncheon recess was take from 2:46 to 2:49.)

JUDGE CLIFTON: All right. Let's go back on record. We're back on record at 2:49, and I have a witness in the witness chair. And I'll ask him to identify himself. Would you please
state your name and spell it?

MR. DAKIN: Jerry Dakin, J-e-r-r-y, Dakin, D-a-k-i-n.

(The witness was sworn.)

JERRY DAKIN

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

DIRECT EXAMINATION

JUDGE CLIFTON: Now, speak that into the microphone just like you did.

MR. DAKIN: Yes.

JUDGE CLIFTON: Thank you. The best way to proceed, I think, Mr. Dakin, is to tell us enough about yourself so we'll know how you fit into the milk universe.

MR. DAKIN: Yes. I'm a third generation dairy farmer, right now currently milking a little over 1,400 cows. We're in southeast Florida. We're one of the last farms to Miami. We are raising about 1,000 heifers. Crops, we do about 600 acres of corn. We have 2,000 acres of grass for grazing, and hay that we do.

And then in 1997, I split off from my brother and -- with 230 cows, and working at my dad's place, built my herd up to 750 cows. In
2004, I built the new dairy I'm at, and I built it a little bit at a time. When we had money, we built, and we've been able to get to the 1,400 cows now.

In 2006, we started a compost, doing composts and selling manure on the -- I mean, selling our compost on our farm. Here in the fall of October 2008, we started our ag. tour. Since then, since the end of October, we've had 8,000 people come through our ag. tour, a new venture we're doing. We built -- in 2006, we built our processing plant, and we opened up in March, a month-and-a-half ago in March. We are bottling our own milk -- I mean bottling some of our milk.

We're currently a DFA member. And, you know, taking the milk to the bottler, it's always been a dream of ours. I mean, it's just -- you know, the day that that milk came off that line, that was a proud day. I mean, there was a lot that went into that. And, you know, this is -- with producer-handler, it's always been a thing for us.

You know, when we worked our business plan, this was an opportunity for us to get into
this, to help pay to keep this, to process it. 
And then -- you know, and the other thing is to 
be able to control our destiny. That's one of 
the biggest things we're looking at. We're the 
last ones down there in the southeast, and, you 
know, it's not easy farming down there. And 
that was another reason, and for the younger 
generation coming into this, you know, to be 
able to create some niche markets.

In the past, the milk prices, you know, 
with the yo-yoing, going up and down and 
everything, it's tough to deal with this. I 
mean, just here in the last four months, I mean, 
that milk price dropped down. I mean, it was 
$170,000 lost income to our farm. I mean -- and 
I'm right there with the farmers on this, but, 
you know, it goes all back to marketing. I feel 
like sometimes we can market these things better 
ourselves, you know, with me having the ag. 
tours and just being down in the community. I 
mean, it's amazing the people we're bringing 
into that farm now, I mean the education that 
we're giving to people.

And, you know, to be able to milk that 
cow and, in four to six hours, put it in a
bottle is pretty amazing. I mean, it's just -- people love it. And, you know, with it being local, and the local sustainability, the specialty markets. I mean, we're looking into -- you know, and we're focusing on selling a premium milk and a premium yogurt and other products, but, I mean, we're just -- we're not looking to being as just a cheap man just throwing the stuff out there on the block. I mean, we're taking pride in what we're doing.

And, you know, the thing -- one of the things is, your average food travels 1,500 miles to get to you. And with the energy costs going up and everything, you know, we keep getting this western milk and everything coming out all the way. I mean, I'm looking at how we can stop that and still keep our culture in our community. You know, another thing we're looking at is grazing, going into the grazing. There's just a lot more opportunities.

And then the decrease in farmers, dairy farmers. I mean, we keep losing them, you know, and this is just another way for me to stay in this. And, you know, we talk about the producer-handler, I mean the producer-handlers
disrupting the milk market. Just in the last week here, Winn-Dixie had their milk for 2.50, Publix was 2.69, Wal-Mart 2.59. I'm selling it for the distribution for 2.60, and I'm selling it on my little farm still for 2.99. I don't see where I am disrupting the milk market at all.

And, you know, it's the -- and from my plant -- from the plant -- from the dairy to the plant, it's about a $3 to $4 spread. And that's pretty much it.

JUDGE CLIFTON: Now, explain that part to me, the $3 to $4 spread from the dairy to the plant.

MR. DAKIN: From what -- from the check I get as a farmer, and then I pump it 100 feet, and then the plant pays a different price to the co-op.

JUDGE CLIFTON: And that is a plant -- you're talking about a plant that is not your plant?

MR. DAKIN: Yes, ma'am, it is my plant.

JUDGE CLIFTON: That's your plant? Okay.

MR. DAKIN: Yes, ma'am. It all sits on 320 acres, the farm.
JUDGE CLIFTON: All right. So the added value by processing it yourself is $3 to $4?

MR. DAKIN: $3 to $4 is what I'm paying the co-op for -- to -- just to handle this -- to handle this. And I've only been in it for a month-and-a-half, so I don't know exactly -- you know, I don't know all the -- everything about it right yet. I mean, I'm here to stand here for the producer and the handler. I mean, this has been an option for me just to keep open. It may not be the best thing for me, but, I mean, I'm here to just -- I mean, right now, I mean we're looking at it being an option for us to be able to have this.

JUDGE CLIFTON: So what was the first month in which you were recognized as a producer-handler?

MR. DAKIN: Right now, I'm not a producer-handler yet.

JUDGE CLIFTON: Okay. But you said you did start processing in March?

MR. DAKIN: Yes, ma'am.

JUDGE CLIFTON: Of 2009?

MR. DAKIN: Yes, ma'am.

JUDGE CLIFTON: All right. And what do
you have to do to gain producer-handler status?

MR. DAKIN: I would have to be able to
sell all my milk.

JUDGE CLIFTON: Okay. So your milk --
you don't have control over the eventual
disposition of your milk at this time?

MR. DAKIN: No, ma'am. Not at this time.

JUDGE CLIFTON: I see what you're saying.
So what you're in favor of is what?

MR. DAKIN: To be able -- a 3 million --
a 3 million-plus -- anything -- a
3 million-pound exemption, and anything over to
pay into the pool.

JUDGE CLIFTON: All right. Let's see
now. Do you have any other things that come to
mind right now before other attorneys, other --
whether attorneys and other parties begin to ask
you questions?

MR. DAKIN: I guess the other thing is,
you know, I was up there listening just -- and,
you know, they talk about the producer-handlers.
And, you know, it takes a special person to be a
producer-handler, to go out there and to build a
bottling plant there and to be able to go out
there in the marketplace and market the milk and
everything.

I mean, I look to producer-handlers as some of the wisest people out there in the dairy industry. I mean, they're promoting the products out there. And, you know, sometimes, to me, sometimes the producer-handler, they know what the consumer needs. Sometimes we're getting so big that the consumer doesn't have any control over that.

JUDGE CLIFTON: The consumer doesn't have any control over?

MR. DAKIN: Well, I mean, if we keep -- if we don't have any producer-handlers, there's just -- how I guess -- I guess how would I say it? I mean, there's just special niche markets out there, and I think the producer-handlers can handle -- would be able to handle the markets better than the bigger industries.

JUDGE CLIFTON: I'll open the floor for cross-examination.

Mr. English, would you begin?

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Good afternoon. My name is Charles English. I represent a coalition of fluid milk
processors, all of whom are subject to the Federal milk market regulation. I won't keep you very long, sir. And if I ask you any questions you don't want to answer for confidentiality reasons, you're certainly welcome not to answer them.

I just want to be clear. Before March of this year, you were not operating the processing plant, is that correct?

A. Yes, sir.

Q. And in March of this year, did you qualify as an exempt facility under the Federal Order?

A. No, sir.

Q. So does that mean that for the month of March you were required to make a payment to the producer settlement fund for Order 6 --

THE COURT REPORTER: I'm sorry. I lost your question.

BY MR. ENGLISH:

Q. Were you required to make a payment to the Producer Settlement Fund for Order 6 for the month of March?

A. The DFA, my co-op, made the payment. I think so. You know, to my knowledge, I mean, we paid into the Federal Order, and DFA received the money. And out of the processing, the check we sent as a processing
to the DFA, they took the Federal money out of that to send to the Federal Order.

Q. So there's -- so I understand this correctly, you sent a check to Dairy Farmers of America?
A. Yes, sir.

Q. And then your understanding is they sent that on or accounted for it to the market industry?
A. Yes.

Q. But you literally had to write a check, whether it was to DFA or the Market Administrator, but your understanding, it was a check for the processing charges, because you were operating a plant for the month of March, correct?
A. Yes.

Q. And it is your understanding that if you become a producer-handler, that you will no longer have to write that check?
A. Yes.

Q. And that your model would like to not have to pay that check, correct, that that money that you're having to pay right now, you would just as soon not have to pay, correct?
A. Yes.

MR. ENGLISH: That's all I have. Thank you.
JUDGE CLIFTON: Mr. Carroll.

CROSS-EXAMINATION

BY MR. CARROLL:

Q. Is it Mr. Dirkin, is that right?
A. Dakin.

Q. Dakin, thank you. You and I have never met. I think this is the first time I've seen you, and I'm sure it's the first time you've seen me, but I've represented producer-handlers all over the United States for 40 years, and some in Florida. Do you remember McArthur's Dairy? Were you in business then?
A. Yes, sir. My father was.

Q. And it was a large, large producer-handler?
A. Yes, sir.

Q. All right. Now, what part of Florida are you located in?
A. Myakka, Florida, 60 miles south of Tampa.

Q. And in that area, do you have a lot of dairy farms?
A. No, sir. We're the last -- our family is the last three dairies in the county. There used to be 38 dairies in that county.

Q. And what's the name of your county?
A. Manatee County.
Q. Manatee County?
A. Yes, sir.
Q. I just came back from Florida, and I bought a book on manatees called The Flying Manatee. Did you ever see or hear of that book?
A. No, sir.
Q. Yeah? Well, they're selling it. I want to tell you, number one, that in our book, you're welcome. But you're not welcome in the book of the milk monopolists of this country, the big processors, the big agricultural co-ops --
MR. ENGLISH: I object.
BY MR. CARROLL:
Q. -- that brought people -- they brought people here --
MR. ENGLISH: Your Honor --
JUDGE CLIFTON: Mr. Carroll, let me hear the objection.
MR. ENGLISH: Your Honor, I didn't even begin to hear the question there. What I was hearing was a speech that was intended in some form as testimony, and that's not appropriate. I object to the discussion that is in the form of testimony by an attorney at the lectern.
MR. CARROLL: I'll withdraw the question,
your Honor.

JUDGE CLIFTON: Thank you.

BY MR. CARROLL:

Q. Do you understand that the proposals in this hearing put out by the National Milk Producers Federation and the milk dealers together, both together, are to grandfather any producer-handler who had the designation at the time of this hearing notice, but everybody else, like you, can never be a producer-handler? Do you know that?

A. Yes.

Q. And you approve of that?

A. No.

Q. And why do you object?

A. I object, because I think everybody ought to have the opportunity to be able to go out there and to be able to do this. I don't object to the big companies going out there buying dairy cows and opening dairies up. I mean, I'm not there to stop them from doing that.

You know, the thing about it is, you know, I'm out there selling my compost. I mean, is there going to be one day where everybody is going -- all the compost people are going to be able to get together and tell me that I won't be able to sell my
compost, I'm going to have to give them some money to be able to sell my compost?

Q. And you came here from Florida on your own?

A. Yes, sir.

Q. You don't have any attorney?

A. No, sir.

Q. And you don't have any milk market expert?

A. No, sir.

Q. You know, these people hire milk market experts?

A. Yes, sir.

Q. They pay them, I assume, good money?

A. Yes, sir.

Q. And you don't have that?

A. No. I pray a lot. I got God here.

Q. Well, I think you're doing pretty well. I think you're doing pretty well. Now, how about this plant that you just built? Did that cost you any money?

A. Yes, sir.

Q. How much did it cost you?

A. Right at $2 million.

Q. Right. And the milk that you have, that comes from your cows at the present time?
Q. And if you were a producer-handler, would you largely operate that way, with your own milk going through your own plant?
A. Yes, sir.
Q. Do you have a store on the farm?
A. A farm store.
Q. A farm store?
A. Yes, sir.
Q. How big is that store?
A. It would be probably 700 square feet.
Q. Okay. Did you make these investments on the premise that you could be a producer-handler if you otherwise qualified?
A. Yes.
Q. And if they grandfather only the existing producer-handlers, and you're not a producer-handler, what's going to happen to that investment?
A. It's going to be costly.
Q. I take it you borrowed to do it?
A. Yes, sir.
Q. And I take it the creditor doesn't want to know whether you're a producer-handler or an exemption or not, right?
A. No. They don't ask that question.
Q. Yeah. They don't. Now, I want to ask you about your family. Do you have children?

A. Yes, sir.

Q. How many do you have?

A. I have one daughter and one grandbaby.

Q. And how old is your daughter?

A. My daughter is 21.

Q. Right. Do you have any hopes that she could carry on your business?

A. Yes. I mean, I have -- there's 14 nephews. And the younger generation -- I keep seeing it, the younger generation isn't getting into this business, because it's tough. And if we don't make opportunities where the younger generation can take an opportunity to get into it, then, I mean -- I mean, I've been fortunate and been blessed that I've been able to do well in the dairy industry. But, you know, I want the opportunity for them, too.

Q. Right. And you want it for everybody else, too?

A. Yes.

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

JUDGE CLIFTON: Thank you, Mr. Carroll.

Next?
BY MR. MILTNER:

Q.  Good afternoon, Jerry. We had the opportunity to have lunch together and talk a little about your operation. And you mentioned a couple of things to me, and I wanted to make sure that you had a chance to talk about them here if you choose.

A.  Yes.

Q.  We were talking about the size of your farm and the size of your family's farm that you grew up on. Your farm now, I think you said, had about -- was it 1,200 cows?

A.  1,400.

Q.  1,400 cows. That's a large farm, is it not?

A.  To people, it is, yes.

Q.  But in relation to farms in Florida, how is that farm?

A.  The average size of the dairies in Florida is about 686 cows.

Q.  So it's bigger than average, but -- and I wrote -- I jotted this down when you said it. You said you've got to be big to make it down there?

A.  Yes.
Q. How many cows do you think you have to have to be a viable dairy farm in Florida in 2009?

A. The biggest trouble that we're having is the environmental. I mean, the environmental costs, it's eating us up so much, and it's costing so much to pay into this. It used to be, you know, we could make real good on 400 cows. And then it moved to -- I mean, here, four or five years ago, the most money-making dairy was about 800 cows. And that has moved up, because our costs has gotten -- is costing so much more.

Q. So the expense of making sure you fully comply with environmental regulations requires you to have additional cows to offset those, the cost of compliance?

A. Yes. I mean, with the CAFO -- I mean, we have to have a CAFO, and then there's so much into it, you know, to get the right number. I think that's a loaded question. I don't -- everybody is different.

Q. I wasn't trying to load a question, but I wanted to make sure that you had explained that, at least in your experience, you need to have a larger farm to be viable in Florida. Is that accurate?

A. Yes. I mean, with 1,600 cows, that's gave me the time to come here today and testify.
THE WITNESS: A confined animal.

MR. MILTNER: It's a CAFO, C-A-F-O.

JUDGE CLIFTON: Oh. It stands for confined animal --

MR. MILTNER: Feeding operation.

JUDGE CLIFTON: Feeding operation?

MR. MILTNER: Yes.

JUDGE CLIFTON: And that's an environmental requirement?

THE WITNESS: Yes, ma'am.

BY MR. MILTNER:

Q. One of the proposals that's offered here would expand or increase the limit of any exempt plant to 450,000 pounds per month. In other words, if your volumes were below 450,000 pounds a month, you would be exempt, just as a producer-handler is today. Do you have an opinion, based on your experience in designing your plant and being a dairy farmer in Florida for better than 30 years, as to whether a plant of that size is viable as a start-up?

A. It's not. I mean, 450,000 pounds -- I mean, you've got to be efficient. I mean, that's why we're milking more cows. We get more efficient all the time. You know, it's just not an efficient size.

Q. Either as a farm or a plant?
A. As a farm or a plant.

Q. You also -- I wrote down another phrase you had said. You said there's more milk to be sold out there. What do you mean by that?

A. Being -- you know, at times, I get upset with our promotion, because there is so much -- there's just so much opportunity out there. And there's -- the smaller niche market, the -- I mean, the big processors, they're not going to go after them markets. I mean, it's just -- the specialty products out there that can be -- that could be sold.

It's like Latin yogurt. Miami is the number one Latin market in the United States, and there's nobody going after it. I mean, I pay into my promotion board, and, you know, for my ag. tours, I mean, I've gotten four posters, and I've paid in over $50,000 to this. And, I mean, it's just -- you know, I mean, sometimes you got to stand up and get rid of these politics.

Q. They're nice posters, though, aren't they?

A. Yeah.

Q. I apologize. That was a side note. Is it your vision for your plant to find new customers for Class I products as opposed to
competing for existing Class I sales?

A. Yes. I mean, I'll give you an example. A guy -- a lady was in the office yesterday, and her husband hasn't drank milk in four years. And they were doing a taste test, and he tried it. And his wife is driving 14 miles out there to get milk from my farm. I mean, it might be -- I mean, I think my milk is better. You know, when you bought it -- when you can take it from the cow in four hours and put it in a bottle, that's a pretty neat niche.

MR. MILTNER: I don't have anything else.

Thank you. Thank you, Mr. Dakin.

JUDGE CLIFTON: Thank you, Mr. Miltner.

Who will go next?

Mr. Tosi.

MR. TOSI: We have no questions, your Honor. Thank you, Mr. Dakin, for coming. I always appreciate hearing you.

JUDGE CLIFTON: You made your point very well. Thank you. You're welcome to add anything else if there's anything else you've thought of.

THE WITNESS: No, ma'am. I just appreciate the opportunity to come here today.

JUDGE CLIFTON: Thank you.
MR. ENGLISH: Mr. Buelow.

JUDGE CLIFTON: Mr. Buelow will be next.
If you would approach, Mr. Buelow.
I'm going to mark Mr. Buelow's testimony
as Exhibit 33. That's 33.
(Exhibit 33 was marked for
identification.)

MR. ENGLISH: Thank you, your Honor. We
put these out this morning.

JUDGE CLIFTON: Mr. Buelow, would you
first state and spell your name?

MR. BUELOW: James Buelow, James,
J-a-m-e-s.

JUDGE CLIFTON: Talk right into that mic.

THE WITNESS: Sorry.

JUDGE CLIFTON: Thanks.

MR. BUELOW: Buelow, B-u-e-l-o-w.

JUDGE CLIFTON: Thank you.

(The witness was sworn.)

JAMES BUELOW

of lawful age, being first duly sworn, was examined and
tested as follows:

DIRECT EXAMINATION

BY MR. ENGLISH:

Q. Good afternoon, Mr. Buelow.
Good afternoon.

You have a prepared statement?

Yes, I do.

It's been marked as Exhibit 33?

(Nodding head.)

Correct?

Correct.

And it was put out in the back early this morning, correct?

Correct.

And we passed out other copies to the court reporter, to your Honor, and to the government.

Mr. Buelow, would you proceed with your statement?

Yes. My name is James Buelow, and I reside at 146 Clizbe Avenue in Amsterdam, New York, 12010. I have spent all my life, so far, in the dairy industry. I was born and raised on a 40-cow Jersey farm in western New York. At the age of 18, I purchased my own dairy farm in western New York, and operated this 60-cow dairy farm for approximately 20 years.

Then I went to work for the National Farmers Organization for the next 17 years. Most of that time, I was responsible for marketing members' milk, including overseeing the payment of the producers and filing the monthly MA reports and other reports that
go along with it. My geographic area of responsibility increased over the years until it included all the areas of the Northeast, Ohio, Michigan, Indiana.

