

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 VI
- - -

Public Hearing Administrative Law Judge
Before: Jill S. Clifton

Date: May 11, 2009

Time: Commencing at 8:19 a.m.

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

Before: Linda Mullen, RMR, CRR
Notary Public - State of Ohio

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I N D E X

1			
2			PAGE
3	ROGER CRYAN		
4	Cross-Examination By Mr. Miltner		1690
5	KATHIE ARNOLD, RICK SEGALLA, TONY SCHILTER		
6	Cross-Examination By Mr. Carroll		1770
	Cross-Examination By Mr. Vetne		1780
7	Cross-Examination By Mr. Yale		1820
	Cross-Examination By Mr. Beshore		1837
8	Cross-Examination By Mr. Ricciardi		1840
	Recross-Examination By Mr. Carroll		1860
9			
10	ROGER CRYAN		
11	Continued Cross-Examination By Mr. Miltner		1875
	Cross-Examination By Mr. Carroll		1884
12	Cross-Examination By Mr. Vetne		1948
	Cross-Examination By Mr. Ricciardi		1988
13	Cross-Examination By Mr. English		2033
	Voir Dire By Mr. Ricciardi		2040
14	Voir Dire By Mr. English		2043
	Cross-Examination By Mr. Yale		2046
15	Recross-Examination By Mr. Vetne		2064
	Recross-Examination By Mr. Carroll		2071
16	Cross-Examination By Mr. Tosi		2079
	Cross-Examination By Mr. Beshore		2093
17			
18	EXHIBITS	MARKED	ADMITTED
19	Exhibit 23		2096
	Exhibit 71	1743	1864
20	Exhibit 72	1743	1864
	Exhibit 73	1970	2097
21	Exhibit 74	2032	2046
22			
23	- - -		
24			
25			

P R O C E E D I N G S

1
2 JUDGE CLIFTON: Let's go back on record.
3 We're back on record at 8:19 a.m. This is the
4 11th of May, 2009. We're in Cincinnati, Ohio.
5 And this is day six of the milk rulemaking
6 hearing. My name is Jill Clifton. I'm the
7 United States Administrative Law Judge who's
8 been assigned to take evidence here.

9 There are two kinds of evidence,
10 testimony and the exhibits. A number of
11 witnesses have chosen to have their testimony
12 prepared also as an exhibit; that is, they read
13 from it and sometimes depart from the text to
14 explain some things or add to it or correct it.
15 But they also want their written statement
16 marked as an exhibit and taken into evidence
17 that way.

18 That's a good method of proceeding. The
19 only thing I ask is that if you do it, if you
20 intend your written material to be an exhibit,
21 we need enough copies to share with those who
22 are participating here.

23 Last week we were making 50 copies. This
24 week I don't think we'll need that many, maybe
25 more like 20, maybe 25 to be safe. Perhaps more

1 people will arrive as the day goes on. There's
2 no requirement at all that you make your notes
3 into an exhibit. Some people are aware that
4 there's a double impact, though, by doing that,
5 because if the exhibit is posted on the website,
6 a person may notice your exhibit and get the
7 benefit of your testimony without discovering it
8 in the pages and pages and pages of the
9 transcript.

10 All right. I would like to talk a little
11 bit about what we did Friday. Not everyone who
12 is here now was here Friday. We took in
13 Exhibit 41, which was Mr. Carrejo's written
14 statement; Exhibit 44, which was Mr. Rooney's
15 written statement; and then we have a gap.

16 There is no Exhibit 43 and there is no
17 Exhibit 44. That's because of my instruction
18 that the Rooney photographs should begin with
19 Exhibit 45. So there was six photographs that
20 Mr. Rooney brought giving us the flavor of his
21 operation.

22 Then the USDA statistics that were
23 admitted into evidence Friday were numbered 52
24 through 70, 5-2 through 70.

25 And also important within that packet of

1 materials is not only the exhibit number, but
2 the proper sequence for the pages within the
3 exhibit. For example, if an exhibit has 25
4 pages, there would be page 1 of 25, 2 of 25, and
5 so forth within a particular exhibit. Mr. Vetne
6 was not here on Friday, and when he arrives I
7 want to make sure that he's got the right
8 numbering for his exhibit.

9 MR. ENGLISH: I'm working on it.

10 JUDGE CLIFTON: Thank you so much,
11 Mr. English. That's very helpful. Mr. English
12 did make a copy for Mr. Vetne, so he would be
13 ready to go.

14 All right. We have a very full day
15 today. Unfortunately, most of the people who
16 are testifying want to testify later in the day
17 rather than earlier in the day. We were unable
18 to obtain Dr. Carolyn Orr as our first witness.

19 She must stay today. The weather permits
20 it and has not for days, so she's available on
21 notice to come later in the week, but not today.
22 So we did not have her to begin the testimony
23 today.

24 I would like to talk about the names that
25 I'm aware of who will testify today and

1 introduce those who are here. First, I would
2 like for these people to stand so the others can
3 recognize them. And stand when I call your
4 name, please. Kathie Arnold. Thank you. And
5 remain standing. And Tony Schilter. Thank you.
6 And Rick Segalla.

7 MS. ARNOLD: He's not here from the
8 airport.

9 JUDGE CLIFTON: Will anybody else be
10 testifying in your panel?

11 MS. ARNOLD: No.

12 JUDGE CLIFTON: Not that you know of?
13 Okay. Good. And the -- I've given the spelling
14 of those names to the court reporters, so I
15 won't stop to do that now. Now -- and I'm aware
16 of the following four witnesses, Dr. Roger
17 Cryan, Dr. Robert Yonkers, William Schiek and
18 Mike Newell. I had also written down Dakin,
19 D-a-k-i-n, is that for today? We already have
20 him? Okay. And Orr, O-r-r.

21 MR. YALE: That's Carolyn Orr.

22 JUDGE CLIFTON: Oh, that was Dr. Orr that
23 won't be here. Okay. Mr. Yale, did you have an
24 additional witness that's today?

25 MR. YALE: Not today.

1 JUDGE CLIFTON: Not today?

2 MR. YALE: No. And I will know hopefully
3 by noon if there will be one at all this week.

4 JUDGE CLIFTON: Okay. Well, I think
5 that's good. So we have seven people.
6 Dr. Cryan has just arrived. That's excellent
7 news. That was a speedy trip from the airport.
8 Mr. English.

9 MR. ENGLISH: Your Honor, Dr. Schiek is
10 here, as is Mike Newell. Both witnesses will be
11 testifying on one particular subject having to
12 do with how a particular provision works in
13 California. Both witnesses are here.
14 Dr. Schiek's testimony, as always, I've held
15 back copies for USDA, for you and the court
16 reporter.

17 Before the hearing started this morning,
18 I put one copy on the table of each of the
19 counsel who have been actively participating. I
20 put others in the back of the room, back left
21 corner. I think there were 35 copies to start
22 with. I think we now have fewer people here
23 this morning.

24 Mike Newell is having his testimony
25 copied even as we speak, and we'll get it out in

1 similar fashion. We propose, as I think has
2 been successfully done in the past and because
3 the schedule is as full as it is, that because
4 these two witnesses are particularly testifying
5 on one limited subject, they testify as a panel.

6 JUDGE CLIFTON: Great. Are they --

7 MR. ENGLISH: No, they're not ready.

8 JUDGE CLIFTON: We need the printed
9 statement.

10 MR. ENGLISH: They are not ready. I have
11 not had much opportunity. I had a few minutes
12 to speak with them. If Mr. Cryan is here, I
13 think it makes sense to begin with his
14 cross-examination, so -- and I think we -- we're
15 set. I think we have witnesses at this point.
16 I don't think we have to worry about it. I will
17 state, Dr. Yonkers called me. His flight this
18 morning was delayed. He'll get here when he
19 gets here. But now I think we have Dr. Cryan
20 here ready to go and the dairy farmers, organic
21 farmers, and Dr. Schiek and Mike Newell, I think
22 that we're not going to have a dearth of
23 witnesses today.

24 JUDGE CLIFTON: Excellent. Good.

25 Mr. Brosch, welcome back.

1 MR. BROSCH: Thank you, your Honor.

2 JUDGE CLIFTON: And what do you have for
3 the good of the order?

4 MR. BOSCH: For the good of the order, I
5 have a quote from Marvin Gaye and Dr. Cryan.
6 Marvin Gaye had two songs back in the '60s, one
7 was, Can I Get a Witness, and it was so popular
8 that he followed it up with, Yes, I Have A
9 Witness.

10 And here I have Dr. Cryan and we're ready
11 to go, your Honor.

12 JUDGE CLIFTON: Excellent. Welcome,
13 Dr. Cryan. If you would resume the witness
14 stand?

15 MR. RICCIARDI: My only issue at this
16 point, Judge, is Mr. Vetne is not here. To that
17 extent, in terms of starting the
18 cross-examination, it probably would make sense
19 to have him, unless you want to start without
20 him, but I think that may be a little bit
21 improper.

22 JUDGE CLIFTON: I'll have to start
23 without him. I regret that he's not here. And
24 he may plow a little ground we've already
25 plowed, and I regret that as well. But we'll go

1 forward.

2 No one's heard from him, right? No one's
3 heard a message saying, I'm on my way, I've been
4 delayed or anything of the like.

5 MR. BOSCH: He came in last night. He's
6 here somewhere.

7 JUDGE CLIFTON: Well, I wonder if we
8 should try to call his room and make sure he's
9 awake.

10 MR. BESHORE: He knows the time of the
11 hearing.

12 JUDGE CLIFTON: Well, I know. Would you,
13 please? Thank you. All right. Dr. Cryan, I
14 want you again to state and spell your name.

15 THE WITNESS: My name is Roger Cryan,
16 last name is C-r-y-a-n.

17 JUDGE CLIFTON: And you're still under
18 oath. And I would like to invite
19 cross-examination. Who would like to begin?
20 Mr. Miltner, thank you.

21 MR. MILTNER: Ryan Miltner.

22

23 CROSS-EXAMINATION

24 BY MR. MILTNER:

25 Q. Good morning, Dr. Cryan.

1 A. Good morning.

2 Q. First question I have for you. In your
3 experience as a dairy economist, how would you define
4 disorderly marketing?

5 A. I will -- I will say that I -- I think
6 disorderly marketing is the result of something that
7 disrupts the market in the context of the current
8 system, current Federal Order System.

9 Q. Okay. So what is disruptive then?

10 A. Large producer-handlers are disruptive.

11 Q. Okay. In what manner are large
12 producer-handlers disruptive?

13 A. There's been quite a bit of testimony
14 last week.

15 MR. CARROLL: Your Honor, could the
16 witness get a little closer?

17 A. There's been quite a bit of testimony --

18 JUDGE CLIFTON: Let's go off the record
19 for just a moment.

20 (Off the record.)

21 JUDGE CLIFTON: We're back on record at
22 8:30. Go ahead, then. Start again with that
23 answer, if you will. You started, there's been
24 quite a bit of testimony last week, but of
25 course, we want to know what you have to say.

1 A. Would you repeat the question, please?

2 Q. Sure. Could the court reporter read back
3 the question?

4 A. They have a --
5 (The record was read.)

6 A. In several markets, producer-handlers
7 have a substantial and growing share of Class I sales.
8 They pay a price that is substantially lower simply by
9 virtue of not contributing to the producer settlement
10 fund, and that creates disorderly marketing because
11 there's an unjustified competitive disadvantage to
12 people who are participating in the system.

13 Q. Tell me how producer-handlers pay a price
14 substantially lower than others.

15 A. As I said, because they don't contribute
16 to the producer settlement fund, they -- in effect, they
17 pay a price that's substantially lower than other
18 handlers and producers together.

19 Q. Don't producer-handlers, in fact, acquire
20 the milk at whatever it costs them to produce it?

21 A. They -- they acquire the milk. The
22 vertical integration of the handler and the farm
23 involves a chain from -- from the cow to the bottle,
24 that incorporates a farm and a plant. And their --
25 their overall costs are perfectly comparable to those of

1 a farming plant that's not a producer-handler.

2 Q. Okay. And when the milk arrives at the
3 producer-handler's plant, the cost of the plant is
4 whatever it cost the producer-handler to produce that
5 milk on its farm, correct?

6 A. The cost of the plant?

7 Q. The cost of the plant.

8 A. Is the internal transfer price between
9 plant -- between farm and plant.

10 Q. What is the internal transfer price?

11 A. It's whatever -- it's whatever the --
12 it's whatever the producer-handler decides it is.

13 Q. I'm sorry. I didn't mean to cut you off.

14 A. Yes, it is.

15 Q. The -- so the price -- you're saying the
16 price to the plant is whatever the producer-handler says
17 it is?

18 A. Well, for -- in terms of -- for purposes
19 of an analysis, it can be the -- it can be a number of
20 different things, but what really matters is the -- the
21 set of costs from cow to bottle. And in that set of
22 costs from cow to bottle, the producer-handler has the
23 same costs that another farm, another plant, have,
24 except that they're not paying into the producer
25 settlement fund.

1 Q. So your testimony is that if you look at
2 a producer-handler, the total cost to go from the cow,
3 meaning the production of the milk, to the bottle,
4 finished product, is the same in a producer-handler and
5 a regulated handler and a pool producer, save for the
6 producer settlement fund obligation?

7 MR. BROSCH: Objection.

8 JUDGE CLIFTON: Mr. Brosch, you need to
9 put that somewhere else.

10 MR. BROSCH: Yes, I will, your Honor.
11 Your Honor, these questions that begin your
12 testimony are -- his testimony is a matter of
13 record. I wish Mr. Miltner would ask him
14 questions and not try to recharacterize his
15 testimony.

16 JUDGE CLIFTON: You know, I do not have
17 that question in my head. Do you want to reword
18 or should we play it back?

19 MR. MILTNER: I suppose I could try to
20 reword it. I was trying to make clear his
21 response to my last question.

22 MR. BROSCH: Your Honor, it's not
23 Mr. Miltner's -- it's not Mr. Miltner's place to
24 re -- to restate the testimony of the witness.
25 He can ask the witness questions, but the

1 witness' testimony is his testimony and that's a
2 matter of record.

3 JUDGE CLIFTON: Well, all of us, though,
4 Mr. Brosch, on cross-examination, try to get the
5 gist of the witness' testimony by repeating it
6 back. Was it that technique you objected to?

7 MR. BROSCH: If he wants to have the
8 testimony read back, he can have that done, your
9 Honor, but he's recharacterizing the testimony,
10 and I object to that.

11 JUDGE CLIFTON: All right. I'll try to
12 pay more attention. If you would start again,
13 please, Mr. Miltner.

14 MR. MILTNER: Well, at Mr. Brosch's
15 suggestion, could I have the court reporter
16 please read back Dr. Cryan's last response?

17 (The record was read.)

18 BY MR. MILTNER:

19 Q. Then, Dr. Cryan, could you please detail
20 what you believe to be the costs for a producer-handler
21 to go from cow to bottle?

22 A. They're the same costs as another set of
23 producers and plants of similar size and similar
24 arrangement.

25 Q. Can you tell me what you believe those

1 costs to be?

2 A. What I believe them to be? There's a
3 large set of data produced by USDA on farm production
4 costs, and I wouldn't characterize that, all that data
5 based on -- in a short answer like that.

6 Q. Do you have your statement with you, sir?

7 A. I have it.

8 Q. Can you look at page 8, please?

9 JUDGE CLIFTON: What exhibit number is
10 that?

11 MR. MILTNER: 23.

12 JUDGE CLIFTON: Thank you. Exhibit 23.

13 Q. I'm referring to your statement, in the
14 fourth paragraph, beginning, although several Federal
15 Order Markets. Which Federal Order Markets are
16 substantially disrupted by the operations of
17 producer-handlers?

18 A. I think the data that you requested
19 demonstrating substantial impact on pools shows some
20 sort of a ranking of a disruption. I don't think
21 it's -- I don't think you can say -- the only ones that
22 are not disrupted at all are the ones that don't have
23 producer-handlers.

24 Q. So --

25 A. The ones that -- the data, the exhibits

1 that you requested demonstrate pool impacts of -- making
2 the changes that we're requesting, I think demonstrate
3 that there is substantial impact, substantial disruption
4 in some of the markets as a result of producer-handlers.

5 Q. And in your opinion as a Ph.D., a
6 professional economist in the dairy industry, what is
7 your measure of substantial disruption.

8 A. I don't think there is a bright line
9 cut-off of substantial disruption, in terms of looking
10 at an issue like that. I think that as important as the
11 current disruption is, the potential disruption, there's
12 a -- there's a trend, upper trend in producer-handler
13 marketings, and I think that's -- I think -- I think
14 it's as important to be proactive as it is to react to
15 the current problems in the market.

16 Q. So you've seen data that I had requested
17 that USDA's put into the record. You've referred to it,
18 so I assume you've looked at it, is that right?

19 A. I have. That's the whole reason I've
20 been cooling my heels for a week.

21 Q. Okay. So having reviewed that data, in
22 which markets is there substantial disruption?

23 A. I reviewed the numbers, but I am not
24 going to cite them back to you. I don't -- I don't
25 remember them chapter and verse. So I'll tell you that

1 I did see substantial impacts in the Central markets,
2 and I saw greater than zero impacts in most of the
3 markets. So I -- you know, we can go through them one
4 by one, but I don't -- I don't see the point of that.

5 Q. Well, your statement, of course, was
6 drafted before that data was presented, correct?

7 A. Yes, it was.

8 Q. Okay. And when --

9 A. And that data is consistent with the --
10 with the estimations that we made.

11 Q. Well, when you drafted your statement and
12 you made those estimations, in which markets did you
13 believe there was substantial disruption?

14 A. We had reason to believe there was
15 substantial disruption in Order 32, and our estimates
16 were borne out by the data you requested. And we saw
17 numbers for Order 1 that showed some impact. And I
18 think those are the ones that we -- we looked at
19 specific numbers for.

20 Q. And when you were making that
21 determination as to which areas were, in your opinion,
22 substantially disrupted, what was your measure?

23 A. As I said, I'm assuming there would be a
24 bright line if there's -- if there's any impact that
25 could involve some disruption. There can even be

1 disruption associated with potential impact. We know
2 that -- the idea of a contestable market is significant,
3 whether there's somebody in the market or not. The --
4 just the fact that somebody could come into the market
5 can have an impact.

6 And we've heard testimony this week that
7 lays out the issue of markets that are impacted, not --
8 not necessarily because of a producer-handler in their
9 market, but because of a producer-handler in another
10 market that's selling to their market, whether it's
11 selling into another market and there's this -- there's
12 a chain reaction impact across the country. I mean,
13 that's -- the statistics show a part of it. The
14 statistics you requested show a part of it.

15 JUDGE CLIFTON: Mr. Miltner, I hate to
16 interrupt you, but Mr. Vetne arrived.
17 Mr. English is assisting to help him, so they're
18 both out of the room and I don't want them to
19 miss this. So let's take five minutes and that
20 will allow them all to return, get ready, and
21 then I would like to you resume.

22 THE WITNESS: They're here.

23 JUDGE CLIFTON: They may need just a
24 minute. I'm calling a five-minute break while
25 Mr. Vetne gets ready. Do you need that,

1 Mr. Vetne, or are you --

2 MR. VETNE: Well, yeah.

3 JUDGE CLIFTON: Yeah, okay. Please be
4 back and ready to go at 8:50, that gives you
5 seven minutes.

6 (A recess was taken from 8:43 to 8:51.)

7 JUDGE CLIFTON: Please come to order.
8 All right. Let's go back on record. We're back
9 on record at 8:51. Thank you, Mr. Miltner. You
10 may proceed.

11 MR. MILTNER: Thank you, your Honor.

12 BY MR. MILTNER:

13 Q. Dr. Cryan, my last question dealt with
14 your measure of what is disorderly marketing. And in
15 response, I checked with the court reporter, you had
16 stated that there was no bright line. But in the
17 absence of a bright line, do you have a -- do you have
18 any -- any gray areas that you look for?

19 A. Well, I look for disruption of the
20 market. I look for situations where someone has an
21 unfair advantage that is -- that is -- that is putting
22 them -- putting the small and large producers that
23 participate in the pool at a disadvantage for no
24 justifiable reason. I look for things that undermine
25 the integrity of the pool, which undermines the

1 integrity of the whole system. And that's what we're
2 here about, so --

3 Q. It seems to me those are all conclusions
4 based on what you would expect to see in the market.
5 What would you expect to see in the market to determine
6 there is disruption, disorder or unfairness?

7 A. What I would expect to see within the
8 context of our current system is -- is sharing of
9 Class I revenues among all participants in the pool, big
10 and small.

11 And what we have in the case of
12 producer-handlers, particularly the large ones that can
13 complete on a commodity basis, we have -- we have
14 disruption of that. We have players who are out there
15 cherry-picking Class I sales and hurting the producers
16 and the handlers who receive pooled milk in the market.
17 So we're really here representing small and large farms
18 pursuing equity in the Federal Order System.

19 Q. At what point does the sharing, or in
20 your opinion, not sharing Class I revenues become
21 something the Department needs to address?

22 A. Well, I am certainly at this point -- at
23 this point, we've clearly seen substantial members and
24 growing numbers, and the perspective of
25 producer-handlers being able to come to any market at

1 all, if they're not in all the markets yet, and have a
2 substantial impact.

3 Q. I appreciate you believe that there's a
4 substantial impact, but you have yet to characterize at
5 what point the Department should act. Can you define
6 that for us, please?

7 A. They should act when the potential exists
8 for this to happen. And the potential is there already.
9 Whether it's -- even before it's happened, as we've
10 advocated for proactive amendments and proactive changes
11 in the Federal Order System for quite some time. And it
12 has been our -- we've had a position in favor of
13 regulating large producer-handlers for a very long time,
14 even when they were arguably not an issue in many
15 markets. I -- the time -- a good time would have been
16 70 years ago. This is a good second best.

17 Q. Doesn't that bring up exactly the issue
18 about potential that you've raised, that this potential
19 has, in fact, existed for 70 years?

20 A. Technology has changed and the issue has
21 become more critical over time as the scale of farming
22 has grown and has, in a sense, caught up with the scale
23 of processing. So that we've -- we have a -- we have a
24 serious issue, and I've testified to that.

25 Q. So tell me more. I don't understand what

1 you mean by the scale of farming and the scale of
2 processing having changed. What --

3 A. I testified to the growth in the size of
4 farms, the growth in the number of very large farms. We
5 now have 600 -- we have now 600 farms with over 2,000
6 cows, any of which are large enough to support a
7 commodity fluid milk processor.

8 Q. So does that mean that the Department
9 should base its decision here about the size of farms,
10 and that is the size of the farm that dictates where the
11 line should be drawn?

12 A. I don't understand that question.

13 Q. Okay. In response to my question, you
14 stated that farms have gotten larger and that large
15 farms can now supply -- and I believe you said large
16 farms can now supply a significant customer.

17 JUDGE CLIFTON: No, he said a fluid milk
18 processor.

19 Q. Thank you, a fluid milk processor. So is
20 it the size of the farm that is the -- that defines the
21 demarcation between what should be permitted and what
22 shouldn't be?

23 A. In part, because we see from the data
24 that a very large number of the -- of the small plants
25 are, in fact, processing own-farm milk. The -- and the

1 testimony from some of our witnesses -- or from some of
2 the witnesses at least on behalf of producer-handlers,
3 have talked about some certain cost savings associated
4 with -- with the farm and the plant being together, so
5 that there are -- there is a model of combining
6 production and processing.

7 Q. I wasn't talking about combining
8 production and processing, so we make sure we get -- I'm
9 asking the question clearly for you.

10 A. I was answering your question.

11 Q. Okay. My question was: Is it the size
12 of the farm that provides the line of demarcation for
13 what should be exempted and what shouldn't be?

14 A. I was answering that question.

15 JUDGE CLIFTON: Dr. Cryan, since you
16 said, in part, let's just explore that part
17 first.

18 So you've already mentioned that there's
19 a certain amount of cost savings if the farm and
20 the plant are together. What else is there
21 about the size of the farm, in part, being of
22 concern here?

23 THE WITNESS: The experience and the data
24 seems to suggest that the -- the business model
25 that seems to drive most of these smaller plants

1 is a combination -- is combining of farm and
2 plant. So it is a significant consideration.
3 The size of farms is a significant consideration
4 when we're looking at small -- smaller plants.

5 BY MR. MILTNER:

6 Q. And as those farms have gotten larger
7 over time, haven't the sizes of plants also gotten
8 larger over time?

9 A. I believe they have -- they have gotten
10 larger. But the largest -- the largest farms are
11 growing faster in number, certainly, than the -- than
12 the larger -- than the largest plants are growing, that
13 is to say. And I believe the scale of -- cross scales
14 of some of the studies we've looked at show that there's
15 a -- economies of scale sort of top out at a number
16 that's -- that's -- that's in the ballpark of some of
17 these very large farms.

18 Q. On what do you base your statement that
19 the large farms are growing at a faster rate than large
20 plants?

21 A. It's got more to do with the efficient
22 scales that we see. The large farms are growing more --
23 there's a large number of -- large numbers that are very
24 efficient producers. There's a -- we believe there's
25 some limit to economies of scale for processing plants.

1 There are studies that seem to show that, especially for
2 more of some of the specialized processing lines. If
3 you have a limited -- if you have a limited range of
4 products, processing costs don't necessarily come down
5 that fast as you get larger, as you get big.

6 Q. Maybe I misunderstood your prior
7 statement. I thought you had said that the number of
8 large farms is growing at a rate faster than the number
9 of large plants. Did I misunderstand you?

10 A. If I -- if I said that -- I don't think
11 there's any question a number of large farms is growing
12 faster than the number of large plants.

13 Q. Okay.

14 A. A plant, there's been consolidation.
15 There's a growing -- growing number of farms, large
16 farms overall. And yeah, I don't think there's any
17 question about that. There's been a large growth in the
18 number of farms over 2,000 -- over 2,000 head.

19 Q. Have you done any analysis to look at the
20 relative sizes of farms to the size of producer-handlers
21 to the sizes of plants over time?

22 A. What's most relevant are the
23 producer-handlers in the range that we're talking about
24 for regulation.

25 Q. Okay. I asked a yes or no question.

1 Have you done any analysis to look at whether the size
2 of the farms compared to the size of the plants compared
3 to the size of producer-handlers has changed relatively
4 over time?

5 A. I don't understand what you're asking,
6 your Honor.

7 JUDGE CLIFTON: Okay. Hold that thought
8 just a minute. I need to go back to something
9 you just said, Dr. Cryan.

10 You said the size of the farm that we're
11 concerned about is the size we're talking about
12 in this hearing. Now, I want to start with the
13 concept of Proposal 1 eliminating the
14 producer-handler exemption, so there all farms
15 would not be exempt. Then I know Proposal
16 Number 26 talks about a 3 million pound
17 distribution.

18 THE WITNESS: For -- it would grandfather
19 existing producer-handlers and their sales up to
20 3 million pounds. It will allow them to operate
21 a producer-handler plant with sales up to
22 3 million pounds and maintain an exemption,
23 maintain a plant exemption.

24 JUDGE CLIFTON: So --

25 THE WITNESS: And Proposal 2 would expand

1 the size exemption to 450,000 pounds of sales
2 per month.

3 JUDGE CLIFTON: All right. So working
4 back from either distribution or processing,
5 help me understand what size farm we are dealing
6 with in these proposals.

7 THE WITNESS: We're dealing with
8 farms around 250 cows at the 450,000 pound
9 limit, and I think about 1,800 cows at the
10 300,000 pound limit.

11 JUDGE CLIFTON: Thank you. Now,
12 Mr. Miltner, if you want your last question read
13 back, we can go back there.

14 MR. MILTNER: That's okay. He stated he
15 did not understand, so I will restate it.

16 JUDGE CLIFTON: Okay.

17 BY MR. MILTNER:

18 Q. Have you compared -- and I'll break this
19 into two parts, because maybe I tried to get too many
20 parts into the question before.

21 Have you compared the size of producers
22 to the size of producer-handlers to measure their
23 relative size over time?

24 A. Some of the data that's been presented
25 demonstrate that the average size of producer-handlers

1 has grown substantially. And we've also obviously seen
2 a growth in the size of farms, the average size of
3 farms. But I haven't done a -- any sort of specific
4 study of that comparison. However, it's clear that the
5 average -- the average producer-handler has grown
6 substantially. Not -- not even -- even beyond the --
7 and the growth in the average size really understates
8 the growth in the large producer-handlers.

9 Q. So if I strip out all the stuff about
10 producer-handlers growing, which you've cited
11 repeatedly, your answer is no?

12 A. I have looked at both the numbers. Yes,
13 I have. I have seen the average producer-handler size
14 has grown. I didn't have to do a study. The exhibits
15 demonstrate that.

16 Q. I didn't ask about producer-handler
17 growth. I asked about relative growth of producers
18 versus producer-handlers.

19 A. The average producer-handler has grown
20 faster than the average producer.

21 Q. You still haven't answered the question
22 that I asked, I don't think.

23 Have you studied the relative sizes, side
24 by side, comparing producer growth versus
25 producer-handler growth?

1 A. Have I -- I'm sorry. Are you saying have
2 I studied the obvious relationship I just -- I just
3 described?

4 Q. No, that wasn't -- that wasn't what I
5 asked. What I asked was: Have you studied or done any
6 analysis of data to see whether -- I'll rephrase this.
7 Have you studied this to see whether the growth in
8 producer size is commensurate or proportional to the
9 growth in the size of producer-handlers over time?

10 A. The average producer-handler size has
11 grown more than the average farm size.

12 Q. Have you done a similar comparison --
13 well, what did you conclude when you saw that? Let me
14 back up and follow up on your answer.

15 What are the -- what is the relative size
16 of producers to producer-handlers over time and how has
17 that changed?

18 A. Well, the size -- the average size of a
19 producer-handler has -- has doubled between 2001 and
20 2008, which is goodly more than the growth in the
21 average farm size. That's Exhibit 7.

22 Q. You just read that off Exhibit 7, right?

23 A. Yes.

24 Q. Of course, that chart goes back to
25 October 1959, right?

1 A. Yes, it does.

2 Q. Other than looking at that chart right
3 now, have you done any kind of comparison like that
4 over time?

5 A. We're describing a comparison.

6 THE WITNESS: I don't understand -- I
7 don't understand the question, your Honor. He's
8 asking me if I studied a relationship that we
9 see right in front of us.

10 JUDGE CLIFTON: He's wanting -- he sees
11 what USDA statistics are. And he wants to know
12 if you have done study and research and so forth
13 on that issue.

14 THE WITNESS: I have -- no, I have not
15 done a study beyond the numbers that we have
16 before us.

17 BY MR. MILTNER:

18 Q. Thank you. Have you done a similar
19 comparison or study of the average size of plants versus
20 the average size of producer-handlers?

21 A. I have not done a study beyond what we --
22 what we have in the statistics.

23 Q. It's quicker the second time around. Can
24 we turn back to page 2 of your statement, Exhibit 23?
25 At the end of the first paragraph, under Proposal 1, you

1 cite to a mimeographed brief on authority to regulate
2 producer-handlers.

3 A. Yes.

4 Q. Can you direct us to give us some more
5 information about what that brief is and where we might
6 be able to find it and review it?

7 A. I have a copy of it. I believe I have a
8 copy of it with me, but I -- I -- I would have to -- it
9 is a -- it is cited in a -- it is a -- the document as
10 identified before the semicolon is a formal -- formal
11 document and -- which I did not look at directly, I saw
12 the brief.

13 Q. Okay. Who authored the brief that you
14 were looking at?

15 A. I would have to look at it again. I
16 believe it was someone in the USDA some time ago.

17 Q. So there's a --

18 MR. CARROLL: May I interrupt again?

19 JUDGE CLIFTON: Mr. Carroll, if you'll
20 come to the mic?

21 MR. CARROLL: The witness is soft-spoken,
22 so is the questioner. They're carrying on their
23 private conversation but I would like to hear a
24 little more.

25 MR. MILTNER: I will take greater care to

1 speak into the microphone.

2 JUDGE CLIFTON: Thank you, Mr. Miltner.
3 So do you have it -- do you have that
4 mimeographed brief at the table with you,
5 Dr. Cryan?

6 THE WITNESS: No. No, I don't.

7 JUDGE CLIFTON: Mr. Miltner, if you want
8 to examine it, we'll take a recess so you can do
9 it.

10 MR. MILTNER: I would, your Honor. I
11 would appreciate that.

12 JUDGE CLIFTON: All right. Why don't we
13 go off record so that Dr. Cryan can locate it
14 and Mr. Miltner can look at it? It's now 9:12.
15 Please be back and ready to go at 9:30.

16 (A recess was taken from 9:12 to 9:31.)

17 JUDGE CLIFTON: Please come to order.
18 Let's go back on record. We're back on record
19 at 9:31. Mr. Brosch.

20 MR. BROSCH: Thank you, your Honor.
21 We've had a discussion off record, your Honor,
22 about the question that was asked about the
23 source. It appears to us, as best we can tell,
24 your Honor, Dr. Cryan does not have the
25 particular brief cited with him at the time, but

1 we think it was a brief submitted on behalf of
2 United Dairymen of Arizona in the proceeding in
3 2004, having to do with the Pacific Northwest
4 and Arizona/Las Vegas marketing area orders. I
5 think that docket -- well, anyway, that's in
6 2004.

7 We think it was a brief submitted on
8 behalf of United Dairymen by Mr. Syd Berde &
9 Associates. We don't have a copy of that.
10 Fortunately, Mr. English had his own copy, we've
11 looked at it. We think this is it.

12 Now, our understanding is this brief is
13 on the website, the government's website, so if
14 counsel wants to look at it, I think they can go
15 online and see that that document is there.

16 But more importantly, your Honor, the
17 underlying quotations are from the Congressional
18 Record, and those citations are in the document.
19 It's the 74th Congress. It's the hearings
20 before the Committee on Agriculture. This is,
21 of course, a long time ago, your Honor. This is
22 a historical reference in Dr. Cryan's testimony.
23 He was talking about the origins of the
24 producer-handlers exemption way back when in the
25 1930s. So this is 80 years old.

1 But I believe if you go on -- in most law
2 libraries, your Honor, go into the Congressional
3 Record, you can find this. And certainly on
4 something like Thomas Service this is available.

5 Anyway, the quotation is there. It's the
6 testimony we believe of a Mr. Chester C. Davis,
7 who was the administrator of the Agricultural
8 Adjustment Administration during that period.
9 Thank you, your Honor.

10 JUDGE CLIFTON: Thank you, Mr. Brosch.
11 Mr. Miltner.

12 MR. MILTNER: Your Honor, I appreciate
13 their efforts to locate the source of the brief
14 that Dr. Cryan refers to. And, in fact, his
15 statement does refer to that section of the
16 hearing. I have not had the opportunity to
17 locate the actual source quote. If it's
18 accurate, and it probably is, it may very well
19 be out there.

20 But for the clarity of the record, can we
21 strike from the statement, cited at mimeographed
22 brief on authority to regulate
23 producer-handlers, both for clarity and to make
24 certain that the reference is to the underlying
25 authority and not to any brief that had been

1 filed in a different proceeding?

2 JUDGE CLIFTON: Mr. Brosch.

3 MR. BROSCH: Your Honor, we're confident
4 that that is an accurate statement from the
5 Congressional Record. And certainly, I guess,
6 counsel's not saying that it isn't. He's simply
7 saying he hasn't had the opportunity yet to
8 look.

9 MR. MILTNER: That's right.

10 MR. BROSCH: So we would be happy to
11 strike that -- that particular reference.
12 Dr. Cryan put it in there for candid -- wanted
13 to be candid and accurate about what he had been
14 looking at. We don't have any problem with the
15 suggestion of Mr. Miltner.

16 JUDGE CLIFTON: Thank you. Then with
17 regard to Exhibit 23, page 2, the middle of the
18 page just before the quotation, the sentence
19 will end with, HR 5585-serial E. We'll then put
20 a period there and strike the following words --
21 I guess it will be a period, close parenthesis.
22 Strike cited in mimeographed brief on authority
23 to regulate producer-handlers. Does that
24 suffice, Mr. Miltner?

25 MR. MILTNER: Yes, it does, your Honor.

1 JUDGE CLIFTON: All right. Thank you.

2 You may proceed.

3 BY MR. MILTNER:

4 Q. Dr. Cryan, in a couple of places, you
5 make reference to estimates of sizes of larger
6 producer-handlers, and I would like to ask you a few
7 questions about those estimates, if I might.

8 And I'm looking first at page -- the
9 first page of your statement, the last two lines. We
10 estimate that the three largest of these, referring to
11 the largest producer-handlers, each have packaged fluid
12 sales in excess of 15 million pounds per month. In your
13 estimation, whom are those three producer-handlers?

14 A. I would say -- I would say that
15 actually -- I would say that that probably needs
16 correction. My -- my understanding, based on some --
17 some rough calculations, was that there was a -- there
18 was a plant that was over 15 million pounds, some
19 testimony presented here indicates that it's
20 substantially less at the moment.

21 The two that -- the two that we
22 believed -- that I still believe from that original list
23 were over 15 million pounds were in the neighborhood --
24 over 15 million pounds, it would be Aurora and Braum's.
25 And the third -- the third that we have some sort of

1 numbers for, for what seems like a sound source, is
2 Hartland in Missouri, which would appear to be in the
3 neighborhood of 8 or 9 million pounds.

4 Q. What did you base your previous estimate
5 on for Heartland?

6 A. Not for Heartland, for -- for GH, I
7 looked at some numbers, some pool numbers for the
8 Southwest market. Some sales numbers comparing December
9 and January of this -- this past December and January
10 and the previous December and January. It was a
11 crude -- it was a crude estimation and turns out not to
12 be -- not to be accurate. So --

13 Q. What do you mean by a crude estimation?

14 A. I looked -- it was a crude estimation. I
15 looked at the change in Class I sales by pool handlers
16 when that plant went from -- the month that that went
17 from pool handler to a -- to a producer-handler. I
18 looked at the change from December '08 to January '09,
19 compared to the change from December '07 to January '08.
20 And that was -- and that gave a -- if that had been the
21 only change, that would have been about
22 16 million pounds.

23 And I did not have good firsthand
24 information -- good firsthand information about how
25 large they were. So it was -- that was really the

1 roughest number of all the ones I was looking at.
2 Turned out -- and it turned out not to be a good one.
3 But the rest of the numbers are based -- based on
4 sources that are directly or indirectly from the
5 handlers themselves, for those other three, those other
6 three handlers.

7 JUDGE CLIFTON: If I might interrupt,
8 Mr. Miltner? Can you tell me how to spell
9 Braum's?

10 THE WITNESS: B-r-a-u-m apostrophe s.

11 JUDGE CLIFTON: And Heartland is one
12 word?

13 THE WITNESS: Yes.

14 JUDGE CLIFTON: Thank you. Mr. Miltner.

15 BY MR. MILTNER:

16 Q. So which were the three that you were
17 referring to in the last two lines of page 1?

18 A. I was original -- I was originally
19 referring to Aurora, Braum's and GH. And there was an
20 article in -- there was an article in the El Paso Times
21 that talked about GH having 8,000 cows. It seems that
22 they -- they are not putting all the milk from those
23 8,000 cows into -- into the plant at the moment based on
24 testimony from Mr. Carrejo last week.

25 Q. So did you base your estimate on the

1 newspaper story or did you base your estimate on
2 comparing pool numbers?

3 A. Like I said, for GH I based it on some --
4 I based it on the combination of the newspaper article,
5 which seemed consistent with the pool numbers. But I
6 would -- we're here to gather information, and I
7 gathered from Mr. Carrejo that those sales are in the
8 neighborhood of 4 million at the moment. That was his
9 estimate. So I had a couple of sources that were --
10 that were -- that appeared consistent.

11 Q. That were what?

12 A. They appeared to be consistent and I made
13 an estimate.

14 Q. And as for Aurora and Braum's, how did
15 you get their numbers?

16 A. Daily Oklahomian, Oklahoma City, Oklahoma
17 identified Braum's as milking 10,600 cows, which the
18 average per cow production for Oklahoma would be
19 14.7 pounds per month. But I trust that Braum's
20 achieves better than the state average for milk per cow.

21 For Aurora, their own website indicates
22 that they milk 12,290 cows, which we would expect to
23 produce at least 16.9 million pounds per month. And the
24 websites -- all those websites are identified in the
25 footnote in my testimony, in my statement.

1 Q. So for Braum's you relied on a newspaper
2 just like you did for GH?

3 A. Yes.

4 Q. And you're presuming that their
5 production per cow is at the state average and actually
6 you're presuming it's higher than the state average?

7 A. I would certainly presume it's higher.

8 Q. But you have no basis, no -- no knowledge
9 of their actual production or facilities to know whether
10 they're at, below or above the state average?

11 A. No.

12 Q. And there are a number of factors that go
13 into what kind of production you get out of a cow,
14 correct?

15 A. Yes.

16 Q. I mean, it could be -- can be quality of
17 management, could be decisions made by the farmer to
18 produce milk of certain component values, a litany of
19 factors, correct?

20 A. Yes.

21 Q. And again, for Aurora, you're basing this
22 on a presumption of production per cow?

23 A. Yes.

24 Q. Okay. And how did you choose that
25 figure?

1 A. I'm not sure if I -- if I used a -- I'm
2 not sure if I used a national average. I believe -- if
3 I could go back and look at that calculation, I believe
4 I used something like an average, what's been cited as
5 an average organic production per cow. I don't see it
6 in -- I don't see it in the document and that's a --
7 that's unfortunate.

8 But I believe I found a source that cited
9 a reasonable number for an organic farm to expect to get
10 per cow. I think that's the number. I would have to
11 calculate what I got for the per cow production based on
12 the numbers in the footnote here. But I believe it's --
13 it's a number considered to be a reasonable per cow
14 average for an organic dairy farm.

15 Q. That data, that number, is not in your
16 statement, nor is the source, right?

17 A. It is not, although the milk per cow
18 number can be derived from the numbers that are in
19 there, and that can be judged on its own -- on its own
20 merits on the face.

21 Q. We could do the division and figure that
22 number?

23 A. Right.

24 Q. But as you sit here today, you don't
25 recall what the source of the number was for you?

1 A. I believe it was an extension paper about
2 making a transition to organic dairy farming by
3 university extension staff. And they laid out a milk
4 per cow number that they could expect as a result of
5 making a transition to organic production.

6 Q. Do you have any more information other
7 than it was an extension paper that we could use to
8 identify how you made your calculation?

9 A. I -- I want to say it was a University of
10 Wisconsin -- I want to say it was done in the state of
11 Wisconsin, but I'm not sure about that. Yeah.

12 Q. If you look at -- you were referring to
13 note 3 on page 5 of your statement, where you --

14 A. That's right.

15 Q. Okay. And that's where you estimated
16 Braum's at 14.7 million pounds, Aurora at
17 16.9 million pounds, and you stated you believed that GH
18 was over 15 million pounds. But now you believe them to
19 be at 4 million, right?

20 A. I -- I believe that's certainly the --
21 Mr. Carrejo's testimony calls into question the
22 16 million pound figure, yes.

23 Q. So would that change your statement at
24 the top of page 5 -- or the top quarter of page 5, that
25 we estimate the sales of the seven largest

1 producer-handlers to average at least 100 million pounds
2 per year per plant?

3 A. Where is that?

4 Q. The last sentence of the first full
5 paragraph on page 5.

6 A. The last full sentence of the first
7 paragraph, no, that doesn't change that. And that milk
8 per cow figure is 16,500. That's the milk per cow
9 figure that was used to estimate volume at Aurora.

10 Q. How did you get that number just now?

11 A. I multiplied 16.9 million pounds times
12 12, and divided it by 12,290 cows and got 16,500 pounds
13 per month. So that's a number that's consistent with an
14 organic -- organic operation milking cows.

15 Q. So the record is clear, you did the math
16 on that?

17 A. Just now.

18 Q. On your phone actually. But you just
19 took the numbers that were in the statement, you
20 calculated the number, backed into it?

21 A. That's right.

22 Q. But you haven't referred to any other
23 sources?

24 A. No, I've -- I've failed to put that
25 particular source in there.

1 Q. Okay. And your statement that that's an
2 appropriate number for an organic -- organic operation,
3 what's that based on?

4 A. That's based on my experience as an
5 observer of the dairy markets.

6 Q. So you believe that you've read figures
7 or you're aware of figures that lead you to conclude
8 that's a -- that's an appropriate number?

9 A. Yes.

10 Q. Okay. Since you've got your calculator,
11 you have the ability to do some calculations. I want to
12 look at this statement about a hundred million pounds
13 per year per plant for seven producer-handlers. And are
14 you referring just to Class I sales in that sentence?

15 A. Yes.

16 Q. And you believe that Braum's production,
17 not Class I sales, but production, is 14.7 million
18 pounds per month, right?

19 A. This -- that estimate is based on -- on
20 Exhibit 20.

21 Q. If you can hold on for a second while I
22 get my Exhibit 20 out? And I have mine in front of me,
23 so whenever you want to, go ahead. Okay. You said
24 that -- that was based on Exhibit 20?

25 A. Yes.

1 Q. Okay. Can you explain how you took the
2 information in Exhibit 20 --

3 A. And Exhibit 12.

4 Q. Okay. Please explain how you took those
5 two exhibits to arrive at the statement in the first
6 paragraph on page 5 of your testimony.

7 A. Beginning with the -- in Exhibit 12,
8 there's a number of total sales by producer-handlers,
9 654 million pounds.

10 In Exhibit 20, there's an indication of
11 size ranges for a number of plants, number of
12 producer-handlers. There are seven that are less than
13 150,000; 13 that are between 150,000 and 300,000; six
14 more that are between 300,000 and a million; and four
15 more that are between a million and 2 million.

16 So if we multiply each of those numbers
17 by the maximum volume in -- the maximum volume that
18 that -- that that category allows for, we get a maximum
19 amount of money -- maximum amount of -- maximum volume
20 of milk -- maximum volume of fluid milk product sales by
21 producer-handlers smaller than the seven largest. And
22 that gives a -- well, I don't have -- I can do the
23 calculation.

24 Q. Please do.

25 JUDGE CLIFTON: And while you're doing

1 it, tell us what you're doing. For example, if
2 you're multiplying 30 times a number, tell us.

3 THE WITNESS: So 7 times 150,000 pounds
4 is a million 50,000.

5 JUDGE CLIFTON: Can't hear you. Say it
6 again.

7 A. Seven plants under 150,000 pounds, times
8 150,000 pounds is 1 million and 50,000.

9 13 plants under 300,000 pounds times that
10 maximum possible 300,000 pounds is 3.9 million.

11 Six plants under a million times the
12 maximum of a million is 6 million.

13 And four plants times 2 million, which is
14 the maximum for the plants that are between a million
15 and 2 million, is 8 million.

16 And that gives 18 -- 18 million pounds a
17 month -- I'm sorry -- 18,950,000 pounds per month is a
18 total maximum volume that could be sold by those
19 producer-handlers below 2 million pounds, times 12
20 months equals 227,400,000 pounds.

21 So 654 total minus 27.4, which is the
22 upper limits of smaller ones, gives us 426 million
23 divided by 12, is -- is less than -- is smaller than I
24 can -- let's see. 35 million, 12, divided by 7, it's
25 5 million per plant.

1 By that calculation, then, the seven
2 largest averaged 60 million pounds per year per plant.
3 So that is -- I apologize, that number is incorrect. If
4 the correct -- if the calculations I'm doing right now
5 are correct, that should have said -- that should be
6 60 million pounds per year.

7 MR. TOSI: Would that be more helpful for
8 you to use that to do your calculation? It
9 might be easier.

10 JUDGE CLIFTON: What I think we need to
11 do also is give Dr. Cryan a minute and some
12 paper to write it on so that he's not trying to
13 do this on the fly. So let's go off the record
14 for just a few moments while he recalculates
15 this, and then he can walk us through it step by
16 step. All right. We'll go off record. I think
17 we'll only be about five minutes, so don't go
18 very far. It's now 10, please be here by 10:05.

19 (A recess was taken from 10:00 to 10:11.)

20 JUDGE CLIFTON: All right. Let's go back
21 on record. We're back on record at 10:11.
22 Mr. Brosch.

23 MR. BROSCH: Thank you, your Honor. I
24 just want to say I had no objection to the line
25 of questioning here from Mr. Miltner. I think

1 it's a fair line of questioning. He's asking
2 how Dr. Cryan arrived at these figures. That's
3 very fair and Dr. Cryan, of course, is
4 attempting to respond.

5 He has described how he did it. What I
6 am concerned about is this idea of making
7 Dr. Cryan then go through this recalculation on
8 his cell phone while he's sitting up there on
9 the stand under the light.

10 I think in the future, your Honor, if
11 someone asks him to do these recalculations --
12 we're not going to object to this one, we're
13 pretty much through with it. But in the future,
14 if someone asks him to re-do this calculation,
15 I'm going to ask for a recess so that he doesn't
16 have to sit up there with the hand-held cell
17 phone while everybody waits and try to run
18 through to numbers.

19 I think it's very unfair to him and he
20 needs, if they're going to ask him to do that,
21 more time to perform. I don't think he was here
22 to perform. I think he was here to testify. So
23 that's what I'm going to do in the future, your
24 Honor. Thank you.

25 JUDGE CLIFTON: You're welcome. I'll

1 take suggestions as to how we proceed on a
2 case-by-case basis. I think a recess to allow
3 the witness with pencil and paper to keep track
4 of the calculations that he's doing and give him
5 a chance to double-check them is the least we
6 can do.

7 But I think he could do all that just
8 sitting there in the witness chair. So I
9 understand your concern. I also was thinking,
10 you know, that if Dr. Cryan really could do
11 that, have in his head as he went through it,
12 that would be an amazing demonstration. But now
13 we gave him a little time, and we'll see where
14 we go. Mr. Miltner.

15 MR. MILTNER: For the record, Judge, we
16 were trying to explore how the numbers were
17 arrived at, and when reference was made to the
18 exhibits, we went through those calculations.
19 And now that Dr. Cryan has had some time to look
20 over those numbers, I -- I guess I should pose
21 the question.

22 BY MR. MILTNER:

23 Q. As you looked at the upper bounds of the
24 different classes of -- or categories of
25 producer-handlers plants, does your -- does your

1 statement on page 5 need to be modified at all?

2 A. The statement on page 5 does need to be
3 modified. I don't believe that the numbers demonstrate
4 specifically that it's at least 100 million pounds per
5 year per plant, but I'll explain how the numbers were
6 arrived at.

7 I got to a hundred million based on two
8 factors that don't apply. One of them is that I was
9 assuming the addition of the plant in El Paso, the GH
10 plant in El Paso, at 16 million pounds a month, which
11 has not been borne out by the numbers presented this
12 last week.

13 And I also, after adding that, I failed
14 to divide by eight plants instead of seven plants. And
15 by that means, I arrived at a hundred million pounds.
16 And I also made the assumption, which I think is still
17 reasonable, that the -- that these plants that are under
18 2 million were then -- were not all necessarily at their
19 maximum limit. So just a way to rough out that
20 number -- one way to rough out that number is to assume
21 that they were 75 percent of their limit, which for each
22 of them, is at or above the midpoint of the range
23 that's -- that's in the -- that would be captured in
24 that category.

25 So I would say that based on the

1 actual -- the actual numbers, taking the 654 million
2 pounds of total producer-handler sales -- well,
3 actually, it's not -- actually, this is still a
4 calculation based on 16 million pounds, so GH Dairy --
5 so it's probably more in the neighborhood of 75 million,
6 is probably a good ballpark. That's -- 75 million is
7 more appropriate.

8 Q. So you're revising it to 75 million?

9 A. Yes, I'm revising it to 75 million. And
10 I apologize for the errors. Those should not have been
11 in there.

12 JUDGE CLIFTON: Let's go off record just
13 a moment.

14 (Off the record.)

15 JUDGE CLIFTON: Let's go back on record.
16 We're back on record at 10:18. Mr. Ricciardi?

17 MR. RICCIARDI: Your Honor, the
18 suggestion has been made off record that with
19 regard to Exhibit 23, that essentially rather
20 than admit it in its original form, that we
21 simply make the corrections to the document and
22 then admit that document.

23 Because there are changes, in some cases
24 substantial changes that are important, what we
25 would rather do, and our suggestion would be, is

1 to admit the original document as drafted as the
2 statement as Exhibit 23, and to then take any
3 changes that are made and to mark a separate
4 document with the revisions as Exhibit 23-A.
5 That way we can show the original and then the
6 revisions as we go through. Now, I don't know
7 what that Exhibit 23-A is going to look like
8 until we finish all of this process.

9 JUDGE CLIFTON: All right. We'll all
10 keep both suggestions in mind and deal with it
11 when we get to the point. Thank you,
12 Mr. Ricciardi.

