

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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

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 VOLUME V
 - - -

Public Hearing Administrative Law Judge
 Before: Jill S. Clifton

Date: May 8, 2009

Time: Commencing at 8:03 a.m.

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

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

1 APPEARANCES:
2

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

5 Garrett Stevens, Esq.
6 Heather Pichelson, Esq.
7 of
8 United States Department of Agriculture
9 Office of the General Counsel
10 Marketing Division
11 Room 2343 South Building
12 Washington, DC 20250
13 Phone: (202) 720-5707

14 On behalf of Continental Dairy Products and
15 Select Milk:

16 Benjamin F. Yale, Esq.
17 of
18 Yale Law Office, LP
19 527 N. Westminster Street
20 P.O. Box 100
21 Waynesfield, Ohio 45896
22 Phone: (419) 568-5751

23 On behalf of AIDA:

24 Alfred William Ricciardi, Esq.
25 of
Aiken, Schenk, Hawkins & Ricciardi
Suite 100
4742 North 24th Street
Phoenix, Arizona 85016
Phone: (602) 248-8203
Ryan K. Miltner, Esq.
of
The Miltner Law Firm, LLC
527 North Westminster Street
P.O. Box 477
Waynesfield, Ohio 45896
Phone: (419) 568-2920

1 APPEARANCES CONT'D:

2 On behalf of AIDA:

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

10 On behalf of National Milk:

11 Kevin J. Brosch, Esq.
12 of
13 DTB Associates, LLP
14 Third Floor
15 901 New York Avenue, NW
16 Washington, DC 20001-4413
17 Phone: (202) 661-709718 On behalf of the Florida Milk Producers
19 Federation and Dairy Farmers of America, Inc.:20 Marvin Beshore, Esq.
21 of
22 Law Office of Martin Beshore
23 130 State Street
24 P.O. Box 946
25 Harrisburg, Pennsylvania 17108
Phone: (717) 236-0781

On behalf of Aurora Dairy Corporation:

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

1 APPEARANCES CONT'D:

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

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

10 On behalf of Mallories Dairy, et al.:

11 John H. Vetne, Esq.
12 of
13 Law Office of John H. Vetne
14 11 Red Sox Lane
15 Raymond, New Hampshire 03077
16 Phone: (603) 895-4849

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

17 John Benjamin Carroll, Esq.
18 of
19 Carroll & Carroll Lawyers, P.C.
20 440 South Warren Street
21 Syracuse, New York 13202
22 Phone: (315) 474-5356

21 Also Present:

22 Kate Fisher, USDA
23 Jack Rower, USDA
24 Clifford M. Carman, USDA
25

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15 (Exhibit Numbers 43 and 44 were not marked.)

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1 JUDGE CLIFTON: Let's go back on record.
2 We're back on record now at 8:03. It is Friday
3 the 8th of May, 2009. We're in Cincinnati,
4 Ohio. This is day five of the milk rulemaking
5 hearing. I'd like the transcript volume to be
6 given the number of Volume V and the pages to be
7 numbered in sequence to those of yesterday.

8 I want to be sure that I admitted the
9 last two exhibits of yesterday's work. With
10 regard to Exhibit 39, which was Mr. Wilcox's
11 statement, is there any objection to the
12 admission into evidence of that exhibit? There
13 is none. I hereby admit into evidence
14 Exhibit 39.

15 With regard to Exhibit 40, that is
16 Mr. Latta's statement, is there any objection to
17 the admission into evidence of Mr. Latta's
18 statement, Exhibit 40? There is none. I hereby
19 admit into evidence Mr. Latta's statement.

20 JUDGE CLIFTON: All right. So we've had,
21 I think, 24 witnesses and one of whom is not
22 finished because we didn't have
23 cross-examination yet. And we've had 40
24 exhibits, although Dr. Cryan's statement, which
25 is Exhibit 23, has not been admitted because we

1 normally have been doing that following
2 cross-examination. Not normally, but sometimes.

3 All right. I'd again like to go over the
4 schedule for today. My first witness is Gene
5 Carrejo. My second witness is David Bower.
6 That's B-o-w-e-r.

7 MR. CARROLL: Your Honor, may I interrupt
8 for a moment?

9 JUDGE CLIFTON: Do you want to go to the
10 microphone?

11 MR. CARROLL: Thank you very much, your
12 Honor. Actually, I've got a little different
13 order of those three witnesses. The first
14 witness will be Mountain Dairy, Mr. Rooney. The
15 next one will be Mr. Stearns from Monument
16 Farms, and then Mr. Bower.

17 JUDGE CLIFTON: Good. Thank you.

18 MR. CARROLL: Thank you very much. I'm
19 sorry, I should have told you that earlier.

20 JUDGE CLIFTON: No, this is fine. This
21 is not -- this is a rough process. All right.
22 So number 2 would be John Rooney, R-o-o-n-e-y.
23 Number 3 would be James Stearns, S-t-e-a-r-n-s,
24 and number 4 would be David Bower. Those three
25 are Mr. Carroll's clients. Is John Hornstra

1 here? Not yet. We expect to work him in today
2 when he arrives. And then Clifford Carman to
3 present USDA statistics.

4 Is there anyone else who wants to testify
5 today? Now, we have the room until 5:00. We
6 may be able to get it until 6:00. I do not
7 intend to go any longer than 6:00. We really do
8 need to finish Mr. Carman's presentation so that
9 everyone will have it for the weekend so that
10 when we come back Monday for the expert
11 testimony, everyone is ready.

12 Some of the work that Mr. Carman has been
13 doing has just been delivered to some of the
14 representatives here. And so I have a request
15 that we try to address his testimony after lunch
16 so that they'll have an opportunity to try to be
17 ready for cross-examination or examination of
18 the data that they've been given. That makes
19 perfect sense to me. We may be breaking for
20 lunch a little earlier today than the other
21 days. That also makes sense to me.

22 All right. Is there anything else as a
23 preliminary matter before we proceed? All
24 right. Mr. English, is Mr. Carrejo ready to go?

25 MR. ENGLISH: He is ready to go, your

1 Honor.

2 JUDGE CLIFTON: All right.

3 MR. ENGLISH: And while he comes up to
4 the witness stand, I would point out before 8:00
5 I passed out in the places that people have been
6 normally sitting, including your Honor and the
7 court reporter, individual copies of what I
8 propose we mark as Exhibit 41. And there are a
9 few more copies in the back of the room. To the
10 extent I might have missed somebody, I
11 apologize.

12 It's on the left front part of the table,
13 if you look at the table, to the left. I think
14 there are a few copies there. But I tried to
15 hand out to people, individually, hand them to
16 them or put them at their place.

17 (Exhibit 41 was marked for
18 identification.)

19 JUDGE CLIFTON: Thank you. Mr. Carrejo,
20 I have your card. Do you have other cards?

21 THE WITNESS: Yes, I do.

22 JUDGE CLIFTON: Would you hand some to
23 Mr. English? Those of you who would like
24 Mr. Carrejo's card, would you indicate so and
25 Mr. English can bring that to you? A few for

1 the USDA table, if you would.

2 All right, sir. Would you state and
3 spell your name for me?

4 THE WITNESS: Gene Carrejo, G-e-n-e,
5 C-a-r-r-e-j-o.

6 JUDGE CLIFTON: Would you raise your
7 right hand, please?

8 (The witness was sworn.)

9 JUDGE CLIFTON: Mr. English, you may
10 proceed.

11 GENE CARREJO
12 of lawful age, being duly sworn, was examined and
13 testified as follows:

14 DIRECT EXAMINATION

15 BY MR. ENGLISH:

16 Q. Yes. Thank you, your Honor. Good
17 morning, sir.

18 A. Good morning.

19 Q. Before you proceed with your testimony, a
20 couple of preliminary questions. Have you ever appeared
21 at a proceeding before the USDA before?

22 A. No, sir.

23 JUDGE CLIFTON: You're going to -- you
24 may have to make this taller. I think if you'll
25 make it taller, it'll help you. Yes.

1 A. No, sir.

2 Q. And you are delivering a statement today?

3 A. Yes, sir.

4 Q. And how was this statement developed?

5 A. I took the facts and events that are
6 going on in my marketplace and developed an outline and
7 then transferred it over to the testimony statement.

8 Q. You transferred to who? To me and to
9 someone else?

10 A. I had some direction from Mr. Kinser and
11 yourself.

12 Q. But ultimately have you reviewed every
13 word of the statement?

14 A. Every single word.

15 Q. And ultimately have you approved the
16 statement as your own?

17 A. Totally approved.

18 JUDGE CLIFTON: I need a spelling for
19 Kinser.

20 MR. ENGLISH: K-i-n-s-e-r.

21 JUDGE CLIFTON: Thank you. Thank you,
22 Mr. Carrejo. You may proceed.

23 A. As I stated, my name is Gene Carrejo. I
24 am the general manager of Price's Creameries located at
25 600 North Piedras, El Paso, Texas. I first began in the

1 dairy industry working with my dad on a route for
2 Creamland Dairies, in Albuquerque, New Mexico. I earned
3 a bachelor's degree in business and marketing from the
4 University of New Mexico. In total, I have been
5 employed in the dairy industry 30 years. I spent my
6 first seven years at Creamland before transferring to
7 Price's Creameries in El Paso. I have been with Price's
8 Creamery for 23 years and the general manager for
9 17 years. In my capacity as the general manager I
10 oversee all Price's Creamery's departments. I also have
11 full responsibility for the profitability of Price's. I
12 have the lead -- I have the lead responsibility on all
13 local and national key accounts.

14 Price's is the fifth oldest business in
15 El Paso, dating back to its formation in 1906. The
16 family business started in January of 1906 with the
17 purchase of a cow. In the early days the family milked
18 cows, packaged milk and distributed it. The business
19 moved to the current location in 1933. In 1979, the
20 Price family sold the business to Dean Foods. Today,
21 the business employs 170 employees and produces packaged
22 milk and juice/drink products. In consumer focus
23 studies that have been done with El Paso residents, the
24 Price brand recognition is equivalent with Coke,
25 McDonald's and Budweiser.

1 The company serves customers and
2 consumers in El Paso County, Texas. The total marketing
3 area from Price's reaches from the west Texas border as
4 far west as the east Arizona border and from Truth or
5 Consequences, New Mexico, as far south as the Mexico
6 border. We service our customers directly. We also
7 export some milk into the Republic of Mexico. We
8 purchase all of our milk from a cooperative.

9 I am here to testify about my experience
10 selling milk and competing with an unregulated
11 producer-handler. Specifically, the rapid impact of a
12 new producer-handler has been demonstrated in my home
13 market. In very few months we have seen a new
14 producer-handler enter our market. In the balance of my
15 testimony I would like to articulate the market, the
16 size of this new entrant, and the size of the market
17 that I believe is at risk.

18 The first clear sign of GH's entry into
19 the market was as El Paso's school milk was up for bid.
20 There are three major school districts in El Paso:
21 Ysleta School District, the Socorro School District and
22 the El Paso Independent School District. Each district
23 has their own bid process and they are opened at
24 different times. We went through our normal process of
25 constructing the price we were going to bid for the

1 schools. Price's Creameries was successful on the first
2 two school districts but then lost the El Paso
3 Independent School District. We had served the El Paso
4 School District for many years. We know the population
5 of El Paso is currently static so our experiences tell
6 us this business is about 20,000 gallons of milk per
7 week. Interestingly, when school started, the GH El
8 Paso facility was not opened. We surveyed the schools
9 to find the plant code and it was not from a facility in
10 El Paso, rather it was from Las Vegas, Nevada. The
11 Nevada plant code continued to be in the schools until
12 the students returned from the Christmas break, at which
13 point the GH El Paso facility had begun production and
14 the product had the GH plant code on it.

15 There is a large military base (the
16 second largest in the world) in El Paso, Fort Bliss. We
17 have done business at that base since my tenure at
18 Price's. We continue to serve the commissary, but GH
19 has been selling some milk there beginning in early
20 2008. From our observations of our sales and business
21 before GH and since, it appears GH is selling about
22 3,000 gallons per week to the commissaries at Fort
23 Bliss.

24 We have a couple of local retailers that
25 cater to the Hispanic market, both of which have a long

1 history with Price's. They are each local businesses;
2 one has four stores, the other has two stores and all
3 stores are located in El Paso. We lost business at each
4 of these to GH, but they continue to carry our Price's
5 brand. From our observations of our sales and the
6 business before GH and since, it appears GH is selling
7 about 4,000 gallons per week to these businesses in El
8 Paso.

9 In servicing our accounts, we have
10 drivers around town that have observed that GH has four
11 routes. We run similar route trucks, and we know their
12 capacity. With four routes running, I would expect
13 that -- that to amount to be about between 4 and
14 5,000 gallons per week per route. While I can't provide
15 a list of exactly the customers that have been picked up
16 to fill these routes, we see them at work and understand
17 the capacity. I would estimate this to be between 16
18 and 20,000 gallons per week.

19 The final and most significant piece of
20 business that is being served today by GH is a national
21 retailer that is continuing to grow in the U.S. and in
22 El Paso. This is a customer we have served since 1990.
23 This business left in two stages. The first was lost on
24 March 16, 2009 and amounted to six stores, which are
25 large format and large volume. The second loss occurred

1 in April -- on April 13th, 2009 and was four stores;
2 these are much smaller format and less volume, but have
3 higher velocity compared to most single store
4 operations. The total of the above loss was
5 66,000 gallons per week. I can state this with
6 confidence, as we have the exact business within the
7 past 60 days, and we continue to distribute the Price's
8 brand into these stores.

9 GH's manufacturing began in El Paso in
10 November 2008 and from there we have seen an operation
11 start up and gain market share to a point where they
12 have at least 109,000 gallons per week. If one takes
13 that volume over 52 weeks and back into months, it is
14 roughly 472,000 gallons per month. For those who don't
15 think in gallons, a gallon weighs roughly 8.6 pounds, so
16 this would translate into just over 4 million pounds of
17 milk per month.

18 When I evaluate the marketplace where
19 Price's competes, there are packaged gallons and
20 half-gallons sales of approximately 925,000 gallons per
21 week. Today, this area is served at some level by the
22 following: Price's, El Paso; GH, El Paso; Nature's,
23 Roswell, New Mexico; Shamrock, Phoenix, Arizona; Plain's
24 Dairy out of Amarillo, Texas, and others (broadliners
25 and retail distribution centers). In my estimation,

1 looking at the competition, it would appear of the
2 925,000 gallons about 752,000 gallons, or 80 percent of
3 the volume in the marketplace, is at risk to be taken by
4 a producer-handler. It is not 100 percent of the market
5 only because of the distribution centers, entrenched
6 private label relationships, institutional one stop
7 shopping, and vertically integrated businesses.

8 So there are 752,000 gallons available
9 and today GH has 109,000 gallons. The footprint of the
10 property they purchased and the work that has been done
11 leads me to estimate the plant is about 85,000 square
12 feet. Through industry contacts I have learned their
13 cooler capacity is about 30,000 square feet. In
14 comparison, our facility that I operate has a footprint
15 of less than half of this plant and has cooler space of
16 21,000 square feet. I am confident the 109,000 gallons
17 is significantly less than the plant's capacity. From
18 my observations and information, I believe
19 752,000 gallons a week is realistic production within
20 GH's existing investment.

21 My milk supply comes from Don Ana County,
22 New Mexico, which is about 24 miles from my facility.
23 Our plant processes this milk into a quality product
24 that has powerful brand recognition. We are recognized
25 in our community as a company who invests in the quality

1 of life of our children through many grass root
2 programs. We are also committed to excellence in
3 serving our customers, and receive feedback to this
4 effect. To this point, the retailer that has taken
5 business from us has audited our plant by their quality
6 standards and has given us a 100 percent score. I am
7 not aware of another facility that received such a
8 score. We have responded to this retailer's numerous
9 initiatives to help with their processes for inventory
10 control and quality products, most of which have
11 required investments on our part. At the end of the day
12 we were not given a chance to respond to GH. We were
13 just told how much longer to deliver product before GH
14 would supply it.

15 When the GH product showed up, we
16 observed a lower retail cost, which translated to 34
17 cents per gallon below our price. This is milk that is
18 being transported from Muleshoe, Texas, which is about
19 320 miles away. I don't understand many of the workings
20 of Federal Orders, but I am convinced something must not
21 be right for a customer who rates our quality so highly
22 to simply move their business.

23 Thank you for the chance to testify.

24 Q. Sir, there were a couple of times that
25 you added a few words like, you said your facility was

1 in El Paso. I think you changed the word customers to
2 accounts. Those words, as you spoke them, are your
3 intended testimony today?

4 A. Yes, sir.

5 Q. Okay. And then when you referenced the
6 market, and you -- essentially the school districts in
7 your written testimony, you describe sort of the
8 location of the school districts in parenthesis. Even
9 though you left that out in your oral statement, you
10 intend it to be in for your written statement and your
11 exhibit, correct?

12 A. Yes, sir.

13 Q. Now, a couple of times you mentioned
14 whether it's the large retail or other stores that your
15 Price's label is still in the store, but you lost other
16 business. We heard discussion at this hearing. Would
17 that be private label business?

18 A. Yes, private label.

19 Q. And private label generally has a lesser
20 cost?

21 A. Generally, probably 40 to 50 cent
22 difference.

23 Q. Per unit? Per what unit, gallons?

24 A. Per gallon.

25 Q. You also used the phrase on page 4, with

1 respect to the second loss of business to this national
2 retailer, that the stores were smaller format and less
3 volume but have higher velocity compared to most single
4 store operations. What did you mean by that phrase?

5 A. There are about 55,000 square foot stores
6 and they do -- compared to independent retailers in our
7 marketplace, they do probably double the volume.

8 Q. So the volume is moving faster?

9 A. Yes. More traffic. More foot traffic,
10 more consumer traffic.

11 Q. I'm trying to anticipate a question
12 perhaps. You've -- by your own testimony, you obviously
13 were not alive when Price's was formed in 1906, correct?

14 A. No, sir.

15 Q. But you've worked for Price's for 23
16 years?

17 A. 23 years, since 1986.

18 Q. Would it be fair to say that you have a
19 fair amount of institutional knowledge of that entity?

20 A. Yes, I do.

21 MR. ENGLISH: Your Honor, I'll move
22 admission of Exhibit 41. The witness is
23 available for cross-examination.

24 JUDGE CLIFTON: Thank you, Mr. English.

25 Is there any objection to the admission into

1 evidence of Exhibit 41? There is none. Exhibit
2 41 is admitted into evidence. Who would like to
3 begin the cross-examination of Mr. Carrejo?

4 MR. RICCIARDI: I'll do it if I don't
5 have to say his name exactly right.

6 JUDGE CLIFTON: Mr. Ricciardi, I have
7 total confidence and I want to hear you say it.

8 MR. RICCIARDI: Mr. Carrejo.

9 JUDGE CLIFTON: Yes.

10 CROSS-EXAMINATION

11 BY MR. RICCIARDI:

12 Q. Good morning.

13 A. Good morning.

14 Q. I am Al Ricciardi. I represent AIDA.

15 And I have now had an opportunity to read your statement
16 and listen to your testimony and have some questions.

17 First of all, Price's is owned by Dean Foods?

18 A. Yes, sir.

19 Q. Dean Foods sold approximately \$12 billion
20 in dairy products in 2008, correct?

21 A. I just focus on my business in El Paso.

22 Q. Do you know the answer to my question?

23 A. Approximately 12 billion.

24 Q. Thank you very much. Now, Dean Foods is
25 not afraid of a little competition in El Paso, is it?

1 A. I don't believe so.

2 Q. Okay. In fact, that's what you told the
3 El Paso paper, you welcomed the competition, right?

4 A. I think -- I believe my statement was,
5 competition is good for the consumer.

6 Q. It is. Because ultimately competition
7 may reduce the price to the consumer, right?

8 A. Right.

9 Q. And may also -- it may also give the
10 school districts a better deal on the half pint milk
11 that you had been bidding for in the past, correct?

12 A. Right.

13 Q. Okay. You also told the El Paso paper
14 that you felt it was unfair that GH was getting credit
15 for the drop in milk prices, that in reality, the drop
16 of milk prices had to do with international things and
17 things nationally and not GH?

18 A. No, I don't think it was stated that way.

19 Q. Why don't you tell me how you stated it?

20 A. Basically, I said GH moved to town and
21 the price of milk dropped, and they're both correct
22 statements but they don't link into each other.

23 Q. So you attributed the drop in milk prices
24 to something other than GH entering?

25 A. \$11.00 in the market order which we

1 already have.

2 Q. So something different than GH entering,
3 correct?

4 A. Yes, sir.

5 Q. You also understand that when GH actually
6 got into the market, it started as a pool plant, not a
7 producer-handler, correct?

8 A. All I know is they're bringing milk
9 from Yuma, Arizona and Las Vegas, Nevada into the
10 market.

11 Q. Have you looked at the statistics or any
12 information from the Federal Order for November or
13 December to see whether GH is designated as a pool
14 plant?

15 A. No, I haven't.

16 Q. So you rely upon that kind of
17 information, rather than what you're testifying to
18 today, as to what GH was prior to January '09, correct?

19 A. I basically just look at consumer market
20 specifics. I'm not looking at anything from a milk
21 order standpoint.

22 Q. Tell me, sir, on page 4 -- just to help
23 you out a little bit, in the last paragraph. You list
24 the companies that serve the El Paso area currently,
25 correct?

1 A. Yes, sir.

2 Q. All right. Let's do this. Let's go into
3 the past. Prior to the entry of GH, tell me who served
4 the El Paso market at that time.

5 A. All of the above.

6 Q. Okay. So everyone on the bottom of page
7 4, other than GH?

8 A. Right.

9 Q. So Price's, Nature's Dairy, Shamrock out
10 of Phoenix, and Plain's Dairy out of Amarillo?

11 A. Yes, sir.

12 Q. Can you tell me, based upon --

13 MR. ENGLISH: Just a second.

14 MR. RICCIARDI: Did I miss one?

15 JUDGE CLIFTON: Mr. English.

16 MR. ENGLISH: He missed, and others,
17 broadliners and retail distribution centers.

18 Q. Well, thank you very much. I'll see what
19 I can do about that. I did miss that, sir. So that's
20 also included in who served the market, correct?

21 A. Yes, sir.

22 Q. Give me, sir, a percentage of the milk
23 that was provided to that market by Price's prior to
24 GH's entry.

25 A. I believe that's proprietary information.

1 Q. Is it more than 50 percent?

2 A. Once again, it's proprietary information.

3 Q. Isn't it true that Price's basically
4 controlled the entire market?

5 A. Proprietary information.

6 Q. The rest of this stuff isn't proprietary,
7 but that is?

8 A. Yes, sir.

9 Q. Okay, good. Let's talk about the milk
10 bidding process for the school districts, if we can.
11 Prior to the bid that you are referring to at the bottom
12 of page 2 --

13 A. Yes, sir.

14 Q. -- and at the bottom of page 2, you're
15 talking about three school districts, El Paso
16 Independent -- the El Paso Independent School District,
17 and you talk about -- pronounce it for me. Is it
18 Ysleta?

19 A. Ysleta School District.

20 Q. Ysleta School District. And the Socorro
21 School District?

22 A. Right.

23 Q. Prior to this bidding process that you
24 are talking about where you were successful in two but
25 lost one, did Dean have all of those school districts

1 for the previous school year?

2 A. Yes, sir.

3 Q. In the bidding process for the previous
4 school year where -- where Dean's was able to get those
5 three, how many other bidders were there?

6 A. Previous to GH entering the market?

7 Q. Yes, sir.

8 A. In certain parts of the market, there
9 were Shamrock Foods bidding on the -- on the product,
10 Nature's Dairy bid on some school districts and -- and
11 us.

12 Q. What about the other two, was that true
13 for all three of these school districts?

14 A. Yes.

15 Q. So there were -- there was Dean, there
16 was Shamrock and Nature's, correct?

17 A. Yes, sir.

18 Q. And was Dean the low bidder on those
19 three school districts in the previous school year?

20 A. Yes, sir.

21 Q. And it got all three of those school
22 districts in the previous school year?

23 A. Yes sir.

24 Q. Now, let's talk about the three for this
25 last year when GH was involved. The bid was to supply,

1 among other things, half pints, right?

2 A. Yes, sir.

3 Q. Would that be in whole, skim and flavors?

4 A. All of the above.

5 Q. Okay. Anything else?

6 A. From a fluid standpoint?

7 Q. Yes, from a fluid standpoint.

8 A. There was juice.

9 Q. Now, with regard to the bid that you
10 lost, can you tell me what your price per unit was on
11 that bid?

12 A. Proprietary information.

13 Q. Let me ask you this question, sir. Isn't
14 it true that in order to bid on the school district milk
15 contract, that that information has to be published to
16 the school district and the school district has that
17 information and will provide it to the public?

18 A. Yes, sir.

19 Q. Okay. So the information we're talking
20 about as to a per unit bid is a public document, and
21 you're telling me today that that is proprietary?

22 A. You can find it on the website.

23 Q. Okay. Tell me what the bid was.

24 A. You can find it on the website.

25 Q. Tell me what the bid was, sir. Do you

1 remember -- do you know what the bid was?

2 A. I believe I remember close to what the
3 number was, but I'm not absolutely sure.

4 Q. Tell me close to what it was.

5 A. It was in the mid 23 cent range.

6 Q. And do you remember what the bid was from
7 GH?

8 A. It was in the mid 22 cent range.

9 Q. Okay. So it was very close, correct?

10 A. It was.

11 Q. Now, let's talk for a second about the
12 milk that actually was supplied for the school district
13 before GH became a producer-handler plant in January.
14 You said that you had done some investigation, you
15 looked at the plant code and determined that it came
16 from Las Vegas?

17 A. Yes, sir.

18 Q. Have you ever heard of the Milk
19 Regulatory Equity Act?

20 A. No, sir.

21 Q. Do you have an understanding that one of
22 the companies that was pushing for the passage of that
23 act through Congress was Dean Foods?

24 MR. ENGLISH: If he never heard of it,
25 how could he know that, your Honor?

1 JUDGE CLIFTON: Good point, but I'll
2 allow the witness to field the question.

3 A. Could you repeat the question?

4 Q. Sure. Were you aware that one of the
5 companies pushing for the passage of the MREA in 2006
6 was Dean Foods?

7 A. No, sir.

8 Q. Are you aware that under MREA, one of the
9 provisions makes the entire state of Nevada unregulated?

10 MR. ENGLISH: How can he been aware of
11 that?

12 JUDGE CLIFTON: Just a moment. When your
13 attorney stands or approaches me, don't answer a
14 question until I hear the objection, even if the
15 answer is, I don't know. So you wait, and then
16 I hear the objection and then I rule and then we
17 determine whether you even have to respond.

18 MR. ENGLISH: I think we're now down to
19 the third question where the witness doesn't
20 even know, never heard of the Milk Regulatory
21 Act before it was mentioned to him, and now he's
22 being asked about the provisions of it.

23 JUDGE CLIFTON: Thank you, Mr. English.
24 I would like you to reword that question,
25 because a lot of us don't know the names of

1 legislation. And a lot of us don't know exactly
2 when it passed or anything like that, but we
3 know about things that happened. So you may
4 continue to explore, but just put it in terms
5 that he might have knowledge of.

6 MR. RICCIARDI: If he hasn't, great,
7 Judge, and I understand. And he can always tell
8 me he doesn't, and then I'll continue to move
9 on, but I need to lay the predicate because of
10 what he said in the statement.

11 JUDGE CLIFTON: Right. See, you put it
12 in some words there that are helpful. You
13 talked about Nevada being exempt and so forth.
14 Talk in those terms.

15 Q. You have an understanding that as part of
16 the passage of this act, that one --

17 JUDGE CLIFTON: No, he doesn't know about
18 the act.

19 Q. You understand that Nevada, the entire
20 state of Nevada, is currently unregulated out of the
21 Federal Order system?

22 A. No, I don't.

23 Q. Do you know by looking at the plant code
24 what plant the milk from Nevada was coming from?

25 A. Yes, I do.

1 Q. Okay. And what plant does it come from?

2 A. I believe it was Anderson Dairy, Nevada.

3 Q. And Anderson Dairy is a separate company
4 unrelated to GH processing, correct?

5 A. I don't know that.

6 Q. Do you have any information that it's
7 related in some way?

8 A. I don't know that.

9 Q. Okay. Fair enough. So GH was able to
10 obtain milk from another entity, Anderson's, ship it
11 from Las Vegas to El Paso and still beat your bid by
12 less than a penny, correct?

13 A. I guess so.

14 Q. And as a result the school district and
15 the people in El Paso save money, right?

16 A. It's about a penny cheaper.

17 Q. Okay. Have you started the process to
18 bid for the coming school year for the school milk?

19 A. Yes, we have.

20 Q. And has that bid process completed or are
21 you in the -- in the middle of it?

22 A. We're in the middle of it.

23 Q. And do you know who the bidders are going
24 to be?

25 A. No, not 'til the bids are opened.

1 Q. Have you prepared a bid already?

2 A. We have one in the mix right now.

3 Q. Is it for the same three school
4 districts?

5 A. Just for one.

6 Q. Which one?

7 JUDGE CLIFTON: Mr. English, you may
8 approach and make your objection.

9 MR. ENGLISH: If that's not public
10 information, I don't believe it should be
11 answered.

12 JUDGE CLIFTON: Thank you.

13 MR. ENGLISH: Who -- especially in this
14 room, competition, who somebody is or isn't
15 bidding on, is inappropriate and it's an
16 inappropriate question.

17 JUDGE CLIFTON: I can understand your
18 wanting to know.

19 MR. RICCIARDI: Your Honor, all I'm
20 trying to do is attempt to go through and
21 cross-examine a statement that has been given.
22 I don't want to end up getting into proprietary
23 information, but I also do not want to be
24 limited in my ability to represent my clients'
25 interests with regard to claims and other issues

1 made in this statement. And I think it's a fair
2 question, and if he has the information, he
3 should answer.