For the last 10 years, I've been employed by a company named Worcester Creameries. Worcester Creameries is a family-owned business. Worcester Creameries is the supply arm for three major fluid plants, all in New York state. Worcester Creameries has about 200 producers and buys the rest of the milk needed for our plants from cooperatives. These plants are Elmhurst Dairy in Jamaica, New York, New York City, which is the only surviving fluid milk plant in New York City.

The second is Mountainside Farms in Roxbury, New York, which is a unique plant in that it operates as if there were three separate plants all under one roof. The plant packages organic, kosher and conventional milk. Obviously, none of those three products can touch each other. That's why I say it operates as three separate plants.

The third plant, owned by the Schwartz family, is Steuben Foods in Elma, New York. Elma is just a few miles south of Buffalo. This plant processes many food items, including organic and conventional extended shelf life milk.
Today I'm here to testify on behalf of all four of these milk businesses. I might add, I am also the vice president of Northeast Dairy Foods, Inc., which is a trade organization, primarily of milk plants in the Northeast.

Before I get into the specifics of our position today regarding producer-handlers and exempt plants, I would like to state that myself and both of my employers over the last 30 years have supported the Federal Order system. I believe it has worked well, serving dairy farmers, processors and our customers. The overall effect has been to treat all three businesses fairly and equally.

However, since Federal Order Reform in 2000, there has been an increasing amount of price volatility, more and more inequities in the system. Therefore, I would encourage the Department and all the participants today in this hearing to make sure that any decisions made to change the order now and in the future are truly to the benefit of all producers, plants, and consumers.

Regarding the proposed -- regarding the proposal regarding producer-handlers, we are in favor of eliminating the provisions exempt producer-handlers and economic -- and commercial exempt operations for many
reasons. First, we believe all producers should be treated equally. The current situation, as well as what would result from many of the proposals, simply give a small number of producers, somewhere between 100 and 130 or 140 throughout the country, an advantage over the rest of the producers and other handlers. For each producer who receives this exemption, all other producers receive a lower blend price.

Also, on the plant side of this, each producer-handler has an advantage in his milk cost compared to a regulated cost of the other plants in the country, therefore causing disruption in the marketplace, which, in the end, causes all producers that are pooled to receive a lower price for the milk.

In the early days of the Order, when the producer-handlers were very small, it did not make much difference to the rest of the industry. The producer-handler sold their small amount of milk in a very close area to the farmer. Today, producer-handlers are much bigger, their marketing areas are much bigger. In the Northeast, the Federal Order 1 fluid sales from producer-handlers have more than doubled from 2000 to 2008, according to Exhibit Number 12. The larger a producer-handler is allowed to grow, the more disruption in the marketplace will occur.
Currently, Worcester Creameries has a producer just north of Binghamton, New York, that has two large farms. Together these farms produce over 4 million pounds of milk per month. If this producer was to build a fluid milk plant and was exempt from the order, or became a producer-handler under some of these proposals, this new plant would have a tremendous advantage in the Binghamton market.

The current pooled plant in that market, serving that area, would certainly lose market share as this new producer-handler broke into the business with a price advantage. This would result in all the farmers in the Northeast receiving less money, because if that pooled handler was not paying into the pool for the volume he is now, if his volume was reduced, there would be less money in the pool, therefore farmers receiving less money.

Now, this is only a hypothetical example of what could happen under the proposal that would raise exempt plant volumes. I can think of numerous examples of farms that might consider building plants that were exempt near many different metropolitan areas. If a plant is allowed to pay only the competitive price for his milk, "blend price," instead of the announced Class I price, it certainly would have an
advantage over the plants required to pay the Class I price.

The question becomes what the plant does with the money it saves from not paying the Class I price. However, there is only really two choices. The first is to hang onto the money. The second is to use the money to help their business gain a bigger market share by reducing the price they sell their product for. Again, this could cause disruption in the marketplace.

Now, if I would -- before I close my testimony, I would like to add a couple more statements. As the last person was testifying, what came to my mind is, the young man is building a fluid milk plant -- has built a fluid milk plant, and I think we all kind of pat him on the back for having courage and so forth to go ahead and start a new business. But I also thought, you know, if he was not a dairy farmer, if he was just another businessman, and he was building this new plant, then he would have no ability to qualify as a producer-handler, he would not have that ability.

And what crossed my mind is, as much as we applaud this man for building a fluid milk plant, promoting the sales of my product and so forth, why should that individual have a price advantage of -- as has been presented here over the last two or three days,
of maybe up to 15 cents a gallon compared to another
person who would like to do exactly the same thing, only
that person doesn't have a farm?
    So, therefore, that's why the position
that we're taking of recommending that producer-handler
exemptions and exempt plant provisions be eliminated.
We just don't understand why one person should have an
exemption at the benefit -- or detracting from the
benefit of everyone else in the industry.
    My last statement is that if this isn't
possible, to eliminate both, the exempt producer-handler
and exempt plants, it would be our position at this time
to put a solid cap of 150,000 pounds on exempt plants
and eliminate the producer-handler provision. That is
my testimony.
    Q. Mr. Buelow, both with the added
statements that you went out of your way to say were
added statements, and I think fairly stated throughout
your statement, you deviated from the prepared statement
to some extent, correct?
    A. To some extent, yes.
    Q. And you intended to deviate?
    A. Yes.
    Q. And so that is the statement?
Notwithstanding Exhibit 33, your deviations were
intentional?

A. Yes.

Q. Early on in your testimony, on page 1, you referenced that you were the vice president of Northeast Dairy Foods, Inc.?

A. Yes.

Q. Will there be another witness testifying on behalf of that organization?

A. Yes. I am not testifying on behalf of that organization. I am part of it, and so forth.

Q. And Mr. Latta is here?

A. Gary Latta is here, yes.

Q. And he will, we hope, testify tomorrow for that organization, correct?

A. Correct.

Q. Your testimony is -- or your proposals are somewhat different from other proposals submitted by IDFA and National Milk, correct?

A. Correct.

Q. And you are speaking with years of knowledge about particular circumstances in Order 1, correct?

A. Orders -- yeah, the current Order 1.

Q. Current Order 1. You dealt with -- before, it was Orders 1, 2 and 4, correct?
A. Correct.
Q. But now it's Order 1?
A. Correct.
Q. And whether or not any individual entities are out there, you've certainly looked at the aggregate data, correct?
A. Absolutely.
Q. And the aggregate data suggests to you that both exempt facilities, that are the 150,000-pound varieties of facilities, and producer-handlers, their volumes have been growing?
A. Absolutely. Absolutely.
Q. And yet, can you compare that to the overall volume of Class I distribution for package sales as presented by the Market Administrator?
A. I certainly can. Class I sales in the marketing area that I'm familiar with has been declining for many, many, many years.
Q. So the overall number is going down; producer-handlers and exempt plants are going up, correct?
A. That's correct.
Q. What does that tell you about regulated entities?
A. What that tells me about regulated
entities is they're losing market share.

Q. What's the difference between regulated entities and exempt facilities? Every month, what do your facilities get the privilege of doing?

A. The privilege? The privilege that we have, being a regulated plant, is we pay into the producer-settlement fund. And because of our size and volume and so forth, we pay, most months, many, many, many, many thousands of dollars and in some months well over a million dollars into the producer-settlement fund, which is shared with all producers in the order.

Q. And you have no protest of that ultimately?

A. I have no protest to that. What I do have is a protest of why some people don't have to do that.

Q. When you have to?

A. When we have to.

Q. And that's ultimately the point of your testimony?

A. That's the point of my testimony.

MR. ENGLISH: Your Honor, I move admission of Exhibit 33, acknowledging that his statement has deviated from it in some significant respects. But, nonetheless, I move
admission of Exhibit 33, and the witness is available for cross-examination.

JUDGE CLIFTON: Let me ask if there's any objection to Exhibit 33 being admitted.

There is none. Exhibit 33 is hereby admitted.

Before cross-examination of this witness begins, I promised to have Mr. Lee out of here by 4:00, didn't I? And it's 3:30.

All right. Good. Then we do have time. I may have to -- I was hoping to have Mr. Kastel go next. I may have to have Mr. Lee go next and then Mr. Kastel. We'll just have to see.

All right. Cross-examination of Mr. Buelow? Who would like to begin?

Mr. Carroll, thank you.

CROSS-EXAMINATION

BY MR. CARROLL:

Q. Good afternoon, sir.
A. Good afternoon.

Q. You reside where?
A. I reside in Amsterdam, New York.

Q. New York, which isn't too far from my home.
A. Not too far from Syracuse.
Q. Not too far from Syracuse.
A. A couple of hours.

Q. A couple of hours. Worcester Creameries, where is that located?
A. Worcester Creameries' address is Worcester, New York, which is about 50 miles due south of Amsterdam, New York, 20 miles due north of Coney Island.

Q. Okay. It's big, big country there?
A. Big country. Not a lot of people, but big country.

Q. Right, big country. Directing your attention to the concerns that you sell to, I think you said that one of them sell organic milk, or you said you were selling milk that was used or bottled for organic purposes?
A. We do not sell any organic milk, sir.
Q. Oh.
A. Let me explain.
Q. Sure.
A. We have a long-term relationship with an organic distributor whereby we package milk for them.

Q. I see. You just do the processing, then?
A. We do the processing and packaging.
Q. Is the milk involved also your milk or is
it someone else's milk?

A. In some cases, it's our milk that we sell to them. In other cases, it's their milk that they deliver to --

Q. Right. And I take it you're familiar with organic milk, what's required in production and processing?

A. Oh, absolutely.

Q. And at the production end, what's required, the best you know, of your knowledge? What standards do you have to meet?

A. When you say "production end," you mean production in the plant or you mean production on the farm?

Q. I should have said that. Let's start with the farm. Thank you.

A. The farm?

JUDGE CLIFTON: Excuse me. Mr. Carroll, pause. You're not letting him finish before you begin to talk.

MR. CARROLL: Okay.

JUDGE CLIFTON: Thank you.

A. The Federal government has set guidelines that are available to anyone to read as far as how milk has to be produced on the farm to be considered organic.
There's a certification process. One of the important points is as far as land. The land has to have not had any chemicals and certain things done to it for a period of three years prior to the certification.

An animal, in order to become certified organic, cannot be fed any -- used any antibiotics or that type of thing on the animal for a year. There's all sorts of regulations that would take an awful long time to go through every one of them today, sir.

BY MR. CARROLL:

Q. All right. But those regulations incur costs, I take it, to comply?

A. Oh, certainly.

Q. And then, at the plant, what are the requirements for a plant to have the ability to package organic products?

A. The main requirement is, obviously, to keep that milk completely segregated. And the processing of product is done according to any other processing specifications or specifics requested by the company we're doing it for.

Q. Is there some extra cost associated by that requirement at the plant level?

A. There's probably some cost in that you have to keep that product totally segregated.
Q. Right. Now, after it's packaged, are there any further requirements between there and this point of offering for sale and the transportation of the product?
A. There's certainly requirements, but I don't know if the requirements are any greater or any less than they are for any other milk product.
Q. Right. And when it reaches the ultimate wholesaler, are there any requirements on the wholesalers as to how he handles or treats that product?
A. Oh, I'm sure. We live in a regulated industry. There certainly is.
Q. Well, I mean on account of the fact that it's organic.
A. On account that it's organic, not that I'm aware of.
Q. They treat it the same way, then?
A. Treat it the same.
Q. Now, that's how the Schwartz family and Steuben Foods, they do that process according to your statement here?
A. The Schwartz family owns the businesses that I've testified for today.
Q. And that would be --
A. And they include Elmhurst Dairy,
Mountainside Farms, Steuben Foods and the company --

Q. They own all of those?
A. They own all of those.

Q. Okay. And Elma, New York, where is that located?
A. Elma, New York, as I said in my testimony, is just a few miles south of Buffalo.

Q. Buffalo. And your farms are located generally where?
A. Quite a wide geographic area, but for, let's say within 100 miles, maybe 120 miles of Worcester, New York, there's a big circle.

Q. Okay. So I take it that there has to be transportation between the farm and plant of some distance?
A. Oh, yes. When you own a plant in New York City, you don't find many cows right in New York City.

Q. I guess not. Now, ultrapasteurized, what is that?
A. Ultrapasteurized milk is milk that's pasteurized at a higher temperature and, therefore, giving it an extended shelf life designation.

Q. Now, going back to organic milk, are there consumers that look for organic milk? Are there...
people that have an interest in buying that product as a product?

A. My expertise is not in marketing the finished product, but if we keep producing it, they've got to be doing something with it, sir. So somebody is interested.

Q. Okay. And ultrapasteurized, is that something of a value to the product?

A. We believe so.

Q. Okay. Now, I want to ask you a question about local milk, local supplying of milk to a local market. Are you familiar with Byrne Dairy in Syracuse?

A. Yes, I am.

Q. And do you know, as I know, that their milk is largely from the surrounding areas of the city of Syracuse?

A. Yes.

Q. And do people go to their dairy stores to buy that milk?

A. They're still in business, so I'm assuming people are buying their product, okay?

Q. And do you think it's an asset to them to have a local supply of milk with the public, the people can come in?

A. I'm not sure I understand the question.
Do I think it's an asset?

Q. Yeah. Well, let me give you an illustration. I'm a customer. When I finish my shopping at Wegmans, I go over to Byrne and buy my milk for the reason that I know -- I mean, I know two or three of the major producers, and I know what good men they are.

JUDGE CLIFTON: Mr. Carroll, I know you're just setting up your question, but you really are testifying again.

BY MR. CARROLL:

Q. I'm not testifying. I'm just stating that there are people in the market, such as myself, who have knowledge of local production and want to buy a local product. That's a fact, isn't it?

A. There's people that feel that way, yes, I'm sure.

Q. Right. And maybe I'm -- I or someone like me might buy two quarts instead of one quart on that theory, too?

A. I guess that's your choice.

Q. Okay. Now, I want to get to your testimony. As I understand it, you haven't referred, I don't think, to a specific proposal, but you just don't want to see anything but the back side of a
producer-handler? That's about it, isn't it? I mean, you don't see anyplace for them except this 150,000-pound exemption?

A. Our position is that everyone should be on the same level playing field, and that if we increase this volume limit, we're going to be encouraging more people to start businesses like that, and we're going to have a bigger and bigger unlevel playing field.

Q. All right.

A. Okay?

Q. Now, if the producer-handler's cost of production just is farm cost, and added to that is plant cost, if that's greater than any monies he would owe to the pool, does he have any advantage over your customers?

A. Well, these comparisons that have been made the last three days confuse me, quite frankly.

Q. Surely.

A. We talk about cost of production and we talk about cost of production on a producer-handler. The cost of production on a dairy farm that's 100 cows or 1,000 cows or 5,000 cows compared to the cost of production of a producer-handler that's 100 cows, 500 cows, 1,000 cows, I'm sure they're different, just like they're different from every farm to every farm.
But now we're talking about the efficiencies and the ability of that individual farmer. And I'm not sure that that should be part of this hearing and part of this testimony. Farmers have the ability to be efficient, farmers have the ability to be inefficient. Obviously, most of them try to be efficient, they try to be more efficient today than they were yesterday.

Q. Right.
A. Okay?
Q. Right.
A. So I don't know if I've answered your question directly, but I'm trying, sir.

Q. I understand you're making an effort.

Now, you worked a farm at one time?
A. Not only did I work a farm, I owned a farm.

Q. Owned a farm. 20 years?
A. Approximately.
Q. So you know breeding cattle is important to that business?
A. Oh, absolutely.
Q. And the timing of the breeding would be important if you were trying to control your production to your sales?
A. Certainly.

Q. And it would be because you would have to incur some additional costs in order to get that production coming in at a regular rate than if you just let ordinary breeding occur?

A. I don't know if there's additional cost as a dairy farmer who is not a producer-handler. I needed year-round income. I needed to breed my cattle and so forth to create that year-round income. So I don't know that there's any real difference there.

Q. Right. But you recognize, don't you, that if you were a producer-handler -- if you can imagine that for a minute. If you were a producer-handler and you had X number of sales upcoming, you would try to tailor your production to those sales? Don't you think that's a reasonable assumption?

A. I doubt it very much, sir, because if you're talking about breeding cattle and creating milking cycles like that, you're trying to plan nine months ahead. I'm not sure there's too many of us in this industry that know what sales are going to be tomorrow, say nothing about nine months ahead.

MR. CARROLL: All right. Thank you very much.

JUDGE CLIFTON: Thank you, Mr. Carroll.
Would anyone else like to cross-examine Mr. Buelow?

Mr. Tosi, no one said yes. Would you?

MR. RICCIARDI: Your Honor, I do have some questions.

JUDGE CLIFTON: Ah, Mr. Ricciardi has awakened. No, I'm just teasing. I know you're quite alert over there. It's all right to give you a hard time, I hope.

MR. RICCIARDI: It assumes facts not in evidence. And yes, of course.

CROSS-EXAMINATION

BY MR. RICCIARDI:

Q. Mr. Buelow, I'm Al Ricciardi. I represent AIDA. You have been here throughout the course of these proceedings?

A. I arrived Monday night. I've been in and out of here yesterday and today, yes.

Q. You heard the testimony of Mr. Hatch?

A. Yes, I did.

Q. You stopped operating a dairy farm?

A. Uh-huh.

Q. Is that a yes?

A. Yes.

Q. Okay, thanks. You made the decision to
stop operating a dairy farm, and then you went to work for National Farmers Organization, you said, for 17 years?

A. Yes.

Q. Being a dairy farmer is not easy?

A. Pardon?

Q. Being a dairy farmer is not easy, is it?

A. No, it's not easy.

Q. There are investment requirements for the farm operation, cows, feed, et cetera, correct?

A. Certainly.

Q. And with regard to the processing side of the business, there are costs associated with that, too?

A. Certainly.

Q. Let's talk for a moment, because this is the first time it's come up during the course of this hearing, you said that the plant that you're familiar with packages, among other things, kosher milk, correct?

A. One of our plants packages kosher milk, yes.

Q. Now, you buy that on behalf of that plant from a kosher dairy?

A. Correct.

Q. Are you knowledgeable enough to tell me the costs and requirements for being able to sell, as a
dairy farmer, kosher milk?

A. Well, as far as costs go, I feel that that's proprietary information that I'm not willing to share today. As far as requirements to become kosher, I'm not a Jewish rabbi, but I do understand some of the basics. And the kosher milk that we package and sell has rabbinical supervision on the farm, which means there is a rabbi present at all times during the milking process.

It also means that the rabbi monitors the diet of those animals, particularly at certain times of the year with Jewish holidays and so forth. The rabbi makes sure that there is no DA cow's milk being used. And I'm sure there are some others that I've forgotten. But, anyways, so there's rabbinical supervision on the farm.

Then, when the milk is loaded on the truck, there has to be a rabbi there to seal the truck. When the milk gets to our plant, there is a rabbi there to check the seal to make sure there's been no tampering and so forth, and is present during the full processing of that milk. Is that what you're referring to?

Q. That is exactly what I was referring to. And let me take you back through some steps. Worcester 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?
Have we got a deal?

A. Very good.

Q. All right. Good. Tell me, if you know, the percentage of Federal Order route sales nationally by producer-handlers.

A. I do not know that number.

Q. Would it surprise you that producer-handlers would produce about 1.46 percent of the milk nationally?

A. Are you testifying to that, sir?

Q. I'm asking you whether that would surprise you. That's my question.

A. It would not surprise me, no.

Q. Do you have a different number than mine?

A. I already testified I didn't know the number off the top of my head.

Q. But you think that my --

A. It's in that range, certainly.

Q. And that percentage of the milk nationally is causing a major disruption, is that your testimony?

A. Not exactly.

Q. Okay. Let's take the opposite side of the way you approached your same level playing field argument, and let's talk about it this way: You decided
to get out of being a dairy farmer for whatever reasons you did?

A. Yes, uh-huh.

Q. Among other things, it's hard, as we talked about before?

A. That's not the reason I got out, but it's hard work, yes.

Q. Okay. The decision by a processing plant or a co-op, processing plant to purchase, co-op to have a number of members, that's a financial decision that's made not to be a dairy farmer, to find the milk from some other source, right?