13 MR. RICCIARDI: You're welcome.

14 JUDGE CLIFTON: Mr. Miltner?

15 BY MR. MILTNER:

16 Q. Similarly, Dr. Cryan, if we go back to
17 your statement on page 1, that you estimated the three
18 largest producer-handlers have sales in excess of
19 15 million pounds, would that statement need to be
20 revised to be accurate?

21 A. Yes. I would say the two largest.

22 Q. Okay. But that was your estimation when
23 you drafted the statement, right?

24 A. What was?

25 Q. Your estimation was that there were

1 3 million when you drafted the statement, now you're
2 estimating there are 2?

3 A. 3 million?

4 Q. I'm sorry, three plants over
5 15 million pounds.

6 A. That's correct. A good -- quite of bit
7 of this was based on my assumption that GH Dairy was at
8 16 million pounds rather than 4 million pounds.

9 JUDGE CLIFTON: May I interject a
10 question? Looking at Exhibits 12 and 20,
11 Exhibit 12 gave you a 2008 year which you could
12 use, is that correct, Dr. Cryan?

13 THE WITNESS: Yes, it gave sales in the
14 marketing areas by producer-handlers of
15 654 million pounds for the year.

16 JUDGE CLIFTON: All right.

17 THE WITNESS: I actually used the table
18 that's in Exhibit 7. I took 57 million pounds
19 in December of 2008, multiplied that by 12,
20 which gave me a larger number, 682.

21 However, the calculations still were
22 based on the assumption that GH Dairy was at
23 16 million pounds.

24 So if there's another recess before I'm
25 done -- I don't doubt that there will be -- I'll

1 do a recalculation.

2 JUDGE CLIFTON: All right. That would be
3 good. Now, in relying on the information in
4 Exhibit 20, what time period is referenced?

5 THE WITNESS: Oh. That's a good point.
6 Actually, that refers to March 2009, which would
7 have included GH Dairy in El Paso. Thank you,
8 your Honor, for pointing that out. The numbers
9 are less incorrect than I believed they were.

10 It seems to me the only error was that
11 the assumption of 16 million pounds --
12 16 million pounds by that plant in El Paso was
13 actually -- the best number seems to be
14 4 million pounds.

15 MR. BOSCH: Excuse me, your Honor.

16 JUDGE CLIFTON: Mr. Brosch?

17 MR. BROSCH: Now that your Honor has
18 pointed this out, perhaps we need to go back off
19 the record to allow Dr. Cryan to think about
20 this a little bit more, because we now have
21 another factor which apparently affects his
22 calculation. So I would -- rather than having a
23 quick answer to this, because I don't want any
24 more quick answers, can we go off the record and
25 have him look at these numbers again in light of

1 the fact that your Honor's pointed out that this
2 is a different time frame than originally
3 brought up?

4 THE WITNESS: The most significant thing
5 you pointed out, your Honor, is that in
6 March 2009, there were, in fact, seven plants.
7 GH Dairy was not an eighth plant, it was the
8 seventh plant. So there was no error in
9 dividing the total I got by eight. It was, in
10 fact, seven plants.

11 And of course, this is -- this is the
12 kind of -- I'm sure Kevin would say, this is the
13 kind of problem that happens when we try do
14 these things on the fly.

15 MR. BROSCHE: Your Honor, this is the
16 point I was making, I believe, off the record
17 but I'll now make it on the record. That when
18 we have a witness explain how he went through
19 the calculations, and then we ask him to re-do
20 the calculations, under the pressure of the
21 Klieg lights that suspend figuratively, if not
22 literally, over the witness stand, plus the use
23 of a hand-held calculator, plus the fact that
24 everybody is sitting here waiting, we can have
25 errors made, we can have the record reflect

1 things that are erroneous a second time.

2 I think it would be better now, having
3 pointed this out, if we give him time to reflect
4 on this. If we're going to ask him to do the
5 calculation, testify as to his calculations,
6 then I think he needs the time to reflect on
7 this.

8 JUDGE CLIFTON: I have another question,
9 Dr. Cryan. When you went through your
10 explanation of your calculation the first time
11 and you looked at Exhibit 20, and you assumed
12 the maximum production for each category --

13 THE WITNESS: Yes, ma'am.

14 JUDGE CLIFTON: -- rather than, for
15 example, something that is less than the
16 maximum, what does that do to your calculation?

17 THE WITNESS: Well, that's what I did
18 initially as I sat here. That gives you a
19 relatively firm lower limit of how large those
20 largest plants are.

21 But an estimate of how large they
22 actually are can include some assumption of
23 the -- of the plants in the smaller categories
24 because these are not regulatory limits. None
25 of these are regulatory limits, except 150,000.

1 The rest of them are all -- are all, the
2 300,000, the 1 million and the 2 million
3 category cut-offs are all for statistical
4 purposes.

5 Those plants have no reason to be just
6 below that limit. So the reasonable assumption
7 is that they are distributed along the -- along
8 the distribution and not clustered below that,
9 so that they would not in fact be all at
10 2 million.

11 A more reasonable assumption is that the
12 four plants between a million and 2 million are
13 somewhere in the middle. And the same for the
14 other categories.

15 And that sort of consideration increases
16 the best estimate above the -- above the lower
17 limit for the average size of the largest
18 plants, the larger producer-handlers.

19 JUDGE CLIFTON: So could there be some
20 value to having two numbers? One would be it is
21 at least this much, and then another, but it is
22 more reasonable to expect that it is this much?

23 THE WITNESS: Yes.

24 JUDGE CLIFTON: All right. You said you
25 used the 75 percent, I think you said. But that

1 was only as to the largest category. Is that
2 correct? Getting from --

3 THE WITNESS: Well, that was just an
4 example of -- that was something I discussed
5 with someone here as we were redoing this, the
6 75 percent idea. I was -- I don't remember
7 exactly what -- what assumption I made about
8 where along that distribution is, but that would
9 come out about the same.

10 It would be reasonable to say the
11 75 percent is a -- is an approximation of the
12 midpoint that is easy to apply on the fly. As
13 you're looking at the total, applying -- just
14 saying the total maximum volume that these
15 smaller -- that these producer-handlers under
16 2 million pounds sold, and multiplying it by
17 7 -- that total by 75 percent, it's a simpler
18 rule to apply to the total.

19 But it wouldn't necessarily be the rule I
20 would apply if I was sitting down doing this
21 with a spreadsheet and doing a more involved
22 calculation. However, it would be the ballpark.

23 JUDGE CLIFTON: I see. Now, Mr. Miltner,
24 is taking the time off the record for Dr. Cryan
25 to address this important now or should we keep

1 going and come back to this later?

2 MR. MILTNER: Your Honor, what I have
3 been trying to explore is the basis for
4 Dr. Cryan's estimates about producer-handler
5 volumes. We've already established that one of
6 his estimates was off by a magnitude of 3 or 4.

7 And so I think it's important for us to
8 establish how these other estimates were made
9 and how he arrived at that, because the size of
10 producer-handlers is obviously at issue and is
11 important to the conclusions that Dr. Cryan has
12 drawn and is trying to draw.

13 So although I'm cognizant of the pace at
14 which we're moving, I would like to have the
15 record clear on this point.

16 JUDGE CLIFTON: All right. Let me ask.
17 I know there's a panel here of organic producers
18 that wants to testify after lunch. Is there any
19 possibility that you would like to go before
20 lunch to fill in some time for us while some
21 other work is done off record?

22 MS. ARNOLD: I guess we could. Give us
23 a few minutes to get our papers together.

24 JUDGE CLIFTON: Were any of the -- and
25 that is Kathie Arnold speaking?

1 MS. ARNOLD: Yes, it is.

2 JUDGE CLIFTON: Were there any documents
3 that any of you wanted to be exhibits that would
4 be admitted into evidence in that manner?

5 MS. ARNOLD: Yes.

6 JUDGE CLIFTON: Have you had the
7 opportunity to reproduce those?

8 MS. ARNOLD: Yes, I have.

9 JUDGE CLIFTON: Wonderful. Mr. Miltner,
10 do you think it might be good if we interrupt
11 Dr. Cryan's testimony and take that testimony?

12 MR. MILTNER: I'm -- I only caution that
13 Mr. Brosch is only available today, and as we
14 discussed Friday afternoon, Dr. Cryan is only
15 available today. We need to get Dr. Cryan's
16 testimony completed. And so --

17 JUDGE CLIFTON: Are both Mr. Brosch and
18 Dr. Cryan available into the evening hours, if
19 necessary?

20 MR. BROSCH: Your Honor, I think my plane
21 leaves sometime around 8:30 or 8:50, but if I
22 have to leave, your Honor, there is no reason
23 for you to stop because of me. I will be ably
24 supported by Mr. Beshore. And so Mr. Beshore
25 will do whatever needs to be done on our part.

1 So don't change your schedule for me, your
2 Honor.

3 JUDGE CLIFTON: All right. And,
4 Dr. Cryan, will you be available, for example,
5 into the evening hours and tomorrow?

6 THE WITNESS: Yes, your Honor.

7 JUDGE CLIFTON: All right. I would like
8 then to take about a five-minute break, and
9 we'll set up chairs here for a panel of three.
10 And the statements that are available that would
11 become exhibits, you should give about two or
12 three of those to the USDA table in front of the
13 room, you should give one to the court reporter
14 and one to me, and the others can be put on the
15 back table available for people to pick up a
16 copy.

17 All right. Thank you, Mr. Miltner.
18 Let's go off record for about five minutes.
19 It's now 10:31. Back, ready to go at 10:36,
20 please.

21 (A recess was taken from 10:31 to 10:41.)

22 JUDGE CLIFTON: We're back on record at
23 10:41. I would like now for each of the three
24 panelists who is in the witness box to identify
25 himself by stating and spelling his name.

1 MR. SEGALLA: My name is Rick Segalla,
2 R-i-c-k, S-e-g-a-l-l-a.

3 MS. ARNOLD: Kathie Arnold. And that's
4 K-a-t-h-i-e, Arnold is A-r-n-o-l-d.

5 MR. SCHILTER: Tony Schilter, T-o-n-y,
6 S-c-h-i-l-t-e-r.

7 JUDGE CLIFTON: Thank you. I very much
8 appreciate your making yourselves available to
9 testify outside of the time slot that we had
10 given you. It is very helpful to the overall
11 proceeding to take your testimony now and it may
12 help us not to go so late tonight, which I
13 appreciate very much. Would each of you please
14 raise your right hand? Please remain seated.

15 KATHIE ARNOLD, RICK SEGALLA, TONY SCHILTER
16 of lawful age, being duly sworn, was examined and
17 testified as follows:

18 JUDGE CLIFTON: Thank you. Each of the
19 witnesses has been sworn in. I would like the
20 record to reflect that I have marked as
21 Exhibit 71 the document dated May 11, 2009, with
22 a heading FOOD Farmers, that's F-O-O-D,
23 Federation of Organic Dairy Farmers.

24 (Exhibits 71 and 72 were marked for
25 identification.)

1 I have marked as Exhibit 72 the document
2 also dated May 11th, 2009, that contains first
3 the testimony by Rick Segalla, and secondly the
4 testimony by Kathie Arnold. Who would like to
5 begin testifying? Again, state your name.

6 MR. SEGALLA: My name is Rick Segalla.

7 JUDGE CLIFTON: Let's go off record just
8 a moment.

9 (Off the record.)

10 JUDGE CLIFTON: Let's go back on record.
11 We're back on record at 10:44. Thank you,
12 Mr. Segalla. You may proceed.

13 A. My name is Rick Segalla, I operate my
14 family's 900-acre farm in Canaan, Connecticut milking
15 115 cows raising an equal number of young stock. At
16 this time there are about 140 dairy farms remaining in
17 the state of Connecticut. The farm has been in the
18 family since the early 1900s, and today it is a
19 corporation owned by me and my siblings. The farm
20 consists of 300 acres and wooded land and the remaining
21 tillable/open land is used for corn silage, 65 acres;
22 alfalfa, 76 acres; grass, hay, 200 acres; pasture,
23 160 acres. I started transitioning to organic dairy in
24 1997 when I gave up the use of synthetic fertilizers and
25 starting using more sustainable practices, such as crop

1 rotations, green manures, and mined minerals for my
2 health -- or my soil's health and management. My farm
3 was certified organic in 1999, but I did not have a
4 market for my organic milk. A couple of options in
5 marketing, however, eventually I decided to sell my milk
6 to Colabro Cheese, which I've been shipping to ever
7 since. Colabro Cheese is a 43-year-old Italian cheese
8 company located in East Haven, Connecticut that
9 specializes in Ricotta, Ricotta Impastata, mozzarella
10 Fior Di Latte, grated Parmesan, Romano and a select line
11 of specialty cheeses. Along with the dairy cows, I have
12 been raising some Hereford dairy crosses for a small,
13 but growing organic beef market.

14 I am vice president of the Northeast
15 Dairy Producers Alliance, known as NODPA, and today I am
16 speaking on behalf of NODPA and the Federation of
17 Organic Dairy Farmers. I am one of the original NODPA
18 members who descended upon Roman Stolzfoos's farm in
19 Lititz, Pennsylvania for the First Annual 2001 NODPA
20 Field Days.

21 NODPA represents 820 dairy farmers east
22 of the -- in in the east of the USA. The mission of the
23 Northeast Dairy Producers Alliance is to enable organic
24 dairy family farmers, situated across an extensive area,
25 to have informed discussions on matters critical to the

1 being of the organic dairy industry as a whole, with
2 particular emphasis on: Establishing a fair and
3 sustainable price for the products at a wholesale level.
4 Promoting ethical, ecological and economically
5 sustainable farming practices. Developing networks with
6 producers and processors of other organic commodities to
7 strengthen the infrastructure within the industry.
8 Establishing open dialogue with organic dairy processors
9 and retailers in order to better influence the pay price
10 and to contribute to marketing efforts.

11 FOOD Farmers is an umbrella organization
12 of the Northeast Organic Dairy Producers Alliance. The
13 Midwest Organic Dairy Producers Alliance, known as
14 MODPA, the Western Organic Dairy Producers Alliance,
15 known as WODPA, which represents two-thirds of the
16 organic dairy farmers across the country. MODPA's
17 mission is to promote communication and networking for
18 the betterment of the Midwest dairy producers and
19 enhance the sustainable farmgate price. WODPA's mission
20 is to preserve, protect and ensure the sustainability
21 and integrity of the organic dairy farming across the
22 west.

23 Organic dairy farmers have many
24 different production methods, including seasonal grass
25 based dairies and more traditional production methods

1 that combine pasture, conserved forage and grain. They
2 also market their milk in many different ways, selling
3 to the major brands including Horizon Organic, Organic
4 Valley, HP Hood, Humboldt Dairy, Clover Stornetta, as
5 well as smaller cooperatives that included Upstate
6 Niagara Cooperative, Organic Choice and LOFCO, and
7 producer-handlers of organic dairy products marketing
8 direct to the consumers and retail outlets.

9 We support proposals retaining the
10 producer-handler exemption with a monthly hard
11 production cap of 450,000 pounds for any existing
12 producer-handlers and a monthly hard production cap of
13 450,000 pounds for new producer-handlers coming into the
14 market, over which level they would be related. This
15 honors the original intent and purpose of the exemption,
16 to make allowances for small existing -- small -- make
17 allowances for existing small usually owner operated,
18 family owned -- farmer-owned businesses who have made
19 capital investments and it takes into account for size
20 of organic dairy herds of the 20th century.

21 JUDGE CLIFTON: I'm sorry, in which
22 century?

23 MR. SEGALLA: The 21st century.

24 JUDGE CLIFTON: Thank you.

25 MR. SEGALLA: We also believe that small

1 plant exemption levels should have a monthly
2 hard cap production of 450,000 pounds to ensure
3 a level playing field. This will allow small
4 family farm operations to work collectively --
5 cooperatively -- to work cooperatively to
6 process and market their own products in their
7 local community. This is particularly
8 applicable in the organic dairy market as
9 processing in a community plant would allow
10 family farms to combine their equity to maximize
11 their return for their production, which has
12 higher production costs. It is well documented
13 that consumers of organic products value knowing
14 the farmers that produce their product and that
15 it is packaged locally. The production caps
16 would allow a farm production 15 -- or would
17 allow a farm producing 15,000 pounds of milk per
18 cow per year to have about 350 cows and still be
19 exempt from the pool requirements. It would
20 also allow a number of small operations to
21 process their milk together and still fall under
22 the small plant exemption, which is not possible
23 with the producer-handler exemption.

24 We find no justification for a soft cap
25 approach in any proposal. A soft cap will

1 encourage abuse of the exemption, involve
2 extraordinary policing to ensure compliance.
3 And if small is the criterion, there is simply
4 no basis for the so-called soft cap approach put
5 forth by various proposals. Those proposals
6 seek an advantage for a processor by which, by
7 definition, would be larger than the exemption
8 threshold for small businesses by allowing them
9 to be larger than the threshold while still
10 enjoying preferential treatment or preferential
11 price on milk from their own farm in quantities
12 up to that threshold. Whatever the rationale
13 will be offered to support these soft cap
14 proposals, promoting small business cannot be
15 acceptable rationale because there is no size
16 limitation in the proposal.

17 We do not support grandfathering of any
18 existing operations such as grandfathering
19 represents usually special treatment. A special
20 order -- as special order changes are made
21 through the years, plant becomes subject to
22 these changes which may impact their
23 profitability. The same happens to make
24 allowances. Manufacturing plants are subject to
25 reduced profitability or even forced losses if

1 make allowances are not increased to match
2 increases in production costs, even though the
3 plant's investments may have been made when
4 economic conditions were more favorable.
5 Similarly, producers -- every producer is
6 subject to reduced profitability whenever pay
7 prices are reduced, even though the farm
8 investments may have been made when economic
9 conditions were not promising. The federal
10 order system simply can't, in general -- and in
11 general have not protected producers or plants
12 from economic change by grandfathering their
13 status.

14 On the organic side, the largest example
15 of abuse of the producer-handler exemption is
16 Aurora Organic Dairy With 12,600 cows or --
17 12,600 or more cows headquartered in
18 Platteville, Colorado, but with herds in
19 Colorado and Texas. We say 12,600 cows or more,
20 we are being conservative with our figures
21 because some material in the media has indicated
22 they intended -- they intended to milk 19,000
23 cows by the end of 2008. They are a
24 producer-handler that distributes s their Ultra
25 High Pasteurized (UHT) products nationally,

1 primarily selling their fluid milk to direct --
2 directly to big-box stores, supermarket chains
3 and national distributors as private labels.
4 This milk is being brought into all federal
5 orders without producer-handler production caps,
6 and on store shelves competes with locally or
7 regionally produced organic milk at a
8 significant economic advantage. The economies
9 of scale that allow for bulk purchasing of feed
10 and other inputs for large dairies that are
11 financed by private equity firms also in
12 place -- already place Aurora at a significant
13 advantage over the average family farm. When
14 you add the competitive advantage of not having
15 paid the pooling costs, Aurora and other large
16 producer-handlers have significant unfair
17 economic advantages that undermine the
18 negotiating ability of the brands representing
19 the vast majority of organic dairy producers.
20 This situation threatening the viability of
21 organic dairy producers as it drives down the
22 wholesale price of packed organic milk, which
23 translates a drop into a pay price for
24 producers. Without the economies of scale,
25 family farms cannot pay their bills at these

1 lower pay prices and their long-term economic
2 future is threatened.

3 This downward pressure on pricing is
4 already forcing some organic producers to exit
5 the industry, a first since the
6 commercialization of organic dairy approximately
7 23 years ago.

8 The large scale producer-handlers -- the
9 large scale producer-handler is a business model
10 designed to produce packaged milk at a low cost.
11 They would not also have -- they should not also
12 have an unfair economic advantage by being
13 exempt -- they should not also have an unfair
14 economic advantage by being exempt from paying
15 into the Federal pool that provides for the
16 long-term stability of the milk market for all
17 producers. We support the true intent of the
18 producer-handler and exempt plant status that
19 rewards the entrepreneurial work of a single
20 producer or producers working together to
21 benefit each other and their community. We
22 believe the hard cap would ensure the true
23 intent of the exemptions from the federal pool
24 can be enforced which will maintain a level
25 playing -- maintain a level playing field in the

1 middle -- in the marketing of organic milk.

2 I thank you for listening to my testimony
3 and I am prepared to answer questions. I'm not
4 used to talking in front of a lot of people.

5 JUDGE CLIFTON: Thank you, Mr. Segalla.
6 We'll defer the questions until all three of you
7 have testified on direct. Then we'll open it up
8 to cross-examination. And you may be asked a
9 question that all three of you are asked to
10 answer, or a question directed to just any one
11 of you.

12 Ms. Arnold, you may proceed.

13 MS. ARNOLD: Thank you.

14 A. My name is Kathie Arnold and I own and
15 operate Twin Oaks Dairy, LLC in Truxton, New York in
16 partnership with my husband and his brother. We are in
17 our 30th year in business together. We have built and
18 expanded on the farm business that was started by their
19 parents in the 1930s. We also have -- my husband and my
20 son, who's 21, is also an active part of our business
21 and hoping to start to buy into the business in a couple
22 of years. And Bob and Rick's older brother, John, helps
23 us part time as does one of their sisters husband's also
24 works for us part time. So we do have a lot of family
25 input in our farm.

1 We've been shipping certified organic
2 milk since 1998 and currently have approximately 250
3 head of certified livestock, milking about 130 with over
4 700 acres of certified cropland and pasture. To make
5 the transition to organic production, our farm had to
6 make numerous changes in our infrastructure, requiring
7 investment of time and financial resources to enable us
8 to meet the organic standards.

9 Over these last ten years, I have been
10 extensively involved in helping to build the organic
11 industry from the farmer side, mentoring numerous
12 transitioning and new entry organic dairy farms, hosting
13 many farm tours, and giving several presentations around
14 the country on organic dairy production. I have been
15 involved in organizing and building the Northeast
16 Organic Dairy Producers Alliance from its initial
17 meeting in 2001 in Vermont, carrying roles from Board
18 President -- Board Member, excuse me, President,
19 newsletter editor and writer to Policy Committee work.
20 And I have been active in the formation and development
21 of FOOD Farmers. I have written numerous articles on
22 organic dairy production for other publications as well.
23 I've been active with the National Organic Coalition and
24 am a participant on the New York State Organic Dairy
25 Task Force, New York's Commissioner of Ag and Markets

1 has appointed me to be on the New York Milk Marketing
2 Advisory Council, The Northeast Dairy Leadership Team,
3 and appointed me as chair of the New York Organic Task
4 Force to advise his Department. I lay out this partial
5 listing as a reflection of the time and effort, most of
6 all of it gratis, that I have invested in endeavoring to
7 help develop grow and threaten the organic dairy sector.
8 I want to see more farms across the country try continue
9 to have the opportunity to transition to organic
10 production and have a viable market, one that is not
11 outcompeted by large producer-handlers that are given a
12 substantial competitive advantage by their exemption
13 from pooling costs.

14 I am here today not only to speak on
15 behalf of our own farm, but also to represent NODPA and
16 FOOD Farmers, and to represent the New York State
17 Organic Dairy Task Force. The mission of the task force
18 is to, quote, provide a venue to discuss and develop
19 strategies to grow a sustainable organic dairy industry
20 for New York state. This dialogue will help clarify
21 opportunities and the barriers in the organic dairy
22 industry. The members will represent diverse
23 perspectives from all points of the value chain. The
24 primary outcome of the task force will be to identify
25 and advocate for needed communication, education,

1 research and policy initiatives to allow for the
2 production and marketing of New York's organic dairy
3 products in a fashion which is economically, socially,
4 and environmentally sustainable. End quote.

5 The members of the task force include
6 organic dairy and grain farmers, processors, certifiers,
7 educators, and a representative from the New York Farm
8 Viability Institute.

9 The detrimental effect of no
10 producer-handler production cap on the organic market
11 was first identified by the New York Organic Dairy Task
12 Force in July of 2007, noting the volume of milk being
13 sold in the Northeast that originated from a
14 producer-handler in Colorado. The task force then
15 worked with representatives from NODPA and FOOD Farmers
16 on this issue.

17 One of the basic principles of the
18 Federal Milk Marketing Order System is to provide equity
19 between producers. That principle is being compromised
20 with the current producer-handler exemption, in most
21 orders, of all producer-handlers from paying into the
22 federal milk marketing order, when some of today's
23 producer-handlers are milking many thousands of cows.
24 The economic advantage they have by not pay pooling
25 costs creates an inequitable playing field.

1 In the organic dairy industry, we have at
2 least one such example where an organic
3 producer-handler, Aurora Organic Dairy, has multiple
4 operations milking a total of 12,600 or more cows. And
5 likely has as many or more cows than all of the State of
6 Vermont and its 210 organic dairy farms. And 2005, 2006
7 study by Vermont Extension, University of Maine
8 Extension, NOFA Vermont and the Maine Organic Milk
9 Producers show that the average size of an organic herd
10 in Vermont was 56 cows. So you multiply that times
11 approximately 210 organic farms. That's how we
12 calculated that. That Aurora has as many or more cows.

13 JUDGE CLIFTON: So you're talking about
14 cows producing organic milk?

15 MS. ARNOLD: Right, right. These are
16 strictly cows -- organic cows in the state of
17 Vermont.

18 JUDGE CLIFTON: Thank you.

19 MS. ARNOLD: Aurora's milk is on store
20 shelves around the country as private
21 label/store brand fluid milk competing at an
22 economic advantage when most of the rest of the
23 organic milk has had to reflect the additional
24 price of paying pooling costs.

25 When the producer-handler exemption was

1 first put into place, there was no conception of
2 the huge numbers of cows that would come to be
3 part of some of today's producer-handler
4 operations. Their economies of scale, their
5 vertical integration, and their use of ultra
6 high temperature pasteurization, which provides
7 weeks of shelf life allowing nationwide
8 distribution of milk from a single
9 producer-handler plant. This ability to ship
10 packaged milk around the country severely
11 disrupts the organic marketplace and impacts
12 every organic processor and every organic farmer
13 whose processor does have to pay into the pool,
14 as well as all the small organic
15 producer-handlers that this exemption was meant
16 for.

17 When the federal milk marketing orders
18 were first created in the 1930s, there was no
19 conception that a pasteurization process would
20 be developed that would allow milk processed in
21 one plant to be distributed nationwide, from
22 coast to coast, rather than just providing milk
23 for a neighborhood, a community, or at most a
24 region, as producer-handlers would have done in
25 the 1930s. Aurora began processing organic milk

1 in the latter half of 2004. In less than five
2 years' time, they have grown to have
3 approximately 17 percent of the organic fluid
4 market.

5 And to explain how we came up with that
6 figure. USDA data shows the national sales of
7 organic fluid milk at 1263 million pounds for
8 2008. If Aurora Dairy has a little over 12,000
9 cows producing an average of 17,000 pounds of
10 milk a year, for a total of approximately
11 214 million pounds, if you take 214 million and
12 divide it by 1263 million, you come out to just
13 under 17 percent.

14 And a group of us FOOD Farmers did visit
15 one of the -- the High Plains Dairy of Aurora, I
16 think back in 2006, somewhere in that
17 neighborhood, and Juan Valez, their farm
18 manager, told us approximately what their herd
19 average was at that time. Aurora has taken the
20 producer-handler model to a whole new
21 unprecedented dimension. And is continuing to
22 grow their business and up market share from
23 their competitors. Their, what they call ultra
24 pastuerized, private label fluid beverages are
25 distributed nationwide to large, national retail

1 chain customers, and Aurora's exempt status
2 gives them an economic advantage overall their
3 competitors in the private label store brand
4 market who are regulated handlers and over their
5 major brand name competitors who are also
6 regulated handlers as well. How would the
7 institution of a producer-handler production cap
8 benefit organic dairy producers? By level the
9 playing field, it would ensure that the pool
10 could function more efficiently and maintain the
11 profitability of handlers and processors.
12 Processers competing with exempted plants that
13 have a national distribution would not be at a
14 competitive disadvantage. For the hundreds the
15 organic dairy producers in the U.S. that
16 negotiate price directly with their processor,
17 the unfair advantage that exempted plants have
18 in the marketplace restricts the margins of
19 those processors and inevitably lessens their
20 ability to pay their farmers a fair pay price.
21 While organic dairy is only approximately
22 4 percent of total U.S. milk production,
23 although growing, with nearly 2,000 family farms
24 now involved in organic dairy, putting a cap on
25 the exemption will benefit approximately while

1 only impacting those few that are abusing the
2 intent of the exemption for their personal gain.

3 Times have changed from size of some
4 operations to processing techniques, that makes
5 it imperative to change the regulations that
6 were in place 72 years ago. Without the
7 institution of a 450,000 pound production cap,
8 organic farmers face the real risk of continued
9 growth of existing large producer-handlers and
10 the start up of new ones who unfairly,
11 economically advantage by their exempt stat
12 thaws will continue to drive disruption of our
13 marketplace to the extreme. Thank you for
14 listening.

15 JUDGE CLIFTON: Thank you, Ms. Arnold.
16 Would you spell for us, the name of the New York
17 Commissioner of Agriculture?

18 MS. ARNOLD: Patrick, P-a-t-r-i-c-k,
19 Hooker, H-o-o-k-e-r.

20 JUDGE CLIFTON: And would you look with
21 me on your statement, Exhibit 72, the second
22 page of that statement, the first full
23 paragraph? And you spoke about the Federal Milk
24 Marketing Order system. Should those initials
25 be other than they are now?

1 MS. ARNOLD: Help me again find where on
2 the second page.

3 JUDGE CLIFTON: The second page of your
4 statement, the first full paragraph, the middle
5 of the paragraph.

6 MS. ARNOLD: Oh, yes, it shouldn't be
7 FMO. It should be FMMO. Thank you for picking
8 that up.

9 JUDGE CLIFTON: All right. And can you
10 spell, I hope you can, the gentleman who told
11 you about the herd average for Aurora?

12 MS. ARNOLD: Dr. Juan Valez. J-u-a-n,
13 V-a-l-e-z.

14 JUDGE CLIFTON: And do you know what
15 field his doctorate is in?

16 MS. ARNOLD: Veterinary medicine.

17 JUDGE CLIFTON: Thank you. Now,
18 Ms. Arnold, will you be the witness to give us
19 the foundation on Exhibit 71?

20 MS. ARNOLD: Yes, I will.

21 JUDGE CLIFTON: This would be a good
22 time.

23 MS. ARNOLD: Okay. The exhibit with the
24 heading of FOOD Farmers, we are a democratic
25 organization made up of three separate

1 organizations NODPA, MODPA and WODPA,
2 representing the three main areas of the
3 country, and we each have our own board of
4 directors and representatives and officers as
5 listed on the left-hand side of the letter. And
6 each -- each of the ODPAs in and of themselves
7 agree with the statement that is here in this
8 FOOD Farmers letter and we came together with
9 the umbrella organization FOOD Farmers to have
10 this as our nationwide position.

11 JUDGE CLIFTON: All right. Do you at
12 some point in your panel want to read it into
13 the record or do you want it to be admitted into
14 evidence as a stand-alone document?

15 MS. ARNOLD: Well, a lot of it was in
16 Rick Segalla's testimony already, so I would be
17 happy to read it, but it -- a lot of it would
18 just be a repeat, I think of what you've already
19 heard.

20 JUDGE CLIFTON: Thank you. And now the
21 next witness, please.

22 BY MR. SCHILTER:

23 Q. My name is Tony Schilter, and I represent
24 WODPA, that covers the states of Washington, Oregon,
25 California, Montana, Idaho, Utah, Colorado, New Mexico,

1 Arizona, Nevada, Texas and Wyoming. I am here in
2 support of WODPA, NODPA -- the Midwest. And I am also
3 representing my association with Northwest Dairymen's
4 Association, that was testimony that I'm going to pull
5 from, that was given on Thursday by Steve Rowe, which is
6 also Darigold, they are my parent cooperative that I
7 belong to.

8 I, first and foremost, was a producer of
9 Darigold with my wife, Sunny, who's present with me, and
10 my partner, Lonnie Schilter at home and my son that
11 works for Darigold in Seattle, with Steve Rowe, we milk
12 250 cows and we have about equivalent to that in the
13 young stock -- young stock.

14 We're an extensive breeding program. We
15 also have a daughter in the Midwest which is in
16 Illinois, Lanark, Illinois that's got a superb herd of
17 cows and our breeding program is tied in with his cows.
18 He's got, like, two bulls and a stud. He also is a corn
19 farmer and soybean farmer. Firsthand on what the
20 markets are doing.

21 We feed -- we farm 100 acres of mainly
22 grass, which is silage, which I should be doing right
23 now, and then our second and third cutting is hey, and
24 if there is a fourth, it goes back into silage.

25 The history of our farm, my wife and I

1 started it in 1967, probably had more ambition than
2 since, but we survived and we've established quite a
3 farm. If it wasn't for our children, I think we would
4 be retired and in Arizona. But being that the children
5 are all involved in it, we're all active in it.

6 We feed commodities. I buy corn on the
7 open market -- it has to be organic -- buy some wheat,
8 soybean and flax seed, and we mix it all together, and
9 alfalfa out of southern Idaho.

10 I lost my train of thought.

11 JUDGE CLIFTON: That's expensive.

12 MR. SCHILTER: Very expensive.

13 A. On May -- in 2001, my wife and I decided
14 that we were going to be organic, we wanted to go
15 organic. We certified the place. We went through all
16 the procedures. And Organic Valley was in the area, in
17 Oregon, and we're in southern Washington. And Horizon
18 wasn't in the picture yet.

19 And we certified our farm but we weren't
20 accepted. So from 2001 until 2007, we were actually
21 organic certified but we had no market for our milk.
22 And then 2007, on May 18th in 2007, we were certified
23 organic -- going, and Horizon offered to take our milk
24 on a three-year contract.

25 And in 2007, December 3rd, is a day in my

1 infamy, that I shall never forget. That prior to
2 December 3rd of 2007, being the ethanol market had hit
3 the United States, and corn prices were going out of the
4 roof.

5 We had boughten (sic) the equivalent of
6 \$300,000 worth of feed in storage. On December 3rd, at
7 approximately 1:00 in the afternoon, the water started
8 coming in and it crested at 7:00 that night. By the
9 time we were done, we had 6 feet of water in our barn.
10 My \$300,000 of grain was down the river, plus about 400
11 big bales of hay.

12 And it's been a challenge and it -- just
13 this last month or so we feel that we have the upper
14 hand. My neighborhood had 280 cows and every one of
15 them except for 11 perished. I seen them hanging in the
16 rafters. I seen hanging them hanging in the trees.
17 He's still not over it psychologically and financially.

18 So I've paid the price to be an organic
19 producer. I want to protect that status very much so.
20 Another unique situation that I'm sitting in right now
21 is that I'm in a -- in Federal Order 124, which in
22 conjunction with 131, has regulated handlers in it and
23 we have been since 2006. I was involved in those
24 hearings at that time as a spectator. I was on the
25 board of directors prior to of Darigold and at that time

1 I was on the leadership council of Land 'O Lakes.

2 I'm going to quote some of these things
3 out of Steve Rowe's testimony that was done on Thursday.
4 It was 2003 that we had asked for the Federal Order to
5 issue the cap of 450,000 pounds and grandfather at a
6 million pounds of production, and in 2006 it was
7 implemented. So we have 2006, 2007, 2008, and this is
8 2009 history on that. And without that, it would have
9 been a blood bath in our orders.

10 And I was just going through some records
11 back here that of the producer-handlers -- I don't know
12 what statement this is, but I found it in the back --
13 the different producer-handlers that were regulated --
14 and this is 2005, there was 8 producers,
15 producer-handlers in the Federal Order 124.

16 I personally know each one of these. Of
17 those eight, five remain. And I would like to give you
18 the reason that those three had left. And if you look
19 at the first page, if you have it in front of you, it's
20 Faith Dairy of Tacoma. They were at my place last
21 Friday. They were dissolved because of parental -- of
22 internal turmoil within the family. And they so
23 dissolved that producer-handler.

24 They had an ideal location. They were
25 right in downtown, on 72nd Street in Tacoma, and they

1 had a drive-thru and they were there since 1960. They
2 were doing fine except for everybody wanted some money
3 right away and they couldn't do. So they dissolved it.
4 Edaleen Dairy, Graafstra, quite a character, real nice
5 guy, he's got -- he's still there but he is over the 3
6 million and today he does pay into the pool.

7 He also has a lucrative contract in
8 Alaska and with the cruise ships out of Seattle. And he
9 lives right on the Canadian boarder and he's got his
10 farm stores strategically located right on the border.
11 So he gets a lot of money from Canada. He's in -- he's
12 involved in it, he's happy. Gilbert, I can't honestly
13 tell you, but he's there. Graafstra, Country Farm
14 Dairy, died. And that's rather final. That's why he's
15 not there.

16 Lochmead Dairy is doing a good job, and
17 there's one here that -- oh, Mallorie's, they're doing a
18 good job. Mallorie's had a little bit of trouble and
19 they were over the 3 million pound mark per month, but
20 they have since then cut back and they are meeting the
21 criteria of 3 million pounds per month and they seem
22 to be doing fine. Smith Brothers was my next door
23 neighbor in Auburn. They milked -- at that time in
24 Auburn, they were milking, I would say, close to 1,500
25 cows. And they had a pollution problem there. Because

1 we do get substantial amount of rain, about 36 inches a
2 year, and they moved their whole operation, the rural
3 slope on the eastern side of the mountains. Fourth
4 generation, no boys. Alexis is the only survivor of the
5 Smith Brothers family.

6 She had chosen at that time, at that time
7 to dissolve the dairy and sold it out, the dairy itself.
8 And now she buys all her milk from Darigold. And so
9 there is an explanation of the history of what a cap
10 will do. And for me, personally, and with the -- this
11 is a history that everything's explained and it had
12 nothing to do with what we did as far as the cap on the
13 Federal Orders.

14 Like I say, I'm here primarily to support
15 a cap across the -- with us, we represent from coast to
16 coast, from the Pacific Ocean to the Atlantic Ocean and
17 without a cap, I think that -- I think that without a
18 cap, there will be a blood bath coming down the road.

19 And there will be a lot of super good
20 farmers, Rick, Kathie, and I and numerous other farmers
21 under the 500 cow rank that would be history in short
22 order.

23 And I hope I've covered everything I
24 wanted and I thank you for listening to me and I'll
25 answer any questions you got. I'll try. And if I

1 don't -- if I can't answer the question, I'm a phone
2 call away from one of the best individual people, as far
3 as the Federal Order is concerned, and he's waiting for
4 me to call him, if you've got a question that I can't
5 answer. Thank you.

6 JUDGE CLIFTON: Thank you, Mr. Schilter.
7 After cross-examination and when we've gone off
8 record, I would like you to ask the court
9 reporters -- go to their table and ask them if
10 they need help with any of the spellings of the
11 local farms, the people you're familiar with.

12 MR. SCHILTER: Okay.

13 JUDGE CLIFTON: Thank you. All right.
14 Cross-examination, who would like to begin?
15 Mr. Carroll.

16
17 CROSS-EXAMINATION

18 BY MR. CARROLL:

19 MR. CARROLL: I'm John Benjamin Carroll.
20 I'm an attorney in these proceedings for
21 Mountain Dairy and Monument Farms. And the
22 gentleman from Connecticut will recognize
23 Mountain Dairy as my client, giving you any
24 headaches and problems?

25 MR. SEGALLA: Not at the moment but I'm

1 in the organic business.

2 MR. CARROLL: I understand it's a
3 different business for you, right?

4 MR. SEGALLA: Yes, it is.

5 MR. CARROLL: Now, generally I think you
6 said you sell for cheese. You sell to someone
7 who does cheese?

8 MR. SEGALLA: Yes.

9 MR. CARROLL: In the organic industry,
10 are they doing their own processing or are they
11 selling to a processor?

12 MR. SEGALLA: When you use -- what are
13 you asking now?

14 MR. CARROLL: Well, you don't process on
15 your farm?

16 MR. SEGALLA: No, I don't.

17 MR. CARROLL: Okay. Is that typical of
18 organic farmers?

19 MR. SEGALLA: Yes.

20 MR. CARROLL: You're selling to someone
21 else who markets the product?

22 MR. SEGALLA: Yes.

23 MR. CARROLL: That's way the business is
24 done?

25 MR. SEGALLA: There are some -- some

1 farms who have the problem is -- if you don't
2 have the family behind you, you're not going to
3 make that investment to -- to do what you're
4 doing and expand it into doing your own
5 processing.

6 I have -- I have four children, they all
7 grew up. One paid her way partly through
8 college, I wasn't able to afford to put --
9 really, afford to put any of them through
10 college. I got a daughter that's in the Air
11 Force now, son that's a truck driver. Another
12 daughter's raising three kids.

13 And the problem is we need a viable
14 industry for the farmers. And the dairies that
15 you represent were lucky enough that they
16 were -- had farmers to back -- or family to back
17 them to get their business going. But the
18 problem is it still gives them an unfair
19 advantage. I mean, I -- I was in Stop 'N Shop
20 the other day and I was -- I think the price for
21 Farmers Cow, which is -- I forget which group of
22 farmers that is, but it's a group in
23 Connecticut, was almost up to the price that the
24 store brand organic milk was selling for. The
25 store brand organic milk was 3.69 a half gallon.

1 The Farmers Cow was 3.49 a half gallon. And
2 then you have OV, which was 4.19 a gallon and
3 Horizon was 4.49 a half gallon.

4 And the problem is if you have an undue
5 advantage for the processor, they're going to
6 come in and they're going to put that -- sell it
7 to the stores and their milk is gone. And then
8 the rest of the farmers who have got to sell and
9 fight for the rest of the market, and they can't
10 really afford to put their price down to compete
11 with these large producer-handlers. And that's
12 what's killing the organic industry.

13 MR. CARROLL: May I interrupt you for a
14 moment? You talked about large
15 producer-handlers, which you've cited one I
16 think, I've forgotten the name, but it's
17 something in Colorado.

18 MR. SEGALLA: Aurora Milk.

19 MR. CARROLL: Aurora Milk, Colorado. Are
20 you aware of Dean, Dean Foods or HP Hood?
21 You're in Connecticut, you may have heard of HP
22 Hood.

23 MR. SEGALLA: Yes.

24 MR. CARROLL: They claim to market
25 organic milk. I don't know if they do not.

1 MR. SEGALLA: They do.

2 MR. CARROLL: They're considerably larger
3 than anybody in Colorado, I would think. I
4 don't know.

5 MR. SEGALLA: Yes, but they also pay into
6 the pool.

7 MR. CARROLL: I see. And you think that
8 makes a difference in what you get?

9 MR. SEGALLA: Well, that -- what happens
10 is that they're paying into the pool and Aurora
11 Dairy isn't paying into the pool. So Aurora
12 Dairy can go in and undercut them on these store
13 brands. And when they undercut them on the
14 store brands, that pulls the price down that
15 they can sell their milk for.

16 So if they're competing with the store
17 brands with the excess milk that they can't sell
18 under their own label, it draws the price down,
19 which means they -- the price that they pay the
20 producers comes down, too and that -- that's the
21 name of the game. And like Kathie said,
22 Aurora's producing as much milk as the whole
23 state of Vermont. And they're using that milk
24 to compete against in the Northeast.

25 MR. CARROLL: I think you said you had a

1 contract. Could you tell us what your contract
2 was?

3 MR. SEGALLA: I sell my milk to Colabro
4 Cheese in East Haven, Connecticut. And they
5 take all my milk. And I'm a member of
6 Agri-Mark. I get paid for -- through Agri-Mark
7 for conventional prices, so I know what the
8 conventional boys are making nowadays. And I
9 get a bonus check at the end of the month to
10 bring it up to organic prices.

11 MR. CARROLL: Can you tell me what the
12 size of that check is?

13 MR. SEGALLA: Which check?

14 MR. CARROLL: The bonus check.

15 MR. SEGALLA: Well, the bonus check was
16 over \$20,000 this past month. And the organic
17 check -- I mean the conventional checks, which
18 are usually higher because they -- it balances
19 out with the conventional milk, usually get a
20 couple checks a month of 20,000 -- or 10,000
21 apiece for the organic milk.

22 And last -- the check I got the other day
23 was like \$4,300 for the conventional milk.
24 That's how much the price has fluctuated.

25 MR. CARROLL: It's fortunate you're in

1 the organic end of business.

2 MR. SEGALLA: It's fortunate that I'm in
3 the organic business. But you go to the store,
4 and the price for the conventional milk in the
5 store hasn't dropped much in the state of
6 Connecticut.

7 MR. CARROLL: Am I correct that between
8 the -- did you know Dean Foods had purchased
9 Garelick Farms? Are you familiar --

10 MR. SEGALLA: Yes, yes.

11 MR. CARROLL: Weren't there three major,
12 Garelick, Dean and Hood, and then Dean bought
13 Garelick?

14 MR. SEGALLA: Yes.

15 MR. CARROLL: Isn't that so? So you
16 really only have two major suppliers to the
17 grocery stores in New England, isn't that
18 correct?

19 MR. SEGALLA: Well, we have Organic
20 Valley, which does organic milk.

21 MR. CARROLL: Right.

22 MR. SEGALLA: And they process in
23 Wilmington.

24 MR. CARROLL: But the two largest are
25 Dean and HP Hood?

1 MR. SEGALLA: Yes.

2 MR. CARROLL: By a large measure?

3 MR. SEGALLA: Not --

4 MS. ARNOLD: I wouldn't say HP Hood is on
5 the organic side.

6 MR. SEGALLA: Not on the organic side.

7 MR. CARROLL: But on the other side?

8 MR. SEGALLA: On the other side,
9 probably, yeah.

10 MR. CARROLL: Well, I just want to
11 congratulate all you folks because we believe in
12 your right to do what you're doing, and we wish
13 you the best of luck.

14 MR. SEGALLA: Thank you.

15 JUDGE CLIFTON: Would you want to add
16 anything else to Mr Segalla's testimony that's
17 responsive to what Mr. Carroll was asking about?

18 MS. ARNOLD: I guess that just in terms
19 of on the organic side, in New England, we do
20 have three major processors that are buying
21 milk. HP Hood, who we ship to; Organic Valley,
22 and Horizon, who is owned by Dean's. And we
23 would like to have more -- more competition in
24 the marketplace, more people that we could ship
25 milk to. And because currently HP Hood -- well,

1 all three just recently took a dollar off the
2 pay price for all farmers, as well as HP Hood is
3 telling us that we need to voluntarily reduce
4 production by 10 to 15 percent or else. And
5 they've already told over eight farmers -- eight
6 or 11 farmers in Maine they're not going to
7 renew their contracts. They've told farms in
8 Iowa and the Upper Midwest they're not going to
9 renew their contracts either when they come up.
10 So we are seeing severe disruption in the
11 organic milk marketplace at this time.

12 JUDGE CLIFTON: Mr. Schilter, did you
13 want to add any testimony that's responsive to
14 Mr. Carroll's inquiry? Closer still.

15 MR. SCHILTER: I know a little bit about
16 HP Hood from the California experience.

17 JUDGE CLIFTON: Is it HD or HP?

18 MR. SCHILTER: It --

19 MR. CARROLL: P as in Peter.

20 JUDGE CLIFTON: I'm asking you,
21 Mr. Schilter.

22 MR. SCHILTER: HP Hood.

23 JUDGE CLIFTON: Thank you.

24 MR. SCHILTER: Just at the fact that they
25 came in and brought a troubled creamery, Crystal

1 Creamery, and my sister happened to be the
2 comptroller there. And there's about -- I don't
3 remember how many producers, but they got their
4 final check, I think, last September. And two
5 of them are pretty close friends of mine in
6 California.

7 But the thing that I think we should
8 dwell on, too, that I'm 250 cows, Kathie is 150
9 and Rick's 115 to 120. And being we're that
10 close to the dairy industry, and those cows
11 themselves, we have all our names because
12 they're registered. I mean, there's names --
13 you can't even believe the name. But we strive
14 for quality. I have a -- Horizon has got a tier
15 system that we get paid on. And we strive for
16 the best. And my leukocyte is 130, minus 1 on
17 your raw count. Under 8 on your PI count, if
18 those figures mean anything. And we strive to
19 hit them all the time, not -- I always do -- we
20 always did. And now we're getting paid for it.

21 And you can rest assured when you buy
22 organic milk that you will get the top of the
23 line, especially if it comes off the smaller
24 farms.

25 I would like to have an invitation from

1 Aurora to see how they pasture 12,600 cows. I
2 have a hell of a time -- I have a heck of a time
3 pasturing 200 to 250. I would like to see how
4 they do it. I don't know how they do it.

5 JUDGE CLIFTON: Thank you. Additional
6 cross examination of these -- of this panel,
7 these witnesses? Mr. Vetne. I'll need all
8 three of you to stop by the court reporter when
9 all of your testimony is finished.

10 MR. SEGALLA: Strike that.

11 JUDGE CLIFTON: No, that part is not that
12 bad.

13 CROSS-EXAMINATION

14 BY MR. VETNE:

15 MR. VETNE: Good morning, my name is John
16 Vetne. I'm an attorney from New Hampshire. I
17 represent two producer-handlers in the Pacific
18 Northwest and one in Roswell, New Mexico.
19 Mr. Segalla, let me start with you.

20 You have a fairly detailed statement
21 here. Would it be correct to say that your
22 written testimony was a collaborative effort
23 involving a number of people?

24 MR. SEGALLA: Yes.

25 MR. VETNE: Can you identify the people

1 involved in putting together that statement?

2 MR. SEGALLA: Myself, Kathie Arnold and
3 Ed Maltby.

4 MR. VETNE: Mull pea, who is that?

5 MR. SEGALLA: He's an executive director
6 of NODPA.

7 MR. VETNE: Do you know if Ed Maltby
8 received input from other people involved in
9 your testimony, Mr. Segalla?

10 MR. SEGALLA: He works with a lot of
11 people and this is -- you know, a collaborative
12 of a lot of people's thoughts.

13 JUDGE CLIFTON: Might it be M-a-l-t-b-y?

14 MS. ARNOLD: Yes.

15 JUDGE CLIFTON: Thank you.

16 MR. VETNE: Which is on the front page
17 someplace on 71?

18 JUDGE CLIFTON: I found it someplace on
19 page 2, where it says executive director.

20 MR. VETNE: Is this -- Mr. Segalla, is
21 this your first adventure as a witness in a
22 Federal Order proceeding?

23 MR. SEGALLA: I've been before the
24 National Dairy Standards Board three times.

25 MR. VETNE: Dairy Standards Board?

1 MR. SEGALLA: Yes, this is my fourth.

2 MR. VETNE: This is not a Dairy
3 Standards. This is your first appearance at a
4 hearing for economic regulation of the dairy
5 industry?

6 MR. SEGALLA: Yes, it is.

7 MR. VETNE: Okay. And you use a lot of
8 terms here; soft cap, you referred to; history
9 of Federal Orders; and intent of Federal Order.
10 Where did you get the information concerning
11 those concepts in your testimony, did you
12 develop those on your own?

13 MR. SEGALLA: No, that was a
14 collaborative.

15 MR. VETNE: Okay. And specifically what
16 part of the collaboration did that information
17 come from?

18 MR. SEGALLA: Partly from Ed and Kathie
19 and myself.

20 MR. VETNE: Okay.

21 MR. SEGALLA: And others.

22 MR. VETNE: When you say and others, can
23 you elaborate on the list?

24 MR. SEGALLA: Let Kathie.

25 MS. ARNOLD: Yes, I can help a little

1 more because I was very involved in --

2 MR. VETNE: I was going to get to you
3 next, but Mr. Segalla keeps looking at you for
4 the answers.

5 MS. ARNOLD: Right. That's because most
6 of his statement was from the -- our
7 organization statement overall. This -- this
8 statement did go out to all the boards of
9 directors for the different organizations and it
10 was actually written mostly by Ed Maltby and
11 myself. And everybody had a chance to look at
12 it and, you know, put their feedback in.

13 We did -- in terms of some of the
14 information from the soft cap and hard cap, Tony
15 provided some information from his cooperative,
16 and we did borrow some of their -- their wording
17 in terms of -- in terms of some of the effects
18 of the -- and justification for the soft cap and
19 so on.

20 So -- and in addition, other people we've
21 consulted were -- I believe ed spoke with Roger
22 Cryan and Ed spoke with Steve Etko, who is the
23 lobbyist for the National Organic Coalition, and
24 he's -- he lives in Washington D.C., and is very
25 involved in a lot of dairy issues. So I know Ed

1 consulted with him on this whole issue as well.

