

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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

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VOLUME VIII
- - -

Public Hearing Administrative Law Judge
Before: Jill S. Clifton

Date: May 13, 2009

Time: Commencing at 8:08 a.m.

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

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

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P R O C E E D I N G S

JUDGE CLIFTON: Please come to order.

Let's go on record. The time is 8:08. We're back on record, it is 8:08 a.m. on Wednesday, May 13, 2009. This is day eight of the milk rulemaking hearing. We're in Cincinnati, Ohio.

I'm Jill Clifton, I'm the United States Administrative Law Judge who's been assigned to take the evidence in this hearing.

I would like to begin with just a thought that I would like feedback on later, and that is whether we should ask Dr. Carolyn Orr to testify on Friday or on Monday. We could also ask her to testify tomorrow. But I'm thinking that's probably full. So be thinking about that. We need to give her some notice. She is not available after Monday. I still have some hope deep down that we might finish by Friday, so I hesitate to tell somebody to come on Monday at this point.

All right. I believe my next witness presentation will be a panel, is that correct, Mr. Vetne?

MR. VETNE: Apparently not. Although I don't know if there's any part of Sybil up

1 there. But this is Mr. Gilbert, and following
2 him will be a panel or two.

3 JUDGE CLIFTON: Oh, good. All right.
4 Mr. Gilbert, will you please state and spell
5 your name for us? And that microphone needs to
6 be about two inches from you.

7 THE WITNESS: How's this?

8 JUDGE CLIFTON: I think it's good.

9 THE WITNESS: Okay. My name is Gerald
10 Gilbert, spelling G-e-r-a-l-d, Gilbert,
11 G-i-l-b-e-r-t.

12 JUDGE CLIFTON: Thank you. Would you
13 raise your right hand? I'll swear you in.

14 GERALD GILBERT

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

17 DIRECT EXAMINATION

18 BY MR. VETNE:

19 Q. Mr. Gilbert, before -- you have some
20 written presentation you want to prepare?

21 A. Correct.

22 Q. Before you do that, can you tell us a
23 little bit about yourself, your experience, background,
24 so forth?

25 A. Basically come from a farming family. My

1 father, his father, we've been in the agricultural
2 business all of our lives, moved to Washington from a
3 small town in Utah about 1958. Had a family, our
4 family's -- there's seven in our family. Most of us
5 went to college, got graduates -- college, I graduated
6 in agricultural economics. We've been kind of in this
7 business all our lives, so --

8 Q. All right. You moved to Washington from
9 Utah? Your family was farming in Utah, also?

10 A. Correct, correct.

11 Q. Okay. And you are here on behalf of
12 Country Morning Farms?

13 A. Correct.

14 Q. Are you one of the owners of Country
15 Morning farms?

16 A. Yes, it's owned by our family.

17 Q. Do you hold an office? Are there
18 officers of the company or --

19 A. Well, yes, we incorporated a few years
20 ago and I'm the president.

21 Q. All right. Good. And you have a
22 prepared statement? Can you read that?

23 (Exhibit 81 was marked for
24 identification.)

25 JUDGE CLIFTON: I've marked his statement

1 as Exhibit 81, 8-1.

2 MR. VETNE: Thank you, your Honor.

3 Q. Proceed, Mr. Gilbert.

4 A. My name is Gerald Gilbert. I am here to
5 provide some information about Country Morning Farms, a
6 producer-handler business located in Othello,
7 Washington.

8 Our family moved to Washington in 1958
9 where we farmed mostly row crops. In 1980, myself, my
10 brothers and a brother-in-law were all getting out of
11 college and wanted to come back to the farm. This
12 caused a need to expand. At that same time, there was a
13 dairy for sale and also a small processing plant in our
14 area. My brother-in-law had a love for, and a
15 background in dairy. My brother wanted to run the
16 processing plant, so we bought both of them and started
17 in this business.

18 When we bought the dairy, we had an
19 opportunity to only buy the dairy and sell our milk to a
20 local processing plant. But there was an opportunity to
21 add value to the milk through the processing plant. We
22 were willing to make that investment in time, sweat, and
23 capital to do so.

24 In 19 -- in 2003, excuse me, our
25 processing plant caught fire and was burnt and

1 destroyed. With some insurance money, a loan from the
2 bank, which was no small task, we converted all of our
3 employees to construction workers and rebuilt. We did
4 have a construction company billed the main frame of our
5 building. This enabled us to keep our employees
6 employed. During this time, we found a home for our
7 milk in Montana. If we would have taken our milk to a
8 local dairy, they would have required a long-term
9 contract or would have only paid us a low class price
10 for the milk. We built our new plant with some
11 expansion capabilities. Shortly after we rebuilt, we
12 were limited to the 3 million pound cap on
13 producer-handlers. Needless to say, that debt load
14 became high.

15 Country Morning Farms is a small business
16 operation. We have a total of 38 employees, 11 at our
17 processing plant, 20 at our dairy and 5 on the farm, and
18 two family members. Approximately 27 of these employees
19 and their families live in the small town of Warden,
20 Washington, population about 1,750, a fair sized
21 percentage for a town.

22 We are unique in the state of Washington
23 in that we are the only plant, processing plant in the
24 state, that takes their product straight from the farm
25 to the consumer without being mixed and blended with

1 milk from other farms.

2 We supply small consumers and markets
3 with pricing and service to which large plants do not
4 aggressively market their milk. We are not able to
5 break into large grocery accounts because we are limited
6 to the 3 million pounds per month. This factor alone
7 even keeps us from trying to enter these markets. Our
8 packaged fluid milk market area extends from Seattle to
9 Spokane. We distribution our milk -- excuse me. We
10 distribute our milk only to distributors who in turn
11 distribute to their customers. We sell only gallon jugs
12 of milk to these distributors. The distributors buy
13 other milk products from other plants. We have two
14 distributors in the Seattle area and one in Spokane. At
15 one time we had about eight distributors, but these two
16 are a vanishing breed. Most of our distributors'
17 customers are small stores, convenience stores, expresso
18 stands and some pharmaceutical stores. Our competitors
19 in these are other independent distributors who get
20 their milk from larger plant operations and do not find
21 if economical to distribute to these small stores.

22 The major plants in our area are Darigold
23 and Safeway. One smaller plant, Edaleen Dairy, probably
24 bottles about 600,000 gallons a month. Darigold,
25 Safeway and Edaleen are our major competitors in

1 supplying dairy products to independent distributors of
2 the.

3 We are located in the middle of the
4 state. One of our distributors is located 100 miles
5 away, and the other is 200 miles away. This market
6 makes distribution costs somewhat high. Processing
7 costs are also high in our plant due to the small size.
8 Our costs of production and delivery is approximately
9 \$5.11 per hundredweight with an additional --

10 JUDGE CLIFTON: I'm sorry. Your sentence
11 reads, our cost of processing and delivery, and
12 you said production and delivery. Would you
13 start again with that sentence?

14 THE WITNESS: Thank you for your
15 correction.

16 A. Our costs of processing and delivery is
17 approximately \$5.11 per hundredweight. With an
18 additional cost of \$1.10 for debt service. This doesn't
19 account for additional balancing costs. I do not know
20 the operational costs of other plants. I do not know --
21 I do know that the large plants in our market all have
22 their own blow-molding equipment and make their own
23 jugs. We ship our jugs in from a little over 200 miles
24 away. The cost difference is approximately six to eight
25 cents per jug. The other factor is volume. Their

1 massive volumes compared to ours make a huge difference
2 in the cost per unit.

3 We balance our own milk production. In
4 2008 we bottled 88 percent of our farm's milk
5 production. Our excess is shipped to a Darigold powder
6 plant about 250 miles away. Darigold used to pay us
7 Class IV pricing, but in January 2008 they changed to a
8 component pricing formula which dropped the price that
9 we receive for our excess milk. All of our cream is
10 shipped 180 miles away to a Darigold butter plant. At
11 this time there are no other outlets for our excess milk
12 and our cream. The price we were paid for our excess
13 milk in January 2009 was \$7.95 per hundredweight. Our
14 transportation cost to get that price was \$1.95 per
15 hundredweight.

16 With our debt load and high cost of
17 production, if we were to lose our producer-handler
18 status, neither the dairy nor plant would survive.
19 According to our estimates, we would have between 50,000
20 and \$60,000 into the pool each month. Of course, if we
21 were not in business, the vendors who supply us would
22 also lose revenue, and the people who work for us would
23 lose their jobs.

24 In our market, the producer-handler issue
25 was debated and settled with a USDA decision three years

1 ago. It does not need and should not be changed again.

2 If the government nevertheless wants to
3 shut down the opportunity for others to enter milk
4 processing business as producer-handlers, it would not
5 at the -- it should not at the same time destroy those
6 that have invested time, sweat, and capital in the
7 system along with it.

8 I'd be happy to answer any questions at
9 this time.

10 BY MR. VETNE:

11 Q. Mr. Gilbert, at various points in your
12 reading of your statement, you used some words that were
13 a little bit different. Did you -- did you intend to
14 make corrections to your statement because something was
15 wrong, or were you just reading word -- articulating
16 words that were more comfortable than what's in the
17 written statement?

18 A. You mean I missed some of the words that
19 were there?

20 Q. You used some different words.

21 A. Okay.

22 Q. You didn't intend to disavow anything in
23 your statement, did you?

24 A. No, not at all. I have a slight tendency
25 for dyslexia, so my reading is somewhat difficult. If I

1 missed some words, it was only because of that.

2 Q. On the last page, you refer to a price to
3 Darigold of \$7.95 per hundredweight. Was that for milk
4 or for cream?

5 A. That was for milk, excess milk.

6 Q. Excess milk, okay. Is there anything
7 else you want -- observations or comments you wish to
8 add before others ask questions of you?

9 A. I don't think so.

10 Q. All right.

11 MR. VETNE: The witness is available,
12 thank you.

13 JUDGE CLIFTON: Thank you, Mr. Vetne. I
14 have one question before cross-examination
15 begins, Mr. Gilbert.

16 At the bottom of page 2 when you talk
17 about how Darigold pays you, and it's less than
18 you used to receive --

19 THE WITNESS: Correct.

20 JUDGE CLIFTON: -- is that something you
21 could explain a little more fully?

22 THE WITNESS: Well, like I said there,
23 they used to pay us Class IV prices. Then in
24 2008, they went to a component pricing and paid
25 us the one component, so it was on fats and

1 solids. But I think that particular month, the
2 price dropped. I'm going from memory, but it
3 dropped somewhere around \$5 a hundredweight as a
4 result of that price change.

5 JUDGE CLIFTON: Thank you. Mr. Vetne.

6 BY MR. VETNE:

7 Q. That allows me to ask another question.
8 Are you aware that the Pacific Northwest Federal Order
9 has had a component pricing formula for milk used in
10 manufacturing --

11 A. Yes.

12 Q. -- for some time? Was the Darigold
13 component price formula its own formula and in some way
14 different than the Federal Order formula?

15 A. That, I don't know.

16 Q. That you don't know. In that case, when
17 Darigold used to pay Class IV pricing, if that preceded
18 January 2008, the Federal Class IV price was a component
19 formula. Did they pay you on the basis of the Federal
20 Order component prior to January 2008 or did they pay
21 you basically for standard milk, whatever the components
22 were?

23 A. Standard milk.

24 Q. Okay.

25 A. Thank you.

1 Q. So you always received a hundredweight
2 price, to your recollection, regardless of the
3 components?

4 A. Correct.

5 MR. VETNE: Thank you.

6 JUDGE CLIFTON: Who would like to begin
7 cross-examination of Mr. Gilbert? Mr. English?
8 Thank you.

9 CROSS-EXAMINATION

10 BY MR. ENGLISH:

11 Q. Good morning, Charles English.
12 Mr. Gilbert, how far does your distribution get from
13 your plant? And I guess let me start by saying, do you
14 have distribution in Idaho?

15 A. No.

16 Q. Do you have distribution in Canada?

17 A. No.

18 Q. Do you have distribution in Oregon?

19 A. Ourselves, no. We distribute to
20 distributors in the Seattle area. I do not believe they
21 get into Oregon.

22 Q. If they got into Oregon, would it be
23 western Oregon?

24 A. Correct.

25 Q. It would not be eastern Oregon?

1 A. You know, there again, I have a
2 distributor in Spokane who distributes most of the
3 eastern Washington. He could get down into eastern
4 Oregon, but I'm not sure of that.

5 Q. If he did, it wouldn't be a relatively
6 large volume?

7 A. Very small.

8 Q. Now, you refer to the unfortunate
9 circumstances in 2003 with the fire, and you say you
10 found a home for your milk in Montana. Was that Country
11 Classic facility in Montana?

12 A. No, that was Meadow Gold out of
13 Kallispell.

14 Q. Meadow Gold. And so you shipped the milk
15 from your farm. I take it your farm is located very
16 close to your plant?

17 A. Yes, about five miles. And one
18 correction, too, we are -- I'm from Othello, but the
19 plant is in the town of Warden.

20 Q. How is that spelled, sir?

21 A. W-a-r-d-e-n.

22 Q. Thank you. The court reporter really
23 thanks you, but I thank you as well. And you found that
24 it was more economical for you to transport the milk
25 from central Washington across, I guess the narrow

1 portion of Idaho, that's the northwest corner of Idaho,
2 into Montana, than to try to have it processed in
3 Washington, is that correct?

4 A. Well, yes. You know, they had a need for
5 milk -- Montana doesn't have a lot of cows. They had a
6 need for milk and so they actually paid the
7 transportation costs to get our milk there.

8 Q. And did they then package the milk and
9 provide it back to you for sales in Washington?

10 A. No.

11 Q. So, in essence, during that time frame,
12 you were strictly a producer with your sales going to a
13 processor in Montana for sales in Montana, is that
14 correct?

15 A. Correct.

16 MR. ENGLISH: That's all I have.

17 JUDGE CLIFTON: Thank you, Mr. English.

18 Who will next cross-examine Mr. Gilbert?

19 CROSS-EXAMINATION

20 BY MR. BESHORE:

21 Q. Good morning, Mr. Gilbert. My name is
22 Marvin Beshore, I represent the National Milk Producers
23 Federation and Dairy Farmers of America. Just a couple
24 of questions. You say your processing plant was
25 destroyed by fire in 2003. What part of the year was

1 that?

2 A. I think it was in October, if I remember
3 correctly.

4 Q. When -- when did you make the decision to
5 rebuild the plant?

6 A. We were anticipating building a new plant
7 before that, though we made the decision when the bank
8 told us they would back us.

9 Q. And when was that?

10 A. I believe December.

11 Q. You've indicated that your -- you sell
12 only gallon jugs of milk to your distributors, is that
13 correct?

14 A. Correct.

15 Q. Is that the only size in which you
16 package milk at your plant?

17 A. It is at the current time. We have in
18 the past done others, but right now that's all we do.

19 Q. When you rebuilt the plant after the
20 fire, I guess, what, that construction would have
21 occurred during 2004 sometime?

22 A. Correct.

23 Q. When did it come back online?

24 A. December -- I think December of 2004 or
25 January of 2005.

1 Q. Since that time -- and did you
2 intentionally build it to only use gallon equipment?

3 A. No. No, we've got the capabilities to do
4 others, but economically, for such small quantities, it
5 just doesn't make sense.

6 Q. And what -- can you tell us -- you've
7 indicated, I guess, that your plant is under 3 million
8 or you're selling less than 3 million. Approximately
9 what volume business do you have? What is your monthly
10 volume?

11 A. In pounds or gallons?

12 Q. Pounds or gallons.

13 A. Just under 3 million. If we go over the
14 3 million, we become a pool plant, so we make sure we're
15 under the 3 million.

16 Q. Is your -- how many cows do you milk?

17 A. 1,300, give or take a hundred.

18 Q. So do your distributors handle different
19 containers from other suppliers?

20 A. Yes.

21 Q. If a family goes to the supermarket where
22 the -- the stores where your milk is, and they want to
23 buy, like my family does, a gallon of 2 percent and half
24 a gallon of whole milk for the boys and a gallon of --
25 half gallon of skim for mom, you -- what would you --

1 well, the gallon could come from you?

2 A. Correct.

3 Q. But the others would come from a pool
4 supplier, I take it?

5 A. Correct.

6 Q. Your cash costs of processing and
7 delivery -- by delivery, does that include the -- that,
8 I assume, includes getting the product to your
9 distributors?

10 A. Correct.

11 Q. Can you tell us the wholesale price
12 gallons to your distributor?

13 A. It changes monthly. I don't have that
14 price right now.

15 Q. On the third page of your statement, you
16 testified to an estimate of 50 to \$60,000 into the pool
17 each month. Did you make those calculations? Did you
18 make that estimate?

19 A. I did, and that was based upon the
20 difference of blend price and what Class I price would
21 be during the month, and it varies every month.

22 Q. Okay. Do you know what month you did
23 that?

24 A. No specific month. It was just based on
25 that -- it seems like it averages somewhere around \$2 a

1 hundredweight.

2 Q. So you were figuring basically a \$2
3 difference between the Class I and the blend?

4 A. Correct.

5 Q. Did you -- what volume of surplus milk or
6 cream do you have on a monthly basis?

7 A. There again, it varies. We try to
8 balance that by production. You know, the amount of
9 milk -- or the dollar amount we're getting from our milk
10 now is less than our feed costs. So we try to balance
11 that down. But it will vary anywhere from zero to 500,
12 600,000 pounds a month depending on what the cows decide
13 to do.

14 Q. Okay. When you were calculating your
15 estimated monthly obligation to the pool, did you take
16 into account the pool draw you would have on your
17 surplus?

18 A. That was calculated. It's -- strictly on
19 the average, it looks like it's about a \$2 difference.
20 And we're about 3 million pounds, so it's just a simple
21 calculation. I didn't do an extensive survey there.

22 Q. So you didn't take into account the fact
23 that any surplus -- if you had 500,000 of surplus and
24 you were pooled, you would draw out of the pool? Do you
25 know what I mean by that?

1 A. I believe I do.

2 Q. Okay.

3 A. But we're being paid on component prices,
4 I don't know we're being drawn out of the pool.

5 Q. Okay. Have you ever heard of the PPD?

6 A. No.

7 Q. Thank you. I don't think I have any
8 other questions.

9 JUDGE CLIFTON: Who next will
10 cross-examine Mr. Gilbert? Mr. Miltner.

11 CROSS-EXAMINATION

12 BY MR. MILTNER:

13 Q. Good morning, Mr. Gilbert.

14 A. Good morning.

15 Q. You say in your statement that you are
16 unique in the state of Washington in that you're the
17 only plant that takes their product straight from the
18 farm to the consumer bottle without it being mixed and
19 blended with milk from any other farms. Has that always
20 been the case?

21 A. No, there's been other producer-handlers
22 in the past. And that may be somewhat inaccurate
23 because there are some very small producer-handlers
24 there that do that. But of any size, we're the only
25 ones left in the state that can -- that has that

1 opportunity.

2 Q. What happened to the other businesses,
3 the other producer-handlers that used to do that?

4 A. Two of those, Edaleen and Smith Brothers,
5 basically become pool plants when they were capped at
6 3 million. Both of those now receive milk other than
7 their own farms. I think Smith Brothers sold their
8 dairy out. Others got out of business.

9 Q. So Smith Brothers doesn't have their own
10 herd of animals anymore, they don't have any cows?

11 A. Not -- I don't believe so.

12 Q. And what about Edaleen?

13 A. Edaleen has their own cows, but they also
14 buy, you know, milk from the pool.

15 Q. Do you find that the consumers who
16 purchase your milk appreciate the fact that it comes
17 from a single source?

18 A. We get comments to that effect. You
19 know, we haven't done a total survey.

20 Q. But being a -- a producer-handler who
21 doesn't pay into the pool, you could still own your own
22 herd and bottle your own milk, right?

23 A. That just -- ask that again, I didn't
24 quite understand it.

25 Q. Sure, sure. If you weren't a

1 producer-handler -- okay, if you didn't have a
2 regulatory title called producer-handler --

3 A. Okay.

4 Q. -- you could still own your own herd,
5 have your own plant?

6 A. My understanding, yes.

7 Q. Okay. But in reality, does the
8 experience in Washington speak to something different
9 than that?

10 A. Sorry. Could you clarify that one, too?

11 Q. Sure. Those that -- those that were
12 producer-handlers but are no longer producer-handlers,
13 have they been able to maintain a single source for
14 their milk?

15 A. The only two that I know of that are --
16 would fit that category there would be Smith Brothers
17 and Edaleen.

18 Q. Okay. Now, that -- pardon me. The
19 distributors' customers, the small stores, convenience
20 stores, espresso stands and pharmaceutical stores, are
21 all of those customers generally served by all the
22 bottlers in Washington?

23 A. If I understand your question correctly,
24 they are.

25 Q. If I may ask, what is -- what is your

1 cost of production for your milk on your farm compared
2 to the Federal Order blend price?

3 A. Right today it's below -- I mean, it's
4 higher.

5 Q. By a little bit or by a lot?

6 A. Well, I think all dairies right now are a
7 lot.

8 Q. And you've been doing this for a while.
9 Is that an infrequent phenomenon, that your costs of
10 production are higher than Federal Order prices?

11 A. No. Or else we wouldn't be in business.

12 Q. When you're looking at whether Country
13 Morning makes a profit every year, do you -- do you look
14 at whether the farm made money or the plant made
15 money or do you determine whether the enterprise made
16 money?

17 A. Both.

18 Q. Okay. And when you're looking at -- let
19 me ask you this. If the plant makes a bunch of money,
20 as you look at that, and the farm loses a bunch of
21 money, and the enterprise breaks even, what's the most
22 important number to you?

23 A. Well, the most important number is we can
24 keep our debts paid and the aggregate of all that is the
25 most important. Because it's an aggregated business.

1 And it -- which one makes the most money or loses money,
2 it changes every year.

3 Q. What is the cost to your plant to get
4 milk delivered to the plant?

5 A. Our dairy is five miles away. We own our
6 own trucks and everything. The cost is relatively
7 small.

8 Q. I'm sorry. My question was perhaps
9 imprecise.

10 A. Okay.

11 Q. Not so much the delivery of the milk, but
12 what does it cost you for the milk itself?

13 A. You're asking what the production costs
14 on the dairy itself would be?

15 Q. I guess more generally, does it cost
16 you any Federal Order regulated price or does it cost
17 you whatever it cost you to produce milk on your
18 farm?

19 A. I guess like all dairies, it costs what
20 it costs. It's all relative on feed costs, and all
21 those input costs.

22 Q. Now, when you had your fire you couldn't
23 process milk, is that right?

24 A. Correct.

25 Q. So for better than a year you could not

1 buy Country Morning Farms' milk, is that right?

2 A. That's correct.

3 Q. And you testified about getting financing
4 from the bank and that was what helped you make a
5 decision. But in that intervening time, did you
6 consider not -- not re-opening and just being a dairy
7 farmer?

8 A. Not very much.

9 Q. Okay. Why not?

10 A. There again, we've always been willing to
11 work extra for value added. We've become accustomed to
12 that process and that's kind of how we enjoyed doing
13 business. It -- you know, the processing plant, that's
14 value added on an average year-in, year-out basis. If
15 we could not have gotten financing -- I guess we really
16 went that direction first. So since we was able to put
17 that together, we really never considered doing the
18 other, just becoming just a milk supplier.

19 Q. So this is a business model that you
20 and your family have chosen because you enjoy it
21 and that's how you intend to operate going
22 forward?

23 A. That's our hopes, yes.

24 Q. Thank you very much.

25 JUDGE CLIFTON: Who next will

1 cross-examine Mr. Gilbert? Mr. Carroll.

2 CROSS-EXAMINATION

3 BY MR. CARROLL:

4 Q. Good morning, Mr. Gilbert.

5 A. Good morning.

6 Q. I'm John Benjamin Carroll. I represent
7 the New England Association of Producer-Handlers and
8 some independent persons as well.

9 Direct your attention to page 2 of your
10 statement. First, I want to compliment you, not just on
11 the statement but on what you and your family have done
12 with the -- whatever life has thrown at you, you managed
13 to put yourself together and we all admire that. And my
14 clients would understand in a minute what you've been
15 through and respect you for it.

16 My questions are: In the first paragraph
17 of that second page, second sentence, it says, we are
18 not able to break into large grocery accounts because we
19 are limited to the 3 million pounds per month. Can you
20 tell me what you meant by that statement?

21 A. Well, our large grocery stores takes a
22 lot of milk. And since we're limited by 3 million
23 pounds, we just don't have the milk to enter that market
24 and supply them sufficient.

25 Q. And then I take it you're not the cause

1 of any disorder at the large grocery chain level?

2 A. No. And even if we could, we probably
3 wouldn't. Because it's too much -- the old principle,
4 all your eggs in one basket. We like to have them
5 spread out. So by doing business with smaller
6 companies --

7 Q. Right.

8 A. -- it spreads that risk out.

9 Q. Right. Are you aware of any disorder in
10 marketing that your operation has caused?

11 A. No, none.

12 Q. I want to ask you about your family. Are
13 there family members still engaged in the business?

14 A. I have one brother.

15 Q. One brother. And does he have children?

16 A. Yes.

17 Q. And do you have children?

18 A. No.

19 Q. And does your brother have any hopes of
20 his family continuing on your business?

21 A. Possibly. Most of his children -- his
22 boys -- he's got three boys. They've all gone to
23 college and have professions in other areas. One of
24 them has indicated that he might want to come back.

25 Q. And do you want to preserve the right of

1 that boy to continue in business?

2 A. Most definitely.

3 MR. CARROLL: Thank you very much.

4 JUDGE CLIFTON: Who next will
5 cross-examine? Mr. Yale.

6 CROSS-EXAMINATION

7 BY MR. YALE:

8 Q. Benjamin F. Yale, Select Milk Producers
9 and Continental Dairy Products. Good morning.

10 A. Good morning.

11 Q. I want to follow up on that issue of --
12 the issue of the grocery chains. You indicate you
13 would -- first of all, you do not believe you can serve
14 them, right?

15 A. Correct.

16 Q. You don't have enough volume?

17 A. Correct.

18 Q. Do you have any idea what kind of volume
19 you would need to have to be able to serve chains?

20 A. You know, I never investigated that
21 because that's never been our direction.

22 Q. But it's beyond your capacity at this
23 point?

24 A. Correct.

25 Q. Now, you also indicated the concept of

1 not having all your eggs in one basket. Why -- why is
2 that a concern?

3 A. Well, if you've got 50 percent of your
4 business in one, just -- for example, just in one
5 business and they decided to go elsewhere, that's a lot
6 of excess milk on the market you have no home for. It's
7 really quite high risk.

8 Q. And by high risk, what do you mean by
9 that?

10 A. Well, certainly if you had to take all
11 that milk and put it into the excess milk market, there
12 would be significant losses while you were trying to
13 reestablish that amount of volume in business.

14 Q. So you were indicating you were selling
15 that excess for \$7 or so a hundredweight; in other
16 words, rather than getting the Class I or a near Class I
17 price, you would end up at 7, so all that would be a
18 loss, right?

19 A. Correct.

20 Q. Now, you indicate in here that the rules
21 have been set and you want to stay that way. You are
22 aware that there's a number of proposals, including one
23 your group supports, that provides for grandfathering?

24 A. Correct.

25 Q. So you're in support of allowing existing

1 producer-handlers to maintain their status if they're
2 under 3 million pounds, and not allow new entries? Is
3 that an acceptable point or a decision by the Secretary?

4 A. Yes, in our opinion, it is.

5 Q. There was some talk about -- you say you
6 have risk of loss of sales, but you indicated that you
7 went out and you had to get a bank loan, and I got the
8 indication by the words, it was not an easy task to get
9 a bank loan, right?

10 A. Correct.

11 Q. And I know there's talk in the press that
12 maybe banks aren't supposed to want this and the
13 government will help, but my expectation is that the
14 bank wants to be paid back, right?

15 A. That's my indication, yes.

16 Q. In full?

17 A. In full.

18 Q. All right. And when you went to the bank
19 to do that financing, did you share with them the
20 possibility that your -- well, let me ask you this. Did
21 you have to give them some kind of indication of what
22 your income and expenses would be for a period of time?

23 A. Yes.

24 Q. And did that include payments into the
25 pool?

1 A. No, it did not.

2 Q. Would that have changed the profitability
3 enough that the bank would have to re-look at that?

4 A. I'm positive it would have.

5 Q. Does your -- do you know whether your
6 loan has any provision in it that would provide, if
7 there's a change in regulatory status, that the note
8 could be called?

9 A. I do not believe it does.

10 Q. Okay. And you use your own label when --
11 you have your own brand that you use for your milk?

12 A. Most of our milk is put up under private
13 label of the distributor. The distributors own the
14 label.

15 Q. You don't know whether they put up milk
16 from other plants with the same label or not, do you?

17 A. I believe that some of them do. Most of
18 them -- well, we have three distributors. Two of them
19 do not. One of them, I think, did, although I think
20 with Darigold, Darigold has indicated that they're not
21 going to put up private labels for them anymore, so that
22 would eliminate that. So if they do buy excess milk, it
23 is under the label of the processor.

24 Q. You don't have any control. I mean, they
25 come to you and order the milk and they tell you, this

1 is the label we want, and that's what you do, right?

2 A. Correct.

3 Q. You don't actively go out and seek sales
4 under a particular label or to sell your surplus by your
5 labeling, do you?

6 A. No.

7 MR. YALE: I don't have any others.

8 JUDGE CLIFTON: Thank you, Mr. Yale. Who
9 next will cross-examine Mr. Gilbert?

10 Mr. Ricciardi.

11 CROSS-EXAMINATION

12 BY MR. RICCIARDI:

13 Q. Good morning, Mr. Gilbert. I am Al
14 Ricciardi, I represent AIDA in this proceeding, a group
15 of producer-handlers throughout the country and an
16 exempt plant. And I thank you for taking the time to
17 come here and share your thoughts. And I have just a
18 few questions for you.

19 As I understand your -- your testimony,
20 at least overall, is you don't think there's any reason
21 to change with regard to producer-handlers, not to
22 further limit them in any way, am I correct?

23 A. I'm sorry, state that one more time.

24 Q. Sure. Is it your position that
25 producer-handlers should be left alone?

1 A. That's my first option, yes.

2 Q. Okay. Now, you understand that there are
3 a significant number of the largest players in the dairy
4 industry that want to eliminate producer-handlers?

5 A. Correct.

6 Q. Now, is it your understanding that
7 National Milk, for example, which does want to eliminate
8 producer-handlers, is comprised of the 31 largest co-ops
9 in this country, including IDFA?

10 A. That's what I understand.

11 Q. Is it your understanding that IDFA, that
12 wants to eliminate the producer-handlers, is comprised
13 of some of the largest players in this industry,
14 including Dean Foods, which had \$12 billion in sales
15 last year?

16 A. That's what I understand.

17 Q. With regard to your own marketing area,
18 the Northwest Dairy Association, is that the largest
19 co-op in your area?