A. Yes.

Q. One of the reasons is an investment choice, correct?

A. Yes, I guess.

Q. You don't want to have the investment in the farm, the investment in the cows, the investment in the feed, the investment in the number of employees, among other things?

A. Well, most milk plants have many employees, but a different type of employees, I think you're referring to.

Q. Yes. They process milk, they are dairy farmers, and they actually get the milk to the
processing plant?
   A.   Sure.
   Q.   The producer-handler does all of that?
   A.   Yes.
   Q.   Dairy farm, processing plant, locating the customers, transporting the milk, making sure that they have enough customers for the milk that they have?
   A.   Yes.
   Q.   As a creamery, you don't do all of that, right?
   A.   Certainly not.
   Q.   Instead, you look to the members to, in fact, do that other portion of the work for you?
   A.   I'm not sure what you mean by "members," sir.
   Q.   I apologize. You've got 200 producers who provide you with your milk for your plant for --
   A.   They're independent producers that decide to sell their milk to us. They are not our members, we're not a cooperative.
   Q.   You're correct, and I stand corrected. Now, those independent producers, are they all paid, every one of them, the identical amount monthly for their milk?
   A.   Absolutely not.
Q. Well, shouldn't they be treated equally?
A. They are.
Q. By being paid different amounts?
A. Because they give us different volumes, different components, and so forth. We've been down this route in this hearing before, I think.
Q. Not with you. I haven't had a chance --
A. Not with me, no. But, I mean, milk contains three major components that it's paid on. Each farm, each drop of milk contains a different amount of butterfat, a different amount of protein, a different amount of other solids. Each farm is -- delivers to a different plant -- or maybe not each farm, but many farms do. Therefore, they're paid a different PPD as prescribed by the Federal Order. But I believe that we do our best to treat each farmer equally and fairly.
Q. Fairly and equally may be two different things. Let's talk for a moment.
A. Okay.
Q. All farms, as you just said, are not created equally, correct?
A. Yes.
Q. And all producers are not created equally, correct?
A. Yes.
Q. And so when you say that we believe all producers should be treated equally, Worcester doesn't treat -- Worcester Creameries doesn't treat the 200 producers equally, because they're not equal, they have --

A. I disagree with you. We treat them equally, sir.

Q. Okay. What's an over-order premium?

A. It's a price paid over the regulated Federal Order price.

Q. And who gets the over-order premium?

A. The person you're buying the milk from. It could be an independent farmer, it could be a cooperative.

Q. Does Worcester Creameries get over-order premiums?

A. Does Worcester Creameries get over-order premiums?

Q. Or does it get charged over-order premiums?

A. We get charged over-order premiums by cooperatives that we purchase milk from, yes.

Q. And do you ever -- by the way, what co-ops do you purchase from?

A. We purchase primarily from DMS at the
current time. We purchase from Agri-Mark. We purchase
from other cooperatives, Lanco, a variety of
cooperaives available to us in the Northeast.

Q. Right. Do you think it's fair for the
coops to charge you an over-order premium?

A. Is it fair?

Q. That's the question.

A. Sometimes the amount they charge is fair,
sometimes the amount they charge, I feel, is unfair,
sir.

Q. And you try to negotiate the over-order
premums if you think it's --

A. We try in negotiate a fair premium, yes.

MR. RICCIARDI: That's fair enough. I
don't have any further questions. Thank you.

JUDGE CLIFTON: Thank you, Mr. Ricciardi.

How do you spell Lanco?

THE WITNESS: L-a-n-c-o.

JUDGE CLIFTON: That's L-a-n?

THE WITNESS: L-a-n-c-o.

JUDGE CLIFTON: And Agri-Mark?

THE WITNESS: Agri-Mark is A-g-r-i,

hyphen, M-a-r-k.

JUDGE CLIFTON: And what was the other
entity you mentioned with those?

JUDGE CLIFTON: Thank you. Who next will cross-examine Mr. Buelow?

Mr. Beshore.

CROSS-EXAMINATION

BY MR. BESHORE:

Q. I have just one question for clarification of the record. You used the phrase "DA cow."

A. DA cow?

Q. Yeah. Do you remember that?

A. Yes, I do.

Q. Okay. Can you elaborate? I think you should explain that for the record.

A. Completely and fully?

Q. Define it, say what --

A. A DA cow is a cow that had a twisted stomach, has to be operated on to straighten that stomach out.

Q. DA stands for displaced --

A. Displaced -- if I can say the word correctly, abomasum.

Q. Abomasum?

A. Abomasum, something like that.
Q. Thank you.

JUDGE CLIFTON: Now I need a spelling.

THE WITNESS: I'm not going to do that.

JUDGE CLIFTON: Mr. Beshore, I hope you --

MS. DAMM: Your Honor, a displaced abomasum is a-b -- hold on, I've got to write it down. I had it. A-b-o-m-a-s-u-m.

JUDGE CLIFTON: Abomasum?

MS. DAMM: Yes, abomasum.

JUDGE CLIFTON: Displaced stomach?

MS. DAMM: It's a displaced abomasum.

JUDGE CLIFTON: Oh, that's a part of the anatomy?

MS. DAMM: An abomasum is one of four compartments to a cow's stomach.

JUDGE CLIFTON: So it's not good?

MS. DAMM: It could be bad. It's a -- it is, in a lot of situations, through operation, it is a situation with a cow that can be repaired so she can heal and continue producing.

THE WITNESS: Sometimes can be repaired and sometimes cannot.

MS. DAMM: Sometimes can, sometimes cannot. It's a decision we make on the farm.
JUDGE CLIFTON: All right. And just so
the court reporter has your name right, it is?

MS. DAMM: Oh, I'm sorry. It's Cindy
Damm, D, as in dog, a-m-m. Sorry for that
interjection.

JUDGE CLIFTON: No. I appreciate it very
much. Otherwise, Mr. Beshore would have had to
say all that.

MS. DAMM: That would have been
entertaining.

JUDGE CLIFTON: Other questions for
Mr. Buelow?

Mr. Tosi.

CROSS-EXAMINATION

BY MR. TOSI:

Q. Good afternoon, Mr. Buelow.
A. Good afternoon.

Q. Thank you for coming --
A. You're welcome.

Q. -- and offering your testimony. In your
testimony on behalf of the four entities that you
described in your statement --
A. Yes.

Q. -- as a spokesperson for those folks, do
they have any opinions as to support or opposition to
any of the other proposals that we've included in the hearing notes?

A. I guess the answer is yes, but I came prepared to testify as I testified. I'm assuming, from other questions that you've asked, you're referring to plant pools or -- maybe I should shut up.

Q. Well, that's all right. Are you familiar with the term "individual handler pool"?

A. Yes, I am.

Q. Do any of your four organizations that you're speaking on behalf of have an opinion about marketwide pooling versus individual handler pooling?

A. We certainly have a position. I'm not authorized today to testify on that subject.

MR. TOSI: All right. That's all I have for you, sir. Thank you very much.

THE WITNESS: You're welcome.

JUDGE CLIFTON: Thank you, Mr. Tosi.

Mr. English.

MR. ENGLISH: Thank you, your Honor.

REDIRECT EXAMINATION

BY MR. ENGLISH:

Q. Mr. Buelow, you were asked questions about organic milk and kosher milk --

A. Yes.
Q. -- and the costs sort of associated with producing it. That organic milk that is packaged, since you have to make a payment to the producer settlement fund, are the producers who are producing that organic milk pooled producers in Order 1?

A. Yes, they are.

Q. So they are effectively contributing to the blend price of Order 1 producers?

A. Absolutely. Absolutely.

Q. The kosher milk that is produced --

A. Yes.

Q. -- do you make a producer -- is part of your producer-settlement fund payment based upon the milk that you receive from them?

A. Absolutely. The kosher milk we purchase is pooled milk.

MR. ENGLISH: That's it. Thank you.

JUDGE CLIFTON: Thank you, Mr. English. I believe that concludes your testimony, Mr. Buelow. Thank you.

THE WITNESS: Thank you.

JUDGE CLIFTON: You may step down. Now, with apologies to --

MS. KISER: Your Honor, may I be heard?

JUDGE CLIFTON: Yes, that one I didn't do
it the way I normally do. When Mr. English moved its admission, I admitted it before cross, but I do appreciate your checking, because that's not the way I've been doing everything else. Yes?

MS. KISER: Good afternoon, your Honor. My name is Livia Kiser, L-i-v-i-a, K-i-s-e-r, and I represent Aurora Organic Dairy, who is a producer-handler who will be significantly affected by the outcome of these proceedings.

We had understood that Mr. Kastel would be testifying on Friday morning. I understand that he's here. I understand this morning you had directed him to provide his statement to people to review when we came back from lunch. That statement still has not been provided.

We have seen earlier copies of the statement and we are extremely concerned about things that are in there. Mr. Kastel has instigated a series of lawsuits against Aurora Dairy, and we believe that the statement he intends to put in here is not actually evidence in these proceedings. And so, based on the earlier versions of it, we have significant concerns, and so we would like to be able to see
that statement and be able to address those concerns prior to any statement being put into the record, certainly. So if Mr. Kastel would be so kind as to provide that statement, we would like to be able to see it now.

JUDGE CLIFTON: All right. Thank you, Ms. Kiser. Mr. Kastel, will you come to the podium, please? First, I know you've had a long day and a half. I do want to insert Mr. Lee's testimony before yours, with my apologies. Do you want to provide copies of your statement to participants?

MR. KASTEL: Yes, your Honor. I was prepared, as you instructed after lunch, to have them.

JUDGE CLIFTON: All right. And do you have any on the back table?

MR. KASTEL: Not as of yet.

JUDGE CLIFTON: Okay. I would put them there now, but reserve back one for the court report, one for me --

MR. KASTEL: I've already given seven to staff.

JUDGE CLIFTON: Good. Then if you would put them on the back table, we'll let people get
them. Then they will be ready.

MR. KASTEL: Very good.

JUDGE CLIFTON: And then I hope this is not too hard a burden on you, but I would like to take Mr. Lee before you.

MR. KASTEL: I'll handle it. Thank you.

JUDGE CLIFTON: Thank you very much.

Let's take a stretch break. There's a phrase, you know, with horses: If you work your horse hard and put him away wet, it diminishes his well-being. And I want to give the court reporter a break. So let's take a 10-minute stretch. Come back at 4:16.

(A recess was taken from 4:06 to 4:16.)

(Exhibit 34 was marked for identification.)

JUDGE CLIFTON: All right, let's go back on record. It's 4:16, we're back on record. I have marked the statement of Gary Lee as Exhibit 34.

Mr. Lee, would you please state and spell your name?


(The witness was sworn.)

JUDGE CLIFTON: Mr. English, you may
a witness herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ENGLISH:

Q. Good afternoon, Mr. Lee.
A. Hi.
Q. You have a prepared statement that is Exhibit 34, and then I have some questions afterwards. Why don't you proceed with your testimony, sir.
A. Okay. My name is Gary Lee. I'm employed by Prairie Farms Dairy, Inc., as the vice president of procurement. I have been employed by Prairie Farms since May 1973 and have served in my current position since 2000.

Prairie Farms is a dairy farmer cooperative headquartered in Carlinville, Illinois. At the close of its most recent fiscal year on September 30, 2008, Prairie Farms had 743 farmer -- dairy farmer member owners. The geographic breakdown of those 743 farms was as follows: 426 in Illinois, 152 in Indiana, 62 in Iowa, 89 in Missouri, 11 in Michigan, 3 in Ohio.

For the 2007-2008 fiscal year, Prairie Farms member milk production was 1,387,347,510 pounds.
This equates to about 1,873,000 pounds of milk produced per farm. All but two of Prairie Farms members could be described as small family farms. By that, we mean that a family unit provides most of the labor, management and capital. The two exceptions to this term "family" are -- "family farm" are university research farms.

Prairie Farms members' herd sizes range from fewer than 20 cows to about 3,000 cows. We estimate that the average Prairie Farms member milks 100 cows. This estimate is arrived at by dividing average total production per farm of 1,873,000 pounds by USDA's most recent estimate of milk production per cow in Illinois of 18,700 pounds. That is the USDA's 2007 estimate. Most of the family farms who are members of Prairie Farms qualify as small businesses under the Regulatory Flexibility Act in that their annual gross revenue is less than $750,000.

Prairie Farms was founded in 1938, making butter, condensed milk and nonfat dry milk. Prairie Farms got into the fluid milk processing business after World War II. The current company is the result of more than 100 mergers, acquisitions and joint ventures, as well as internal growth.

Through wholly-owned facilities and joint ventures, Prairie Farms currently operates 35 milk and
dairy product processing plants. 26 of those plants are regulated under five Federal Orders. Prairie Farms plants regulated by Order 32 include a fluid plant in Carlinville, Illinois and Olney, Illinois; a fluid cultured -- a fluid and cultured plant in Hazelwood, Missouri; a fluid, ice cream mix, and UHT plant in Granite City, Illinois; a fluid plant in Peoria, Illinois; and cultured plants in Quincy and Carbondale, Illinois.

Prairie Farms plants regulated by Order 33 include fluid plants in Battle Creek, Michigan and Anderson, Indiana; and a fluid and cultured plant in Fort Wayne, Indiana. Prairie Farms plants regulated by Order 5 include fluid plants in Holland, Indiana and Somerset, Kentucky. Prairie Farms operates one plant regulated by Order 7, a fluid plant in Kosciusko, Mississippi.

A joint venture with Midwest Dairymen, called Muller Pinehurst Dairy, operates one plant regulated by Order 30 as a fluid plant in Rockford, Illinois. A joint venture with DFA, called Roberts Dairy, operates three plants regulated by Order 32: A fluid plant in Iowa City, Iowa; a fluid and ice cream plant in Omaha, Nebraska; a fluid plant in Kansas City, Missouri.
A joint venture with DFA, called Hiland Dairy, operates three plants regulated by Order 32 and three plants regulated by Order 7. The Hiland plants regulated by Order 32 are a fluid and cultured plant in Wichita, Kansas; a fluid and cultured plant in Chandler, Oklahoma; and a fluid plant in Norman, Oklahoma. The Hiland plants regulated by Order 7 are a fluid and ice cream plant in Springfield, Missouri; and fluid plants in Fayetteville, Arkansas, and Fort Smith, Arkansas.

A joint venture between Prairie Farms and Hiland Dairy, called Turner Dairy, operates three plants regulated by Order 7. They are all fluid plants located in Fulton, Kentucky; Memphis, Tennessee; and Little Rock, Arkansas.

The unregulated plants are as follows: A fluid, cultured and ice cream plant in Jefferson City, Missouri; an ice cream plant in Decatur, Illinois; ice cream and ice cream mix plant in O'Fallon, Illinois; ice cream mix plant in Springfield, Illinois; a butter, butter oil and anhydrous milkfat plant in St. Louis, Missouri; an ice cream plant in Norfolk, Nebraska; a cultured and ice cream plant in Kansas City, Missouri. I would add that that is separate from the previous mentioned plant in Kansas City. And ice cream novelty plants in St. Louis, Missouri, and Lafayette, Indiana.
In the 2007-2008 fiscal year, sales for Prairie Farms and joint ventures was about $2.9 billion. About 70 percent of those sales were in the fluid milk category. Over 10 percent of the fluid sales are to schools and institutions. I am here today to offer Prairie Farms' support of Proposals 1 and 2.

Prairie Farms is not against producer-handlers. In fact, Prairie Farms could be described as a producer-handler, but instead of being one dairy farmer who is vertically integrated, Prairie Farms is 700-plus dairy farmers who have pooled their resources to process and market their milk.

Because of this pooling of resources, the vast majority of Prairie Farms -- of the plants Prairie Farms operates are regulated by various Federal Orders as indicated earlier in this testimony. This prevents Prairie Farms from qualifying or using the producer-handler provisions in Federal Orders.

Systemwide, Prairie Farms Class I utilization is about 70 percent. This means that most months, Prairie Farms pays more into the pool than it draws out, the exception being those rare months when the Class III or the Class IV price is higher than the Class I price. In other words, Prairie Farms members must share their Class I utilization with all dairy
farmers participating in a Federal Order pool each
month.

The U.S. dairy industry is large and
diverse. There is plenty of room for entrepreneurs and
innovators. When businesses offer unique products or
packaging or serve a small niche market, that is a good
thing and helps expand the product category.

Proposals 1 and 2 do nothing to harm most
dairy farmers who are trying to capture more of the
consumers' dairy dollar. Prairie Farms members
collectively do that every day. Proposals 1 and 2 would
preserve equity for those who operate under the
constraint of the Federal Order vis-a-vis
larger-than-average dairy farmers who vertically
integrate their operation, but use a loophole in the
Order to permit them to grow to sizes that allow them to
cherry-pick the fluid milk market.

While there are currently only a few
large-scale producer-handlers, failure to close this
loophole may encourage more to enter the fluid milk
business. Prairie Farms has no problem competing with
any fluid milk processor on an equitable basis. If a
processor offers products that are superior in quality
or packaging, or if that company provides better service
to its customers, it should be successful.
Likewise, if a milk processor operates efficient processing plants that enable it to offer its products at a lower price, the owners of that company and its customers benefit. However, if the milk processor's main advantage is exploiting a loophole in Federal Orders, that is unfair to those who play by the rules every day.

One of my biggest concerns with the Federal Order hearing process is that quite often we hold hearings to fix last year's problems. At this hearing, we have a chance to address a concern before it becomes a large problem. Adoption of Proposals 1 and 2 will simplify Federal Order language and close a loophole that, while currently not widely exploited, may be in the near future.

Failure to remove the producer-handler definition from Federal Orders could lead to the creation of business relationships that could not have been anticipated not so long ago. It is quite possible that fluid milk processing entities could be created that involve farmers and retailers that fall completely outside the current system.

Dairy farmers could be faced with two different choices: They can keep the current system in place, but be relegated to serving only the customers
that a new generation of producer-handler chooses not to serve, or they could vote out the current system and face the unknown of deregulation in the fluid milk business.

Recent problems in financial markets show that some parts of the American economic system need a regulatory safety net. Prairie Farms believes that the fluid milk industry is another industry that needs some minimal level of regulation to protect dairy farmers and consumers.

The situation that we are talking about at this hearing is not about the big processor exploiting the small dairy farmer. It's about larger dairy farmers potentially using a regulatory loophole to harm smaller dairy farms. As I said earlier, Prairie Farms is not afraid to compete with any company on an equitable regulatory basis, but if the present and future competitors use regulatory loopholes as their primary advantage, it amounts to institutionalized unfair economic advantage.

Proposals 1 and 2 do nothing to harm dairy farmers who want to process, package and sell their own milk. At the same time, Proposal 2 recognizes that after reaching a certain size, any processor can use their regulatory advantage to negatively impact
dairy farmers and milk processors operating under the Federal Order system. Failure to address the producer-handler definition now has the potential to cause serious financial harm to dairy farmers and consumers.

Q. Thank you, Mr. Lee. Now, I know initially that your testimony supports Proposals 1 and 2, which were originally submitted by both National Milk Producers and International Dairy Foods Association, correct?

A. Yes.

Q. Has Prairie Farms encountered any direct impacts by the presence, in any of the markets that it deals, of producer-handlers?

A. Our Roberts Dairy joint venture and our plant in Peoria, Illinois, are currently competing with a large producer-handler located in northeast Missouri, who has used his regulatory advantage to his benefit. And in order for Prairie Farms to maintain some retail accounts, we have had to lower prices 30 to 40 cents per gallon just to maintain our shelf space.

Q. Are you aware of any other entities competing with that same producer-handler who have actually lost shelf space?

A. I believe Anderson Erickson Dairy is
impacted by that, as well, perhaps Dean Foods at a
couple of plants.

Q. So that's a direct impact based upon a
reduction in the margins you are able to receive,
because in competition you had to lower your milk price
in order to meet competition?
A. The handler that I alluded to has even
been so bold as to go out and offer firm pricing to
customers for one year.