4 JUDGE CLIFTON: Well, he has answered
5 that his company has not given up on the school
6 bid process. What else is it that you want to
7 know?

8 MR. RICCIARDI: What I'm attempting to
9 find out, Judge, is if, in fact, we have a
10 market now that, as a result of the entrance of
11 a new competitor, is becoming more competitive
12 on price, not unfairly but simply competitive.
13 To the extent that you have an issue with regard
14 to that question, I'll move on.

15 JUDGE CLIFTON: Yeah, it's not a done
16 deal. I don't see how you can get what you
17 want.

18 MR. RICCIARDI: That's fine.

19 JUDGE CLIFTON: Mr. English.

20 MR. ENGLISH: I need to go a step
21 farther. Excuse me, Mr. Ricciardi. Your Honor,
22 the question, frankly -- and I want to be clear
23 on the record -- is an inappropriate question,
24 notwithstanding the nature of these proceedings,
25 Noerr-Pennington, First Amendment right to

1 testify. Entities in this room are competitors
2 and the antitrust laws apply, notwithstanding,
3 and for a competitor -- representative of a
4 competitor of this entity to ask the question
5 effectively which school district are you going
6 to bid on before the school bids have been
7 opened is, in my mind a clear, clear question
8 that leads to an answer that could violate the
9 antitrust laws.

10 I instruct the witness not to answer any
11 questions of that nature.

12 JUDGE CLIFTON: Thank you, Mr. English.
13 That went farther than I realized. New area,
14 Mr. Ricciardi.

15 BY MR. RICCIARDI:

16 Q. New area of concern for me. But I will
17 move on because I am not concerned. Let me ask a few
18 more questions and I'll finish my current
19 cross-examination.

20 You state on page 5 in the first full
21 paragraph, about the middle of it that, quote, through
22 industry contacts I have learned their cooler capacity,
23 et cetera. Who are the industry contacts that you are
24 talking about?

25 A. El Paso is a pretty small town and we

1 don't have a lot of refrigerator and stainless steel
2 contractors there, and they work for all the companies
3 in the market. And we have worked with them for a lot
4 of years and they just, through casual conversations,
5 told us what was going on out there.

6 Q. Okay. So you talked to the contractors
7 in that area?

8 A. Uh-huh.

9 Q. Is that yes?

10 A. Yes, sir.

11 Q. Okay. Prior to the GH processing plant
12 actually physically opening, was there a -- any other
13 milk processing facility that was located in El Paso,
14 other than Dean?

15 A. Prior?

16 Q. Yes, sir.

17 A. Yes.

18 Q. And what was that?

19 A. How far do you want to go?

20 Q. I want to go back to just prior.

21 A. Just prior, the last processing plant
22 that was available in El Paso was 2004, I believe,
23 Farmer's Dairies.

24 Q. And how much of the processing business
25 in El Paso did Farmer's Dairy have, if you know?

1 A. I wouldn't know that.

2 Q. Was it a small amount?

3 A. No. It was a decent amount. I
4 wouldn't -- I wouldn't know a percentage or a gallon
5 amount.

6 Q. I mean, do you have -- do you have an
7 estimate? Was it 10 percent or less?

8 A. I can't estimate.

9 Q. Okay.

10 MR. RICCIARDI: At this point, I don't
11 have any further questions, your Honor.

12 JUDGE CLIFTON: Thank you so much
13 Mr. Ricciardi. Next cross-examiner.

14 Mr. Vetne.

15 CROSS-EXAMINATION

16 BY MR. VETNE:

17 Q. Good morning, Mr. Carrejo.

18 A. Good morning.

19 Q. My name is John Vetne. I'm an attorney
20 from New Hampshire. One of my clients is Nature's Dairy
21 in Roswell, so I have a little interest in your answers
22 here.

23 While my memory is fresh, at the
24 current -- not at the current time. Through -- 2005
25 through most of 2008, your plant was the only milk plant

1 in El Paso, is that correct?

2 A. Farmer's Dairy is still in existence.

3 Q. Does it still bottle milk?

4 A. And they're -- it still bottles milk,
5 yes.

6 Q. Okay. What happened in 2004? I must
7 have misunderstood something.

8 A. It became nonregulated.

9 Q. It became nonregulated for what reason?

10 A. Export into Mexico.

11 Q. It is -- okay. Is that its exclusive
12 market or its primary market?

13 A. Exclusive market.

14 Q. All right. So let me rephrase the
15 question, then. From 2004 at some point through 2008,
16 your plant was the only plant in El Paso that
17 distributed milk in El Paso?

18 A. We're the only plant in El Paso
19 distributing milk, but milk is coming from Amarillo into
20 many independent retailers.

21 Q. I understand that. There was only one
22 plant located in El Paso that also distributed milk in
23 El Paso?

24 A. Yes, sir.

25 Q. And when the Farmer's Dairy plant in 2004

1 refocused its market and no longer distributed milk in
2 El Paso, did Price's gain sales in El Paso, El Paso
3 County?

4 A. Yes, it did.

5 Q. Okay. And what, approximately, was the
6 volume of that gain?

7 A. It's proprietary information.

8 Q. All right. That gain would give you
9 some -- some measure of the size of -- some reference to
10 the size of the plant that shifted its focus, correct?

11 A. I wouldn't know that.

12 Q. You would not know that?

13 A. It's proprietary information again.

14 Q. Well, you would not know whether or not
15 your gain in sales is somehow connected with somebody no
16 longer selling? You have no opinion on that?

17 A. Once again, it's proprietary.

18 Q. Your knowledge -- your opinion of whether
19 you gained sales as a result of somebody else not
20 selling anymore is proprietary?

21 A. I believe so.

22 Q. I see. Prior to the entry of GH into the
23 school bidding process, was Price's the successful
24 bidder during the immediate, say, four to five preceding
25 years?

1 A. Yes, sir.

2 Q. And during that four or five preceding
3 years, were there consistently multiple bidders? You've
4 mentioned a couple of others.

5 A. Yes.

6 Q. Was there any time in which Price's was
7 the only bidder?

8 A. A couple districts, yes.

9 Q. Is it not helpful in the school bidding
10 process for there, in fact, to be a second or even
11 better yet, a third bidder?

12 A. As I stated, competition is good if -- if
13 the playing field is level.

14 Q. Let me try to ask the question again. Is
15 it not useful when you are looking for school sales to
16 have a second or third bidder in the process, that,
17 first of all, demonstrated to the school that there is
18 competition of the milk available and secondly,
19 demonstrate that yours is the best?

20 A. I believe I answered that question.

21 Q. When?

22 A. Prior to this question.

23 Q. Pardon?

24 A. Prior to this question.

25 Q. Oh. I didn't get it.

1 JUDGE CLIFTON: Would you ask the
2 question again about whether it's useful to have
3 more than one bidder and in the context of whom
4 it's useful?

5 Q. Useful to the school system is my next
6 question. You spoke to the school system; to have
7 multiple bidders so that the school system is aware that
8 there are multiple sources. We'll start there.

9 A. Once again, competition is good. I think
10 it's good for the consumer and the school system is a
11 consumer. And -- but once again, if the playing field
12 is level, competition is good.

13 Q. Okay.

14 JUDGE CLIFTON: Mr. Carrejo, I don't
15 think that's actually responsive to his
16 question. And if your answer is that you don't
17 speak for the school district, I understand
18 that. But his question is, is it useful for the
19 school district to have more than one bidder in
20 a situation like this?

21 THE WITNESS: My opinion is you would
22 have to ask the school district.

23 Q. Okay. You have no responsibility for
24 bids to the school districts?

25 A. I construct the bids, yes.

1 Q. And it's a small town. You have
2 communication with town officials or school officials?

3 A. Yes.

4 Q. Okay. And school bidding -- might even
5 been an occasional article in the newspaper or
6 newsletters?

7 A. I wouldn't know that.

8 Q. You would not know that?

9 A. No. School bidding, no, I wouldn't.

10 Q. Do you know enough to be able to tell us
11 whether -- if there's only one bidder, whether a school
12 district actively seek other sources for a second bid or
13 a third bid?

14 A. Once again, you'd have to ask the school
15 district.

16 Q. I'm asking about your knowledge of what
17 has happened in the past, and I can't ask the school
18 district about your knowledge.

19 A. Sir, I don't know what the school
20 districts do from that perspective.

21 Q. You have no experience in whether a
22 school district has sought -- has ever sought or
23 attempted to seek a second or third opinion?

24 A. My responsibility is to construct a
25 school bid and turn it in on time.

1 Q. I understand your responsibility. My
2 question was a little bit different. My question, I
3 wanted to confirm that you represent under oath that you
4 have no knowledge or experience that a school district
5 that you serve has ever sought a second or third bid?

6 A. I don't know. I don't know what the
7 school districts did.

8 Q. Okay. Has Shamrock -- let me ask you
9 this. Shamrock Foods testified yesterday that they have
10 a food service part of their business. Do you know
11 whether the school institutional sales would be part of
12 their food service?

13 A. I don't know.

14 Q. However, schools seek, in addition to
15 milk, other -- other food and beverage products,
16 correct?

17 A. Yes, sir.

18 Q. Okay. And those food and beverage
19 products are also offered to the school on bid, correct?

20 A. I believe so.

21 Q. Has Shamrock Foods ever successfully bid
22 on El Paso school sales?

23 A. Not in El Paso, but in our market area
24 they have.

25 Q. That's why I asked just El Paso. El

1 Paso, where you're located, more efficiently than
2 anybody else, Shamrock has never successfully bid to
3 your knowledge?

4 A. No, sir.

5 Q. Okay. Can you define in your testimony
6 the word broadliners?

7 A. Shamrock Foods, U.S. Foods, Sysco, Redi
8 Key (phonetic), people that carry 15,000 products on
9 their trucks to satisfy a restaurant or a institutional
10 business.

11 Q. Your term broadliners is synonymous with
12 Mike Krueger's word, food service?

13 A. Yes, sir.

14 Q. Okay. And retail distribution centers in
15 your testimony at page 4, what do you mean by that?

16 A. The big players in the market have their
17 own distribution centers that many products flow
18 through, and a lot of those products are dairy products
19 that either have extended shelf life or are ultra
20 pasteurized that come directly from the food center to
21 the store.

22 Q. Can you give some examples?

23 A. A lot of the cultured products, a lot of
24 the SL products, Silk, soy product. It's a big
25 percentage of the store's business.

1 Q. Okay. Can you also give some examples of
2 who are those retail distribution centers?

3 A. I'm not going to mention names.

4 Q. Can you give an example of a retail
5 distribution outside of your marketing area, any retail
6 distribution center in the world of which you are aware,
7 that might be an illustration of your use of that word?

8 A. There's -- there's retail distribution
9 centers in Phoenix and in Albuquerque, Dallas. They
10 come from all the markets into El Paso.

11 Q. I understand that they're located
12 elsewhere. Telling me where they are does not give me
13 an illustration of what you intended. You are reluctant
14 to tell me. You're reluctant to name a company in your
15 market that you believe fits the term retail
16 distribution center, so I'm asking you to overcome that
17 reluctance and identify one, somebody else, that's not
18 going to affect your reputation.

19 A. Okay. I got your question. There's a
20 Wal-Mart distribution center in Phoenix and Los Lunas,
21 New Mexico, which is 50 miles south of Albuquerque.
22 There's an Affiliated warehouse in Amarillo, Texas, that
23 serves a lot of our customers. There's Costco out of, I
24 believe, Dallas, Texas, that comes into El Paso.
25 Albertson's DC in Phoenix, Arizona has a huge

1 distribution center that comes into the El Paso market.

2 Q. Okay. Those distribution centers serve
3 their own brand stores, is that correct?

4 A. In some instances, yes.

5 Q. And are you aware of any other instances
6 where one of those distribution centers of that nature
7 would serve a mom and pop convenience store or a school
8 district?

9 A. Affiliated serves probably a hundred
10 independent retailers.

11 Q. A hundred independent retailers? Can you
12 describe a little bit more what you mean by independent
13 retailers now?

14 A. Mom and pop business that you spoke
15 about.

16 Q. Okay. And by a hundred independent
17 retailers, would be a hundred in the market area in El
18 Paso County or El Paso City?

19 A. It's all over the west Texas, New Mexico
20 area.

21 Q. On the very -- on the very last page at
22 the top, the sentence, you say, when the GH product
23 showed up, we observed a lower retail cost, which
24 translated to 34 cents per gallon below our price. I'm
25 not sure I understand your use of the word translated

1 there. I mean, it's either 34 cents per gallon less or
2 not. Where does translation fit in?

3 A. Repeat the question, please.

4 Q. Okay. I'm curious about what you
5 intended by your use of the word, translated.

6 A. They are 34 cents below our cost.

7 Q. Below your price. It says -- you used
8 the word translated, right? If I see a gallon to my
9 right and a gallon to my left and the one to my left is
10 34 cents less, it's just 34 cents less. That's not
11 translated to 34 cents less. So you have something
12 other than package-to-package product comparison when
13 you use the word translate?

14 A. We don't serve that package anymore.
15 They took that business from us. And it was 34 cents
16 lower than what we had it. So we can't compare to a
17 similar product.

18 Q. Oh, okay. So the 34 cents, temporally in
19 time, is a product at two different time periods. You
20 had product in the store and it was at a price, and a
21 later time you came in the store and you saw that
22 product, the same -- the same size package, and it was
23 34 cents less. Don't look at Mr. English for this
24 answer.

25 MR. ENGLISH: I'm not sure he understands

1 the question.

2 JUDGE CLIFTON: Let me ask a question if
3 I may, Mr. Carrejo. When you say that the GH
4 product was 34 cents less than Dean's, was it
5 only gallon items that you took into
6 consideration?

7 A. We measure the market by gallons. It's a
8 number one mover and it's a big percentage of the
9 volume. That's how we measure cost.

10 JUDGE CLIFTON: All right. And is it
11 gallon items that they replaced you with?

12 THE WITNESS: Yes, sir.

13 JUDGE CLIFTON: Okay. So is a different
14 way to -- to read this sentence, that the GH
15 gallons cost 34 cents less than your gallons?
16 Is that what -- would that be accurate?

17 THE WITNESS: Yes, your Honor.

18 JUDGE CLIFTON: Go ahead, Mr. Vetne.

19 BY MR. VETNE:

20 Q. Okay. My question was, you observed a
21 price at -- was this a particular store or generically
22 through the market?

23 A. Particular store. It's a business they
24 took from us, from the large retailer.

25 Q. A business they took -- oh, a large

1 retailer business that they took from you?

2 A. (Nodding head.)

3 Q. Okay. And who was that large retailer?

4 A. I'm not going to state the name.

5 Q. I go back to my question. You observed a
6 gallon price in that store that was 34 cents less than
7 your product was being offered in that store, correct?

8 A. We weren't in the store when the price
9 dropped 34. They took that business from us. And when
10 they got the business, the price dropped 34 cents a
11 gallon.

12 Q. Yeah, I'm not saying that you compared
13 items side-by-side on the shelf. You had product in
14 there at some point and you had a price. And at a later
15 point, you came -- you or somebody from your company or
16 your wife or somebody came into that store and saw a
17 gallon of milk, and when that person or you came to the
18 store, that gallon was 34 cents less than your price
19 previously had been?

20 A. Yes, sir.

21 Q. Okay. What was the month for that in
22 reference in which your product was in the store, and
23 what was the month at which the observation was made of
24 a gallon 34 cents less?

25 A. It's stated in there. March 16th was the

1 date.

2 Q. March 16th was the date of observation,
3 which is 34 cents less than what month in which you had
4 your product in that store?

5 A. March, 16th.

6 Q. Both things happened on March 16th?

7 A. It was a Monday. They took over on a
8 Monday.

9 Q. Yes.

10 A. And we had it on the Sunday previous to
11 that Monday.

12 Q. Were not both products in the store at
13 that time?

14 A. The store -- the store systems changed
15 the price. I'm not understanding your question.

16 Q. And I'm confused now, because I thought
17 it was not a side-by-side comparison, it was a
18 time-to-time comparison.

19 A. When price changes take effect in a
20 grocery store, there's a cut-off date. With the market
21 order fluctuations, if milk goes up a nickel on the
22 first of -- for example, June 1, then it's going to
23 reflect that at retail on June 1.

24 And their price -- their new price to
25 this retailer changed on March 16th and the price

1 changed at store level by 34 cents.

2 Q. Okay. Had you been observing prices in
3 that store from the period of January and February?

4 A. Yes, sir.

5 Q. Okay. The regulated Class I price
6 between January, February and March dropped
7 significantly, right, correct?

8 A. Yes, sir.

9 Q. Okay. Did you observe that the retailer
10 price dropped correspondingly?

11 A. Yes, sir.

12 Q. During those months?

13 A. Yes, sir.

14 Q. And in El Paso, the retail price drops
15 penny per penny regardless of the Federal Class I?

16 A. Yes, sir.

17 Q. Good for El Paso. And was the -- let's
18 see. Do you have any -- any other record of retailer
19 prices for that store? You say dropped 34 cents. You
20 must know, then, what the retail price was on -- in
21 early March for a gallon of milk and what it was when it
22 came down to the GH level. What were those two prices?

23 A. I believe the March 1 price was \$2.62 on
24 a gallon of homogenized whole milk, that's what we
25 measure it by.

1 And I believe when GH took the business,
2 it was 34 cents less than that, not including -- can I
3 just add one thing -- not including any drops in the
4 market order. It was just a net below after the market
5 order changes.

6 Q. All right, okay. And at that same store,
7 do you know what the February and March retail price was
8 per homogenized gallon?

9 A. No, sir, I don't, not off the top of my
10 head.

11 Q. But it would be your testimony that it
12 would be -- if the Class I price were higher in January
13 and February, that the retail price would have
14 corresponded penny for penny with those higher Class I
15 prices?

16 A. Yes, sir.

17 Q. Okay. How -- how long has -- strike
18 that.

19 You mentioned that Nature's Dairy had
20 competed for -- I believe for some school bids.

21 A. In my market, yes.

22 Q. Yeah. Okay. In El Paso, has Nature's
23 Dairy ever succeed in those bids?

24 A. Not in El Paso.

25 Q. In your market, El Paso area, has

1 Nature's Dairy taken away business from you on the basis
2 of price?

3 A. No, sir.

4 Q. In your market area, has Nature's Dairy
5 products ever appeared on the shelf at lower than the
6 retail price of your products?

7 A. In the Roswell area, yes.

8 Q. When I say your market --

9 A. Roswell is my market, sir.

10 Q. Okay. El Paso. Oh, in Roswell. That's
11 where they're located?

12 A. Yes.

13 Q. And you have to haul milk up to Roswell?

14 A. Yes, I do.

15 Q. How far is that?

16 A. 163 miles from El Paso.

17 MR. VETNE: Okay. All right. That's the
18 questions I have. Thank you.

19 THE WITNESS: Thank you.

20 JUDGE CLIFTON: Thank you, Mr. Vetne.

21 Let me see. Is everybody doing fine? Yeah,
22 it's 9:00. Everybody is doing fine.

23 Next person to examine Mr. Carrejo?

24 Mr. Beshore.

25 CROSS-EXAMINATION

1 BY MR. BESHORE:

2 Q. Good morning, Mr. Carrejo.

3 A. Good morning.

4 MR. BESHORE: I'm too close maybe.

5 BY MR. BESHORE:

6 Q. I represent National Milk Producers
7 Federation and Dairy Farmers of America, and I have just
8 a couple of questions. Just to connect the dots, make
9 sure there's no question here. I don't know -- could
10 you have --

11 MR. BESHORE: Your Honor, could he have
12 Exhibit 13?

13 JUDGE CLIFTON: Sure.

14 Q. And while the judge is getting that for
15 you, let me indicate Mr. Carrejo, that Exhibit 13 is a
16 list of producer-handlers compiled by the United States
17 Department of Agriculture, the Market Administrator, the
18 Dairy Programs staff, okay?

19 Could you turn to the last page of that
20 exhibit, which is a producer-handler list for 2009. And
21 towards the bottom of the list there's an entry, GH
22 Dairy, El Paso, Texas. Do you see that?

23 A. Yes, sir.

24 Q. Okay. Now, is that the dairy competition
25 about which you have spoken in your testimony?

1 A. Yes, sir.

2 Q. Okay. And they are a producer-handler?

3 A. Yes, sir.

4 Q. Okay. During the -- during the time
5 period of the change of accounts such as the March
6 account, they were a producer-handler under your order,
7 correct?

8 A. Yes, sir.

9 Q. Okay. Now, you've -- the bottom of
10 page 1 on your testimony, just you've described the area
11 which your plant serves, and you gave some distance with
12 respect to -- in response to Mr. Vetne's question, but
13 could you just give us a little more information with
14 respect to west to east, how large an area it is you're
15 comprised of, your service area and north to south?

16 A. It's approximately about 600 square miles
17 from the west Texas border to the Arizona border. El
18 Paso is in the furthest southwest corner of Texas. Just
19 a bit of trivia, I guess. It's closer to San Diego,
20 California, from El Paso than it is to Dallas, just for
21 reference purposes.

22 And -- and basically we cover a lot of
23 miles with very sparse population.

24 Q. Okay. Now, you gave me square miles.
25 I'm interested in dimensions, like from west -- from the

1 point, you said, the --

2 A. The cities I mentioned are from T or C,
3 New Mexico, to El Paso, you're looking at about
4 175 miles. From Roswell to El Paso, about 163. From
5 Carlsbad to El Paso, about 212, I believe it is. Silver
6 City, New Mexico, which is on the Arizona/New Mexico
7 border, is probably about 210 away. Las Cruces, which
8 is about an 80,000 populated city, is probably 40 miles
9 from my plant.

10 Q. Okay. And how about to the north, to the
11 east?

12 A. Albuquerque, New Mexico, is 250 miles
13 directly north of El Paso. The center of New Mexico is
14 about basically Belen, New Mexico, and that's about
15 220 miles away from El Paso.

16 Q. Do you distribute that far?

17 A. We distribute to T or C 175 miles north.

18 Q. And how far east do you distribute?

19 A. East, we go all the way to Carlsbad, New
20 Mexico. West to Silver City.

21 Q. Okay. How about in Texas?

22 A. In Texas, El Paso County only.

23 Q. Okay. So from the points east in Texas
24 in El Paso County, east of El Paso City?

25 A. We have some small towns in the county

1 that are probably 40, 50 miles east of us.

2 Q. And within the state of Texas, how far
3 north do you go?

4 A. El Paso County.

5 Q. That's it? And is that, what, 40 or
6 50 miles?

7 A. Yes.

8 Q. Okay.

9 JUDGE CLIFTON: Would you spell Tiarra
10 City for me?

11 THE WITNESS: No. It's Truth or
12 Consequences, I'm sorry.

13 JUDGE CLIFTON: Oh. T or C. I'm doing
14 T-i-e-r-r-a. Truth or Consequences is T or C.

15 THE WITNESS: You know how that city got
16 their name?

17 JUDGE CLIFTON: No.

18 THE WITNESS: Ralph Edwards, the old
19 Truth or Consequences game show, he paid a town
20 half a million dollars if they would change
21 their name. And Hot Springs, New Mexico changed
22 into Truth or Consequence, New Mexico.

23 JUDGE CLIFTON: True story?

24 THE WITNESS: True story.

25 BY MR. BESHORE:

1 Q. I had maybe just one -- one other
2 question or question area, Mr. Carrejo. You've
3 discussed, in response to Mr. Vetne's questions, the
4 prices at the large retailer where -- which changed
5 dairy product suppliers in March. And prior to the
6 change in their retail price, the price to their
7 consumer for a whole gallon -- a gallon of whole milk
8 supplied by your company was \$2.62, correct?

9 A. Yes, sir.

10 Q. Of course you know, and I'm not asking
11 you to reveal, but you know what your charge was, what
12 the price was that you sold to the retailer was,
13 correct?

14 A. Yes, sir.

15 Q. So you knew the markup from your price to
16 the retail price, correct?

17 A. Yes, sir.

18 Q. Okay. And when the price came down 34
19 cents, is it your experience with that retailer that,
20 you know, there's a fairly predictable relationship
21 between the wholesale price and the retail price?

22 A. We've been serving them for 19 years and
23 it's been constant.

24 Q. So a constant difference between markup,
25 if I can use that, between the wholesale price and the

1 retail price?

2 A. Yes, sir.

3 Q. Okay. So when you say the retail price
4 dropped 34 cents, you have a pretty good idea what the
5 wholesale price was of that product?

6 A. Yes, sir, I do.

7 Q. Okay. And I take it it was at least 34
8 cents per gallon?

9 A. Yes, sir.

10 Q. 34 cents per gallon translates to very
11 nearly \$4 per hundredweight of raw milk?

12 A. Close to \$4, yes.

13 Q. Do you think that plant is \$4 per
14 hundredweight more efficient than yours in processing
15 costs?

16 MR. RICCIARDI: Objection. Your Honor.

17 JUDGE CLIFTON: Mr. Ricciardi, you would
18 like a foundation?

19 MR. RICCIARDI: Yeah, it would be --
20 Judge, two things. I would like a foundation
21 for that question. I also want to point out
22 that in this hearing, we cannot be selective as
23 to when we decide that we're going to say what's
24 confidential or not.

25 Now, we've gotten from the questioning

1 from Mr. Beshore information about markups, et
2 cetera, but we're unable to get information
3 because it's claimed to be confidential.

4 It's like the attorney-client privilege.
5 If you decide that you are going to go ahead and
6 utilize it as a shield, that's fine. You cannot
7 use it as a sword. You cannot selectively
8 decide, I'm going to give that information to my
9 friends, like people that Mr. Beshore
10 represents, but not tell the people that you
11 perceive to be on the other side. It is unfair
12 in this proceeding, and it is unwarranted. And
13 with regard to this question, obviously, there
14 is no basis.

15 He has no foundation to testify about
16 what the processing costs are, what the
17 percentage of processing costs are in the GH
18 plant. He can't. He doesn't even know.

19 JUDGE CLIFTON: Mr. English?

20 MR. ENGLISH: I would note that the
21 witness never even had a chance to answer, so
22 for all we know the answer was going to be
23 proprietary, or I don't know, and might have
24 avoided all of this.

25 JUDGE CLIFTON: Well, I sense what

1 Mr. Ricciardi is concerned about, because I've
2 been so nervous with Mr. Beshore asking these
3 questions. But let's see. Let's go back to
4 your last question before we had the objection.
5 The question is whether this witness knows
6 whether -- I think the gist of the question is
7 whether the competitor was selling below cost or
8 whether the cost -- cost of processing could
9 have been that much.

10 MR. BESHORE: My question was, do you
11 believe that the GH plant could process milk
12 for -- at cost, a plant cost, of more than \$4
13 per hundredweight less than his plant?

14 JUDGE CLIFTON: And would you first lay
15 the foundation for him to have that opinion?

16 BY MR. BESHORE:

17 Q. You know something about plant processing
18 costs?

19 A. Yes, sir.

20 Q. And you've testified you know something
21 about the -- the configuration of the GH plant.

22 A. I know where it's located and the size.

23 Q. And the size of it. You know something
24 about the -- what the refrigeration -- the capacity of
25 the refrigeration equipment or some limited knowledge of

1 the plant?

2 A. Yes, sir.

3 Q. Okay.

4 MR. BESHORE: Actually, I'll just leave
5 it there.

6 JUDGE CLIFTON: That's a good idea. All
7 right. Thank you, Mr. Beshore. Who next would
8 like to cross-examine Mr. Carrejo? Mr. Tosi?
9 Mr. Rower? Before you go, Mr. Rower,
10 Mr. Ricciardi has another question.

11 MR. RICCIARDI: Yeah, I do now based upon
12 the door that Mr. Beshore has opened.

13 JUDGE CLIFTON: Not exactly.

14 MR. RICCIARDI: Well, I do.

15 JUDGE CLIFTON: No.

16 MR. RICCIARDI: I do.

17 JUDGE CLIFTON: I mean, you may ask a
18 question. He didn't exactly open a door.

19 MR. RICCIARDI: Okay. Let's see.

20 RE-CROSS-EXAMINATION

21 BY MR. RICCIARDI:

22 Q. Can you tell me, sir, what the processing
23 costs at the Dean's plant that you serve was in March of
24 2009?

25 A. Proprietary information. No, sir.

1 Q. So you are not going to tell me that?

2 A. No, sir.

3 Q. Can you tell me what the product cost was
4 for the -- for obtaining the milk in March of 2009?

5 A. No, sir. I'm not going to tell you that.

6 Q. And obviously you have no clue with
7 regard to either the product costs or the processing
8 costs for GH processing, correct?

9 JUDGE CLIFTON: I'd like you to reword
10 that. No clue is a little bit extreme.

11 Q. You have no information about that?

12 A. No, sir, I don't.

13 Q. All right. So with regard to this
14 information that you did provide in the statement, the
15 only thing that you know is that there's a -- there was
16 a difference in retail of 34 cents, you say, between
17 March 17 and March 16th, right?

18 A. Yes, sir.

19 Q. You don't know whether or not that
20 particular store, which you haven't named, decided to
21 have a loss leader on milk at that particular time,
22 correct?

23 A. I have no knowledge of that.

24 Q. You have no information as to what
25 marketing decision that particular store made concerning

1 milk at that time, correct?

2 A. Yes, sir.

3 Q. And so the difference in price that you
4 may have observed could have been a marketing decision
5 by that retailer, correct?

6 A. Yes, sir.

7 Q. Thank you.

8 JUDGE CLIFTON: Mr. English.

9 MR. ENGLISH: Can I just follow up on
10 that?

11 JUDGE CLIFTON: You may follow up on that
12 before I ask Mr. -- for Mr. Rower's questions.
13 And also it looks like we may have another
14 little action.

15 REDIRECT EXAMINATION

16 BY MR. ENGLISH:

17 Q. I believe you testified contrary to what
18 Mr. Ricciardi just tried to get you to say, that this
19 customer has a consistent markup?