2 MR. VETNE: Okay.

3 JUDGE CLIFTON: Would you spell Steve
4 Etkka's name?

5 MS. ARNOLD: Yes, S-t-e-v-e. Etkka is
6 E-t-k-a.

7 JUDGE CLIFTON: And the Tony you were
8 referring to is the witness to your left?

9 MS. ARNOLD: That is correct.

10 JUDGE CLIFTON: Thank you.

11 MR. VETNE: Can you move the mic over to
12 Mr. Schilter, please? Ms. Arnold mentioned you
13 had some assistance from your cooperative, which
14 would be Northwest Dairy Association.

15 MR. SCHILTER: Correct.

16 MR. VETNE: When you refer to a fellow
17 who might be able to answer questions, if you
18 don't have the answer, it was just a phone call
19 away, that would be somebody who is or was in
20 the Northwest Dairy Association management?

21 MR. SCHILTER: Correct.

22 MR. VETNE: Would that be Mr. Rowe or
23 Mr. Marshall or somebody else, or inclusive --
24 well, I should stop.

25 MR. SCHILTER: Well, I'm sure

1 Mr. Marshall is probably the most versed
2 individual there was, but he's retired now. And
3 the person I was referring to was Dan McBride
4 that was employed by the Federal Order Marketing
5 Administration prior to the fact of him going to
6 work for us.

7 MR. VETNE: Okay.

8 MR. SCHILTER: When I refer to us, I'm
9 talking as a member of the association of
10 Darigold, Northwest Dairymen's Association.

11 MR. VETNE: You're not talking about an
12 organic organization?

13 MR. SCHILTER: Right now I'm not.

14 MR. VETNE: Mr. Marshall still consults
15 with Northwest Dairy Association, correct? Do
16 you know that?

17 MR. SCHILTER: I didn't hear.

18 MR. VETNE: Mr. Marshall still works as a
19 consultant for the Northwest Dairy Association?

20 MR. SCHILTER: As a consultant for the
21 NDA.

22 MR. VETNE: Why don't you move the
23 microphone back to Ms. Arnold, please?

24 Your testimony, as well as that of
25 Mr. Segalla, refers to large producer-handlers

1 that have a substantial competitive advantage.
2 Other than Aurora, who you specifically all
3 identified, is there any other existing
4 producer-handler that you would identify in that
5 category as being both large and having a
6 substantial competitive advantage?

7 MS. ARNOLD: I don't know for sure that
8 they are actually producer-handlers, but I do
9 know there are at least a few other very large
10 organic operations around the country, or
11 operations that have a very large conventional
12 herd and have transitioned and have some
13 component of organic. For example, Fair Oaks
14 Dairy in -- I believe they're in Indiana. My
15 understanding is that they have converted one of
16 their 3,000 cow barns to organic. I have never
17 actually confirmed that with them, but that's my
18 understanding.

19 Shamrock Farms down in Arizona has a
20 component of organic in their operation. And
21 then in Nevada, there is Rockview Dairy, who is
22 a large organic producer-distributor, and I
23 don't know what they do with their milk,
24 whether they sell it to another processor or
25 whether they might also handle it. But I assume

1 currently they're selling it to another
2 processor, but they would be someone that would
3 be poised to become a producer-handler
4 perhaps.

5 MR. VETNE: So if I could summarize and
6 characterize, other than Aurora, you're not
7 aware of another large producer-handler of the
8 type that you're concerned has a substantial
9 competitive advantage, but you are aware of
10 large organic farms?

11 MS. ARNOLD: Correct. And our concern is
12 that, you know, Aurora's there, and they
13 blossomed in just a few years' time, and it
14 wouldn't take long for others to come into the
15 market with this competitive advantage and do
16 the same thing.

17 MR. VETNE: Okay. When you refer to
18 Rockview Dairy in Nevada, I'm familiar with a
19 company, a bottling operation, in the Los
20 Angeles suburbs called Rockview Dairy. Would
21 that be a farm, an organic farm, in Nevada that
22 is affiliated with the bottling plant in
23 California?

24 MS. ARNOLD: I would expect so, but I
25 can't confirm that for sure.

1 MR. VETNE: Okay. You believe that there
2 is?

3 MS. ARNOLD: I believe there's a
4 connection between the Rockview Dairy farm
5 operation in Nevada, and I'm quite sure there is
6 some production facilities or something in
7 California, or at least some sort of connection
8 in California.

9 MR. VETNE: Okay. So you believe that
10 there is an organic farm in Nevada?

11 MS. ARNOLD: Yeah. I know there is.

12 MR. VETNE: You know there's an organic
13 farm there?

14 MS. ARNOLD: Right.

15 MR. VETNE: It's on the Association list.
16 And you surmise something about where it's going
17 to be processed?

18 MS. ARNOLD: Correct.

19 MR. VETNE: So you don't know whether
20 that is a farm that would or will or could offer
21 its milk in the Federal milk order system?

22 MS. ARNOLD: That is correct, I don't
23 know.

24 MR. VETNE: And when you refer to
25 Shamrock Farms, are you referring to Shamrock

1 Foods' affiliated farm located in Arizona?

2 MS. ARNOLD: It would be -- that could be
3 their name. All I -- I just know Shamrock in
4 Arizona.

5 MR. VETNE: Okay. Shamrock's a fully
6 regulated handler that has an organic component
7 in its distribution, is that correct?

8 MS. ARNOLD: Yes. I don't know about the
9 regulated part. I assume they are because
10 they're in the Arizona-Nevada Order that does
11 now have the 3 million pound cap. So I guess
12 that would follow.

13 MR. VETNE: Okay. Let's see. At the --
14 at the bottom of your second page you refer
15 to -- I think you were just talking about Aurora
16 there. But near the bottom of the last
17 paragraph, you're talking about their ultra
18 pasteurized private label fluid beverages. That
19 means Aurora's?

20 MS. ARNOLD: Yes, should be Aurora.

21 MR. VETNE: No, I understood that. And
22 then you refer to large national retail chain
23 customers. Can you identify --

24 MS. ARNOLD: That would be like --

25 MR. VETNE: -- some of those.

1 MS. ARNOLD: -- Wal-Mart, Target, Costco.

2 MR. VETNE: Can you complete the so on
3 list, to the best of your ability? I know you
4 may not get all of them, but continue with your
5 current recollection of who those are.

6 MS. ARNOLD: Yeah, I'm not sure that
7 there are -- whether there are beyond that, I --
8 in a sworn statement, I can't say that -- those
9 are three I'm quite sure of. The others, I'm
10 not sure enough to say.

11 MR. VETNE: Okay.

12 MS. ARNOLD: Perhaps Safeway, but -- I
13 think Safeway. That's right.

14 MR. VETNE: Okay. A line down, you refer
15 to all of their competitors in the private label
16 store brand marketplace who are regulated
17 handlers. Can you identify those competitors
18 who are regulated handlers in the private label
19 store brand marketplace?

20 MS. ARNOLD: Right. I believe all three
21 of the major organic processors, Horizon, Dean
22 Foods, Organic Valley and HP Hood, all do some
23 private label store brand milk. And also, you
24 know, there are other entities like LOFCO,
25 Lancaster Organic Farmers Cooperative, and

1 Organic Choice out of Wisconsin that sell milk
2 on the -- you know, that make up -- make
3 contracts and sell milk. And I'm sure, you
4 know, they try for the private label market as
5 well in their marketing.

6 MR. VETNE: Okay. But have we gotten to
7 LOFCO? I wondered what that was.

8 MS. ARNOLD: I should have written that
9 out. I'm sorry.

10 MR. VETNE: That's the Lancaster
11 Organization. Lancaster being Pennsylvania?

12 MS. ARNOLD: Correct.

13 MR. VETNE: And is that a cooperative
14 group?

15 MS. ARNOLD: Yes, it is. It's a
16 cooperative that is affiliated with LANCO,
17 Lancaster -- and I don't know --

18 MR. VETNE: L-A-N-C-O?

19 MS. ARNOLD: Yes.

20 MR. VETNE: So the LAFCO -- do you know
21 whether the organic producers that make up LAFCO
22 in turn are members of LANCO, L-A-N-C-O?

23 MS. ARNOLD: I don't know just how
24 they're structured but I know there is an
25 association between the two, I think LOFCO uses

1 a lot of the services and employees, you know,
2 of LANCO, but I don't know exactly what the
3 membership requirements are.

4 MR. VETNE: Okay. So you don't know
5 whether any LOFCO procuring participants might
6 also be members of cooperatives other than
7 LANCO?

8 MS. ARNOLD: I would doubt they would be
9 members of other cooperatives, other than just
10 LOFCO and perhaps --

11 MR. VETNE: Other than LANCO?

12 MS. ARNOLD: Other than LANCO and LOFCO,
13 yeah.

14 MR. VETNE: Do you know whether any of
15 the LOFCO participants are independent producers
16 who are not members of any cooperatives?

17 MS. ARNOLD: Well, I'm sure they all have
18 to be a member of LOFCO. LOFCO is a cooperative
19 itself.

20 MR. VETNE: To the extent that these
21 producers participate in the Federal Order
22 System and receive a blend price, do you know
23 who would be the handler that would arrange for
24 that?

25 MS. ARNOLD: Well, I wouldn't -- I don't

1 expect that any LOFCO producers receive any
2 payment from the pool, because, in general,
3 organic milk does not benefit from whatever we
4 pay into the pool, because that benefit of being
5 able to pool milk out of the cheese vats when
6 there is a shortage of milk is not available to
7 organic, because we have very specific source
8 needs that our milk has to be certified organic
9 to certain standards.

10 So, you know, at times when there's a
11 shortage of milk, even though all our processors
12 have paid in their pooling costs, they can't,
13 you know, just go to a cheese plant and say, I
14 need your milk.

15 So I don't -- and because our prices are
16 higher than the federal minimums, I don't
17 believe any organic farmers ever actually
18 receive payments from the pool, unless perhaps
19 in some cases when there's a surplus of milk and
20 it's gone conventional. I don't know whether
21 there is some --

22 MR. VETNE: I think you misunderstood my
23 question.

24 MS. ARNOLD: Okay.

25 MR. VETNE: By payments from the pool, I

1 did not mean a draw from the pool. I simply
2 meant participate in part of the uniform price
3 that all producers in the pool participate.

4 MS. ARNOLD: Well, I think organic
5 pricing and payment is different and really
6 outside of the pool, even though we pay -- even
7 though our processors pay into the pool.

8 MR. VETNE: That's my question. They pay
9 into the pool on your milk.

10 MS. ARNOLD: Right, they do, as the
11 regulated handlers do.

12 MR. VETNE: Okay. So on all of the milk
13 that you're aware of, the organic producers
14 aren't part of the pool, but receive additional
15 income outside of the pool?

16 MS. ARNOLD: Right. And I don't believe
17 they receive any income from, you know, the
18 pooling -- the Federal pooling costs or the
19 money that goes in -- you know, the differential
20 price between the Class I and the other classes,
21 you know, that our handlers are making, I don't
22 believe then we ever pull out of that pool.

23 MR. VETNE: Can you pass the microphone
24 to Mr. Segalla? Mr. Segalla, let me see if I
25 understand correctly your operation and rules

1 here. Your milk -- well, first of all, you are
2 a member of Agri-Mark, cooperative member?

3 MR. SEGALLA: Yes, I am.

4 MR. VETNE: And your milk is marketed to
5 HG's plant, correct?

6 MR. SEGALLA: Yes, it is.

7 MR. VETNE: For that milk, you market it
8 collectively or does Agri-Mark market it in your
9 name or for you?

10 MR. SEGALLA: Agri-Mark provides all the
11 services, as far as inspectors and stuff like
12 that. And they do do the daily testing and
13 stuff.

14 I'm a member of the cooperative, partly
15 because I -- the cooperative has some advantages
16 like health insurance. I also stayed a member
17 of the cooperative in case something happens to
18 Colabro Cheese, I still have a market for my
19 milk. But Colabro Cheese picks up my milk
20 directly. Sends a truck up. I'm the only
21 person on the truck that sends them organic
22 milk. It's kept in a separate compartment.
23 They store it separately. They process it
24 before they process any other milk when they
25 process it to make the organic cheeses. But --

1 MR. VETNE: Okay. Who sends a bill to
2 Colabro Cheese to collect payment for?

3 MR. SEGALLA: Agri-Mark sends a bill to
4 Colabro Cheese for their amount of milk, the
5 amount of milk I send? And Colabro takes that
6 same amount, figures out the differential
7 between the price that -- their total price that
8 they pay Agri-Mark and pays me the excess. I
9 have a set price, and it doesn't fluctuate up or
10 down and they just send me the difference.

11 MR. VETNE: So Agri-Mark pays a price
12 based on whatever rules of distribution it has
13 for its members?

14 MR. SEGALLA: Yes.

15 MR. VETNE: And Colabro pays a separate
16 check premium for the value of your -- is that
17 correct?

18 MR. SEGALLA: Yes. But my price is -- is
19 based on my price, okay? Regardless -- they
20 only use Agri-Mark as in between that -- as an
21 in-between. I still get paid for the same
22 amount of milk, it's just that they're in
23 between.

24 MR. VETNE: They're your marketing agent.

25 MR. SEGALLA: They're my marketing agent.

1 MR. VETNE: And they are the means by
2 which your milk is included in the pool?

3 THE WITNESS: Yeah. And I pay my dues
4 and the 15 cent check off and all that stuff to
5 go with it.

6 MR. VETNE: So on your milk, which goes
7 to cheese, which is a lower class value,
8 Agri-Mark in effect draws out of the pool?

9 MR. SEGALLA: No.

10 MR. VETNE: You don't think your milk is
11 included in the pool?

12 MR. SEGALLA: My -- well, yes, my milk is
13 included into the pool, but it's -- organic
14 cheese isn't in the pool. I don't know how that
15 works.

16 MR. VETNE: You don't know how it works.
17 Okay.

18 MR. SEGALLA: I would assume because
19 it -- organic milk isn't included into the pool.

20 MR. VETNE: It's just included the way
21 any other milk is included. It's not a unique
22 part of the pool, it's just milk?

23 MR. SEGALLA: Yes, I guess so.

24 MR. VETNE: Okay.

25 JUDGE CLIFTON: Can I get the spelling of

1 the cheese plant?

2 MR. VETNE: It's in the testimony, your
3 Honor.

4 MR. SEGALLA: C-o-l-a-r-b-o (sic).

5 MR. VETNE: Page 1 of his testimony. Can
6 you move the microphone, please, to Kathie
7 Arnold?

8 JUDGE CLIFTON: All right. I'm just
9 going to spell that like it is in Exhibit 72.
10 C-o-l-a-b-r-o. Is that correct? Thanks.

11 MR. VETNE: Ms. Arnold, on the last page,
12 you refer to organic dairy producers that
13 negotiate directly with their processor. Is
14 that a practice that takes place for all organic
15 producers or some? You refer to hundreds, so I
16 don't know how the process works or whether
17 that's for most, for some.

18 MS. ARNOLD: Yeah, it varies. For
19 example, Organic Valley, it is a cooperative.
20 They have a dairy executive committee that there
21 are a few representatives from each state. They
22 have at least monthly phone calls that discuss
23 things like pay price and so on and give
24 feedback. And then the actual board of Organic
25 Valley decides.

1 In terms of -- we ship to HP Hood. We
2 started shipping to them, oh, three or four
3 years ago, when they were first coming into the
4 market. And we negotiated quite a bit with them
5 and -- before we came to agreement, and we were
6 one of their initial shippers. I think through
7 negotiations we raised the pay price a couple of
8 dollars, and changed some of the other bonus
9 payments around somewhat.

10 And then -- then we formed a small
11 cooperative that is affiliated with Dairylea,
12 and every year our cooperative has an annual
13 meeting and we meet with either -- in the past
14 it was with Mike Seger, VP of operations at HP
15 Hood. And recently, the last few years, they
16 have hired Karen Cole as their national organic
17 procurement director. And she comes to our
18 meeting and we, you know, discuss pay price
19 issues. We've had numerous meetings.

20 And Horizon, they are the -- the largest
21 buyer of organic milk, and I know their farmers
22 also, you know, do some negotiations and
23 discussions back and forth as well on pay price.

24 MR. VETNE: Okay. Let me go back to the
25 beginning of your answer. You refer to, we

1 negotiated the price for HP Hood.

2 MS. ARNOLD: Yes.

3 MR. VETNE: We in that part of your
4 answer refers to --

5 MS. ARNOLD: Refers to --

6 MR. VETNE: -- Twin Oaks Dairy?

7 MS. ARNOLD: Twin Oaks Dairy, and
8 probably three to four other producers who were
9 also considering going with HP Hood and being
10 sort of their initial pool of producers to get
11 organic off the ground for them.

12 MR. VETNE: It was a small group of
13 organic dairy farms?

14 MS. ARNOLD: Yes.

15 MR. VETNE: And at that time did you
16 belong to a cooperative?

17 MS. ARNOLD: At that time we still
18 belonged to Organic Valley. We were shipping to
19 Organic Valley at that time, and once we came to
20 an agreement with HP Hood, we gave our six month
21 notice, and six months later we were shipping to
22 HP Hood instead of Organic Valley.

23 MR. VETNE: All right.

24 MS. ARNOLD: Most -- a lot of contracts
25 have a six month notice period in them.

1 MR. VETNE: And then you refer to the
2 organization of a small cooperative that is
3 affiliated with Dairylea. Can you identify that
4 cooperative?

5 MS. ARNOLD: Yes, that's an organic dairy
6 farmers cooperative. It's a member of United Ag
7 Services out of Seneca Falls, New York.

8 MR. VETNE: And is Organic Dairy Farmers
9 Cooperative -- let's see.

10 MS. ARNOLD: That's who we receive our
11 checks from.

12 MR. VETNE: Yes. And what -- how about
13 Organic Farmers Cooperative, does it receive a
14 check from Dairylea? Is Dairylea the reporting
15 handler for Federal Milk Order purposes, is my
16 question?

17 MS. ARNOLD: Well, I know -- it's either
18 Dairylea or Dairy Marketing Services, and I
19 don't know whether the check comes directly from
20 HP Hood to Organic Dairy Farmers Cooperative or
21 whether DMS or Dairylea are in the middle. I
22 don't know that.

23 MR. VETNE: Okay. You don't know how the
24 milk is pooled? Pooled means brought into the
25 regulatory system.

1 MS. ARNOLD: No, I don't know the
2 specifics on that. But I don't believe we
3 receive any benefit from the fact that our milk
4 has pooling costs paid on it.

5 MR. VETNE: Okay. Organic Valley. First
6 of all, one of you referred to OV early in the
7 testimony. Was that intended to be a reference
8 to Organic Valley?

9 MS. ARNOLD: Yes, they often go by OV.

10 MR. VETNE: Where is Organic Valley
11 located?

12 MS. ARNOLD: They're headquartered in
13 La Forge, Wisconsin. They pool milk all around
14 the country.

15 MR. VETNE: Do they operate any plants of
16 their own?

17 MS. ARNOLD: They only own one small
18 plant, somewhere in Wisconsin, they might make
19 butter. They might be a separation plant, but
20 otherwise they do all copacking.

21 MR. VETNE: Otherwise they do copacking?

22 MS. ARNOLD: They contract with other
23 plants to process their milk around the country.
24 You know, for example. What's made the milk --
25 if it's produced in the northeast, some of it

1 goes to Stonyfield Farms to be processed into
2 yogurt, some of it goes to Byrne Dairy in
3 Syracuse to be processed into fluid milk. And I
4 believe they also maybe do Guida, they have a
5 contract with Guida, or at least have in the
6 past. And so they have multiple contracts
7 around the country to process the milk.

8 They market organic milk to a number of
9 plants, both fluid plants and manufacturing
10 plants.

11 MS. ARNOLD: It's mostly under their own
12 brands. So they are contracting, say, with
13 Byrne Dairy, to process the milk but it comes
14 out in Organic Valley labeled containers, so
15 they are, you know, just contracting the
16 service, the processing. They aren't selling
17 the milk to Byrne Dairy.

18 MR. VETNE: So -- okay. So they're
19 retaining title to the milk --

20 MS. ARNOLD: Correct.

21 MR. VETNE: -- wherever it goes?

22 MS. ARNOLD: Maybe not wherever it goes,
23 because I know they also do sell some as store
24 brand milk maybe to Whole Foods. So I'm not
25 sure whether in that case they might be selling

1 the milk to Whole Foods and then Whole Foods
2 retains title. It's possible.

3 MR. VETNE: Okay. Is it your
4 understanding that if it shows up on a grocery
5 store shelf under the brand Organic Valley, that
6 it was milk for which Organic Valley had
7 retained the title and contracted for the
8 service of converting the milk to a packaged
9 product?

10 MS. ARNOLD: I believe that is correct.

11 MR. VETNE: Okay.

12 JUDGE CLIFTON: Let me interrupt you just
13 a moment, Mr. Vetne. It's 12:07. I need a
14 break. We can either have a short break and
15 come right back, which is what I would prefer,
16 or break for lunch. I would prefer the short
17 break if that's fine with everybody.

18 MR. ENGLISH: Finish this panel before
19 lunch.

20 JUDGE CLIFTON: Okay. Good. Is ten
21 minutes adequate for everyone?

22 MR. VETNE: Yes.

23 JUDGE CLIFTON: It appears so. We'll go
24 off record now. Please be back at 12:17.

25 (A recess was taken from 12:07 to 12:19.)

1 JUDGE CLIFTON: All right. Let's go back
2 on record at 12:19. Mr. Vetne, you may resume.

3 MR. VETNE: I have a question I would
4 like each of you to answer, if you can, start
5 with Kathie Arnold, please. U.S. producers and
6 members of various organic associations have a
7 primary market to Horizon, Organic Valley, Hood,
8 your major markets, correct?

9 MS. ARNOLD: Correct.

10 MR. VETNE: Have your buyers communicated
11 to you that your pay price is at risk if the
12 large producer-handler provision is not
13 addressed to eliminate folks like Aurora?

14 MS. ARNOLD: My processor, HP Hood, has
15 not directly said that to me, no.

16 MR. VETNE: Can you elaborate? How about
17 indirectly?

18 MS. ARNOLD: No.

19 MR. VETNE: Has HP Hood -- keep the mic.
20 Has HP Hood reduced the premiums to you over the
21 past -- course of the past few years?

22 MS. ARNOLD: Yes. They just did as of
23 February 1st, as well as instructed us that we
24 need to voluntarily reduce production 10 to
25 15 percent or else they will take further

1 measures, which I assume means -- we also have
2 two other dollars in our contract that they can
3 take away from us during the contract period.

4 MR. VETNE: Keep the mic. Did they --
5 did -- let's see. Did you infer or did they
6 tell you that a reason for that reduction was
7 because of competition from Aurora?

8 MS. ARNOLD: Oh, ab -- well, not
9 necessarily competition from Aurora, but just
10 because they are -- they are oversupplied with
11 milk currently. There's too much milk.

12 MR. VETNE: Oversupplied with organic
13 milk?

14 MS. ARNOLD: Excuse me, oversupplied with
15 organic milk, yes.

16 MR. VETNE: And you inferred, in turn,
17 that that oversupply could in part be attributed
18 by competition from Aurora?

19 MS. ARNOLD: Correct, yeah. They have
20 indicated that they are under great pressure
21 from their competitors in the marketplace.

22 MR. VETNE: Okay. Can you pass the mic
23 to your right?

24 Mr. Segalla, I would ask you the same
25 question. Have any of your customers indicated

1 that your price is at risk because of the
2 introduction of milk from large
3 producer-handlers into the Northeast?

4 MR. SEGALLA: Let's see. How can I
5 answer this? I have -- I have only one person
6 that I supply. And last -- last fall, before
7 all this -- everything went to heck on the world
8 market and stuff, we were trying to -- well,
9 actually it started last spring, which I -- I
10 have been in conversation with them to try to
11 get them to raise the price because we had a
12 large increase in the price for production
13 because of the price of fuel, and the price of
14 grain and stuff. You know, it's competi --
15 competition in the marketplace wouldn't allow
16 them to do that. They didn't say where the
17 competition came from, but if there's somebody
18 that's driving down the market price, that's
19 where it comes from.

20 MR. VETNE: Okay. Just hold the mic.
21 Colabro Cheese requires at least some of its
22 supply to be organic, am I correct?

23 MR. SEGALLA: Colabro Cheese requires
24 only its organic cheese to be made out of
25 organic milk.

1 MR. VETNE: Right. That's what I said,
2 some of its supply. So it makes cheese other
3 than organic cheese, am I correct?

4 MR. SEGALLA: Yes.

5 MR. VETNE: And for that organic supply,
6 it can look to any organic producer to meet that
7 supply, not just yours?

8 MR. SEGALLA: Yes. But part of the
9 market is its local milk. And the -- as I
10 believe right now, I am the only certified
11 organic farm in the state of Connecticut.

12 MR. VETNE: So there are -- for
13 competitive purposes, there are other organic
14 producers that could supply Colabro Cheese?

15 MR. SEGALLA: That's correct, if they
16 were willing to -- in the way that they market
17 from local milk, which they market their cheese,
18 it's working against the competition that
19 produces other cheeses, the market against it,
20 the problem is at lower prices than what they
21 can produce it for.

22 MR. VETNE: Okay. Pass the mic over to
23 Mr. Schilter. Same question to you. Have
24 organic buyers -- buyers of organic milk, yours
25 individually or --

1 MR. SCHILTER: Horizon?

2 MR. VETNE: Yeah, or the organizations of
3 which you're a member, have you been told by
4 those buyers that price has been reduced or will
5 be reduced because of failure to regulate large
6 organic producer-handlers?

7 MR. SCHILTER: No, I haven't.

8 MR. VETNE: Has your price been reduced
9 or do you expect it to be reduced?

10 MR. SCHILTER: It has been reduced twice
11 in the last six months.

12 MR. VETNE: Have your buyers of the
13 organic milk indicated a reason for the
14 reduction?

15 MR. SCHILTER: Economics.

16 MR. VETNE: Competition?

17 MR. SCHILTER: Competition.

18 MR. VETNE: Oversupply, shortage of milk?

19 MR. SCHILTER: Oversupply, yes.

20 MR. VETNE: Do you know -- I'll ask this
21 to you first, and then pass the mic. Do you
22 know whether the volume of milk produced by
23 organic dairy farmers who have jumped into
24 organic production with some enthusiasm and
25 cost, whether that supply of milk exceeds

1 consumers' demand for organic fluid milk?

2 MR. SCHILTER: If everything was on an
3 equal level playing field, I think that we would
4 match demand with supply. But there is some
5 organic milk being sold in our area under a
6 false label. In my -- it's my -- in my opinion,
7 the environment doesn't meet the organic. And
8 the shadow, the thought to the consumers is that
9 it is organic milk, and it isn't, and that cuts
10 into our market.

11 MR. VETNE: Okay. It takes part of your
12 market share away --

13 MR. SCHILTER: Correct.

14 MR. VETNE: -- correct? Without that
15 there, do you believe that your farm premium for
16 organic milk will be higher?

17 MR. SCHILTER: Due to the economy today,
18 I agree -- I would agree with the fact that it
19 would be right where it would be. Maybe this
20 last reduction would not have come.

21 MR. VETNE: I see. And if the price paid
22 to you were higher, or the last reduction had
23 not come, consumers would buy somewhat less
24 because of a higher shelf price, wouldn't they?

25 MR. SCHILTER: In the bigger cities, I

1 disagree with that.

2 MR. VETNE: Okay. So you're saying that
3 consumers will pay any price for organic milk?

4 MR. SCHILTER: I didn't say that. I said
5 that, at a higher price with the assurance that
6 they have -- receive the quality product, they
7 will pay the price.

8 We have in our shadows Boeing employees
9 and Microsoft executives that are making a
10 tremendous amount of money. And they will pay
11 the price because they are so removed from our
12 livelihood. They have -- they have to agree or
13 they have to rely on the state or the federal
14 government to judge the price of that product.

15 MR. VETNE: Now, as long as I have the
16 microphone in front of you, Mr. Schilter, is
17 it -- is it your position -- and I'm talking
18 about your position as an organic producer and
19 member of NDA, member of the Western Organic
20 Organization, that the 3 million pound cap that
21 was instituted by USDA for the Pacific Northwest
22 a few years ago, that that should be eliminated
23 so that the producer-handlers who currently
24 market, who have survived, no longer market?

25 JUDGE CLIFTON: Mr. Vetne, did you say

1 300 million?

2 MR. VETNE: No, a 3 million pound cap.
3 So that a producer-handler between a half
4 million pounds and 3 million pounds has to go
5 out of business?

6 MR. SCHILTER: That was just brought to
7 my attention a few minutes ago and that shocked
8 me because I don't think that was in a question.

9 MR. VETNE: Is it your position --

10 MR. SCHILTER: I assumed that those
11 people who are my friends and neighbors who have
12 this investment involved in the production of
13 their dairies have a right to get their
14 investment back, because they were there prior
15 to us and they should therefore be grandfathered
16 in.

17 MR. VETNE: Okay. Let me ask the same
18 question of the other two witnesses on the
19 panel. Ms. Arnold?

20 MS. ARNOLD: Yes.

21 MR. VETNE: Yes? Yes, what?

22 MS. ARNOLD: Which of your many questions
23 do you want me to answer first?

24 MR. VETNE: The question is, do you want
25 to eliminate existing producer-handlers that are

1 currently operating at a level below 3 million
2 pounds?

3 MS. ARNOLD: No, I don't want to
4 eliminate them, they can still continue. But
5 anybody that's producing over 450,000 pounds a
6 month would then have to become a regulated
7 handler and pay into the market.

8 MR. VETNE: So you would oppose the
9 grandfathering --

10 MS. ARNOLD: Yes, I would.

11 JUDGE CLIFTON:

12 MR. VETNE: -- Mr. Schilter talked about?

13 MS. ARNOLD: Because that extends that
14 unlevel playing field.

15 MR. VETNE: Okay. Let me ask you about
16 that unlevel playing field. A lot of your
17 testimony, the two of you that had prepared
18 testimony, talked about a competitive advantage
19 of somebody who is larger. You identified
20 Aurora as an example of someone who has a
21 competitive advantage. There's testimony about
22 their size in the record.

23 You believe that 450,000 pounds or
24 thereabouts does not provide a competitive
25 advantage, correct?

1 MS. ARNOLD: Correct.

2 MR. VETNE: Would you agree with me that
3 competitive advantage is the ability to place a
4 package of processed milk on a store shelf at a
5 price less than fully regulated handlers? Is
6 that what you mean by a competitive advantage?

7 MS. ARNOLD: Well, just -- I would say
8 it's that they have one less cost that they have
9 to include in their pay price.

10 MR. VETNE: I understand that.

11 MS. ARNOLD: Okay.

12 MR. VETNE: Okay? But is not the bottom
13 line of your concern the ability of somebody to
14 place a packaged product on a store shelf less
15 than your regulated buyers, and thereby
16 undercutting the price and the market share for
17 you?

18 MS. ARNOLD: Yes, that is a concern,
19 because yes, they have this one less cost that
20 everybody else has.

21 MR. VETNE: Is that not your primary
22 concern?

23 MS. ARNOLD: That is a primary concern,
24 yes.

25 MR. VETNE: Okay. You understand that

1 the ability of a producer-handler to place
2 finished product on a store shelf or offer it to
3 consumers at a farm or anyplace else is a
4 combination of the cost of producing milk, plus
5 the cost of bottling milk?

6 MS. ARNOLD: Sure.

7 MR. VETNE: Okay. And you have, both of
8 you, the New England part of the panel -- or the
9 Northeast part of the panel, have referred to
10 cost advantage in terms of the farm price. Do
11 you have any information to suggest that the
12 processing costs of plants with 1 or 2 or
13 2 1/2 million pounds are comparable to your
14 buyers who have plants that are, you know, 20,
15 30, 40, 50 million pounds?

16 MS. ARNOLD: Well, I would see one thing
17 that is different, is that our buyers have to
18 pay the trucking costs. We, as organic farmers,
19 do not pay the trucking costs. So our buyers,
20 you know, have to run all around New York and
21 all around Maine. And that's one of the reasons
22 why they're dropping these Maine producers,
23 because of the trucking costs. So they have to
24 bear all the trucking costs as well as the
25 pooling costs that, say, somebody like Aurora,

1 you know, their farms are right there by their
2 plants. So they have that advantage.

3 MR. VETNE: Let me go back to my
4 question.

5 Do you have any information or can you
6 point to some information that would show that
7 when you take the bottling costs, the cap costs,
8 the labor costs, the pasteurization costs,
9 everything else involved in processing included
10 in that, that at 2 million pounds a
11 producer-handler has an advantage over your
12 customers?

13 MS. ARNOLD: No, I don't have any data
14 like that.

15 MR. VETNE: Okay. And you're not aware
16 of any data like that --

17 MS. ARNOLD: No, I'm not.

18 MR. VETNE: -- is that correct?

19 JUDGE CLIFTON: I would just like all
20 panel members to pause before you answer
21 Mr. Vetne so that when this is typed, his whole
22 question is in one piece before your answer.

23 MR. VETNE: And I think this may have
24 been part of the statement by Mr. Schilter. You
25 referred to a proposal made a few years ago in

1 the Pacific Northwest.

2 I think you said that there was a
3 proposal there for a 450,000 pound cap for
4 exempt plants. Do you recall whether that was
5 your testimony, and if so, whether that was --

6 MR. SCHILTER: I -- I don't think I said
7 450,000. I'm reading back. I'm reading back
8 from Steve Rowe's testimony.

9 MR. VETNE: Okay.

10 MR. SCHILTER: And the things I did say,
11 in 2003 we requested it, in 2006 we received it,
12 and there was a 2 million pound cap put on that.

13 MR. VETNE: My recollection of your
14 testimony is one of the things requested in
15 2003, in addition to the cap, was an exempt
16 plant. But you -- you don't see that now?

17 MR. SCHILTER: As applied by the term
18 small business, it includes a producer who makes
19 less than 500,000 pounds of milk a month. And
20 that's the only referral I have to that.

21 MR. VETNE: I see. Okay. Good. That's
22 all I have. Thank you.

23 MS. ARNOLD: I would like to respond to
24 some of your questions to Tony in terms of the
25 price paid to farmers for our milk versus the

1 store shelf price and what consumers will pay.

2 MR. VETNE: Please. Please do.

3 MS. ARNOLD: Okay. Just looking, our
4 executive director of NODPA has been keeping
5 track of store prices in his area of
6 Massachusetts for some time and he has said
7 there is very, very little relationship between
8 the store shelf price and the farmer pay price.
9 That just within a five-mile region, there can
10 be great variations in store price. And the
11 organic dairy farmer receives usually less than
12 40 percent of the actual store shelf price. So
13 just a dollar or two raise to the farmer is very
14 negligible in terms of how it might affect the
15 store shelf price.

16 MR. VETNE: And in that testimony you
17 just gave, when you refer to store shelf price,
18 are you referring exclusively to organic milk
19 offered on the store shelf?

20 MS. ARNOLD: Yes.

21 MR. VETNE: And it was not a statement
22 that referred to the relationship of milk in
23 general to what the farmer received?

24 MS. ARNOLD: Right. Not milk in general,
25 only specifically to organic milk.

1 MR. VETNE: Okay. And that was something
2 somebody told you. Who was that again?

3 MS. ARNOLD: Ed Maltby, the executive
4 director of NODPA.

5 MR. VETNE: And you don't have specific
6 numbers with you?

7 MS. ARNOLD: I do not have them with me,
8 but we can get them to you if you would like.

9 MR. VETNE: Is that something that your
10 organic organizations regularly track and keep a
11 record of?

12 MS. ARNOLD: I believe Ed has been doing
13 it for some time, yes.

14 MR. VETNE: And it has been for the
15 Northeast or the nation?

16 MS. ARNOLD: I believe it's mostly been
17 the Northeast, but I have -- I'm not sure
18 whether he has figures for other parts of the
19 country as well.

20 MR. VETNE: If you were able to get that
21 information from Ed and e-mail it to me --

22 MS. ARNOLD: Sure.

23 MR. VETNE: -- I would love it.

24 MS. ARNOLD: Can you give me your card?

25 MR. VETNE: I will after we're done here.

1 Thank you.

2 MS. ARNOLD: You're welcome.

3 JUDGE CLIFTON: Thank you, Mr. Vetne.

4 Who will next cross-examine the panel?

5 Mr. Yale.

6 CROSS-EXAMINATION

7 BY MR. YALE:

8 MR. YALE: Good afternoon, Benjamin F.
9 Yale on behalf of Continental Dairy Products and
10 Select Milk.

11 MS. ARNOLD: Hello.

12 MR. YALE: Hello. I'll get it -- I'll
13 ask all three, whoever wants to go first, and
14 then I'll take the other two.

15 JUDGE CLIFTON: Let me ask you, because
16 he's going to do it that way, when you take the
17 microphone, just say your name.

18 MR. YALE: I realize some of you might be
19 quicker thinkers, and we'll let you get the
20 first shot out to help the rest with it. And I
21 appreciate your coming today.

22 As I read -- listened to both of your
23 testimonies and listened to, I guess, all three
24 of them, read two and listened to three, and in
25 the cross-examination, here's what I hear.

1 And I want to break this apart. So this
2 is the foundation to a question, so there will
3 be a question at the end of this, but there's a
4 little bit of a lead-up to this.

5 I get the sense that your anger, your
6 angst with larger organic producers or
7 producer-handlers, and the name you give is
8 Aurora, is that, first of all, there's a concern
9 whether or not they are truly organic or not.
10 Because if they're not truly organic, that gives
11 them an advantage. There is the issue that they
12 are larger in scale than your operations, and
13 that gives them an advantage.

14 And just recently you made a comment that
15 there might be some advantage because of
16 hauling. And then there is this talk about the
17 idea of processing and using UHT as opposed to
18 traditional pasteurization. And then there's
19 the issue of the distribution system that
20 they're able to use, that is the Wal-Marts or
21 the other large stores and the fact that they
22 are a PD.

23 And what I hear is, is that the sum of
24 all of that puts them at an advantage over you
25 and those who are members of your various

1 groups. That -- first of all, is that a fair
2 statement?

3 MS. ARNOLD: I would say that's a fair
4 statement. But the only thing we are concerned
5 about really here today is the
6 producer-handler -- their producer-handler
7 exempt status. And that's the focus here and I
8 don't want to focus on the other.

9 MR. YALE: Thank you. Because that's
10 really the concern that I have is, is that -- I
11 mean, you are aware, are you not, that this part
12 of the USDA -- and I know it's a large
13 organization -- has no say in organic or not, do
14 you understand that?

15 MS. ARNOLD: Totally, yes.

16 MR. YALE: And that the Secretary should
17 not consider whether or not it's an organic
18 small farm or a regular small farm, in the sense
19 they should be treated the same in terms of its
20 view of its obligations under this particular
21 program?

22 MS. ARNOLD: Right, correct. But I think
23 our testimony, our -- our knowledge and our
24 concerns are specific to the organic market and
25 so that's where we are, you know, targeting our

1 comments --

2 MR. YALE: Okay.

3 MS. ARNOLD: -- is to the market we know.

4 MR. YALE: And the issue of size of
5 farms, I know that concerns you, but that's
6 not --

7 MS. ARNOLD: That's not the issue today.

8 MR. YALE: Okay. Now, have you
9 quantified the value of this total grass to
10 glass -- I guess it's grass to UHD box. Have
11 you quantified the value of that advantage as
12 compared to you?

13 MS. ARNOLD: Not the total advantage, no,
14 we've not quantified that.

15 MR. YALE: Okay. And have you quantified
16 the advantage of the PD to you, the change in
17 that?

18 MS. ARNOLD: Well, I can't say we've
19 actually quantified it, and I know it's
20 something that changes over time, as the values
21 for Class I versus the other classes of milk
22 changes. So it's not something that's static.
23 It varies from order to order, so we have not
24 sat out and said, you know, there's a definitive
25 number that we can call on, because it's

1 variable.

2 MR. YALE: Okay. And do both of you
3 agree to this, the answer she's had so far?
4 Anything you want to add to anything of her
5 answers?

6 JUDGE CLIFTON: Identify yourself before
7 you respond.

8 MS. ARNOLD: This has been Kathie Arnold,
9 by the way.

10 MR. YALE: Okay. Mr. Segalla?

11 MR. SEGALLA: Yeah, I agree with that.
12 It is -- it's not so much size. You know,
13 the -- the larger operations have a -- have a
14 competitive advantage to us, to the smaller
15 operations, like you wouldn't believe. I mean,
16 to be able to buy in bulk, buy the grain by
17 contract, growers to grow all their grain for
18 them. That gives us -- so somebody that lives
19 in Connecticut, where probably 75 percent of
20 Connecticut is forest and there's no large -- I
21 mean, you don't see a farm in Connecticut
22 sitting in a big sector of land -- I mean, a
23 barn out in the middle of 600 acres, where you
24 do out in the Midwest. And you go out into
25 Colorado and stuff, and they sit out in the

1 middle of thousands of acres.

2 But the thing that bothers us is they
3 have all this, and then they're taking advantage
4 of the market orders and it gives them the extra
5 advantage over us that we -- that they shouldn't
6 have. That's what bothers us.

7 MR. YALE: Okay.

8 MR. SEGALLA: My home farm is a
9 combination of seven farms that my parents put
10 together. They bought the original farm from my
11 mother's grandparents and then they bought out
12 the farms down the street as they came up for
13 sale. Well, one farm milked six cows, one farm
14 milked eight cows. I think the largest one
15 milked 15 cows. Well, the market orders were
16 set up in 1929, and they were set up to
17 accommodate things of that time.

18 Well, now you have farms that -- out in
19 the Midwest and in the West that are milking 10
20 or 15,000 cows. And for an organic producer,
21 when you see a 15,000-cow operation that could
22 tomorrow turn to organic, start bottling milk
23 and put that on the market, with all the
24 advantages that they have of size, and still
25 have an extra competitive advantage of the

1 marketing with the pool, it's just not fair.

2 It's absolutely not fair for the smaller
3 guys to have to compete against a vertically
4 integrated corporation. And, I mean, it looks
5 good for the people on Wall Street that back
6 these guys, but you know, it does nothing for
7 the small farms across the country, whether
8 they're large or 3 or 400 cows or 50 cows. And
9 you go into the Vermont area, there's a lot of
10 farms in Vermont, like she said, that are small.

11 And Connecticut, I used the figure of
12 farms that are in business. Well, in the last
13 week I've heard of three farms that have gone
14 out since then. I mean, what is it, 140 cows, I
15 think it was. Now, we're three less. And we're
16 getting less and less.

17 Unless we can remain competitive, the
18 small rural farms are going to be gone, and it's
19 all going to be produced in one area of the
20 country and rural America is going to lose out.
21 Thank you.

22 MR. YALE: Mr. Schilter, do you have any
23 answer?

24 MR. SCHILTER: Tony Schilter. That was
25 very well put. There's one thing that you're

1 referring to, a size. And you have to realize
2 that NDA or Darigold, which I'm affiliated with,
3 is 580 smaller farmers that are put together
4 that are paying into the pool. Combined, we're
5 way outproduced as to any organic or
6 producer-handler whatsoever. But we have to
7 meet with the criteria of that. But we have to
8 keep our plants moving. If anything else,
9 common sense dictates the fact that we need to
10 regulate all PDs. We're here, the three of us,
11 as organic producers. It's going to be a big
12 mess if we don't do something.

13 And I have a history of our Order of 121
14 and 131, and everybody seems to have conformed
15 in that order. But there seems to be washing
16 over the borders now and that has to be closed
17 up. Thank you.

18 MR. YALE: While you still have the mic,
19 Mr. Schilter, let me ask you this question.
20 What is your understanding of the impact these
21 Proposals 1 and 2 would have on
22 producer-handlers?

23 MR. SCHILTER: Proposal 1 and 2?

24 MR. YALE: That's the one that eliminated
25 PDs and capping plants at 450,000 pounds.

1 MR. SCHILTER: What impact it would have?

2 MR. YALE: Yeah. How would that affect a
3 producer-handler? Do you know what the impact
4 or change in the regulations would have on
5 existing producer-handlers?

6 MR. SCHILTER: That are above that
7 150,000?

8 MR. YALE: Yes.

9 MR. SCHILTER: It wouldn't be to its
10 advantage.

11 MR. YALE: You don't know how that
12 affects them?

13 MR. SCHILTER: Well, it's just -- it's
14 just -- it's the same situation individually on
15 each producer -- PD. It would be the equivalent
16 of my wife and I starting from nothing in 1967,
17 '68 and going through a flood like we did. And
18 we survived.

19 Of the five dairies that were under that
20 flood, I'm the only one that survived it. And
21 it comes down to management.

22 And I think if I was a producer-handler
23 with 3 million pounds of milk or more -- heaven
24 forbid, I couldn't even realize myself doing
25 that. But if I was at 300,000 pounds, I can see

1 a common sense -- or at 500,000, let's say,
2 common sense would tell me that it would behoove
3 me to realize that cap of 450, because if it
4 doesn't come through, the 500,000 pounds
5 would mean nothing to me in the future. If
6 I'm --

7 MR. YALE: I think you're saying if you
8 went to a PD, you will not allow yourself to get
9 above the 450,000 pounds?

10 MR. SCHILTER: I would stay within the
11 limitations and be able to survive, because
12 there isn't enough money in the world for some
13 of these operations I see triggered to go,
14 right now, in the West, that if this cap does
15 not come on, they're going to go and
16 there's going to be so much milk on the
17 market that it is disadvantageous to the
18 associations.

19 Right now, about 580 producers in our
20 association, we have a tremendous disadvantage
21 because of the differential between Class I and
22 Class III and Class IV, whichever is the higher
23 of the two. On our order alone, I think it's
24 \$1.81 this month and 4.84 the differential.
25 That's what we're talking about.

1 MR. YALE: You had a lot in that answer
2 so I'm trying to sort that out to develop my
3 next question.

4 MR. SCHILTER: This is what I read out in
5 the market industry.

6 MR. YALE: You said a lot of things. Try
7 and give me a second as I try to think through
8 those things I want to ask.

9 I think the question I was really wanting
10 to ask you is: Is it your understanding -- I'm
11 not going to go there. I think that probably --
12 it's a nuance question, and I'm not going to be
13 unfair to you.

14 I think as you -- Miss Arnold, you
15 mentioned Fair Oaks Farms?

16 MS. ARNOLD: Yes, I did.

17 MR. YALE: Are you aware of how Fair Oaks
18 Farms markets its milk at this point?

19 MS. ARNOLD: No, I'm not totally sure
20 whether they market themselves or not.

21 MR. YALE: You don't know whether they
22 are a member of the co-op or not?

23 MS. ARNOLD: I don't know.

24 MR. YALE: If I told you they were with
25 Continental Dairy Products that supports

1 National Milk's proposal, would that mean
2 anything to you?

3 MS. ARNOLD: Well, that would allay my
4 fears about them. But just knowing that there's
5 a potential they could always pull out and
6 become a producer-handler if that cap wasn't
7 there.

8 MR. YALE: Does it -- I think that's --
9 oh, this is just kind of another related thing.
10 There's been a shift in the last couple of years
11 to what is sometimes referred to as rbST-free
12 milk. And has that had an impact on the volume
13 of organic milk that was sold?

14 MS. ARNOLD: I don't have any facts or
15 figures to say one way or another.

16 MR. YALE: Okay. And this one goes to
17 Mr. Segalla, just a comment on your testimony.
18 You mentioned at the bottom of the second page,
19 you start talking about we don't support any
20 grandfathering. But as we go on to the third
21 page, the Federal Order System simply can't, and
22 in general has not, protected producers or
23 plants from economic change by grandfathering
24 their status. Because you talk about the fact
25 that there are rules that change the economic

1 viability of plants and producers all the time,
2 right?

3 MR. SEGALLA: Yes.

4 MR. YALE: Now, what struck me again,
5 it's kind of music and not just the words and I
6 wanted to make sure that I wasn't listening to
7 the wrong tune.

8 If you go to the end of the next
9 paragraph, you say -- or in the next paragraph,
10 you talk about the impact of caps and the size
11 and competitive advantage of organic farmers.
12 And it talks about the situation threatening the
13 viability of organic dairy producers based on
14 these prices.

15 And I guess the question, the way -- I'm
16 not trying to be unfair, it looks to me like
17 what we're saying here is that it depends on
18 whose ox is being gored in terms of how I want
19 the rules to go. Or are you willing, as an
20 organic producer, that you'll play by the rules,
21 whatever they are, and see whatever the price
22 generates?

23 MR. SEGALLA: Well, I guess we have to.
24 But my feeling on the grandfathering is, if
25 you've got guys that are -- have been -- how can

1 I say this -- taking advantage of the rules,
2 these large farms that are taking advantage of
3 the rules, and you grandfather them in, they're
4 still going to be out there taking advantage of
5 the rules. And that's going to give them an
6 unfair competitive advantage over the new guy
7 that tries to get in, who can't take advantage
8 of the rules because he's new. So you have to
9 level the playing field.

10 MR. YALE: You're aware that the PD --
11 the grandfathers all have a cap of up to
12 3 million pounds, or the size that they are now?

13 MR. SEGALLA: Well, whatever they decide
14 to do. But I mean, what it -- what it does do,
15 it gives them an unfair advantage regardless.

16 MR. YALE: So it's either no
17 grandfathering, or if you're going to
18 grandfather, at least allow others in?

19 MR. SEGALLA: I -- I would rather just
20 have a hard cap where everybody plays by the
21 same rule and that's where they stay. Because
22 the new guy coming in can't compete against the
23 older guys that are there.

24 MR. YALE: There was some earlier
25 questions about the impact of plants under

1 3 million pounds. I don't think any of you
2 testified that any of those have interfered with
3 your markets in any way, is that correct?

4 MR. SEGALLA: No.

5 MS. ARNOLD: No.

6 MR. YALE: So, I mean, do you have an
7 objection if the Secretary found, based on the
8 totality of the testimony, that 3 million might
9 be the cap, that you would be terribly objecting
10 to that?

11 MR. SEGALLA: I'm -- I'm not in favor of
12 something that -- because that -- that still
13 gives them -- I mean, how can the small guys
14 start their own business and compete against
15 somebody with a 3 million pound cap? The small
16 farmer. You can't.

17 MR. YALE: But I think your testimony --

18 MR. SEGALLA: But if he was milking 350
19 cows and decided to start bottling milk, he
20 could compete. But, I mean, if he had -- had
21 that 450,000 -- is it a 450,000 pound cap? But,
22 you know, you put somebody that's just starting
23 out against somebody that's got a 3 million
24 pound, you just can't do it.

25 I mean, you're talking about the future

1 of milk in this country. And if you set up
2 rules like that, it just makes it almost
3 impossible for that to happen.

4 MR. YALE: But the current rules do allow
5 for 3 million in two orders and unlimited in
6 eight orders?

7 MR. SEGALLA: Are they working?

8 MR. YALE: My question is, you're
9 aware --

10 MR. SEGALLA: That's my question to you.

11 MR. YALE: You're aware that they are
12 there, right?

13 MR. SEGALLA: Yes.

14 MR. YALE: All right. And are there new
15 producers entering the market in some markets
16 where there are PDs, are you aware of whether
17 that's the case or not?

18 MR. SEGALLA: I would imagine there are
19 small -- there are small farms that are starting
20 off. And I know there's some smaller farms -- I
21 don't know the names of them -- trying to get
22 into the market and bottle their milk and sell
23 it or make cheese or whatever.

24 MR. YALE: Are you aware -- you probably
25 have no information about the Southwest Order --

1 MR. SEGALLA: Right.

2 MR. YALE: Are you aware -- maybe you're
3 not -- there are two PDs in their market right
4 now? You're not aware of that? You're not
5 aware of whether producers have added on and
6 built new dairies in the Southwest --

7 MR. SEGALLA: I have no clue.

8 MR. YALE: -- under the current rules?

9 MR. SEGALLA: No.

10 MR. YALE: If the evidence would show
11 that even with an unlimited cap, that there's
12 been a large number of new dairies being built
13 in that region and marketing their milk
14 conventionally, would that not indicate that
15 maybe what --

16 MR. SEGALLA: What are the sizes of these
17 dairies?

18 MR. YALE: I would suggest they're
19 probably a thousand cows and larger.

20 MR. SEGALLA: Would they be competitive
21 to somebody that was only milking 3 or 400 cows?

22 MR. YALE: They all share out of the same
23 pool.

24 MR. SEGALLA: They all share out of the
25 same pool, but they're not pooling into the

1 pool?

