

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

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

Public Hearing

Before: Administrative Law Judge  
 Jill S. Clifton

Date: May 12, 2009

Time: Commencing at 8:05 a.m.

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

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

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1 (Exhibit 75, 75-A and 76 were was marked  
2 for identification.)

3 JUDGE CLIFTON: All right. Let's go on  
4 record. We're back on record at 8:05. It's  
5 Tuesday, May 12th, 2009. We are in Cincinnati,  
6 Ohio. This is day seven of the milk rulemaking  
7 hearing. I'd like this to be Volume VII of the  
8 transcript and the pages to be numbered in  
9 sequence to those of yesterday. Mr. English.

10 MR. ENGLISH: Yes, your Honor. Before we  
11 begin with Dr. Schiek and Mr. Newell, I wanted  
12 to make a comment more in the form of a concern  
13 than an objection. It doesn't quite yet rise to  
14 the level of an objection.

15 JUDGE CLIFTON: Right in the microphone,  
16 please.

17 MR. ENGLISH: Your Honor, we seem to  
18 have, whether it's an arm's race or a lawyers'  
19 race, we seem to be at a point now where we  
20 lawyers have indicated the intention to testify  
21 as witnesses.

22 I am concerned for a couple of different  
23 reasons. Obviously you have situations, for  
24 example, Mr. Hughes, who both testified and  
25 asked questions. He is not an attorney. We had

1 an attorney who also serves in other roles  
2 testify for Darigold. I think the situation is  
3 different when you have outside counsel  
4 testifying. And I understand the various  
5 reasons and rationales that have been provided.

6 But I do think that there are issues  
7 which I hope all of us will consider, that when  
8 an attorney gets on the witness stand, it may  
9 very well be the case that a couple of different  
10 things happen: Waiver of privilege.

11 And in addition, once you get on the  
12 witness stand and take an oath, it's different  
13 from lawyers who are quite accustomed,  
14 referencing Rumpole and Bailey or something  
15 taking contrary positions on different days as  
16 attorneys.

17 But when you get on the witness stand and  
18 raise your hand and take the oath, and then make  
19 any statement that is in effect a legal  
20 statement, I think it puts it in a different  
21 context. I don't have a solution. I was  
22 mulling this over at an unseemly hour in the  
23 middle of the night. But -- so I mostly wanted  
24 to respectfully suggest that there is some  
25 discussion, perhaps off the record or otherwise,



1 of how this issue may be resolved.

2 I think there have been other instances.  
3 I can think of one in particular where an  
4 attorney testified, and while I'm sure that  
5 attorney would disagree, I think a number of  
6 people who were at that proceeding would think  
7 that it didn't help the record.

8 I'm not trying to get into a debate about  
9 that issue. I mostly want to express a concern  
10 before we get there. I can easily see a  
11 situation where attorneys under oath take  
12 positions, end up being cross-examined by  
13 positions they've taken.

14 And while, again, we may take different  
15 positions in different proceedings, it's  
16 different when you're under oath. There is an  
17 express provision within the rules for making  
18 oral arguments, if that's what necessary instead  
19 of briefing. There are briefs that can be  
20 filed.

21 Now, if attorneys are going to testify  
22 about how a proposal works, that may -- and I  
23 emphasize the word may -- be different. But it  
24 also may not be different. And I just am very  
25 concerned that we are heading down a road that,

1 for whatever reason, is not a very healthy one  
2 either for this industry or for rulemaking.

3 JUDGE CLIFTON: Does anyone else want to  
4 be heard on this issue at this point, or do you  
5 want just to think? All right. Thank you for  
6 raising the concern, Mr. English.

7 Good morning, gentlemen, in the witness  
8 box.

9 MR. NEWELL: Good morning.

10 DR. SCHIEK: Okay.

11 JUDGE CLIFTON: I'd like you each to  
12 state and spell your name, and I'll swear you in  
13 at the same time. Please note you need to be  
14 about two inches from this microphone.

15 MR. CARROLL: Your Honor?

16 JUDGE CLIFTON: Mr. Carroll.

17 MR. CARROLL: May I make a preliminary  
18 objection to these witnesses?

19 JUDGE CLIFTON: You may. Let me find out  
20 their names first and then your objection will  
21 be more fitting.

22 DR. SCHIEK: My name is William Schiek.  
23 That's W-i-l-l-i-a-m. Schiek is S-c-h-i-e-k.

24 MR. NEWELL: My name is Michael Newell.  
25 M-i-c-h-a-e-l, N-e-w-e-l-l.

1 JUDGE CLIFTON: Mr. Carroll, now I'll  
2 hear your objection before I swear them in.

3 MR. CARROLL: Thank you. I only want to  
4 take a minute on this. But, you know, we've had  
5 a long hearing. It doesn't look like it's  
6 shortening. These witnesses are not involved in  
7 the marketing areas that we're involved with.

8 The Secretary can't make findings about  
9 some other area somewhere else and extrapolate  
10 that into the -- our own marketing areas. This  
11 may be interesting, it may be fun, but I don't  
12 think it has anything to do with the hearing and  
13 it's been a long hearing.

14 So I'd like to enter a formal objection  
15 to the relevancy of this testimony. Thank you.

16 JUDGE CLIFTON: Why can it not be  
17 instructive to the Secretary, Mr. Carroll?

18 MR. CARROLL: Because the Secretary can't  
19 act without findings. And nothing in the state  
20 of California will have -- should have anything  
21 to do with the conditions in the Northeast  
22 marketing area. We're 3,000 miles away.  
23 There's absolutely nothing of any consequence  
24 that I know of in this hearing, and certainly I  
25 think some proof should be offered in advance as

1 to the relevancy. At any rate, I've made my  
2 objection.

3 JUDGE CLIFTON: All right. Thank you.  
4 Any other objections before I ask for any  
5 responses to the objections? Mr. Ricciardi.

6 MR. RICCIARDI: I'll add one point to  
7 what Mr. Carroll had said. What we have is a  
8 state system in California that operates under  
9 state law, under a different standard with base.  
10 And as I read the statements last night -- I  
11 should have called Mr. English because it was  
12 really early in the morning for me. We could  
13 have convened on the issue that he raised.

14 But what I found was, obviously, we have,  
15 as I said, a different statute, a different  
16 regulatory system. It's not part of the Federal  
17 Order. And I understand the issue that was  
18 raised, that one proposal noted that it was  
19 similar in some ways to how California operates.  
20 I think it was Proposal 17. That's referenced  
21 in one of the statements. But the bottom line  
22 is we are in a different area. The Federal  
23 Order system operates in pooling totally  
24 different than California does. And so to, I  
25 guess, corroborate what Mr. Carroll has said,

1 the court has to decide whether or not this is  
2 relevant information that the Secretary really  
3 needs.

4 JUDGE CLIFTON: Thank you, Mr. Ricciardi.  
5 Any objections before I hear any responses to  
6 the objections? There are none other. Would  
7 you like to respond, Mr. English?

8 MR. ENGLISH: Thank you, your Honor.  
9 These witnesses are offered as fact witnesses  
10 with respect to how a particular portion of the  
11 California system has worked and their  
12 reflections on a proposal -- especially  
13 Dr. Schiek -- with respect to how it relates to  
14 one particular proposal.

15 Now, unfortunately, with how the hearing  
16 has unfolded, we haven't had testimony about  
17 that proposal yet. That might be inevitable,  
18 but this is when these witnesses are available.

19 I would also point out that we have in  
20 recent times had a series of four or five -- I'm  
21 losing track -- hearings in which issues of how  
22 the California system interacts with the Federal  
23 system has been a direct issue.

24 We've even had -- frankly, I think it was  
25 the very first panel at a Federal Order hearing,

1 two officials from the California Department of  
2 Food and Agriculture appear in Order 30, a  
3 thousand 500 miles away, to testify about how  
4 the California system worked.

5 These witnesses are resource witnesses.  
6 They are not here to testify in favor or  
7 against -- for or against any proposal, except  
8 to the extent that their testimony may infer a  
9 position. They are not here to take a position.  
10 They are here to offer a factual, factual,  
11 factual perspective. It is highly relevant and  
12 it should be heard.

13 JUDGE CLIFTON: Mr. English, do you agree  
14 that it's Proposal 17 that suggests something  
15 similar to what California has?

16 MR. ENGLISH: I believe that is the  
17 testimony of Dr. Schiek that he will be giving,  
18 yes. And so there's a proposal in this hearing  
19 record. And they are here to testify at the  
20 request of National Milk and others with respect  
21 to how a part of the California system works  
22 that is like Proposal 17. The fact that it may  
23 be statutory in California isn't relevant. What  
24 matters is their perceived similarity to  
25 Proposal 17.

1 JUDGE CLIFTON: Thank you. Counsel, I  
2 appreciate your raising the cautions. And I  
3 believe that this testimony may have some merit  
4 for the Secretary to consider.

5 Gentlemen, I'll swear you in now. Would  
6 each of you raise your right hand?

7 (The witnesses were sworn.)

8 JUDGE CLIFTON: Thank you. The record  
9 should reflect that both witnesses took the  
10 oath. Mr. English.

11 WILLIAM SCHIEK AND MICHAEL NEWELL  
12 of lawful age, being duly sworn, was examined and  
13 testified as follows:

14 DIRECT EXAMINATION

15 BY MR. ENGLISH:

16 MR. ENGLISH: Thank you. Gentlemen, you  
17 are going to quickly find that you are going to  
18 have to have the microphone very close. I don't  
19 think the court reporter had difficulty picking  
20 up the I dos there.

21 Your Honor, I propose to have them  
22 testify as a panel. We've done that several  
23 times. I think it is most efficient, given the  
24 circumstances here.

25 Dr. Schiek, your testimony is labeled as

1 Exhibit 75, correct?

2 DR. SCHIEK: Yes, it is.

3 MR. ENGLISH: And 75-A is different, is  
4 basically a color version in the chart of page 3  
5 of 75, correct?

6 DR. SCHIEK: Yes, it is.

7 MR. ENGLISH: There's no other  
8 difference, correct? You made the copy.

9 DR. SCHIEK: Correct.

10 MR. ENGLISH: And this testimony was  
11 prepared by whom, sir?

12 DR. SCHIEK: By me.

13 JUDGE CLIFTON: I did want to ask  
14 Dr. Schiek, what is your doctorate?

15 DR. SCHIEK: Doctor of philosophy in food  
16 and resource economics.

17 JUDGE CLIFTON: Thank you.

18 MR. ENGLISH: Dr. Schiek, have you  
19 testified at Federal Order hearings in the past?

20 DR. SCHIEK: I have at one.

21 MR. ENGLISH: And have you testified at  
22 California Department of Food and Agriculture  
23 proceedings in the past?

24 DR. SCHIEK: Yes, at many.

25 MR. ENGLISH: And have you been



1 recognized as an expert in these proceedings --

2 DR. SCHIEK: Yes, I have.

3 MR. ENGLISH: -- in food and agriculture  
4 economics?

5 DR. SCHIEK: Yes, I have.

6 MR. ENGLISH: Your Honor, I believe and  
7 we can -- the witness has, in his prepared  
8 statement, some extensive discussion that he  
9 will give. And perhaps I'll wait until  
10 afterwards. But I will make a motion to  
11 recognize him as an expert in the field of food  
12 and agricultural economics.

13 JUDGE CLIFTON: Thank you. Mr. Vetne.

14 MR. VETNE: If that is the intention,  
15 your Honor, I would object. I would ask for  
16 voir dire.

17 We are dealing with the Federal Order  
18 system and prior experts have testified --  
19 economists have testified as experts and in  
20 relation to the Federal Order sytem.

21 Mr. English early on indicated that these  
22 two are fact witnesses. He said they're fact,  
23 fact, fact witnesses, as I recall. Percipient  
24 witnesses are okay and they can discuss what  
25 happens in California. And that was -- that was

1 my understanding when these witnesses -- when we  
2 received notice that these witnesses would come  
3 and received advanced copies prior to this.

4 This is the first -- absolutely the first  
5 hint that anybody on this panel would be called  
6 as an expert witness. So I didn't even have  
7 time to prepare the voir dire part because I  
8 assumed, as represented, that this is a fact  
9 witness -- or two fact witnesses.

10 JUDGE CLIFTON: Don't leave. Let me ask  
11 you a question. We know that when facts are  
12 being established, lay witnesses can testify to  
13 certain facts, how fast was the car going, how  
14 far was she from him and the like.

15 People who have training that qualifies  
16 them to testify of facts that lay witnesses  
17 cannot can give their opinions about things that  
18 are different from distance and speed and the  
19 like.

20 They're still facts. Handwriting experts  
21 tell us more facts than lay witnesses tell us.  
22 Both can testify about handwriting. So why  
23 would an expert not still be a fact witness just  
24 by virtue of having been qualified as a expert?

25 MR. VETNE: And on the contrary, why

1           bother to qualify him on an expert if he can  
2           give opinion sort of in the same nature as a  
3           fact witness.

4           The intention of this apparently is to  
5           provide for the Department and for the record  
6           more weight on esoteric opinion than I had  
7           anticipated the witness would be called for.

8           As I said -- and the record's clear --  
9           for the past week this witness has been touted  
10          as a fact witness. Now, you know, sure, every  
11          witness up there gives opinion whether  
12          they're -- whether they have a Ph.D. or not.  
13          Every witness that comes to this proceeding is  
14          an expert. And an expert is -- actually, I  
15          think, the best description is somebody that  
16          knows more than the Average Joe about something.

17          All of us know more than the Average Joe  
18          about milk and milk marketing. But the  
19          intention of calling attention to this witness  
20          as an expert is to -- is to ask the Department  
21          and the record and the Secretary to give  
22          somewhat more weight to this witness' opinion  
23          testimony than would be given to particularly  
24          small business handlers who have no economists  
25          on staff. And that's essentially the function

1           that Mr. Schiek serves for his organization,  
2           Mr. Cryan from -- Dr. Cryan for his  
3           organization, Dr. Yonkers for his organization.

4           So the request is essentially for us  
5           large organizations and associations  
6           representing large organizations, give more  
7           weight to our witness than we do to -- to the  
8           individual small handlers and producers that  
9           come up here. I don't think that's fair. And  
10          it certainly wasn't anticipated.

11          JUDGE CLIFTON: Thank you, Mr. Vetne.  
12          Mr. Beshore.

13          MR. BESHORE: Very briefly, I would note  
14          that Dr. Schiek was employed in the Market  
15          Administrator's office in Order 2 and has  
16          testified in his capacity as an expert at  
17          Federal Order hearings prior to this one.

18          I think your Honor's comments with the  
19          type of the testimony we're going to hear from  
20          Dr. Schiek were very much to the point, that  
21          his expertise very much enables him to provide a  
22          factual analysis and discussion of the  
23          California system, which is proposed here in at  
24          least one proposal. I think there was actually  
25          another one that basically adopts the same --

1           you know, the same producer-handler system.

2                   And the fact that he's an expert in  
3 his -- in his field really is not subject to --  
4 to controversy, should not be. And he should be  
5 recognized as such for his testimony. I didn't  
6 hear him presented for the last week or  
7 whatever, as Mr. Vetne touted, as Mr. Vetne has  
8 asserted, as a fact witness. I think when Dr.  
9 Bill Schiek comes to testify at these hearings,  
10 everyone knows that he's coming to speak with  
11 his training, education and experience. And  
12 that's how he's offered.

13                   JUDGE CLIFTON: Thank you, Mr. Beshore.  
14 I won't rule until he's offered as an expert. I  
15 have previously accepted him as an expert.  
16 Mr. English.

17                   MR. ENGLISH: Your Honor, I think it's  
18 appropriate to have him give his testimony first  
19 and then I might ask a few more questions after  
20 that. But I think that contrary to statements  
21 of Mr. Vetne, I think his statement, which was  
22 out at 8:00 a.m. yesterday morning, so that  
23 means people have had more than 24 hours as  
24 opposed to the required -- could have been out  
25 this morning.

1           The fact of the matter is, one can look  
2           at it and see where he is giving, what is --  
3           what may be viewed as opinion testimony. And so  
4           that's more notice than many people will be  
5           getting with respect to other things.

6           Your Honor, at this time I would ask just  
7           a few questions of Mr. Newell.

8           JUDGE CLIFTON: Now, position the  
9           microphone between you and Mr. English since  
10          you'll be looking at him when you talk to him.

11          MR. ENGLISH: Mr. Newell.

12          MR. NEWELL: Yes.

13          MR. ENGLISH: Good morning.

14          MR. NEWELL: Good morning.

15          MR. ENGLISH: You are presently employed  
16          by who?

17          MR. NEWELL: HP Hood.

18          MR. ENGLISH: And you are appearing here  
19          with their permission?

20          MR. NEWELL: Yes.

21          MR. ENGLISH: And their knowledge?

22          MR. NEWELL: Yes.

23          MR. ENGLISH: Are you testifying with  
24          respect to facts having to do with HP Hood?

25          MR. NEWELL: No, I am not.

1                   MR. ENGLISH: Okay. What are you  
2                   testifying about?

3                   MR. NEWELL: I am testifying as to my  
4                   experience with Crystal Cream & Butter Company.

5                   MR. ENGLISH: And are you testifying at  
6                   the request of the Dairy Institute of  
7                   California --

8                   MR. NEWELL: Yes.

9                   MR. ENGLISH: -- basically as a  
10                  representative of that organization?

11                  MR. NEWELL: Yes, I am.

12                  JUDGE CLIFTON: The name of that,  
13                  Mr. English? Say it again.

14                  MR. ENGLISH: Dairy Institute of  
15                  California.

16                  Dr. Schiek, would you please give your  
17                  prepared statement, Exhibit 75?

18                  DR. SCHIEK: Good morning. My name is  
19                  William Schiek. For the past 12 years I have  
20                  been Economist to Dairy Institute of California,  
21                  a trade association representing fluid milk  
22                  processors and dairy product manufacturers with  
23                  plants in California. Dairy Institute provides  
24                  member companies with market and regulatory  
25                  information services and advises them on

1 regulatory and legislative issues impacting  
2 their business operations. We also serve as our  
3 members' primary advocate on dairy legislative  
4 and regulatory matters. Prior to joining Dairy  
5 Institute's staff, I was Assistant Professor of  
6 Agricultural Economics at Perdue University in  
7 West Lafayette, Indiana from 1991 to 1997. At  
8 Perdue, I had responsibility for teaching  
9 courses in agricultural marketing and food  
10 business management. I conducted research on a  
11 variety of food and agricultural marketing  
12 topics, including dairy marketing topic. From  
13 1982 to 1989, I was employed by the New York-New  
14 Jersey Milk Market Administrator's Office,  
15 Federal Order Number 2, as a cooperative  
16 relations specialist and economist. I have a  
17 bachelor of science degree from Cornell  
18 University in Applied Economics and Business  
19 Management and M.S. and Ph.D. degrees from the  
20 University of Florida in Food and Resource  
21 Economics.

22 I am testifying today at the request of  
23 the National Milk Producers Federation for the  
24 purpose of describing the producer-handler  
25 exemption that exists under California's state



1 milk pooling plan and its impact on market  
2 structure and competition within the state. It  
3 is my belief that the Secretary will find the  
4 California experience helpful in formulating  
5 policy as it pertains to producer-handlers in  
6 Federal Orders, especially since the California  
7 producer-handler exemption is similar to one of  
8 the proposals under consideration at this  
9 hearing, Proposal Number 17. A testament to the  
10 relevance of California's experience with  
11 producer-handlers -- with producer-handlers was  
12 provided at the March prehearing information  
13 session by a representative of Mallorie's Dairy,  
14 the proponent of Proposal Number 17. In  
15 describing Mallorie's alternative proposal, its  
16 representative characterized Proposal 17 as  
17 being inspired by the producer-handler exemption  
18 in California.

19 Proposal 17, in the words of its  
20 proponents, would allow producer-handlers whose  
21 plants would become regulated pool distributing  
22 plants, to grandfather their existing farm milk  
23 production up to 3 million pounds per month, by  
24 exempting such production from obligations to  
25 pay money into or receive money from the pool

1 settlement fund. Such pool-exempt milk would  
2 essentially be treated as milk in an individual  
3 handler pool. Milk production from the  
4 handler's own farm in excess of the  
5 grandfathered exempt volume, along with receipts  
6 of milk from other producers, would be subject  
7 to marketwide pool obligation and payments to  
8 the fund just like milk received by other  
9 handlers.

10 Some in the industry refer to the type of  
11 exemption described in Proposal 17 as a soft cap  
12 because a specified volume of the  
13 producer-handler's milk production receipts  
14 remains exempt from pooling even as the  
15 operation's milk volume grows, either by  
16 increased own-farm production or by receipts  
17 from other sources, beyond the exempted volume.  
18 This type of exemption stands in contrast to a  
19 so-called hard cap like the ones operative for  
20 producer-handlers in the Pacific Northwest and  
21 Arizona orders, where once a threshold volume is  
22 exceeded, the producer-handler is subject to  
23 regulation on all its production/receipts. As  
24 you will see from my description that follows,  
25 the soft cap exemption contained in Proposal 17

1 is quite similar to the producer-handler  
2 exemption in California, although there are some  
3 differences.

4 In California, producer-handlers are  
5 often referred to as producer distributors or  
6 PDs. The terms are used interchangeably and  
7 refer to the same type of operation under  
8 California's pricing and pooling system. There  
9 are two types of producer-handler exemptions in  
10 California. The first type is known as a Type  
11 66 or exempt producer-handler. These operations  
12 do not have to pool their own-farm production,  
13 provided they meet qualifying requirements.

14 First, milk production and sales both  
15 must average less than 500 gallons per day.

16 Second, 95 percent of both production and  
17 sales must be disposed to retail/wholesale  
18 outlets other than handlers.

19 And, three, no more than 5 percent of  
20 Class I sales can be from outside sources. Only  
21 two Type 66 producer-handlers are currently  
22 operating, and the average monthly combined  
23 volume of both is 129,000 pounds. This group  
24 will not be the focus of my testimony. And for  
25 the remainder of my testimony, the term PD will

1 refer to the second type of producer-handler  
2 described below.

3 The second type of producer-handler in  
4 California is the Type 70 or option exempt  
5 producer-handler. These handlers operate with a  
6 soft cap and can deduct the volume of their  
7 exempt milk production from their Class I pool  
8 obligation. On their nonexempt milk production  
9 and on any milk purchased from other producers,  
10 the Type 70 PDs must account to the pool in the  
11 same manner as fully regulated handlers. Thus,  
12 the exemption is analogous to the one contained  
13 in Proposal 17, except that the entire  
14 production is applied to the plant -- the  
15 plant's Class I usage. And I should say the  
16 entire exemption is applied to the plant's  
17 Class I usage.

18 Currently, there are five Type 70 PDs  
19 operating in California. And for the  
20 September 2007 through August 2008 period, the  
21 five Type 70 PDs had a combined exemption of  
22 around 21.2 million pounds per month and their  
23 pooled Class I volume was an additional  
24 100.1 million pounds per month. They also  
25 utilized another 83.3 million pounds per month

1           that was pooled in other classes. The  
2           accompanying graph (Figure 1) shows the Type 70  
3           PDs' average daily exempt production, pooled  
4           Class I milk volume, and other pooled milk  
5           volume by year since 1995. What is striking  
6           about this graph is that it shows a clear upward  
7           trend in the total PD Class I milk volumes.

8           California's producer-handler exemption  
9           was not born amid policy deliberations by  
10          agriculture marketing specialists, but was the  
11          result of the political compromise that was  
12          needed to pass the enabling legislation for the  
13          Gonsalves Milk Pooling Act in 1967. This  
14          compromise, which established statewide milk  
15          pooling in California also led to our unique  
16          method of dividing producer revenues according  
17          to each producer's quota, base and overbase milk  
18          production. Under the pooling legislation and  
19          regulations, each producer was assigned a  
20          production base derived from their historical  
21          milk output. Any production above the  
22          producer's base was termed overbase. Each  
23          producer was originally allocated quota volumes  
24          equal to some percentage of their production  
25          base in proportion to their historic milk

1 shipments to Class I uses. Quota milk received  
2 a higher price than base and overbase milk and  
3 was highly desired by producers under the new  
4 pricing system. This system of prices was  
5 adopted in lieu of uniform pool prices in order  
6 to gain legislative support from producers in  
7 Southern California who traditionally had a  
8 large share of the Class I market.

9 It was anticipated that growth in Class I  
10 sales over time would allow the issuance of new  
11 quota that would be allocated first to those  
12 producers with relatively low quota holdings in  
13 proportion to their base. In this way, it was  
14 expected that all producers would eventually be  
15 equalized with respect to their quota holdings.  
16 Over time, quota began to be traded among  
17 dairymen, providing a second way for producers  
18 (including PDs) to increase their quota  
19 holdings.

20 Under the Act, PDs who did not meet the  
21 criteria for exempt plants (Type 66) were given  
22 the option to deduct the volume of their  
23 original allocated quota for their Class I pool  
24 obligation, or they could receive the quota  
25 price from the milk for their quota production,

1 but would receive no exemption in calculating  
2 their handler obligation to the pool. This  
3 choice or option was a one-time offer for the  
4 Type 70 PDs and no new PDs could use this  
5 exemption after the pooling plan was enacted.

6 In 1978, following legislative changes,  
7 amendments were made to the Pooling Plan (the  
8 regulations governing milk pooling in  
9 California), which allowed Type 70s PDs to  
10 increase their exemption to equal their original  
11 quota plus any additional quota purchased prior  
12 to 1978. They also received an additional daily  
13 exemption of 150 pounds of fat and 375 pounds of  
14 solids not fat, provided that they had not  
15 transferred production base and pool quota after  
16 February 9th, 1977. These changes to the PD  
17 exemption were part of larger legislative and  
18 regulatory amendments that were instigated by  
19 producers to equalize each producer's quota  
20 holdings at 90 percent of their historic  
21 production base. The broader changes were  
22 important to producer leadership and they were  
23 willing to accept the PD exemption increases as  
24 the price for getting their desired changes in  
25 the quota regulations enacted.

1           By the early 1990s, producers needed to  
2           change the way in which prices for base,  
3           overbase and quota milk were determined to  
4           relieve tensions over pool revenue distributions  
5           that were developing between quota holders and  
6           non-quota holders. In 1993, producers crafted a  
7           quota reform bill that they viewed as a must  
8           pass regulation, essential for the continued  
9           viability of the pooling program. Once again,  
10          because producers needed to move the  
11          legislation, they were willing to accept  
12          legislative amendments offered by the PDs, who  
13          threatened to derail the quota reform bill if it  
14          did not contain their amendments. As a result  
15          of the legislation, the PD exemption was  
16          expanded to cover all original quota and all  
17          quota subsequently purchased, plus the  
18          additional daily exemptions of 150 pounds of fat  
19          and 375 pounds of solids not fat that were  
20          allowed as a result of the 1978 amendments. The  
21          ability of PDs to continue purchasing new exempt  
22          quota was eventually terminated by legislation,  
23          effective March 1, 1995. The point that I  
24          believe is important from this history is that  
25          once the soft cap exemption was established in



1 California, it became an attractive target for  
2 economy rent-seeking behavior on the part of the  
3 PDs. By opportunistically holding must-pass  
4 dairy legislation hostage to their amendments,  
5 PDs were able to increase their exemption, and  
6 the regulators charged with overseeing the  
7 proper administration and functioning of the  
8 state order had little to say in the matter.

9 On exempt milk, the milk cost advantage,  
10 which is a regulated cost advantage, PDs receive  
11 is calculated as the Class I price less the  
12 quota price. If the PD did not have a plant, he  
13 would receive the quota price for all the exempt  
14 milk he shipped to a regulated handler.

15 Therefore, the PD's opportunity cost on exempt  
16 milk is the quota price. Put another way, the  
17 transfer price between the farm side of the  
18 operation and the plant is assumed to be the  
19 quota price. In reality, integrated firms will  
20 establish transfer prices to maximize the  
21 profits of the entire integrated operation, not  
22 just each component operation. If greater  
23 profits can be made in total by accepting a  
24 lower price at the farm, the PD will do it. So  
25 the actual cost advantage to the PD may well be

1 greater than I have calculated here.

2 Using California price data from the  
3 California Department of Food and Agriculture, I  
4 calculated the advantage for California milk  
5 testing of 3.5 percent fat and 8.7 percent  
6 solids not fat on a per hundredweight basis by  
7 subtracting the quota price per hundredweight  
8 from the Class I price. The PD regulated raw  
9 product cost advantage on a per gallon basis was  
10 calculated by dividing the advantage per  
11 hundredweight by the number of whole milk  
12 gallons in a hundredweight of milk. On a  
13 month-to-month basis, the value of this cost  
14 advantage varies greatly due to changes in the  
15 relationship between the Class I price and the  
16 pool quota price.

17 For the January 2000 through March 2009  
18 period, regulated cost advantage on milk covered  
19 by the exemption averaged 11.3 cents per gallon.  
20 And for the most recent 12-month period, it  
21 averaged 17.7 cents per gallon. Competition for  
22 fluid milk sales is intense in California and  
23 business often moves from one milk supplier to  
24 another based on price differences of a few  
25 hundredths of a cent per gallon. In this

1 competitive environment, having a raw products  
2 cost advantage of more than a dime per gallon is  
3 a tremendous advantage for the PDs and a  
4 formidable challenge for the fully regulated  
5 suppliers of milk. The accompanying graph  
6 (Figure 2) shows the PD cost advantage by month  
7 as well as the 12-month moving average of that  
8 advantage. During the September 2007 through  
9 August 2008 period, the exempt portion of the  
10 PDs Class I sales accounted for about 17 1/2  
11 percent of their total Class I sales.

12 In the marketplace, not all customers are  
13 created equal with regard to the profits they  
14 generate for the businesses that supply them.  
15 Customers that sell high volumes and which are  
16 served at a relatively low cost per unit are  
17 usually the most profitable or desirable for a  
18 Class I supplier. It is these accounts: Club  
19 stores, mass merchandisers and large grocery  
20 stores that California PD's have aggressively  
21 and successfully pursued. When going after  
22 these types of accounts, producer-handlers have  
23 made full use of their exemption. As an  
24 illustration, several years ago one of our  
25 member companies acquired a large piece of

1           grocery-chain business that could not be  
2           adequately served from its existing processing  
3           facilities, so they put that business up for bid  
4           using an online auction. Three processors that  
5           were fairly well positioned to serve the account  
6           bid on the business -- who were fairly well  
7           positioned to serve the account bid on the  
8           business. Two were fully regulated processors  
9           and the third was a PD. After the auction, a  
10          representative of the company that put the  
11          business up for bid contacted me, noting that  
12          the bid submitted by the PD was significantly  
13          below the bid of the other competitors. Given  
14          that California has a law prohibiting sales  
15          below cost, the representative wanted to know if  
16          the bid was legitimate. When I informed him of  
17          the magnitude of the PD cost advantage, he was  
18          surprised, but was no longer concerned that the  
19          bid might be below cost. The account was  
20          awarded to the PD, even though one of the  
21          regulated processors was more favorably located  
22          to serve the business. The PD's low price was  
23          the determining factor.

24                    One of the axiom's of competition in the  
25                    California market is that, all other things

1           being equal, to acquire business you need to bid  
2           lower than your competitor, but to retain the  
3           business, you only need to match your  
4           competitor's bid. With regard to PDs, their  
5           soft-cap exemption can be characterized as a  
6           movable feast or the gift that keeps on giving.  
7           The California PD can pick and choose when to  
8           use its exemption. When it wishes to acquire  
9           business it can use its exempt volume to bid  
10          aggressively and undercut fully regulated  
11          competitors whose raw product cost cannot be  
12          lower than the Class I price. Later, the PD can  
13          simply match the regulated competitor's price by  
14          utilizing it's nonexempt volume to retain the  
15          account. Its exempt volume is then free to be  
16          used to aggressively bid the next account it  
17          wishes to acquire.

18                 As a result of the cost advantages from  
19                 their exemption, producer-handlers have grown  
20                 their share of Class I sales at the expense of  
21                 their fully regulated competitors over time.  
22                 Using data contained in CDFA's Hearing Exhibit  
23                 from its October 2008 Class I pricing hearing, I  
24                 was able to compare the Type 70 PD's share of  
25                 California-sourced Class I milk with the share

1 of non-PDs over the July 1995 to August 2008  
2 period. As the accompanying graph illustrates,  
3 that's Figure 3, the PDs' share has increased  
4 and the fully-regulated processors' share has  
5 declined. The trend is unambiguous. For  
6 example, in July 1995 the PDs' share of the  
7 market was 14.8 percent and the non-PD share was  
8 85.2 percent. By August 2008, the PD's share  
9 had grown to 23.4 percent and the non-PD share  
10 was 76.6 percent.

11 The operation of the soft-cap  
12 producer-handler exemption in California has  
13 significantly advantaged producer handlers to a  
14 great degree. In California, it cannot be  
15 argued that this has worked to the advantage of  
16 producers, and it has certainly worked to the  
17 disadvantage of fully-regulated Class I  
18 processors. It has created a dilemma for policy  
19 makers in the state, who struggle to reconcile  
20 the goal of providing equal prices to handlers  
21 competing in a marketplace with the  
22 legislatively mandated producer-handler  
23 exemptions. It is my sincere hope that the  
24 Secretary will find the California experience  
25 useful in forming effective policy with regard

1 to producer-handlers in Federal Orders. Thank  
2 you.

3 MR. ENGLISH: Mr. Newell, if you would  
4 get the microphone in front of you. Please  
5 provide your testimony when you are ready after  
6 adjusting the microphone.

7 MR. NEWELL: Thank you. Good morning.  
8 My name is Michael Newell and I am currently  
9 employed by HP Hood LLC as their Director of  
10 Business Development for the Western United  
11 States. From 1987 until May of 2007, I worked  
12 in a variety of positions at Crystal Cream &  
13 Butter Company, my family's milk processing  
14 business which was located in Sacramento,  
15 California. Relevant to today's testimony are  
16 the positions I held as a Sales and Marketing  
17 Analyst from 1991 until 1997, Vice President of  
18 Marketing from 1997 until 2003, and Company  
19 President from February 2003 through October of  
20 2007. In May of 2007 Crystal's dairy assets  
21 were sold to HP Hood and on November 1st, 2007,  
22 HP Hood sold the Crystal brand and the  
23 conventional milk business to Foster Farms Dairy  
24 in Modesto, California. At that time I  
25 transitioned to my present position at HP Hood.

1           The purpose of my testimony is to give a  
2           first-hand perspective on the soft cap  
3           producer-distributor exemptions that Dr. Schiek  
4           discussed in his testimony and their impact on  
5           the competitive landscape in the Northern  
6           California milk market.

7                     Crystal Cream & Butter Company was  
8           founded in Sacramento in 1901. The Hansen  
9           family owned the business from 1921 until its  
10          sale in 2007. Crystal based its business on  
11          core principles of quality, service, integrity  
12          and competitive pricing. Crystal built an  
13          extremely strong brand name in the Sacramento  
14          Valley by consistently advertising on radio,  
15          television, and print media from the late 1950s  
16          through the early 2000s. Another key to  
17          Crystal's success was its high quality milk  
18          supply was almost entirely purchased from  
19          independent dairy farmers. Being located in the  
20          capitol city, Crystal was also extremely active  
21          in the California dairy associations and  
22          participated regularly in the California  
23          Department of Food and Agriculture milk pricing  
24          and pooling hearings.

25                     Between 1990 and 1996, Crystal's -- let



1 me correct that. Between 1990 and 2006,  
2 Crystal's annual milk purchases ranged from  
3 45 million to 60 million gallons. During this  
4 period Crystal had between 400 and 500  
5 employees. For most of its business life  
6 Crystal was a full line manufacturer producing  
7 fluid milk, cultured products, ice cream, butter  
8 and nonfat dried milk. Until 1996, all of these  
9 products were produced at Crystal's downtown  
10 plant in Sacramento. In 1996 Crystal opened a  
11 state-of-the-art bottling facility on Belvedere  
12 Avenue in Sacramento which also incorporated  
13 extended shelf life pasteurization capabilities.  
14 Fluid milk accounted for approximately  
15 65 percent of Crystal's 140 to 180 million of  
16 annual sales.

17 Crystal served the full gamut of  
18 customers - schools, restaurants, independent  
19 distributors, convenience store, other  
20 processors, and grocery stores. Grocery stores  
21 were the largest segment of Crystal's business.  
22 Crystal's primary distribution area ranged from  
23 Modesto (75 miles to the south of Sacramento) to  
24 Redding (150 miles to the north) and from the  
25 San Francisco Bay Area (75 miles to the west)

1 and Lake Tahoe (100 miles to the east.)

2 In the early 1990s, the vast majority of  
3 the fluid milk sold in Northern California was  
4 provided by three captive dairy processors and  
5 five significant, family-owned independent  
6 processors. For the most part, the captive  
7 processors sold milk to the stores owned by  
8 their corporate parents. They, in general, did  
9 not compete with the independent processors and  
10 for that reason will not be the focus of this  
11 overview.

12 The independent processors were located  
13 in Petaluma; Emeryville, which is near Berkeley;  
14 Modesto, Fresno, and Sacramento. I would  
15 estimate that in 1990 the processors based in  
16 Emeryville and Modesto were of comparable size  
17 to Crystal and the processors in Fresno and  
18 Petaluma were less than half that size.

19 In the early 1990s competition between  
20 the five independents was probably best defined  
21 as orderly. The independent processors were  
22 dominant in their own hometowns and although  
23 each competed to some degree, distribution  
24 distance really seemed to be a limiting factor,  
25 i.e., you competed with your neighbor and not

1           your neighbor's neighbor. At that time a  
2           customers' price was dictated by a published  
3           bracketed -- by published bracketed price lists  
4           and service levels. Based on the competitor's  
5           price lists that I recall seeing, the prices on  
6           the published price lists of the independent  
7           processors were fairly similar, so customers  
8           tended to base their purchasing decision on  
9           quality, service, support, and brand in addition  
10          to price. Looking back I think that price lists  
11          were similar because the independent processors'  
12          costs were fairly comparable.

13                         Around 1993, we began seeing an elevated  
14          level of competition with the processors located  
15          in Modesto and Fresno. At first this  
16          competition manifested itself in seemingly  
17          disconnected actions like more aggressive  
18          pricing on a school bid, offering full service  
19          to a customer in what level -- at what  
20          previously had been a drop ship price, or the  
21          creation of a new price bracket for a high  
22          volume -- a new price bracket for high volume  
23          accounts. Then we learned about an undisclosed  
24          provision in the 1993 Quota Reform Bill that had  
25          removed the cap from the PD exemption and that

1           this had allowed the independent processors in  
2           Fresno and Modesto to significantly decrease  
3           their milk cost by increasing their exempt quota  
4           holdings. Prior to this time we had a vague  
5           knowledge of their dairy operations and that a  
6           small portion of their milk had been exempted  
7           from the pool since its establishment in 1969.

8           The discovery of this significant  
9           competitive advantage was of great concern. We  
10          began tracking this advantage on a monthly basis  
11          and it ranged between 20 cents a gallon and no  
12          difference. As Dr. Schiek has testified, on the  
13          average the advantage was 11 cents per gallon on  
14          the portion of the milk they were able to exempt  
15          from the pool. In our mind, this was an  
16          incredible cost advantage that threw what had  
17          previously been a level playing field out of  
18          balance. As I'm sure has been noted at this  
19          hearing, customers often base their purchasing  
20          decisions on a fraction of a penny per gallon,  
21          and when you have an advantage of a dime per  
22          gallon to use at your discretion, it becomes an  
23          enduring competitive advantage. We actively  
24          pursued legislative changes to correct this  
25          inequity via the Dairy Institute, but were

1           unsuccessful beyond ceasing further expansion  
2           after March of 1995.

3           This advantage was a truly disruptive  
4           development for the Northern California  
5           competitive landscape. In about 1996 a large  
6           box store chain from the Northwest initiated its  
7           expansion into California by opening a store in  
8           Redding, California. Crystal had a large  
9           distribution plant in Redding that had  
10          previously been bottling a plant. Additionally  
11          Crystal served a large box store in Redding and  
12          virtually every independent grocery store in the  
13          area with the exception of Costco. Thus we felt  
14          we were in a great position to serve this new  
15          prospective customer. We gave the customer our  
16          very best pricing and the new entrant promptly  
17          selected the PD from Fresno as its supplier -  
18          from a distance of over 300 miles to the south  
19          due to superior pricing.

20          This was just the start of a trend that  
21          developed over the next ten years. Crystal was  
22          very successful at taking care of its existing  
23          business, but anytime new business was available  
24          it seemed to go to one of the two  
25          producer-distributors. Despite having a new

1           bottling facility, we found it extremely  
2           difficult to be price competitive for new  
3           business opportunities in the conventional milk  
4           market. The PD from Fresno put the PD advantage  
5           to good use - building a first rate full service  
6           route system that covered virtually all of  
7           Northern California to serve the Target stores  
8           and several major convenience store chains. The  
9           PD in Modesto was selected as the supplier for  
10          the Wal-Mart stores in Northern California. I  
11          should note that Crystal had a working  
12          relationship with this PD and did serve the  
13          Wal-Mart stores in the Redding area on their  
14          behalf. During this period margins compressed  
15          and business growth was slowly declining for  
16          Crystal as independent stores went out of  
17          business and very few new customers were added.

18                 The PD advantage impacted the other two  
19          independent processors in different ways. The  
20          large independent processor that was located in  
21          Emeryville opened a new facility in 1999 and by  
22          2000 had sold their business. I believe that  
23          increased competition and the declining prices  
24          and margins were a fact in that family's  
25          decision to sell. The new owner has lost its

1 share of high volume business opportunities  
2 including the online bid for a chain that  
3 Dr. Schiek referenced in his testimony. We  
4 actively participated in this process and could  
5 not come close to the price that was settled on.  
6 The independent processor in Petaluma took a  
7 different direction. They positioned their  
8 business to appeal to a natural, health-minded  
9 customer base conveniently located in close  
10 proximity to their plant, and have been able to  
11 grow their business quite successfully by  
12 marketing their conventional and organic  
13 products to this growing niche consumer segment  
14 on product benefits rather than price.

15 By mid-2006 the Hansen family had reached  
16 the conclusion that it was time to sell the  
17 business. Margins and prices were continuing to  
18 fall and business was eroding. Certainly, many  
19 factors beyond the PD issue played a part in  
20 this decision like industry consolidation,  
21 market-wide excess bottling capacity, increasing  
22 business insurance costs, union labor issues,  
23 and family considerations. We did not have the  
24 cost advantage of the producer-distributors, the  
25 resources of a national milk processor, nor were

1 we focused on a specific consumer niche like the  
2 Petaluma milk processor. The attributes that  
3 had made us successful for so many years -  
4 quality, service, and brand were not valued as  
5 much as a lower price. The business was not fun  
6 anymore and it was time to move on, which the  
7 family did in May of 2007. HP Hood has taken a  
8 much different approach with the Sacramento  
9 plant choosing to sell the Crystal brand name  
10 and conventional milk business and focus instead  
11 on the segment of Extended Shelf Life dairy  
12 products.

13 In conclusion, reflecting upon the impact  
14 of the PD exemption over the last 15 years,  
15 leads me to several conclusions. First of all,  
16 I have no ill feelings toward the Northern  
17 California PDs. To the contrary, they are both  
18 excellent operators and I admire their ability  
19 to see an opportunity and exploit it to their  
20 advantage. I find it highly ironic however,  
21 that the California milk pooling system that was  
22 put in place to stabilize the milk market for  
23 the benefit of all milk producers created this  
24 situation. The expansion of the PD exemption  
25 essentially channeled money that had previously



1           been paid to the producers via the pool to the  
2           producer-distributors which used it to improve  
3           their cost competitiveness and grow their  
4           business, limiting other producers' access to  
5           the Class I market.