20 A. Yes.

21 Q. Does it ever use milk as a loss leader?

22 A. No.

23 MR. ENGLISH: Thank you.

24 JUDGE CLIFTON: Mr. Ricciardi.

25 FURTHER RECROSS-EXAMINATION

1 BY MR. RICCIARDI:

2 Q. Tell me who the customer is.

3 A. No.

4 Q. Tell me who the customer is.

5 MR. BESHORE: Asked and answered.

6 JUDGE CLIFTON: You may step back,
7 Mr. Ricciardi, if that's your only question.

8 Q. I've got another question. What is the
9 source of your information regarding the marketing
10 decisions by that customer in terms of markup?

11 A. A retail tag on the shelf.

12 Q. So you go into the store?

13 A. Right.

14 Q. And that's what you saw?

15 A. (Nodding head.)

16 Q. That's the basis for your testimony,
17 right?

18 A. Yes, sir.

19 MR. RICCIARDI: Thank you.

20 JUDGE CLIFTON: Mr. Miltner.

21 CROSS-EXAMINATION

22 BY MR. MILTNER:

23 Q. Good morning, Mr. Carrejo.

24 A. Good morning.

25 Q. The 34 cent difference you have provided

1 us information about, limited information, was for whole
2 milk. Do you have similar information on any other --
3 any other items, 2 percent, 1 percent, skim?

4 A. We focus on whole milk. It's the big
5 driver in our market. It was all relatively waterfalled
6 from there, depending on the butterfat. It was about
7 the same price.

8 Q. That retailer, unlike several, you're
9 testifying that they actually adjust their prices based
10 on the butterfat content?

11 A. Yes, sir.

12 Q. For March 2009, what was the Federal
13 Order raw milk value for the amount of milk at 3.25
14 butterfat?

15 A. I don't know off the top of my head.

16 Q. In the neighborhood of \$1.10?

17 A. I wouldn't know.

18 Q. Okay. Thank you.

19 JUDGE CLIFTON: Thank you, Mr. Miltner.

20 Mr. Rower.

21 MR. ROWER: Thank you.

22 CROSS-EXAMINATION

23 BY MR. ROWER:

24 Q. Good morning, sir.

25 A. Good morning.

1 Q. Did your customers, other than the school
2 districts, tell you why they switched business to GH
3 from your company? Did they tell you they switched on
4 the basis of price solely?

5 A. It was all based on price. And the only
6 customer we lost completely was the one that was stated
7 in the testimony. The rest of the customer base we've
8 taken big margin hits in the marketplace, but we've kept
9 the business. And in some instances, we share the
10 business with these -- with these retailers, with
11 these -- with GH Dairy, excuse me. And -- but, yes,
12 we've taken some big margin hits in the marketplace.

13 Q. Okay. So the military base, the
14 retailers, they all moved their business solely on the
15 basis of price?

16 A. Yes, sir.

17 MR. ROWER: Thank you.

18 JUDGE CLIFTON: Any redirect,
19 Mr. English?

20 MR. ENGLISH: No, your Honor.

21 JUDGE CLIFTON: Mr. Vetne, make it brief,
22 please.

23 MR. VETNE: Your Honor, I don't have a
24 question. However, I do have a motion.

25 JUDGE CLIFTON: I'll hear it.

1 MR. VETNE: Okay. My motion is to strike
2 this witness's testimony, both direct and cross,
3 and here's why.

4 When -- I'll start with an analogy. My
5 medical information, my finances, my taxes are
6 all privileged to me. I can keep them out of
7 court if I want to. But if I'm injured and I
8 put my health at issue, I have waived that
9 privilege.

10 If I'm in a business transaction or
11 anything and my finances are at issue, I have
12 waived that. Or if I assert it, I've lost.
13 There is a burden of proof here on the
14 proponents so that this witness is here in
15 support of IDFA, in support of Proposals 1 and
16 2, without 26. So basically get rid of any
17 producer-handler.

18 For that proposition, IDFA and its
19 constituent members have the burden of proof.
20 If, in presentation of all this information
21 where they have put their -- their competitive
22 situation, competitive status at issue, and
23 decline to provide information based on an
24 unrecognized objection, proprietary, but decline
25 to put that information on, they cannot possibly

1 meet their burden of proof and no opponent can
2 probably cross-examine them.

3 Coming to this hearing with a proposal
4 that involves competitive issues, if one is to
5 be a proponent, either requires provision of
6 competitive information about you upon which you
7 make comparisons; in other words, waiving it for
8 purposes of relevant competitive information, or
9 withdrawing their proposal because there's no
10 way one can meet the burden of proof. So that's
11 my motion and that's the reason for it.

12 JUDGE CLIFTON: Don't leave. I have two
13 questions for you.

14 The first one is, assume for a minute
15 that what I need in order to decide this case is
16 all the information, all the proprietary
17 information, about Dean Foods in El Paso and all
18 the proprietary information about GH as it
19 originates in El Paso. And I'm a witness who
20 only knows one of them.

21 MR. VETNE: Yes.

22 JUDGE CLIFTON: How can I possibly give
23 you everything you need to decide the case if
24 you need all that?

25 MR. VETNE: Oh, you know, that's a very

1 good point. And -- and, actually, with what
2 this witness has done is sort of the opposite.
3 He works for a company in El Paso for which he's
4 willing to reveal nothing and he's objecting
5 about the business of somebody else for which
6 he's willing to surmise, infer as much as
7 possible.

8 The way it would come, and if I were a
9 plaintiff in a personal injury or medical
10 malpractice is, I would put my confidential,
11 privileged information on the record and then
12 the other side would come and respond.

13 So the way it should work, if this
14 were -- if this applied to the 5 U.S.C. 556
15 burden of proof, as it's commonly understood,
16 which the Supreme Court has said it applies, is
17 that a competitor complaining of competitive
18 dislocation would describe and provide hard
19 evidence of their competitive dislocation. And
20 at that point, the burden would shift to the
21 others. They want to defend it, to reveal their
22 proprietary information as relevant to that
23 competitive dislocation.

24 JUDGE CLIFTON: Now, much of this
25 statement reveals a condition without going into

1 proprietary information. It's facts on the
2 ground that can be established by investigation.

3 MR. VETNE: No, it can't be. It can't be
4 established by investigation because this is the
5 place where the investigation takes place.

6 It is -- it is conclusory and
7 speculative, and it provides -- it provides --
8 yeah, it provides a conclusion of competition
9 without providing the foundation facts for those
10 conclusions. And it provides some -- some
11 information specific to the competitor of which
12 one complains without revealing comparable
13 information of one's own, the person that has
14 the burden of proof, information that -- by
15 which a comparison can be made that -- so --

16 JUDGE CLIFTON: Don't leave. I
17 understand your point. But doesn't that go to
18 the weight rather than the admissibility?

19 MR. VETNE: I do not think so. I do not
20 think so, because admiss -- one of the grounds
21 for admissibility is -- is -- this is a
22 percipient witness, a fact witness, not an
23 expert witness. An expert can make -- draw
24 conclusions and opinions.

25 This percipient witness is giving

1 conclusions without being an expert and
2 conclusions derived from facts of which he has
3 personal knowledge of his own company that he's
4 not going to share with this record.

5 So what we have is conclusion and
6 speculation being the essence of the testimony,
7 which is objectionable. You know, if it
8 weren't -- if it were just an expert but without
9 the foundation facts from which anybody else can
10 measure the credibility or value of those
11 conclusions.

12 JUDGE CLIFTON: Now, admittedly some of
13 the information shows you the conclusion and
14 will not reveal to you the detail, but what's
15 speculative about Exhibit 41? I'm unaware of
16 anything speculative.

17 MR. VETNE: Well, not just Exhibit 41,
18 your Honor. There's the direct examination and
19 the cross-examination when some details of --
20 about -- and conclusions in exhibit -- there's
21 nothing speculative about 34 cents per
22 hundredweight or per gallon. That is not
23 speculative.

24 But speculation about -- about someone
25 else's costs, cost structure advantage that's --

1 all right. That's all I have.

2 JUDGE CLIFTON: All right. Thank you.
3 Mr. Ricciardi.

4 MR. RICCIARDI: I join in my learned
5 friend's motion. And I add two things to it.
6 First of all, what we do have now is innuendo
7 with regard to costs, we have innuendo with
8 regard to the decision by the retailer, unnamed,
9 as to what the price was at retail and what they
10 actually acquired it for. I cannot examine
11 because they won't tell me the cost structure,
12 what the processing costs are, what the raw milk
13 product cost was for Dean's so that we can
14 compare it.

15 And here's the worst part. Not only do
16 they have the burden of proof, if you allow the
17 innuendo in, then all of a sudden it shifted to
18 GH. And if GH doesn't put on information
19 regarding its own costs, et cetera, and in fact
20 decides it's proprietary, which it is, then we
21 are in a situation where we are unable to
22 cross-examine a conclusion by a fact witness,
23 and therefore put in the position of somehow
24 trying to disprove something that we don't have
25 the basis and the underlying data to be able to

1 disprove.

2 And that is -- that is the height of
3 unfairness, whether we use the APA or whether we
4 use any other standard, even in a situation
5 where -- we're in a regulatory hearing, the
6 basis for the ability to cross-examine is
7 sacrosanct.

8 JUDGE CLIFTON: Mr. Beshore.

9 MR. BESHORE: Two quick comments. First
10 of all, there is -- I agree with Mr. Ricciardi
11 about one thing. Mr. Vetne is experienced in
12 the field. There is not one precedent in 70
13 years of rulemaking history under this statute
14 you have been offered that says a proponent of a
15 rule must come in and open its proprietary
16 information or not meet its burden of proof;
17 never. Never. Okay? And that's the basis for
18 the motion.

19 Now, in terms of innuendo, Mr. Ricciardi
20 is the maestro of innuendo in this hearing. The
21 problem that there -- that they are -- that they
22 have is that Mr. Carrejo's facts, his
23 observations of the retailer's 19-year history
24 of price -- pricing, product pricing behavior,
25 that's factual observed information. It leads

1 to certain inescapable conclusions, not
2 innuendo.

3 JUDGE CLIFTON: Mr. Ricciardi, briefly.
4 I know how I'm going to rule, so I want to get
5 there.

6 MR. RICCIARDI: Judge, I'm not even going
7 to go to that. I just am concerned that my
8 learned friend Mr. Beshore would personally
9 attack me in this hearing.

10 JUDGE CLIFTON: Well, I'm not sure
11 whether maestro of innuendo is an attack.

12 MR. RICCIARDI: Depends always on what
13 the meaning of is is.

14 JUDGE CLIFTON: Mr. English.

15 MR. ENGLISH: Your Honor, I don't want to
16 belabor the point, but unlike a (15)(A)
17 proceeding when a handler challenges an
18 obligation, and expressly, under the rules --
19 the same rules of practice -- expressly gives up
20 its proprietary information if it wishes to
21 bring a claim in a (15)(A).

22 As Mr. Beshore said, there is no
23 obligation. And Mr. Vetne has brought probably
24 hundreds of witnesses in his time to these
25 proceedings, and those witnesses at times have

1 asserted proprietary information.

2 There is no precedent for forcing an
3 entity to give up proprietary information. This
4 witness did not attempt to testify, and never
5 actually did testify. The only costs came up
6 here at the lecturn. This witness never
7 attempted to talk about costs once. So the
8 issue of innuendo goes away.

9 This witness has testified that this
10 particular national retailer, who remains
11 unnamed, although I expect everybody in the room
12 knows who it is, the fact of the matter is that
13 this witness has testified that in his many,
14 many years in this market, there's only one way
15 this entity prices, and he has made a conclusion
16 based upon that.

17 This is some of the most crisp, factual
18 information we have had, (indicating), and I
19 note that there hasn't been an objection of this
20 'til the fifth day of the hearing. And suddenly
21 this witness comes in and this witness's
22 testimony is objectionable. The motion should
23 be denied.

24 JUDGE CLIFTON: The motion is denied. I
25 agree with Mr. English, that this Exhibit 41 and

1 the witness's testimony are very crisp
2 factually, and are not at all speculative. He
3 confined himself to his own knowledge.

4 This is the kind of valuable testimony
5 that we want for a hearing like this. No, it
6 doesn't tell the whole picture. And I don't
7 know what the whole picture is just by having
8 this witness's testimony in this exhibit, but
9 it's a piece of the puzzle that the Secretary
10 needs to address, and a valuable piece.

11 So there isn't any requirement that a
12 witness reveal proprietary information in order
13 to be heard. And I'll stop there and we'll take
14 a break. Mr. Carrejo, thank you.

15 THE WITNESS: Thank you, your Honor.

16 JUDGE CLIFTON: Mr. Tosi, did you have a
17 question?

18 MR. TOSI: Yes, I do, your Honor. I'm
19 hoping that this will at least help clarify
20 things for us folks that aren't trained in the
21 legal profession.

22 JUDGE CLIFTON: Oh, you're trained. You
23 just don't have a degree.

24 MR. STEVENS: He tells me that all the
25 time.

1 JUDGE CLIFTON: You may proceed,
2 Mr. Tosi.

3 CROSS-EXAMINATION

4 BY MR. TOSI:

5 Q. On page 4 there when you were talking
6 about the folks that are the suppliers and your
7 competitors there in the El Paso area, your organization
8 pays minimum -- pays a minimum Class I price or accounts
9 to the pool at a minimum price, is that correct?

10 A. Yes, sir.

11 Q. Okay. Does Nature's in Roswell, New
12 Mexico, do the same thing?

13 A. No, he's an -- an unregulated
14 producer-handler.

15 Q. Okay. Shamrock?

16 A. They're a -- they're regulated.

17 Q. Plain's Dairy, in Amarillo?

18 A. They're regulated.

19 Q. Would it be accurate to say, then, that
20 while you may not know everything about those other
21 folks' business, you do know what their minimum Class I
22 price is that they're accounting for?

23 A. I can find that, yes.

24 Q. I mean, it would be something that you
25 would know that?

1 A. Yes, sir.

2 Q. Okay. And is some of your testimony here
3 based on the fact that some people are paying minimum
4 prices that you know about, and other folks you have no
5 idea what it is, and when you see a -- something that
6 changes there in your business, does that go to explain,
7 in your mind, why you lost business?

8 A. Strictly related to price.

9 Q. Thank you.

10 A. Thank you.

11 JUDGE CLIFTON: Thank you, Mr. Tosi.

12 MR. TOSI: And I appreciate you coming
13 and putting up with all of this. Thank you.

14 THE WITNESS: Thank you.

15 JUDGE CLIFTON: Mr. Vetne.

16 MR. VETNE: I want to ask one follow-up
17 question.

18 JUDGE CLIFTON: You may.

19 RECROSS-EXAMINATION

20 BY MR. VETNE:

21 Q. With respect to all of your competitors,
22 all of those that market in what you have described as
23 your market area, you don't know what price they're
24 actually paying for milk because milk prices include
25 premiums, service charges, credits and so forth?

1 A. Not the exact price. Ballpark, depending
2 on -- just Class I price is all I know.

3 Q. Class I is all you know?

4 A. (Nodding head.)

5 Q. And if there are other add-ons there,
6 credits, that, you don't know?

7 A. No, I don't know.

8 JUDGE CLIFTON: Any redirect,
9 Mr. English?

10 MR. ENGLISH: No, your Honor.

11 JUDGE CLIFTON: Now, Mr. Carrejo, you may
12 step down. Thank you so much.

13 THE WITNESS: Thank you, your Honor.

14 JUDGE CLIFTON: Let's take a 15-minute
15 break. Let's see. Come back at 9:55.

16 (A recess was taken from 9:38 to 10:07.)

17 JUDGE CLIFTON: All right. We're back on
18 the record at 10:07. I apologize for taking
19 longer than I had said for the break. I have in
20 front of me a document that comes from Monument
21 Farms, so I believe that James Stearns must be
22 in the witness stand.

23 MR. CARROLL: No.

24 THE WITNESS: No. This is John Rooney.

25 JUDGE CLIFTON: This is John Rooney.

1 THE WITNESS: Yes, and I am from Monument
2 Farms.

3 JUDGE CLIFTON: And you are from Monument
4 Farms?

5 THE WITNESS: There was a bit of
6 confusion, your Honor.

7 JUDGE CLIFTON: Okay. It's what
8 Mr. Carroll had told me, that you would be his
9 first witness. And I got confused. Is James
10 Stearns also from Monument?

11 MR. CARROLL: No. He is from Mountain
12 Dairy, your Honor.

13 JUDGE CLIFTON: Oh, that's what I had
14 written down wrong. All right. Now I'm going
15 to mark this statement as Exhibit 42, and
16 Mr. Rooney, I'd like you now to speak into the
17 microphone and state your full name and spell
18 it, please.

19 (Exhibit 42 was marked for
20 identification.)

21 THE WITNESS: Full name is Jonathan
22 Rooney. J-o-n-a-t-h-a-n, R-o-o-n-e-y.

23 JUDGE CLIFTON: All right. And when you
24 are called Jon, how do you spell that?

25 THE WITNESS: Well, J-o-n. Thank you for

1 asking.

2 JUDGE CLIFTON: You're welcome. Now, I
3 know some people prefer, when they agree to tell
4 the truth, not to be sworn in. Do you have a --
5 any objection to my giving the oath as I've been
6 giving it?

7 THE WITNESS: No.

8 JUDGE CLIFTON: All right. Would you
9 raise your right hand, please?

10 (The witness was sworn.)

11 JUDGE CLIFTON: Thank you. Mr. Carroll.

12 MR. CARROLL: Thank you, your Honor. I
13 might point out to the other persons here that
14 we've tried to leave at the back of the room
15 sufficient copies for everyone, in the event
16 that they don't know that.

17 JUDGE CLIFTON: And did you give a copy
18 to the court reporter and to USDA?

19 MR. CARROLL: We did give one to the
20 USDA, but I don't believe we did to the court
21 reporter, but we'll do that now, your Honor.

22 MR. WOODY CARROLL: She's got one right
23 now. She just picked it up.

24 JUDGE CLIFTON: All right. Mr. Carroll
25 you may proceed.

1 MR. CARROLL: Thank you, your Honor. I
2 might state in the beginning, as you've advised,
3 your Honor, we have some pictures of this
4 particular farm. And we have marked on the back
5 of them, pursuant to your Honor's directions,
6 numbering for those pictures. And I believe
7 that they are -- then run from 45 to 50 -- wait
8 a minute -- 51. And I wanted to alert everyone
9 to that situation. We have six copies, but
10 that's all we were able to get at this time.

11 JUDGE CLIFTON: What I'd like you to do
12 with regard to the photos -- at one point in
13 this witness's testimony, will they be
14 addressed?

15 MR. CARROLL: I think at the end.

16 JUDGE CLIFTON: Okay. When we get near
17 the end, I'd like you to distribute those
18 proportionally so people can look on.

19 MR. CARROLL: Right.

20 JUDGE CLIFTON: I've looked at them.
21 They're not technical photos. They're the type
22 of photos that help a witness describe his
23 organization and his family.

24 MR. CARROLL: That's right.

25 JUDGE CLIFTON: All right. You may

1 proceed.

2

3

JONATHAN ROONEY

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

6

DIRECT EXAMINATION

7

BY MR. CARROLL:

8

9

Q. Mr. Rooney, you prepared a statement for
your presentation today, is that correct?

10

A. Yes.

11

12

Q. And before you give the statement, could
you tell me just briefly what your position with
13 Monument is?

14

A. My position currently is president.

15

Q. And are you here on their behalf?

16

A. Yes, I am.

17

18

Q. And are you testifying in support of the
proposal for the 3 million pound level of exception --

19

A. Yes.

20

Q. -- for producer-handlers?

21

A. Yes, I am.

22

23

Q. All right. Would you now read us your
statement?

24

A. Thank you for the opportunity to offer

25

testimony in support of the proposal put forth by the

1 New England Producer Handler Association regarding the
2 status of producer-handlers within the Federal Order
3 system. Specifically, the Association proposes to
4 retain the producer-handler exemption and to establish a
5 3 million pound per month exemption for all Class I milk
6 distributed by a producer-handler in all Federal Orders.

7 Monument Farms, Inc., is a
8 producer-handler located in Weybridge, Vermont, in
9 Addison County, one of the top two milk producing
10 counties in Vermont. In our third generation of family
11 ownership and management, we milk approximately 400 to
12 450 cows, producing nearly a million pounds of milk per
13 month without the use of rbST. We produce our own feeds
14 on about 1,800 acres of tillable lands and raise our own
15 replacements. Our herd is one of the best managed in
16 our area and produces the extremely high quality raw
17 product necessary to sell under our own name to
18 customers from southern Addison County north to the
19 Canadian border. As owner/managers, we generally work
20 60 to 70 hour weeks, especially on the farm side of our
21 business. We employ 35 people including farm,
22 processing, distribution, sales and office staff. The
23 majority of our employees have worked with us for more
24 than ten years, proving that we provide a stable,
25 enjoyable working environment. We have provided

1 numerous family members to fill the ranks of local
2 Select Boards, Chamber of Commerce boards, school
3 boards, church boards, Farm Bureau boards, local
4 planning boards, bank boards, Lions Club, Rotary, milk
5 promotion boards, et cetera.

6 Vermont is a state that prides itself on
7 independence, and as such, is a very strong proponent of
8 the Buy Local theme. Consumers want to know where their
9 food comes from and where their food dollars go. Our
10 dairy, which has been operating since 1930, is a long
11 established fixture in our area of the state and has
12 acquired a reputation for strong stewardship of our
13 lands and a very consistently high quality product.
14 People in our area of Vermont take as much pride in the
15 fact that they support us as we take in providing the
16 products and care of the land and community. Monument
17 Farms has been lauded with numerous conservation awards
18 throughout our 79-year history, recognizing our
19 commitment to preserving our lands for the public
20 benefit. We owe our existence to our customers who buy
21 our products over our competitors' products regardless
22 of price because they know, like, and trust us. They
23 also know that our prices to the stores reflect our cost
24 of production from our farm all the way through
25 distribution. They know that our prices remain

1 consistent, changing only when our cost structures
2 change. Yet, beyond these warm and fuzzy, very
3 subjective points, the most important fact is that the
4 consumer has a choice and makes a choice, voting with
5 his or her food dollar. If our business did not exist,
6 consumers in our area of the state of Vermont would have
7 no option but to purchase products offered by a large,
8 nationally-sized dairy processor who counts profits in
9 the hundreds of millions of dollars while the producers
10 of their raw product suffer from the roller coaster ride
11 which dairy pricing has become. Monument Farms believes
12 in a fair return for providing a high quality product.
13 This philosophy leads to a very steady, consistent
14 pricing, one based entirely on our cost structure.

15 A graph of our wholesale prices over the
16 past nine or ten years would look positively boring when
17 compared to that of our competitors. During those rare
18 periods of extremely high uniform prices, our cost of
19 production allows us to be, at best, competitive
20 pricewise with our pooled competitors. As USDA
21 cost-of-production figures for the Northeast Region of
22 the United States demonstrate, the total cost of
23 production, not just operating costs, was never exceeded
24 by the Class I price. This shows clearly that there is
25 no price advantage enjoyed by a producer-handler in

1 Federal Order 1. During periods of low milk prices such
2 as we are experiencing at this time, the cost of raw
3 supply for a producer-handler already exceeds his pooled
4 competitors' cost. If the proposal put forth by NMPF
5 and IDFA is adopted by the USDA, affected
6 producer-handlers in the Northeast would find themselves
7 with an untenable disadvantage. Far from removing the
8 price advantage, as stated by IDFA, this
9 producer-handler would be faced with a cost of over \$20
10 a hundredweight, compared to his pooled competitor's
11 cost of under \$14 per hundredweight for the current
12 month of May.

13 For the use of this esteemed group, I
14 would like to share cost of production figures for
15 our -- for our fiscal year ending March 31, 2009. These
16 numbers represent operating costs per gallon for the
17 various sections of our business. We utilize cash-based
18 accounting, thereby creating a need to look at numbers
19 over an extended period of time to derive meaningful
20 information.

21 And I'll just interject with that, that
22 due to the fact that it's an extended period of time
23 that we have to look at it, in order to adjust our cost
24 structures, that's one reason why our costs change very
25 infrequently. On a cash accounting system, you --

1 monthly numbers are virtually meaningless.

2 Cost of raw supply. \$1.69 per gallon is
3 what it costs us for the past fiscal year, which just
4 ended the end of March of this year. And these are
5 operating costs. \$19.65 per hundredweight.

6 Cost of processing. Including
7 containers, for a gallon of milk, between the processing
8 and the container cost, 65 cents a gallon.

9 Cost of delivery works out to 48 cents a
10 gallon. And that's excluding any -- any amount that --
11 selling purchased products through our delivery trucks.
12 We deduct that in arriving at the cost of delivery for a
13 gallon of milk. Cost of sales and office, 22 cents a
14 gallon. Total cost, per gallon, is \$3.04 per gallon,
15 operating.

16 The above numbers represent the operating
17 costs involved in getting a gallon of whole milk into a
18 bottle and to a store. They include no interest
19 expense, no depreciation, and no return on investment.

20 16 months ago, Monument Farms became a
21 pooled plant for a two-month period due to exceeding the
22 limit on distributions of non-farm Class I milk of
23 150,000 pounds per month. This was mostly due to a
24 slight drop in milk production combined with strong
25 demand. The cost to Monument Farms of this pooling for

1 two months would translate into approximately \$360,000
2 over a year's time. We were forced to drop one large
3 customer and a few smaller, as well. Aside from the
4 direct monetary price tag, which had a substantial
5 impact on our business, it is important to look at the
6 bigger picture to see the difficulties producer-handlers
7 of our size and smaller are faced with. As most dairy
8 farmers will admit, there is nothing easy about farming
9 and producing milk. Concurrently, I have yet to ever
10 hear another milk processor say that processing,
11 packaging and distributing milk is easy. The two sides
12 of the business wrapped up all in one create a very
13 capital-intensive business with far more complications
14 than those of either one, individually. A processor who
15 acquires a new customer simply needs to order more milk
16 from the cooperative that supplies him with raw milk.
17 Or, for example, if demand climbs or falls suddenly, as
18 it can on occasion, a fluid bottler gets first choice on
19 available milk and can order up a couple of extra loads
20 of milk or cancel a load or two, as the case may
21 require. A producer-handler, on the other hand, must
22 constantly balance demand with available supply and pay
23 a premium over Class I to purchase extra, or receive the
24 lowest class price available to ship excess. Besides
25 these supply-demand complications, a producer-handler is

1 faced with all of the issues faced by any farmer;
2 weather which is tending to be more and more extreme;
3 high input costs for grains, fertilizers and pesticides;
4 increasing health insurance and workers' compensation
5 insurance premiums; fossil fuel prices increase as we
6 all experienced a year or two ago, and the list goes on
7 and on. The raw supply cost structure for a
8 producer-handler is at least as high as any individual
9 producer and generally higher due to the fact that a
10 producer-handler always needs to be aware of the volume
11 of milk that he will be able to market. Any growth in
12 sales has to be accompanied by a corresponding growth in
13 milk production, which, as any knowledgeable person
14 knows, cannot be accomplished quickly, but must be
15 planned well in advance.

16 In summary, figures compiled by the USDA
17 shows that without a doubt that the total cost of
18 producing milk in the Northeast exceeded the Class I
19 price in both 2006 and 2007. If one accepts USDA
20 numbers, there can be no claim that producer-handlers
21 enjoy a price advantage over pooled processors, and USDA
22 numbers also show that producer-handlers' percentage of
23 the national or even regional total milk production is
24 less than 1 percent of that total. Therefore, the only
25 real impact of a ruling in favor of the proposals

1 submitted by NMPF and IDFA to limit Class I sales by
2 producer-handlers to less than 450,000 pounds per month
3 would be to drive those small producer-handlers affected
4 out of business, thereby consolidating further the power
5 of the large processors who are already found at the top
6 of the list of the largest processors in the U.S. In
7 the case of our sales area in Vermont, this would
8 dramatically affect consumer options, by removing
9 50 percent of available choices, leaving only one source
10 for non-organic fluid milk. For these reasons, we
11 believe that a 3 million pound exemption for
12 producer-handlers would accomplish the protection that
13 NMPF is seeking, while still allowing our customers to
14 choose between supporting a local supplier with close
15 ties to our communities or one whose headquarters are in
16 another state entirely.

17 Q. Thank you, Mr. Rooney. Now, I want to
18 ask you --

19 JUDGE CLIFTON: Mr. Carroll, you are not
20 close enough.

21 MR. CARROLL: Oh, thank you.

22 BY MR. CARROLL:

23 Q. I want to ask you about your -- your
24 family. Are there any members of your family employed
25 by the dairy?

1 A. Yes.

2 Q. And can you give us their names and their
3 occupations?

4 A. Peter James is my cousin.

5 Q. Peter James?

6 A. Peter James. He's in charge of the farm
7 side of our business. Bob James is his younger brother;
8 he's in charge of our sales and distribution. Myself, I
9 run the processing plant and deal with quality issues.
10 My mother, who's almost 81, is still our
11 secretary/treasurer, deals with all payables. And my
12 cousin, Bob, has two younger sons who are currently
13 working in the business --

14 Q. All right.

15 A. -- but don't hold any ownership.

16 Q. Now, would you give us the history of
17 your dairy?

18 A. My grandparents -- our grandparents
19 started the business in 1930. They both came from
20 farming families, which were located within a mile
21 either direction of our current operation.

22 They began this business in 1930 and
23 quickly realized that they needed to -- at that time, it
24 was very common for a producer to bottle his own milk
25 and sell it to a few homes. I think my grandparents

1 started with a -- delivering bottled milk to a
2 restaurant and, like, ten home delivery customers. And
3 that was in 1930.

4 And we've grown steadily, adding new
5 technologies as they became available. We began high
6 temperature, short-time pasteurizing in the mid '60s,
7 built our first barn with a parlor in the mid '60s and
8 have added some land to our operation. We own about
9 2,000 acres of land and crop about 1,800 of that.