2 MR. YALE: The large -- not PDs, I'm
3 talking about conventionally marketing their
4 milk.

5 MR. SEGALLA: I don't know.

6 MR. YALE: I don't have any other
7 questions. Thank you very much.

8 JUDGE CLIFTON: Thank you, Mr. Yale. Who
9 will next cross-examine the panel? Mr. Beshore.

10 CROSS-EXAMINATION

11 BY MR. BESHORE:

12 MR. BESHORE: Good afternoon. I have
13 just a couple of questions, I promise, your
14 Honor.

15 Ms. Arnold, one question quickly.
16 Footnote 2 of your statement cites AMS figures
17 for national sales for organic fluid milk, 1,263
18 million pounds for 208. Can you tell us a
19 particular AMS publication or where you got that
20 information?

21 MS. ARNOLD: That was pulled out by Ed
22 Maltby, our executive director.

23 MR. BESHORE: Okay. So you don't know.

24 MS. ARNOLD: So I don't know the specific
25 citation where he got that, but I do know that

1 we all probably have on our desk the new USDA
2 Organic Census, so we will be soon filling out
3 more information so the government will know
4 more about us --

5 MR. BESHORE: Okay.

6 MS. ARNOLD: -- in the future.

7 MR. BESHORE: For clarification, there's
8 been earlier testimony about an organize called
9 CROP, and you may have mentioned CROP.

10 MS. ARNOLD: Okay.

11 MR. BESHORE: You also mentioned a
12 cooperative based in La Farge, Wisconsin and a
13 cooperative that uses the Organic Valley label.
14 Is that -- are they all the same entity?

15 MS. ARNOLD: Yes. And this is Kathie
16 Arnold. Yes, CROP Cooperative, which stands for
17 Cooperative --

18 MR. BESHORE: Cooley Region --

19 MS. ARNOLD: No, they changed their
20 name. Anyway, Organic Valley is their brand
21 name, so they usually go by Cooperative Organic
22 Valley, headquartered in La Farge,
23 Wisconsin.

24 MR. BESHORE: That's the same?

25 MS. ARNOLD: Yes.

1 MR. BESHORE: Okay. A number of organic
2 farmers in the Northeast are members of CROP?

3 MS. ARNOLD: Yes, a large number.
4 Probably -- I would say that Organic Valley
5 probably has more -- at least as many farms in
6 the Northeast as any of the other processors,
7 way more than HP Hood and probably more than
8 Horizon as well.

9 MR. BESHORE: Okay. Can you tell us,
10 from your knowledge, what stores -- and this is
11 directly for you, Ms. Arnold. What stores in
12 the Northeast carry the Aurora organic product?

13 MS. ARNOLD: Unfortunately, since we have
14 our own milk -- we use our own milk, I don't
15 spend a lot of time at the dairy case in grocery
16 stores. My husband tends to do more of our
17 grocery shopping than I do.

18 But I believe -- I believe he sees it at
19 Tops Market -- Tops Friendly Market in Cortland,
20 New York. And I do know they also do market
21 for -- or through Wal-Mart, Costco, Target,
22 Safeway and in the Midwest, Meijer.

23 MR. BESHORE: Okay. Now, one final
24 question. Mr. Yale asked you all about a number
25 of differences between Aurora and your types of

1 farms, size, you know, whether or not they have
2 the same organic practices you do and those
3 things, and other things.

4 My question to you is: In the -- and, of
5 course, the difference we're here to discuss is
6 the regulatory difference where they're not --
7 they're not obligated to pay into the pool, but
8 the buyers -- the processors of your products,
9 the regulated pool plants, are required to pay
10 into the pool, correct?

11 MS. ARNOLD: Correct.

12 MR. BESHORE: Okay. Are you satisfied --
13 and your objective here is just to see that that
14 difference is eliminated, correct?

15 MS. ARNOLD: That's our objective here at
16 this hearing, yes.

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

19 JUDGE CLIFTON: Thank you, Mr. Beshore.
20 Mr. Ricciardi.

21 CROSS-EXAMINATION

22 BY MR. RICCIARDI:

23 MR. RICCIARDI: Al Ricciardi on behalf of
24 AIDA, a number of producer-handlers and exempt
25 plants.

1 I guess my first question -- Ms. Arnold,
2 you have the microphone, so I'll direct one to
3 you.

4 Let me see if I understand your prior
5 testimony. I think that you said for organic
6 milk, at least in the region that you operate
7 in, there are really three choices that you
8 could sell to, Hood, Organic Valley and also
9 Dean's Horizon. Did I get that right?

10 MS. ARNOLD: Right. In my area, just
11 west of us there's also the Upstate Niagara
12 Co-op, but we're a little too far east of their
13 area.

14 MR. RICCIARDI: You also indicated as
15 part of that testimony that you would like to
16 see more competition for your organic milk.

17 MS. ARNOLD: Yes.

18 MR. RICCIARDI: And the reason, at least
19 from your perspective, more competition, whether
20 we're talking from co-ops or handlers of organic
21 milk, that would give you some type of a
22 benefit, right?

23 MS. ARNOLD: Yeah, more choice.

24 MR. RICCIARDI: More choice. And it's
25 also important to the consumer of organic milk

1 or any milk that there be the option to have
2 choice out there, correct?

3 MS. ARNOLD: Correct.

4 MR. RICCIARDI: And therefore
5 accessibility to organic milk is a benefit to
6 consumers, from your perspective, correct?

7 MS. ARNOLD: Yes.

8 MR. RICCIARDI: And lower prices
9 ultimately for organic milk to the consumer, on
10 the shelf, is also a benefit to consumers,
11 correct?

12 MS. ARNOLD: Not necessarily.

13 MR. RICCIARDI: Okay. It can be.

14 MS. ARNOLD: It can be.

15 MR. RICCIARDI: Okay. And currently, if
16 a consumer in your area wants to buy a local
17 organic product, they have the ability to do
18 that, correct?

19 MS. ARNOLD: Yes.

20 MR. RICCIARDI: And you don't want to
21 limit the ability of a consumer to go into a
22 larger store -- and you used Wal-Mart as an
23 example, so I'll use that in my question -- to
24 be able to go into a Wal-Mart in your location,
25 assuming there is one available, and be able to

1 purchase organic milk, you're not trying to
2 limit that, right?

3 MS. ARNOLD: Correct.

4 MR. RICCIARDI: Let me make sure I
5 understand this, and I guess this will be --
6 I'll start with you since you've got the
7 microphone.

8 You currently sell your milk to, or did,
9 to Organic Valley, right?

10 MS. ARNOLD: Yeah, a few years ago.
11 Currently to HP Hood.

12 MR. RICCIARDI: Okay. The packaged
13 product for HP Hood coming from your organic
14 milk, do they use UHT processing?

15 MS. ARNOLD: Yes, they do.

16 MR. RICCIARDI: With regard to Organic
17 Valley, did they?

18 MS. ARNOLD: They do both, UHF and UHT.

19 MR. RICCIARDI: They did both?

20 MS. ARNOLD: They do both.

21 MR. RICCIARDI: You don't believe that
22 real organic milk cannot be processed by using
23 UHT, correct?

24 MS. ARNOLD: Well, I would -- personally,
25 I would prefer to see it all HTST, but that's

1 not my decision.

2 MR. RICCIARDI: Okay. But you don't
3 think that people should be limited in being
4 able to market the UHT product?

5 MS. ARNOLD: No.

6 MR. RICCIARDI: You don't consider UHT
7 processed milk, since you're obviously in a
8 package like that, that's still organic milk?

9 MS. ARNOLD: Correct.

10 MR. RICCIARDI: Let me see if I can
11 understand what your testimony is on this point.
12 On the issue of benefit from the pool, I think
13 that you said, and if I'm wrong you'll correct
14 me, that as an organic producer, you don't get
15 any benefits from the pool, is that your
16 understanding?

17 MS. ARNOLD: That's my understanding, but
18 I have to admit, you know, I don't have a
19 hundred percent understanding of all the
20 internal workings of the pools and the Federal
21 Order and everything.

22 MR. RICCIARDI: Okay. And you've never
23 operated a producer-handler operation either,
24 correct?

25 MS. ARNOLD: No, I have not.

1 MR. RICCIARDI: When you started your
2 business, you simply decided that you were going
3 to be a farmer and ultimately an organic farmer,
4 right?

5 MS. ARNOLD: Yeah. I bought into an
6 existing business and we grew it, and yeah,
7 over time when the market was available, then we
8 transitioned to organic.

9 But I'm aware of -- and I am very
10 acquainted with some organic producers who are
11 producer-handlers on a small scale, and so I
12 have some understanding of what it means to be a
13 producer-handler.

14 MR. RICCIARDI: Let me ask you about
15 that, and hopefully I'll remember the other ball
16 I put up in the air and make sure it's still
17 behind me.

18 On the producer-handler operation, the
19 one that you're familiar with, leaving aside
20 size issues for a moment, that operation is
21 different from yours in a number of respects?

22 MS. ARNOLD: Yes, it is.

23 MR. RICCIARDI: The producer-handler is
24 processing his or her own milk, correct?

25 MS. ARNOLD: Yes.

1 MR. RICCIARDI: The producer-handler is
2 finding a market for his or her own milk,
3 correct?

4 MS. ARNOLD: Yes.

5 MR. RICCIARDI: The producer-handler is
6 transporting that milk to the market, whatever
7 that market is?

8 MS. ARNOLD: Yes.

9 MR. RICCIARDI: And all of those costs
10 are costs that your operation does not have to
11 bear, correct?

12 MS. ARNOLD: That is correct.

13 MR. RICCIARDI: Now --

14 MS. ARNOLD: But my processor has to bear
15 all those costs.

16 MR. RICCIARDI: I'm talking about you
17 now, in terms of your operation. With regard to
18 the amount of milk that that producer-handler or
19 organic has to deal with, he has to or she has
20 to ensure that their supply is balanced; that
21 is, that they have enough and they don't have
22 too much, correct?

23 MS. ARNOLD: Correct.

24 MR. RICCIARDI: Because if, in fact, they
25 run short, there is no way that they can get

1 that milk from anywhere else?

2 MS. ARNOLD: Uh-huh.

3 MR. RICCIARDI: Correct?

4 MS. ARNOLD: Correct.

5 MR. RICCIARDI: Or, in fact, if they run
6 short, they may not have them as their customer
7 next month?

8 MS. ARNOLD: If they've got a good
9 product, that customer will still be there
10 waiting for it when it comes.

11 MR. RICCIARDI: We hope, right?

12 MS. ARNOLD: Yes.

13 MR. RICCIARDI: Now, with regard to being
14 able to get that product from the pool, as
15 you've described it, it's -- that
16 producer-handler, especially in the organic
17 area, doesn't have access to be able to balance
18 that, to be able to get the organic milk from
19 the pool, right?

20 MS. ARNOLD: Well, I don't know that they
21 usually get it from the pool, but maybe -- you
22 know, say Organic Valley needs more milk so they
23 may buy a truckload from HP Hood or something.
24 It's not really out of the Federal Order system,
25 but from another organic handler.

1 MR. RICCIARDI: Okay. But the
2 producer-handler can't?

3 MS. ARNOLD: Well, I thought that there
4 was some provision that they could -- I don't
5 know the total rules. But I thought there was a
6 little bit of a leeway in there for them.

7 MR. RICCIARDI: And it depends on the
8 Order that you're talking about. In some
9 places, there's the ability, assuming it's
10 available, to go ahead and purchase up to
11 150,000 pounds and some Orders not.

12 MS. ARNOLD: Okay.

13 MR. RICCIARDI: With regard to Organic
14 Valley milk, isn't it true that Organic Valley
15 will have milk that is taken from producers in
16 New York, package that milk, and that milk
17 actually finds itself on shelves outside of the
18 New England area, in the New York area?

19 MS. ARNOLD: Yeah, probably some of it
20 goes down to the Southeast, because there's very
21 little organic milk in the Southeast.

22 MR. RICCIARDI: And some may go as far
23 west as Colorado?

24 MS. ARNOLD: I suppose that's possible.
25 It would be unlikely, under most usual marketing

1 times, because I think they would supply that
2 either from the far -- out of the Midwest rather
3 than bring it from the Northeast.

4 MR. RICCIARDI: Let me -- since you still
5 have the microphone and control of the room for
6 the moment, let me ask you to take a look at
7 your statement -- no, actually, I apologize.

8 If you would shift the microphone to the
9 right to Mr. Segalla? It's his statement that I
10 want to ask a question about.

11 It would be, Mr. Segalla, the third page
12 of your statement.

13 And, your Honor, if you could pass over
14 to Mr. Segalla Exhibit 68, I would appreciate
15 it. If you want me to hand him my copy, I can
16 do that.

17 JUDGE CLIFTON: No, I want you to keep
18 your copy.

19 MR. RICCIARDI: Okay.

20 JUDGE CLIFTON: I'm glad we're using
21 these exhibits.

22 MR. RICCIARDI: That's why we put them
23 in.

24 JUDGE CLIFTON: There's sweat, blood and
25 tears involved in these exhibits.

1 MR. RICCIARDI: While the Judge is
2 helping you --

3 JUDGE CLIFTON: It's very small print,
4 which can be very difficult in this light.
5 Let's go off record for just a moment.

6 (Off the record.)

7 JUDGE CLIFTON: Let's go back on record.
8 We're back on record at 1:15. We may need a
9 little help in getting those numbers identified
10 as you go through. Miss Arnold's got her
11 glasses, and she can assist.

12 MR. RICCIARDI: Okay. Now, this is a
13 jumping-off point for my discussion with you,
14 Mr. Segalla, and I'm going to point to what is
15 about the middle of the page. It's a one --
16 essentially a one-sentence paragraph, this
17 downward pressure on pricing. Do you see that?

18 MR. SEGALLA: Uh-huh.

19 MR. RICCIARDI: Let's talk about the
20 downward pressure on pricing for a minute, and
21 then I want to bring in some of the statistics
22 that are part of Exhibit 68 to tie in some of my
23 questions.

24 I think I already heard, and I don't know
25 from what member of the panel, we all live in

1 this country and so we understand it, that there
2 had been some economic difficulties since the
3 fall of '08 in all industries, including your
4 industry, correct?

5 MR. SEGALLA: Uh-huh.

6 MR. RICCIARDI: Is that a yes?

7 MR. SEGALLA: Yes.

8 MR. RICCIARDI: Yes. I mean, obviously
9 we can sit here and have a debate about what
10 caused it or what didn't, but what we know is
11 that in all industries, which would include the
12 milk industry and your portion of it, the
13 organic milk industry, too, that there have been
14 a -- there have been problems in the sense that
15 perhaps you're not now here, in May, getting the
16 same price that you were before the downturn
17 starting in the fall of '08, correct?

18 MR. SEGALLA: Correct.

19 MR. RICCIARDI: Milk prices have gone
20 down?

21 MR. SEGALLA: Uh-huh.

22 MR. RICCIARDI: Yes, okay. And the
23 problem -- the macro problems in the economy,
24 which have an effect on your portion of the
25 industry --

1 MR. SEGALLA: Yes.

2 MR. RICCIARDI: -- are not directly
3 related to any issues with regard to
4 producer-handlers, correct?

5 MR. SEGALLA: Yes, they are.

6 MR. RICCIARDI: Okay. Producer-handlers
7 have caused a downturn in the economy?

8 MR. SEGALLA: No, producer-handlers
9 haven't caused a downturn in the economy, but
10 producer -- producer-handlers if -- if they
11 can -- if they can have the inequities in
12 production in milk on their side and bottling
13 and stuff on their side, against the smaller
14 farmers, then they are -- they are
15 inadvertently, because they can produce a
16 lower-priced product and deliver it to market,
17 are causing the other farmers to take a lower
18 price for their milk.

19 MR. RICCIARDI: Okay. I understand your
20 answer. Take a look for me since -- you're
21 familiar with the Northeast Order, correct?

22 MR. SEGALLA: Order 1.

23 MR. RICCIARDI: Order 1, Northeast Order.
24 What we've got as Exhibit 68 shows a packaged
25 disposition of organic fluid milk products by

1 handlers, and you can see the rest of it,
2 regulated under Federal Order, et cetera.

3 What it shows is the volume of organic
4 milk products for 2006, '7 and '8 in the first
5 column in one of those years. Do you see that?
6 And it's in million pounds.

7 MR. SEGALLA: Yes.

8 MR. RICCIARDI: So in 2006, there were
9 276.1 million pounds, 2007, 353.8 million
10 pounds. And in 2008, 400.1 million pounds,
11 correct?

12 MR. SEGALLA: Yes.

13 MR. RICCIARDI: So what we've got is, by
14 looking at these statistics, the fact that
15 organic packaged products, which are handlers
16 regulated under the Federal Orders, have
17 increased in the last three years?

18 MR. SEGALLA: That's correct.

19 MR. RICCIARDI: So the amount sold by
20 organic producers over the last three years in
21 your Order area has gone up?

22 MR. SEGALLA: Yes, that's correct.

23 MR. RICCIARDI: Now, you said, since you
24 have the microphone, that it's important for
25 Mr. Colabro, that he have your supply for at

1 least a portion of his cheese products, right?

2 MR. SEGALLA: For his organic.

3 MR. RICCIARDI: Yeah, the organic
4 portion.

5 MR. SEGALLA: Yes.

6 MR. RICCIARDI: Because you recognize,
7 and obviously you advocate, that a local supply
8 of organic milk, or even conventional milk is
9 advantageous for the local community, and also
10 for the producer because it's sustainable.
11 People want local products because they know
12 about the quality, right?

13 MR. SEGALLA: That's true.

14 MR. RICCIARDI: And they're looking to
15 ensure that they can get a quality product, it
16 can be produced by a business like yours and
17 available longer term, correct?

18 MR. SEGALLA: Correct.

19 MR. RICCIARDI: Now, you weren't here for
20 any of the testimony earlier this week, correct?

21 MR. SEGALLA: No, I wasn't.

22 MR. RICCIARDI: And you don't know
23 Mr. Hatch out of New Hampshire?

24 MR. SEGALLA: No.

25 MR. RICCIARDI: You don't know anything

1 about his operation?

2 MR. SEGALLA: No, I don't.

3 MR. RICCIARDI: You don't know anything
4 about Mr. Dunajski out of Peabody, Mass?

5 MR. SEGALLA: No.

6 MR. RICCIARDI: And you also don't know
7 anything about Mr. Rooney, Monument Farms, in
8 Weybridge, Vermont?

9 MR. SEGALLA: No.

10 MR. RICCIARDI: Did you know that all of
11 their individuals and their families are
12 producer-handlers?

13 MR. SEGALLA: No.

14 MR. RICCIARDI: Did you know that if you
15 take the position that you cap at 450,000
16 pounds, that you are going to affect those
17 individuals and potentially put them out of
18 business?

19 MR. SEGALLA: I don't know that it would
20 put them out of business.

21 MR. RICCIARDI: Well, if Mr. Hatch said
22 that he might be able to make it a month if
23 these regulations were put into effect and
24 probably not more than that, he obviously knows
25 a heck of a lot more about his business and

1 whether he would go out of business.

2 MR. BROSCH: Your Honor --

3 JUDGE CLIFTON: Mr. Brosch.

4 MR. BROSCH: -- counsel is arguing with
5 the witness. That was argument with the
6 witness. It's objectionable.

7 JUDGE CLIFTON: I note your objection but
8 I overrule it. This witness may well stick to
9 his original position despite the additional
10 statements that counsel wants him to consider.
11 But I'll allow counsel to question in this
12 manner.

13 MR. SEGALLA: I am here today for -- in
14 speaking on behalf of the organic farmers. Now,
15 these farms are not organic farmers. And I
16 don't know what their situation is, but for the
17 organic industry, I am speaking on behalf of
18 them.

19 MR. RICCIARDI: Do you think, then, that
20 the issues should be limited, if there's going
21 to be a limitation, of producer-handlers only to
22 organic producers?

23 MR. SEGALLA: No, I don't. I think that
24 the levels should -- should be set at some -- at
25 some point where -- where it gives equity to the

1 small farms. I mean, they -- like I said
2 before, these rules were set up in 1929, and we
3 have to make an adjustment to them to limit the
4 large farm inequities that are out there today.

5 MR. RICCIARDI: Let me ask you a couple
6 of follow-up questions and then we'll move
7 through this.

8 You're familiar with the New England, New
9 York Area Order 1, correct?

10 MR. SEGALLA: Yes.

11 MR. RICCIARDI: And the farms obviously
12 are smaller in those areas for geographic
13 reasons, for weather reasons, and for other
14 reasons, correct?

15 MR. SEGALLA: Yes.

16 MR. RICCIARDI: You're not familiar with
17 what's going on in the Southwest or out West or
18 down in the Southeast or something like that?

19 MR. SEGALLA: No, I'm not.

20 MR. RICCIARDI: So your experience has to
21 do with organic in your local area, correct?

22 MR. SEGALLA: Yes.

23 MR. RICCIARDI: Now, I guess if you would
24 shift this over to Ms. Arnold, I have a couple
25 of questions, and then I think I am done.

1 In producing your statement, which has
2 been marked as part of Exhibit 72, you got some
3 assistance from one of the advocates for
4 National Milk, Mr. Cryan, correct?

5 MS. ARNOLD: I never spoke with
6 Mr. Cryan. I had spoke with Mr. Beshore.

7 MR. RICCIARDI: Okay. You talked to
8 Mr. Beshore?

9 MS. ARNOLD: Yes, I talked with
10 Mr. Beshore, but he didn't really have anything
11 to say about my testimony. He just sort of told
12 me what it would be like at the hearing, gave me
13 ideas on, you know, what kind of things we
14 should be covering in our testimony, but he
15 never saw this until we were here today.

16 MR. RICCIARDI: When did you speak to
17 Mr. Beshore?

18 MS. ARNOLD: Oh, probably about a week
19 ago.

20 MR. RICCIARDI: And do you know when
21 Mr. Cryan provided information to your
22 organization?

23 MS. ARNOLD: He would have done -- he
24 talked with our executive director, but I don't
25 know when that was.

1 MR. RICCIARDI: Okay. Do you understand
2 that Dean Foods supports limitations on
3 producer-handlers?

4 MS. ARNOLD: I do understand that.

5 MR. RICCIARDI: Do you understand that
6 DFA supports limitations?

7 MS. ARNOLD: I know that.

8 MR. RICCIARDI: That National Milk, which
9 comprises 25 of the largest cooperatives in the
10 United States, supports it?

11 MS. ARNOLD: I know that.

12 MR. RICCIARDI: There was a response from
13 Mr. Segalla with regard to what was anticipated,
14 and I think he meant 1937, not 1929, but he
15 might have meant 1929. Was it anticipated, do
16 you think, back in 1937, that there would be
17 cooperatives, national cooperatives, that would
18 control such a significant amount of the milk
19 supply in this country?

20 MS. ARNOLD: That's possible --

21 MR. RICCIARDI: Do you think?

22 MS. ARNOLD: -- that there was no
23 conception of that. There was a lot of things
24 in 1937 that are different from today.

25 MR. RICCIARDI: That you could ship milk

1 from one part of the country to another as
2 opposed to simply within a limited milkshed, was
3 that, do you think, contemplated back then?

4 MS. ARNOLD: I doubt it.

5 MR. RICCIARDI: Nothing further. Thank
6 you very much.

7 MS. ARNOLD: You're welcome.

8 JUDGE CLIFTON: Thank you, Mr. Ricciardi.
9 Other cross-examination of the panel?
10 Mr. Carroll.

11 RE-CROSS-EXAMINATION

12 BY MR. CARROLL:

13 MR. CARROLL: I'll address my questions
14 to Mrs. Arnold. Now, I believe, and I could be
15 wrong, we're probably living 10 to 12 miles
16 apart.

17 MS. ARNOLD: I would say a little more
18 than that, maybe 20.

19 MR. CARROLL: 20, maybe. I live in
20 Cazenovia and you live in Truxton?

21 MS. ARNOLD: Correct.

22 MR. CARROLL: You're familiar with Byrne
23 Dairy, I think I heard you mention that. That's
24 why I'm getting up. I went to Byrne Dairy this
25 weekend and they didn't have any of the milk

1 that you're making on their shelves. They had
2 only this Organic Valley.

3 Do you have any interest in marketing
4 your own milk sometime or having it marketed
5 locally, so that those of us can go out to your
6 farm and look at it and understand this whole
7 movement, have a place to go?

8 MS. ARNOLD: Yeah. Actually if you're
9 into raw milk, you can come to our farm and I'll
10 sell it to you because I do have a New York
11 state raw milk permit.

12 MR. CARROLL: But if it were processed,
13 you would have to go to Byrne Dairy and make an
14 arrangement of some kind or --

15 MS. ARNOLD: I guess we could always be
16 called a producer-handler and have some on-farm
17 processing if we decided to go that route.

18 MR. CARROLL: Have you considered that as
19 an option you would like to have?

20 MS. ARNOLD: Not seriously. I mean,
21 we've thrown the idea out there, but with the --
22 you know, the number of cows we have, you know,
23 we would be way under the 450,000.

24 MR. CARROLL: What would -- then if your
25 present contract party said, I'm sorry, we don't

1 want your milk anymore, what are your plans?

2 MS. ARNOLD: Well, I think that is very
3 unlikely to happen because of our geographic
4 location, and we're right in central New York.
5 We're an hour from HP Hood's plant, so I think
6 we have, you know, such a good location that
7 would never happen.

8 But I guess if it did, I would likely go
9 to the other marketers, Horizon, Organic Valley,
10 talk with LOFCO. The present cooperative,
11 Organic Dairy Farmers Cooperative, has started a
12 New York milk label. Perhaps we could work out
13 something with them.

14 MR. CARROLL: What is the New York milk
15 label?

16 MS. ARNOLD: Well, Upstate Niagara
17 Cooperative is doing the processing of it and it
18 just rolled out the end of March, I believe,
19 into Whole Food Stores. And it's a beautiful
20 carton from the -- specifically from New York
21 state organic dairy farms processed in New York.

22 MR. CARROLL: And that's a program of
23 upstate -- and you mentioned some programs from
24 the state of New York. I think you were on a
25 board or two or something that dealt with that.

1 MS. ARNOLD: Some commissions, yes.

2 MR. CARROLL: What's the state
3 government's position on organic milk?

4 MS. ARNOLD: They're very supportive and
5 want to do whatever they can to help. And
6 actually, the commissioner had held a hearing on
7 milk marketing a couple of years ago, and I
8 testified at that hearing on this issue and that
9 perked up his -- our commissioner's ears. And
10 he said we need to help and get behind this
11 effort to level the playing field for New York
12 organic producers.

13 MR. CARROLL: Thank you.

14 MS. ARNOLD: You're welcome.

15 JUDGE CLIFTON: Other cross-examination
16 for members of the panel? Mr. Tosi, do you have
17 any questions?

18 MR. TOSI: No. No, your Honor, but we
19 really appreciate this group of people coming
20 and speaking to us as a panel. We thank you for
21 coming and your participation, thank you very
22 much.

23 MR. CARROLL: Thanks for the opportunity
24 to do it as a panel. We appreciate that.

25 JUDGE CLIFTON: Is there any objection to

1 the admission into evidence of Exhibit 71?

2 There is none. Exhibit 71 is hereby admitted
3 into evidence.

4 Is there any objection to the admission
5 into evidence of Exhibit 72? There is none,
6 Exhibit 72 is hereby admitted into evidence.

7 Thank you all. You may step down. A
8 reminder to check in with the court reporter for
9 spellings. Is there any objection to our
10 breaking for one hour for lunch? There is none,
11 please be back and ready go at 2:30.

12 MR. YALE: Who will be next?

13 JUDGE CLIFTON: Dr. Cryan. We'll see you
14 at 2:30.

15 (A recess was taken from 1:32 to 2:31.)

16 JUDGE CLIFTON: All right. Let's go back
17 on record. We're back on record at 2:31.

18 Dr. Cryan is now in the witness stand.

19 Dr. Cryan, returning to page 5 of Exhibit 23,
20 the sentence, we estimate the sales of the seven
21 largest producer-handlers to average at least
22 100 million pounds per year per plant. I would
23 like to pick up there.

24 Is there anything we need to do,
25 Mr. Brosch, preliminary to that?

1 MR. BROSCHE: Well, your Honor, perhaps.
2 I don't want to belabor this. I'm wondering,
3 your Honor, we started this morning with Marvin
4 Gaye, this afternoon perhaps our inspiration
5 should come from the country western band
6 Alabama. They once wrote a song where the first
7 stanza was, I'm in a hurry to get things done, I
8 run and run until life's no fun. And then all I
9 do is sit and cry, I'm in a hurry, I don't know
10 why.

11 I think, your Honor, we have not been in
12 a hurry in this proceeding at all. In fact, I
13 would say quite the opposite, we have been in no
14 hurry at all.

15 But we got in a hurry this morning and we
16 were probably mistaken to do that, and that
17 was -- the hurry was to try to get Dr. Cryan to
18 recalculate his original study based on some
19 different assumptions while sitting up on the
20 stand using a cell phone. And that didn't work.

21 JUDGE CLIFTON: I'm sorry, Mr. Brosch, I
22 have to interrupt you. We all learned when we
23 took mathematics, show your work. To the extent
24 you neglected to do that and are asked do it,
25 that's the least that can be expected.

1 MR. BROSCH: Your Honor, I have no
2 problem with Dr. Cryan showing his work. I have
3 a problem with Dr. Cryan having to recalculate
4 his number while sitting on the stand using a
5 cell phone. I'm just saying, if we had taken
6 more time to allow him to do this in the way
7 that made sense, we would not have what I think
8 we're going to have, which is a somewhat
9 confused record on this point.

10 And what I would suggest, your Honor, is
11 that if we were to go back and start as your
12 Honor, I think, ably suggests at the questions
13 that Mr. Miltner was asking, I would move that
14 we strike what we've done up to now and we start
15 again.

16 JUDGE CLIFTON: That motion is denied.
17 All of that is relevant to the credibility of
18 the witness.

19 MR. BROSCH: Well, your Honor, let me
20 just say in the future, if that's your Honor's
21 ruling in the future, I think your Honor should
22 be fair, then, to the witnesses and to allow
23 them, if they're asked to recalculate it, to do
24 it in a more appropriate setting and manner,
25 rather than trying to do it on his cell phone on

1 the stand.

2 JUDGE CLIFTON: Whose choice was it to do
3 it on the cell phone on the stand?

4 MR. BROSCHE: Well, I don't know, your
5 Honor. I don't know whose choice that was, that
6 was what was asked of him.

7 JUDGE CLIFTON: No, nobody asked him to
8 recalculate it on a cell phone on the stand.
9 Dr. Cryan undertook to try to do that. It
10 didn't work out very well.

11 MR. BROSCHE: Well, then, your Honor, I
12 will take responsibility for not getting up
13 immediately and objecting to that. In the
14 future, I will get up and object immediately
15 then.

16 JUDGE CLIFTON: I understand. All right,
17 page 5, that sentence. Dr. Cryan, begin again
18 and explain, if you will, how we should be able
19 to calculate that same figure ourselves, or
20 whatever you think that figure should be.

21 THE WITNESS: All right. Your Honor,
22 I -- with the opportunity to sit down and do
23 this right and go back to the documents that
24 I -- that I used originally, I -- I guess, first
25 of all, I should say I withdraw my apologies for

1 getting the numbers wrong because I didn't have
2 the numbers wrong.

3 So let me explain what I -- what, in
4 fact, I did do. On reflection -- and thanks in
5 large part to your Honor's comment about the
6 dates on the two tables -- I realized that in
7 fact we were talking about seven plants because
8 in March 2009 we had seven plants.

9 The basic -- the idea of the calculation
10 is the same. I did -- I went through the
11 numbers and concluded that I had been so
12 conservative on estimating a hundred million
13 pounds -- at least that the corrected version
14 with the change to 4 million pounds for the GH
15 plant, still -- came out to over a hundred
16 million pounds a month.

17 And I will go over the calculation using
18 one particular -- one particular scenario that
19 gives the -- actually, the lowest number.

20 As I described from Exhibit 20, I took
21 the numbers for -- I took the numbers for the
22 number of plants in each category, and I
23 calculated -- using the top of the range and the
24 bottom of the range, I calculated a minimum and
25 maximum volume that could have been -- of fluid

1 milk sales that could have been undertaken by
2 that -- each of those categories.

3 So, for example, there were -- a category
4 of 0 to 150,000 pounds, there were seven plants.
5 The mid-range volume was -- is 525,000 pounds,
6 which is half of 150,000 pounds times 7. I also
7 calculated a maximum, which is the maximum of
8 150,000 pounds times 7, which is a million and
9 50,000. I also -- of course the minimum for
10 that would be 0, which is the bottom limit.

11 However, I ended up doing the same kind
12 of calculation for each of these three
13 categories. I end up with a range of -- a range
14 of volume for those 30 plants, those 30
15 producer-handlers that are under 2 million,
16 between 7.75 million and 18.95 million.

17 JUDGE CLIFTON: Now, that's four
18 categories, is that correct?

19 THE WITNESS: Four categories, 0 to
20 150,000; 150,000 to 300,000; 300,000 to
21 1 million; and 1 million to 2 million.

22 And again, in each case, I took the --
23 for one example, to do the most conservative
24 calculation, the maximum volume in each of those
25 is the number at the top of the range, so that

1 the maximum volume that could have been handled
2 by the plants between a million and two million
3 is 2 million pounds per plant for four plants,
4 which gives 8 million, for example.

5 That -- that type of calculation for
6 those four groups gives a maximum -- an upper
7 limit on the volume handled by those plants of
8 18.95 million pounds per month.

9 Now, to -- to follow the other -- the
10 other track, the other branch of this -- these
11 numbers come together with the other one. From
12 Exhibit Number 7 -- which I thought I had in
13 front of me but I don't.

14 Exhibit Number 7 -- which is the table I
15 used, because at the time I did these
16 calculations, Exhibit Number 12 did not exist.

17 Exhibit Number 7 is the table with the
18 historic progression of volume and average sizes
19 by producer-handlers. It has a figure for
20 December of 2008 of sales by producer-handlers
21 in that month of 56,883,000 multiplied by -- I'm
22 sorry.

23 Under the -- under the corrected and more
24 conservative assumption that the new plant in
25 El Paso -- the plant which is not captured in

1 this December 2008 figure because it became a
2 producer-handler in January of 2009. Taking the
3 conservative number for that, the volume handled
4 by that plant, volume of fluid milk sales by
5 that plant, is 4 million pounds per month. I
6 add that to the 56.883 million pounds, and I get
7 60.883 million pounds as an estimated total
8 based on the December 2008 numbers of
9 producer-handler volume, plus the additional
10 4 million pounds from the producer-handler
11 presumed to be in operation on March -- in
12 March 2009. Multiplying that times 12 months
13 gives 730.596 million pounds of estimated annual
14 fluid milk sales by producer-handlers.

15 JUDGE CLIFTON: 730 point --

16 THE WITNESS: 596 million pounds. And
17 again, to the conservative, I take the -- I take
18 the largest -- the upper limit of the volume
19 that could have been handled by the smaller
20 plants, which is 18.95 million pounds, and I
21 subtract that from the --

22 JUDGE CLIFTON: Now, do you multiply that
23 by 12? Since it's pounds per month.

24 THE WITNESS: Yes. Yes, I do.

25 JUDGE CLIFTON: Okay.

1 THE WITNESS: Yes, I do. And I get --
2 okay. I get 503 million pounds --
3 503.196 million pounds of sales by
4 producer-handlers in the -- that are over in the
5 top seven. Dividing that by 7 gives 71,885,000.

6 JUDGE CLIFTON: Let's see. What we're
7 going to divide by 7 will be the
8 730.596 million, subtracting the 503.196, is
9 that right? We subtract out the smaller ones
10 before we divide by 7.

11 THE WITNESS: That's right. We subtract
12 the 227.

13 JUDGE CLIFTON: Are you talking right
14 into the microphone?

15 THE WITNESS: No, I'm not. So the -- the
16 12 -- the 12 times the 18.95 million gives
17 27.4 million. I've subtracted that from the
18 70.596 million to get 503 million. This is the
19 lower limit -- this is the lower limit based
20 on -- based on the 4 million-pound number for
21 the El Paso plant. Divided by 7, that gives
22 71.885 million pounds.

23 Now, the range for that goes up.

24 JUDGE CLIFTON: Could you do that again?
25 Because I couldn't -- I couldn't write fast

1 enough to understand what you just said.

2 THE WITNESS: Sure, sure. We'll go
3 through it in a string. Where are you?

4 JUDGE CLIFTON: Okay. So far, I've
5 got -- I know where the annual pounds from
6 Exhibit 7 came from.

7 THE WITNESS: Okay. 730.596 million. We
8 have 227.4 million as the upper limit, the
9 absolute upper limit on the volume of sales from
10 the smaller -- smaller than 2 million pounds per
11 month. And if we subtract that from --

12 JUDGE CLIFTON: Do you want to go smaller
13 than 2 million or do you want to include
14 2 million -- oh, smaller than 2 million.

15 THE WITNESS: I would like to do both
16 ends of the range of the calculation.

17 JUDGE CLIFTON: Okay. All right.

18 THE WITNESS: So these -- yeah, these are
19 the plants that are smaller than 2 million, this
20 is the upper limit of what that volume could be.

21 JUDGE CLIFTON: Okay. The upper limit --

22 THE WITNESS: Is 227.4 million.

23 JUDGE CLIFTON: 227.4 million --

24 THE WITNESS: Right.

25 JUDGE CLIFTON: -- per year?

1 THE WITNESS: Per year. That assumes
2 each plant produces the top of the -- the top of
3 the range for the range that they're in. If we
4 subtract that from the 730.596 million, we get
5 503.196 million, divided by seven plants, gives
6 us the lower end of the range of all these
7 calculations of 71.885 million. That's with --
8 that's with the 4 million-pound plant
9 assumption.

10 Now the maximum, doing the same
11 calculation with the -- with the bottom of those
12 ranges, gives us 91.085 million. And the middle
13 of the range gives us 81.485 million.

14 Now, the calculations based on the
15 assumption of 16 million pounds have a range of
16 92.5 million to 11.7 million, with a mid range
17 of 102 -- 102.1 million. That's where the
18 hundred million pound calculation came from.
19 That's where the hundred million pound result
20 came from.

21 The actual -- the actual mid range figure
22 for total volume by the producer-handlers of the
23 largest seven producer-handlers should be --
24 should be 81.485 million pounds. That would be
25 the best number. So that hundred million pounds

1 A. That -- that sounds right.

2 Q. And so presuming that the shape of the
3 curve has not changed, which we don't know, cost of
4 production has increased significantly since 2005, would
5 you agree with that?

6 A. I'm sorry, could you ask me the question
7 again?

8 Q. Sure. Cost of production in 2009 is
9 significantly higher than in 2005?

10 A. Yes.

11 Q. So the shape may or may not have changed,
12 but we can expect that curve to have shifted upward
13 somewhat?

14 A. It would -- we would expect it to have
15 shifted upward, but generally maintain the same shape.

16 Q. The study that you relied upon to
17 construct that chart -- let me ask. Was that chart
18 directly pulled from the ERS publication or did you
19 recreate it with your own data points?

20 A. I recreated it with the data from that
21 study.

22 Q. Okay. The data point that shows that
23 2,000 cows, can you refer to the page of the ERS table
24 from which that came?

25 A. No, I can't.

1 Q. As I recall, the data points listed --
2 list categories greater than a thousand cows. I don't
3 recall a category for 2,000 cows. Am I missing a data
4 point in there?

5 A. Those points, where they show the cows,
6 would represent the average number of cows in each
7 grouping.

8 Q. Okay. So you took the data set for
9 greater than a thousand cows and plotted a midpoint
10 between a thousand cows and what?

11 A. It wasn't a midpoint. It was the -- it
12 was the average number of cows milked by the farms in
13 that group.

14 Q. Okay. And that was -- was that reflected
15 in the text of the report or did you calculate that
16 yourself?

17 A. It was -- that's how the data was laid
18 out in the report.

19 Q. Okay. Can we flip over to page 14 of
20 your statement, please? Now National Milk originally
21 had proposed Proposals 1 and 2, which would have
22 eliminated the producer-handler exemption and raised the
23 exempt plant level. Those were the original proposals
24 submitted to USDA, correct?

25 A. That's correct.

1 Q. And then National Milk submitted
2 Proposal 26 separately at a later date, correct?

3 A. That's correct.

4 Q. And you talk about -- and I'm looking
5 through to make sure my notes are accurate -- you talk
6 about Proposal 26, I believe, as tempering the impact.
7 Maybe -- yeah, you talk about Proposal 26 tempering the
8 impact of the previous proposal. I was wondering why
9 National Milk felt it important to temper the impact of
10 Proposals 1 and 2? Proposal 1 in particular.

11 A. Well, the -- actually, the membership
12 took a very active role in the discussion of that, that
13 tempering. There was a conclusion that -- that the
14 existing operations that were -- had an impact, it was
15 less than that, of those over 3 million pounds, could be
16 accommodated, live and let live approach.

17 Q. Did the membership not consider that when
18 they drafted Proposal 1 to begin with?

19 A. These -- these positions evolve as we --
20 as we evaluate them and reevaluate them. And we believe
21 we've come out in the end in the right place. We're
22 after doing the right thing for small farmers. We're
23 after getting the system fair and making sure that
24 there's equity in the pool.

25 And we believe that to make an

1 accommodation to the limited number of existing
2 producer-handlers below 3 million pounds would not
3 undermine the fundamental objectives of our initial
4 proposal. And so for that reason we believe that
5 Proposal 26 is thoroughly consistent with our objectives
6 in pursuing Proposals 1 and 2.

7 Q. Okay. So were -- were those impacts not
8 considered by your membership when they came up with
9 Proposal 1?

10 A. They were -- they were considered. I
11 beg -- ask the question again, please.

12 Q. Did the impacts that you're trying to
13 temper in Proposal 26, did the membership not consider
14 those impacts when they came up with Proposal 1? In
15 other words, what changed after introducing Proposal 1
16 that caused National Milk to introduce another proposal?

17 A. It became -- the membership and the staff
18 became more aware as we worked on this proposal, as we
19 worked on the underlying work to take this to hearing,
20 to take it to a petition and to take it to the
21 information session, that we concluded that -- that
22 there was -- it was appropriate to temper the proposal
23 with an accommodation for existing producer-handlers.

24 So there was consideration of impacts up
25 front. That was one of the reasons that the 450,000

1 pound limit was raised, was -- we proposed to have
2 raised the limit to 450,000 pounds for the exempt
3 plants. We continued to look at it. We concluded that
4 Proposal 26 was an appropriate accommodation for people
5 who were caught in between.

6 Q. And you state that one of the reasons
7 that Proposal 26 was offered is to -- to temper the
8 impact on the businesses that have relied in part upon
9 the current regulations. Well, haven't all
10 producer-handlers, regardless of the size, relied upon
11 current regulations?

12 A. Yes.

13 Q. And then so why your statement there that
14 the reliance by a producer-handler under 3 million
15 pounds is more valid than the reliance of a larger
16 producer-handler?

17 A. Well, as the testimony indicates, we
18 believed there was a different impact for the -- for
19 considering the impact of existing handlers under
20 3 million and existing handlers above 3 million.

21 We believe the largest producer-handlers
22 have a substantial impact in and of themselves, and that
23 the impact of the -- the producer-handlers in the group
24 between 450 and 3 million tend more to have their impact
25 in aggregate.

1 And so that the limiting of the
2 existing -- the limiting of the number of handlers that
3 were -- joined the exemption in that range would
4 accomplish the primary objective, which is to avoid a
5 proliferation of producer-handlers in some sort of an
6 integrator arrangement.

7 Q. Okay. My question dealt specifically
8 with your -- with the reliance by producer-handlers
9 regardless of size on the exemption. And I didn't hear
10 an answer to that.

11 Why is the reliance by a large
12 producer-handler to be considered differently than the
13 reliance on the existing regulations by a smaller one?

14 A. Well, I think I did answer the question.
15 We're talking about a cost to benefit. We're talking
16 about weighing pros and cons.

17 And our belief is that the impact that
18 the producer-handlers above 3 million are having
19 outweighs any consideration for their -- for that
20 reliance.

21 We also believe that the larger -- now
22 that you mention it, we also believe that the larger
23 producer-handlers are -- have such economies of scale
24 that there's no reason not to expect them to be able to
25 compete effectively as regulated handlers.

1 Q. So their reliance is unjustified because
2 of their size?

3 A. It's --

4 JUDGE CLIFTON: That's not what he said.
5 He didn't say that their reliance is unjustified
6 because of their size.

7 Q. Let me rephrase the question.

8 JUDGE CLIFTON: Thank you.

9 Q. How is their reliance any less meaningful
10 simply because of their size?

11 A. I think that's the same question you've
12 asked twice before and I've answered it.

13 JUDGE CLIFTON: Not exactly, Dr. Cryan.
14 What you have explained is that the damage the
15 larger ones are doing outweighs the need to
16 consider the damage done to them in that they
17 relied on exemption. Isn't that what you have
18 explained?

19 THE WITNESS: I've explained that,
20 your Honor. I've also explained that based on
21 their size, they have economies of scale such
22 that there's no reason to expect that they
23 shouldn't be able to compete as regulated
24 handlers.

25 MR. MILTNER: Your Honor, I don't have

1 any other questions at this point but I do want
2 to review my notes before we let the witness
3 step down.

4 JUDGE CLIFTON: All right, good. You
5 will let some other people to begin questioning
6 and then you can come back?

7 MR. MILTNER: Yes.

8 JUDGE CLIFTON: USDA, AMS Dairy
9 needs about a 20-minute break at 3:30 for a
10 conference call. And I would like to afford
11 that to them. So that gives us about -- let's
12 not go right up to 3:30, they will need to be at
13 a telephone somewhere. Let's go up to 3:20.
14 That gives us 17 more minutes.

15 MR. TOSI: I'm sorry, your Honor.

16 JUDGE CLIFTON: Did I misread this?

17 MR. TOSI: Yes, your Honor. We're asking
18 that at 3:30 --

19 JUDGE CLIFTON: Come to a microphone,
20 please, Mr. Tosi.

21 MR. TOSI: Yes, your Honor. I'm sorry if
22 I wasn't clear there. We were asking that if at
23 3:30, if we could take a 15 to 20 minute break
24 so that we can make this phone call. We have to
25 go to a room and several of us all need to hear

1 this conversation simultaneously.

2 JUDGE CLIFTON: Okay. So if you leave
3 this room at 3:30, that works for you?

4 MR. TOSI: Yes.

5 JUDGE CLIFTON: Great. Okay. Good,
6 thank you. So that gives us 27 minutes, then
7 we'll let them go. When they go, we'll take a
8 20-minute break. All right. Who will be the
9 next person to cross examine Dr. Cryan?
10 Mr. Carroll.

11 MR. CARROLL: I'm going to try to make it
12 on these time limits; if I can't, I hope we can
13 resume.

14 JUDGE CLIFTON: Pull that microphone
15 somehow so it's closer there.

16 MR. CARROLL: Right.

17 CROSS-EXAMINATION

18 BY MR. CARROLL:

19 Q. I don't have to tell you who I am, I
20 guess.

21 A. No.

22 Q. Would you get your report and turn to
23 page 15, which is where you have the order language that
24 you have proposed?

25 A. Yes, sir.

1 Q. Now, directing yourself to that language,
2 and to the section that says, 1000.8, nonpool plant.
3 And then comes down to (a), (b), has a ~~strikeout~~ (c), a
4 partial strike out, (edc), and finally we come to (ed),
5 an exempt plant.

6 Now, I probably should back up a little
7 bit. At (b), there was an exemption for
8 producer-handlers in so many words, and you've stricken
9 that -- those words from the order. In other words, as
10 I look over the exempt plant definition, and the
11 producer-handler words do not appear there, and they
12 have been stricken from subparagraph (b). Am I correct
13 in that?

14 A. Yes.

15 Q. And what is the reason for the cessation
16 of the use of the words producer-handler?

17 A. We believe that producer-handler
18 provision has outlived its usefulness in the interest of
19 equity and in the interest of the Federal Orders
20 themselves. We believe it's time to end what is
21 effectively an individual handler pool for
22 producer-handlers of unlimited size. We believe that's
23 important for farmers, large and small, and so we've
24 proposed to eliminate the provision.

25 Q. Okay. So summing it up, there is in the

1 future never to be a producer-handler plant provision in
2 any Federal Order in the United States, according to
3 your proposal?

4 A. Not per se.

5 Q. All right. Now, why do you say not per
6 se?

7 A. Because we -- in our Proposal 26, we have
8 made a provision for an exempt status for a qualified
9 exemption for existing producer-handlers, plants
10 operated by existing producer-handlers, in order to
11 accom -- mitigate the impact on small businesses.

12 Q. All right. Before I leave this point,
13 can I leave it with the understanding that never again
14 do you want to have a producer-handler exemption in a
15 Federal Order?

16 A. That's correct.

17 Q. You want that out of this hearing, is
18 that correct?

19 A. That's correct.

20 Q. Okay. Now -- now, it's no longer
21 producer-handler, but we come down to, on the same page
22 at 1000.8, nonpool plant, subparagraph (ed), an exempt
23 plant starts there.

24 And as I understand it on exempt plant,
25 this is the language you have, means a plant described

1 in this paragraph that is exempt from the pricing and
2 pooling provisions of any order provided that the
3 operator of the plant files reports as prescribed by the
4 Market Administrator of any marketing area in which the
5 plant distributes packaged fluid milk products to enable
6 determination of the handler's exempt status. And that
7 is language which is already in an order. You're not
8 proposing to change that language, am I correct?

9 A. That's correct.

10 Q. And at least at this order at 1000.8?

11 A. On this page, what we are proposing to
12 change is made clear by underlines and strike-outs.

13 Q. And so that underlines your intent to
14 never have a producer-handler exemption, but to leave
15 the exempt plant -- overall definition of an exempt
16 plant the same as it was before?

17 A. No.

18 Q. Okay. Would you explain that, please?

19 A. There are -- there are five subparagraphs
20 in paragraph D, three of them are unchanged. The fourth
21 one encompasses -- changes are those encompassed in
22 Proposal 2, which is a proposal to raise the size
23 exemption from 150,000 pounds per month to
24 450,000 pounds per month with a provision for unique
25 branding.

1 And subparagraph -- I believe it's
2 subparagraph (5), is a -- is the grandfathering clause
3 that we've proposed for existing -- plants operated by
4 existing producer-handlers that would -- that would be
5 limited to plants -- that would limit those plants to
6 3 million pounds or less of fluid milk sales within all
7 markets, and would also provide for a unique branding
8 provision.

9 Q. Now, directing your attention, though, to
10 the first part, which I read, that's the same language
11 exactly -- may be changes in 1, 2, 3, 4 and 5 at one
12 point or another, but basically that ribbon, what I
13 would call the overall ribbon, that's the same language
14 that was there before, isn't it? It defines what an
15 exempt plant, at least in the beginning, overall is.

16 A. Well, the definition is the whole
17 provision, including the subparagraphs. So the first --

18 Q. I understand that, but I'm just saying,
19 it's peripherally obvious --

20 JUDGE CLIFTON: Mr. Carroll, he hadn't
21 quite finished.

22 Q. Okay. Go ahead.

23 A. And as I said, everything in -- on this
24 page is indicated -- all changes are indicated by
25 underlines and strike-outs.

1 Q. All right.

2 A. If there's --

3 Q. So since there's no underlying on this
4 page --

5 JUDGE CLIFTON: Mr. Carroll --

6 MR. CARROLL: I don't need a hundred
7 words to answer the question. He said yes.

8 MR. STEVENS: Then he continued.

9 JUDGE CLIFTON: Mr. Carroll, he's still
10 answering your question. And as he continues to
11 answer it, you talk over him.

12 MR. CARROLL: Well, it's because he's
13 already answered the question.

14 JUDGE CLIFTON: No, he hasn't.

15 MR. CARROLL: All right. I'm sorry, I
16 apologize. And I would like to hear his answer.

17 JUDGE CLIFTON: You asked him,
18 Mr. Carroll, since what used to be paragraph (e)
19 and will now be paragraph (d), reads the same in
20 its first four sentences -- or the first four
21 lines, excuse me, isn't it the same? And his
22 answer to that is no, it's not, because of what
23 follows.

24 MR. CARROLL: All right.

25 JUDGE CLIFTON: Now, are you saying you

1 don't need the detail read because we can all
2 see what follows?

3 MR. CARROLL: No. I'll withdraw my
4 question. I don't want to take any more time in
5 this hearing than I have to.

6 Q. Subparagraph (1) under (eg) that you have
7 here, deals with the government agency that has no route
8 dispositions in commercial channels. Can you tell me
9 what you mean by commercial channels?

10 A. That's an existing -- that's an existing
11 language. I haven't proposed to change it. I haven't
12 given consideration to existing commercial channels.