Q. Why is that a difficult issue for you?
A. They're not subject to the upward and
downward movements of the Class I price under the Order.

Q. And you are?
A. Yes.

Q. What about hedging that could be
available?
A. We have explored hedging with a couple of
different brokers. We've been told it's doable, but
it's not practical, particularly on the scale we would
have to get into the market to do some hedging.

Q. That is to say that you would be so large
in the hedge market, there isn't a flip side for it?
A. Correct.

Q. How about any indirect impacts that you
have experienced as a result of producer-handlers?
A. In March, Prairie Farms --

Q. Of this year?

A. Pardon me. I'm sorry. In March of 2009, Prairie Farms lost some business with a large national, even international retailer, who will remain unnamed. The business was taken away from Prairie Farms and given to a large national fluid milk processor, a competitor of ours. The logic that we were given for the loss of business was that because that large national processor lost business in El Paso, Texas, that this retailer felt an obligation to help them maintain their volume with them, so they took business away from Prairie Farms.

Q. And where did the business get taken away at Prairie Farms?

A. The business was located in north central Illinois, about an hour south of Chicago.

Q. And was it your understanding that the business in El Paso went to a producer-handler?

A. Yes.

Q. And so the impact of a producer-handler in Order 126 is felt today how many miles away in Illinois?

A. I would guess it's in excess of 1,000 miles from El Paso to one hour south of Chicago.

Q. Has Prairie Farms had any discussions
with any of its buyers that you would like to discuss
with regard to producer-handlers?

A. I would just say that the concept
intrigues large national retailers.

MR. ENGLISH: I move the admission of
Exhibit 34, and the witness is available for
cross-examination.

JUDGE CLIFTON: Thank you, Mr. English.
Is there any objection to the admission into
evidence of Exhibit 34?
There is none. Exhibit 34 is hereby
admitted into evidence.

Who will begin the cross-examination?
Mr. Miltner, thank you.

CROSS-EXAMINATION

BY MR. MILTNER:

Q. Good afternoon, Mr. Lee. I am looking at
what I think is the fourth page of your statement. Yes,
it is the fourth page.

A. Okay.

Q. In the third full paragraph, you note
that there are exceptions when Prairie Farms draws milk
from the pool, when there's a price inversion?

A. Yes.

Q. When that type of price inversion occurs,
is there also a depooling of milk from the Orders, in
your experience?
   A. Yes.
   Q. Is there a price, a negative financial
   impact on Prairie Farms' members when that depooling
   occurs?
   A. There is the negative PPD under the
   Order.
   Q. Does the milk that is depooled from the
   Order, not pooled as a result of that price inversion,
   exacerbate that negative PPD?
   A. Yes, it does.
   Q. To the disadvantage of your members?
   A. Yes.
   Q. Does Prairie Farms calculate what that
   negative impact is?
   A. No. I'm sorry, we don't.
   Q. You had attended, and I was also in
   attendance at hearings that addressed curtailing that
   incidence of depooling direct price inversions?
   A. Yes.
   Q. Since those rule changes took effect, has
   depooling ceased?
   A. No. It's still used by organizations
   that can to the maximum of their ability to do so.
Q. Two paragraphs down, you say, "Proposals 1 and 2 do nothing to harm most dairy farmers who are trying to capture more of the consumers' dairy dollar"?

A. Uh-huh.

JUDGE CLIFTON: Is that yes?

THE WITNESS: I'm sorry. Yes.

JUDGE CLIFTON: Okay.

BY MR. MILTNER:

Q. Does it, in fact, cause harm to those larger dairy farmers that also trying to capture more of the consumers' dairy dollar?

A. I don't understand the question.

Q. Well, you say that the proposals don't harm most dairy farmers. The implication that I read into that is that it actually does cause harm to larger dairy farmers.

A. I would counter that by saying that Proposals 1 and 2 recognize that after farmers reach a certain scale, they can have a wide-ranging impact in the marketplace if they take advantage of the producer-handler exemption. Proposals 1 and 2 do nothing to harm what I regard as a more traditional producer-handler. I'm talking about a unit that is milking 50 to 200 cows, that decides they want to process and package and wholesale or resale their own
milk. But it recognizes that there is a point where larger players can exploit the advantage of being a producer-handler.

Q. And in many marketing areas, the average farms are in that range of up to 200 cows, particularly the upper Midwest, the Northeast, even portions of the Mideast and Central Orders, right?

A. Yes.

Q. And in other marketing areas, particularly in the south and southwest, those size farms are almost nonexistent, correct?

A. I believe so.

Q. Is it your -- is it your -- or Prairie Farms' position that we should adopt regulations on a nationwide basis that afford opportunities to producers in some regions, but not others?

A. If you're asking if I think that the exemption ought to be based -- regionalized, no.

Q. Okay. But what you are saying is that the cutoff should be set based on the farm size, that at some point the farm becomes so big, they shouldn't be entitled to have that exemption?

A. Yes.

Q. Does Prairie Farms have a position on the proposal to adopt individual handler pools?
A. We do not have an official position, but for Prairie Farms, with our high Class I utilization, it would be wonderful.

Q. I thought you might say that.
A. Pardon me?
Q. I thought you might say that.
A. Yeah.
Q. Do you have a stated position on any of the other proposals other than 1 and 2, including National Milk's Proposal 26?
A. No. I only came prepared to testify on 1 and 2.

Q. So Prairie Farms would like to see the elimination of producer-handlers as a regulatory option and the expansion of the exempt plant limited to 450,000 pounds?
A. Correct.

Q. Of the plants you list that Prairie Farms operates, you say they are regulated under five Federal Orders. Are all of those plants fully regulated?
A. Yes.
Q. Do you have any partially regulated plants?
A. The plant in Jefferson City, Missouri, is a partially regulated plant, but I categorize it as
unregulated for the record.

Q. Does its volume exceed 450,000 pounds of fluid milk?
A. Yes.

Q. Has it caused disruption in this area as a result of being partially regulated at that level?
A. No, because the plant is located in the donut hole in Order 32 that is unregulated, and its sales area remains in that donut hole.

Q. Could you describe the donut hole as a loophole?
A. I'm sorry. I thought you wanted me to just describe the donut hole.

Q. No, no. I know what it looks like.
A. Or how we happened to end up with this. Only the authors of Order reform know why it's there. Is it a loophole?

Q. You can call it a donut or a loophole. They look about the same. You don't have to answer it.
A. I'm thinking of the way I want to answer you, but it does two things: It does provide that plant with some advantage in the area in which it is located, but it also prevents that plant from expanding its sales area outside of the unregulated area -- or discourages. I'll say that, it discourages.
Q. It's not in your statement, you had a colloquy with Mr. English about some competitive -- I'll call it competitive situations or account changes which you attribute to producer-handlers, and I jotted down the first one you discussed with the producer-handler in Missouri. Was it Roberts Dairy?

A. The Roberts Dairy joint venture and our plant in Peoria, Illinois, both compete with this producer.

Q. For what type of account? Who is that?

A. One fairly substantial regional grocery chain, and then a lot of small proprietor-type groceries located in small towns in Missouri and Iowa and western Illinois.

Q. Would you provide us the prices that you were supplying the account at and that you lost the bid at?

A. No, I will not.

Q. Will you supply us the volumes of those accounts?

A. No.

Q. Who told you that this producer-handler would offer firm prices for a year?

A. The general manager of the Roberts joint venture and the sales manager for the Prairie Farms
division in Peoria.

Q. Those are employees of Prairie Farms or --

A. Yes.

Q. -- Prairie Farms joint venture?

A. Yes. I'm sorry to interrupt, yes.

Q. So that's where you heard it. Where did they hear it?

A. From the customers to whom the offer had been made.

Q. Which customers?

A. Again, they will remain unnamed.

Q. Okay. Do you have any information at all about the contract that was allegedly taken by the producer-handler in El Paso, such as the price that was being quoted by the previous supplier, the price that was quoted by the producer-handler, the volumes, the number of stores, or any of that information that you will share with us?

A. The only specific information I have was a news article out of an El Paso, Texas, newspaper that talked about, with the arrival of this producer-handler in the marketplace, that prices for milk had gone down substantially.

Q. They were talking about retail prices in...
that article?
   A. Yes.
   Q. So they didn't provide any information about the quoted price for the stores?
       A. No. That would have been proprietary information.
       Q. Somebody could have shared it with a reporter, though. There's lots of stuff that gets into papers, right?
       A. Yes.
       Q. But you don't have any information about why that account changed hands or the prices at which it changed hands?
       A. We were told it changed hands over price, but not at what price.
       Q. Who told you that?
       A. A spokesman for the large retailer.
       Q. Will you tell us what retailer it is?
       A. No. I think you can connect the dots in my testimony and figure it out.
       Q. I can, but the record can't.
       A. No, I will not name that retailer.
       Q. And the same retailer told you you lost an account to make room for the account that was lost on the basis that might have been price or might not be,
but we don't know?

A. Correct.

MR. MILTNER: Thank you.

JUDGE CLIFTON: Thank you, Mr. Miltner.

Mr. English -- oh, you just want your water?

Who else is ready to cross-examine?

Mr. Beshore.

MR. BESHORE: Thank you, your Honor.

Marvin Beshore.

CROSS-EXAMINATION

BY MR. BESHORE:

Q. Good afternoon, Gary.

A. Hi, Marvin.

Q. I'm interested in the testimony, first of all, with respect to the competition from a producer-handler located in Missouri, I think you said?

A. Yes.

Q. Did I understand your testimony correctly, that because of competition from that producer-handler, you were required to reduce your price to certain accounts, to maintain them, by 30 to 40 cents per gallon?

A. That is correct.

Q. Let's translate that into dollars per hundredweight. 30 cents per gallon is --
A. It's in excess of $3 per hundred.

Q. So they're what, 12 gallons?

A. 11.6 when you allow for shrinkage.

Q. Pardon?

A. 11.6 gallons per 100 pounds of milk when you allow for shrink.

Q. Okay. So 30 cents a gallon means that the gross revenues to the dairy farmers supplying those Prairie Farms plants or joint venture plants went down in excess of $3 per hundredweight on those sales?

A. Correct.

Q. And if it was as much as 40 cents per hundredweight, the reduction -- 40 cents per gallon, I'm sorry. The reduction in gross revenues on those volumes would be approximately how much?

A. Something between $4 and $5 per hundred.

Q. When you reduced -- and those reductions would have been on the wholesale price per gallon, wholesale and to-store price per gallon, I assume?

A. Correct.

Q. Can you impute a -- or did you, let me ask you that. Did you impute a raw milk cost for those wholesale gallon prices that you were competing with?

A. The difference would be approximately the Class I differential and the over-order premium and fuel
surcharges and such, such as that, yes.

Q. So, in other words, the $3 to $4.50 range was approximately the difference between -- the Class I differential in those geographic areas?

A. The area where that plant is located would be in the $1.80 Class I differential zone in Order 32. We currently have a $2.91 per hundred over-order premium in that area. We have a fuel surcharge of around 7 or 8 cents per hundred. We have an MA fee of a nickel.

Q. So those amounts aggregate to --

A. Approximately the prices that the processor was quoting.

Q. So in order for you to compete, you had to, in essence, assume that you were purchasing the milk at blend price, or actually Class III price, I guess?

A. We were competing against an unregulated handler whose cost of milk was what he wanted it to be. And he could very easily back into what our cost was and use that as his apparent advantage.

MR. BESHORE: Okay. Thank you.

JUDGE CLIFTON: Did you have a question, Mr. Miltner?

MR. MILTNER: I want to point out that the line of questioning here assumes information
that the witness will not provide. We don't have any information about the prices at which these accounts were serviced, and so there's no information about what kind of margin or markup we're working back from.

We're assuming that we're working back from an invoice price that Prairie Farms was providing, that nobody knows. And so we're assuming an awful lot that we have nothing in the record to substantiate.

JUDGE CLIFTON: Before I hear from you, Mr. Beshore, when you say that this producer-handler's cost was whatever he wanted it to be, my mind is saying, his price is whatever he wanted it to be, but his cost is his cost.

THE WITNESS: That would be a better term, yes.

JUDGE CLIFTON: Okay. Go ahead, Mr. Beshore.

MR. BESHORE: Well, I just want to -- that was -- I don't know. It wasn't an objection. It was argument inserted in the examination here. But I think it's completely incorrect.
BY MR. BESHORE:

Q. Mr. Lee, isn't it correct that your testimony, in terms of the reduction of your prices, the amount they were reduced, that's factual? I mean, you reduced your price 30 to 40 cents per gallon, correct?

A. Yes, we did.

Q. And regardless of whether you reduced it from $10 or $9 or $2 or $1, you reduced it 30 to 40 cents per gallon, correct?

A. Yes.

Q. And that's your reduction, it's nobody else's, correct?

A. Yes.

Q. And you have direct information and factual knowledge of those price reductions?

A. Yes.

Q. And when you multiply -- when you convert those price reductions into dollars per hundredweight, it's simply arithmetic?

A. Correct.

Q. And you testified to your cost, that is Prairie Farms' cost, of milk in terms of the Class I differential required by the Federal Order, correct?

A. Correct.

Q. And the over-order premiums that prevail
in that market from your suppliers, correct?

A. Correct.

Q. Including fuel surcharges, correct?

A. Yes.

Q. Those are your charges, nobody else's?

A. Correct.

Q. I mean, there are -- other people have the same charges applicable to them, but they're not -- they have nothing to do with the producer-handler's operations, they have to do with Prairie Farms' actual cost of milk, correct?

A. That's correct.

Q. And so when you were testifying with respect to the difference, the 30 to 40 cents, you just testified that it equals the Class I differential plus the over-order premiums that apply in that marketplace?

A. I think I said approximately.

Q. Approximately, yes, you did. I didn't mean to misstate your testimony. So when Mr. Miltner comments that you're talking about information that you won't provide, that's completely inaccurate with respect to that testimony, is it not?

A. My response to him was, I was not going to provide the names of the accounts and what our original wholesale price was and what it had to be
adjusted to.

Q. Okay. Would you provide the name of his client that you're competing with in that situation?
A. I am referring to Heartland Farms located in Newark, Missouri.

Q. Okay. Now, with respect to -- and I know you don't want to provide the identity of the account in El Paso, and I'm not going to ask you to. But in terms of connecting the dots, I want to make sure that I've got your testimony correct. You described it as a large national and even international retailer?
A. Correct.

JUDGE CLIFTON: Would you spell Heartland for me?
THE WITNESS: H-e-a-r-t-l-a-n-d. I think it's one word.

CROSS-EXAMINATION

BY MR. MILTNER:

Q. Now, one other area. You indicated, in response to a question from Mr. English, that large national buyers, if my notes are close, were, quote, I think you used the word "intrigued" by the possibility of purchasing milk from the producer-handlers.
A. That is correct.
Q. When you -- I wonder if you can provide
any more information with respect to what's involved in that intrigue. Are they aware -- those large national buyers aware of the fact that producer-handlers are not required to make payments into the Federal Order pool?

A. Yes, they are.

Q. And are they aware of what that means on a, you know, dollars-and-cents basis in terms of Federal Order obligations?

A. They can certainly figure it out.

Q. Okay. And they're aware that those producer-handlers would not be subject to the movements of minimum federally regulated class prices?

JUDGE CLIFTON: Don't answer yet. Let me hear the objections. First Mr. Ricciardi.

MR. RICCIARDI: Your Honor, I sat down because I'm getting tired, but they, being unidentified people, who may be two or three sources away, we have no testimony at all that there's a basis for what he just said on this witness stand. We have raging hearsay problems. And I realize we're letting a lot of things in, but let's be fair. We've got to have identification of the basis for this. And when requested to get some of this information, we're told, I know this, we're not going to tell you
about it. Let's at least give us an opportunity
to try to fairly cross-examine and make
Mr. Beshore ask a nonleading question once.

    JUDGE CLIFTON: Mr. Vetne.

    MR. VETNE: I concur. I might put it a
little bit differently. Administrative
proceedings have a bit looser standard for
receipt of evidence than do Federal courts.
However, I think that's measured by the kind of
thing that's also described in the rules of
practice, the type of evidence upon which a
responsible person is accustomed to rely.

    And we do have the witness talking about
the state of mind of somebody else, or a number
of somebody else's. The universe of that
somebody else's or the identity of that somebody
else's is not identified. And what goes into
making that state of mind, or even the details
of it, we have no way of examining that. Are
they aware? You know, it could be five, it
could be 100. Who is "they"?

    It doesn't -- you know, if the Secretary
were to rely on some version of this for any
part of a decision, this decision, hopefully,
wouldn't be able to stand by itself. It would
be arrested and taken off to dry out in a tank someplace, because it wouldn't be able to walk that straight line. Thank you.

JUDGE CLIFTON: Thank you, Mr. Vetne. Do you remember the question, Mr. Lee? Starting with, these large national retailers who are intrigued. Do you have reason to know what their state of mind is with regard to either becoming producer-handlers or becoming the buyers from producer-handlers? And if so --

THE WITNESS: I would simply say that there are retailers who are not that familiar with the history and the need for Federal Orders, who question the need for any sort of governmental regulation in the pricing of milk. They may not understand why one group of milk processors is subject to a different set of regulations than perhaps another. And being good businessmen, if they can get the same quantity of milk, the same quality of milk, the same delivery service at a lower price, they are certainly going to look into that opportunity.

JUDGE CLIFTON: Have you had any discussion with representatives from such firms?

THE WITNESS: No, I have not. I'll avoid
the Paul Rovey mistake from earlier. I will say
I am going on information from the CEO of
Prairie Farms and from sales and operations
people at Prairie Farms.

JUDGE CLIFTON: Mr. Beshore, I think you
got as much as you need from this witness when
he said, they can figure it out. If you want to persist in your last question, you may.

MR. BESHORE: I have just one question.

CROSS-EXAMINATION

BY MR. BESHORE:

Q. The information that you received from
the CEO of Prairie Farms and from -- who were the others?

A. I said operational-type management people
and salespeople.

Q. Okay. Did they indicate to you that the
buyers from the large national chains demonstrated, in
their actions, knowledge of the regulatory status of
suppliers of milk, including producer-handlers?

A. I think they had a limited knowledge --

MR. RICCIARDI: Judge.

JUDGE CLIFTON: Mr. Ricciardi.

MR. RICCIARDI: Judge, come on. We have
no basis for that statement. Now we have double
hearsay. He wants to testify, I understand that. But Mr. Vetne is correct, this decision has to be based upon what reasonable people rely upon. Double and triple hearsay is not fair to my clients or the Secretary. We need to have personal knowledge or information that is reliable, and Mr. Lee has already admitted he doesn't have that.

JUDGE CLIFTON: That objection is overruled. The witness' answer stands.

Mr. English.

MR. ENGLISH: I think this was my witness, and I didn't really get a chance to respond to a number of objections that were made. And I want to point out, and maybe I can ask a couple questions of the witness.

REDIRECT EXAMINATION

BY MR. ENGLISH:

Q. Maybe it's so basic that it's absurd, but, unfortunately, apparently, some people think --

JUDGE CLIFTON: Don't go there. Just ask the questions.

BY MR. ENGLISH:

Q. Is the dairy industry, in particular the fluid milk market, extremely competitive?
A. We regard it as very competitive.
Q. Is it in your interest to anger or otherwise upset your buyers by naming them by name in this proceeding?
A. I'm on risky ground just alluding to certain retailers. Certainly, it's very thin ice to start naming the names of your largest customers.
Q. And so as a reasonable businessperson, you are declining to name names for that purpose?
A. Correct.

MR. ENGLISH: I think that sets the stage, your Honor, for why, as a reasonable person, he's not disclosing the names. He has said both the institution and from his own knowledge, based upon the competition and the reduction in price, that these are the things that Prairie Farms has had to do in response to competition.

JUDGE CLIFTON: But, Mr. English, weren't there some companies that Mr. Lee did not want to name that are not Prairie Farms' customers in the course of these last few questions?