20 A. Yes.

21 Q. And I think when Mr. Rowe, their senior
22 vice president and general counsel for Darigold
23 testified, when I asked him the question about whether
24 they controlled 80 percent of the milk in that area, I
25 think he said it was more than that. Does that comport

1 with your understanding?

2 A. That's my understanding.

3 Q. Now, you understand that they want to
4 eliminate producer-handlers?

5 A. Very much so.

6 Q. Exhibit 7, which has been marked in this
7 case, shows that as of December of 2008, the percentage
8 of sales by producer-handlers in the Federal Order areas
9 is about 1.5 percent across the entire Federal Order
10 system. Now, I'll ask you a question.

11 Do you think, based upon what you know
12 about this dairy industry, given the significant control
13 exhibited by the people who want to eliminate
14 producer-handlers, and the amount of milk that's
15 actually sold by producer-handlers at 1.5 percent,
16 pursuant to Exhibit 7, that it is possible that the
17 producer-handlers are disrupting these people?

18 A. In my opinion, in the 30 years I've been
19 in the business, I have seen no significant disruption
20 from us who are very small percentage.

21 Q. And by logic, taking it out of the dairy
22 industry for a moment, is it possible that the smallest
23 players can actually disrupt the largest players in any
24 industry?

25 A. I would think it highly unlikely.

1 Q. Thanks.

2 JUDGE CLIFTON: Who will next
3 cross-examine Mr. Gilbert? Mr. Rower?

4 MR. ROWER: I don't have any questions
5 for the witness, your Honor.

6 JUDGE CLIFTON: Are you close enough?

7 MR. ROWER: Sorry. I don't have any
8 questions for the witness, your Honor, but I
9 want to thank Mr. Gilbert for coming in and
10 expressing his views this morning. Thank you,
11 sir.

12 THE WITNESS: Thank you.

13 MR. VETNE: Don't leave yet.

14 JUDGE CLIFTON: Mr. Vetne, any redirect?

15 REDIRECT EXAMINATION

16 BY MR. VETNE:

17 Q. I just wanted to follow up on a couple of
18 questions that were asked of you.

19 First, with respect to your finding a
20 temporary home for your farm milk while the plant was
21 being rebuilt, that home being in Montana, did you have
22 an alternative market, temporary market for your
23 producer milk in Washington that would allow you to
24 bring it back online in the plant whenever you wanted
25 to?

1 A. Not an economical one.

2 Q. The -- the market is mostly supplied by a
3 very few large suppliers, including -- including
4 Darigold or Northwest Dairy Association?

5 A. Correct.

6 Q. Did you have an option to temporarily be
7 part of the Darigold supply, and rather than hauling
8 your milk all the way -- or reach all the way to Montana
9 for a customer?

10 A. You know, we never investigated with
11 Darigold the possibilities. Just from past experience,
12 we, in selling them our excess milk, so they would --
13 they would have taken all of our milk in the excess
14 department. But we didn't explore any kind of contracts
15 for doing anything else.

16 Q. Did you know whether Darigold accepts and
17 markets nonmember milk that can enter its supply chain
18 and leave its supply chain at will?

19 A. No.

20 Q. By the way, have you ever done anything
21 like this before, appeared as a witness at any kind of
22 proceeding?

23 A. This is the first opportunity.

24 Q. All right. And during '03 and '04 when
25 you were rebuilding your plant, did you participate in

1 the proceedings out West at that time?

2 A. I did not.

3 Q. You were busy doing other things?

4 A. We were in contact with those that were
5 involved in it and had discussions, but we didn't
6 actively participate.

7 Q. It was during that time that you were
8 trying to get back on your feet, correct?

9 A. Yeah, that also.

10 Q. I neglected one thing. When you started
11 the operation in Washington, there was an opportunity
12 for dairy, an opportunity for a plant. Your farm
13 currently is not located on the same premises as your
14 plant, is that correct?

15 A. Correct.

16 Q. How do you get the milk from your farm to
17 your plant?

18 A. We have our own trucks and we truck it.

19 Q. What's the size of your trucks, capacity?

20 A. We have a couple in the neighborhood of
21 6,000 gallon.

22 Q. Is that relative -- it's not a huge
23 tanker truck, is it?

24 A. It's -- it's about -- yeah, it's pretty
25 good size.

1 Q. It's not a 50,000 pound --

2 A. No, no.

3 Q. -- tanker?

4 A. Yes, it's 54,000 pounds.

5 Q. It's -- over-the-road tanker --

6 A. Yes.

7 Q. -- same as a gasoline truck?

8 A. Yes.

9 Q. Good. What about distribution trucks?

10 A. We use reefers. Actually, we use
11 four-axle reefers to try to be efficient because we have
12 a long way to travel.

13 Q. All the trucks are owned by you?

14 A. Correct.

15 Q. Is your tank -- tanker truck used for any
16 other commercial purpose when it's not hauling milk for
17 you?

18 A. No. Strictly our own use.

19 Q. Somebody asked you some questions about
20 your loan arrangements with the bank and those
21 arrangements include a projected cash flow that included
22 your producer-handler revenue?

23 A. Correct.

24 Q. And you're not aware of any provision
25 about calling the note if -- if those projections

1 changed, correct?

2 A. Well, if those projections changed --

3 Q. No --

4 A. -- then there's always --

5 Q. I mean, the --

6 A. If the regulatory -- no.

7 Q. If the regulatory status changed, and
8 your projections were based on regulatory status of
9 producer-handlers for some 70 years or so?

10 A. Correct.

11 Q. However, the note would be called if you
12 couldn't pay your monthly payment, correct?

13 A. That's my understanding.

14 Q. Okay. And it's your belief that if your
15 status as a producer-handler were terminated and your
16 investment was not grandfathered in some way, that you
17 would not be able to pay the note and therefore it would
18 be called?

19 A. That's correct.

20 MR. VETNE: Thank you very much.

21 JUDGE CLIFTON: Thank you, Mr. Vetne.

22 Mr. Miltner, please come forward. I have a
23 question in the meantime. Is reefer a nickname
24 for some sort of name for refrigerated truck?

25 THE WITNESS: That's correct.

1 JUDGE CLIFTON: And does anybody know how
2 to spell that?

3 THE WITNESS: Reefer.

4 MR. MILTNER: I have seen it as
5 r-e-e-f-e-r.

6 JUDGE CLIFTON: All right. Thank you.

7 MR. MILTNER: I have one question to
8 clarify an answer that you gave to Mr. Vetne on
9 redirect.

10 RECROSS-EXAMINATION

11 BY MR. MILTNER:

12 Q. The question as I heard it was, do you
13 know whether Darigold, NDA, allows nonmember milk to be
14 marketed through the co-op and to leave at will or
15 something like that. And your answer was no. Was your
16 answer no, I don't know whether that's the case, or no,
17 they do not allow that to occur?

18 A. There again, I didn't investigate it.
19 It's my understanding, though, that with Darigold you
20 have to enter into a long-term contract with them. And
21 so to come and go at will, that option is not available.
22 That's my own personal understanding.

23 MR. MILTNER: Thank you.

24 JUDGE CLIFTON: Let's go off record for
25 just a moment.

1 (Off the record.)

2 JUDGE CLIFTON: Back on record at 9:01.

3 Any other questions for Mr. Gilbert?

4 FURTHER REDIRECT EXAMINATION

5 BY MR. VETNE:

6 Q. The Edaleen you referred to in your
7 statement, is that a different spelling than Mr. Miltner
8 just gave, that's the same plant?

9 A. Same plant. My own unique way of
10 spelling it probably.

11 MR. VETNE: Thank you. No more
12 questions.

13 JUDGE CLIFTON: Do we know which is
14 right, is it l-e-e-n or is it l-e-n-e?

15 MR. VETNE: Mr. -- I defer to
16 Mr. Miltner.

17 JUDGE CLIFTON: Mr. Miltner, are you
18 quite confident that's it's l-e-e-n?

19 MR. MILTNER: I have confidence in that.

20 JUDGE CLIFTON: All right. That's what
21 we'll adopt for this proceeding, l-e-e-n.

22 JUDGE CLIFTON: Mr. Gilbert, thank you so
23 much. I really applaud you for continuing to
24 rise in spite of adversity.

25 THE WITNESS: Thank you.

1 JUDGE CLIFTON: You're welcome.

2 Mr. Vetne, who will be the next witnesses?

3 MR. VETNE: There will be a pair of
4 witnesses from Mallorie's Dairy.

5 JUDGE CLIFTON: Good. Let's go off
6 record while we put one more chair in the
7 witness box.

8 (Off the record.)

9 JUDGE CLIFTON: Back on record at 9:03.
10 Is there any objection of admission into
11 evidence of Exhibit 81, which is Mr. Gilbert's
12 statement? There is none, Exhibit 81 is hereby
13 admitted into evidence.

14 (Exhibit 82 was marked for
15 identification.)

16 I have marked Charles Flanagan's
17 statement for Mallorie's Dairy as Exhibit 82.
18 And now I would like each of you to identify
19 yourself, and you do have to be close to the
20 microphone when you do that, so you end up
21 having to pass it back and forth.

22 MR. VETNE: Please try to be about two or
23 three inches from the microphone, otherwise your
24 voice won't carry.

25 MR. MALLORIE: My name is Rick Mallorie,

1 and that's R-i-c-k, M-a-l-l-o-r-i-e, president
2 of Mallorie's Dairy.

3 JUDGE CLIFTON: Thank you. You have a
4 booming voice so you can get away with three
5 inches.

6 MR. MALLORIE: Okay.

7 JUDGE CLIFTON: But you do have to make
8 sure that the microphone is positioned between
9 you and Mr. Vetne when you talk so that you're
10 looking right toward the microphone.

11 MR. MALLORIE: Yes, ma'am.

12 JUDGE CLIFTON: All right.

13 MR. FLANAGAN: My name is Charles
14 Flanagan, C-h-a-r-l-e-s, F-l-a-n-a-g-a-n. I'm
15 business manager at Mallorie's Dairy.

16 JUDGE CLIFTON: I'll swear you both in at
17 the same time, and then if you're asked a
18 question and you're aware that someone reading
19 the transcript would not know which of you is
20 speaking, if you'll just state your name before
21 you answer. That way it will be really clear who
22 the testimony is coming from.

23 RICK MALLORIE AND CHARLES FLANAGAN
24 of lawful age, being duly sworn, were examined and
25 testified as follows:

1 JUDGE CLIFTON: Thank you, each answered
2 yes. Mr. Vetne, you may proceed.

3 DIRECT EXAMINATION

4 BY MR. VETNE:

5 MR. VETNE: Mr. Mallorie, Mr. Flanagan,
6 before we begin with a prepared statement and
7 oral testimony about Mallorie's, I would like
8 you to each tell us something about yourself,
9 your experience, your history in the dairy
10 industry. Why don't you start with you,
11 Mr. Mallorie?

12 MR. MALLORIE: Yes, I'm Rick Mallorie,
13 and I've been in the dairy business all my life.
14 My father started the dairy in the early '50s,
15 started bottling milk in '54. And when I was
16 about five I started hanging around with him
17 quite a bit. And have been there all my life,
18 that's what I know.

19 MR. VETNE: Okay. Mr. Flanagan,
20 something about your background, your work
21 experience.

22 MR. FLANAGAN: My grandfather and my dad
23 were both long-time dairymen. So I was raised
24 in that industry. I studied animal science at
25 Oregon State, got a bachelor's degree there. I

1 worked with my dad for a while and I worked on
2 other dairies in Oregon and eventually worked on
3 a large dairy in Arizona.

4 While I was there, I took the opportunity
5 to go to Arizona State University and got a
6 second degree in accounting. I did work in
7 public accounting for about five years, and when
8 I moved back to Oregon, I came back to Oregon to
9 work at Mallorie's Dairy, where I could use both
10 of those areas of education. That was in 1982.
11 So I've been there over 26 years in capacity as
12 business manager.

13 JUDGE CLIFTON: Thank you. Mr. Flanagan,
14 put the microphone back in front of
15 Mr. Mallorie.

16 Mr. Mallorie, your business manager has a
17 prepared statement, but before he does that, can
18 you tell us a little bit about the history of
19 Mallorie's Dairy and how you started and how you
20 got where you are?

21 MR. MALLORIE: Rick Mallorie again. And
22 I started to say earlier, my dad started the
23 dairy in the early '50s -- he was a
24 veterinarian -- and started bottling milk in '54
25 with nothing. And has built it up to where in

1 1979, we were milking right at 2,000 head of
2 animals and did that until 2005, when we cut
3 back -- or 2006, when the 3 million pound cap
4 came into effect.

5 At that time we consolidated our
6 operation to try to stay under the 3 million
7 pound cap, which we have succeeded in doing and
8 not being in the pool market.

9 It's a family business. I'm the
10 president. My sister takes care of the cow
11 records and what -- the daily herd health that's
12 going on. Charlie's been with us. He's almost
13 like a brother or something, he's been there so
14 long. Our herdsman have been with us in the 25
15 year range. It's just a small operation and
16 it's -- we know each other and we're not some
17 big factory.

18 MR. VETNE: Are there family members that
19 you hope will take the business to the next
20 generation -- generations?

21 MR. MALLORIE: There's hope. There's
22 hope that way, but we're not sure.

23 MR. VETNE: Okay. Could you put the
24 microphone back in front of Mr. Flanagan?

25 Mr. Flanagan, you have a -- you have a

1 prepared statement concerning Mallorie's, its
2 business operations and the proposals, correct?

3 MR. FLANAGAN: That's correct.

4 MR. VETNE: Is there anything you want to
5 add to the history before you proceed with your
6 written statement?

7 MR. FLANAGAN: Not at this time.

8 MR. VETNE: Okay. Proceed, please, then.

9 JUDGE CLIFTON: Now, I'm going to ask you
10 to position the microphone so that it's directly
11 between you and Mr. Vetne, close to you --
12 closer to you, I think.

13 MR. VETNE: There you go.

14 JUDGE CLIFTON: There.

15 MR. VETNE: I agree.

16 MR. FLANAGAN: As you can see, this is
17 not something I do a lot. We just heard -- Rick
18 Mallorie gave a brief history of Mallorie's
19 Dairy, and I intend to provide some details on
20 the operation, the market, competition, costs,
21 and also our perspective on IDFA and National
22 Milk Federation Proposals 1 and 2 and as the
23 reason why we're here.

24 During 2008, our milk production averaged
25 about 3.1 million pounds per month. Class I

1 packaged fluid milk use averaged 63 percent,
2 Class II use averaged 15 percent per month, and
3 Class IV ranged from 9 percent to 29 percent,
4 with an average of 22 percent for the year.
5 Production volume and Class utilization
6 information for the years 2007 and 2008 are
7 summarized below.

8 Our Class I sales have slipped some as we
9 have lost customers primarily due to warehouse
10 discount rebate programs. Most of the Class II
11 sales that we have are to food manufacturers who
12 make yogurt, soups and other food products. And
13 our Class IV sales is -- sales are all surplus
14 milk.

15 Selling excess cream is not a problem.
16 We seldom have any surplus and if we do,
17 Larsen's Creamery will always take it for a fair
18 price. Surplus milk is a different story.
19 Farmer's Co-op Creamery will take it if they
20 have the capacity to handle it, and they will
21 pay us the lowest class price less a \$2 a
22 hundredweight make allowance. Darigold also
23 would probably take it at the same price but it
24 would involve a 260 mile round trip to Chehalis,
25 Washington for an additional transportation cost

1 of about a dollar per hundredweight. Our usual
2 market for surplus milk is Valley Crest Foods in
3 Myrtle Point, Oregon, which is a 400 mile round
4 trip, which costs about \$1.50 per hundredweight
5 in transportation cost. They pay the lowest
6 class price less a dollar to \$2 a hundredweight.

7 We haul with our own tanker that holds
8 about 6,400 gallons. Most of the larger
9 handlers use 7,500 gallon configurations which
10 give them a 15 to 20 percent cost savings on
11 hauling. We would have the opportunity to sell
12 to several small processors that would like to
13 buy our high-quality, rbST milk, but they are
14 discouraged from that by the Federal Order
15 pooling rules and co-op supply agreement
16 penalties that they would have to pay.

17 We have not purchased any milk from
18 outside for several years. But when we did,
19 there was a \$2 up charge on all milk and the
20 milk we received was of poor quality compared to
21 our own. Our customers and consumers expect
22 high standards and appreciate our ability to
23 control the whole process from cow to store. We
24 couldn't do that with outside milk.

25 All milk delivered directly by Mallorie's

1 is within a 50-mile radius. Our distributors'
2 range is mostly within 60 miles, although some
3 milk goes to central and southern Oregon and
4 also along the Coast. Our primary customers
5 are: Roth's Family Markets, which is a local
6 grocery chain, and they've been our customer for
7 over 40 years; Food 4 Less/Shop N' Kart, which
8 is also a local grocery chain, they've been with
9 us for 15 years. And we have two distributors,
10 independent distributors, Spring Valley Dairy
11 and Sun Star Dairy, both of which have been
12 customers for over 30 years.

13 Due to the long history with these
14 customers, there is a lot of loyalty, trust and
15 confidence that they will always be charged a
16 fair price without gimmicks, they will receive
17 great service and excellent quality products.
18 We also serve several small customers that would
19 not be able to purchase milk elsewhere at a
20 reasonable cost. Mallorie's also bottles a
21 small amount of special kosher milk that
22 requires special segregation and handling of one
23 pen of cows and separate handling and processing
24 of that milk.

25 A growing number of consumers are

1 concerned about where their milk comes from, how
2 it is produced and that it is produced locally.
3 Mallorie's can comply with these concerns. Most
4 of the larger processors cannot, despite their
5 claims about being your local dairy, or that
6 their milk comes faster from the pasture. We do
7 have the advantage that our milk travels
8 directly from the milking parlor to the
9 processing plant through a pipeline.

10 Mallorie's customers are constantly
11 bombarded in the marketplace with price offers
12 and sales schemes to encourage them to change
13 suppliers. The wholesale grocery distributors
14 are especially aggressive, offering generous
15 volume discounts and rebates on total grocery
16 purchases, which would be enhanced by purchases
17 of milk from the warehouse. The sources of this
18 milk are regulated plants. Proprietary plants
19 such as Safeway are very aggressive in their
20 pricing as well. At one time we had over 20
21 independent Thriftway stores, but we eventually
22 lost them all to generous pricing and rebate
23 programs that we could not match.

24 If current customers were forced to buy
25 from competitors, they will pay higher prices.

1 Transportation costs alone would be substantial.
2 All customers that we deliver to are within
3 50 miles of our plant. Mallorie's has always
4 been competitive on price and has been the
5 source of milk for hundreds of customers too
6 small to be served economically by the large
7 processors. Through our jobbers we serve a
8 niche of small customers ignored or exploited by
9 others.

10 We also do orders, specialty orders that
11 are too small to be economical for large
12 processors. And examples are special butterfat
13 products for food manufacturers and special
14 kosher milk.

15 Milk sales competition in the Willamette
16 valley is intense. Safeway and Kroger have
17 their own bottling plants and distribution
18 networks. Darigold, Andersen Dairy, Alpenrose,
19 Sunshine Dairy and others distribute throughout
20 the area. They control most of the volume to
21 national grocery chains, big box stores and
22 wholesale grocery warehouses. All of these
23 processors market very aggressively. At times
24 we have been forced to lower our prices to meet
25 their price offers. We have lost more than a

1 dozen independent stores due to price and
2 marketing allowances that Mallorie's could not
3 match. The lowest cost milk supplier in this
4 area is Safeway, who sells to distributors as
5 well through its own stores. Since Mallorie's
6 does not have a complete line of dairy products,
7 we can't penetrate some markets.

8 Our distributors service a wide range of
9 small customers that in the past were poorly
10 served and at exorbitant prices. These
11 businesses would be adversely affected if not
12 supplied through Mallorie's.

13 Mallorie's is too small to solicit larger
14 accounts. We continue to have relationships
15 with two local independent chains, but have had
16 no luck attracting new accounts of this type.
17 Factors such as a lack of a full line of
18 products, less familiar brand name and wholesale
19 grocery rebate incentives and warehouse
20 financing to grocery stores restrict our ability
21 to access -- access other independent stores.

22 Our processing plant is old, undersized
23 and poorly laid out. It started out as a hop
24 dryer and has been added on to and expanded many
25 times. Most of our equipment is fairly modern,

1 although much of it is used and was acquired
2 from other processors. We don't have our own
3 blow mold for making plastic jugs, which puts us
4 at a cost disadvantage.

5 One of the difficulties of operating as a
6 producer-handler is that both sides of the
7 business require the scarce resources of time,
8 management and investment. Since these
9 resources are always limited, it is a difficult
10 balancing act to determine which projects get
11 approved and which don't.

12 The processing cost-per-gallon of a small
13 plant like ours is definitely higher than the
14 large plants of our competitors. There are few,
15 if any, other process or plants as small as the
16 largest producer-handler plants in Federal
17 Order 124. Because of the mixing of costs
18 between the dairy and the processing operations
19 on our farm, it is difficult to segregate
20 accurate cost data. We currently add a
21 processing charge of 71 cents per gallon, which
22 includes the cost of the container. I have
23 tried to find statistics on cost variation based
24 on plant size, but so far the most recent I
25 found was dated in 1987. That data showed that

1 a plant processing 300,000 gallons per month had
2 a processing cost of about 40 cents per gallon,
3 compared to a 2.5 million-gallon per month plant
4 cost of less than 27 cents. That translates to
5 a small plant processing cost disadvantage of
6 nearly 50 percent. Although these numbers are
7 old, I think modern numbers would reflect that
8 the same economics of scale are still enjoyed by
9 larger processors.

10 The producer-handler exemption issue has
11 recently been reviewed extensively in the
12 Pacific Northwest and the Arizona Federal Orders
13 and new rules went into effect in 2006.
14 Producer-handlers in these Federal Orders have
15 painfully adjusted to these new rules and there
16 is no justifiable reason to address the subject
17 again.

18 The Pacific Northwest Federal Order has
19 already considered the producer-handler
20 exemption in detail. The result of two years of
21 hearings and administrative procedures was a
22 ruling that limited the producer-handler
23 exemption to only those producer-handlers with
24 less than 3 million pounds of Class I
25 utilization per month. This is the same

1 exemption that National Milk Producers
2 Federation described as fair in a June 23rd,
3 2005 letter to Secretary Johanns. Now they are
4 back asking for further restrictions on
5 producer-handlers.

6 It is unfair to allow the huge co-op and
7 processor organizations to systematically
8 destroy the producer-handlers and others with
9 continuing regulatory attacks. Their purpose is
10 to consolidate their control of the milk market,
11 to restrict and disrupt competitors and to
12 eliminate an entire class of independent dairy
13 farmers.

14 The arguments of IDFA and NMPF are
15 misleading. True, some producer-handlers today
16 are much larger than any of the 1930s. This is
17 the very same growth trend experienced by all
18 dairy industry participants. All are fewer in
19 number and larger in size. Dairy farms, milk
20 processors, co-ops and customers have all grown
21 in sizes never imagined in the 1970. To single
22 out producer-handlers for blame is unreasonable.

23 National Milk argues that the potential
24 exists for producer-handlers to proliferate
25 across the market, but history has shown that

1 the number of producer-handlers is steadily
2 declining, not increasing. Despite what
3 producer-handler opponents claim, it is not easy
4 to start up or operate a producer-handler
5 business. According to USDA statistics, there
6 were 348 producer-handlers in October 1959 and
7 only 79 left by December 2001. The number today
8 is probably between 40 and 50. Only five
9 producer-handlers still survive in Federal
10 Order 124. The alleged producer-handler
11 advantage and risk of proliferation have been
12 greatly exaggerated.

13 NMPF also discusses in detail how
14 producer-handlers supposedly disrupt the orderly
15 marketing of milk in a market. In the Pacific
16 Northwest Federal Order the number of
17 producer-handlers has decreased from 14 in
18 June 1997 to six in November of 2008, one of
19 which is actually located in Colorado. The
20 percentage of Class I sales by producer-handlers
21 has consistently been less than 4 percent for
22 the last several years. This can hardly be
23 categorized as disruptive.

24 Producer-handlers in Federal Order 124 do
25 not threaten orderly marketing nor do they

1 undermine the pool. The calculated effect in
2 2007 was less than 4 cents per hundredweight on
3 total pool utilization. In the NMPF request for
4 hearing letter, they calculated the benefit that
5 producer-handlers receive from Class I sales
6 percentage greater than the pool Class I
7 percentage, but they failed to consider the
8 negative consequences of disposing of surplus
9 milk by a producer-handler at the Class IV
10 price, less a substantial penalty. The net
11 advantage is such an insignificant amount that
12 it does not support accusations of market
13 disruption or unfair advantage by
14 producer-handlers. The economic effect of
15 eliminating the producer-handler exemption is
16 the disruption of several family-owned
17 businesses that have been here for many decades
18 with very little compensating benefit to the
19 pool.

20 NMPF states that producer-handlers were
21 originally given special status for
22 administrative reasons. One of the major
23 reasons for the Agricultural Adjustment Act of
24 1933 was to remedy -- to remedy processor abuses
25 and to eliminate processors from price gouging

1 producers. Minimum prices were established for
2 payment by processors to producers. Since
3 producer-handlers neither bought nor sold milk,
4 they were exempt from these pricing regulations.
5 Over the last 70 years, the producer-handler
6 exemption has been reexamined numerous times.
7 The fact that the exemption has remained in
8 place is likely due to a lack of evidence that
9 producer-handlers are disruptive, and because
10 USDA wisely refused to destroy an innovative
11 business model that has withstood the test of
12 time, that meets contemporary customer
13 preferences, and that serves as a viable
14 alternative to the co-op system.

15 Proponents of the proposal to eliminate
16 the producer-handler exemption argue that it is
17 good policy to establish uniform provisions
18 across all Federal Orders. While that sounds
19 good in theory, it has historically never been
20 the case. While there are similarities between
21 the various orders, distinct differences have
22 always been present. One such example is the
23 3 million pound limit applied to the Arizona and
24 Pacific Northwest markets that do not exist in
25 other Federal Orders. There is no good reason

1 why the Pacific Northwest can't continue under
2 the current rules that were approved less than
3 three years ago.

4 Although USDA decided in 2006 to classify
5 producer-handlers under the Regulatory
6 Flexibility Act based on their size as
7 producers, the fact is that all Pacific
8 Northwest producer-handlers are clearly small
9 businesses based on their size as processors.
10 They are a small plant subset of milk processor
11 small businesses. None of these
12 producer-handlers processing plants can compete
13 with the large pool plants with their size,
14 economies of scale and marketing connections.
15 The producer-handler exemption allows these
16 small processors to compete.

17 In summary, the producer-handler
18 exemption has been debated and decided in the
19 Pacific Northwest and the Arizona Federal Order.
20 There is no reason to re-open the issue. NMPF
21 and IDFA clearly have superiority in numbers and
22 political muscle. In a democracy, even though
23 the majority rules, the majority has a strict
24 obligation to protect the basic rights of the
25 minority. We ask USDA to do the same.

1 Operating as a pool plant would have
2 catastrophic effects on our business. Based on
3 sample charge computations provided by the
4 Market Administrator's office, we were able to
5 compute the hypothetical pooling charge we would
6 have had to pay if we were a nonexempt -- if we
7 were nonexempt. For the years 2007 and 2008,
8 the pooling charges would have averaged \$40,000
9 per month, with a high of 74,000 and a low of
10 10,000. Such a large cash flow drain would
11 force us to reevaluate our entire business, if
12 we could survive at all.

13 Current stresses in the banking industry
14 combined with dismal milk price forecasts and
15 high input costs are already making it more
16 difficult to renew lines of credit. Projecting
17 future income losses of \$40,000 per month are
18 having a negative impact on our credit
19 relationships.

20 When the Federal Order 124
21 producer-handler exemption was set at a maximum
22 of 3 million pounds, Mallorie's Dairy responded
23 by reducing our herd size to 800 cows -- and --
24 excuse me, by 800 cows and 800 replacement
25 animals in order to stay below the cap. We also

1 closed our heifer-raising facility in Central
2 Oregon and closed a 300-cow dairy that we were
3 leasing. About 25 employees lost their jobs and
4 purchases of feed, other supplies and services
5 were reduced by nearly one-third, or over
6 \$3 million a year.

7 If the current producer-handler exemption
8 is lost, it is unlikely that Mallorie's Dairy
9 could continue to operate either the production
10 side or the processing plant long term. The two
11 departments operating in tandem, with the
12 exemption from paying pooling charges generate
13 a modest profit in most years. Without the
14 exemption, we would not be profitable much of
15 the time. This business was built over a period
16 of five decades with the expectation that the
17 exemption would remain in effect. To abruptly
18 change the rule now leaves no time for the
19 business to reorganize or reengineer a new
20 business model.

21 If Mallorie's were to go out of business,
22 50 more employees would lose their jobs. Most
23 have been here at least ten years, some over 20.
24 The impact on the local and Oregon economy would
25 be a loss of over \$6 million a year. Many loyal

1 customers who appreciate locally owned and
2 controlled products would be forced to buy other
3 brands. Mallorie's has had relationships with
4 Roth's Fresh Markets, Spring Valley Dairy, and
5 Sun Star Dairy that go back over 40 years.
6 Through our jobbers, we also -- we are also the
7 economical source of milk for hundreds of small
8 businesses that previously were gouged by the
9 large processors with inflated prices and
10 minimum stop charges. These customers would be
11 seriously hurt, possibly leading to more
12 business failures and loss of jobs.

13 Mallorie's participates with other local
14 dairies in the purchase of railcar loads of
15 feed, commodities through a central buyer and
16 unloading operation. Without our participation,
17 the economics and scale of this operation would
18 be negatively impacted.

19 In conclusion, Proposals 1 and 2 should
20 be rejected. If some rules are necessary to
21 control industrial-sized producer-handlers, the
22 existing rules in the Pacific Northwest market
23 should be used as a model for other milk orders.
24 If Proposals 1 and 2 are adopted, existing
25 investment by producer-handlers, made in

1 reliance on 70 years of regulatory policy,
2 should be grandfathered. We have made a
3 reasonable grandfathering proposal in
4 Proposal 17. We do not believe that a pool
5 exempt volume for grandfathered plants should be
6 employed regardless of whether -- regardless of
7 possible future growth of the plant. That would
8 potentially give a large plant with exempt
9 volume a competitive advantage over plants of
10 similar large size. That is not our intent.

11 A plant such as ours would have a
12 grandfathered volume of 2 million pounds per
13 month under Proposal 17. If we ever grow to
14 6 million pounds per month, we would be paying
15 the full pool obligation on two-thirds of our
16 milk. Since 6 million pounds per month is the
17 approximate size of a few of the smallest
18 fully-regulated distributing plants, it is a
19 good point at which to eliminate all exempt milk
20 for a grandfathered plant.