13 Q. You've given no consideration to the
14 meaning of that word?

15 A. I don't see the relevance to this.

16 Q. I know, but I'm asking a question.

17 A. I have --

18 Q. Did you consider -- did you give any
19 consideration as to what a commercial channel is?

20 A. No.

21 Q. All right. (2). The plant is operated
22 by a duly accredited college or university disposing of
23 fluid milk products only through the operation of its
24 own facilities with no route disposition in commercial
25 channels. Again, did you give any consideration to the

1 meaning of the words commercial channels?

2 A. No.

3 Q. (3). A plant from which total route
4 disposition is for individuals or institutions for
5 charitable purposes without remuneration. And I'll skip
6 that.

7 (4). At (4), there are changes made, is
8 that correct?

9 A. Yes, that's correct.

10 Q. And you added the words, in all markets,
11 in the first line on paragraph (4). I want to know,
12 what do you mean by, all markets?

13 A. All sales. All sales by the plant,
14 whether in a regulated market or an unregulated market,
15 in all Federal Order markets. To avoid any confusion
16 regarding some provisions that have defined sales limits
17 based on sales within a single market.

18 Q. So the word markets refers to Federal
19 Order market?

20 A. No.

21 Q. No? Any market?

22 A. Any market.

23 Q. Whether it's regulated or unregulated?

24 A. That's right, whether it's in the United
25 States or Canada or Mars.

1 Q. Or where?

2 A. Mars.

3 Q. You've also added -- I'll skip over the
4 450,000 pounds for now. You've added the words,
5 uniquely branded. I find those rather vague. Can you
6 tell me exactly what is a unique brand?

7 A. A unique brand as intended in this
8 proposal is a brand that is packaged by the plant in
9 question and by no other plant.

10 So a plant like this could be packaging
11 several brands, as long as no other plant is packaging
12 any of the same brands.

13 Q. Now, I'm not sure I understood that. If
14 I were involved in an exempt plant, and the situation is
15 I had three brands that I marketed on my own; that is,
16 they are my different brand names. Would that be
17 uniquely branded?

18 A. Yes.

19 Q. Okay. If I process for another person
20 who had a different brand and gave him that milk for his
21 distribution, would that be uniquely branded?

22 A. If that -- is that plant the only plant
23 supplying that brand, that label?

24 Q. Let's assume that the -- that the person
25 who delivers the milk and gets it back, it's their

1 brand.

2 A. But is the plant in question the only
3 plant that is delivering that label to that customer?

4 Q. Let's assume that.

5 A. Then that would be okay. That would be
6 uniquely branded.

7 Q. Okay. Then number (5), a distributing
8 plant that was operated during 2008 by a
9 producer-handler in a Federal Order Market within the
10 meaning of the Federal Milk Marketing Order at that
11 time, provided that the plant, (A), has route
12 disposition in all markets. I want to stop there. What
13 do you mean by route disposition?

14 A. I mean the same thing that is meant in
15 subparagraph (4), sales of fluid milk products
16 through -- to customers.

17 Q. If the person operated a dairy store on
18 their farm and had no route, in the normal understanding
19 of that word, would they comply with this subparagraph
20 (5)(A)?

21 A. I believe that is the -- how it would be
22 interpreted under the current administrative practices
23 of the Federal Orders.

24 So my assumption is that's how they're
25 currently interpreted, for example, for a farm that's

1 pooled as -- that's regulated as own-farm milk and could
2 have a store on the plant site. And that would be
3 considered route disposition, I believe that would be
4 consistent, yes.

5 Q. Even though the normal meaning of a route
6 would be some kind of a distribution program? I mean,
7 you understand there's a little confusion in that word?
8 I just want to be sure I understand it.

9 A. Well, the Federal Orders, the Market
10 Administrators have defined that -- needed to define
11 that for administrative purposes, so I don't think
12 there's any --

13 Q. And you're adopting that type of --

14 A. Sir, can I finish? I don't think there's
15 any confusion about that term.

16 Q. Okay. And for the purposes of your
17 proposal, the word route includes on -- the store
18 outlets of the plant?

19 A. Is that a question?

20 Q. Yeah.

21 A. I -- I -- yes, as it would currently --
22 just as it would be currently interpreted by the Market
23 Administrators.

24 Q. Okay. At least that's your intention in
25 your proposal?

1 A. That is the intention.

2 Q. Supposing the dairy store was not on the
3 premises, it was at some other location but they did
4 drive there to deliver. Would that be acceptable for
5 route disposition?

6 A. I would defer to the Market
7 Administrators as they define route disposition, but I
8 would assume that it would.

9 Q. All right. At least that was the intent
10 of your proposal? And in all markets, again, I take it
11 that is the same meaning you've given us earlier,
12 wherever you have those words, you have the same
13 meaning?

14 JUDGE CLIFTON: Let's explore that,
15 Mr. Carroll.

16 MR. CARROLL: Surely.

17 JUDGE CLIFTON: As you use it there,
18 Dr. Cryan, do you mean in all markets, both
19 regulated and unregulated, whether covered by
20 Federal Order or not?

21 THE WITNESS: Yes, your Honor. It is the
22 same meaning for packaged sales of fluid milk
23 products to other plants in all markets later in
24 the same line.

25 JUDGE CLIFTON: So in order to be

1 grandfathered in, is an entity required to have
2 route disposition in all markets?

3 THE WITNESS: No.

4 JUDGE CLIFTON: Or is it required that
5 the markets that he operates in comply with
6 this?

7 THE WITNESS: It requires that their
8 total route disposition in all markets be less
9 than 3 million pounds. So if you let me -- I'll
10 read the sentence, and see if it -- instead of
11 talking about it phrase by phrase, if it makes
12 more sense. Has route disposition in all
13 markets and packaged sales of fluid milk
14 products to other plants in all markets that are
15 uniquely branded and total 3 million pounds or
16 less during the month.

17 JUDGE CLIFTON: So in all markets
18 modifies 3 million pounds or less, more than
19 where the route disposition is?

20 THE WITNESS: Yes, that's the intention.
21 Of course the -- I would expect the order
22 formulation people to come up with language. If
23 I can make my intent clear, I expect the order
24 formulation people can formulate an order in the
25 way that it is -- that may be more clear than

1 the language, if the language is not clear.

2 JUDGE CLIFTON: So someone under this
3 provision, and I'm going to call it the
4 grandfathering provision, may have route
5 disposition in only one market?

6 THE WITNESS: That's correct.

7 JUDGE CLIFTON: All right. I understand.
8 Go ahead, then, Mr. Carroll.

9 THE WITNESS: Your Honor, may I explain?

10 JUDGE CLIFTON: Yes, Dr. Cryan.

11 THE WITNESS: There's concern, and I
12 believe there's -- I may be wrong about whether
13 this is interpreted this way, but there's
14 concern that some of this -- some of the
15 language, for example, of the -- I believe the
16 150,000 pound limit allows for 150,000 pounds or
17 less in the series of different markets.

18 And if -- as long as it doesn't go over
19 150,000 pounds in any one market, they can have
20 any volume that they can reach by that manner.
21 The objective here is to limit it by the size of
22 the overall plant, rather than the size of the
23 segment of their sales.

24 JUDGE CLIFTON: And that's why you want
25 that phrase, in all markets, up front, to show

1 that any request for exemption under these
2 provisions will consider all markets in
3 analyzing the milk volume?

4 THE WITNESS: That's right.

5 JUDGE CLIFTON: I understand now. Thank
6 you.

7 BY MR. CARROLL:

8 Q. I think you said that's right to that
9 last question?

10 A. Yes. Yes, I did.

11 Q. Okay.

12 A. Thank you for clarifying -- questions
13 that led to the clarification.

14 Q. Sure. Then it continues on and says, and
15 packaged sales of fluid milk products to other plants in
16 all markets. Can you tell me the intent of that
17 section, of that reading?

18 A. It's the same intent as the packaged
19 sales of fluid milk products to other plants that are
20 limited in (4), number (4). Again, applying to all
21 markets.

22 Q. And does that word at that point have the
23 same meaning you've given elsewhere to the words in all
24 markets, that the sale in a single market would be
25 sufficient?

1 A. Yes.

2 Q. And for the record, although I'm sure you
3 know and everyone in the room knows it, but could you
4 define, in terms of your proposal, exactly what you mean
5 by fluid milk products? What products are included in
6 that definition?

7 A. I can't discuss the merits of a
8 particular definition of fluid milk products because
9 there's a hearing under -- I'm sorry, I'm being a little
10 facetious.

11 There's a class -- classification --
12 there's a definition of fluid milk products in the
13 Federal Order. I could go get the language and read it
14 to you, if you would like, but I would refer you to
15 that.

16 Q. Generally speaking, what products are you
17 talking about?

18 A. There are typically beverage products,
19 milk-based beverage products. Mostly milk.

20 Q. Go ahead.

21 A. Go ahead.

22 Q. I'm sorry, I didn't mean to interrupt
23 you.

24 A. Milk and milk-based products.

25 Q. Well, would it include cream, half and

1 half?

2 A. No -- well, I don't -- I have not
3 reviewed the fluid milk product definition for this
4 hearing so I would rather not define it beyond that.

5 Q. Well, this is rather important for some
6 people. Would it be possible before you leave this
7 world or leave this meeting, that you could tell us?

8 A. It's in the regulation. There's a
9 definition of fluid milk products in the Federal Order.

10 MR. STEVENS: Your Honor, your Honor.

11 JUDGE CLIFTON: Mr. Stevens.

12 MR. STEVENS: I can help you on this,
13 Mr. Carroll. If you look at the Code of Federal
14 Regulations, you will find at 7 CFR part 1015 a
15 definition of fluid milk product. And this
16 gentleman could read that, I suppose. And you
17 could read it, too, and it is the fluid milk
18 definition under the Federal Orders.

19 JUDGE CLIFTON: Let's start with this.
20 Dr. Cryan, do you intend by using that phrase,
21 fluid milk products, to change in any way the
22 current definition?

23 THE WITNESS: No.

24 BY MR. CARROLL:

25 Q. And did you say there was some proposals

1 afloat to make changes in that definition?

2 A. That's a separate hearing, yes.

3 Q. In a separate hearing?

4 A. Yes.

5 Q. And if that were to be changed in some
6 way, would it come back against -- and be included in
7 your proposal, whatever changes were made?

8 A. I think it's relatively obvious.

9 JUDGE CLIFTON: Just a minute. Go ahead
10 and repeat that.

11 A. I began a sentence for the record that
12 said -- that was, I think it's obvious, and then
13 didn't -- did not finish the sentence.

14 JUDGE CLIFTON: Mr. Brosch.

15 MR. BROSCH: I think that question is
16 frankly a legal question, whether a later change
17 in the regulations would redact back. He's
18 asking that. He's not appeared to answer legal
19 questions, your Honor.

20 JUDGE CLIFTON: Well, can any of us even
21 answer that right now?

22 MR. BROSCH: I can't, your Honor, but
23 certainly I don't believe Mr. Cryan -- Dr. Cryan
24 can either. I think it's asking a legal
25 question.

1 MR. CARROLL: I'm only trying to
2 determine what they proposed. And if you didn't
3 consider this problem, that's fine. I just want
4 to know whether he considered this to be a
5 roving definition to be changed in the future,
6 or whether this definition was to be locked in
7 based as it presently is on fluid milk products.

8 JUDGE CLIFTON: I'll sustain the
9 objection. I don't think Dr. Cryan's -- I don't
10 think Dr. Cryan's in a position to respond to
11 that. What he's indicated is, he's not, by
12 these proposed changes, proposing to change that
13 definition.

14 MR. CARROLL: I understand that. But my
15 question is, did he consider the fact that this
16 is a roving definition, it can be changed at any
17 time? And if so, did he intend to incorporate
18 the future changes or is he taking a present
19 definition of fluid milk products? Because
20 we're here today under one definition.

21 JUDGE CLIFTON: Mr. Brosch.

22 MR. BROSCH: Dr. Cryan has already
23 testified what he intended to do, whether he --
24 the question of whether he intended to
25 incorporate future changes is not, of course,

1 within Dr. Cryan's responsibility or
2 jurisdiction. That is a legal question that
3 will be determined later on when people look at
4 any future changes and whether they are
5 reflected in other regulations. It's a legal
6 issue, your Honor.

7 JUDGE CLIFTON: I have to agree with him.
8 Now, if -- if you want to ask Dr. Cryan -- well,
9 I really don't see how you could pin down what
10 you want to pin down since we don't know what
11 will happen.

12 MR. CARROLL: It isn't a question, your
13 Honor, of what's going to happen in the future.
14 The question is, did he give a consideration and
15 what are we to look for in this proposal? Are
16 we to have a roving definition that could be
17 changed tomorrow afternoon, or is he saying, he
18 did -- in making this, he's presently got a
19 fluid milk definition apparently in his mind.

20 I have no idea what he means because it's
21 not a -- it's not a term of certainty anyway.
22 There are products that could arguably be fluid
23 or nonfluid. I just want to know so we know how
24 to handle this proposal, what are they
25 proposing, today's definition, and if it changes

1 tomorrow, or did they not even consider the fact
2 that this definition could be changed and
3 someone could lose a producer-handler exemption
4 over it?

5 MR. BROSCH: Your Honor --

6 JUDGE CLIFTON: Mr. Stevens.

7 MR. STEVENS: Is this on? Can you hear
8 me? I just want to -- maybe I can help you,
9 sir. I don't know if I can or not. But let me
10 try.

11 In terms of the present CFR, the fluid
12 milk definition is in place. As Mr. Cryan
13 referred, there is ongoing rulemaking which may
14 or may not change the fluid milk product
15 definition. I understand your questions to him
16 to the extent that, under this current proposal,
17 are you using the fluid milk product definition
18 that is in the present CFR. And I understood
19 him to say yes.

20 Then I think you went to the next step,
21 which was, if that is changed in the future, if
22 it may be changed in the future, did you take
23 that into consideration when you made this
24 proposal.

25 Now, his counsel has come up and said

1 that this is a legal matter, which of course it
2 is, when we do change or seek to change --
3 anyone seeks to change the Federal Order
4 language. It's changed or it's not changed.
5 And that's a matter of rulemaking. He's not in
6 a position, I don't think, clearly as the Judge
7 referred, to go into that point because we're
8 not there.

9 I mean, how can he answer you when he
10 says, I intended to change it as it may future
11 be changed, because certainly he doesn't know
12 what it would be, nor do any of us. So I think,
13 as I understand the testimony, he's saying that
14 he's using the current definition for his
15 proposal.

16 As to what happens in the future, any of
17 us in this room can have opinions about that,
18 can ask the Secretary to change the orders if
19 they don't conform with our thoughts about it --
20 not us, but the industry. And that's what
21 happens in rulemaking. That's why we're here
22 today on some other topic.

23 But -- so I don't see that it moves us
24 forward to ask this gentleman what his -- what
25 his -- what his future -- how the future

1 amendment or non-amendment of an order will
2 affect the proposal that he now has pending.

3 MR. STEVENS: I hope that's helpful.

4 JUDGE CLIFTON: Thank you, Mr. Stevens.
5 Mr. Rower.

6 MR. ROWER: Judge Clifton, it's 3:30, we
7 need to ask for our break now.

8 JUDGE CLIFTON: Thank you. We'll go off
9 record at 3:30. Please be back and ready to go
10 at 3:50.

11 (A recess was taken from 3:30 to 3:54.)

12 JUDGE CLIFTON: All right. Let's go back
13 on record, please. We're back on record at
14 3:54. Mr. Stevens, shall we proceed as we were?

15 MR. STEVENS: It seems like a good idea
16 to me, your Honor.

17 JUDGE CLIFTON: Thank you. Mr. Carroll,
18 you may come back to the podium. Mr. Carroll,
19 you may resume.

20 MR. CARROLL: Thank you.

21 BY MR. CARROLL:

22 Q. Now, I'm going down to subparagraph (5)
23 on page 15, (eg -- I believe it's a g, close parens. It
24 says, a distributing plant that was operated during 2008
25 by a producer-handler in a Federal Order market within

1 the meaning of the Federal Milk Marketing Order at that
2 time, and then there's a colon, and there's some
3 provisos. Okay?

4 (A), it has route disposition in all
5 markets. Now, we've previously talked about what the
6 meaning of the route was in other provisions, and also
7 the meaning of the words, in all markets. Is that the
8 same use of the words that you meant earlier?

9 A. Yes.

10 Q. And then it says, and packaged sales of
11 fluid milk products. We've already just finished
12 talking about fluid milk products. Is that the same
13 type of definition that you had intended to be used in
14 the other section that we described? In other words,
15 these words have the same meaning in both sections?

16 A. Yes.

17 Q. It says, to other plants in all markets.
18 Is that the same definition --

19 A. Yes.

20 Q. -- that you were saying earlier? And are
21 uniquely branded, is that the same definition?

22 A. Yes.

23 Q. And now, total 3 million pounds or less
24 during a month. That's a new number, I believe, isn't
25 that correct?

1 A. Yes.

2 Q. All right. Where did you acquire that
3 number from?

4 A. That number is the limit on the
5 grandfathering clause in our proposals, in Proposal 26.

6 Q. Well, I know that's what you're reading
7 here. But I'm saying, where did you get the figure
8 3 million from?

9 A. 3 million is in part based -- it's in --
10 my testimony goes over a number of bases for 3 million
11 pounds.

12 Q. I'm sure it would help us if you would
13 just answer the question as to, what was the source of
14 3 million pounds?

15 A. Very good. This is a very good
16 opportunity to explain why we picked 3 million pounds.

17 Q. Is it in your report, so you're
18 looking --

19 A. Well, it will be in my testimony now that
20 you've given me the opportunity.

21 Q. But it's not in your report --

22 A. I don't see it.

23 Q. -- or your statement? Okay. So there's
24 nothing in your statement on where 3 million pounds came
25 from, but now you want to tell us. And that's fine, I

1 would like to hear it.

2 A. There are a number of bases that include
3 the current 3 million pound limit in the MilkPEP program
4 as a basis for exemption. There is a -- there's also --
5 3 million pounds is the number that has been established
6 in the current Pacific Northwest and Arizona markets,
7 and that is probably the most important basis, that
8 there are plants that are -- there are plants that are
9 faced with a 3 million pound restriction in those
10 markets that are already in the markets and already
11 relying upon those limits. And it is most fair to apply
12 a uniform limit to existing plants facing that
13 restriction.

14 Q. Okay. And I take it, then, that you've
15 been satisfied with that number in the markets you've
16 Just described?

17 A. If we were, we would not have proposed a
18 new -- changes for those two markets. We're proposing
19 something that's different for both of those markets,
20 which is to eliminate the producer-handler provision --

21 Q. Right.

22 A. -- and to establish a grandfathering
23 exemption for existing producer-handlers that will allow
24 them to sell up to 3 million pounds per month in the
25 interest of producer equity.

1 Q. Right.

2 A. To make the pool whole from
3 cherry-picking by large producer-handlers that -- that
4 undermine the Class I value in the Federal Orders,
5 undermine the incomes of small and large producers and
6 undermine the integrity of the Federal Order System.

7 Q. I understand. Did any act of Congress
8 play any role in your selection of that figure?

9 A. Not necessarily. I don't -- I don't --
10 no.

11 Q. Okay.

12 A. It may play a role in some other support
13 or not, but not -- I don't believe it -- it did not play
14 a role in ours. The number that was proposed and
15 implemented in Arizona and the Pacific Northwest was
16 3 million from the beginning of that hearing. That's
17 the status quo.

18 Q. Right.

19 A. Only to the extent that --

20 Q. I believe you do lobbying as well for the
21 National Milk Producers?

22 A. No, sir, I am not a lobbyist.

23 Q. You don't appear -- you do not contact
24 staff or members of the Senate or the House of the
25 United States on dairy matters?

1 A. Only when requested to provide
2 information.

3 Q. And unless you get a phone call, you
4 don't go to their offices and discuss dairy matters with
5 them?

6 A. That's correct.

7 Q. Okay. Now, directing your attention to
8 subparagraph (5)(B) of (eg), it starts out, receives no
9 fluid milk products and acquires no fluid milk products.
10 And I want to ask you, is there a difference between
11 receiving and acquiring, because the same object is
12 there, fluid milk products?

13 A. I believe that language comes from one of
14 the other orders in their producer-handler provision.

15 Q. It's just copied, you mean?

16 A. I believe so.

17 Q. Okay. Do you intend to make any
18 difference between receiving fluid milk products and
19 acquiring fluid milk products?

20 A. I'm not aware of the difference. There
21 may be a difference --

22 Q. Okay. But at least for the purposes of
23 your proposal, they're substantially the same?

24 A. It relies on existing qualifications for
25 the producer-handler provision in current language. And

1 simply --

2 Q. Okay.

3 A. -- copies that.

4 Q. And it also, of course, uses the words
5 fluid milk products twice. And I take it that's the
6 same subject discussion we had earlier on the same
7 words?

8 A. Yes.

9 Q. And, again, it has route disposition,
10 which is -- again, we've had a subject discussion on. I
11 take it you mean the same type of route disposition we
12 have talked about earlier?

13 A. Yes.

14 Q. And then it talks about sources other
15 than own-farm production. Can you tell us what you had
16 and what was intended by that language?

17 A. Could you clarify the question?

18 Q. Yeah. The line reads, receives no fluid
19 milk products and acquires no fluid milk products for
20 route disposition from sources other than own-farm
21 production.

22 And I'm asking you about the, from
23 sources other than own-farm production. To what does
24 that refer?

25 A. Are you asking what I mean by own-farm

1 production?

2 Q. Yeah -- well, sources other than own-farm
3 production. Sources is the subject of it, I think?

4 A. Sources would be sources of milk.

5 Q. Right. And is that from regulated
6 handlers or does it make any difference if they're
7 regulated or unregulated?

8 A. It makes no difference.

9 Q. I'm sorry?

10 A. It makes no difference. No sources other
11 than own-farm production.

12 Q. Okay. And that does not refer to the
13 order definition of other source milk?

14 A. No.

15 Q. Subpart (C), the plant disposes of no
16 other source milk as Class I milk. Can you tell me if
17 there's any difference in your mind between using the
18 word Class I milk and fluid milk products? Are they
19 the equivalent in your mind?

20 A. Not -- not technically. No, they're not
21 technically equivalent, but they're very similar.

22 Q. Could you describe the difference, if
23 any?

24 A. There is -- there are some
25 classifications. There's some ways that milk can be

1 classified as Class I, other than through disposition as
2 Class I products. There's Class I shrinkage, that's the
3 first thing that comes to mind. I'm not sure what else
4 there is, but most -- most Class I milk is -- are fluid
5 milk products.

6 Q. But are there some that are not fluid
7 milk products?

8 A. Shrinkage is not a fluid milk product.

9 Q. Anything else?

10 A. I don't know off the top of my head, no.

11 Q. Okay. So at this point in time, we
12 really don't know what Class I milk is included, except
13 by increasing the nonfat milk content of fluid milk
14 products received from own-farm production.

15 Now, down to (D). This, again, is the
16 same subparagraph. Provides proof satisfactory to the
17 Market Administrator that the care and management of the
18 dairy animals and other resources necessary to produce
19 all Class I milk handled. And I'll stop right there
20 because it's quite a long paragraph. Provides proof
21 satisfactory to the Market Administrator. Is the Market
22 Administrator in your proposal to be the sole decider of
23 whether or not there will be a producer-handler
24 exemption?

25 A. Is who to be the sole decider?

1 Q. Sole decider. Is it -- proof to be
2 satisfactory to the Market Administrator, is he to be
3 the sole person that makes that decision?

4 A. He or she is to be the person to make the
5 determination, according to the rules laid out in the
6 order --

7 Q. All right.

8 A. -- as it is now.

9 Q. And one person can make that decision?

10 A. Yes.

11 Q. And then the decision that the care and
12 management of the dairy animals and other resources
13 necessary to produce all Class I milk handled. I'll
14 stop there.

15 At this point in time on production --
16 I'm only on the production side of the producer-handler,
17 the word ownership isn't in that definition, so far
18 anyway.

19 Is it your intention that the farm could
20 be managed by the plant operator, but the farm itself
21 and the cattle would not have to be owned?

22 A. Well, I would say it's difficult to --
23 for the management -- care and management of dairy
24 animals to be at the exclusive risk of a -- of anyone if
25 they don't own the animals, but I suppose there could be

1 a way to separate those things.

2 Q. Right.

3 A. But it does not assume the owner -- land
4 ownership, for example. For example, many -- there are
5 farms, plenty of farms, that operate leased land --

6 Q. Right.

7 A. -- in whole or in part.

8 Q. Right.

9 A. And there's no intention to exclude a
10 leased operation.

11 Q. And I know you're familiar with
12 agriculture on a dairy farm. Isn't it true that as the
13 animals come along and the younger people begin to breed
14 animals for themselves, pretty soon you've got animals
15 in the herd that are owned differently than another --
16 three stanchions down, there's another owner of that cow
17 because they bred them and brought them up? Isn't that
18 true?

19 A. On many farms, yes.

20 Q. Yeah.

21 A. Yes, that is true.

22 Q. And it doesn't mean the operation isn't
23 an integrated operation, it just means that somebody
24 worked hard to produce that animal and wants the
25 privilege of it.

1 JUDGE CLIFTON: Comma, isn't that true?

2 Q. Isn't that true?

3 A. That is a -- well, I don't want to agree
4 too readily to your assertion that's an integrator
5 operation with respect to this definition.

6 I mean, the family can operate a farm in
7 joint, but the intention here is that the -- that the
8 plant owner would also be the operator of the dairy.

9 Q. I'm coming to that part of it. But
10 stopping right at the production end, the farming is
11 sometimes a family operation, isn't that true? And if
12 it is, you're going to give that any recognition in
13 these proposals?

14 A. Some -- something like 98 percent of
15 dairy farms in this country are family operations,
16 whether they're family proprietorships or family
17 corporations.

18 Q. Right.

19 A. But yes, they are family operations. If
20 a family wants to operate a producer-handler, they would
21 have to make it a thoroughly integrated operation.

22 Q. I understand that. But -- I don't know
23 if you were here for the testimony of a couple of
24 gentlemen from Virginia, who were descended from a
25 common ancestor and side-by-side lands split up, you

1 know, because of the death. But they're still in
2 business together. That's fairly common, isn't it?

3 A. I don't know.

4 Q. Okay. Now, continuing on, and the
5 processing and the packing --

6 JUDGE CLIFTON: Mr. Carroll, could I ask
7 a question that you just raised?

8 MR. CARROLL: Right.

9 JUDGE CLIFTON: Could the plant owner be
10 a partnership under your understanding of what
11 you've described here?

12 THE WITNESS: Certainly. And it was our
13 understanding that the gentlemen from Virginia
14 were convinced that it would be too complicated
15 to form a partnership that would, in effect, be
16 responsible for the operation of the plant and
17 the two farms together. I don't presume to give
18 legal advice, but I find that hard to imagine.

19 Q. I didn't hear that last answer.

20 A. I find that hard to imagine.

21 Q. What was hard to imagine?

22 A. That it was too complicated for them to
23 form a partnership that would operate the farm.

24 Q. You think it's a very simple thing?

25 A. I would think so, yes.

1 Q. Uh-huh. What about the fact that two
2 farms aren't owned by the same people?

3 A. Well, the two farmers could lease --
4 lease to the partnership.

5 Q. All right. What if the cattle are owned
6 separately?

7 A. I don't presume to --

8 Q. You don't see any problem with that
9 either?

10 A. I imagine they can work it out.

11 JUDGE CLIFTON: Mr. Brosch, would you
12 like to be heard?

13 MR. BROSCHE: I'm just trying to
14 understand what -- yes, your Honor.

15 JUDGE CLIFTON: I think both Mr. Carroll
16 and I are trying to see if the two cousins, who
17 are his clients who testified, who are from
18 Virginia, could fit this definition. I think
19 that's where both Mr. Carroll and I are coming
20 from.

21 So this last question of, if the
22 partnership is going to operate the processing
23 plant and the partnership also has to operate
24 the farm, could both the land and the animals be
25 leased to the partnership?

1 MR. BROSCH: I think the problem with
2 that is you're assuming that Mr. -- Dr. Cryan
3 understands the situation of those clients.
4 They testified that that -- what their land is
5 and who owns it and everything is not something
6 that's necessarily as apparent to Dr. Cryan as
7 it might be to their lawyer.

8 And then you're asking Dr. Cryan to make
9 some judgments about what legal situation that
10 those clients would be in. And Dr. Cryan has
11 never testified that he's a lawyer or a person
12 knowledgeable about partnerships or the legal
13 intricacies of those things. So, you know, it
14 seems to me that if there is some question about
15 that, that really falls much more into
16 Mr. Carroll's end of it than it does to
17 Dr. Cryan's.

18 JUDGE CLIFTON: So those cousins still
19 need a lawyer.

20 MR. BROSCH: I would think they do need a
21 lawyer, your Honor, but they don't -- Dr. Cryan
22 is not their lawyer since he's not admitted to
23 practice law.

24 JUDGE CLIFTON: Thank you, Mr. Brosch.
25 Mr. Carroll.

1 MR. CARROLL: Let me try to bring this
2 back into focus again.

3 BY MR. CARROLL:

4 Q. If a farm -- if there are two farmers and
5 they each own their own cows, and you've already covered
6 ownership, a separate ownership could be done by
7 partnership. Could they also form a partnership on the
8 cows, under your proposal?

9 MR. BROSCH: Objection, your Honor.

10 JUDGE CLIFTON: I think you just stated
11 that objection, didn't you, Mr. Brosch?

12 MR. BROSCH: Yes, I did.

13 JUDGE CLIFTON: Understood. You know, I
14 would love for us to have a clear answer,
15 Mr. Carroll, you and I, but I don't think this
16 is the right way to get it.

17 MR. CARROLL: This is their proposal.
18 And I'm trying to find out how I'm going to
19 oppose this thing and I don't even know what
20 he's doing with that problem.

21 JUDGE CLIFTON: Well, you know, what
22 we've got is that the -- the -- the plant owner
23 has as its enterprise all of this. And that's
24 pretty clear by the proposal. All of this being
25 the farm operation, the processing operation,

1 and the distribution.

2 MR. CARROLL: I understand that and it's
3 an owner's risk. The question becomes -- he's
4 had no problem with a divided legal ownership.
5 There's no legal ownership needed in order to
6 form this arrangement.

7 But there is not just land, there's cows
8 and they're owned separately and many times by
9 various members of the family. We've already
10 established that.

11 My only question is, simply, under this
12 proposal, what does he intend to do in terms of
13 that particular situation? Can they form an
14 operating partnership even though the title of
15 the cows is not in the partnership?

16 JUDGE CLIFTON: Mr. Brosch.

17 MR. BROSCH: Excuse me, Mr. Carroll.
18 Your Honor, legal language is proposed all --
19 often, constantly. And when it's proposed,
20 people who may be affected by that legal
21 language go to their lawyers and say, what does
22 this do to me or for me. And that's why we
23 lawyers gladly have a business, your Honor, and
24 we operate.

25 Now, people do not go to economists or

1 other people in other -- that represent other
2 people, and aren't legally trained, and ask them
3 those kinds of legal questions.

4 And Dr. Cryan is simply not in a position
5 to advise Mr. Carroll's clients as to their
6 specific situation.

7 First of all, it assumes a series of
8 facts that are incomplete. He doesn't know the
9 background of these people or how this land is
10 owned or how their cows are owned or anything
11 else like that. And he is not a legal expert.
12 So this is an entirely improper line of
13 questioning.

14 JUDGE CLIFTON: Mr. Beshore, let me hear
15 from you. You know, I've always had a great
16 deal of respect for Market Administrators and it
17 deepens as we go through these scenarios.
18 Mr. Beshore.

19 MR. BESHORE: Might I note, apropos to
20 this dialogue, Dr. Cryan testified that this
21 language was simply -- it's existing order
22 language. That order language also has a
23 60 year -- I'll be generous -- 70 year,
24 probably, history similar of application by
25 Market Administrators, litigation and

1 construction by Administrative Law Judges,
2 judicial officers, federal district courts and
3 federal courts of appeal.

4 Now, Dr. Cryan is not in a position in
5 draw upon that history, a portion of which
6 Mr. Carroll has been involved in with clients.
7 There are many different leasing programs that
8 have been attempted and other sorts of legal
9 structures that have been attempted with respect
10 to producer-handlers over the years. And we
11 shouldn't be talking about it here, we should
12 get on the with the business at hand.

13 JUDGE CLIFTON: Thank you, Mr. Beshore.
14 Mr. Carroll, you've done a valuable service by
15 raising the questions, and I'll let you --

16 MR. CARROLL: I would like to get a
17 valuable result.

18 JUDGE CLIFTON: Well, you know, you can't
19 rely on the result. You still have to do your
20 own advising. But I'll let you move on now.

21 MR. CARROLL: All right.

22 BY MR. CARROLL:

23 Q. I'm going to withdraw any inference in my
24 next question that I'm talking about any specific
25 producer-handler situation, I'm just going to ask: Did

1 you give any consideration to the situation where there
2 are two producer-handlers and they have title --
3 different titles, and they have formed a partnership
4 together?

5 A. The language requires that a
6 producer-handler have operated as a producer-handler in
7 2008. So to the extent that the Market Administrator
8 has made such a determination whether someone is a
9 producer-handler or not on the -- on the same criteria
10 that the current language uses, and that this new
11 language is based upon -- that's been considered.

12 Q. All right. And if the Secretary denies
13 your proposal, you have no alternatives other than
14 what's set forth at -- on page 15 for proposals, is that
15 correct?

16 A. This is our proposal.

17 Q. Okay. In a later part of that
18 subparagraph (D) on paragraph (5), you refer to the
19 plant owner. The plant owner has no interest in any
20 other distributing plant except through membership in a
21 Capper-Volstead cooperative association. Can you tell
22 me what you had in mind there?

23 A. With respect to which part of that?

24 Q. Just what I've read. It says, has no
25 interest in any other distributing plant, except through

1 membership in a Capper-Volstead cooperative association.
2 What did you mean by that?

3 A. Well, if -- along the same lines that
4 we've been discussing all along, the idea is to avoid
5 strings of producer-handlers organized as a -- organized
6 as a larger enterprise.

7 So the unique ownership of a
8 producer-handler is laid out as a qualification for this
9 grandfathering provision. The membership -- except
10 through membership in a Capper-Volstead cooperative is
11 in recognition of the fact that there are a -- there are
12 producer-handlers who continue to participate as members
13 of a cooperative, and that that membership in a
14 cooperative should not result in their disqualification
15 as producer-handlers.

16 Q. Are they marketing their milk through the
17 cooperative, is that what you're saying? Or how -- what
18 is the relationship of a Capper-Volstead cooperative to
19 a producer-handler?

20 A. Well, in the current -- that's a good
21 question. I don't know.

22 Q. Okay. Then it says that you should have
23 no interest in any farms from which the plant does not
24 receive milk. What would -- what do you have in mind
25 there, farms in which any interest which the plant does

1 not receive milk? Supposing a father dies, two sons.
2 One is the pool producer, the other one becomes a
3 producer-handler. The father gave them equal interest
4 in the land of the other farmer. How is that going to
5 be handled? I think I've lost you. Let me start again.

6 If -- have you given any consideration to
7 the fact that a producer-handler could lose his
8 exemption if he happened to have an interest, which you
9 haven't defined what interest is, but an interest in a
10 farm that he's not -- that's not shipping to him as a
11 producer-handler?

12 A. This is consistent with the idea of the
13 single integrated plant and farm. The grandfathering
14 for the producer-handler operations is designed to allow
15 the traditional producer-handler that is a farm that
16 bottles to continue operating without hardship, but is
17 not designed to allow a much larger enterprise to
18 operate a producer-handler as one small piece.

19 Q. Have you given --

20 A. I'm sorry, I'm not finished.

21 Q. I'm sorry, go ahead.

22 A. That producer-handler is one small piece
23 of a larger enterprise. And now I am finished.

24 Q. All right. Now, have you given any
25 consideration in these proposals -- would you -- if you

1 haven't, would you now give consideration to the family
2 relationships that have -- the possibility of existing
3 in the marketplace that don't seriously affect the
4 purpose that you're talking about but would give some
5 flexibility to these individual farmers?

6 A. We have not -- we have not proposed
7 anything along those lines.

8 Q. All right. Would you object if the
9 Secretary was to take that factor into account?

10 A. It would have to be consistent with all
11 of the objectives we're seeking, which I think we've
12 laid out. There are certain -- I certainly expect that
13 there will be details -- certainly would be at least
14 details changed before we're done. But I am not aware
15 of some change along those lines that would satisfy
16 that.

17 Q. All right. I want to direct your
18 attention now to a portion of your proposal that is
19 what's been called here the grandfather clause. Do you
20 recognize that? And I think that restriction or
21 requirement is set forth at subparagraph (5) of
22 paragraph (ed) of section 1000.8, nonpool plant.

23 Directing your attention to that section,
24 can you, in a couple of sentences, tell me the reason
25 why you would deny the producer-handler exemption to a

1 new entrant in the market?

2 A. The producer-handler exemption has
3 outlived its usefulness, it undermines the integrity of
4 the Federal Order System. It creates individual handler
5 pools, in effect, of unlimited size.

6 It is -- it has no justification in the
7 modern dairy markets. And therefore there's no basis
8 for allowing a new producer-handler to take advantage of
9 that, that exemption.

10 Q. Now, directing your attention to those
11 who do qualify for grandfathering. Do you recognize
12 that that could be -- that exemption position could be
13 lost by a fire?

14 A. I think that's a matter of
15 interpretation.

16 Q. And how do you interpret it?

17 A. I -- I wouldn't. I would leave it to the
18 Market Administrators to interpret it, but I would -- I
19 could imagine a rebuilding of the same plant still to
20 meet the definition of the same plant.

21 Q. Did you hear the testimony of Mr. Wilcox?
22 Were you here for that? He was from the west --

23 A. I don't know if I heard all of his
24 testimony or not.

25 Q. But he had managed to run a cooperative.

1 And he said they had a settle policy in the event of a
2 fire, that the person would -- that as long as the ID
3 number, the tax ID number, is a means of determining
4 whether the entity was the same. And the fact they
5 didn't ship for a month or two or three or four wouldn't
6 make any difference as long as the ID number was the
7 same. Would that be acceptable to you?

8 A. I think the meaning of the language, the
9 language on its face says that a distributing -- offers
10 the qualification to a distributing plant that was
11 operated as a producer-handler -- operated by a
12 producer-handler in 2008. So it may not necessarily
13 be -- there may not necessarily be any requirement for
14 continuity.

15 Q. That's very helpful. Thank you.

16 A. But I think that would be something to be
17 interpreted by the Market Administrators.

18 Q. Right. Now, in the event that there is a
19 death and a change of title from death, do you have any
20 thought as to whether that would qualify -- continue to
21 qualify as a producer-handler?

22 A. It refers to a plant, not to an operator,
23 the plant qualifies for the exemption.

24 Q. There could be a new tax number in the
25 name of the estate?

1 A. I would presume so.

2 Q. And so you would have a change of ID
3 numbers, is my question?

4 A. I would presume so. That's the meaning,
5 that's how it's been laid out.

6 Q. Now --

7 A. That's designed to avoid offering a
8 franchise that can be moved around at will. It's linked
9 to a specific physical plant.

10 Q. That's the purpose of it?

11 A. That's the purpose of it.

12 Q. Okay. I think you made it plain, but I
13 just want to ask you once more.

14 The purpose of elimination of the
15 exemption and the grandfather clause is, at one time or
16 another, to not have any more producer-handlers, is that
17 correct?

18 A. To not have any more -- eliminating the
19 legal definition of the producer-handler is different
20 from eliminating the type of operations that are now
21 represented by producer-handlers. There's no intention
22 to put anybody out of business.

23 The intention is to end an exemption that
24 provides a pricing advantage that is to the detriment of
25 the pool and to the producers who participate in the

1 pool, and to the bottling plants that also participate
2 in the pool. And for that matter, to all the plants
3 that participate in the pool. Everyone that
4 participates in the pool is at a disadvantage when
5 producer-handlers cherry-pick Class I sales. It's a
6 violation of the equity in the system and undermines the
7 integrity of the order system itself.

8 Q. Right. Is that what you call disorder,
9 what you've just described? Cherry-picking the Class I
10 sales, is that disorderly?

11 A. I would say that is disorderly, yes.

12 Q. All right. You gave us a learned
13 dissertation on the history of the producer-handler
14 exemption. And I take it you took that by reading
15 documents of some kind. Some you have identified.

16 Are there any you haven't identified that
17 you have read and observed in coming to your conclusions
18 on the history of the producer-handler exemption?

19 A. I think I've identified the documents
20 that lead to the conclusion, although I've read others
21 that confirm the conclusion.

22 Q. And since you haven't cited it, I wonder
23 if you are aware of a direction from the United States
24 Congress that there should be a producer-handler
25 exemption without burdensome conditions. Have you ever

1 read that or heard it, or anyone told you about that?

2 A. I don't believe that's in force. I'm not
3 an attorney.

4 Q. I see. But you did know about it?

5 A. That's not my understanding of the
6 provisions that I've heard of.

7 Q. What did you hear?

8 A. I don't have the language in front of me
9 and I would not presume to interpret the language. But
10 that was -- my understanding was simply that there
11 were -- at various points, certain farm bills made some
12 rather general reference to there be no change in the
13 legal status with respect to the statute of
14 producer-handlers; although that does not -- that does
15 not -- as I understood it, preclude -- did not preclude
16 the Department from regulating the producer-handlers
17 even at that time.

18 Q. Did you look over the legislative history
19 of each bill?

20 A. No, I did not.

21 Q. I know it's in the record, but there's no
22 question you're not an attorney, that's for sure.

23 Although I've got to say this, it's been
24 my experience that all economists consider themselves
25 attorneys, and all attorneys consider themselves

1 economists. I'm not upset about it, I just want to put
2 it on the record, that it's a skill you don't possess.

3 A. It is a -- it is a degree -- I do not
4 possess a law degree, no.

5 Q. Okay. And you -- are you maintaining
6 your testimony here today is as an expert?

7 A. Yes.

8 Q. And I think you said that you're employed
9 full time by the people you're testifying for?

10 A. Yes.

11 Q. And you're presenting whatever their
12 board told you to present?

13 A. I'm presenting positions that were --
14 that were developed with my participation.

15 Q. Are you aware of any studies on the
16 actual cost of production of producer-handlers?

17 A. No, I would say -- I don't think anything
18 I'm aware of would be defined as a study of the cost of
19 production for producer-handlers.

20 Q. And I take it you've never actually been
21 running or part of a producer-handler farm? It's
22 obvious, but I want to ask that.

23 A. No, I have not.

24 Q. And in your economic analysis, you have
25 assumed an average producer for production costs and an

1 average handler for handling costs?

2 A. I don't -- I don't think I've assumed
3 that anywhere.

4 Q. Okay.

5 A. I'm not sure what you mean.

6 Q. Well, you have determined what you think
7 are the so-called advantages of the producer-handler.
8 And, you know, you've determined that, as I understand
9 it from the Class I blend differential, as being an
10 expense that that producer-handler doesn't have?

11 A. That's right.

12 Q. And with that expense lifted, he's able
13 to go out to stores and other places and compete
14 successfully?

15 A. Potentially.

16 Q. And I'm seeing that in -- you also talked
17 about cost studies, producer or plant operator studies,
18 you did those. You also talked about average --

19 A. I didn't do those.

20 Q. I'm sorry, you didn't do that?

21 A. I read the studies.

22 Q. Read studies, okay. And then you read
23 studies on production, farm production.

24 JUDGE CLIFTON: What was that, a yes?

25 THE WITNESS: No, he didn't actually ask

1 a question.

2 JUDGE CLIFTON: I thought he asked you if
3 you read studies on farm production?

4 THE WITNESS: He said I did.

5 Q. Yeah.

6 A. Yes, I did.

7 Q. And you put the two together for your
8 testimony here today?

9 A. They are -- yes.

10 Q. Okay. Now, are you aware of any -- of
11 the economic principles --

12 JUDGE CLIFTON: Excuse me, don't ask that
13 question yet. Is there an objection,
14 Mr. Brosch?

15 MR. BROSCH: I think Dr. Cryan is trying
16 to answer these questions, but sometimes it's
17 just a statement and it kind of tails off. And
18 I don't think he's quite sure if Mr. Carroll is
19 finished with his question, because he doesn't
20 say, is that right or is that correct or
21 whatever. And I think that's the problem we're
22 having here, your Honor.

23 Q. Would you agree that it would be
24 preferable to have actual costs of production and actual
25 costs of plant expenses for producer-handlers? That

1 would be a preferable series of economic data.

2 A. Well, on the one hand it might help
3 define the limits we're talking about.

4 But on the other hand that hasn't -- that
5 hasn't figured -- those sorts of considerations have not
6 figured significantly into the previous hearing on the
7 previous decision on a similar topic. So I'm not sure
8 how useful it would be.

9 Q. Okay. Now, I have to pay some attention
10 to your raising the exempt figure from 150,000 pounds to
11 450 because I could have people that could be having to
12 use that. You can understand that some of those are
13 going to be larger than 450,000 pounds.

14 Your statement, as I understand it, is
15 that in 1991 was the last time that that figure of
16 150,000 pounds was addressed by the Secretary, in terms
17 of deciding whether to raise it or not. Is that a
18 proper statement of your position?

19 A. Could you restate that?

20 Q. Yeah. The last time the Secretary
21 visited the subject of 150,000 exempt plant, according
22 to your statement, I believe was 1991, is that correct?

23 A. Well, it was -- it was revisited at the
24 time of order reform. And the decision was made to
25 apply the 150,000 in all markets that had originally

1 been established in the West Texas, New Mexico market.
2 But the last time that the Secretary set a new level was
3 in 1991.

4 Q. Was there any reference by the Secretary
5 to the state of the record in that hearing?

6 A. I beg your pardon?

7 Q. Was there any reference by the Secretary
8 to the state of the hearing record on that subject?

9 A. I -- I don't -- I don't understand the
10 question, your Honor.

11 JUDGE CLIFTON: Nor do I. Go ahead and
12 reword it, Mr. Carroll.

13 Q. When the Secretary made the finding
14 you're talking about, did they not also say that on this
15 record, 150,000 pounds is what they would have
16 recommended?

17 A. I still don't understand the question,
18 your Honor.

19 JUDGE CLIFTON: So, Mr. Carroll, you're
20 referring to something that occurred in 1991, is
21 that correct?

22 MR. CARROLL: Well, I think it's later
23 than that. I think this revisiting occurred at
24 a later time. No, we're not in 1991. I believe
25 we're actually a few -- just about three years

1 ago, four years ago.

2 Q. This 150,000 pounds comment you're
3 talking about -- do you have that in your -- let me try
4 to save time. Do you have in writing the finding of the
5 Secretary in your report on the 150,000 pounds that
6 you've just referred to?

7 A. Do I have a copy of the decision?

8 Q. Do you have a reference to it in your
9 report in a quote?

10 A. I have a quote from the 1991 decision on
11 the West Texas-New Mexico Order.

12 Q. And does that not indicate that it was
13 based upon the record at that time?

14 A. Not the -- well, let me see.

15 JUDGE CLIFTON: What page are you on,
16 Dr. Cryan?

17 THE WITNESS: I'm looking at pages 9 and
18 10. There is a quote from the proposed rule,
19 the 1998 proposed rule on order reform. I'm
20 looking for anything that resembles what
21 Mr. Carroll is talking about. That -- and I
22 don't see that.

23 And then shortly afterwards, there is a
24 quote from the 1991 decision on West Texas-New
25 Mexico, sets the producer-handler limit in that

1 market. And I don't see anything like he's
2 saying there either. So I still don't
3 understand the question.

4 MR. BROSCH: Your Honor.

5 JUDGE CLIFTON: Mr. Brosch?

6 MR. BROSCH: You'll note, your Honor,
7 that the quotations from that are in the Federal
8 Register. If, in fact, the Secretary has said
9 something in the results of that Order Reform
10 that Mr. Carroll alludes to, it will be a matter
11 of the public record in either 63 Federal
12 Register or 56 Federal Register, and is
13 therefore a matter of public record.

14 I'm not sure that Dr. Cryan has memorized
15 the Secretary's decisions at either place. And
16 so asking him questions about what else may be
17 in there somewhere may not be the best evidence.
18 The best evidence may simply be what's in the
19 record itself.

20 JUDGE CLIFTON: Thank you, Mr. Brosch.
21 Mr. Carroll.

22 MR. CARROLL: I just thought he claimed
23 to be an expert. But I'll pass that, he's done
24 what he can do.

25 MR. BROSCH: Your Honor, if Mr. Carroll

1 wanted to challenge his credentials as an
2 expert, he had an opportunity when I asked you
3 to qualify him. And there was no objection to
4 his qualifications. He was an expert at that
5 time.

6 MR. CARROLL: It's not the fact that he's
7 had a degree in economics. It is what he has
8 testified to here today, or will in his report,
9 as to whether or not he did his work and to what
10 extent he did his work deals directly with
11 credibility.

12 JUDGE CLIFTON: Thank you, Mr. Carroll.
13 You're asking in areas that may well be
14 important, but I wouldn't expect any expert
15 necessarily to know everything that you're going
16 to find to be important. It does not diminish
17 his characteristic as an expert.

18 MR. CARROLL: Okay.

19 BY MR. CARROLL:

20 Q. On the figure of 450,000 pounds for
21 exempt milk, I think you've indicated that that is your
22 recommendation because enough time has gone by and
23 enough changes have occurred in the -- am I interrupting
24 something?

25 A. I'm just checking the time, sir.

1 Q. Okay. That 450,000 pounds in 19 -- isn't
2 present, but in 1991 it was 150. And that's about 18
3 years, isn't it, since the last time it was visited by
4 the Secretary?

5 A. Yes, 1991 was 18 years ago.

6 Q. Yeah. And during that time, what's
7 happened to the cost of production?

8 A. It's gone up.

9 Q. How much?

10 A. I don't know.

11 Q. And what's happened to the cost of
12 processing?

13 A. It's gone up.

14 Q. And how much?

15 A. I don't know.

16 Q. And I think you indicated that 450,000
17 pounds was an estimate, but that it was not an easy
18 decision as to where the proper breaking point was,
19 isn't that correct?

20 A. I indicated that it is not easy to
21 establish a bright line limit because there -- there was
22 really no single right answer, that it is only to be
23 expected that a reasonable answer is arrived at. For a
24 number of reasons, we've concluded that 450,000 was a
25 reasonable bright line limit for this provision.

1 Q. Would you object if the Secretary were to
2 find 1 or 2 or 300,000 more based upon his judgment of
3 what had happened in the meantime and what's needed as a
4 policy matter in the market today?

5 A. We offer our -- we offer our best number,
6 and it will certainly be up to the Secretary to decide
7 on what he concludes is the best number.

8 Q. Would you look at page 16 of your -- of
9 your statement? And the first, second, third -- the
10 fourth paragraph down, it deals with Proposals 3, 4, 5,
11 7, 8, 11, 13, 15, 18, 21, 27 and 28.

12 Directing your attention to that
13 paragraph, you state, each of these is a step in the
14 right direction. What do you mean by that?

15 A. We believe it's appropriate to limit
16 the -- the pricing pooling exemptions for
17 producer-handlers based on their size.

18 We believe, as we've stated before, that
19 3 million pounds is an appropriate limit for existing
20 producer-handlers, and 450,000 would be an appropriate
21 limit for new farm bottlers to take -- to combine that
22 with the raised size exemption.

23 Q. Did you recognize --

24 A. So we believe that the proposals and the
25 concept of limiting the producer-handler exemption is a

1 step in the right direction, but we believe that our
2 proposal is what goes far enough.

3 Q. Did you recognize that not only was it a
4 step in that direction that you have talked about, but
5 that it was the same figure that you, yourself, had
6 proposed as an alternate proposal in this hearing, same
7 3 million figure?

8 A. We haven't -- we do not have an
9 alternative proposal. We have a -- we have three
10 proposals that, in combination, represent our position
11 for what we believe this hearing should return.

12 Q. But the figures are in agreement, as far
13 as you can see? The dollar -- I mean, the 3 million
14 pounds is the same figure?

15 A. Some of these set a limit of 3 million
16 pounds, and 3 million pounds happens to be the same
17 number that we have set for our grandfathering proposal.
18 Those numbers coincide.

19 Q. Was that the same figure that was in the
20 Western Orders?

21 A. Those are -- 3 million pounds is the
22 figure in the Western Orders, as I've stated before, and
23 in the Arizona Market and in the Pacific Northwest
24 Market.

25 Q. So the issue between us, then, is the

1 rest of this does not go far enough in addressing the
2 potential of a proliferation of medium-sized
3 producer-handlers. That's the issue for this hearing,
4 as at least between the two of us.