BY MR. ENGLISH:
Q. Would you like to clarify? Were they customers?
A. I was only talking about Prairie Farms' experience.

Q. With Prairie Farms' customers?

A. Yes.

MR. ENGLISH: So they are Prairie Farms customers, your Honor.

JUDGE CLIFTON: Okay. That's helpful.

MR. MILTNER: Your Honor, I would like to point out that in order to adequately prepare our case and our evidence, we need to -- Mr. Lee needs to make a decision, which he's made, whether to provide the full information upon which the Secretary can base a decision, and upon which we can base a cross-examination and an analysis of his assertions. And if he chooses not to do that for competitive reasons, he's certainly free to do so, but the record ought to reflect that that decision has been made, at the very least.

JUDGE CLIFTON: Thank you, Mr. Miltner. Oh, Mr. Carroll, I hope this is productive.

MR. CARROLL: Oh, I do, too. I just want to state, since everyone is stating their position, that I join in the objection. I agree that the witness has a right to keep proprietary
information, and I try, in all my questions, to acknowledge that, and I acknowledge it here.

But that does not give him a right to come to a hearing, assert that someone else should be driven out of business, and make it impossible to determine whether his statement is accurate or inaccurate. Those are two different things. I have a couple cross-examination questions, also, when the time comes.

JUDGE CLIFTON: All right.

MR. CARROLL: Thank you.

JUDGE CLIFTON: Anything else on the issue of the difficulty in getting at -- first of all, let me say, I have been very benefited by Mr. Lee's testimony. He is very knowledgeable and his statement is very helpful.

That said, is there any other record that anyone wants to make about what more you wish you had to work with?

None. Then, Mr. Carroll, you may cross-examine.

CROSS-EXAMINATION

BY MR. CARROLL:

Q. I'm sure, directly or indirectly, this subject has been raised, but I want to, if I can,
crystalize it at one point in the record. It's so, isn't it, that in the business that you're engaged, that sometimes you cut prices?

A. Yes.

Q. And so does everybody else at one time or another?

A. Yes.

JUDGE CLIFTON: I don't think he can speak for everybody else.

BY MR. CARROLL:

Q. Well, I mean, in the trade, it's common practice?

A. It's also common practice to raise prices.

Q. Right. They can raise or they can be lowered, and that's the freedom of competition that we have in the sale of this product that you're involved in?

A. Correct.

Q. So there's nothing about a price being cut, by itself, that indicates anything except a desire to please the customer, isn't that correct?

A. Would you restate that, please?

Q. There's nothing about the price -- the fact a price is cut, by itself, that indicates anything
more than an attempt to get the customer?

A. I wouldn't agree with that completely.

Q. Well, let me ask you this --

A. When you say "get the customer," no.

Q. Well, to service. I should say service the customer. Let me ask this: On occasion, haven't you cut a price in order to establish a relationship with a customer?

A. I would assume I have.

Q. Sure. And maybe you took a loss on that?

A. Perhaps.

Q. And maybe that's what happened in this case? Thank you.

JUDGE CLIFTON: Do you want an answer, Mr. Carroll? Don't walk away until he has a chance to answer you, please.

MR. CARROLL: I don't know. He didn't look like he was going to, but I'll be glad to --

JUDGE CLIFTON: Give him a little minute if he wants to think about it.

MR. CARROLL: If he wants to think about it.

A. Prices were adjusted for competitive conditions. In the short run, if you want to maintain
volume in your plants to keep them operating efficiently, you do what you have to do in terms of price. In the long run, you either walk away from the business or you go broke.

MR. CARROLL: Thank you.

JUDGE CLIFTON: Mr. Vetne.

CROSS-EXAMINATION

BY MR. VETNE:

Q. John Vetne, representing Mallorie's, et al., three plants in the Pacific -- two in the Pacific Northwest and one in Roswell, New Mexico.

Mr. Lee, I'm looking at the list of 35 plants operated by Prairie Farms. There are a number of joint venture plants with various other cooperatives. In all cases, Prairie Farms is the operating partner in those joint ventures, is that correct?

A. Prairie Farms provides the management of the joint ventures. The partner has the obligation to arrange for the milk supply.

Q. So you run the plant?

A. Yes.

Q. You're very good at running plants, aren't you? You think you are?

A. We've done okay.

Q. I think you are. With respect to --
let's go to the Order 32 plants. There are a couple of cultured plants there, Quincy and Carbondale?

A. Yes.

JUDGE CLIFTON: What page are you, Mr. Vetne?


BY MR. VETNE:

Q. Are there page numbers on here?

A. No, but it was the second page in.

Q. Those two cultured plants, are they stand-alone cultured plants?

A. Yes, they are.

Q. And do those two cultured plants occasionally have some product that is assigned to Class I?

A. No. Well, perhaps. If it was excess shrink, that would be the only Class I that either of those plants would have.

Q. None of them make, concurrently or ever have made, for example, like, a beverage yogurt or a beverage cultured product?

A. We make a spoonable yogurt in Quincy, but we do not make a drinkable yogurt.

Q. And you would not have had any occasion
for those plants to receive packaged products that would
otherwise be Class I for distribution?

A. There is no route distribution out of
either of those facilities.

Q. How is that product distributed, then?
Does it come to a common warehouse and get distributed
with food and milk that's packaged elsewhere?

A. It is delivered to the fluid plants
mentioned above, plus other fluid plants in our system,
where it is off-loaded into a cooler and then
order-loaded to go out to customers, fluid milk, the
cultured products, orange juice, various products that
we offer.

Q. Okay. And with respect to the
unregulated plants on page 3, with the exception for the
moment of Jefferson City, do any of those plants ever
use milk that ends up in any Class I product
consignment?

A. No.

Q. Again, there's no beverage cultured
product or anything produced by those plants?

A. None.

Q. And they never receive packaged -- ever
receive packaged --

A. They do not.
Q. You operate a number of fluid milk plants. What are the size ranges of those plants, the smallest to largest?

A. I'll give you a range, but I won't tell you specifically about the size of the plants, again for proprietary reasons.

Q. I didn't ask that yet.

A. The smallest plant runs about 5 million pounds per month and the largest about 30 million pounds per month.

Q. Okay.

A. The majority would be between 10 million and 20 million pounds per month.

Q. All right. Can you share something about the range of costs for your plants from receipt of milk at the silo to placement of packaged fluid milk products in the plant cooler?

A. The conversion cost at the plants?

Q. The costs, yeah, per gallon, to take milk from your silo to --

A. Conversion costs are calculated on a per-hundredweight basis.

Q. All right. Then I know how to do the arithmetic. We got it in here earlier.

A. All of the plants have operating costs in
excess of $2 per hundred and less than $10 per hundred.

Q. Is that the range?

A. That's about as vague as I can be with you, John, without making an asinine statement.

Q. Okay. My question is, can I reasonably infer, yes or no, that you have some plants that can package milk for $2, as little as $2, and some plants at which the cost is as much as $10, or is it somewhere close --

A. It's somewhere greater than 2 and less than 10.

Q. I see. Can you -- are you able to say whether your experience is that of what appears to be the rest of the universe, that it costs more to package milk at your smaller plants than your larger plants on a per-unit basis?

A. Yes.

Q. Okay. Do all of your plants produce their own packages, either blow mold or cartons?

A. Any of the plants that have a gallon jug filler mold them on-site. Some of the plants that are filling plastic half gallons or plastic pints mold them on site. Some buy them.

Q. The vast majority of the milk distributed by the plants operated by Prairie Farms, however, blow
their own containers?
   A.    Yes.
   Q.    And that is more -- that is more efficient and less expensive than buying them, correct?
   A.    Correct.
   Q.    The plant in Fulton, Kentucky, was that plant at one time a partially regulated plant, or has it always been fully regulated?
   A.    I can't answer that. For as long as it's been a part of Prairie Farms, which is about three years, it's been fully regulated.
   Q.    Okay. Do any of these fluid -- are any of these fluid plants plants that are dedicated to producing a specialty fluid milk product, such as, I don't know, Slim-Fast or milk without lactose, or that kind of thing?
   A.    No.
   Q.    They all produce the regular range of white milk and flavored milks?
   A.    Specialty products are purchased from third parties.
   Q.    Now, with respect to the plant in Jefferson City, Missouri, that's the plant that was formerly known as Central Dairy?
   A.    Correct.
Q. So it was owned by somebody else, and they went out of business and sold it to Prairie Farms?
A. They never went out of business. There was a smooth transition from private ownership one day to Prairie Farms ownership the next.
Q. You acquired it from Central Dairy?
A. Yes.
Q. And you own it wholly?
A. Yes.
Q. Would it be fair to say that the balancing means the surplus milk associated with the Central -- former Central Dairy plant is dispooled for the most part?
A. I can't answer that because that plant is supplied almost entirely by another cooperative.
Q. Would you agree with me that it would be in whatever supplier's best interest to pool the surplus associated with the plant and not pool the milk delivered to the plant?
A. If that were necessary, yes.
Q. That would generate the highest returns?
A. Yes.
Q. Okay. And a cooperative is under a fiduciary obligation to its members to generate the highest returns when -- within legal bounds, correct?
A. Agreed.

Q. Would it be fair to say that the Central Dairy plant in Jefferson City -- is it still called Central Dairy?

A. Yes.

Q. -- is among the smallest of the plants that you operate?

A. Among them, but not the smallest.

Q. Does the Central Dairy plant package milk in containers using labels that are also used in other plants operated by Prairie Farms?

A. The plant in Jefferson City packages milk in labels other than the Central Dairy label, but not for delivery to other Prairie Farms plants, but to serve Prairie Farms accounts located in that area.

Q. And aren't those Prairie Farm accounts also served by pooled plants on occasion for some of their milk?

A. Yes.

Q. So when the Central Dairy supply is insufficient, milk under that label can come from one or more of the other plants operated by Prairie Farms?

A. Theoretically.

Q. And that has actually happened, hasn't it?
A. Yes.

Q. Does the supply to the plants that are not wholly owned and wholly operated by Prairie Farms -- let's look at that. Milk that's used for Class I commands a Class I premium, correct?

A. Yes.

Q. Does Prairie Farms make a decision of what that premium will be?

A. No. The joint ventures are price takers.

Q. So whatever -- okay. So the supplying for the joint ventures, Prairie Farms does not supply that with its own producer member milk?

A. That is correct.

Q. Is it supplied by somebody else, and that somebody else, or those somebody elses, decide what the Class I premium will be?

A. Either on their own or through the umbrella of an agency, yes.

Q. Yes, okay. And what about the -- what about the milk to the Prairie Farms plants that are mostly on page 2? Is there a Class I premium attributed to such milk, or actually charged between the operating offices of Prairie Farms?

A. The plants mentioned at the top, Carlinville, Olney, et cetera, their price of milk is
announced by the St. Louis Marketing Agency, which is an agency that oversees the delivery of milk to Prairie Farms and Dean Foods and I think one other small plant, and it consists -- the members of the agency consist of DFA, the MPI, Foremost, Land O'Lakes, Central Equity, Michigan Milk Producers.

Q. Okay.

A. The next group of plants, Battle Creek, their premium is announced by the southern Michigan pricing agency. I forget the exact title. The other two plants follow the Mideast Marketing Agency price. And Holland, we follow the Mideast Marketing Agency price. At Somerset, we follow the DFA price announced out of Knoxville. In Rockford, we follow the CMPC price.

Q. CMPC meaning?

A. Central Milk Producers Cooperative.

Q. And that's an organization of cooperatives that operates throughout Federal Order 30?

A. Correct.

Q. For any of those, is there a particular member cooperative of those agencies that is designated as the managing agency? Say St. Louis, is there a cooperative?

A. The St. Louis agency is managed by a
third party.

Q. Okay. And the prices are fixed what, at a committee meeting, or how?

A. There is -- I would call it a board, for lack of a better word, made up of the co-ops that I mentioned a minute ago, AMPI, DFA, Foremost, Land O'Lakes, Central Equity. I think currently, someone from AMPI is president of the agency. They decide what the premium is going to be.

Q. And southern Michigan, is there a third party involved there, or is one of the partners --

A. Yes, it is. The price in southern Michigan is announced by an agency. The pool is run by an individual. I think there's a co-op in Michigan that kind of acts as leader in announcing premiums for that market.

Q. MMPA?

A. Yes.

Q. Let's see, Quincy and Carbondale was a different organization?

A. No. Quincy and Carbondale -- we do have premiums on Class II milk in the St. Louis agency, so they follow the premium announced by that agency.

Q. I see. Good. Somewhere in the colloquy or discussion on evidence, and objections after that,
you testified that your comments on competitor responses and your knowledge of competition was limited to the markets in which you operate?
   A. Yes.
   Q. Okay. So just to be clear, you did not intend to imply any state of competition or any state of mind to a seller or buyer, for example, in the Pacific Northwest market?
   A. Not at all.
   Q. You're vice president of procurement. Is there another vice president or somebody with a -- comparably up in the corporate organization that is in charge of packaged products, sales, and plant -- or plant management, or both?
   A. There are two directors of operations.
   Q. Okay.
   A. And there's a chief operating officer. The two directors of operations report directly to the CEO, however.
   Q. Okay. It would be the directors of operation that would be most knowledgeable in customer responses, competitor responses for milk sales, is that correct?
   A. No. It would be more under the VP of sales.
Q. So there's a VP of sales?
A. Yes.
Q. And the VP of sales is a VP for finished product sales?
A. Yes.
Q. Okay. Do you know enough about buyer behavior, that is purchasers of packaged fluid milk products, to know that sometimes they seek price concessions based on rumors or even made-up things that, gee, you know, Joe Blow is offering milk for, you know, a dollar over, you're charging me $1.50, and you don't know, and so you make a concession based on that kind of representation?
A. The simple answer to that would be what I know there is what I've heard from other Prairie Farms employees.
Q. Okay. So you don't know the practices of buyers in trying to negotiate price concessions --

JUDGE CLIFTON: Excuse me. Mr. Vetne, I promised to have this witness out of here by 5:00. I lost track of the time. It's 5:24.

MR. VETNE: Mr. Lee, I'm done. Thank you. Did you answer the last question? You don't know --

JUDGE CLIFTON: I didn't let you finish
asking.

A. I was just going to respond that, as a rule, when I get the milk delivered to the operating plants, I'm done with it. I turn it over to processing and sales, and they take it from there. So anything I know beyond delivery of the raw milk to the plant is relayed to me by others.

MR. VETNE: Godspeed.

THE WITNESS: Thanks.

JUDGE CLIFTON: Mr. Ricciardi.

MR. RICCIARDI: Your Honor, I have not had an opportunity to cross-examine Mr. Lee, and I know that he has difficulties in scheduling. I don't know whether or not he's available another time. I don't know whether or not --


JUDGE CLIFTON: Thank you, Mr. English. You may cross-examine, Mr. Ricciardi.

CROSS-EXAMINATION

BY MR. RICCIARDI:

Q. Mr. Lee, Al Ricciardi on behalf of AIDA. So I'll do the last point first, and I will try, as I usually do, to get through this as quickly as I can.
With regard to customer actions or price concessions or anything else, that is someone else that we would look to for that information, such as the VP of sales?

A. Correct.

Q. You have been in this industry, since at least '73 employed by Prairie Farms, and you are familiar, in general, with the dairy industry, correct?

A. Yes.

Q. And you've been to a number of Federal Order hearings?

A. Yes.

Q. Now, you're aware that back in the period of time when you started at Prairie Farms around '73, the number of producer-handlers throughout the country was in excess of 400? Actually 421 if you want to --

A. I cannot agree or disagree with that number.

Q. You don't know?

A. No, I don't.

Q. We do know, because we've got Exhibit 13, that the current number of producer-handlers, at least as of 2009, is now down to 37. Were you aware of that?

A. That is correct. I agree with that.

Q. So in terms of growth, at least by numbers of producer-handlers, they've substantially
declined since you've been in the business, correct?
   A.    Yes.
   Q.    With regard specifically to Heartland Creamery, you named them as the competitor, right?
   A.    Uh-huh, yes.
   Q.    Okay.  You know nothing about the size of their plant, correct?
   A.    I have not been in the facility.
   Q.    So you don't know how large it is, correct?
   A.    Correct.
   Q.    You don't know the equipment?
   A.    Correct.
   Q.    You don't know when it was built?
   A.    I know approximately when it was built, but I can't give you the date or the month.
   Q.    And you can't tell me what its cost of processing is, because you don't have any of that information, correct?
   A.    But, again, as I said in my testimony, I think that's irrelevant.
   Q.    I understand that, but I'm not asking you whether it's irrelevant or not. You're not objecting to anything. I'm saying you don't know it?
   A.    I don't.
Q. Okay. With regard to this customer who you haven't named, that supposedly had something to do with Heartland Creamery, my assumption is that your VP of sales would have invoices, purchase orders and other documents if, in fact, what you told us that he told you or somebody told you is actually true?

A. Yes.

Q. And you don't have those today?

A. No, I don't.

Q. And you won't even tell me the name of the customer?

A. No, I won't.

Q. But you're willing to name our company? That's okay.

A. The customer I'm referring to is the Hy-Vee stores.

Q. Okay. The Hy-Vee stores. How many of the Hy-Vee stores?

A. I can't say. I don't know exactly how many. They divide their business up among several customers -- I mean, I'm sorry, several suppliers. I don't know in how many cases we had to lower prices to maintain shelf space. I don't know in how many cases we lost shelf space.

Q. When was that?
A. Pardon me?

Q. When was that?

A. I said I don't know in how many cases.

Q. And specifically what stores? In what locations?

A. I don't know.

JUDGE CLIFTON: Would you spell Hy-Vee for me? I'm not familiar with it.

THE WITNESS: Yes. H-y, V-e-e. If you've heard Kurt Warner, the quarterback for various teams, that's where he worked as a stock boy in college.

BY MR. RICCIARDI:

Q. Well, you've heard of Kurt Warner, and he doesn't play for various teams. He plays for the Arizona Cardinals, and he should have won the Super Bowl.

A. He's played for the St. Louis Rams, he's played for the New York Giants.

Q. Yes, but he currently plays for the Arizona Cardinals?

A. Correct.

Q. All right. Let's move on.

JUDGE CLIFTON: That's all one word, H-y-V-e-e?
THE WITNESS: I think so.

BY MR. RICCIARDI:

Q. You list, on pages 2 and 3, some of the plants which are joint ventures with DFA?

A. Correct.

Q. Are all of the Hiland plants DFA joint ventures?

A. Yes.

Q. So wherever it says a Hiland plant, that's a joint venture between Prairie Farms and DFA?

A. Yes.

Q. When you say the plants are unregulated, and you list them at the bottom of page 3, and we've talked about Jefferson City, why are the remainder of the plants that you have there, from Decatur down to Lafayette, unregulated?

A. In the case of O'Fallon; Springfield; St. Louis; Norfolk, Nebraska; the novelty plants, they don't use any milk. They use condensed or powder or cream or nonfat dry -- when I said "powder," I mean nonfat dry milk or whey powder. They don't use any fresh milk. Decatur uses a limited amount of fresh milk. The cultured plant in Kansas City uses a very limited amount of fresh milk.

Q. So do those plants have to make a pool
payment?

   A. No, they don't.

   Q. When you have a plant, such as the Hiland plant at the top of 3, that's fluid and cultured, if that was a 50/50 plant, is there a pool payment that is required?

   A. It depends on the various class prices that month. But yeah, they're going to pay in on their Class I. They're going to pay in on all classes and they're going to draw the uniform.

   Q. Okay. And so in a situation on a month, depending on pricing, it could be that those plants that are split plants wouldn't have any real pool obligation, because they put it in with one hand in one pocket and take it out with another?

   A. Yes.

   Q. Okay. Lastly, so you can get moving, you can refer to page 5 of your statement, although it's not required that you do that, but I'm going to do the jumping off point from the sentence you wrote. The third paragraph up from the bottom, you say in that last sentence, "Or they can vote out the current system and face the unknown of deregulation in the fluid milk business." That was your statement, right?