6                   I was asked to testify about my  
7           perception of the impact on the California PD  
8           situation -- of the California PD situation. My  
9           understanding is the Federal Order system is  
10          considering a petition that would create a hard  
11          cap that would effectively limit the size of an  
12          exempt producer-handler to a relatively low  
13          volume level. I would encourage this. The goal  
14          of government controlled dairy pricing systems  
15          should provide for market stability for both  
16          producers and processors and should not create  
17          opportunities which stand to benefit one party  
18          at the expense of other parties.

19                   That concludes my testimony. Thank you  
20          for the opportunity to share Crystal's  
21          experience. I hope you find it helpful.

22                   MR. ENGLISH: Your Honor, if I may?

23                   Dr. Schiek --

24                   DR. SCHIEK: Yes, Mr. English.

25                   MR. ENGLISH: -- I'm not going to belabor

1 the point too much. You first moved to  
2 California 12 years ago?

3 DR. SCHIEK: That's right.

4 MR. ENGLISH: And before that -- that  
5 would have been 1997. Before that, you were  
6 involved with Federal Milk Marketing Orders for  
7 at least 15 years, from 1982 to 1997, in one way  
8 or the other?

9 DR. SCHIEK: In -- yeah, in difference  
10 capacities, yes.

11 MR. ENGLISH: You received your bachelor  
12 of science degree from Cornell University in  
13 applied economics and business management,  
14 correct?

15 DR. SCHIEK: Yes.

16 MR. ENGLISH: Did that involve in any way  
17 dairy policy issues?

18 DR. SCHIEK: Well, it involved courses in  
19 dairy marketing. And as an undergraduate  
20 research assistant, I -- in 1980, I worked on a  
21 series of milk transportation and milk receiving  
22 studies while I was at Cornell.

23 MR. ENGLISH: And were those receiving  
24 studies within Federal Order systems?

25 DR. SCHIEK: Yes, they were.

1 MR. ENGLISH: And then you received your  
2 master's and Ph.D. from the University of  
3 Florida in food and resource economics. That  
4 master's and Ph.D., did they involve dairy  
5 policy in any way?

6 DR. SCHIEK: Yes, they did.

7 MR. ENGLISH: To what extent?

8 DR. SCHIEK: My master's thesis had to do  
9 with the impact of milk concentration  
10 technologies on milk supply arrangements in the  
11 Southeast United States. Particularly we were  
12 looking at reverse osmosis, concentration of  
13 fluid milk and its potential for supplying  
14 deficit markets in the Southeast. And that was  
15 under Federal Order pricing rules.

16 My dissertation for my doctorate was  
17 related to a variety of policy factors that were  
18 potentially impacting the regional structure of  
19 production in the U.S., including the Federal  
20 Order areas. We were looking at the impact of  
21 milk inventory management programs, which were  
22 in vogue at the time; at least they were  
23 proposed at the time; as well Federal Order  
24 changes that were being talked about and  
25 considered and the use of bovine somatotropin as

1 a potential changer of production structure in  
2 various regions of the country.

3 MR. ENGLISH: You mean recombinant bovine  
4 somatotropin. I'll spell it later. I'll do it  
5 during a break, if that's okay.

6 There's a difference between recombinant  
7 bovine somatotropin --

8 DR. SCHIEK: Yes, there is.

9 MR. ENGLISH: -- and bovine somatotropin,  
10 correct?

11 THE WITNESS: Yes, there is.

12 MR. ENGLISH: I only want to reference a  
13 couple terms that you've used. You used the  
14 phrase, economic rent seeking. Now, before I  
15 ask you what that means, is that a phrase used  
16 by economists?

17 DR. SCHIEK: It is a phrase used by  
18 economists. And in its simplest sort of common  
19 use, economic rent seeking is basically using  
20 either market power or legislation or regulation  
21 to obtain higher levels of profits than would be  
22 found in -- without those changes in a  
23 competitive market.

24 MR. ENGLISH: You've also used the  
25 phrase, transfer price. Is that also a term

1 used by economists?

2 DR. SCHIEK: Yes, it is.

3 MR. ENGLISH: What is the meaning of that  
4 term, at least as you are using it in this  
5 testimony?

6 DR. SCHIEK: Usually transfer pricing  
7 refers to integrated firms or multi-national  
8 firms, and refers to how inside the confines of  
9 the boundary of the firm, the firm will  
10 establish pricing to move economic units of  
11 production and goods or services from one part  
12 of the business to another.

13 MR. ENGLISH: And other than providing  
14 this testimony, is the Dairy Institute of  
15 California taking any position of any kind of  
16 what the Department should do as a result of  
17 this hearing?

18 DR. SCHIEK: No, we are not.

19 MR. ENGLISH: So you are not opining on  
20 which proposal -- proposal or proposals should  
21 be or should not be adopted, is that correct?

22 DR. SCHIEK: No, I'm not.

23 MR. ENGLISH: No, you're not doing that?

24 DR. SCHIEK: I'm not doing that.

25 MR. ENGLISH: Before you were fortunate

1           enough to arrive here for this proceeding, there  
2           was, I think, some discussion, much of it off  
3           the record last week, with respect to a 15-A, 15  
4           hyphen A, proceeding a few years ago with  
5           respect to the regulatory treatment of  
6           California processors for their sales into Clark  
7           County. Do you remember that proceeding?

8           DR. SCHIEK: I do.

9           MR. ENGLISH: Did you appear in that  
10          proceeding as an economist for the Dairy  
11          Institute of California?

12          DR. SCHIEK: Yes, I did.

13          MR. ENGLISH: And were you accepted as an  
14          expert, as an agricultural economist, in that  
15          proceeding?

16          DR. SCHIEK: Yes, I was.

17          MR. ENGLISH: Your Honor, I have no  
18          further questions of this witness at this time.  
19          I believe that his credentials as an expert are  
20          well established. I reemphasize that he's  
21          talking about the California system. He is not  
22          opining -- and that's what I meant by a fact  
23          witness -- he's not here to say the Department  
24          should do X, the Department should do Y. He was  
25          applying facts using his economic background.

1           Given both his history in the Federal  
2           Order sytem, given his university experience,  
3           given his experiences in California and the fact  
4           that even while he was in California he  
5           testified in a (15)(A) as an economist, I think  
6           it is fair to recognize him as an expert.

7           As for the statement made 20, 25 minutes  
8           ago that somehow people weren't on notice, the  
9           testimony was out yesterday morning at 8:00  
10          a.m., probably even before, and was available.

11          In fact, I handed it out physically to  
12          each attorney. No statements were made prior to  
13          that about what Dr. Schiek was or was not  
14          saying. The statement was there.

15          The term rent seeking, the term transfer  
16          price, the entire testimony was out there so it  
17          cannot be a surprise. Those are terms of art  
18          used by economists and that is one of the  
19          reasons -- only one of the reasons, but one of  
20          the reasons -- why this witness should be  
21          recognized as an expert.

22          Ultimately he is not asking, telling or  
23          otherwise opining on what the Secretary should  
24          do. He is providing, as I said before, within  
25          the context of his professional life, a factual

1 background of how a producer-distributor  
2 exemption in California has worked. I move  
3 admission of the exhibit and I move Dr. Schiek  
4 as an expert in agricultural economics.

5 JUDGE CLIFTON: Don't leave yet.  
6 Dr. Schiek, I'd like to look at your statement.  
7 On page 2 in the last paragraph about the middle  
8 of the paragraph you changed the word production  
9 to exemption when you read it.

10 DR. SCHIEK: That's correct. That's  
11 correct.

12 JUDGE CLIFTON: And is that a change you  
13 would like made on the copy of your Exhibit --

14 MR. ENGLISH: 75.

15 JUDGE CLIFTON: -- 75, thank you. That  
16 will be available on the website for all to see?

17 DR. SCHIEK: I would like that change  
18 made. That is a correction. It means -- it has  
19 a different meaning than production in that  
20 case.

21 JUDGE CLIFTON: All right. I'm going to  
22 ask that the AMS people mark that change for his  
23 initials, and there was one other -- two others  
24 that I wanted to ask if you want them changed on  
25 your written statement.



1                   Look at the bottom of page 4, the last  
2                   line. When you read that, you read it as, he  
3                   would receive the quota price. Is that a change  
4                   that's important enough that you want it to show  
5                   in the document that will be on the website?

6                   DR. SCHIEK: Yes. The price was --  
7                   should have been in there.

8                   JUDGE CLIFTON: All right. I'd like that  
9                   change also to be made available for your  
10                  initial.

11                  And then on page 5 above the chart, the  
12                  paragraph above the chart in the middle of that  
13                  paragraph, there's a sentence that starts, the  
14                  PD, and you inserted the word, regulated, before  
15                  we got to raw product cost advantage.

16                  DR. SCHIEK: Yes, I did. Because I feel  
17                  that clarifies what I'm talking about. So I do  
18                  think that's an important change as well.

19                  JUDGE CLIFTON: All right. I'd ask that  
20                  that item also be changed. And then,  
21                  Dr. Schiek, before you leave here today,  
22                  Ms. Fisher will approach you for initials of  
23                  those changes.

24                  DR. SCHIEK: Okay.

25                  JUDGE CLIFTON: Are you aware of any

1 others -- I realize I didn't read it exactly as  
2 written, but those are the only changes I noted  
3 that might have some significance important  
4 enough to deal with.

5 Mr. English, are you aware, or,  
6 Dr. Schiek, are you aware of any others?

7 MR. ENGLISH: I am not, your Honor.  
8 Thank you for catching those. I circled them  
9 and then I neglected to mention them. Thank  
10 you, your Honor.

11 DR. SCHIEK: I'm not aware of any others  
12 either.

13 JUDGE CLIFTON: Thank you, Dr. Schiek.  
14 And then, Mr. Newell, would you look on your  
15 Exhibit 76? You pointed out the change in the  
16 last paragraph on page 1. It's not a full  
17 paragraph, but it has three lines. And you  
18 changed the 1996 data to 2006.

19 MR. NEWELL: Yes. It should have been  
20 2006.

21 JUDGE CLIFTON: Is that important enough  
22 that you would like that to be changed --

23 MR. NEWELL: Yes.

24 JUDGE CLIFTON: -- and you'll initial it?

25 MR. NEWELL: Yes, I would.

1 JUDGE CLIFTON: That's the only one I  
2 noted. Mr. English and Mr. Newell, are there  
3 any other changes that you would like made?

4 MR. ENGLISH: Your Honor, I noticed only  
5 that on page 2 in the bottom paragraph in the  
6 i.e. section, the third or fourth line, instead  
7 of saying, you competed with your neighbor but  
8 not your neighbor's neighbor, he said and not  
9 your neighbor's neighbor. I don't think there's  
10 a material difference there, but if the witness  
11 wishes -- he said the word and rather than but.  
12 I will let him tell whether either matters.

13 MR. NEWELL: No, it doesn't matter.

14 MR. ENGLISH: I didn't think so, but I  
15 did note it, your Honor.

16 JUDGE CLIFTON: All right. Any others,  
17 Mr. English?

18 MR. ENGLISH: Just one thing -- with  
19 Mr. Newell, I'm fine. I just want to clarify  
20 one thing with Dr. Schiek. 75-A, it was passed  
21 out -- it was made available today. It is  
22 different from page 3 of 75 in what respect?

23 DR. SCHIEK: In that the graph is  
24 displayed in color on 75-A as opposed to black  
25 and white in the copies distributed.

1 MR. ENGLISH: And you thought that was  
2 necessary because or was important because?

3 DR. SCHIEK: Because when the color graph  
4 was rendered into black and white, the trend  
5 that I referenced in the written testimony was  
6 not seen as clearly as it was in color. And I  
7 did not realize when copies were made that --  
8 that they would diminish the visual clarity of  
9 that relationship.

10 MR. ENGLISH: There's no other reason for  
11 the difference, correct?

12 DR. SCHIEK: There is no other reason for  
13 the difference.

14 MR. ENGLISH: All right. Your Honor, I  
15 again offer Exhibit 75, 75-A and 76 for  
16 admission. And I repeat that Dr. Schiek should  
17 be recognized as an expert in agricultural  
18 economics for the testimony he has given.

19 JUDGE CLIFTON: Thank you. Let me start  
20 with the exhibits and determine whether there's  
21 any objection to their being admitted beyond  
22 that already stated by counsel.

23 Starting with Exhibit 75 and 75-A, is  
24 there any objection to those being admitted into  
25 evidence, other than the objections that were

1           made at the testimony in the first place? There  
2           are none.

3                     Exhibit 75 and 75-A are hereby admitted  
4           into evidence.

5                     Is there any objection to the admission  
6           into evidence of Exhibit 76, other than those  
7           already stated before the witnesses testified?  
8           There is none. Exhibit 76 is hereby admitted  
9           into evidence.

10                    Any objection to Dr. Schiek being  
11           recognized as an expert in agricultural  
12           economics, other than those that have already  
13           been stated? There is none, and Counsel, I  
14           appreciate that. I do accept Dr. Schiek as an  
15           expert in the field of agricultural economics.

16                    Now, the witnesses are available for  
17           cross-examination. Would anyone like to  
18           cross-examine? Mr. Vetne.

19                    MR. VETNE: John Vetne representing  
20           Mallorie's Dairy and two other producer-handlers  
21           whose production in Class I is less than  
22           3 million pounds.

23                                    CROSS-EXAMINATION

24           BY MR. VETNE:

25                                    MR. VETNE: Starting with you,

1 Dr. Schiek. The definition of economic rents  
2 that you -- let me see if I can paraphrase this  
3 correctly. Pursuit of a competitive advantage  
4 or economic gain from regulation, from  
5 legislation were like artificial -- I say  
6 artificial -- means that one could not gain in  
7 the competitive marketplace, is that correct?

8 DR. SCHIEK: That -- yeah. That's the  
9 definition I gave.

10 MR. VETNE: Okay. You have not been here  
11 for more than a week of hearings, is that  
12 correct?

13 DR. SCHIEK: That is correct.

14 MR. VETNE: And you have not heard  
15 testimony of producer-handlers who invest in  
16 their business who have testified they would not  
17 be able to meet their debt load, their cash flow  
18 needs if they become fully regulated and had to  
19 contribute to the pool. You are not aware of  
20 that testimony, is that correct?

21 DR. SCHIEK: I am not. I was not here.

22 MR. VETNE: Would not the term economic  
23 rent seeking also apply to the proposals,  
24 Proposals 1 and 2, for a cap with respect to the  
25 proponents' efforts by regulation or rulemaking

1 to make it uneconomic for smaller processors to  
2 continue in business?

3 DR. SCHIEK: Any agricultural policy --  
4 let me put it in a broad context. The Federal  
5 Order system in its entirety could be viewed as  
6 economic rent seeking by producers in their  
7 entirety. So with specific -- in regard to  
8 specific changes, they could be characterized  
9 that way.

10 MR. VETNE: Okay. And with respect to  
11 handlers, and looking specifically here, you  
12 were asked to come and offered as a witness by  
13 Mr. English. He represents handlers, you  
14 understand that, not producers?

15 DR. SCHIEK: I understand that.

16 MR. VETNE: Okay. And with respect to a  
17 handler proposal, the results of which,  
18 according to the testimony of an earlier  
19 witness, would be to put them out of business.  
20 That would be an effort at economic rent seeking  
21 by those who hope to gain that business when  
22 their regulatory targets go out of business,  
23 correct?

24 DR. SCHIEK: Well, I should say I didn't  
25 hear the testimony, but if I take on face value

1           what you have said, it could be categorized that  
2           way.

3           MR. VETNE:   And even if they don't go out  
4           of business, increasing a competitor's costs  
5           creates advantage for those who, by regulation  
6           or legislation, seek to increase those costs?

7           DR. SCHIEK:   If you assume the starting  
8           point is a competitive market, yes.  It could  
9           also be characterized as redressing a former  
10          regulatory imbalance that created -- but was  
11          created by economic rent seeking on the part of  
12          the advantaged party.

13          MR. VETNE:   You're assuming a -- a  
14          seeking took place at some point by the  
15          advantaged party.  Can we --

16          DR. SCHIEK:   I am, you're right.

17          MR. VETNE:   You are.  Okay.  With respect  
18          to producer-handler status in the Federal Order  
19          system, it's been relatively unchanged other than  
20          into markets for maybe 70 years.  So if there  
21          are those who sought, they are long since passed  
22          on.

23          DR. SCHIEK:   Is that a question?

24          MR. VETNE:   Is it?  Yes, that's a  
25          question.



1 DR. SCHIEK: As you described it to me,  
2 that sounds correct.

3 MR. VETNE: Now, let me start with your  
4 graph, with the colored version, so I can  
5 understand it. Let me see what this represents.

6 This represents aggregate combined volume  
7 of milk reported processed by the Type 70  
8 producer-handlers, is that correct?

9 DR. SCHIEK: Yes.

10 MR. VETNE: That's all of their milk  
11 receipts and utilization?

12 DR. SCHIEK: That's correct.

13 MR. VETNE: Okay. And there are five  
14 such plants that continue to exist?

15 DR. SCHIEK: That's correct.

16 MR. VETNE: Okay. And they derive their  
17 exemption for part of their milk back to 1967,  
18 correct?

19 DR. SCHIEK: Yes. That was when the  
20 legislation was enacted. The pooling plan  
21 become effective in 1969.

22 MR. VETNE: Okay. There -- let's see.  
23 On the color version, there is -- a portion of  
24 the bar is red. That is the legislatively  
25 exempt volume?

1 DR. SCHIEK: That's correct.

2 MR. VETNE: And that's a volume that's  
3 exempt from accounting at the difference between  
4 Class I and quota for those producer-handlers,  
5 correct?

6 DR. SCHIEK: Correct.

7 MR. VETNE: And they only get to take  
8 advantage of that exemption or enjoy the  
9 difference -- let me put it this way. They only  
10 get to enjoy a retention of the difference  
11 between Class I and quota if they actually  
12 produce a volume of Class I milk that equals or  
13 exceeds that?

14 DR. SCHIEK: That's correct.

15 MR. VETNE: Okay. And then the blue  
16 portion is the additional Class I that these  
17 five Type 70 producer-handlers fluid milk  
18 products make from either their own milk above  
19 the exempt volume or milk purchased from other  
20 producers?

21 DR. SCHIEK: That's correct.

22 MR. VETNE: And the gray portion is  
23 Class II, Class III, Class IV A and IV B,  
24 correct?

25 DR. SCHIEK: Correct.

1           MR. VETNE: And do you know whether in  
2 this system any of this volume would include the  
3 diversions to manufacturing plants or sales to  
4 manufacturing plants?

5           DR. SCHIEK: This is pool volume, so it  
6 would include diversions which would be  
7 classified at the ultimate utilization. In  
8 other words, how it was finally used wherever  
9 they sent it.

10          MR. VETNE: Of the receiving plant?

11          DR. SCHIEK: That's right.

12          MR. VETNE: Okay. And do you know if  
13 this represents all pooled receipts, these bars?

14          DR. SCHIEK: Pooled receipts by the Type  
15 70s?

16          MR. VETNE: Yes.

17          DR. SCHIEK: Okay. The blue and the gray  
18 bar are the pooled receipts of the Type 70s.

19          MR. VETNE: Do you know if these, the  
20 blue and the gray and the red combined, reflect  
21 all receipts by the Type 70 exempt  
22 producer-handlers to the extent -- let me put it  
23 this way -- to the extent that these  
24 producer-handlers received milk from dairy farms  
25 located out of California, is that volume

1 reflected here?

2 DR. SCHIEK: That volume would not be  
3 reflected here.

4 MR. VETNE: Would it be reflected for  
5 some of those years?

6 DR. SCHIEK: It is possible that that  
7 volume would have been reflected for some of  
8 those years. It is possible, yeah.

9 MR. VETNE: Is it not the case that from  
10 about 1997 through about 2004 that out of state  
11 milk was included in the pool?

12 DR. SCHIEK: It is the case, yes.

13 MR. VETNE: So do you know any reason why  
14 it would not be reflected here for those years?

15 DR. SCHIEK: Other than the fact that I,  
16 in my time at Dairy Institute and discussing  
17 matters of the market with a lot of people in  
18 the industry, including our membership, there  
19 was never any indication that the Type 70s in  
20 Northern California engaged in importing milk  
21 from out of state.

22 MR. VETNE: Okay. There are two Type 70  
23 PDs in Northern California and three in Southern  
24 California?

25 DR. SCHIEK: That's correct.

1 MR. VETNE: No gray above the bar graph  
2 for 1993 and '94. Could you explain that?

3 DR. SCHIEK: Yeah. This data was  
4 provided by the milk pooling branch of the  
5 California Department of Food and Agriculture as  
6 part of a hearing exhibit in the matter of the  
7 Class I, II and III milk pricing hearing that  
8 was conducted on October 30th and 31st of 2008.  
9 And the exhibit they put together, for whatever  
10 reason -- I'm not quite sure why -- did not have  
11 the -- other than the exempt quota level did not  
12 have the pooled Class I and the pooled other  
13 information available for those prior years.

14 MR. VETNE: Okay. Would it be correct to  
15 say that for every year from 1996 when the  
16 pooling plan was first put into effect through  
17 1994, there was also some pooled Class I and  
18 some pooled other milk from those Type 70  
19 producer-handlers?

20 DR. SCHIEK: Could you restate the  
21 question? I want to make sure I give an  
22 accurate answer.

23 MR. VETNE: Yeah. The pool plan was put  
24 into effect in 1969, okay? If you had all of  
25 the data on receipts and utilization, would you

1 not expect to find some blue and some gray on  
2 the bar graphs going back prior to 1994?

3 DR. SCHIEK: If you included out of state  
4 milk, is that what you're --

5 MR. VETNE: No.

6 DR. SCHIEK: Okay. I'm confused.

7 MR. VETNE: In 1994, if you had the data,  
8 you would expect to find, on the 1994 bar, some  
9 blue and some gray?

10 DR. SCHIEK: Yes, that's correct.

11 MR. VETNE: And it would probably be  
12 pretty close to what appears in the following  
13 year, 1995. There's not much change from year  
14 to year?

15 DR. SCHIEK: Yeah, that would be my  
16 assumption.

17 MR. VETNE: And the same thing would be  
18 true for prior years, there would be some blue  
19 and some gray?

20 DR. SCHIEK: There would be some blue and  
21 some gray, that's correct.

22 MR. VETNE: And you're not aware of any  
23 dramatic increase in the blue and the gray for  
24 years prior to 1995?

25 DR. SCHIEK: I am not aware of it, no.

1                   MR. VETNE: With respect to the Type 70  
2 exempt producer-handlers, there are five  
3 remaining. How many were there originally in  
4 1969 when the pooling plan went into effect?

5                   DR. SCHIEK: I don't know the answer to  
6 that.

7                   MR. VETNE: Okay. Do you know the number  
8 for any period of time prior to the current  
9 year?

10                  DR. SCHIEK: There have been five since I  
11 have been at Dairy Institute. So from 1997  
12 forward, there have been five. My understanding  
13 is there were five in 1993 when the last  
14 legislative increase in the exemption occurred.

15                  MR. VETNE: Okay, all right. Do you  
16 know -- do you know what the specific exempt  
17 volume is for each of the five?

18                  DR. SCHIEK: No, I do not.

19                  MR. VETNE: Do you know the range of  
20 exempt volume for the five?

21                  DR. SCHIEK: No, I do not. I do know  
22 that it is not equal among the five. Two are  
23 significantly smaller than the other three. And  
24 even among those three, there is a range in  
25 terms of what percentage of their production is

1 covered. It -- what I had been told was that it  
2 ranged -- and this was several years ago, so as  
3 they expand production, the percentages go down,  
4 you understand. But the range was between 10  
5 and 30 on the larger PDs.

6 MR. VETNE: And as a percentage of what?

7 DR. SCHIEK: Of their total Class I  
8 sales.

9 MR. VETNE: Okay. Then what does that  
10 translate to in -- in pounds or gallons?

11 DR. SCHIEK: I don't know. I can tell  
12 you that, on average, we're looking at 21 to  
13 22 million pounds a month, roughly  
14 4 million pounds per -- if you divided by 5,  
15 it'd be 4 million pounds per. Since three of  
16 them are larger it's reasonable to assume for  
17 those three it's more than 4 million pounds a  
18 month.

19 MR. VETNE: Okay. Who are the two  
20 smaller ones?

21 DR. SCHIEK: The two smaller ones are  
22 Scott Brothers Dairy and Hollandia Dairy.

23 MR. VETNE: And they are located?

24 A. Scott Brothers, I believe, is in -- I was  
25 going to say Ontario, but it might be San Bernadino, in



1 San Bernadino County. And Hollandia is in San Diego.

2 MR. VETNE: Okay. So one of the what  
3 you've described larger PDs with a larger  
4 exemption is located in Southern California, and  
5 the other two relatively larger ones are the two  
6 Northern California ones that were described,  
7 correct?

8 DR. SCHIEK: Correct.

9 JUDGE CLIFTON: Would you spell  
10 Hollandia?

11 DR. SCHIEK: One moment, please. I  
12 believe it's H-o-l-l-a-n-d-i-a.

13 JUDGE CLIFTON: Thank you.

14 MR. VETNE: On the bottom of page 2, the  
15 last full paragraph in the middle, after the  
16 word Proposal 17, you say, except that the  
17 entire production is applied to the plants'  
18 Class I usage. The characterization of the  
19 entire production applied to the plant's Class I  
20 usage. You are contrasting what exists in  
21 California with Proposal 17, correct?

22 DR. SCHIEK: I need to make the  
23 correction that that word production was changed  
24 to exemption.

25 MR. VETNE: Okay.

1 DR. SCHIEK: Okay. With that correction,  
2 except the entire exemption as applied to the  
3 Class I usage, you were comparing Proposal 17 to  
4 what currently exists in California for Type 70  
5 PDs?

6 DR. SCHIEK: I was comparing my  
7 understanding of Proposal 17, yes.

8 MR. VETNE: Okay. And to which of those  
9 two regulatory schemes or proposed regulatory  
10 schemes did you apply the characterization of  
11 the entire exemption applied to Class I usage?

12 DR. SCHIEK: For the California system.

13 MR. VETNE: Okay. So you weren't  
14 referencing back to Proposal 17?

15 DR. SCHIEK: That's correct.

16 MR. VETNE: You were referencing to  
17 California?

18 DR. SCHIEK: That's right.

19 MR. VETNE: Okay. And you understand  
20 that the Proposal 17 in contrast would apply it  
21 to a plant blend?

22 DR. SCHIEK: That was my understanding  
23 from reading it, yes.

24 MR. VETNE: What -- that would make a  
25 difference, wouldn't it, in a plant's ability to

1 offer milk at a lower price?

2 DR. SCHIEK: Unless the plant was  
3 100 percent Class I utilization, yes.

4 MR. VETNE: Okay. Further on, you  
5 indicate that the five plants that have some  
6 Type 70 exempt milk have a pooled Class I  
7 volume, an additional 100.1 million pounds per  
8 month. Do you know -- and then some additional  
9 pooled in other classes. So five plants, 183,  
10 '84 million pounds for all of them. Do you  
11 know -- other than dividing 183 by five, do you  
12 know something about the size range of those  
13 plants?

14 DR. SCHIEK: I couldn't comment with  
15 certainty on that.

16 MR. VETNE: Can you comment with  
17 something less than certainty but informed  
18 information?

19 DR. SCHIEK: Not at this time. I could  
20 perhaps do that with a little time to think  
21 about it.

22 MR. VETNE: Okay. Can you identify the  
23 plants that are the largest among the five, say  
24 the three largest?

25 DR. SCHIEK: Sure. The largest three are

1 Producers Dairy located in Fresno, California;  
2 Foster Farms Dairy located in Modesto,  
3 California; and Rockview Dairy located in  
4 Downey, California.

5 And the order in which I gave them is not  
6 necessarily the order of largest to smallest.  
7 It's just those are the three that are larger  
8 than the other two.

9 MR. VETNE: Are you able to -- based on  
10 the information that you have gained for the  
11 past 12 years in California, is that right, 12  
12 years?

13 DR. SCHIEK: 12 years, yes.

14 MR. VETNE: Okay. Do you know whether  
15 any of these plants are as small as  
16 5 million pounds or 4 million pounds total  
17 receipts per month?

18 DR. SCHIEK: Of the five?

19 MR. VETNE: Yes.

20 DR. SCHIEK: I do not.

21 MR. VETNE: Do you know?

22 DR. SCHIEK: Let me clarify that. I'm  
23 sure four of the five are larger than that. I'm  
24 not sure about the fifth.

25 MR. VETNE: Okay. As I understand -- as

1 I understand your testimony, things were going  
2 on fairly okay with respect to Type 70 PDs until  
3 the legislature on two occasions increased their  
4 exempt volume, is that correct -- is that a  
5 correct understanding?

6 DR. SCHIEK: I believe that was from  
7 Mr. Newell's testimony.

8 MR. VETNE: Okay. Do you have any  
9 different view?

10 DR. SCHIEK: No. I arrived in 1997 so I  
11 don't have the specific knowledge of what it was  
12 like in the market prior to that time.

13 MR. VETNE: Okay. And based on your  
14 experience and understanding, you're not aware  
15 of any particular difficulty prior to that time?

16 DR. SCHIEK: From familiarity with Dairy  
17 Institute meetings -- we have boards meetings  
18 like any trade association does, several times a  
19 year -- the producer-handler issue was one that  
20 could come up in discussion, and I probably  
21 should note that until the 1993 exemptions,  
22 producer-handlers were -- even the large  
23 producer-handlers were members of our  
24 organization.

25 The issue was talked about, discussed

1 among the non-PDs who probably had concerns --  
2 some of whom had concerns about it, but  
3 certainly the -- I think the best way to  
4 characterize it is the level of concern became  
5 much higher after the 1993 amendments.

6 MR. VETNE: Okay. Going to page 4, so we  
7 can translate concepts you use in California to  
8 concepts that we use in the Federal Order  
9 system.

10 The second full paragraph, beginning with  
11 the words, in 1987 producers received -- Type 70  
12 producer-handlers received an additional daily  
13 exemption of 150 pounds fat and 375 pound solid  
14 nonfat. What does that translate to in terms of  
15 pounds of milk or monthly pounds of milk?

16 DR. SCHIEK: Well, I haven't made the  
17 calculation in terms of into converting it into  
18 producer milk. Primarily that's because our  
19 pricing in general works on components and has  
20 for a long time in California. So the  
21 hundredweight milk price, for example, is more  
22 of a reference point than it is a matter of  
23 economic measurement in the state.

24 But to -- you could ascertain that by  
25 assuming 3.5 percent fat in standard milk, and

1           figuring out what -- what volume that would come  
2           to, taking the 150 and doing the math, or  
3           8.7 percent solid nonfat at that time.

4           MR. VETNE: Okay. Otherwise, is the 150  
5           to 375 ratio intended to be similar to fats, to  
6           nonfat solids in producer milk?

7           DR. SCHIEK: Looking at it, it appears  
8           that it is.

9           MR. VETNE: Okay. You could do either  
10          one. You could take 3.5 pounds of fat and  
11          simply divide 150 by 3.5 pounds, and you'll get  
12          the daily pounds of milk. And multiplied by the  
13          number of days in the month, you get the monthly  
14          volume that represents?

15          DR. SCHIEK: That sounds correct, yes.

16          MR. VETNE: So two things happened  
17          legislatively in 1978 with respect to Type 70  
18          PDs. One, they got an additional exempt volume  
19          of 150 pounds fat, whatever milk that  
20          represents, plus to the extent that they had  
21          purchased quota --

22          DR. SCHIEK: Uh-huh.

23          MR. VETNE: -- and quota is sold on the  
24          open market in California as an asset?

25          DR. SCHIEK: It is, yes.

1                   MR. VETNE: And it's an asset that  
2 provides -- basically you're purchasing an  
3 income stream?

4                   DR. SCHIEK: Correct.

5                   MR. VETNE: Plus there -- the value of  
6 the asset they purchased in the past increased,  
7 because the income stream increased by adding  
8 quota purchased to the exempt volume, is that  
9 correct?

10                  DR. SCHIEK: Again, could I ask you to  
11 repeat the question?

12                  MR. VETNE: To the extent, prior to 1978,  
13 producer-handlers had purchased quota, that  
14 additional purchased volume was added to their  
15 exempt volume?

16                  DR. SCHIEK: It was added to the original  
17 allocated exempt volume, yes.

18                  MR. VETNE: All right. So when they  
19 purchased quota, they purchased an income  
20 stream. And when the legislature acted in 1978,  
21 it improved that income stream?

22                  DR. SCHIEK: Correct.

23                  MR. VETNE: And a similar thing happened  
24 in 1993?

25                  DR. SCHIEK: Correct.



1 MR. VETNE: And all of this, as I  
2 understand your testimony -- well, first of all,  
3 it happened before you got there, so you did  
4 some research, correct?

5 DR. SCHIEK: Correct.

6 MR. VETNE: Okay. All of this happened  
7 because of, as I understand it, the political  
8 power of producer-handlers, correct?

9 DR. SCHIEK: Yes.

10 MR. VETNE: And in California,  
11 producer-handler exemptions and classification  
12 of milk and milk products, the relationship of  
13 quota to overbase, a lot of things are  
14 determined legislatively that, in the federal  
15 system, are determined by the Secretary of  
16 Agricultural in a hearing such as this?

17 DR. SCHIEK: That is correct.

18 MR. VETNE: Okay. And, in fact, one of  
19 the reasons that producer-handlers in particular  
20 have political power in California is that  
21 during this time, and maybe even now, they were  
22 represented by Representative Gonsalves, who was  
23 the father of the original pooling act, correct?

24 DR. SCHIEK: You've done your homework,  
25 too. Correct.

1 MR. VETNE: And he's a lobbyist now, or  
2 he was during this time?

3 DR. SCHIEK: When he was alive, he was a  
4 lobbyist, and his son continues.

5 MR. VETNE: Continues the business?

6 DR. SCHIEK: Uh-huh.

7 MR. VETNE: And it was the original  
8 Gonsalves, the father of the Milk Pooling Act,  
9 who -- who was the lobbyist that secured for his  
10 clients the 1978 legislation when he was alive  
11 and kicking?

12 DR. SCHIEK: He was the lobbyist then,  
13 yes.

14 MR. VETNE: And your belief is that it  
15 would have been better for your Dairy Institute  
16 members if this kind of decision could be made  
17 by the Agriculture Department, the Secretary of  
18 Food and Agriculture who administered the  
19 program, correct?

20 DR. SCHIEK: In general. I would say it  
21 depends on the person, the Secretary's chair,  
22 but as a -- as a rule and in general, the  
23 Department has experts in dairy marketing on  
24 staff. Typically, the legislature does not.  
25 And I -- I bring this point up primarily because

1 even -- you are correct in -- in your statements  
2 about the legislator being more involved in --  
3 in dairy policymaking in California. But we've  
4 seen, I believe, in the Federal Order sytem  
5 cases where legislature has stepped in and  
6 overruled the Secretary on various issues. The  
7 one I'm thinking of is the Class I differentials  
8 in 1999.

9 MR. VETNE: Do you -- are you aware in  
10 the Federal Order sytem of whether  
11 producer-handlers have any measure of political  
12 power with the decision makers; that is, the  
13 Department of Agriculture, comparable to the  
14 political power that producer-handlers have with  
15 the legislature in California?

16 DR. SCHIEK: Okay. Let me state back  
17 your question. You're asking if the  
18 producer-handlers in the Federal Orders have  
19 power with the Department in the Federal Orders,  
20 the U.S. Department of Agriculture, comparable  
21 to the power that they have in the legislature  
22 in California? And I guess my answer to that  
23 is, I am not aware of any such.

24 MR. VETNE: Good. Thank you. That's my  
25 question, and thank you for understanding my

1 questions and giving me a direct answer.

2 JUDGE CLIFTON: Mr. Vetne, this is about  
3 the time of morning that's good to take a break.  
4 Would you mind terribly if I interrupt your  
5 cross?

6 MR. VETNE: Absolutely not.

7 JUDGE CLIFTON: All right. Thank you.  
8 Let us take a 20-minute break. Please be back  
9 and ready to go at five minutes after ten.

10 (A recess was taken from 9:47 to 10:06.)

11 JUDGE CLIFTON: Let's go back on record.  
12 We're back on record at 10:06. Mr. Vetne, you  
13 may proceed.

14 MR. VETNE: Okay. Dr. Schiek. Still  
15 with you. One of the characteristics of the  
16 California regulatory system to which you  
17 referred is a law that regulates the ability of  
18 milk handlers to sell below cost, is that  
19 correct?

20 DR. SCHIEK: That's correct.

21 MR. VETNE: Excuse me. Let's go off  
22 record just a minute.

23 (Off the record.)

24 JUDGE CLIFTON: Mr. Vetne.

25 MR. VETNE: Okay. We were discussing the

1           sell below costs. Is that law administered by  
2           the same people that administer the pooling and  
3           pricing plans?

4           DR. SCHIEK: It is administered by the  
5           dairy marketing branch, which also determines  
6           minimum pricing, in terms of -- oversees minimum  
7           pricing by class. The pooling plan is  
8           administered by the milk pooling branch, which  
9           is a separate branch although they're both under  
10          the configuration of marketing services.

11          MR. VETNE: Okay. So the division of  
12          marketing services, overall, administers all of  
13          these programs?

14          DR. SCHIEK: Yes, correct.

15          MR. VETNE: Okay. As I understand it,  
16          your testimony, there's a relationship between  
17          the -- the sale below or anti sale below cost  
18          law and the ability of California Section 70  
19          producer-handlers to bid on wholesale or retail  
20          accounts, is that correct?

21          DR. SCHIEK: I'm not sure I would  
22          characterize it that way. If I could explain --

23          MR. VETNE: You might anticipate my  
24          question, so please do.

25          DR. SCHIEK: Okay. There is a part of

1           the food and agricultural code that prohibits  
2           sales below cost. And to the extent that a  
3           processor is competing for sales, they can sell  
4           below cost if they are needing a legitimate  
5           price that is in the below cost. So what is --  
6           what becomes important is not only as a  
7           processor your cost if you were a processor, but  
8           the cost of your competitors as well. So if  
9           your competitive has a lawful price that they're  
10          offered based on their costs, then you are  
11          allowed to beat it. That may not answer your  
12          question.

13                 MR. VETNE: Well, it sort of does. When  
14                 there's a bid, for example, for -- well, you  
15                 described a bid process. And school sales are  
16                 bid processes, correct?

17                 DR. SCHIEK: Usually, yeah.

18                 MR. VETNE: Once you put in a bid, you  
19                 don't get a chance to meet your competition, is  
20                 that correct?

21                 DR. SCHIEK: Typically, yeah.

22                 MR. VETNE: And am I correct that, in  
23                 interpreting your testimony, that  
24                 producer-handlers, when they make a bid in  
25                 relationship to the below cost rule, they are

1           allowed to assign their exempt volume to that  
2           bid?

3                     DR. SCHIEK:  Yeah, because that exempt  
4           volume is a portion of their costs.

5                     MR. VETNE:  So they're allowed to take a  
6           portion of their milk supply that they received  
7           presumably at a lower cost and relate that to  
8           the below cost law, disregarding their entire  
9           average milk cost, is that correct?

10                    DR. SCHIEK:  That's my understanding,  
11           yes.

12                    MR. VETNE:  Okay.  And there is no  
13           comparable regulations administered by USDA  
14           that's integrated with milk pricing or pooling,  
15           is there?

16                    DR. SCHIEK:  I'm not aware of any.  Back  
17           on your previous question, I might point out  
18           that if that exemption, which I estimated on --  
19           the advantage on exempt milk, which I estimated  
20           at 11.3 cents, I believe, over the ten-year  
21           period I was looking at, 11.3 cents per gallon  
22           given the volumes of unregulated -- excuse me,  
23           the volumes of exempt Class I and the volumes of  
24           pooled Class I milk of the producer-handlers in  
25           aggregate.  If you spread that exemption over

1           their entire Class I volume, it would still be  
2           about 2 cents a gallon --

3           MR. VETNE: I was going to ask that  
4           question. Okay. So let's see. The bar graph  
5           at the bottom of page 5, your testimony at the  
6           bottom of page 6, and your reference to cost  
7           advantages, all of your written testimony, all  
8           relate to the advantage on that isolated portion  
9           that is exempt?

10          DR. SCHIEK: The numbers that I cite  
11          there are -- are on the exempt portion, that's  
12          correct.

13          MR. VETNE: Okay. Other than your  
14          response to the comment a question or two ago,  
15          you did not in your testimony estimate an  
16          advantage on the entire milk receipts and  
17          utilization of Section 70, exempt  
18          producer-handlers?

19          DR. SCHIEK: Not in my testimony, no.

20          MR. VETNE: Okay. Let's go to the top of  
21          page 7, the sentence beginning with, as a result  
22          of the cost advantages producer-handlers have  
23          grown. Are you familiar with the term,  
24          incremental costs?

25          DR. SCHIEK: I'm familiar with the term.



1           And I've heard it used different -- differently  
2           in different situations.

3           MR. VETNE:   Okay.   Well I'm going to get  
4           to that.

5           DR. SCHIEK:   Okay.

6           MR. VETNE:   Okay.   When a  
7           producer-handler -- somebody in the aggregate in  
8           Figure 1 that has receipts of milk that is fully  
9           pooled takes on an additional account, increases  
10          Class I sales, is not the incremental cost for  
11          that additional sale the same as for regulated  
12          handlers; that is, the Class I price minus  
13          quota?

14          DR. SCHIEK:   I better ask you to repeat  
15          the question.

16          MR. VETNE:   Okay.   When a  
17          producer-handler that has some exempt milk but  
18          also has nonexempt milk that's fully pooled,  
19          right, increases Class I sales, takes on a new  
20          account, is not the incremental cost for that  
21          additional volume of milk receipts Class I minus  
22          quota?

23          DR. SCHIEK:   The additional cost -- the  
24          additional cost -- Class I as --

25          MR. VETNE:   I'm talking about on

1 nonexempt milk.

2 DR. SCHIEK: On non-exempt milk.

3 MR. VETNE: We are getting to that  
4 portion that is not exempt.

5 DR. SCHIEK: Okay. So what you are  
6 asking is, the cost of that milk to the handler,  
7 nonexempt milk on incremental business --

8 MR. VETNE: Uh-huh.

9 DR. SCHIEK: -- is a Class I minus quota?  
10 Unless I'm misunderstanding your question, I  
11 think it's Class I, period.

12 MR. VETNE: Oh, it's Class I, okay. So  
13 there is no advantage on -- for additional  
14 nonexempt volume. The Section 70  
15 producer-handler pays the same Class I price as  
16 everybody else and accounts to the pool just  
17 like everybody else?

18 DR. SCHIEK: Given the parameters of your  
19 question, that's correct.

20 MR. VETNE: Has there been, in  
21 California, a consolidation of plants and --  
22 fluid milk plants in plant capacity as there has  
23 been in the rest of the country?