5 JUDGE CLIFTON: Is that a question?

6 MR. CARROLL: Yeah.

7 JUDGE CLIFTON: Comma, is that true?

8 Q. Yeah. Is that true?

9 A. I'm not sure I remember what your
10 position is. What is your position, Mr. Carroll?

11 Q. Well, our position is that there should
12 be a wide-open, from your viewpoint, right for
13 medium-size producer-handlers to continue in business.
14 And they may or may not qualify under your other
15 exemptions.

16 We would like to see an exempt figure
17 higher than 450,000 pounds because we've been told you
18 can't live at that level. It's not a livable, practical
19 level. Ultimately the costs are going to drive you out
20 of business. We want more.

21 MR. ENGLISH: Is he testifying? I
22 object. I object.

23 JUDGE CLIFTON: Just a moment. Let me
24 hear from Mr. Brosch first.

25 MR. CARROLL: Sure.

1 MR. BROSCHE: Well, Mr. English has got
2 part of my objection right. But I would
3 suggest, your Honor, that if Mr. -- is that --
4 Mr. Carroll's asking for a comparison of
5 National Milk's proposal versus his proposals or
6 his group's proposal.

7 It would be a lot easier if he would say
8 what number they are or which proposal he's
9 referring to. Because it's kind of hanging --
10 it's one of these proposals. If it's
11 Proposal 13 or 15, he could say, is this
12 different from, you know, Proposal 13 or 15 or
13 whatever.

14 But Dr. Cryan's really not in a position
15 to be guessing what he's talking about. They're
16 in the Federal Register, they could be referred
17 to specifically.

18 JUDGE CLIFTON: Thank you, Mr. Brosch.
19 Mr. English.

20 MR. ENGLISH: Your Honor, by the fourth
21 or -- your Honor, this is Charles English. By
22 the fourth or fifth declarative sentence, there
23 was clearly no question there. There was
24 testifying by the attorney.

25 I don't think attorneys should testify.

1 That's an issue for another day, I guess, in
2 this hearing. But they certainly -- you know,
3 there was no question on the table there with
4 respect to what the position was of this
5 counsel. And it certainly, at a minimum, was
6 compounded. But this was testimony from the
7 lectern, and I object to that. It wasn't a
8 question. I don't object to the question, I
9 object to the testimony.

10 JUDGE CLIFTON: Mr. Carroll, I have one
11 additional concern. And that is that your
12 clients do not necessarily have a uniform
13 proposal. So I do believe Mr. Brosch has the
14 best suggestion, and that is, if you want this
15 witness to compare what he believes is the best
16 proposal with another proposal, that we point
17 him to it. And I'll hand him the Federal
18 Register if he doesn't have a copy handy.

19 MR. CARROLL: I'm completed, thank you,
20 your Honor.

21 JUDGE CLIFTON: All right. I'm going to
22 ask the witness if he would like a short break
23 before the next cross-examiner begins?

24 THE WITNESS: Yes, five minutes would
25 suffice, your Honor.

1 JUDGE CLIFTON: Let's take a five-minute
2 stretch break. Everyone be back and ready to go
3 at 4:56.

4 (A recess was taken from 4:51 to 5:01.)

5 JUDGE CLIFTON: Let's go back on record.
6 We're back on record. It's actually 5:01. Who
7 will be the next cross-examiner of Dr. Cryan?
8 Mr. Vetne.

9 CROSS-EXAMINATION

10 BY MR. VETNE:

11 Q. Good afternoon, I'm John Vetne, I
12 represent two producer-handlers in the Pacific Northwest
13 and one in Roswell, New Mexico. I'm trying to find out
14 what I've listened to and what I've read.

15 What is the primary mover of NMPF's
16 position? And I want to start out on page 7, I want to
17 take you through parts of your testimony.

18 Second full paragraph, first sentence.
19 You refer to such producer-handlers who can sell to
20 wholesalers or large retail chains at a significant
21 price advantage. In that sentence, you're using price
22 advantage as the price offered by the producer-handler
23 to the purchasing customer of packaged milk, am I
24 correct?

25 A. Could you restate the question, please?

1 Q. Your use of the term price advantage in
2 that sentence, am I correct in reading that to be the
3 price at which a producer-handler offers packaged milk
4 to a wholesaler or a large retail chain?

5 A. Relative to a regulated handler, yes.

6 Q. Relative to anybody else. Okay. So the
7 advantage you're referring to is the advantage of the
8 producer-handler entity versus everybody else who's
9 fully regulated, and the price added to that is the
10 price charged by the producer-handler to the wholesaler
11 retail buyer compared to everybody else?

12 JUDGE CLIFTON: That was a question and I
13 didn't hear the answer.

14 Q. I didn't hear one either.

15 A. I didn't -- could you restate the
16 question, please?

17 Q. Okay. The key words are can sell, okay?
18 That's an opportunity. Significant price advantage, and
19 selling to wholesalers or large retail chains, okay?

20 My question relates to -- first of all,
21 to price advantage. Is your use of that term there
22 intended to refer to the price at which the plant offers
23 packaged milk to the buyers; i.e., wholesalers or retail
24 chains?

25 A. Yes.

1 Q. Okay. Going from there to page 9, end of
2 the second full paragraph, plants this small have
3 difficulty competing with large model plants on cost
4 alone.

5 JUDGE CLIFTON: Not model plants.

6 Q. Large modern plants on cost alone with or
7 without the pricing advantage offered by
8 producer-handler status. In that sentence, when you are
9 referring to price advantage, I'm inferring that you're
10 referring to that -- only the farm price, a portion of
11 it, the handlers' costs, am I correct in that inference?

12 A. This is -- this refers to plants.

13 Q. It refers to plants, true. And then you
14 use the term, pricing advantage. And you also use the
15 term, previously in the sentence, costs alone. Is your
16 reference to costs, processing costs, and your reference
17 to pricing advantage, the regulatory cost for milk, or
18 are they two different things?

19 A. Could you restate the question, please?

20 Q. Okay. You're referring to small plants.
21 You conclude that small plants -- certain small plants
22 have difficulty competing with large modern plants on
23 costs alone. Are the costs that -- costs alone. Is the
24 costs that you're referring to in the first part of the
25 sentence processing costs for which a small plant would

1 have a relatively high cost per unit?

2 A. All kinds of costs to the plant incurs,
3 including processing costs, marketing costs, acquisition
4 costs. You know, the costs associated with procuring a
5 supply and have the facilities to bring milk into the
6 plant. There are a whole range of things that --
7 including processing costs that put a small plant into
8 disadvantage to a larger plant.

9 Q. Okay. And then you end the sentence with
10 a reference to pricing advantage. Did you -- you did
11 intend, I take it, to attribute, even to small plants, a
12 concept of pricing advantage when it came to raw milk?
13 Am I correct or am I not correct?

14 A. Producer-handler status conveys an
15 advantage to any plant that has that status, yes.

16 Q. And the pricing advantage you refer to is
17 simply the arithmetic difference between Class I and
18 blend?

19 A. Simply, yes.

20 Q. And then at the bottom of page 10, the
21 last full sentence, does that convey the same idea, that
22 a small plant might have a milk price advantage, but
23 that advantage is outweighed by high processing costs?
24 And processing costs, here you're not capturing any part
25 of the milk price?

1 JUDGE CLIFTON: Mr. Brosch -- before you
2 answer, let me hear from Mr. Brosch.

3 MR. BROSCH: That sentence of that last
4 question and some of Mr. Vetne's prior questions
5 have more than one question in them, they're
6 complex questions. And I would appreciate it if
7 Mr. Vetne would ask one question at a time.
8 Because there are -- I would like him to respond
9 to one question at a time and not multiple
10 questions in the same sentence.

11 JUDGE CLIFTON: Thank you, Mr. Brosch.
12 Mr. Vetne, I lost my place as to where you are.

13 Q. Okay. The next to the last line, the
14 phrase, greatly outweighed by high processing costs. Do
15 you see that, at the bottom of page 10?

16 JUDGE CLIFTON: I'm on the wrong page, no
17 wonder I can't find it. Thank you. All right.
18 So call your -- call the witness's and my
19 attention again, please.

20 Q. Okay. Next to the last line, bottom of
21 page 10. I'm going to break it down into as many
22 questions as I can so that Mr. Brosch can follow.

23 Do you see the line that says -- phrase
24 that says, greatly outweighed by high processing costs?

25 A. Yes, I do.

1 Q. And does that cost -- high processing
2 costs, did you intend to refer that to all costs that
3 occur after receipt of milk from the farm side of the
4 operation?

5 A. All the costs -- yeah, and all the costs
6 that a plant faces, including costs that they face
7 before receipt of the milk.

8 JUDGE CLIFTON: You're not quite close
9 enough to the microphone, Dr. Cryan.

10 THE WITNESS: Sorry. Did you hear it?

11 Q. Would you restate your answer so that
12 everybody can hear?

13 A. It refers to all -- all the costs
14 associated with operating a plant, including the costs
15 of procurement and processing, marketing, distribution.

16 Q. But in the line before that, you refer to
17 the same price advantage. Isn't that price advantage a
18 reference to procurement so that it would be excluded
19 from the phrase, high processing costs?

20 A. That is a specific advantage we've been
21 talking about for the length of the hearing, the
22 difference between the blend price and the Class I price
23 with respect to this -- to this exemption, that that
24 pricing advantage which I referred to multiple times --

25 Q. Yes.

1 A. -- is that in isolation. It is not --
2 generally the -- the cost of receiving milk is above
3 that advantage.

4 Q. Okay. So that in the second line of that
5 paragraph, when you refer to high processing costs,
6 you're intending to refer to the aggregate of costs in
7 all categories for the small plant, correct?

8 A. Yes.

9 Q. Okay. And that aggregate, as I
10 understand your statement here, is such that even with
11 an isolated price advantage component, the end result is
12 that that small plant cannot be competitive with what
13 you call modern large plants?

14 A. Is that a question?

15 Q. That was, that was a question. Is that
16 what you intend? Did I correctly restate what you
17 intended there?

18 A. I believe so. Although it's -- it's
19 difficult to read passages and listen to the questions
20 at the same time. It's late in the day.

21 Q. Okay. I think --

22 A. So I believe so.

23 Q. So, yeah. Just listen to me for a second
24 here. When you refer to high processing costs, you are
25 intending to refer to the aggregate of all costs that a

1 small plant incurs getting milk into the bottle, into
2 the market?

3 A. Okay.

4 Q. Is that true? Is that what your
5 intention is?

6 A. I would say so, yes.

7 Q. And you're comparing that to the costs of
8 regulated plants who have lower processing costs, and
9 because of that, the small plant to which you refer does
10 not have an advantage? Am I correct that that is the
11 conclusion to draw from your testimony?

12 JUDGE CLIFTON: Mr. -- before you answer,
13 he's talking about small plants, so I would
14 think the opposite is large plants, rather than
15 regulated plants. So you lost me somewhere
16 there. Mr. Vetne, if you would again ask that
17 question.

18 Q. All -- let me start with this. The
19 things that we have been discussing since I got up here,
20 you understand has to do with economies of scale?

21 A. Yes.

22 Q. And small plants don't have economies of
23 scale, and therefore have higher costs, correct?

24 A. Per unit, yes.

25 Q. Okay. Per sale unit, per gallon of milk,

1 for example, that's a unit, correct?

2 A. Yes.

3 Q. Okay. And is that the unit you had in
4 mind?

5 A. That will do.

6 Q. That will do. And that's the same
7 concept that you state again in the -- the full -- first
8 full sentence on top of page 11. Such plant -- such
9 plants will not proliferate on the basis of their
10 regulatory cost advantage. Let me see if I understand
11 what you intend to put in the record there. Now, you're
12 referring again in isolation to the imputed milk cost
13 advantage, correct? Am I correct regulatory cost
14 advantage is synonymous --

15 A. Let me state what I believe you're asking
16 me, what I -- what we mean here, and what I believe
17 you're asking me if we mean.

18 What we're saying here is that plants of
19 such a small size seem to have a history of not
20 proliferating in order to take advantage of that sort of
21 a price advantage. That is to say, there is clearly a
22 regulated price advantage that they don't have to pay
23 the producer settlement fund when they're below that,
24 below a certain size, but they don't seem to proliferate
25 at that size in order to take advantage of that.

1 Q. They don't seem to. And as a matter of
2 fact, you, in prior testimony in a Pacific Northwest
3 hearing in particular, you supported, sponsored evidence
4 concerning higher processing costs to smaller plants, am
5 I correct, and lower processing costs to larger plants?

6 THE WITNESS: Well, your Honor, that was
7 another hearing, is that a relevant --

8 JUDGE CLIFTON: It is. If you maintained
9 the same position there that you're maintaining
10 here, that adds to your credibility, I think.

11 THE WITNESS: I think we were maintaining
12 a slightly different position. Let me say
13 regarding the processing costs, that -- let me
14 say, first of all, that we entered into the
15 previous hearing when the scope was already
16 defined, as a hearing to consider whether or not
17 to limit producer-handlers in those two markets
18 to 3 million pounds or not.

19 And given the choice between not and so,
20 and regulating them at 3 million pounds and
21 over, we supported the limitation of 3 million
22 pounds. So given that we -- given we did that,
23 we provided some cost data that demonstrated
24 again that -- not that there was a single bright
25 line number of 3 million pounds, but the

1 3 million pounds could be a reasonable bright
2 line number given certain considerations.

3 Those considerations, the data we
4 provided with respect to processing costs, were
5 not given very -- very great weight in the
6 decision by the Department.

7 We concluded that those -- that the
8 approach -- that the line of thinking didn't --
9 didn't seem to make the point we thought it
10 might make.

11 We are looking now at the history of
12 these unregulated plants and we have these
13 exhibits over time that seem to demonstrate that
14 the growth is in -- is in the larger plants.

15 We believe that 450,000 pounds and under
16 is a reasonable number to allow new plants. We
17 believe that the basic -- the most common
18 business model for small exempt plants is
19 actually the use of own-farm milk. So that is
20 essentially addressing producer-handler issues
21 for -- at that level, that smaller level.

22 And we conclude that some larger plants
23 of some larger size, up to some reasonable
24 limit, could be -- can be grandfathered in order
25 to mitigate the impact on relatively small

1 businesses that have a -- that have a lot to
2 lose with a change in this regulation.

3 So given that a decision had been made in
4 the past to set a limit of 3 million pounds in
5 two markets, we thought for consistency and for
6 the other issues I raised earlier in cross-
7 examination by Mr. Carroll, that the range of
8 450,000 to 300 million pounds per month was a
9 good, reasonable range within which to allow a
10 grandfathering of existing producer-handlers.

11 Q. 3 million pounds per month --

12 A. Yes.

13 Q. -- correct? You said 300 million. You
14 meant 3 million?

15 A. If I said 300 million, I did not mean
16 that, I meant 3 million.

17 Q. On the very first page of your testimony,
18 six lines up, you use the term, large producer-handlers.

19 JUDGE CLIFTON: Which page, Mr. Vetne?

20 MR. VETNE: First page.

21 JUDGE CLIFTON: Oh, first page.

22 Q. Large producer-handlers --

23 A. Which page?

24 Q. Very first page, six lines up from the
25 bottom. Large producer-handlers, different set of

1 rules, playing field greatly to their advantage. When
2 you use -- when you use the term, large
3 producer-handlers and their advantage, did you have a
4 size in mind of those producer-handlers who have a great
5 advantage?

6 A. I would say for the purposes of this
7 proposal, plants over 3 million pounds.

8 Q. Okay. And in this context, when you use
9 the term advantage and made that comparison in your mind
10 and in your testimony, were you referring to advantage
11 using the aggregate of imputed milk costs plus
12 processing costs?

13 A. The advantage that the producer-handler
14 provisions provides us, the pricing advantage, is based
15 on not having to pay into the producer settlement fund.

16 Q. I understand that. Earlier we discussed
17 both processing costs and milk costs. My question is,
18 did you take both of those in mind when you used the
19 term, greatly to their advantage, in this sentence?

20 A. No.

21 Q. So it's -- and why is that?

22 A. I think it is -- as we've -- as I've
23 presented this before, and as it's been discussed
24 before, I've often got into discussions of transfer
25 pricing and the internal price of this, of the --

1 between the farm and the plant for an integrated firm.

2 And when it really comes right down to
3 it, the simplest, clearest way to show the issue -- the
4 clearest, simplest way to think about the issue is
5 fundamentally the difference between the
6 producer-handler, which is an integrated plant and farm
7 that does not pay into the producer settlement fund, and
8 the exact same plant and farm, if they are not organized
9 as a producer-handler, that do pay into the producer
10 settlement fund.

11 Q. You've now, in response to this question,
12 used the term transfer price, which you use on the top
13 of page 6 of your testimony. Is the term transfer price
14 an economic term that has a specific meaning?

15 A. It is a -- it is an economic term that
16 generally refers to some means of defining the
17 appropriate valuation for -- for something that's moved
18 within a company. There are a number of reasons for
19 doing something like that, one of the most common is for
20 taxation purposes.

21 A company may ship a product from a --
22 from their -- their own warehouse in Mexico to their
23 warehouse in the United States for purposes of customs
24 duties or income taxes or any number of things. Some
25 valuation has to be established for that product. The

1 most common basis for that is to use the market value
2 for the product, no matter what the cost -- no matter
3 what the production cost within the company or anything
4 else. The most common basis for setting such a transfer
5 price is to use the market value.

6 Q. Can you refer us for our further study
7 and education at home after the hearing to an economic
8 journal or economic text or an IRS release or something
9 that would explain transfer price as you use it here?

10 A. No, I don't have one in mind.

11 Q. At the bottom of that same page, you use
12 the term, dead weight losses. Same question, is that an
13 economic term, and explain what it is and tell me where
14 I can find more information on it?

15 A. Dead weight loss is the loss associated
16 with some sort of distortion in the market that ends up
17 not just moving money from Peter to Paul, but it also
18 ends up costing in that.

19 So, for example, if the program -- if the
20 exemption for producer-handlers encourages an
21 organization -- the reorganization of the farm and a
22 plant that are not efficient enough to compete in the
23 market, but that benefit from the -- from, effectively,
24 the subsidy provided them by the producer-handler
25 exemption, then the market as a whole has lost. There's

1 a dead weight loss, which is the difference between
2 the -- which is basically the total cost of the
3 inefficiencies of the subsidized company. And I don't
4 have a source in mind for looking that up either.

5 Q. Okay. But it is a recognized term used
6 in economics?

7 A. It certainly is.

8 Q. Okay. And the line after that goes to 15
9 cents per gallon less efficient. In that phrase, are
10 you referring to processing costs?

11 A. I'm sorry, could you repeat the question?

12 Q. Okay. First, look down at the bottom of
13 page 6, read to yourself the phrase that contains the
14 words, 15 cents per gallon less efficient than the
15 competition. Develop a thought about what you meant by
16 that and then answer my question. Did you have in mind
17 in that phrase a reference to the processing costs of
18 the plant?

19 A. No, I had in mind a combination of
20 processing and milk production costs.

21 Q. Is that not -- that 15 cents not a
22 cross-reference to near the middle of the page where you
23 refer to, an advantage ranges from 6 to 15 cents per
24 gallon?

25 A. Yes, it refers to that. 15 cents is the

1 effective subsidy provided by the producer-handler
2 exemption at its height. That is, it's the high end of
3 the range for this effective subsidy provided by the
4 producer-handler exemption. And that subsidy can
5 compensate for up to 15 cents a gallon in inefficiencies
6 that would otherwise put the plant and the farm out of
7 business. And that is done at the expense of the market
8 as a whole.

9 Q. So that 15 cents is -- let me strike
10 that.

11 In the upper, middle part of the page,
12 you refer to an advantage of up to 15 cents due to
13 imputed regulatory costs prices.

14 A. 15 cents per gallon that doesn't have to
15 be paid to the producer settlement fund.

16 Q. And in the bottom of the page, you're
17 referring to -- in addition to procurement, you're
18 referring basically from the cow to the store shelf.
19 And your -- could be up to 15 cents less efficient?

20 A. That's right, if it's an integrated farm.

21 Q. Okay. And that efficiency, as I
22 understand it, or inefficiency, would be a function
23 primarily of plant size and economies of scale?

24 A. No, no, no.

25 Q. No? Not --

1 A. There are other factors involved in plant
2 efficiency.

3 Q. Okay.

4 A. Farm efficiency. And a farmer -- or a
5 plant that is not facing the same price as everybody
6 else will survive even if he's less efficient than
7 everybody else.

8 Q. By less efficient?

9 A. At the expense of everybody else.

10 Q. At the expense. By less efficient, do
11 you intend to assert that a plant of 2 or 3 million
12 pounds is doing something wrong to create dead weight by
13 not being as efficient as a 30 or 40 million pound
14 plant?

15 A. No, I didn't say that either. I said
16 that's not the only factor. Size is a factor and so is
17 management and location, the implications of location.
18 They're -- every factor involved in processing and
19 production is a factor in efficiency.

20 Q. You're not aware and don't assert that a
21 2 million pound plant can do something to be as
22 efficient as a 50 million pound plant?

23 A. Not operating the same type of business,
24 not necessarily, I wouldn't say that. I don't have the
25 numbers, though.

1 Q. However, it is numbers of that nature,
2 economy of scale information, to which you refer at the
3 bottom of page 10 when you refer to the University of
4 Maine and Cornell studies?

5 A. That's right. Those studies demonstrate
6 the principle of economies of scale in fluid milk
7 processing.

8 Q. Okay. And those principles support your
9 testimony elsewhere, that a small processing plant in
10 the end does not have an advantage over a larger
11 regulated plant because of higher costs due to lower
12 scale?

13 A. A smaller plant will -- will tend to have
14 this economies of scale that outweigh the price
15 advantage that the exemption of the producer-handler
16 provisions will provide.

17 Q. Which you previously referred to as the
18 isolated cost component?

19 A. Well, that's not exactly the term I used,
20 but you could call it that.

21 Q. And you would accept that?

22 A. If it's properly qualified, yeah.

23 Q. It is a cost component, but it's in
24 isolation from other cost components?

25 A. It's a cost component faced by regulated

1 handlers and not faced by producer-handlers.

2 Q. Referring back again to your prior
3 testimony, is it not true that even at a production of
4 5 million pounds per month, that the producer-handler
5 becoming regulated and having to pay in the pool would
6 suffer a cost disadvantage in all categories from other
7 handlers?

8 A. I don't think I understand the question.
9 Could you restate it?

10 Q. Maybe I'll give you this to look at so we
11 can read from the same page. I'm handing the witness a
12 document, NMPF table 3, which is part of Exhibit 26 in
13 the Pacific Northwest hearing. And --

14 MR. BOSCH: Your Honor? Is this --

15 JUDGE CLIFTON: Mr. Brosch.

16 MR. BROSCH: Is Mr. Vetne going to
17 distribute this? Is this going to be marked as
18 an exhibit?

19 MR. VETNE: No, it's not. I'm going to
20 ask him questions but you can have a copy.

21 JUDGE CLIFTON: We all do really need to
22 follow along. I realize it's a public record,
23 but we need to look at it while you're asking
24 him questions. I would rather have counsel have
25 them, are there enough? For the court reporter,

1 if there are enough.

2 MR. VETNE: I don't intend to have this
3 marked at this point, I just want to ask some
4 questions.

5 JUDGE CLIFTON: That's fine. Mr. Yale, I
6 appreciate you doing this. I would like to go
7 off record just a moment. We're off record at
8 5:34.

9 (Off the record.)

10 JUDGE CLIFTON: Back on record at 5:36.
11 Thank you, Mr. Vetne, you made proceed.

12 Q. Dr. Cryan, let's go back to what was part
13 of Exhibit 26 in the Pacific Northwest hearing a few
14 years ago. In that hearing, NMPF referred to the
15 Maine -- state of Maine cost data like they do in your
16 testimony today, and refer to the Cornell data as you do
17 today, correct?

18 A. Yes.

19 Q. Okay. And then --

20 JUDGE CLIFTON: Now, Mr. Vetne, the
21 page 1 is table 1. Do you want us to turn to
22 table 3 for these questions and answers?

23 MR. VETNE: Yeah, I'm just looking at
24 table 3 right now.

25 JUDGE CLIFTON: Okay.

1 MR. VETNE: That's where it sort of comes
2 down to the bottom line.

3 BY MR. VETNE:

4 Q. And then from that data, an effort was
5 made to extrapolate, based on observations of economies
6 of scale, to smaller plants who are not part of those
7 two studies, am I correct there?

8 A. No.

9 Q. No?

10 A. Table 3 does not have data from Cornell
11 or Maine.

12 Q. Okay.

13 A. And there's no extrapolation. There is
14 interpolation.

15 Q. Interpolation, okay. Let's go to table 1
16 then. Table 1, the third line has the word, monthly
17 volume, and then Cornell. Is that the same Cornell
18 study to which you made reference in this proceeding?

19 A. Yes, it is.

20 Q. Okay.

21 JUDGE CLIFTON: May I hear from Mr. Yale?

22 MR. YALE: Could I request that we do
23 identify this as an exhibit? It would be easier
24 to identify in the record.

25 JUDGE CLIFTON: Is there any objection,

1 Mr. Vetne?

2 MR. VETNE: I don't have a problem.

3 JUDGE CLIFTON: All right. Let's do it
4 then, I think that will be helpful. I believe
5 this is 73. We'll mark this as Exhibit 73.

6 (Exhibit 73 was marked for
7 identification.)

8 MR. BESHORE: All four pages, your Honor?

9 JUDGE CLIFTON: The whole thing, yes.

10 MR. VETNE: And let me represent for the
11 record that I have a copy of the entire
12 Exhibit 26 by NMPF from that hearing, which
13 includes these tables, should anybody desire to
14 look at it, to -- if they think things are out
15 of context, to refer to it and so forth. It's
16 just here.

17 BY MR. VETNE:

18 Q. Now, you refer in your testimony today
19 also to Maine data showing -- Maine studies on plant
20 costs showing economies of scale, is that the same Maine
21 data to which you refer in lines 5, 6, 7 and 8 of table
22 1 of what used to be Exhibit 26?

23 MR. VETNE: What number is it now, your
24 Honor?

25 JUDGE CLIFTON: Exhibit 73.

1 MR. VETNE: All right.

2 Q. Is that the same Maine data to which you
3 referred in your testimony for this hearing?

4 A. I believe so. The 2001 data, I believe,
5 is the same. I believe it's the same study.

6 Q. Okay. And then but the first two lines,
7 which the source of which is Herbein, contains
8 information for monthly volumes which are lower than
9 Cornell or Maine. Is it not the case that Mr. Herbein
10 extrapolated or interpolated from the Cornell and Maine
11 data to come up with imputed economies of scale costs
12 for smaller plants?

13 A. No.

14 Q. No? Did he actually survey -- or what
15 happened? How did he get to those numbers?

16 A. Well, he's not here to testify.

17 Q. He was your witness and this was part of
18 your statement, so I'm asking you your best
19 recollection.

20 A. He drew numbers from his own database of
21 plant costs with permission. And those numbers, as I
22 recall, were -- were given relatively little weight --

23 Q. Okay, all right.

24 A. -- by the Department.

25 Q. Okay. And let me see. Is Table 1A from

1 that data?

2 A. Table 1A is from -- that is constructed
3 from the Cornell costs --

4 Q. Okay.

5 A. -- according to the table.

6 Q. It does say that?

7 A. It has been six years or so since I
8 prepared these.

9 Q. All right, I understand.

10 A. And the plant costs -- the actual plant
11 costs represented by both the Cornell study and the
12 Maine study are in ranges that are rather far above the
13 proposed limits in our -- in our proposals.

14 So that as I said in my testimony, the
15 studies -- we present the studies as a demonstration of
16 principle of economies of scale, but we certainly don't
17 maintain that they demonstrate any means of arriving at
18 a bright line figure.

19 Q. All right. The Table 1A data that you
20 presented back then as part of Exhibit 73 now contains a
21 consistent cost of 8.8 cents as a cost of producing a
22 gallon jug. Do you recall why that is the same number
23 or costs for all of these sizes?

24 A. No, I don't.

25 Q. Okay. And the same thing for plant

1 depreciation, the consistent cost across all gallon
2 sizes, do you recall why?

3 A. I don't.

4 Q. And when you get to table 3, then, we
5 come up with an advantage and a difference. Do you know
6 whether the plant cost data attributed to the smaller
7 plants in that range are based on a consistent and
8 uniform cost for bottle or for depreciation?

9 A. I don't know.

10 Q. And if we look down to the bottom, under
11 5 million pounds per month, based on this data, a
12 producer-handler would have an advantage without paying
13 into the pool of 4.6 cents per gallon. Am I reading
14 that correctly?

15 A. I'm sorry, could you repeat the question?

16 Q. Okay. Under the column 5.0, which is
17 5 million pounds, volume?

18 A. Yes.

19 Q. Okay. You go down to the
20 producer-handler advantage, am I reading that correctly
21 that that advantage is 4.6 cents per gallon?

22 A. Yes.

23 Q. Okay. And am I reading it correctly that
24 if that same producer-handler were fully regulated and
25 paid into the pool, that producer-handler would have a

1 disadvantage compared to regulated handlers of 9.7
2 cents?

3 A. Those -- that's compared to a regulated
4 handler of average size.

5 Q. Yes, that's true. For
6 26.7 million pounds, is that right?

7 A. 9.7.

8 Q. 9.7.

9 A. In that market.

10 Q. Okay.

11 A. No, let me think about this. I'm sorry,
12 it's been six years, I don't --

13 Q. All right.

14 A. I will answer if I know the answer, but
15 I --

16 Q. Okay. Well, I'm just asking if that's
17 the way to read it. That with respect to a group, a
18 reference group of regulated handlers, that the
19 producer-handler of 5 million pounds would have a
20 competitive disadvantage of 9.7 cents. Am I reading
21 that line correctly?

22 A. I'm not sure what all these numbers mean,
23 so I don't -- out of context, I don't -- I can't answer
24 that question.

25 Q. Well, let me help you a little bit by

1 looking at the same page. About the third numerical
2 line down, there's the word, price advantage (Class I
3 minus blend).

4 A. I understand that the intention in that
5 table was to demonstrate the producer-handler's price
6 advantage; that is, the advantage of a plant of that
7 size against the average pool plant with and without the
8 producer-handler subsidies, with and without the
9 advantage provided by the producer-handler exemption.
10 But I wouldn't say for sure what the -- what the
11 specific number -- how the specific number is derived.

12 Q. Okay. Because you don't recall sitting
13 here what you intended three or four years ago?

14 A. Six years ago, I don't recall.

15 Q. Six years ago.

16 A. I don't recall exactly how I constructed
17 this table six years ago.

18 Q. Okay. But your --

19 JUDGE CLIFTON: Could I ask a question,
20 Mr. Vetne? Can you tell, looking at table 3,
21 whether your numbers came from Herbein?

22 THE WITNESS: Those numbers did come from
23 Herbein.

24 MR. VETNE: They did.

25 JUDGE CLIFTON: And you have indicated

1 that the Department gave little weight to that
2 data, is that correct?

3 THE WITNESS: I did. The Department in
4 their decision gave very little weight to the
5 Herbein data, partly because the number that was
6 most significant in deriving -- trying to derive
7 some significance for very small plants was from
8 an extremely small plant that could easily be an
9 outlier in terms of the costs of processing.

10 So if you take that number out,
11 everything looks very different. And it's very
12 hard to hang a lot, I think, on that one number,
13 on the results from that one very, very small
14 plant.

15 JUDGE CLIFTON: As you look at this
16 Exhibit 73, is there something more solid that
17 we could analyze in order to try to get some
18 understanding of this concept using data other
19 than Herbein's?

20 THE WITNESS: Well, I think, your Honor,
21 that table number 1 can -- if we look only at
22 the -- if we look at the two -- the two -- well,
23 first of all, the two studies that I cited are
24 the Cornell 1997 study, and the Maine 2001
25 study, which are both graphed on here.

1 The Herbein study we did not consider
2 given its history, so don't look at that.

3 The Cornell line has two parts. It has a
4 solid line that represents the data within the
5 range of actual data; that is to say, the curve
6 estimated within the actual range of data from
7 the smallest plant in the data to the largest
8 plant. The dotted line is a continuation of
9 that estimated line going towards 0 in plant
10 size.

11 That is extrapolation. That is -- that
12 is rather problematic when you use an estimated
13 line and try and go well beyond the range of
14 data to come up with some meaning.

15 So that's why that part of that line is a
16 dotted line, to sort of indicate it's -- it's
17 lesser value as an analytical result.

18 So that leaves us, then, with the solid
19 part of the Cornell line and the two main lines,
20 which really just sort of show very similar
21 costs of -- I'm sorry. They show very similar
22 economies of scale within relatively typical --
23 a range of relatively typical plant sizes from
24 about -- the Cornell study ranges from about
25 13.3 million pounds a month to

1 51.4 million pounds a month.

2 Again, that's far above the size we're
3 talking about for the exemptions. It's far
4 above the 450,000 pound and 3 million pound
5 limits we're discussing.

6 So while these studies do demonstrate the
7 principle of costs falling as the -- as the size
8 of the plant grows, they by no means provide a
9 basis for determining what the cost is for a
10 plant that's 5 million pounds or 3 million
11 pounds or 2 million pounds, or especially
12 450,000 pounds. So we've -- we've not relied on
13 cost data to establish our proposed limits.

14 JUDGE CLIFTON: Is that because both the
15 Maine study and the Cornell study start with
16 10 million pounds per month production or
17 processing?

18 THE WITNESS: That's right. That's
19 exactly why.

20 JUDGE CLIFTON: Okay. Go ahead,
21 Mr. Vetne.

22 MR. VETNE: Yes, okay.

23 BY MR. VETNE:

24 Q. Let's go back to your written testimony
25 for a minute. The bottom of page 1 you changed one

1 number from three to two, the largest plants. Was there
2 also a change to the range of just three to five? Our
3 proposals would increase the regulation for just three
4 to five of the largest producer-handlers.

5 A. No, I think that's still right. The
6 plant that we had assumed to be -- the plant that we had
7 assumed to be selling 16 million pounds a month is
8 selling 4 million pounds a month, according to testimony
9 earlier, testimony of another witness.

10 And the result is the same in terms of
11 the number of plants regulated, because 4 million pounds
12 is above -- above the 3 million pound limit, the same as
13 16 million pounds. And of course that doesn't even
14 address -- well --

15 Q. Okay. And your use of the phrase,
16 increase the regulation, that's synonymous with fully
17 regulated, am I correct?

18 A. Yes.

19 Q. Thank you.

20 A. Or you could constrain it to 3 million
21 pounds.

22 Q. Okay. So either fully regulated or maybe
23 cut back?

24 A. That's right. Either one, I think, would
25 be additional increased regulation.

1 Q. Okay. On the middle of page 4, you refer
2 to -- fourth full paragraph, first line, page 4, 87 of
3 117 potential producer-handlers. I couldn't get from
4 this what you mean by potential producer-handlers.
5 These are 117 producers or handlers or something that
6 are not currently regulated, that are potentially
7 regulated?

8 A. This includes -- this includes
9 potential -- when I say potential producer-handlers
10 here, I am adding together 80 size-exempted plants that
11 have own-farm milk --

12 Q. Uh-huh.

13 A. -- with 37 producer-handlers. Together,
14 that's 117 handlers and producer-handlers -- I'm sorry,
15 potential producer-handlers. Defining a potential
16 producer-handler as somebody who either is a
17 producer-handler or someone who has own-farm milk. That
18 does not include current pooled plants that have
19 own-farm milk.

20 Q. Okay. And it doesn't include -- in this
21 range, doesn't include any farms that have no plant
22 associated with the farm?

23 A. That's right. But in this context we're
24 discussing, that's right.

25 Q. Okay. In the next paragraph, you start

1 referring to farms that do not have plants that are
2 added to some analysis of potential -- you refer to 595
3 farms. Those are all farms that do not have plants as
4 distinguished from the prior paragraph?

5 A. I believe some of them do have plants.

6 Q. So your reference to 595 was a number
7 that wasn't linked one way or the other to whether there
8 was a plant associated with the farm, it was only linked
9 to the size of the farm?

10 A. It is a figure from the USDA milk
11 production. Actually, it used to be part of milk
12 production, now they're printed in Farms and Land On
13 Farms reports. But that study -- I'm sorry, that
14 publication breaks out dairy farms by -- by herd size.
15 And indicates that there are -- in 2007, there were 595
16 dairy farms with herd sizes of 2,000 or greater.

17 Q. So the answer to my question, which was
18 you referred to farms of a certain size without
19 reference to whether or not they had plants, the answer
20 to that is yes?

21 A. Yes.

22 Q. Thank you.

23 MR. BOSCH: Your Honor.

24 JUDGE CLIFTON: Mr. Brosch.

25 MR. BROSCH: I don't mean to interrupt

1 Mr. Vetne. Excuse me, Mr. Vetne. Your Honor, I
2 have to leave again. As I mentioned to you
3 earlier, I'm going to leave Dr. Cryan, National
4 Milk's interest, in Mr. Beshore's very capable
5 hands. I just want to thank you for trying to
6 accommodate my schedule and for getting
7 Dr. Cryan on today. I really appreciate that
8 very much.

9 JUDGE CLIFTON: Thank you for coming back
10 to see us, briefly though it may be.

11 MR. BROSCHE: Thank you, your Honor.

12 JUDGE CLIFTON: Do you need a little
13 break to say good-bye, Mr. Brosch? Because I'll
14 give you five minutes.

15 MR. BROSCHE: No. He asked if you were to
16 see me again and I said, as they said in Henry
17 the V, you shall see Harold no more.

18 JUDGE CLIFTON: Our most thespian lawyer
19 is leaving. Mr. Vetne, back to you.

20 Q. On the bottom of page 5, you referred to
21 specific information from the Northeast market, an
22 increase from 2002 to 2007 of producer-handler milk.
23 I'm not sure the record reveals this. I'm going to ask
24 you, do you know whether that includes producer-handler
25 milk originated outside of the Northeast?

1 A. I believe so.

2 Q. Okay. Are you aware of any information
3 which would illuminate for this record whether
4 producer-handlers located within the Northeast have
5 increased in volume or number or size?

6 A. I'm not aware of such data.

7 Q. Thank you. At the bottom of page 13,
8 Mr. Cryan, your written testimony, I would say second --
9 next to the last full paragraph, last sentence, you're
10 referring to avoiding written testimony. This would
11 avoid confusion and would confirm the current
12 interpretation that is applied by the Market
13 Administrators.

14 When you gave your testimony, you
15 modified that and said, this would avoid confusion and
16 would confirm what I believe is the current
17 interpretation. You inserted the term, the words, what
18 I believe is.

19 Let me ask you, when you prepared your
20 testimony, did you have an understanding or
21 documentation or oral representation from either Dairy
22 Programs or the Market Administrators as to what their
23 interpretation was?

24 A. I had some discussions, but I -- I had
25 some discussions about it, but as I read the testimony,

1 I wasn't sure whether that was thoroughly confirmed or
2 not. I believe the current interpretation -- I'm not
3 sure what the current -- in fact, that's the confusion
4 I'm trying to avoid.

5 Q. You had talked to individual Market
6 Administrators or just to Dairy Programs?

7 A. I don't recall, I don't recall who I
8 talked to.

9 Q. Do you recall when you talked to somebody
10 who you don't recall talking to?

11 A. It was -- it was several months ago. I
12 don't recall. I could have confirmed that with any of
13 the dozen people in the room today. I have not.

14 Q. Okay. Now, I'm going to the bottom -- or
15 page 16 and 17, Mr. Cryan. Almost done here. You're
16 referring to -- I'm referring to the paragraph beginning
17 on the bottom of page 16. Proposal Number 17, referring
18 to Mallorie's Dairy, Country Morning Farms and Nature's
19 Dairy as a group of middle to large-sized
20 producer-handlers. Do you see that?

21 A. Yes.

22 Q. Now, are you aware that all of these
23 producer-handlers currently operate within the 3 million
24 pound limit set by USDA as of -- whenever it was, 2006?

25 A. I was not aware that all three were

1 operating within 3 million pounds, no.

2 Q. They wouldn't be producer-handlers in the
3 Pacific Northwest -- the two of them, that is, wouldn't
4 be producer-handlers in the Pacific Northwest if they
5 weren't under 3 million?

6 A. I knew that two of them had to operate
7 within the 3 million pounds, yes.

8 Q. So let's see. The two in the Pacific
9 Northwest, would they be the ones you intended to fit in
10 the middle-size category? You referred to --

11 A. Those are two -- those are exactly the --
12 in fact, they are most specifically the
13 producer-handlers whose operations we did not want to
14 see destroyed by change in regulation.

15 While we believed that they -- although
16 they have an impact, we believe that they have -- they
17 are subject to regulations that were put into place.
18 They made adjustments to deal with the 3 million pound
19 limit in the Pacific Northwest. So we believe that the
20 grandfathering provision is a fair way to -- to limit
21 the growth -- to limit the proliferation of
22 producer-handlers in that size range, but to allow those
23 operations -- those sorts of operations to continue
24 functioning.

25 Q. On page 16, when you use the term large

1 size producer-handlers, you were intending to refer only
2 to Nature's Dairy?

3 A. Yeah. I had been given informally to
4 understand that Nature's Dairy was somewhere --
5 somewhere in the range of 2 to 4 million. And I
6 didn't -- so a group of middle to large size was sort of
7 an all-encompassing description that would include
8 any -- any eventuality, whether they turned out to be a
9 2 million-pound plant or a 4 million-pound plant in the
10 context of our proposal.

11 Q. All right. On page 17 --

12 A. But I understood that Nature's Dairy was
13 not a 10 million or 15 million pound plant.

14 Q. On page 17 of your testimony you use the
15 term, exceptionally large plants. What size
16 producer-handler did you have in mind when you used
17 exceptionally large?

18 A. Where is this?

19 Q. Page 17.

20 A. That may be an overgeneralization.

21 Several of them are exceptionally large
22 producer-handlers, certainly not all seven of them are.
23 In fact, it's my understanding that not all seven of
24 them are producer-handlers, that at least one of them is
25 a prospective producer-handler. And I believe -- I

1 believe -- and I would have to rely on their counsel
2 whether a couple of them may not be above the 3 million
3 pound limit at all.

4 Q. For those trying to look for that, it's
5 the paragraph beginning on the bottom of page 17, first
6 sentence. However, you end your whole statement with,
7 in the next to the last paragraph, the last sentence,
8 the ultimate sentence in your testimony, referring to
9 grandfathering of smaller existing producer-handlers.
10 And in that sentence, you intend to have smaller mean
11 less than 3 million pounds?

12 A. I think we tried to avoid attaching too
13 firm a definition of small, large and medium. Although
14 occasionally we use the terms in order to generally
15 describe what I'm talking about, I wouldn't want to
16 get -- I wouldn't -- I mean, they are just words. There
17 is a continuum. The plants are all on a continuum,
18 there's a continuum of sizes.

19 And we -- we have proposed and pursue
20 some bright line definitions. And in some cases, I'm
21 using those definitions as the -- to refer to small,
22 medium and large. But they are not -- certainly not
23 definitive for all purposes.

24 Q. Nevertheless, in your -- on page 20 of
25 your statement when you use the term, small, you did

1 intend to refer to plants with distribution of less than
2 3 million pounds?

3 A. I think in that specific context, in that
4 sentence, yes.

5 JUDGE CLIFTON: That was page 20, is that
6 correct?

7 MR. VETNE: Page 20, last page of
8 testimony.

9 JUDGE CLIFTON: Thank you.

10 MR. VETNE: Thank you.

11 JUDGE CLIFTON: Thank you, Mr Vetne. Who
12 next would like to cross-examine this witness?

13 MR. VETNE: Maybe I can come up with some
14 more.

15 JUDGE CLIFTON: You're welcome to come
16 back.

17 MR. VETNE: Oh, wait a minute.

18 JUDGE CLIFTON: You're welcome to come
19 back, Mr. Vetne, you're not limited. Let's see,
20 I think I'll have Mr. Ricciardi go first,
21 although others still have questions.

22 CROSS-EXAMINATION

23 BY MR. RICCIARDI:

24 Q. This is Al Ricciardi on behalf of AIDA.
25 Good evening, Mr. Cryan. It has been a long day. We'll

1 see if we can move it along.

2 National Milk is described as a farm
3 commodity organization representing most of the dairy
4 marketing cooperators serving the U.S., correct?

5 A. I don't believe that's in my testimony.

6 Q. I asked you a question.

7 A. I have not heard it described that way,
8 no.

9 Q. Would you describe it that way?

10 A. No.

11 Q. You are currently the vice president of
12 milk marketing and economics, is that correct?

13 A. That's correct.

14 Q. Do you have other staff economists
15 working with you?

16 A. We have two economists on staff.

17 Q. Now -- and you're not a registered
18 lobbyist for National Milk but you do have registered
19 lobbyists working for National Milk, correct?

20 A. Yes.

21 Q. With regard to the proposal that was made
22 in conjunction with IDFA in January of this year, when
23 was the first time that you had any discussions with
24 individuals at the Department concerning their
25 proposals?

1 A. I think that depends on the way you look
2 at it. We -- we've been -- it's been a topic of
3 conversation since the -- since the decision for the
4 first hearing came out. So it's been quite a while.
5 It's not easy to define.

6 Q. The specific proposals that we're talking
7 about, which is the first one that you came out with to
8 eliminate the producer-handler exemption, and then in
9 conjunction raise the exempt plant limit from 150 to
10 450.

11 A. I'm not sure. Sometime late in the fall,
12 probably, last year.

13 Q. As early as the spring of '08?

14 A. I -- I don't remember it that early, but
15 it may have been. I don't remember.

16 Q. And with regard to the issue of raising
17 the exempt plant limit, is that something that National
18 Milk had proposed or is that information that National
19 Milk received from the Department?

20 A. Well, the record shows that we proposed
21 that.

22 Q. I do understand that that's true, but did
23 you get any kind of input from the Department with
24 regard to the limitation -- the elimination of
25 producer-handler totally in conjunction with raising the

1 exempt plant limit from 150 to 450?

2 A. I did not -- I did not. The first time I
3 discussed raising the exempt plant limit from 150 to 450
4 with people in the USDA, it was an idea that I brought
5 to the conversation.

6 Q. Okay. And initially, even though
7 National Milk had supported 3 million pound limits in
8 131 and 124, and then a 3 million pound proposed limit
9 in 5 and 7, the first proposal that was made by
10 National Milk in January was for the actual elimination,
11 total elimination, of the producer-handler exemption,
12 correct?

13 A. That's correct. In principle, we agree
14 with that idea, that eliminating the producer-handler
15 makes the most sense. But we believe that the
16 accommodation of the existing producer-handler up to a
17 certain size is the most reasonable approach, and makes
18 an accommodation for people who have already responded
19 to the -- to the decision in the Pacific Northwest.

20 Q. But that proposal, the alternative
21 proposal which became Proposal 26, that was not made by
22 National Milk until sometime in March, correct?

23 A. Again, it was not an alternative
24 proposal. It was a complementary Proposal to 1 and 2.
25 2 and 26 together, without contradiction, represent our

1 position.

2 Q. And -- the --

3 A. And yes, Proposal 26 was formally
4 submitted almost two months after the initial proposal,
5 the initial proposals.

6 Q. Did you have a survey sent out to the
7 member cooperatives prior to the time that the proposals
8 were submitted to get their input regarding the
9 elimination of the producer-handler exemption?

10 A. Regarding the initial proposal?

11 Q. That would be true.

12 A. I'm sorry, that would be true?

13 Q. That was my question.

14 A. That's your question?

15 Q. Yes, sir.

16 A. We had -- we had forms of the members
17 before and after that proposal. And it was a discussion
18 of the board of directors that led to -- to Proposal 26
19 being -- being added to the overall position.

20 Q. Let me be more specific. Did you send
21 out a survey to members?

22 A. Before we -- did we? No, we did not send
23 out a survey.

24 Q. Okay. Now, in the past when proposals
25 had been made by National Milk, whether to the

1 Department on this issue or other issues, you have
2 conducted surveys, correct?

3 A. We -- as an internal matter, we've
4 communicated with our members in a number of ways.

5 In this issue, we had a position taken by
6 our board of directors in November in favor of Proposals
7 1 and 2, and reconsideration of the same board in March
8 that led to Proposal Number 26. The membership is
9 active in discussing these and in our formulation of
10 policy and we represent the members.

11 Q. And so my question was -- I know you
12 wanted to give that information regarding the board of
13 directors, that wasn't my question. In the past, you
14 have sent out surveys to members. You didn't in this
15 case, correct?

16 A. I can't think of a comparable situation
17 where we sent out surveys to the members.

18 Q. In other situations, like the Commodity
19 Credit issue and other issues, you sent out surveys to
20 members, correct?

21 A. Are you talking about surveys to collect
22 information?

23 Q. That would be one thing, yes.

24 A. Or to determine position?

25 Q. Let's talk about both.

1 A. Go ahead.

2 JUDGE CLIFTON: The commodity what?

3 MR. RICCIARDI: Credit corporation,
4 Judge.

5 JUDGE CLIFTON: Did you use a survey on
6 that topic, for example?

7 THE WITNESS: Some time ago we did a
8 survey of our members that have sold products to
9 the Commodity Credit Corporation under the Dairy
10 Price Support Program, in order to try and
11 establish what additional costs are imposed on
12 manufacturers in order to meet the standards and
13 requirements of the Commodity Credit Corporation
14 under that program, so that we could advocate
15 for an increase in those -- in the support
16 prices to recognize those additional costs. At
17 that time -- well, that was the purpose.

18 Q. Yeah. So one of the reasons you do that
19 is to actually get realistic hard data from the members
20 so that, when you make a presentation, you will be able
21 to give the best data to the Department for its action,
22 correct?

23 A. When there's relevant data to be
24 collected from the members, yes.

25 Q. And in this case with regard to

1 producer-handlers and producer-handler issues, the data
2 that you have is based in part upon certain assumptions
3 that you make, correct?

4 A. For example?

5 Q. For example, you made certain assumptions
6 with regard to GH which we found were erroneous,
7 correct?

8 A. Yes.

9 Q. Based upon anecdotal evidence from the
10 witness stand, you were off by about 75 percent,
11 correct?

12 A. I would say it's certainly possible that
13 I was closer than the witness, but I will be
14 conservative and go with the 4 million pounds. And to
15 this point, that's the only number -- that number and
16 some numbers deriving specifically from that number are
17 the only things I found in my presentation that do not
18 bear scrutiny.

19 Q. You guessed about what the production
20 number was for GH, correct?

21 A. Right.

22 Q. Okay. And we had anecdotal evidence that
23 your number, assuming that person's testimony was
24 correct -- and we'll assume it just for this point, you
25 were off by a measure of -- 16 million was your guess

1 and his testimony was 4 million. That's off by
2 75 percent, right?

3 A. Yes.

4 Q. Now, you were a professor before you got
5 this job?

6 A. No.

7 Q. Have you ever been a professor?

8 A. No.

9 Q. Okay. You did take some examinations in
10 economics when you were going through both undergraduate
11 and also for your Ph.D. program, correct?

12 A. Yes, I took some examinations.

13 Q. All right. And if you got 25 percent out
14 of a hundred, what would you get on that particular
15 test?

16 A. It depends on the curve.

17 JUDGE CLIFTON: That's a great answer.

18 Q. You know what? I've never seen a curve
19 that large. But the probability is you get an F,
20 wouldn't you?

21 A. Well, I should point out that that was
22 one -- in a sense, one answer in a very long exam.

23 Q. And I confined my exam to that one
24 question, and I'm afraid that on that one you flunked,
25 right?

1 A. And that's why I'm not taking your class.

2 Q. Okay. I'm a tough grader. What you
3 don't have is, you have no processing costs for
4 producer-handlers, correct? Right?

5 A. No, we had no processing costs for
6 producer-handlers.

7 Q. You have no raw product cost for
8 producer-handlers, correct?

9 A. We don't have specific production costs
10 for producer-handlers specifically, correct.

11 Q. Okay. And you got -- you did no
12 interviews with any of the producer-handlers that are
13 involved, correct?

14 A. Correct.

15 Q. You never examined the specific plant
16 size for each of the producer-handlers, correct?

17 A. No, what we have with -- I presented
18 numbers on plant size.

19 Q. On general plant sizes. But I'm talking
20 about the specific producer-handlers that are involved
21 in this matter.

22 A. I have not surveyed individual
23 producer-handlers for their plant sizes.

24 Q. Okay. And with regard to the number of
25 producer-handlers, the argument about the potential

1 proliferation of producer-handlers, you have advanced in
2 124 and 131, you've also advanced in 5 and 7 in the
3 past, correct?