10 Q. And can you tell me if you have any local
11 connections to the community, and if so, what they are?

12 A. Well, as I mentioned, I can't remember a
13 time -- I was born in 1958, but I -- I can't ever
14 remember a time when one of our family members or
15 another was not involved in local town government, local
16 charities. My grandmother was a state legislator at one
17 point. But we've always been very tightly involved
18 with -- with our communities. And we make every effort
19 to support local sports programs and certainly donate
20 lots and lots of product to -- to fundraisers, et
21 cetera.

22 We -- we delivered milk to the schools in
23 our county until we stopped packaging in paper about
24 five years ago. We had always managed to keep those
25 school bids, mostly because there were very few other --

1 very few other, if any, other bids.

2 But we -- we continue to distribute
3 purchased half pints to the schools just to maintain our
4 connection. We felt a number of the schools are too
5 small to interest any other type delivery system for
6 milk. So we continued to go to a lot of schools, just
7 because there would have been no other way for them to
8 have fresh milk.

9 Q. Do you deliver home -- do any home
10 delivery?

11 A. No. We ceased that about ten years ago.

12 Q. Have there been any awards given to your
13 farm?

14 A. A number of different conservation
15 awards. Just a year ago we received the Lake Champlain
16 Basin Conservation Award, and we've been Farm of the
17 Year, I believe, Farm Bureau Farm of the Year recently.
18 I can't remember exactly when.

19 Q. I show you what's been marked for
20 identification as Exhibit 46, and ask you if you would
21 look at that exhibit?

22 JUDGE CLIFTON: Now, for ease,
23 Mr. Carroll, please put them all in front of him
24 and put a set of all of them in front of USDA.
25 The court reporter won't need the photographs.

1 MR. CARROLL: This is just one of the
2 exhibits. One of each.

3 JUDGE CLIFTON: Let me ask you, who will
4 identify Exhibit 47?

5 MR. CARROLL: He'll identify all of these
6 exhibits.

7 JUDGE CLIFTON: Let's put them all in
8 front of him then.

9 MR. CARROLL: Okay.

10 JUDGE CLIFTON: Let's go off record while
11 you make distribution of them. You'll need to
12 place them strategically around the room for
13 those who would like access.

14 MR. VETNE: I seem to have lost track,
15 your Honor. The witness's statement, I believe,
16 was marked as 42.

17 JUDGE CLIFTON: Yes. And what we did
18 before we went on record this morning is I -- I
19 asked Mr. Carroll to leapfrog forward to 45
20 because I didn't know for sure how many exhibits
21 would come before.

22 MR. VETNE: I wonder if I missed three of
23 them.

24 JUDGE CLIFTON: Right now there is no 43
25 and there is no 44.

1 JUDGE CLIFTON: Thank you. All right.
2 Now we'll go off while those are distributed.
3 It's now 10:31.

4 (A recess was taken from 10:31 to 10:36.)
5 (Exhibits 45-51 were marked for
6 identification.)

7 JUDGE CLIFTON: All right. We're back
8 on record at 10:36. Mr. Carroll, you may
9 proceed.

10 MR. CARROLL: Your Honor, to save -- to
11 save time, since there are numerous of these, I
12 thought I would simply ask the witness to -- if
13 he has 45 through 51, ask him if he would
14 explain each picture. Would that be sufficient?

15 JUDGE CLIFTON: Excellent. Yes.

16 BY MR. CARROLL:

17 Q. All right. Then I now ask you, sir, if
18 you would examine the pictures. If you can do them in
19 order, it would be helpful. But if you can, just
20 identify which one you're talking about and tell us what
21 that picture shows.

22 A. Okay. Exhibit 45 is just the front of
23 our one milking facility where all our cows are milked
24 in-house.

25 Q. Let me ask you something. On the side of

1 the barn, on one of the barns, it has Hagar Farms,
2 Mountain Farms Dairy. What about -- Hagar Farms, what
3 does that mean?

4 A. It says Hagar Farm.

5 Q. Hagar Farm, thank you.

6 A. In Vermont, there is a long tradition of
7 naming farms after owners three or four or five steps
8 back down the road. And my grandparents had purchased
9 the land from a Mr. Hagar. I can't remember his first
10 name, but the lands originally came from him. So that
11 became our Hagar Farm. We also had Hamilton Farm or
12 Jewitt Farm (phonetic) or Bingham Farm. And this --
13 this is currently our only mixing facility.

14 Q. Okay. But it is part of and owned by
15 Monument Farms Dairy?

16 A. Yes. It's totally, totally owned by us.

17 JUDGE CLIFTON: And how is Hagar spelled?

18 THE WITNESS: H-a-g-a-r.

19 JUDGE CLIFTON: Thank you.

20 A. And if you notice that sign, the sign
21 post in front of the building says -- you may not be
22 able to read it, but it says, Dairy of Distinction. And
23 that's a program run by the Vermont Agency of
24 Agriculture -- actually run by Vermont Dairy Industry
25 Association, recognizing farms that look -- need and

1 represent the dairy industry in a very positive manner.
2 And we've been awarded the Dairy of Distinction at least
3 the past 10 or 12 years of its -- of the program's
4 existence.

5 Q. Directing your attention to the building
6 that says Hagar Farm, Monument Farms Dairy, what did you
7 say the function of that building was?

8 A. The part of the building with the name on
9 it is our parlor area where we have a double pen
10 herringbone milking parlor and where all of our cows are
11 milked.

12 Q. And there's a building to the right of
13 that. Can you tell us what that building is?

14 A. That's just additional housing. There
15 are one, two, three -- there are three different housing
16 facilities all tied together. It's a very common --
17 common way of laying out a modern dairy farm.

18 Q. All right. Directing your attention to
19 Exhibit Number 46, can you tell us what that is?

20 A. That's myself and my two cousins
21 receiving an award from Vermont Dairy Industry. This
22 was actually an award from Lake Champlain Basin
23 Committee. And it's our governor, Jim Douglas, on the
24 right.

25 Q. For the benefit of some of these Texans,

1 can you tell them what Lake Champlain is?

2 A. Lake Champlain is the sixth great lake.
3 Actually, I'm not sure if it ever attained that status.
4 Senator Leahy was attempting to have it named as part of
5 the Great Lakes System. It's just a lake that runs
6 between New York and Vermont and managed to keep us
7 separated most of the time in the early years of
8 Vermont.

9 It was discovered by Samuel deChamplain.
10 I believe it's the 400th anniversary coming up this
11 summer of his exploration of the lake for the first
12 time.

13 Q. And the farm award was for what purpose?

14 A. Just recognizing our conservation efforts
15 in reducing farm waste runoff, pump silo leachate
16 runoff, which all flows eventually into Lake Champlain.

17 Q. Directing your attention to Exhibit
18 Number 46, starting from the left to the right, can you
19 tell us who are the persons in that picture and what
20 their relationship to the dairy is?

21 A. That's myself on the left. Looks like
22 I'm missing a tooth but I'm not. That's my cousin, Bob
23 James.

24 Q. And what does he do on the farm?

25 A. He runs our distribution and sales and

1 he's the one who spends most evenings working on trucks
2 or truck reefers, trying to keep them going for the next
3 day.

4 Next to him is his older brother, my
5 cousin, Peter James, and he's the oldest of our
6 generation. He's a couple years older than I am. And
7 he runs the farm side of our business, a real handful
8 given the size, and also requires upkeep on about seven
9 or eight tenant houses that have all -- that house a
10 number of our employees. And he literally is working
11 seven days a week to one extent or another.

12 Q. And the gentleman next to him?

13 A. I honestly can't remember his name. He
14 was one of the Lake Champlain Basin people.

15 Q. All right.

16 A. As is the person directly behind the
17 award sign.

18 Q. And who is the person on the far right
19 side?

20 A. Our governor, Jim Douglas, who happens to
21 be from Middlebury, which is right next door to our
22 town. We know him.

23 Q. Is he governor of what?

24 A. He's the governor of the state of
25 Vermont.

1 Q. All right. Now, showing you Exhibit -- I
2 next show you Exhibit Number 47. Can you tell us what
3 that exhibit shows?

4 A. This is just a shot of our calf raising
5 facility, which is located directly behind our Hagar
6 Farm. It's just a big greenhouse, and it's a wonderful,
7 airy, bright greenhouse. It's a great calf raising
8 facility. And it looks pretty empty right there. That
9 was a few years ago. But the number of calves is always
10 going up or down.

11 Q. And then if you would look at
12 Exhibit Number 48 and tell us what that exhibit shows.

13 A. Is this the picture you -- mine says
14 Exhibit 49 on the back of two of them, so --

15 Q. Oh, 49?

16 A. No. Is this 48?

17 Q. I have 48.

18 A. Then.

19 Q. Yeah, that's what I have.

20 A. Okay. That would be my cousin, Pete;
21 cousin, Bob. My mother, Millicent.

22 JUDGE CLIFTON: Stop just a minute. Let
23 me see what the record copy is. Would you hold
24 Exhibit 48 for us and we'll see if it's the same
25 as their Exhibit 48.

1 MR. ROWER: Just a moment. Thank you for
2 protecting them.

3 MS. FISHER: That's 48.

4 MR. ROWER: Four people.

5 THE WITNESS: Yeah.

6 MS. FISHER: 49 is the small barn.

7 JUDGE CLIFTON: Good. Thank you so much.

8 A. This is simply a shot taken inside our
9 small office where we also have a -- a store cooler, a
10 three-bay store cooler where customers can stop. And it
11 became quite a focal point for our whole community.
12 It's like a community bulletin board in there. And I
13 think people feel very welcome and comfortable in
14 stopping in there.

15 Q. Do you market milk then on the farm?
16 People come to the farm for milk?

17 A. Yes. This is at our office, which is --
18 which is located at our processing plant.

19 Q. Now, once again, would you go through the
20 names and the functions of the persons in the picture?

21 A. That's my cousin, Pete, is on the left,
22 Peter James. And as you can tell from looking at him,
23 he runs the farm side.

24 Bob is -- Bob James is next to him and
25 runs our sales and distribution. That's my mother. And

1 my mother, Millicent Rooney, and myself on the right.

2 Q. And your mother works on the premises?

3 A. Yes. She's still our treasurer. Takes
4 care of payables.

5 Q. Exhibit Number 49, would you examine
6 that?

7 A. That's a lovely winter shot of our Hagar
8 Farm from the back side. You can see five bump silos
9 where most of our -- our hayage and corn silage are
10 stored. There's an ingredient shed on the right which
11 houses the various purchased ingredients, feed
12 ingredients, that we need to supplement what we grow on
13 the -- on the farm.

14 And the greenhouse is on the left. It
15 doesn't look much like a greenhouse right there, but
16 that's where we raise our calves.

17 As you can see, there are four different
18 structures up near on the road. The right-hand
19 structure and the two on the left are both housing
20 for -- for our cows, which are broken up into low --
21 low, medium and high producing areas, refresh cows that
22 haven't been freshened yet and -- and the fresh group,
23 which is cows that have just recently calved and need
24 special attention paid to them for about three weeks.

25 Q. Directing your attention to Exhibit 49, I

1 want to ask you if you have loans outstanding on -- with
2 loaning agencies on those structures?

3 A. Yes, absolutely.

4 Q. And how much are your loans?

5 A. We're -- currently we're around the
6 2 million mark with Yankee Farm Credit.

7 Q. And who is the lending agency?

8 A. Yankee Farm Credit. It's part of the
9 National --

10 Q. Part of the National Federal Farm Credit
11 Program?

12 A. Yes.

13 JUDGE CLIFTON: Be sure, Mr. Carroll,
14 that his voice has died away before you --

15 MR. CARROLL: Thank you. Right. Thank
16 you.

17 Q. Now, directing your attention to
18 Exhibit 50, can you tell me what that shows?

19 A. That's -- four years ago, we celebrated
20 our 75th anniversary of being in business. And we threw
21 a big community get-together, gave out free hot dogs,
22 free creamies and had a number of animal exhibits. And
23 we put so much work into preparing it. I was -- I was
24 totally sick of it by the time the day finally arrived.

25 But the amount of community support and

1 enjoyment, it was like one of the few beautiful clear
2 days out of, you know, two weeks of rain before and two
3 or three weeks of rain after. And it was just such a
4 great, great time. We had a real ball. And we had
5 somewhere around 2,000 -- we're estimating, around 2 --
6 2 -- over 2,000 people coming by to visit.

7 And -- and a really high percentage of
8 them all said to us, as they were leaving, that that was
9 just the best time they had. And that really made it
10 all worth it. But that's just thanking --

11 At the same time there was a local
12 museum, a Middlebury museum, and there was a John Deere
13 exhibit that was making the rounds of the country. And
14 it was there in Middlebury at that point and so we took
15 advantage of that. And we co-sponsored an antique
16 tractor parade and had about -- over 50 antique
17 tractors, too. This is our tractor with the bunk blade
18 on it. I was bringing up the end of the parade just
19 thanking everyone. It was a great time.

20 Q. Now, do you have an opinion as to what
21 would happen to your --

22 JUDGE CLIFTON: Did we go through all the
23 photos?

24 MR. CARROLL: Oh, no. I'm sorry, we have
25 one more.

1 JUDGE CLIFTON: Let's do that one before
2 you go on to a new area.

3 MR. CARROLL: Exhibit 51, can you tell us
4 what that is?

5 A. That's just the front of our processing
6 area and office area. Inside this, I have six -- six
7 people that work with me in the processing plant. And
8 we have 2 1/2 to 3 people doing office and -- and
9 receptionist-type work inside this building. And of
10 course all the drivers on there have done their routes
11 and such.

12 Q. Do you have local employees?

13 A. Yes.

14 Q. Local persons employed?

15 A. Yes. They're all what I would consider
16 local.

17 Q. How many employees do you have besides
18 the family?

19 A. I would put it at 28 or 29.

20 Q. Thank you. Now, would you tell me what
21 would happen to those employees and to yourself if you
22 were to be -- have the exemption taken away from your
23 farm?

24 A. Well, it would -- as it would
25 extremely -- well, not just difficult, there's no way we

1 can -- we can finance, you know, 2 million in debt, a
2 debt load of 2 million and still pump out what we've
3 estimated would be \$360,000 for market pool payments.
4 The two won't fit together.

5 Q. Would you be out of business?

6 A. Yes, absolutely.

7 Q. That's all, your Honor.

8 JUDGE CLIFTON: Don't leave yet. I'm
9 going to hand the witness Exhibit 1, which is
10 the Notice of Hearing that's in the Federal
11 Register. And I have turned it to page 16,300
12 where Proposal Number 13 is located and ask the
13 witness to look at that and see if he recognizes
14 that as the proposal that he said he's
15 supporting.

16 THE WITNESS: 16, you said?

17 JUDGE CLIFTON: 13, actually. Left-hand
18 column.

19 THE WITNESS: Uh-huh. Yes.

20 JUDGE CLIFTON: All right. And were
21 there any other proposals that you had any
22 comment on, either in favor of or against?

23 MR. CARROLL: Your Honor, may I
24 interrupt?

25 JUDGE CLIFTON: You may, Mr. Carroll.

1 MR. CARROLL: As I said, I will be a
2 witness and I'm covering these subjects of the
3 various clients' positions on proposals.

4 JUDGE CLIFTON: Ah. That will be
5 helpful.

6 MR. CARROLL: Yeah.

7 JUDGE CLIFTON: Now, they won't be
8 available for cross-examination on that, but you
9 will be able to communicate how -- you know
10 that's how they feel?

11 MR. CARROLL: Absolutely.

12 JUDGE CLIFTON: All right, then. I'll
13 withdraw that question unless you want to add
14 something in that vein.

15 THE WITNESS: The huge differences in the
16 various proposals that I've seen are -- are
17 broad enough that I can't really propose any --
18 or point out anything on any specific proposal.
19 They're just so wide ranging.

20 JUDGE CLIFTON: You know, I understand.
21 All right. So the witness is available for
22 cross-examination, Mr. Carroll?

23 MR. CARROLL: Yes, he is. Yes, he is
24 your Honor.

25 JUDGE CLIFTON: Did you want to move any

1 of the exhibits now or did you want to wait
2 until the cross-examination is complete?

3 MR. CARROLL: I'll move Exhibit 42 now.

4 JUDGE CLIFTON: All right. Is there any
5 objection to the admission of Exhibit 42? There
6 is none. Exhibit 42 is hereby admitted.

7 You know, Mr. Carroll, I'll bet you can
8 get those photos in now, too.

9 MR. CARROLL: At this time I'd like to
10 move the photographs into evidence.

11 JUDGE CLIFTON: Is there any objection to
12 the admission into evidence of Exhibits 45
13 through 51? There is none. Exhibit 42 and
14 Exhibit 45 through 51 are hereby admitted into
15 evidence. Mr. Stevens.

16 MR. STEVENS: Might I inquire, just for
17 the purpose of the record -- I was out of the
18 room, unfortunately. Exhibit 43 and 44 are
19 reserved --

20 JUDGE CLIFTON: Yes.

21 MR. STEVENS: -- for a future time?

22 JUDGE CLIFTON: Yes. And the reason is I
23 wanted these photos marked before we went on
24 record today so we wouldn't have to do it during
25 the hearing. So I just picked some number that

1 I didn't think would be used.

2 MR. STEVENS: Right. Thank you very
3 much, your Honor.

4 JUDGE CLIFTON: You're welcome.
5 Mr. Vetne.

6 CROSS-EXAMINATION

7 BY MR. VETNE:

8 Q. I'm John Vetne from Raymond, New
9 Hampshire. I represent two producer-handlers in the
10 Pacific Northwest and one from Roswell, New Mexico.

11 You came here, as I understand it, to
12 testify in opposition to two proposals that would
13 eliminate the producer-handler opportunity and limit
14 exempt plants to 450,000 pounds, am I correct?

15 A. Yes.

16 Q. And are you aware that National Milk
17 Producers, original proponents of Proposals 1 and 2, now
18 has added a third proposal as part of a package that
19 would allow you to continue as a grandfather?

20 A. I'm aware of that, yes.

21 Q. And you are aware that International
22 Dairy Foods, which represents your processor
23 competitive -- competitors, still embrace only
24 Proposals 1 and 2, which would eliminate
25 producer-handlers?

1 A. Yes.

2 Q. Okay. I'm looking on page 2 where you
3 give some information on your costs. And I have some
4 information about that. As I understand, this is a
5 summary of one fiscal year's data from your joint farm
6 and plant operation, correct?

7 A. Yes.

8 Q. And these are cash operating costs
9 excluding your cash costs to service debt?

10 A. Correct.

11 Q. Okay. Are there any other excluded cash
12 costs for you?

13 A. Well, there's debt and certainly there's
14 depreciation, which is a great deal more a real cost
15 than most people realize.

16 Q. Because you have to replace things --

17 A. Yeah.

18 Q. -- eventually?

19 A. Yes. Especially farm equipment.

20 Q. Okay. The line labeled cost of raw milk
21 supply, was that cost put together following any
22 conventional boilerplate or model -- line-item model by
23 which farm costs are measured?

24 A. No. The only other model that we've ever
25 used was -- was, again, through -- Yankee Farm Credit

1 offers Agri-FACTs format. But we employ a -- a very
2 part-time CPA who, between him and my mother, they
3 arrived at a format to come up as close as we can to
4 determining the cost for the various parts.

5 Q. Okay. So you are familiar with an annual
6 or periodic publication of the Northeast Farm Credit
7 System?

8 A. Yes.

9 Q. That provides information on costs of
10 production for farm credit participants in the
11 Northeast?

12 A. Yes.

13 Q. Okay. And you tried to follow that
14 format as a guide?

15 A. No, not necessarily.

16 Q. Not necessarily?

17 A. This is a very customized way -- way that
18 we've come up with to break costs down. There are some
19 overlapping costs in any integrated business.

20 Q. Yeah, that's sort of my next line of
21 questioning. You anticipate me.

22 You have utility costs, electric costs.
23 do you have one meter serving the whole operation.

24 A. No.

25 Q. You have two meters?

1 A. No. We have multiple meters.

2 Q. Multiple meters?

3 A. Yeah.

4 Q. Okay. So you -- your farm meter is
5 separate from your plant meter?

6 A. Yes.

7 Q. Okay. So to the extent there are
8 electric utility costs, there's no overlap of one to the
9 other?

10 A. No. As far as electrical cost, no.

11 Q. Okay. How about fuel, how did you
12 allocate fuel between the farm operation or the
13 processing operation and the delivery operation?

14 A. Again, that's a little tricky in that our
15 farm -- all of our crop work now is done utilizing
16 trucks rather than tractors and forage wagons and such.
17 Such trucks are doing all the hauling to the bunks from
18 the field. They usually fill up from the plant, from
19 our distribution fuel tank that also services our
20 distribution, and they also use some fuel from our farm
21 shop area.

22 It gets a little confusing. It's hard to
23 keep track of, but that's --

24 Q. So you -- my question is, you made some
25 allocation of your total fuel costs and applied, in your

1 best judgment, an allocation to each of the lines?

2 A. Yes.

3 Q. Okay.

4 A. Absolutely.

5 Q. Okay.

6 A. Is -- again, these are -- these are
7 numbers that we use in making decisions. We need them
8 to be as accurate as possible.

9 Q. Okay. And the same thing for labor. You
10 have some people that provide labor services both for
11 the farm and for the processing and for delivery and
12 sales?

13 A. That's -- yes, that's much easier to
14 break down, to itemize.

15 Q. Well, for example, you and your family,
16 you do -- do you pay yourself salaries?

17 A. Yes.

18 Q. Yes. And you provide overall management
19 services for each of these line items, farm, processing,
20 delivery and assessment?

21 A. Yes.

22 Q. Did you allocate the value of your
23 salaries, your administrative services, to each of those
24 as part of the costs?

25 A. Yes.

1 Q. Okay.

2 A. Even though, as you pointed out, there's
3 certainly overlap.

4 Q. And cost of delivery, would that
5 include -- do you use crates to deliver milk, plastic
6 crates?

7 A. Yes. We call them cases.

8 Q. Cases. When you have case losses, what
9 line would that be applied to?

10 A. I believe we pretty much applied it to
11 processing rather than distribution.

12 Q. And that's -- and some of your -- the
13 folks that drive the trucks might provide service for
14 either the cost of delivery or cost of processing line
15 or farm line?

16 A. No, that's all fairly well separated out.

17 Q. It is?

18 A. Yeah.

19 Q. Okay. In your farm operation -- well, in
20 the combination operation, do you experience more cream
21 than you use in a bottle, in Class I products?

22 A. It all -- it all depends on what our
23 volumes are and at what time of the year.

24 Q. And some times of the year you have
25 higher fat content than others, correct?

1 A. Yes, and more available.

2 Q. And more -- and what -- when you have
3 cream in excess of your bottling needs, what do you do
4 with that cream?

5 A. We either sell it to another pooled
6 processor or we're a Grade A plant. So sell to either a
7 pooled process or to a cream broker, who I'm not quite
8 certain what he does with it, frankly.

9 Q. Okay. When you -- when you -- when you
10 make those sales, are you a price setter or a price
11 taker? Do you know the difference?

12 A. No, we're definitely a taker.

13 Q. So whatever they're willing to offer,
14 you'll take?

15 A. Yes, absolutely.

16 Q. And at times do you also produce more
17 milk, not just cream, but more milk in total than you
18 use?

19 A. Yes.

20 Q. And what do you do with that?

21 A. We sell it, again either to the same
22 pooled processor or to a local cooperative in Vermont.

23 Q. Okay. And this would be -- how is that
24 transported, by the way?

25 A. We have to hire a -- a hauler to make a

1 special trip. If it's going to the cooperative, we hire
2 an outside hauler.

3 Q. To put it in a bulk tank?

4 A. Yes.

5 Q. Would it be a large trucker that has
6 other milk in it at the same time?

7 A. No, because most trucks are fairly well
8 filled, their routes are fairly local. This needs to be
9 a separate trip. It costs us a great deal of money
10 to -- to transport it.

11 Q. Okay. If you -- let's see. If you sell
12 to a pooled handler, would that sale be coming from a
13 tank in your plant?

14 A. No.

15 Q. It leaves from the farm?

16 A. It leaves from the farm, yes.

17 Q. And by pooled handler, am I correct that
18 that would be a manufacturing plant that enjoys pool
19 status?

20 A. It's a fluid bottler.

21 Q. A fluid bottler?

22 A. Yes, who enjoys pooled status.

23 Q. How frequent an occurrence is it for you?
24 Is it every month that you sell something or -- of bulk
25 milk?

1 A. It -- it all depends how sales production
2 are working out. During the fall and the winter, those
3 are generally the periods of our highest sales, so it's
4 rare that we would have excess milk during those times.
5 Like every other processor or fluid bottler, April, May
6 and June into July tend to be slower so the odds are
7 greater that we would have excess production.

8 Q. Okay. And when you have to hire a truck
9 to -- to haul milk or to haul cream, what line item
10 here, if any, would that trucking cost be under?

11 A. I believe it comes in under cost of -- I
12 believe it comes in under cost of raw supply.

13 MR. CARROLL: Cost of raw supply. That's
14 all the questions I have. Thank you very much
15 for the detail you provided about your
16 operation.

17 THE WITNESS: You're very welcome.

18 JUDGE CLIFTON: Thank you, Mr. Vetne.
19 Who next will cross-examine Mr. Rooney?
20 Mr. Yale.

21 CROSS-EXAMINATION

22 BY MR. YALE:

23 Q. Good morning. Benjamin F. Yale,
24 Continental Dairy Products and Select Milk. Good
25 morning.

1 A. Good morning, sir.

2 Q. I'm very impressed with the cleanliness
3 of your facilities.

4 A. Thank you.

5 Q. It was very nice. You indicated a strong
6 tie to family. You've got cousins and uncles and
7 nephews and everybody else that seems to be involved in
8 the operation. There are some proposals that talk about
9 grandfathering in. In other words, protecting you or
10 Monument Farms, but not allowing you to -- it has to
11 stay within the family.

12 At some point, if it moved to another
13 family or anything like that, it would lose the
14 exemption. Do you have any statement or any comments
15 about that?

16 A. I believe that would be too restrictive.
17 Not in our case, but as a personal opinion. I don't
18 doubt that we can continue to provide family members to
19 continue our business.

20 Q. So you think that the next phase will be
21 somebody else that will own it. Is that what you're
22 saying?

23 A. I don't understand.

24 Q. Are you saying if this company survives
25 in the years to come, it may have to be owned by

1 somebody other than in the family. Is that --

2 A. No, I'm not of that belief.

3 Q. But just think it's too restrictive?

4 A. I -- I don't believe -- your statement
5 that if a producer-handler changed families, changed
6 hands, was sold, you would no longer be grandfathered,
7 is that the way?

8 Q. Right, right.

9 A. I said that would not be an issue for us.
10 Then I gave a personal opinion that that was too
11 restrictive.

12 Q. Okay. Thank you. That's what I needed
13 to clarify.

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

15 JUDGE CLIFTON: Thank you, Mr. Yale.

16 Other cross-examination of Mr. Rooney?

17 Mr. Ricciardi.

18 CROSS-EXAMINATION

19 BY MR. RICCIARDI:

20 Q. Mr. Rooney, good morning. I'm Al
21 Ricciardi.

22 A. Good morning.

23 Q. And I know that you supplied Middlebury
24 College, but don't exclude the University of Vermont,
25 okay?

1 Four things. There's been a claim made
2 that somehow producer-handlers in Federal Order 1 have
3 created disorder. Have you seen any disorder in Federal
4 Order 1 caused by a producer-handlers?

5 A. It -- it depends totally on one's
6 definition of disorder.

7 Q. Yours.

8 A. No.

9 Q. Okay. Do you believe that there's
10 any need to change the status of producer-handlers at
11 all?

12 A. I believe that by my definition of
13 producer-handler, there is no need.

14 Q. Okay. And your strong preference would
15 be to keep the status of producer-handlers the same?

16 A. Yes, that would be my preference.

17 Q. Thank you.

18 JUDGE CLIFTON: Who next would like to
19 cross-examine Mr. Rooney? Is there any
20 redirect, Mr. Carroll?

21 MR. CARROLL: None.

22 JUDGE CLIFTON: Thank you, Mr. Rooney.
23 You may step down.

24 THE WITNESS: Thank you.

25 JUDGE CLIFTON: Thank you for your

1 presentation. Now, let's see. I'm going to ask
2 you to hand me back the Exhibit 1. Thank you.
3 And let me check how we're doing on time. It's
4 11:13.

5 Who would be your next witness? Is this
6 the panel now, Mr. Carroll?

7 MR. CARROLL: No, not yet.

8 JUDGE CLIFTON: Not yet. So this is a
9 single?

10 MR. CARROLL: Mr. Stearns.

11 JUDGE CLIFTON: Mr. Stearns. Let's have
12 Mr. Stearns go on before we -- let's try to have
13 Mr. Stearns before we break. I may have to
14 interrupt him with a break. But let's begin
15 with Mr. Stearns.

16 Mr. Stearns, would you please state and
17 spell your name for us?

18 THE WITNESS: My name is James W.
19 Stearns, J-a-m-e-s, W. S-t-e-a-r-n-s.

20 JUDGE CLIFTON: All right. Would you
21 raise your right hand, please?

22 (The witness was sworn.)

23 JUDGE CLIFTON: Thank you. Mr. Carroll,
24 you may proceed.

25 MR. CARROLL: Thank you.

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JAMES STEARNS

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

DIRECT EXAMINATION

BY MR. CARROLL:

Q. Mr. Stearns, would you be so kind to tell us when your family first entered into the dairy business?

A. 1871.

Q. And can you tell me where they started?

A. 50 Stearns Road, Storrs, Connecticut.

Q. Right.

JUDGE CLIFTON: I'm sorry, the name of the town in Connecticut? Say it and spell it for me.

MR. CARROLL: Storrs.

THE WITNESS: Well, the legal name is actually Mansfield. Storrs is a borough, post office address.

JUDGE CLIFTON: And how is Storrs spelled?

S-t-o-r-r-s.

JUDGE CLIFTON: Thank you.