24 DR. SCHIEK: There has been some, yes.

25 MR. VETNE: Plants are --

1 DR. SCHIEK: There are fewer plants.

2 MR. VETNE: Fewer plants. And the plants  
3 that survive are larger?

4 DR. SCHIEK: We've had some fairly large  
5 and some small plants close, so I don't know if  
6 I'm really prepared to characterize the  
7 situation that -- probably the average size of  
8 -- of the remaining plants is larger, yes.

9 MR. VETNE: Well, if you have fewer  
10 plants and fairly consistent volume of Class I,  
11 they would be larger, wouldn't they?

12 DR. SCHIEK: Yes.

13 MR. VETNE: And in California during --  
14 now, I'm on page 7 looking at that graph -- in  
15 California are there other over-order premiums  
16 on Class I milk?

17 DR. SCHIEK: Yes, there are.

18 MR. VETNE: Okay. And those have varied  
19 over time, haven't they?

20 DR. SCHIEK: They have.

21 MR. VETNE: And they've become an  
22 increasing part of the price that handlers have  
23 to pay during the last decade?

24 DR. SCHIEK: An increasing part? They  
25 varied over time. I'm not sure that the trend

1 is necessarily increasing. I don't know. But  
2 at times they've been larger. At times, we had  
3 a -- a marketing agency operative in southern  
4 California for a number of years that got very  
5 large at that point. That agency collapsed, and  
6 then they got much smaller again.

7 MR. VETNE: The -- the chart, the line  
8 graph on page 7 --

9 DR. SCHIEK: Uh-huh.

10 MR. VETNE: -- showing shares of Class I  
11 market by types of plants, that reflects a  
12 number of competitive factors, does it not,  
13 including premiums charged, location of plants,  
14 plants closing, plant efficiencies, in addition  
15 to whatever the cost advantage Section 70 plants  
16 have on a portion of their supply?

17 DR. SCHIEK: The graph is simply an  
18 estimate of the share -- simply is the share and  
19 it would be reflective of all the factors that  
20 are at work in the marketplace.

21 MR. VETNE: Okay. So it is not your  
22 intent by this graph to opine that the ratio of  
23 sales by Section 70 plants and non -- and fully  
24 regulated plants is exclusively due to the  
25 Section 70 producer-handlers having a cost

1 advantage on some of their milk?

2 DR. SCHIEK: Exclusively, no. To the  
3 largest degree and as the most important factor,  
4 yes.

5 MR. VETNE: Okay. Have you quantified or  
6 identified the other factors?

7 DR. SCHIEK: I have not quantified the  
8 other factors.

9 MR. VETNE: Okay. Have you identified  
10 the other factors?

11 DR. SCHIEK: No, not specifically.

12 MR. VETNE: Okay.

13 DR. SCHIEK: But I would point out other  
14 factors are, in general, at work for all  
15 processors.

16 MR. VETNE: Okay. With respect to fully  
17 regulated California processors, what is the  
18 average size of those plants?

19 DR. SCHIEK: I don't know.

20 MR. VETNE: What about the average size  
21 of the members, fluid distributors in your  
22 membership?

23 DR. SCHIEK: I don't have that figure  
24 either.

25 MR. VETNE: Okay. Does your membership

1 collect data on plant costs --

2 DR. SCHIEK: No, we didn't.

3 MR. VETNE: -- on processing costs?

4 DR. SCHIEK: We don't collect any data  
5 simply on our members' processing costs, no.

6 MR. VETNE: Do you receive information  
7 from other sources on processing costs of fluid  
8 milk plants in general, for example, for  
9 purposes of below-cost regulation?

10 DR. SCHIEK: We do not. The state is the  
11 one in charge with enforcing sales below costs.  
12 And they would -- they would have costs. If  
13 they're involved in a matter, they would be  
14 given those costs by the processor, if there's a  
15 complaint. So we don't specifically request  
16 those costs from our members.

17 MR. VETNE: So it's not part of your  
18 function of the Dairy Institute of California to  
19 consult and advise with its members on issues of  
20 below cost sales?

21 DR. SCHIEK: We will when they ask us  
22 specifically to do it. We don't maintain a  
23 database or we're not out there telling our  
24 members that -- we're not monitoring our members  
25 on that, I should say.

1           MR. VETNE: Okay. Based on the limited  
2 involvement that your institute has with  
3 processors costs, do you have a ballpark figure  
4 on what it costs to take milk from the silo to  
5 the package?

6           DR. SCHIEK: Again, I don't think I have  
7 a number that I can give you at this time. The  
8 Department of Agriculture in California, the  
9 CDFA, does produce annually a limited analysis  
10 of marketing margins. In other words, they  
11 would look at the fluid milk price and retail  
12 price and assign a share attributed to  
13 production and retailing. So that data is  
14 available. I have seen it. I just don't recall  
15 it.

16          MR. VETNE: Okay. Would it be fair to  
17 say, based on what we know of the  
18 producer-handlers and their total volume, that  
19 the type 70 producer-handlers are not  
20 substantially smaller than most of the fully  
21 regulated plants with which they compete?

22          DR. SCHIEK: I think that would be fair  
23 to say for three of the five Type 70s, yes.

24          MR. VETNE: Okay. On the top of page 5  
25 of your testimony, you -- I guess speculate is

1 the best word. In the last sentence, the  
2 paragraph ending at top of the page. So actual  
3 cost advantage may be greater.

4 You are referring there to the price  
5 received at the producer-handler farm, is that  
6 correct?

7 DR. SCHIEK: Yes, I'm referring to that  
8 transfer price that I've described.

9 MR. VETNE: Okay. And that would occur,  
10 cost advantage being greater, would occur if the  
11 cost of farm milk production at the  
12 producer-handler farm were lower than costs at  
13 other farms?

14 DR. SCHIEK: I think it could -- I think  
15 my point there is that it could occur regardless  
16 of the cost at the farm.

17 MR. VETNE: It could occur at -- so  
18 you're saying -- I don't -- I don't get it in  
19 that case. Because a farm that operates  
20 continually below cost is not going to exist  
21 very long. Would you agree with that?

22 DR. SCHIEK: Not necessarily. In the  
23 case of a Type 70 producer-handler you could  
24 operate your cost at the farm significantly --  
25 significantly -- a -- below cost at some level,



1 and as long as your profitability from the  
2 processing side more than compensated you, you  
3 could do it. There's an integrated business.  
4 Total profit of the entire business is what  
5 matters.

6 MR. VETNE: Yeah, it really doesn't  
7 matter how the producer -- Type 70  
8 producer-handler allocates within its units?

9 DR. SCHIEK: Yeah.

10 MR. VETNE: It's the bottom line from the  
11 cow to the package totaled up that makes the  
12 difference, correct?

13 DR. SCHIEK: The bottom in terms of  
14 costs, you mean?

15 MR. VETNE: In terms of cost advantage.  
16 That's the word you used.

17 DR. SCHIEK: Certainly the business is  
18 not viable long run if they're selling milk  
19 below that total cost. In terms of their  
20 advantage relative to a fully regulated handler  
21 at any point in time, it's -- they will price  
22 internally in a manner that maximizes their  
23 total profit. That's my point.

24 MR. VETNE: Do you know for a fact that  
25 producer-handlers price within -- within their

1 organization to the farmer?

2 DR. SCHIEK: So you're asking me -- what  
3 you are really asking me there from an economic  
4 perspective is whether they're profit maximizers  
5 or not. And I have no reason to believe they're  
6 not.

7 MR. VETNE: You assume, as an economist,  
8 that everybody is.

9 DR. SCHIEK: I would say from my  
10 experience in California with three of the Type  
11 70 PDs that they are profit maximizers.

12 MR. VETNE: My question was, don't you,  
13 as an economist, assume that everybody operating  
14 in a competitive market is a profit maximizer?

15 DR. SCHIEK: Yes.

16 MR. VETNE: You say earlier in that  
17 paragraph the transfer price is assumed to be  
18 the quota price. My question is, assumed by  
19 whom?

20 DR. SCHIEK: Well, certainly assumed by  
21 me.

22 MR. VETNE: I got that part.

23 DR. SCHIEK: So there's -- there's one.  
24 Discussions with industry personnel, from the  
25 producer trade associations from CDFA's staff,

1 from my membership and -- I guess that's pretty  
2 much everybody except the PDs. That's how  
3 everyone calculates it, and that's the  
4 assumption everyone makes.

5 MR. VETNE: Everyone. I guess I can't  
6 cross-examine you on that. The sentence ending  
7 at the top of the page from the prior page.

8 DR. SCHIEK: The sentence ending the top  
9 of the page?

10 MR. VETNE: Page 4 to 5. If the PD did  
11 not have a plant --

12 DR. SCHIEK: Okay.

13 MR. VETNE: -- he would receive --

14 DR. SCHIEK: Okay.

15 MR. VETNE: -- the quota price for all  
16 exempt milk he shipped to a regulated handler.

17 DR. SCHIEK: Uh-huh.

18 MR. VETNE: In that case the exempt milk  
19 is no different from any other milk. It's just  
20 quota milk?

21 DR. SCHIEK: It's quota milk, exactly.

22 MR. VETNE: It's, in effect, not exempt  
23 milk anymore?

24 DR. SCHIEK: If that were the case, if  
25 the exemption did not exist, it would not be

1 exempt milk, that's correct.

2 MR. VETNE: Okay. The label exempt milk  
3 on that volume is not intended to suggest that  
4 that milk is any different than any other quota  
5 holder's milk going to a regulated handler?

6 DR. SCHIEK: In the situation described,  
7 that's correct.

8 MR. VETNE: And it is not exempt from  
9 pooling in that transaction?

10 DR. SCHIEK: In the situation described,  
11 that's correct.

12 MR. VETNE: All right. Could you move  
13 your microphone to the right, please?

14 MR. VETNE: Good morning, Mr. Newell.

15 MR. NEWELL: Good morning.

16 MR. VETNE: What was the date you changed  
17 from 1996 to 2006? Was that at the bottom of  
18 page 1?

19 MR. NEWELL: Yes.

20 MR. VETNE: Okay. Of the -- let's see,  
21 during this time period through -- through 2006,  
22 Crystal operated one plant?

23 MR. NEWELL: 1990 to 2006?

24 MR. VETNE: Yes.

25 MR. NEWELL: From -- in 1990, we operated

1 two plants. We had our plant on D Street and to  
2 be perfectly clear, we had a small plant in  
3 Redding, California.

4 MR. VETNE: Okay.

5 MR. NEWELL: A little plant.

6 MR. VETNE: A little fluid plant?

7 MR. NEWELL: A little fluid plant.

8 MR. VETNE: And that was in 1990?

9 MR. NEWELL: That was in 1990. When we  
10 opened our new plant in Sacramento, our new  
11 fluid plant in 1996, that small plant in Redding  
12 ceased to produce milk, and we consolidated into  
13 one plant.

14 MR. VETNE: Okay. The small plant in  
15 Redding was what volume, so we get a reference  
16 to your small plant characterization?

17 MR. NEWELL: So long ago I can't -- I  
18 can't remember.

19 MR. VETNE: Okay. And the plant in  
20 Sacramento, between those years processed how  
21 much fluid milk?

22 MR. NEWELL: The --

23 MR. VETNE: Gallons, pounds, whatever.

24 MR. NEWELL: Yeah. I would say 50 to  
25 60 million gallons a year.

1                   MR. VETNE: Okay. And the rest of it was  
2                   in various soft products, Class II products?

3                   MR. NEWELL: Yes.

4                   MR. VETNE: Class III?

5                   MR. NEWELL: Class II through IV.

6                   MR. VETNE: Class II through IV A?

7                   MR. NEWELL: IV A, yeah. No cheese. No  
8                   hard cheese.

9                   MR. VETNE: No cheese. Okay. During  
10                  those same years would Crystal Creamery -- did  
11                  Crystal Creamery receive all of its milk from  
12                  dairy cooperatives or have some independent  
13                  producers?

14                  MR. NEWELL: No, I think in my -- in my  
15                  testimony the vast majority of our milk came  
16                  from independent producers. And we balanced  
17                  ourselves. Essentially we would buy cream on  
18                  occasion if we -- if we did have a shortfall on  
19                  milk, we could go buy from a co-op, but not  
20                  usually.

21                  MR. VETNE: Okay. Did that ratio of  
22                  co-op to independent milk change during those  
23                  years, again going through 2006?

24                  MR. NEWELL: Yes, we did as we got out of  
25                  the milk drying business, and we -- our producer

1 based strength, so we did buy more co-op milk  
2 than we have in the past towards the end.

3 MR. VETNE: Okay. And during the latter  
4 part of that period through 2006, what was the  
5 range of premiums paid for that milk?

6 MR. NEWELL: Approximately -- I think we  
7 had -- I'm sorry, for the independent producers?

8 MR. VETNE: No, for the co-ops first.

9 MR. NEWELL: I don't know.

10 MR. VETNE: Okay. Then for the  
11 independent producers 25 cents per hundredweight  
12 for rbST free and then we paid a quality bonus  
13 on top of that that probably topped out at about  
14 45 cents.

15 MR. VETNE: Okay. That was a premium on  
16 the blend, not on the class, correct?

17 MR. NEWELL: Yes.

18 MR. VETNE: And you talked about some --  
19 some bidding and below costs also. Is it your  
20 understanding that Type 70 producer-handlers  
21 were able to bid the prices that were successful  
22 on bid because they were able to isolate their  
23 exempt volume to that sale?

24 MR. NEWELL: Psychologically they had an  
25 advantage, and they seemed to use it.

1                   MR. VETNE: Psychologically. Well, how  
2 does that work?

3                   MR. NEWELL: They -- it means they just  
4 bid very aggressively when they want something.  
5 Now, below cost, the -- the state does not -- I  
6 would say very seldom do they get involved in  
7 bid issues.

8                   MR. VETNE: Okay. And this was a bid  
9 from one of the two northern California Type 70  
10 producer-handlers?

11                   MR. NEWELL: We're talking about the  
12 online bid?

13                   MR. VETNE: Yes.

14                   MR. NEWELL: Yes. The online bid was --  
15 one -- yes, one of them was the winner of that  
16 bid.

17                   MR. VETNE: Okay. You used the term,  
18 independent processors, several places in your  
19 testimony.

20                   MR. NEWELL: Yes.

21                   MR. VETNE: Do you intend that to be  
22 synonymous with Type 70 producer-handlers?

23                   MR. NEWELL: No.

24                   MR. VETNE: Okay. What --

25                   MR. NEWELL: Type 70 producer-handlers I



1 refer to as PDs. So that's exclusive to those  
2 two. Independent processors is meant to define  
3 the five independent processors in northern  
4 California.

5 MR. VETNE: Okay.

6 MR. NEWELL: PDs being a -- two-fifths of  
7 the five.

8 MR. VETNE: A subgroup?

9 MR. NEWELL: A subgroup.

10 MR. VETNE: Okay. So the top of page  
11 3 -- refer to your testimony please -- the first  
12 full paragraph, you refer to legislative action  
13 in 1993 moving the PD exemption cap. Well,  
14 actually it changed the cap, correct?

15 MR. NEWELL: I think it removed it and  
16 then the cap got put back on. But that's my  
17 perception.

18 MR. VETNE: Okay. And this allowed  
19 independent -- the independent processors in  
20 Fresno and Modesto to significantly decrease  
21 their milk costs, increasing their exempt quota  
22 holdings. In that case your use of the words,  
23 independent processors, simply characterized a  
24 subgroup of independent processors located in  
25 Fresno and Modesto who happened to be --

1                   MR. NEWELL: The two PDs, yeah. I was --  
2 I was transitioning them from independent  
3 processors into PDs.

4                   MR. VETNE: Got it.

5                   MR. NEWELL: Prior to that time -- as a  
6 sales part of our organization I think maybe  
7 upper management had a different view. But  
8 prior to that time we really didn't know the PD  
9 issue exists. We didn't know there was an  
10 advantage there.

11                  MR. VETNE: All right. For Crystal  
12 Creamery during this time through 2006 -- well,  
13 the last few years before that that you were  
14 there, do you have information on processing  
15 costs, what it costs to move milk from the silo  
16 to the package?

17                  MR. NEWELL: I do not.

18                  MR. VETNE: Do you know whether Crystal  
19 had its own blowing -- bottle blowing operation?

20                  MR. NEWELL: Yes, we had a blow mold. We  
21 had five blow molds.

22                  MR. VETNE: And did you make your own  
23 caps?

24                  MR. NEWELL: No.

25                  MR. VETNE: Purchased caps?

1 MR. NEWELL: Purchased caps.

2 MR. VETNE: Make your own labels?

3 MR. NEWELL: Purchased labels.

4 MR. VETNE: Install your own labels?

5 MR. NEWELL: Installed our own labels.

6 MR. VETNE: Okay. You refer to a large  
7 box store. What's a box store?

8 MR. NEWELL: A box store is a -- it's a  
9 large grocery store that sells their goods  
10 cheaply to bring volume through. So a -- an  
11 example of a box store would be -- probably a  
12 Wal-Mart Supercenter could be a box store. I  
13 think Meijer in this area is -- is a box store.

14 MR. VETNE: M-e-i-e-r?

15 MR. NEWELL: I think it's M-e-i-j-e-r.

16 MR. VETNE: J-e-r. Yeah, that was  
17 referenced yesterday by one of the witnesses.

18 MR. NEWELL: Yeah, that's a box store.  
19 Price impact is another word for that.

20 MR. VETNE: And the word, box? What --  
21 what significance does the word, box, have to do  
22 in box store?

23 MR. NEWELL: I don't know.

24 MR. VETNE: Okay. I'm looking at page 4.  
25 Referring to the independent processor in

1           Petaluma, that took a different direction?

2           MR. NEWELL: Yes.

3           MR. VETNE: Again, we're referring to the  
4           Type 70 producer-handler?

5           MR. NEWELL: No.

6           MR. VETNE: No?

7           MR. NEWELL: No, no. They are one of the  
8           three nonPDs.

9           MR. VETNE: NonPDs?

10          MR. NEWELL: Right.

11          MR. VETNE: Okay. As was the independent  
12          processor in Emeryville?

13          MR. NEWELL: Yes.

14          MR. VETNE: That was one of the three --

15          MR. NEWELL: Non-PD.

16          MR. VETNE: -- non-PD independent  
17          processors?

18          MR. NEWELL: Yes, family-owned  
19          independent processors.

20          MR. VETNE: Got it. Do you have any  
21          knowledge, information, from your experience,  
22          which would indicate that the size of the Type  
23          70 partially exempt PDs is any different than  
24          the size of their fully regulated competitors?

25          MR. NEWELL: I -- I think I'll refer to

1           what -- or agree with what Dr. Schiek said, is  
2           three of them are comparable size plants and two  
3           of them, I think, are very small.

4           MR. VETNE:   Quite small.  Do you have a  
5           volume reference when you use the term, quite  
6           small?

7           MR. NEWELL:   I do not.

8           MR. VETNE:   Do you have --

9           MR. NEWELL:   I don't -- I don't really  
10          know much about southern California, so I  
11          can't --

12          MR. VETNE:   All right.  Move the mic back  
13          over to Dr. Schiek, please.

14          The number that you use as a transfer  
15          price and competitive advantage Class I minus  
16          quota, right --

17          DR. SCHIEK:   Uh-huh.

18          MR. VETNE:   -- that is the difference,  
19          resulting difference from that subtraction, is a  
20          dollar amount that has declined over -- well,  
21          increased over a period of years, correct?  As  
22          production has increased in California, the  
23          resulting subtraction produces a higher number?

24          DR. SCHIEK:   Yeah, that would be the --  
25          the effect of new production in the lower

1 classes.

2 MR. VETNE: And all new production goes  
3 into lower classes?

4 DR. SCHIEK: I would say typically, yes.

5 MR. VETNE: I mean, there has been no  
6 increase in --

7 DR. SCHIEK: In fluid volume there's been  
8 no substantial -- there's no upward trend since  
9 the late 1980s in fluid milk production in  
10 California.

11 MR. VETNE: Now, by fluid milk  
12 production, you mean Class I sales?

13 DR. SCHIEK: Class I sales.

14 MR. VETNE: And the way that this works  
15 in California is all of the revenues in all  
16 classes are put into the pool, is that true?

17 DR. SCHIEK: That's true.

18 MR. VETNE: Okay. And then from all  
19 those revenues that are in the pool, you figure  
20 up how much quota eligibility -- the dollar  
21 value of quota eligibility is, correct?

22 DR. SCHIEK: The -- if I can be more  
23 precise, the amount of quota is -- that's out  
24 there is known obviously prior to the running of  
25 the pool. The amount of quota shipped is -- is

1 known. And that -- once they know the pounds of  
2 quota shipped, then the -- the amount that has  
3 to be set aside to pay the quota premium is  
4 known.

5 MR. VETNE: Right. So the quota value is  
6 set aside from the total pool?

7 DR. SCHIEK: Uh-huh.

8 MR. VETNE: Every pound of milk or  
9 actually every pound of solid not fat then gets  
10 an equal share of that pool after the set aside,  
11 and then for the quota holders that set aside is  
12 thrown back and applied to their solids not fat,  
13 am I correct?

14 DR. SCHIEK: That's right except for the  
15 exempt quota volume of the producers.

16 MR. VETNE: Right. But that's not in the  
17 pool in the first place.

18 DR. SCHIEK: Well, you said all Class I  
19 revenues.

20 MR. VETNE: Okay. So would it be fair to  
21 say that the problem you've described of  
22 competitive advantage is one that has  
23 exacerbated over time as the difference between  
24 Class I minus quota has become larger and  
25 larger?

1 DR. SCHIEK: Yeah. And in fact, it, as  
2 you can view from the graph I provided, Figure  
3 2, it changes significantly from month to month  
4 as well, depending on the -- not just the volume  
5 growth in lower classes but the relationship  
6 between Class IV A and IV B as a consequence of  
7 Class I being priced off the higher of.

8 We had a situation last year where the PD  
9 advantages I calculated as -- was quite large,  
10 and that was more a consequence of the fact that  
11 IV A, a significant portion of our pool, was  
12 quite low relative to Class IV B.

13 MR. VETNE: Again, that would illustrate  
14 that the advantage over time during that month  
15 is a product of increasing milk going into  
16 cheese and butter powder.

17 MR. VETNE: Yes. And increasing  
18 volatility in the dairy market.

19 MR. VETNE: And volatility. And there's  
20 some months it's negative, and that's  
21 illustrated by upside down prices --

22 DR. SCHIEK: Right.

23 MR. VETNE: -- when the Class I price is  
24 somewhat less than the blend prices?

25 DR. SCHIEK: Yeah. And a consequence of



1 advanced pricing on Class I.

2 MR. VETNE: California has advanced  
3 pricing on some uses and retroactive pricing on  
4 others just like the federal system?

5 DR. SCHIEK: That's correct.

6 MR. VETNE: However, the timing of those  
7 are not identical to the federal system?

8 DR. SCHIEK: No, they're not. Class I is  
9 more similar than Class II and III, Class II and  
10 III in California, which is equivalent to  
11 Federal Order Class II.

12 MR. VETNE: And over time, the Class III  
13 and IV prices that have produced this spread of  
14 increasing concern, those Class III and IV  
15 prices over time have generally been lower than  
16 than Class III and IV prices?

17 DR. SCHIEK: Class IV A and IV B.

18 MR. VETNE: IV A and IV B in California  
19 are equivalent products to Federal Class III --  
20 well, let's see, IV B is Federal Class III, and  
21 IV A is Federal Class IV, is that correct?

22 DR. SCHIEK: Uh-huh. That's correct.

23 MR. VETNE: Now, what did I ask?

24 DR. SCHIEK: If they were lower. If they  
25 were lower --

1 MR. ENGLISH: Your Honor?

2 JUDGE CLIFTON: Mr. English.

3 MR. ENGLISH: Your Honor, Charles  
4 English. I think Mr. Vetne just asked a very  
5 pertinent question: Why did I ask that?

6 I've been wondering the same thing for  
7 myself for the last 20 or 30 minutes. The  
8 relevance of the questioning is so far afield at  
9 this point. I mean, perhaps for a class in  
10 agricultural trigonometrics about dairy regulation,  
11 but, you know, your Honor, since yesterday  
12 morning -- I live three blocks from the U.S.  
13 capitol. I know a filibuster when I see it.  
14 And the time has come for some pointed relevant  
15 questions and enough of this filibuster. I  
16 object. Mr. Vetne is absolutely correct: Why  
17 did I ask that question? Who knows?

18 JUDGE CLIFTON: Mr. English, don't leave  
19 yet. It appears to me -- and I do not  
20 understand everything that I am listening to.  
21 But it appears to me that Mr. Vetne did not want  
22 this evidence in.

23 One of Mr. Vetne's clients has proposed  
24 Proposal Number 17. If he were to leave the  
25 testimony unchallenged, it would appear that

1 Proposal 17 is not such a good idea.

2 I think all of his cross-examination has  
3 been to distinguish the situation in California  
4 from the situation in the Federal market orders.  
5 I think it's all been relevant. Now, tell me  
6 where I'm wrong.

7 MR. ENGLISH: Well, it's certainly not  
8 different. I would say a question of what is a  
9 box store -- you know, at some point your  
10 Honor -- we could be here for absolutely  
11 forever. Of course, it's connected.

12 The same entities that have been  
13 testified about are the entities that have been  
14 testified about that are -- that are the --  
15 those sales are going to in the Federal Orders,  
16 maybe not by Mr. Vetne's clients but by others.

17 But if this hearing is going to come an  
18 end and if people who are going to say, our  
19 clients can't afford economic experts, are going  
20 to drag it out for three weeks, just to drag it  
21 out for three weeks, you know, there needs to be  
22 something said.

23 The fact of the matter is that we  
24 questioned organic dairy farmers for three hours  
25 yesterday. Unheard of in these proceedings.

1                   Frankly, I have stayed silent long  
2                   enough. Mr. Vetne opened the door by asking the  
3                   question of himself: Why did I ask that  
4                   question?

5                   A perfect question, your Honor. I  
6                   object. Enough is enough. The filibuster must  
7                   end.

8                   JUDGE CLIFTON: Mr. Beshore I'll hear you  
9                   in a moment. Mr. Stevens?

10                  MR. STEVENS: Well, I guess all of us in  
11                  this room have been to one or more hearings.  
12                  We've had a lot of testimony that is, I might  
13                  say, peripheral to the issues of the proposals.

14                  And I -- I, too, not with the eloquence  
15                  of my fellow counsel there, but I would -- I  
16                  would say there is a point when in  
17                  cross-examination you seek to enter evidence  
18                  through cross-examination of witnesses.  
19                  Everyone does it. But you also have your  
20                  witnesses to be for or against any proposal.

21                  So I think we do reach a point at some  
22                  point when -- when in the cross-examination of  
23                  the witnesses we are reiterating or will  
24                  reiterate or try to through -- through testimony  
25                  what we seek to put in through direct witnesses.

1           And if that's the case, then we are -- then we  
2           are plowing the same ground.

3                     And so better put in by your witnesses  
4           for or against proposals and certainly  
5           cross-examine the witnesses for or against any  
6           other proposals. But don't -- but I don't think  
7           we should allow the endless or seemingly endless  
8           continuation of that line of questioning. I  
9           mean, ask the questions. Fine.

10                    But what is a box store, the basics of  
11           milk marketing, an assembler on the California  
12           program. There are some comparisons, but we  
13           don't need to go, I don't think, into the  
14           minutiae of the California program to decide the  
15           issues that are before the Secretary in these  
16           proposals. Thank you, your Honor.

17                    JUDGE CLIFTON: Thank you. Mr. Stevens.  
18           Mr. Beshore.

19                    MR. BESHORE: I will be very brief. I  
20           join Mr. English's objection. I would just note  
21           that before the break we had -- there was some  
22           extended dialogue, questions by Mr. Vetne of  
23           Mr. Schiek about California politics, who is the  
24           legislative representative for the  
25           producer-distributors in California.

1 I ask, your Honor, and anyone here what  
2 possible pertinence California politics and the  
3 political system has to do with the economic  
4 operations of any of these proposals?

5 JUDGE CLIFTON: Let me tell you what I  
6 got out of that, Mr. Beshore. Please don't  
7 leave the podium yet.

8 What I got out of that is the dangers of  
9 the increasing value of the exemption that  
10 happened in California is not too likely to  
11 happen under the Secretary of Agriculture.  
12 That's what I got out of that.

13 MR. BESHORE: Well, you got more out of  
14 it than I did because I don't know -- the  
15 economics effects of organizations, fine. But  
16 as to who put them in or how they were put in in  
17 California, I still don't see how that has any  
18 pertinence whatever.

19 JUDGE CLIFTON: Let me ask you,  
20 Mr. Beshore, was there any relevance to  
21 Dr. Shriek bringing it up in the first place?  
22 That's what raised the issue.

23 MR. BESHORE: I didn't see him bring up  
24 who the legislative representatives were. He  
25 gave us some history of how it evolved, not who

1 promulgated this or why.

2 JUDGE CLIFTON: And how political it is  
3 and how the producer-handlers mattered and how  
4 the situation got worse with every legislative  
5 act, that's what Dr. Schiek raised.

6 MR. BESHORE: The economic effects, how  
7 the economic -- you know, what happened and what  
8 the economics effects were. That's -- he's an  
9 economist and that's what he testified, the  
10 economic effects, how this would work if it were  
11 promulgated by the Secretary of Agriculture. It  
12 doesn't matter who promulgates it. How it would  
13 work, that's what the issue is.

14 JUDGE CLIFTON: I'll hear from a few more  
15 likewise, and then we'll get on with it.  
16 Mr. Yale.

17 MR. YALE: Just briefly we believe the  
18 line of questioning has been excellent. It's  
19 been relevant. It's been right on point. I  
20 think your Honor understood very well what that  
21 question on the line of politics was.

22 I know Mr. Stevens mentioned minutiae  
23 between California and -- and the Federal Orders  
24 but it is in the minutiae that accumulates that  
25 shows there is a vast chasm between the two.

1           And you can't do it big boulders. You got to do  
2           it pebble by pebble, as painful as that is.

3                       We didn't ask for the witness. And it's  
4           in the record, and we cannot stand by and let it  
5           be untested. And that's the way it's going to  
6           have to be tested. It's not what we want to do.  
7           We think the hearing is going too long anyhow.  
8           We've got to defend our own positions.

9                       JUDGE CLIFTON: Mr. Ricciardi.

10                      MR. RICCIARDI: I concur with  
11           Messrs. Yale and Vetne and add this.

12                      In the middle of this room we have the  
13           largest players in the dairy industry. They  
14           have decided that they want to eliminate  
15           producer-handlers. They have decided to put  
16           this issue into play. They have decided to  
17           bring people from every corner of this world,  
18           including California and to bring fact witness  
19           that transferred into expert witnesses. We have  
20           the right to cross-examine them unfettered.

21                      There has not been an extended effort to  
22           do anything other than ask questions. And the  
23           objection that I have at this point is to try to  
24           characterize anything as a filibuster, as your  
25           Honor indicated, is unfair and doesn't reflect



1           this record.

2                   JUDGE CLIFTON: Thank you, Mr. Ricciardi.  
3           Mr. English, I'll hear from you. Thank you,  
4           your Honor. I did make the objection.  
5           Unfettered was the word just used. No, your  
6           Honor, there are standards. This proceeding is  
7           still governed by administrative rules with some  
8           guidance from the Federal Rules of Evidence; it  
9           is not unfettered cross-examination. That's  
10          precisely what we have right now.

11                   I realize how your Honor is going to  
12          rule. I still think the objection was timely  
13          and well made, I especially think after  
14          yesterday's three-hour cross-examination of  
15          organic dairy farmers. We see a pattern.

16                   I am certainly entitled to say what I  
17          think I see. And when the very people who  
18          complain about the cost of the proceeding are  
19          the ones who are lengthening it, I think I'm  
20          entitled to comment on that.

21                   Your Honor, I'm prepared for people to  
22          move on, but I don't think the answer is  
23          unfettered cross-examination. There has to be  
24          some basis. And I think much of this  
25          cross-examination has exactly been unfettered.

1                   JUDGE CLIFTON: I personally enjoyed very  
2 much Dr. Schiek's testimony both on direct and  
3 on cross. He's extremely knowledgeable. He  
4 understands the differences between California  
5 and the Federal Orders. He is very responsive  
6 to questions whether they're asked on direct or  
7 on cross. And you -- in response to Mr. Stevens  
8 suggestion that everyone who needs to be heard  
9 here should just have his own witness like  
10 Dr. Schiek, my paraphrasing, there isn't another  
11 one like Dr. Schiek. So even though this has  
12 gone on long, and we have probably eight more  
13 witnesses to hear today and these witnesses were  
14 supposed to be heard yesterday and I am  
15 concerned about how long this is taking, I am  
16 not going to limit relevant questions.

17                   And I do find that Mr. Vetne's questions  
18 have been relevant to the proceeding. And as  
19 far as how timely your objection was,  
20 Mr. English, he's almost at the end. So I'm not  
21 sure how timely it was.

22                   I believe you made it as kind of a  
23 prophylactic concern going forward. As I've  
24 said, Dr. Schiek is very unique.

25                   Mr. Vetne, you may proceed. Where you

1           were, you were talking about the increasing  
2           concern.

3           MR. VETNE:   Yes, I was your Honor.  I  
4           don't have a client in this room, so I don't  
5           need to raise my voice, and I'm not playing to  
6           the audience.

7           It was actually my last question and I'd  
8           lost my train of thought.  And my observation to  
9           myself was the result of a 15-minute delay in  
10          the hearing.  We were talking about --

11          JUDGE CLIFTON:  No, your question to  
12          yourself was the digression to get straight what  
13          Class IV is in California compared to what it is  
14          in the federal order.  That's when you had lost  
15          your thought.

16          MR. VETNE:   Yes.

17          JUDGE CLIFTON:  But the reason you went  
18          into that was you were talking about upside down  
19          pricing and about the increasing concern over  
20          what I'll call disorderly conditions.

21          MR. VETNE:   Okay.  Dr. Schiek.

22          DR. SCHIEK:   Yes.

23          MR. VETNE:   Thank you for your attention  
24          and thank you for your precise answers to my  
25          questions.  The last question I had here and

1           which I was getting to was one of the -- one of  
2           the factors that creates a spread of increasing  
3           concern between Class I and quota is the -- is  
4           that there is more Class III and IV utilization  
5           in California and Class III and IV prices in  
6           California in addition are lower than those in  
7           the Federal Order have been over the past few  
8           decades, correct?

9           DR. SCHIEK: Yes, that would be correct.  
10          I would point out that for me the last time I  
11          looked at the relationship between those prices,  
12          particularly on IV B in relationship to Class  
13          III, that they had grown closer together with  
14          Federal Order pricing, comparable Federal Order  
15          pricing than they have been in the past.

16          MR. VETNE: And that has been since  
17          California removed the whey factor?

18          DR. SCHIEK: Yes, but even before then.  
19          We had a much wider pricing gap in the '80s and  
20          early '90s than we have had in the last -- in  
21          the 12 years I've been in hearings.

22          MR. VETNE: Thank you. Thank you very  
23          much both for your responses and courteous  
24          answers.

25          JUDGE CLIFTON: Who next will

1 cross-examine these witnesses? Mr. Yale.

2 CROSS-EXAMINATION

3 BY MR. YALE:

4 Q. Good morning. Benjamin F. Yale on behalf  
5 of Continental Dairy Products and Select Milk Producers.  
6 Good morning.

7 MR. NEWELL: Good morning.

8 DR. SCHIEK: Good morning.

9 MR. YALE: I want to start with  
10 Mr. Newell, who seems to have been an observer  
11 most of the morning.

12 MR. NEWELL: Okay with me.

13 MR. YALE: Yeah, I'm sure it probably is.  
14 I have just a couple of questions in terms of  
15 market conditions.

16 I think one of your testimonies was the  
17 fact that there was -- I think a box store  
18 started purchasing money from one of the Type  
19 70s PDs; in other words, took business away from  
20 you there in the central part of -- in the  
21 northern part of California, is that right?

22 MR. NEWELL: Didn't take business away  
23 from us.

24 MR. YALE: They didn't take it. They got  
25 it that you didn't get?

1 MR. NEWELL: Right.

2 MR. YALE: Are you aware of any recent  
3 market conditions in that situation that's gone  
4 vis-a-vis that PD 70 supplying that customer?

5 MR. NEWELL: Yes. That -- that customer  
6 continued to expand into California. I'd say  
7 that PD served them for probably five years and  
8 then they -- maybe longer. Then Dean Foods, a  
9 Berkeley Farms subsidiary, picked up the  
10 business via a bit and then Foster Farms in  
11 Modesto picked up the business from Dean Foods,  
12 Foster being the PD. So they've kind of  
13 round-tripped.

14 MR. YALE: And then what's happened in  
15 recent months to that business?

16 MR. NEWELL: As far as I know, it's with  
17 Foster Farms.

18 MR. YALE: You are not aware of a change  
19 that's occurred as a result of a plant in  
20 Nevada?

21 MR. NEWELL: Not on that business.

22 MR. YALE: Not on that business. But  
23 it's on another box store, right?

24 MR. NEWELL: Well, I believe that there  
25 is -- Sam's Club and Costco are purchasing milk

1 from that plant in Nevada to some degree.

2 MR. YALE: These are Costco and Sam's  
3 stores in California?

4 MR. NEWELL: Yes.

5 MR. YALE: All right.

6 MR. NEWELL: But maybe not all Costcos in  
7 northern California.

8 MR. YALE: But Berkeley Farms is not a  
9 Type 70 PD?

10 MR. NEWELL: No, they're owned by Dean  
11 Foods.

12 MR. YALE: Okay. Would you describe the  
13 competition amongst Class I handlers in  
14 California as being vigorous?

15 MR. NEWELL: Vigorous, yeah.

16 MR. YALE: Now, there is another factor  
17 we've kind of suggested with Nevada and that is  
18 that in addition to regulated handlers in  
19 California in Type 70 PDs, because you are a  
20 state order you also have a situation with  
21 plants outside of California supplying milk into  
22 the market, is that correct?

23 MR. NEWELL: I know that was the case,  
24 yes.

25 MR. YALE: And it is the case in Nevada,

1 right?

2 MR. NEWELL: That is the case in Nevada,  
3 yes.

4 MR. YALE: And that plant is unregulated?

5 MR. NEWELL: I believe that plant is  
6 unregulated --

7 MR. YALE: Okay.

8 MR. NEWELL: -- by California.

9 MR. YALE: By California, right. Let me  
10 ask Dr. Schiek some questions.

11 MR. YALE: Good morning.

12 DR. SCHIEK: Good morning, Ben. How are  
13 you?

14 MR. YALE: I'm doing fine. It was an  
15 interesting examination. I'm always learning  
16 something about California. I learned some  
17 things this morning, so it was --

18 DR. SCHIEK: Good.

19 MR. YALE: -- fruitful. And there's some  
20 who say I don't know enough.

21 DR. SCHIEK: Can you ever know enough?

22 MR. YALE: Can you ever know enough? I  
23 want to follow on that line of question. There  
24 is a -- there is -- in California, you've talked  
25 about the fully regulated plants and the Type 70



1 PDs, right?

2 DR. SCHIEK: Uh-huh. I have.

3 MR. YALE: And then we have another group  
4 of suppliers of bottling milk into California  
5 that have just been identified and this is  
6 plants regulated by Nevada. Some would suggest  
7 that's not a regulation, but regulated by  
8 another state order, not California, that's now  
9 supplying stores in California, right?

10 DR. SCHIEK: Correct.

11 MR. YALE: Right. And they have a  
12 different price relationship vis-a-vis their  
13 minimum pricing and the like as compared to  
14 California plants, is that right?

15 DR. SCHIEK: They have a different --  
16 please repeat the question.

17 MR. YALE: All right. That create a  
18 different price relationship for their costs  
19 than what you have in California, right? I mean  
20 the regulated plants.

21 DR. SCHIEK: It could. It really depends  
22 on how they procure milk.

23 MR. YALE: Right. And I think you  
24 testified at a hearing, I think in September,  
25 was it --

1 DR. SCHIEK: October.

2 MR. YALE: -- October, on Class I pricing  
3 in California?

4 DR. SCHIEK: Yes, I did.

5 MR. YALE: And at that hearing, and I'm  
6 sure you probably attended the whole thing and  
7 paid attention to all of it, because that's your  
8 job, right?

9 DR. SCHIEK: It is my job.

10 MR. YALE: Okay. And one of the  
11 testimonies there was the fact that the handler  
12 in Nevada is able to acquire milk at basically  
13 the over base price in the valley of California,  
14 transfer it to Nevada, process it, and ship it  
15 back as bottled milk into California, not  
16 subject to the California rules, is that right?

17 DR. SCHIEK: Yeah. They were procuring  
18 milk in that manner for a period of time, yeah.  
19 I'm not --

20 MR. YALE: You don't know whether they  
21 still are or not?

22 DR. SCHIEK: What I had heard was when  
23 the extreme advantages of doing it that way  
24 diminished, they began sourcing the milk in  
25 Nevada more, more in terms of large volumes from

1 Nevada.

2 MR. YALE: Right. Now, we also have  
3 another situation in California that is unique  
4 in the Federal Orders in that there are plants  
5 in California, fully regulated plants in  
6 California that purchase milk from out of state  
7 and that milk is not subject to the minimum  
8 price under the California order, is that  
9 correct?

10 DR. SCHIEK: That's correct.

11 MR. YALE: All right. And what  
12 percentage of milk now going into California  
13 comes from that unregulated source? Do you  
14 know?

15 DR. SCHIEK: Not off the top of my head,  
16 I don't.

17 MR. YALE: Is it in excess of 10 percent?

18 DR. SCHIEK: It has at times been above  
19 10 percent. I don't know if it is right now.

20 MR. YALE: Has it ever been above  
21 20 percent?

22 DR. SCHIEK: In terms of the pool, no.

23 MR. YALE: In terms of the pool. You  
24 mean in pooled Class I or total pool?

25 DR. SCHIEK: Total pool.

1 MR. YALE: What about Class I?

2 DR. SCHIEK: Class I it may have been  
3 above 20 percent. Again, I don't recall the  
4 numbers.

5 MR. YALE: Okay. And now as a result of  
6 the MREA you have yet another type of regulation  
7 on milk being supplied in the South or into  
8 California and that is that a plant located in  
9 Arizona shipping milk into California is subject  
10 to the Federal Order prices, but not the  
11 California price, is that right?

12 DR. SCHIEK: As a result of the MREA, the  
13 regulation of that milk became part of the  
14 federal order pool. Yes. That's right.

15 MR. YALE: Okay. So California has a  
16 wide variety of different types of regulation or  
17 nonregulation or whatever the one they describe  
18 it, between all of the bottlers within the state  
19 or -- or the supply of the milk within the  
20 state. Let's stay with the supply of the milk.  
21 There's a wide variety there, right?

22 DR. SCHIEK: Yeah, I would say right, as  
23 would be true with most state orders.

24 MR. YALE: Yes. And that adds to the  
25 complexity of the competition, right?

1 DR. SCHIEK: It certainly adds complexity  
2 to figuring out costs of raw product, regulated  
3 costs of raw products, yes.

4 MR. YALE: And it also puts even PDs at a  
5 disadvantage within California because they have  
6 to match sometimes even cheaper milk or at least  
7 the appearances of cheaper milk from out of  
8 state sources, right?

9 DR. SCHIEK: It could, particularly with  
10 packaged milk coming in from out of state.

11 MR. YALE: And I was typing the note and  
12 I forget to write down who it was that said it,  
13 so if it's you, you can say, fine, I'll agree  
14 with that, or this is what I meant. And if not,  
15 we'll ask Mr. Newell. But something to the  
16 effect that is this psychological impact of the  
17 pricing, that there's just the appearance that  
18 they have the ability to price creates in itself  
19 a market condition.