21 And thank you for giving us this
22 opportunity to tell you a little bit about
23 Mallorie's Dairy and to hear our views on these
24 issues.

25 MR. VETNE: Mr. Flanagan, that concludes

1 the statement written in Exhibit 82. But there
2 is an attachment to Exhibit 82, the first page
3 of which is a Market Administrator's report for
4 the Pacific Northwest and Arizona marketing
5 areas for February 2009. There's some
6 information copied from that report that's
7 attached to your statement, correct?

8 MR. FLANAGAN: That's correct.

9 MR. VETNE: The cover and two additional
10 pages. The second page of that attachment is on
11 page 4. There was some information that you
12 wanted to be sure to make some comments on and
13 observations and perhaps questions for the
14 record. Can you identify that?

15 MR. FLANAGAN: Yes. If you look at the
16 bottom section, under Annual Supplemental
17 Statistics, there is -- the first group there is
18 producer-handler data, and it shows a Class I
19 use of 267 million pounds. And when I was
20 looking at that --

21 MR. VETNE: 267. You're referring to --

22 MR. FLANAGAN: Under 2008.

23 MR. VETNE: 2008, Production of -- almost
24 328 million pounds, with Class I use of over
25 267 million?

1 MR. FLANAGAN: Right.

2 MR. VETNE: Okay. Go ahead.

3 MR. FLANAGAN: When I got to looking at
4 that, I thought, how can that be. There's only
5 five producer-handlers in the Pacific Northwest.
6 And with a 3 million pound limit on each, that's
7 nowhere near that amount of milk.

8 If you look at the next category down, it
9 shows Class I route disposition in the area by
10 producer-handlers, and there it's about
11 80 million. So I was wondering what the
12 discrepancy was. So I contacted the Market
13 Administrator's office and found out that in the
14 top category, any producer-handler that has any
15 Class I sales in the Pacific Northwest Order,
16 all of their Class I sales are in that figure.

17 MR. VETNE: All of their Class I sales
18 anywhere in the country?

19 MR. FLANAGAN: Right.

20 MR. VETNE: And that explains the high --
21 the high number for production and the high
22 number for Class I use under the Pacific
23 Northwest for producer -- for producer-handlers
24 in the supplemental statistics?

25 MR. FLANAGAN: That's correct. And my

1 concern was that that could be very misleading
2 if you didn't know all the background of where
3 those numbers come from.

4 MR. VETNE: Okay. And the -- the same
5 observations and data on a monthly basis for
6 November and December of 2008 is on the last
7 page of the attachment to your exhibit, which
8 would be page 6 of the monthly publication of
9 the Market Administrator?

10 MR. FLANAGAN: It's consistent with the
11 annual figures.

12 MR. VETNE: That is for December of 2008?
13 For example, producer-handler production of
14 28 million pounds represents the production of
15 approximately five producer-handlers in the
16 Pacific Northwest and all of the milk production
17 of any producer-handler that had distribution in
18 the Pacific Northwest?

19 MR. FLANAGAN: I believe that's correct.

20 MR. VETNE: You indicated your belief.
21 Who or what organization provided you with that
22 belief?

23 MR. FLANAGAN: Market Administrator's
24 office.

25 MR. VETNE: Who did you talk to in the

1 Market Administrator's office for that?

2 MR. FLANAGAN: John Mykranz, who has been
3 very helpful.

4 MR. VETNE: Thank you very much. Now
5 that you have concluded your testimony, is there
6 any other comment you wish to give before others
7 ask you questions?

8 MR. FLANAGAN: I don't think so.

9 MR. VETNE: Thank you very much.

10 JUDGE CLIFTON: Mr. Vetne, I would like
11 to take our 20-minute morning break now before
12 we begin cross-examination.

13 MR. VETNE: That would be great.

14 JUDGE CLIFTON: All right. Good. I do
15 need a spelling for the court reporters on John
16 Mykranz, and I'll let you do that when we're off
17 record. All right. We'll go off record, 9:41.

18 (A recess was taken from 9:41 to 10:01.)

19 JUDGE CLIFTON: All right. Let's go back
20 on record. We're back on record at 10:03. I
21 would like to invite cross-examination of the
22 panel. Who would like to be first to
23 cross-examine either Mr. Mallorie or
24 Mr. Flanagan?

25 Mr. English, thank you.

1 CROSS-EXAMINATION

2 BY MR. ENGLISH:

3 MR. ENGLISH: Good morning, gentlemen, my
4 name is Charles English.5 Mr. Flanagan, I think you've -- I
6 hesitate to say had the pleasure, but
7 experienced one of these Federal Order
8 proceedings before, correct?9 MR. FLANAGAN: That's correct. Though I
10 wouldn't want to make a career of it.11 MR. ENGLISH: I don't have a lot of
12 questions for you. When you say in your
13 testimony that for 2008 your milk production
14 averaged 3.1 million pounds per month, was that
15 the milk production on-the-farm portion versus
16 what was processed through the plant?17 MR. FLANAGAN: That's on-the-farm
18 production.19 MR. ENGLISH: And you have testified
20 about a fairly limited distribution area, and I
21 just want to test it so the record is clear. Do
22 you have any sales directly or through
23 distributors into California?

24 MR. FLANAGAN: Not that I'm aware of.

25 MR. ENGLISH: Do you have any sales

1 directly or indirectly into Canada?

2 MR. FLANAGAN: No.

3 MR. ENGLISH: Do you sell milk either in
4 bulk form or in packaged form to Alaska?

5 MR. FLANAGAN: No.

6 MR. ENGLISH: Do you have any sales of
7 milk into Idaho -- sorry. Do you have any sales
8 into Idaho?

9 MR. FLANAGAN: No, we do not.

10 MR. ENGLISH: How about Nevada?

11 MR. FLANAGAN: No, no.

12 MR. ENGLISH: How far east in Oregon do
13 you go?

14 MR. FLANAGAN: We don't go there
15 ourselves. But our -- one of our distributors
16 is in central Oregon.

17 MR. ENGLISH: How about east of the
18 range, the mountains? Do they go as far as east
19 of the mountains?

20 MR. FLANAGAN: Not that I know of.

21 MR. ENGLISH: And to the extent that
22 distributor has some sales in the central part
23 of the state, are you -- I don't want you to
24 give confidential information, but are they a
25 relatively small portion of your sales?

1 MR. FLANAGAN: Well, we sell -- we sell
2 our milk, and we don't really know where it all
3 goes, I mean, the volume amount.

4 MR. ENGLISH: Is the volume very small,
5 though, total? I'm getting an indication that's
6 not on the record from your colleague. I'm
7 wondering.

8 MR. FLANAGAN: He's a major customer as
9 far as that goes.

10 MR. ENGLISH: He's a major customer, but
11 how about the volume that may be going -- if you
12 want to hand the microphone over if the
13 gentleman knows more. I'm just wondering what
14 the relative volume is that moves east in
15 Oregon.

16 JUDGE CLIFTON: Mr. Mallorie.

17 MR. MALLORIE: Yes, I'm Rick Mallorie,
18 and it is a very, very small amount. I'm going
19 to say less than a thousand gallon a week. It
20 goes into central Oregon, as far east as John
21 Day.

22 MR. ENGLISH: I'm sorry?

23 MR. MALLORIE: John Day, I believe.

24 MR. ENGLISH: How is that spelled?

25 MR. MALLORIE: J-o-h-n, D-a-y.

1 MR. ENGLISH: Is that two words?

2 MR. MALLORIE: I think so.

3 MR. ENGLISH: Just helping the court
4 reporter, that's all.

5 MR. MALLORIE: Yes.

6 MR. ENGLISH: Now, the last time you
7 appeared, Mr. Flanagan, you testified about some
8 of your milk sales, and I believe that while you
9 had reduced some of your sales at the time, that
10 you still sold to Thriftway at that time?

11 MR. FLANAGAN: To some Thriftways, yes.

12 MR. ENGLISH: And I don't see that on
13 page 2 of your testimony today, so is that some
14 volume that you gave up subsequent to that
15 hearing?

16 MR. FLANAGAN: No. We lost those to
17 competitors.

18 MR. ENGLISH: So it was lost as opposed
19 to voluntarily given up --

20 MR. FLANAGAN: Yes.

21 MR. ENGLISH: -- is what you're saying?
22 Were there any particular customers that you
23 voluntarily gave up in early 2006, in order to
24 drop your volume down below 3 million pounds?

25 MR. FLANAGAN: Yes.

1 MR. ENGLISH: You don't have to tell me.

2 MR. FLANAGAN: Spring Valley is still a
3 customer but they're a smaller customer than
4 they were before. They had to find a milk
5 supply elsewhere.

6 MR. ENGLISH: Is Spring Valley the
7 distributor that distributes east into central
8 Oregon?

9 MR. FLANAGAN: Yes.

10 MR. ENGLISH: So that is, by way of
11 saying that when the producer-handler regulation
12 changed, you didn't -- you didn't try to
13 increase your sales outside of the marketing
14 area, but stay below 3 million pounds inside the
15 marketing area?

16 MR. FLANAGAN: Yes.

17 MR. ENGLISH: That is a true statement,
18 you didn't try to do that, correct?

19 MR. FLANAGAN: We did not look for other
20 markets outside of the area.

21 MR. ENGLISH: Thank you. That's all the
22 questions.

23 JUDGE CLIFTON: Thank you, Mr. English.
24 Who next will cross-examine the panel?
25 Mr. Beshore. Thank you.

1 CROSS-EXAMINATION

2 BY MR. BESHORE:

3 MR. BESHORE: Gentlemen, my name is
4 Marvin Beshore and I represent National Milk
5 Producers Federation and Dairy Farmers of
6 America. I have just a couple of questions.

7 Mr. Flanagan, on page 1 of Exhibit 82, I
8 just want to try to understand the numbers that
9 you provided. You said, during 2008 our milk
10 production averaged about 3.1 million pounds per
11 month. Do you see that? That's the second full
12 paragraph.

13 MR. FLANAGAN: Yes.

14 MR. BESHORE: Okay. If we go down in
15 your chart to the 2008 information, you have
16 provided the total -- under total sales, the
17 volume for 2008 is 32,302,176. Do you see that?

18 MR. FLANAGAN: Yes.

19 MR. BESHORE: Now, my mental math says
20 that 32 million over 12 months is about
21 2.6 million per month average, perhaps.

22 JUDGE CLIFTON: You can go off record to
23 make calculations, if you would like.

24 MR. ENGLISH: Just to get my question,
25 I'm trying to discern if that is roughly 2.6 or

1 so million -- 6 or 7 million, what is the
2 difference between the 3.1 million per month
3 indicated above and the 2.6 or 7 million total
4 sales in the break out?

5 MR. FLANAGAN: Well, I don't have an
6 answer for that. I would say the numbers in
7 the -- well --

8 JUDGE CLIFTON: Let's go off record for
9 just a moment while you think about that.
10 10:10. We'll go off record.

11 (Off the record.)

12 JUDGE CLIFTON: All right. We're back on
13 record at 10:11. Mr. Flanagan, you may respond
14 to Mr. Beshore's query.

15 MR. FLANAGAN: Okay. It was brought to
16 my attention, if you add those numbers across,
17 they don't add up to 32 million. It's more like
18 36 million.

19 MR. BESHORE: When you say, add the
20 numbers across, add the Class I sales, Class II
21 sales and Class IV sales figures on the line
22 2008, pounds?

23 MR. FLANAGAN: Right.

24 MR. BESHORE: All right. So the -- I
25 think the total of 32,302,176 on Exhibit 82 is

1 inaccurate in the totaling of the numbers.

2 MR. FLANAGAN: That's correct, and that's
3 my error.

4 JUDGE CLIFTON: Let's get that right. So
5 what we've got to do is add, from left to right,
6 20 million something, 5 million something, and
7 the 8 million something, is that correct?

8 MR. FLANAGAN: That's correct.

9 JUDGE CLIFTON: Let's go off record just
10 a moment.

11 (Off the record.)

12 JUDGE CLIFTON: All right. We're back on
13 record. It's 10:15. With thanks to Brian Hill,
14 thank you very much, Mr. Hill.

15 Mr. Flanagan, what is the error in your
16 chart?

17 MR. FLANAGAN: The number on the far
18 right is off by an even 5 million pounds. So
19 the total should be 37,302,176.

20 MR. BESHORE: Thank you very much,
21 Mr. Flanagan.

22 Now, you testified that when the current
23 producer-handler regulations in Order 124, when
24 the changes became effective, Mallorie's
25 responded by reducing our herd size by 800 cows,

1 800 replacement animals in order to stay below
2 the cap. That's on page 6 of Exhibit 82. How
3 many cows were you milking prior to that time
4 and how many cows are you milking now?

5 MR. FLANAGAN: We were milking right at
6 2,000 and now we're at 1,200.

7 MR. BESHORE: So you reduced your milking
8 herd by 40 percent? 800 of the 2,000.

9 MR. FLANAGAN: Slightly less than
10 40 percent.

11 MR. BESHORE: My question -- my question
12 is: And you did that -- you felt that was
13 necessary to stay under the cap?

14 MR. FLANAGAN: Yes.

15 MR. BESHORE: Okay. Now, going back to
16 page 1 of 82. You've shown that in 2007 and
17 2008 your Class I sales are roughly 2 million
18 per month?

19 MR. FLANAGAN: Yes.

20 MR. BESHORE: Yes. And the cap is
21 3 million per month in the marketing area,
22 correct?

23 MR. FLANAGAN: Correct.

24 MR. BESHORE: Can you tell us anything
25 about -- about that -- that difference? I mean,

1 it appears that you're well under the cap, or
2 are there monthly fluctuations that put you
3 right at the cap?

4 MR. FLANAGAN: We are well under the cap
5 and we are not able to get Class I sales in that
6 competitive market.

7 MR. BESHORE: So were you -- were you
8 under the cap at the -- at the time the fact --
9 the time that the regulations went in effect?

10 MR. FLANAGAN: No, we were over it at
11 that time.

12 MR. BESHORE: So you've lost Class I
13 sales since that time?

14 MR. FLANAGAN: Yes.

15 MR. BESHORE: Okay. On page 3 of your
16 testimony, you indicated that you -- at the
17 second line from the bottom, add a processing
18 charge of 71 cents per gallon. Do you see that?

19 MR. FLANAGAN: Yes.

20 MR. BESHORE: Okay. My question is, what
21 do you add the 71 cents per gallon to?

22 MR. FLANAGAN: To the Class I price.

23 MR. BESHORE: Okay. So when you're
24 setting your wholesale -- wholesale price, you
25 take the Class I prices as announced by the

1 Market Administrator in 124, I take it, and add
2 71 cents per gallon?

3 MR. FLANAGAN: That's correct.

4 MR. BESHORE: And that's, then, the
5 wholesale price of your packaged product?

6 MR. FLANAGAN: Yes.

7 MR. BESHORE: Do you handle all types --
8 all sizes of containers or just certain sizes,
9 or how does it come?

10 MR. FLANAGAN: Mainly just gallons and
11 half gallons in plastic. We also do a small
12 amount of cream in plastic pints.

13 MR. BESHORE: I think -- I think this may
14 be clear, but I just want -- want to make sure.

15 At the conclusion of your testimony,
16 you've indicated some -- you have made some
17 comments about how you -- if I understand them
18 correctly, how you would want Proposal 17 to
19 operate. Did I understand that -- those
20 correctly, that that was your intent with those
21 comments?

22 MR. FLANAGAN: Yes.

23 MR. BESHORE: So that to the extent that
24 the -- that those comments are different than
25 the printed text of Proposal 17, you're in

1 essence modifying it slightly at the hearing?

2 MR. FLANAGAN: That's correct.

3 MR. BESHORE: One other question. You
4 mentioned that the -- the statistics for Order
5 124, when they show six producer-handlers --
6 this is the bottom of page 4, top of page 5 --
7 six producer-handlers in November 2008, one of
8 those producer-handlers is actually located in
9 Colorado. That's at the top of page 5. Can
10 you -- do you know the name of that Colorado
11 producer-handler?

12 MR. FLANAGAN: Well, I suspect I do, but
13 I don't know -- well, yeah, I do. It's listed
14 in the -- in the information that comes from the
15 Federal Order of who the producer-handlers are
16 in that Order.

17 MR. BESHORE: Okay. And that Colorado
18 producer-handler is?

19 MR. FLANAGAN: Aurora Farms.

20 MR. BESHORE: Aurora Organic Dairies?

21 MR. FLANAGAN: Yes.

22 MR. BESHORE: Thank you very much,
23 Mr. Flanagan.

24 JUDGE CLIFTON: Thank you, Mr. Beshore.
25 Who will next cross-examine the members of the

1 panel? Mr. Yale.

2 CROSS-EXAMINATION

3 BY MR. YALE:

4 MR. YALE: Benjamin F. Yale for
5 Continental Dairy Products and Select Milk.
6 Good morning.

7 MR. FLANAGAN: Good morning.

8 MR. YALE: You're -- one of your
9 proposals provides for a grandfather clause,
10 you're aware of that?

11 MR. FLANAGAN: Yes.

12 MR. YALE: And the purpose of that, that
13 would allow you to continue your current
14 existence in operation, even though they changed
15 the regulations for new people, is that right?

16 MR. FLANAGAN: Yes.

17 MR. YALE: Okay. Now, I think you
18 explained the reason for that is that if you
19 aren't grandfathered, then you're probably out
20 of business, is that --

21 MR. FLANAGAN: That's a distinct
22 possibility.

23 MR. YALE: I want to go back. And I
24 guess you also talked about how you had to
25 downsize to meet the last level of regulations,

1 right?

2 MR. FLANAGAN: Yes.

3 MR. YALE: And so the process you went
4 through, then, would be similar to what you
5 would have to go through if you couldn't
6 continue to be a PD, is that right, on the rest
7 of your herd or the rest of your business?

8 MR. FLANAGAN: Yes.

9 MR. YALE: All right. So first I want to
10 turn it over to Rick for a moment. You had some
11 involvement with the herd, right?

12 MR. MALLORIE: Yes.

13 MR. YALE: Tell me about this herd. Is
14 this -- how is this herd created and what went
15 into this? I mean, I know there's animals and I
16 know there's biological processes, but
17 personally, for the farm of -- I don't need all
18 that, but what I want is for Mallorie's Farm,
19 what did it take you to get to the herd that you
20 have today?

21 MR. MALLORIE: Well, we haven't brought
22 any herds in -- any animals into our herds since
23 the early '80s. We've raised all of our
24 replacements and sold extra animals that we've
25 had. So we've got a closed herd, which is kind

1 of unique.

2 MR. YALE: What it means -- what is a
3 closed herd? A closed herd has no new -- it's
4 all animals that's have been born and raised --
5 bred, born and raised on the farm?

6 MR. MALLORIE: That's correct.

7 MR. YALE: What does it mean? I mean,
8 that's how you get there. What is the
9 significance of having a closed herd?

10 MR. MALLORIE: Well, we have total
11 control of our animals, the breeding -- just
12 total control of what's going on, all the feed
13 that's gone into them. We know everything
14 that's been done.

15 MR. YALE: These animals, this herd that
16 you developed, is there any special genetics or
17 any special effort that's been made over the
18 years to have a particular type of herd or type
19 of genetics or anything?

20 MR. MALLORIE: Well, they're constantly
21 working on that, trying to improve, get the cows
22 leaner and better production.

23 MR. YALE: I want to, I guess, come down
24 to a little more personal. When the point came
25 that you had to sell off part of your herd, was

1 there more than just an economic decision, an
2 economic impact of selling that herd?

3 MR. MALLORIE: Well, it was very
4 personal.

5 MR. YALE: That's my point.

6 MR. MALLORIE: Yeah. Yes, because -- and
7 mainly my sister takes care of the health of the
8 animals. I mean I help, but it's really her
9 thing doing that. It's really hard for her.
10 She has a real tough time getting rid of the
11 animals.

12 MR. YALE: You developed an attachment to
13 them --

14 MR. MALLORIE: Yeah.

15 MR. YALE: -- to the herd, is that
16 correct?

17 MR. MALLORIE: That's correct.

18 MR. YALE: This is a herd that your
19 father started?

20 MR. MALLORIE: That's correct.

21 MR. YALE: And is this attachment to the
22 animals and the replacement, is this typical of
23 farms of your own of your size? Do most farmers
24 take an attachment to the herd?

25 MR. MALLORIE: I would say a lot of

1 smaller ones do, but dairies our size, I think
2 I -- I feel that my sister has a lot closer
3 attachment than most people --

4 MR. YALE: Okay.

5 MR. MALLORIE: -- to the animals there.

6 MR. YALE: Whoever may be the businessman
7 will have to answer the question. Were there
8 any special costs associated with the downsizing
9 of your operation?

10 MR. FLANAGAN: Well, the major one is
11 that we lost a major customer, which cut our
12 Class I sales down considerable, well below the
13 3 million. But we just didn't have the Class I
14 capability of servicing him anymore, so that was
15 it. That was one of the worse outcomes of it.
16 And we foresaw that when we did that. We knew
17 that was going to be part of it.

18 MR. YALE: Were there any other costs,
19 any special taxes, any assessments, any losses
20 or animals or assets being sold at less than
21 true value or anything involved in this?

22 MR. FLANAGAN: No. We got full value out
23 of the animals, but we do have now a substantial
24 feed lot sitting empty, growing up to weeds. It
25 hasn't been used since we did that. There's

1 some cost there.

2 I guess I would say there's a human cost,
3 that we laid off over 25 employees, most of
4 which were excellent employees and some of which
5 had been there a long time. It just -- under
6 the new system, they just -- we didn't have room
7 for everybody, so we had to let some people go.

8 MR. YALE: And do you stay in contact
9 with these people? I mean, do you stay in
10 contact with these people that you have laid
11 off?

12 MR. FLANAGAN: Most of them, no.

13 MR. YALE: So you don't know what's
14 happened to their life as a result of this
15 change?

16 MR. FLANAGAN: Anybody we laid off, we
17 gave them a one month severance pay, so
18 hopefully that would give them an opportunity to
19 find something else. Some of them did go to
20 work for other dairies, landed on their feet.
21 And quite a few of them, I don't know what
22 became of them.

23 MR. YALE: Now, the -- there was a
24 question regarding the fact that you don't quite
25 reach the 3 million pound cap. I think part of

1 your answer was you just can't get any more
2 sales, is that -- is that what I understood you
3 to say?

4 MR. FLANAGAN: That's correct.

5 MR. YALE: Is part of that because the
6 sales have to be within a certain size range to
7 work to stay within the cap, or is it just that
8 the sales aren't there?

9 MR. FLANAGAN: Just it's very competitive
10 and there are other prices out there that are
11 good or better than what we can live with.

12 MR. YALE: Now, I think you also
13 testified that you lost business to a regulated
14 handler. Not that you gave it, you just
15 actually lost it, you lost some sales?

16 MR. FLANAGAN: We've lost a bunch of
17 independent stores to other regulated handlers.

18 MR. YALE: I don't have any other
19 questions.

20 JUDGE CLIFTON: Thank you, Mr. Yale. I
21 would like to go off record just a moment.

22 (Off the record.)

23 JUDGE CLIFTON: We're back on record at
24 10:34. Who will next cross-examine the panel?
25 Mr. Carroll. Thank you.

CROSS-EXAMINATION

1
2 BY MR. CARROLL:

3 MR. CARROLL: Mr. Flanagan?

4 MR. FLANAGAN: Good morning.

5 MR. CARROLL: I'm John Benjamin Carroll.
6 I'm an attorney for the New England
7 Producer-Handlers Association and two
8 producer-handlers located in New England and one
9 in Virginia.

10 And I'm -- first of all, I want to
11 congratulate you for the amount of time and
12 effort and thought that went into this very
13 excellent presentation, and I'm going to go
14 through it with you if you have the patience to
15 do that.

16 First of all, did you say you were a
17 family-type operation?

18 MR. FLANAGAN: Yes.

19 MR. CARROLL: And can you describe what
20 members of the family are involved?

21 MR. FLANAGAN: Business was founded by
22 Bob and Juanita Mallorie, Rick's parents.
23 Juanita is still involved, although she's
24 elderly at this point. The active members are
25 Rick and his sister, Terri. They are involved

1 in the day-to-day operation.

2 MR. CARROLL: And do they have children?

3 MR. FLANAGAN: Yes.

4 MR. CARROLL: Is it your hope or one of
5 your programs to try to maintain in the future
6 the exemption for the benefit of the family?

7 MR. FLANAGAN: That's the hope.

8 MR. CARROLL: Now, directing your
9 attention to page 1 of your statement. In the
10 paragraph which is one, two, three paragraphs
11 down. There you state, a growing number of
12 consumers are concerned about where their milk
13 comes from, how it is produced, and that it is
14 produced locally.

15 Can you tell me what you meant by that
16 statement?

17 MR. FLANAGAN: There seems to be a trend
18 that customers are more concerned about the
19 source of their food, whether it's local, how
20 it's produced, if it's produced in an
21 environmentally friendly manner, if the animals
22 are humanely treated, all those kinds of things.
23 And we get quite a few comments like that and so
24 do some of our customers that -- we've been
25 around -- we've been bottling under the

1 Mallorie's label for now almost 50 years. There
2 are a lot of loyal customers. And we think, and
3 so do a lot of customers, that there's a
4 difference between our milk and other milk. And
5 not on the basis of quality necessarily, but
6 it's the way it's produced.

7 MR. CARROLL: Do your customers make
8 those type of comments to you, that they think
9 it's a better quality product?

10 MR. FLANAGAN: They do.

11 MR. CARROLL: Directing your attention to
12 the last paragraph of page 1. In the second
13 sentence it says, all customers that we deliver
14 to are within 50 miles of our plant. Is --
15 page 2, I'm sorry, I'm calling it page 1. I've
16 turned it, but actually it's page 2. It's the
17 last paragraph, second sentence. It reads, all
18 customers we deliver to are within 50 miles of
19 our plant.

20 MR. FLANAGAN: That's true.

21 MR. CARROLL: That's true. So that's a
22 local set of customers looking for local milk
23 and buying it from a farm they could visit even,
24 if they wanted to?

25 MR. FLANAGAN: That's true.

1 MR. CARROLL: And that's your market?

2 MR. FLANAGAN: Yes.

3 MR. CARROLL: And directing your
4 attention to the paragraph just above that
5 paragraph, in the last sentence it says, at one
6 time we had over 20 independent Thriftway
7 stores, but we eventually lost them all to the
8 generous pricing and rebate programs that we
9 could not match. Could you explain that to me?

10 MR. FLANAGAN: These grocery stores get
11 most of their merchandise from a wholesale
12 warehouse, and most of these warehouses also
13 offer dairy products.

14 There's been more of a push to create
15 programs that the larger your volume of
16 purchases, there is an escalating rebate. Maybe
17 at one level you get 2 percent, at a higher
18 level of volume, you get 5 percent, or whatever.

19 And by carving their milk out of that
20 large pool of groceries, they -- they -- it
21 drops them to a lower rebate rate. And those
22 have been created for a variety of reasons, but
23 one is to compete with independents like us that
24 we're selling them dairy products. Does that
25 answer the question?

1 MR. CARROLL: That's fine. Thank you.
2 And I think you said you just can't match that?

3 MR. FLANAGAN: Well, in some stores it
4 amounted to about 5 cents a gallon and to -- or
5 more, and to lower our price to those levels,
6 then -- it just wasn't economical for us to do
7 that. They created a system that had things
8 about it that we couldn't compete with, other
9 than lower the price.

10 MR. CARROLL: Directing your attention to
11 the first sentence of the last paragraph on
12 page 2, you state, if current customers were
13 forced to buy from competition, they would pay
14 higher prices. What do you mean by that?

15 MR. FLANAGAN: There's two types of
16 customers. One are customers that -- well, they
17 are customers of our jobbers who have developed
18 a very efficient distribution system and a
19 pricing that isn't abusive to these small
20 customers. So if they didn't have that supply
21 of milk, then their prices would go up.

22 The -- some of our larger customers, if
23 we weren't there, they -- well, we're -- we're a
24 source of competition for one thing, but we
25 also -- we are pretty efficient at what we do.

1 And so we can save some money -- save them some
2 money by being efficient in our delivery system.

3 MR. CARROLL: Your associate has a
4 comment to make.

5 MR. MALLORIE: Yeah. This is Rick
6 Mallorie again. And the biggest thing is where
7 we're getting put out from those Thriftway
8 stores, they are a larger chain and are getting
9 supplied by a warehouse.

10 Our jobbers that are in the markets that
11 Charlie is talking about, were our small
12 mom-and-pop stores that don't get grocery
13 supplies. They maybe have milk and eggs, you
14 know, small -- a small dairy line. And that's
15 where the competition is. We're able to get in
16 there at a cheaper price than what a wholesale
17 grocer is going to bring stuff into a small
18 account like that. Does that help answer your
19 question?

20 MR. CARROLL: Yes, it does. Thank you
21 very much.

22 And then you state in that same paragraph
23 that Mallorie's has always been competitive on
24 price and has been the source of milk for
25 hundreds of customers too small to be served

1 economically by the large processors. Is that
2 what you have been saying?

3 MR. FLANAGAN: Yes.

4 MR. CARROLL: Okay. Through our jobbers,
5 we serve a niche of small customers ignored or
6 exploited by others. What do you mean by that,
7 sir?

8 MR. FLANAGAN: Before Spring Valley
9 really got into those small customers, they --
10 if a delivery truck stopped, there was a stop
11 charge. If they ordered five gallons, maybe
12 there was a minimum charge of \$200 or something.
13 So a lot of them were taking the dairy products
14 out of their store because it just wasn't
15 economical.

16 When our distributors started entering
17 that market, then those kind of stores started
18 coming out of the woodwork all over the place.
19 And it was not because of aggressive marketing
20 on his part, it was because of negligence on the
21 part of the bigger guys. There was no
22 competition, so they were able to charge
23 whenever they wanted, and these little guys
24 either had to pay it or drop the dairy line.
25 And that's what I'm talking about, is that there

1 was a whole class of customers that were being
2 neglected, a whole niche, if you want to call it
3 that.

4 MR. CARROLL: Thank you. Now, if you
5 would turn to page 3, the second paragraph from
6 the bottom, you state, one of the difficulties
7 of operating as a producer-handler is that both
8 sides of the business require the scarce
9 resources of time, management, and investment.
10 Can you tell me what that means?

11 MR. FLANAGAN: The production side,
12 there's a lot of things we would like to do
13 there, lots of improvements we would like to
14 make, equipment replaced, those kind of things.
15 Likewise, in the plant it's the same thing.
16 There are always renovations that need to be
17 done or improvements to be made. Those compete
18 with each other. There's never enough resources
19 to do everything we want to do.

20 So if we decide to do something in the
21 plant, that eliminates the ability to use those
22 resources -- I'm talking mainly about financial
23 resources, on the dairy and vice versa. It's
24 always a -- they compete for the dollars but
25 also time and management as well.