MR. CARROLL: And was your family -- did your family play a role in the establishment of

1 the University of Connecticut at Storrs during
2 that period of time?

3 A. Yes. My great, great grandmother's
4 family donated the land for the University of
5 Connecticut in 1872, I believe. And then because of
6 that, that part of Mansfield has been called Storrs
7 since then. She was a Storrs.

8 Q. She was a Storrs?

9 A. Yes.

10 Q. Now, from that time forward, has the
11 family been engaged in the dairy business?

12 A. Yes, we have.

13 Q. And did they pedal milk to homes to start
14 with?

15 A. Yes.

16 Q. And can you trace the evolution of that
17 business from those days until your present day?

18 A. Oh, in 1881, it was a horse and wagon and
19 a can and a ladle. I would guess about 20 cows. I'm
20 not sure of that.

21 Up through the Depression, during the
22 Depression, we were actually bankrupt and came out of
23 bankruptcy. We've been serving the local hospital since
24 its inception in 1931. We were predominantly a home
25 delivery business until 1975, '76.

1 And as everybody in this room knows, I'm
2 sure that home delivery is pretty much a thing of the
3 past. We still run eight home delivery routes, but it's
4 a very small part of the business now and most of our
5 business is independent markets, restaurants,
6 convenience stores.

7 Q. Are you presently an exempt plant
8 handler?

9 A. Yes, I am.

10 Q. Can you tell us approximately the number
11 of cows that you presently have?

12 A. About 500.

13 Q. And can you tell us your general area of
14 service?

15 A. Our general area of service is east of
16 the Connecticut River, although we do have a few stops
17 west of the river. The Hartford area and east and
18 Hartford is right on the Connecticut River. And the
19 Connecticut River basically bisects the state of
20 Connecticut.

21 Q. Are these areas you've just described
22 relatively close to your farm?

23 A. Yes.

24 Q. And are you -- are you a recognized local
25 supply of milk?

1 A. Yes, we are.

2 Q. And what efforts, if any, do you make to
3 advertise that fact?

4 A. We advertise that we're a local producer
5 of milk, that it's Connecticut grown, no artificial
6 hormones. We support various civic groups. We're
7 members of civic groups, and promote youth activities
8 and charities.

9 Q. Now, directing your attention to the
10 effect that the exemption loss -- you're presently
11 exempt?

12 A. Yes, we are.

13 Q. What effect, if any, would it have on
14 your business if you were to lose that exemption?

15 A. It would substantially alter. What
16 effect? It would be where -- we're about the same size
17 of Mr. Rooney, and the cost of being in the pool would
18 amount to about \$360,000 a year. We've managed to avoid
19 being in the pool. But at one point when I thought it
20 might be imminent, I had the Market Administrator just
21 run up a mock what it would cost. And it was \$33,000
22 for the month of July of '08.

23 Q. So you think it's approximately 360,000?

24 A. I would say approximately, yeah.

25 Q. Is there \$360,000 of money in your

1 business to make that payment?

2 A. Unfortunately, no.

3 Q. And would it therefore force you out of
4 business?

5 A. It would force us out of business or
6 force us to hit the street and sell a lot more to spread
7 that rate around.

8 Q. All right. Now, directing your attention
9 to the family aspect of your business, are you the only
10 member of the family engaged in that business?

11 A. No, myself and my brother are involved in
12 the processing end and an uncle and two cousins are
13 involved in the agricultural end.

14 Q. And can you -- can you tell me -- they're
15 on salary, I take it?

16 A. Yes.

17 Q. Paid salary?

18 A. Yes.

19 Q. Can you tell me how many employees you
20 have?

21 A. About 25.

22 Q. All right. Did you hear the testimony of
23 Mr. Rooney ahead of you?

24 A. Yes, I did.

25 Q. Yeah. Do you have approximately the same

1 sized operation?

2 A. Yes.

3 Q. You saw the pictures of his -- or at
4 least the pictures here of his farm?

5 A. Yes, I did.

6 Q. Are yours comparable, the size operation
7 in the pictures?

8 A. Yes, we are.

9 Q. Do you oppose the proposal of the
10 National Milk Producers and the Milk Dealers to
11 eliminate the exemption?

12 A. Absolutely.

13 Q. And do you support the 3 million pound
14 figure testified to -- to Mr. Rooney -- by Mr. Rooney?

15 A. Yes, I do.

16 Q. And how many acres of land do you farm?

17 A. Approximately 2,000.

18 Q. Is there a milk regulation board of the
19 state of Connecticut?

20 A. Yes, there is.

21 Q. What relationship, if any, do you have
22 with that?

23 A. I'm a member of that board.

24 Q. And do you -- is there a milk promotion
25 program for the state of Connecticut?

1 A. We're starting one, yes. We've had one
2 meeting. And I'm the chairman of the milk promotion
3 board.

4 Q. And are you involved in civic
5 organizations, like Lions and Rotary and the other
6 clubs?

7 A. Yes, we are. I'm a member of the Lions.
8 My brother is a member of the Rotary and we're members
9 of the Farm Bureau, I've already said.

10 Q. Are there schools that you serve on
11 occasion?

12 A. We serve some very small schools, a few
13 Catholic schools that found they were just paying too
14 much because they bought so little milk and called and
15 solicited our business, and another school in an
16 outlying town that, to the best of my knowledge, does
17 not have a cafeteria and they were getting their product
18 delivered kind of as a Meals On Wheels type thing. And
19 they wanted fresher, better taken care of products, so
20 they also solicited us.

21 Q. If you didn't supply that school, would
22 it having difficulty getting supplies?

23 A. Yes, it would.

24 Q. Do you compete with any large regional or
25 national handlers?

1 A. Yes, we do. Our main competition is Dean
2 Foods, HP Hood and Guida based in New Britain,
3 Connecticut.

4 JUDGE CLIFTON: I need help with the one
5 out of Connecticut, the name, the spelling, and
6 the town.

7 THE WITNESS: G-u-i-d-a.

8 JUDGE CLIFTON: And how do you say that?

9 THE WITNESS: It's Polish, so it it's
10 instead of Guida.

11 JUDGE CLIFTON: What town are they?

12 THE WITNESS: They're in New Britain.

13 JUDGE CLIFTON: And how is New Britain
14 spelled?

15 THE WITNESS: N-e-w, B-r-i-t-a-i-n.

16 JUDGE CLIFTON: Thank you.

17 MR. CARROLL: That's all, your Honor.

18 JUDGE CLIFTON: Thank you, Mr. Carroll.
19 Who would like to begin the cross-examination of
20 Mr. Stearns? Mr. Yale.

21 CROSS-EXAMINATION

22 BY MR. YALE:

23 Q. Good morning.

24 A. Good morning.

25 Q. Benjamin F. Yale on behalf of

1 Continental Dairy Products and Select Milk. By the way,
2 I spent four very happy years in New Haven, Connecticut,
3 a number of decades ago and I've got some family that
4 still lives there. It's a small state, what, about an
5 hour away, a little further away?

6 A. About a hour away.

7 Q. Of course, if you go about an hour
8 anywhere in Connecticut, you're pretty much out of
9 state, right?

10 A. Right.

11 Q. How many dairies are left in Connecticut?

12 A. I really believe it's three; the very
13 small exempt plant a couple of towns over; there's
14 Guida, which is a very large plant; there's ourselves.
15 That's three I know of. I may be overlooking somebody.

16 Q. When I was there, there was an Elm City
17 Dairy. That's gone?

18 A. Right.

19 Q. There were some questions I asked of the
20 other gentlemen I just want to ask you as well.

21 Do you have a position as regards the
22 issue of grandfathering? I mean, in other words, allow
23 you to continue but not allowing new entries. Do you
24 have any position on that?

25 A. Yes, I'm against that.

1 Q. Okay.

2 MR. YALE: I have no other questions.

3 JUDGE CLIFTON: Thank you, Mr. Yale. Are
4 there other questions for Mr. Stearns?
5 Mr. Miltner.

6 CROSS-EXAMINATION

7 BY MR. MILTNER:

8 Q. Good morning, Mr. Stearns.

9 A. Good morning.

10 Q. Do you believe that producer-handlers are
11 currently contributing to disorderly marketing in
12 Order 1?

13 A. No.

14 Q. If you had your preference, would you
15 advise the Department to make any changes to the
16 producer-handler provisions in Order 1?

17 A. No.

18 Q. Thank you.

19 JUDGE CLIFTON: Are there any other
20 questions for Mr. Stearns, cross-examination
21 questions? There are none. Any redirect,
22 Mr. Carroll?

23 MR. CARROLL: None. Your Honor.

24 JUDGE CLIFTON: None. Thank you. Thank
25 you, Mr. Stearns. You may step down.

1 THE WITNESS: Well, thank you.

2 JUDGE CLIFTON: I appreciate your
3 testimony here. There is going to be a break
4 for lunch for one hour, if that's fine with you,
5 Mr. Carroll. It would mean your --

6 MR. CARROLL: That's fine.

7 JUDGE CLIFTON: -- your next clients
8 would be on in an hour.

9 MR. CARROLL: That's fine.

10 JUDGE CLIFTON: All right. Thank you.
11 Please be back and ready to go at 12:30.

12 (A recess was taken from 11:26 to 12:36.)

13 JUDGE CLIFTON: We're back on record at
14 12:36. I have just a couple of housekeeping
15 items to discuss before we call the panel of two
16 witnesses that are Mr. Carroll's clients.

17 The first is, I purposefully chose to
18 leave a little space between the exhibit
19 numbers. I did not use Exhibit 43 or
20 Exhibit 44 and I will not use them. And the
21 reason I do not want to use those numbers is I
22 want Mr. Rooney's statement to be followed
23 immediately by Mr. Rooney's photographs so that
24 those are together.

25 So there will be a little gap. That

1 frequently happens in proceedings. There will
2 not be an Exhibit 43. There will not be an
3 Exhibit 44.

4 MR. ENGLISH: Your Honor, may I?

5 JUDGE CLIFTON: Mr. English.

6 MR. ENGLISH: May I suggest, partly for
7 the benefit of those who weren't here, that when
8 the exhibits go up on the Internet, that it then
9 says expressly no Exhibit 43 or no Exhibit 44,
10 so that people see that and don't go calling the
11 Department constantly?

12 MR. STEVENS: That's what we intended to
13 do. That's the intention.

14 JUDGE CLIFTON: Good. Thank you. That's
15 a good suggestion.

16 All right. The other item that was
17 suggested to me is that I consider changing my
18 hours a little next week, that the core, instead
19 of being from 8:00 a.m. to 5:00 p.m. be from
20 8:30 a.m. to 5:30 p.m. just to try to give
21 people a little more time to take care of
22 business. A lot of them are needing time to
23 take communications with offices, get a little
24 exercise, get a little sleep.

25 We lose an hour a day that way, but if it

1 makes everybody a little more able to do
2 everything they need to get done, I don't have
3 any strong objection to it. I thought I would
4 air it and see what the majority want me to do.
5 Mr. English.

6 MR. ENGLISH: I have a related comment,
7 if I may. I don't object to that. I think all
8 of us -- subject to the fact, of course, that we
9 have a day where witnesses need to go to get
10 done, that we can reserve the right to keep
11 going. But I especially agree about the 8:30
12 and the 5:30 as a general stop point.

13 If we get to a point, we have a day
14 there's two or three witnesses that absolutely
15 have to get done and by going to 7:00 or 8:00 we
16 get them done, I would like to reserve the
17 possibility of getting that done. I agree with
18 the general principle. Let me raise a related
19 issue and that is about Monday.

20 I'm not sure who is going to be here at
21 8:00 or 8:30 on Monday. My understanding is --
22 and I'll let Mr. Beshore speak specifically
23 about the organic farmers, is that one of them
24 will be here, but the others may not.

25 Mr. Scheik and Mr. Newell, who I thought

1 would be able to get in Sunday afternoon, now
2 can't get in until 11:00 p.m. or midnight Sunday
3 night. And they're coming from the West Coast.
4 So that doesn't suggest that they're going to be
5 able to get on the stand at 8:00 or 8:30.

6 JUDGE CLIFTON: Why not? Because it's
7 like 5:00 or 5:30 their time?

8 MR. ENGLISH: Right, because it's five or
9 5:30 their time, and I'll have no opportunity to
10 speak with them at all.

11 JUDGE CLIFTON: That makes sense to me.
12 As far as people getting a short night's sleep,
13 we all do that.

14 MR. ENGLISH: Right. I will have no
15 opportunity to speak to them. I want to think
16 through what our start time is. And I guess
17 Mr. Beshore can tell us when Dr. Cryan will be
18 here, and so all of those things may flip again.
19 I think Dr. Cryan may be arriving sometime that
20 morning.

21 MR. BESHORE: Dr. Cryan is on the
22 earliest plane Monday morning from Washington,
23 D.C. to here, which arrives at the airport at
24 8:00, give or take, something a little before
25 8:00, I think, but he'll get here when he gets

1 here from the airport.

2 JUDGE CLIFTON: How about Dr. Yonkers,
3 could we start with him?

4 MR. BESHORE: I'm not sure when he's
5 going to be here. I think he -- he really needs
6 to go after Dr. Cryan. That's how his testimony
7 is.

8 MR. ENGLISH: He had a family commitment
9 and he's not going to land till like noon or
10 1:00 on Monday.

11 JUDGE CLIFTON: If we started at 8:30,
12 could I fit in Mr. Carroll there? Could I fit
13 in Mr. Vetne? Mr. Vetne probably not, because
14 his clients haven't even testified.

15 MR. ENGLISH: I leave that to
16 Mr. Carroll. If he's prepared to go at 8:30,
17 I'm not going to object. What about Monday at
18 8:30?

19 MR. CARROLL: I'll have to prepare some
20 more this weekend. I'm not sure I'd be
21 finished.

22 JUDGE CLIFTON: Step up to the mic.

23 MR. CARROLL: I did want to hear more of
24 the evidence because mine will be more
25 conclusory.

1 JUDGE CLIFTON: Understood.

2 MR. BESHORE: One other note. I am aware
3 there's a -- there will be a panel or -- several
4 organic producers who would like to appear as a
5 panel. One of them, I think, will be here, but
6 not all of them will be here at 8:30 Monday
7 morning.

8 JUDGE CLIFTON: Now, which one between
9 Kathie Arnold and Tony Schilter is not a dairy
10 farmer but has some other connection with
11 organic dairy farming?

12 MR. BESHORE: I believe that Kathie
13 Arnold is the dairy farmer. I do not know --

14 JUDGE CLIFTON: One person is from the
15 Northeast Organic Dairy Producers Alliance.

16 MR. ROWER: Your Honor, yes, that is
17 Kathie Arnold. She has sent a e-mail to me here
18 asking if it could be in the -- soon after the
19 lunch break on Monday, that she and three other
20 dairy farmers will be here to offer their
21 testimony.

22 JUDGE CLIFTON: So they all want to be a
23 panel and they all want to be after lunch?

24 MR. TOSI: Well, she didn't exactly say a
25 panel, but we'll see, I suppose.

1 JUDGE CLIFTON: Okay. All right. Well,
2 that's interesting, isn't it? Well, did John
3 Hornstra ever come? Not yet. So he may -- now,
4 I'll tell you what we can do. There are two
5 people who left us their phone number. Now, one
6 is Erick Metzger, and I don't know whether
7 either Mr. Miltner or Mr. Vetne would be ready
8 for him to testify as early as Monday morning.
9 But that's one.

10 And then the woman who said that her
11 state was tired of subsidizing dairy production;
12 my words, not hers.

13 MR. BESHORE: Dr. Orr.

14 JUDGE CLIFTON: Dr. Carolyn Orr said
15 she's available. We have to give her notice.
16 She's four hours away.

17 MR. ENGLISH: Could we perhaps, for her,
18 have somebody from the Department call her and
19 see if she would be available? Would that be
20 possible?

21 JUDGE CLIFTON: I think that would be
22 great. Okay. I'll give you her phone number.
23 It's Dr. Carolyn Orr, O-r-r. Her phone number
24 is (765) 893-8209. And if she could be here for
25 whatever time we decide first thing Monday

1 morning, that would be great. Mr. Beshore.

2 MR. BESHORE: I just want to make one
3 quick comment on the proposed change in the
4 hours of the schedule. I don't have any problem
5 with that, with the proviso that we should be
6 able to get done next week, and we must get done
7 next week as far as -- I think we should do
8 everything to get done next week.

9 I don't want to shorten the days and not
10 get done, and I also don't want to shorten the
11 days and be in a situation where we have a much
12 shorter period of time to prepare and to
13 cross-examine the witnesses from AIDA and that
14 group, which will be at the end of the week in
15 order to get done. I don't want to go until
16 10:00 because we've taken a couple of hours out
17 of the front end of the week.

18 JUDGE CLIFTON: We, and the other -- the
19 other consequence of not putting in as many
20 hours on Monday, Tuesday, Wednesday is that we
21 may have to stay Friday, when there's a
22 possibility that we might finish Thursday, if we
23 don't do that, or we might get out earlier
24 Friday and have a better chance to go on planes
25 than if we don't. So there are consequences

1 when you -- when you shorten your workday.

2 Mr. Miltner.

3 MR. MILTNER: Uh-huh. I just want to
4 speak as to Mr. Metzger. Although he's not our
5 witness, he may be commenting on one of our
6 proposals as well as one of Mr. Vetne's. And I
7 did not have discussion with him as to whether
8 he preferred to wait until those proposals were
9 presented or not.

10 So if -- if you would want to have USDA
11 contact him about his preference, that would be
12 my recommendation. But I don't know that his
13 preference would be to go before those proposals
14 have been discussed.

15 JUDGE CLIFTON: When I talked to him, and
16 he said that he would come next week, he said he
17 would be in touch with Messrs. Vetne and Miltner
18 about when he should come. So I think he'll be
19 guided by your best advice as to when he would
20 fit in. And I think it best that you stay in
21 touch rather than USDA.

22 MR. MILTNER: I will contact him, so the
23 record -- we're not on the record, but he has
24 not contacted me.

25 JUDGE CLIFTON: We are on the record.

1 MR. MILTNER: We are on the record. He's
2 not contacted me in the interim.

3 JUDGE CLIFTON: Okay. Very good. Okay.
4 You know, I'm going to be here at 8:00 Monday
5 morning, and the reason I'm going to be here at
6 8:00 Monday morning is we noticed the hearing
7 for that. And I've got something on the website
8 that says that those are our hours. And I will
9 be in this room during the hours I said I was,
10 regardless.

11 But I can certainly -- I don't have as
12 much demand on me during this hearing. My time
13 is pretty much time free when we're off the
14 record, and nobody else's is. And I know that.

15 So I don't -- this proposal is fine with
16 me. I don't object to it. I am aware that it
17 could prolong the hearing in terms of number of
18 days or numbers of half days. Mr. Carroll.

19 MR. CARROLL: Does anyone have a list
20 of --

21 JUDGE CLIFTON: Would you come where we
22 can hear you, sir?

23 MR. CARROLL: I'm just wondering if we
24 might sometime have available before the end of
25 the day the list of witnesses that might be

1 coming and their general subjects, so some of us
2 may not even need to be here?

3 JUDGE CLIFTON: All right. Mr. Miltner,
4 I would -- I don't know for sure. It looks to
5 me like Monday is full, which makes me think
6 Tuesday would be when your case-in-chief would
7 begin. But I don't know that for sure because I
8 don't know who else is going in between where we
9 are now and when you go, Mr. English.

10 MR. ENGLISH: I think I advised, your
11 Honor, at the beginning that we have two
12 witnesses scheduled for Tuesday, Mr. Warren
13 Erickson and Ms. Chrissie Dewey, both who will
14 arrive early enough on Monday so they can go
15 first thing Tuesday morning, that that won't be
16 an issue.

17 I wonder, given everything else we have
18 on for Monday, whether Dr. Yonkers may actually
19 get on Monday. And therefore he may get on
20 Tuesday, just to be realistic about it. But
21 obviously once Dr. Cryan is finished and
22 Dr. Yonkers is here, he can go on, so he might
23 be able to start. It may be the case, so -- I
24 just want that to be what there is.

25 I have, in answer to Mr. Carroll's

1 question, Mr. Scheik and Mr. Newell. Mr. Scheik
2 is from the Dairy Association of California.
3 Mr. Newell is from HP Hood. Obviously it's
4 processor pieces. Mr. Warren Erickson is from
5 Anderson Erickson Dairy. A-n-d-e-r-s-o-n, no
6 hyphen, E-r-i-s-t-k -- I'm sorry. E-r-i-s-k --

7 JUDGE CLIFTON: No, no, you don't mean
8 s-k.

9 MR. ENGLISH: I'm sorry, c-k. Thank you,
10 your Honor. And Chrissie Dewey, D-e-w-e-y, from
11 Harrisburg. H-a-r-r-i-s-b-u-r-g.

12 JUDGE CLIFTON: And how does Chrissie --
13 how is that?

14 MR. ENGLISH: C-h-r-i-s-s-y.

15 MR. BESHORE: I-e, I think.

16 MR. ENGLISH: I-e. We'll know when she
17 gets here.

18 JUDGE CLIFTON: And I assume that
19 Harrisburg Dairy is in Pennsylvania?

20 MR. ENGLISH: Pennsylvania, yes. A
21 relatively small -- very small regulated handler
22 in Pennsylvania.

23 JUDGE CLIFTON: Okay. Other thoughts,
24 Mr. Beshore?

25 MR. BESHORE: Just for our information

1 now, two other witnesses that I'm aware of for
2 Tuesday; Mr. Hollon would expect to testify, and
3 there is a representative, whose name I do not
4 know, of a small dairy in Michigan that I would
5 expect to come on Tuesday.

6 JUDGE CLIFTON: Now, Mr. Miltner, if you
7 would come back to the podium. When you talked
8 to me about your case, I was thinking it was
9 three days' worth. Am I right on that?

10 MR. MILTNER: We believe it's more likely
11 two, your Honor. Okay. Two and a half was
12 whispered behind me.

13 JUDGE CLIFTON: And that includes your
14 experts?

15 MR. MILTNER: It does.

16 JUDGE CLIFTON: Two and a half days.
17 Let's assume for a minute that you didn't even
18 get on Tuesday, didn't even get started Tuesday.
19 Now, I hope that doesn't happen.

20 MR. MILTNER: Nor do we.

21 JUDGE CLIFTON: But if you started
22 Wednesday and you had Wednesday, Thursday, and
23 half of Friday, then when is rebuttal?

24 MR. RICCIARDI: Well -- go ahead, I'm
25 sorry. I'll get out of the way. You can do it.

1 MR. MILTNER: Well, what did --

2 JUDGE CLIFTON: Don't leave him.

3 MR. MILTNER: I want to make sure --

4 (Off the record.)

5 MR. MILTNER: There are -- Mr. Vetne, who
6 had to return to his home on a flight a little
7 while ago, wanted me to make sure that the Court
8 recalled that his witnesses, which I believe are
9 three, were planning on coming in Wednesday.
10 And he did anticipate that those witnesses would
11 take up no more than half a day.

12 JUDGE CLIFTON: And we may have some more
13 dairy farmers who knew this week would be
14 crowded and will show up.

15 MR. MILTNER: Mr. Carroll, I don't know
16 his case, when he intended to finish his.

17 JUDGE CLIFTON: All right. Mr. Carroll
18 and Mr. Vetne will both be witnesses. So they
19 have to fit in. They may want to go after
20 your -- your case-in-chief.

21 MR. MILTNER: I don't know about
22 Mr. Vetne as a witness. But I know that his --
23 I guess his client witnesses -- or his
24 producer-handler witnesses are intending to be
25 here Wednesday.

1 JUDGE CLIFTON: Okay. All right. I
2 personally don't think it's smart to shave off
3 an hour. But I'll put it to a vote now. All in
4 favor of amending the core hours, knowing that
5 we don't always confine ourselves to the core
6 because sometimes we have to go later, amending
7 them from 8:30 -- from 8:00 to 8:30 and from
8 6:00 p.m. to 5:30 p.m., please raise your hand.

9 All those opposed, please raise your
10 hand.

11 Oh, great, it's a tie.

12 MR. MILTNER: Mr. Vetne votes in favor.

13 MR. WOODY CARROLL: Can we ask the court
14 reporters? Can we ask the court reporters?

15 JUDGE CLIFTON: Ah, let's go off record
16 for just a moment.

17 (Off the record.)

18 JUDGE CLIFTON: All right. We're back on
19 record at 12:54. I'm going to keep it 8:00 to
20 6:00. I'm sorry, we've got a lot to do. It
21 would be preferable if we finish it next week.
22 And for that reason, I'm not going to shave an
23 hour off the core.

24 I am aware that this whole thing is a
25 tremendous hardship on everybody who's

1 participating. And I am sorry for that. But
2 we'll keep the hours as they are, 8:00 to 6:00,
3 as a general matter.

4 Okay. Mr. Miltner, when you do begin
5 your case in chief, can you give me an idea of
6 what witnesses you would call?

7 MR. MILTNER: Sure. First, there's a
8 witness who is not our witness but we've been
9 told is coming in. His name is Jim Oberweis.
10 He'll be here on Tuesday. I don't expect his
11 testimony to be lengthy. So we can pencil him
12 in on Tuesday.

13 One of the members of AIDA may only be
14 available on Tuesday and we're working very hard
15 to confirm that. But, again, we don't
16 anticipate that his testimony would be lengthy.
17 His name is David Boyd. Longmont Dairy in
18 Colorado.

19 JUDGE CLIFTON: Ah, my old stomping
20 grounds.

21 MR. MILTNER: Our experts we would like
22 to get on the schedule for Thursday, so we
23 can -- I don't think that if we do that now and
24 lock them in for Thursday there should be any
25 issues.

1 JUDGE CLIFTON: All right. And how many
2 experts do you have?

3 MR. MILTNER: Two.

4 JUDGE CLIFTON: Two. All right. And do
5 they have written statements?

6 MR. MILTNER: They will have written
7 statements.

8 JUDGE CLIFTON: And how early can you
9 distribute those?

10 MR. MILTNER: I believe we have to
11 distribute them the morning before.

12 JUDGE CLIFTON: You are going to try to
13 distribute them on Wednesday for Thursday?

14 MR. MILTNER: I believe we have to
15 distribute them the morning they testify.

16 JUDGE CLIFTON: Okay. And that's the
17 earliest people will have them?

18 MR. MILTNER: Unless we shave some more
19 hours off the day so we can meet with them and
20 stuff.

21 MR. HOLLON: That's what the weekend is
22 for.

23 MR. MILTNER: No, the weekend is to spend
24 with my kids, Elvin.

25 JUDGE CLIFTON: And who are they?

1 MR. MILTNER: Ron Knutson, K-n-u-t-s-o-n,
2 and Wayne Knoblauch, K-n-o-b-l-a-u-c-h.

3 JUDGE CLIFTON: And what was the first
4 name on Mr. Knutson?

5 MR. MILTNER: Ron, Ronald.

6 JUDGE CLIFTON: Okay. Now, you have no
7 idea how long they'll be cross-examined, but
8 just guessing, how many hours should I allot to
9 each of them for direct, cross, redirect,
10 recross, redirect, recross again?

11 MR. MILTNER: I would say two hours for
12 Dr. Knoblauch and three hours for Dr. Knutson.

13 JUDGE CLIFTON: Are they both economists?

14 MR. MILTNER: They are.

15 JUDGE CLIFTON: Okay. Would they be your
16 final witnesses?

17 MR. MILTNER: Depending on scheduling, we
18 would hope so.

19 JUDGE CLIFTON: And then Friday could be
20 for rebuttal.

21 MR. MILTNER: Friday could be for
22 rebuttal. And then we have the additional
23 producer-handler members of AIDA that would
24 likely be sending in representatives to testify,
25 we hope, on Wednesday. And it may make sense,

1 if they spill over and we've completely
2 exhausted ourselves Wednesday, to put one,
3 perhaps two of them on before the economists,
4 into Thursday.

5 JUDGE CLIFTON: All right. Thank you,
6 Mr. Miltner. Who else knows of witnesses who
7 will be next week who have not already been
8 identified? Mr. Yale.

9 MR. YALE: I will be consulting with my
10 client this weekend and there is the possibility
11 that we may have one, hopefully very short,
12 witness, but with direct and cross might be an
13 hour or so.

14 JUDGE CLIFTON: Okay. And you won't
15 know until after this weekend --

16 MR. YALE: Monday, right.

17 JUDGE CLIFTON: -- when this witness
18 would appear?

19 MR. YALE: I think they can appear
20 anytime that works for the Court towards the end
21 of the week. I mean, we can be very flexible.
22 But I'm not going to know for sure when or
23 whether until the weekend.

24 JUDGE CLIFTON: Okay. Good. Are there
25 any other counsel who have been participating

1 throughout who also wish to testify besides
2 Mr. Vetne and Mr. Carroll? I see no one.

3 All right. Good. Thanks. Are there any
4 other preliminary matters before we resume the
5 testimony of Mr. Carroll's clients? No.

6 All right then. I need someone to bring
7 up a chair. I believe these two witnesses will
8 testify as a panel. So if we could bring a
9 chair and the witnesses can come forward.

10 Isn't it nice when he takes the
11 uncomfortable one. Now, you actually have to
12 physically pass the microphone back and forth
13 and you really do need it pretty close to your
14 mouth. So I'd like you each to state who you
15 are and spell your name.

16 MR. MONTGOMERY: Donnie Montgomery,
17 D-o-n-n-i-e, M-o-n-t-g-o-m-e-r-y.

18 MR. BOWER: David Bower, D-a-v-i-d,
19 B-o-w-e-r.

20 JUDGE CLIFTON: Thank you. And which one
21 of you wants to affirm?

22 MR. MONTGOMERY: Both.

23 JUDGE CLIFTON: Both. That will be easy.
24 I'll do it at the same time.

25 (Both witnesses were affirmed.)