20 I may have misstated that. Maybe it was  
21 Mr. Newell. I think it was Mr. Newell.

22 Mr. Newell, will you take the mic,  
23 please. Do you recall that comment?

24 MR. NEWELL: Yeah.

25 MR. YALE: Would you explain that

1 comment?

2 MR. NEWELL: It's very tough to compete  
3 when you know the person you are competing with  
4 has an advantage that you can't possibly have.

5 MR. YALE: Or at least has an appearance  
6 of. You don't know how they can use it, but  
7 everybody assumes they have an advantage, and  
8 therefore you have to compete against something  
9 you don't know. Is that a fair statement?

10 MR. NEWELL: I think that's a fair  
11 statement, yeah.

12 MR. YALE: And, really, what's going on  
13 is there's a lack of transparency in that  
14 situation, right?

15 MR. NEWELL: Yes. But, I mean, when you  
16 are offering a proposal, that's the idea, there  
17 is a -- that's competition.

18 MR. YALE: I understand that. But it's  
19 that lack of transparency that creates the risk  
20 and the uncertainty in those situations, is that  
21 right?

22 MR. NEWELL: Yes.

23 MR. YALE: I want to go back to  
24 Dr. Shriek. If you would look at your Figure 3  
25 on page 7, and we talk, a California source

1 Class I market by type of operation.

2 DR. SCHIEK: Yes.

3 MR. YALE: We've just mentioned some  
4 other types of operation, so let me clarify.  
5 This does not represent the share of  
6 California-sourced milk by class of operation of  
7 all of the Class I milk sold in California, does  
8 it?

9 DR. SCHIEK: It does not, no.

10 MR. YALE: All right. The milk from --  
11 we mentioned from Nevada and Arizona would not  
12 be included in that, right?

13 DR. SCHIEK: In this chart, the bulk  
14 milk -- the bulk -- neither the bulk milk nor  
15 the packaged milk from out of state would be  
16 included in that graph.

17 MR. YALE: That's great. I got two  
18 answers.

19 DR. SCHIEK: Simply because we don't have  
20 the data broken out.

21 MR. YALE: So this only references milk  
22 produced in California sold to a processor in  
23 California and marketed in California by that  
24 Class I processor, right?

25 DR. SCHIEK: It would -- yes, it would be

1 the pool milk in class I that is  
2 California-sourced, which it's going to pool  
3 milk that's California sourced and the exempt  
4 quota.

5 MR. YALE: Okay. So if the milk  
6 is produced on the farm outside of California,  
7 it's not included, right?

8 DR. SCHIEK: That's correct.

9 MR. YALE: And if the milk is processed  
10 out of state, whether it's from California or  
11 not, it's not included?

12 DR. SCHIEK: If the milk is processed  
13 from out of state, it's not included, that's  
14 correct.

15 MR. YALE: And you have indicated that of  
16 Class I in California as much as maybe  
17 20 percent or so could come from bulk milk  
18 shipped from out of state shipped into the Class  
19 I handlers in California?

20 DR. SCHIEK: It could. It could.

21 MR. YALE: And that's not reflected in  
22 this chart, right?

23 DR. SCHIEK: No it's not. Although  
24 based -- again, based on my understanding and  
25 discussions in the industry, one of the larger



1           importers of bulk milk for their own use is an  
2           exempt -- Type 70 exempt PD in southern  
3           California. If I included other bulk source  
4           milk, it is my firm conviction that the angle of  
5           those graphs would be even steeper. In other  
6           words, the increase in the Type 70 PD share  
7           would go up faster, would be greater, and the  
8           fully regulated would be less.

9           MR. YALE: But you don't have to be a  
10          Type 70 to take advantage of the out of state  
11          bulk milk, right?

12          DR. SCHIEK: You don't have to be.

13          MR. YALE: Right. But it would be a  
14          different graph in Figure 3 if we were able to  
15          include the bulk milk purchased from out of  
16          state?

17          DR. SCHIEK: It would be different in  
18          terms of numerical values. I don't believe the  
19          direction of the trend would reverse in any way.

20          MR. YALE: Now, and maybe the question  
21          was asked. I had to step out of the room  
22          quickly, and I apologize. I just want to make  
23          sure. Of the Type 70 PDs, do you know what  
24          percent of their supply of milk is own-farm  
25          production?

1 DR. SCHIEK: Own-farm production, no.

2 MR. YALE: Okay.

3 DR. SCHIEK: They have own-farm  
4 production that is in excess of their exemption.  
5 The data sources I had only included the  
6 exemption in aggregate, so I don't have the  
7 own-farm production.

8 MR. YALE: Okay. Is there -- California  
9 also, unlike the Federal Order, does audits and  
10 checking costs of production at the farm level.  
11 You are aware of that?

12 DR. SCHIEK: They do. They survey --  
13 well, they do audits of a select number, yeah.

14 MR. YALE: Right. To provide some  
15 relatively accurate data in terms of the costs  
16 of producing, would you not agree, of milk in  
17 California?

18 DR. SCHIEK: Yeah. It's certainly  
19 accurate for those farms they survey.

20 MR. YALE: Have you compared -- let me  
21 back up. For a Type 70 PD --

22 DR. SCHIEK: Uh-huh.

23 MR. YALE: -- the production -- or the --  
24 if they didn't have the quota, they would only  
25 get credit for the overbase price on their farm.

1 Am I mixing things? Because they're a  
2 producer-handler.

3 DR. SCHIEK: What type -- which type of  
4 milk are we talking about? If they didn't have  
5 quota, they wouldn't have an exemption. So they  
6 would receive the overbase price on their farm,  
7 and they would be paying the Class I price on  
8 milk purchased.

9 MR. YALE: Right. So under the Type 70  
10 exemption, it's just that they have quota, they  
11 just don't have to report that to the pool?

12 DR. SCHIEK: No, they deduct it from  
13 their Class I usage.

14 MR. YALE: They deduct it from their  
15 Class I usage, right.

16 DR. SCHIEK: Yeah. Which is different  
17 than --

18 MR. YALE: Yes, it is. That was my next  
19 question. You mentioned in your testimony over  
20 on page -- that leads right into a segue to  
21 that. Over on page 2, that -- at the bottom of  
22 the first full paragraph, the last sentence, it  
23 says, although there are some differences. Do  
24 you see that?

25 DR. SCHIEK: Yeah.

1 MR. YALE: And that's differences between  
2 Proposal 17 and 20 as compared to the California  
3 system?

4 DR. SCHIEK: That's correct.

5 MR. YALE: And one of those proposals is  
6 to do a down-allocation. You understand that?

7 DR. SCHIEK: I believe I do.

8 MR. YALE: Okay. Do you know what a  
9 down-allocation is?

10 DR. SCHIEK: Okay. My understanding of a  
11 down-allocation is that you would look at a  
12 particular subset of milk received, used in a  
13 plant, and indicate its use to lower Class I  
14 utilization as opposed to the higher Class I  
15 utilization. That would be a down-allocation,  
16 as I understand it.

17 MR. YALE: So if you -- I think we're  
18 right, and I just want to -- you say lower Class  
19 I, but to the lower class?

20 DR. SCHIEK: Lower classes, yeah.

21 MR. YALE: Right. So that the own-farm  
22 production would absorb all of the Classes II,  
23 III and IV milk before it was ever able to  
24 reduce the obligation to the Class I milk for  
25 the purchase. Is that how you would understand

1 it?

2 DR. SCHIEK: That's how I would -- I'm  
3 taking it on faith, as you've described it. Is  
4 that --

5 MR. YALE: That's what was intended by  
6 that.

7 DR. SCHIEK: Is that -- are you referring  
8 to Proposal 17?

9 MR. YALE: It's in 17 and/or 20.

10 DR. SCHIEK: Okay.

11 MR. YALE: Which are very close.

12 DR. SCHIEK: Then perhaps I didn't  
13 understand 17. My understanding of 17 was that  
14 milk would simply not be reported, and as Dr. --  
15 excuse me, as Mr. Vetne questioned, we were  
16 talking about the relevant comparison, analogous  
17 comparison, to what I was doing on advantages  
18 being plant blend less market blend. And that's  
19 how I understood Proposal 17 to work.

20 I wouldn't necessarily characterize that  
21 as a down-allocation, but perhaps it would be in  
22 the Federal Orders. I don't know.

23 MR. YALE: Are you -- what other  
24 differences did you see between the proposals  
25 that you think are relevant?

1 DR. SCHIEK: Well, I'm -- I'm not as  
2 certain on the proposal itself how  
3 producer-handlers would be handled if they grew.  
4 I guess I'm assuming when they grow, if they're  
5 under the 3 million cap, then their exemption  
6 would increase up to that point, whereas in  
7 California there is no ability to increase their  
8 exemption other than through legislation.

9 MR. YALE: Do you understand that the cap  
10 here is the higher or -- I'm sorry, the lower of  
11 an average of production during a narrow window  
12 of time or 3 million?

13 DR. SCHIEK: Okay. Then I -- then --  
14 presumably then that cap is set.

15 MR. YALE: So the exemption would not  
16 grow. It would be fixed.

17 DR. SCHIEK: Okay.

18 MR. YALE: So that's a difference, right?

19 DR. SCHIEK: Right, yes.

20 MR. YALE: And that would temper the  
21 ability compared to the California exemption.  
22 They may not have quite the juice under this  
23 system to grow like you are suggesting that the  
24 California system had?

25 DR. SCHIEK: They may not.

1 MR. YALE: Yeah.

2 DR. SCHIEK: I can't give you a definite  
3 answer, but they may not.

4 MR. YALE: You haven't modeled it?

5 DR. SCHIEK: No.

6 MR. YALE: And the same thing with the  
7 down-allocation, that could be kind of a downer,  
8 so to speak, and slow some of that advantage as  
9 well, right?

10 DR. SCHIEK: It -- excuse me. It could.  
11 As I -- again, as I understand it, if the PD in  
12 question had significant sales outside Class I.

13 MR. YALE: And although I know you  
14 referenced it in terms of the politics of the  
15 situation, which clearly there was, but in large  
16 part, the -- the rationale for the Type 70 PD  
17 was that the industry wanted to move to a  
18 different method of regulating itself and here  
19 are people who had a vested interest under a  
20 particular model that at least needed some  
21 acknowledgement in the new regulations to avoid  
22 some economic waste on those models' parts,  
23 right?

24 DR. SCHIEK: I'm not sure that I would  
25 characterize it that way.

1 MR. YALE: How would you characterize it?

2 DR. SCHIEK: One of the reasons that I  
3 believe that there was an option given was  
4 because at the time this happened, Class I  
5 utilization for the pool as a whole was  
6 extremely high in the state, well above  
7 70 percent, I believe, when I looked at the  
8 data. And I think that at the time electing to  
9 participate in the pool under the option that  
10 they had, that I described, would have returned  
11 not really much different than electing the  
12 exemption.

13 So I'm not sure -- I really think the  
14 option was -- was, you know, more of a political  
15 dynamic than a means to redress some economic  
16 losses.

17 MR. YALE: Yes. Okay.

18 DR. SCHIEK: Perhaps an opportunistic  
19 decision.

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

21 JUDGE CLIFTON: Thank you, Mr. Yale.  
22 Mr. Ricciardi.

23 CROSS-EXAMINATION

24 BY MR. RICCIARDI:

25 MR. RICCIARDI: Good morning. I am Al



1 Ricciardi on behalf of AIDA, which is a group of  
2 producer-handlers and also an exempt plant.  
3 And, Mr. Schiek, you've got the microphone, so  
4 let's start with you.

5 DR. SCHIEK: Okay.

6 MR. RICCIARDI: Thank you. The Dairy  
7 Institute is a trade association that represents  
8 dairy processors who have plants in California,  
9 correct?

10 DR. SCHIEK: That's correct.

11 MR. RICCIARDI: And it assists those  
12 plants who are members with regulatory and  
13 legislative issues, among other things?

14 DR. SCHIEK: Among other things, yes.

15 MR. RICCIARDI: And one of the members of  
16 the institute is Dean Foods?

17 DR. SCHIEK: That would be correct, yes.

18 MR. RICCIARDI: One of the other members  
19 is HP Hood?

20 DR. SCHIEK: That is also correct.

21 MR. RICCIARDI: Now, Dairy Institute  
22 employs a lobbyist in Washington, D.C., correct?  
23

24 DR. SCHIEK: We have employed lobbyists,  
25 yes.

1                   MR. RICCIARDI: And the lobbyists that  
2 Dairy Institute has employed is the same  
3 lobbyist that is employed by Dean Foods?

4                   DR. SCHIEK: You know, I don't really  
5 know the answer to that question. I'm sorry.

6                   MR. RICCIARDI: Okay. Fair enough.  
7 Did -- in fact, we talked about political issues  
8 in your testimony. Did, in fact, Dairy  
9 Institute have a substantial amount of lobbying  
10 costs that were spent in attempting to pass the  
11 MREA?

12                  DR. SCHIEK: I'm not sure what you mean  
13 by substantial.

14                  MR. RICCIARDI: \$400,000 or more.

15                  DR. SCHIEK: I'm not sure the Dairy  
16 Institute costs were that high to employ  
17 lobbyists.

18                  MR. RICCIARDI: Can you tell me how much  
19 it was?

20                  DR. SCHIEK: I don't know exactly here.

21                  MR. RICCIARDI: Fair enough. Let's move  
22 to a term in your testimony. I think Mr. Vetne  
23 asked you some questions on it. I want to  
24 follow up because I have some other questions  
25 too. You used the phrase, economic rent

1 seeking. And you remember the cross-examination  
2 questions asked by Mr. Vetne, correct?

3 DR. SCHIEK: Uh-huh, uh-huh.

4 MR. RICCIARDI: Now, isn't economic rent  
5 seeking also known as monopoly privilege rent  
6 seeking?

7 DR. SCHIEK: It can be if the -- if the  
8 basis of the rent seeking is market power.

9 MR. RICCIARDI: Okay. And one  
10 possibility of economic rent seeking is to  
11 capture special monopoly privileges, correct?

12 DR. SCHIEK: Yes.

13 MR. RICCIARDI: And another factor in  
14 economic rent seeking is that it seeks to impose  
15 substantial losses on society as a whole,  
16 correct?

17 DR. SCHIEK: Again, I -- it sounds like  
18 you are reading a definition from an economic  
19 textbook, and I -- you know, economists describe  
20 it in different ways. I -- I -- the attempt to  
21 impose an economic loss on society, that may be  
22 an effect. I'm not sure it's the intent.

23 MR. RICCIARDI: Okay. Let's assume it's  
24 an effect, and let's talk hypothetically as a  
25 economist now. If you assume for purposes of my

1 question that a particular group of cooperatives  
2 control 80 or 85 percent or more of the milk in  
3 a particular Federal Order area and they seek  
4 through the passage of a proposed regulation to  
5 eliminate any independent producer-handlers who  
6 don't, in fact, sell their milk through the  
7 cooperatives, that, my hypothetical, would be an  
8 example of economic rent seeking, correct?

9 DR. SCHIEK: I think it really depends on  
10 the parameters of the market and the market  
11 structure that you're talking about. I think in  
12 a regulated system like we have in milk in  
13 California, for example, that may not  
14 necessarily be characterized as rent seeking if,  
15 in fact, the economic system that's in place has  
16 conferred market power already to -- to a  
17 certain subset. It could be simply a redressing  
18 or rebalancing of market power to restore a more  
19 competitive situation. And I wouldn't  
20 characterize that as rent seeking.

21 MR. RICCIARDI: If, in fact, the  
22 cooperatives already have monopoly privileges by  
23 being exempted from certain forms of antitrust  
24 laws federally, then the additional effort to  
25 eliminate any potential competition could be an

1 example of economic rent seeking under your  
2 definition?

3 DR. SCHIEK: I think, again, in the  
4 narrow confines of your hypothetical, yes.

5 MR. RICCIARDI: Okay. This is actually  
6 the good thing about cross-examination from  
7 others, because they eliminate a lot of the  
8 questions that this particular person might ask.

9 So why don't we move the microphone to  
10 Mr. Newell, because I want him to know that I  
11 like him, too.

12 Mr. Newell, you say at the last part of  
13 your statement, which is Exhibit 76, that I was  
14 asked to testify about my perception, and then  
15 it goes on. It's the next to the last full  
16 paragraph. Who were you asked to come here and  
17 testify?

18 MR. NEWELL: Bill asked me if I would  
19 come and testify.

20 MR. RICCIARDI: Okay. And that would be  
21 Mr. Schiek?

22 MR. NEWELL: Yes.

23 MR. RICCIARDI: Who is paying the  
24 expenses for the time that you're spending here?

25 MR. NEWELL: Well, I believe my company

1 is, but if not, you're looking at him.

2 MR. RICCIARDI: You're unsure about that.  
3 Hopefully you can send this transcript over and  
4 they will. Let me ask you some questions, and  
5 the basis for my questions is going to be found  
6 on page 4 of your statement. So give yourself a  
7 chance to take a look at that.

8 MR. NEWELL: Okay.

9 MR. RICCIARDI: You don't have to refer  
10 to it, but that's where I'm taking the  
11 information from. You state in the second  
12 paragraph, and you're talking about a couple of  
13 independent processors who have sort of gone in  
14 different directions; one went out of business,  
15 and the other continues to grow their business.

16 MR. NEWELL: Well, one sold their  
17 business.

18 MR. RICCIARDI: Sold their business. I  
19 apologize, sold their business.

20 Now, you weren't involved in the decision  
21 by that company to sell?

22 MR. NEWELL: No.

23 MR. RICCIARDI: When you say things like,  
24 I believe, that's -- you assume the reasons why  
25 they sold, correct?

1 MR. NEWELL: Yes.

2 MR. VETNE: Okay. With regard to the  
3 other business, which is the one that decided to  
4 go into conventional and/or organic products,  
5 that company has stayed in business and, in  
6 fact, has grown even in competition with the  
7 Type 70 producer-distributors, correct?

8 MR. NEWELL: That is -- that is true in  
9 as far as they're really going after a different  
10 customer base and consumer, and the location of  
11 their plant matches with that type of consumer.

12 MR. RICCIARDI: Now, and you understand  
13 that for that particular business they've  
14 decided to go in that direction to serve a  
15 particular market, correct?

16 MR. NEWELL: (Nodding head.)

17 MR. RICCIARDI: Yes?

18 MR. NEWELL: Yes.

19 MR. RICCIARDI: And with regard to that  
20 quality market and the type of niche area  
21 they're talking about, they can compete with  
22 producer-distributors or others, but they are  
23 focused on their own market, correct?

24 MR. NEWELL: Yeah, my point is, they  
25 don't compete on price. They compete, you know,

1 on their product differentiation.

2 MR. RICCIARDI: Everybody, as you state  
3 in the front part of your statement, competes,  
4 among other things, on price, quality, service,  
5 reputation, et cetera, correct?

6 MR. NEWELL: Yes, yes.

7 MR. RICCIARDI: That would include even  
8 the producer-distributors, such as Producers  
9 Dairy that you mentioned and also Foster Farms,  
10 correct?

11 MR. NEWELL: Yes.

12 MR. RICCIARDI: You indicate in the next  
13 to the last paragraph on paragraph 4 that the  
14 decision by the Hansen family to sell had many  
15 factors, and I want to talk about one of them.  
16 It says, we did not have the cost advantage of  
17 producer-distributors or the resources of a  
18 national milk processor.

19 Well, first of all, that always brings up  
20 the question. You put the word, we. Did you  
21 actually own part of the business?

22 MR. NEWELL: Yeah, I think I said at the  
23 beginning of the testimony I was one of the  
24 family members.

25 MR. RICCIARDI: Okay. So you're actually



1 a family member and the decision to sell was  
2 partly yours, obviously?

3 MR. NEWELL: Yes.

4 MR. RICCIARDI: Working with Hood, is  
5 that part of the sales agreement, that you would  
6 stay with them for a period of time?

7 MR. NEWELL: Yes. But no longer.

8 MR. RICCIARDI: Okay. All right. You're  
9 no longer working with them?

10 MR. NEWELL: No. I'm working with Hood,  
11 but the agreement is no longer in place.

12 MR. RICCIARDI: I got it. Are you  
13 getting continued compensation as a result of  
14 the sale right now?

15 MR. NEWELL: I'm an employee. Not as a  
16 result of the sale.

17 MR. RICCIARDI: Okay. Fair enough. The  
18 resources of a national milk processor, are you  
19 talking about someone like Dean Foods?

20 MR. NEWELL: Yes.

21 MR. RICCIARDI: Okay. You guys didn't  
22 have \$12 billion in sales before you decided to  
23 sell?

24 MR. NEWELL: No.

25 MR. RICCIARDI: Okay.

1 MR. NEWELL: And we were in one market,  
2 not multiple markets.

3 MR. RICCIARDI: Fair enough. Thanks.

4 MR. NEWELL: Okay.

5 JUDGE CLIFTON: Thank you, Mr. Ricciardi.  
6 Who will next cross-examine the panel?  
7 Mr. Rower.

8 CROSS-EXAMINATION

9 BY MR. ROWER:

10 MR. ROWER: My questions are for Mr.  
11 Schiek. Would it be accurate to say that the  
12 California producer-handler exemption is not  
13 transferable? It can't be sold, is that  
14 correct?

15 DR. SCHIEK: That is accurate, yes.

16 MR. ROWER: On page 2 of your statement,  
17 sir, you describe the two types of California  
18 producer-handlers. Are those descriptions --  
19 are they complete official definitions of  
20 producer-handlers in California -- for  
21 California?

22 DR. SCHIEK: They are, I believe, the  
23 salient points. The actual descriptions with a  
24 lot more verbiage than I put in are available in  
25 the milk pooling plan chapters -- or Article 6

1           and 6.5 and those are available on CDFA's  
2           website. You can download the pooling plan and  
3           the most complete description is there.

4           MR. ROWER: Okay. And CDFA is the  
5           California Department of Food and Agriculture,  
6           is that correct?

7           DR. SCHIEK: That is correct.

8           MR. ROWER: Mr. Tosi is next.

9           JUDGE CLIFTON: Mr. Tosi.

10                           CROSS-EXAMINATION

11           BY MR. TOSI:

12                           MR. TOSI: Thank you Dr. Schiek and  
13           Mr. Newell for coming.

14                           DR. SCHIEK: It is our pleasure. Mine  
15           anyway. I don't know about Mike.

16                           MR. NEWELL: Mine as well.

17                           MR. TOSI: To the extent that any  
18           cross-examination is in conflict with things  
19           that you articulated in your written statements,  
20           would it be proper for the Secretary to rely on  
21           your written statements?

22                           DR. SCHIEK: I'll answer first. I  
23           believe -- I'm not aware that I was in  
24           contradiction, but if that was perceived, I  
25           believe my written statement to be accurate.

1           There's nothing that I heard in  
2           cross-examination that would make it inaccurate.  
3           So I think, yes, they could rely on it -- the  
4           Secretary could rely on the written statement or  
5           should rely on the written statement.

6           MR. TOSI:   And Mr. Newell?

7           MR. NEWELL:  I would say yes as well.

8           MR. TOSI:  Thank you.  That's all I have.  
9           Again, thanks for coming.  I know you both came  
10          a long way.

11          MR. NEWELL:  Thank you.

12          JUDGE CLIFTON:  Thank you, Mr. Tosi.

13          Mr. Beshore.

14                           CROSS-EXAMINATION

15   BY MR. BESHORE:

16           MR. BESHORE:  Sorry.  I just have one  
17           question or area for Dr. Schiek that I'd like to  
18           cover.  And let me thank you first for coming.  
19           As you indicated in your testimony, National  
20           Milk did request your testimony.  And we  
21           appreciate that.

22           DR. SCHIEK:  You're welcome.

23           MR. BESHORE:  With respect to Figure 3 on  
24           page 7 of your testimony --

25           DR. SCHIEK:  Yes.

1 MR. BESHORE: -- there are a lot of  
2 things that go on in the California marketplace  
3 as Mr. Yale, for one, at least discussed. I  
4 mean, there's milk that comes in, both packaged  
5 form and bulk milk from out of state, correct?

6 DR. SCHIEK: That is correct.

7 MR. BESHORE: And other things. This  
8 doesn't attempt to depict everything that goes  
9 on there?

10 DR. SCHIEK: That's true.

11 MR. BESHORE: But what it does -- is this  
12 what it depicts? It depicts two groups of  
13 plants in California, both of which are subject  
14 to all those other forces, competitive forces,  
15 correct?

16 DR. SCHIEK: Correct.

17 MR. BESHORE: The only difference being  
18 that one group of plants has the Type 70, the  
19 subject of the Type 70 production-handler  
20 regulation, correct?

21 DR. SCHIEK: Correct.

22 MR. BESHORE: And the other group of  
23 plants does not have those prerogatives?

24 DR. SCHIEK: Correct.

25 MR. BESHORE: And over time both groups,

1           being subject to all other external forces in  
2           the marketplace, these are the trend lines of  
3           their aggregate sales?

4           DR. SCHIEK:    Correct.

5           MR. BESHORE:    Thank you.

6           JUDGE CLIFTON:  Thank you, Mr. Beshore.  
7           Any redirect?

8           MR. ENGLISH:   Absolutely not, your Honor.

9           JUDGE CLIFTON:  Thank you, Mr. English.  
10          What I'd like to do now is thank the witnesses  
11          and ask them to step down.  And I would like for  
12          those who are here and available to testify  
13          today to come to the front of the room, and if  
14          there is counsel who will assist them with their  
15          question and answer, I'd like counsel to come  
16          forward with them as well.

17          MR. ENGLISH:   Can we take a five-minute  
18          break?

19          JUDGE CLIFTON:  Mr. English would really  
20          like a five-minute break first.  Let us do that.  
21          Please be back and ready to go at 11:46.

22          (A recess was taken from 11:41 to 11:50.)

23          JUDGE CLIFTON:  Let's go back on record.  
24          We're back on record.  It's 11:50.  I think  
25          I'd -- Mr. Carroll.  I think what I'd like to do

1 is have you stand in front of the podium sort of  
2 in order of how soon it is you would like to  
3 testify; that is, if there's someone for whom it  
4 is somewhat urgent that you go next for whatever  
5 reason, because of cows to milk, because you  
6 have a plane to catch, because you've had enough  
7 for one day, please come to the podium. Do not  
8 be shy to take the first spot.

9 MR. ENGLISH: Your Honor, it may be  
10 simple. Mr. Erickson is here, he's been here  
11 since yesterday. He needs to get out today. I  
12 believe he has like an 8:00 p.m. flight, which  
13 means adjusting for that. Ms. Dewey has been  
14 here since yesterday. She also has about an  
15 8:00 flight. They're flying different  
16 directions. But so she needs to be about the  
17 same time.

18 Mr. Beshore.

19 MR. BESHORE: Mr. Wernet, who is from  
20 Bareman's Dairy in Michigan is here and has been  
21 here since yesterday, also needs to leave later  
22 today sometime.

23 MR. WERNET: When we can. We're driving.

24 MR. OBERWEIS: Your Honor, Jim Oberweis  
25 from Oberweis Dairy Farm. I also have a flight

1 out tonight. It's the only day I am available  
2 to be here. The flight is about 7:00 tonight.  
3 And I will be brief in my comments.

4 DR. YONKERS: And, your Honor, Robert  
5 Yonkers. If we get through those, then I would  
6 like to go on.

7 JUDGE CLIFTON: And Mr. Carman hasn't  
8 come up here but I have Mr. Carman available for  
9 cross-examination, in my mind. We don't need --  
10 we don't need to get him. All right.  
11 Mr. Oberweis, would you go back to the  
12 microphone? How do you spell your last name?

13 MR. OBERWEIS: O, b as in boy,  
14 e-r-w-e-i-s.

15 JUDGE CLIFTON: One S?

16 MR. OBERWEIS: One S.

17 JUDGE CLIFTON: And you said you're Jim?  
18 Is that your formal name?

19 MR. OBERWEIS: How about if I give you a  
20 card?

21 JUDGE CLIFTON: Would you? And would you  
22 give one also to the court reporters and one to  
23 the USDA table, more than one if you have them.  
24 All right. Mr -- is it Wernet?

25 MR. WERNET: Yes.



1 JUDGE CLIFTON: Spelled W-e-r-n-e-t, is  
2 that correct?

3 MR. WERNET: Correct.

4 JUDGE CLIFTON: Would you please state  
5 and spell your name?

6 MR. WERNET: Jim Wernet, W-e-r-n-e-t.  
7 I'm with Bareman Dairy, B-a-r-e-m-a-n.

8 JUDGE CLIFTON: And would you distribute  
9 cards in like fashion if you have them?

10 All right. Mr. Erickson, would you go to  
11 the podium, please, and spell and state your  
12 full name and if you have cards distribute them?

13 MR. ERICKSON: Warren Erickson.  
14 W-a-r-r-e-n. Erickson, E-r-i-c-k-s-o-n. I  
15 represent Anderson Erickson Dairy.

16 JUDGE CLIFTON: And Anderson Erickson is  
17 two different words, but there's no hyphen?

18 MR. ERICKSON: Yes. Yes, your Honor.

19 JUDGE CLIFTON: Okay. And Ms. Dewey, if  
20 you would go to the podium and identify yourself  
21 please.

22 MS. DEWEY: Christine Dewey from  
23 Harrisburg Dairies. Dewey is D-e-w-e-y.

24 JUDGE CLIFTON: And I presume that's  
25 Pennsylvania?

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MS. DEWEY: It is.

JUDGE CLIFTON: Thank you. And,  
Dr. Yonkers, I'd like you to do likewise. We  
know you, those of us who have been here for a  
while, but we have some new people in the room.  
Would you say who you are?

MR. YONKERS: Sure. Robert Yonkers,  
Y-o-n-k-e-r-s. I'm representing the  
International Dairy Foods Association.

JUDGE CLIFTON: Now, I thought I had  
about ten people to testify today. Who else do  
I have besides Mr. Carman and those of you who  
have stepped forward? This is good news. All  
right. I'd like to take another witness before  
we break for lunch. And I'd like that to be  
Mr. Oberweis. So Mr. Oberweis.

MR. MILTNER: This is Ryan Miltner for  
the record. Mr. Oberweis, I understand, will be  
commenting on one of the AIDA proposals, and he  
arrived from the airport within the hour and  
we've not had a chance to talk. I would like to  
have his examination after the lunch hour if we  
could.

JUDGE CLIFTON: Okay.

1 MR. WERNET: That's why I did not step  
2 forward first.

3 JUDGE CLIFTON: I just said who's got a  
4 7:00 flight. The other people have 8:00  
5 flights. We'll go with him.

6 MR. MILTNER: We appreciate that  
7 consideration, Judge. Then let me go to  
8 Mr. Wernet.

9 MR. ENGLISH: Your Honor.

10 JUDGE CLIFTON: Mr. English.

11 MR. ENGLISH: We would propose an order  
12 if we could, your Honor, for various reasons.  
13 Mr. Beshore and I, who are sponsoring those  
14 three witnesses, Mr. Wernet, Mr. Erickson, and  
15 Ms. Dewey, for various reasons, we would propose  
16 Mr. Erickson go now. So if that's okay with  
17 your Honor.

18 By the way, I also mentioned Ms. Dewey's  
19 testimony has been in the back of the room for a  
20 while. I passed out some to the government and  
21 I have one here for your Honor and for the court  
22 reporter.

23 MR. YALE: So the order will be what  
24 then?

25 MR. ENGLISH: We propose Mr. Erickson now

1           and then if we break for lunch, either Chrissie  
2           Dewey and then Bareman or Bareman and then  
3           Chrissie Dewey. We'll figure it out at lunch.  
4           And then Mr. Oberweis.

5           JUDGE CLIFTON: Now, does Mr. Erickson  
6           have a statement?

7           MR. ENGLISH: No, it'll be a traditional  
8           direct, your Honor.

9           JUDGE CLIFTON: All right. Thank you.

10          MR. ENGLISH: And I've handed your Honor  
11          for later today, and they're also in the back of  
12          the room, Ms. Dewey's testimony, both you and  
13          the court reporter. And I believe I've handed  
14          them out to the government as well.

15          JUDGE CLIFTON: Good. Thank you. You  
16          may take the witness stand, if you will, and  
17          would you, after you set your water down remove  
18          that extra chair?

19          Would you please again state and spell  
20          your name?

21          THE WITNESS: My name is Warren Erickson,  
22          W-a-r-r-e-n, E-r-i-c-k-s-o-n.

23          JUDGE CLIFTON: Thank you. Would you  
24          raise your right hand, please?

25          (The witness was sworn.)

1 JUDGE CLIFTON: Thank you. Mr. English,  
2 you may proceed.

3 MR. ENGLISH: Thank you, your Honor.

4 WARREN ERICKSON

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

7 DIRECT EXAMINATION

8 BY MR. ENGLISH:

9 Q. Mr. Erickson, would you please first tell  
10 us just a little bit about the background of Anderson  
11 Erickson Dairy?

12 A. Yes, sir. Anderson Erickson Dairy is a  
13 family-owned dairy processor in DeMoines, Iowa. We  
14 produce a full line of dairy products, including milk,  
15 cottage cheese, yogurt, sour cream, and dips. Also have  
16 some juices. We're a family business started by my  
17 grandfather in 1930.

18 We have 525 full-time employees and we  
19 distribute to portions of six states in and around Iowa.  
20 We have typical monthly receipts of approximately  
21 38,000 pounds of milk.

22 Q. Is Anderson Erickson Dairy affiliated  
23 with any other dairy company in the United States?

24 A. No, sir. We're a privately-owned family  
25 business.

1 Q. What is your background? First, what is  
2 your position today?

3 A. My -- my position today is one of an  
4 employee of Anderson Erickson Dairy and owner. I'm the  
5 chief operating officer of Anderson Erickson.

6 Q. What is your background, educational  
7 background?

8 A. I have a background in accounting. I  
9 have a master's degree, master's of arts in accounting  
10 from the University of Iowa. I'm a CPA. I've been  
11 involved in the dairy business for approximately 12  
12 years on a full-time basis and oversee all portions of  
13 the company, but specifically the plant operations,  
14 office, accounting, and milk procurement, among others.

15 Q. Now, you've been at the dairy for 12  
16 years, but you're also a CPA. Did you work at an  
17 accounting firm?

18 A. Yes, sir.

19 Q. Where did you work?

20 A. I worked for Arthur Andersen in Kansas  
21 City for six years.

22 Q. Now, you've been here since yesterday,  
23 just before noon, correct?

24 A. That is correct.

25 Q. Yes. We went to 9:00 last night, so you

1 had a full day? Yes?

2 A. Exactly, yes.

3 Q. So you understand that the issues being  
4 discussed in this proceeding are with respect to the  
5 regulatory treatment of producer-handlers, correct?

6 A. Yes, sir.

7 Q. Are you here to talk about any specific  
8 proposal?

9 A. No. I'd like to share my views and facts  
10 as I see them as to producer-handlers in our area.

11 Q. So are there producer-handlers in -- in  
12 the Iowa and surrounding state marketing area?

13 A. There are several, yes.

14 Q. Can you describe the kinds of operations  
15 there are?

16 A. Yeah, I would be glad to. Many of the  
17 producer-handlers in our area are smaller farm-based  
18 organizations. They specialize in niche markets, some  
19 of them organic, some of them glass bottles. Some of  
20 them do have distribution to stores, but some of them  
21 don't. They have an exclusive distribution just on  
22 their farm.

23 We have a wide variety. There are -- I  
24 can think -- there's a handful, and most of them are of  
25 that category. One in particular, Heartland Creamery,

1 started out that way. We have a -- they started in  
2 glass bottles, and were just distributing their product  
3 that way. And then they transitioned to a little  
4 different strategy.

5 Q. What was their transition? What was the  
6 strategy for the transition?

7 A. They transitioned from exclusively glass  
8 bottles to starting to sell gallon jugs, low-cost gallon  
9 jugs into the -- into the marketplace.

10 Q. Now, do you have a -- a large customer  
11 that may have already previously been described in this  
12 record in your marketing area that currently receives  
13 milk from Heartland Creamery?

14 A. Yes, sir, we do. We have a very large  
15 customer of ours and that customer in the -- they will  
16 traditionally bid their milk business for private label  
17 on a -- on an occasional basis, and they did put out for  
18 bid their milk in 2007.

19 And we were successful in a -- just --  
20 they bid in geography, so we were successful in a  
21 portion of that bid and started serving this customer in  
22 June of 2007. They're a little unique because they have  
23 two different labels. And I'll refer them to as PL 1  
24 and PL 2.

25 Q. You mean private label 1 and private



1 label 2?

2 A. That's my own secret code. But private  
3 label 1 is branded with their store name and it is the  
4 one that they promote the most. Private label 2, PL 2,  
5 is branded with a different name, and they use it  
6 exclusively as the low-cost dairy product on the shelf.  
7 And they use it for matching purposes and other -- other  
8 purposes. It doesn't have as much space as PL 1, PL 2  
9 would not, but it is a portion of their private label  
10 business which we were awarded in -- specifically in  
11 the -- in one area of geography.

12 Q. Let me see if I can back up for a moment.

13 A. Yes.

14 Q. You -- this customer, does it have  
15 branded product?

16 A. It does have branded product, yes.

17 Q. I'm not sure. I think we've gone seven  
18 days, and I'm not sure how clear we've been about the  
19 difference there. Could you describe what branded  
20 product is in the dairy industry?

21 A. In my terms I can. I guess some might  
22 disagree. But we, our business at Anderson Erickson, is  
23 primarily branded business, whereas most of the product  
24 that we sell carries the Anderson Erickson name.

25 Q. So that's a brand?

1           A.       That is the brand, yes. And you will see  
2 in different markets a variety of different brand names,  
3 which are usually company names that are in the milk  
4 processing business. And then you'll see store branded  
5 product, which is usually the name of a store or a --  
6 kind of a little bit more generic type of a label.

7           Q.       And is that like a private label?

8           A.       That would be a private label. That's  
9 what I would refer to as a private label.

10          Q.       So in terms of this customer you've been  
11 discussing, did you have branded product in that store?

12          A.       Absolutely, yes.

13          Q.       And then there's the store private label?

14          A.       There is a store private label, yes.

15          Q.       And did you have that product in the  
16 store?

17          A.       Well, that is the product that they bid  
18 periodically. We were awarded in June of 2007.

19          Q.       But that's the name of the customer,  
20 right?

21          A.       Yes.

22          Q.       And then there's a secondary private  
23 label?

24          A.       Yes.

25          Q.       And that doesn't have a store name on it?

1 A. It does not.

2 Q. Does that have just sort of a name that  
3 the store uses throughout its system for that private  
4 label?

5 A. Yes.

6 Q. Okay. So for the purpose of convenience,  
7 they're sort of private label 1?

8 A. Yes.

9 Q. Which is what you were bidding on, which  
10 had the store name?

11 A. Yeah.

12 Q. And then there's private label 2, which  
13 doesn't have the store name but has a common name  
14 throughout the system of the store, is that correct?

15 A. Yes.

16 Q. Is that correct?

17 A. That is.

18 Q. And when the store sells the milk out the  
19 door, does it have a pricing scheme for branded milk,  
20 the store private label 1, and the other private label  
21 2?

22 A. Yes.

23 Q. Okay. What is that pricing scheme that  
24 you have -- first of all, have you seen that pricing  
25 scheme for yourself?

1           A.       I have seen the effects of that pricing  
2 scheme.

3           Q.       But do you -- for yourself, have you seen  
4 in the stores what those prices are?

5           A.       Yes.

6           Q.       Okay. And how do those prices work for  
7 the branded milk versus the private label 1 and the  
8 private label 2?

9           A.       I'll speak in the terms of difference  
10 because milk prices do tend to change. And it's not the  
11 same for every store because this particular store gives  
12 their local managers leeway in pricing up to an extent.  
13 But -- so, in other words, it is not set by corporate,  
14 but the managers would.

15                    But a typical configuration, very typical  
16 would be a branded product would be the highest priced.  
17 The private label, the store PL 1, the store-branded  
18 product would be approximately 10 cents less per gallon.  
19 And the PL 2 would be approximately 20 cents less per  
20 gallon.

21           Q.       So now when was it that this customer  
22 solicited bids for private label 1?

23           A.       They solicited bids in the spring of  
24 2007.

25           Q.       And how often does this customer go

1 through that process?

2 A. Every few years.

3 Q. And did you participate in that process?

4 A. Yes, sir.

5 Q. And you had mentioned earlier that you  
6 sell milk in various states. Does that include down  
7 into Missouri and Kansas City?

8 A. Yes, Kansas and Missouri are both states  
9 that we distribute into.

10 Q. Where were you awarded the private label  
11 business?

12 A. In the Kansas, Missouri, region of this  
13 store chain.

14 Q. And do you know, since you bid,  
15 successfully bid on the business, what the customer's  
16 issues are for awarding that particular business?

17 A. You know, the customer has a very lengthy  
18 vetting process, culminated in written responses to many  
19 questions. But it is a very price sensitive process.

20 Q. And when you bid, what did you get  
21 awarded by this customer?

22 A. We were awarded the private label, both  
23 PL 1 and PL 2 in the Kansas City region.

24 Q. So you were awarded both the P1 and the  
25 P2 -- private label 1 and private label 2, correct?

1           A.       That is correct.

2           Q.       Did you also have a branded product?

3           A.       We previously had branded.  And that  
4 continued.

5           Q.       What happened next with respect to this  
6 customer and in terms of its milk supply that you are  
7 aware of?

8           A.       Well, an interesting thing happened.  
9 We -- like I said previously, we started servicing this  
10 customer in June of 2007 with both PL 1 and PL 2 labels  
11 for their stores.  Heartland Creamery became a very  
12 aggressive part of that market.

13                   And in the latter stages of 2007, but  
14 increasingly in 2008 they were trying to place their  
15 product in this particular store's shelves.  And the way  
16 that they did that was they -- they used their product  
17 instead of PL 2.  So they -- they -- they priced their  
18 product such that it was more aggressive.  It was a  
19 better sales point than PL 2, and thereby replaced PL 2  
20 over time in that -- in that area.

21           Q.       So today do you still have the branded  
22 product in the store?

23           A.       We do.  We have the branded product in  
24 the store.

25           Q.       Do you still have the store private label

1 1?

2 A. We still manufacture and distribute the  
3 PL 1, service the store with that.

4 Q. And what has happened with PL 2 over  
5 time?

6 A. PL 2, just to give you some concrete  
7 numbers, during 2007, we had annualized sales of  
8 185,000 gallons of PL 2 and that during 2008, we had  
9 annualized sales of 40,000 gallons. And that product is  
10 no longer produced.

11 Q. By Anderson Erickson?

12 A. Right. And it's been replaced by  
13 Heartland Creamery's product that has taken all of that  
14 volume away from us.

15 Q. Now, to be clear -- and I think some  
16 other people have testified on this. But to be clear,  
17 the label that is being used for PL 2, is that the same  
18 label as you used when you had PL 2?

19 A. Actually, to be clear, we used -- the PL  
20 2 that we used to their specification for the label.  
21 Heartland Creameries came with their own brand.