   A. Yes.
Q. You're aware that the Western Order was voted out a few years ago?
A. Yes.
Q. And, therefore, Idaho, for example, has been unregulated for a number of years now?
A. Yes.
Q. And that, in actuality, since deregulation or unregulation, that the dairy business in Idaho has grown?
A. The business of manufacturing cheese in Idaho has grown, yes.
Q. And that would be part of the dairy business, right?
A. Yes.
Q. Okay.
A. My statement was primarily referring to the fluid milk. I do not think the fluid milk industry lends itself well to deregulation.

MR. RICCIARDI: Okay. I understand.

Thank you.

THE WITNESS: Okay.

JUDGE CLIFTON: Thank you, Mr. Ricciardi, for keeping that brief. That was very succinct. I can't believe you got the information from Mr. Lee.
MR. RICCIARDI: I'm the nicest person in the room, Judge.

JUDGE CLIFTON: I'm hoping there's no more cross-examination, but I would ask if Mr. Tosi has any questions for Mr. Lee.

MR. TOSI: Mr. Lee, we have no questions for you, but I appreciate you coming here, and I congratulate you on your endurance here. Thank you.

JUDGE CLIFTON: Mr. English, redirect.

MR. ENGLISH: Very limited, your Honor, just to clarify the record.

REDIRECT EXAMINATION

BY MR. ENGLISH:

Q. When you say that the Jefferson City, Missouri, plant -- or you were asked if it was unregulated. You said it's really partially regulated?

A. Yes.

Q. That's pursuant to section 1000.76, correct?

A. Yes.

Q. So you either have to be paying the plant blend on all the milk under 1000.76(B) or you're paying into the pool under (A) for any milk sold in the regulated areas, correct?
A. That is what that plant is doing. It is paying into the pool on the sales or unregulated areas, or keeping the sales under a level where they become fully regulated. And their occasional sales into the regulated areas are basically to help out another plant.

Q. So when they sell in competition with regulated facilities in a regulated area, they are contributing to the pool on those sales?

A. Yes, they are.

MR. ENGLISH: Thank you, sir.

JUDGE CLIFTON: Thank you, Mr. English.

Thank you so much, Mr. Lee. You may step down.

THE WITNESS: Thank you very much.

JUDGE CLIFTON: I want to take a 10-minute stretch break before we go on to the next witness. It's 5:35. Please be ready to go at 5:45.

(A recess was taken from 5:35 to 5:48.)

(Exhibit 35 was marked for identification.)

JUDGE CLIFTON: All right, let's go on record. We're back on record. It's now 5:48. I would first like to take the pulse of those who are still participating. We still have a full room, which is wonderful. I'm thinking...
perhaps this should be our last witness of the
day, unless there's strong objection.

If there's strong objection, then I would
ask J.T. Wilcox to testify yet tonight. If
everyone would be content that we end with
Mr. Kastel, then I'll work in Mr. Wilcox
sometime tomorrow. Okay. Is there anyone that
strongly objects to our taking Mr. Wilcox
tomorrow?

Nobody. That's good. Let me just
mention some of the names I have for tomorrow.
And if you're here tonight and I don't call your
name, but you want to testify tomorrow, please
identify yourself by coming forward. I know
about the people from Vermont, New Hampshire and
Wisconsin. I think their names are Roger Alby,
Diane Wallfield and Wil Hughes. I know about
Matt Shatto, S-h-a-t-t-o, John Hornstra, Steve
Rowe, Gary Latta, Mike Krueger and J.T. Wilcox.
Is there anyone else here now who would also
like to be heard from tomorrow?

All right. Tomorrow we may acquire some
more witnesses as, indeed, we did today. So
tomorrow morning I'll find out in what order
we'll proceed.
All right. Mr. Vilsack, this exhibit that you've brought, this Exhibit 35 --

MR. KASTEL: I've already had a promotion. It's Mr. Kastel. I've already had a promotion to Secretary, and I haven't put my hat in the ring.

JUDGE CLIFTON: I'm looking for a name on here that's of the person, and that's the first name I saw. With apologies to our Secretary of Agriculture.

Mr. Kastel, this document is not signed by just you. Tell me about this document, if you will. And I'm speaking of Exhibit 35.

MR. KASTEL: Yes, your Honor. This document I prepared myself, no one reviewed this, no one edited this, and it was presented to organic dairy producers with the option for them to sign onto it, expressing that it would be presented at this hearing. So this is my testimony that's being supported by -- I counted, and it's about 60 mostly dairy producers. There are 13 producer-handlers, a number of milk handler processors, and just a couple of folks that are allied to the organic dairy industry.
MS. KISER: Your Honor --

JUDGE CLIFTON: It looks to me -- just a moment. I have a couple more questions, and then I'll recognize you.

It looks to me like you've put them in pretty much alphabetical order.

MR. KASTEL: That's correct, your Honor.

JUDGE CLIFTON: All right. And how did you communicate with these members to ask them if they supported this statement?

MR. KASTEL: Through e-mail, principally.

JUDGE CLIFTON: All right. I want to swear you in first, and then I'll hear your motion. All right. Please state and spell your name for me.

MR. KASTEL: Mark Alan Kastel, M-a-r-k, A-l-a-n, K-a-s-t-e-l.

JUDGE CLIFTON: Thank you. And what is your relationship to the organization whose members are on this Exhibit 35?

MR. KASTEL: I am the codirector of the Cornucopia Institute. We're a 501(c)(3) tax-exempt charity. And some of these signatories are members of the Cornucopia Institute.
JUDGE CLIFTON: All right. And how did you have the names of those that are not members?

MR. KASTEL: They responded to an outreach alerting them that I would be presenting testimony at this hearing, and inviting them to sign on. And, obviously, we will communicate -- subsequent to this testimony, communicate this to the Secretary directly.

JUDGE CLIFTON: All right. And I'll hear your motion in just a moment.

(The witness was sworn.)

JUDGE CLIFTON: Now, if you would identify yourself and tell me why you're here.

MS. KISER: Okay. Your Honor, as I previously introduced myself, my name is Livia Kiser, K-i-s-e-r. I represent Aurora Organic Dairy, and I'm here because we are moving to exclude the letter that Mr. Kastel has drafted, because it is immaterial and irrelevant, because it contains a lot of false statements about Aurora, and it's inflammatory and slanderous. And I'm happy to present to you the reasons why, and they're set forth in my motion. If I may
approach, I can give you a written copy of that.

JUDGE CLIFTON: Would you, please? And, also, the court reporter and the USDA officials, if you have not yet approached them.

MR. KASTEL: And, your Honor, I'm not represented by legal counsel, so I would appreciate being able to be engaged in this process and to respond.

JUDGE CLIFTON: Oh, my goodness.

MS. KISER: Those are just documentary exhibits to support it.

JUDGE CLIFTON: Okay. So now have you given Mr. Kastel a copy?

MS. KISER: I will give Mr. Kastel a copy right now.

JUDGE CLIFTON: Okay.

MR. KASTEL: Obviously, your Honor, there's no way that I can review this. I'm under oath, so I'll just say that there is a factual basis for all statements made in my testimony. And I have brought with me some -- if -- I think we should be able to publicly respond to any questions of my credibility or the veracity of this testimony. And if those questions do come up in cross-examination, I'm
prepared to respond to them.

JUDGE CLIFTON: All right. While you --
Mr. Kastel, I do not agree with you that because
you are not a lawyer, you cannot deal with this.

MR. KASTEL: No, I didn't say I couldn't
deal with it. I said I obviously don't have the
time right now to thoroughly review this
document.

JUDGE CLIFTON: Actually, you do, because
I need to, as well. So you and I will both read
this.

MR. KASTEL: Okay.

JUDGE CLIFTON: Before we read it,
though, I want to take advantage of Ms. Kiser's
knowledge of it. And, Ms. Kiser, if you will
summarize for me, roughly, what is objectionable
about Exhibit 35. If there are particular
paragraphs you can call to my attention, that
would be helpful.

MS. KISER: Absolutely. I can tell you
that -- so, for example, statements that Aurora
Organic Dairy has "caused catastrophic
marketplace disruption," statements that
Aurora --

JUDGE CLIFTON: You see, that may not be
slanderous or defamatory.

MS. KISER: I don't disagree, but I'm getting to the worst of it. I thought you wanted me to identify every statement that we find objectionable.

JUDGE CLIFTON: I do.

MS. KISER: Okay. Right. Statements that this corporation is "currently disadvantaging family farmers nationwide." We disagree. Characterizing Aurora as a "bad actor." Characterizing Aurora as "milking between 12,000 and 19,000 cows." But here's where --

JUDGE CLIFTON: Where is that?

MS. KISER: That's the next paragraph, right below characterizing Aurora as a "bad actor."

JUDGE CLIFTON: I see it now.

MS. KISER: And here's where it really gets offensive. "Aurora has gained their enviable market share by operating illegally." That is absolutely untrue. "Abusing the organic standards." That is absolutely untrue. "And by taking advantage of their exempt status, undercutting the rest of the industry on price."
That is absolutely untrue.

The next sentence, "Prompted by a formal industry complaint," that is false. It was prompted by a complaint by Mr. Kastel, who is not a member of the formal industry, of the dairy industry.

"The USDA found Aurora Organic Dairy 'willfully' violated 14 tenets of the Federal organic standards." That is not true. Stating that Aurora has "damaged its neighbors' environmental living conditions in Colorado," is not true, "to the point where they have been under supervision by local units of government." That is absolutely not true.

You know, "The major equity control of Aurora is held by Charlesbank in Boston." That is not true. Charlesbank is an investor in Aurora, but Aurora is owned by families.

"Aurora has competitively injured family farmers and their processing/marketing partners around the country by shipping milk that did not qualify for organic labeling under the law." That is absolutely not true.

Characterizing Aurora as exploiting family farmers is absolutely false. And then,
of course, when he goes on to say, "Along with organic industry participants who pay into the pool, legitimate producer-handlers" --

JUDGE CLIFTON: Okay. You're on page 2, in the second paragraph?

MS. KISER: Yes.

JUDGE CLIFTON: Okay. Go ahead.

MS. KISER: -- "are injured by Aurora and other exploiters of the exemptions." Aurora is not exploiting anything. They are a producer-handler recognized by the USDA. They are lawfully not participating in the pooling. So to suggest that they're somehow doing something improper is absolutely untrue.

He says that Aurora didn't obtain their cattle legally. That is absolutely false. He says, "One of the violations found by the USDA at Aurora was their bringing conventional cattle that did not qualify for organic production into their operation." That is absolutely false. The USDA never made any findings with respect to Aurora.

Then the next -- oh, and this one, "We seriously question whether Aurora's ownership structure and management model...would qualify."
They plainly qualify. The USDA has recognized that they qualify. And for Mr. Kastel to make these statements, he has no inside information into their business. These are just outrageous and speculative, and they are totally inappropriate.

Characterizing Aurora as exploiting "dairy farmers around the country" is absolutely inappropriate and untrue.

MR. KASTEL: She already mentioned that. Do I have to respond to that twice when I rebut this?

JUDGE CLIFTON: It's up to you.

MR. KASTEL: Okay.

MS. KISER: "Changing the regulation would not put anyone out of business." He's hoping that Aurora goes out of business. He's on record repeatedly saying that one of his great missions in life is to put Aurora out of business. When he says, "Large producer-handlers can obviously continue in business while paying into the pool," that is not true. There are many producer-handlers, and we've already heard from some, who will be driven out of business if the proposal that he
purports to the court is adopted. And, in fact, he hopes, as I said, that Aurora is driven out of business.

And then, finally, "The organic dairy industry is in crisis due...to the marketplace disruption caused by Aurora Organic Dairy." That is false.

Now, your Honor, Mr. Kastel should not, in my view, be able to "rebut" what I have to say until I'm able to show you, through evidence, why what he said is untrue. And my motion sets forth, and I've given you the documents that demonstrate, that what Mr. Kastel has said, and continues to say in public forums and other places, is just for the expressed purpose of driving Aurora out of business, and he finds no basis in fact. And this is obviously a serious concern.

What he has said, and this is absolutely on the record, and I've given the information to you, he said that he wants to drive Aurora out of business in order to drive up the price of organic milk. He said that, and this is a direct quote from him, the USDA might not have done their job and shut Aurora down, but, along
with organic farmers, consumers are going to get the job done.

He has said, quote, it is really unfortunate that the USDA did not drum Aurora out of the organic industry. We are working on that right now. He is working with and supporting plaintiffs' counsel in a series of class action lawsuits that were filed against Aurora and some of its customers. He has taken credit for finding individuals willing to act as named plaintiffs in those cases. And the lawyers who filed those lawsuits openly admit that they're working closely with Cornucopia and Kastel. In fact, he posted on the Internet that he, quote, helped organize the lawsuit by reaching out to people who would be potential plaintiffs.

The complaints that were filed against Aurora were not filed by a formal industry organization. They were filed by Mr. Kastel and Will Fantle of Cornucopia. And they filed complaints with the USDA against the Colorado Department of Agriculture in Aurora and requested an investigation.

The USDA dismissed their first complaint,
but in the spring of 2007, the USDA issued two notices, largely patterned after Cornucopia's complaint. Both notices ultimately resulted in consent agreements. These consent agreements have been fully resolved to the USDA's satisfaction.

The alleged violations in the notices -- and they were alleged violations, they were not findings, as Mr. Kastel should know, now that he's actively involved in litigation. Just because you file a complaint against someone doesn't make it true. The paragraphs in the complaint are not actually true unless they're proven. And the USDA has decided to resolve its differences with Aurora based on discussions between the parties by continuing to hold valid their organic certificate and they entered a new consent agreement. I'm sure your Honor is familiar with that process.

JUDGE CLIFTON: Oh, yes.

MS. KISER: And I'm sure that, as an ALJ, you've dealt with these charging documents, and the parties have come in and presented evidence, and you've made findings.

JUDGE CLIFTON: Now, consent agreements
sometimes admit the allegations of the
complaint, or some of them.

    MS. KISER: Right.

    JUDGE CLIFTON: And some say the parties
do not admit the allegations of the complaint
except for the jurisdictional allegations.

Which kind were these two consent decisions?

    MS. KISER: They were the latter. No,
there was no admission of anything. Basically,
what Aurora said was, and the USDA said, Aurora
has had and continues to have valid organic
certificates, and the parties desire to resolve
their differences, and here's what Aurora is
going to do going forward. So you have that in
your binder of exhibits, that you can look at if
you would like.

So the notices that were sent to Aurora
and the Colorado Department of Agriculture were
the subject of negotiations between the parties
and were conclusively resolved through the
consent agreements.

    The Colorado Department of Agriculture,
just to be clear, is the certifying agent for
Aurora and the dairy that was at issue in that
case. So they were acting on behalf of the
USDA, they approved Aurora's OSPs, they authorized everything Aurora did, and the USDA acknowledged that.

And the USDA said with DEA and Aurora going forward, here are some changes we would like to see. And Aurora actually agreed to things that were even more stringent than required by the NOP regulations at that time.

JUDGE CLIFTON: Now, what are those initials you've used? Did you say SOP?

MS. KISER: NOP.

JUDGE CLIFTON: NOP. What is NOP?

MS. KISER: I'm sorry. NOP is the National Organic Program regulations. Aurora holds certificates that are issued pursuant to the Organic Foods Production Act, and organic certificates are issued pursuant to Federal law by duly accredited certifying agents operating pursuant to the authority given to them by the USDA. So --

JUDGE CLIFTON: And then you used another acronym that started with an S?

MS. KISER: OSP?

JUDGE CLIFTON: Yes, OSP.

MS. KISER: An OSP is an organic systems...
plan. And it's basically the plan that the certified operation develops with the certifying agent's authority and approval. And then they have to follow their OSP on a foregoing basis. So organic entity A, who may be in, let's say Vermont, is going to have different issues, you know, different things that will confront them. Depending on the size of the dairy, depending on the various issues, they will have a specific OSP to that site, okay?

Aurora is in Colorado. It's a different situation. They also will have a specific OSP pursuant to their dairy and their particular situation, okay?

The OFPA is scale neutral. It's also geographically neutral. Obviously, Congress wanted dairies to be able to be all over the country. They didn't want to unfairly advantage one location of the country over another. And they wanted everybody who could develop an OSP and ascribe to those standards be able to have an organic dairy. It was pro commerce, it was pro organic.

So the consent agreement with the CDA affirmed the fact that the CDA has always been
accredited as a certifying agent and acknowledged that the CDA's decisions regarding Aurora's OSPs were based on reasonable interpretation of the NOP. The consent agreement with Aurora, likewise, resolved all issues. It confirmed the validity of Aurora's organic certifications and its operation at all times under valid OSPs.

It required Aurora to take certain steps to address issues relating to the CDA's interpretation of the NOP. It required Aurora to submit amended OSPs and it provided for the dismissal of the notice upon implementation of the amended OSPs. Aurora implemented everything that the USDA asked them to do, and the USDA subsequently confirmed that Aurora had fully complied with the terms of the consent agreement. And, in fact, the USDA sent a letter to Aurora saying the USDA considers this matter closed.

Everyone considers this closed but Mr. Kastel. Mr. Kastel continues to say things about Aurora that are just patently untrue. So when he says that Aurora operates illegally by abusing the organic standards, that's plainly
false.

If you look at what the USDA has said about what Aurora has been doing, which they have publicly published, and which have been on their Website, the USDA said that the notice contained only allegations, not findings, and that Aurora's organic certifications have always been valid.

So when Mr. Kastel says that the USDA made findings, that is absolutely not true. And when he says it was prompted by a formal industry complaint, that is also not true, because it was actually prompted by Mr. Kastel himself.

And the Aurora consent agreement makes clear that the parties were resolving the allegations in the notice of proposed revocation, and also reaffirmed that Aurora was operating pursuant to valid OSPs.

MR. KASTEL: Can I interrupt?

MS. KISER: No, you cannot --

MR. KASTEL: Sorry, your Honor. If I had counsel, the counsel would say she's basically acting as a witness, and she's repeating over and over again. I'm trying to protect my own
time and the time of everybody else here. She said certain statements three to four times. I think once was adequate. And I'm making careful notes, so I'm paying attention to what you're saying, as I'm sure you are, and other members of your audience.

JUDGE CLIFTON: Well, I'm not making careful notes, because I'm reading along with the motion. But I'm going to allow counsel to finish. She's about on page 9, I think.

MR. KASTEL: Okay.

MS. KISER: Thank you.

JUDGE CLIFTON: You're welcome.

MS. KISER: Thank you, your Honor. I'm sorry, I lost my train of thought. Anyway, the consent agreement makes clear that the parties are resolving allegations. And that is the word that is used in the notice of proposed revocation.

Again, he said that "Aurora has competitively injured family farmers...by shipping milk that did not qualify for organic labeling under the law." That is absolutely false. The USDA has published on their Website that Aurora's organic certificates are valid,
and have been valid at all times, and so does the consent agreement affirm that.

Mr. Kastel, you know, is hoping that this regulation that may be promulgated as a result of this formal hearing will, in fact, put Aurora out of business. And the individuals who signed the Kastel letter, the letter that he has, intending to send to the Secretary, did so, we assume, believing that the false statements in the letter are true.

So we feel that it's a very unfair and prejudicial letter. And, you know, reading the letter and assuming the contents were true, people signed it. But, in fact, it's full of so many false statements and defamatory and inflammatory statements about Aurora, that it really is of no probative value.

And I would just like to point out that this -- that this court, these proceedings, you know, you are vested with the authority to provide for the exclusion of irrelevant or immaterial evidence. In fact, the USDA has a duty to do so. And that is pursuant to the Administrative Procedure Act. That's 5 USC, Section 556(D). Material that is false cannot
be reliable or prohibitive and is properly excluded.

I think a case that is directly on point is U.S. Steel v. Director, and the cite for that is 187F.3rd 384, and that's from the Fourth Circuit. And I'm going to read the quote, because it is so relevant. The ALJ's duty to screen evidence for reliability, probativeness and substantially similarly -- and substantially similarly ensures that final agency decisions will be based on evidence of requisite quality and quantity.