1 JUDGE CLIFTON: The record should reflect
2 that each witness has answered yes.

3 Mr. Carroll, you may proceed.

4 DAVID BOWER, DONNIE MONTGOMERY
5 of lawful age, being duly affirmed, was examined and
6 testified as follows:

7 DIRECT EXAMINATION

8 BY MR. CARROLL:

9 MR. CARROLL: Thank you very much, your
10 Honor. I'm going to address my questions to
11 Mr. Bower to start with.

12 At this particular time are you in the
13 milk business?

14 MR. BOWER: Yes.

15 MR. CARROLL: And what part of the United
16 States are you doing business in?

17 MR. BOWER: We're in Southwest Virginia.

18 MR. CARROLL: And is it W-i-r-t-z? Is
19 that your post office address?

20 MR. BOWER: Yes.

21 MR. CARROLL: How is that pronounced?

22 MR. BOWER: Wirtz.

23 MR. CARROLL: Wirtz, Virginia. And the
24 name of your business is Homestead Creamery?

25 MR. BOWER: Yes.

1 MR. CARROLL: Is that correct?

2 MR. BOWER: (Nodding head.)

3 MR. CARROLL: Now, the gentleman sitting
4 next to you, Mr. Montgomery, is he related to
5 you in any way?

6 MR. BOWER: He's my cousin.

7 MR. CARROLL: Are you in business
8 together?

9 MR. BOWER: Yes.

10 MR. CARROLL: Thank you. In your own
11 words, could you explain what that business is
12 and how it operates?

13 MR. BOWER: Donnie Montgomery has two
14 sons about my age, and as we were forced to
15 decide our career and our future in the dairy
16 industry, we decided to try to keep the family
17 farm. And which time as we're in right now, \$11
18 milk comes, we really see no future, no future
19 of ever being able to buy the farm. So we come
20 to the conclusion that we would like to come
21 together as two small farms. At the time we
22 were around 70 cows a piece.

23 And we would like to become united and be
24 a producer-handler. And we have not been able
25 to achieve that in our market administration

1 because of a technicality, and so we've done the
2 best we can to be a united team as a little
3 niche market, support sustainable agricultural,
4 support an all-natural product, focusing on the
5 local people.

6 We focus on home delivery, which to some
7 is dying, but to some may drop crumbs that
8 becomes a niche for others.

9 We have also worked with Krogers as a
10 small niche market and we're strictly in glass.
11 We do some other things that are not, but our --
12 the core of our business is in glass in the
13 niche market. So together Donnie Montgomery and
14 myself as family entities, we've run our farms
15 and run the creamery together to try to sustain
16 our farms to keep them in the generations.

17 MR. CARROLL: Okay. Are you recognized
18 as a producer-handler by the state of Virginia?

19 MR. BOWER: By the state, yes.

20 MR. CARROLL: But not by the Federal
21 Order?

22 MR. BOWER: Right.

23 MR. CARROLL: And do you want to change
24 that status? Do you want to become a
25 producer-handler under the Federal Order?

1 MR. BOWER: We would like for the
2 administration to recognize that we could change
3 the technicalities to be operations rather than
4 ownership, so that we could be a
5 producer-handler. But we also recognize that
6 there is a proposal in for exempt plants to be
7 raised to 3 million also.

8 We feel that as -- the Montgomery family
9 and I, our families has come together, that we
10 believe that we come to America for the freedoms
11 that it offered. And to take away and
12 grandfather in and to stop these freedoms would
13 be a great detriment to the small farmers as we
14 are. So we would like for the exempt plants to
15 be raised also.

16 The 150 completely stifles any
17 opportunity to serve the organic or natural or
18 the local sustainability farming that all of the
19 government colleges teach. So we would really
20 plead with this Department to recognize and
21 raise -- it does not have to be 3 million for
22 the exempt status. Maybe it could be 1 million.
23 450 would not even take care of a 200 cow dairy.

24 So when you have a couple of farms -- and
25 I know in hearing the testimony and being a part

1 of this that a couple of thousand cow dairies
2 could real easily come together and raise havoc
3 in the marketplace.

4 However, a couple of hundred cow dairies
5 or a couple of 50 cow dairies are not going to
6 do anything. We don't have the money. We're
7 leveraged to the hilt. So to speak, we've bet
8 the farm. If it goes wrong, we lose everything,
9 the farm.

10 So we really would plead with the
11 administration not to leave it at 450 but at
12 least bring it to a million or something and
13 allow what the consumer is demanding to us.

14 They're coming in hoards. The Green
15 movement is great now. They're coming and
16 there's a niche of that. And that movement will
17 never be as big as the Wal-Mart and the Costcos
18 that we've heard about and these grand numbers
19 that we've heard today.

20 But could we just have room for us to be
21 made now? And then I testify for my
22 grandchildren and great-grandchildren, that they
23 can come together and stay in the dairy
24 industry. If you don't allow this, the heart of
25 the American that has made America what it is is

1 gone.

2 MR. CARROLL: I wanted to ask you about
3 your family a little bit. When did they first
4 come to the state of Virginia?

5 MR. BOWER: The best we can tell, our
6 people come from Schwarzenau, Germany, in the
7 mid 1700s. They came for religious living, and
8 farming was a way of life. They took that up.
9 Exactly where that boat landed and how they
10 walked, I'm not sure.

11 MR. CARROLL: Okay.

12 JUDGE CLIFTON: Do you know how to spell
13 the town in Germany?

14 MR. BOWER: No.

15 JUDGE CLIFTON: Say it again.

16 MR. BOWER: Schwarzenau.

17 JUDGE CLIFTON: Okay. Schwartz I can
18 spell. What's the last part of it? Schwartz --

19 MR. BOWER: It's pronounced Schwarzenau.
20 But it's a real long word. I have no idea.

21 JUDGE CLIFTON: Schwarzenau.

22 MR. MONTGOMERY: Schwarzenau.

23 MR. BOWER: Schwarzenau maybe.

24 JUDGE CLIFTON: Schwarzenau. I think
25 make it say Schwarzenau. Well, court reporters,

1 do the best you can.

2 MR. CARROLL: Schwartz is German for
3 blank, isn't it?

4 MR. BOWER: I have no idea.

5 MR. CARROLL: S-c-h-w-a-r-t-z, is that
6 part of it, and then there's another?

7 MR. BOWER: Maybe a-u.

8 MR. CARROLL: All right.

9 JUDGE CLIFTON: So it's sort of a
10 French-German town maybe.

11 MR. CARROLL: It may have been from
12 Alsace-Lorraine. You know, they say -- the
13 Scotch-Irish, they say those folks don't know
14 which they are.

15 Is part of your thought that relatives
16 ought to be given something when they're getting
17 together and working together, ought to have
18 some recognition as a family-type recognition in
19 the marketing order?

20 MR. BOWER: Yeah, we've talked about --
21 me and Donnie and myself are cousins and when we
22 come together -- his and son and I are the
23 founding ones that really worked on it. And
24 possibly down the road, my son and one of his
25 brothers would want to do it or one of his

1 cousins would want to do something like this.

2 That's why we would believe in some
3 relaxed definition so that families that aren't
4 father and son can be producer-handlers. And we
5 understand that producer-handlers can be a
6 detriment and they can hurt when they become
7 really big. So we have no problem at all with
8 putting the caps on it, but just relax it so
9 that the ones of us that like to farm doesn't
10 have to hire New York attorneys to help us do
11 that.

12 MR. CARROLL: With that, your Honor, I
13 retire from this deal. Thank you very much.

14 JUDGE CLIFTON: You may be proud to be a
15 Virginian.

16 MR. CARROLL: I didn't mean that in a bad
17 way. He's done a good job.

18 JUDGE CLIFTON: Do we want separate
19 comments?

20 MR. MONTGOMERY: I would just reaffirm
21 what Dave said. The reason I got into this was
22 because of the young guys. I'll just share what
23 my father-in-law told me. He said that a young
24 fellow and a older fellow makes the best
25 partners because the young fellow has all the

1 ambition, too much of it sometimes; the older
2 fellow can hold the reins on it. And maybe I
3 didn't hold the reins enough this time, but we
4 got into the processing business.

5 JUDGE CLIFTON: Thank you.

6 Cross-examination, please. Mr. Yale, why don't
7 you begin?

8 CROSS-EXAMINATION

9 BY MR. YALE:

10 MR. YALE: Benjamin F. Yale for
11 Continental Dairy Products and Select Milk.
12 What part of Virginia are you in?

13 MR. MONTGOMERY: We are in the foothills
14 of the Blue Ridge Mountains on the east side,
15 about 25 miles south of Roanoke.

16 MR. YALE: Okay. So basically western
17 Virginia, right?

18 MR. MONTGOMERY: Southwestern Virginia,
19 yeah. On the other side of the mountains would
20 be considered the western part of the state.

21 MR. YALE: I didn't want to offend you.
22 I wanted to understand your structure. You
23 don't qualify as a producer-handler, but yet you
24 still own the farm -- the farm is owned by one
25 person and the plant is owned by somebody else?

1 Is that the --

2 MR. BOWER: Yes. We don't -- Donnie and
3 his family owns his farm. My family owns our
4 farm. And we understand the laws that's wrote
5 now. That's why we're asking for the fact that
6 two brothers in the future, two cousins could
7 come together, they could own two separate dairy
8 farms and come together with a small little
9 bottling plant.

10 MR. YALE: Okay. Does somebody own a
11 bottling plant now?

12 MR. BOWER: We do, together.

13 MR. YALE: And you take your cousin or
14 your brother's milk and --

15 MR. BOWER: Yes, ours we take -- the two
16 of us put our milk in. Two separate dairy farms
17 go into one creamery, operating as one creamery.

18 MR. YALE: Now, are you -- I don't want
19 to probe on this too far. If I become
20 offending, I apologize, and we'll change that.

21 But you can't organize as a company or a
22 legal entity in order to take advantage of that
23 or that -- have you looked at that possibility?
24 Is that something you cannot do?

25 MR. BOWER: Mr. Carroll has indicated

1 that he could, but it would be very complicated,
2 very, very complicated. Possibly he could.

3 MR. YALE: So your concern -- you're --
4 really, your support is more not just the
5 3 million pound cap or a higher one, but also --
6 for PDs but also to include exempt plants?

7 MR. BOWER: Yes. And we -- we also
8 understand that maybe they wouldn't be quite as
9 high. In other words, maybe they would be held
10 at 1 million as an exempt plant whereas the
11 producer-handler would be 3 million.

12 MR. YALE: Okay. Very good. I have no
13 other questions.

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

16 MR. BESHORE: I just have one question.

17 CROSS-EXAMINATION

18 BY MR. BESHORE:

19 MR. BESHORE: Are you currently a pool
20 plant?

21 MR. BOWER: Yes.

22 MR. BESHORE: And that's under Federal
23 Order 5?

24 MR. BOWER: 5.

25 MR. BESHORE: How long have you been in

1 operation?

2 MR. BOWER: We started on January 16th of
3 2001.

4 MR. BESHORE: And you've been a pool
5 plant during that full --

6 MR. BOWER: No. 150,000 is -- is our
7 limits, and we've bounced in and out a lot. You
8 know, of course, Christmas season would get us
9 into eggnog in fluid 1 sales, but we're not
10 always. However, in the last year we've been
11 around 300,000 where we're at right now.

12 Our facility, however, would never allow
13 us -- ever allow us, the way we are now, to grow
14 to 3 million or over.

15 MR. BESHORE: Okay. Thank you very much.

16 JUDGE CLIFTON: Who else would like to
17 examine Mr. Bower or Mr. Montgomery? Mr. Tosi.

18 CROSS-EXAMINATION

19 BY MR. TOSI:

20 MR. TOSI: Thank you, Mr. Bower, and,
21 Mr. Montgomery, for coming. I'm enjoying your
22 testimony. I'm going to ask some things just to
23 help summarize a little bit where you're at.
24 What you are really seeking is a modification to
25 one of the proposals that would increase the

1 exempt plant limitation to be something greater
2 than 150,000?

3 MR. BOWER: Yes. And we understand
4 there's a proposal that takes the exempt plants
5 to 450, and we're just pleading that 450 would
6 not suffice.

7 MR. TOSI: Okay. And the reason that
8 that doesn't fit your situation is because you
9 don't have the option -- even though you're
10 blood relatives, you don't have the ability
11 right now to -- to get the -- to meet the
12 current Federal Order Standards for being a
13 producer-handler?

14 MR. BOWER: It would be very, very
15 complicated to do that, if we even could,
16 because as we understand -- and I'm sure someone
17 has that here, that it has been to be one owner.
18 The one has to be the singular owner, singular
19 risk all the way through. And it makes it
20 really complicated.

21 We try to keep everything a farm. We
22 don't really want to build a legacy amongst us.
23 We like to keep things small, so Montgomery
24 would own his farm and we would own our farm.
25 And that's why we would like to have operations

1 rather than ownership to be that.

2 So if it would be changed and would be
3 relaxed in the terminology, we could accept and
4 be a producer-handler, that'd be fine. If not,
5 we'd plead with the exemption, and not only for
6 our case but for other little, small organic,
7 all natural farmers to have a provision where a
8 couple could come together. And 450,000 won't
9 handle 200 cows at the milk -- at the rate we
10 like to see them milked.

11 MR. TOSI: Are you offering a specific
12 number for an exempt plant exclusion?

13 MR. BOWER: We would offer 1 million.

14 MR. TOSI: 1 million pounds?

15 MR. BOWER: (Nodding head.)

16 MR. TOSI: Would you consider it to have
17 had your interests satisfied if the exempt plant
18 definition went a little bit further in some of
19 its features that would -- that would allow, for
20 example, a partnership like you have with your
21 cousin, to look at that a little bit
22 differently?

23 MR. BOWER: Yeah. Yes, we'd be up for
24 that. Really, the one thing that we would
25 strongly oppose would be any grandfathering.

1 MR. TOSI: And what's the harm that you
2 see in grandfathering?

3 MR. BOWER: I hope to have -- I have two
4 young sons. I hope that they can carry that
5 forward. And I hope that the same freedom that
6 my forefathers come across that ocean for is
7 continued to hand down to my children and their
8 grandchildren, so it's not socialism but
9 freedom.

10 MR. TOSI: Okay. I have no other
11 questions. And again, thank you for coming.
12 And I know you guys have been here awhile at the
13 hearing, and I appreciate your participation and
14 your attendance here. Thank you.

15 JUDGE CLIFTON: Mr. Carroll, do you have
16 any redirect examination?

17 MR. CARROLL: I have none. Thank you.

18 JUDGE CLIFTON: Thank you very much. I
19 appreciate your testimony very much.

20 JUDGE CLIFTON: Ready for Mr. Carman, and
21 he has escaped. No, he's here.

22 MR. ENGLISH: I would if I were him.

23 JUDGE CLIFTON: Do we need a little
24 break? Why don't we have a little break and
25 then I'll ask for an announcement from USDA as

1 to what is the best way for us to go forward
2 from here. So ten minutes, please. It's
3 almost 1:20. Please be ready to go at 1:30.

4 (A recess was taken from 1:19 to 1:38.)

5 JUDGE CLIFTON: We're back on record.
6 It's about 1:38. Mr. Stevens, would you give us
7 an indication of how we'll now proceed?

8 MR. STEVENS: Yes, your Honor. Garrett
9 Stevens, Office of the General Counsel, U.S.
10 Department of Agriculture. We had a short
11 meeting and have been meeting during the course
12 of the hearing in attempts to complete the
13 record requests that the Department has received
14 that were not completed at the beginning of the
15 hearing.

16 Mr. Carman is here now with the completed
17 information requests that were not completed at
18 the beginning of the hearing. He has a copy of
19 them with him. He has a copy that he's given to
20 your Honor. I believe there is at least -- the
21 reporters have a copy. There is at least one or
22 two copies or more at the rear of the room.
23 Two -- one at the rear of the room.

24 Let me preface my -- well, let me add
25 that the individual requests have been given to

1 the individual requesters. Those papers include
2 a piece of paper that describes what they have
3 received, what they are not receiving, and the
4 reasons why they are not receiving what they are
5 not receiving.

6 This is an attempt to fully answer the
7 information requests.

8 As everyone here in this hearing knows, a
9 tremendous amount of effort has been going into
10 the preparation of this hearing by the AMS Dairy
11 Programs personnel. They have been diligently
12 working before the hearing, during the hearing
13 until this time to present the documents that
14 have been requested by the parties.

15 And for my part, they have made an extra
16 effort to do this. I have heard compliments
17 during the course of the hearing from individual
18 participants about how much assistance they have
19 gotten from the Department in fulfilling the
20 information requests and being helpful and
21 trying to assist people in their preparation and
22 conduct during the course of the hearing.

23 So having said all this, we now are at
24 the position where we want Mr. Carman to speak
25 to the exhibits -- well, we will have them

1 marked and we will not ask for the admission of
2 them unless -- unless the parties and your Honor
3 and all of us here deem that that's appropriate.
4 So the point would be that Mr. Carman would go
5 through the exhibits one by one, as the requests
6 are made, and will describe what's in the
7 documents. He will then be subject to
8 cross-examination on the contents of those
9 documents.

10 Then after we complete that, your Honor,
11 then I would ask that we consider whether it's
12 appropriate for us to move their admission,
13 which we have no problem doing, understanding
14 full well that having done that, that the
15 parties may choose on their own to use the whole
16 documents, part of them, different pieces of
17 them for their own purposes, for any proposal --
18 for or against any proposal that is here before
19 the hearing for -- and for or against any of
20 these proposals as the parties choose. It is
21 their place to use the documents as they will
22 during the course of the hearing.

23 They are -- I will say in the beginning
24 that they are offered -- that they are
25 constructed from the records of the Department

1 of Agriculture by Mr. Carman or pursuant to his
2 supervision.

3 They are -- they come from official
4 records of the Department, the Market
5 Administrator's office. Exercises have been
6 employed, that is to say, pools have been run
7 based on information supplied or on estimated
8 information, and that will be described by
9 Mr. Carman.

10 So they are -- they are -- and finally,
11 they are not presented for or against any of the
12 proposals as Exhibit 5 through 20. They are
13 here, presented for the use of the parties as
14 they will during the course of the hearing.

15 JUDGE CLIFTON: Mr. Stevens, my stack of
16 these is -- I don't know, five-eighths,
17 three-quarters of an inch high, and I can tell
18 by looking that a lot of work went into
19 preparing them. Does this stack that I have
20 here include the document which the parties were
21 given that says, this is what you were given,
22 this is what you were not given and why?

23 MR. STEVENS: I believe it does, your
24 Honor. I believe each of the tab -- each of the
25 sets of documents have on them a front sheet

1 that describes what you have now described for
2 the record, your Honor.

3 JUDGE CLIFTON: All right. And even
4 though none of these is an exhibit at this point
5 and it's possible that none of them will ever
6 become an exhibit, will they nevertheless appear
7 on the AMS Dairy website?

8 MR. STEVENS: The other point that I
9 guess I neglected to get to during my remarks
10 was that the intention is that all of this
11 information will be put upon the AMS website. I
12 don't believe it is presently on the website. I
13 believe within the next day or so, certainly
14 before next week, with every human effort being
15 possible, that that document -- that those
16 documents will be on the website and available
17 to the public in that way. It is true, of
18 course, that once on the website, they can be
19 downloaded and created and copied or, you know,
20 in other words, this digital information is
21 available to the public. Anyone can pull down
22 off of that website the information that's
23 contained there.

24 Now, certainly that -- in addition to the
25 parties that have requested it and to us making

1 it available here, it now becomes available to
2 the world, to the public. And so who knows? I
3 mean, next week we may see people show up based
4 on those postings, based on their own decision
5 to appear in this hearing to use that
6 information or whatever information is up
7 there -- this information we're talking about,
8 or any additional information that's up there
9 for their use during the course of this hearing
10 and as everyone in this room and everyone who
11 has been in this room during the course of the
12 proceeding is able to do.

13 JUDGE CLIFTON: Now, let me ask. Those
14 of you who are here, is there anyone here who,
15 before Mr. Carman begins to testify, needs a
16 copy of what I'm holding and does not have it?
17 Mr. Beshore.

18 MR. BESHORE: There is one public copy,
19 okay? Mr. English is using it now, which is
20 fine. We certainly need to have the opportunity
21 to review it timely.

22 JUDGE CLIFTON: I would be happy to allow
23 one of you counsel, if you want, to borrow my
24 copy. Mine is not a record copy at this time.
25 It's to assist me as the proceeding goes on,

1 just as it is for you. I would loan you my copy
2 and recess long enough for you to duplicate it
3 for cross-examination purposes, if you want.

4 MR. STEVENS: And let me say, your Honor,
5 that certainly is our intention. I know there
6 are concerns by counsel, and there may be others
7 that would like to have a copy of these
8 documents to review to use during the -- you
9 know, to look at, I suppose, while Mr. Carman is
10 identifying them and talking about them or -- or
11 to have a recess and to get sufficient copies
12 made.

13 As I say, we have made -- as I have said,
14 I guess, we have made every effort to make these
15 available. We request the understanding of the
16 parties to the hearing that we have made that
17 effort, that we continue to make that effort,
18 and that if it's your Honor -- if your Honor
19 decides, we certainly have no problem with
20 recessing the hearing for sufficient time for
21 copies to be made of this.

22 We did not make these copies. It was not
23 to deprive the parties of the information. It
24 was just in order to get these in the hearing
25 record as quickly as possible.

1 MR. BESHORE: I understand full well the
2 efforts that have been made. And I didn't
3 intend to impugn them in any way. We would
4 appreciate the opportunity to efficiently make a
5 couple of copies we could use.

6 MR. YALE: Your Honor, I believe --

7 JUDGE CLIFTON: Mr. Yale.

8 MR. YALE: Yes. Basically all of the
9 stuff that was presented on my request, and
10 there may be a few pages that weren't, I have
11 made copies. I have available six sets of those
12 back there that will -- I think represents the
13 vast -- did I -- let me ask this. My request
14 probably encompassed almost all you're going to
15 talk about, right?

16 THE WITNESS: Yes.

17 MR. YALE: So they may have the copies.
18 There may be a few pages that I left out. It
19 wasn't -- part of it I didn't understand them,
20 even though I asked for them. But I think I got
21 them pretty well all copied. So that's
22 available. They're on that table. I've got
23 stacks. I've given them to most of the counsel.
24 So that might obviate the need to go copy right
25 now, and then they can find the ones that are

1 missing and we can go from there.

2 JUDGE CLIFTON: That's very proactive. I
3 appreciate that.

4 MR. YALE: I intend to have those
5 admitted as exhibits, if I've got them collated
6 correctly, which I may not have.

7 JUDGE CLIFTON: So you've made enough for
8 them to be, in fact, exhibits?

9 MR. YALE: Yes.

10 JUDGE CLIFTON: Good for you. I am
11 impressed. Okay. Let me go through these tabs
12 one by one. Mr. English.

13 MR. ENGLISH: I just want to say I'm
14 holding in my right hand what Mr. Yale very
15 kindly shared, one copy or so, with interested
16 persons, and so I have those as well. I'm
17 holding in my left hand a stack that is
18 significantly larger. And I just want to ask,
19 if I can, Mr. Carman, are you saying that today
20 the only ones you are going to talk about are
21 the Ben Yale ones?

22 MR. CARMAN: Well, this morning we gave a
23 packet to AIDA that contained their request. We
24 gave a packet to Mr. Vetne --

25 MR. ENGLISH: Right.

1 MR. CARMAN: -- related to his requests.
2 We gave a packet to Mr. Yale --

3 MR. ENGLISH: Right.

4 MR. CARMAN: -- that relate to his
5 requests.

6 MR. ENGLISH: Yes.

7 MR. CARMAN: Well, there are duplicates
8 within those packets. So you, in fact -- the
9 Yale and the AIDA packet that you held up
10 separately from -- pardon me, the AIDA and the
11 Vetne packet that you held up separate from the
12 AIDA packet may, in fact, be of similar size
13 because they are two sets in one hand and only
14 one set in the other hand.

15 MR. ENGLISH: But nonetheless, is it the
16 case, Mr. Carman, that there are things in the
17 AIDA -- I'm sorry, the American Independent
18 requests that are not duplicated in Mr. Yale's
19 material, correct?

20 MR. CARMAN: Yes.

21 MR. ENGLISH: And are you presenting
22 those today?

23 MR. CARMAN: Well, yes.

24 MR. ENGLISH: You are?

25 MR. CARMAN: Well, I have some of that

1 material to go through.

2 MR. ENGLISH: Okay. So those are the
3 ones that we only have -- we have limited
4 copies. Only is the wrong word because you have
5 done a lot of work and a lot of us know that.
6 So let me strike the word only. That we have
7 limited but valuable copies but we don't have,
8 unless AIDA tells us, more copies, as Mr. Yale
9 has made more copies. Similarly -- is that
10 correct, Mr. Carman?

11 MR. CARMAN: Well, yes, that would be my
12 understanding.

13 MR. ENGLISH: And similarly as to
14 Mr. Vetne's materials, there's some materials
15 within the Mr. Vetne materials that are
16 duplicated in the Mr. Yale's materials, correct?

17 MR. CARMAN: Correct.

18 MR. ENGLISH: But there are also
19 materials that Mr. Vetne asked for that you
20 provided that are not contained in my right
21 hand, which is to say, the materials for
22 Mr. Yale?

23 MR. CARMAN: Yes.

24 MR. ENGLISH: Are you presenting any
25 materials for Mr. Vetne this afternoon?

1 MR. CARMAN: Well, yes.

2 MR. ENGLISH: And again, unless
3 Mr. Vetne, who I believe left some time ago for
4 the day, has made additional copies, at the
5 moment what we have are the valuable, although
6 limited, number of copies from the Department,
7 correct?

8 MR. CARMAN: Correct.

9 MR. ENGLISH: And then if Mr. Miltner
10 wants to say something. I just wanted to
11 clarify what we have just in terms of copies for
12 a moment.

13 JUDGE CLIFTON: Mr. Miltner.

14 MR. MILTNER: Thank you. I just wanted
15 to note that we have not had the opportunity
16 that Mr. Yale has had to make copies of his
17 materials. And nor do we have copies of
18 Mr. Vetne's materials at this time.

19 But, again -- and we appreciate the
20 efforts that the Department has made to -- to
21 produce us the materials that they have and
22 would like the opportunity to go through them
23 with Mr. Carman because I understand
24 availability next week is limited for him.

25 Perhaps I'm wrong on that. But we can --

1 I think if we need to take a break to make some
2 copies or provide people opportunities to review
3 things, we can -- we can do that.

4 JUDGE CLIFTON: Now, let me ask you,
5 Mr. Carman. These blue tabs, do you know each
6 time there's a blue tab what attorney or request
7 group it's associated with?

8 MR. CARMAN: Well, there are -- the
9 tabbing is to separate the requests by attorney.
10 They start with Mr. Yale's request on the top,
11 and there's about six different tabs that follow
12 for Mr. Yale.

13 JUDGE CLIFTON: And when you say tabs,
14 you're not talking about the blue sticky note
15 tabs, you're talking about everything before I
16 get to the next blue sticky note tab?

17 MR. CARMAN: Well, yeah. Yes.

18 JUDGE CLIFTON: Okay. What's -- whose
19 are the next blue sticky note?

20 MR. CARMAN: The second reply to AIDA
21 data requests. We previously had material that
22 was made available on the web and which, during
23 early examination of myself, we had some
24 discussion of that information.

25 JUDGE CLIFTON: All right. And is the

1 corrected information, if there was any
2 correction to the first reply, on the web?

3 MR. CARMAN: Yes.

4 JUDGE CLIFTON: Okay. And we don't have
5 it here in front of us in these tabs?

6 MR. CARMAN: We have provided those
7 corrections in this packet of material.

8 JUDGE CLIFTON: Okay. What is the third
9 tab?

10 MR. CARMAN: Mr. Vetne.

11 JUDGE CLIFTON: Okay. And what is the
12 fourth tab?

13 MR. CARMAN: It's the hard copies of some
14 of the discussions we had earlier. Initially on
15 Monday, we provided AIDA with an -- with a brief
16 summary of what we had beyond Exhibits 5 through
17 20 that we made available to them, of which we
18 later discovered there was some corrections that
19 needed to be made.

20 JUDGE CLIFTON: And so this last tab is
21 also in response as to AIDA's requests?

22 MR. CARMAN: Yes.

23 JUDGE CLIFTON: All right. I need a
24 volunteer.

25 MR. ENGLISH: We're already doing this.

1 JUDGE CLIFTON: Okay. And you figured
2 out who is going to pay for them?

3 MR. ENGLISH: Your Honor, we haven't
4 figured that out yet, but we are making the
5 copies, so I guess that implies we may end up
6 paying for our copies of their documents. But
7 it's more important to get the documents than it
8 is to worry about who pays for them.

9 JUDGE CLIFTON: I agree. And if you want
10 to hold hostage their copies until they agree to
11 pay for it, it's all right with me.

12 MR. ROWER: We could run an individual
13 pool.

14 MR. CARMAN: I think that would be a
15 marketwide pool.

16 JUDGE CLIFTON: Mr. English, would you
17 approach?

18 MR. ENGLISH: Your Honor, what we have
19 done -- as you noted, about 10 or 15 minutes ago
20 there was one copy that was set before us. I
21 was looking at it. Mr. Beshore referenced it.
22 It occurred to us suddenly, why don't we do this
23 while we're talking about it.

24 We have sent that copy out to have six or
25 seven -- we're making it for ourselves. But I

1 think other people have their own copies. I may
2 be wrong, but we'll figure that out. We're
3 making at least six for now. We'll figure out
4 what we can do. I can probably send somebody
5 down to make more, actually.