1 MR. CARROLL: Could you describe the
2 management time problem that you have in mind?

3 MR. FLANAGAN: Well, we -- we have a
4 fairly lean organization, so if people are
5 involved with marketing and planning and all
6 that on the distribution side, then that's less
7 manpower and man-hours to devote to solving some
8 of the problems on the dairy side, which can
9 range from nutritional to environmental,
10 regulatory, any number of things.

11 MR. CARROLL: I want to ask you -- give
12 you an example and ask you if you had this
13 experience.

14 Have you ever had the experience on the
15 farm side of deciding, for example, what fields
16 are going to be planted and when they're going
17 to be planted, and then the person responsible
18 for that has to go over to the plant, and when
19 he gets back, some of that work hasn't been
20 done? Have you ever had that experience?

21 MR. FLANAGAN: It's possible. I would
22 say another example is when there's feed to be
23 harvested and things like that going on, and the
24 primary people are in Cincinnati.

25 MR. CARROLL: Okay. Would you turn to

1 the following page, page 4. In the -- under the
2 caption, Our Views on Proposals 1 and 2. You
3 have a statement, second sentence from the end,
4 that says, this is the same objection that NMPF
5 described as fair in a June 23rd letter to
6 Secretary Johanns. Can you tell me what you're
7 referring to?

8 MR. FLANAGAN: There was a letter sent in
9 support of the proposed 3 million pound cap back
10 in 2005.

11 MR. CARROLL: Are you saying that that
12 letter is not consistent with any position that
13 the producer-handler exemption should be totally
14 eliminated?

15 MR. FLANAGAN: I would say it's very
16 inconsistent.

17 MR. CARROLL: Directing your attention to
18 the next following paragraph. It says, it is
19 unfair to allow the huge co-ops and processors
20 or organizations to systematically destroy
21 producer-handlers and others with continuing
22 regulatory attacks. When you're talking about
23 the huge co-op and producer -- processor
24 organizations, who would you have in mind?

25 MR. FLANAGAN: That would be NMPF and

1 IDFA. They seem to be the source of all of
2 these requests.

3 MR. CARROLL: Why do you say they're
4 huge?

5 MR. FLANAGAN: Well, I think each of them
6 in their respective industry control well over
7 half of the volume in the country.

8 MR. CARROLL: And together, do you have
9 an opinion that they control processing and
10 distributing of milk in the United States?

11 MR. FLANAGAN: That would be my opinion.

12 MR. CARROLL: And then you continue on to
13 say, their purpose is to consolidate their
14 control of the milk market to restrict and
15 disrupt competitors and to eliminate an entire
16 class of independent dairy farmers. Can you
17 tell us what you mean by that?

18 MR. FLANAGAN: Based on their history,
19 they buy out, take over other smaller businesses
20 until they've grown to the size they are. I
21 think this process of attacking
22 producer-handlers is -- they would prefer that
23 it would eliminate us entirely, but if not, that
24 to at least restrict and/or disrupt our
25 businesses.

1 MR. CARROLL: If you would turn to
2 page 5, the first full paragraph, you state, the
3 producer-handlers in Federal Order 124 do not
4 threaten orderly marketing nor do they undermine
5 the pool, period. The calculated effect in 2007
6 was less than 4 cents per hundredweight on total
7 pool utilization.

8 Directing your attention to that section,
9 can you tell me what marketing order you're
10 referring to? Was it 124 in the second sentence
11 as well as the first?

12 MR. FLANAGAN: Yes. That's really the
13 only order I'm very familiar with.

14 MR. CARROLL: And it's your opinion,
15 then, that it was -- the effect on the average
16 producer, assuming that there is a legitimate
17 effect, is less than 4 cents per hundredweight?

18 MR. FLANAGAN: Yes.

19 MR. CARROLL: And in your opinion, is
20 that any sign of disorder whatever?

21 MR. FLANAGAN: I believe it is not.

22 MR. CARROLL: Directing your attention to
23 the last sentence in that paragraph, you state,
24 the economic effect of eliminating the
25 producer-handler exemption is the disruption of

1 several family-owned businesses that have been
2 here for many decades with very little
3 compensating benefit to the pool. Do you want
4 to explain that statement?

5 MR. FLANAGAN: Well, it's related to the
6 earlier comments. The loss of the
7 producer-handler exemption would make it very
8 difficult for most of these producer-handlers to
9 survive. And the rest of the producers in the
10 pool would get less than 4 cents a hundredweight
11 out of it. It's -- it's a huge economic blow to
12 the producer-handlers with very little
13 recognizable benefit to the other dairymen in
14 the -- in that Order.

15 MR. CARROLL: Is it your position that
16 the Secretary should pay attention to the facts
17 you just described in making his findings and
18 determination?

19 MR. FLANAGAN: I think so. I think if
20 disruption and all of these things -- if there's
21 not evidence of that, then there's -- there is
22 no reason to change it.

23 MR. CARROLL: Going on to the next
24 paragraph, and the sentence in roughly the
25 middle of it, starts with the word over.

1 Over -- you state, over the last 70 years, the
2 producer-handler exemption has been reexamined
3 numerous times. The fact that the exemption has
4 remained in place is likely due to a lack of
5 evidence that producer-handlers are disruptive,
6 and because the USDA wisely refused to destroy
7 an innovative business model that has withstood
8 the test of time, meets contemporary customer
9 preferences and serves as a viable alternative
10 to the co-op system.

11 Can you explain what it is you meant when
12 you stated that the exemption had remained in
13 place as evidence of not having any disruption?

14 MR. FLANAGAN: It has been considered
15 numerous times in various reorganizations of the
16 Federal Order System and revision of rules and
17 whatnot in different orders. And through all of
18 that, the producer-handler exemption pretty much
19 remained intact. I think it's been reviewed in
20 Congress, in legislation and other ways, and
21 it's always been durable.

22 MR. CARROLL: I want to direct your
23 attention further to the following paragraph and
24 the sentence that starts, while. You state
25 there, quote, while there are many similarities

1 between the various orders, distinct differences
2 have always been present. Can you tell us what
3 you meant by that?

4 MR. FLANAGAN: I think the way -- some of
5 the way the milk is priced varies from order to
6 order. Some, it's based on component; some,
7 it's based on other things. I'm not all that
8 familiar with other orders, other than when you
9 look at the pricing and whatnot. Even between
10 the Arizona Order and the Pacific Northwest
11 Order, there's differences in how milk is priced
12 there. I guess our point is that there's no
13 precedent that every order has to be just like
14 every other order.

15 MR. CARROLL: In the following paragraph,
16 toward the end there's a sentence, none of the
17 producer-handler processing plants can compete
18 with the large pool plants with their size,
19 economies of scale and marketing connections.
20 The producer-handler exemption enables these
21 smaller processors to compete. Can you tell me
22 what you meant by that language?

23 MR. FLANAGAN: There have always been
24 economies of scale in larger plants. They have
25 bigger filling machines. They have blow molds

1 to make jugs. They have more automation.
2 There's a lot of things that you can do on a
3 large scale that you can't do on a small scale.
4 And most of those type of things help to reduce
5 the processing costs, and we kind of have to do
6 the best we can with what we've got at the size
7 we are.

8 MR. CARROLL: And then you, at the next
9 following sentence, have a sentence, NMPF and
10 IDFA clearly have superiority in numbers and
11 political muscle. In a democracy, even though
12 the majority rules, the majority has the strict
13 obligation to protect the rights of the
14 minority. We ask the USA (sic) to do the same.
15 Can you tell us what you meant by that?

16 JUDGE CLIFTON: USDA, Mr. Carroll?

17 MR. CARROLL: USDA. Thank you.

18 JUDGE CLIFTON: Thank you.

19 MR. FLANAGAN: I guess what I meant by
20 that is, just because you have a majority of
21 votes or a majority of power doesn't give you
22 unlimited authority to do anything you want.
23 Within our system, there are basic rights that
24 everybody gets, even if they're a minority, and
25 that agencies, the government, courts and all

1 that need to protect those rights against
2 overwhelming power.

3 MR. CARROLL: And the -- under the
4 caption, The Effect of IFDA and NMPF
5 Proposals 1 and 2 On Our Small Business, and the
6 second paragraph you have a statement,
7 projecting future income losses of 40,000 per
8 month are having a negative impact on our credit
9 relationships. Can you tell me what you meant
10 by that?

11 MR. FLANAGAN: We are completely honest
12 with our banks that finance us. And we recently
13 went through our annual refinancing, and we felt
14 it was our obligation to tell them that there
15 was this situation coming up, that could be a
16 real financial hardship for us. And I'm not
17 saying it was a result of that, but for a
18 variety of reasons, they chose not to refinance
19 us this year.

20 As any dairyman knows, the cash flow on
21 any producing dairy is very difficult right now.
22 And a producer-handler, as a producer, suffers
23 that same hardship. So it had to do some with
24 that. But this certainly didn't help, the
25 possibility that we would be required to pay

1 that amount of money into the pool.

2 MR. CARROLL: Was that subject discussed
3 by you and your creditors?

4 MR. FLANAGAN: Yes.

5 MR. CARROLL: Directing your attention to
6 the changes you made as a result of the change
7 in the Order, you have a statement that you
8 reduced by 800 cows. Was that caused by a
9 change in the order exemption?

10 MR. FLANAGAN: Yes. We had to reduce our
11 Class I sales below the 3 million pounds.

12 MR. CARROLL: You didn't do that
13 voluntarily?

14 MR. FLANAGAN: Definitely not.

15 MR. CARROLL: And also you had to -- had
16 to drop off 800 replacement animals, in
17 addition, you said?

18 MR. FLANAGAN: Right.

19 MR. CARROLL: Right.

20 MR. FLANAGAN: There was no sense of
21 raising all those excess animals that would have
22 no home when they became cows. Plus, if we're
23 going to bring everything back from the feed
24 lot, we had to reduce the number of head we had
25 on the home place to make room for all the other

1 animals coming home.

2 MR. CARROLL: Did that have any effect on
3 the efficiency of your operation, dropping the
4 cows?

5 MR. FLANAGAN: Yes. We were able to
6 raise heifers less expensively in central Oregon
7 in a drier climate, near the feed supply, than
8 we are in the Willamette Valley in the high rain
9 conditions where they require barns and housing
10 and bedding and more intense labor.

11 So -- so it -- there was an increase in
12 costs then on the plant side. We are -- our
13 volume we run through the plant is considerably
14 less now than it was, so that -- that's hurt.

15 MR. CARROLL: And I think you said --
16 I want to emphasize that none of these
17 changes were done except by reason of the
18 Order. They were not voluntary changes on your
19 part.

20 MR. FLANAGAN: They were not.

21 MR. CARROLL: At the bottom of page 6,
22 you have the statement, through our jobbers we
23 are also the economical source of milk for
24 hundreds of small businesses that were
25 previously gouged by the larger processors with

1 inflated prices and minimum stop charges. Could
2 you tell me what you meant by that?

3 MR. FLANAGAN: All of these little stores
4 were -- just didn't have the volume to really
5 be -- to earn the better prices that other
6 distributors had with their stop charges and
7 different price lists. And our distributors
8 have figured out ways of delivering it to them
9 for a fair price. And mainly the reason it
10 works is because they picked up such a large
11 volume of these that they -- well, it's -- they
12 just expanded the volume of those kind of
13 customers.

14 MR. CARROLL: You go on to say, these
15 customers would be seriously hurt, possibly
16 leading to more business failures and loss of
17 jobs. What did you mean by that?

18 MR. FLANAGAN: If they were to have to
19 get their milk through the old system, the
20 results would probably be the same as they were
21 in the old days, when a lot of them discontinued
22 their dairy line because of the -- the price
23 they had to pay to get the milk.

24 There is a lot of -- milk is available a
25 lot of places at a pretty reasonable price. So

1 these stores with the real small volume, if they
2 have to pay the -- the small volume price, they
3 would be at a real handicap.

4 MR. CARROLL: And then on page 7, you
5 state, Mallorie's participates with other local
6 dairies in the purchasing of railcar loads of
7 feed commodities through a central buyer and
8 unloading operation. Without our participation,
9 the economics and scale of this operation would
10 be negatively impacted. I want to ask you if
11 you could tell us what you mean by local
12 dairies?

13 MR. FLANAGAN: These are other producing
14 dairies in the area. Some of them are quite
15 large, and I think there's some that are small.
16 And we -- by pooling our needs, they are able to
17 bring in large enough quantities to be
18 economical, and then we divide them up according
19 to our needs. We buy out of that situation.
20 But Mallorie's is a large part of that volume.

21 MR. CARROLL: And by the word dairies,
22 you mean farmer producers of milk?

23 MR. FLANAGAN: Yes.

24 MR. CARROLL: And you state, without our
25 participation the economics and scale would be

1 negatively impacted. Would that negatively
2 impact those farmer producers of milk and affect
3 their costs negatively?

4 MR. FLANAGAN: I believe it would.

5 MR. CARROLL: You talked about the
6 grandfathering provision that has been discussed
7 in this hearing. Is that something that would
8 not be needed if the present exemption remained
9 as it is?

10 MR. FLANAGAN: That's true. It's a -- I
11 guess you would call it a fall-back position.
12 We would prefer the Northwest be left alone.
13 We've already been through this. We've adjusted
14 to it. For better or worse, that's where we
15 are. And -- well, we think it should be left
16 alone.

17 But if that's not done, then we think we
18 should at least be grandfathered in at where we
19 are. If the -- if the concern is expansion and
20 other large producer-handlers entering the
21 market, then I think that would address those
22 concerns without a tremendous amount of harm to
23 the existing producer-handlers, of which there's
24 only five of us.

25 MR. CARROLL: Thank you very much.

1 JUDGE CLIFTON: Thank you, Mr. Carroll.
2 Who will next cross-examine this panel?
3 Mr. Miltner, please.

4 CROSS-EXAMINATION

5 BY MR. MILTNER:

6 MR. MILTNER: Good morning, Charlie.

7 MR. FLANAGAN: Good morning.

8 MR. MILTNER: Good morning, Rick.

9 MR. MALLORIE: Good morning.

10 MR. MILTNER: I think I have two areas
11 where I wanted to ask you some questions, and
12 the first is on your disposal of surplus milk.
13 Have you guys calculated the -- the total cost
14 of disposing of surplus milk on a per
15 hundredweight basis for your operation?

16 MR. FLANAGAN: Yes.

17 MR. MILTNER: Would you be willing to
18 share that with us?

19 MR. FLANAGAN: What we get for it is
20 usually the Class IV price. At this time, it's
21 minus a dollar -- sometimes it's minus \$2 --
22 plus the shipping cost to get it there. Which I
23 believe was \$1.50 a hundredweight we figure to
24 get it there. So basically we would get the
25 Class IV price minus, either 2.50 or 3.50 for

1 hundredweight.

2 MR. MILTNER: And if you would turn to
3 the Market Administrator's report that's
4 attached to your statement? I'm trying to find
5 it. I think it's numbered page 4, which I think
6 is the second page as attached. And for this
7 particular month, the Class IV price is 14.65.
8 So your -- your base receipt would be \$13.65 and
9 then you would have to subtract the
10 transportation costs from that?

11 MR. FLANAGAN: And which --

12 MR. MILTNER: I'm sorry, I'm looking at
13 the first column in the first section, where it
14 says, minimum class prices, 3.5 percent
15 butterfat. And it has Class I, Class II, Class
16 III, Class IV.

17 MR. FLANAGAN: Okay.

18 MR. MILTNER: And that's the -- those are
19 the annual numbers. Let's turn to the next
20 page, which is for the month. So for
21 January 2009, you would receive -- the Class IV
22 price is 9.59 there. Do you see that?

23 MR. FLANAGAN: Yes.

24 MR. MILTNER: Okay. So as I understand,
25 you would have received \$8.59, less

1 transportation?

2 MR. FLANAGAN: Yes. We would have got
3 paid 8.59, but then we would have our
4 transportation costs to cover.

5 MR. MILTNER: Okay. And the same
6 calculation could be made for the other months
7 that are listed, and really any month using the
8 Federal Order statistics?

9 MR. FLANAGAN: Yes.

10 MR. MILTNER: Okay. Now, roughly, it's
11 about an \$8 spread between Class I and Class IV
12 in that month. And you're going to pay another
13 dollar or 2 on that?

14 MR. FLANAGAN: Yes.

15 MR. MILTNER: And your Class IV
16 utilization was around 20 percent, right? It
17 averaged 22 percent?

18 MR. FLANAGAN: In 2008, that's correct.

19 MR. MILTNER: So overall your milk, if we
20 took that \$10 spread times 22 percent, I think
21 it is roughly \$2.20. Would you agree with that?

22 MR. FLANAGAN: Sounds reasonable.

23 MR. MILTNER: So the weighted cost of
24 your Class IV dispositions on all your milk is
25 \$2.20?

1 MR. FLANAGAN: Yes, I think so.

2 MR. MILTNER: That's a balancing cost to
3 you?

4 MR. FLANAGAN: Yes.

5 MR. MILTNER: And you could do a similar
6 calculation for your Class II dispositions,
7 right?

8 MR. FLANAGAN: Yes. The difference would
9 be considerably less there.

10 MR. MILTNER: But the methodology would
11 be similar?

12 MR. FLANAGAN: It would be the same.

13 MR. MILTNER: Between the two of you, are
14 you pretty familiar with the plants in Oregon
15 and southern Washington?

16 MR. MALLORIE: Yes.

17 MR. MILTNER: Rick says yes.

18 MR. MALLORIE: Yes.

19 MR. MILTNER: I'm working from a list,
20 so -- you guys know these guys by heart and I
21 don't, so bear with me. Alpenrose Dairy in
22 Portland, are you familiar with their operation
23 at all?

24 MR. MALLORIE: Yes, yes.

25 MR. MILTNER: Rick, are they an

1 independent bottler or are they owned by another
2 larger company?

3 MR. MALLORIE: They're independent.

4 JUDGE CLIFTON: Go ahead and pull the mic
5 closer.

6 MR. MALLORIE: Sorry. They are
7 independent.

8 MR. MILTNER: They are independent.
9 Larger plant than you guys?

10 MR. MALLORIE: Considerably, yes.

11 MR. MILTNER: Would you expect them to
12 have more or less than 500 employees? And if
13 you don't know, that's fine.

14 MR. MALLORIE: I don't know.

15 MR. MILTNER: How about Sunshine Dairy in
16 Portland, are you familiar with their operation?

17 MR. MALLORIE: Yes.

18 MR. MILTNER: Are they an independent?

19 MR. MALLORIE: Yes, I believe they're
20 independent.

21 MR. MILTNER: Considerably larger than
22 you? Same size? How do they fit in?

23 MR. MALLORIE: They're a lot larger than
24 us. I'm not sure of their size.

25 MR. MILTNER: Any guess as to how many

1 employees they might have? More or less than
2 500?

3 MR. MALLORIE: I would imagine less than
4 500.

5 MR. MILTNER: How about Eberhard Creamery
6 in Redmond, are you familiar with them at all?

7 MR. MALLORIE: Yes.

8 MR. MILTNER: How is their size?

9 MR. MALLORIE: I believe they are close
10 to our size.

11 MR. MILTNER: Based on the size of your
12 plant, do you expect them to have more or less
13 than 500 employees?

14 MR. MALLORIE: Less.

15 MR. MILTNER: Considerably less?

16 MR. MALLORIE: Yes. They don't have
17 any --

18 MR. MILTNER: Are you familiar with Smith
19 Brothers Farms and Edaleen Dairy?

20 MR. MALLORIE: I know them from the
21 last --

22 MR. MILTNER: You know a little about
23 their operation?

24 MR. MALLORIE: Just a little.

25 MR. MILTNER: They're regulated handlers

1 right now, as you understand, correct?

2 MR. MALLORIE: Correct.

3 MR. MILTNER: With regard to Edaleen, do
4 you believe them to have more or less than 500
5 employees?

6 MR. MALLORIE: I would think it's less.

7 MR. MILTNER: Okay. And when the
8 3 million pound cap went into effect in the
9 Pacific Northwest Order, do you know -- the
10 only -- the only change was the change in
11 regulations and the fact that you guys had made
12 some changes to bring your production under
13 3 million pounds.

14 Does it make sense to you that you would
15 be measured as a small business based on your
16 farm size while Smith Brothers or Edaleen would
17 be measured on their plant size?

18 MR. MALLORIE: What do you think,
19 Charlie?

20 MR. FLANAGAN: You're asking if that's
21 consistent?

22 MR. MILTNER: You can answer that
23 question.

24 JUDGE CLIFTON: He asked if it was fair.

25 MR. FLANAGAN: No, I don't think it is.

1 MR. MILTNER: Is it consistent?

2 MR. FLANAGAN: No.

3 MR. MILTNER: Okay. Do you think that
4 for the purposes of determining the impact of
5 these regulations on small businesses, that
6 Eberhard Creamery should be measured based on
7 the number of employees as a plant, whereas you
8 guys would be measured as a farm?

9 MR. FLANAGAN: Do I think that's fair?

10 MR. MILTNER: Yes.

11 MR. FLANAGAN: No, I don't.

12 MR. MILTNER: Thank you. I don't have
13 anything else.

14 JUDGE CLIFTON: Thank you, Mr. Miltner.
15 Who else will cross-examine the panel?
16 Mr. Ricciardi.

17 CROSS-EXAMINATION

18 BY MR. RICCIARDI:

19 MR. RICCIARDI: Good morning, gentlemen.

20 MR. FLANAGAN: Good morning.

21 MR. RICCIARDI: Al Ricciardi on behalf of
22 AIDA, producer-handlers and an exempt plant. I
23 don't want to slight Mr. Flanagan or
24 Mr. Mallorie so I need to be sure I ask both of
25 them questions. So let me start with

1 Mr. Flanagan for a moment.

2 Your Honor, would you pass him
3 Exhibit 13, if you would?

4 JUDGE CLIFTON: Yes.

5 MR. RICCIARDI: Thank you. Mr. Flanagan,
6 I'm going to focus for a moment on page 4 of
7 your statement, and in particular, although you
8 don't need it, I think you understand what you
9 wrote, but to the extent you want to look at it,
10 that's fine. It's the next to the last
11 paragraph that I'm basing some of these
12 questions on.

13 Now, National Milk theorizes, as they
14 have a number of times, that the potential
15 exists for producer-handlers to, quote,
16 proliferate across the market. Those are your
17 words, correct? That's what you understand
18 their position to be?

19 MR. FLANAGAN: Yes.

20 MR. RICCIARDI: Now, you say that history
21 has shown the number of producer-handlers is
22 steadily declining not increasing. Has that
23 been your experience?

24 MR. FLANAGAN: Yes.

25 MR. RICCIARDI: And you gave a number in

1 that paragraph. The number today is probably
2 between 40 and 50, and that's why I handed you
3 Exhibit 13. And I want you to make a
4 comparison.

5 Again, I did the numbers, so be very wary
6 on percentages when I do them. But let's talk
7 for a moment about Exhibit 13, the next to the
8 last page, which is producer-handler regulatory
9 status. This is a document provided by USDA
10 indicating for 2008 the names, locations,
11 states, order numbers, Class I differential, and
12 then those months when those plants were
13 actually producer-handlers. Have you seen this
14 document before?

15 MR. FLANAGAN: Yes.

16 MR. RICCIARDI: Okay. If you take a look
17 at December, and the number of
18 producer-handlers, which are the ones marked
19 with the X, and you eliminate those that are ED,
20 or the exempt distributors, for the month, and
21 count up the number of producer-handlers at the
22 end of 2008, you will come up with 47, if I'm
23 correct.

24 Does that -- in looking at the document,
25 and you can take the time to do it, does that

1 seem accurate to you?

2 MR. FLANAGAN: Yes.

3 MR. RICCIARDI: Okay. Now, if you flip
4 over, and the current -- the latest month that
5 we have on this document for 2009 is March. If
6 you do the same computation, eliminate the
7 exempt plant and any closed plant for that month
8 and simply count the number of producer-handlers
9 as USDA has in this document, Exhibit 13, you
10 come up with 37.

11 MR. FLANAGAN: Yes.

12 MR. RICCIARDI: So within three months,
13 we have a decrease of producer-handlers of
14 21 percent, if my math is right, am I right?

15 MR. FLANAGAN: That sounds reasonable.

16 MR. RICCIARDI: Okay. Now, taking that,
17 the actual numbers, the reality as provided by
18 the data in USDA's information, is the theory
19 espoused by National Milk regarding the
20 proliferation of producer-handlers matched by
21 the reality of the number of producer-handlers
22 in just looking at a three-month period from
23 2008 through March of 2009?

24 MR. FLANAGAN: It doesn't look like it.

25 MR. RICCIARDI: In fact, it would be the

1 opposite, wouldn't it?

2 MR. FLANAGAN: If that trend continued,
3 there pretty soon wouldn't be any left.

4 MR. RICCIARDI: By the end of the year,
5 we would have no producer-handlers left, would
6 we?

7 MR. FLANAGAN: That's true.

8 MR. RICCIARDI: Which is what they want?

9 MR. FLANAGAN: Well, I -- I won't comment
10 on that, I guess.

11 MR. RICCIARDI: Okay. We'll leave that
12 alone, then.

13 Do you see any need to change the status
14 of producer-handlers today?

15 MR. FLANAGAN: I can really only comment
16 on the Pacific Northwest because that's what I'm
17 familiar with. But I don't think there's any
18 need to change the rules that are in effect in
19 that order. I'm not familiar with other orders,
20 so I really can't say on that.

21 MR. RICCIARDI: Why don't you pass the
22 microphone off so that I don't -- I don't slight
23 the gentleman to your left.

24 MR. MALLORIE: Thank you.

25 MR. RICCIARDI: Same question. Do you

1 see any need to change the status of
2 producer-handlers? And you can limit yourself
3 to the Order 124 as Mr. Flanagan did.

4 MR. MALLORIE: Yeah, I agree with
5 Charlie, I don't think we need to have a change
6 in our order.

7 MR. RICCIARDI: Thank you very much.

8 JUDGE CLIFTON: Who next would like to
9 cross-examine the panel? Mr. Beshore, did you
10 think of something else?

11 MR. BESHORE: I did.

12 RECROSS-EXAMINATION

13 BY MR. BESHORE:

14 MR. BESHORE: Just a couple of follow-up
15 questions. Mr. Flanagan or Mr. Mallorie,
16 Mr. Yale asked you about the disposition of
17 the -- part of your herd that was -- that you've
18 testified to after the order changed. And I
19 think, if I understood you correctly, you got --
20 you said you got full value for that 800 head of
21 milking cows and 800 head of replacement
22 heifers, right?

23 MR. FLANAGAN: That's correct.

24 MR. BESHORE: So they didn't go to
25 slaughter?

1 MR. FLANAGAN: No.

2 MR. BESHORE: Did they stay locally?

3 MR. FLANAGAN: No, they all went to
4 Idaho, one man, one dairy.

5 MR. BESHORE: Your -- when you sell milk
6 in bulk, do you sell it for component values?

7 MR. FLANAGAN: Like the surplus milk?

8 MR. BESHORE: Surplus milk.

9 MR. FLANAGAN: If the price is -- if the
10 lowest price is Class IV, it's sold as a
11 component value.

12 MR. BESHORE: Okay. What's the average
13 butterfat test of the herd?

14 MR. FLANAGAN: Probably around 3.6.

15 MR. BESHORE: What's your average
16 protein?

17 MR. FLANAGAN: Oh, slightly over 3.

18 MR. BESHORE: In solids, not fat?

19 MR. FLANAGAN: Or not --

20 MR. BESHORE: Or other solids, I should
21 say.

22 MR. FLANAGAN: I don't -- I don't have
23 that information.

24 MR. BESHORE: Your milk production per
25 cow is -- you know, is quite outstanding, in

1 excess, apparently, I take it, of 30,000 pounds
2 per cow. I'm just dividing 12 -- you know,
3 you're at 37 million for the year. You have
4 1,200 milking.

5 MR. FLANAGAN: Our production is
6 approaching 90 pounds per cow.

7 MR. BESHORE: Per day?

8 MR. FLANAGAN: Per day, average.

9 MR. BESHORE: Now, you made some comments
10 about National Milk -- National Milk Producers
11 Federation. And I'm wondering if you understand
12 what National Milk Producers Federation is. Do
13 you know what a trade association is?

14 MR. FLANAGAN: Yes.

15 MR. BESHORE: Are you a member of any
16 trade associations?

17 MR. FLANAGAN: Yes.

18 MR. BESHORE: Okay. Such as what? What
19 trade associations?

20 MR. FLANAGAN: Oregon Dairymen's
21 Association.

22 MR. BESHORE: Does -- Oregon Dairymen's
23 Association, it's a trade association now. Does
24 it market its members' milk?

25 MR. FLANAGAN: No.

1 MR. BESHORE: Do you understand that
2 National Milk is a trade association?

3 MR. FLANAGAN: Yes.

4 MR. BESHORE: And you would then
5 understand, just like Oregon Dairymen's
6 Association, National Milk doesn't market any
7 milk? Do you understand that?

8 MR. FLANAGAN: I do.

9 MR. BESHORE: So that since they don't
10 market any milk, they're not going to be in a
11 position of controlling any milk market,
12 correct?

13 MR. FLANAGAN: Technically, I guess
14 that's true.

15 MR. BESHORE: Well, I mean, it's got to
16 be true, right, if they don't market milk?

17 MR. FLANAGAN: They represent people that
18 do.

19 MR. BESHORE: That do market milk?

20 MR. FLANAGAN: Yes.

21 MR. BESHORE: And they represent
22 competitive organizations, organizations that
23 compete with each other for dairy products or
24 milk markets?

25 MR. FLANAGAN: That's true.

1 MR. BESHORE: Pardon?

2 MR. FLANAGAN: Yes.

3 MR. BESHORE: Okay. Thank you.

4 JUDGE CLIFTON: Thank you, Mr. Beshore.

5 Who next has questions for the panel?

6 Mr. Rower.

7 CROSS-EXAMINATION

8 BY MR. ROWER:

9 MR. ROWER: Good morning.

10 MR. MALLORIE: Good morning.

11 MR. ROWER: You told me you had a long
12 flight, three-hour time difference, so I
13 congratulate you on your endurance. I have some
14 fairly simple questions.

15 JUDGE CLIFTON: Pull the cord so it's
16 over this way and doesn't keep skewing it. Much
17 better. Thank you.

18 MR. ROWER: I guess I'll direct the first
19 question to Mr. Flanagan. Are Mallorie's
20 distributors independent contractors or are they
21 your employees?

22 MR. FLANAGAN: They're independent.

23 MR. ROWER: Okay. And you don't own any
24 of those independent contractors, right?

25 MR. FLANAGAN: No. They've been

1 independent for 30 plus years.

2 MR. ROWER: Okay. Thank you. On page 3
3 of your statement, Mr. Flanagan, second to the
4 last sentence of the first full paragraph,
5 you're saying that the lowest milk supplier in
6 this area is Safeway. Did you mean the lowest
7 wholesale price?