22 Q. They actually came in with a brand?

23 A. Heartland Creameries and replaced PL 2.

24 Q. So a branded product replaced your PL 2,  
25 is that correct?

1 A. That is correct.

2 Q. Is that somewhat unusual for a branded  
3 product to replace the lowest cost pricing in a retail  
4 store?

5 A. That would be quite unusual.

6 Q. And at this time do you have any sales to  
7 this customer of the private label 2?

8 A. PL 2 sales have been eliminated. We no  
9 longer sell that product.

10 Q. And do you know for a fact that that  
11 product is on the shelves from Heartland?

12 A. I know for a fact that Heartland  
13 Creameries supplies product to that store in lieu of  
14 PL 2.

15 Q. Now, have there been any impacts on  
16 either the branded sales or the PL 1 sales?

17 A. There have been some impacts on PL 1.  
18 And I've tried to quantify that. Approximately a  
19 decrease of approximately 200,000 gallons annually in  
20 the PL 1 sales.

21 Q. And have you done -- made any estimate  
22 about what the loss of the PL 2 completely and the loss  
23 of the PL 1, the portion of the PL 1, represents for the  
24 Central Milk Marketing Order?

25 A. My estimation is about -- it's in excess



1 of 3 and a quarter million pounds on an annual basis.

2 Q. It's not a huge number right now?

3 A. No, it's not -- not an astounding number,  
4 but it's troubling. And the trend is troubling. And I  
5 might add that that's a number I can most completely  
6 quantify. They do service other customers. But there  
7 hasn't been a relationship where they've just took out  
8 a -- a brand -- or a brand -- or some kind of label like  
9 the PL 2 where that was much more easy to quantify.

10 Q. Have there been any other effects in the  
11 market of this new PL 2 product, say, with respect to  
12 the price you're able to sell product elsewhere?

13 A. It has a depressing impact on -- on the  
14 market.

15 Q. Depressing. Do you mean financial or  
16 emotional or both?

17 A. Well, from my standpoint, I'm an  
18 accountant, so it would be both. In terms of this --  
19 this venue, it would depress the market price.

20 Q. Now, given -- given the competition at  
21 the PL 2 level as opposed to a brand level, although  
22 it's PL 2 level at the brand of that company, do you  
23 have any conclusion about -- well, let me back up for a  
24 moment.

25 Do you still have the Anderson Erickson

1 branded product in those stores?

2 A. Yes, sir.

3 Q. And other than some loss of volume of  
4 PL 1 to PL 2, do you still have the PL 1 in those  
5 stores?

6 A. Yes, sir.

7 Q. So can this be a quality issue?

8 A. No.

9 Q. Is this a service issue?

10 A. No.

11 Q. Do you have a conclusion as to what it  
12 is?

13 A. Well, the nature of PL 2 is it's the most  
14 price-sensitive product on the dairy shelf. So my  
15 conclusion would be that price was the -- the driver on  
16 that decision.

17 Q. Now, that's competition?

18 A. Yes.

19 Q. So what's wrong with that?

20 A. Competition in and of itself is fine.

21 And there's -- there's a lot of ways we can  
22 differentiate and do differentiate ourselves: Service,  
23 quality, different package options, things -- and  
24 including price. But I have a problem with competition  
25 when I'm not on an equal playing field with somebody

1 else from a regulatory standpoint.

2 Q. Somebody might say, well, you've got a  
3 bigger plant, and I've got a smaller plant, so I'm on an  
4 equal field with you there.

5 A. I wouldn't really -- I wouldn't define  
6 that as a meaningful argument. If I have inefficiencies  
7 in my plant, that is my problem. And if somebody else  
8 can do it better or more efficiently, then I need to  
9 respond to that. And we have -- in our 79 years of  
10 business have been able to do that.

11 But when that -- when that unequal  
12 playing field is as a result of regulatory things that I  
13 can't necessarily overcome, then that's -- that's --  
14 that's a different issue. That's very troubling.

15 Q. Do you have -- do you reach any  
16 conclusion based upon this regulatory difference as to  
17 its impact on producer-handlers in your market?

18 A. Well, it has -- I can quantify in excess  
19 of 3 million pounds of milk that is not part of the  
20 order that would have been had this product remained a  
21 part of a regulated plan.

22 So I think that decreases the -- the  
23 overall ability of the order to compensate the farmers  
24 and things like that. I also would add that, you know,  
25 it's troubling to be on an unequal playing field. And

1 if we can overcome efficiency differences, that's --  
2 that's one thing. But if it's -- if it's just  
3 differences in the Class I differential, that's  
4 troubling.

5 Q. And you've been here now for a little  
6 over a day and obviously the hearing notice has been  
7 out. Do you reach any conclusion about what a solution  
8 could be for this problem?

9 A. Well, I think that I'll leave that to the  
10 hands of the experts. I think Bob Yonkers is going to  
11 testify on and to -- as far as AIDA's opinion, and I'll  
12 follow their lead, but I think some of those proposals  
13 that I've heard are very intriguing.

14 Q. Do you have anything you wish to add at  
15 this time?

16 A. No, sir.

17 MR. ENGLISH: The witness is available  
18 for cross-examination.

19 JUDGE CLIFTON: Thank you, Mr. English.  
20 Mr. Yale, you may cross-examine Mr. Erickson.

21 CROSS-EXAMINATION

22 BY MR. YALE:

23 Q. Good afternoon. Benjamin F. Yale for  
24 Continental Dairy Products and Select Milk. How are you  
25 doing this afternoon?

1           A.       I'm doing just fine. Thank you.

2           Q.       I just have a couple of questions on the  
3 labeling issue. There's clearly a difference between  
4 the PL 2, as you call it, and the Heartland label,  
5 right?

6           A.       They're -- yeah, the labels look  
7 different, yes.

8           Q.       So this isn't a situation where that  
9 store was -- you were balancing their supply of PL 2  
10 with a PD. You understand what I mean by balancing that  
11 supply with a PD?

12          A.       I'm familiar with that, yes.

13          Q.       And that was not going on here, right?

14          A.       No.

15          Q.       So I guess the -- the question -- the  
16 comment comes back that you don't have to have the  
17 same level -- label to be able to participate in the  
18 sales of some of these chain stores, is that correct?  
19 You don't have to use their label to still be a part of  
20 that marketing, right?

21          A.       If your question is, is there multiple  
22 labels in a store, that would be correct.

23          Q.       So if you made a limitation that said you  
24 couldn't -- you had to have a unique label, that in  
25 itself wouldn't necessarily stop a PD or anybody else

1 from getting into a store, the sales. This would be  
2 price, right?

3 A. A lot of that decision is based on price.

4 Q. Now, while we're talking about price, the  
5 question I had was -- and I -- you may have said it and  
6 I -- I misunderstand. And I apologize.

7 Originally you said you had branded  
8 PL 1, PL 2 and it was like a dime difference between the  
9 branded and PL 1 and a dime difference between the PL 1  
10 and the PL 2. Was that correct, the way I understood  
11 that?

12 A. That's a typical outcome, yes.

13 Q. Okay. Now, with this PD, did that  
14 relationship change?

15 A. Somewhat, yes. We had a branded product,  
16 and there was still approximately a 10 cent difference  
17 between branded and PL 1. Between PL 1 and PL 2 it  
18 could get up to 20 cents difference.

19 Q. Okay. Now, in your market, do you pay  
20 premiums?

21 A. Yes.

22 Q. Okay. And what's the range in the  
23 premium structure for Class I milk in that market?

24 A. In May approximately \$2.60.

25 Q. And that would be --

1 A. That's an over-order premium.

2 Q. Yeah. So that's 20 cents, 30 cents a  
3 gallon?

4 A. Yeah.

5 Q. And that's more than the dime difference  
6 between -- on the Heartland, right? I mean, one could  
7 explain the Heartland difference as just the over-order  
8 premium?

9 A. One could explain it as \$1.80 difference  
10 in the Class I as well.

11 Q. As well, right?

12 A. Yeah.

13 Q. Now, I have to set this question up  
14 because I don't know an easy way to lead into it. There  
15 are -- going back to your bit where you had the branded  
16 PL 1 and PL 2, an astute, knowledgeable milk marketer  
17 could go into the dairy case and look at the plant  
18 number that's stamped or sealed or somehow on each of  
19 those containers, whatever they are, and determine that  
20 they came from the same plant, is that right?

21 A. Plant codes are a required part of  
22 your -- on our package, yes, sir.

23 Q. Right. All right. So if you were  
24 supplying all three of them. Someone like me, because I  
25 know that, could go in there and identify that they're

1 all three from the same plant, right?

2 A. That's correct.

3 Q. And it's also safe to say that it's  
4 fundamentally the same milk between the three, it's just  
5 different cartons, right?

6 A. That's accurate.

7 Q. Okay. Now, are you aware that there are  
8 some stores and chains that have been criticized for  
9 selling the same product from the same plant with  
10 different labels at different prices?

11 A. I haven't been a part of that criticism.

12 Q. You haven't been a part of that. So you  
13 don't know -- you don't think that that would have been  
14 the part of the overall strategy of this store to make  
15 this change?

16 A. I have knowledge that that wasn't.

17 Q. That's the answer then. That's really  
18 what I wanted to know because that's a factor that's out  
19 there.

20 MR. YALE: I don't have any other  
21 questions. Thank you.

22 JUDGE CLIFTON: Thank you, Mr. Yale.

23 Mr. Ricciardi.

24 CROSS-EXAMINATION

25 BY MR. RICCIARDI:



1 Q. Good afternoon, Mr. Erickson. I  
2 represent AIDA, a group of producer-handlers and exempt  
3 plants. And I've got some questions based upon your  
4 testimony. Your plant, as I understand -- I'm looking  
5 at the Dairy 100 and congratulations on being number 66,  
6 by the way -- is located in DeMoines, Iowa, correct?

7 A. That is correct.

8 Q. What's the distance between DeMoines and  
9 Kansas City?

10 A. It's approximately 200 miles.

11 Q. Do you know the distance between Newark,  
12 Missouri, and Kansas City?

13 A. Not intimately. Approximately a hundred  
14 miles.

15 Q. Okay. So the Heartland plant is located  
16 closer to Kansas City than your plant is, correct?

17 A. That's correct.

18 Q. What's your transportation costs to go  
19 from your processing plant to Kansas City?

20 A. That's a -- could you -- could you be  
21 more specific?

22 Q. Sure. I mean, it costs money to  
23 transport milk to a customer, right?

24 A. That is correct.

25 Q. Okay. And who transports your milk?

1           A.       Anderson Erickson transports the milk.

2           Q.       Okay.  And do you have a figure that you  
3 break out per gallon for transportation from this --  
4 your plant to this particular customer?

5           A.       This particular customer is 22 different  
6 stores in a pretty wide geographic area, so no, I  
7 couldn't answer that specifically.

8           Q.       Let me be more specific.  You were  
9 talking about one store or were you talking about the 22  
10 locations in your testimony?

11          A.       Yes, sir, the 22 locations.

12          Q.       Okay.  And where are those 22 locations?  
13 Are they all in the Kansas City area?

14          A.       They're in a region in and around Kansas  
15 City and extending up to parts of Missouri and Kansas.

16          Q.       And what's the farthest store location  
17 from your processing plant?

18          A.       The farthest?

19          Q.       Yes, sir.

20          A.       Potentially Topeka.

21          Q.       How far is that?

22          A.       250 miles.

23          Q.       Okay.  Can you give me at least an idea,  
24 ballpark range, as to what your cost of transportation  
25 is to take the milk from your processing plant to these

1 locations of this particular customer in the Kansas City  
2 region?

3 A. I can tell you it's a number greater than  
4 zero, but I don't have that number in front of me. I'm  
5 sorry.

6 Q. Well, it's more than zero. We'll take  
7 that as a number. Isn't it true, though, that if, in  
8 fact, Heartland is closer to those locations, their  
9 plant is than yours, that their transportation costs  
10 should be -- all things being equal, it should be less?

11 A. That's correct.

12 Q. So therefore, they would be able to  
13 utilize at least the transportation distance in pricing  
14 their milk to this particular customer, correct?

15 A. That is correct.

16 Q. And they -- since they process their own  
17 milk and they source their own milk, they don't have to  
18 pay a 25 cent over-order premium to a co-op, right?

19 A. That is an opportunity cost to them if  
20 they were going to market their milk somewhere else. So  
21 they wouldn't pay it to themselves necessarily.

22 Q. But they don't have to pay the money to  
23 the co-op that you do?

24 A. That's correct.

25 Q. Now, getting to that point, your family

1 has invested in the processing plant that you have? You  
2 don't have farms, right?

3 A. No farms.

4 Q. You made the decision at some point, your  
5 family did, and let me check this out. Don't tell me.  
6 But you've been in business for a while. At some point  
7 your family made a decision that they were going to  
8 invest in that portion of the business and not the dairy  
9 farm portion of the business, correct?

10 A. Correct.

11 Q. And you also source your milk through a  
12 cooperative, is that right?

13 A. Some of it.

14 Q. And where do you get the other portion of  
15 it?

16 A. We source it directly from a few farms  
17 and through co-ops.

18 Q. How much of your milk comes from  
19 independent sources versus cooperative sources, sir?

20 A. 40 percent independent, 60 percent co-op  
21 on average.

22 Q. And the -- I apologize. I'm sorry. I  
23 thought you were done.

24 The 60 percent that comes from the co-op,  
25 is there a particular co-op that you use?

1 A. No. We use three.

2 Q. What are the three co-ops that you use?

3 A. Dairy Farmers of America; AMPI, which is  
4 American Milk Producers, Inc., I believe; and Swiss  
5 Valley.

6 JUDGE CLIFTON: I lost the last part of  
7 that.

8 THE WITNESS: Swiss Valley.

9 Q. Your plant is located in what Federal  
10 Order, sir?

11 A. We're in order 32.

12 Q. So with regard to Federal Order 32, do  
13 you know the percentage of the milk that is supplied in  
14 that order into the pool from Dairy Farmers of America?

15 A. No, I'm sorry, I do not know that.

16 Q. Is it more than 50 percent, to your  
17 knowledge?

18 A. Honestly, I don't know.

19 Q. Honestly is important. That's good.  
20 Thanks.

21 One of the reasons that you use a  
22 cooperative to source your milk is you don't want to  
23 have to deal with the issue of the question of having an  
24 adequate source. If you need milk, you simply go ahead  
25 and contract for the milk, right?

1           A.        Could you reask the question?

2           Q.        Yeah.  It's probably not a good one.  
3           I'll see if I can do it this way.  A producer-handler  
4           such as Heartland, since you brought Heartland up, has  
5           to supply its own milk source through its processing  
6           plants and so it needs to ensure at the end of any  
7           particular month, one, that it's got enough milk and,  
8           two, that it doesn't have too much milk, right?

9           A.        Yes.

10          Q.        That is not your problem?

11          A.        No, that is my problem, also.

12          Q.        Okay.  Do you have that issue in terms of  
13          finding milk?

14          A.        Absolutely.  I have to balance milk.

15          Q.        In what way?

16          A.        I have two contracts with co-ops that  
17          specify the loads taken per day.  And they're the same  
18          year round.

19          Q.        Okay.  And those particular co-ops will  
20          supply you -- so you've got -- you've got a yearly  
21          supply contract that requires a certain amount be picked  
22          up every day?

23          A.        Yes.  Actually, technically, it's a  
24          certain amount to be dropped off every day.

25          Q.        Dropped off.  You're right.  Sorry.  I

1 apologize. That is a factor in making the decision that  
2 you made to pick those particular co-ops to contract  
3 with, correct?

4 A. Availability of milk is a factor when I'm  
5 sourcing milk, yes.

6 Q. All right. By the way, I didn't ask you  
7 this. You are a member of AIDA?

8 A. That is correct.

9 Q. And as a member of AIDA, you are here to  
10 support their proposal, correct?

11 A. I am here to give you facts that pertain  
12 to my experience with the producer-handler.

13 Q. And you're here to support their proposal  
14 also, or not?

15 A. I'm here to give facts as it pertains to  
16 the producer-handler.

17 Q. Do you support their proposal or not?  
18 Just -- if it's yes or no or you don't know, that's  
19 fine.

20 A. I'm going to defer to Mr. Yonkers and  
21 others as to the ultimate disposition of that matter.

22 Q. Okay. Have you looked at any other  
23 proposals?

24 A. Have I read any of the proposals, yes.

25 Q. Okay. Have you read Proposals 23, 24 or

1 25? 25 would be, among other things, the individual  
2 handler pool proposal.

3 A. I have no intimate knowledge of the  
4 numbering of said proposals. I've read several, but  
5 honestly, I can't tell you if I've read number 24 or 25  
6 or 23.

7 Q. Good enough. The six states that you  
8 actually market milk in would be Missouri, Kansas, and  
9 what?

10 A. Iowa.

11 Q. Yes, sir.

12 A. Illinois, Minnesota, Nebraska.

13 Q. You said you don't have any problem with  
14 competition. That's not a problem for you, right?

15 A. It's a fundamental part of this business.

16 Q. And you also don't have any problem that  
17 milk is available at a low price to consumers in stores,  
18 correct?

19 A. Milk consumption in the aggregate is a  
20 good thing. So I do not have a problem with economical  
21 availability of milk.

22 Q. Now, you have -- we've danced around this  
23 large customer private label information. Is that  
24 because you are not going to identify the name of the  
25 customer?



1 A. I'd prefer not to.

2 Q. Okay. Good enough. Is it what we've  
3 referred to as a warehouse store or a box store?

4 A. You could characterize it like that.

5 Q. If I characterize it like that, would I  
6 be right?

7 A. Yes.

8 Q. And as I understand it, you have not seen  
9 the purchase orders or the invoice -- invoices between  
10 this particular customer and Heartland. You've seen the  
11 shelf prices, correct?

12 A. Physically seen, yes, that is correct.

13 Q. Okay. Now, I don't understand. Have you  
14 seen the purchase orders or the invoices between this  
15 customer and Heartland?

16 A. No, I have not.

17 Q. Okay. You have seen the shelf prices?

18 A. Yes, sir.

19 Q. By going into the store?

20 A. That would be public knowledge, yes.

21 Q. Yes. I understand. Did you go into more  
22 than one location of the 22 that you talked about or  
23 just one?

24 A. All 22.

25 Q. Okay. And when did you do that?

1           A.       Various dates between -- approximately a  
2 week ago.

3           Q.       Okay. Do you know, by the way, the  
4 particular date that Heartland started supplying this  
5 particular customer that you've been talking about?

6           A.       There isn't a bright line. It was a  
7 process that started in the end of 2007 but accelerated  
8 through 2008.

9           Q.       Okay. So the starting time was  
10 sometime --

11          A.       Late fall 2007.

12          Q.       Calendar year 2007, correct?

13          A.       Yes. That it was most aggressive in  
14 2008.

15          Q.       Okay. So you started to lose some of the  
16 business, though, in calendar year '07, correct?

17          A.       That's correct.

18                   MR. YALE: Thank you, sir.

19                   THE WITNESS: You're welcome.

20                   JUDGE CLIFTON: Who will next  
21 cross-examine Mr. Erickson? Mr. Beshore.

22                                   CROSS-EXAMINATION

23 BY MR. BESHORE:

24          Q.       Good afternoon, Mr. Erickson.

25          A.       Good afternoon.

1 Q. I just have one question. Did -- with  
2 respect to the PL 1 sales that were -- that went to  
3 Heartland, did the customer bid those sales?

4 A. PL 1 sales, we continue to service that  
5 customer with PL 1.

6 Q. I'm sorry, PL 2. I misspoke.

7 A. PL 2 sales were -- were replaced by  
8 Heartland. I'm not sure -- I guess I'll ask you to ask  
9 your question again.

10 Q. Okay. Did the store bid -- you said that  
11 you had obtained those sales sometime in 2007, I think,  
12 through a bid process, is that correct?

13 A. That is correct.

14 Q. Okay. Now, when you lost the PL 2 sales  
15 to Heartland, was there a -- you know, had the bids been  
16 reopened, had the account been reopened, did you have  
17 the opportunity to bid on those sales?

18 A. No, it was not a bidding situation. The  
19 nature of PL 2 is it was the cheapest milk in the milk  
20 case. That was replaced by Heartland Creamery and  
21 thereby not -- there was -- there was no need for PL 2  
22 anymore.

23 Q. Okay. Was -- so you didn't have the  
24 opportunity to provide a lower price on your supply of  
25 PL 2 versus whatever price Heartland was charging the

1 customer for its labeled milk? Do I understand that  
2 correctly?

3 A. You would always have an opportunity to  
4 go to a customer and lower your price.

5 Q. Okay. Do you know -- did you -- did you  
6 talk to the customer about your loss of those sales?

7 A. We did, yes.

8 Q. Okay. What did you learn?

9 A. Well, we learned that their pricing  
10 strategy, their -- Heartland Creamery's pricing strategy  
11 was one that they were going to undercut the lowest cost  
12 dairy product in the case.

13 Q. And that's what the -- the store told  
14 you?

15 A. That's what the store managers told us,  
16 that they were communicated by Heartland Farm -- or by  
17 Heartland Creamery. They take our price, subtract some,  
18 that would be their price.

19 Q. They would take your price, subtract  
20 some, and that would be their price?

21 A. Yes.

22 MR. BESHORE: Thank you.

23 JUDGE CLIFTON: Thank you, Mr. Beshore.

24 Is there any other cross-examination of

25 Mr. Erickson? There is none. Mr. Tosi.

1 MR. TOSI: I have no questions for you,  
2 Mr. Erickson, but we do appreciate your coming  
3 and participating in the hearing. Thank you  
4 very much, sir.

5 THE WITNESS: Thank you.

6 JUDGE CLIFTON: Mr. Ricciardi, did you  
7 think of something else?

8 RECROSS-EXAMINATION

9 BY MR. RICCIARDI:

10 Q. I thought of one thing based upon the  
11 last question from Mr. Beshore. As I understand the  
12 information that you provided to Mr. Beshore, is that  
13 someone who works for you heard something from someone  
14 who worked for the customer, and you just reported it,  
15 correct?

16 A. Triple hearsay, yes, correct.

17 MR. RICCIARDI: Thank you very much.

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

20 MR. ENGLISH: No, your Honor.

21 JUDGE CLIFTON: Thank you. Thank you so  
22 much, Mr. Erickson. You may step down.

23 Would anybody object to our taking an  
24 hour now for lunch? No objection. It's almost  
25 12:45. Please be back at 1:45 ready to go.

1 (A recess was taken from 12:42 to 1:49.)

2 JUDGE CLIFTON: Please come to order.

3 (Exhibit 77 was marked for  
4 identification.)

5 (Exhibit 78 was marked for  
6 identification.)

7 JUDGE CLIFTON: We're back on record at  
8 1:49. Mr. Beshore, shall I have the witness  
9 identify himself?

10 MR. BESHORE: Yes, please, your Honor.

11 JUDGE CLIFTON: Would you please spell  
12 your name again for us?

13 THE WITNESS: My name is Jim Wernet,  
14 W-e-r-n-e-t. And I'm employed by Bareman's  
15 Dairy in Holland, Michigan.

16 JUDGE CLIFTON: Thank you. Would you  
17 raise your right hand, please?

18 (The witness was sworn.)

19 JUDGE CLIFTON: Thank you, Mr. Wernet.  
20 Mr. Beshore, you may proceed.

21 MR. BESHORE: Thank you, your Honor.

22 JIM WERNET  
23 of lawful age, being duly sworn, was examined and  
24 testified as follows:

25 DIRECT EXAMINATION

1 BY MR. BESHORE:

2 Q. Mr. Wernet, before you proceed to present  
3 your written testimony, which has been marked as  
4 Exhibit 77, I have just a couple of preliminary  
5 questions.

6 First of all, would you tell us just a  
7 little bit about yourself, your personal background?

8 A. Well, I've been in the dairy business my  
9 whole life. My father was a home delivery milkman.  
10 That's how he started out. And I worked on his trucks  
11 off and on during high school, and for different dairies  
12 that he worked for in that period and spent a couple of  
13 years at college.

14 And in 1971, I joined the Marine Corps  
15 Reserve. When I came home from the reserves, the  
16 opportunity arose that I could start my own distribution  
17 business, of which I bought a truck and started a  
18 business. Built that business over the next 16 years  
19 into about 12 trucks and subsequently was sold to Stan  
20 Bareman, who is my current employer, and I've been with  
21 Bareman's ever since, which was 1987.

22 Q. Okay. What did you distribute in your  
23 distribution --

24 A. We distributed milk and ice cream  
25 products.

1 Q. And what geographic area were you in?

2 A. Generally, it was the area east of Grand  
3 Rapids, Michigan, kind of a rural area, maybe about a  
4 six-county area. And, in fact, that was the main reason  
5 that we sold the business, is the customer base was  
6 expanding and basically wanting to drag us into areas of  
7 the state that were uneconomical for us to go to with  
8 the coverage that we would have.

9 So by combining with Bareman Dairy  
10 routes, we were able to get route efficiencies and  
11 service the customers that we brought to the business as  
12 they expanded in other areas of Michigan.

13 Q. Just one other question before going into  
14 your prepared statement. Have you ever testified in a  
15 Federal Milk Order hearing before?

16 A. No, I have not.

17 Q. What brought you here today?

18 A. Well, one of the suppliers that we buy  
19 milk from is DFA, and my representative is Chuck  
20 Courtade, who I've known for years. He used to be our  
21 representative from an independent milk co-op of which  
22 ended up being folded into DFA at some point in the  
23 past. But for years I've complained about some of the  
24 unfair competition from the producer-handler.

25 And when he was notified that there was



1 going to be a hearing, then he, in one of his normal  
2 visits to call on us, told me that if I had something to  
3 say, now was the time to say it. And so I agreed to  
4 come and say what I know.

5 Q. And this statement that you are going to  
6 present, did you prepare that?

7 A. I did. It is my statement. I did ask  
8 Chuck some questions about what to expect, what a  
9 Federal hearing is all about, is it in a courthouse.  
10 You know, I knew nothing. He directed me to a telephone  
11 number to Elvin -- and I don't even right now remember  
12 Elvin's last name, I'm sorry. And he and I conversed on  
13 the phone and through e-mail, he gave me a general idea  
14 of what I could expect here and what the hearing would  
15 require of me, as far as some idea of my background and  
16 why I was qualified to speak on this issue.

17 So I did have some assistance in the  
18 basic outline of what my statement is from Elvin, but  
19 the words are mine.

20 Q. Okay. With that, would you proceed with  
21 your statement, sir?

22 A. Yes. I am Jim Wernet and I'm the  
23 sales -- general sales manager for Bareman Dairy,  
24 located at 234 Charles Street in Holland, Michigan.  
25 We're a fluid milk processing business with in excess of

1 \$100 million in annual sales. Like most of our dairy  
2 farm suppliers, Bareman's Dairy is a family owned and  
3 run business, now in its fourth generation. Our  
4 distribution area includes Michigan, Northern Indiana  
5 and the Greater Chicago area. We currently employ 287  
6 employees and have operated in Holland, Michigan, since  
7 1898.

8 My duties at Bareman's include oversight  
9 of the 11 person sales team, determining pricing for all  
10 products and customers, customers relations as well as  
11 purchasing all dairy products not produced at our  
12 plant -- or by our plant.

13 I am responsible for the bottom line  
14 profitability on all items that we sell. I've been  
15 employed at Bareman Dairy for the last 21 years. I have  
16 held my current position at Bareman's since 1994. In  
17 total, I have been employed in the dairy business in  
18 Michigan since 1971.

19 Bareman's Dairy purchases raw milk from  
20 Dairy Farmers of America, Incorporated, and Michigan  
21 Milk Producers Association and is fully regulated by the  
22 Federal Marketing Order 33. We are a completely  
23 independent company and do not belong to any trade  
24 organizations.

25 Bareman's Dairy competes in all channels

1 of trade, grocery, institutional, vending, C stores in  
2 three of the top 40 markets. That would be Chicago,  
3 Detroit and Grand Rapids. We compete against the  
4 largest fluid milk processing company in the country,  
5 Dean Foods, as well as several large regional dairy  
6 companies, Prairie Farms, and Kemp's. Additionally, we  
7 compete against a producer-handler, Country Dairy, that  
8 has added cows steadily over the past decade.

9 I am here to testify in support of  
10 Proposals 1 and 2 as offered by the National Milk  
11 Producers Federation and the International Dairy Foods  
12 Association and oppose any grandfathering. Bareman's  
13 Dairy is supportive of Federal Orders and feel that the  
14 orders are a benefit to our dairy and its 287 employees.  
15 I am not a expert in the field of Federal Milk Marketing  
16 regulations, but I do have a general understanding of  
17 what is being discussed here.

18 I understand that a producer-handler does  
19 not pool the revenues from his farm with the Federal  
20 Order. I understand that most producer-handler milk  
21 volume is Class I volume and that these volumes are sold  
22 for the highest price; so when the returns from that  
23 volume of milk is not part of the Federal Order pool,  
24 the resulting blend price will be lower. But more  
25 importantly for Bareman's Dairy, a producer-handler is

1 not accountable to the Federal Order for the minimum  
2 Class I price -- and that is a big concern to us.

3 In the business lines I have discussed  
4 above, we deal daily with many of the processors  
5 mentioned here at the hearing. The one fact that I can  
6 be assured of is that they -- they pay the Federal Order  
7 minimum prices in the same way that I do. This is not  
8 true when I compete with a producer-handler. In my  
9 competitive area, I do face competition from  
10 producer-handlers.

11 In our market, this is an actual daily  
12 marketplace concern. We think the issue needs to be  
13 reviewed and are appreciative of the hearing. Our view  
14 is that the large producer-handlers can and do affect  
15 the marketplace and exploit a price difference in ways  
16 that are not intended. We urge the Secretary to change  
17 the Order rules as suggested in Proposals 1 and 2.

18 I understand that the order system does  
19 not guarantee a profit for Bareman's Dairy but it does  
20 claim to provide the same minimum prices to processors  
21 in the form of class prices. Once this balance gets  
22 upset, the consequences may be hard to correct - we are  
23 dealing with that situation now in portions of my  
24 marketing area, and I am concerned that if the Secretary  
25 does not act soon, we could have similar issues in other

1 areas.

2 Due to the continued growth of the  
3 largest retailers such as Wal-Mart, Kroger, Target and  
4 the like, with whom the largest dairy companies have an  
5 advantage and the inside track due to their larger  
6 distribution footprint, the smaller, independent grocer  
7 and the C store operator has become more important to  
8 our survival. This is the very customer targeted by our  
9 large producer-handler competitor.

10 Our continued existence and the jobs that  
11 we now provide and have provided to the Holland  
12 community for over 100 years are as valuable as the jobs  
13 that they provide. If their existence depends on a  
14 regulatory wrinkle, as the producer-handlers would have  
15 you believe, then that's a very fragile existence  
16 indeed.

17 We object to the head start the producers  
18 have in pricing at the expense of other farmers in  
19 Michigan, but we also feel that they cause havoc in the  
20 marketplace when in the normal cycle of production, they  
21 have more milk than customers to purchase it. This  
22 normally happens in the spring when per cow production  
23 is up and per capita consumption is down. With no way  
24 to balance sales with milk production, they turn to fire  
25 sales both to establish customers and any others that

1 might be receptive.

2           When below cost priced milk flows out  
3 into the market, we are left with two choices: Match  
4 the costs to retain the sales and the customer and lose  
5 money in the process, as we have no surplus milk at  
6 lower costs; let them have the sale and hope the surplus  
7 cycle works its way out and that they don't add more  
8 cows.

9           Either way, the low retail prices spread  
10 across the marketplace as one retailer after another  
11 match up to prevent their customers -- their own  
12 customers from switching stores. The reality is that  
13 one below market quote affects much more milk than --  
14 more than the milk quoted, and incumbent vendors match  
15 up and the producer-handler rolls on to other prospects.  
16 Therefore a producer-handler affects more milk than he  
17 can produce and deliver. We have watched this cycle  
18 repeat itself annually as our producer-handler  
19 competitor has worked his way up from 80 cows to a  
20 thousand. Will a thousand be enough, or another 500  
21 more cows, which would keep them under the 3 million  
22 pound limit -- level be added?

23           Will a new producer-handler begin this  
24 cycle all over again?

25           A recent example -- a recent example of

1 competitive issues we face with producers, a C store  
2 chain of 32 stores, 28 of which we service, four  
3 serviced by our producer-handler competitor, was offered  
4 all gallons of milk at \$1.90 if they would retail at  
5 \$1.99. This same offer is being currently made to  
6 others in our marketing area. These costs are not  
7 possible to meet paying the current Federal Order --  
8 Federal Order cost plus the over-order Class I premiums  
9 with the volumes and cost of delivery that a typical C  
10 store purchases.

11 We are told that many producer-handlers  
12 have built their businesses on quality, not on the cost  
13 advantage that they have. From our viewpoint, it's  
14 simply not true in our market. Price has been the first  
15 weapon used by producer-handlers in our marketplace.

16 I am asking that fairness be restored and  
17 competition can live on.

18 If independent dairies like Bareman's are  
19 forced out of the marketplace, there will be no one to  
20 compete with the large dairies on school bids and dairy  
21 government contracts as most producer-handlers do not  
22 process half pints. In addition to many Michigan  
23 schools, we also serve the Chicago public schools, the  
24 third largest in the country. Competition is good and  
25 something we do not fear, but to require participation

1 in the Federal Order by some companies but not others is  
2 not our idea of fair competition and simply not  
3 justifiable. How can one family business be favored  
4 over another simply because they have livestock?

5 If this issue is not corrected, we may  
6 have to press our suppliers to eliminate the Order  
7 system as the only way to meet the lower price offered  
8 to retailers from producer-handlers.

9 Thank you for the opportunity to express  
10 my opinions. I'll be glad to try and answer any  
11 questions you may have about my testimony.

12 BY MR. BESHORE:

13 Q. Okay. Mr. Wernet, first question I have  
14 about your testimony is, you have used the phrase, C  
15 store, several times. Can you tell us what you mean by  
16 C store?

17 A. A C store is a convenience store, gas  
18 station, that type of -- with a -- more than a gas  
19 station but with a store added on.

20 Q. Okay. Now, you've referenced in your --  
21 in your testimony --

22 Before I get to that, let me ask you, do  
23 you have in front of you a document that's been marked  
24 as Exhibit 78? And it consists of double-sided -- seven  
25 double-sided pages, and I think 13 pages of copy. Do



1 you have that?

2 A. I do.

3 Q. Okay. Are you -- could you look through  
4 it, please, and tell us if you are familiar with it?

5 A. Well, the first page is the home page of  
6 Country Dairy.

7 Q. And who is --

8 A. That is -- Country Dairy would be the  
9 producer-handler in New Era, Michigan, that markets in  
10 our area.

11 Q. And that is the producer-handler that you  
12 have referred to in your testimony you've just  
13 delivered?

14 A. Correct.

15 Q. What are the rest of the pages after the  
16 first page?

17 A. The rest of the pages are -- they list  
18 the customer list, where you can buy the Country Dairy  
19 milk on their website. And those are the locations.

20 Q. Okay. And that's all just printouts from  
21 the website of Country Dairy?

22 A. That is correct.

23 Q. Okay. Now, the last two pages appear to  
24 be a map with Xs. Can you tell us what that is?

25 A. That is a Michigan state highway map,

1 this map. And I reviewed the -- every town that is  
2 represented by -- on those web pages and marked with an  
3 X. So therefore like, say, Grand Rapids may have  
4 multiple locations but only one X. Just an attempt to  
5 show the range of their distribution.

6 Q. So the Xs on this map essentially show  
7 the locations of the stores which are listed in the  
8 previous web page printouts where Country -- Country  
9 Dairy's products are distributed?

10 A. That is correct.

11 Q. Okay. Did you -- did you make the map?

12 A. I did.

13 Q. Okay. Now, you say -- you've testified  
14 Country Dairy has what, about a thousand cows? Is that  
15 your understanding?

16 A. They have a thousand cows, based on their  
17 letter in support -- or in opposition to the -- the  
18 proposals.

19 Q. And that's a letter -- a letter that was  
20 addressed to officials in the United States Department  
21 of Agriculture that was posted on the USDA website and  
22 which you have reviewed?

23 A. I have.

24 Q. Okay. And now, is this -- the  
25 distribution area, depicted on the map that you have

1 just described, would appear to be quite a broad --  
2 quite a large geographic area. How far is it from north  
3 to south, roughly, would you say?

4 A. North to south would be 200 -- a little  
5 over 200 miles probably.

6 Q. Okay. How would a -- you know, a single  
7 plant location, a thousand cow herd, have a distribution  
8 system that extensive?

9 A. They do not. They do not have a truck.

10 Q. They do not have a truck?

11 A. No.

12 Q. Okay. You know that of your personal  
13 observation?

14 A. Yes.

15 Q. Okay. So how are their products  
16 distributed to this broad set of geographic locations?

17 A. They sell all their milk to a  
18 distributor, who sells the milk for them and distributes  
19 it alongside regulated milk from Dean Foods and Prairie  
20 Farms.

21 Q. And you are familiar with that  
22 distributor?

23 A. I am.

24 Q. Okay.

25 A. Cedar Crest --

1 Q. Is the name?

2 A. -- is the name of the distributor.

3 Q. Name of the distributor, okay.

4 A. And their address would be on the exhibit  
5 here, because in reality this is not -- this list was  
6 uploaded from Cedar Crest's computer. As an example, on  
7 page -- well, let's see, if you were numbering -- it  
8 would be on the -- it would be on the back of the second  
9 page, but the fourth customer on the list is listed as  
10 Employee - Price List, 5850 Balsam Drive, Hudsonville,  
11 Michigan -- I guess there's no Michigan -- Hudsonville,  
12 49426. This is Cedar Crest's customer list uploaded  
13 into Country Dairy's website.

14 Q. Okay. So what does -- 5850 Balsam Drive,  
15 Hudsonville, Michigan, what's that?

16 A. That would be Cedar Crest's location and  
17 the location of these employees who can possibly buy  
18 this milk using -- you know, I mean, they must have a  
19 employee price or they wouldn't be listed in the  
20 customer directory. And it didn't get edited out.

21 Q. So this came off of Country Dairy's web  
22 page?

23 A. It did.

24 Q. But as far as employees go, Country Dairy  
25 doesn't have any employees at 5850 Balsam Drive in

1 Hudsonville, Michigan?

2 A. No, they didn't.

3 MR. RICCIARDI: Objection, your honor.

4 JUDGE CLIFTON: Mr. Ricciardi, I'll hear  
5 your objection.

6 MR. RICCIARDI: The foundation is shown,  
7 that this witness does not know. He is  
8 guessing. He is speculating about what is  
9 actually included here. And therefore we need  
10 for this record to be clear that we have  
11 information and evidence that's based on  
12 personal knowledge.

13 I can guess along with this witness as to  
14 why the employee price list is included on this  
15 document. I don't know, just like he doesn't  
16 know. And therefore let's not have a record  
17 replete with information that is not based on  
18 personal knowledge or information he doesn't  
19 have.

20 JUDGE CLIFTON: Thank you, Mr. Ricciardi.  
21 Mr. Beshore, would you go into the foundation on  
22 which he bases his opinion?

23 BY MR. ENGLISH:

24 Q. How do you know the Hudsonville location  
25 is Cedar Crest's location?

1 A. I know that from memory.

2 Q. Okay. Have you been there?

3 A. I have.

4 Q. Do you do business with Cedar Crest?

5 A. My company sells Cedar Crest a little bit  
6 of fruit drink.

7 Q. And you've done business with them in the  
8 past?

9 A. I --

10 Q. Other kinds of business with them in the  
11 past?

12 A. Yes.

13 Q. Okay.

14 A. They're in the ice cream business. They  
15 sell some of the same kinds of ice cream that we do.  
16 When they're short a product, say, they need a pallet of  
17 Haagen-Dazs vanilla pints and we have it, we trade and  
18 get it back. I mean, we're familiar with them.

19 Q. Okay. So if Cedar Crest has its  
20 headquarters at 5850 Balsam Drive in Hudsonville, you  
21 are assuming they have some employees at the  
22 headquarters?

23 A. Yes.

24 Q. Now, let's talk a little bit --

25 JUDGE CLIFTON: Mr. Beshore, let's go

1           into what else he said about this. When you  
2           click on that category on this website, the  
3           category that says Employee - Price List, does  
4           any drop down material appear or does any  
5           additional information show?

6           THE WITNESS: No, your Honor. All the  
7           information -- there's no more drop downs. The  
8           drop down would be -- there really isn't. It's  
9           just an aid for -- if you were looking for  
10          Country Dairy milk, then you could look for your  
11          town. That's why the -- I would assume the  
12          purpose that Country Dairy placed this on their  
13          website.

14          MR. BESHORE: So the website -- I  
15          apologize.

16          JUDGE CLIFTON: Now, when you were  
17          talking about the price list --

18          MR. BESHORE: I don't think I called it a  
19          price list. Did you?

20          JUDGE CLIFTON: Well, that's what he --  
21          he pointed us to.

22          THE WITNESS: Customer list. If I called  
23          it a price list --

24          JUDGE CLIFTON: Oh, customer list?

25          THE WITNESS: Yes. Okay. Customer list.

1           When you talked about that and you talked about  
2           how you could obtain additional information  
3           about buying the product in your location and so  
4           forth, were you just referring to this -- what  
5           we see here is not something that can be  
6           generated on the website that we do not see?

7           THE WITNESS: Correct. The only -- if --  
8           when you are on the website, if -- I can't  
9           exactly remember. But if you want to find out  
10          where to buy it, then you click and it brings up  
11          these following pages. And then it lists these  
12          customers.

13          JUDGE CLIFTON: All right. And explain  
14          how you -- how you understand that Country Dairy  
15          uses the customer that's shown on this list as  
16          an employee price list to distribute its  
17          product.

18          THE WITNESS: I don't. I think -- what I  
19          was saying there is the -- the very fact that it  
20          says employee price list on the list and it --  
21          that it shows that it's a Cedar Crest generated  
22          list of customers, it is not a Country Dairy  
23          generated list of customers.

24          JUDGE CLIFTON: Now, what you're telling  
25          me is, if I -- I go, for example, to the first



1 entry here, which is in Sparta. And it's  
2 called -- how do you say that? AGO?

3 THE WITNESS: It's American Gas & Oil,  
4 Number 1.

5 THE COURT: Okay. How do you know that  
6 to be not Country Dairy's customer but rather  
7 the customer of its distributor?

8 THE WITNESS: I know that to purchase  
9 Country Dairy milk from -- Country Dairy milk at  
10 all -- other than from their retail outlet, you  
11 must buy it from Cedar Crest. And I know this  
12 because the general manager told me so, of  
13 Country Dairy.

14 JUDGE CLIFTON: Okay. If you'd describe  
15 when and where you had that conversation and who  
16 that person is.

17 THE WITNESS: The person is Paul Aaredma  
18 (sic) He is the son-in-law. And how I came to  
19 have that conversation was, three years ago I  
20 was close to making a deal with Whole Foods in  
21 the Chicago area. It's a chain of stores.

22 They were looking for a less than organic  
23 product that they could sell at a lower retail.  
24 We were real close to having the deal done, and  
25 at the last minute they needed rbST free milk,

1 of which we did not have a supply at that time.  
2 So rather than just do away with the prospect, I  
3 called Country Dairy for reasons -- might just  
4 well as keep the business in Michigan and also  
5 that would be a thousand gallons a day that I  
6 didn't have to deal with on the market.

7 So I arranged to meet. I called Paul  
8 Aaredma, asked him if he would be interested in  
9 the business. He said he would, but we would  
10 have to work through Cedar Crest Dairy, that he  
11 had to sell all his milk to Cedar Crest.