6 JUDGE CLIFTON: I have one piece of paper
7 that you don't have.

8 MR. ENGLISH: Well, you may very well.

9 JUDGE CLIFTON: Because it was just
10 delivered. At least I don't think it was in
11 their packet. Mr. Beshore has it.

12 MS. FISHER: Yeah.

13 JUDGE CLIFTON: Okay. So when you say
14 we're making these six copies for us, who are
15 you leaving out?

16 MR. ENGLISH: I'll tell you who we're
17 leaving in.

18 JUDGE CLIFTON: Who are you leaving out?

19 MR. ENGLISH: Everybody other than
20 Mr. Beshore and Mr. English. We were making
21 them for Mr. Beshore, Mr. -- Dr. Cryan,
22 Dr. Yonkers, Mr. Kinser, Mr. English and
23 Mr. Connelly (sic). That's what I was thinking
24 of myself, we could probably run down with this
25 other document and increase the number. It's

1 probably easier to increase the number of
2 documents than it is to worry about making a
3 second copy.

4 I apologize for not thinking about
5 Mr. Carroll, but maybe we'll send somebody down
6 to make ten copies? I'm looking back at
7 Mr. Beshore.

8 JUDGE CLIFTON: I think ten would be
9 good. Are you saving one for John Vetne?

10 MR. ENGLISH: I decline to answer that
11 question on the grounds of proprietary
12 information.

13 JUDGE CLIFTON: The we're taking care of
14 this implies some sort of a community
15 responsibility here.

16 MR. ENGLISH: We will -- if there's ten
17 and six are going to cover us, we'll give one to
18 Mr. Yale, one to Mr. Vetne, one to ADI and one
19 to Mr. Carroll. So that's ten.

20 JUDGE CLIFTON: You're a good man. Thank
21 you.

22 MR. ENGLISH: You're very welcome.

23 JUDGE CLIFTON: While we are off record
24 awaiting those copies --

25 (A recess was taken from 1:58 to 2:45.)

1 JUDGE CLIFTON: All right. Let's go back
2 on record. We're back on record at 2:45.
3 Mr. Carman, I thank you for all of the
4 tremendous production of information that you
5 and your colleagues have assembled here.

6 And you remain under oath. You were
7 placed under oath when you first testified on
8 Monday. And I'd like you now to continue your
9 testimony addressing these additional documents
10 that you've brought.

11 CLIFFORD CARMAN
12 of lawful age being first duly sworn, was examined and
13 testified as follows:

14 REDIRECT EXAMINATION

15 BY MR. STEVENS:

16 Q. Thank you, your Honor. Garrett Stevens,
17 Office of the General Counsel U.S. Department of
18 Agriculture.

19 Cliff, you are back on the stand again,
20 and I guess you could be considered recalled, but you
21 are back on the stand.

22 Q. You have -- after a break we now want to
23 discuss, or at least put on the record some additional
24 materials that have been prepared pursuant to requests
25 of the parties to this hearing. And you have prepared

1 those documents and you have brought them with you
2 today?

3 A. Yes, I have.

4 Q. And to start out with, these have been
5 prepared by you or pursuant to your supervision?

6 A. Yes.

7 Q. From official records of the Department
8 of Agriculture?

9 A. Yes.

10 Q. They aren't presented for against any of
11 the proposals, are they?

12 A. That's correct.

13 Q. Okay. And could you -- could you go
14 through the documents in your own way, I guess.
15 Present, for the record, the requests that you received,
16 discuss them generally, I guess I would say, then -- and
17 then go to the specific documents and let's see if we
18 can do this briefly but completely, certainly. And
19 describe for the record the requests, what your answers
20 were, and what is contained in the documents.

21 MR. STEVENS: Your Honor, in terms of
22 marking them, I guess we could mark them as he
23 goes through them or he could discuss the --

24 JUDGE CLIFTON: If he wants to mark them,
25 and we can all have the same numbers, that might

1 be very useful, even though some of them will
2 never be used as exhibits, but they can still
3 have a label that way.

4 MR. STEVENS: That was my intention at
5 the beginning, was for him --

6 Cliff, if you would do that as you go
7 through them, page by page, request by request,
8 numbering them.

9 MR. STEVENS: I don't know where you want
10 to start, your Honor, if we want to start where
11 we left off. It will -- won't burden the record
12 certainly. It would be informative to the
13 record in terms of the numbers.

14 There will be a goodly -- there will be a
15 number of documents, certainly. And I guess
16 we'll get through this as best we can. Thank
17 you, your Honor.

18 (Exhibit 52 was marked for
19 identification.)

20 JUDGE CLIFTON: Thank you. Mr. Carman,
21 I'd like you to just choose natural numbering
22 according to what you've got. For example, now,
23 we'll start, the very first number will be 5-2,
24 52, Exhibit 52. Now, if you, for example felt
25 that the most orderly way for us to look at this

1 is 52 is just a one-page document, that's fine.

2 And then if we get into a number of
3 documents that are the same category, but just
4 different years or something of the like, you
5 may want them all to have the same number or you
6 may want them to have different numbers. And
7 it's entirely up to you.

8 THE WITNESS: Well, thank you, your
9 Honor.

10 A. To begin with, this morning we gave a
11 packet of material that we believe completed the
12 requests for three remaining parties that had
13 outstanding requests. And I would like to start with
14 the packet that we gave to Mr. Yale.

15 As you indicated, put number 52 on that.
16 It's a one-page cover sheet that describes what was
17 contained in the packet that we had prepared and
18 presented to Mr. Yale this morning.

19 The first group of sheets in that packet
20 are ten printouts that contain the -- by column,
21 indicated month and year, the cooperatives Class I price
22 for that location in case -- in terms of looking at the
23 page it would be Boston, Massachusetts.

24 What I've done is selected one city in
25 each of the ten orders where we have both a retail price

1 and a co-op Class I over-order price. It's simply a
2 rendition of that data in terms of hundredweights for
3 the first three columns, and then the collected MA milk
4 price for whole milk in that location, and then
5 converting the co-op Class I, Federal Class I, and the
6 over-order charges to per gallon numbers and then just
7 simply making a couple of comparisons of the retail
8 price to the co-op Class I price or to the Federal Order
9 Class I price.

10 Those ten pages, one for each of the ten
11 orders, can be 53. That relates to Mr. Yale's request
12 number 1 in which he was looking for container size
13 costs. And it's not exactly what he was asking for, but
14 I think it's a pretty close approximation.

15 (Exhibit 53 was marked for
16 identification.)

17 A. He was asking for a response, and which
18 we were not able to provide information. To do so, as I
19 indicated previously in testimony, if we expanded to all
20 ten orders, because we've all ready put out the eight
21 orders, which I believe is -- it's a previous exhibit.
22 We've already put it in, and I believe it was number 8.
23 Let me check.

24 MS. FISHER: 6, 6.

25 A. Exhibit Number 6. And it was available

1 on our website and Mr. Yale was asking why it couldn't
2 be included -- why it didn't include all ten orders. As
3 I explained earlier, there were differences from 2002 to
4 present in some of those times, so we elected to do it
5 for the eight orders so that would be compatible or
6 comparable.

7 To now go back and put 2007 and 2008 for
8 all ten orders would result in -- because the Pacific
9 Northwest is available elsewhere, you would disclose the
10 Arizona data, which is restricted. But we can do the
11 eight.

12 Item 3, which is the next set of data in
13 the packet of material for Mr. Yale is the utilization
14 by partially regulated handlers, where we can report it
15 without restrictions.

16 MR. ENGLISH: May I ask a question?

17 JUDGE CLIFTON: You may, Mr. English.

18 MR. ENGLISH: I hope this is not a
19 collation issue. But the first page of that
20 says Vetne Number 3, Northwest Order, Federal
21 Order 1.

22 MR. CARMAN: That's correct. If we get
23 to the Vetne --

24 MR. ENGLISH: So there's a carryover?

25 THE WITNESS: He asked for the same data.

1 MR. ENGLISH: And it happened to be the
2 same request number?

3 THE WITNESS: Yes, it happened to be the
4 same request number.

5 MR. STEVENS: So Cliff. This is Garrett
6 Stevens. We're dealing with 54 now or you are
7 going to give these individual numbers or
8 how ---

9 A. Yeah, make it 54.

10 (Exhibit 54 was marked for
11 identification.)

12 Q. The utilization document?

13 A. Yes. And it starts with the Northeast
14 Order. Federal Order 30 is the next page in that set.
15 Federal Order 14 and 131 and Federal Order 126.

16 JUDGE CLIFTON: So those documents are
17 all Exhibit 54?

18 THE WITNESS: Well, yes.

19 A. The next request that Mr. Yale had dealt
20 with total pounds of unregulated milk by
21 producer-handlers and exempt plants be identified. So
22 Mr. Vetne's number 1 request was asking for that same
23 information. So we have presented that information
24 where available. It begins with the Northeast Order.
25 The actual beginning title is, Vetne Number 1, Northeast

1 Order Federal Order 1.

2 JUDGE CLIFTON: All right. I'll
3 ask people to mark that as Exhibit 5-5, Exhibit
4 55.

5 (Exhibit 55 was marked for
6 identification.)

7 JUDGE CLIFTON: And would you,
8 Mr. Carman, just count the numbers of pages that
9 are all Exhibit 55?

10 THE WITNESS: There's a single page for
11 the Northeast Order. There's two pages for the
12 Appalachian Order. Upper Midwest Order is, I
13 believe, four pages in length. The Order 32,
14 the Central Order, is one page.

15 Order 124 and 131 are on the same sheet
16 as one page. And Order 126 is one page. I
17 would point out that we have an additional --
18 that sheet is out of order. Excuse me. Number
19 55.

20 JUDGE CLIFTON: Good. Thank you. Now, I
21 would encourage folks on their own keeping --
22 trying to keep these in the order that
23 Mr. Carman has talked about them, on their own,
24 to say, for example, page 1 of 12, page 2 of 12,
25 or something of the like, so that you can call a

1 witness's attention quickly to a document.

2 A. We have previously given Mr. Yale some
3 theoretical pools information, and so what we've added
4 in the packet this morning was a table for the Arizona
5 Order that was not contained in what we gave him
6 previously. The theoretical pools were already up on
7 the website and so we've just corrected one of the pages
8 on the website by what we submitted to Mr. Yeal -- Yale.

9 Q. How many pages is that?

10 A. It's a single page. Theoretical facts of
11 proposals 1 and 2 for the Arizona Order.

12 Q. It's a corrected document, am I right.

13 A. No, I think I'm still wrong on that.
14 That's -- that page is out of order.

15 BY MR. STEVENS:

16 Q. Let's get it corrected.

17 MS. FISHER: You should have all this.

18 A. That's not -- that's out of order.

19 (Off the record.)

20 MR. STEVENS: So we're still on 57. Have
21 you finished with 57?

22 MR. ENGLISH: That was.

23 MR. STEVENS: I'm not numbering right.

24 Okay. I'll make sure I'm numbering right.

25 JUDGE CLIFTON: Let's see. I don't know

1 where 56 is.

2 MR. STEVENS: You're right.

3 MS. FISHER: You're holding it.

4 MR. STEVENS: You're right 56, Arizona,
5 the Arizona pool document.

6 Q. I thought you said that was a one-page
7 document. Is it more than one page?

8 A. My page was out of place. It begins with
9 the packet that -- Estimated Impact of Proposal 1,
10 Eliminating the Producer-Handler Provisions Federal
11 Order 5.

12 JUDGE CLIFTON: Now, is that something
13 that was prepared in response to Ben Yale's
14 request?

15 THE WITNESS: Well, yes.

16 JUDGE CLIFTON: All right. And which
17 item number does it relate to on Exhibit 52?

18 THE WITNESS: Well, item number 3, the
19 same -- item number 3 of Mr. Yale's request for
20 the same report, can estimate pools be done if
21 Proposals 1 and 2 are adopted. And it turns out
22 to be the same as another request by Mr. Yale as
23 well as another -- a request by AIDA.

24 Q. And you are going to have that in these
25 documents, right, Cliff? You're going to have

1 information that you are talking about, which has been
2 requested by more than one party? And I guess as we go
3 over these, you might be mentioning the same document
4 again in a subsequent request?

5 A. Yes.

6 Q. So certainly take that into account as
7 you run through them. Thank you.

8 A. All right.

9 JUDGE CLIFTON: All right. So I'm
10 marking what you just described as Exhibit 56,
11 5-6. And it is a multipage document.

12 (Exhibit 56 was marked for
13 identification.)

14 MR. ENGLISH: What is the first page,
15 your Honor? I'm sorry.

16 JUDGE CLIFTON: It looks like this.

17 MR. ENGLISH: Looks like that. For the
18 record, Estimated Impact of Proposal 1
19 Eliminating the Producer-Handler Provision,
20 Federal Order 5, is that what it is?

21 THE WITNESS: Yes.

22 MR. ENGLISH: So that's the first page of
23 Exhibit 56.

24 JUDGE CLIFTON: And it looks to me like
25 it has 15 -- about 1-5, about 15 pages or more,

1 roughly.

2 A. There are three pages related to the
3 Appalachian Order.

4 MR. ENGLISH: Is it effectively the
5 reminder of the Ben Yale request, Mr. Carman?

6 THE WITNESS: No. I have one other set
7 of data.

8 BY MR. STEVENS:

9 Q. So, Cliff, how many pages is that part --
10 that part of it is multiple pages. The judge said 15.
11 You want to count them, so we know what number?

12 A. I have two pages for the Appalachian
13 Order -- pardon me, three pages for the Appalachian
14 Order. Arizona Order --

15 MR. ENGLISH: Four pages.

16 A. No, one page of the Arizona Order. I
17 have the --

18 MR. ENGLISH: I think it's four pages.

19 MR. STEVENS: Just give him a minute. We
20 need to go through them, make sure they have the
21 right number and everyone has the same number of
22 copies. Take your time. There's no hurry.

23 A. I have three pages for the Appalachian
24 Order.

25 MR. HOLLON: Titled how?

1 THE WITNESS: Estimated Impact of
2 Proposal 1 Eliminating Producer-Handler
3 Provision Federal Order 5 Appalachian marketing
4 area.

5 MR. HOLLON: Okay.

6 THE WITNESS: Theoretical Effect of
7 Proposals 1 and 2, Arizona Order, Federal Order
8 131 -- Federal Order -- excuse me. FMO 032
9 Price Calculations Assuming PD Exemption
10 Eliminated. Also on that page is calculations
11 assuming the 450 and then the combination.

12 JUDGE CLIFTON: Okay. Now, let me make
13 sure I'm with you. First, we have the
14 Appalachian. Then the second one was which one?

15 MR. ENGLISH: Your Honor, this one. It's
16 a one page.

17 JUDGE CLIFTON: Arizona.

18 MR. ENGLISH: At least in the package
19 that we had -- that may not be identical to
20 yours -- it was the last page of that section.

21 JUDGE CLIFTON: Okay. Is it Arizona,
22 Mr. Carman?

23 THE WITNESS: Well, yes.

24 JUDGE CLIFTON: Okay. And then after
25 Arizona -- now, Arizona has -- is it just a one

1 page document for Arizona?

2 THE WITNESS: Well, yes. There were no
3 plants affected by the three scenarios.

4 JUDGE CLIFTON: All right. So that's
5 part of Exhibit 56, is this one-page document
6 with regard to Arizona. All right. And what's
7 next in 56?

8 THE WITNESS: Well, a one-page document
9 dealing with the Central Order, 32, yes.

10 MR. ENGLISH: Your Honor, I'm holding up
11 what Mr. Carman -- it has three different charts
12 on it.

13 THE WITNESS: Well, the three scenarios,
14 all on one page.

15 JUDGE CLIFTON: And that's FMO 032.
16 That's the Central Order. Good. Thank you.
17 And that's still part of Exhibit 56.

18 MR. ENGLISH: Are we calling that page 5?

19 MR. BESHORE: Yes. I am.

20 A. Then the next order is the Mideast Order
21 so Producer-Handler Hearing Change in the Pool Values of
22 Statistical Uniform Price per Proposals 1, 2 and 3.
23 Federal Order 33 Mideast Marketing Area. It's a
24 one-page, part of 56. The next one is a one-page for
25 the Northeast Order. Pool price recalculations under

1 three scenarios, Northeast Milk Marketing Area.

2 The next one should be a three page for
3 the Order 1 26, i.e., the Southwest Order.

4 JUDGE CLIFTON: All right. And we're
5 still in Exhibit 5-6, 56.

6 MR. ENGLISH: Pages, 8, 9 and 10.

7 A. Federal Order 307, there should be two
8 pages, scenarios 1 and 2 on page 1, scenario 3 on page 2
9 for the Upper Midwest Order.

10 JUDGE CLIFTON: Those are pages 11 ran
11 12?

12 THE WITNESS: And the last two pages, I
13 think the one page is repetitive, but there's
14 one for the Pacific Northwest Order and then
15 this was the extra page that I was trying to get
16 started with, which is the Arizona Order. And
17 we've already covered the Arizona Order.

18 MR. ENGLISH: So we relabeled that page
19 5 -- or page 4, I'm sorry. So 124 would be page
20 13, your Honor, I believe.

21 THE WITNESS: Well, I think so.

22 MR. ENGLISH: Let's just get everything
23 in, please.

24 THE WITNESS: Yes.

25 BY MR. STEVENS:

1 Q. Does that complete Mr. Yale's requests or
2 are there more documents for Mr. Yale?

3 A. No, there's one more set of documents for
4 Mr. Yale, and these were -- we had previously given him
5 his calculation of, quote, the theoretical pools, which
6 were -- could a 3 million pound, 2 million pound,
7 1 million pound producer-handler be assumed for each of
8 the 10 orders and the calculation done.

9 MR. YALE: Here, your Honor, is a copy of
10 that which may or may not be in his set, but it
11 wasn't in the copies. I'll give you a copy.

12 JUDGE CLIFTON: Now, this looks like --

13 THE WITNESS: Your Honor, when I was on
14 the stand before, we had posted out on the web
15 the theoretical pools. We, after examining them
16 again, discovered three pools that we felt were
17 not representative and we had the Market
18 Administrators redo them. That's what's in the
19 packet that I'm presenting today, is a corrected
20 pool, theoretical pools for the Upper Midwest
21 Order, the Southeast Order and the Florida
22 Order.

23 BY MR. STEVENS:

24 Q. So this would be the correct version of
25 those, the latest?

1 A. The latest.

2 Q. The most recent versions of those?

3 A. The most recent version and should be
4 replaced if anybody had downloaded the theoretical pools
5 from the website previously.

6 Q. And so this re-does what is on the -- or
7 is another shot at what was on the website?

8 A. Yes.

9 Q. And the new version will be up on the
10 website.

11 A. The new version has already been posted
12 to the website. The previous versions are no longer
13 there that were available.

14 Q. So the previous versions have been taken
15 off the website and the new, as we might say, corrected
16 versions or redone versions are now up on the website?

17 A. Yes.

18 Q. And that's what you are presenting here
19 now?

20 A. Yes.

21 Q. And it relates to the orders that you
22 have -- that you have mentioned?

23 A. The Upper Midwest, the Florida Order for
24 Number 6 and the Southeast Order Number 7.

25 Q. And that is 57. And that is what we are

1 now referring to as Exhibit 57?

2 (Exhibit 57 was marked for
3 identification.)

4 A. Yes.

5 MR. ENGLISH: May I just, for one second?
6 I believe Mr. Yale's copies of these handouts
7 may be bigger than that, because it may include
8 the other materials.

9 Q. That's the whole point of what I'm trying
10 to go through here is to make sure that the latest
11 version is what you all are looking at. And Mr. Yale
12 has been very helpful. We want to make sure that you
13 have the latest version, and the one that has replaced
14 every previous version, and so he has now described them
15 as -- and that is 57?

16 A. 57.

17 THE WITNESS: But Mr. Yale -- Mr. Yale,
18 the copy you gave me was for the response to
19 number 3, not the response to number 6.

20 MR. YALE: The back page was on. Oh, I'm
21 sorry.

22 THE WITNESS: We can calculate a
23 theoretical pool on all orders, so I would --
24 the packet you gave me shows zero impact in the
25 Appalachian Order.

1 We have a -- out on the web, if you go,
2 there's a theoretical for a 3 million pound
3 plant in each of the ten orders.

4 MR. YALE: Right.

5 THE WITNESS: Of which three have been
6 corrected since they were corrected this
7 morning.

8 MR. YALE: 6, 7 and 30?

9 THE WITNESS: 6, 7 and 30 have been
10 changed from what was there before.

11 MR. YALE: And I thought this reflected
12 those changes?

13 THE WITNESS: This is what you gave me,
14 right?

15 MR. YALE: I gave you the wrong sheet. I
16 gave everybody the wrong sheet. This is --

17 THE WITNESS: Yes, that's it.

18 MR. YALE: Let me get that for everybody
19 over here.

20 JUDGE CLIFTON: Let's go off for just a
21 moment.

22 (Off the record.)

23 JUDGE CLIFTON: All right. We're back on
24 record at 3:16. Mr. Carman, with regard to
25 Exhibit 57, what are we looking at?

1 A. Exhibit 57 is theoretical pools. It
2 starts with Mideast, at least the copy I have, Federal
3 Order 33. On the back side of that is the second -- a
4 second page for the Mideast Order. So that --

5 JUDGE CLIFTON: Mine actually starts with
6 Midwest. So let me find Mideast.

7 MR. STEVENS: I think yours is upside
8 down.

9 JUDGE CLIFTON: Was mine upside down?
10 Oh, that makes it so much easier.

11 MR. STEVENS: There you go. I find that
12 too, your Honor. Some days are like that, and
13 some days are not.

14 JUDGE CLIFTON: All right.

15 A. 57 is an attempt to be green. It's
16 printed on the back and front of each of the pages. It
17 starts with the Mideast Order. There are three pages
18 for the Mideast Order printed front to back, scenario 1
19 at 3 million pounds, take 2 million pounds, and then
20 1 million pounds.

21 The next page is Federal Order 5, and
22 it's a single page representing three levels of 3
23 million, 2 million and 1 million going across the page.

24 JUDGE CLIFTON: Now, is it important you
25 go in that order? Mine are stapled in a

1 different order, I think. No, I just have to
2 remember to look on the back. Okay. I'm fine.

3 A. The next page I have is the Arizona
4 Order. Again, a single page. No, I stand corrected.
5 It's a front and back for the Arizona Order.

6 Q. And certainly, Cliff, these documents
7 having gotten them from the individual Market
8 Administrators' offices on the format, the presentation
9 of it may not be exactly the same. But unless you say
10 so, I suppose, the information contained therein as
11 described by the document is similar -- I mean, it is
12 the same information?

13 A. Yes.

14 Q. For all the orders in somewhat different
15 format, but the information is -- is set forth there?

16 A. Yes.

17 Q. So I didn't mean to interrupt. Continue
18 with -- you were at Arizona I guess FO 131 and then
19 there are subsequent pages?

20 A. The next table is 32. It's the three
21 scenarios. They're all contained on one page. The next
22 one is the Southeast Federal Orders 7 and -- 7 and 6
23 were printed together, so they go from -- they go in the
24 lower right-hand corner as being numbered from page 1 of
25 6, 2 of 6, 3 of 6, 4 of 6, 5 of 6 and 6 of 6. So that

1 would be Federal Order 7 and Federal Order 6.

2 The next page is the Northeast Order, all
3 three scenarios on one page. The Pacific Northwest
4 Order is front to back, two pages indicated in the lower
5 right-hand corner as page 1 of 2 and 2 of 2. And the
6 next page is the Federal Order 126, the Southwest Order.
7 And the last page is the Upper Midwest Order, Federal
8 Order 30.

9 Q. That comprises Exhibit 57?

10 A. Yes.

11 MR. HOLLON: I would point out that all
12 of these documents --

13 JUDGE CLIFTON: Could you come to the
14 microphone, please? And I don't think --

15 MR. HOLLON: Elvin Hollon, Dairy Farmers
16 of America. In the stack that the judge handed
17 out that is rubber banded together, says
18 Packaged Disposition of Organic Fluid Milk.
19 That's the front page. Every one of these are
20 in the back 15 pages of that.

21 JUDGE CLIFTON: Okay.

22 MR. WOODY CARROLL: What's the one --

23 MR. CARROLL: Organic milk.

24 MR. HOLLON: There's a stack that says,
25 Organic Milk. You said you had a whole complete

1 stack of it. So we copied them all.

2 JUDGE CLIFTON: Except nobody took my
3 set.

4 MR. HOLLON: You gave them to us.

5 JUDGE CLIFTON: No. Actually, I didn't
6 give them to you.

7 MR. ENGLISH: You Honor, I think
8 Mr. Hollon was in and out of the room. The set
9 on the back table was identical to your set,
10 save the one extra page.

11 JUDGE CLIFTON: Okay.

12 MR. ENGLISH: What Mr. Hollon is trying
13 to say, for those who might not have received a
14 copy from Mr. Yale separately, when I came back
15 and handed out copies, I noted that there was a
16 tab, a tab labeled Mr. Yale, there was a tab
17 labeled AIDA, there was a tab labeled Mr. Vetne
18 and there was a fourth tab with no label on it.

19 And that section, I believe Mr. Hollon is
20 pointing out, if you look in it, so this will
21 help Mr. Carroll, who may not have received a
22 copy --

23 MR. CARROLL: Yeah, I haven't.

24 MR. ENGLISH: -- you will find -- and I
25 will help you in a second -- you will find this

1 material that Mr. Carman has just been referring
2 to --

3 JUDGE CLIFTON: Good.

4 MR. ENGLISH: -- in that section.

5 JUDGE CLIFTON: Excellent.

6 MR. ENGLISH: As soon as I find it, I
7 will show it to you.

8 JUDGE CLIFTON: Now, does that complete
9 the Yale set, Mr. Carman?

10 THE WITNESS: Yes, I believe it does.

11 JUDGE CLIFTON: All right.

12 A. Turning to the data set that we gave out
13 to AIDA this morning, we had -- we need to point out
14 that there's a previous page, that's the extra page that
15 Mr English has as last in the set. And it lists the
16 information that we made available to American
17 Independent Dairy Alliance on Monday and is available on
18 the website.

19 JUDGE CLIFTON: And what does it look
20 like?

21 THE WITNESS: It's a single page.

22 JUDGE CLIFTON: (Indicating.)

23 THE WITNESS: Yes.

24 BY MR. STEVENS:

25 Q. Now, correct me if I'm wrong. This

1 material was given to AIDA on Monday?

2 A. Yes.

3 Q. And the piece of paper that you are now
4 describing was included in that -- in giving documents
5 to them?

6 A. Yes.

7 Q. Please continue.

8 JUDGE CLIFTON: And so shall we mark it
9 as an exhibit probably?

10 MR. STEVENS: Your Honor, I might
11 suggest, I guess, that when I'm looking at
12 the -- 52, that was Yale's request cover sheet.
13 And so I'm, shorthand, referring to this as
14 AIDA's request cover sheet.

15 JUDGE CLIFTON: All right. And we'll
16 call it Exhibit 5-8, 58.

17 (Exhibit 58 was marked for
18 identification.)

19 MR. STEVENS: And then, I believe, as
20 with the other request, that now he will relate
21 individual numbers for the -- for the
22 information given over in that request or
23 subsequent requests as he testified to.

24 A. The -- I have a one-page lengthy document
25 that relates to AIDA -- AIDA's first request for data,

1 item 13, and this dealt with the -- recalculating the
2 pools for the depooled milk. That page, which I want to
3 number 59, details what we were able to provide and what
4 we weren't able to provide in terms of the recalculated
5 pools. In effect, we were to able provide data for only
6 three orders. And two of those orders have
7 restrictions.

8 (Exhibit 59 was marked for
9 identification.)

10 JUDGE CLIFTON: And please read into the
11 record the title of Exhibit 59, 5-9?

12 THE WITNESS: Response to American
13 Independent Dairy Alliance, April 16th, 2009,
14 request number 1, item 13, Federal Order 1. The
15 data is restricted as it is for 5. There is no
16 depooled milk in Order -- in Federal Order 6.

17 Federal Order 7, all the data is
18 restricted.

19 Federal Order 30, we provide some of the
20 data as there are restrictions for certain
21 months.

22 32, the depooled data was put back in the
23 pool and there are no restrictions on those
24 calculations.

25 The Mideast Order, again, there was data

1 provided, but with certain months restricted.
2 124, 126, and 131, there's -- 124 and 126,
3 there's restricted data. And there was no
4 depooling in 131.

5 The next three pages present -- pardon
6 me, the next two pages present the Upper Midwest
7 response with the restricted months so
8 indicated, page 1 of 2 and 2 of 2.

9 JUDGE CLIFTON: Shall that be part of
10 Exhibit 60? Or part of 59, part of 59?

11 MR. STEVENS: Yes.

12 JUDGE CLIFTON: Okay. That will still be
13 part of 59.

14 BY MR. STEVENS:

15 Q. Are you finished with 59, Cliff, or is
16 there more?

17 A. There are two more pages.

18 Q. Finish that, and then I'm going to ask
19 you a question about 58 and 59.

20 A. The next page is for Federal Order 32.
21 There were no restrictions on the data for the milk that
22 was pooled -- that would have been pooled if it hadn't
23 been depooled, or however you want to phrase that.

24 And then the final page of 59 is the
25 Mideast marketing area, with the indicated restrictions

1 on the table.

2 Q. Now, are you finished with 59?

3 A. I hope so.

4 Q. Now, let me make sure the record
5 correctly reflects Number 58, the page that you
6 described from AIDA. That refers to the information
7 that you gave to them today and not the information that
8 you gave to them on Monday?

9 Because when you first testified, I
10 believe you said that was Monday's information. Later
11 in the packet is the information that you gave on
12 Monday. Is that correct?

13 A. Yes.

14 Q. So let's make sure the record reflects
15 that, that 58 is the information that you gave them
16 today, recitation of what it is and what it is not and
17 why it is not. And 59 is -- are the pages -- is a cover
18 page and then followed by the pages that contain that
19 information?

20 MR. WOODY CARROLL: Can I just see -- can
21 somebody hold 58 up so I know what you are
22 talking about?

23 THE WITNESS: That page.

24 Q. It's a short document. These cover
25 documents, just so you understand -- and before we leave

1 here today, I want to make sure that everyone gets what
2 they need for their purposes.