As the Supreme Court has observed in enacting Section 556(D) of the Administrative Procedure Act, Congress was primarily concerned with the elimination of agency decision-making premised on evidence which was of poor quality, irrelevant, immaterial, unreliable and nonprobative, and of insufficient quantity. Material that is proffered for an improper purpose with the intention to harm another is, likewise, properly excluded.

We feel very strongly that Mr. Kastel is here, as he said, as an activist. He is not a producer, he is not a handler. He has no dog in
this hunt except for he wants to try to adopt a rule that will run Aurora out of business. He has no evidence that Aurora or anyone else has caused catastrophic market disruption.

He claims that there are more producer-handlers operating under the organic rules than conventional producer-handlers, but then admits there are no statistics available to substantiate his claim. You know, his sensational characteristic that dairy farmers are being exploited by other dairy farmers like Aurora has no support in the evidence, and, in fact, he proffers none.

We believe that any testimony that he might proffer in support of this letter, insofar as it pertains to Aurora, will add nothing of value to these proceedings.

Now, I realize that, you know, I've raised a big problem, and I actually have a solution I would like to propose. Mr. Kastel has come a long way, he obviously believes that he speaks for a number of people.

Certainly, he can speak to the proposal that he supports, and the reasons why, without having to say the things that -- the false and
untrue things that he wants to say about Aurora. If he really has a passionate belief that a
450,000-pound, you know, cap on production is appropriate, he can certainly make that
statement, and any other statements that he believes supports that position without defaming
Aurora and bringing Aurora into this and making the untrue statements that he has made in the
letter. So that's what we would propose.

Just like everybody else, he can state his position on the merits, you know, because this isn't a hearing about organic, it's not a hearing about whether large-scale organic dairies should be allowed to exist. It's a hearing about what rule, if any, should the USDA adopt concerning Federal milk market orders on a forward-going basis.

So I would respectfully request that Mr. Kastel be required to limit his testimony to the issues at hand and pertaining to the proposal, the one he supports, again without making reference to Aurora or making the false statements that he has made in the letter.

JUDGE CLIFTON: Will Aurora be testifying about the proposals?
MS. KISER: They will, but I believe they are intending to give very narrow testimony, again, on the merits of the proposals.

JUDGE CLIFTON: And when would you like to be scheduled?

MS. KISER: Well, we actually haven't -- haven't made an arrangement on that at this point. I suspect it will be after Proposals 1 and 2 are considered and the subsequent proposals. I mean, Aurora supports one of the proposals, but that's not my bucket, so I'm not sure which one it is. And I apologize to you.

JUDGE CLIFTON: That's all right.

MS. KISER: But we will certainly get together with them and let you know.

JUDGE CLIFTON: Now, I do have a concern. If I were to agree with you and I were to allow the witness to testify, but reject Exhibit 35 as an exhibit, Exhibit 35 would still go on the Website as a rejected exhibit. Admitted exhibits go there, rejected exhibits go there.

MS. KISER: Okay.

JUDGE CLIFTON: So if there is any defamatory content, the only way I know of for that to be cured is if the proponent of this
exhibit were to ask to withdraw it. So if
Mr. Kastel wanted to withdraw it and just wanted
to give me his testimony, then it would not be
on the Website. But if he wants it admitted as
an exhibit, and I decide to reject it as an
exhibit, it still goes on the Website.

    MS. KISER: Well, obviously, I'm not his
counsel, but that's what I would recommend he
do. But it's certainly up to him. Obviously,
your Honor, I appreciate you raising that with
me, because that's a huge concern. And I
appreciate you giving Mr. Kastel a way out of
this uncomfortable and inappropriate situation.

    We obviously, whether -- I just -- I
don't know what Mr. Kastel is going to do, but I
would certainly appreciate, and I think the
record would be much more appropriate, if
Mr. Kastel is not willing to withdraw it, if you
would reject it. And even if it goes on the
Website as a rejected exhibit, that would be --
that would be much preferable, because, as I
said, he's working with plaintiffs' counsel on
some class action lawsuits. And if that's
admitted into evidence and it's posted on a
Website, they're likely to print that out and
take it to a court and say, look, this is a bunch of true stuff in here, this -- look at this, this is true, it was on the USDA Website. And that would be very, very harmful.

JUDGE CLIFTON: All right. Thank you, Ms. Kiser.

Mr. Yale, do you have some wisdom for me?

MR. YALE: I don't know if I have any wisdom. Benjamin F. Yale on behalf of Continental Dairy Products and Select. I just wanted to move that we join them in that, in this motion. And I point the court to part 900, the section that deals with evidence, and the irrelevant and immaterial.

The issue has nothing to do with organic in this hearing. I mean, there's no provision, there's no proposal dealing with whether you're organic or not, that you're qualified or not for PPD status. So whether Aurora is organic or not is immaterial to the issue of whether or not these should be adopted.

I think that there's some comment that they want to make, that they support 450, 450,000 or billion or gazillion. You know, I mean, I think, I guess that they're citizens and
they have that right, but I don't want to do
that. But I don't think that, you know,
impertinent information should be permitted.

And I think that it's even appropriate
for the court, in some cases, or the judge, to
say that it is so impertinent that it can be
stricken. And I guess it does have to
accompany, but I think that there is provisions
for redaction of immaterial and destructive
information. It's not the purpose of this
hearing. I mean, we get into some bitter
arguments, but to present evidence that is just
not true, it demeans everything that we're doing
here and should not even be part of the record.

The other objection I have on Exhibit 35,
it appears to be signed by people that aren't
even here, and we don't have the ability to
cross-examine them. And we don't have in
evidence -- he said he made a request of people,
sent out a call for people to sign. I don't
know whether that's the letter they signed onto
or another one. And we don't have in evidence
the letter that he sent out. So we would move
to -- we would move, also, and join with them to
strike the exhibit.
JUDGE CLIFTON: Thank you, Mr. Yale. Would anyone else like to weigh in on this before I call on Mr. Kastel?

Mr. Carroll.

MR. CARROLL: With all due deference to the proposed witness, who is not a lawyer, and has used terms that have legal significance, I can understand the frustration that's shown on this, but, basically, our guide here is not what Aurora might have done under another problem with the Department of Agriculture, how that was challenged and what happened and so forth. That has nothing to do with a producer-handler dairy, so it is irrelevant.

And all those references that are based on that, I assume the witness would have the right to state as a private citizen, or some other way, that he doesn't like the proposals we've made or that other people have made, or that he's in favor of a different proposal, as any citizen can say that, but Aurora's situation that he's described here is utterly irrelevant.

JUDGE CLIFTON: Mr. Ricciardi.

MR. RICCIARDI: I was waiting to see if anybody else was rushing behind me, Judge. We
would -- AIDA would join with my colleagues, Messrs. Yale and also Carroll, for the reasons that they already articulated. I'm not going to expound on it any further.

I do, however, Judge, have a potential solution for you on whatever concern you raise regarding what goes on the Website. My thought is, to the extent that you were going to allow any portion of it, you would allow, obviously, the date and the salutation to Secretary Vilsack.

But if you go over on 35 to what is the third page, you will see there's a paragraph that begins, "We support a production cap." If you take those three paragraphs, "We support a production cap," "If officials deem this higher level necessary," which is the next paragraph, and then the last, next paragraph, "Large producer-handlers," that essentially sets forth the position: We support these particular limitations that have been proposed, and they're the reasons.

If you would redact the remainder of the letter, so it cannot be read, and if you decide to leave on the signatures, you leave on the
signatures, but at least the redaction would allow the exhibit to come in for simply what is here that would be relevant, which is, we support a production cap, here are the reasons, and large producer-handlers can continue in business. So, to that extent, that's a possibility, to just give you another option, Judge.

JUDGE CLIFTON: Thank you, Mr. Ricciardi. All right, does anyone else want to be heard on this issue before I speak with Mr. Kastel further?

MR. CARROLL: Your Honor.

JUDGE CLIFTON: Mr. Carroll.

MR. CARROLL: I wasn't aware what counsel has just said, but my problem is broader now as I look it over. There are innumerable people listed as making this statement, and they are represented to be in the dairy industry, one kind or another. They've all been exposed to the obviously irrelevant material. We have no way of knowing whether that produced their position or not, and I think that the entire statement really should not be admitted.

But if the witness wants to testify that
his understanding of the situation -- as to his understanding of the situation, and that he's in favor of the various caps, that's fine, but I don't think, based upon what's contained here, that these signatures have any validity. And in addition, we have no verification whatever as to the matter of fact as to whether or not they were in support of the basic restriction.

JUDGE CLIFTON: Mr. Kastel, I'm having trouble finding where you are listed in the people here.

MR. KASTEL: I'm not. Other than taking the word of counsel for Aurora Dairy, this isn't Mark Kastel against Aurora Dairy. I haven't had a chance to introduce myself on the record yet. I don't know if I should do that now, your Honor.

But I'm here representing the Cornucopia Institute. And the Cornucopia Institute has over 3,000 members, as far as we understand, more members than any other NGO representing organic interests. We operate as an organic industry watchdog group, and I'm here representing the organic -- or the Cornucopia Institute, which is a signatory to this letter.
I'm also under oath, so let's just talk about the challenges that counsel brought up concerning signing on here. We've heard from other cooperatives that are testifying in front of their -- on behalf of their members. These were individuals who have all -- some interest in the dairy industry, who wanted to represent themselves here today and couldn't. They read that same letter.

Quite frankly, I've heard this before, and I take umbrage to the suggestion that we have a bunch of dumb farmers that can be taken advantage of. These are people who read that letter, who understand this issue, your Honor, which has been ruminating, no pun intended, for four or five years. This has been covered in The New York Times, National Public Radio, The Wall Street Journal.

If this $100 million corporation, Aurora Dairy, thinks that I've used defamatory language, that I've presented factually inaccurate information that is injuring their corporation, they should have sued us a long time ago, your Honor, because there are few, if any, statements, factual statements, contained
in that letter which we have not already made
publicly in some venue, either in testimony in
front of other USDA hearings or through the
media.

And so this is an attempt to intimidate a
citizen who is here today representing other
citizens who have standing. And counsel for
Aurora mentioned, on my count, about 14
different bullet points, not including the
repetition, in her presentation to you. About
half of those I would represent her challenging
our "opinion" and the other half challenging
factual evidence that we presented. And I am
more than willing -- if you need to decide
whether or not to admit this into testimony, I
am more than willing to, point by point, respond
to Aurora's concerns.

JUDGE CLIFTON: Well, let me ask you
this: A practical way to proceed would be for
me to do as two counsel suggested, and that is
to redact certain portions.

MR. KASTEL: I'm not willing to do that,
your Honor.

JUDGE CLIFTON: All right. Is there any
portion of Exhibit 35 that you would willingly
withdraw?

MR. KASTEL: No, ma'am. I am willing to -- if we need to do this before I make the presentation, again, I'm willing to respond, point to point, to the concerns expressed by the Aurora Dairy Corporation.

JUDGE CLIFTON: You may do so.

MR. KASTEL: Okay. Thank you. First of all, again, there was a number of times where counsel suggested that this was Mark Kastel against Aurora Dairy, that we were not -- she challenged the statement that this legal action by the USDA was based on an industry complaint.

Again, I think we documented our credibility in representing dairy farmers in this matter. We filed a formal legal complaint against Aurora Dairy alleging that they were violating the organic law in January of 2005. It was closed without explanation by the USDA in August of 2005. Their letter informing us of that stated that if we wanted to know why, we had to file a Freedom of Information, FOIA, request, which we did. We thought that was unreasonable.

We received a couple hundred pages of
documents, with no summary document to indicate why they were closed. There was one e-mail from the head of compliance in the Agriculture Marketing Service. I'm going to apologize to everybody for having to go through the detail here.

That document -- that e-mail suggested that it was closed for political reasons, that because the National Organic Standards Board was considering rulemaking on the issue of whether there was adequate pasturing of organic dairy cows, the allegation was that Aurora Dairy was running a confinement operation in conflict with the Organic Foods Production Act and its regulation.

And the statement in the e-mail was that the -- it did not use her name, but used her title, that the deputy administrator of TMP, that acronym, I understand, stands for Transportation Marketing Programs, that oversees the NOP, requested them to close that because rulemaking was taking place.

My analogy would be if you were on Highway -- or Interstate 71 in Cincinnati and you were pulled over for going 75 in a 65 zone,
and the local authorities were considering changing the speed limit, that we would let you off. The irony of this is that they were considering rulemaking, your Honor, making the rules more restrictive, not less restrictive.

After a visit to two facilities associated with Aurora Dairy, we refiled that complaint. The second time we refiled that complaint, they said -- sent AMS sworn investigators to interview Cornucopia staff. This time they fully adjudicated the allegations that were made by Cornucopia.

And now I want to read into the record, if I may, the Notice of Proposed Revocation issued by the USDA, which is a de facto finding of fault. And it states -- it's dated April 16th, 2007 --

JUDGE CLIFTON: Before you read that, is that one of the items that ended in a consent decision?

MR. KASTEL: Yes, your Honor.

JUDGE CLIFTON: Okay. The most important part of that case is the end of it.

MR. KASTEL: Yes. I have all the documents here.
JUDGE CLIFTON: Was there any admission of the allegations in the consent decision?

MR. KASTEL: I don't think so, your Honor, but there was an agreement to change certain practices that were out of compliance. And so, you know, we call that a plea bargain --

MS. KISER: Your Honor, I'm sorry to interrupt --

MR. KASTEL: -- and, obviously -- ma'am, I don't want you to interrupt me --

MS. KISER: I just want to tell you --

JUDGE CLIFTON: Ms. Kiser --

MS. KISER: You --

JUDGE CLIFTON: Ms. Kiser, you can stand there until I recognize you.

MS. KISER: I'm sorry.

JUDGE CLIFTON: I think the reason you're there is that I probably have it. That does not mean I cannot hear from Mr. Kastel before I recognize you.

MS. KISER: I'm sorry, your Honor.

JUDGE CLIFTON: That's all right. Go ahead, Mr. Kastel.

MR. KASTEL: Thank you. There are many instances in our system of jurisprudence where
charges are filed and the penalty phase of our justice system comes up with some kind of an agreement. That does not mean that the factual actions that took place by a party did not take place. It doesn't change the record.

And so I'm -- I would like the Notice of Proposed -- first of all, by the way, this is my opportunity to respond to counsel for Aurora. This directly refutes the accuracy of the presentation she made to you, your Honor, the language in this letter, Notice of Proposed Revocation.

JUDGE CLIFTON: What you have is the beginning of a case. What you have is the beginning of a case.

MR. KASTEL: Yes, but she --

JUDGE CLIFTON: And in a moment, I'll look at the end of the case.

MR. KASTEL: Yes. The document from the USDA, at the beginning of the case -- well, I wouldn't say it was the beginning of the case. This was subsequent to them closing the investigative stage.

JUDGE CLIFTON: I understand. But that's not the document that I'm going to look at. So
go ahead to the next topic.

MR. KASTEL: Yes. I'm saying, your Honor, that this document -- the language in this document directly refutes statements that counsel made.

JUDGE CLIFTON: I understand that.

MR. KASTEL: Yes.

JUDGE CLIFTON: And your next topic?

MR. KASTEL: I'm sorry?

JUDGE CLIFTON: Your next topic. I'm asking you to go on to the next topic.

MR. KASTEL: Okay. So am I not being allowed to read from this document?

JUDGE CLIFTON: Correct.

MR. KASTEL: Okay. So counsel used the word "disadvantage." I would say that's my opinion and the opinion of others in the industry. And we have the right to express that opinion. "Bad actor" is another term that you would say is someone expressing an opinion.

"Illegal," that's a factual statement. And, again, I would say that if someone accused me, your Honor, of doing something illegal, that I had never done, I might, in fact, take that individual to court and try to defend my
reputation. I don't know why Aurora Dairy has never chosen to do that, but I stand behind every statement in my testimony. And I'm willing to back that up, if challenged, with factual readings from documents here.

JUDGE CLIFTON: Now, with regard to the purpose of this hearing, is your main concern with Aurora Organic Dairy that it is what you call an industrial scale producer-handler and that that in some way damages Cornucopia's members?

MR. KASTEL: Your Honor, my presentation is an integrated approach to the extreme market disruption that has been caused in the organic marketplace by Aurora Dairy, and they're a combination of factors. And I would like the opportunity to present them all in an integrated manner.

JUDGE CLIFTON: Can you do it without referring to culpability of Aurora Dairy?

MR. KASTEL: Your Honor, I have the right to make that testimony, because it's accurate. Now, if we want to debate, point by point, the accuracy to my statements, I'm willing to do that. If not, then I think you should allow me
to put the -- make my testimony as I had
proposed -- as I had intended. I'm sorry.

JUDGE CLIFTON: Let me ask you this:
Just assume for a minute -- now when I ask you
to assume something, that's hypothetically, and
it may not be true. But if you were to assume
that Aurora Organic Dairy was not a bad actor
and did nothing illegal, would the sheer size of
it still constitute -- and its activities in the
market still constitute disorderly marketing
that would hurt Cornucopia's members or the
people Cornucopia is interested in helping?

MR. KASTEL: I don't think that's the
issue at hand, their size. It's what their
activities have been in the marketplace and
vis-a-vis taking advantage of the
producer-handler exemption that we're discussing
here at this hearing.

JUDGE CLIFTON: I agree with that. I
agree that's what we want to talk about. I'm
hopeful that you can do it in such a way that --

MR. KASTEL: What I'm unwilling to do is
let this lawyer impugn my reputation, the
reputation of the organization I work for, and
its members, without the opportunity to refute,
one by one, the allegations. Now, we can
continue to go through this or you can let me
present my testimony. That's what I am
appealing to you for, your Honor, one or the two
of those avenues.

JUDGE CLIFTON: Okay.

MR. KASTEL: And I'm under oath and I'm
willing to take full responsibility for all
statements that I make here. It will, again,
not be the first time that I make any of these
statements. The Aurora Dairy folks who came up
and, you know, really wanted to see this bad,
and they needed a copy, obviously to prepare
this 16-page rebuttal to try to strip me of my
rights to speak here today, they've obviously
been cooking this for quite some time.

JUDGE CLIFTON: Well, I would imagine
that when you circulated this to half the world,
they got a copy.

MR. KASTEL: Yes, it was done quite
publicly, and it was not surprising to me that
they were aware of it.

JUDGE CLIFTON: Did you just give me the
choice to either let you defend yourself against
the motion or testify on the propositions that
are relevant to this hearing?

MR. KASTEL: No, no. I -- no. I said I would like to present my testimony as I brought it here today -- or I would like to, before you make a decision on that, go through, point by point, and defend the credibility of the statement that I produced.

And I think that because the statements that have been made by counsel are, in my opinion, inaccurate, I have been exposed to the same kind of defamatory behavior that they're accusing us of. And I think that would be unfair not to be able to both defend our credibility and working in this industry, and being able to refute the statements that she's made, that we think are not accurate.

JUDGE CLIFTON: Mr. Yale.

MR. YALE: Yes. Your Honor, I'm going to assume for the moment that -- and I don't say this as a fact, but assume for the moment that this counsel has said some untrue statements about Cornucopia vis-a-vis this dispute over organic qualification, okay?

JUDGE CLIFTON: All right.

MR. YALE: This is not the place to
settle this. The issue before the court, as you
were starting to lead, is whether there's
disorderly marketing conditions, and those are
marketing conditions dealing with milk, not
organic milk. It has nothing to do with
organic. It's disruptive marketing conditions.
And the rest of it is irrelevant. It has no
place in the Secretary's decision whatever, true
or not.

The only issue here is whether there's
disorderly marketing conditions. And we're all
being asked to stay late, and I'm willing to sit
there and listen to somebody tell me why that's
disorderly. If we want to cross him, we can.
But the issues of whether or not, you know, the
consent decree was really plea bargaining and
there's really an implied, you know, agreement,
that the facts were true, and that all -- who
cares for what we're here tonight? Who cares?