12 So we did. It was a three-way meeting.

13 There was -- it ended up they did get the  
14 deal. And the deal for Bareman Dairy, in turn,  
15 for the lead, was a commission of 4 1/2 cents a  
16 gallon for two years, of which they paid --  
17 Cedar Crest paid, not Country Dairy paid -- from  
18 the period of July '06 to August '07.

19 So I have that from his own words.

20 JUDGE CLIFTON: Now I understand. Could  
21 you spell Aaredma for me, if you know?

22 THE WITNESS: I'm pretty sure it's  
23 A-a-r-e-d-m-a.

24 JUDGE CLIFTON: Thank you. Mr. Beshore,  
25 back to you.

1 MR. BESHORE: Thank you, your Honor.

2 BY MR. BESHORE:

3 Q. Let's talk just a little bit, Mr. Wernet.  
4 I'd like to ask you just a little bit about the current  
5 pricing that you've testified about and that you've  
6 observed in your marketplace with respect to Country  
7 Dairy competition.

8 At page 4 of your testimony, Exhibit 77,  
9 you've indicated that an offer has been made to a  
10 customer of Bareman Dairies, 28 convenience stores that  
11 you service, an offer has been made at \$1.90, and I  
12 assume is that per gallon?

13 A. Correct, it is.

14 Q. Okay. And is that an offer that's been  
15 made by Country Dairy?

16 A. Yes. It was an offer that was made to  
17 the four stores that they service, with the condition of  
18 selling it at that retail and with the offer that it  
19 could be extended to the other 28 stores if they so  
20 desired.

21 Q. How are you aware of that offer?

22 A. The buyer of the C store company conveyed  
23 it to my salesman.

24 Q. And what has transpired with respect to  
25 that account?

1           A.       Well, this happened a week and a half or  
2       so ago. The original conversation between my salesman  
3       and the buyer, I instructed the salesman to put them on  
4       with some special pricing, not \$1.90. And I don't know  
5       exactly the pricing. It was around 2.10. And he did.

6                    And then when I was on my way down here  
7       yesterday morning, I got another call from my salesman.  
8       The buyer was on the phone wanting to know if we were  
9       unable to meet the offer.

10           Q.       The offer being the --

11           A.       The previous \$1.90 offer. She needed to  
12       know.

13           Q.       Okay.

14           A.       I instructed the salesman that was too  
15       low, we could not do it. I did give him a lower number,  
16       lower than our previous number, and asked him to convey  
17       that number. And I do not know if we held the business  
18       or not.

19           Q.       Now, your testimony says this same offer  
20       is currently being made to others in your marketing  
21       area.

22           A.       Yes, it has been.

23           Q.       And how are you aware of that and what  
24       can you tell us about that?

25           A.       We have both; some of our customers that

1 have told us that and then asked us if we could meet it  
2 or we've just had our customers ask how their  
3 competition across the street can be a \$1.99 all of a  
4 sudden. It's also based on the knowledge that this has  
5 happened almost annually for years.

6 Q. Okay. I want to ask you some more about  
7 that. What -- what do you mean by annually? Is that a  
8 particular time of the year?

9 A. In the spring when there's too much milk.

10 Q. Such as May?

11 A. Yes.

12 Q. And has that been, in your experience and  
13 your observation, Country Dairy's marketing practices?

14 A. They have utilized that marketing  
15 practice. I don't know if it's a marketing practice as  
16 much as a survival practice. They have the milk. It's  
17 got to go someplace. I doubt they want to sell it at  
18 that price.

19 Q. But that's what happens?

20 A. It's got to go someplace.

21 Q. Have you -- are you aware that Country  
22 Dairy has touted itself, including to the Secretary of  
23 Agriculture, to officials in USDA, as a company that  
24 operates on a premium product or survives on -- or  
25 markets a premium product as opposed to a price -- a

1 low-priced product?

2 A. I did read all of the letters that were  
3 posted on the USDA website as of a week or ten days ago,  
4 and I did see the Country Dairy letter. And yes, I saw  
5 that. And I got a chuckle.

6 Q. Okay. Why did you chuckle?

7 A. Because it's simply not true.

8 Q. Are there other producer-handlers in  
9 Michigan with which you're concerned?

10 A. There are at least four other  
11 producer-handlers in Michigan that are smaller,  
12 farm-based, have their own particular thing that they're  
13 doing and we're not concerned with those unless they  
14 have the potential to grow to 3 million pounds a month.  
15 Then four of those, four more of those would be  
16 devastating. But at the level they are or the way they  
17 market today, no.

18 MR. BESHORE: Thank you. I don't have  
19 any further questions. Is there anything else  
20 you'd like to add, Mr. Wernet, before  
21 cross-examination?

22 THE WITNESS: No, I don't believe so.

23 MR. BESHORE: Okay.

24 JUDGE CLIFTON: Mr. Beshore, stay there  
25 for a moment. The witness indicated, that after

1 he had talked with Chuck Courtade, and I'd like  
2 to have that spelling.

3 MR. BESHORE: C-o-r-t-a-i-d, I believe.  
4 No? I'm wrong.

5 AUDIENCE MEMBER: C-o-u-r-t-a-d-e.

6 MR. BESHORE: C-o-u-r-t-a-d-e.

7 JUDGE CLIFTON: Good. Thank you. And  
8 the witness said he was referred with a phone  
9 number to, sounded like Alvin. Might be Elvin.

10 MR. BESHORE: Elvin.

11 JUDGE CLIFTON: Would you spell that for  
12 us?

13 MR. BESHORE: E-l-v-i-n.

14 JUDGE CLIFTON: And because you know who  
15 that person is, would you identify him by his  
16 whole name?

17 MR. BESHORE: Elvin Hollon, H-o-l-l-o-n.  
18 And he's on the -- on our witness list, your  
19 Honor.

20 JUDGE CLIFTON: Thank you. All right.  
21 Good. Thank you. And who would like to begin  
22 the cross-examination of Mr. Wernet? Mr. Yale.

23 CROSS-EXAMINATION

24 BY MR. YALE:

25 Q. Good afternoon, Benjamin F. Yale,

1 Continental Dairy Products, Select Milk Producers. Good  
2 afternoon.

3 A. Good afternoon.

4 Q. And I had to slip out, and I apologize,  
5 maybe I missed it. But how big is Country Dairy? Do  
6 you know approximately how big they are?

7 A. I can only guesstimate by a thousand cows  
8 that that would put them in the 2 million pound a month  
9 range.

10 Q. And all -- to your knowledge, is  
11 everything they do under their own label or do they  
12 private label?

13 A. The only private label that I'm aware of  
14 is the label -- the Whole Foods business that I was  
15 instrumental in arranging for them.

16 Q. The -- you mentioned something about a  
17 \$1.90 price or a \$1.99. Is that for skim milk or whole  
18 milk or reduced or --

19 A. All.

20 Q. It was for all of them?

21 A. (Nodding head.)

22 Q. And what is -- for -- that would be,  
23 what, for May prices or June prices? Do you know what  
24 the --

25 A. It's for May.



1 Q. It's for May. And what's the Class I  
2 Federal Order price for that area of Michigan?

3 A. We pay 15.70 for the month of May,  
4 including all service charges.

5 Q. And what -- what do the service charges  
6 run, approximately?

7 A. More than \$2. I mean, that's the  
8 over-order premium. And I don't pay that much. The  
9 bottom line is what I'm concerned -- you know, our  
10 accountant, our CPA, takes care of that part of it.  
11 And, you know, to the best of my recollection, it -- the  
12 total of all the service charges, the over-order  
13 premiums, everything that we pay above Federal Order  
14 is more than \$2 and less than 2.50. But any given  
15 month, I --

16 Q. It could vary?

17 A. Yes. And I don't keep that close a track  
18 of it.

19 Q. Does the cost -- I mean, would you expect  
20 it to cost more than 70 cents to process a gallon of  
21 milk in that market?

22 A. No, I wouldn't. But to -- the actual  
23 cost -- when you are talking about C store business, the  
24 cost of distribution exceeds the cost of processing.

25 Q. So what would be a distribution in

1 roughly -- I mean, in that range? Can you give me a  
2 range of distribution and processing?

3 A. The problem with distribution is you need  
4 to know how much you are distributing. And the stopping  
5 of the truck is a relatively static number. And if you  
6 deliver 100 cases, you can get it down pretty good. The  
7 average C store is very lucky to get up to 20 cases. So  
8 you would need -- at 50 cents a gallon, with 20 cases of  
9 milk, that would give you \$40 distribution income.  
10 You'd be hard pressed to turn a route of 15, 16 C stores  
11 in a legal day. And that's what you would need to bring  
12 back to pay for the man and the truck, is at least that  
13 \$600 or so.

14 Q. What's a -- a full-sized semi, how many  
15 cases does that hold, roughly?

16 A. A delivery semi?

17 Q. Yeah.

18 A. Okay. We utilize all different sizes.  
19 We have a lot of 28-foot, single axle tractor-trailer  
20 combinations and you could legally scale up to 5 -- 550  
21 cases on a rig like that. We have 45-foot  
22 tandem-tandem, tractor-trailer combinations that you  
23 could scale 1,100 cases on. And then we have straight  
24 trucks that -- single axle straight trucks that you  
25 might only have 300 cases on.

1                   When it comes to the C store business,  
2                   the issue is time more than -- a route times out way  
3                   before it cubes out, or weights out.

4                   MR. YALE: Very interesting. Thank you  
5                   very much.

6                   THE WITNESS: Thank you.

7                   JUDGE CLIFTON: Who next? Mr. Vetne.

8                   CROSS-EXAMINATION

9                   BY MR. VETNE:

10                  Q.           Mr. Wernet, I'm John Vetne. I represent  
11                  two producer-handlers in the Pacific Northwest and one  
12                  in New Mexico. I live in New Hampshire, and I grew up  
13                  in Michigan.

14                  Am I correct that you have estimated the  
15                  size of the producer-handler as -- at approximately  
16                  2 million pounds per month?

17                  A.           That's correct. That's figuring 75,  
18                  80 pounds of milk a day per cow and using their number  
19                  of a thousand.

20                  Q.           And what is -- what is Bareman's volume  
21                  per month?

22                  A.           Currently 19 million pounds.

23                  Q.           Is that Class I?

24                  A.           We are very heavily skewed toward  
25                  Class I, well over 90 percent.

1           Q.       90 percent of 19 or 19 is 90 percent of  
2 your total receipts?

3           A.       90 percent of the 19 would be Class I.

4           Q.       Let's see. Grand Rapids is -- is not too  
5 far from Holland. However, Detroit is clear across the  
6 state, correct?

7           A.       It is.

8           Q.       In the Detroit market, do you have large  
9 grocery chain or box store accounts or are those mostly  
10 what you call C stores?

11          Q.       We have a -- I don't know if it's a large  
12 chain. No, we don't have any large national chains  
13 other than Walgreen's, which, of course, is not a  
14 grocery store. But we have independent grocers. We  
15 have a grocer that has six very nice-sized stores and a  
16 grocer that has three nice-sized stores in the Detroit  
17 market.

18          Q.       Okay. The area in which you compete with  
19 Country, the producer-handler in New Era, is that  
20 coextensive with your distribution area or is it  
21 smaller?

22          A.       Our distribution area covers the entire  
23 lower peninsula of Michigan as well as the areas in  
24 Northern Indiana and Greater Chicago. So we're -- our  
25 distribution area is larger than the Cedar Crest/New Era

1 distribution area which defines where Country Dairy  
2 is -- milk is available.

3 Q. Cedar Crest meaning what?

4 A. They are the distributor that distributes  
5 all of the Country Dairy milk.

6 Q. Okay. And how far do they go, say, south  
7 from New Era?

8 A. They go very close to the state line on  
9 the western side, which would be down in the --

10 Q. Buffalo, St. Joe area?

11 A. Yes, Three Rivers, that area. They go  
12 north to Traverse City. And they only go east to  
13 about -- there's a highway in Michigan that kind of  
14 dissects the middle. That would be 27 -- or 127 when  
15 you get down farther. And they don't really go much  
16 east of that.

17 But they have picked up a subdistributor  
18 in Detroit that is a distributor of -- the distributor  
19 that puts some of that milk out. But those locations --  
20 they're small locations, and they wouldn't be listed on  
21 the Country Dairy website because they're not listed in  
22 the -- the Cedar Crest web -- customer list.

23 Q. Okay. When you refer to the C store  
24 chain of 32 stores, 28 of which you service, do you  
25 still service those 28?

1 A. As of yesterday morning, we did.

2 Q. Okay. And four were serviced by your  
3 producer-handler competitive. Were those four of the 32  
4 store chains that were closer to New Era, Michigan?

5 A. Actually, they're closer to Hudsonville,  
6 Michigan --

7 Q. Okay.

8 A. -- the home of Cedar Crest.

9 Q. Okay. Home of the distributor. And how  
10 far out in the state does this -- strike that.

11 When you say C store, you refer  
12 generically to convenience stores?

13 A. Correct.

14 Q. You are not referring to a convenience  
15 store brand that's called C Store?

16 A. No.

17 Q. And this chain of 32 stores, does it have  
18 stores outside of the regular distribution area of the  
19 distributor of the producer-handler?

20 A. No.

21 Q. They're all within that -- all in western  
22 Michigan?

23 A. Yes. Very much concentrated around the  
24 Grand Rapids area.

25 Q. Okay. And when you conclude that -- that

1 costs are not possible to meet, the bottom of page 4,  
2 you are referring to actually a -- an offer of a milk  
3 price of a \$1.90 is not possible to meet?

4 A. That's correct.

5 Q. Okay. And that's not possible to meet  
6 because you have a combination of costs to get the  
7 product into the package in order to market it?

8 A. Yeah. Actually, if you take the 15.60  
9 that is the Class I complete price to a regulated  
10 handler in Michigan in May and divide it by the 11 point  
11 whatever gallons, you are going to end up with very  
12 close to a \$1.40 just raw milk costs before you touched  
13 it.

14 And we already established if you really  
15 ran the route efficiently, you could do the distribution  
16 for 50 cents. So now you got \$1.90, and you haven't put  
17 a bottle around it or processed it.

18 Q. Okay. What are your costs of getting the  
19 milk from the silo into the bottle?

20 A. That's not something that -- that I'm  
21 actually involved in in deciding. I don't know if I --  
22 I guess I got a number. I don't know if I -- if it  
23 makes a difference and --

24 Q. Please. If you have a number in mind --  
25 I guess it would be a number at which you could start

1 competing someplace above 1.90. But --

2 A. All right. I'll give you a number. We  
3 believe our internal number is 33 cents a gallon.

4 Q. Okay. That's into your cooler, before  
5 it's distributed?

6 A. Well; actually, we figure that -- we  
7 average our hauling costs into our cost of production,  
8 with the theory being that you can't get more milk --  
9 for milk in one location than another. When, like,  
10 you're selling to a chain of 32 stores, they're not  
11 going to pay you more because this store is closer to  
12 the plant and this store is farther.

13 So our loaded costs, when we get to a  
14 final cost before we put distribution on it, includes  
15 the cost of getting it to our distribution branches.

16 Q. All right.

17 A. And then the truck cost begins after  
18 that.

19 Q. And when you used the term, cost of  
20 production, an answer or two ago, you were referring to  
21 the cost of processing from the silo to the store, is  
22 that right?

23 A. No. Cost of production would not include  
24 delivery.

25 Q. Okay. Not include delivery. The 33



1 cents or so that you gave me would not include delivery?

2 A. Correct.

3 Q. Okay. But you still are referring to  
4 processing costs?

5 A. Correct.

6 Q. Would it be accurate to say that many of  
7 the -- the convenience stores, mom and pop stores and  
8 stores of that nature, are stores that are no longer  
9 serviced by the largest dairy companies in the state  
10 such as Dean Foods?

11 A. No, that wouldn't be true. We --

12 Q. Compete with --

13 A. -- compete with Dean Foods all the time.  
14 In fact, we lost one of our least volume C store chains  
15 to Dean Foods last fall, and it was -- probably not a  
16 five case average there. So they'll go after anything.  
17 They compete in all arenas.

18 Q. So they compete in all your arenas, but  
19 you are not able to compete in all of theirs, is that  
20 correct?

21 A. Where we have a disadvantage against Dean  
22 Food, is that as the big boys, the Wal-Marts, the  
23 Meijer, the business like that, if you were successful  
24 in getting it, if you ever lost it, you'd be gone. And  
25 you would -- it is so much volume that you would -- you

1 would lose 50 percent of your business overnight because  
2 someone made a decision somewhere. That's a position we  
3 haven't put ourselves into.

4 And then also another handicap is quite  
5 often the footprint of how they bid stores, like a group  
6 of stores, if it doesn't fit your distribution  
7 footprint. Like if they include Toledo, Ohio, as part  
8 of the Detroit Metro area and you don't go to Toledo,  
9 Ohio, now you may not bid on that unless you are willing  
10 to go to Toledo, Ohio. You know, they could cut it any  
11 way they want, yet -- or a big regional or a Dean, of  
12 course, they just chop it up between plants.

13 Q. All right.

14 A. And that's the same problem that Country  
15 Dairy would have in bidding on that kind of thing. You  
16 can't get a piece of it you can chew.

17 Q. Got it. When you say -- on your last  
18 page, you say, most producers do not process half pints.  
19 Is that based on personal observation?

20 A. Personal observation. Country Dairy does  
21 not.

22 Q. Country Dairy does not. Country Dairy is  
23 one. We have quite a few producer-handlers represented  
24 here.

25 A. Okay. In the state of Michigan, no

1 producer-handler produces half pints. And in my  
2 marketing area, no producer-handler. So in my  
3 experience. And I have no experience outside of that  
4 area.

5 Q. Okay. You indicated that there were four  
6 others. Let me ask you this. Do you know whether those  
7 others are, in fact, producer-handlers as opposed to  
8 exempt plants?

9 A. I don't know. I -- well, one I know is a  
10 producer-handler for a fact. That would be MOO-ville  
11 Creamery in Nashville, Michigan.

12 Q. MOO-ville Creamery -- let me represent to  
13 you that MOO-ville Creamery shows up in data supplied by  
14 USDA as a producer-handler during some months of 2008,  
15 and in other months shows up as an exempt plant. And it  
16 doesn't show up anyplace in 2009.

17 A. And the others, I don't know about.  
18 There's -- they're small. They haven't caused me a  
19 reason to find out about it.

20 Q. All right. Going back to this offer of a  
21 \$1.90 a gallon, first of all, this was -- this was  
22 actual gallons. It wasn't a gallon equivalent or  
23 different size packages, correct?

24 A. Gallons.

25 Q. Actual gallons. And what month was that?

1 A. May.

2 Q. All of this was May?

3 A. (Nodding head.)

4 Q. Okay.

5 JUDGE CLIFTON: You nodded your head.

6 Yes?

7 THE WITNESS: May 2009, yes.

8 Q. All right. Got it. And last couple of  
9 questions. When you used the term, when below cost  
10 priced milk flows out into the market, what is below  
11 cost priced milk?

12 A. Well, I guess I'd start with a \$1.90.  
13 But what I was getting to there is the fact that, you  
14 know, if you blunt the attack, the attack goes somewhere  
15 else. It just rolls on until -- I mean, until they find  
16 a place for the milk to go. Because the milk must go.

17 Q. What do you mean by below cost? What is  
18 your cost reference and how is it below that cost  
19 reference?

20 A. Below the cost for the milk plus the cost  
21 of the production, plus the cost to the bottle, label  
22 and cap, and plus the cost to delivery. If you don't  
23 get that much money, you lost money, and you're below  
24 cost.

25 Q. Okay. So you were referring to your

1 below cost priced milk flowing into the market or  
2 somebody else's below cost priced milk flowing into the  
3 market?

4 A. Sir, when you're looking at a figure such  
5 as a \$1.90, it's everybody's below cost. Even the  
6 supposed -- the -- the allowance or the gap that's been  
7 tossed around here for the past couple of days, the 6  
8 cents to 15 cents or whatever, none of that is going to  
9 help. That -- that is not going to fix \$1.90 milk. And  
10 if you take my \$1.40 and make it a buck and a quarter,  
11 if you've still got 50 cents to get it to the store, and  
12 you've still got 12 or 13 cents minimum for bottle, cap,  
13 and label, you're still not going to run it through a  
14 plant. And you're going to be below cost, whether it's  
15 my cost or the producer-handlers' cost.

16 Q. All right. Does Bareman's sometimes sell  
17 below its calculation of costs in order to gain a  
18 customer?

19 A. Not to gain a customer, to keep a  
20 customer.

21 Q. To keep a customer. You don't do it to  
22 get your shoe in the door?

23 A. No.

24 Q. Okay. Do you believe that other people  
25 do that?

1           A.       Yes, I believe they do.

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

3           JUDGE CLIFTON:  Mr. Vetne, it's not  
4           really clear to me whether the other people do  
5           it to get a shoe in the door or to keep a  
6           customer.

7           MR. VETNE:  Good point, your Honor.  She  
8           listens better than I do because she's not  
9           asking the questions.

10       BY MR. VETNE:

11           Q.       When I said, do you believe other people  
12           do that, I intended:  Do you believe other people sell  
13           milk below cost to get a foot in the door?

14           A.       I would believe so.

15           MR. VETNE:  Okay.  Thank you.

16           JUDGE CLIFTON:  Thank you, Mr. Vetne.  
17           Who next will cross-examine this witness?  
18           Mr. Ricciardi.

19                           CROSS-EXAMINATION

20       BY MR. RICCIARDI:

21           Q.       Good afternoon, sir.  Al Ricciardi on  
22           behalf of AIDA, producer-handlers, and an exempt plant.  
23           And I appreciate you taking the time.  And I have some  
24           questions.  And, unfortunately, some of them are going  
25           to have to do with math, so bear with me.

1 JUDGE CLIFTON: Should we get the witness  
2 a pad and pen?

3 MR. RICCIARDI: Well, I don't know if we  
4 need to do that, Judge. He was pretty good in  
5 his head. But if he feels like he needs one,  
6 that's fine.

7 THE WITNESS: Thank you.

8 JUDGE CLIFTON: I have learned that  
9 that's the least I can do.

10 MR. RICCIARDI: I understand.

11 BY MR. RICCIARDI:

12 Q. And let's get our parameters correct. As  
13 I understood your testimony thus far, including  
14 cross-examination, you were talking about -- about --  
15 for Bareman Dairy, a \$1.40 in raw milk costs, 33 cents  
16 in processing costs and an estimate of 50 cents for  
17 distribution?

18 A. That would be correct. That would be on  
19 a -- a distribution on a 20 case volume stop.

20 Q. Okay. Now, I have added up -- be very,  
21 very afraid on this because I've added it up. See if  
22 you get it right. That comes to 2.23?

23 A. That would be correct. We don't have a  
24 bottle yet.

25 Q. Okay. And how much would be the cost for

1 the bottle?

2 A. 13 cents. The bottle, cap and label.

3 Q. Okay. Now we're at 2.36?

4 A. Correct.

5 Q. And if we back off any perceived  
6 producer-handler advantage, and let's use the largest  
7 number, 15 cents, where does that get us?

8 A. 2.21.

9 Q. So your testimony is -- and we'll explore  
10 the -- the basis for it in a moment -- that regardless  
11 of any alleged advantage at \$1.90, if we use these as  
12 your costs, that sale would be well below the cost even  
13 to a producer-handler?

14 A. It would seem so.

15 Q. Okay. Let's leave that point there, and  
16 I want to come to a couple of other things. Exhibit  
17 78's been marked. That is a document that you prepared  
18 by simply going to the Country Dairy website, copying  
19 the front page, then copying other portions of it where  
20 their products could be found. And then you went and  
21 added the last two pages, which are a map. And then  
22 what you did is, you reviewed the locations that were  
23 found on the website and put Xs on them?

24 A. That would be correct.

25 Q. Okay. You indicate in your statement,



1 which is Exhibit 77, page 5, first full paragraph --  
2 actually, second paragraph on the page, last sentence,  
3 your words, price has been the first weapon used by  
4 producer-handlers in our marketplace.

5 First clarification, then question.  
6 Producer-handlers, you have testified only about Country  
7 Dairy. So do you mean Country Dairy when you say  
8 producer-handlers there?

9 A. That's been my experience.

10 Q. Okay. So that should actually be  
11 changed. It should be one producer-handler, and that's  
12 Country Dairy?

13 A. I would agree with that.

14 Q. Okay. And as I think, Mr. Vetne pointed  
15 out, Exhibit 13 shows us that the only producer-handler  
16 listed, at least in that Order that you're in, in 33, is  
17 Country Dairy in New Era for 2009?

18 A. That's what Mr. Vetne said.

19 Q. Okay. And that's what the USDA document  
20 says?

21 A. If you say so. I haven't looked at it.

22 Q. Well, I can get that for you, but I can  
23 represent to you I've read it correctly.

24 A. I don't know why you'd tell me different.

25 Q. Thank you very much. Take a look at the

1 first page of Exhibit 78. Now, if you were creating a  
2 website, and you have this document here in front of  
3 you, and you were going to want to represent to people  
4 that you were competing on price, is this the first page  
5 of the website that you would actually put up?

6 A. The -- the -- that's immaterial. Because  
7 the -- they don't compete -- you compete to get the  
8 customer on price.

9 Q. Okay. I understand your statement.  
10 Let's actually go through the document. It says -- it,  
11 first of all, has a lovely picture of a cow, a bucolic  
12 looking cow. And it says, come visit our family farm,  
13 exclamation point.

14 A. They've got a very nice farm.

15 Q. And they do have a picture of the farm.  
16 And it says, Welcome to Country Dairy. Under that, we  
17 are a producer-handler, which means we own and control  
18 the process - from our herd of registered Holsteins to  
19 our modern processing plant, to the gallon of milk on  
20 your store shelf.

21 A. Which is not true.

22 Q. Okay. Well, I understand that's what  
23 you're saying. I'm just reading their website with you,  
24 and we'll go through and finish this.

25 By doing this, we provide you the

1 freshest and best tasting milk, exclamation point.

2 If we read that, at least the  
3 representation that's on the website, what they're going  
4 for, is the fact that they control their own process,  
5 that they have a fresh -- fresh product and that it is  
6 essentially better tasting. That's how they are  
7 advertising themselves as a producer-handler, correct?

8 A. That's what it says.

9 Q. Okay. Fair enough.

10 A. But it's also not true, at least part of  
11 it's not true.

12 Q. Okay. And that's your position. I  
13 understand. But you also brought this document with  
14 you, and that's what this document says, right?

15 A. Yes.

16 Q. Okay. As I understand it -- a couple of  
17 other things and then I'll move on and let you do the  
18 same. Did I understand you telling Mr. Yale that you  
19 pay over-order premiums in the range of 22 to 25 cents a  
20 gallon? Is that right?

21 A. Sounds about right.

22 Q. Okay. And that's from DFA and also  
23 Michigan Milk Producers?

24 A. That's correct.

25 Q. Those are the two sources of your milk?

1           A.       That is correct.

2           Q.       With regard to the commission that you  
3 received for this Whole Foods business when you dealt  
4 with Country Dairy back in '06, '07, the reason you got  
5 a commission as opposed to the business is because you  
6 didn't have rbST free milk?

7           A.       Correct.

8           Q.       Because you had to get it from the co-op?

9           A.       And we would have had to segregate it as  
10 we processed it, and it would have been something we had  
11 talked about but we were not there yet.

12          Q.       Whereas, Country Dairy, because it's a  
13 producer-handler, has the ability to go ahead and  
14 process its own milk and ensure that it's rbST free,  
15 which is one of the reasons why whole milk -- why Whole  
16 Foods got it, right?

17          A.       That would be one of the reasons, yes.

18          Q.       Because they were looking for that type  
19 of product that you didn't have access to, right?

20          A.       That's correct.

21          Q.       Now, lastly, this \$1.90 issue that you've  
22 referenced, it's sort of this old phrase that they used  
23 to have, and I think I may be right, for those Cub fans,  
24 is, Tinker to Everest to Chance. This is -- the  
25 information came like this. It's supposedly someone

1 from Country Dairy to a buyer to a sales rep to you,  
2 correct? That's the source of your information?

3 A. The buyer to my salesperson.

4 Q. To you?

5 A. Correct.

6 MR. VETNE: Thank you very much.

7 JUDGE CLIFTON: Thank you, Mr. Ricciardi.

8 Mr. Carroll.

9 CROSS-EXAMINATION

10 BY MR. CARROLL:

11 Q. Good afternoon, sir.

12 A. Good afternoon.

13 Q. You come from a city well known in my  
14 area, so -- and in a business well known. I represent  
15 the New England Producer-Handlers Association in Order  
16 1, and -- some Order 1 handlers and another one in --  
17 in -- not a producer-handler, presently in Order 5. I  
18 have no connection or any experience with your markets,  
19 so I'm not going to bother you much with it. I just  
20 want to ask you a few simple questions, though.

21 From what I've listened to from your  
22 testimony, you're in vigorous competition?

23 A. Correct.

24 Q. Not just with producer-handlers but with  
25 some of the biggest people in America, really --

1           A.       Correct.

2           Q.       -- some of the bigger ones?  And also  
3 with regional handlers?

4           A.       Correct.

5           Q.       And through your efforts and skill, you  
6 are still surviving and still in business?

7           A.       So far, so good.

8           Q.       Right.  And is that competition -- has  
9 that competition been -- in terms of price -- been a  
10 benefit to the stores or to the consumers of the milk in  
11 your distributing area?

12          A.       Competition always benefits everybody.

13          Q.       All right.  And I want to ask you if you  
14 know the terms of the arrangements between Country and  
15 Cedar Crest.  Do you know what their deal is?

16          A.       No.  The only thing that I know firsthand  
17 is that I tried to buy the milk to sell to Whole Foods  
18 and I was told by the owner, general manager, that I had  
19 to buy it through Cedar Crest, that that was their  
20 agreement.

21          Q.       Okay.

22          A.       And then we pulled Cedar Crest in, and  
23 then that's how it all panned out.

24          Q.       Do you know the terms of sale to -- from  
25 Country to Cedar Crest?  Do you know the pricing of

1 those sales?

2 A. I do not.

3 Q. Do you know the pricing or cost,  
4 rather -- perhaps that's not right. Do you know the  
5 costs of production and processing of Country?

6 A. I do not.

7 MR. CARROLL: Okay. Thank you very much,  
8 sir.

9 JUDGE CLIFTON: Thank you, Mr. Carroll.  
10 Mr. English.

11 CROSS-EXAMINATION

12 BY MR. ENGLISH:

13 Q. Good afternoon. Charles English.

14 A. Good afternoon.

15 Q. Just a couple of questions. You  
16 testified about price. Have you actually gone to the  
17 store to see what it's being sold at?

18 A. I have not.

19 MR. ENGLISH: I have no further  
20 questions.

21 JUDGE CLIFTON: Is there any other  
22 cross-examination of this witness? Yes, I see  
23 you, Mr. Miltner.

24 CROSS-EXAMINATION

25 BY MR. MILTNER:

1 Q. Ryan Miltner on behalf of AIDA. Good  
2 afternoon, sir.

3 A. Good afternoon.

4 Q. A distributing plant, after it runs all  
5 the different types of milk through its plant, it  
6 doesn't use milk at 3 1/2 percent butterfat, does it?

7 A. Our average blended product would  
8 probably be plus or minus 2 percent, depending on what  
9 time of year it was. Because the more school milk, the  
10 lower it would be.

11 Q. And just because of the mix of whole  
12 milk, 2 percent, 1 percent, skim milk, that's what --  
13 that's what creates plant average, correct?

14 A. Correct.

15 Q. Okay. In your experience in Michigan,  
16 not necessarily in your plant, what's the -- what's the  
17 ratio of sales of those different fat levels?

18 A. Again, it depends on the package. When  
19 we're talking about half pints, it's going to be  
20 80 percent 1 percent, because that's what the schools  
21 call for.

22 But when we're talking about gallons,  
23 when you put -- given a choice -- and again, it depends  
24 if you price it -- the difference or not. There's two  
25 ways of pricing gallon milk. You can go all over the



1 country and see different -- sometimes there's -- like  
2 one is 2.99 whole milk, 2.79, 2.59, 2.49 for fat free,  
3 sometimes all gallons 2.79 or whatever.

4 Obviously, if you give the consumer all  
5 gallons at the same price, they're going to buy up.  
6 They know that it's a better value to -- to -- to buy  
7 the 2 percent or whole. And the price buyers will --  
8 there -- will buy more of that product.

9 So that all depends. But in --  
10 companywide, we would be close to 50 percent 2 percent.  
11 And then the other 50 percent would be about split,  
12 20 percent whole -- Michigan's a strange market because  
13 we have half percent. 5 percent would be 1 percent,  
14 which would be the next one in most markets, but not  
15 Michigan.

16 Then we would go to fat free and half  
17 percent, and fat free would pick up the lion's share of  
18 that. But fat free -- or half percent would be more  
19 than 1 percent. But, you know, if -- you're trying to  
20 get to an average butterfat of a gallon. Is that where  
21 you're headed?

22 Q. Yeah.

23 A. Okay. I usually figure a little over  
24 2 percent. If I cost out my 2 percent in a one price  
25 situation, then that's going to be close to what the

1 public will buy. And that will also vary depending on  
2 neighborhood and ethnic concentration. Hispanics will  
3 skew way heavily to whole milk, and so will -- lower  
4 income levels for some reason, whether it's inner city  
5 or rural, buy whole milk.

6 Q. And in the retail context you described  
7 some different models. I want to make sure my notes on  
8 that were correct. You said you will see some retailers  
9 differ their price on butterfat and others will not?

10 A. Correct. Because there's an actual  
11 difference depending on how much -- the price of solids,  
12 nonfat and fat. I mean, the difference between whole  
13 milk and skim milk could be as much as 40 cents a gallon  
14 or as little as 20 cents a gallon. And then, of course,  
15 the other grades will fall in between there. And some  
16 retailers will reflect that difference, so they -- skim  
17 milk actually sells for a lower price than homo and some  
18 will not.

19 Most of the time on regular price lists  
20 I've seen from any milk vendor, they differentiate those  
21 prices also. It's not all gallons. The only time you  
22 see that is on a special that you want -- that you are  
23 going to promote gallons two for five or \$1.99 or  
24 something like that. Then you might get a one price all  
25 gallons, mix or match.

1           Q.       And as an Ohioan, it's nice to hear  
2 somebody from Michigan admit you guys are a little  
3 strange. Thank you.

4                    But in Ohio, for example, in my part of  
5 the state, which is a little bit north of here, we've  
6 had Kroger put half gallons on sale for a buck a piece  
7 in the past month. Do you have that same experience in  
8 Michigan?

9           A.       Kroger has run -- not half gallons.  
10 They've run some gallons. There are no Krogers in  
11 western Michigan. But in the Detroit area, Kroger has  
12 run \$1.99 gallons since the price break on milk in  
13 February.

14           Q.       And Kroger in Michigan, I assume, is  
15 supplied by its own captive plant, just like it is in  
16 Ohio?

17           A.       Right. They have a plant in the Detroit  
18 area.

19           Q.       Okay. Let's assume that -- do you guys  
20 do bottled water in your gallons?

21           A.       We do.

22           Q.       Is the cost of your water negligible?

23           A.       It is.

24           Q.       Okay. Could you supply a gallon of water  
25 to one of those convenience stores for, say, a dollar?

1 A. Yes.

2 Q. How about for \$1.20?

3 A. We couldn't get that much.

4 MR. MILTNER: Okay. Thank you.

5 JUDGE CLIFTON: Is there any other  
6 cross-examination of Mr. Wernet? Mr. Tosi.

7 CROSS-EXAMINATION

8 BY MR. TOSI:

9 Q. Good afternoon, sir.

10 A. Good afternoon.

11 Q. A few questions. Has Bareman Dairy lost  
12 accounts to producer-handlers?

13 A. Some of the accounts on that list are old  
14 accounts of Bareman Dairy.

15 Q. And when those accounts were lost, what  
16 were the conditions of losing the account? Was it based  
17 on price?

18 A. Most of the time.

19 Q. Has Bareman Dairy ever regained an  
20 account that was being supplied by a producer-handler?

21 A. Yes.

22 Q. And when a regulated handler like Bareman  
23 wins an account back, what's the primary reason for  
24 getting the account back?

25 A. It -- it can vary. A driver will get you

1 an account back alone on his service level at times, or  
2 a bad driver from the other guy. That can swing the  
3 business.

4 I mean, especially in the smaller stores,  
5 they need the product in the right quantities. The  
6 whole process that -- that -- we do what you would call  
7 pack and peddle or driver peddle. So the driver  
8 actually walks into the store, surveys the dairy case,  
9 rotates the product, pulls out any old, determines from  
10 his gut feeling what that store is going to do in the  
11 next three or four days, whether Memorial Day is a big  
12 deal for this store or a downer and takes that all into  
13 consideration and fills them up accordingly.

14 And no matter if the customer -- the  
15 store runs out of milk, then it doesn't matter what they  
16 are buying it for if they're making their customer  
17 happy. So we would get customers back on driver  
18 service. We will also get some customers back on  
19 acceptance, acceptance issues on the new dairy that --  
20 and that doesn't necessarily mean that their product is  
21 bad, just means the customers didn't accept it.

22 People are creatures of habit. They've  
23 had maybe our milk for years and years and then there's  
24 something else there, they're not -- in all cases, it  
25 doesn't work.

1           And by the same token, we've replaced  
2   Dean Foods in Chicago on occasion and had the same thing  
3   happen to us. So there's various reasons. Sometimes  
4   it's the promises that were made don't end up being  
5   kept. It's hard to get them back. A lot of customers  
6   on that list were our customers. Their growth over the  
7   years has come at our expense.

8           As I said in my statement, the written  
9   statement, the -- the call always is, is when you have  
10  these price situations, do you meet it and hold the  
11  account and then face them somewhere else, because you  
12  will, or do you let them have it and hope that's enough.  
13  It's like, you know, giving Czechoslovakia to Hitler.  
14  Strike that, take that back. Appeasing, you never know  
15  if it's enough.

16           Q.       And you would -- you would attribute  
17  price competition, at least with respect to Country  
18  Dairy, that the biggest issue that you have with them  
19  is -- has to do with being price competitive with them  
20  and you see them as having this advantage?

21           A.       There are other issues.

22           Q.       But not having a pool obligation, where  
23  you do?

24           A.       I don't know that. I think that, as far  
25  as -- because that can't really be quantified from time

1 to time. But you think that. And then I believe this  
2 disposal of surplus milk is a problem.

3 And the other reason that Country Dairy  
4 has taken business over the years is the rbST issue.  
5 And that -- that was -- it's been an issue that was not  
6 resolved because there is no rbST in any Class I  
7 anywhere in our marketing area. But that was an issue.  
8 Consumers didn't how know to deal with that.

9 And they would get -- they very  
10 prominently displayed on their cartons and bottles. So,  
11 yeah, they got some business that way.

12 MR. TOSI: That's all I have for you.

13 And, again, I want to thank you for coming in --  
14 coming all the way down here to Cincinnati and  
15 participating in this hearing.

16 MR. WERNET: Thank you.

17 MR. TOSI: Thank you.

18 JUDGE CLIFTON: Mr. Wernet, when you  
19 said, their growth has come at our expense, who  
20 is the they?

21 THE WITNESS: The Country Dairy or the  
22 producer-handler. Their -- from the 80 cows to  
23 the thousand cows, that milk had to go  
24 somewhere.

25 JUDGE CLIFTON: And did you tell me how

1 long ago they were at 80 cows?

2 THE WITNESS: They're -- that's what they  
3 started with in 1983.

4 JUDGE CLIFTON: Any other  
5 cross-examination? Redirect? Mr. Beshore.

6 REDIRECT EXAMINATION

7 BY MR. BESHORE:

8 Q. Thank you. Just a couple of points,  
9 Mr. Wernet. I think you, in response to one of  
10 Mr. Tosi's questions -- I just want to make clear that  
11 Bareman's is rbST free now, is that correct?

12 A. Correct.

13 Q. Okay. You were not at the time of the  
14 Whole Foods transaction?

15 A. Correct. It was not available through  
16 any of our two co-ops at that time.

17 Q. Okay. But -- and all of the -- basically  
18 all of the dairies in Michigan are now, is that correct,  
19 as far as you know?

20 A. Michigan, Indiana, Illinois, Wisconsin,  
21 everywhere we market is bST free.

22 Q. Okay. Have you ever heard the term  
23 balancing used --

24 A. Yes.

25 Q. -- in dairy terms? In your view, is



1 reducing price on milk products in the spring when milk  
2 is long in essence a form of balancing?

3 A. Desperate balancing. But it simply has  
4 to go someplace.

5 Q. And that's what you've seen over the  
6 years with -- with Country Dairy?

7 A. Yes. I believe they balance using the  
8 regulated milk that Cedar Crest purchases from Dean  
9 Foods. Most of the time it works; most of the time.

10 But when there's extreme, when there's  
11 too much, then they can't do it anymore.

12 Q. When you say, they balance using the  
13 regulated milk Cedar Crest buys from Dean Foods, what do  
14 you mean by that?

15 A. One of the problems that a typical  
16 producer-handler would have is what happens when sales  
17 are too strong. What do you tell your customers when  
18 you don't have any milk? The simple answer is, you'll  
19 order some in from Dean.

20 And even if it costs you a little more,  
21 that's still good business. You're going there anyway,  
22 so it's an incremental, anyhow delivery. So if you have  
23 to put 20 gallons of Dean's in there that you pay X less  
24 or more for, then so be it.

25 So I think that fact alone, the -- the

1 marriage of the producer-handler with an independent  
2 distributor that is buying milk from two regulated  
3 dairies that are in the pool is in itself some sort of a  
4 twisted outcome of -- of these rules. I just can't  
5 believe that that was ever intended.

6 Q. So, in other words, the distributor meets  
7 its customers' needs with pool or nonpool milk depending  
8 on availability?

9 A. Correct. The places that the milk is  
10 sold as a -- like the Meijers stores are listed in --  
11 in -- on the website. And we've talked about the Meijer  
12 stores. I've heard their name two or three times. I  
13 saw one on the hill when we were coming in. They're big  
14 stores.

15 Q. Listed in Exhibit 78?

16 A. Yes, big stores, lots of dairy case. You  
17 know, Country Dairy is in there as a specialty item.  
18 You know, obviously at that store you can't substitute  
19 the -- a Dean product. That's not what's expected. But  
20 at another store that -- that is, say, a convenience  
21 store that has got milk on sale, the consumer there  
22 doesn't care. They're buying it there because it's on  
23 sale.

24 And so if you run out of the Country  
25 Dairy, balance with the -- the Dean or the Prairie

1 Farms. No one cares. But it's just a very twisted way  
2 of using this producer-handler rule.

3 Q. And that's the way it works today in  
4 Michigan?

5 A. It does.

6 Q. One final question. The -- you  
7 testified -- it was in your direct statement that milk  
8 was being offered by Cedar Crest, Country Dairy milk for  
9 a \$1.90 on the condition that the store sell it out of  
10 store at a \$1.99. Is that the way it worked?

11 A. That's the way it works in the spring.

12 Q. Okay. Is that the way it's working now  
13 in Michigan?

14 A. No, we don't do that.

15 Q. No, no, not you. But the country -- the  
16 Cedar Crest was offering the Country Dairy milk to the  
17 convenience stores at a \$1.90 a gallon on the condition  
18 that they sell it for a \$1.99 out of the store?