8 MR. FLANAGAN: Yes, wholesale.

9 MR. ROWER: Wholesale, okay. Thank you.
10 And are you familiar with the language of
11 Proposal 17 as it appears in some of the Federal
12 Register?

13 MR. FLANAGAN: And that is our proposal?

14 MR. ROWER: Yes, sir. It's on page
15 16,301 of the Federal Register.

16 MR. FLANAGAN: I'm fairly familiar with
17 it, yes.

18 MR. ROWER: Okay. A very technical
19 question, and if you don't know the answer, I'll
20 understand, but I was hoping to get an answer.

21 There's a term, individual persons,
22 that's used there. And persons or person is a
23 defined term with a very special meaning in our
24 regulations. And it's -- it's in
25 7 CFR 1000.2(e), which means nothing to you, but

1 it will mean something to the attorneys.

2 And I was wondering if you knew if that
3 individual persons has a special meaning
4 different than the meaning in our regulations?
5 Did it mean one person or did it refer back to
6 what's in the definition of persons or person in
7 our regulations?

8 JUDGE CLIFTON: Mr. Vetne.

9 MR. VETNE: Yes, your Honor. This does
10 ask, as Mr. Rower's suggested, a legal question.
11 And I can represent for the record that the
12 intention there was not a natural person, but as
13 generally used, a person, including a corporate
14 entity, partnership, and so forth.

15 And as I indicated, I will be available
16 to discuss the technical in context part of the
17 proposal, which neither of these witnesses has
18 the experience to address.

19 So if there's -- if there's a legal
20 meaning question, how does this fit in the whole
21 scheme, I'll be able to address that.

22 JUDGE CLIFTON: All right. When Proposal
23 Number 17 was drafted, Mr. Vetne, did the use of
24 the term here match the definitions, words?

25 MR. VETNE: Person is already in the

1 order, and it did not intend to -- to
2 incorporate a different meaning than that
3 already in the order. There was only one
4 amendment here and that amendment used the term
5 that's defined. So that would be the definition
6 that controls, I'll make that a representation
7 of counsel.

8 MR. ROWER: Thank you. Those are my
9 questions. Thank you very much.

10 JUDGE CLIFTON: Thank you, Mr. Rower.

11 MR. ROWER: Thank you for coming.

12 JUDGE CLIFTON: Mr. Vetne, any redirect?

13 REDIRECT EXAMINATION

14 BY MR. VETNE:

15 MR. VETNE: Just a couple things to
16 clarify. Mr. Flanagan, you -- in response to a
17 question from Mr. Beshore, you were asked about
18 component content of your herd, and you said the
19 average protein is a little over 3.0. Would
20 that be something that has come to be known as
21 true protein?

22 MR. FLANAGAN: I believe it is, yes.

23 MR. VETNE: You're aware that there was
24 something referred to as total protein, which
25 included some nonprotein nitrogen?

1 MR. FLANAGAN: Right. Urea.

2 M. VETNE: And back then, the
3 conventional protein content was 3.2?

4 MR. FLANAGAN: Yes.

5 MR. VETNE: So you're referring to the
6 true protein portion?

7 MR. FLANAGAN: Right. When that change
8 was made, the protein level decreased slightly,
9 but the price increased to make up for it.

10 MR. VETNE: Well, the measured protein --
11 the instrument measured protein decreased, but
12 the actual protein in the milk did not decrease?

13 MR. FLANAGAN: Right.

14 MR. VETNE: You were asked some questions
15 about costs that you incurred when you downsized
16 to make the 3 million pound cap. I think
17 Mr. Yale asked the question, and he gave you a
18 list of things, and at the end of the questions,
19 some of that list may have been lost.

20 When you sold part of your herd, had --
21 had those animals been depreciated in your tax
22 accounting?

23 MR. FLANAGAN: No, they were not because
24 they're home-grown animals so they were not
25 depreciated.

1 MR. VETNE: Was any equipment sold as
2 part of that process that had been depreciated?

3 MR. FLANAGAN: On our leased dairy, there
4 was some equipment on there that stayed with the
5 dairy that we -- milk tanks and other stuff we
6 didn't move. And it was part of the lease
7 agreement that if we left, it would stay behind.

8 MR. VETNE: All right. On that leased
9 dairy, did you have a long-term lease for which
10 you -- you had to provide some compensation for
11 discontinuing?

12 MR. FLANAGAN: No, it was year to year.
13 We've been there over 20 years, and so the -- in
14 the beginning, there were some penalties if we
15 left early. But by the time we had to leave,
16 those had expired.

17 MR. VETNE: Okay. And when you sold the
18 home-grown cows, you experienced a -- you
19 experienced income and a gain outside of your
20 business plan, am I correct?

21 MR. FLANAGAN: Yes.

22 MR. VETNE: So you took a higher tax hit
23 than you otherwise would have taken over the
24 course of years?

25 MR. FLANAGAN: We did.

1 MR. VETNE: You now have approximately
2 2 million pounds of monthly Class I sales?

3 MR. FLANAGAN: Yes.

4 MR. VETNE: And you had downsized. What,
5 approximately, was your average monthly Class I
6 sales before you had to downsize?

7 MR. FLANAGAN: Probably closer to
8 4 million.

9 MR. VETNE: So you are at about half?

10 MR. FLANAGAN: Yes.

11 MR. VETNE: Okay. Thank you very much,
12 both of you. Your Honor, that concludes it.
13 And I move the admission of Exhibit 82.

14 JUDGE CLIFTON: Mr. Flanagan, I would
15 like the record copy to show in the chart on
16 page 1, the total sales for 2008 to be
17 37,302,176. 37 rather than 32, is that what you
18 want done?

19 MR. FLANAGAN: Yes.

20 JUDGE CLIFTON: All right. I would ask
21 that during a break, you find Kate Fisher, who
22 is with the USDA group -- she'll raise her
23 hand -- so that you can initial that change on
24 the record copy exhibit. And I commend you for
25 this very comprehensive document, which I know

1 also took time away from your normal duties.

2 Thank you both.

3 MR. MALLORIE: Thank you.

4 MR. FLANAGAN: Thank you.

5 JUDGE CLIFTON: You may step down.

6 MR. VETNE: Your Honor, I have an awkward
7 moment. We have three proponents of Mallorie's
8 alternative Proposal 17. The other proponent is
9 represented by Judge Sapp of Roswell, New
10 Mexico.

11 Last week, he told me he was going to be
12 here, and I haven't heard from him, so -- and I
13 had hoped to put all three of them together at
14 one point so they can hear each other's
15 testimony. Unfortunately, we can't do that, and
16 it is now what time, approximately?

17 MR. STEVENS: 11:30.

18 MR. VETNE: All right. These -- these
19 two witnesses had some important -- what they
20 felt to be important statements and information
21 and facts to give to the Department
22 decision-makers. And the format here, where you
23 can see the people and talk to USDA, I think, is
24 important. This proceeding is run sort of like
25 a jury trial. The judge doesn't have the

1 decision-making function but acts as a traffic
2 cop, and the jury is over here at the government
3 table.

4 I know Mr. Tosi has been gone all
5 morning; sort of like the foreman of the jury
6 being gone. These witnesses will be around for
7 some of the day, and I would -- you know, if
8 Mr. Tosi has the ability and time to read their
9 statements and wants to ask them questions, they
10 would be back and can be recalled for that
11 purpose.

12 JUDGE CLIFTON: Good. Thank you,
13 Mr. Vetne.

14 MR. VETNE: Thank you.

15 JUDGE CLIFTON: I appreciate that. When
16 do they have to leave?

17 MR. VETNE: Gentlemen?

18 MR. MALLORIE: 10 minutes.

19 MR. VETNE: Okay.

20 MR. MALLORIE: Mid afternoon, is that
21 about right?

22 MR. FLANAGAN: We'll stay however long we
23 need to do whatever we need to do.

24 MR. VETNE: If there is a desire for
25 further examination for that reason, if we know

1 early afternoon, we can make them available.

2 Thank you.

3 JUDGE CLIFTON: All right. Good. Thank
4 you very much. All right. Mr. Miltner, do you
5 have a witness who could go on now?

6 MR. MILTNER: We do, your Honor, Mr. Jim
7 Docheff is here from Colorado, and if we could
8 take five minutes just to get everything set, we
9 can put him on.

10 JUDGE CLIFTON: Good. Spell his last
11 name for me.

12 MR. MILTNER: D-o-c-h-e-f-f.

13 JUDGE CLIFTON: Good. Let's take ten
14 minutes, please. Be back and ready to go at
15 11:48.

16 (A recess was taken from 11:38 to 11:50.)

17 JUDGE CLIFTON: Let's go back on record.
18 All right. We're back on record at 11:50. I
19 have a little housekeeping to do. First of all,
20 is there any objection into evidence of
21 Exhibit 82, which is Mr. Flanagan's statement?
22 There is none, Exhibit 82 is hereby admitted
23 into evidence.

24 Secondly, I would like to comment on
25 Mr. Vetne's concern about Mr. Tosi not being

1 here for the hearing thus far today.

2 I agree with Mr. Vetne that Gino Tosi is
3 very recognizable by all of us as a leader in
4 these rulemaking hearings. But the
5 characterization of him as foreman of the jury
6 is not actually accurate and for purposes of
7 trying to evaluate the USDA team, Jack Rower and
8 Gino Tosi can be thought of as interchangeable
9 in their role in this proceeding.

10 I did like Mr. Vetne's characterization
11 of this being like a judge and jury in that I,
12 the judge, have no part in the decision-making.
13 But I am even less like the judge and jury,
14 because the judge in a trial continues control
15 throughout the whole proceeding, even jury
16 deliberations.

17 And I have an even more limited role.
18 Because once I've certified the record, in other
19 words I've said what the transcript is as
20 corrected and what the exhibits are, I'm done
21 and I have no other input and no other control.
22 So I did want people to realize that. I think
23 most of you did already.

24 Mr. Tosi, unfortunately, is ill and has
25 been ill through the night and that's why he is

1 not here. I regret that he is not here for the
2 testimony we've had this morning, which I
3 thought was like all the testimony we've had,
4 valuable. But he'll have the transcript and
5 he'll have the exhibits and the USDA team has
6 indicated that it is not essential that
7 Mr. Mallorie and Mr. Flanagan, Mr. -- is it
8 Gilbert -- that any of them remain for the
9 purpose of being recalled because we won't
10 recall them, we'll just keep going. All right.
11 Anybody with any comment further on that?

12 All right. I would like the statement of
13 Jim Docheff. I have marked it as Exhibit 83.
14 So if you would like to mark your copies, that
15 is Exhibit 83.

16 (Exhibit 83 was marked for
17 identification.)

18 Mr. Docheff, would you state and spell
19 your name?

20 THE WITNESS: Jim Docheff,
21 D-o-c-h-e-f-f.

22 JIM DOCHEFF
23 of lawful age, being duly sworn, was examined and
24 testified as follows:

25 JUDGE CLIFTON: Mr. Miltner, you may

1 proceed.

2 MR. MILTNER: Thank you, your Honor. And
3 Mr. Docheff's statement, which was just marked
4 as Exhibit 83, was distributed to the attorneys
5 and to the representatives of USDA, the court
6 reporters and a copy for your Honor. There are
7 additional copies in the back of the room for
8 anybody who would like one.

9 DIRECT EXAMINATION

10 BY MR. MILTNER:

11 Q. Good morning, Mr. Docheff.

12 A. Good morning.

13 Q. Before you read your statement, which is
14 brief and should not take us too darn long, you are from
15 Longmont, Colorado, is that right?

16 A. Yes, sir.

17 Q. There's another operation in Longmont,
18 Colorado that goes by the name of Longmont Dairy, is
19 that right?

20 A. Correct.

21 Q. You're not affiliated with Longmont
22 Dairy, are you?

23 A. No, I'm not.

24 Q. Okay. And you are not a member of the
25 American Independent Dairy Alliance, is that right?

1 A. No, sir, that's correct.

2 Q. You're here to express your own views on
3 the proposals to change producer-handler regulations in
4 general?

5 A. Yes.

6 Q. You're not speaking directly to any
7 proposal of AIDA?

8 A. No.

9 Q. If you want to read your statement, go
10 right ahead, sir.

11 A. My name is Jim Docheff. My wife,
12 Kristie, and I are fourth generation dairy farmers in
13 Colorado. My grandfather helped start Denver Milk
14 Producers in the 1940s, a dairy co-op in Denver. The
15 Diamond D Dairy has grown from milking 65 cows in 1987
16 to 500 today. Our oldest son, Joshua, recently
17 graduated from Colorado State University in May of 2008.
18 He wanted to continue the dairying tradition of the
19 Docheff family. In order to make that possible, the
20 economics of dairy farming required opening a processing
21 plant.

22 In September 2007 we began building a
23 milk processing plant on the dairy that began in
24 operation in March of 2008. We started business from
25 ground zero, built the plant, hired a sales and delivery

1 staff and began running the plant, and began sales in
2 January of 2008 and began accumulating sales. We are
3 not a producer-handler yet, but we do not want to have
4 the door closed on us as we have invested in the
5 bottling plant with a capacity of 3 1/2 to
6 4 million pounds of milk per month.

7 We currently sell approximately half of
8 the milk through the plant, the other half is sold to
9 Dairy Farmers of America, which is today the only co-op
10 operating in Colorado. Diamond D has been a member of
11 DFA since 1987, formerly Western Dairy Cooperative, and
12 continues to be a member today.

13 The Diamond D client base consists of
14 1,200 home delivery customers, began in March when we
15 opened the bottling plant, and 175 wholesale accounts in
16 the Colorado Springs to Fort Collins area. We are
17 hopeful that our business will continue to grow so by
18 the end of the summer, we will be in a position to
19 transition to producer-handler status.

20 Diamond D is both a producer member and
21 a processor customer of Dairy Farmers of America. As a
22 producer member, I pay all the normal fees and charges
23 associated with marketing my milk. These include
24 balancing plant, milk hauling, forward haul,
25 administrative and milk promotion fees. Administrative

1 fees are 10 cents a hundredweight, typically described
2 to us as nothing by DFA as management. As a processor
3 customer, I purchase my milk back to bottle it. When I
4 purchase this milk back, I pay a handling charge and a
5 service charge that consists of an over-order premium
6 and a balancing charge. DFA charges me approximately \$5
7 a hundredweight for this service, which is simply an
8 out-of-pocket cost to us. As a reference point, our
9 cost of production is around \$17 a hundredweight.

10 At a 60 to 65 percent sales volume
11 through our own processing plant, we can become
12 independent and create a viable next generation business
13 for our family that is local, sustainable and very
14 well-matched to our customer base. The ability of
15 Diamond D Dairy to survive and go on to the fifth
16 generation depends on maintaining the continuing
17 viability of producer-handler status. For every bad
18 year like the current one, we have -- as a small
19 producer, we need two to three years to get back even of
20 good years. We want to build an economically
21 sustainable business and we ask the government not adopt
22 a national policy that deprives us of that choice.

23 BY MR. MILTNER:

24 Q. Thank you Mr. Docheff. Now, your
25 statement, was it drafted by you?

1 A. Yes.

2 Q. Okay.

3 A. It was -- I stated it and I had another
4 person type it.

5 Q. Okay. So it was dictated and somebody
6 else did the word processing?

7 A. Yes.

8 Q. Now, you've been a dairy farmer for
9 better than 20 years in Colorado?

10 A. Correct.

11 Q. What were the factors, economic or
12 otherwise, that led you and your family to make the
13 decision to invest in a processing plant?

14 A. It was always in the back of my mind to
15 do it, I've always been intrigued with that aspect. And
16 you put a lot of time and effort in producing a good
17 quality product, and it really bothered me over the
18 years when that would go on a truck and be commingled
19 with other milk and be processed and distributed. And I
20 always wanted the consumer to appreciate that fresh
21 taste from a local farm getting it as fast as they
22 could. So that was in the back of my mind.

23 When my son stated he wanted to come back
24 to the dairy, basically I had two choices, you get
25 bigger or try to extract a little higher price for the

1 product. It wasn't feasible to make our dairy bigger
2 where we're at, so I felt this was the time to build a
3 processing plant.

4 Some of economic factors in that,
5 historically when you look at your cost of production on
6 your dairy, feed cost is the highest cost.

7 Historically, it's been around \$6 a hundredweight. With
8 what's happened in the last couple years, that's crept
9 up to 8 to 8 1/2 dollars. Next has always been labor.
10 That historically's been \$1.60 to \$1.70 a hundredweight.
11 Next was probably debt service of around 90 to a dollar
12 a hundredweight. Next in line was co-op marketing
13 costs, that was historically around 70 to 75 cents.

14 Then the rest of the things fell in.
15 Your vet services of around 30 cents, your semen costs
16 of 15 cents. Milk supply is 25 cents.

17 When I looked at that over the last four
18 to five years, all of those have come up some. The most
19 drastic was my charges for having my milk marketed
20 through the co-op. They rose basically from 70 to 75
21 cents to up around \$1.75. And currently that's my
22 second highest cost on the dairy, behind feed, is my
23 cost to get my milk marketed.

24 So in my mind, I justified for what I was
25 paying the co-op to sell that milk and haul that milk to

1 the customer, I think I could do the same for probably a
2 little less and hopefully get a little higher price for
3 my milk at the end of the day.

4 Q. So as you saw it, your options for the
5 survival of your farm in the next generation were to get
6 larger, and presumably more efficient in the process, or
7 increase the revenues from your current operation, is
8 that right?

9 A. That's correct.

10 Q. And after you looked at all the numbers,
11 taking responsibility to bottle and market your milk was
12 the only way to grow the bottom line?

13 A. You know, we could -- we could have
14 invested money and built a new dairy and gotten more
15 cows. At the end of the day, I looked at it, and to
16 justify building a new milking parlor in a new facility,
17 you're going to have to look at 1,500 to 2,000. And in
18 our state, moving to eastern Colorado to do that, invest
19 7 to \$10 million. I felt it was better to invest
20 2 million in a processing plant.

21 Q. When you say invest \$2 million, you
22 didn't have \$2 million sitting around to actually invest
23 in the plant?

24 A. I wish I would have, but no.

25 Q. Okay. So you had to obtain financing for

1 that?

2 A. Correct.

3 Q. When the co-op costs rose as dramatically
4 as you described, couldn't you have found another agent
5 to market your milk?

6 A. Not in Colorado. I would have had to
7 move out of state to find another co-op. That's the
8 only choice we have in Colorado.

9 Q. And your statement, you say your
10 grandfather started a co-op, Denver Milk Producers.
11 What became of that organization?

12 A. Over the years, there were numerous
13 co-ops in Colorado and they just consolidated. Probably
14 the last consolidation was in to Western Dairymen
15 Cooperative in the early to mid '80s. And there was
16 Colorado Springs Milk Producers, Empire Dairymen, Fort
17 Collins Milk Producers, a few on the western slope that
18 I don't recall the names. They conglomerate or came
19 together and formed Western Dairymen Cooperative. Then
20 Western Dairy Cooperative a few years later merged with
21 the co-op producer in Utah and became Western Dairy
22 Cooperative. And then Western Dairy Cooperative merged
23 into the now Dairy Farmers of America.

24 Q. In your statement, you say that you sell
25 half of your milk through your plant and the other half

1 is sold to DFA.

2 A. Correct.

3 Q. I want to examine how that actually takes
4 place. You actually sell all of your milk production to
5 DFA, correct?

6 A. Yes, we do.

7 Q. And then buy?

8 A. We purchase what we process through the
9 plant back from DFA.

10 Q. And when you say that DFA charges me
11 approximately \$5 a hundredweight for this service, are
12 you describing the spread between what you sell your
13 milk to DFA for and what you receive -- sorry. Are you
14 describing the difference between what you receive when
15 you sell your milk and what you pay to get it back?

16 A. Yes, that's correct.

17 Q. Now, when you say you sell your milk to
18 DFA and then buy it back, does the farm -- the milk you
19 process, does it actually get into the possession of the
20 cooperative?

21 A. A physical possession, no. It's just a
22 paper transfer. It goes from the milk parlor, the
23 measure of the tank, and that milk gets pumped to the
24 plant.

25 Q. Gets pumped to the plant. There's no

1 truck involved?

2 A. No.

3 Q. It's a pipeline?

4 A. Yes, a pipeline.

5 Q. Are you saying that even -- you say for
6 every bad year like the current one, a producer needs
7 two to three years to get back even. This year is, I
8 would say, exceptionally bad. Would you agree with
9 that?

10 A. I agree. My dad's been in the business
11 for almost 45 years and he's never seen it, that the
12 cost between what it -- the price with what it costs to
13 produce the milk and the price we're receiving, he's
14 never seen that spread this big.

15 Q. When you say it takes two to three years
16 to get back even, is that based on prior bad years that
17 aren't as bad as this one?

18 A. Yes.

19 Q. When -- when was the last bad year, in
20 your recollection?

21 A. 2006 was kind of tough.

22 Q. And before that?

23 A. 2001.

24 Q. Okay. How was 2003 for you?

25 A. It was a marginal year.

1 Q. So in 2001, were you able to catch up by,
2 say, 2004?

3 A. No.

4 Q. Okay. When do you think things caught up
5 after 2001?

6 A. 2003 put us a little behind there and
7 2006 put us a little further behind. 2007, 2008, we
8 were getting close but we still hadn't completely
9 recovered from 2001.

10 Q. 2008 was actually a historically high
11 year for milk prices, correct?

12 A. Actually, 2007 were probably higher. We
13 had some historically high prices in 2008, but it wasn't
14 for a sustained period. When you look at the average
15 price over the year, 2007 was actually better than 2008.

16 Q. So at the end of 2007, were you saying
17 that you were caught up from the downturn in 2001?

18 A. We were probably caught up for the
19 downturn in 2001, but the slim years in 2003, 2006, we
20 were starting to rebuild from those years.

21 Q. And if you were just operating a farm,
22 how long would you expect to recover from 2009, if and
23 when it recovers?

24 A. If we were -- if we didn't have the
25 processing plant, we would have probably filed

1 bankruptcy before the end of the year.

2 Q. You're familiar with the other dairies in
3 your area?

4 A. Yes.

5 Q. Do you believe your farm situation is any
6 different from the others in your area?

7 A. On the cow end of it, no. The fact that
8 we have a processing plant, yes. That is different.

9 Q. I didn't -- I meant to limit that
10 question to the farm side of the operation.

11 A. Our production is probably a little
12 better than the typical farm.

13 Q. And the financial situation would be
14 comparable on average?

15 A. On average, comparable.

16 Q. And you're not taking any position on any
17 formal proposals here, as I understand?

18 A. Correct.

19 Q. But do you believe that the
20 producer-handler regulations, in particular in your
21 order, the Central Order, need to be changed?

22 A. I do not.

23 Q. And there's one proposal, Proposal
24 Number 2, that would expand an exempt plant limit to
25 450,000 pounds of Class I sales. And in testimony that

1 you weren't here for, the number of cows to reach that
2 has been variously described between 2 and 300 cows.
3 You said your operation is a 500 cow operation?

4 A. Correct, yes.

5 Q. And so an expansion of the exempt plant
6 limit to 450,000 pounds, would that help you?

7 A. No, it would not.

8 MR. MILTNER: Thank you.

9 JUDGE CLIFTON: Mr. Docheff, I don't
10 recall whether you said that both the farm and
11 the plant are in Longmont. Are they?

12 THE WITNESS: Yes, they are.

13 JUDGE CLIFTON: All right. And about how
14 far is the location of the farm and the plant
15 from the Denver area?

16 THE WITNESS: We're 20 miles north of
17 Denver.

18 JUDGE CLIFTON: Thank you. Who next will
19 cross-examine Mr. Docheff? Mr. English. Thank
20 you.

21 CROSS-EXAMINATION

22 BY MR. ENGLISH:

23 Q. Good afternoon, sir. My name is Charles
24 English. I don't have a lot of questions but I have a
25 few.

1 Do you have neighbors, dairy farmer
2 neighbors --

3 A. Yes.

4 Q. -- in your area?

5 A. Yes.

6 Q. And are they having trouble staying in
7 business themselves?

8 A. Yes. Currently there are two that are in
9 Chapter 11 bankruptcy. And I can't tell you the exact
10 finances. They're all struggling.

11 Q. You have one to two neighbors that one of
12 the two are Chapter 11 who are dairy farming?

13 A. There's two of them that are in
14 Chapter 11.

15 Q. But are there other dairy farmers in your
16 immediate vicinity who are not in Chapter 11 right now?

17 A. Yes.

18 Q. And when you say, in order to make it
19 possible to continue dairying, the economics of dairy
20 farming require opening a processing plant, does that
21 also mean that in order to stay in dairying, they need
22 to open a processing plant?

23 A. No. In my particular situation, I had --
24 I needed to. That was my best option, to open a
25 processing plant.

1 Q. Do you have any reason to believe that
2 their options are different from yours?

3 A. If they have the ability to increase cow
4 numbers, they probably wouldn't need to put the
5 processing plant in.

6 Q. But you don't have the ability to put
7 more cows on where you are now?

8 A. Correct.

9 Q. And you didn't want to make the financial
10 investment in the additional herd, correct?

11 A. Correct.

12 Q. Do you understand that there is a
13 proposal to have a -- what is it -- a cap of 3 million
14 pounds for producer-handler?

15 A. Yes, sir.

16 Q. And you're presently nowhere near that
17 cap, correct?

18 A. Correct.

19 Q. Let me backtrack. Are you paying into
20 the pool now?

21 A. Yes, I am. I'm classified as a
22 distributing plant at the current time.

23 Q. I'm sorry?

24 A. A distributing plant I'm classified as.

25 Q. A fully regulated distributing plant?

1 A. Yes, sir.

2 Q. And can you tell us, for the most recent
3 month, approximately -- and you don't have to, by the
4 way -- could you tell us approximately what your pool
5 payment was for the last month?

6 A. More than I would like.

7 Q. Okay. But in order to -- you're milking
8 500 cows, correct?

9 A. Yes.

10 Q. But then you say you're selling half the
11 milk to DFA, correct?

12 A. Correct.

13 Q. So would it be fair to say that only milk
14 from 250 cows right now are running through the plant,
15 correct?

16 A. Correct.

17 Q. Is that somewhere in the neighborhood of
18 700 to 750,000 pounds a month?

19 A. About 475,000 pounds.

20 Q. Okay. I went at the high end of milk
21 production. So 475,000 pounds a month is where you are
22 today?

23 A. Correct.

24 Q. And can you add any cows in the existing
25 facility?

1 A. No. We are maxed out.

2 Q. So in order to go to a thousand cows, 500
3 more cows, you're going to have to have a different farm
4 facility, correct?

5 A. Correct.

6 Q. And you determined that would have to be
7 in a different location, is that correct?

8 A. Yes.

9 Q. How far away?

10 A. Probably, populationwise, you could
11 probably go 30 to 40 miles east. But in that area
12 there's not very good feed or water resources. So
13 you're looking at 75 to a hundred miles east, around
14 Fort Morgan, Yuma area.

15 Q. Yuma, Colorado?

16 A. Yes.

17 Q. Yuma, Arizona has been -- but this is
18 Yuma, Colorado?

19 A. Yuma, Colorado, right.

20 Q. So in order -- if your -- you could, of
21 course, with your 500 cow herd run, I guess, double 475,
22 or 950, through the plant, correct?

23 A. Yes.

24 Q. You just don't have the customers right
25 now for that?

1 A. State that again.

2 Q. You're processing 475,000 pounds at the
3 plant, correct?

4 A. Right.

5 Q. But that's half of your volume, because
6 half the volume is being sold to DFA, correct?

7 A. Correct.

8 Q. So if you had the customers, you could
9 actually process -- because you already have twice that
10 much milk, 950,000 pounds, correct?

11 A. Correct, yes.

12 Q. But in order to get to 3 million pounds,
13 which is a limit that some people are discussing at this
14 hearing, you would have to triple the size of your herd,
15 correct?

16 A. Correct.

17 Q. And that couldn't be on the existing
18 facility, correct?

19 A. Correct.

20 Q. And that's exactly the investment you
21 decided not to make in additional cows, correct?

22 A. Correct.

23 MR. ENGLISH: I have no further
24 questions, thank you, sir.

25 JUDGE CLIFTON: Thank you, Mr. English.

1 Who will next cross-examine this witness?

2 Mr. Carroll.

3 CROSS-EXAMINATION

4 BY MR. CARROLL:

5 Q. Good morning, sir.

6 A. Good morning.

7 Q. I'm John Benjamin Carroll, I'm an
8 attorney for New England Producer-Handlers Association
9 and several independent persons who are owners or
10 processors of milk.

11 A. Okay.

12 Q. I think you indicated that you're in a
13 family relationship in this business. Could you expand
14 on that and tell us who's in the business and tell us
15 what they do?

16 A. My wife and I manage the business. Our
17 oldest son, who just graduated from college, is the herd
18 manager of the cows. And we have a younger daughter and
19 son that are involved. My daughter's in college, my
20 son's in high school, so they help out wherever they
21 can. And then we have about 40 employees that help milk
22 the cows, process the milk, deliver the milk, sell the
23 milk.

24 Q. And is it part of your business plan to
25 attempt to continue as a family business, give the

1 opportunity to your children to continue in the
2 tradition of your family?

3 A. I'm very hopeful. We're the only dairy
4 in Colorado in the fourth generation. And the prospect
5 of my son making it the fifth, I'm pretty excited about
6 that, so I would love to see this thing going.

7 Q. Well, we all need things like that to get
8 up in the morning for, don't you agree?

9 A. I agree totally.

10 Q. Now, directing your attention to the home
11 delivery that you have started. Are you a principal
12 person in home delivery? Are there others that compete
13 with you or is that a market you developed yourself?

14 A. No, in Colorado there's three other home
15 delivery companies. And we're all basically in the same
16 area.

17 Q. And when you put your plant up, did you
18 engage in financing of any kind?

19 A. Yes.

20 Q. To finance that plant?

21 A. Yes, sir.

22 Q. And I don't know that you want to reveal
23 the cost, but if you want to, could you tell us whether
24 that was an expensive investment or not, basically?

25 A. I revealed it a few minutes ago. It was

1 about \$2 million.

2 Q. Right. And are you -- is your family or
3 yourself a guarantor on that loan?

4 A. I am.

5 Q. If that loan's not paid, what impact, if
6 any, would it have upon you or your family?

7 A. It would -- I would have to pay for it
8 somehow. If I didn't pay for it, I would probably have
9 to file bankruptcy.

10 Q. As a citizen of this country, do you
11 believe -- do you have an opinion as to whether it's
12 your right to attempt to enter into a business, and if
13 you fail, fail, and if succeed, succeed, and that the
14 government ought not be in a position deciding whether
15 or not you have that right?