I mean, I'll assume that all that he says
is true. It's just plain irrelevant. We need
to get down -- he can say that 450,000 is a good
number, that anything bigger than that is
disruptive to the market, that's fine. But the
rest of it is irrelevant, and I think we just
need to move on to the relevant stuff. And defending on the motion, he could file responses, put it in the record, that's fine, but we don't need to hear whether organic -- whether organic or nitrogen. It doesn't have any ruling. If you look at all the parts, 1000, 101 through 131 has zip to do with organic. I don't even think the word appears.

JUDGE CLIFTON: Thank you, Mr. Yale.

Mr. Ricciardi.

MR. KASTEL: Your honor, may I respond to his statement?

JUDGE CLIFTON: In a moment.

Mr. Ricciardi.

MR. RICCIARDI: Your Honor, this is a lengthy hearing. We have the issues that are before us. We are now into what I was concerned about when I started to read this information. We're into a collateral matter.

You have the authority, under 7 CFR 900.8(D)(3), to determine the -- (i), to determine what's irrelevant and what's not. And I will leave with a quote from Oliver Wendell Holmes, which I think says, with regard to collateral matters, it is a concession to the
shortness of life.

MS. KISER: And, your Honor, I just
wanted to tell you that the consent agreement is
under Exhibit L. So if you want to look at
that, the first two pages just showed it was
posted on the USDA Website, and the consent
agreement itself is two pages after that. But I
have to completely agree with the counsel who
spoke in here.

JUDGE CLIFTON: Okay. I like his
suggestion. I think if you want to file a
written response to this motion --

MR. KASTEL: A written response to
counsel, the statement that they just made?
Your Honor --

JUDGE CLIFTON: Could I finish? And then
I'll let you go. A written response to this
motion to defend your dignity would be entirely
appropriate if you want to spend that time and
energy.

But what I have decided to do, and then
I'll hear you, is I have decided to accept
Exhibit 35 as a redacted document. So I will
mark out the paragraphs that I think are
irrelevant, immaterial and inflammatory. I will
also mark out the "Respectfully submitted"
names. I will allow you to sign it if you wish
on behalf of Cornucopia.

The unredacted document I'm going to
seal. I'm going to ask that USDA take custody
of it and not put it on the Website, but keep it
available for the Secretary's review. So that's
what I plan to do.

Now, let me hear, Mr. Kastel, anything
you want to say.

MR. KASTEL: Why does it matter now, your
Honor? I've sat here today, this is a long
hearing, and I'm only here for the one day. I
invested 20 hours of transportation time to get
here, and I sat here today hearing counsel talk
about how hard it is to milk cows. Is it a hard
job? Is that why you left dairying? I've heard
people talk about DAs. I've heard repetitive
questioning about the organic industry. What
does it mean to be organic? What does it mean
to be -- well, you know, we can't treat our land
with antibiotics, we have to refrain from using
certain banned pharmaceuticals.

We might -- someone might offer our view
that those lines of questions aren't germane
specifically to the producer-handler question, as maybe they could argue whether the kosher segregation rules, and one rabbi here and one rabbi there. But I think that there must be a logic to people wanting to put this issue in context.

Aurora Dairy, your Honor, is paying for legal counsel that has been actively engaged and aggressively cross-examining every witness here, virtually. I think that the process here deserves to understand who all parties are. And the organic industry, the people who get their hands dirty for a living and crack a sweat, have had their livelihoods materially injured to the point where some of them are now losing their farms.

And it's been because of the holistic behavior of this corporation. And they have leveraged their size and their ability to not pay into the Federal Order, along with illegal activities. And you don't have to take the word of the Cornucopia Institute for that, because there's a document right here. And so I take great exception to counsel saying that Mark Kastel of the Cornucopia Institute is being
untruthful, your Honor.

And I would like to -- if you say submit this in the future, I don't -- you know, it really makes this argument moot. The word "willfully violating the law" was not cooked up by the Cornucopia Institute. It was used in the letter of proposed revocation by the USDA. The career civil servants found that Aurora Dairy had violated 14 tenets of the law that governs organic food production in this country.

It was the decision of the political appointees at the USDA to let them off with just a slap on the wrist. And -- but that does not make what they were doing -- it doesn't change what they were doing factually, and it doesn't make it legal.

And I believe that -- you know, we've spent a lot of time here in order so we don't discuss things that are on the record in other venues already. And I'm just appealing to you, on behalf of myself as a citizen, but also the people who I work for, to be able to present our testimony as we prepared it. And if someone wants to invest a lot of money in trying to impugn my reputation in a public forum, your
Honor, I would think that it would be reasonable to let me, point by point, defend the factual accuracy of the statement that I was prepared to make.

JUDGE CLIFTON: I don't have time. I do not have time for you to engage in that luxury.

MR. KASTEL: But she had time to make all those points telling that Mark Kastel was not telling the truth on the witness stand.

JUDGE CLIFTON: I'm not making a finding one way or the other about that. It's 10 minutes till 7:00, we've got a lot of work to do here. And what I propose to redact is, on page 1, everything but the date, the salutation, and the first two paragraphs. On page 2, everything down through the two checked paragraphs. So that page would begin with, "The exploitation of dairy farmers around the country." You would have that paragraph, the next paragraph, and the paragraph that begins on the bottom of that page, down through the paragraph that says, "Large producer-handlers can obviously continue in business while paying into the pool. The proposed rule changes do nothing more than level the competitive playing
field." Your statement will end there.

    Then the "Respectfully submitted" will not have any of these names, but if you wish to sign it on behalf of Cornucopia, that will show. Now, that's how I intend to proceed. And I intend to let you testify about those relevant items. Are you willing to proceed in that way?

    MR. KASTEL: I have no choice, do I, your Honor?

    JUDGE CLIFTON: No, you don't.

    MR. KASTEL: Okay. Then I'm going to proceed. I also state, for the record, that if the corporation has the right to challenge the accuracy of statements that I'm making, I have the right to another venue to challenge your professional behavior.

    JUDGE CLIFTON: Yes, you do.

    MR. KASTEL: And I will investigate looking at that. I'm sorry that I --

    JUDGE CLIFTON: I'm licensed in the State of Colorado. You may file it there.

    MR. KASTEL: No, not you, your Honor. The counsel. You didn't present anything that would injure me. I hope not. I'm sorry, I hope I didn't insult you.
JUDGE CLIFTON: Well, don't go after professional licenses. There are fairer ways to fight.

MR. KASTEL: She said that I was lying, and she made statements that were factually inaccurate about me. I told --

MR. STEVENS: Your Honor. Please, sir, let's be respectful with each other.

MR. KASTEL: Yes.

MR. STEVENS: Are you an attorney, sir?

MR. KASTEL: No, I am not.

MR. STEVENS: All right. Well, you don't need an attorney, you don't need to be an attorney, and some attorneys are enough, but we need to be respectful of each other.

MR. KASTEL: Right.

MR. STEVENS: You certainly have your rights, sir. I think the judge has made a ruling. I think we should proceed, and whatever follows after that will not be involved in this hearing.

MR. KASTEL: That's correct.

MR. STEVENS: So let's not belabor the record with unnecessary discussion, please. And I think we can move forward. Let's be
respectful, let's get done what needs to get
done, and let's move on.

MR. KASTEL: I want you to know that I
feel bad about this, and I feel bad because a
lot of people are emotionally invested in my
being here today. And I understand that you
have to make a hard decision on the fly based on
the information you have, but it doesn't mean
that I can't feel bad about it. Thank you.

MR. STEVENS: All right, sir. But
remember, you are a witness like every witness
here. Your testimony will be made a matter of
record. Your testimony will be considered by
the Secretary of Agriculture, and a decision
will be made based upon the record.

So your evidence, just like all the
evidence here, is subject to the weight to be
given to that evidence. Take it as it's
offered, present your evidence. And, please,
let's move on.

MR. KASTEL: Yes, sir.
MR. STEVENS: Thank you.
JUDGE CLIFTON: Thank you, Mr. Stevens.

For the USDA table, I want you to keep your
Exhibit 35 for the sealed copy. Tomorrow I will
present you with a redacted copy.

MR. STEVENS: Thank you, your Honor.

JUDGE CLIFTON: Now, for your signature, will you want to sign what I have gutted, or will you prefer not to sign that?

MR. KASTEL: Oh, I'll be happy to sign that, your Honor. And then I'll need someone to communicate to me how I can make a formal appeal to you to reenter that into the record, the full testimony.

JUDGE CLIFTON: All you would have to do is -- now, you had mentioned that afterwards, someone asked you, had you submitted this, and you said, no, I will.

MR. KASTEL: Yes, ma'am.

JUDGE CLIFTON: Were you going to submit it to Gino Tosi?

MR. KASTEL: No. I think the question was whether it had been submitted to the Secretary of Agriculture, because that's who it's addressed to. And it has not been submitted yet.

JUDGE CLIFTON: I see. And do you intend to submit it to the Secretary of Agriculture?

MR. KASTEL: Yes, your Honor.
JUDGE CLIFTON: I see. All right. Then I think when you submit it, that would be a good time to submit whatever else it is that you object to about the way this was handled.

MR. KASTEL: Okay. I assume staff -- so we don't take time today, I assume staff can advise me on how to submit those comments to you?

JUDGE CLIFTON: Well --

MR. STEVENS: Sir, my name is Garret Stevens. I'm with the office of General Counsel. I will give you my card. Call me, talk to me. We assist everyone in the conduct of this hearing, and I will help you to the extent I can. I am not your attorney, I cannot represent you, but I --

MR. KASTEL: I only need to know how to -- the judge said that she would consider written comments.

MR. STEVENS: Right. And if you follow these proceedings, as many of these people in this room have, there is an opportunity for you to submit copies. There is an opportunity for you, through legal counsel, to file briefs at some time during the course of this proceeding.
Follow the proceeding and do what you feel is necessary.

All this will be considered by the Secretary and will be given the weight, the due consideration that it merits, as with every bit of evidence and documentation that comes into this hearing. It is a public hearing. You are here, you are participating. Please, let's complete your participation.

And I will give you my contact information. If you have concerns, please express them to me and we will see that you -- that you get the advice that will help you to work through this proceeding.

MR. KASTEL: Thank you.

JUDGE CLIFTON: Thank you, Mr. Stevens. All right. Do you need a little break before you tell me about this support that you have of some of the proposals?

MR. KASTEL: Are you saying to read my redacted testimony at this point? I assume that's what you're saying.

JUDGE CLIFTON: We can do that or you might have additional comments.

MR. KASTEL: I might.
JUDGE CLIFTON: So do you need a little break?

MR. KASTEL: Sure. If I could have just a very short break, that would be nice.

JUDGE CLIFTON: Good. Let's take a 10-minute stretch break. I know it's late. Please be back and ready to go at 7:10.

(A recess was taken from 6:57 to 7:18.)

JUDGE CLIFTON: All right. Let's go back on record. We're back on record at 7:18. I'm ready to proceed with the testimony.

Ms. Kiser, did you have something additional that you wanted to --

MS. KISER: Actually, it's just a clerical thing. These are the exhibits. And should I provide them with that so they have a copy of those in addition to the motion?

JUDGE CLIFTON: I don't want all that on the Website. It's the tail wagging the dog.

MS. KISER: Okay.

JUDGE CLIFTON: So I appreciate your giving us the opportunity to look at it, but just as I didn't give the witness the opportunity to explain himself, I'm not going to give you the opportunity to prove your motion.
MS. KISER: Okay.

JUDGE CLIFTON: So if you would retrieve these. And I appreciate your being prepared in that way. That was excellent lawyering. It's just not the issue we've got here.

MS. KISER: Okay. Thank you.

JUDGE CLIFTON: You're welcome. All right. Mr. Kastel, how I would like you to proceed is, I would like you to read the redacted Exhibit 35. I have left it as I described it on the record, even though, arguably, some of the other paragraphs were not inflammatory. But what I would like you to do in that regard is just read the redacted 35, and then, in your own words, explain what you have perceived is true based on your observations in the market you're familiar with.

And you may identify Aurora by name, and you may say those factual items that you believe are true about the size of their operation and the impact that it has in the market.

All right. And I realize that you're doing all this having objected to my insistence on it, and that you feel an obligation to those people who are counting on you to present it.
And I understand that. All right, you may proceed.

MARK KASTEL

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

DIRECT EXAMINATION

MR. KASTEL: Thank you, your Honor. My name is Mark Kastel, and I'm the codirector of the Cornucopia Institute. We're based in Cornucopia, Wisconsin. And I also act as their senior farm policy analyst.

Cornucopia Institute acts as an organic industry watchdog. We have approximately 3,000 members, the largest percentage being organic farmers, a very large percentage of those being certified organic dairy producers.

We've also redacted -- I'll say this on the record. We redacted the signatories out of this letter that will be submitted to the Secretary of Agriculture. I'm presenting this testimony today on behalf of the Cornucopia Institute.

We wholeheartedly support the original 450,000-pound-per-month production cap originally proposed by the National Milk
Producers Federation on behalf of their member co-ops. This cap should accommodate every legitimate family scale farmer who wants to engage in processing and direct marketing, while closing the loopholes for industrial scale producer-handlers.

JUDGE CLIFTON: Now we've gone to page 2 and we're looking at the bottom of the page.

MR. KASTEL: The exploitation of dairy farmers around the country by large corporations taking advantage of loopholes in the current regulations need to end. Just like tax shelters, where American corporations have moved their headquarters or subsidiaries to Bermuda or other offshore venues, or played games like transferring ownership of their goodwill or other intellectual property to dummy corporations, these regulations need to change.

Although lobbyists probably argued that corporate tax reforms would have disadvantaged those operating under the rules that were being exploited, our Federal government, looking after the welfare of the majority of citizens, decided that these corporations knew very well that what they were doing was violating the intent of the
law, and that it was only a matter of time until regulators would catch up to them.

There's no reasonable argument for not changing this dairy regulation now. Changing the regulation would not put anyone out of business, although maintaining the status quo is squeezing margins so much for legitimate family farmers that some are currently exiting the industry. And let me qualify that by saying, I'm saying organics right now, specifically organics.

We support a production cap of 450,000 pounds per month as being reasonable. Although an improvement, the alternative proposal to bump this cap up to 3 million pounds per month, opens up a potential for continued and possibly expanded exploitation of the nation's rank-and-file dairy producers.

If officials do deem this higher level necessary to "grandfather" certain producers in, and again we do not support that, we would highly suggest that producer-handlers currently operating in the 450,000 to 3 million-pound range be prevented from expanding their operations. In other words, the 3 million-pound
figure should not be a cap that current producer-handlers exceeding 450,000 pounds could grow into.

I'm a little unclear on the last two paragraphs. Do I --

JUDGE CLIFTON: You have two more lines.

MR. KASTEL: Large producer-handlers can obviously continue in business while paying into the pool. The proposed rule changes do nothing more than level the competitive playing field.

And I would like to add just a few more comments here. We've heard some testimony today from some that have been concerned, not just from the current impacts that producers -- producer-handlers are having in terms of marketplace disruption, but the potential for growth, the potential for some of them to form alliances, and an unqualified level of risk that exists.

Let me tell you folks that there is a perfect model for the type of marketplace disruption that we might see more widespread in the conventional marketplace, and that's in organic dairy. To my knowledge, there's only one entity that is exercising that amount of
market clout, and that is the Aurora Organic Dairy Corporation. They represent possibly 10 percent or more of the market.

They have taken advantage -- we've talked about the changing playing field, changing technology, we've talked about the fact that there's a lot fewer producer-handlers in operation today. There are a lot fewer producers in operation today than there were 10 or 20 years ago.

When I started working for farmers in Wisconsin in the mid-1980s, we had 45,000 cows -- I'm sorry, 45,000 farms, averaging about 45 cows per dairy. Today I think the number is 13,000. So I did a great job in those interceding years. And there's a lot of people that have lost their livelihoods, and there are some people that aren't with us anymore today, because either their health so deteriorated or they committed suicide. So these are not light, light issues. So we have fewer producer-handlers because we have fewer producers.

But the technology, that's a little different. You know, historically, milk has
been a local product and a regional product. And we've had a lot of consolidation in this industry, but processing, farms, consumers, there's been a relationship geographically.

Aurora Dairy started a new model with the help of UHT pasteurization and extended shelf life. They ship milk from one plant in Colorado supplied by four massive dairy farms to, literally, we believe every state in the country. Certainly we know it's shipped for consumers in Portland, Maine and Portland, Oregon, and close to where I live in Portland, Wisconsin.

It's caused catastrophic market disruptions. No matter where family scale farmers ship their milk, whether it's Dean Foods or Organic Valley or one of the regional players, the price leader has been Aurora Organic Dairy and their retail customers, including Wal-Mart and Costco and Target and Safeway, I believe a total of about 20 of the largest supermarket chains.

And so the impacts in organics have deteriorated the financial status of family farmers in two ways: Not only, as we've heard
testimony today, does that affect pooling for some of their market, some of their competitors, but the -- it's handicapped them to the point where they're losing market share.

And we now have the three largest players in the organic dairy processing world, Dean, HP Hood and Organic Valley, have all cut their prices to their farmers recently. This is unprecedented in the 20 years since we've seen commercialization of organic dairy. They've all -- in addition to cutting their prices, some of them have put production quotas on their farmers and some of them have fired their farmers. In fact, all three companies have released some of their farmers. And these are some farmers who have literally built dairies from scratch on the promise by processors that they would have a market for their milk. And they have not been able to competitively compete in the marketplace with the major producer-handler that's engaged in the industry right now.

So although we stand in solidarity with other dairy interests in the conventional marketplace, we want to articulate how this
exploitation has advantaged the very largest player in organics. And there's no guarantee. We have a number of other major players.

We've heard reference to Fair Oaks with 18,000 cows. They have, I believe, managed 3,000 of those cows organically. There's no guarantee that we might have more players on the national scene, that we might have more players on a regional scheme. If Fair Oaks that's in conventional milk in the Chicago market decided to put 3,000 cows' worth of milk at 50 to 70 pounds of milk a day on the marketplace in Chicago, it would be a material disruption in the marketplace. So that potential obviously exists. And I'm sorry I'm rambling around a little bit, but I've had to, obviously, edit my comments.

So we know the history of this rule, and it was promulgated when we had small family farms ringing dairies and sometimes delivering their own milk. So when we have a $100 million corporation vertically integrated, so we have corporate-owned cows, and utilizing UHT technology, they have the ability to undercut the retail price everywhere in the country.
And we've seen the statistics that the USDA has put out that looks like the range is somewhere like 7 to 13 cents a gallon in pooling costs, but I can tell you, from my past experience in the marketing end, that you can almost double that in certain markets based on distribution margins and the retail margin. That's going to mark that differential up. And that's a -- if you're talking as much as 30 cents, that really makes a difference on the store shelves. So I'll end there, your Honor, and thanks for your patience in this matter.

JUDGE CLIFTON: Thank you, Mr. Kastel. I know it's quite late, and you delivered that very eloquently, and exactly as I asked you to stay in the parameters of, and I appreciate it very much.

All right. Cross-examination of Mr. Kastel. Who would like to begin?

Mr. Tosi, do you have any questions of Mr. Kastel?

MR. TOSI: No, your Honor. Mr. Kastel, thank you for coming, and we appreciate your testimony and explaining your views here. Thank you.
MR. KASTEL: Thank you, Mr. Tosi. Thank you, your Honor.

JUDGE CLIFTON: Thank you. I want you to sign what I've got here, and I'm going to give this to USDA staff. It did say "Respectfully submitted," so if you want to say that again, and then your initials.

(Witness complied.)

JUDGE CLIFTON: Thank you so much. All right. I did already read who I thought would be tomorrow, didn't I? So you have some idea.

Okay. Then let's go home. Which is the first one? I don't know. We have to decide tomorrow. We don't know when the state officials are going to come. All right. So good night. It's 7:33. See you at 8:00 in the morning.

---

PROCEEDINGS ADJOURNED AT 7:33 P.M.

---
CERTIFICATE

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