19 A. Correct. That's the way it was reported  
20 to my salesmen from the buyer. And it didn't surprise  
21 either my salesmen or myself because we've heard it  
22 before. And it makes sense because you've got to move  
23 the milk. I mean, the -- to sell it cheap and have a  
24 high retail on it doesn't take care of the problem.

25 Q. And have you seen it happen that way

1 before?

2 A. I have.

3 MR. BESHORE: Thank you. I would move  
4 Exhibit 77, 78, your Honor.

5 JUDGE CLIFTON: Thank you, Mr. Beshore.  
6 Is there any objection to the admission into  
7 evidence of Exhibit 77? There is none. Exhibit  
8 77 is hereby admitted.

9 Is there any objection to the admission  
10 into evidence of Exhibit 78? There is none.  
11 Exhibit 78 is hereby admitted.

12 Mr. Wernet, you are an extremely clear,  
13 dynamic witness, and I appreciate your testimony  
14 here.

15 MR. WERNET: Thank you, your Honor.

16 JUDGE CLIFTON: You're welcome. You may  
17 step down. And let us take a ten-minute break.  
18 Please be back and ready to go at 3:28.

19 MR. ENGLISH: At which time we can have  
20 Chrissie Dewey, your Honor.

21 JUDGE CLIFTON: That would be good.

22 (A recess was taken from 3:18 to 3:43.)

23 JUDGE CLIFTON: All right. We're back on  
24 record at 3:43. I've indicated that you may  
25 mark Ms. Dewey's statement as Exhibit 79.

1 (Exhibit 79 was marked for  
2 identification.)

3 JUDGE CLIFTON: And I'd like you now to  
4 state your name and spell it for us, please.

5 THE WITNESS: Officially, my name is  
6 Christine Dewey. C-h-r-i-s-t-i-n-e, D-e-w-e-y.

7 JUDGE CLIFTON: Thank you. And when you  
8 are known as Chrissie, how is that spelled?

9 THE WITNESS: C-h-r-i-s-s-i-e.

10 JUDGE CLIFTON: Thank you. Would you  
11 raise your right hand, please?

12 (The witness was sworn.)

13 JUDGE CLIFTON: Thank you. Mr. English  
14 you may proceed.

15 CHRISTINE DEWEY

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

18 DIRECT EXAMINATION

19 BY MR. ENGLISH:

20 Q. Good afternoon, Ms. Dewey.

21 A. Good afternoon, Mr. English.

22 Q. Before you begin, have you ever testified  
23 in a Federal Order hearing before?

24 A. No.

25 Q. Before -- I'm sorry, what time -- when

1 did you arrive at this proceeding?

2 A. Yesterday afternoon around 3:00 I entered  
3 the hearing.

4 Q. And so you saw six hours yesterday and  
5 today's proceedings, correct?

6 A. Yes, I did.

7 Q. Have you ever before today and yesterday  
8 even attended a Federal Order proceeding before?

9 A. No, I have not.

10 Q. I'll resist asking whether you'll ever  
11 come back.

12 A. If I have to.

13 Q. Have you ever testified at a proceeding  
14 before the Pennsylvania Milk Marketing Board?

15 A. Yes, I have on one occasion.

16 Q. With that prelude, then, would you please  
17 provide your testimony?

18 A. My name is Chrissie Dewey. I am  
19 testifying today on behalf of my family's business,  
20 Harrisburg Dairies, and on behalf of our trade  
21 association, the Pennsylvania Association of Milk  
22 Dealers, in support of their proposal to eliminate the  
23 producer-handler exemption and increase the exempt plant  
24 provision from 150,000 pounds per month to  
25 450,000 pounds per month.

1                   Harrisburg Dairies was founded by my  
2                   great grandfather, Ben Wolfe, in 1931. We started as a  
3                   small operation with all home delivery customers and  
4                   have grown and changed a great deal since our start. We  
5                   currently produce milk or purchase milk from 40  
6                   independent farmers in central Pennsylvania and deliver  
7                   milk to institutional, commercial, and retail customers  
8                   in 13 states. We process fluid milk, iced tea and fruit  
9                   juices as well as distribute other dairy byproducts.  
10                  Approximately 70 percent of our current milk sales are  
11                  to customers located outside of Pennsylvania. I  
12                  currently serve as the marketing manager at Harrisburg  
13                  Dairies.

14                   The hallmarks of our business are our  
15                   independence, respect for our employees and dairy  
16                   farmers, and the quality of our milk.

17                   Harrisburg Dairy is a fully  
18                   regulated fluid milk distributor located in the Federal  
19                   Milk Marketing Order 1. That means that every month we  
20                   have to endure the worry and uncertainties that many  
21                   fully regulated handlers must endure while waiting to  
22                   receive the bill for their pool payment. For us the  
23                   pool payment determines whether we make money, break  
24                   even, or worse.

25                   All fluid milk processors operate on thin

1 margins, but when you are small like Harrisburg Dairies,  
2 which is approximately 4 to 6 million pounds a month,  
3 that pool payment really makes a difference. Due to the  
4 way our financials are calculated each month, all other  
5 costs and expenses are calculated before we receive the  
6 pool payment invoice. So each month our bottom line is  
7 calculated, and we simply wait for that invoice to  
8 determine how much profit, if any, we have left over  
9 after the pool payment is made. From month to month our  
10 pool payment fluctuates, and if we have a month when it  
11 is much higher than the average, it often completely  
12 eliminates any profit we may have made. If we don't  
13 have to make the pool payment each month, like some of  
14 our competitors, we could use those funds for  
15 advertising and public relations to help us be more  
16 competitive in the marketplace. We could also offer  
17 lower pricing on out of state accounts to make us more  
18 competitive -- price competitive.

19 Harrisburg Dairies is not here to  
20 complain about its pool payment. We recognize that it  
21 is a part of doing business in such a highly regulated  
22 industry, but we are extremely concerned that the  
23 producer-handler exemption provides privileges to  
24 producer-handlers that place companies like us at a  
25 competitive disadvantage. Presently, we are not



1 experiencing direct competition from producer-handlers,  
2 but we are extremely concerned that there is a trend  
3 developing. We are aware of the producer-handlers out  
4 west -- meaning western Pennsylvania -- that are serving  
5 the kind of retail chains that we compete for, and we  
6 would not survive in our current form if that trend  
7 moves east. I have calculated that producer-handler  
8 status for a company that is comparable in size to  
9 Harrisburg Dairies would give them a minimum regulated  
10 raw milk cost advantage of an average \$100,000 per month  
11 or slightly more than 17 cents per gallon on the  
12 purchase of 5 million pounds. This calculation is  
13 derived from what Harrisburg Dairy would save if it  
14 didn't have to contribute to the pool.

15 This would be devastating for us since  
16 raw milk is such a significant portion of our costs. I  
17 have calculated that raw milk is between approximately  
18 61 and 66 percent of our costs. In my experience,  
19 accounts are won and lost based on 1/100 of a cent per  
20 gallon. It is true that Harrisburg Dairies prides  
21 itself on quality and in fact we have won a number of  
22 recent bids based on taste tests, but if we were 1/100  
23 of a cent higher than our competitors, we would never  
24 get to that tasting competition. In several instances  
25 you must be among the lowest three bidders to be given

1 the opportunity to even bring your product to be  
2 sampled. If we were going head-to-head with a  
3 competitor that has a raw milk cost of over 17 cents  
4 lower than ours, we can in no way be as price  
5 competitive as they can.

6 I'm not even confident that we can  
7 survive by converting to a producer-handler status. We  
8 have been approached recently to become a  
9 producer-handler and declined. We declined for a number  
10 of reasons, including on principle alone. We couldn't  
11 see doing that to our dairy farmers, many of whom have  
12 shipped to us for three or four generations and count on  
13 us for their livelihood. For us, this would mean  
14 putting 40 farm families out of work. Even if we would  
15 consider making the move to converting to a  
16 producer-handler, in our particular situation, it is  
17 very difficult to believe that it would be a viable  
18 option for us at all. The urban location of our plant  
19 leaves us nowhere to place a farm or herd of milking  
20 cows nearby. Thus I do not even see that producers like  
21 ourselves, if faced with competition from  
22 producer-handlers, can reasonably expect to adopt the  
23 producer-handler status as their salvation. We do not  
24 believe that some companies should have regulatory  
25 privileges that others cannot. In a business that

1 operates on such thin margins and incredible price  
2 pressures to begin with, it is hard to imagine that we  
3 could withstand direct competition from a handler that  
4 is allowed this regulatory privilege.

5 Thank you for the opportunity to testify  
6 here today.

7 Q. Ms. Dewey, in that last paragraph, at one  
8 time you said, thus I do not even see that producers, I  
9 believe is what you said, like ourselves. Did you mean  
10 to say processors?

11 A. Processors, I'm sorry.

12 Q. And I believe you inserted a word that  
13 might have been missing in the last sentence?

14 A. Right. That would be a typo that was  
15 there.

16 Q. Is this your statement, ma'am?

17 A. It is.

18 Q. You wrote this?

19 A. I did.

20 Q. There were some questions of a previous  
21 witness with respect to the issue of rbST-free milk.

22 A. Yes.

23 Q. What is Harrisburg Dairy's position or  
24 what has their marketplace position been with respect to  
25 rbST-free milk?

1           A.       Our entire milk supply is rbSt free and  
2 always has been. Ever since the beginning of the use,  
3 we've -- our farmers have not been allowed to use that.  
4 We only source milk from independent farmers that do not  
5 use it.

6           Q.       And do you supply, for instance, as we  
7 heard, maybe supplied elsewhere, a major retailer with  
8 rbST free milk?

9           A.       We do. Actually, part of the reason that  
10 we go to 13 states is we service Whole Foods in 13  
11 states on the East Coast.

12          Q.       Okay. Do you wish to add anything at  
13 this time?

14          A.       Not at this time.

15                 MR. ENGLISH: The witness is available  
16 for cross-examination. And I move the admission  
17 of Exhibit 79.

18                 JUDGE CLIFTON: Thank you, Mr. English.  
19 Let's start with the exhibit. Is there any  
20 objection to the admission into evidence of  
21 Exhibit 79? There is none. Exhibit 79 is  
22 hereby admitted.

23                 Who will begin cross-examination of  
24 Ms. Dewey? Mr. Vetne. Thank you.

25                         CROSS-EXAMINATION

1 BY MR. VETNE:

2 Q. Ms. Dewey, my name is John Vetne. I'm  
3 from New Hampshire. I represent two producer-handlers  
4 in the Pacific Northwest and one in New Mexico. I  
5 wouldn't want you to come all this way and watch us for  
6 two days without having asked you a question.

7 MR. ENGLISH: She wouldn't mind.

8 A. That would be just fine.

9 Q. You mentioned -- let's start with Whole  
10 Foods you serve in 13 states. If you were to take the  
11 Whole Foods account out of the equation --

12 A. Correct.

13 Q. -- what portion of your milk sales would  
14 be outside of Pennsylvania?

15 A. As a percentage?

16 Q. Yeah. Take those out.

17 A. It would still be nearly 50 percent of  
18 our sales.

19 Q. Okay. And Harrisburg is located near the  
20 Maryland border?

21 A. It's about an hour from the Maryland  
22 border, yes.

23 Q. And is that the direction of most of your  
24 sales, towards Maryland and --

25 A. Surprisingly, we do a good bit of sales

1 in Maryland, Virginia. We also go to Delaware, New  
2 Jersey, and New York. So we head out in all directions.

3 Q. Okay. The very last line of the first  
4 page of your testimony --

5 A. Yes.

6 Q. -- you're concerned that the  
7 producer-handler exemption provides -- that place  
8 companies like you at a competitive disadvantage?

9 A. Correct.

10 Q. The next sentence, you say you're not  
11 currently experiencing direct competition. Would it be  
12 more correct to say, would place companies like yours at  
13 a competitive disadvantage, since you are not  
14 experiencing it now?

15 A. Correct. It would be -- it would be more  
16 accurate as -- as things stand today. But what I would  
17 like to say about that is although we don't directly  
18 compete head-to-head for a lot of the business, there  
19 are a few producer-handlers, one, in particular, in our  
20 general vicinity that we don't necessarily compete for  
21 the same customers, but at this point is still  
22 an outlet -- another outlet to purchase milk.

23 We all know that the market is made up of  
24 one pie and, you know, you can only divide it so many  
25 ways. So I didn't -- I wanted to be fair and not say

1 that that's direct competition for us at this point, but  
2 I still would like to acknowledge that it is a  
3 competitor.

4 Q. All right. You buy milk just from  
5 independent producers?

6 A. We do.

7 Q. You have no Class II processing?

8 A. We do not.

9 Q. Okay.

10 A. We do -- as far as Class I utilization,  
11 we are usually between 90 and 96 percent. That varies.  
12 We obviously balance our own milk supply. When we have  
13 a surplus, we sell to a cheese plant, is how we balance  
14 our milk surplus, because we don't purchase co-op milk.  
15 We do our own balancing, so that's how the things change  
16 for us every month.

17 Q. If you had to supplement your food milk  
18 needs, where would you go to acquire that?

19 A. If we start to gain more business and we  
20 need to pick up more fluid milk, we would pick up more  
21 independent farmers in our area. We generally have a  
22 waiting list, and so we go into the waiting list.

23 Q. Okay. Have you ever had to acquire some  
24 supplemental bulk milk and gone out on the market to get  
25 it?

1           A.       Not any time recently. We've been  
2 fortunate.

3           Q.       All right. Okay. All right. You  
4 calculated a producer-handler advantage for a  
5 hypothetical plant of comparable size, am I correct?

6           A.       Correct. And that calculation was simply  
7 based on our average pool payment per month and then  
8 based on a plant of our size.

9           Q.       Okay. Are there any producer-handlers on  
10 the East Coast that are even close to your size, to your  
11 knowledge?

12          A.       Not producer-handlers, no.

13          Q.       Okay. Are there any producer-handlers on  
14 the East Coast that are threatening to become close to  
15 your size, to your knowledge?

16          A.       To my knowledge, I'm not intimately aware  
17 of their plans for growth, so I don't feel I can answer  
18 that.

19          Q.       Okay. Do you know what the size of the  
20 producer-handler out west -- and I was surprised you  
21 then said western Pennsylvania rather than Colorado --  
22 what the size of that producer-handler in western  
23 Pennsylvania is?

24          A.       I don't know of their size volumewise.  
25 But what I am aware of are the types of accounts that



1 they are acquiring or serving at this point. They are  
2 accounts that we would certainly like to have an  
3 opportunity to serve ourselves, so --

4 Q. Okay. That producer-handler is limited  
5 in its geography of distribution, to your knowledge?

6 A. To my knowledge, at this point, yes.

7 Q. And it doesn't come as far east as your  
8 primary market, correct?

9 A. Not currently.

10 Q. All right. Do you know of any plans for  
11 that producer-handler to come to your primary market in  
12 eastern Pennsylvania?

13 A. I'm not aware of their plans.

14 Q. Do you know what the processing costs are  
15 for that producer-handler compared to yours?

16 A. I'm not aware of their processing costs.

17 Q. What are your processing costs for about  
18 5 million pounds per month?

19 A. On a total?

20 Q. Yeah, on the average per gallon per  
21 hundredweight.

22 A. It depends. As far as processing outside  
23 of what we purchase our milk for?

24 Q. No. I'm talking about when you -- from  
25 the time you receive the milk from your independent

1 farmers, put it in your silo, to the time a milk jug is  
2 filled and put in your cooler, how much does that cost?

3 A. I don't feel that I could give you an  
4 accurate number that I'd be willing to put on record at  
5 this point.

6 Q. What kind of containers do you use for  
7 your milk?

8 A. Plastic containers for everything but  
9 half pints are still in paper.

10 Q. Okay. Do you blow your own plastic?

11 A. We do not.

12 Q. You purchase them from where?

13 A. From a plastic supplier.

14 Q. Located how close to your plant?

15 A. They come in about three hours from where  
16 we are.

17 Q. Okay. What about paper?

18 A. They come from a paper supplier that's  
19 closer than that but still about an hour and 15 minutes  
20 from our plant.

21 Q. I don't know much about paper. They  
22 don't come pre-opened, do they?

23 A. No, they come folded down flat on a  
24 pallet.

25 Q. They come folded, that you put it in a

1 machine, you open them --

2 A. Correct.

3 Q. -- seal them -- fill them, seal them  
4 again?

5 A. Yes.

6 Q. Okay. And that's for half pints only?

7 A. Yes.

8 Q. Okay. Your reason for being here today,  
9 as I understand it, is prophylactic. It is to prevent  
10 something from happening in the future rather than --  
11 you perceive is bad, rather than something bad happening  
12 now?

13 A. It's a concern about a trend that would  
14 have a great impact on us, yes.

15 Q. Okay. You are -- you are also here on  
16 behalf of the Pennsylvania Association of Milk Dealers?

17 A. That's correct.

18 Q. You didn't mention that other than in  
19 your heading much. What is -- first of all, in that  
20 association, who are the members?

21 A. We have several members, dairy -- both  
22 located in and outside of Pennsylvania that sell into  
23 the state of Pennsylvania. So they would be considered  
24 members. We have members of all sizes from much smaller  
25 than us to obviously much, much larger than us. So it's

1 a varying group of members, I would say.

2 Q. And the members would include some  
3 processing plants from central Pennsylvania that are not  
4 federally regulated that have their independent handler  
5 pools?

6 A. As far as they're not fully regulated  
7 plants?

8 Q. Yes.

9 A. Yes.

10 Q. But the state of Pennsylvania regulates  
11 price for those plants, correct?

12 A. It regulates, yes. In the state of  
13 Pennsylvania, for sales in the state of Pennsylvania,  
14 yes.

15 Q. Right. It regulates raw milk prices and  
16 retail prices? It has two levels of regulation,  
17 regulates -- Pennsylvania regulates a Class I price for  
18 milk that is not federally regulated, am I correct?

19 A. Yes.

20 Q. Okay. And for plants that are subject to  
21 that regulation, instead of Federal regulation, the  
22 plants pay a plant blend, whatever the regulated value  
23 of all their milk use, that they pay to their individual  
24 farmers, is that correct?

25 A. They're responsible for paying their

1 farmers, yes. They are not responsible to the Federal  
2 Order.

3 Q. And they're not responsible to a state  
4 pool?

5 A. No.

6 Q. So they're just responsible to pay the  
7 minimum value of milk in all uses to their patrons or  
8 co-ops, whoever supplies them, correct?

9 A. Yes.

10 Q. Okay. And that kind of processor --  
11 there are that kind of processors within the membership  
12 of the Pennsylvania Association of Milk Dealers?

13 A. Yes, there are.

14 Q. And operating within Pennsylvania, you  
15 have minimum markup or minimum retail prices, don't you?

16 A. We do, yes.

17 Q. Okay. Is it -- does the state regulation  
18 of -- of transactions from a processing plant regulate  
19 the transaction from the plant to the store as well as  
20 the store markup, both, or neither?

21 A. It does not regulate the store markup.  
22 It regulates our pricing to a retail customer.

23 Q. Okay. So the state of Pennsylvania on  
24 in-state sales tries to make sure that in-state dairy  
25 farmers have a market for milk to viable distributing

1 plants. Is that the general idea?

2 A. That -- you'd have to ask them their  
3 intention for it. But of my understanding, that's close  
4 to being accurate, yes.

5 Q. Okay. They don't want you and Dean Foods  
6 cutting each other's throat. We know who is going to  
7 win that one.

8 A. Thank you.

9 MR. VETNE: Okay. Thank you very much.

10 JUDGE CLIFTON: Thank you, Mr. Vetne.

11 Who next will cross-examine Ms. Dewey? Thank  
12 you, Mr. Miltner.

13 CROSS-EXAMINATION

14 BY MR. MILTNER:

15 Q. Ryan Miltner on behalf of AIDA. Good  
16 afternoon.

17 A. Good afternoon.

18 Q. I want to ask about your -- your  
19 statement about balancing --

20 A. Yes.

21 Q. -- your milk supplies.

22 A. Correct.

23 Q. You buy your milk from independent dairy  
24 farms?

25 A. We do.

1 Q. Okay. And what you don't use in your own  
2 packaged products, you said you sell to a cheese plant,  
3 right?

4 A. Correct.

5 Q. Okay. How is that reported to the  
6 Federal Market Administrator?

7 A. I'm not sure.

8 Q. Okay. Are you responsible for preparing  
9 the Market Administrator's report?

10 A. I'm not.

11 Q. You're not. Are you familiar with those  
12 reports?

13 A. Partially.

14 Q. Okay. The volumes of milk that you  
15 transfer to a cheese plant that's reported on that form,  
16 do you know how that's reported --

17 A. I do not.

18 Q. Okay. When you sell that milk to a  
19 cheese plant --

20 A. Correct.

21 Q. -- what price do you receive for it?

22 A. Much lower than we pay for it. I can  
23 tell you that much.

24 Q. Okay. What do you pay for it?

25 A. The way that we pay our farmers -- I'm

1 sure in Pennsylvania -- this is a little different for  
2 everyone. But we pay the -- we pay a Pennsylvania  
3 over-order premium. And then in addition to that, in  
4 our case we pay a volume, a quality, and an rbST-free  
5 premium in addition to the Pennsylvania over-order.

6 Q. Okay. Can you describe for me what the  
7 Pennsylvania over-order is?

8 A. It's an over-order premium over the  
9 Class I price that's determined by the state -- mandated  
10 by the state that everyone is required to pay.

11 Q. Okay. So all of your producers receive  
12 the class -- the Class I price plus the over-order  
13 premium, plus the other bonuses that you have discussed?

14 A. Ours in particular, yes.

15 Q. Okay. So their price is not based on the  
16 Federal Order blend price, it's based off the Federal  
17 Order Class I price?

18 A. I'm not -- I'm actually not sure.

19 Q. Okay. So you're not sure of what -- what  
20 the agreement with your suppliers is on the base?

21 A. No, I only have -- I have only been  
22 intimately involved with the pricing of our -- you know,  
23 the bonus or premiums on top of the base pricing.

24 Q. Okay. And you're not familiar with how  
25 that plant-to-plant transfer is reported to the Market



1 Administrator?

2 A. I am not. But I can tell you that  
3 doesn't happen -- when we sell to the cheese plant, that  
4 might happen three to four times a year. It's not a  
5 regular occurrence for us. We normally are very close  
6 to balancing our -- using everything that we buy. If we  
7 have any excess, we do -- you know, we also make our own  
8 half and half. We make -- are now going to start making  
9 our own fresh heavy cream and light cream products. So  
10 we do have a use for most of what we buy, so it is not  
11 very often that we sell to a cheese plant, mostly  
12 because it's not cost effective for us to do so. We try  
13 to avoid doing that.

14 Q. And for a producer-handler that would  
15 handle their milk supplies in the same way --

16 A. Correct.

17 Q. -- would you say that they also are  
18 responsible for balancing their supplies if they operate  
19 in a similar manner to you?

20 A. I can really only comment on what we're  
21 responsible for. And I can tell you in our situation  
22 we've made a conscious decision to balance our supply  
23 that way. You know, other businesses make a decision to  
24 use -- you know, buy from a co-op and deal with their  
25 surplus in other ways. But for us, that's what we are

1 responsible for.

2 Q. Okay. And in your opinion, the way you  
3 handle it, you bear the responsibility for those -- for  
4 those balancing actions?

5 A. Our company bears, yes.

6 Q. It's not you as an individual but your  
7 company?

8 A. Not me personally, right.

9 Q. Can you explain for me how you calculated  
10 the -- as you call it, a milk cost advantage for the  
11 producer-handler?

12 A. Right. And I think that I've gone  
13 through this, but what I did was simply used \$100,000,  
14 which is an average. And that's actually a conservative  
15 average for what our pool payment is. We face -- in a  
16 one year time our pool payment can vary by \$120,000 per  
17 month. And \$100,000 per month is actually a  
18 conservative average for the average. But I thought for  
19 the case of argument it's always better to be more  
20 conservative with your numbers. So I chose \$100,000 per  
21 month.

22 And I used the purchase of  
23 5 million pounds, because in our situation, that is very  
24 near to what we purchase every month. So I would try to  
25 equate what our pool payment is to what our purchases

1 are every month. And I also used a calculation of 8.6  
2 is what -- is the number that I used for gallons to  
3 pounds conversion. And that leaves you with just over  
4 17 cents per gallon, is what that calculation works out  
5 to be.

6 So what I'm saying, I'm not saying that  
7 this is what it is for everyone. I'm saying for us, if  
8 we did not have to pay into the pool, this would be the  
9 difference in our situation on average.

10 Q. You are saying on average, the cost --  
11 your cost, what you pay --

12 A. Into the pool.

13 Q. -- to get -- no, let me finish, because I  
14 want to make sure you're answering the full question.

15 The 17 cents represents costs incurred by  
16 you that you believe a producer-handler does not incur?

17 A. Incorrect.

18 Q. Okay.

19 A. What I've said here is that the 17 cents  
20 per gallon is the difference between if we did not have  
21 to pay into a pool -- in our current situation, the way  
22 that we handle things now, if we did not have to pay  
23 into a pool versus how we currently pay into the pool.  
24 That's the only comparison that I'm making here.

25 Q. Okay. So this is just -- this is your

1 pool payment on a per gallon basis on average?

2 A. Correct.

3 Q. Conservatively estimated, as you  
4 described?

5 A. Correct.

6 Q. Now, you -- and in the sentence, though,  
7 you used the phrase, raw milk cost advantage?

8 A. Correct.

9 Q. And that seems a little different to me.  
10 Can you explain?

11 A. In our eyes -- and I think I mentioned  
12 this, down the road. You know, again, we're not  
13 complaining about the pool payment that we make. We  
14 understand that we operate in a regulated environment,  
15 and we expect that as part of our business, and we make  
16 adjustments for that. However, we also feel strongly  
17 that either everyone should have to pay or everyone  
18 shouldn't.

19 So what I'm making the comparison is for  
20 those that don't have to pay the pool payment versus  
21 those of us that do, this is the difference in our case.  
22 That's the only comparison that I'm making here.

23 Q. For May, what is the per hundredweight  
24 cost for you to acquire milk from your independent  
25 suppliers?

1 A. That, I'm not sure of.

2 Q. Okay. If we assume that under your  
3 contracts with your farmers, you pay them --

4 A. We don't operate under a contract with  
5 any of our farmers.

6 Q. Not a written contract or --

7 A. No.

8 Q. Okay. It's just an agreement?

9 A. Yeah. We ask that they give us 30 days.  
10 Either way, they give us 30 days' notice or we give them  
11 the courtesy of 30 days' notice. It's very rarely that  
12 we need to drop a farm, but if we do. But they do not  
13 have to sign a contract with us then.

14 Q. Let's not call it a contract. Let's  
15 assume under the arrangements with your farmers for May  
16 you're going to pay them \$15 per hundredweight.

17 A. In Pennsylvania, you do realize that  
18 that's not determined by us. The state determines --  
19 the Federal and the state, and we just determine the  
20 quality premiums that we pay on top of that.

21 Q. Let's assume that that is the  
22 calculation, okay?

23 A. Okay.

24 Q. And that a producer-handler in the  
25 western part of the state, it costs them, let's say, \$17

1 to produce their milk.

2 A. Okay.

3 Q. Do you still believe that there's a cost  
4 advantage to the producer-handler in that example?

5 A. I would think that should that  
6 producer-handler choose to just be a producer, they  
7 would be entitled to the same price that everyone else  
8 in the state is entitled for their milk. So I don't  
9 feel that you are necessarily asking me to compare  
10 apples to apples.

11 Q. Okay. My question was, at the plant  
12 side, do you believe that there's a cost advantage still  
13 in that example?

14 A. To our particular situation? It's all  
15 very hypothetical, so I guess maybe if you could  
16 rephrase it in a way that --

17 Q. Well, I tried to by asking what you paid  
18 because I wanted to use your costs to make a comparison,  
19 okay?

20 A. Okay.

21 Q. But you don't have that. So I gave a  
22 hypothetical. When I say hypothetically, your payment  
23 to your producers was \$15.

24 A. Correct.

25 Q. And that there was a \$17 cost of

1 production.

2 A. Correct.

3 Q. Okay? For a producer-handler. And my  
4 question was, do you still believe there's a cost  
5 advantage there?

6 A. In the situation that you are presenting  
7 in those words, I know that you are trying to get me say  
8 no, there is not a cost advantage. But I don't think  
9 that necessarily -- that's not the issue or -- that's  
10 really not the position, I guess, I'm trying to -- to  
11 explain here.

12 All's that I'm trying to say is in our  
13 particular case, in our situation, for us that's not the  
14 concern. The concern is that should there -- there are  
15 other advantages to being a producer-handler that you  
16 can -- I look at being a producer-handler just like  
17 vertical integration. We all have taken classes, I'm  
18 sure, that talk to us about vertical integration. So  
19 there are cost benefits to that.

20 So we have to pay -- you know, we haul  
21 the milk from all of the different farmers in and that's  
22 the cost of business that we have of acquiring our raw  
23 milk. That doesn't go into the cost that we pay the  
24 farmers and things like that.

25 So every business has different operating

1 costs. And that's part of running a business and trying  
2 to be competitive. However, when you are looking at the  
3 way that the pool system is set up at this point, and  
4 you have two companies that are competing for the same  
5 business, and one of them has to make, in our case, an  
6 average of \$100,000 pool payment every month and another  
7 one doesn't, to me, that is a competitive disadvantage.

8 MR. MILTNER: I hope I don't get out of  
9 line, Judge, when I try to characterize that  
10 last answer.

11 BY MR. MILTNER:

12 Q. What I hear you saying, then, is that  
13 it's not -- not a question of a cost advantage to the  
14 producer-handler, but that there is a cash expenditure  
15 that you have that they don't have, is that right?

16 A. That is not right.

17 Q. Okay.

18 A. It's an expense that we have that they do  
19 not have, yes.

20 Q. Okay. Thank you. Maybe that's a fairer  
21 way to describe it. Are you willing -- I hope this  
22 hasn't been asked and answered. Who was it that  
23 approached you about becoming a producer-handler?

24 A. Mr. Fink. Oh, a producer-handler. I'm  
25 sorry. I thought about being a witness.



1 Q. No, that's okay.

2 A. As far as about being a producer-handler,  
3 there is a farm located south of us that has about 2,000  
4 head on the farm and they do not do any processing of  
5 their own. They have attempted to in the past and were  
6 not successful at doing so. So they are strictly just a  
7 producer at this point.

8 In the past and as recently as a couple  
9 of months ago, have approached us about becoming --  
10 taking producer-handler status and processing, you know,  
11 as far as us purchasing their herd and us doing the  
12 processing for them -- for ourselves at that point if we  
13 purchase the herd.

14 Q. And you said you declined because of what  
15 you believe to be your obligation to your dairy farmers?

16 A. As one of the reasons, yes.

17 Q. Okay. But then you say we don't believe  
18 some companies should have regulatory privileges that  
19 others cannot. And I can't reconcile those statements,  
20 because you do have the privilege to become a  
21 producer-handler, don't you?

22 A. Well, everyone does, sure.

23 Q. Okay.

24 A. If you can feasibly make that work for  
25 your business, but I don't think that's the answer.

1 JUDGE CLIFTON: Let's go off record.

2 (Off the record.)

3 JUDGE CLIFTON: All right. Let's go back  
4 on record. We're back on record at 4:18. We  
5 had a little noise interruption. Do you  
6 remember where you were, Mr. Miltner?

7 MR. MILTNER: I don't. Could I ask the  
8 court reporter to read back the last question  
9 and answer?

10 JUDGE CLIFTON: You may.

11 (The record was read.)

12 BY MR. MILTNER:

13 Q. Do you want to add anything to that  
14 answer?

15 A. Not at this time.

16 Q. Okay. As you describe it, your operation  
17 is a family business founded by your great grandfather?

18 A. Correct.

19 Q. Did he have any cows when he started the  
20 business?

21 A. No.

22 Q. Okay. And presumably he -- he made --  
23 the family made that decision over the years that you  
24 were going to focus exclusively on processor?

25 A. Correct.

1 Q. And obviously have at least considered  
2 whether being a producer-handler worked for you?

3 A. Correct.

4 Q. Are there any producer-handlers that are  
5 members of the Pennsylvania Association of Milk Dealers?

6 A. I'm not sure.

7 Q. Do you know if Kreider Farms is a member?

8 A. I do not know if they're a member. I  
9 know of their existence. I do not know if they're a  
10 member.

11 Q. Do you know if, when PAMD decided to  
12 support Proposals 1 and 2, whether they surveyed their  
13 members or not?

14 A. I'm not aware of that.

15 Q. Do you know how they decided to -- to  
16 support the proposals, how they arrived at that decision  
17 at all?

18 A. I'm not aware of what their  
19 decision-making process was.

20 Q. How did you become aware of their  
21 position?

22 A. Through Mr. Fink.

23 Q. Okay.

24 MR. MILTNER: I don't think I have  
25 anything further, Judge.

1 JUDGE CLIFTON: Thank you, Mr. Miltner.  
2 Who next will cross-examine Ms. Dewey?  
3 Mr. Tosi?

4 MR. TOSI: I have no questions for her,  
5 but I wanted to thank you for coming here and  
6 giving your testimony.

7 MS. DEWEY: Thank you for having me.

8 MR. TOSI: Appreciate it. Thank you.

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

11 MR. ENGLISH: No, your Honor.

12 JUDGE CLIFTON: Ms. Dewey, thank you very  
13 much and thank you for your statement.

14 JUDGE CLIFTON: Mr. Miltner, would you  
15 approach the podium, please? You can call as  
16 the next witness, Jim Oberweis, Clifford Carman  
17 or Elvin Hollon, if he's available to testify  
18 today. He's not. Okay. Not Elvin, but  
19 Dr. Yonkers testimony, the cross-examination of  
20 Mr. Carman or of Jim Oberweis, you may chose.

21 MR. MILTNER: Because of Mr. Oberweis'  
22 travel schedule, we'd like to have him next, and  
23 a five-minutes recess before we bring him to the  
24 stand.

25 JUDGE CLIFTON: Okay. I think five

1 usually means ten and the people who have come  
2 back at five have been corralled early. So I'm  
3 going to interpret that as ten. Come back at  
4 4:43. Don't make it longer. 4:43. Before we  
5 go off record, Mr. Yale.

6 MR. YALE: Yes. I had some additions to  
7 my witness list that I had failed to realize --  
8 or not failed to realize, failed to add, and  
9 that is Mr. Vetne has three producer-handlers  
10 that he wishes to have testify tomorrow, a  
11 Mr. Gilbert, a Mr. Mallorie, and a Mr. Sapp.

12 JUDGE CLIFTON: That last one is S-a-p-p?

13 MR. YALE: Yes.

14 JUDGE CLIFTON: Thank you.

15 MR. YALE: And just kind of a rough  
16 guessing, based on experience in this, I'm  
17 saying somewhere between 30 and 40 hours of  
18 hearing time.

19 JUDGE CLIFTON: That's frightening.

20 MR. YALE: Yes.

21 JUDGE CLIFTON: You know when a lawyer  
22 says, just five minutes, your Honor --

23 MR. YALE: I understand that. I said --  
24 this isn't me asking any questions, because I'm  
25 not really including myself in the time, so who

1 knows. That's kind of where it's at, so -- I  
2 just want to share that with you.

3 JUDGE CLIFTON: Thank you. I appreciate  
4 that. Okay. I'm going to give you ten minutes  
5 from now. Please be back and ready to go at  
6 4:35.

7 (A recess was taken from 4:25 to 4:40.)

8 JUDGE CLIFTON: We're back on record at  
9 4:40. Mr. Oberweis, would you again state and  
10 spell your name for me?

11 THE WITNESS: Yes. It's Jim Oberweis, O,  
12 b as in boy, e-r-w-e-i, s in super.

13 JUDGE CLIFTON: And I'd like your card.  
14 I like the embossed cows.

15 THE WITNESS: Thank you very much.

16 JUDGE CLIFTON: Would you raise your  
17 right hand? I'll swear you in.

18 (The witness sworn.)

19 JUDGE CLIFTON: Thank you. Mr. Miltner,  
20 you may proceed.

21 MR. MILTNER: Thank you. We don't have a  
22 written statement for Mr. Oberweis. We're just  
23 going to facilitate a question and answer here.

24

25 JIM OBERWEIS

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

3 DIRECT EXAMINATION

4 BY MR. MILTNER:

5 Q. Mr. Oberweis, this is Ryan Miltner on  
6 behalf of AIDA. First of all, you are not a member of  
7 AIDA, your business is not a member of our alliance?

8 A. That's correct. In fact, I had never  
9 even heard of it until about two days ago.

10 Q. Okay. And what brings you to the hearing  
11 today?

12 A. I have some very strong-felt feelings  
13 about the industry and about the direction that our  
14 country is taking. And I greatly appreciate the  
15 opportunity to be able to present some of those ideas  
16 today.

17 Q. And a lot of us in the room know a little  
18 bit about you and your business. But if you could fill  
19 in all of us a little bit, first of all, on your  
20 business, and then anything about your involvement in  
21 the business.

22 A. Sure. Our company was incorporated in  
23 1927. My grandfather was a farmer who had a little  
24 extra milk that he sold to some of our neighbors and in  
25 1927 bought a processing plant. My father ran that

1 business after my grandfather. And I grew up in the  
2 business, but -- had an older brother who entered the  
3 business, and I decided at a young age, you know what,  
4 this is a pretty tough business and there has to be  
5 something better to do.

6 So I ended up going to a financial  
7 services business, started a money management company  
8 and a family of six mutual funds, which my son, Jim,  
9 runs today. My brother, unfortunately, had a stroke and  
10 wasn't able to continue in the business, and I bought  
11 the business at that time.

12 It was a pretty small business at that  
13 time, about 5 million in sales. Today we are at about  
14 65 million in sales. We produce milk in glass bottles,  
15 deliver it to homes in the Midwest, in the Chicago area,  
16 in St. Louis and Detroit, in Indianapolis, Milwaukee,  
17 and most recently in the Virginia Beach area of  
18 Virginia.

19 And we have our own ice cream stores. We  
20 have 48 of those, some of which are franchised,  
21 41-company owned. And we do a little bit of what we  
22 call wholesale business or sales to or through grocery  
23 chains.

24 I'm currently chairman of the board and  
25 my younger son, Joe, is now president of the company,



1 fourth generation in the business.

2 Q. And did I hear you correctly, when you  
3 started the business, you did have cows as well as the  
4 facility?

5 A. That's correct. We had cows. We were a  
6 producer until the -- sometime in the 1970s my father  
7 sold the cows and sold the farm.

8 Q. At that time, do you know if you were  
9 actually a producer-handler under any of the Federal  
10 Orders?

11 A. We were not. We bought some additional  
12 milk from some of the other farms in the area at that  
13 time.

14 JUDGE CLIFTON: Might I inquire,  
15 Mr. Miltner? When you said you took over the  
16 company, you had about 5 million in sales and  
17 are now at about 65 million in sales?

18 THE WITNESS: Correct.

19 JUDGE CLIFTON: Is that dollars or  
20 pounds?

21 THE WITNESS: Dollars.

22 JUDGE CLIFTON: Dollars. Thanks.

23 BY MR. MILTNER:

24 Q. And we've been dealing in pounds.

25 A. I'm sorry.

1 Q. You've probably heard -- you were here  
2 for a few of the witnesses today so --

3 MR. MILTNER: I appreciate your  
4 clarifying the record on that point, your Honor.  
5 BY MR. MILTNER:

6 Q. Now, you have been here at the hearing  
7 for most of today, is that correct?

8 A. Correct.

9 Q. Okay. And so aside from your awareness  
10 of the hearing, your presence here, do you feel like you  
11 have a good understanding about what the issues are  
12 here, we're dealing with here about producer-handlers?

13 A. I certainly feel like I have an overall  
14 understanding of some of the issues, how they apply to  
15 our business. Again, I want to emphasize my background  
16 is primarily in financial services. I think I  
17 understand how our economy works. I understand how  
18 markets work. I understand what free markets are, and  
19 I'm still learning about the dairy business. It doesn't  
20 generally fall in that category.

21 Q. Are you familiar with the individual  
22 handler pool proposal that's been offered by AIDA in  
23 this hearing?

24 A. I believe I am somewhat familiar with it.

25 Q. And did you -- one of the reasons you're

1 here was to offer your thoughts on that proposal, is  
2 that right?

3 A. Yes. I believe it's a terrific idea. I  
4 believe that it would be very beneficial to companies  
5 like ours and would offer an opportunity for other  
6 companies who chose to address the market in that  
7 fashion to have an equal opportunity to do so, if they  
8 wish to do so.

9 Q. Tell me a little bit about the farmers  
10 that supply your plant.

11 A. We have approximately 30 family farms in  
12 northern Illinois and southern Wisconsin. We buy all  
13 the milk that they produce and that can be very  
14 challenging at times because we don't necessarily  
15 control how many cows they have. They can increase  
16 their production if they chose to do so, and we're not  
17 contractually obligated but have a general understanding  
18 we will produce everything that they do, as long as it  
19 meets our quality standards. And we have some high  
20 quality standards, and we pay them a nice premium for a  
21 higher quality raw milk.

22 Q. And you understand that under the  
23 individual handler pool proposal, you will pay all of  
24 your supplying producers based on your own plant  
25 utilization and blend?

1           A.       Correct.

2           Q.       And do you feel that would be beneficial  
3 for the farmers that are supplying you?

4           A.       I think they would be ecstatic. I think  
5 it would be very beneficial for -- for our producers. I  
6 think it would be good for our company. I think it  
7 would be good for consumers. I think it would help to  
8 ensure that not only our consumers and our customers,  
9 but customers across the country would have an  
10 opportunity to secure the finest fresh milk that could  
11 be produced.

12          Q.       I want to turn to just a couple of  
13 questions about producer-handlers in your market.  
14 You've described the areas where your products are  
15 available. But you're currently regulated in the Upper  
16 Midwest Order, is that correct?

17          A.       That is correct, yes, it is.

18          Q.       Do you compete directly with any  
19 producer-handlers either in the Upper Midwest Order or  
20 other areas that you do business?

21          A.       As I mentioned, we recently began home  
22 delivery in the Virginia Beach area of Virginia. A  
23 dairy by the name of Yoder Dairy went out of business  
24 and we purchased their customer list and trucks and  
25 hired some of their employees and began to provide home

1 delivery in that area. It's fairly recently, within the  
2 last 30 to 60 days.

3 We are competing in that area with a  
4 producer-handler. I believe the name is South Mountain  
5 Creamery. That was the only producer-handler that I was  
6 aware of before today that we competed with directly.  
7 But one of the witnesses earlier today testified that  
8 they were competing with a producer-handler in Detroit.  
9 We're competing in Detroit, so I guess therefore we're  
10 competing with them in Detroit.

11 Q. Now, you understand that as a  
12 producer-handler, those operations don't have to  
13 participate in the producer settlement fund as you do?

14 A. Correct.

15 Q. In your experience, has that fact, in  
16 your opinion, put you at a competitive disadvantage to  
17 those producer-handlers?

18 A. Well, look, each and every one of us has  
19 competitive advantages and disadvantages. You can be  
20 closer to your producers; you can be farther from your  
21 producers and closer to your market; farther from your  
22 market; you can have better, smarter management. We all  
23 have different advantages in our individual businesses.