16 A. I totally agree with that.

17 Q. And do you need this exemption in order
18 to engage in the business as you designed and planned
19 for?

20 A. Yes, I do.

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

22 JUDGE CLIFTON: Thank you, Mr. Carroll.

23 Who will next cross-examine Mr. Docheff?

24 Mr. Beshore.

25 CROSS-EXAMINATION

1 BY MR. BESHORE:

2 Q. Good afternoon, Mr. Docheff.

3 A. Good afternoon.

4 Q. I'm Marvin Beshore, I'm an attorney. I
5 represent National Milk Producers Federation and Dairy
6 Farmers of America.

7 A. Okay.

8 Q. Just one question at this time, I think,
9 or one area. The 175 wholesale accounts which you have
10 indicated you service at the present time, can you tell
11 us about those, what types of accounts they are?

12 A. The majority of them, amazingly, are
13 coffee shops and small restaurants. We have a few
14 independent grocers, I want to say mom-and-pop grocers,
15 I don't know if that's the right term. Family grocers.
16 There's one in Berthoud, which is a town north of us.
17 It's been in the family two or three generations.

18 There's a couple of them in Fort Collins,
19 three of them in Boulder we have. Just independent, not
20 chain stores. Lucky's Market, Haye's Market, Beaver's
21 Market. Geez, I'm drawing a blank here. That's the
22 gist of it. But the biggest percentage are restaurants,
23 coffee shops, that nature.

24 Q. Now, you've just been operating since
25 March of 2008 --

1 A. Correct.

2 Q. -- as far as your processing business is
3 concerned? Who was supplying those wholesale accounts
4 prior to your obtaining that business?

5 A. It was a wide variety in Colorado. We
6 have Sinton's Dairy, Robinson, Meadow Gold, then
7 Longmont Dairy Farm, Morning Fresh Dairy Farm, Royal
8 Crest. And to tell who each of them were, it was a mix
9 of every one.

10 Q. And are the Sinton's and Meadow Gold,
11 Royal Crest, those are all pool handlers?

12 A. Correct.

13 JUDGE CLIFTON: May I interrupt? Would
14 you spell Sinton's? I'm not sure we've had
15 that.

16 THE WITNESS: S-i-n-t-o-n apostrophe S.

17 JUDGE CLIFTON: Thank you.

18 Q. I think, is Longmont a producer-handler?

19 A. Yes, it is.

20 Q. Are any of the others?

21 A. Morning Fresh.

22 Q. Morning Fresh is also a producer-handler?

23 A. Yes.

24 MR. BESHORE: Your Honor, I do not have
25 any other questions for Mr. Docheff at this

1 time. However, my DFA representative,
2 Mr. Hollon, who has been at the hearing
3 throughout is not in the room at this time.
4 There's certain business, non-hearing business,
5 which he must be taking care of, which he is
6 taking care of and he's out of the room. So he
7 hasn't been able to hear Mr. Docheff.

8 I've not been able to speak with him
9 concerning his testimony. I would like the
10 opportunity to speak with him to determine that.
11 And I don't know that we have any other
12 questions, but you know, in the event that he
13 might have some, I would like that opportunity
14 to -- before Mr. Docheff is completed.

15 JUDGE CLIFTON: Don't leave the podium
16 yet. Mr. Docheff, what is your current plan as
17 to when you would leave the room? Oh, good.
18 Mr. Hollon just walked in the room. That may
19 solve the problem. But go ahead, Mr. Docheff,
20 and tell me your plan as to when you would
21 depart the room.

22 THE WITNESS: I have a flight leaving at
23 3:30, so I need to leave by about 2:00.

24 JUDGE CLIFTON: Or earlier, actually.

25 THE WITNESS: Okay.

1 MR. BESHORE: I'll take the opportunity
2 to consult with Mr. Hollon immediately.

3 JUDGE CLIFTON: Great, all right.

4 MR. BESHORE: Thank you. I don't have
5 any other questions at this time.

6 JUDGE CLIFTON: Thank you, Mr. Beshore,
7 we'll see you again when you've had an
8 opportunity to consult.

9 All right. Who next has questions for
10 this witness? It's a very concentrated
11 statement. I'm still digesting it. Is there
12 anyone else that has some particular questions
13 right now? Mr. Rower, do you?

14 MR. ROWER: No, your Honor.

15 JUDGE CLIFTON: Thank you. All right.
16 Why don't we just a -- I think Mr. Beshore and
17 Mr. Hollon will be fairly brief. If they would
18 be the only other ones cross-examining, I would
19 like to have that before we do anything else.
20 This time, try not to go too far, this truly is
21 like a five-minute stretch break, would take us
22 to 12:30. Do you have another suggestion,
23 Mr. Miltner?

24 MR. MILTNER: My only suggestion is
25 starting another witness before lunch. And

1 if -- if Mr. Beshore has anything or if he needs
2 more time --

3 JUDGE CLIFTON: Mr. Beshore, would you
4 come to the podium? No one else had any
5 cross-examination, wouldn't you know.

6 MR. BESHORE: Well, I do need some more
7 time. Mr. Hollon has just -- has just now seen
8 Mr. Docheff's statement. And we need some
9 time --

10 JUDGE CLIFTON: All right.

11 MR. BESHORE: -- just to get or check
12 some information.

13 JUDGE CLIFTON: To get some basic
14 information, is what he said. Okay. If this
15 witness should be leaving the room in a half
16 hour or 45 minutes, something like that, then we
17 could have another witness for a short time and
18 then interrupt that witness. Mr. Ricciardi, a
19 suggestion, please?

20 MR. RICCIARDI: Your Honor, my suggestion
21 is that what we do is we give Mr. Hollon the
22 opportunity to read the statement, we take a
23 five or ten minute break, that should be
24 sufficient. If they have questions, they should
25 ask them so that Mr. Docheff, since he came here

1 on his own, should be allowed to wing his way
2 back to Colorado. Then we could take our lunch
3 break and start our next witness.

4 JUDGE CLIFTON: Mr. Miltner, would that
5 work for you?

6 MR. MILTNER: It would, your Honor.

7 JUDGE CLIFTON: All right. It would for
8 me, too. Let's -- okay. You all can have ten
9 minutes, because it will take Mr. Hollon that
10 long to digest this very concentrated statement
11 and talk with Mr. Beshore. So please be back,
12 ready to go at 12:36.

13 (A recess was taken from 12:26 to 12:37.)

14 JUDGE CLIFTON: All right. Let's go back
15 on record. Back on record at 12:37.
16 Mr. Beshore?

17 MR. BESHORE: Your Honor, Mr. Hollon is
18 still on the phone with his office, but I do
19 have a question for clarification that I want to
20 ask of Mr. Docheff.

21 BY MR. BESHORE:

22 Q. You referenced the fact that formerly you
23 had a 75 cent per hundredweight account -- or amount
24 with the cooperative, and that has recently gone to a
25 \$1.75 per hundredweight?

1 A. Over the last two to three years it's
2 risen. You know, I realize fuel costs and stuff like
3 that. But historically, it had been 65 to 75 cents a
4 hundredweight. And the last, probably, year, we've been
5 as high a \$1.95, but right around \$1.75 per
6 hundredweight.

7 Q. Now, are you referring to the capital
8 account --

9 A. No.

10 Q. -- with the cooperative?

11 A. No. The charges, hauling charges, our
12 intermountain haul charge, our balancing plant costs,
13 promotion. Which I -- you know, I'm going to have that
14 cost no matter what. 10 cents administrative fee.

15 Q. Okay. I think Mr. Miltner may have
16 clarified this, but I want to make sure.

17 When you say DFA charges me approximately
18 \$5 a hundredweight for this service, you're comparing
19 the price that you're charged for the Class I milk used
20 at your processing plant, that's the top number, is that
21 correct?

22 A. No. For all the milk that we put through
23 our plant that we get from DFA, there's about a \$4.90
24 charge per hundredweight.

25 Q. Is some of that milk not Class I?

1 A. Some of it is Class II.

2 Q. Okay. But you're comparing that amount
3 to the, what, the blend price you receive?

4 A. No. That's on the bill that I get for
5 that milk, that's what the charges are. There's a
6 service charge of \$2.70, there's a location adjustment
7 of 45 cents. And then basically the difference between
8 what they charge and what I get, there's about \$1.75 in
9 there.

10 Q. Did you take into account the equal
11 receiving credit you get?

12 A. I'm not familiar with that.

13 Q. Did you look at all the entries on your
14 invoice?

15 A. Okay.

16 Q. Did you?

17 A. I don't understand the equal receiving
18 charge.

19 Q. Okay. If you're credited an amount on
20 your invoice for taking a level amount of milk on a
21 daily basis --

22 A. Right.

23 Q. -- okay? Are you aware of that?

24 A. They failed to put it on my bill if I
25 qualified for it.

1 Q. Okay. So that's the top -- the top
2 number -- well, how do you get the \$5? You said it was
3 \$2.70 -- 45 cent location adjustment, that's set by the
4 Federal Order, right?

5 A. Correct.

6 Q. Okay. Now, that's not \$5. What's the
7 rest of the charges? Is that the basic differential,
8 Class I differential under the order?

9 A. There's a service charge, and that's how
10 it is, service charge of \$2.70 a hundredweight.

11 Q. I understand that. Then you said there's
12 a 45 cent location differential?

13 A. Right.

14 Q. Okay. Now, that's \$3.15.

15 A. And then there's another \$1.75.

16 Q. Is that the Class I differential under
17 the order?

18 A. No, I wouldn't classify it as a Class I
19 differential. It's the price that I'm getting paid for
20 my milk as a member. And then there's about an 80 cent
21 premium that I'm paying as a processor. So there's
22 \$1.75 -- \$1.50, \$1.75 there.

23 Q. That's where the \$1.75 comes from?
24 You're being paid an 80 cent premium as a member.

25 A. No, deduct of 75 cents. We have an -- an

1 intermarket haul charge and a balancing plant cost that
2 is coming off our federal -- minimum Federal Order
3 price.

4 Q. Okay. But the two -- 2.70 over -- 2.70
5 service charge, you said, is what you charged?

6 A. Correct.

7 Q. Plus the 45 cent location differential?

8 A. Correct.

9 Q. Correct?

10 A. Correct. I'm digging a little deep
11 there. Well, not -- I don't think I'm digging a little
12 deep. I'm looking at the figures of what they're
13 selling their milk for and what they're paying me for,
14 and there's \$1.50 to \$1.75 there.

15 Q. Okay.

16 A. Enough said.

17 Q. You understand you get paid a blend
18 price. But when you're buying it, you're buying it at
19 the class value?

20 A. Yes, I understand.

21 Q. Okay.

22 MR. BESHORE: I don't have any other
23 questions for Mr. Docheff at this time.

24 JUDGE CLIFTON: Thank you, Mr. Beshore.

25 Is there any other cross-examination? There is

1 none. Mr. Miltner.

2 MR. MILTNER: Your Honor, I don't have
3 any questions, unless Mr. Docheff has anything
4 he would like to state before he leaves the
5 stand.

6 A. Well, I would urge the USDA to leave the
7 rules as they are. The 3 million cap, granted that's
8 not going to affect me, it still is the United States of
9 America. And if my son wants to eventually milk 2,500
10 cows or 25,000 cows or drop back to 200, it bothers me
11 that the government can tell him if he can do that.

12 I do not like the grandfather clause,
13 that if you were a handler in 2008 you could stay that.
14 Because if that is in effect, then that would exclude me
15 from this. So I would urge you to throw that out. And
16 that's all I have to say.

17 MR. MILTNER: Your Honor, we would move
18 admission of his statement, please.

19 JUDGE CLIFTON: Is there any objection to
20 the admission into evidence of Exhibit 83, which
21 is Jim Docheff's statement? There is none,
22 Exhibit 83, 8-3, is hereby admitted.

23 MR. MILTNER: Thank you. And thank you
24 very much, Mr. Docheff.

25 JUDGE CLIFTON: I think it's helpful that

1 Mr. Vetne's client had not arrived or
2 Mr. Docheff might not be able to take that
3 plane, so that worked out well. Is there
4 anything else? Well, let's decide who will
5 testify when we come back from lunch before we
6 go to lunch. Do you have another witness right
7 after lunch, Mr. Miltner?

8 MR. MILTNER: We do, your Honor,
9 Mr. Kreider is here, and his statement was
10 distributed first thing this morning to the
11 attorneys, to USDA, to the court reporter. And
12 I believe I gave one to your Honor as well. If
13 I did not, I reserved one that I could give you
14 now.

15 JUDGE CLIFTON: I think I do not have it.
16 How does he spell his name?

17 MR. MILTNER: K-r-e-i-d-e-r.

18 JUDGE CLIFTON: Good.

19 MR. MILTNER: Thank you.

20 JUDGE CLIFTON: That will be our first
21 witness when we come back. Mr. English?

22 MR. ENGLISH: We didn't begin the day the
23 way we had begun most days, your Honor. It
24 would be nice for all of us to have had the same
25 opportunity everyone else has had, to know the

1 rest of the witnesses who expect or want to or
2 need to or are available to testify today.

3 JUDGE CLIFTON: Okay. We know for sure
4 that if Mr. Sapp comes, Jeff Sapp --

5 MR. VETNE: Your Honor --

6 JUDGE CLIFTON: Do you have an update,
7 Mr. Vetne?

8 MR. VETNE: Yes, he will not be coming.
9 He's either got a stricter doctor or a more
10 compliant patient than Mr. Ricciardi.

11 JUDGE CLIFTON: So not at all? Okay.
12 Thank you. I'm sorry that he's unable to
13 attend.

14 Now, the category that I have,
15 Mr. English, is six AIDA witnesses, but you
16 would like names.

17 MR. ENGLISH: We've been providing names,
18 usually many days in advance, your Honor. It
19 would be helpful to have an idea. I think it
20 would help preparation.

21 JUDGE CLIFTON: Very fine. Is such a
22 list available now Mr. Miltner?

23 MR. MILTNER: Your Honor, today we have
24 Mr. Kreider, and Mr. Heine Hettinga,
25 H-e-t-t-i-n-g-a. And then the others are either

1 in transit or would be available by tomorrow or
2 Friday. And tomorrow we expect Mr. Tony
3 Bostwick, B-o-s-t-w-i-c-k, of Braum's Dairy,
4 B-r-a-u-m.

5 Tomorrow our economists will be here and
6 I think it probably would behoove us to try to
7 get them on, Dr. Knutson and Dr. Knoblauch.

8 JUDGE CLIFTON: You've spelled those
9 before for me before, would you mind doing it
10 again?

11 MR. MILTNER: Sure, K-n-u-t-s-o-n,
12 K-n-o-b-l-a-u-c-h.

13 JUDGE CLIFTON: All right. Good. What I
14 know, in addition to the AIDA witnesses -- let's
15 see. Do we know for sure, Mr. Miltner, that
16 Mr. Boyd will be testifying at all?

17 MR. MILTNER: He will not be available
18 this week.

19 JUDGE CLIFTON: But might be if we go
20 into next week?

21 MR. MILTNER: We don't know.

22 JUDGE CLIFTON: Oh. And what else I know
23 is that Dr. Yonkers is available to testify
24 today and tomorrow, but only up to through noon
25 Friday. And I also know that we have not yet

1 had the cross examination of Mr. Carman. So
2 what else should we all know?

3 MR. MILTNER: We have Sally Keefe,
4 K-e-e-f-e, from Aurora Organic Dairy; Warren
5 T-a-y-l-o-r, T-a-y-l-o-r, of Snowville Creamery;
6 and Tim Button, B-u-t-t-o-n, and Charles Sharpe,
7 S-h-a-r-p-e, of Heartland Dairy. And as to the
8 gentlemen from Heartland, we need to advise them
9 whether to be here Friday or Monday.

10 JUDGE CLIFTON: Now, is that two people
11 from Heartland?

12 MR. MILTNER: Yes.

13 JUDGE CLIFTON: Both Sharpe and Button?

14 MR. MILTNER: Yes.

15 JUDGE CLIFTON: And either Friday or
16 Monday, but they need to know.

17 MR. MILTNER: And we can -- yes. I'll
18 try to find out over lunch what their schedules
19 are and when we could get them here.

20 But I think it's -- I think it's highly
21 likely we are going to go past Friday. Would
22 counsel agree that we are, in fact, going to go
23 past Friday at this point?

24 MR. ENGLISH: I believe I made my views
25 crystal clear yesterday. I thought yesterday we

1 are going past Friday. I have not changed my
2 views.

3 JUDGE CLIFTON: In spite of the Judge's
4 hope, deep hope?

5 MR. MILTNER: I will say maybe for
6 Mr. English as well, despite all of our hopes.

7 MR. ENGLISH: I agree with Mr. Miltner.

8 MR. MILTNER: Please let the record
9 reflect that Mr. English has agreed with me.
10 And that will give us some flexibility in
11 advising the folks from Heartland, and we
12 appreciate that.

13 JUDGE CLIFTON: All right. Mr. Rower?

14 MR. ROWER: We also had Carolyn Orr and
15 Mr. Metzger, I believe, Erick Metzger was
16 interested in testifying.

17 JUDGE CLIFTON: And he's here,
18 Mr. Metzger is here. I would like to work him
19 in today. And he said he's flexible, and if we
20 don't get him today, he doesn't want to take the
21 place of someone who has a plane to catch.
22 Which is very helpful to us all. Mr. English?

23 MR. ENGLISH: Can I have clarity then,
24 your Honor? I understand we have Kreider,
25 Kreider Dairy. I heard we have Heine Hettinga

1 for today. The other names I wasn't sure. Any
2 of them available for today in terms of what we
3 prepare for during lunch?

4 MR. RICCIARDI: No.

5 JUDGE CLIFTON: Mr. Ricciardi says no.

6 MR. RICCIARDI: They will not be -- we
7 can make some decisions on what we do at that
8 point, whether or not we proceed with the
9 continued examination of Carman, whether or not
10 we get Dr. Yonkers on, perhaps Mr. Metzger can
11 also testify at that point. Let's see where we
12 go after Messrs. Kreider and Hettinga.

13 JUDGE CLIFTON: Okay. Good.

14 MR. ENGLISH: Thank you for that clarity.

15 JUDGE CLIFTON: I think we will not run
16 out of witnesses, which is great. All right. I
17 would like to take an hour now for lunch. It's
18 almost 12:55. Please be back at 1:55 ready to
19 go.

20 (A recess was taken from 12:55 to 2:05.)

21 JUDGE CLIFTON: All right. We're back on
22 record at 2:05. Mr. Miltner?

23 MR. MILTNER: Thank you, your Honor.

24 Mr. Ron Kreider is taking the stand.

25 JUDGE CLIFTON: Hello. Thank you, and

1 please be seated, Mr. Kreider.

2 THE WITNESS: Thank you, your Honor.

3 JUDGE CLIFTON: If you'll state and spell
4 your name for us?

5 THE WITNESS: My name is Ron Kreider,
6 R-o-n, K-r-e-i-d-e-r.

7 JUDGE CLIFTON: Thank you. If you'll
8 raise your right hand, I'll swear you in.

9 RON KREIDER

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

12 DIRECT EXAMINATION

13 BY MR. MILTNER:

14 Q. Good afternoon, Mr. Kreider.

15 A. Good afternoon.

16 Q. You have a prepared statement which has
17 been distributed in the room, and your Honor indicated
18 that we marked it as an exhibit.

19 MR. MILTNER: And I apologize, your
20 Honor, I wasn't at the statement when you gave
21 the number. What is it now?

22 JUDGE CLIFTON: 84.

23 (Exhibit 84 was marked for
24 identification.)

25 MR. MILTNER: 84, thank you.

1 Q. Mr. Kreider, if you want to read your
2 statement for the record? And then I'll have some
3 follow-up questions for you.

4 A. Okay. Thank you.

5 My name is Ron Kreider. I own and
6 operate Kreider Farms which is located in Manheim,
7 Pennsylvania in Lancaster County. Kreider Farms was
8 started by my grandfather over 70 years ago. Our family
9 has continually operated the farm since that time and
10 became a producer-handler in 1972 when my father and
11 uncle opened our milk processing plant. We also produce
12 and distribute our own Kreider Farm eggs. Our business
13 and our farm brand is well-known in Lancaster County.
14 Kreider Farms is a member of the American Independent
15 Dairy Alliance and opposes elimination of
16 producer-handler status.

17 Kreider Farms does not in any way create
18 disorderly marketing conditions in the area in which we
19 operate. We grow our own crops, milk our own cows,
20 bottle and make ice cream from our own milk and
21 distribute it in our own trucks. When we became a
22 producer-handler in 1972, we were processing milk from
23 400 cows. Today, our plant processes milk from about
24 1,400. We have worked hard to keep our farms
25 independent and economically viable. We have a

1 diversified operation that includes an egg business as
2 well as our milk business. We also provide farm tours
3 for fun and for education about our farming operations.

4 We sell the majority of our milk to small
5 independent local supermarkets in Pennsylvania. We are
6 a price leader in the dairy case and our market is based
7 on local recognition of our farm brand, our reputation
8 for high quality milk, which has been built over many
9 years, and consumer desire for readily identifiable
10 local milk. Data provided for this hearing suggests
11 that we are one of the largest seven producer-handlers
12 in the country. To put this into perspective, our
13 customer list fits on one page; half of our customers
14 are less than 350 gallons per week.

15 In addition, we produce a substantial
16 amount of kosher milk for Jewish communities in
17 Maryland, Pennsylvania, Washington, D.C. and New Jersey.
18 Kosher milk must be certified as conforming to all
19 aspects of Jewish law. Many children from this
20 community also participate in our farm tours during the
21 summer. We have a mashgiach who lives on the farm to
22 supervise our milk production. He is present at every
23 milking, monitors our cows and their health care to
24 assure continuous kosher status, witnesses the filling
25 of the milk tankers and supervises transportation and

1 bottling. All of these requirements must be met on a
2 continuous basis to maintain our kosher certification.
3 Our certifying authority is the Star-K Kosher
4 Certification and Rabbi Tzvi Rosen. The kosher milk we
5 provide is sold under the Pride of the label -- I'm
6 sorry, the Pride of the Farm label. As explained in the
7 letter from Rabbi Rosen attached is my statement.
8 Vertically integrated producer-handler operations and
9 are our farm specifically are especially well suited to
10 the production of kosher milk.

11 I would like to address two points - why
12 I believe that the existing producer status gives us an
13 equitable opportunity to exist in the milk market and
14 why Kreider Farms sales in our area cannot be considered
15 to be disruptive. First, with respect to our
16 opportunity to exist. My father and uncle built our
17 processing plant to provide Kreider Farms with the
18 opportunity to bottle and sell our own milk. The
19 purpose was to keep our local farm operation going and
20 to ensure its economic viability. We don't buy milk
21 from anyone else because we want to have complete
22 control of our milk supply. Being a member of a pool
23 plant with access to other milk would therefore be of no
24 benefit to Kreider Farms. In order to meet our
25 contractual obligations to customers, we do need to

1 balance our own production. We make some ice cream, and
2 we also sell our extra milk as required under the
3 regulatory constraints of the producer-handler exemption
4 at whatever price we can get for it - always less than
5 the blend price.

6 We get our milk from our cows at the cost
7 of production, not a regulatory price set by the FMMO
8 system. I believe that our production costs are higher
9 than average given our production system.

10 Kreider Farms can in no way be viewed as
11 a disruptive market force or as a threat to the large
12 cooperatives and processors that dominate the regulated
13 market. We have certainly grown over the years (from
14 milking 400 cows to 1400) but in a slow and steady
15 fashion essential to our economic survival. No one is
16 asking us to expand our farm or processing plant to
17 provide a captive supply for a major chain, nor would we
18 expect them to. We operate in a niche market - our
19 local region - and our customers are people who are
20 willing to pay above-average prices for the value they
21 perceive in the milk we produce and sell to them.

22 Just this month, Kreider Farms has been
23 forced to lower its price to an existing customer to
24 respond to a price from a Dean Foods plant. This
25 customer reported a price from Dean at 7 cents a gallon

1 below the Kreider price. We have been able to respond
2 partially, but not completely on price, and are waiting
3 to see if we can keep the account.

4 We do not believe as a matter of national
5 policy that the government should close the door to the
6 opportunity for other farms like us to become
7 producer-handlers, nor that it should impose an
8 artificial size cap that is very low in today's
9 marketplace. A 3 million pound cap is very low in
10 today's marketplace. Had a size cap been imposed on our
11 original producer-handler operation when we were 400
12 cows, we would not exist today, neither would the jobs,
13 tax revenues and economic value provided by our farm
14 operation. And a 450,000 pound cap for an exempt plant
15 is simply unworkable for a business such as Kreider
16 Farms.

17 I'm aware that earlier testimony in the
18 proceeding was offered on behalf of the Pennsylvania
19 Department of Agriculture in support of a cap on
20 producer-handlers at 2 million pounds of monthly Class I
21 route disposition. I was unaware of this proposal prior
22 to the presentations of this proposal, and immediately
23 contacted our state Secretary of Agriculture, Dennis
24 Wolff. He was equally surprised to learn that we would
25 be adversely affected by this proposal, and has said

1 that he does not support a cap that would restrict
2 Kreider Farms current operations. To me, this
3 demonstrates a widespread lack of understanding about
4 the actual impacts of the proposal under discussion.

5 We respectfully request that USDA deny
6 the NMPF/IDFA petitions and make no change to the
7 existing producer-handler provisions. Thank you.

8 BY MR. MILTNER:

9 Q. Now, Mr. Kreider, at the end of your
10 statement is a -- is a two-page letter from Star-K
11 Kosher Certification. It's dated April 30th, 2009, and
12 addressed to Judge Clifton. A copy was provided to you,
13 and it's -- although there's no signature, it's from
14 Rabbi -- is it Tzvi, is that how it's pronounced? Tzvi
15 Rosen, and Tzvi is spelled T-z-v-i. To your knowledge,
16 was this letter actually mailed to Judge Clifton?

17 A. No.

18 Q. Okay. Did you get your copy on
19 April 30th --

20 A. Yes, I did.

21 Q. -- or thereabout?

22 A. Yes.

23 Q. Was it provided to you with the intention
24 that it be appended to your statement and submitted as
25 part of the record?

1 A. That's correct.

2 Q. And actually, you had asked Rabbi Rosen
3 or another one of the rabbis from Star-K to come to the
4 hearing, is that right?

5 A. Yes, we did.

6 Q. And were they able to attend?

7 A. No, they were not.

8 Q. They had other obligations during the
9 period of the hearing?

10 A. That's correct.

11 Q. Can you summarize what the letter
12 conveys, your understanding of what Kreider Farms has to
13 go through to obtain this particular kosher
14 certification?

15 A. Yes, this Pride of the Farm label goes to
16 a strict Jewish population and it requires fully
17 supervised product and inspection. They're there for
18 every surgery that we do on cows and live right on the
19 farm. And also with milk processing, there's specific
20 rules for milk segregation at the milk plant, and so I
21 think the overall intent in what he is trying to
22 display, this is very difficult to develop a brand for
23 this population and run the milk through a large dairy,
24 because they would have to turn the machines on for, you
25 know, a few minutes and shut them down and disinfect

1 them, wash the system down.

2 Q. And you have certifying rabbis on your
3 farm, is that right?

4 A. Yes, that's correct.

5 Q. Do you have rabbis at the plant as well?

6 A. The same rabbi, which I think is --
7 technically is a mashgiach, but he travels back -- he
8 travels the one mile between the milk plant and the
9 dairy farm to do the overall daily supervision.

10 Q. He has to supervise at the farm and the
11 plant?

12 A. That's correct.

13 Q. And there's no distinction among any
14 different loads of milk or shipments of milk that you
15 bring from your farm to your plant, it's all equally
16 observed by Star-K?

17 A. That's correct.

18 Q. Now, if you were a plant acquiring milk
19 from many sources, you've described that they would have
20 to shut down the plant to receive kosher milk and run it
21 through, is that -- is that your description?

22 A. Yes.

23 Q. And that's some of what Rabbi Rosen
24 describes in this letter?

25 A. I think that was the intent, for him to

1 spell out all the extra layers of inspection that --
2 that he requires with this Pride of the Farm label.

3 Q. And so it's not that it would be
4 impossible for a pool plant to do it, but there is a
5 certain amount of efficiency that's achieved through the
6 producer-handler doing that?

7 A. That's correct.

8 Q. At the bottom of page 1 of your
9 statement, I want to point out what was a typographical
10 error. And I think you read it as typed and I want to
11 make sure the record is clear. It says, I would like to
12 address two points - why I believe that the existing
13 producer status gives us an equitable opportunity.
14 Should that read, producer-handler status?

15 A. That's correct.

16 Q. Okay.

17 MR. MILTNER: I suppose, your Honor, we
18 could make that change on the record copy and
19 have Mr. Kreider initial it.

20 JUDGE CLIFTON: Yes. I knew what he
21 meant, but I also noticed that, and I would like
22 it to be reflected on Exhibit 84. This is
23 page 1, the next to the last line. Producer
24 should read producer-handler.

25 And, Mr. Kreider, before you leave the

1 room, I would like you to initial that change.

2 Ms. Fisher will make it on the record copy.

3 THE WITNESS: Okay. Fine.

4 BY MR. MILTNER:

5 Q. Another -- well, first of all, Ron, the
6 statement you read, was that prepared by you?

7 A. That's correct.

8 Q. Okay. And other than word processing and
9 things of the like, those are your words and your
10 statements?

11 A. That's correct.

12 MR. MILTNER: And, your Honor, could you
13 hand the witness Exhibit 20?

14 JUDGE CLIFTON: Yes.

15 MR. MILTNER: Thank you.

16 Q. Mr. Kreider, you've seen that page
17 before, correct?

18 A. Yes.

19 Q. Did you and I have a chance to look at
20 that page together --

21 A. Yes.

22 Q. -- after you arrived here?

23 A. Yes.

24 Q. And you are a sworn witness under oath.
25 We want to be not just honest, but also as clear as we

1 can be, right?

2 A. That's correct.

3 Q. You said in your statement you believe
4 you're one of the seven largest producer-handlers in the
5 country?

6 A. That's correct.

7 Q. Look at that chart at the top. And it
8 breaks producer-handlers into size categories. You can
9 see that producer-handlers between 2 million and
10 20 million pounds, there are seven of them in
11 March 2009.

12 A. Yes.

13 Q. Now, you understand you're under no
14 obligation to disclose confidential information about
15 your business, right?

16 A. Yes.

17 Q. But we want to be clear, right?

18 A. That's correct.

19 Q. Okay. To that extent, you're going to
20 have to share a little something about your business.
21 Depending on -- every plant, including
22 producer-handlers, has various sales each month, right?

23 A. That's correct.

24 Q. And depending on any particular month, is
25 it possible that you would fall into one of these

1 categories or another and not stay in the same category
2 each month?

3 A. Yes, that's correct.

4 Q. Thank you. If you can hand that back to
5 Judge Clifton?

6 I want to ask you about your operation
7 when you -- when you became a producer-handler. In
8 1972, what was your involvement with the operation, if
9 at all, back then?