4 A. Yes.

5 Q. Okay. Now, let's examine the reality on
6 5 and 7. You testified in Order 5 and 7 in February of
7 2004, and I believe that there were one or two
8 producer-handlers at that point. And if you want to,
9 you can take a look at Exhibit Number 13.

10 MR. RICCIARDI: Judge, if you would pass
11 that to him, I would appreciate it.

12 A. I have it.

13 Q. Great. Since that testimony, tell me
14 about the proliferation of the number of
15 producer-handlers in Orders 5 and 7.

16 A. There has not been a proliferation in
17 Orders 5 and 7.

18 Q. In fact, the numbers are either the same
19 or they've declined, correct?

20 A. Correct.

21 Q. Also tell me, if you would, in Order 124,
22 Pacific Northwest, since the decision reached in 2006,
23 tell me what disorder is being caused by
24 producer-handlers in that Order that would mandate a
25 change from the 3 million pound current limit.

1 A. We are advocating proactive regulation
2 for some markets in order to maintain uniform provisions
3 across markets so that it's fair to everybody, so that
4 there is no confusion for potential producer-handlers
5 who might come in anticipating taking advantage of a
6 provision whose only basis for existing was that no
7 disruption has yet happened.

8 Q. So the answer is, there hasn't been any
9 disorder at all in 124 since 2006, correct, caused by
10 producer-handlers?

11 A. I can't point to anything.

12 Q. Okay.

13 A. But I -- but I have not examined each
14 market point by point. I believe we've had testimony
15 from people in the Pacific Northwest about this.

16 Q. Well, National Milk is advocating a
17 national hearing, which we're at?

18 A. Yes.

19 Q. In every order, correct?

20 A. Yes, yes.

21 Q. So then I need to know what you have
22 found to support the proposed change. And as I
23 understand your testimony from 124 now, you see no
24 disorder caused by producer-handlers since 2006 in that
25 Order under the current system, correct? Right?

1 A. I can't point to any.

2 Q. Which means there isn't any?

3 JUDGE CLIFTON: Not necessarily.

4 A. No, not at all. That doesn't --

5 MR. RICCIARDI: That's fine, Judge, I'll
6 move on.

7 Q. In 131, have you looked at the impact of
8 the MREA on that Order as to whether or not the
9 Department has the ability to make any change to
10 producer-handler status there?

11 A. It is a legal issue. As a layman, I've
12 looked at the legislation and concluded that the only
13 limitation is that they cannot allow producer-handlers
14 to be larger than 3 million pounds.

15 Q. Okay. And I'm actually glad that you
16 brought that up. I noticed -- unfortunately, Mr. Brosch
17 has gone, but I'll use his words. He indicated that you
18 are not a lawyer, you didn't intend to give any kind of
19 legal opinions and you weren't a legal expert. Now, you
20 agree with him, don't you?

21 A. I agree that I am not a lawyer.

22 Q. All right. And does that mean you're a
23 legal expert?

24 A. I'm not a legal expert.

25 Q. So I looked through Exhibit 23, and I

1 note, for example, on pages 2 and 3, particularly
2 footnote 1, there appear to be a lengthy -- there
3 appears to be a lengthy discussion on legal issues.

4 I also note that on page 8 of your
5 exhibit there's also discussion about the legal
6 justification for producer-handler provisions. I also
7 note on page 12 of that exhibit that there is a
8 discussion about the mandates of the Regulatory
9 Flexibility Act and the small business definition, et
10 cetera.

11 My assumption, based upon your testimony,
12 is that these are simple -- simply layperson's view of
13 those particular issues, not legal opinions, right?

14 A. They are a layperson's view and it is up
15 to the Department to decide whether they are correct or
16 not.

17 Q. Understand.

18 A. The fact that I'm not a lawyer doesn't
19 necessarily make them all incorrect, not necessarily.

20 Q. I understand, sir. Take a look for me,
21 if you've got up there Exhibit Number 7, if you would.

22 A. Yes.

23 Q. Do you have the document there?

24 A. Yes.

25 Q. Okay. The document, which has been

1 admitted, is headed, Information on Producer-Handler's
2 Operating in Federal Milk Marketing Areas for Selected
3 Time Periods. And it selects time periods from 1959
4 through 2008.

5 And I want to focus your attention on the
6 percentage of sales by producer-handlers by percent,
7 which is the -- I guess if we eliminate the time period
8 column, the fifth column over to the right.

9 Would you agree with me that in terms of
10 the percentage of sales by producer-handlers in Federal
11 Milk Marketing areas, going from 1959 to 2008, there
12 doesn't appear to be a proliferation of additional
13 percentage of sales by producer-handlers?

14 A. Well, what you have in this chart, there
15 are only two numbers that are less than -- less than 17
16 years old. And one of them -- and they're not
17 necessarily comparable because of some -- some changes
18 in regulation. I think -- I think, frankly, that
19 Exhibit Number 6 -- I think Exhibit Number 6 is more
20 relevant.

21 Q. Well, let's -- I kind of like Exhibit 7,
22 I think it's relevant, so let's talk about it for a
23 second.

24 A. I understand. I understand your
25 preference.

1 Q. The bottom line is, as we start looking
2 through those numbers, the highest percentage is in 1969
3 at 2.1. All of the others are under 2. And from 2001
4 to 2008, there is a decline in the percentage of sales
5 by producer-handlers, right?

6 A. In a -- in the growth in the absolute
7 number consisting -- it's since -- at least since 1987.

8 Q. Yeah, but if we're looking at percentage
9 of sales by producer-handlers, we have to look at the
10 context. And the fact is, what that means is, if it's
11 staying fairly constant in comparison to the regulated
12 community, there is not a lot of substantial growth over
13 the regulated community by looking at these numbers,
14 right?

15 A. These numbers are selective and too few
16 points to tell us much about the trend in recent years.

17 Q. Well, if we were just to look at these
18 numbers, which are USDA numbers provided as part of this
19 hearing, we would have to conclude that there is no
20 significant increase in the percentage of sales by
21 producer-handlers, right?

22 A. No. I disagree.

23 Q. Okay. Your Exhibit 23 has an attachment
24 to it, which is actually page 22 of that document, which
25 lists the top 50 U.S. dairy cooperatives by volume for

1 2007. And now -- excuse me -- as I read it, one-half of
2 the top 50 are actually members of National Milk
3 Producers, correct?

4 A. About -- yeah, about one-half.

5 Q. About one-half. And in terms of the
6 percentage of milk volume that the NPF numbers
7 represented in 2007, it is 111 -- excuse me,
8 111.3 billion pounds of the U.S. total of 185.6. Am I
9 reading that right?

10 A. Yes.

11 Q. Which is a significant number?

12 A. Pretty significant.

13 Q. And in terms of control of certain
14 markets, the National Milk members would process -- or
15 would have milk processed in certain Federal Order areas
16 that may in fact be over 50 percent of all of the milk
17 in the pool?

18 A. I would say most pools have over
19 50 percent milk from National Milk members.

20 Q. And some may be 80 percent?

21 A. Or higher.

22 Q. Or higher. And also you are familiar,
23 being in the dairy industry, with a publication called
24 Dairy Foods?

25 A. Yes -- yes.

1 Q. And Dairy Foods each year comes out with
2 what it calls a Dairy 100, which is the largest, at
3 least by sales volume, of dairy businesses in the
4 country, correct?

5 A. By dollar sales volume.

6 Q. By dollar sales volume. And of the Dairy
7 100 for 2008, if my notes are correct, about 14 members
8 of National Milk are listed in the dairy 100? Sound
9 right?

10 A. Sounds reasonable.

11 Q. Tell me, if you would, outside of the
12 context of the producer-handler issue, your definition
13 of disorderly marketing.

14 A. Disorderly marketing is -- is that which
15 disrupts the markets in context of the current Federal
16 Order System.

17 Q. Would you say that depooling disrupts the
18 market?

19 A. It can.

20 Q. And we know it has, for example, back in
21 2005 when we had the price inversion. There were some
22 markets in the Federal Milk Marketing Order system,
23 25 percent of the milk got depooled, right?

24 A. I don't know the numbers.

25 Q. Does that sound reasonable?

1 A. I understand you put some numbers on the
2 record, but I don't know them off the top of my head.

3 Q. And in 2005, that was as much as \$2 per
4 hundredweight on some orders, right?

5 A. It could have been.

6 Q. And we also heard from Mr. Rowe back in
7 2008 for Northwest Dairy Association that they depooled
8 milk in some months that had an impact, I think, of up
9 to 25 cents on the blend price in that pool, right? Do
10 you remember that testimony?

11 A. I don't recall that specifically, but
12 I'll -- I'll take your word that's on the record.

13 Q. Okay. Now, if a cooperative like
14 Northwest Dairy Association decides to depool milk and
15 it has an impact on the blend price of 25 cents, is that
16 money that is taken away from dairy farmers in that
17 particular order?

18 A. In a manner of speaking, it is taken --
19 it is moved from -- yes.

20 Q. They don't see it in their mailbox check
21 for that particular month, right?

22 A. (Nodding head.)

23 Q. Yes?

24 A. That's right.

25 Q. And so it is money that's coming out of

1 their pocket?

2 A. For certain producers.

3 Q. And does National Milk have a position
4 with regard to depooling?

5 A. Depooling is an issue that has various
6 distinctly regional dimensions. Each market -- our
7 members in each market have expressed -- most of them
8 have expressed a desire to address the issue; however,
9 there doesn't seem to be a one-size-fits-all. It is an
10 issue -- it is an issue of disorderly marketing that is
11 of significant concern to National Milk and its members,
12 but it is a separate issue which is -- which is -- we
13 work towards addressing in other hearings. This is
14 certainly not a hearing about depooling.

15 Q. Do you believe it needs a national
16 hearing to address?

17 MR. BESHORE: Your Honor --

18 JUDGE CLIFTON: Mr. Beshore.

19 MR. BESHORE: I object. He answered that
20 question in his response, and depooling is not
21 in this hearing, as Dr. Cryan said. It's not a
22 subject of this hearing. Enough is enough.

23 JUDGE CLIFTON: The objection is noted,
24 but Dr. Cryan may answer. Do you think it's a
25 national issue?

1 THE WITNESS: It's a national issue whose
2 characteristics vary considerably more by Order
3 than the producer-handlers.

4 Q. Now, National Milk, the 31 large co-ops
5 who market their milk in the United States, compete with
6 producer-handlers under certain Federal Orders, correct?

7 A. Yes.

8 Q. And what you're, in essence, proposing on
9 behalf of National Milk is to move money from
10 producer-handlers to your member organizations and their
11 members, correct?

12 A. It would not go exclusively to National
13 Milk members. It would go to the pool generally. It
14 would go to the benefit of all the producers for
15 participating in the system and who are currently
16 suffering at the expense of the producer-handler
17 exemption.

18 Q. To the extent that National Milk members
19 control 80 or 90 percent of the milk in particular
20 Federal Orders, 80 or 90 percent of the money that you
21 want to move is going to go to National Milk, correct?

22 A. And anything that's good for producers
23 overall benefits National Milk members to a tune of
24 60 percent. So, of course, since we met, we represent
25 the substantial majority of dairy farmers in this

1 country. And milk production, anything that benefits
2 producers overall, anything that raises all votes, will
3 raise the votes of a lot of National Milk members.

4 The -- as I demonstrated in my testimony
5 and in the table you've -- you're -- you've pointed to,
6 National Milk members are very much representative of
7 dairy farmers across the country. They are small
8 farmers and large farmers, conventional farmers and
9 organic farmers. They are farmers of all types, all
10 across the country. And to distinguish between them and
11 anybody else is -- is unfair.

12 Q. Okay. So to the extent, then, that you
13 move money from producer-handlers to those who compete
14 with them in certain Federal Orders, and you control or
15 have 90 percent of the milk in those orders, 90 percent
16 of that money is going to go to National Milk members,
17 right?

18 A. I don't know that any markets have
19 90 percent. I would assume that there are some that
20 have over 80 percent. But that's true, to the extent
21 that National Milk members represent a majority of the
22 producers in this country, then the benefits to
23 producers from correcting the producer-handler exemption
24 would benefit -- the majority of those benefits would go
25 to National Milk members.

1 Q. You don't believe that competition is
2 disorderly marketing, do you?

3 A. Not per se.

4 Q. Okay. Have you considered the regulatory
5 benefits that cooperatives have in your testimony?

6 A. The regulatory benefits that cooperatives
7 have?

8 Q. Yes, sir.

9 A. I'm not sure I follow.

10 Q. Let me see if I can help. Cooperatives
11 are exempted from certain provisions of the antitrust
12 laws under the Capper-Volstead Act, correct?

13 A. That's not a Federal Order provision.

14 Q. Regulation, statute, regulation. Take
15 that into consideration in any of your testimony?

16 A. In -- I'm not sure -- well, I'll just say
17 no.

18 Q. Did you take into consideration that when
19 those acts were passed, that it was not envisioned that
20 we would have as much consolidation in the dairy
21 industry as we've had over the last 40 years?

22 A. Well, the consolidation on the
23 cooperative side has matched the consolidation on the
24 processing side. So I would say that it's -- it's
25 proportionate.

1 Q. Did you take into consideration that we
2 now have national cooperatives that market across the
3 country?

4 A. No. It's not -- it's not relevant to
5 this context.

6 Q. Over-order premiums --

7 JUDGE CLIFTON: I'm sorry to interrupt.
8 Let's go off record for just a moment.

9 MR. RICCIARDI: Sure.

10 (Off the record.)

11 JUDGE CLIFTON: We're back on record at
12 6:45. Thank you, Mr. Ricciardi.

13 MR. RICCIARDI: Thank you, your Honor.

14 Q. Over-order premiums are what, sir?

15 A. Over-order premiums are payments for milk
16 that are above the minimum prices required by the
17 Federal Orders.

18 Q. So the Federal Order in a particular
19 Federal Order area may have a certain minimum price, but
20 if, for example, the co-op in that area has some control
21 over the milk, they may be able to extract an amount
22 over and above the minimum price for their milk,
23 correct?

24 A. I think it's very difficult for
25 cooperatives to assert monopoly powers, it's been

1 demonstrated over and over again. But it's -- that
2 is -- potentially can happen, though. Often, though, in
3 connection with services, balancing services, more
4 orderly marketing.

5 Q. You don't consider the fact that a co-op
6 who has -- which may have significant control in a
7 Federal Order area enough to be able to have over-order
8 premiums is a disorderly marketing condition?

9 A. Beg your pardon?

10 Q. Is that a disorderly marketing condition,
11 in your opinion?

12 A. Please restate the question.

13 Q. I'll do it. If you've got a Federal
14 Order area where a co-op has significant control in
15 terms of the percentage of the milk that's pooled,
16 enough so that they can extract an over-order premium,
17 is that a disorderly marketing condition?

18 A. No.

19 Q. Can it ever be a disorderly marketing
20 condition, in your opinion?

21 A. Disorderly?

22 Q. Yes, sir.

23 A. I hadn't -- I hadn't thought of it that
24 way. I don't -- I don't have an answer for you. I
25 don't know.

1 Q. Okay. And I apologize for jumping around
2 because a lot of people asked you questions, and I'm
3 trying to see if I can follow up or ask other issues.

4 Take a look, if you would, at Exhibit
5 Number 23 for a minute. And specifically, if I can flip
6 my page, 17, bottom of 17, beginning Proposals 23, 24
7 and 25, last paragraph. Do you got that?

8 A. Yes, sir.

9 Q. It says -- you say that, American
10 Independent Dairy Alliance, who I'm representing, is a
11 group of, quote, seven exceptionally large
12 producer-handlers, close quote. Can you tell me who
13 those are?

14 A. Well, as I -- sorry. As I indicated
15 earlier, I recognize that that was an
16 overgeneralization. That at least one of those seven is
17 not a producer-handler, and I would be -- I could be
18 corrected that these remaining six are not necessarily
19 all exceptionally large, although some are.

20 Q. When you wrote it, you said that they
21 were all exceptionally large producer-handlers. What's
22 the basis of the information you had to make that
23 statement in Exhibit Number 23?

24 A. It was a -- it was written from --
25 written from memory. It was not -- I did not

1 double-check the facts. I characterized it in terms
2 that are generally true, but not in detail.

3 Q. Because of the seven, one is an exempt
4 plant under the exempt plant limit, and of the remaining
5 six that are producer-handlers, you don't have specific
6 data to tell me what their actual monthly pound
7 production is, correct?

8 A. I would say Snowville Creamery is not a
9 producer-handler, and that the balance of the plants
10 are -- are -- at least among producer-handlers are
11 exceptionally large.

12 Q. Okay. And so give me the bright line.
13 Exceptionally large versus large is what level?

14 A. I don't have a bright line for defining
15 exceptionally large.

16 Q. Give me the flashing light as to when we
17 get there.

18 A. These -- I -- I don't know.

19 Q. Okay. Fair enough. The -- I'll flip you
20 to Proposal 26 now. You have certain restrictions in
21 that proposal for what people have been calling the
22 grandfather provision, and I guess I'll use that.
23 Although my grandmother would like the grandmother
24 provision.

25 Tell me, for the timing issue

1 specifically, why National Milk stated that the
2 producer-handler, to get -- to have the potential for
3 that provision had to be in existence in 2008.

4 A. That was simply in order to establish a
5 date in -- a broad date that was before -- before --
6 before a hearing in order to discourage -- to rush to --
7 to the status. That's -- obviously the Department has
8 leeway in establishing an appropriate base period for
9 that.

10 Q. Why wouldn't National Milk have picked
11 some point prior to the time of any final decision?

12 A. As I said, the pending regulation could
13 lead to decisions of people to become producer-handlers
14 who had not fundamentally relied upon the
15 producer-handler provision.

16 Q. Okay. Let's talk about this for a
17 second.

18 A. And I should point out, we submitted this
19 in January of 2009, so 2008 covers the 12 months
20 immediately preceding the month that we submitted the
21 proposal.

22 Q. But as I understand it -- and then I'm
23 going to ask you some other questions that I've got in
24 mind.

25 If a producer-handler operation under

1 your Proposal 26 was in operation on December 31st,
2 2008, they would potentially fall under the
3 grandfather/grandmother provision, but if they started
4 on January 1, 2009, they would not, correct?

5 A. That's the way it's written, but I would
6 not assume that we would object to the date of
7 January 30th of 2009. I don't -- I don't see that as a
8 fundamental point, except to avoid -- avoid it becoming
9 a base period after it's clear what may be happening.

10 Q. Take a look at Exhibit 13 for me. Have
11 you got it?

12 A. I have it.

13 Q. Thanks. The last two pages would be for
14 2008 and 2009. Have you had a chance to look at those
15 two pages? I have a question I want to ask you.

16 A. I don't have them memorized.

17 Q. I know you don't and neither do I. But
18 I'm going to ask you this question, see if we can work
19 on this together.

20 Tell me, based upon the Proposal 26 and
21 the data produced by the Department in Exhibit 13, is
22 there any producer-handler that would not meet the
23 timing requirement for the potential grandfather
24 exemption?

25 A. Without going through the list, I will

1 presume that you are referring to GH Dairy, and as I
2 said, I don't see a reason that we would object to a
3 date that included January 2009. And I promise you that
4 if they had begun operations as a producer-handler on
5 December 1st, 2008, it still would have said 2008. So
6 you can take that for what you want.

7 Q. So you're telling me that it wasn't
8 drafted by National Milk in an effort to ensure that GH
9 was precluded from meeting any type of grandfather
10 provision? That's your testimony under oath?

11 A. Yes.

12 Q. Good.

13 A. As far as I'm concerned, there was no
14 intention on my part to -- to necessarily exclude GH
15 from -- from being able to participate in the
16 grandfather provision.

17 Q. Okay.

18 JUDGE CLIFTON: Dr. Cryan, what did you
19 understand to be the name of the creamery that,
20 of the seven, is not a producer-handler?

21 THE WITNESS: Snowville Creamery.

22 JUDGE CLIFTON: And how is that spelled?

23 THE WITNESS: Snow, ville.

24 MR. RICCIARDI: S-n-o-w-v-i-l-l-e, your
25 Honor.

1 JUDGE CLIFTON: Thank you.

2 MR. RICCIARDI: You're welcome.

3 Q. Let's see if I can move through this,
4 again. Based upon your knowledge of cooperatives, the
5 31 that are members of National Milk, do the
6 cooperatives pay every producer the same amount for
7 every hundredweight of milk that's produced?

8 A. No. No.

9 Q. Different producers get different prices
10 based on volume or something like that, right?

11 A. There are different markets. Yeah, there
12 are a lot of factors.

13 Q. So when we're looking for equity pricing,
14 it's not equal pricing, it's not identical pricing,
15 correct?

16 A. That's right.

17 Q. Were you here when Howard Hatch, Ted
18 Dunajski and Matt Shatto testified?

19 A. I was here.

20 Q. Now, these witnesses testified, in
21 essence, that the producer-handler status made it
22 possible for them to achieve economic independence,
23 which they wouldn't have achieved through essentially a
24 membership in a co-op. Why is it that National Milk
25 wants to close the door for new producer-handlers?

1 A. Well, there are two ways of -- I mean,
2 we've talked at great length about why we were doing
3 what we were doing.

4 Q. Right.

5 A. But with respect to closing the door, I
6 think there's two ways of looking at it. They both
7 offer an important perspective.

8 First of all, there is the way of looking
9 at it that's been presented by producer-handlers that
10 had been offered opportunities they might not have had
11 otherwise.

12 Of course, that opportunity included a
13 substantial price benefit from the pool at the expense
14 of the rest of the producers in the market, and who
15 knows how many of those were not able to make it based
16 on even a small difference in price.

17 But the other perspective is that of the
18 producer-handler. And I think the people who work in
19 the Market Administrators offices could testify to how
20 frequently they're approached by farmers who are seduced
21 by the idea of the producer-handler exemption as a basis
22 for the building of a new business, a bottling plant, on
23 the farm. And how frequently the people who actually
24 try to do that, especially the smaller producers --
25 well, any of the producers, how frequently they make the

1 investment, become overextended, are unable to operate
2 the two businesses together, because it is a difficult
3 thing to do, and end up losing the farm, as well as the
4 bottling plant.

5 So in some sense, it is removing a -- an
6 attractive nuisance from the Federal Order.

7 Q. Or an attractive business model or option
8 for those people who want to be independent, right?

9 A. That -- when it's successful, it is based
10 in part on subsidy from the rest of the pool.

11 Q. I understand that's your point of view.

12 A. It is my point of view.

13 Q. I understand. But with regard to the
14 business model itself, what you're doing is, through the
15 proposals made by National Milk, is you are removing the
16 business model that has existed for 70 or so years for
17 new entrants into the market, right? Correct?

18 A. That's right. New entrants who are not
19 vested in the regulation.

20 Q. Do you remember -- I think it was in your
21 testimony in 124 and 131. I'm not asking for a memory
22 contest here at all, but do you remember anything about
23 Braum's? And do you know who Braum's is?

24 A. Yes.

25 Q. And who is Braum's?

1 A. Braum's is a large producer-handler in
2 Oklahoma that has most or all of their sales through
3 their own retail stores.

4 Q. They do, through their own retail stores.
5 And in terms of the use of their milk, they also have an
6 ice cream that they end up selling?

7 A. That's what I understand, yes.

8 Q. Okay. Now, in their circumstance then,
9 with regard to their own needs, they use the ice cream
10 to balance their plant, correct?

11 A. I don't think it's as simple as that, but
12 they use -- I mean, ice cream is based primarily on
13 cream. A producer-handler, I believe, can sell cream.
14 But it's balancing butterfat in a sense. But it doesn't
15 really -- it doesn't necessarily manage balancing
16 seasonal supplies, for example.

17 Q. Well, let's assume that they're able to
18 balance their butterfat and their seasonal supply on
19 their own and that they sell all of their production,
20 whether it go into ice cream or other fluid milk, on
21 their own without balancing in any other way, on any
22 other regulated community.

23 Is it fair, under those circumstances, to
24 take away the producer-handler status from them that
25 they've operated under for years?

1 A. Well, unless they're locked in a bubble
2 city as the only bottler, with people not able to go in
3 and out, they're not truly balancing their own supply.
4 They are not -- they can be -- they can adjust their
5 pricing in ways that encourage their customers to come
6 in with -- if they have surplus, they can run a sale.
7 They can run specials and draw people in to take the
8 surplus off their hands. And that all comes at the
9 expense of the rest of the market.

10 Q. Hang on a second, I want to make sure
11 that my memory is not bad. I know you don't have the
12 hearing testimony in front of you and it has been, as
13 you said, almost six years. Let me remind you of some
14 testimony and see whether or not it helps us now in
15 trying to deal with this issue here.

16 At page 939 of the transcript, a question
17 was asked to you: Let's talk about the handling of that
18 surplus. You indicate that to perfectly balance a
19 supply with a demand would be prohibitive, and I think
20 everybody would agree to that. But there can be, I mean
21 at the farm level?

22 And your answer: To balance a
23 predominantly class --

24 JUDGE CLIFTON: Wait, wait. I lost --
25 was the question over then?

1 MR. RICCIARDI: The question was over
2 there, Judge.

3 JUDGE CLIFTON: Could you do the question
4 again? And Mr. Beshore and Mr. English, you can
5 come close to the podium so that you can object
6 before the witness answers. Okay. I didn't
7 quite grasp that the question had ended. So
8 would you read that again, more slowly?

9 MR. RICCIARDI: I can, Judge. The
10 question was: Let's talk about that handling of
11 that surplus. You indicate that to perfectly
12 balance a supply with a demand would be
13 prohibitive. And I think everybody would agree
14 to that. But there can be, I mean, at the farm
15 level?

16 That's the end of the question, Judge.
17 And the answer begins from Dr. Cryan.

18 JUDGE CLIFTON: Well, I still didn't get
19 the question.

20 MR. RICCIARDI: I understand.

21 MR. BESHORE: There wasn't one.

22 JUDGE CLIFTON: Okay. So may he keep
23 reading before you object, Mr. Beshore?

24 MR. BESHORE: With respect to reading, we
25 need to know if we're going to be able to look

1 back at that transcript at some point, we don't
2 have copies here.

3 MR. ENGLISH: I do, actually.

4 MR. BESHORE: We need to know the day
5 because that hearing was not numbered
6 sequentially from day 1 through day 11. So
7 there is more than one page 939 or whatever.
8 And we need to know the day.

9 JUDGE CLIFTON: Mr. English.

10 MR. ENGLISH: Your Honor, I do think it
11 would be easier -- because I do have all the
12 transcripts of that hearing, but I don't know
13 which one. And there are like 14 or 15 of them.
14 So rather than just being random, if I could
15 know which transcript to look in, it would help
16 immensely.

17 MR. RICCIARDI: Give me two minutes,
18 Judge.

19 JUDGE CLIFTON: Yes, I will. And I
20 wonder how important this is to you, really.

21 MR. RICCIARDI: Well, you know what,
22 Judge, I was deciding on that myself. Let me
23 see if I can do it a different way --

24 JUDGE CLIFTON: Okay.

25 MR. RICCIARDI: -- and get through it

1 hopefully a lot more quickly than obviously I
2 am. Do this differently, Judge.

3 BY MR. RICCIARDI:

4 Q. Okay. With regard to a producer-handler,
5 for example, if they had a butter plant or a powder
6 plant, they would be able to balance their own supply,
7 correct?

8 A. Well, yes and no. In some sense. But,
9 for example, the market as a whole has -- has certain
10 utilization that balances the market as a whole. And a
11 producer-handler may -- may manage their short-term
12 surpluses through -- through making butter or powder in
13 their own plant without necessarily -- without
14 necessarily contributing to the overall balancing of the
15 market.

16 That is to say, they may balance their
17 supply but still burden the rest of the market in terms
18 of drawing Class I value that takes away income that
19 allows the rest of the market to be balanced.

20 Q. Okay. Hopefully I'm near the end of
21 this. One reference you've got in Exhibit 23, and it's
22 a lengthy discussion, is about your opinion that the
23 producer-handler status was simply a matter of
24 regulatory convenience. And you cite for that the early
25 development of milk marketing plans in the Kansas City,

1 Missouri area, correct? Am I right about that?

2 A. Yes, and I brought my copy.

3 Q. I got mine, too. With regard to the
4 Kansas City study -- which was actually done in May of
5 1952 related to what happened in the 1930s in Kansas
6 City, correct?

7 A. (Nodding head.)

8 Q. Yes?

9 A. Yes.

10 Q. And, actually, prior to the time of the
11 enactment of the AMAA, when there were actually licenses
12 in Kansas City, correct?

13 A. That's right.

14 Q. Now, the reality is that there were 14
15 traditional distributors that the Kansas City study
16 refers to, and 335 producer-handlers, right?

17 A. (Nodding head.)

18 Q. Is that a yes?

19 A. Yes.

20 Q. And actually --

21 A. Actually, that sounds right.

22 Q. Okay. And with regard to the amount of
23 production in that market, we're talking about
24 50 percent for the traditional distributors, 50 percent
25 for the producer-handlers, right?

1 A. That sounds right.

2 Q. And, in fact, in the '30s there were
3 thousand and thousands of producer-handlers that were
4 out there in the various markets, right?

5 A. Hence the need to make administrative
6 accommodation.

7 Q. And as opposed to 37 now?

8 A. That's right. So it would be much more
9 easier to regulate 37 producer-handlers than thousands.

10 Q. But maybe a more need to regulate
11 producer-handlers because they're producing 50 percent
12 of the milk in a particular area, right?

13 A. That was the intent of Congress.

14 Q. And with regard to the 1950s in Order 2,
15 in New Jersey and New York, the producer-handlers then
16 controlled about 50 percent of the milk supply there,
17 correct?

18 A. I don't have that. I don't have that
19 number.

20 Q. Okay. Does that sound right?

21 A. I couldn't tell you.

22 Q. You do have your copy of the Early
23 Development of Milk Marketing Plans?

24 A. It's at my -- at the table.

25 Q. Why -- well, I'll tell you what.

1 Somebody can hand it to me, and I'll hand it to you.

2 JUDGE CLIFTON: Thank you, Mr. Beshore.

3 MR. BESHORE: This is my copy.

4 THE WITNESS: This is Marvin's copy.

5 Thank you.

6 Q. Thank you, sir. Top of page 36.

7 JUDGE CLIFTON: Before you answer the
8 next question, would you read into the record
9 the title of that document?

10 THE WITNESS: The title of this document,
11 your Honor, is Early Development of Milk
12 Marketing Plans in the Kansas City, Missouri
13 Area. And it is dated May 1952. It is
14 Marketing Research Report Number 14 from the
15 United States Department of Agriculture,
16 Production and Marketing -- I'm sorry,
17 Production and Marketing Administration, Dairy
18 Branch, Washington, D.C.

19 MR. BESHORE: If I might note, your
20 Honor, it is one of the documents for which
21 Dr. Cryan has requested that official notice be
22 taken. It's on his official notice list, which
23 is page 21 of Exhibit 23.

24 JUDGE CLIFTON: Thank you very much.

25 MR. RICCIARDI: Thank you, your Honor.

1 BY MR. RICCIARDI:

2 Q. Now, producer-distributors or
3 producer-handlers in the 1930s argued, among other
4 things, that they shouldn't be required to pay into the
5 pool because they were balancing their own needs and not
6 relying upon the remainder of the pool, correct?

7 MR. BESHORE: Is there a page reference,
8 your Honor?

9 MR. RICCIARDI: Page 36 at the top.

10 MR. BESHORE: Thank you.

11 Q. And let me read a specific sentence from
12 you -- for you at the bottom of the first paragraph on
13 page 36.

14 The producer-distributors considered that
15 problems of seasonal production and seasonal surpluses
16 were not their problems. They did not see why they
17 should be compelled to pay a toll through the
18 equalization pool to subsidize producers who supplied
19 the pasteurizing distributors. Did I read that
20 correctly?

21 A. Yes.

22 Q. Now, the position of producer-handlers
23 even early on, before the AMAA, was that they were
24 balancing -- given their integrated operation, they were
25 balancing their own needs and therefore they should not

1 have to pay a toll or a tax to the regulated community,
2 right?

3 A. That's what it says.

4 Q. And that was their position then and
5 that's their position now, correct?

6 A. If you say so.

7 Q. Well, I'm asking you. You're the one
8 that referenced the document, that's why I brought it
9 up.

10 A. Well, the document also indicates that
11 the Department concluded it was appropriate to regulate
12 them. And ultimately only made provision for exempting
13 them after they were unable to regulate them, which is
14 very different.

15 The Department's conclusion was that they
16 should be regulated. And it was the practical
17 consideration that led to their being exempted.

18 Q. I understand your position, just wanted
19 to point out some other points of the document.

20 A. Very good.

21 MR. RICCIARDI: Thank you very much.

22 JUDGE CLIFTON: Thank you, Mr. Ricciardi.

23 Do we need a short break? Mr. English, do you
24 have a suggestion for how we might proceed?

25 MR. ENGLISH: Subject to the comfort

1 needs of your Honor, the court reporter and
2 Dr. Cryan, I would hope that we could move
3 forward. I don't know -- I have what I hope
4 will be a series of very focused questions about
5 one issue entirely. I don't know whether the
6 government has any questions, but I would like
7 to see if we can get Dr. Cryan done tonight.

8 JUDGE CLIFTON: Now, I haven't heard from
9 Mr. Yale at all, nor have I heard from
10 Mr. Carroll or Mr. Vetne on the second
11 go-around. Haven't heard from Mr. Miltner on
12 the second go-around. I think we can finish,
13 but -- you know, I'm willing to keep going. How
14 do all of you feel?

15 MR. ENGLISH: Swell.

16 JUDGE CLIFTON: Let's finish. Everyone
17 is in agreement to finish? Are you fine to
18 finish without nourishment? Are you doing fine?

19 MR. RICCIARDI: Can I call my
20 cardiologist, Judge?

21 JUDGE CLIFTON: No, don't let him know
22 what we're doing here. All right. Let's take a
23 ten-minute break. Please be back and ready to
24 go at 7:26.

25 (A recess was taken from 7:16 to 7:28.)

1 (Exhibit 74 was marked for
2 identification.)

3 JUDGE CLIFTON: Let's go back on record.
4 We're back on record at 7:28. I have been given
5 a document that Mr. English has provided the
6 number of Exhibit 74, that's 7-4. Up at the
7 top, it has Exhibit 12 underlined, and the
8 typewritten portion says, Adjusted For
9 April 2006 Amendments to Arizona and PNW Orders.

10 Now, before Mr. English proceeds with
11 examination of this witness, I would like to
12 determine whether there would be any other
13 cross-examination, either from those who have
14 already cross-examined or have not yet had an
15 opportunity?

16 MR. BESHORE: What was --

17 JUDGE CLIFTON: Before Mr. English
18 begins, which I assume will be more or less a
19 redirect, I would like to see if there's any
20 other cross-examination, either from someone
21 who's not yet cross-examined or has additional
22 questions? Mr. Yale.

23 MR. YALE: I have new questions.

24 JUDGE CLIFTON: You have new questions?

25 MR. YALE: He can go ahead, I'm fine. He

1 might even answer some of mine.

2 JUDGE CLIFTON: He objects to my
3 characterization of his questioning. All right.
4 So Mr. Yale, he can go ahead before you ask your
5 additional questions?

6 MR. YALE: I'm fine with that.

7 JUDGE CLIFTON: Okay, Mr. English you may
8 proceed.

9 MR. ENGLISH: Thank you, your Honor, I
10 don't think it's in the form of redirect, but it
11 does respond to something that's been up there,
12 but since I am not his lawyer, I don't think
13 it's truly redirect.

14 CROSS-EXAMINATION

15 BY MR. ENGLISH:

16 Q. Dr. Cryan, I'm going to focus on one set
17 of questions only. Exhibit 12, has as originally
18 provided, lists -- and this was data, I believe, that
19 was requested by Mr. Carroll, and I appreciate the fact
20 that he requested the data. But it provides sales of
21 fluid milk products in Federal Milk Marketing Orders by
22 producer-handler, by order, 2000 to 2008, correct, the
23 original?

24 A. Yes.

25 Q. Could you tell me whether a comparison of

1 2000 numbers on the left-hand margin is comparable as
2 stated to 2008 numbers?

3 A. No, it's not.

4 Q. Why not?

5 A. Well, for a number of reasons. The --
6 first of all, the Western Order is no longer -- no
7 longer exists.

8 For another, there are large -- large
9 volumes from Pacific -- former producer-handlers in the
10 Pacific Northwest that are now regulated plants. And
11 I'm not sure how far back it went. But Sarah Farms in
12 Arizona was -- was operating as a producer-handler for
13 quite some time with substantial volumes as well.

14 So it doesn't really reflect the volumes
15 of -- the comparable volumes of the plants that were
16 producer-handlers, that the number of these plants have
17 changed because of regulation. Again, the Western
18 volumes, Sarah Farms is being regulated by regulation.
19 And at least three plants -- at least two plants in the
20 Pacific Northwest have also been regulated based on
21 changes in regulation.

22 Q. Now, the document that's been marked as
23 Exhibit 74, without going into the details, is it a
24 modified version of Exhibit 12?

25 A. Yes.

1 Q. Okay.

2 A. Yes, it is.

3 Q. Its headline is adjusted for April -- so
4 it says, Exhibit 12, Adjusted for April 2006 Amendments
5 to Arizona and Pacific Northwest Orders?

6 A. That's the title. It is also adjusted
7 for the Western volumes, for 2004.

8 Q. Thank you, I knew there would be some
9 error in my typing.

10 And then otherwise at first, the chart is
11 the same through footnote 5, correct, as Exhibit 12?

12 A. That's right.

13 Q. Given the past hearing, which began in
14 2004, correct?

15 A. Began in 2003, right.

16 Q. 2003, I'm sorry. So we have latter
17 months of '03, we have '04, we had '05. Were you here
18 yesterday for the testimony of -- I'm sorry, yesterday,
19 it does all blend together. Were you here last week for
20 the testimony of Mr. Krueger?

21 A. Yes, I was.

22 Q. And did you hear his testimony that he
23 had calculated both at the time of the hearing and as we
24 now know for April of -- the month of April 20 -- I'm
25 sorry, March 2006, and comparing it to April 2006, the

1 volume of Sarah farms?

2 A. Yes.

3 Q. And what volume did you hear?

4 A. About 17 million.

5 Q. And then you attended the earlier
6 proceeding, correct?

7 A. That's right.

8 Q. The earlier proceeding being the
9 proceeding in the Pacific Northwest and Arizona,
10 correct?

11 A. That's right.

12 Q. And while you haven't testified to it and
13 others may testify to a number, we know something about
14 Edaleen because they were an exempt producer-handler and
15 now they're not an exempt producer-handler, and so they
16 were at least 3 million pounds each, correct, per month?

17 A. Edaleen and Smith Brothers.

18 Q. And then Mallorie's, we know from their
19 own testimony, and also testimony that people believe
20 they were about 3 million pounds, they're still a
21 producer-handler today, correct?

22 A. That's right.

23 Q. So by definition there's some volume that
24 they have given up since then, correct, in order to
25 remain a producer-handler, correct?

1 A. Right, that's right.

2 Q. And then finally, as you, yourself, noted
3 a moment ago, the Western Order, it doesn't exist
4 anymore, correct?

5 A. It was terminated.

6 Q. Correct. So if you're going to do an
7 apples to apples comparison going forward to 2008, it
8 would be logical to do something about that
9 4.6 million pounds that's showing up in the Western
10 Order, correct, and adjust for it?

11 A. In order to get a number that is
12 exclusive of changes associated with regulatory changes,
13 you have to make these adjustments.

14 Q. So looking at 2004 for a moment, which
15 was during the hearing but after the hearing started, if
16 you have 17 million pounds a month for Sarah Farms and
17 it's 12 months, that works out to be 204 million pounds,
18 correct?

19 A. That's right.

20 Q. And for Edaleen, while there may have
21 been testimony at that proceeding that they were more
22 than 3 million pounds, for this purpose, being
23 conservative, that would be 36 million pounds a year,
24 correct?

25 A. That's a lower limit, that's right.

1 Q. And for Smith Brothers, similarly, almost
2 exactly like Edaleen, it would be a lower limit,
3 correct?

4 A. That's right.

5 Q. For Mallorie's, we don't know, right?
6 Zero plus?

7 A. That's right. It could be 500,000, it
8 could be 2 million. We don't know the number.

9 Q. And then quite simply we can adjust -- in
10 order to do a 2004 to 2008 comparison, we could adjust
11 for the Western Order, correct?

12 A. That's right.

13 Q. And the totals of those would be 378.2
14 million pounds?

15 A. That's right.

16 Q. And that's really an upper limit, because
17 there was testimony in the earlier proceeding about
18 Edaleen and Smith Brothers being above 3 million pounds,
19 is that correct?

20 A. Your numbers for all three of those
21 Pacific Northwest plants are conservative.

22 Q. And so this is sort of an upper limit,
23 it's really lower than that, correct?

24 A. Probably.

25 Q. And so similarly for 2005, it's basically

1 the same analysis?

2 A. That's right.

3 Q. And then finally 2006 is different. How
4 is it different?

5 A. Well, in 2006, the producer-handler
6 decision in the Arizona and the Pacific Northwest went
7 into effect. So the numbers have already -- after
8 March, the numbers exclude those plants, so we only have
9 to remove their volumes for the first three months of
10 the year in order to adjust the number for comparison.

11 Q. And, again, those adjustments for Edaleen
12 and Smith Brothers are on the conservative side?

13 A. Yes.

14 Q. Do you see a trend from 2004 to 2008 of
15 producer volumes net of what was done in the regulatory
16 world in terms of Pacific Northwest and Arizona?

17 A. Yes. There's very steady growth. Not
18 quite a doubling, but -- not, you know, the magnitude of
19 a doubling.

20 Q. And that magnitude would be greater if
21 there's testimony later in this hearing about the size
22 of Edaleen and Smith, that they were actually more than
23 3 million pounds each, correct?

24 A. That's right. In fact, it's very
25 substantial growth from 2004 to 2008.

1 MR. ENGLISH: Your Honor, that's all I
2 have. I move -- it was marked Exhibit 74?

3 JUDGE CLIFTON: It is.

4 MR. ENGLISH: I move the admission of
5 Exhibit 74.

6 JUDGE CLIFTON: All right. Would anybody
7 like to begin with voir dire on this document
8 before we again get to any objections?
9 Mr. Ricciardi.

10 MR. RICCIARDI: I would, thank you, your
11 Honor.

12 VOIR DIRE EXAMINATION

13 BY MR. RICCIARDI:

14 Q. I'm Al Ricciardi here from AIDA. First
15 of all, did you prepare Exhibit 74 in conjunction with
16 Mr. English?

17 A. No.

18 Q. Okay. Who prepared it?

19 A. Mr. English did, based on our
20 discussions.

21 Q. So you had discussions with him in the
22 room outside of the hearing room and you talked about
23 this exhibit?

24 A. We -- he presented the idea and we
25 discussed it and I agreed that that was an appropriate

1 way to compare apples to apples.

2 Q. And did he give you any information that
3 you relied upon in the preparation of this document?

4 A. No, I was -- I was familiar with all the
5 facts upon which this is based, and that is all the
6 numbers upon which this is based.

7 Q. Let's actually talk about the assumptions
8 upon which this is based for a minute. You assumed for
9 Sarah Farms that they were in fact processing 17 million
10 pounds per month for every month in 2005 and every month
11 in 2004, correct?

12 A. 2004, 2005, that's correct.

13 Q. Okay. And you have no data at all to
14 establish that they in fact were processing at that
15 level for every month for those years, correct?

16 A. That they were processing every month?

17 Q. That level, 17 million. You assumed for
18 '04, '05 and actually all '06 through April, that every
19 month they processed 17 million pounds per month,
20 correct?

21 A. That's correct.

22 Q. Okay. And that assumption is based, as I
23 heard the testimony, on something that was stated by
24 Mr. Krueger about the month of April of 2006, correct?

25 A. No, that's not what he said.

1 MR. ENGLISH: No.

2 Q. Well, hang on a second. Tell me, then,
3 what you based your number upon.

4 A. There were -- there were several sources
5 that were all consistent. The calculation based on the
6 money requested in the 15A case. I think 15A.

7 Q. For April of 2006, correct?

8 A. For that specific month.

9 Q. Yes, go ahead.

10 A. The same number was generated at the 2003
11 hearing. It was presented as the best estimate of their
12 volume, and it was pretty well borne out by the numbers
13 from 15A.

14 Q. Best assumption regarding their volume
15 for any month other than April of 2006, correct?

16 A. That's what we have to work with.

17 Q. Okay. So you make an assumption that not
18 only did they process 17 million in April of 2006,
19 you're assuming going back 2 1/2 years that every month
20 that was their volume, correct?

21 A. That's right.

22 Q. And this exhibit assumes that without a
23 hard factual basis, correct?

24 A. Best information we have.

25 Q. The best information is an assumption,

1 and you want the Secretary to rely upon that assumption?

2 A. I would -- the Secretary will give such
3 weight as is reasonable to the testimony of Mr. Krueger.

4 Q. For April of 2006?

5 A. Well, the -- Mr. Kreuger's testimony from
6 the 2003 hearing is on the record. I think it's -- I
7 think you're suggesting that it be noticed.

8 Q. I'm not suggesting it be noticed at all.

9 A. That's the remedy to what you're saying.

10 Q. The remedy -- what I want is testimony
11 from a witness that's not making assumptions. And what
12 we've got is, as Exhibit 74 shows, that with regard to
13 Sarah Farms, you've made assumptions.

14 MR. RICCIARDI: That will be my point on
15 voir dire, Judge. Thank you.

16 JUDGE CLIFTON: Thank you, Mr. Ricciardi.
17 Mr. English.

18 VOIR DIRE EXAMINATION

19 BY MR. ENGLISH:

20 Q. Did you attend the earlier hearing?

21 A. I did.

22 Q. Did you hear an analysis by Mr. Krueger
23 at that time about the size of Sarah Farms?

24 A. I did.

25 Q. Did he not say that 17 million was his

1 estimate then, in 2003?

2 A. Yes, yes.

3 MR. RICCIARDI: Let me object.

4 Q. Did he not confirm that in this
5 proceeding?

6 MR. RICCIARDI: Let me object to this,
7 Judge.

8 JUDGE CLIFTON: Mr. Ricciardi?

9 MR. RICCIARDI: My objection here is now
10 we've got two things. We have him, by the way,
11 telling us before that it was six years ago, I
12 can't remember. But now coming in and stating
13 that, oh, yeah, that's what he said. So the
14 record will be whatever the record is. We
15 haven't gone ahead and said specifically that's
16 what he testified to, that was confirmed or
17 anything like that.

18 We're really going into what amounts
19 to -- what could be a double hearsay issue and
20 trying to extrapolate based upon this witness'
21 recollection that he says is faulty. So I've
22 got a problem with it.

23 JUDGE CLIFTON: Mr. English.

24 MR. ENGLISH: I think I may have muddied
25 the waters little bit and the record will speak

1 for itself, but I think Mr. Krueger, when he
2 testified last week, said that it was amazing
3 how this number was the same number he testified
4 to several years ago. And so, you know, that
5 record will stand for itself.

6 I believe this witness can testify about
7 what he heard another witness say on -- in
8 examination under oath. And I think the point
9 stands. But I think Mr. Krueger last week said
10 that this was their estimate then and look what
11 it turned out to be.

12 JUDGE CLIFTON: Mr. Beshore, would you
13 like to be heard?

14 MR. BESHORE: Just to reiterate the point
15 that Mr. Krueger testified in this hearing that
16 that was his testimony in '04, the testimony he
17 had determined in '04, and he also testified
18 that he was available for cross-examination by
19 Mr. Ricciardi or anybody else with respect to
20 that as well as his other assertions. And I
21 would also note that a chart calculated on the
22 basis of testimony is not an assumption.

23 JUDGE CLIFTON: Thank you, Mr. Beshore.
24 Mr. Ricciardi.

25 MR. RICCIARDI: A chart premised upon one

1 month that was testified to, and 2 1/2 years of
2 assumptions by a witness who has already been
3 75 percent wrong on his assumptions, as we've
4 shown in this hearing --

5 JUDGE CLIFTON: On one item.

6 MR. RICCIARDI: Your Honor, one item,
7 maybe this item, too. So the answer is, there's
8 not enough data to actually have this type of a
9 presentation admitted.

10 JUDGE CLIFTON: All right. Thank you.
11 Any other objections now? I'm going to take
12 that as -- everything that Mr. Ricciardi has
13 raised, I'll include in my analysis of what to
14 do with objections. Are there any other
15 objections? None.

16 Over objection, I do admit into evidence
17 Exhibit 74. Its frailties go to the weight, not
18 its admissibility. And the Department has been
19 adequately warned to scrutinize the figures by
20 the objections and the voir dire.

21 Other cross-examination? Mr. Yale.

22 CROSS-EXAMINATION

23 BY MR. YALE:

24 Q. Benjamin F. Yale, Continental Dairy
25 Products and Select Milk. I guess it's good evening,

1 Mr. Cryan.

2 A. Good evening.

3 Q. And I'm impressed with your stamina. I
4 don't think I could put up with this the length that you
5 have and I'll try to make it as quick as possible.

6 I want to focus on the issue of the
7 grandfathering clause and the language that you used and
8 why you're at that position, okay?

9 And the first thing, you have mentioned a
10 number of times in your testimony and answers to
11 examination and the like that -- about this advantage
12 that producer-handlers have. And I want to focus on the
13 3 million pounds. And it's kind of a -- a flip of the
14 questions that John Vetne was asking you in regards to
15 some testimony you gave five or six years ago.

16 And it has to do -- let me try to see if
17 I can state this the right way. You have no evidence as
18 to the cost to operate a producer-handler in the range
19 of 2 to 3 million pounds, is that correct?

20 A. That's correct.

21 Q. All right. So is it -- it's also safe to
22 say that you have no evidence that would show
23 implementation of Proposals 1 and 2 would or would not
24 put existing producer-handlers in that size range at a
25 disadvantage? Let me back up a minute.

1 You don't have any evidence right now to
2 indicate they actually have a price advantage in the
3 market based upon their cost of production and their
4 cost of processing, right?

5 A. Are you talking about their -- their --
6 what their -- what are you comparing their -- what price
7 are you talking about and what are you comparing it to?

8 Q. First of all, we're going to be talking
9 about 3 million pounds or smaller producer-handlers.

10 A. Okay.

11 Q. All right? Now, their cost is whatever
12 it costs them to produce the milk plus their cost of
13 processing, kind of a grass to glass, to get it to the
14 consumer, right? Or to the store, wherever they market
15 it. That's their -- economic costs will determine their
16 profitability, right?

17 A. Yes.

18 Q. Okay. And over time --

19 A. Looking at it as an integrated firm,
20 considering it as a -- you know, considering the bottom
21 line of the firm only.

22 Q. Right.

23 A. Yes.

24 Q. Now, they compete with bottlers who buy
25 milk under the Federal Order program, or pay under the

1 Federal Order program, do not have own-farm production,
2 and their cost would be the costs that they have to pay
3 for the raw milk plus their processing costs, right?

4 A. As long as you're including in their cost
5 for what they have to pay for the milk. As long as you
6 include in their cost of raw milk, what they have to pay
7 the producer settlement fund.

8 Q. I think that's assumed, because they have
9 to pay minimum Class I prices.

10 A. I want to make sure it's clear.

11 Q. If you take those two costs, that
12 3 million pounds that's aggregated, their costs of grass
13 to glass, and you look at the total cost of the fully
14 priced handler, you have not presented any evidence that
15 would indicate that one or the other has a net economic
16 advantage in what their unit cost is in marketing that
17 milk, right?

18 A. Well, if all other things are equal, that
19 is if the plants and the farms involved are -- are
20 identical, then the advantage to the regulated
21 producer-handler is equal to the payment to the producer
22 settlement found.

23 Q. Assuming that the cost of production is
24 less than the uniform price, right?

25 A. I'm sorry, ask me the question again.

1 Q. I said, you know, if you -- if you
2 compare two processors of the same size, regulated and
3 unregulated at 3 million pounds, although you make that
4 hypothetical, that the price advantage is still the
5 Class I price plus processing for the regulated handler
6 as compared to the cost of production for milk, plus the
7 processing for the producer-handler, right?

8 A. I -- I have to apologize, my phone keeps
9 vibrating and it's really --

10 Q. Oh.

11 A. -- real difficult to focus. So I
12 apologize.

13 Q. And I wasn't calling you, either.

14 A. I know. Ask me again.

15 Q. My hands are off my phone.

16 A. One more time.

17 Q. All right.

18 A. I'll ask you one more time to repeat the
19 question, I apologize.

20 Q. No, and trust me, I know where you're at
21 right now. This is -- this is a demanding thing and I
22 respect your ability to hold up with this.