3 MR. CARROLL: We could be in error, your
4 Honor, but looks as if what we have is one
5 sheet.

6 MR. WOODY CARROLL: That's the only thing
7 I have that is close to that. That's a
8 different page.

9 MR. STEVENS: I believe what you are
10 holding up there, sir, is the copy from Monday,
11 the first response.

12 MR. WOODY CARROLL: Okay.

13 MR. STEVENS: AIDA has gotten at least
14 two responses. The first response was sent to
15 them on Monday with the cover page and the
16 document.

17 MR. CARROLL: We appear not to have it.
18 We're in a state of confusion.

19 MR. WOODY CARROLL: I don't have that.

20 MR. ENGLISH: Yes, you do.

21 MR. STEVENS: Your Honor, I ask that the
22 court reporter not record the conversation
23 between counsel.

24 JUDGE CLIFTON: Let's go off the record.
25 (Off the record.)

1 JUDGE CLIFTON: All right. Let's go back
2 on record. All right. We're back on record at
3 3:33. Mr. Carman.

4 A. The next set of data relates to the cost
5 to producer-handlers if scenario 1 -- pardon me, if
6 Proposal 1 is taken out, eliminated, and they became
7 regulated, what's their current own-farm milk pounds and
8 they would owe to the administration each of the orders
9 varying amounts depending on the order.

10 First one is the Northeast Order, and it
11 relates to the actual producer-handler pounds in the
12 order.

13 JUDGE CLIFTON: I'm sorry, Mr. Carman. I
14 have to go back.

15 This is if Proposal Number 1 is
16 eliminated, or this is if the producer-handler
17 status is eliminated?

18 THE WITNESS: Proposal 1 is to eliminate
19 the producer-handler status.

20 JUDGE CLIFTON: Right. Which is
21 eliminated to produce these statistics, the
22 proposal or the producer-handler status?

23 THE WITNESS: The producer-handler is --
24 becomes a regulated plant for all of their
25 own-farm production.

1 JUDGE CLIFTON: Okay. Okay.

2 A. The first page is for the Northeast
3 Order. It shows the total pounds of own-farm milk for
4 the producer-handlers and the administrative assessment
5 is 4 1/2 cents, so it's simply multiplication of the
6 pounds times the rate.

7 JUDGE CLIFTON: And shall I mark the
8 first page of that Exhibit 60? 6-0.

9 (Exhibit 60 was marked for
10 identification.)

11 THE WITNESS: 60. We're going to have
12 one of these for a number of the orders. So --

13 JUDGE CLIFTON: So we'll have several
14 pages of Exhibit 60?

15 THE WITNESS: Yes, ma'am.

16 JUDGE CLIFTON: Good. Thank you.

17 A. The second page is for the Appalachian
18 Order. The data was restricted, so there's theoretical
19 volumes put in there, 250,000 pounds, 5 -- 500,000, a
20 million, 3 million and 5 million. The rate of
21 assessment for the Appalachian Order is 4 cents per
22 hundredweight.

23 In the Appalachian Order, there's also a
24 requirement for Class I milk of 15 cents per
25 hundredweight that goes into supplemental transportation

1 pool. We have assumed that all of those volumes of milk
2 would be at Class I, 100 percent Class I utilization
3 plan. Not likely to be that case, but that's just the
4 assumption we made. So it shows the cost for
5 administration and it shows the transportation costs in
6 the aggregate.

7 The next page is for both Orders 6 and 7.
8 Again, theoretical levels. There is no transportation
9 credit assessment in the Florida Order. So it's just
10 the administrative assessment.

11 In the Southeast Order, there is a
12 transportation credit but it's at 30 cents rather than
13 15 cents a hundredweight. So you see the impact of the
14 admin fee at 4 1/2 cents in the Southeast and 4 cents in
15 the Florida Order and the 30 cents for a total cost.

16 The next page is the Upper Midwest Order.
17 In this case, the data was restricted but what we have
18 is the aggregate producer-handler data for the 15 months
19 of January 2008 through March of 2009. That's the total
20 pounds times the admin fee of 3 and three-quarters cents
21 per hundredweight.

22 Next table is the Central Order. It
23 shows the actual producer-handlers pounds, the
24 administration rate at 5 cents a hundredweight and total
25 administration costs.

1 The Mideast, the producer-handler data is
2 restricted. So, again, we're using the theoretical
3 pounds to give an example.

4 Same thing for the Southwest Order,
5 theoretical was of 250, 500, a million, 3 million and
6 5 million pounds times the assessment rate of 4 1/2
7 cents.

8 The next page is Pacific Northwest Order.
9 It shows the actual producer-handler data for each of
10 the months, and you appropriate 3 cents administrative
11 fee and the resulting values.

12 We do not have, for the Arizona Order,
13 the theoretical calculation, but the administration fee
14 is 3 1/2 cents. And I think the record -- the examples
15 above can give you necessary information needed to
16 calculate the theoretical for the Arizona Order. That's
17 all of Exhibit 60.

18 JUDGE CLIFTON: All right. Help me,
19 Counsel. I got nine pages for Exhibit 60. Does
20 everybody agree with that?

21 THE WITNESS: I would agree with that
22 because there was one order with two on it and
23 there were ten orders. One page with two on it.

24 JUDGE CLIFTON: Woody Carroll says I have
25 nine.

1 MR. WOODY CARROLL: I have nine.

2 JUDGE CLIFTON: Yes, we're good. Thank
3 you. Mr. Carman.

4 A. The next packet I have is where we can
5 provide the producer-handler utilization by class, if
6 known. This happens to have also been information
7 requested by Mr. Vetne and Mr. Yale. So some of this is
8 probably repetitive in the package that we looked at
9 already.

10 The Northeast Order utilization are
11 reported for the producers-handlers.

12 JUDGE CLIFTON: I'm going to mark this as
13 Exhibit 61.

14 (Exhibit 61 was marked for
15 identification.)

16 A. Appalachian Order, the data is
17 restricted. There's a two-page table that shows the
18 number of producer-handlers for the appropriate months,
19 but that's all that is. I would point out that there is
20 a footnote on page 2 that provides some information
21 about the fact that we don't have any data going back
22 to -- in 2002, and it may or may not have -- would
23 have -- could have resulted in data.

24 Upper Midwest Order is the next page. It
25 goes on for four pages. So -- in the middle on the

1 bottom is numbered as 1 of 2, 1 of -- excuse me 1 of 4,
2 2 of 4, 3 of 4, 4 of 4.

3 The next page is for the Central Order,
4 the monthly data is not presented. Rather we're
5 presenting just the annual data in order to avoid some
6 restrictions by doing this. We can give you the total
7 in those utilizations.

8 And the next page is for both the Arizona
9 and the Pacific Northwest Orders aggregated across in
10 order to not disclose proprietary information in the
11 Arizona Order.

12 And the last page is the -- is the total
13 Class I sales for the Southwest Order. Classes II, III
14 and IV are restricted, excuse me, in all months.

15 Q. Okay. And that completes 61?

16 A. Yes.

17 MR. WOODY CARROLL: Ten pages.

18 JUDGE CLIFTON: Ten pages is what I've
19 got as well. Mr. English.

20 DR. CRYAN: I believe that's identical to
21 Exhibit Number 55.

22 JUDGE CLIFTON: Thank you, Dr. Cryan.

23 A. The next set of data in the packet is
24 material that we presented to Mr. Vetne this morning.
25 The first document is a one-pager detailing our response

1 to his requests, what we can and cannot provide.

2 Q. So we might refer to that as the Vetne
3 request cover sheet?

4 A. Yes.

5 Q. Number 62?

6 A. Yes.

7 Q. One page.

8 (Exhibit 62 was marked for
9 identification.)

10 MR. WOODY CARROLL: That's the Mallorie's
11 Dairy, Country Morning Farms and Nature's Dairy?

12 A. Yes.

13 Q. So this is a one-page document. I think
14 we can say for the record, can't we, Cliff, that you had
15 one response to his request, which is this response,
16 that instrument?

17 A. Yes.

18 Q. Because some others had more than one
19 response. But this request is the response to
20 Mr. Vetne's record request?

21 A. Yes. Mr. Vetne's was the last received
22 and it's last in this stack.

23 Q. Conforming with the theory of last in,
24 last out?

25 A. Correct. It's labeled Vetne Number 1.

1 The packet I have, we've already seen it, I believe,
2 elsewhere, but it starts with the Northeast Order. The
3 Appalachian Order is two pages in length. The Upper
4 Midwest Order --

5 JUDGE CLIFTON: I'm going to mark these
6 as Exhibit 63.

7 (Exhibit 63 was marked for
8 identification.)

9 MR. STEVENS: Thank you, your Honor.

10 Q. Producer-handler utilization by class?

11 A. Yes.

12 MR. YALE: That's a new exhibit?

13 MR. STEVENS: 62.

14 THE WITNESS: It's 63.

15 MR. STEVENS: 63, I'm sorry.

16 A. And it's identical to a prior set. Just
17 when we handed everything out, some of it was the same,
18 i.e., individuals are asking for the same set of data.

19 THE WITNESS: The next set of documents,
20 64, your Honor --

21 JUDGE CLIFTON: Let's see. What's the
22 last one in this packet referring to, which
23 Federal Order?

24 THE WITNESS: It's the Southwest Order,
25 126. It shows the data of producer-handlers for

1 Class I and the Class II, III and IV are
2 restricted in all months.

3 Q. Now, correct me if I'm wrong, Cliff, this
4 document that you are now referring to, 63, is the same
5 information, or tell me if it's not, as 61?

6 A. I believe it is.

7 Q. And this is because you got requests from
8 people that asked for the same information?

9 A. Yes.

10 JUDGE CLIFTON: Good. All right.

11 A. The next document I'll pick up is Vetne
12 Number 2, Northeast Order Federal Order 1, utilization
13 by class by fully regulated distributing plants
14 receiving 70 percent or more of their raw milk from non
15 9(c) producers.

16 JUDGE CLIFTON: All right. I'm going to
17 mark that as Exhibit 64.

18 (Exhibit 64 was marked for
19 identification.)

20 A. Page 2 and 3 of Exhibit 64 are for the
21 Appalachian Order. The data of individual pounds are
22 restricted, but we do have some indication of percentage
23 of direct producer receipts.

24 MR. WOODY CARROLL: Where are you?

25 JUDGE CLIFTON: Let's go off record just

1 a moment at 3:47.

2 (Off the record.)

3 JUDGE CLIFTON: We are back on record at
4 3:48.

5 A. Starting again in Exhibit 64, starts with
6 the Northeast Order. Pages 2 and 3 are for the
7 Appalachian Order. Page 4, 5 and 6 are for the Upper
8 Midwest Order. Page 7 is for the -- is -- is a -- also
9 for the Upper Midwest Order, but are the annual numbers
10 rather than the monthly numbers. The monthly numbers,
11 there were no totals, so we've just provided a page that
12 shows the annuals.

13 And the last two pages are -- pardon me,
14 the last -- the last three pages, the last -- the next
15 two pages are for the Mideast Order, a two-page
16 document.

17 And the last is for the Pacific Northwest
18 and the Arizona Order. All of the data for the Arizona
19 Order is restricted. Some data for the Pacific
20 Northwest is available relative to the request by
21 Mr. Vetne.

22 JUDGE CLIFTON: All right. Counsel, I
23 have ten pages for Exhibit 64. I'm seeing nods
24 in agreement.

25 A. What I picked up now is to be Exhibit 65.

1 It relates to Mr. Vetne's request for partially
2 regulated plants' utilization by class. We were able to
3 respond for the Northeast Order. We have a response for
4 the Upper Midwest Order, some data for the Arizona and
5 Los Vegas -- excuse me, Arizona and Pacific Northwest
6 Order together, and the Southwest Order is the last page
7 of the four pages.

8 Q. Four pages total -- four pages total,
9 Cliff?

10 A. That's what I come up with.

11 Q. Thank you.

12 (Exhibit 65 was marked for
13 identification.)

14 A. I lost my numbers. Number 66 is the
15 receipts of milk and milk products by producer-handlers
16 from sources other than own-farm production. As related
17 before, there are three others that don't allow that to
18 occur. So those three orders wouldn't have a response.
19 What we have is for the Northeast Order, there was none.
20 For the Upper Midwest Order and then for the Pacific
21 Northwest Order, some data is available and it's all --
22 it's either zero or restricted in the Arizona Order.

23 JUDGE CLIFTON: All right. So for the
24 Pacific Northwest and Arizona Orders, I'm
25 marking that as Exhibit 66, page 3.

1 (Exhibit 66 was marked for
2 identification.)

3 A. There are three pages in Exhibit 66, the
4 Northwest Order; a single page that says that there was
5 none for the Upper Midwest Order, and a single page that
6 covers two orders, Pacific Northwest and the Arizona
7 Order.

8 The next packet of information is the
9 packet that shows the initial material that was made
10 available to AIDA and to Mr. Yale. It's a cover sheet
11 that relates what we were providing and what we were
12 working on.

13 Q. Okay. So now this packet, which I
14 believe is the last packet --

15 A. Yes.

16 Q. -- of four that you have been describing
17 for the record today, includes material that was -- was
18 prepared and given to parties at that hearing which you
19 identified on Monday or some other day?

20 A. On Monday.

21 Q. And was put up on the USDA AMS website?

22 A. Yes. In fact, some of it was put up
23 prior to Monday.

24 Q. And some of this -- and correct me if I'm
25 wrong again -- some of this has been supplanted by

1 subsequent information production that you made today?

2 A. Yes.

3 Q. Thank you. And that -- and those changes
4 are on the website or will be on the website soon?

5 A. Yes.

6 Q. We were asked to provide some information
7 on organic. The first page of this second document --
8 of this last doc -- set of documents relates to the
9 amount of organic sales --

10 JUDGE CLIFTON: Before you go there,
11 let's mark the requested page as
12 Exhibit 68.

13 MR. WOODY CARROLL: Can somebody hold it
14 up so we've got the right --

15 JUDGE CLIFTON: This will 68.

16 THE WITNESS: I have it as 67.

17 JUDGE CLIFTON: Okay, good. Thank you
18 all for keeping me straight here. So that's 67.
19 So what Mr. Carman is now talking about will
20 begin 68.

21 (Exhibit 67 was marked for
22 identification.)

23 (Exhibit 68 was marked for
24 identification.)

25 A. 68 is a one-page -- pardon me, 68 is a

1 one-page document that's been available on the website.
2 And it's data that we have available from Washington
3 looking by order of organic Class I route sales compared
4 to total Class I route sales.

5 MR. WOODY CARROLL: Now, I'm lost. Can
6 you hold it up so I can -- okay. This thing?

7 JUDGE CLIFTON: (Nodding head.)
8 (Exhibit 69 was marked for
9 identification.)

10 A. 69 is a one-page document that details by
11 month the total across all orders of depooled milk that
12 has been available on the website. In fact, I -- there
13 was some questions about that earlier.

14 MR. BESHORE: That's 69?

15 JUDGE CLIFTON: (Nodding head.)

16 A. That was 69.

17 Number 70 is a packet that details the
18 amount total producer milk, member producer milk,
19 nonmember producer milk, total producers, members and
20 nonmembers, by order. Not all months are available
21 because some of it is restricted data. My version is a
22 very thick document. It begins with the Appalachian
23 Order beginning in January of 2000 and runs through
24 March of 2009. I believe that takes three pages to do
25 that.

1 MR. BESHORE: Is this Exhibit 70?

2 THE WITNESS: 70 is what I have on it.

3 (Exhibit 70 was marked for
4 identification.)

5 A. The next order covered in there is the
6 Arizona Order, runs from four pages. So in the lower
7 right-hand corner, it's numbered 1 of 4, 2 of 4, 3 of 4
8 and 4 of 4.

9 The Central Order is laid out next. I
10 think that takes three pages to do.

11 Order 6 is covered in three pages. Order
12 33 is three pages. Northeast Order in one page.
13 Pacific Northwest Order in four pages. The Southwest
14 Order is three pages -- pardon me, that's the Southeast
15 Order. The Southeast Order, Order 7, is three pages.
16 The Southwest Order, I believe, is four pages to do it.

17 The Upper Midwest Order. In this case,
18 you'll note that the months and the annuals are all in
19 the document. And this takes four pages to do that.

20 And then the last part is the -- why is
21 that -- mine is duplicated. I have the Upper Midwest
22 appearing again.

23 Q. Well, let me say, Cliff, if there are
24 duplicate pages in your copies, and there are duplicate
25 pages in our copies that have been distributed, I'd ask

1 people to use their best judgment in that respect and
2 remove the extra copies.

3 A. Yes.

4 JUDGE CLIFTON: So if we take off four
5 pages as duplicates, and I think --

6 MR. STEVENS: I believe then it's 32
7 pages, your Honor, and we apologize for that.

8 JUDGE CLIFTON: Small problem.

9 MR. STEVENS: It's a lot of documents.

10 JUDGE CLIFTON: All right. So Exhibit
11 7-0, 70 has 32 pages.

12 Q. Now, let me ask you, Mr. Carman, do you
13 have any additional documents or does that complete the
14 package?

15 A. I believe that completes the package.

16 JUDGE CLIFTON: All right. Now, I have
17 additional documents.

18 MR. STEVENS: And I don't know if I have
19 an answer to that, but what I would offer to
20 your Honor is Mr. Yale handed out some documents
21 and those might be the additional documents.
22 They are not our documents that we're putting in
23 at this point.

24 JUDGE CLIFTON: Okay.

25 MR. WOODY CARROLL: That's this stuff

1 right here.

2 MR. STEVENS: That was the bottom.

3 MR. WOODY CARROLL: The bottom?

4 MR. STEVENS: Well, the bottom. It was
5 distributed after this first group was
6 distributed by Mr. Yale.

7 MR. BESHORE: Part of 57.

8 MR. STEVENS: And it's part of 57. Yes,
9 it is. But we have 57 in there, right, and this
10 is part of -- more copies of 57?

11 MR. CARROLL: I don't believe that we
12 have 58 on the tables.

13 JUDGE CLIFTON: Let's go off record for
14 just a moment while Messrs. Carroll check it.
15 It's 4:01.

16 (Off the record.)

17 JUDGE CLIFTON: We're back on record at
18 4:02. Mr. Stevens.

19 MR. STEVENS: Well, now having -- having
20 presented the documents, I guess we're at the
21 point where if people have questions about them,
22 we're prepared to -- to offer Mr. Carman to
23 answer any questions they may have about the
24 documents.

25 We realize that this is a lot of

1 material. And maybe people would have to review
2 this for a little while and then have questions,
3 which means Mr. Carman, unfortunately, may have
4 to come back to the hearing next Monday and be
5 available. I don't know what his schedule is.

6 And I don't want to speak for him, but we
7 want these documents to be available as they
8 are, and we want to answer the questions that
9 people have about them, and so he is available
10 for cross-examination.

11 JUDGE CLIFTON: Thank you. Let's take a
12 ten-minute break and then we'll come back.

13 MR. STEVENS: And let me see. Are we off
14 the record?

15 THE COURT: No, we're on. Go ahead,
16 Mr. Stevens.

17 MR. STEVENS: I'm finished on the record.

18 JUDGE CLIFTON: Oh, all right. Then as
19 soon as we go off the record, please come back
20 at 4:15. We're off record.

21 (A recess was taken from 4:03 to 4:21.)

22 JUDGE CLIFTON: All right. Let's go back
23 on record. It's now 4:21. Who would like first
24 to cross-examine Mr. Carman?

25 MR. STEVENS: Let me ask one question,

1 your Honor. Garrett Stevens, Office of General
2 Counsel, U.S. Department of Agriculture.

3 I am willing to offer these for admission
4 and to have them be admitted today. I am
5 willing to -- to hold off on that until -- until
6 this witness has been cross-examined.

7 I have been informed and want the record
8 to reflect that Mr. Carman had a previous
9 commitment on Monday which he made me aware of
10 early on and he is not available on Monday but
11 he is available Tuesday at 8:00 a.m., if we
12 start at that time, your Honor, or whatever time
13 you choose to start on Tuesday.

14 And he will be available -- he is
15 available today and is available on Tuesday
16 starting at 8:00 a.m.

17 And that's what I have to say on that
18 matter. So I am prepared to ask for their
19 admission, unless there's a serious objection
20 here to their admission.

21 JUDGE CLIFTON: All right. I am hopeful
22 that they are available to all to use today,
23 whether they're admitted into evidence or
24 whether cross-examination is complete, or
25 whatever, for the reason that we have those two

1 experts who will be testifying on Monday,
2 Dr. Cryan and Dr. Yonkers, plus the California
3 people. At least one of those is an economic
4 expert. So they need this data.

5 They won't get an opportunity -- those
6 experts, they won't have an opportunity,
7 perhaps, to ask all the questions they might
8 have of Mr. Carman. Their counsel can do that,
9 what they could today, but it could be that
10 those experts who aren't even here would like to
11 see Mr. Carman. I don't know. No? Mr. Yale.

12 MR. YALE: My recommendation -- and this
13 has had been my experience. I can't imagine
14 that any of these documents would not be
15 admitted. The court asked if there was any
16 exception. We could get them admitted and then
17 as the schedule makes them available from
18 Tuesday on, he would be available for cross to
19 the need that we need to clarify any of the
20 information that's in there to develop the
21 record.

22 Many of them are very straightforward,
23 and I mean, I'm not saying we can't do it today.
24 That's fine. I think the way things are going,
25 I think people are exhausted, and maybe it may

1 not be too fruitful. By the time they get to
2 Mr. Carman, it would be much more narrow, much
3 quicker and more focused on what's needed to be
4 done as opposed to trying to do it -- that would
5 be my suggestion. But I'm along for the ride,
6 and whatever is the pleasure of your Honor and
7 everybody else, that's what we'll do.

8 JUDGE CLIFTON: All right. Who else?
9 Now, I know that it's kind of late. And I know
10 that this is a lot of material to mull over,
11 including talk to your experts about.

12 Mr. Beshore.

13 MR. BESHORE: Yes, just two quick things.
14 I think they should be admitted because they
15 should part of the record. Do it now rather
16 than later. That's fine.

17 But I have one important, from our
18 perspective, point to make with respect to
19 Dr. Cryan.

20 Dr. Cryan has prescheduled, has waited a
21 week for cross-examination. He's going to be
22 available for cross-examination on Monday. He
23 will not be made available any other time. His
24 cross-examination must start and must stop
25 regardless of whether any cross-examination --

1 examiner may claim they want to ask Mr. Carman
2 or anybody else questions before cross-examining
3 Dr. Cryan.

4 He will be made available Monday and not
5 deferred or continued until a later time in this
6 hearing. Mr. Brosch will be here, of course, as
7 prescheduled and planned for that time for
8 Dr. Cryan's cross-examination.

9 JUDGE CLIFTON: Mr. English.

10 MR. ENGLISH: I'd like to hear from those
11 attorneys in the room in a moment. I think it
12 may be okay with them. I would point out a sort
13 of practical issue. While I would like to
14 complete, at least try to, I suspect we can't
15 complete Mr. Carman tonight. I just -- I feel
16 it in my bones.

17 And when he's not complete, when he comes
18 back, there's an attorney who's not in the room
19 who, historically, has a few questions about
20 things. And I suspect that we would then
21 restart. And since Mr. Vetne won't have known
22 or had the opportunity and whatever else -- I'm
23 sorry. Yes.

24 JUDGE CLIFTON: I'm okay. I'm about to
25 sneeze. Go ahead.

1 MR. ENGLISH: So if -- if the counsel who
2 are here will agree to Mr. Beshore's condition.
3 I think that's very important. And if people
4 want to start, that's fine. And that's up to
5 your Honor and all the participants.

6 But I do point out the practical reality
7 that I suspect we're not going to finish
8 Mr. Carman tonight. And then when Mr. Vetne is
9 back here, we may find ourselves treading new
10 ground.

11 And while I think he could have -- he has
12 a family issue. We all have family issues. So
13 whatever the issue is, he would have the right
14 to retread that ground. I think he has the right
15 to retread it. I'd rather not retread it. So
16 I'd rather do it once.

17 JUDGE CLIFTON: Mr. Ricciardi.

18 MR. RICCIARDI: I want to get up here,
19 Judge, to say I was in the room, so they weren't
20 talking about me.

21 But the second thing is, I wanted to have
22 the opportunity to say I do agree with both
23 Brethren Yale and English on this. I want the
24 record to be clear.

25 JUDGE CLIFTON: I wish you'd all make a

1 joint recommendation to the Secretary on the
2 issues in this case. All right.

3 Mr. Carman, if I admit your exhibits now
4 and if I defer cross-examination on those
5 exhibits until next week, knowing that you're
6 not here Monday, will that be acceptable to you,
7 to return and be available beginning Tuesday?

8 THE WITNESS: That -- that's fine, your
9 Honor. As you desire.

10 JUDGE CLIFTON: That's excellent. All
11 right. Is there any objection to the admission
12 into evidence of --

13 THE WITNESS: 52.

14 JUDGE CLIFTON: Exhibits -- thank you --
15 exhibit 52 through 70? Is that all I have?

16 THE WITNESS: Yes.

17 JUDGE CLIFTON: 52 through 70. Is there
18 any objection? Mr. Carroll?

19 MR. CARROLL: I would like to voir dire a
20 couple of questions first, if I could.

21 JUDGE CLIFTON: You may.

22 VOIR DIRE

23 BY MR. CARROLL:

24 Q. Mr. Carman, there are tables, I believe,
25 in these various exhibits on producer-handlers that show

1 unit statistics for the entirety of all of the orders in
2 a summary form, is that correct?

3 A. Some of the tables that we've presented,
4 yes, looks at how many producer-handlers there are for
5 individual orders. It may show the total Class I route
6 sale by the producer-handlers for the total producer
7 milk that would become regulated once they were -- if
8 the producer-handler provision was removed and they
9 became regulated.

10 Q. All right. And the definition of
11 producer-handler in the orders, is it all the same in
12 every order?

13 A. No, it is not the same in all ten orders.

14 Q. And in any of your tables, have you taken
15 the statistics of -- for the producer-handlers and those
16 in other orders and put them all together for one
17 national summary?

18 A. We have assembled the -- most of the
19 relevant information in terms of code. It is in the
20 Code of Federal Regulations by order principle. There
21 are three orders in the Southeast that are
22 producer-handlers not allowed to receive any milk from
23 other than own-farm source.

24 The other seven orders, they can receive
25 up to 150,000 pounds of pooled milk, that is milk that's

1 been received and pooled elsewhere.

2 Two Orders in the western United States,
3 the Pacific Northwest and the Arizona Order have size
4 limitations on -- of annual routes -- pardon me --
5 monthly route sales not to exceed 3 million pounds.

6 There was verbiage difference from order
7 to order in terms of -- but in general, those provisions
8 are -- the rest of them are own risk and enterprise
9 type.

10 Q. And exempt milk, are those provisions the
11 same for all listed exempt milk persons?

12 A. The exempt milk provisions are in part
13 1000 of the Order, so it would be the same in all ten
14 orders.

15 There are four types of exempt plants.
16 Plants that are run by charitable institutions, plants
17 that are run by governmental agencies, and plants that
18 are run by universities, accredited colleges, do not
19 have size limitations.

20 The other exempt plant list -- or the
21 other exempt plants are less than 150,000 pounds.

22 Q. And the statistics that you present, have
23 you included, for example, a university that had an
24 unlimited exemption?

25 A. In the structure data, we presented some

1 of that. There was approximately 10 entities that fit
2 in -- fit in an aggregate across those three categories,
3 universities, prisons, governmental agencies, and the
4 charitables.

5 Q. Right. And back to producer-handlers for
6 a minute. I think you said it, but I want to get it
7 more clearly in my mind.

8 You got -- have you taken tables from
9 orders that have a different definition than another
10 order and put them all together as -- and merged --
11 merged them together?

12 A. No, not -- not in that sense. We have
13 not aggregated total utilization by producer-handlers
14 across the orders. Those are -- those have been kept
15 separate.

16 We have shown in a couple of tables the
17 total number of producer-handlers and their route sales.
18 I believe that -- and it has some history to it, Exhibit
19 Number 7, for example.

20 Q. And directing your attention back again
21 to producer-handler definition, is it possible that
22 there would be producer-handlers included in that list
23 and from one marketing area that would not have been
24 included had they been included under a differing
25 marketing area?

1 A. A producer-handler that was qualified in
2 one of the three orders would still qualify -- three
3 Southeastern Orders where they can receive no other
4 milk, other than their own farm, would qualify as a
5 producer-handler in other orders.

6 I would point out that there are some
7 national producer-handlers, that is, they have route
8 sales in many of the orders that are qualified as a
9 producer-handler on one of the orders and then are
10 recognized as producer-handlers under the other orders.

11 For example, a plant with route sales in
12 the Central Order, qualified as a producer-handler in
13 the Central Order, could well have route sales in the
14 Appalachian Order or the -- or the Southeast Order or
15 the Southwest Order. They would -- they would be
16 included -- or they would be a nonpool plant, couldn't
17 be a pool plant in the Southeast Order because they were
18 qualified as a producer-handler under the provisions of
19 the Central Order. They would be recognized as a
20 producer-handler by the Southeast Order.

21 MR. CARROLL: Thank you.

22 JUDGE CLIFTON: Thank you, Mr. Carroll.

23 Any other voir dire? Is there any objection to
24 the admission into evidence of Exhibits 52,
25 that's 5-2, through 70? There is none. Exhibit

1 52 through 70 are hereby admitted into evidence.

2
3 JUDGE CLIFTON: Is there any further
4 evidence to be presented today? There is none.
5 I will see you all at 8:00 Monday morning. We
6 go off record at 4:35.

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10 PROCEEDINGS ADJOURNED AT 4:35 p.m.

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C E R T I F I C A T E

I, S. Diane Farrell, RMR, CRR, the undersigned, a court reporter for the State of Ohio, do hereby certify that at the time and place stated herein, I recorded in stenotypy and thereafter had transcribed into typewriting under my supervision the foregoing pages, and that the foregoing is a true, complete and accurate report of my said stenotype notes.

S. Diane Farrell, RMR, CRR