10 A. Well, actually, I would process milk
11 occasionally.

12 Q. Okay. Do you have a bit of a
13 recollection about what the farms looked like in
14 Lancaster County back in that time period?

15 A. Well, fortunately, not a lot has changed.
16 There are still a lot of small farms.

17 Q. Not as many?

18 A. Not as many.

19 Q. In 1972, was a 400-cow farm in Lancaster
20 County extremely large?

21 A. It was one of the largest.

22 Q. And today with 1,400 cows, is it still
23 relatively large for that area?

24 A. Yes.

25 Q. So in 1972, compared to everybody else,

1 you guys were pretty darn big?

2 A. That's correct.

3 Q. So in that respect, your relative size
4 over the past 37 years hasn't changed so much, even
5 though you've added cows? You were relatively big then
6 and you're relatively big now, is that right?

7 A. Yeah, that's a good point. I would view
8 us as being about the same size relative to the rest of
9 the county.

10 Q. I know this term is used a lot. I don't
11 want to try to define a term everybody knows. In your
12 third paragraph, second sentence, you say, we are a
13 price leader in the dairy case. What do you mean by
14 we're a price leader?

15 A. We are a higher quality milk, we feel.
16 We're a local, sustainable, grain company which demands
17 a higher price. We -- we have a quick-chill glycol
18 chiller on the farm to chill the milk down to 33 degrees
19 in eight seconds. There's just things like that that we
20 do to try to produce a higher quality milk, as long as
21 the -- as well as what I just mentioned, where a lot of
22 local consumers are looking for local, sustainable
23 farms, and it's a benefit to them to know exactly where
24 their milk comes from, and they come to the barn to
25 visit.

1 Q. When you say price leader, you're not the
2 cheapest milk in the dairy case?

3 A. We're not the cheapest milk in the dairy
4 case. In a lot of instances our milk is priced at a
5 premium to the store brand price.

6 Q. What is that premium to the store brand,
7 usually?

8 A. 30, sometimes greater. When it gets
9 higher than that, we try to convince the store to lower
10 it.

11 Q. You also state on page 2 of your
12 statement that you believe your production costs are
13 higher than average given your production system. Are
14 you talking about your farm costs of production there?

15 A. Yes.

16 Q. Why do you believe that you have a higher
17 cost of production? What do you do that results in that
18 higher cost?

19 A. Well, all the things associated with the
20 kosher business add cost, being 100 percent rbST free,
21 adds cost. And the -- some of the extra things we're
22 doing, like I mentioned the milk chilling and putting
23 time and effort into innovative manure technology, to be
24 more environmentally friendly and promote the green
25 status.

1 Q. Later on in that page, you say, had a
2 size cap been imposed on our original producer-handler
3 operation when we were 400 cows, we would not exist
4 today. And what you are saying is, if they had capped
5 you at that level, then you don't believe you would have
6 been able to survive until today?

7 A. No, absolutely. I'm sure we would be out
8 of the milk processing business.

9 Q. Okay. I just wanted to make sure. When
10 you talk about that size cap, you're saying had they put
11 a cap on then. You're not talking specifically about
12 anything that's been proposed today?

13 A. That's correct.

14 Q. I want to ask you about your statement
15 about the Pennsylvania Secretary of Agriculture, Dennis
16 Wolff. You had a conversation with Secretary Wolff?

17 A. My marketing director had a conversation
18 with him.

19 Q. So when you say I -- I immediately
20 contacted our state Secretary of Agriculture, that's a
21 Kreider Farms reference. You had somebody in Kreider
22 Farms, you did not have a personal conversation?

23 A. That's correct.

24 Q. And the individual at Kreider Farms
25 relayed to you what he had heard from the Secretary?

1 A. That's correct.

2 Q. Mr. Kreider, you're a member of the
3 American Independent Dairy Alliance, is that right?

4 A. That's correct.

5 Q. Give us just a quick description of what
6 that organization is.

7 A. It's a group of producer-handlers and one
8 exempt plant that formed a group to try to keep things
9 as they are.

10 Q. And common interest among that group is
11 opposition to the producer-handler status change
12 proposals?

13 A. That's correct.

14 Q. And you know that AIDA as a group has
15 submitted three proposals in this hearing?

16 A. Yes.

17 Q. The first proposal, which as I recall is
18 Proposal 23, deals with exempt from pool obligations,
19 the own-farm production of any handler regardless of
20 their status as a producer-handler or not. And if the
21 Secretary chose -- found there was a need to make
22 changes to the marketing orders, would an adoption of
23 that proposal be acceptable to Kreider Farms?

24 A. Yes.

25 Q. Proposal 24, which AIDA submitted, deals

1 with the exemption from pool obligations for volumes of
2 milk retailed, sold at retail by a producer-handler.
3 Does Kreider Farm currently sell any milk to retail
4 customers, direct to consumer through home delivery or
5 farm store or otherwise?

6 A. No.

7 Q. And the last deals with a proposal to
8 adopt individual handler pools. And do you have a
9 general understanding of how the individual handler pool
10 would work?

11 A. Yes.

12 Q. And if the Secretary found a need to make
13 changes to the marketing order, would Kreider Farms
14 support the adoption of individual handler pools?

15 A. Yes, we would.

16 Q. You're not an expert in marketing order
17 or marketing order regulation, are you?

18 A. No.

19 Q. Let me reflect the witness has also
20 smiled ear-to-ear as he said that.

21 JUDGE CLIFTON: Yeah, big grin.

22 Q. And there are economists, people with
23 backgrounds in Federal Orders that will be testifying
24 about specifics about regulatory language. Do you
25 understand that?

1 A. Yes.

2 Q. And asking you specific questions about
3 regulatory language probably wouldn't give much, is that
4 right?

5 A. That's absolutely correct.

6 Q. Kreider Farms is located in Federal
7 Order 1, that is right?

8 A. That's correct.

9 Q. Do you see any need to change the
10 producer-handler regulations in Order 1?

11 A. No, I do not.

12 Q. And there's also a proposal to -- a
13 couple of proposals that would put a 3 million pound cap
14 on existing producer-handlers and not allow any new
15 producer-handlers and grandfather -- grandfather in
16 those existing producer-handlers. Would you support any
17 of -- any of those -- any of those proposals? Would
18 they be workable for Kreider Farms?

19 A. No.

20 MR. MILTNER: Your Honor, I may have some
21 redirect, obviously, but I don't believe I have
22 any questions for Mr. Kreider right now.

23 JUDGE CLIFTON: Thank you very much,
24 Mr. Miltner. Who will begin the
25 cross-examination of Mr. Kreider? Mr. English.

1 Thank you.

2 CROSS-EXAMINATION

3 BY MR. ENGLISH:

4 Q. Charles English. Good afternoon,
5 Mr. Kreider.

6 A. Good afternoon.

7 Q. Among others, I represent the
8 Pennsylvania Association of Milk Dealers. Are you a
9 member of the Pennsylvania Association of Milk Dealers?

10 A. Not at this time.

11 Q. Yesterday, it was sort of suggested that
12 the Pennsylvania Association of Milk Dealers had not
13 consulted with you about their position. Since you're
14 not a member of the association, does it surprise you if
15 they didn't consult you about their position?

16 A. No, it doesn't. And they also didn't
17 remind me when my membership dues weren't paid either.

18 Q. When were you last a member of the
19 Pennsylvania Association of Milk Dealers?

20 A. I can't answer that exactly.

21 Q. Was it last year?

22 A. I'm not sure.

23 Q. When did you join AIDA?

24 A. Within the last year.

25 Q. Do you know when it was formed?

1 A. I don't have that date in front of me,
2 no.

3 Q. Was it in 2008?

4 A. No.

5 Q. So it was the last several months?

6 A. 2009, yes.

7 Q. Do you pay dues to AIDA?

8 A. I'm not sure what the dues structure is.
9 It just formed.

10 Q. Have you paid any fees to date?

11 A. No, I did not.

12 Q. Other witnesses, both entities who are
13 regulated and a number who are not presently regulated,
14 have indicated an estimate of what the pool payment
15 would be, on average, round numbers. Have you made any
16 such estimate of what would be required if you were a
17 regulated handler?

18 A. No, I have not.

19 Q. I, too, like your counsel, really am not
20 looking for very specific information, especially when
21 it comes to confidential information. I'm not trying to
22 get at that, but your counsel opened the door just a
23 little bit by asking you the question about Exhibit 20,
24 but I'm going to be as general as I can.

25 Would it be fair to say that the Class I

1 operation -- the Class I pounds operating through your
2 plant is less than 3 million pounds per month?

3 A. That's correct.

4 Q. You said your customer list fits on one
5 page, half of your customers are less than 350 gallons
6 per week. Can you tell us the approximate size of your
7 largest customer, per week?

8 A. Our largest customer is the Jewish kosher
9 business, which is significantly larger than the number
10 two customer.

11 Q. Is that sold through one distributor?

12 A. I'm not sure.

13 Q. Do you know that there are other entities
14 in the fluid milk business who are also kosher, produce
15 kosher milk products?

16 A. Producer-handlers?

17 Q. Other entities, whether or not they are
18 producer-handlers.

19 A. Yes.

20 Q. Do you know any of the names of those
21 entities that are -- that put up a kosher product?

22 A. No, I don't.

23 Q. Would it be fair to say -- let me ask
24 this. You don't sell in New York City?

25 A. I think some of this milk does go into

1 New York City, but once again, like previous
2 testimonies, we can't track where every gallon of milk
3 goes when we're selling milk to distributors.

4 Q. Do you know that there are other kosher
5 milk products being sold in New York City, other than
6 your own?

7 A. Well, kosher is a very general statement.
8 There's a different certification of kosher, but if
9 you're using kosher as a general statement, that's
10 correct.

11 Q. Now, you talked about Star-K Kosher
12 Certification. Are there other certification -- kosher
13 certified organizations?

14 A. Of Star-K?

15 Q. Are there entities -- well, first of all,
16 does Star-K, to your knowledge, certify other milk or
17 dairy products?

18 A. I learned today that they do have another
19 plant. So if the information I looked at was correct,
20 yes, then I am aware of that.

21 Q. Do you know what that other plant is that
22 they certified?

23 A. I think it's the plant -- I'm sorry, the
24 farm in our group, Heartland Creamery.

25 Q. Okay. So they aren't limited to central

1 Pennsylvania or southeastern Pennsylvania, are they, if
2 they are also certifying Heartland, which is in
3 Missouri, right?

4 A. That's correct.

5 Q. Okay. So it is possible that Star-K is
6 also certifying product from New York, correct?

7 A. Not with the Pride of the Farm label.

8 Q. I see. So the Pride of the Farm is a
9 specific kosher label?

10 A. I really can't -- I'm also not an expert
11 in the Jewish certification, labels and processes.

12 Q. Has anyone told you that a witness who
13 has already appeared at this lengthy proceeding has
14 testified that they, too, put up a kosher milk product
15 produced in New York state?

16 A. I don't remember the details of that
17 testimony.

18 Q. Is it your testimony that because you put
19 up kosher milk, that is one reason why producer-handler
20 status should be maintained?

21 A. Theoretically, that's correct. It just
22 happens to be a part of our business model. But if we
23 lose the kosher business, we're not going to -- we're
24 going to continue as an entity.

25 Q. And are you aware that you compete,

1 whether it's you or your distributors, for sales in New
2 York and New Jersey with kosher milk products from
3 regulated operations?

4 A. Yes, I'm aware. However, they're
5 competing with a different product. They're competing
6 with this highly supervised kosher symbol, to my
7 knowledge.

8 Q. You don't know whether they're highly
9 supervised as well?

10 A. My understanding is that this is a unique
11 brand.

12 Q. Are there -- hard to put it this way.
13 Are there sort of competing kosher certifying
14 organizations?

15 A. That's my understanding.

16 Q. And so another kosher certifying
17 organization may also have its own strict standards,
18 correct?

19 A. It's possible.

20 Q. Just a couple more questions, sir, and I
21 thank you for your time.

22 You mentioned having been forced to lower
23 your price to an existing customer. Is that customer
24 inside Pennsylvania?

25 A. Yes.

1 Q. And is the Dean Foods plant against whom
2 you're competing also from inside Pennsylvania?

3 A. Yes.

4 Q. And Pennsylvania maintains a minimum
5 pricing system for milk produced, processed and sold in
6 Pennsylvania, correct?

7 A. That's correct.

8 Q. And so if a customer reported price from
9 Dean at 7 cents a gallon below the Kreider price, then
10 the Kreider price had to be at least 7 cents above the
11 Pennsylvania minimum price in order for the Dean Foods
12 price to be legal, correct?

13 A. Are you talking about just the specific
14 price on whole milk?

15 Q. You understand that Pennsylvania Milk
16 Marketing Board maintains and publishes monthly a
17 schedule of minimum prices charged to wholesale
18 customers within Pennsylvania, correct?

19 A. Correct.

20 Q. And this sale is within Pennsylvania,
21 correct?

22 A. That's correct.

23 Q. And your plant's located in Pennsylvania,
24 correct?

25 A. That's correct.

1 Q. Is the Dean Foods plant located in
2 Pennsylvania?

3 A. Yes, it is.

4 Q. And that schedule that Pennsylvania puts
5 out every month for minimum prices for wholesale is
6 broken down by product, correct?

7 A. That's correct.

8 Q. By size of product, correct?

9 A. That's correct.

10 Q. Okay. So my question is, is it not the
11 case that the price that Kreider was charging prior to
12 Dean -- at least a customer reporting a price from Dean
13 at 7 cents a gallon below the Kreider price -- does that
14 not mean that the Kreider price was at least 7 cents a
15 gallon higher than the minimum regulated price for
16 wholesale sale in Pennsylvania?

17 A. No, that's not correct. What I based
18 that statement on was a document, was a comparison that
19 we made on the total account, including drinks, orange
20 juice. And what I simply did was took the overall
21 package and calculated what the per gallon of milk
22 difference would be.

23 Q. So -- so were you selling things other
24 than milk --

25 A. Yes.

1 Q. -- to this customer?

2 A. Yes.

3 Q. And Dean was selling products other than
4 milk to this customer, correct, or was offering to sell?

5 A. Offering to sell, that's correct.

6 Q. And you have looked at sort of the total
7 value of the whole deal and divided it out and come up
8 with 7 cents a gallon on milk, is that what you've done?

9 A. Yes.

10 Q. And for all you know, Dean Foods was
11 being very aggressive on a nondairy product within that
12 total value that you happen to divide out to be 7 cents,
13 correct?

14 A. That's correct.

15 MR. ENGLISH: Thank you, sir. I have no
16 further questions.

17 JUDGE CLIFTON: Thank you, Mr. English.

18 MR. ENGLISH: I do, just before -- I
19 don't think the motion has been made, but I
20 certainly do not object to the letter from Rabbi
21 Rosen to accompany the record. But it's,
22 unfortunately, of course, on the back of this
23 exhibit. If an exhibit is admitted, it gives it
24 a certain mark as being part of the record.

25 I don't think that an unsworn statement,

1 even from a rabbi, should become part of the
2 record without being subject to the same
3 opportunity to be cross-examined. So I don't
4 object to the document, per se, as accompanying
5 the record, but I don't think it should become
6 part of the exhibit.

7 And I appreciate the fact that whether it
8 was Mr. Kreider or representatives of AIDA were
9 being green and copying on front and back, but I
10 do know that I don't think it should be formally
11 part of the record.

12 JUDGE CLIFTON: Stay right there,
13 Mr. English. You think it should be part of the
14 record but not a part of the formal record?

15 MR. ENGLISH: It can be a 42-A if it's
16 not admitted as an exhibit. It's not sworn, so
17 it ought not to be given the same imprimatur as
18 sworn statements, subject to your Honor's
19 swearing in witnesses.

20 It certainly can accompany the record,
21 but it is no different from any other letter
22 submitted by a person who has not actually
23 appeared.

24 And I do think it's different from the
25 nature of the state representatives who are

1 doing what they were doing, but I don't think it
2 should become -- become part of the exhibit.

3 JUDGE CLIFTON: Don't leave. What you're
4 saying is, that if it's not admitted into
5 evidence, then it's not evidence in the case.
6 And what good does it do in the record if it's
7 not evidence?

8 MR. ENGLISH: I think, your Honor, there
9 have been many times at Federal Order
10 proceedings that a letter is received from a
11 person who doesn't appear. And --

12 JUDGE CLIFTON: Received in what manner?

13 MR. ENGLISH: Received in that people
14 bring it with them up to the -- up to the
15 lectern or up to the witness stand and they
16 testify about it. And/or the judge, in other
17 proceedings, for instance, receives this in the
18 mail as opposed -- let's say this -- as opposed
19 to having been handed to you by Mr. Kreider, had
20 actually been sent to you in the mail. And
21 let's say, unlike what actually happened here,
22 you went home this weekend and had time to go
23 into your office and here was this letter. It's
24 not ignored. It is not sworn testimony, but I'm
25 not standing here saying, let's exclude it

1 entirely. But I am saying it's different and
2 it's not sworn testimony.

3 So I was trying to draw the line between
4 what it is and what it isn't. But I don't --
5 I'm not asking -- far from that -- that it
6 should be excluded entirely. I'm saying it's
7 just not testimony.

8 JUDGE CLIFTON: Now, you raised an
9 interesting point. You see, had I been the one
10 who received it, I would have to testify to get
11 it in. And I don't have even the knowledge that
12 this witness has that it legitimately came from
13 the rabbi that attends the production of milk on
14 his farm.

15 So it would have actually been less
16 valuable. I knew this would be an issue because
17 the rabbi is not here testify. We require
18 people to be here to testify and subject
19 themselves to cross-examination. But my dilemma
20 is, that I think -- and I'm going to hear from
21 counsel. My dilemma is that I think this kind
22 of exhibit bears certain marks of reliability
23 that are often not accompanied by hearsay.

24 And if the Secretary is cautioned that no
25 one had an opportunity to cross-examine the

1 rabbi, it may be better to just let it in as
2 part of this exhibit.

3 The very vocabulary that he used is
4 somewhat authenticating. I think we're all
5 aware that Kreider produces kosher product. So
6 I appreciate what the normal way of handling it
7 would be, and I fear that it would do more harm
8 than good to keep it out of the evidence.

9 So I would invite counsel to suggest
10 guidance for me.

11 MR. ENGLISH: Your Honor, maybe I can
12 short-circuit it. If all the people will agree,
13 I'm willing to accept the characterization you
14 have given it and are prepared to have it
15 treated in the way you've just indicated. If it
16 shortens things, that's great.

17 JUDGE CLIFTON: Mr. Miltner?

18 MR. MILTNER: I appreciate that,
19 Mr. English. I would like to see it treated no
20 differently than the letters that were attached
21 to, I believe, Exhibit 36, which were --
22 accompanied the statement from the state
23 Departments of Agriculture, and as I recall
24 admitted without any qualification.

25 I mean, the record is clear as to why the

1 rabbi couldn't be here and it provides
2 information that Mr. Kreider has about his farm
3 and amplifies his nontheological understanding,
4 perhaps, of what happens. And so we'd like to
5 see it admitted on the same grounds.

6 It's frequent that people refer to
7 something in their statement and amplify it and
8 it gets included as part of the record. And I
9 think the dialogue back and forth is pretty
10 clear for the Secretary to determine what weight
11 it should be afforded.

12 JUDGE CLIFTON: Thank you, Mr. Miltner.
13 Mr. Vetne.

14 MR. VETNE: I, too, agree that it should
15 be admitted as part of Exhibit 84 without
16 qualification. We've had -- we've had
17 considerable testimony over the course of a week
18 and a half where a witness on the stand has
19 referred to what a customer or a plant or a
20 consumer or somebody told them that influenced
21 processing behavior or competitive reaction.

22 It seems that the hair that we're trying
23 to split here -- the hair we're trying to split
24 here is that if that type of hearsay comes in
25 oral form from the witness, it's perfectly okay,

1 even though you're not sure the witness is
2 interpreting it correctly when testifying about
3 it.

4 But if it comes more reliably in paper
5 form, so you know exactly what the hearsay is,
6 it's objectionable. I don't see that. And
7 there is, even under the Federal Rules of
8 Evidence, a reliability catchall, as I think --
9 which is what your Honor referred to.

10 If it has context, that makes it
11 reliable, the kind of thing that a reasonably
12 prudent person would rely upon, it can be
13 admitted under that catchall.

14 And thirdly, although this all comes back
15 to the right of cross-examination, the right of
16 cross-examination is essentially a right to --
17 to test material facts that are in dispute.
18 It's just not an open, oh, well, you said
19 something, we get to talk about it. I haven't
20 heard any part of the objection that any portion
21 of what the rabbi says in this letter is a --
22 includes a fact that is both material and in
23 dispute. And, in fact, if there's nothing in
24 dispute, there's nothing to cross-examine him,
25 what's the problem?

1 JUDGE CLIFTON: The one issue that I wish
2 the rabbi were here to be cross-examined on is,
3 does it require a producer-handler to provide
4 kosher products. And we have some evidence that
5 regulated handlers provide kosher products, too.
6 I would like to explore that a little further
7 through the rabbi or someone like that.

8 So the fact that we do not have
9 cross-examination is a bit of a problem. I
10 would have to agree with Mr. Miltner, we've let
11 in a lot less reliable hearsay than this. Okay.
12 Let us deal with whether Exhibit 84 will be
13 admitted in its entirety.

14 Are there any other objections to
15 Exhibit 84 being admitted into evidence?
16 Mr. Stevens.

17 MR. STEVENS: Your Honor, Garrett
18 Stevens, Office of General Counsel, U.S.
19 Department of Agriculture. I guess you and I
20 are familiar with the admission of evidence in
21 hearings before our agency, and certainly
22 unsworn statements, statements that are not
23 subject to cross-examination, are entitled to a
24 little weight by anyone considering them.

25 If this were presented in another context

1 within the Department's hearing process, a
2 letter may well be admitted, but it certainly
3 wouldn't be admitted for the truth or falsity of
4 the statements in the letter, because the person
5 that made it is not here to be cross-examined
6 to examine the truth or falsity of those
7 assertions.

8 So I don't have a problem with it
9 accompanying the record, but in terms of how it
10 will be considered -- and this would apply to
11 anyone's sworn statement or any statement that
12 the -- that the person making the statement is
13 not here and subject to cross-examination. It
14 is unsworn, and cannot be admitted for the truth
15 or falsity of the assertions.

16 JUDGE CLIFTON: You and I differ somewhat
17 there. As an Administrative Law Judge, I do
18 allow hearsay to be admitted into evidence, and
19 I judge the reliability of it. And I rely on it
20 if I deem it to be reliable. And I would ask
21 that the Secretary do the same thing in this
22 case.

23 MR. STEVENS: The only thing I would say
24 about that, your Honor, is that we're all bound
25 by the determinations of the Department. The

1 Secretary has made rulings on these matters in
2 the past, and I would say that those rulings
3 apply in this situation.

4 JUDGE CLIFTON: It is true that the very
5 Notice of Hearing cautioned all people that they
6 had to be present here at the hearing to present
7 evidence. In other words, there aren't any
8 phone calls in and there aren't any -- there is
9 no solicitation of letters to come in. A person
10 had to be here to present evidence.

11 And if we -- if we vary from that,
12 we've -- we've changed the proceeding entirely.
13 Fortunately here, we have Mr. Kreider here and
14 he has established some foundation for the
15 admissibility of Rabbi Rosen's letter.

16 So, Mr. Stevens, it is your job to guide
17 the Department in this matter, and I'm -- I'm
18 confident that the Secretary will make the wise
19 decision in that case. Mr. Yale.

20 MR. YALE: Let me add one other aspect to
21 the -- to the discussion. By the way, we are in
22 support of 84 being admitted entirely as it is
23 and the Department can deal with it, weigh it as
24 it wishes.

25 I'm sure that it's even had sworn

1 testimony under cross-examination that it's
2 decided not to give any weight at all, so that's
3 the Secretary's prerogative. Hopefully, it's
4 none of my witnesses, but you know, it can
5 happen.

6 What we really have here, and I can't
7 put, really, the name to it. But there's
8 something that says, there's reliability about
9 this.

10 First of all, Mr. Kreider has testified
11 into the general aspects of how the kosher
12 affects his operation and that it's an important
13 market for his milk. That's sworn and subject
14 to cross-examination. The letter from the rabbi
15 merely gives detail and gives us some kind of
16 cultural, religious Torah background as to the
17 why, the general things that Mr. Kreider
18 testified under oath, are meaningful to the
19 observant Jews. So I just think it really adds
20 to that. And they can always bring in evidence
21 to show that's not the case.

22 I would agree that the issue of whether
23 it is required or not is a -- is one that would
24 be subject to cross-examination. The Department
25 can do what it wants with that, so --

1 JUDGE CLIFTON: Thank you very much. I
2 think we've made adequate record for the
3 secretary. And based on that record, I do admit
4 it in its entirety, Exhibit 84. I do caution
5 the Secretary that Rabbi Rosen's statement was
6 not subject to cross-examination and therefore
7 the weight to be accorded should be approached
8 by the Secretary with some caution.

9 All right. Now, other cross-examination
10 of Mr. Kreider? Mr. Vetne.

11 CROSS-EXAMINATION

12 BY MR. VETNE:

13 Q. Mr. Kreider, my name is John Vetne. I
14 represent two producer-handlers in the Pacific Northwest
15 and one in Roswell, New Mexico. Good afternoon.

16 A. Good afternoon.

17 Q. As long as we're on the kosher part of
18 your business, I have some questions on that. The Pride
19 of the Farm label, it's not your plant, Kreider Farms'
20 label, it is a label that you put on your kosher
21 products for somebody else, is that correct?

22 A. Correct.

23 Q. And do they also have a Star-K label or
24 is Star-K part of the label?

25 A. I'm not sure.

1 Q. Okay. There was some question, I believe
2 it was perhaps Mr. Beshore, is the term competing kosher
3 certifying organizations. Do you recall that? Do you
4 recall some discussion about other kosher certifying
5 organizations?

6 A. In a previous --

7 Q. It was Chip English that asked the
8 questions.

9 A. Yes.

10 Q. Other kosher certifying organizations?

11 A. Yes.

12 Q. Isn't it the case that within the
13 kosher -- within the observant Jewish community that
14 desires kosher products, there's some kosher that's
15 different from other kosher?

16 A. Yes.

17 Q. So it's not simply certifying
18 organizations that are competing for the same consumer
19 population; there are subgroups of consumer populations
20 that will look for kosher milk from only one certifying
21 organization?

22 A. That's true.

23 Q. Okay. So you -- your product is
24 specifically packaged for a subset of the consumer
25 market -- of the consumer kosher market?

1 A. That's correct.

2 Q. You indicated that this market is
3 primarily in Maryland, Pennsylvania, Washington and New
4 Jersey?

5 A. Yes.

6 Q. Okay. My assumption is -- correct me if
7 I'm wrong, agree with me if I'm right -- that Washington
8 means the District of Columbia?

9 A. That's correct.

10 Q. You don't go to the state of Washington?

11 A. No, we do not.

12 Q. Is the distribution area for your
13 nonkosher milk as large as for your kosher milk?

14 A. Yes.

15 Q. Your nonkosher milk goes to those same
16 states?

17 A. Yes.

18 Q. Is it distributed and marketed
19 differently than kosher milk?

20 A. Yes.

21 Q. You distribute -- that is, Kreider,
22 distributes its nonkosher milk?

23 A. That's correct.

24 Q. And for your nonkosher milk, is that all
25 under a Kreider brand or is it multiple brands?

1 A. Mostly Kreider Farms. I think we have
2 one other private label.

3 Q. Okay. Kreider Farms is a private label?

4 A. Kreider Farms is a branded.

5 Q. Is it your branded label?

6 A. And we have one other private label in
7 addition to Pride of the Farm.

8 Q. The Pride of the Farm is somebody else's
9 label?

10 A. Yes.

11 Q. But it's not a label that's associated
12 with a particular milk distributor, correct?

13 A. I'm not sure.

14 Q. Like Dean's. Dean's label is associated
15 with Dean Foods. Do you know whether Pride of the Farm
16 has a similar affiliation to a milk distributor other
17 than your own?

18 A. We deal with one distributor and he may
19 use smaller distributors to deliver the kosher product
20 into certain markets.

21 Q. I understand. Is the milk distributor
22 that you deal with, is that a person that also receives
23 raw milk and packages it into --

24 A. No.

25 Q. No? It's just a person that markets milk

1 that somebody else packages, correct? Your
2 distributor --

3 A. It's the Jewish trucks that come and pick
4 up the milk at our plant to take to their Jewish
5 centers.

6 Q. Okay. And that label is on there at
7 their request?

8 A. Yes.

9 Q. Did you say approximately what percentage
10 of your milk was in the kosher subset category, kosher
11 category?

12 A. Yeah, it's about 30 percent for Class I
13 sales.

14 Q. 30 percent, okay. And you answered a
15 question about your Class I sales less than 3 million.
16 What was it on average in 2008?

17 A. I'm not sure what the average was. Less
18 than 3 million.

19 Q. More than 2.5?

20 A. No.

21 Q. Somewhere between 2 and 3?

22 MR. MILTNER: Your Honor, I want to
23 remind the witness he doesn't have to disclose
24 confidential information if he chooses not to.

25 JUDGE CLIFTON: Thank you, Mr. Miltner.

1 Could you hear that? Could you hear that,
2 Mr. Kreider?

3 THE WITNESS: Oh, yes. I'm sorry, your
4 Honor.

5 JUDGE CLIFTON: No, I wasn't asking you
6 first, but I am now.

7 A. Okay.

8 Q. Okay. I'm going to ask you some
9 questions. I have the option to ask and you have the
10 option not to answer, do you understand?

11 A. Thank you.

12 Q. So is your Class I between 2 and
13 3 million pounds?

14 A. Our Class I is less than 2.5.

15 Q. What portion of your total production is
16 non-Class I? That is, ice cream, cream, excess milk
17 sold to manufacturing, what portion is not Class I?

18 A. I think the only numbers that I have
19 memorized is that Class I sales are between 64 and
20 77 percent.

21 Q. Okay. Is that a range that's based on a
22 year?

23 A. I'm not sure.

24 Q. It varies from month to month, doesn't
25 it?

1 A. That's correct.

2 Q. Other than ice cream, do you produce any
3 non-Class I products, such as creamers or cream, yogurt,
4 that kind of thing?

5 A. We produce some cream, some heavy cream,
6 some half and half.

7 Q. Do you produce any cultured products?

8 A. No. Is buttermilk cultured?

9 JUDGE CLIFTON: Yes.

10 A. I apologize.

11 Q. As a matter of fact, it is.

12 A. We produce a little buttermilk, I think.

13 Q. You produce a cultured Class I product?

14 Are you producing -- other than ice cream, do you
15 produce any spoonable products or any hard products?

16 A. No, we do not.

17 Q. When you sell what you call extra milk,
18 to what -- to what plants do you market that? If you
19 have surplus you can't use, where does it go?