23 Assuming, again, a producer-handler in
24 that 2 to 3 million pound range, and a regulated handler
25 fully priced in 2 to 3 million, okay? The difference in

1 their advantage would be for the producer-handler over
2 the long term, it's his cost of production for his milk
3 plus his processing as compared to the minimum prices
4 plus cost for production for the fully priced and
5 regulated handler. That's the comparison, right?

6 A. I'm sorry, you're losing me. You're
7 talking about -- are you talking about -- are you trying
8 to compare the costs for the producer-handler as an
9 integrated firm with the costs of the regulated handler
10 by itself? Is that what you're trying to do?

11 Q. Yes.

12 A. Okay.

13 Q. The regulated handler would pay the
14 Class I price, plus they have their costs of whatever it
15 takes to receive the milk, process it and distribute it,
16 right?

17 A. Right.

18 Q. And the producer-handler has the cost of
19 producing the milk plus its cost to receive it, process
20 it, bottle it and distribute it, right? Those are --
21 that's how -- that's how you would compare the two in
22 terms of an economic advantage or disadvantage, right?

23 I'm not asking you to compare the two,
24 but let's start right there. That would be the basis to
25 compare apples to apples in terms of their costs.

1 A. It wouldn't take into account the impact
2 on the farm in the -- that's supplying the regulated
3 handler. But in some sense that's correct, yes.

4 Q. Okay. And all I was looking at is the
5 plant side, not the producer side, so your answer, I
6 think, is consistent with what I was trying to get at,
7 okay?

8 The question I really have gets back --
9 there's nothing that you -- or you've seen in the record
10 so far that would indicate, for a 2 to 3 million pound
11 producer-handler, whether there is, in fact, an economic
12 price advantage in their marketing of milk to the buyers
13 of packaged milk as compared to any regulated handler,
14 either their size or bigger there's nothing in the
15 record that the Secretary could look on and say, they
16 actually have this advantage or this disadvantage?

17 A. The regulated handler is able to pay
18 the -- the producer he's paying directly with a -- less
19 by the amount that's being contributed to the -- to the
20 producer settlement fund.

21 It's -- I mean, I think that's really the
22 clearest way of looking at it. You line the two of them
23 up, and the difference is that the regulated handler is
24 paying into the producer settlement fund. That makes
25 that much less money available.

1 If both plants are selling in the same
2 market and can derive the same price, you know, in the
3 hypothetical, the handler that pays into the producer
4 settlement fund has less to pay for his own processing
5 and for his own -- and to his producer altogether than
6 the producer handler who's not paying into the producer
7 settlement fund.

8 Q. But their total costs, not what they have
9 but their actual costs, from a balance sheet income
10 statement basis for a producer-handler versus a
11 regulated handler, for the regulated handler it doesn't
12 make a difference whether or not the producers -- what
13 they get, right? He just has to pay whatever price he's
14 negotiated, whatever the minimum price the order is. So
15 whether they can produce it at that price or not --

16 A. He cares what he has to pay the producer
17 because he has to meet the market.

18 Q. He has to meet the market?

19 A. Yeah.

20 Q. But in terms of comparing an economic
21 value in terms of their ability to price milk to a
22 customer, the comparison has to be between the -- what
23 they pay for the milk or acquire their milk at, in the
24 case of a producer who produces their own milk, plus
25 their cost of processing? And in that equation for the

1 regulated handler, they do have a payment, you know --
2 they have minimum payments they have to make under the
3 Order. But that doesn't -- in the end, that's included
4 in this comparison, right?

5 A. In the long return, the regulated handler
6 has to be able to pay the producer a price that covers
7 his cost of production. So in terms of the -- in terms
8 of the -- in terms of the theory, in terms of the
9 economics, in the long term, you can say that the
10 producer-handlers' milk cost is his cost of production,
11 but that the regulated handlers cost for milk is also
12 the cost of production. If their processing costs are
13 the same, they're not done. Because the difference is
14 that the regulated handler, on top of all that other
15 cost, has to pay into the pool or the producer
16 settlement fund and the producer-handler does not.

17 Q. You have testified -- and this is really
18 what I'm trying to get back to. You have testified that
19 producer-handlers in general -- and I want to get it
20 down to the 2 or 3 million pounds -- have a regulatory
21 advantage, a price advantage in the marketplace over
22 regulated handlers. And that focus has to be on the --
23 on their actual costs to deliver the product to a
24 consumer or to a buyer, right? I mean, that's where you
25 determine where the advantage is or not, right?

1 A. And that's what we've been talking about.

2 Q. I understand that. But at the end of the
3 day, the producer handler pays into the pool or not, or
4 just pays for his -- out of his cost of production --
5 let me phrase it a different way, okay?

6 You would agree, would you not, that
7 under your proposal without a grandfathering clause, a
8 3 million pound producer-handler would have, in addition
9 to costs it has today, the additional assessment of the
10 difference between Class I and the uniform price in that
11 Order, right?

12 A. That's right.

13 Q. And do you know --

14 A. And that captures most effectively the --

15 Q. I understand that's your theory. So the
16 question I have is: Do you know whether or not, under
17 the current marketing of milk by producer-handlers in a
18 size of 2 to 3 million pounds, whether or not the
19 addition of that charge of the uniform to Class I price
20 will put them at a price disadvantage or advantage in
21 net prices that they sell their product to buyers? Do
22 you have anything that can tell whether they would still
23 be at an advantage or not?

24 A. If they -- well, if they're competing
25 with regulated plants of the same size and structure and

1 identical, everything's identical, then they would --
2 they would basically lose an advantage they have now and
3 be the same.

4 But of course they -- a 2 million or
5 3 million pound plant is smaller than the average, and
6 that's really where the justification for -- for
7 allowing these -- these existing producer-handlers to be
8 grandfathered comes from.

9 Q. Thank you, that's where I want to get to.
10 In the real market, they are competing -- the smaller
11 PDs are really competing against much larger units,
12 right?

13 A. And my testimony, I think, is pretty
14 clear on that. I mean, the same principle that applies
15 to the 450 discussion -- 450,000 pound discussion,
16 applies to the grandfather. And it just requires
17 certain other qualifications to avoid a business model.
18 An integrator business model, we think, would not be
19 helpful for the dairy industry.

20 Q. Let's move on to some of these other
21 topics. Maybe it's my own exhaustion and I'm not able
22 to phrase the question. So let's talk about your
23 proposal that you find at page 15, and I've got some
24 specific questions. This is under your paragraph (5), I
25 guess it would be (e)(5). Under your proposal

1 language --

2 A. (d)(5).

3 Q. Pardon me?

4 A. It's (d)(5).

5 JUDGE CLIFTON: The (e) actually has a
6 strike-out through it.

7 A. The (e) is stricken.

8 Q. From this distance, I wasn't seeing -- I
9 wasn't sure that was a strike-out. Thank you. (d)(5),
10 okay.

11 Now, have you done any research to
12 determine whether or not the Secretary has the authority
13 to vest in some people a right based upon prior acts
14 that can go forward or not? Has there been any look at
15 that authority?

16 MR. BESHORE: Objection.

17 JUDGE CLIFTON: Mr. Beshore.

18 MR. BESHORE: Objection. It's asking for
19 a legal conclusion.

20 MR. YALE: I'm just asking whether
21 they've done any look at it. I'm not asking
22 what his conclusion was. I just want to know
23 whether it was looked at.

24 JUDGE CLIFTON: By anybody on his team?

25 MR. YALE: Yeah. If it's been a

1 proposal. I'm just -- it's a simple question.
2 I just want to know whether it's been thought
3 about.

4 JUDGE CLIFTON: By whom?

5 MR. YALE: By Mr. --

6 JUDGE CLIFTON: Dr. Cryan?

7 MR. YALE: By Dr. Cryan or any of his
8 team. It's not a trick question.

9 A. It's been thought about, and I guess
10 there are different opinions. I assume we will attempt
11 to address that legally in our post-hearing brief. And
12 so we've thought about it.

13 Q. It wasn't -- I was trying to see if we
14 can help the Department with some information on
15 supporting having a grandfather clause that was
16 different. So I wasn't --

17 A. I understand, Ben. We're -- we are aware
18 of the question.

19 Q. Or is it just going to be a legal one,
20 and the Secretary is going to have to make a decision
21 based on his own expertise or whatever arguments we may
22 present in brief?

23 A. That's right.

24 Q. I was just hoping there was something
25 else we could do to help him along. But I guess we

1 don't.

2 A. I can say there are other examples.

3 Q. What are some of those examples?

4 A. There are -- there is a -- there's some
5 programs that I guess had been problematic. There's
6 some sort of a cheese import allotment or something like
7 that. And there's -- I mean, there's many -- many
8 examples in other -- other kinds of regulation. Like
9 land use regulation, there's lots of grandfathering.
10 And so --

11 Q. So it's not going to be a unique thing
12 for the Department of Agriculture to do some
13 grandfathering?

14 A. It's my understanding that it's not, but
15 of course we're going to have to explore that more.

16 Q. Okay, very good. I hoped we could help
17 more, but you know, it's fine.

18 Now, in your proposal, you in (b),
19 (5)(b), you're aware that in the Southwest there is a
20 producer-handler by the name of Nature's Dairy, right?

21 A. Yes.

22 Q. And under the Southwest Order currently,
23 that producer-handler can purchase up to three loads of
24 milk per month without being subject to -- without
25 losing the producer-handler status, are you aware of

1 that?

2 A. I wasn't aware of the specific provisions
3 in the -- in that market. But I'll take your word for
4 it.

5 Q. Okay. And this would change that
6 producer-handler -- assuming it's under 3 million and it
7 was existence under the other terms, that would be a
8 change in its regulatory status, would it not?

9 A. It would -- it would be. When we drafted
10 this, we started with the tightest regulations that we
11 thought were -- could be justified. And we'll see
12 how -- I don't think the -- we haven't put a lot of
13 thought into what the implications of the 150,000 pound
14 allowance is. But I don't imagine it's -- it would
15 ruin -- I would imagine if our proposal came out as is,
16 except it added a 150,000 pound allowance for Class I
17 purchases from pool plants, that that would break our
18 hearts.

19 Q. I would hope not. Now, there's two other
20 issues here I want to talk about in, again some
21 differences. One of those has to do with not owning any
22 other farm.

23 And if a -- there is a producer-handler
24 with full producer-handler status now, the Market
25 Administrator in its research and investigations

1 determine that it's okay for the owners of that to also
2 have an interest in a farm some distance from that
3 plant, and has found that to be consistent under its
4 interpretation of the rules today, is there a reason
5 that that should be changed as a result of -- I'm on a
6 grandfathering basis, I'm not talking make that
7 universally available for everybody, but under a
8 grandfather, is it appropriate that there be a change in
9 that?

10 A. I guess I would -- I guess I would say --
11 and, you know, we've discussed this a little bit. That
12 some of the -- some of the qualifications that we
13 would -- some of these qualifications are more necessary
14 if you have input, if you have an open producer-handler
15 definition than if you were grandfathering. Although
16 the -- and that's -- that's -- so even though there's a
17 place for these qualifications in the grandfathering,
18 there is some balance that has to be found.

19 Q. Now, as regards -- the other issue has to
20 do with the labeling. And I understand that your
21 testimony is the concern that somebody might be able to
22 aggregate a number of producer-handlers at 3 million or
23 less pounds and use the same label, and be able to
24 balance somehow or another between producer-handlers
25 over a large scale operation. Is that a fair --

1 A. I'm sorry, could you --

2 Q. On the labeling?

3 A. -- restate that?

4 Q. On the labeling.

5 A. The labeling.

6 Q. As I understand it, one of the
7 concerns --

8 A. That's right.

9 Q. -- is by having unique labeling, is to
10 make sure that somebody doesn't aggregate a number of
11 PDs and they use the same label?

12 A. That's the idea.

13 Q. All right. Under the grandfathering
14 clause as you just mentioned, that would greatly limited
15 the ability to aggregate anything, because we would only
16 be limited to what's already there as opposed to
17 anything new, right?

18 A. Yes.

19 Q. Again, if there is a small
20 producer-handler, I mean small in the sense of 3 million
21 or less, that currently does some private label for some
22 chain stores and has for some time, are you proposing
23 that their regulatory status because of that sale be
24 changed, or can that be grandfathered in as well?

25 A. Well, let me say -- let me say altogether

1 that it is important to find balance, but at the same
2 time it would be -- it would just be very disturbing if
3 the loopholes were allowed. That is to say, if the
4 qualifications were not such to -- to -- to prevent the
5 kind of proliferation that we're discussing.

6 You know, their -- it's appropriate to
7 seek a proper balance for grandfathering provisions.
8 But we don't want to -- we don't want to turn those
9 grandfathered plants into franchises for a larger
10 operation, if there may be some other way to establish
11 that. But the principle, I think, is sound.

12 It could be -- it could be -- for
13 example, if the grandfathered provision, that no other
14 plants under the same status had the same label, or that
15 may or may not be appropriate or adequate. It's -- but
16 it's important to fully avoid the kind of thing that
17 would lead to that, that proliferation, to lead to that
18 integrator model.

19 Q. The assumption is that the integrator
20 model requires that it be the identical label, right?

21 A. Well, that it's the same brand. We're
22 talking about a brand. And it's -- it's certainly
23 possible that -- I mean, I could picture a large chain
24 going on a -- on a -- on a buy local kick to happen to
25 allow them to exploit this with multiple labels. These

1 kinds of things are certainly possible. But the
2 principle and the spirit of the labeling is intended to
3 avoid that.

4 Q. Which brings now the question, how unique
5 is unique in the label?

6 A. I would say the Market Administrators
7 would know it when they see it.

8 MR. YALE: That's all the questions I
9 have. Thank you very much.

10 JUDGE CLIFTON: Other cross-examination
11 of Dr. Cryan? Mr. Vetne.

12 RECROSS-EXAMINATION

13 BY MR. VETNE:

14 Q. Just quickly, can you pull out Exhibit 74
15 which was recently marked as received?

16 A. I have it.

17 Q. All right. I believe that in response to
18 a question by Mr. English, you agreed with him when he
19 said that there has been significant growth in
20 producer-handlers in the Pacific Northwest. Do you
21 recall that question and answer?

22 A. I don't remember -- no, I don't remember
23 saying that. Ask me again.

24 Q. That there has been significant growth in
25 the producer-handler?

1 A. Please start from the beginning.

2 Q. That you -- your testimony was in
3 agreement with the statement that there has been
4 significant growth from producer-handler volume in the
5 Pacific Northwest?

6 A. No.

7 Q. Or Pacific Northwest and Arizona?

8 A. No. We testified -- I agreed that there
9 has been significant growth in producer-handler volume
10 across the system, if you adjust for these volumes that
11 have only been taken out of the producer-handler totals
12 because they've been regulated.

13 Q. Okay.

14 A. And volumes that continue to be out there
15 and that were built on that model.

16 Q. Okay. So if you're just looking at the
17 Pacific Northwest, if you take out those volumes, you
18 would take out Edaleen and Smith, conservatively
19 36 million pounds per year for 2004, to come up with
20 apples to apples to 2008, am I correct?

21 A. Yes. And conservatively --

22 Q. And conservatively?

23 A. -- because the actual numbers, they would
24 be larger and it would show more -- more substantial
25 growth.

1 Q. Okay. So if you take out those -- that
2 72 million pounds, you end up in 2004 with 119 million
3 and in 2008 with 79 million. There's no substantial
4 growth in those two numbers, would you agree with me?

5 A. In the Pacific Northwest?

6 Q. Yes. 119 million in 2004 to 79.7 in 2008
7 is not substantial growth in what you've described as
8 apples?

9 A. Say it again.

10 Q. In your description --

11 A. 72 million from what year?

12 Q. In 2004?

13 A. In 2004.

14 Q. Yeah. That was your reference.

15 A. So that gets you down to about 118 or
16 119 million pounds, yeah.

17 Q. 119 million, correct?

18 A. Yeah.

19 Q. In 2008, that's your apples to apples
20 conservative comparison?

21 A. Right.

22 Q. And in 2008, there's 79.7 million.
23 That's not growth at all, is it?

24 A. Well, it may reflect the fact that --
25 Edaleen and Smith Brothers were substantially larger,

1 and that Mallorie's reduction in volume was considerably
2 larger. It doesn't really demonstrate anything because
3 this is what you have as an upper limit for 2004, 2005.

4 Q. Okay. And all of these volumes, I think
5 would -- through other witnesses, government witnesses,
6 the in-area -- for the sales of fluid milk products by
7 producer-handlers is not necessarily sales by
8 producer-handlers within the identified markets, it
9 could be and frequently is sales from producer-handlers
10 elsewhere?

11 A. Well, I thank you for the opportunity to
12 point out that according to my understanding, Sarah
13 Farms' producer-handler plant specifically was --
14 because of its regulatory status, was focused on the
15 Arizona market. And that the Edaleen/Smith Brothers'
16 and Mallorie's plants are all in a rather large
17 northwestern market where they don't really have much
18 else to sell to. I know they sold a little bit in
19 Alaska and part -- and -- but that most of those volumes
20 certainly were within the markets where they were
21 located.

22 Q. In those markets. But for the other
23 markets, Central market, the Mideast market, the
24 Northeast market, among others, there would be
25 producer-handler volumes reflected in that data from

1 plants located outside of each of those areas?

2 A. Yes. But in terms of the total, in terms
3 of an aggregate, most -- almost all the sales from
4 these -- from these subtracted plants would also be
5 understood to be within the Federal Order marketing
6 areas.

7 Q. Yes, okay. And then one question
8 about -- back to transfer costs following your
9 discussion with Ben Yale. Would not transfer costs --
10 you've indicated it's Class I minus blend. Shouldn't it
11 be plant blend minus market blend, and if not, why not?

12 A. That's -- that's true. The -- not
13 transfer cost, but the pricing advantage that's -- that
14 the producer-handler has based on the regulation, based
15 on the exemption, is plant blend minus market blend.

16 Many of the plants are very high. And
17 it's true that the Class I minus market blend is an
18 upper limit for the plants that are very high Class I,
19 95 percent, 99.5 percent, the numbers are pretty close.

20 But I agree there are some plants where
21 they may be 80 percent Class I and at 40 percent Class I
22 market. And the difference is less than that full blend
23 to Class I gap.

24 Q. Okay. And so would you say that's not --
25 that's a plant cost comparison but not a transfer

1 cost -- what are the differences here?

2 A. Well, we're talking about -- when we talk
3 about this blend gap, this blend-to-blend gap or the
4 Class I to blend gap, we're talking about --
5 specifically about the pricing advantage that the --
6 that a producer-handler gains from not having to pay
7 into the producer settlement fund.

8 Q. Yes. So it's Class I in -- again, in
9 isolation?

10 A. In isolation.

11 Q. Okay. And with respect to regulated
12 plants that have Class II, III or IV like some
13 producer-handlers do, those plants, in effect, for
14 transfer cost, draw the difference between a lower class
15 III or IV or II price and the blend price, correct?

16 A. They draw -- they draw money from the
17 pool, manufacturing plants with a lower value plant
18 blend draw money from the pool, that's right.

19 Q. Well, for any use other than Class I, if
20 the blend price is higher, on that portion they draw.
21 Their balance sheet may have a net amount to the Market
22 Administrator, but if you're doing apples to apples on
23 that volume, that in effect would be a draw to offset
24 the Class I blend on the Class I portion, correct?

25 A. Yes.

1 Q. And producer-handlers, when they dispose
2 of milk in Class II, III or IV, never get a draw. On
3 that volume, they're -- regulated competitors have an
4 advantage because they draw from the pool on that -- on
5 those uses?

6 A. I -- I don't know what the -- what a pool
7 handler that receives -- I don't know how -- how that
8 milk is treated in an allocation when a pool handler
9 receives surplus milk from a producer-handler, so I
10 couldn't say.

11 Q. My question didn't -- didn't address
12 allocation to a pool handler. I'm talking about a
13 producer-handler --

14 A. You said something about -- okay.

15 Q. A producer-handler who has class II, III
16 or IV, unlike a regulated handler, does not get to draw
17 the difference, positive difference, between Class II,
18 III or IV and the blend?

19 A. Yes. I -- yes.

20 Q. But the regulated competitors do?

21 A. Well, if you -- if you break -- break it
22 down in that way to -- okay.

23 Q. I'm just looking at this in isolation the
24 way you looked at Class I minus blend in isolation.

25 A. I understand.

1 Q. You would agree with that?

2 A. Yes.

3 Q. You have to look at both of them?

4 A. Yes.

5 Q. Okay.

6 MR. VETNE: Thank you.

7 JUDGE CLIFTON: Thank you, Mr. Vetne.

8 Other cross-examination for Dr. Cryan?

9 RE-CROSS-EXAMINATION

10 BY MR. CARROLL:

11 Q. Dr. Cryan, I believe you testified, and
12 if I'm in error please tell me, that on occasion some
13 members of the co-ops have been interested in becoming
14 producer-handlers and they spoke to the co-op about that
15 opportunity. Do you recollect that testimony?

16 A. I didn't say they spoke to the co-op. I
17 said I hear stories from people, including all kinds of
18 people, but I've talked to producers who are interested
19 in doing it. It is a --

20 Q. You, yourself, have talked to
21 producers --

22 A. Yeah, I have.

23 Q. -- right?

24 A. I have followed them, yes.

25 Q. Now, in those conversations, did you

1 advise them about whether or not it would be to their
2 interest to become a producer-handler?

3 A. I did not advise them to do one thing or
4 another. I tried to point out the pros and the cons.

5 Q. All right. And when you pointed out the
6 cons, what did you say?

7 A. I said it's very -- it's a difficult
8 thing to do. It takes a certain set of skills to be
9 both a plant operator and farm operator and do them both
10 well. Just like it's very difficult to do any two
11 things that are -- that are substantially different, do
12 them both well at the same time.

13 Q. Did you also point out that there was an
14 investment, capital investment, that would have to be
15 made at least for -- the farmer would have to invest in
16 a plant of some kind?

17 A. That's -- I think that's the first thing
18 everybody understands. They know that it's a capital
19 cost.

20 Q. Did you ever discuss the relevant cost of
21 a plant as to what it would cost to put a plant on a
22 farm?

23 A. No.

24 Q. Okay. Do you recollect any producers
25 after you had that conversation who went ahead and

1 became producer-handlers or applied to
2 producer-handlers?

3 A. No, not the folks I've talked to.

4 Q. All right. Now, directing your
5 attention --

6 A. Not that I can confirm.

7 Q. I'm sorry, excuse me.

8 A. That's okay. I started up again.

9 Q. Are we ready to go?

10 A. Go ahead.

11 Q. Directing your attention to the
12 producer-handler exemption, it's not got the name
13 producer-handler, but there's an exemption for prior
14 producer-handlers. Directing your attention to that
15 portion of your proposal. Would that be assignable?
16 Could the producer-handler assign that exemption right
17 to anybody he wanted?

18 A. I would not presume too much about how
19 the Market Administrator would handle that. But the way
20 it is written, the intention is that a plant that was
21 operated by a producer-handler can -- can continue to
22 maintain exemption, which means the plant could be sold
23 and continue to operate with that exemption.

24 Q. All right.

25 A. But that the exemption could not be pick

1 up and moved somewhere else to a new plant --

2 Q. Okay.

3 A. -- to another location.

4 Q. And it would be subject to the 3 million
5 amount in any event, I believe, wouldn't it?

6 A. That's right.

7 Q. All right. Have there been any contacts
8 that you know of by Congressional offices concerning
9 your proposal to eliminate the producer-handler
10 exemption?

11 MR. BESHORE: Your Honor --

12 JUDGE CLIFTON: Let me hear the objection
13 before you answer, Dr. Cryan. Mr. Beshore.

14 MR. BESHORE: Two bases. One, object as
15 to relevance, as to what's the relevance of
16 Congressional contacts.

17 Secondly, the question is unanswerable.
18 It's contacts, you know, with who, when. It's
19 vague, impossible to answer and it's not
20 relevant.

21 If we get into Congressional, you know --
22 Congressional, you know, letters or contacts by
23 people or solicitations of Congressional acts or
24 whatever, what relevance does that have with
25 anything?

1 JUDGE CLIFTON: Mr. Carroll, do you wish
2 to persist in the question?

3 MR. CARROLL: I do, your Honor. And I
4 would like to reply if I could, to their
5 statements.

6 It certainly is not irrelevant if it had
7 anything to do with a proposal that later came.
8 There was -- there were two sets of proposals, 1
9 and 2, as the one set.

10 There was a later proposal, and my
11 question -- ultimately it will go to the point
12 as to whether or not that second proposal, the
13 one at the end, I believe it's 20 --

14 JUDGE CLIFTON: 6.

15 MR. CARROLL: -- 6 was influenced by the
16 fact that there are Congressional objections to
17 driving producer-handlers out of business.

18 JUDGE CLIFTON: Could you go right to the
19 heart of the matter and ask him that question?

20 BY MR. CARROLL:

21 Q. Yes, I will. Directing your attention to
22 Proposal Number 26, was -- did you receive any
23 Congressional objections to Proposals 1 and 2 that --
24 prior to the making that 26 proposal?

25 A. Not that I'm aware of.

1 Q. And is it your testimony, then, that
2 there was no contact with you by any Congressional
3 office on the subject of producer-handler exemption as
4 proposed in Proposals 1 and 2?

5 A. There might have been some secondhand
6 explanation, but no -- I think there was some secondhand
7 questions about it, but I don't recall any -- any
8 positions or desires expressed by any -- anyone.

9 Q. Can you describe the secondhand matters
10 you've just described?

11 MR. ENGLISH: Objection, your Honor.

12 JUDGE CLIFTON: Mr. English.

13 MR. ENGLISH: If a hearing record is
14 going to have meaning, describing a secondhand
15 objection is just so far beyond the bounds of
16 relevance. It just doesn't matter.

17 This is a hearing record about what is
18 going to be decided on this hearing record.
19 What somebody may or may not have asked in
20 Washington D.C. is not relevant to this
21 proceeding. And if it is, if that's at standard
22 of the relevance, then this hearing will not
23 ever end. I object to the question.

24 MR. CARROLL: This is the last of my
25 questions, in case any -- I'm as exhausted as

1 anyone else here. I just want to know what is
2 the second -- maybe will ask this question.

3 Q. What do you mean by secondhand objection?

4 A. I didn't say objection. I said
5 questions.

6 Q. Secondhand questions, you're right, I
7 misspoke, secondhand questions.

8 MR. BESHORE: Same objection. Relevance.
9 Double hearsay.

10 JUDGE CLIFTON: Mr. Carroll, you started
11 out wanting to know if inquiries from Congress
12 led to the Proposal Number 26. Is that still
13 what you really want to know?

14 MR. CARROLL: That's where I am, your
15 Honor, yes.

16 JUDGE CLIFTON: All right. Can you
17 reword your question so that you're focusing on
18 whether any inquiries from Congress led to the
19 Proposal Number 26 being added?

20 Q. Thank you.

21 Are there any -- were there inquiries for
22 Congress that led to the Proposal Number 26?

23 A. Not to my knowledge.

24 MR. CARROLL: Thank you.

25 JUDGE CLIFTON: Thank you, Mr. Carroll.

1 Just a moment. I'll give Mr. Carroll another
2 moment.

3 Q. This is on the subject of plants, not on
4 the other subject. Would it be possible to renovate the
5 plant and build a plant under your proposal, build an
6 additional plant, enlarge the plant and make changes in
7 the plant itself?

8 A. I -- I believe -- I mean, that would
9 be -- those are the kind of details I would expect will
10 be addressed administratively. But I don't see why a
11 plant couldn't be renovated. It's still the same --
12 essentially, the same plant. I don't know why a plant
13 that burned down, for example, couldn't be replaced.
14 But I would not presume that that would be the
15 conclusion of the Market Administrators in the
16 Department.

17 Q. Could the --

18 MR. WOODY CARROLL: Completely new plant.

19 Q. Could the producer-handler plant
20 exemption be transferred to another producer-handler?

21 A. To another owner?

22 Q. Another owner, right.

23 A. In the same plant?

24 Q. Same -- same physical facility.

25 A. I think I've said -- I've answered that

1 question several times. I've said yes.

2 Q. All right.

3 A. That's my -- that's how it's written.

4 MR. CARROLL: All right. Thank you very
5 much.

6 JUDGE CLIFTON: Thank you, Mr. Carroll.

7 Any other questions of Dr. Cryan?

8 Mr. Tosi, do you have any questions of
9 Dr. Cryan?

10 MR. TOSI: Yes, I do, your Honor.

11 JUDGE CLIFTON: Thank you.

12 CROSS-EXAMINATION

13 BY MR. TOSI:

14 Q. Dr. Cryan, does the Department consider a
15 distributing plant's costs with respect to the minimum
16 prices it establishes and imposes upon them?

17 A. I don't believe so.

18 Q. Do you know if the Department has ever
19 accommodated regulated handlers in that context -- I
20 mean, distributing plants with respect to their
21 differing costs?

22 A. Of milk procurement or of processing?

23 Q. Their differing plant operational --

24 A. No.

25 Q. -- costs?

1 A. No.

2 Q. With respect to issues that might relate
3 to disorderly marketing, I want to throw a couple --
4 excuse me, I want to throw several scenarios at you and
5 ask you to answer whether or not you think they're a
6 disorderly marketing condition.

7 Would an example of a disorderly
8 marketing condition be if the Department were to set
9 unequal class prices to similarly situated handlers?

10 A. In the same location?

11 Q. Yes. That's what I mean by similarly
12 situated.

13 A. Yes.

14 Q. Okay. Would it be an example of
15 disorderly marketing if we did --

16 A. No. Similarly situated, different class
17 prices but the -- the same class -- different prices for
18 the same class for similarly situated plants?

19 Q. Yeah.

20 A. Yes.

21 Q. For example, if we had two handlers that
22 were in the \$2 Class I pricing zone, that would be the
23 Class I differential, for example?

24 A. Uh-huh.

25 Q. And if we charged -- if we decided to

1 charge one handler something different than another?

2 A. For the same class of milk?

3 Q. Yes. Would that be an example of
4 disorderly marketing?

5 A. Yes.

6 Q. If we were pooling the milk that doesn't
7 have a reasonable association with the market, would
8 that be an example of disorderly marketing?

9 A. If you were -- I'm sorry, say it again.

10 Q. If we were pooling milk under an Order
11 that does not have a reasonable association with the
12 market, would that be an example of disorderly
13 marketing?

14 A. Pooling milk that does not have a
15 reasonable association with the market. A reasonable
16 association. Yeah, I --

17 Q. Okay. Let me give you an example, okay?
18 Let's say, for example, you're in Texas -- you're in the
19 Southwest Order, and we're pooling the milk from Idaho
20 and we're in the Texas market.

21 A. Without any institutional connection
22 or -- or any performance for balancing or no -- no
23 delivery to Texas plants, to pooled plants, just -- just
24 pooling without any qualification?

25 Q. Well, let's assume that there was a

1 minimal qualification standard with very little of that
2 milk that's pooled under the Texas order receiving that
3 order's blend price, would that be an example of
4 disorderly marketing?

5 A. It could be.

6 Q. Okay. If we didn't have uniform product
7 classification, would that be an example of disorderly
8 marketing?

9 A. If each order has -- had a different
10 product classification, different products in different
11 classes?

12 Q. You're free to interpret the question
13 however you would like.

14 A. Well, if -- I'll interpret it as -- with
15 the idea that one order has ice cream in Class II and
16 another order has ice cream in Class III. That kind of
17 thing could be disorderly, could lead to disorderly
18 marketing, yes.

19 Q. Okay. If an Order had -- if an Order was
20 not able to define what its limits are and the amount of
21 milk that it could pool -- that could be pooled on that
22 Order, would that be an example of disorderly marketing?

23 A. I think it's probably more important to
24 be able to establish the qualifications effectively.
25 And the volume could -- could be -- I mean the volume,

1 if it's qualified for the right reasons, there's no
2 reason to limit the volume. But if the idea is to find
3 the right balance between the volume and qualifications;
4 that is, if the question really is about qualifications,
5 yeah, that makes sense.

6 Q. Is it important for an Order to define
7 what the size of the pool could possibly be, is that --
8 if it didn't do that, would that be an example of giving
9 rise to disorderly marketing?

10 A. I don't know.

11 Q. Okay. If the Order didn't -- if an Order
12 did not verify weights and tests, would that be
13 something that would lead to disorderly marketing?

14 A. It could. I think that's a substantial
15 value of the Federal Orders.

16 Q. And to the extent that there are
17 different over-order premiums in the same market, would
18 that be an example of disorderly marketing?

19 A. Within the same Federal Order market?

20 Q. You're free to answer, interpret it
21 however you would like.

22 A. Well, the -- the Federal Order markets
23 are very large, so there's clearly different over-order
24 premiums within those -- so those large markets.

25 There's also different handlers have

1 different demands that they place on their milk
2 suppliers, so it would not necessarily be disorderly, as
3 long as it was related to, you know, the market. The
4 market should reflect value and service.

5 But given that there are variations in
6 value and service, value by location, I would say that
7 there could be quite a bit of difference without
8 disorderly marketing of Federal Order premiums within a
9 market.

10 Q. If different supplying organizations or
11 cooperatives in the same market charge the distributing
12 plants that they deliver their milk to different service
13 charges, would that be an example of disorderly
14 marketing?

15 A. If it was not based on service and
16 location value, yes, it could. It certainly could be if
17 they're drastically different. I mean, if they're --

18 Q. With regard to your -- your testimony on
19 what route disposition to base the regulation of a
20 producer-handler, or with respect to bringing someone
21 that's currently a producer-handler into the realm of
22 pooling and pricing, is it correct that your testimony
23 was to look at the total route dis -- excuse me -- their
24 total distribution?

25 A. Total route sales of packaged fluid milk

1 sales to other plants, yes.

2 Q. And that -- and was it -- one moment.
3 And that would be regardless of whether it was within
4 any specific marketing area?

5 A. Yes.

6 Q. How would you -- how would you reconcile
7 that with the extent to which we made the order
8 partially regulate some -- partially regulated
9 distributing plants that may have -- that they don't
10 meet the full criteria for total regulation because they
11 have most of their sales in an unregulated area?

12 A. How would I reconcile the exemption
13 with -- for --

14 Q. I'm concerned that there's -- we're
15 talking about bringing somebody into the realm of
16 pooling and pricing --

17 A. Oh, bringing them in. Right.

18 Q. -- right?

19 A. Okay.

20 Q. Okay.

21 A. Well, if they -- if they lose their
22 producer-handler status but they end up qualified as a
23 partially regulated handler rather than a pool
24 distributing plant, then that -- it makes sense to -- I
25 don't think it says that because you are a

1 producer-handler, you become a pool -- a pool
2 distributing plant just because you're a
3 producer-handler. You have to meet that -- you would
4 have to meet those standards. You would have to meet
5 those qualifications in every other way as a pool
6 distributing plant.

7 Q. Then perhaps I misunderstood what your
8 intent was on what it was -- what was important about
9 looking at whose total distribution here, a
10 producer-handler or deciding when -- excuse me, I
11 shouldn't say producer-handler. I should say an exempt
12 plant or former producer-handler.

13 A. A plant operated by -- a plant formerly
14 operated by a producer-handler?

15 Q. Yes. My terminology is getting quite
16 complex here.

17 A. What we're talking about with the
18 3 million pounds is a qualification on an exemption. So
19 if they -- if they -- if they meet the -- if they -- if
20 they don't meet the exemption, they're not eligible for
21 that status. But it doesn't -- it doesn't say anything
22 about what their status is otherwise, except that they
23 would be regulated, not regulated or partially regulated
24 on the merits of their qualification.

25 So if they're -- if they don't meet the

1 pooling standards for the market, that is to say if they
2 don't have -- I mean, this doesn't really address the
3 issue of 25 percent of your sales in the market. That's
4 another issue.

5 If they're -- if they don't qualify as a
6 producer-handler but they don't have 25 percent in any
7 one Federal market, they could end up partially
8 regulated wherever they're selling into a Federal Order.
9 But they would lose their producer-handler status if
10 their total sales were over 3 million pounds. Does that
11 answer your question?

12 Q. That would be the combination of what
13 they're distributing within a Federal Order area and
14 perhaps any area that's currently unregulated?

15 A. Right. The qualification would depend on
16 wherever they sold.

17 Q. Okay.

18 A. But that they're -- having removed the
19 producer-handler exemption, if it's removed, they would
20 be regulated on the same basis as any other plant, which
21 is the point to establish equity by treating
22 producer-handlers over -- who have a significant
23 individual impact on the market, a large -- a -- you
24 know, to plants of that size, to treat them like any
25 other distributing plant, whether it's a pool

1 distributing plant or partially regulated plant, on the
2 basis of what they're actually doing in the market.

3 Q. Okay. Maybe I'm little premature in
4 asking this, but we -- we're going to have your -- your
5 written statement slightly revised because you have
6 recalculated some numbers. Okay?

7 A. Okay.

8 Q. Is that correct?

9 A. Are you asking me to --

10 Q. No, I'm not asking you to do anything
11 yet. I wanted to ask some questions. If that's true,
12 then I have other -- a couple of other real simple
13 questions to ask.

14 A. I'm not sure how that needs to be
15 handled, if there's just a couple.

16 Q. Last I remember, one of the ideas was
17 there was Exhibit 23, which is your statement.

18 A. Right.

19 Q. Subsequent to that, you made some
20 changes, you were asked to recalculate some numbers and
21 you did that.

22 JUDGE CLIFTON: We didn't actually get to
23 that yet, because I'm expecting a motion to
24 admit something.

25 MR. TOSI: Right.

1 JUDGE CLIFTON: There are several changes
2 that I could not keep track of. So my current
3 thought is that Exhibit 23 probably ought to
4 come in like it is, without changes, and if
5 Mr. Beshore or someone wants to move the
6 admission of an Exhibit 23A, for example, that
7 is revised, I think those revisions should be
8 made and then we should look to them to see if
9 there's any objection.

10 MR. TOSI: Okay, your Honor.

11 JUDGE CLIFTON: Because I couldn't write
12 down what would go in that 23A at this point.
13 But it is not premature to ask your questions.

14 MR. TOSI: No, I was -- I had -- I was
15 exactly at the same point that you are, your
16 Honor.

17 BY MR. TOSI:

18 Q. And notwithstanding -- let's make an
19 assumption here, a very simple assumption, assuming that
20 the most significant changes that you're going to make
21 are to the numbers that you've recalculated in your
22 written statement.

23 A. I believe there are three changes that
24 have been discussed and agreed to. One was to strike a
25 phrase that said, cited in mimeographed brief on

1 authority to regulate producer-handlers.

2 The other one, where it says, we estimate
3 the three largest of these, on page 1, be changed to
4 two. And that the -- we estimate the sales of the seven
5 largest producer-handlers to average at least, and
6 change 100 million to 80 million.

7 It was my understanding that those were
8 all agreed to -- discussed and agreed to. I thought
9 those three changes were all discussed and agreed to. I
10 would obviously defer to your Honor and to counsel.

11 Q. Okay. But none of the numbers that are
12 contained in your written statement change?

13 A. Two numbers change.

14 Q. Other than the numbers that you just said
15 there?

16 A. I think that's right.

17 Q. Okay. The reason I ask this is this --

18 JUDGE CLIFTON: There was another change
19 that I recall where there's a reference to seven
20 producer-handler and there are six. There were
21 some other changes as well.

22 Q. I also remember that if you go, for
23 example, and look at the bottom of page 17 of your
24 written statement, in cross-examination by
25 Mr. Ricciardi, you seemed to back away from your

1 characterization of the members of who the American
2 Independent Dairy Alliance represent.

3 A. Well, the categorization of them is -- I
4 mean, I think -- I think Mr. Ricciardi thought that the
5 statement as it is should remain on the record. And I
6 don't think there's -- I don't object to the idea that
7 evidence of what the thing originally said should be on
8 the record.

9 But I think it would be simpler to do a
10 strike-out where it was agreed on this phrase and to
11 change those two numbers, again with strike-outs,
12 and write it in. Because that way -- I think that way
13 there's an honest record of what we presented.

14 And I'm sure that that Mr. Ricciardi
15 would like to have it on the record, and also the
16 corrections made during the -- during the -- during the
17 testimony.

18 Q. Okay. Okay. Here's the big, big
19 question then, okay?

20 A. Okay.

21 Q. To the extent that the answers that you
22 have given in cross-examination, and we've been through
23 about 11 1/2 hours of that, conflict with the positions
24 you've articulated in your written statement, is it your
25 position that the Secretary rely on your written

1 statement?

2 A. Where my written statement -- I'm sorry.
3 Where my testimony indicates specifically that there is
4 a -- this is a change, that it is contrary to the
5 written statement, yes, certainly.

6 Q. And to the extent that in
7 cross-examination, it's constructed that you
8 inadvertently said something that's counter to your
9 written statement, should the Secretary rely on your
10 written statement?

11 A. Yes, where I own up to it, I would
12 like that to be reflected in the record and be relied
13 upon.

14 MR. TOSI: That's all the questions I
15 have, your Honor. And, Roger, I commend you for
16 your endurance today. Thank you for coming.

17 THE WITNESS: Thank you, Jim. Thank you,
18 Mr. Tosi.

19 JUDGE CLIFTON: Mr. Tosi, I took your pen
20 and yet you had those questions.

21 MR. TOSI: I had a couple pens, your
22 Honor.

23 JUDGE CLIFTON: Mr. Beshore.

24 MR. BESHORE: Thank you, your Honor.
25 This is going to be short.

CROSS-EXAMINATION

1
2 BY MR. BESHORE:

3 Q. Dr. Cryan, I just want to pick up on the
4 last question or two questions from Mr. Tosi to make
5 sure that I'm clear and the record is clear on what you
6 intend. Where your testimony has indicated that the
7 written statement which has been marked as Exhibit 23
8 should be changed, was in error, such as on page 1 where
9 you say that the three should be changed to two, second
10 line from the bottom, I think -- do you see that?

11 A. Yes.

12 Q. Okay. Is it your statement here today --
13 your testimony here today that the Secretary should pay
14 attention to the written statement before it was changed
15 or to the statement as changed? In other words, to your
16 testimony?

17 A. To the statement as changed.

18 Q. Okay. In other words, to your
19 testimony -- your responses to questions which changed
20 or clarified parts of the written exhibit as originally
21 presented?

22 A. That's right. And obviously with
23 respect to the -- the recalculation, that should be
24 the final recalculations rather than the
25 intermediate recalculations, that they be relied

1 upon.

2 Q. Okay. So the final word is your sworn
3 verbal statements from the witness stand --

4 A. That's right.

5 Q. -- during this extended
6 cross-examination?

7 A. That's right.

8 Q. Okay. One final subject. The
9 decision-making process within the National Milk
10 Producers Federation, you were asked the question by
11 Mr. Ricciardi whether there had been a survey taken of
12 the membership with respect to the Proposals 1, 2 and
13 26.

14 My question to you is, were -- and I
15 think this is what you said in your testimony. Were
16 those proposals endorsed -- reviewed and endorsed by the
17 board of directors of the National Milk Producers
18 Association?

19 A. Yes, they were.

20 Q. Okay. How many cooperatives are in the
21 National Milk? You testified to what, 31?

22 A. 31.

23 Q. Okay. How many members are on the board
24 of directors?

25 A. How many --

1 Q. How many co-ops?

2 A. -- co-ops are represented?

3 Q. Well, how many co-ops are represented?

4 A. Probably 29. 28 or 29.

5 Q. Okay. And how many voting seats are
6 there on the board of directors?

7 A. I believe it's about 48, but I couldn't
8 swear to that.

9 Q. Is that a rather robust decision-making
10 process?

11 A. I would say so, yes.

12 Q. And, in fact, was the initial
13 authorization for these proposals made at the annual
14 meeting of the Federation?

15 A. Well, the board considered it at the
16 annual meeting, that's right.

17 Q. Okay. And that 48-member board composed
18 of representatives of all but perhaps two of the member
19 cooperatives --

20 A. Right.

21 Q. -- authorized and directed --

22 A. And I should point out, those co-ops not
23 directly represented on the board are indirectly
24 represented through caucus. So all the cooperatives are
25 represented one way or the other on the board of

1 directors.

2 Q. Thank you very much, Dr. Cryan, I have no
3 further questions.

4 MR. BESHORE: I do move for the admission
5 of Exhibit 23. And, your Honor, subject to
6 sleep and considering further, I'm not going to
7 at this time propose to offer a supplemental
8 exhibit that has annotated corrections on it.

9 I believe that Dr. Cryan has identified
10 very precisely the three changes in calculations
11 or numbers. And other differences in
12 characterization of descriptions of
13 organizations I think will stand on the basis of
14 the record of his testimony. Subject to further
15 thought about it, that's where we are at this
16 time.

17 JUDGE CLIFTON: All right. Thank you.
18 Is there any objection to the admission into
19 evidence of Exhibit 23, which has not been
20 modified from the way it was first presented?
21 There is none. Exhibit 23 is hereby admitted
22 into evidence. Mr. Vetne?

23 MR. VETNE: If I neglected to do, I'll
24 move the admission of Exhibit 73, which was
25 identified by Dr. Cryan.

1 JUDGE CLIFTON: Exhibit 73 are the tables
2 from Exhibit 26 in the Pacific Northwest
3 hearing. Is there any objection to the
4 admission into evidence of Exhibit 73? There is
5 none, Exhibit 73 is hereby admitted.

6 MR. VETNE: I further request, your
7 Honor, that we reconvene not before 9 a.m.
8 tomorrow.

9 JUDGE CLIFTON: I'll be here at 8. I
10 would like some company. Mr. English?

11 MR. ENGLISH: Your Honor, while I
12 sympathize with Mr. Vetne, we have witnesses who
13 need to get out, and some of them were scheduled
14 for today. And if we don't keep going, this
15 hearing is not going to end. I'm going to be
16 the one having to prep those witnesses, I'm the
17 one that's going to have to be here. I don't
18 see how we can't get started at 8:00 a.m.
19 That's just what's going to happen. And maybe
20 it will lengthen the hearing, maybe it will
21 cause people to ask cleaner, crisper questions
22 and we can go faster. But we've got to start at
23 8 a.m.

24 JUDGE CLIFTON: We actually had some
25 questions, very good questions today, some very

1 good cross-examination. Mr. Ricciardi.

2 MR. RICCIARDI: Your Honor, if we have to
3 show up at 8:00 in the morning, I will tell you
4 my questions will not be crisper than they are
5 right now. And we have gone past the point of
6 endurance. The witness has and all of us have.
7 I think it makes more sense, it's logical that
8 we, finishing almost at 9:00, give ourselves the
9 ability to actually sleep, to eat and to prepare
10 for the upcoming testimony tomorrow. An hour
11 off of the amount of time that we have
12 allotted -- and if we have to go later again
13 tomorrow, we'll do it, makes more sense. It is
14 fairer to the parties, it is fairer to the
15 process and it's fairer to me.

16 JUDGE CLIFTON: Mr. Ricciardi, I am
17 mindful of your health considerations, but --
18 and I'm mindful of how hard the court reporters
19 are working.

20 MR. RICCIARDI: Exactly.

21 JUDGE CLIFTON: If we start late, people
22 may miss planes over it. People who are
23 supposed to testify today. I don't want to be
24 aggravating that situation. I realize you won't
25 get a lot of sleep tonight, but I think you'll

1 get enough to be refreshed. Mr. Miltner.

2 MR. MILTNER: I would like to point out
3 that Mr. Oberweis will be here tomorrow and I
4 expect him to be a short witness. We mentioned
5 him on Friday, and I don't recall him being
6 discussed earlier. I wanted to make sure that
7 he was also on the Court's list.

8 JUDGE CLIFTON: Thank you.

9 MR. MILTNER: Also, as I look at
10 tomorrow's list, and I understand Mr. Vetne at
11 least has anticipated presenting his witnesses
12 on Wednesday, we're looking at the availability
13 of our expert witnesses and their flexibility
14 with regard to Thursday or Friday, and hopefully
15 will have some advice for everybody tomorrow.

16 JUDGE CLIFTON: Thank you, Mr. Miltner.
17 Mr. Beshore.

18 MR. BESHORE: Just I think the one -- the
19 single thing that would speed the proceedings,
20 make them more efficient than they have been, is
21 to avoid repetitious examination. And there was
22 quite a lot. If we -- second, third and fourth
23 time, same questions asked. If that is avoided,
24 we will all move faster.

25 Second point, did I understand that the

1 two-day notice to the Ricciardi and Miltner
2 experts has been given and that they will be
3 coming on Thursday? And if not, I think we need
4 to -- you know, we need that to be in place or
5 we're not going to get done.

6 JUDGE CLIFTON: Mr. Miltner.

7 MR. MILTNER: Right now we're planning on
8 Thursday. However, given what looks like a
9 schedule that is extremely full for -- for
10 tomorrow and into Wednesday, we're just trying
11 to make things as efficient as we can. That's
12 all, your Honor.

13 JUDGE CLIFTON: Thank you, I appreciate
14 it. Mr. Yale.

15 MR. YALE: First off, I fully appreciate
16 the need to get started tomorrow, but I just
17 want to register my objection. I think that
18 putting the hearing schedule on the way we're
19 doing it now is going to have the effect of
20 diminishing the power of these hearings. You
21 know, this is -- the process is not just here in
22 the room. It's outside the room.

23 And we've come off of a hard week, this
24 is a very hard day. And I think we're going to
25 have to start having some give. And I think a

1 lot of repetitious questions is a fact because
2 we're tired, and I think it's only going to get
3 worse.

4 So I think this schedule is not conducive
5 to due process, and it's more of punching a
6 ticket to get to an end result that's already
7 decided as opposed to preparing for one. And I
8 am not suggesting that's where we're at, but
9 that's what it can start to look like.

10 It's an objection. I understand you're
11 going to be starting at 8, I'll be here tomorrow
12 ready to go. I wanted to state my objection.

13 Secondly, depending on schedule -- I'll
14 be very flexible about it, but right now it is
15 our intent to have a witness on behalf of Select
16 and Continental, it will be me. It will
17 probably -- well, I'll make myself available
18 Friday or whenever -- allow everybody else to
19 get on, and that way I only put in the record
20 what I need to put in that's not already there.

21 JUDGE CLIFTON: Thank you, Mr. Yale. I'm
22 glad to know that. Now, for those of you who
23 need to prepare for tomorrow, you already
24 prepared for Drs. Yonkers and Schiek, and for
25 Mr. Newell. So you won't have to work quite so

1 hard tonight on that. And that will get us
2 started. I presume Dr. Yonkers will be our next
3 witness, is that correct?

4 MR. ENGLISH: I guess he would have to
5 speak for himself, your Honor, but if we do
6 that, I wonder if we're going to get through the
7 people who are not the expert witnesses but are
8 the fact witnesses, like in this instance Dr.
9 Schiek and Mr. Newell and Ms. Dewey and
10 Mr. Erickson. And, I'm sorry, the name's in the
11 back from the plant in Michigan.

12 I think, subject to the fact that I'm not
13 sure Dr. Yonkers can come back next week, I
14 think Dr. Yonkers is flexible. And I'll let him
15 speak for himself but I think I have it right.
16 That I think -- I also think maybe we can use a
17 rest from the expert and go to the fact
18 witnesses for a little while.

19 But we have people here who are not on
20 the staffs of or not the attorneys who also want
21 to testify of various clients. I think their
22 flexibility is greater. I'll let Mr. Yonkers
23 speak for himself.

24 DR. YONKERS: Robert Yonkers, your Honor.
25 Several of the witnesses that Mr. English is

1 representing here are member companies of IDFA.
2 And while I do plan to be here through at least
3 noon on Friday, I would like to see them get on
4 the stand so they can get back to running their
5 businesses.

6 JUDGE CLIFTON: All right. Let's decide
7 before we leave who will be first tomorrow.

8 MR. ENGLISH: We'll have a team. Try to
9 speed this up a little bit. Dr. Schiek and
10 Mr. Newell will go first.

11 JUDGE CLIFTON: I win.

12 MR. ENGLISH: So we will have two
13 witnesses up front, and then I guess the parties
14 will discuss it either this evening or tomorrow
15 morning among Ms. Dewey and Mr. Erickson and the
16 folks from Michigan.

17 JUDGE CLIFTON: Excellent. Thank you,
18 Mr. English, and I appreciate your help in
19 getting us coordinated. All right, all, adieu.
20 It's 9:03. I'll see you at 8.

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22 PROCEEDINGS ADJOURNED AT 9:03 p.m.

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C E R T I F I C A T E

I, Linda S. Mullen, RPR, 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.

Linda S. Mullen, RPR, RMR, CRR