24 What I object to more than anything else  
25 is government-imposed advantages such as the fact that

1 we have to compete, in my opinion, unfairly with unfair  
2 competition from cooperatives where they have advantages  
3 such as the ability to forward contract, which we are  
4 not allowed to do for Class I milk. That, to me, is  
5 unfair competition.

6 Competing with a producer-handler, bring  
7 them on. I mean, that's perfectly acceptable, perfectly  
8 fine. If I thought it was a huge advantage to operate  
9 in that -- in that way, I certainly would give more  
10 serious consideration to doing it myself.

11 And if we have individual handler pools,  
12 you know, I think that gives us the best of both worlds.

13 Q. Are you a member of the International  
14 Dairy Foods Association?

15 A. I sure am. I believe our company has  
16 been a member for -- certainly as long as I can  
17 remember. I'm sure it's been 20, 30 years or more.

18 Q. And as a member, do you support their  
19 proposals to eliminate the producer-handler exemption?

20 A. I think IDFA does many very good things  
21 for our industry. I have been very pleased with what  
22 I've perceived as a movement within IDFA towards more  
23 free markets, towards doing the right things in this  
24 industry. And I've seen that significant change, that  
25 significant movement, in my opinion, over the last five

1 or six or seven or eight years.

2 In my opinion, their position on this  
3 issue is dead wrong. It's a step backwards from a  
4 movement towards free markets, and it clearly is in  
5 opposition to many IDFA's members' positions, such as  
6 our position.

7 When I first became aware of this issue  
8 and the potential hearings regarding this, I called Bob  
9 Yonkers to try to get a better understanding of the  
10 issue, because I wasn't sure I was really understanding  
11 what was going on.

12 And Bob was very friendly, very helpful  
13 on filling me in. The more I heard, the more upset I  
14 became, the more disappointed I was about the position  
15 that Bob was being directed to take by IDFA, which in my  
16 opinion is -- may not be what Bob really believes in his  
17 heart, but it is a position that he has been directed to  
18 take.

19 He suggested if I wasn't happy with that,  
20 I ought to call Connie Tipton, which is the head of  
21 IDFA, which I immediately did with my next phone call  
22 when I hung up.

23 Not reaching Connie, I left a message for  
24 her regarding this issue and my beliefs and opinions on  
25 this issue in pretty clear, strong terms.

1 Unfortunately, I never heard back from -- from Connie,  
2 so I wasn't sure she got the message, but Bob assured me  
3 this morning that she had definitely gotten the message.

4 Q. I want to return just for a second to the  
5 payments you make to your supplying producers. And you  
6 said you pay them premiums, and I assume pay them on  
7 what both sides believe to be fair terms.

8 But how are your producers doing right  
9 now in today's economic climate?

10 A. Well, certainly our producers would like  
11 to see higher prices for milk. I think all producers  
12 always like to see higher prices for milk. When the  
13 price is over \$20, then they would likely be complaining  
14 about the high cost for corn or other inputs.

15 Today, obviously the complaint is about  
16 the low price for milk, and I'm sure that none of them  
17 are doing very well with -- with the current level of  
18 milk.

19 One thing that I think would lead to more  
20 stable market prices, which I think would be good for  
21 consumers, it would be good for producers, and it would  
22 be good for processors, would be to allow companies like  
23 us to forward contract so we could achieve --

24 MR. BESHORE: Your Honor.

25 JUDGE CLIFTON: Excuse me. Let me hear



1 the objection.

2 MR. BESHORE: Well, we're about to  
3 hear -- we're about to hear a position statement  
4 on --

5 JUDGE CLIFTON: Pull it closer or move  
6 over more.

7 MR. BESHORE: We're about to hear a  
8 position statement on an issue that is not  
9 before the Secretary in this hearing in any way,  
10 shape or form. It's not even under this Act, I  
11 don't think. It's different legislation. It's  
12 not relevant, and I don't think we need to take  
13 time with that.

14 JUDGE CLIFTON: Thank you, Mr. Beshore.  
15 I'll allow the witness to finish his sentence  
16 and then we'll see what the next question is.

17 I'd ask that the court reporter read back  
18 the question and the answer, as far as we got  
19 one.

20 (The record was read.)

21 A. Okay. I'll make it very short. Yes, I  
22 feel forward contracting would allow for stable prices,  
23 would be good for our industry.

24 As an alternative to that, if we cannot  
25 get forward contracting, which at the present we can't,

1 then I think individual handler pools would provide a  
2 very positive benefit that would accomplish some of the  
3 same goals.

4 Q. I was not trying to get into forward  
5 contracting. I want to develop that answer a little  
6 bit. Farms have a risk that the prices set by USDA and  
7 the prices that are agreed to with their -- with their  
8 buyers won't cover their costs of production at all  
9 times, is that right?

10 A. You bet.

11 Q. And based on your conversation --

12 A. Probably in those times right now.

13 Q. We are in those times, is that what you  
14 said?

15 A. Yes.

16 Q. Okay. But as a -- as a regulated  
17 handler, you don't assume any of the risk of farm  
18 losses, do you?

19 A. That's correct, we do not. But we have  
20 some great family farmers, some great producers, and we  
21 certainly feel very badly for them when they can't make  
22 a profit. We think they'd have a better opportunity,  
23 and they think they'd have a better opportunity to  
24 achieve a reasonable profit level if we had an  
25 individual handler pool.

1 Q. Let me ask you if -- if your operation  
2 became a producer-handler and you produced milk from  
3 your own cows and your own farm and supplied it to your  
4 own plant, would you not also in that process be  
5 assuming the risk of farm losses?

6 A. We certainly would, and that's certainly  
7 been a hesitation and a concern about considering that  
8 as an alternative.

9 Q. Okay. Thank you. Mr. Oberweis, is there  
10 anything else that you wanted to add to your thoughts  
11 here today?

12 A. Not that I can think of off the top of my  
13 head, no.

14 MR. MILTNER: I don't have any other  
15 questions, your Honor.

16 JUDGE CLIFTON: Thank you, Mr. Miltner.  
17 Mr. Oberweis is available for cross-examination.  
18 Who would begin?

19 Mr. Carroll. Thank you.

20 CROSS-EXAMINATION

21 BY MR. CARROLL:

22 Q. Good afternoon, Mr. Oberweis.

23 A. Good afternoon.

24 Q. As you probably know, this is a great  
25 moment for me. And I'm not sure you remember, but

1 perhaps you do, that I represented your dairy --

2 A. I do indeed.

3 Q. -- years ago. And I represented them  
4 against a federation of cooperatives that had raised its  
5 handling charges to the point where your father  
6 objected.

7 A. Very strongly, yes.

8 Q. Yeah. And I want to ask just so the  
9 public -- people here know. It's true, isn't it, that  
10 you have been the Republican candidate for the United  
11 States Senate from the State of Illinois?

12 A. That's correct. Unfortunately, the time  
13 that I ran in 2004 there was a candidate who got more  
14 votes by the name of Barack Obama.

15 Q. And then were you a candidate for the  
16 United States Congress at any time?

17 A. I was the Republican nominee last year.

18 Q. And you all came originally from a dairy  
19 farm of your grandfather's and great grandfather's in  
20 Illinois?

21 A. Actually, I've never lived on the farm,  
22 per say, but our family farm --

23 Q. Family was there. I think you lived in  
24 Aurora in those days?

25 A. Correct. My grandfather lived on the

1 farm.

2 Q. Now, I take it from what you've said you  
3 have no fear of competing with producer-handlers?

4 A. I always have a fear of competing with  
5 everybody, particularly the much larger companies who  
6 have the competitive advantage that we can never achieve  
7 of very large production.

8 As we talked earlier, several of the  
9 witnesses have already testified that -- that there are  
10 obviously economies of scale and we've recognized that,  
11 as a little guy, we can never compete effectively  
12 with -- with those big guys. But those are the guys  
13 that I worry about the most.

14 But you know what? In any industry,  
15 you've got big guys, you've got little guys, you've got  
16 all kinds of different competition, and we just do the  
17 best we can.

18 Q. Right.

19 A. Incidentally, I would mention growing up  
20 in this industry, my father used to talk about the fact  
21 that there were 54 home delivery dairies in the Chicago  
22 milk marketing area when I was a kid growing up. Today,  
23 I can tell you there is one left. We're it. We're the  
24 last guys.

25 Q. You're the last ones?

1           A.       Last ones.

2           Q.       And I'm not sure you recollect this, but  
3 at the time that he was in his battle with the  
4 cooperatives on handling charges of his milk, that he  
5 was in home delivery at that time to a considerable  
6 degree?

7           A.       Virtually entirely. Had one ice cream  
8 store to go on and that was it, yes.

9           Q.       Now, directing your attention to  
10 something you may have -- I would like to expand on, and  
11 that is, you're more concerned about cooperatives. Can  
12 you tell me what you mean by that?

13                   MR. BESHORE: Your Honor --

14                   JUDGE FELSON: The objection is  
15 sustained. He mentioned that he's more  
16 concerned about the big guys and you may have  
17 inferred that he meant cooperatives, but --

18                   MR. CARROLL: I heard that, but if I  
19 didn't, I'll ask the question.

20 BY MR. CARROLL:

21           Q.       Do you have any concern about  
22 cooperatives in terms of problems in the marketing area?

23           A.       Yes, because they have an unfair  
24 competitive advantage, as we've been talking about  
25 earlier.

1 MR. BESHORE: Your Honor --

2 JUDGE CLIFTON: Mr. Beshore, get closer.

3 MR. BESHORE: -- I object to the  
4 relevance.

5 JUDGE CLIFTON: Get closer. Thank you.

6 MR. BESHORE: I object to the relevance  
7 of a general discourse about cooperatives in the  
8 marketing area, which is what the question was  
9 about. If you have a general -- if you have a  
10 concern about cooperatives in the marketing  
11 area, it's not relevant, and actually the  
12 hearing -- I mean, cooperatives are not the  
13 subject of -- of the hearing.

14 JUDGE CLIFTON: Thank you.

15 MR. CARROLL: I think the hearing  
16 involves marketing conditions. We've certainly  
17 had lots of testimony about marketing conditions  
18 and all sorts of complaints about this and that  
19 part of the marketing, and certainly  
20 cooperatives are engaged in marketing. It seems  
21 to me we ought to be able to develop that  
22 theory.

23 MR. BESHORE: I'd like to -- I'd like to  
24 have a proffer from Mr. Carroll, or the witness,  
25 for that matter, with respect to one proposal in

1           this hearing where the word cooperative has --  
2           enters in.

3           MR. CARROLL: I thought cooperatives --

4           THE WITNESS: I would be very  
5           cooperative.

6           JUDGE CLIFTON: Go ahead, Mr. Carroll.

7           MR. CARROLL: I thought that these were  
8           proposals by cooperatives that were claiming  
9           some type of a terrible imbalance in the  
10          relationships that were so severe that they had  
11          to bring the entire United States to one hearing  
12          and take almost three weeks for problems that  
13          they presented. And we're certainly entitled to  
14          look at the other side of the coin as well.

15          JUDGE CLIFTON: Mr. Beshore, I appreciate  
16          the reason for your objection. I'm going to  
17          allow the witness limited comment about his  
18          concern about the marketplace, whatever the  
19          concern is. We won't get too far afield because  
20          he has a 7:00-something plane to catch, and it's  
21          after 5:00.

22          So I do think that a mention of  
23          cooperatives is appropriate in a discussion of  
24          the current marketplace. But we won't let the  
25          tail wag the dog. So that answer stands. I



1           heard his answer. He does have a concern about  
2           cooperatives. You may very briefly inquire into  
3           what that concern is.

4 BY MR. CARROLL:

5           Q.       Can you tell us what that concern is?

6           A.       Yes.

7                    THE WITNESS: And, your Honor, I -- my  
8           concern is unfair competitive advantage mandated  
9           by government. And very clear examples, the  
10          fact that cooperatives can compete with us  
11          directly and they can forward contract for their  
12          milk supply, which we are not allowed to do.  
13          That would be my biggest, number one concern.

14                   MR. CARROLL: That's all. Thank you,  
15          sir.

16                   JUDGE CLIFTON: Thank you, Mr. Carroll.  
17          Who next will cross-examine Mr. Oberweis?

18                   THE WITNESS: I guess we're done.

19                   JUDGE CLIFTON: No, no, no, no.  
20          Sometimes they're just still thinking.  
21          Mr. Beshore.

22                   MR. BESHORE: Thank you, your Honor.

23                                CROSS-EXAMINATION

24 BY MR. BESHORE:

25           Q.       Mr. Oberweis, Marvin Beshore. I

1 represent the National Milk Producers Federation and  
2 Dairy Farmers of America. I have just two questions, I  
3 think -- or three.

4 The 30 dairy farms that supply your  
5 dairy, what's the monthly volume of milk that they  
6 produce?

7 A. To be honest with you, I don't have those  
8 figures off the top of my head. The average herd is  
9 probably about 110 to 120 cows. You can probably  
10 calculate it from that faster than I can.

11 Q. Okay. Yeah, I can't make that  
12 calculation in my head. But do you know the -- the --  
13 do you know the monthly volume at your plant? Do you  
14 know about what that would be?

15 A. If you give me a second, I can probably  
16 calculate it here for you in just a second. Ballpark,  
17 we produce about 12,000 gallons per day, probably  
18 operate the plant maybe about 22 days a month. So it  
19 would be -- I think that's in the area of  
20 250,000 gallons a month. Does that answer your  
21 question?

22 Q. Okay. 250,000 gallons a month. We have  
23 8 pounds -- 8.6 pounds per gallon. 4 to  
24 5 million pounds a month, does that sound about --

25 A. That's -- yeah, 3 to 5 million.

1 Q. 3 to 5. Okay. Let's assume 5 million.  
2 Now, let's assume you're paying your farmers \$20 a  
3 hundredweight, which is -- are you paying them that much  
4 now?

5 A. No.

6 JUDGE CLIFTON: Mr. Beshore, you are not  
7 quite loud enough. I'm sorry.

8 MR. BESHORE: Okay.

9 JUDGE CLIFTON: Say it again, please.

10 BY MR. BESHORE:

11 Q. Okay. My question was, let's assume  
12 you're paying your farmers \$20 a hundredweight, which is  
13 above the current price, correct?

14 A. Yes.

15 Q. Okay. \$20 a hundredweight on  
16 5 million pounds a month would be a raw milk cost of  
17 \$1 million a month. Does that sound right?

18 A. I don't know.

19 Q. Assume with me it would -- that that  
20 would be correct.

21 A. Okay.

22 Q. Okay? Now, your company has sales of  
23 \$65 million per month?

24 A. No, per year.

25 Q. 12 plus million dollars a month?

1 A. No.

2 Q. I'm sorry. 5?

3 A. Yes.

4 Q. 5, okay. So you're taking a million  
5 dollars of milk and you have \$5 million worth of sales?

6 A. Well, those sales include ice cream.  
7 They include eggs, they include bacon and cheese and  
8 chips, all kinds of other products. Those are total  
9 company sales, not milk sales.

10 Q. Okay. Well, ice cream would be produced  
11 out of the same milk --

12 A. Correct.

13 Q. -- milk from the farm, is that correct?

14 A. Correct.

15 Q. So your dairy sales are actually a  
16 minority of the company's business then, less than --  
17 less than half probably?

18 A. Dairy sales meaning milk and ice cream?

19 Q. Yeah.

20 A. No, it would be more than half.

21 Q. Okay. So the million translates into  
22 more than 2.5 million in sales for your company?

23 A. Yes.

24 Q. Okay. If you had your druthers,  
25 Mr. Oberweis, would -- would there be -- there would be

1 no Federal Milk Order regulations at all, isn't that  
2 correct?

3 A. Would that make me unhappy if that  
4 happened? I don't think I would be unhappy. I think  
5 that if we had the opportunity to compete on a level  
6 playing field, generally free markets are good for the  
7 consumer and good for the country.

8 Q. And that's what you would advocate?

9 A. Well, I think it's been pretty clear that  
10 what we're advocating here is an individual handler  
11 pool, because I think that will directly provide an  
12 opportunity for our producers to receive a good price  
13 and for the assurance of a good supply of the best,  
14 fresh milk possible.

15 MR. BESHORE: Thank you.

16 JUDGE CLIFTON: Thank you, Mr. Beshore.

17 Other cross-examination of Mr. Oberweis?

18 Mr. Tosi.

19 CROSS-EXAMINATION

20 BY MR. TOSI:

21 Q. Good afternoon, sir. Excuse me, I went  
22 the wrong way on the switch there.

23 Do you support the objectives of the  
24 Federal Milk Marketing Order program?

25 A. I will be honest with you and say I'm not

1 sure what those objectives are. I believe it's to  
2 assure a -- a supply of milk, fresh milk to consumers,  
3 and to do so at the most reasonable price for consumers.  
4 If those are the objectives, of course.

5 Q. Okay. And to the extent that the Federal  
6 Orders, in terms of leveling the playing field, make  
7 sure that you and your competition that are similarly  
8 located have the same minimum price, is that helping  
9 keep the field level?

10 A. If you are -- are you asking me, do I  
11 think the government should be involved in assuring that  
12 I pay the same price that somebody else pays? Is that  
13 your question?

14 Q. The same minimum price, that you know  
15 what your competitors are paying at a minimum.

16 A. I do not think that should be the  
17 objective of the government.

18 Q. Okay. Then what about producers? Should  
19 producers receive the same minimum price for their milk?

20 A. I don't think that it's necessarily  
21 destructive to have producers receiving the same minimum  
22 price, as long as it's set at a reasonable level.

23 However, for almost every other product  
24 in this country, the free market tends to set that  
25 price, and the free market generally works better than

1 the ability of any individual to determine what that  
2 should be.

3 Q. Would you agree, then, that even under  
4 individual handler pooling that that would be the use of  
5 a -- of the Federal Milk Marketing Order program, that  
6 you're still asking the program to provide you  
7 something?

8 A. I'm not sure I understand the question.  
9 Would you explain a little further?

10 Q. Well, I'm taking away from your -- from  
11 some of the things that you said, and you've said a lot  
12 of different things about a lot of different things.  
13 And I'm trying to reconcile what your position is on the  
14 program itself and its objectives. And I understand, I  
15 think, that you have issues with some of the things that  
16 the program does. And I'm taking away from it that  
17 somehow the government is intruding on something or that  
18 we're not keeping the field level.

19 A. Right. I think individual handler pools  
20 would remove some of the objective parts that -- that  
21 create some inequalities in the competitive field. I  
22 think that would be a big step in the right direction  
23 towards free markets, yes.

24 Q. Okay. For those producers who are  
25 fortunate enough to be located close to you, if we had

1 an individual handler pool and to the extent that we  
2 have handlers that are not fortunate enough to be  
3 located close to you, and they're delivering to a cheese  
4 plant closer to their location --

5 A. You're saying, handlers. Do you mean  
6 handlers or do you mean producers?

7 Q. I meant to say producers located near a  
8 handler. There are going to be producers that are  
9 advantageously located that are close to you. There are  
10 going to be another set of producers that aren't that  
11 may have to deliver to a cheese plant. And if we did  
12 individual handler pooling, those folks are going to  
13 have a price that's very significantly different than  
14 those producers that are sending milk to you.

15 A. According to my favorite economist, that  
16 would -- individual handler pools would probably  
17 encourage the best quality milk to move to those plants  
18 even if it meant moving the milk a little bit further,  
19 which would assure the best quality milk ending up as  
20 fresh milk. And I think that would probably be good for  
21 the country.

22 Q. Are you aware that just about all milk  
23 produced is Grade A and is eligible to be used in fluid  
24 uses?

25 A. Yes. Are you aware that some of that



1 Grade A milk is better than others?

2 Q. Yes, sir, I am. But, please, I'm asking  
3 the questions of you.

4 A. Okay.

5 Q. Okay. How would we achieve the  
6 requirements of the law under an individual handler pool  
7 when we have markets that have multiple handlers  
8 converting raw milk into multiple dairy products? How  
9 are we able then to return a price to producers that's  
10 uniform and have a price to handlers, similarly situated  
11 handlers, that's uniform?

12 A. Well, first of all, I'm not sure I have  
13 all the answers to all the issues. I think that to the  
14 degree that you have individual handler pools, that  
15 could create an opportunity for certain producers to  
16 receive higher payments than other producers.

17 It could also create a situation where  
18 consumers would have access to higher quality milk and  
19 consumers would have access to that milk at a lower cost  
20 than is currently -- in the current system.

21 Q. Please describe, then, what is it about  
22 the system now that is preventing consumers from having  
23 this high quality milk because of the way the system is  
24 now? You're making a lot of charges about something --

25 A. Sure. And the fact is that once --

1 JUDGE CLIFTON: Wait.

2 Q. And you're not backing it up with a real  
3 example.

4 A. Okay. Let me please do that.

5 Q. Okay.

6 A. When you have a system that establishes  
7 the uniform price to all producers across the entire  
8 region, the entire market, you do not assure in any way  
9 that the best milk is going to end up as fresh milk. If  
10 you have an opportunity where there is a different  
11 pricing system for that milk, the highest price going  
12 for the highest quality milk, you will end up with the  
13 milk moving to the -- its highest and best use, which,  
14 in my opinion, happens to be fresh milk.

15 Q. And the distance of that producer having  
16 access to a Class I handler would have less meaning over  
17 quality?

18 A. It's certainly a factor, as many things  
19 are factors.

20 Q. Okay. But that's -- you're basically  
21 saying that, though? Would that be accurate?

22 A. I'm saying -- please state again what  
23 you're --

24 Q. Well, you're -- what I'm hearing from you  
25 is that there's something about the system right now,

1 because we don't have individual handler pooling, that's  
2 somehow affecting the public's ability or handler's  
3 ability to attract the highest quality milk to offer for  
4 drinking purposes for Class I uses?

5 A. Yes.

6 Q. And I'm not seeing the connection in your  
7 answers to --

8 A. Let me try it again.

9 Q. What is it about the system that's  
10 limiting that?

11 A. Let me try it again. When the government  
12 sets one fixed price that everybody is going to pay for  
13 the same milk regardless of the quality of that milk,  
14 which is essentially what we have today -- that's an  
15 exaggeration; that's an oversimplification, because  
16 obviously you pay more for higher butterfat and protein  
17 and so on, but not particularly for the quality of that  
18 milk -- then you end up with a random distribution of  
19 where that milk goes.

20 If, in fact, you have a market that is  
21 paying for the quality of that milk, you will have a  
22 greater tendency for the best quality milk to reach its  
23 highest and best use, which, as I said, in my opinion,  
24 is fresh milk. And that's historically what we had in  
25 this country and most other countries in the world.

1           Q.       Are you saying, then, that you're paying  
2 the same price for milk as a cheese plant?

3           A.       We are paying essentially the same price  
4 for milk. Of course, there's a different price for  
5 Class I than for Class III, as we all recognize. But  
6 the price to the producer ends up being the same. There  
7 is no incentive for that producer if he -- to produce --  
8 there's no incentive for him to make the extra effort to  
9 produce the best milk.

10                    If there were a graduated payment system  
11 where the best milk got a higher price, there would be  
12 incentive for individual producers to produce a higher  
13 quality product, which, again, benefits consumers.

14           Q.       So then -- are you suggesting, then, that  
15 the statute that we operate under, the Agricultural  
16 Marketing Agreement Act, that would have to be changed  
17 in some way to address the quality issue?

18           A.       I'm not an expert on that. What I am  
19 saying, again, is I believe that establishment of  
20 individual handler pools would allow an incentive, would  
21 allow a reward for those producers that make the extra  
22 effort to produce the best quality milk, low bacteria  
23 counts, low somatic cell, things of that nature. And I  
24 think that would be good for our country, good for  
25 consumers, good for producers.

1 Q. Are you aware that there are other  
2 premium structures above what Federal Order minimum  
3 prices are that provide reward for things such as  
4 quality?

5 A. Yes.

6 Q. And would you then conclude that that's  
7 already part of the system?

8 A. I believe that a -- an individual handler  
9 pool would tend to allow that to a much greater degree.

10 Q. Okay.

11 A. We could reward our producers, paying  
12 them a significantly higher price directly, for  
13 producing the high quality of milk that they produce.

14 Q. But to the extent that that's done now  
15 through premiums above Federal Order minimums, there's  
16 no government intrusion there?

17 A. The opportunity for us to pay a larger  
18 premium would be there under individual handler pool  
19 than exists today.

20 MR. TOSI: Thank you, sir. I appreciate  
21 you coming.

22 THE WITNESS: Thank you.

23 JUDGE CLIFTON: Thank you, Mr. Oberweis.  
24 Any redirect, Mr. Miltner?

25 MR. MILTNER: No, your Honor.

1 JUDGE CLIFTON: Mr. Oberweis, is there  
2 anything else you want to add to your testimony?

3 THE WITNESS: No, your Honor.

4 JUDGE CLIFTON: Thank you so much for  
5 being here.

6 THE WITNESS: Thank you.

7 JUDGE CLIFTON: You may step down, and  
8 we'll take just a five-minute stretch break  
9 before we call the next witness. Please be  
10 ready to go at 5:28.

11 (A recess was taken from 5:28 to 5:34.)

12 JUDGE CLIFTON: All right. Let's go back  
13 on record. We're back on record at 5:34.  
14 Dr. Yonkers, would you begin by stating and  
15 spelling your name?

16 THE WITNESS: My name is Robert Yonkers,  
17 R-o-b-e-r-t, Y-o-n-k-e-r-s.

18 JUDGE CLIFTON: And all right. And what  
19 is your title?

20 THE WITNESS: I'm a vice president and  
21 chief economist with the International Dairy  
22 Foods Association in Washington, D.C.

23 JUDGE CLIFTON: All right. And what  
24 educational designation do you carry with your  
25 name?

1 THE WITNESS: I have a Ph.D. in  
2 agricultural economics and put the term Dr. in  
3 front of it.

4 JUDGE CLIFTON: Thank you. Would you  
5 raise your right hand, please?

6 (The witness was sworn.)

7 (Exhibit 80 was marked for  
8 identification.)

9 JUDGE CLIFTON: Thank you. I have, while  
10 we were off record, indicated that I have marked  
11 Dr. Yonkers' statement as Exhibit 80.

12 Dr. Yonkers, you may proceed.

13 ROBERT YONKERS

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

16 DIRECT EXAMINATION

17 BY MR. BESHORE:

18 A. Thank you, your Honor. This testimony is  
19 submitted on behalf of the International Dairy Foods  
20 Association or IDFA, a trade association representing  
21 manufacturers, marketers, distributors and suppliers of  
22 fluid milk and related products, ice cream and frozen  
23 dairy deserts and cheese. IDFA represents the nation's  
24 dairy manufacturing and marketing industries and their  
25 suppliers, with a membership of 300 companies,

1 representing an industry.

2 JUDGE CLIFTON: Let me ask you how many  
3 companies?

4 THE WITNESS: The membership of 530  
5 companies.

6 JUDGE CLIFTON: Thank you.

7 A. Representing an industry whose retail  
8 value of production exceeds \$100 billion annually. IDFA  
9 is composed of three constituent organizations: The  
10 Milk Industry Foundation, or MIF; the National Cheese  
11 Institute, NCI; and the International Ice Cream  
12 Association, IICA. IDFA's 220 dairy processing members  
13 run more than 600 plant operations and range from large  
14 multinational organizations to single-plant companies.  
15 Together they represent more than 80 percent of the  
16 fluid milk, cultured dairy products, cheeses and frozen  
17 dairy deserts produced and marketed in the United  
18 States.

19 As buyers and processors of milk, the  
20 members of the IDFA and its constituent organizations  
21 have a critical interest in these hearings. Most of the  
22 milk bought and handled by IDFA members is purchased  
23 under the Federal Milk Marking Orders promulgated  
24 pursuant to the Agricultural Marketing Agreement Act of  
25 1937, (the AMAA).



1 I am Dr. Robert Yonkers, vice president  
2 and chief economist at the International Dairy Foods  
3 Association, where I have worked since June of 1998. I  
4 hold a Ph.D. in agricultural economics from Texas A&M  
5 University in 1989, a master's degree in dairy science  
6 from Texas A&M in 1981, and a bachelor's degree in dairy  
7 products from Kansas State University in 1979.

8 Prior to taking my current position at  
9 IDFA, I was a tenured faculty member in the Department  
10 of Agricultural Economics and Rural Sociology at the  
11 Pennsylvania State University, where I was employed for  
12 nine years. At Penn State, I conducted research on the  
13 impacts of changing marketing conditions, alternative  
14 public policies and emerging technologies on the dairy  
15 industry. In addition, I had statewide responsibilities  
16 to develop and deliver extension materials and programs  
17 on topics related to dairy marketing and policy. I have  
18 written and spoken extensively on economic issues  
19 related to the dairy industry, and I have prepared and  
20 delivered expert witness testimony to state legislatures  
21 and to Congress.

22 IDFA submitted a petition simultaneously  
23 with National Milk Producers Federation to USDA on  
24 January 30th, 2009 representing -- requesting that a  
25 hearing be held to consider our proposals to modify

1 Federal Order regulations in all marketing areas with  
2 respect to producer-handlers and exempt handlers. These  
3 proposals are Proposals 1 and 2 in the Notice of Hearing  
4 for this proceeding. IDFA urges USDA to adopt Proposals  
5 1 and 2 as they and only they best address the issues  
6 cited in the IDFA and National Milk Producers Federation  
7 petitions. Since my testimony today follows that of  
8 Dr. Roger Cryan of NMPF in support of Proposals 1 and 2,  
9 I do not plan to restate all the facts in his testimony,  
10 but rather will supplement his testimony from the  
11 perspective of IDFA.

12 Federal Orders establish the minimum  
13 price that dairy handlers must pay dairy farmers and  
14 their cooperatives. The minimum price established for  
15 Class I or fluid milk is intended by design to be the  
16 highest of these regulated prices. On the other hand,  
17 the regulated minimum price actually received by dairy  
18 farmers and cooperatives from handlers is the uniform or  
19 blend price, which represents Federal Order's  
20 utilization of each class of milk and the minimum price  
21 for each class. Because the regulated minimum price for  
22 classes other than Class I are intended by design to be  
23 lower than the Class I price, the uniform price is  
24 nearly always lower than the Class I price. Proposal 1  
25 submitted by IDFA and NMPF would eliminate the existing

1 producer-handler exemption from pricing and pooling  
2 provision in all 10 Federal Milk Marketing areas.  
3 Producer-handlers currently are entirely exempted from  
4 this obligation to pay minimum class prices in eight of  
5 the ten Federal Orders milk marketing areas, and are  
6 exempted in the other two marketing areas if their Class  
7 I use remains below 3 million pounds per month. This  
8 means that, with respect to Class I milk, a  
9 producer-handler can, in effect, pay their own farm milk  
10 the uniform price rather than the class price. As  
11 testified to in detail by Dr. Cryan, this provides a  
12 producer-handler a very substantial advantage in the  
13 cost of farm milk as compared to the cost incurred by  
14 regulated plants processing and marketing Class I fluid  
15 milk products, solely as a result of this regulatory  
16 exemption.

17 Having some but not all fluid milk plants  
18 subject to the Class I minimum price clearly creates  
19 disorderly marketing conditions. Handlers not subject  
20 to such regulations can use their artificial cost  
21 advantage to offer customers lower priced processed  
22 milk, or to offer increased customer services, or to  
23 invest additional funds in their plant operations; or  
24 they can engage in a combination of these business  
25 strategies. All of these opportunities stem from the

1 increased profits artificially created by their  
2 regulatory exemption.

3 By the same token, exempting  
4 producer-handlers creates disorderly marketing by  
5 excluding from the order pool the funds representing the  
6 difference between the Class I and uniform price with  
7 respect to the producer-handler's sales volumes. This  
8 denies other dairy farmers and their cooperatives a  
9 uniform price, because the producer-handler can derive  
10 and keep a price in excess of the uniform price by  
11 selling its fluid milk products to customers based on a  
12 farm milk price above the uniform price, but still below  
13 the Class I minimum price.

14 Whatever historical justification may  
15 have once existed for the producer-handler exemption, it  
16 clearly no longer applies in light of the significant  
17 structural changes which have occurred at all levels of  
18 the dairy product marketing chain. This is true nowhere  
19 as much as the farm level.

20 At the farm level, not only has the  
21 average farm size increased, whether measured in terms  
22 of number of milk cows or total farm milk marketings,  
23 but the share of total U.S. farm milk production from  
24 the largest farm size categories has grown  
25 substantially. USDA reports that in 2008 the 730 dairy

1 farms in the U.S. with 2,000 or more milk cows accounted  
2 for 30.5 percent of all U.S. milk production that year.  
3 This is significantly up from 1998, the first year USDA  
4 began reporting the 2,000 or more milk cows category,  
5 when 235 such farms accounted for only 8.4 percent of  
6 milk production that year. Combined with the 2,620  
7 dairy farms with between 500 and 1,999 milk cows, farms  
8 with more than 500 milk cows accounted for 58.5 percent  
9 of U.S. farm milk production last year.

10 To put this in perspective, the top five  
11 states ranked by milk production per cow had an average  
12 of more than 23,000 pounds produced per cow. This means  
13 that a farm in these states with 500 milk cows produced  
14 on average 11.5 million pounds of milk per year, nearly  
15 1 million pounds per month. A 2,000 cow herd with a  
16 23,000 pound per cow average would produce  
17 46 million pounds per year, or nearly 4 million pounds  
18 per month. Clearly, very large farms, with levels of  
19 total milk production never contemplated during the  
20 decades when the producer-handlers were exempt from  
21 pricing and pooling regulations of Federal Orders, are a  
22 fact of life in the marketplace today. The pernicious  
23 impact of broad exemptions for producer-handlers has  
24 simply grown too large to ignore any longer.

25 IDFA and NMPF also propose a concomitant

1 increase in the exemption for all smaller handlers,  
2 (Proposal 2), from 150,000 pounds of fluid milk a month  
3 to 450,000 pounds a month. This will preserve the  
4 exemption from regulation for those plants too small to  
5 cause material market disruption, including those small  
6 plants previously exempted as producer-handlers.

7 As Dr. Cryan noted in his testimony, the  
8 current 150,000 pounds per month threshold was adopted  
9 in all Federal Milk Marketing Orders beginning  
10 January 1, 2000 as part of what is known as Federal  
11 Order reform.

12 JUDGE CLIFTON: Let me stop you,  
13 Dr. Yonkers. Where -- in the middle line of  
14 that sentence, where it says Federal milk  
15 marketing areas, you actually read orders. And  
16 does that make any difference at all?

17 THE WITNESS: I often use those terms  
18 interchangeably. I prefer it to be reflected,  
19 the areas, as I've written it. Thank you, your  
20 Honor.

21 JUDGE CLIFTON: Thank you.

22 A. In the final decision to implement that  
23 provision, USDA noted that this was the highest volume  
24 threshold then in existence in Federal Order marketing  
25 areas prior to 2000, and Dr. Cryan noted that this limit

1 first was adopted in the West Texas-New Mexico marketing  
2 area in 1991.

3           Since the 1990 data that was available at  
4 the time this hearing was adopted in the West Texas-New  
5 Mexico marketing area, the average volume of fluid milk  
6 products produced by U.S. fluid milk bottling plants  
7 operated by commercial processors has roughly doubled,  
8 from 93.9 million pounds annually in 1990 to  
9 189.8 million pounds in 2007 (the most recent data  
10 available). While this might suggest the current  
11 threshold should also be doubled, IDFA and NMPF support  
12 tripling it; after all, the data clearly show that the  
13 average fluid milk bottling plant volumes continue to  
14 increase over time, and Proposal 2 allows for future  
15 growth while keeping the limit in line with the industry  
16 structure at the time the threshold was first adopted in  
17 the early 1990s.

18           Proposal 2 also requires that an exempt  
19 plant sell its fluid milk products using unique labels,  
20 lest this exemption be abused through the establishment  
21 of numerous small plants effectively linked together so  
22 as to market their milk jointly and to garner the  
23 advantages of a large plant without being subjected to  
24 minimum price regulations. This is not intended to  
25 prevent an exempt plant from marketing packaged fluid

1 milk under more than one label; for example, an exempt  
2 plant could have its own label as well as another for a  
3 local home delivery distributor solely supplied by that  
4 exempt plant and even have a third label for a local  
5 grocery store solely supplied by that exempt plant.  
6 This provision of Proposal 2 is intended to prevent a  
7 large distributor, retailer, or other entity from  
8 coordinating the production of fluid milk products from  
9 a number of smaller exempt plants under the same label.  
10 As an example only, an exempt plant under this proposal  
11 should not be able to distribute a fluid milk product  
12 under the name IDFA Milk Company if any other handler  
13 also distributes a fluid milk product using that same  
14 label name.

15 While a number of other proposals were  
16 submitted by other parties and included in the hearing  
17 notice, IDFA urges USDA to reject those and only adopt  
18 Proposals 1 and 2. The proposals which seek to continue  
19 the producer-handler exemption from pricing and pooling  
20 provisions with some volume limit could in effect  
21 continue the problem of disorderly marketing created by  
22 this exemption. In particular, Proposals 23 and 24  
23 could create new incentives for existing regulated  
24 handlers to invest in dairy farms and/or retail stores  
25 for the sole purpose of gaining a new exemption from



1 pricing and pooling regulation on at least a portion of  
2 their Class I sales.

3 Proposal 25, rather than being innovative  
4 instead proposes going back many years when such a  
5 provision existed in Federal Orders. There were many  
6 hearings over many years in which this type of provision  
7 was found to contribute to disorderly marketing and IDFA  
8 urges USDA to reject its adoption today.

9 And then, your Honor, on the last page  
10 here, because I did cite from a reference that had not  
11 been referred to earlier in this hearing, I have  
12 included a page I printed from a website at the USDA's  
13 economic research service.

14 The website is given at the bottom of the  
15 page. It comes from a publication called, Livestock,  
16 Dairy and Cultured Outlook. And it shows as long a time  
17 series as they have put -- made available on the  
18 website, what the number of fluid milk bottling plants  
19 operated by a commercial processor are, 1950 to 2007,  
20 and their estimate of the average volume per plant  
21 processed in million pounds. And I refer to that in my  
22 testimony. And that concludes my prepared statement.

23 JUDGE CLIFTON: Thank you, Dr. Yonkers.

24 Now, Mr. Beshore, do you have additional direct  
25 examination of this witness?

1 MR. BESHORE: I do not have any questions  
2 for Dr. Yonkers at this time.

3 JUDGE CLIFTON: All right. It's ten  
4 minutes to 6:00 and I want to get consensus how  
5 counsel wish to proceed. We can begin  
6 cross-examination now, we can begin  
7 cross-examination at 8:00 a.m., or we can begin  
8 cross-examination when those witnesses who can  
9 testify only tomorrow have been completed. Many  
10 of those, I understand, are producers.

11 So Dr. Yonkers has indicated great  
12 flexibility except that he has to leave -- is it  
13 leave this hearing room at noon on Friday?

14 THE WITNESS: Yes, your Honor. I have a  
15 flight that leaves a little after 2:00.

16 JUDGE CLIFTON: All right. So I'd like a  
17 suggestion, a comment, idea. Mr. Yale.

18 MR. YALE: I think everybody else is so  
19 tired they can't say anything, but --

20 JUDGE CLIFTON: You, on the other hand --

21 MR. YALE: I'm so tired I don't know  
22 whether I'm awake or not. You know, let me just  
23 give you kind of the pros and cons. You know,  
24 in one respect, I think we can do bits and  
25 pieces of cross-examination of Dr. Yonkers, and

1           somebody can start tonight and we can do some  
2           later tomorrow and the like. And we've done  
3           that in the past with other witnesses.

4           On the other hand, it does create a very  
5           messy record when they're all spread out like  
6           that. So if we're going to try to do it all at  
7           once, I think it's a mistake to start with him  
8           now.

9           I think if we got some of these other  
10          witnesses, who have got to get out of here, I  
11          think we're better off getting them out and  
12          starting with him. That's my opinion. But on  
13          the other hand, I'm game for anything because  
14          you are so compassionate at this point.  
15          Whatever you want to do.

16          But I -- that, to me, is the real issue,  
17          is whether we want to fragment or do we want to  
18          have it contiguous. And my preference is  
19          contiguous, but I'm not going to make a big beef  
20          if we need to break it up.

21                 JUDGE CLIFTON: Thank you, Mr. Yale.  
22          That's helpful. Does anyone else want to chime  
23          in before I announce our course?

24                 MR. VETNE: I agree with Ben.

25                 THE COURT: Mr. Vetne seconds Mr. Yale.

1 Mr. Beshore.

2 MR. BESHORE: Maybe we'll get him done.

3 JUDGE CLIFTON: Get him done tonight? Do  
4 you think it's possible?

5 MR. RICCIARDI: Now I will chime in.

6 JUDGE CLIFTON: Please, Mr. Ricciardi.

7 MR. RICCIARDI: That's the one thing I  
8 totally agree with. I don't think we should  
9 start the cross-examination of Dr. Yonkers. I  
10 think that we should make a decision for the  
11 good of the order, which is to get people some  
12 sleep, or if they have to actually meet with  
13 witnesses for tomorrow, let them do that.

14 The real question, your Honor, is do we  
15 start with Dr. Yonkers or start with the other  
16 witnesses. That's the determination we have to  
17 make.

18 JUDGE CLIFTON: Okay. All right. Thank  
19 you all. We'll start with the other witnesses.  
20 We'll start with people who have come to testify  
21 who have to leave tomorrow, and we'll try to  
22 favor dairy farmers. And what I need to know is  
23 whether to go with Mr. Miltner's witnesses or  
24 Mr. Vetne's witnesses first at 8:00.

25 MR. VETNE: Mr. Miltner's.

1 JUDGE CLIFTON: Mr. Vetne.

2 MR. VETNE: Some of my people will be  
3 staggering in tomorrow morning. I think it's  
4 better toward mid morning.

5 JUDGE CLIFTON: I would like Mr. Vetne to  
6 be heard. Start again.

7 MR. VETNE: Sure. My people are coming  
8 in at staggered times between tonight and  
9 tomorrow morning. I would like, if possible, to  
10 do them consecutively. And it could be starting  
11 mid morning or first thing in the afternoon.

12 If Mr. Miltner is ready with his first  
13 thing, that would be my preference. If he's  
14 not, I will struggle downstairs in the morning  
15 or get a -- get a coffee cake and show up 30  
16 minutes late. We'll make it.

17 JUDGE CLIFTON: Mr. Miltner.

18 MR. MILTNER: Our witnesses are also  
19 coming in mostly after 5:00 today. We would be  
20 able to put somebody on in -- to start the day  
21 and then go from there.

22 JUDGE CLIFTON: Excellent. Good. And  
23 then I'm going to rely on Miltner and Vetne to  
24 keep me supplied with a witness. And we'll get  
25 them done, and then I'll recall Dr. Yonkers.

1           Good. Thank you. Is there anything else before  
2           we call it a night?

3                   MR. ENGLISH: Thank the court reporters.

4                   JUDGE CLIFTON: Thank the court  
5           reporters. Yes, I do. That concludes our  
6           record at 5:55. We'll see you at 8:00 in the  
7           morning.

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9                   PROCEEDINGS ADJOURNED AT 5:55 p.m.

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C E R T I F I C A T E

I, S. Diane Farrell, RMR, CRR, the undersigned, a court reporter for the State of Ohio, do hereby certify that at the time and place stated herein, I recorded in stenotypy and thereafter had transcribed into typewriting under my supervision the foregoing pages, and that the foregoing is a true, complete and accurate report of my said stenotype notes.

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S. Diane Farrell, RMR, CRR