20 A. We sell -- historically, we've sold a lot
21 of it to Turkey Hill, Turkey Hill Dairy.

22 Q. Turkey Hill is an ice cream maker -- or
23 what else do they use it for?

24 A. I don't know what they use it for, but
25 it's predominantly an ice cream product.

1 Q. They are a soft product manufacturer,
2 Class II manufacturer?

3 A. I'm not sure what their class is.

4 Q. Are there other markets for your excess
5 milk, cheese, powder, butter that you can recall?

6 A. We've sold some milk to Land 'O Lakes,
7 some surplus milk.

8 Q. Do you have occasion to market excess
9 cream?

10 A. Yes.

11 Q. And where would your excess cream be
12 marketed?

13 A. I don't recall the names of those
14 companies.

15 Q. Okay. But you do market excess cream
16 as --

17 A. From time to time, yes.

18 Q. And your fluid milk products, what kind
19 of packaging do you use for that?

20 A. Mostly plastic.

21 Q. Plastic?

22 A. Plastic.

23 Q. Exclusively plastic?

24 A. Yes.

25 Q. Okay. And you market in what sizes?

1 A. One gallon, half gallon, quarts, pints.

2 Q. Could you explain a little bit more your
3 response to a question? As I recall, you responded a
4 3 million pound cap would not work for you. And you've
5 testified that your current Class I sales are less than
6 2.5. In that situation, why would it not work?

7 A. It may work in the short term, but any
8 sustainable long-term business plan allows some room for
9 growth. And so in that respect, I don't think it's a
10 successful -- it would be a successful long-term
11 profitable business for us to be, if we were capped at
12 3 million.

13 Q. Okay. You want to retain the option to
14 grow beyond 3 million, is that what you're saying?

15 A. That's correct.

16 Q. And at your size and with your discrete
17 customer base, you cannot survive without pool exempt
18 milk, is that also correct?

19 A. Long term, I feel as though that's
20 correct.

21 MR. VETNE: Thank you. That's all I
22 have, your Honor.

23 JUDGE CLIFTON: Thank you, Mr. Vetne.
24 Who will next cross-examine Mr. Kreider?
25 Mr. Carroll. Thank you.

CROSS-EXAMINATION

1
2 BY MR. CARROLL:

3 Q. Good afternoon, Mr. Kreider.

4 A. Good afternoon.

5 Q. I'm John Benjamin Carroll. I represent
6 the New England Producer-Handlers Association and two
7 producer-handlers like yourself, one in Vermont and one
8 in Connecticut, and also a handler who would be
9 interested in becoming a producer-handler in Virginia.

10 I also want to say before I start that
11 for the better part of 25 years, I represented a kosher
12 producing producer-handler along with other sales, and I
13 know exactly what your -- what you've been going
14 through.

15 I want to go back a little in some of the
16 things you've said. Does your -- does your consumer in
17 your local area recognize your dairy as a local asset;
18 in other words, a place that they would like to buy
19 their milk from? Do you have customers that feel that
20 way?

21 A. Yes, most definitely. That's what
22 they -- that's our main selling point, really.

23 Q. And is that your main business?

24 A. That's our main business.

25 Q. And over the years, that's the trade that

1 you built up, I take it, in doing that?

2 A. That's correct.

3 Q. And should you go out of business, they
4 would lose a local supplier of that milk, isn't that
5 correct?

6 A. I would assume that's correct.

7 Q. Now, in view of that relationship and
8 your close association with the consumer, have you
9 attempted to manage your farm so the product was the
10 highest quality product you could produce?

11 A. Yes.

12 Q. And in doing that, did you incur costs
13 that you would not have otherwise incurred?

14 A. Yes.

15 Q. And in addition, the consumer, I take it,
16 is interested in maintaining competition?

17 A. Yes.

18 Q. This proposal, if enacted, would prohibit
19 any -- that is Proposal Number 1, if enacted -- do you
20 understand that would prohibit anybody for all time ever
21 becoming a producer-handler?

22 A. Yes.

23 Q. Do you understand that? Do you think
24 that's in the consumer's interest, that no one can ever
25 enter and compete?

1 A. Yes, I do. I think the mere fact that --
2 that people are coming to our farm and wanting to know
3 where their milk comes from is an indication that they
4 are concerned about it, and I think the consumer would
5 lose if they don't have that milk supply.

6 Q. And in order to do business the way
7 you've described it, I take it your management has to
8 manage not one entity but two entities simultaneously;
9 one, the plant, and the other the farm, is that correct?

10 A. Well, I have two site managers so they
11 are specifically -- one oversees the milk processing and
12 one oversees the dairy farm.

13 Q. And someone has to oversee them?

14 A. That's correct.

15 Q. And that person has to watch two
16 operations, isn't that correct?

17 A. Yes, I do.

18 Q. And that's what you do?

19 A. That's correct.

20 Q. Okay. And you really run a -- virtually
21 no surplus or a small surplus -- or what is your surplus
22 situation? If you took it for a year and averaged it
23 out, would you have any substantial amount of surplus
24 that you didn't market some other way? By surplus, I
25 mean -- let me start again.

1 Aside from your Class I milk, you take
2 your own milk and you make ice cream out of it and so
3 forth.

4 A. Yes.

5 Q. And you make some other products?

6 A. Yes.

7 Q. Right. Does that constitute the vast
8 majority of your sales; that is, your own-farm
9 production?

10 A. No, we're producing about 25 percent
11 surplus milk on the dairy farm.

12 Q. You are?

13 A. That's been -- unfortunately, that's been
14 pretty consistent over the last couple of years.

15 Q. Okay. Is that your long-term plan?

16 A. No, it's not.

17 Q. And the reason for it is that it's not
18 very remunerative, is that correct?

19 A. Yeah, that's correct. I mean, lots of
20 years we pretty much analyzed it and say that all the
21 benefit we gained, if any, of being a producer-handler,
22 we gave away by selling cheap surplus milk.

23 Q. Right. Some of our members in New
24 England have a bakery that they market the milk through
25 in the form of baked goods. Have you done that at all?

1 A. No, we have not.

2 Q. Okay. Have you done anything that's
3 disorderly in handling of your pricing or any of your
4 other activities? Disorderly to the market, I mean, at
5 any time?

6 A. Not to my knowledge.

7 Q. Rabbi Rosen has made some statements in
8 his letter. I take it you've read his letter?

9 A. Yes.

10 Q. Are you in agreement with his statements
11 that he's made in his letter?

12 A. Yes.

13 MR. CARROLL: That's it. Thank you, your
14 Honor.

15 JUDGE CLIFTON: Thank you, Mr. Carroll,
16 that was clever. I know we still have perhaps a
17 little cross-examination and some redirect, but
18 I need to take a break. If we could take ten
19 minutes and please be back and ready to go at
20 3:32.

21 (A recess was taken from 3:22 to 3:38.)

22 JUDGE CLIFTON: All right. We're back on
23 record at 3:38. What other cross-examination is
24 there for Mr. Kreider? Mr. English.

25 RE-CROSS-EXAMINATION

1 BY MR. ENGLISH:

2 Q. Thank you, I just have a few clarifying
3 questions. Charles English again. I just want to be
4 perfectly clear. Has Kreider Dairy Farms been kosher
5 since 1972?

6 A. I don't remember which year we went
7 kosher.

8 Q. But kosher was something you did because
9 you perceived it as a valuable niche market, is that
10 correct?

11 A. That's correct.

12 Q. And kosher, because of the way things are
13 set up in this country, that the kosher designated
14 entities are entirely private entities, correct?
15 They're not governmental or pseudogovernmental agencies
16 in the United States, correct?

17 A. I'm not a kosher expert.

18 Q. Do you know if Star-K Kosher is a private
19 company?

20 A. I don't know that.

21 Q. Do you know whether kosher certification
22 is performed by the United States Government?

23 A. I don't know that.

24 MR. ENGLISH: I have no further
25 questions.

1 JUDGE CLIFTON: Thank you, Mr. English.

2 Who next will cross-examine Mr. Kreider?

3 Mr. Tosi.

4 CROSS-EXAMINATION

5 BY MR. TOSI:

6 Q. Good afternoon, Mr. Kreider. Thank you
7 for coming. Is your father Noah Kreider?

8 A. My grandfather's Noah Kreider and my
9 father is Noah Kreider, Jr.

10 Q. Okay. I remember I met your father years
11 ago, a very nice man.

12 A. Thank you.

13 Q. And your -- okay. For the -- just to
14 probe a little bit here about a letter from the rabbi to
15 Judge Clifton. Do you know where the rabbi lives?

16 A. No, I do not.

17 Q. Does he live on the farm, on your farm?

18 A. Rabbi Rosen?

19 Q. Yes.

20 A. No, Rabbi Rosen does not.

21 Q. Who pays the mashgiach fee for his
22 supervision?

23 A. You know, we pay for some things. I'm
24 not sure what fee you're talking about. I don't know
25 what all the fees are. I mean, I know when the water

1 pump cuts out on Christmas Day, we fix it.

2 Q. But this isn't -- I mean, the fact that
3 the production and the handling of milk there on your
4 farm is supervised by Rabbi Rosen, this isn't something
5 that Kreider itself pays for then?

6 A. We pay for some fees. And like I say --
7 what I want to say is, you know, if we pay -- we pay a
8 certain amount of the fees, and everybody looks at their
9 bottom line anyway for what their bottom line cost is.

10 Q. Okay. Are you and the rabbi like -- are
11 you guys, you know, friends where you talk business and
12 that kind of stuff about --

13 A. We're friendly.

14 Q. Friendly. Okay. Do you know why the
15 rabbi reached the conclusion that he makes in his
16 letter? He seems to suggest that if somehow you were to
17 lose your producer-handler status, that -- that you
18 would lose your ability to produce kosher milk? Do you
19 know how it was that the rabbi arrived at that
20 conclusion?

21 A. Which paragraph are you looking at?

22 Q. It would be, like, on the second page,
23 the second paragraph that begins the cholov Yisroel milk
24 known as -- known to all as Pride of the Farm --

25 A. Thank you. I was wondering how you

1 pronounced those words.

2 Q. Well, I don't know if I have it quite
3 right. I tried.

4 A. I don't think he was speaking
5 specifically about a producer-handler or
6 producer-handler status, but more in the overall aspect
7 of trying to outline how expensive it would be for him
8 to supervise his little bit of milk through a gigantic
9 plant.

10 JUDGE CLIFTON: Mr. Tosi, your sentence
11 is actually in the next paragraph, the last
12 sentence.

13 MR. TOSI: Excuse me, your Honor. I
14 was -- I jotted a few notes there in the margin,
15 and I wrote a little higher on the paper.

16 JUDGE CLIFTON: So, Mr. Kreider, if
17 you'll look at the next paragraph and read that
18 last sentence.

19 A. And specifically what's your question?

20 Q. Yeah. I'm just wondering why he -- if
21 you know why the rabbi takes the position that if
22 somehow you had to pay what he describes as an
23 exorbitant fee. And I would take from reading the
24 letter that what he meant by that was your payment if
25 you lost your producer-handler status, and that now you

1 were going to be required to be subject to the pooling
2 and pricing provisions of the order, you were going to
3 pay into the pool.

4 And I'm just wondering why he developed
5 those -- you know, the opinions that he makes there
6 about what the financial and economic implications would
7 be with someone that seems to be -- spoke quite -- quite
8 in detail about the -- the religious aspects of what it
9 means to be kosher.

10 A. I think he's just reemphasizing the fact
11 that his costs would go up, in his view, if he had to
12 buy his milk from another larger dairy. Right now he's
13 a big fish in a little pond.

14 Q. I mean, is he referring to himself or is
15 he referring to -- he seems to be referring, to me, to
16 the -- what's going to happen to Kreider, not what's
17 going to happen to himself as the attending rabbi.

18 A. Well, he says it would affect the
19 viability of Kreider Dairy and Pride of the Farm milk.
20 So obviously we would lose -- I mean, his costs would go
21 up, is what he's saying.

22 Q. Okay. How -- how do his costs go up? I
23 mean, if he's being paid to do something, how does his
24 costs go up?

25 A. Well, once again, I think he views -- and

1 I don't know all the aspects of his supervision rules.
2 But he is, I think, indicating that his costs would go
3 way up if he would have to try to run that same level of
4 supervision at a large plant. He realizes it's going to
5 be disruptive at a large milk plant and so the cost to
6 him inevitably will flow back. The increased cost from
7 a large dairy would flow back to his company.

8 Q. So we could interpret, then, that really
9 what this letter is about is the effect on -- the effect
10 to rabbis -- the effect on rabbis supervising kosher
11 milk if a producer-handler -- if a producer-handler
12 loses that status? That's really what he's talking
13 about here. He's not talking about Kreider, per se?

14 JUDGE CLIFTON: Do you agree with what
15 Mr. Tosi just said, Mr. Kreider?

16 THE WITNESS: Yes.

17 MR. TOSI: Thank you, Mr. Kreider. And
18 we appreciate that you came all this way to
19 testify at this proceeding.

20 THE WITNESS: Thank you.

21 JUDGE CLIFTON: Mr. Miltner, any
22 redirect?

23 REDIRECT EXAMINATION

24 BY MR. MILTNER:

25 Q. Mr. Kreider, you're going to have to help

1 me with terminology. The gentleman from Star-K who
2 lived at your facility that I referred to as rabbi
3 before, what's the term I should be using?

4 A. The way I understand it, technically he's
5 a mashgiach.

6 Q. Mashgiach?

7 A. Yes.

8 Q. I want you to assume a very large --
9 well, given what I will call a medium-sized processing
10 facility, larger than yours, okay? Assume we have that.
11 Assume it buys its milk from a cooperative association
12 that delivers milk from multiple members at a time,
13 okay?

14 A. Okay.

15 Q. Assume that plant wanted to supply the
16 same type of kosher milk that you provide to the Jewish
17 community today. Would you need to use more mashgiach
18 in numbers than you currently have today? Would you
19 need more people to achieve the same result?

20 A. I would assume that he would, yes.

21 Q. Why do you make that assumption?

22 A. You're talking about a regulated plant
23 that would buy milk from multiple farmers?

24 Q. I am.

25 A. Well, somehow they're going to have to

1 get around to all the dairy farms every day, authorize
2 each milking start up, monitor all DA operations, 24
3 hours a day, in the middle of the night, and then it
4 would be quite labor intensive.

5 Q. There's a certain efficiency with having
6 you do that today as a producer-handler, is that
7 correct?

8 A. That's correct.

9 Q. Given the volumes of milk that you're
10 able to market as kosher milk, if you were doing so in a
11 larger plant and you were not sourcing all the milk from
12 kosher farms, would it acquire additional shutdown of
13 the plant to run a kosher line, kosher run?

14 A. I would assume that that's the case.

15 Q. You couldn't run kosher milk through --
16 and bottle that and then bring in regular milk and run
17 it right through, right? I assume the mashgiach would
18 have a problem with that?

19 A. Yes, there needs to be complete
20 wash-down, and once again, I don't know all the rules,
21 but it's intensive.

22 Q. Not your job to know all the rules,
23 that's the mashgiach's job, right?

24 A. That's correct.

25 Q. Kreider Farms actually lost its

1 producer-handler status several years ago, correct?

2 A. In a specific order, yes.

3 Q. For a short period of time?

4 A. Yes.

5 Q. You had to make pool payments for that
6 period?

7 A. Yes, up until the law changed in 2000.

8 Q. And when you had to make the pool
9 payments, what did it do to the profitability of your
10 enterprise?

11 A. Pretty much robbed the enterprise of any
12 profits -- of all profits.

13 Q. So if you're pooled, would you be able to
14 continue processing kosher milk, or any milk for that
15 matter, under your current business model?

16 A. I'm sure that we would shut the milk
17 plant down.

18 MR. MILTNER: Thank you, your Honor, I
19 have nothing else. Thank you, Mr. Kreider.

20 JUDGE CLIFTON: Thank you, Mr. Miltner.
21 All right. Mr. Kreider, that completes your
22 testimony. Thank you so much.

23 THE WITNESS: Thank you, your Honor.

24 JUDGE CLIFTON: Mr. Miltner, you may call
25 your next witness. Mr. Ricciardi, you may call

1 your next witness.

2 MR. RICCIARDI: Good afternoon, your
3 Honor. Al Ricciardi on behalf of AIDA, and our
4 next witness will be Hein, H-e-i-n,
5 H-e-t-t-i-n-g-a.

6 JUDGE CLIFTON: Yes, please,
7 Mr. Hettinga, if you'll take the chair in the
8 witness box and be seated, I'll swear you in.
9 Now, do you want to pour a glass of water before
10 we begin? Please -- even though counsel has
11 just spelled your name, please state it into the
12 microphone and spell it again.

13 THE WITNESS: Hein, H-e-i-n, Hettinga,
14 H-e-t-t-i-n-g-a.

15 JUDGE CLIFTON: Thank you. If you will
16 raise your right hand, please?

17 HEIN HETTINGA
18 of lawful age, being duly sworn, was examined and
19 testified as follows:

20 JUDGE CLIFTON: Thank you.
21 Mr. Ricciardi, you may proceed.

22 MR. RICCIARDI: Thank you, your Honor.

23 DIRECT EXAMINATION

24 BY MR. RICCIARDI:

25 Q. Mr. Hettinga, you have already provided

1 your name for the record. Tell us your address for the
2 record.

3 A. El Paso -- no, I'm not El Paso.

4 Muleshoe, Texas. I have to look at it. 1140 --

5 JUDGE CLIFTON: You need to be about two
6 inches from that mic.

7 THE WITNESS: My eyes won't reach that
8 far.

9 A. 1140 U.S. Highway 84.

10 Q. Thank you, sir.

11 JUDGE CLIFTON: What was the town in
12 Texas?

13 THE WITNESS: Muleshoe, Texas.

14 JUDGE CLIFTON: How is that spelled?

15 THE WITNESS: I don't know.

16 MR. RICCIARDI: Just like it sounds,
17 M-u-l-e-s-h-o-e.

18 JUDGE CLIFTON: Muleshoe. Thank you.

19 THE WITNESS: No problem.

20 BY MR. RICCIARDI:

21 Q. What is your position with GH Dairy, El
22 Paso, sir?

23 A. I run it.

24 Q. And does that -- will that be your
25 day-to-day responsibility, too?

1 A. I have people that help.

2 Q. Okay. Gerben Hettinga, your son, being
3 one of them?

4 A. Correct.

5 Q. What's the mission of GH Dairy, El Paso?

6 A. To put out a better product, higher
7 quality, for a better price.

8 Q. Can you describe for us the operations of
9 GH Dairy, El Paso?

10 A. You mean the products we put out?

11 Q. Well, that would be good. That was
12 actually my next question, but let's take it now.

13 A. Gallons, half gallons. We're not doing
14 quarts. We're doing pints, half pints for the school
15 business. That's it right now.

16 Q. And where -- where can customers find
17 your products?

18 A. Wal-Mart, Costco, schools, and then we
19 have distributors that sell all over.

20 Q. Okay. That's out of El Paso?

21 A. That's out of El Paso.

22 Q. Now, Exhibit 13 that's been admitted in
23 this case, shows that GH Dairy, El Paso, became a
24 producer-handler as of January of this year, in '09, is
25 that correct?

1 A. That's correct.

2 Q. That's correct. Did the plant actually
3 operate as a pool plant in Order 126 before becoming a
4 producer-handler in January of '09?

5 A. I believe we started in November.

6 Q. And when it started in November, did GH,
7 El Paso have its milk from its own farms available at
8 that time?

9 A. No, it did not.

10 Q. And why not?

11 A. All my milk was contracted. The
12 contracts were up in '01 or -- of the new year, January.

13 Q. Okay. Now, why is GH Dairy, El Paso,
14 organized as a producer-handler operation?

15 A. I like running my own business.

16 Q. Okay. Tell me, having your own milk
17 supply, what kind of benefit does that provide to GH
18 Dairy, El Paso and its customers?

19 A. The customers really like source
20 verification. It's very big. Even on the cattle we
21 kill today, they're -- all have implants and the packers
22 want source verification, the processors want source
23 verification. It's going to be the next step.

24 Q. What do you mean by source verification?

25 A. Where the product was originally coming

1 from. So they can run it all the way back if there's a
2 quality issue or so forth.

3 Q. So if a customer were to have a problem,
4 they know where to look. If they look to you, they know
5 where the milk came from?

6 A. Correct.

7 Q. Now, why did you choose to locate the GH
8 Dairy, El Paso operation in El Paso?

9 A. UDA started to build a plant there or had
10 intentions of building a plant there. And they had
11 started doing some distributors and so forth, and I went
12 there, looked at the operation. And they basically had
13 a lot of accounts receivable for it. I said, I'll take
14 it over and that way you'll get paid on your accounts
15 receivable. And I took it over and started distributing
16 there. And I brought the milk from Arizona, which is a
17 regulated plant, and it had 35 cents freight, and I
18 could make a profit.

19 So I realized if I built a plant there, I
20 would have 35 cents a gallon. I had a 35 cents
21 disadvantage when I hauled it than if I bottled there, I
22 could make a profit.

23 Q. Let's follow up on that point. Did you
24 come to some conclusion as to why it was possible for
25 regulated plants to ship milk all the way in from

1 Arizona into El Paso and still be able to make money?

2 A. There's only one plant that's selling
3 milk in the area, which is Price's Dairy, which belongs
4 to Dean's, and they were ripping the general public off.

5 Q. Okay. Now, let's turn to a specific
6 issue that has been raised by another witness to this
7 hearing, a Mr. Carrejo, who's testified. And I want to
8 talk specifically first about the school -- El Paso
9 school milk bid and the El Paso school milk that GH
10 supplies.

11 Was one of the first contracts that GH
12 got for the El Paso School District?

13 A. Was that one of the first contracts that
14 we made? Yes. As far as the school, we bid that
15 contract first.

16 Q. Okay. Now, let's talk about timing,
17 because it's important. When that bid was made, were
18 you a producer-handler operation?

19 A. No.

20 Q. Did you even have any type of supply of
21 milk at that point?

22 A. No.

23 Q. When you bid for that contract, was it a
24 public bid process?

25 A. Yes.

1 Q. And did you submit a bid for the El Paso
2 School District?

3 A. Yes.

4 Q. And where did you intend to source the
5 milk for that bid if you were to receive it?

6 A. I was building a plant. I had bought
7 real estate, and I had started to build. And it always
8 takes longer than you think. So I had to make do. I
9 hauled the milk out of Andersen Dairy, made a mutual
10 agreement, if they ever break down, I will sell them
11 milk, because we don't have many friends; and they will
12 sell me milk and we will haul it, pay the freight.

13 Q. Okay. You, on behalf of GH Dairy, El
14 Paso, made an agreement with Andersen out of Nevada?

15 A. Las Vegas, Nevada.

16 Q. For them to ship milk --

17 A. No, me to pick up milk.

18 Q. You to pick up milk, I apologize. For
19 you to pick up milk in Nevada, transport it over to El
20 Paso, if you were to receive the El Paso school bid,
21 right?

22 A. I had already received it. Then I made
23 it work.

24 Q. Got you. Now, when you made the bid, can
25 you tell me approximately how much per half pint you

1 were willing to supply the El Paso School District with?

2 A. I believe -- and this is off the top of
3 my head, I believe I bid it for 22, and prior to that it
4 was like 32, the previous year. And the year before
5 that, or a couple years before that, it was like 17, 18
6 cents.

7 Q. Okay. So let's step back.

8 A. Okay.

9 Q. The year before you made the bid and
10 received the bid for El Paso, your testimony is that
11 they were charged about 32 cents per half pint --

12 A. Uh-huh.

13 Q. -- under the contract?

14 A. Uh-huh.

15 Q. Who had that contract?

16 A. Dean Foods.

17 Q. So when you made the bid, looking at what
18 it previously had been charged, did you believe that by
19 shipping the milk in, if you received the bid, that you
20 could make profit?

21 A. I could make it work.

22 Q. All right. So you did not use
23 producer-handler milk for that bid?

24 A. No.

25 Q. You did not use your producer-handler

1 status at GH, El Paso, because you didn't have it yet,
2 right?

3 A. Correct.

4 Q. By the way, how long was the duration of
5 that school milk bid contract?

6 A. It was a year with two years probable
7 renewal. I mean, basically if you did a good job the
8 first year, because we were spending -- to do a proper
9 line of half pints, it's almost a \$2 million investment.
10 And we told them we would play, if they guaranteed us,
11 you know, two or three years. And this was all done
12 much earlier. And they said that they would give us a
13 contract for one year, and if we like it, we'll give you
14 another year, and if we like it, we'll give you another
15 year.

16 Q. Has that been renewed?

17 A. Yes.

18 Q. There's also an issue that was raised by
19 Mr. Carrejo about serving the military base at
20 Fort Bliss. And he indicates -- he says that GH had
21 been selling some milk there beginning in early 2008.

22 Did GH, even before the plant was
23 operational, go ahead and sell milk in El Paso on Fort
24 Bliss?

25 A. I believe I hauled milk out of Yuma,

1 Arizona into El Paso, probably 14 months before I ever
2 started bottling in there. And that was part of the
3 reason that I built the plant there, because it worked.
4 I mean, if I had 35 cents freight and able to compete in
5 that market, I was going to play there.

6 Q. So hang on a second so I can understand
7 it and everybody else here can, too. You had a 35 cent
8 per gallon freight charge, you were taking care of that
9 customer through a regulated plant, and you were able to
10 be competitive?

11 A. Correct. Actually cheap.

12 JUDGE CLIFTON: Mr. Hettinga, you've
13 relaxed back away from the microphone. I'm
14 sorry, it's not comfortable, but we need your
15 mouth to be very close to it.

16 Q. I want to get to another issue that was
17 raised by Mr. Carrejo with regard to what he described
18 as a national retailer which GH apparently replaced in
19 some stores in El Paso. And let me at least summarize
20 what I believe Mr. Carrejo said, and I've got Exhibit 41
21 in front of me to make sure I get it correctly.

22 He indicated that GH Dairy had replaced
23 Dean, a national retailer, in March of this year. And
24 he further testified that, I think, he saw some shelf
25 prices upon GH Dairy's entry into the store that he

1 claims fell from \$2.62 for whole milk per gallon to
2 \$2.28. Now, has GH, in fact, been given some of the
3 stores of the national retailer in El Paso in March of
4 this year that were previously supplied by Dean's?

5 A. Yes.

6 Q. And tell me whether or not GH, El Paso is
7 supplying those stores through its producer-handler
8 operation?

9 A. Yes.

10 Q. Does Sarah Farms in Arizona also supply
11 the same type of national retailer stores customer in
12 Arizona?

13 A. Yes.

14 Q. And is the Sarah Farms customer supplied
15 by the regulated -- now regulated plant in Arizona?

16 A. Uh-huh. Yes.

17 Q. Is that a yes? And can you tell me
18 whether the price that is being paid by that retailer in
19 El Paso is higher or lower than the regulated plant in
20 Arizona is selling to the same customer in that market?

21 A. In Arizona, I am probably from 8 to 15
22 cents a gallon cheaper than in El Paso. And the reason
23 it's higher in El Paso, I have a new structure and I
24 need to depreciate it out and get refunds on it, so I
25 can get it paid off and be tough.

1 Q. So that I understand it, the Sarah Farms
2 plant pays into the pool as required now under Order
3 131?

4 A. Correct.

5 Q. And your testimony is that the regulated
6 plant paying into the pool is actually getting less for
7 the same customer than the one -- than the unregulated
8 Sarah Farms plant in El Paso?

9 A. That's correct.

10 Q. And it's somewhere between 8 to 15 cents
11 higher in El Paso?

12 A. Correct.

13 Q. Can you give us a reason why you're
14 actually able to charge more money in El Paso from a
15 producer-handler operation than a regulated plant?

16 A. There's less competition in Texas.

17 Q. Okay. There's been a number of claims
18 made by the proponents here with regard to a
19 producer-handler operation having some type of unfair
20 advantage because it doesn't pay into the pool. Can you
21 tell us whether or not having producer-handler status
22 is, in fact, some type of unfair competitive advantage?

23 A. I think anybody who doesn't put out a
24 million gallons a week is at a disadvantage. You
25 need -- to be efficient today with the equipment we have

1 today, they're talking here about 3 million pounds. I
2 think that they're -- they're living in the Stone Age
3 when they used to milk cows by hand. These new plants
4 will run a million gallons through there. If you want
5 to be tough, you've got to have a million gallons a
6 week, not -- not these small numbers. And a PD is not
7 competitive until it gets over a million gallons a week.

8 Q. With regard to plant operations as you
9 just described, if that's all the case, then why would
10 you choose to start a producer-handler operation in
11 El Paso rather than simply become a regulated plant?

12 A. I don't have enough volume. I don't have
13 a million gallons. When I've got a million gallons,
14 I'll quit being a PD because then I can't produce the
15 milk.

16 Q. There have been a number of alternative
17 proposals that have been made by various groups, some
18 including AIDA. One of those proposals, Proposal 25,
19 deals with individual handler pools. I'm not asking you
20 the technical issues regarding those, but based upon
21 your understanding of Proposal 25 and the individual
22 handler pooling proposal, is that something that you
23 would be in favor of, and why?

24 A. You're going to have to give the rule to
25 me because I don't remember which is which.

1 Q. Okay. Individual handler pools,
2 effectively what they mean is each plant being supplied
3 by the dairy farms would be effectively a
4 producer-handler.

5 A. I could live with that.

6 Q. Okay. I understand that. Now, with
7 regard to another Proposal 23, which deals with
8 exempting own-farm production, is that something also
9 that you would support?

10 A. I would support that.

11 Q. And while it's not directly attributable
12 to your business model, Proposal 24, that deals with an
13 exemption for retail stores and also home delivery, is
14 that something that you're in favor of?

15 A. I don't do home delivery.

16 Q. I understand. Does that mean that you --
17 do you take no position on it?

18 A. I take no position on that.

19 MR. RICCIARDI: Okay. I think for the
20 moment that's all I have of this witness, Judge.

21 JUDGE CLIFTON: Thank you. Mr. Hettinga,
22 can you help me equate either a million gallons
23 a week to 3 million pounds a month or the other
24 way around?

25 THE WITNESS: There's 8.5 pounds in a

1 gallon. So you get 8.5, it would 8 million 500
2 gallons a week times 4, would be what I would
3 say should not be a PD.

4 JUDGE CLIFTON: 8,400,000 --

5 THE WITNESS: Gallons or pounds per week.

6 JUDGE CLIFTON: Pounds per week.

7 THE WITNESS: 16, 32, 34 million pounds a
8 month.

9 JUDGE CLIFTON: Good grief. Wow.

10 THE WITNESS: Yes. They're asking for
11 peanuts. With all the PDs, all they get is
12 crumbs, that's all they get and they won't even
13 give them to them.

14 AUDIENCE MEMBER: Amen.

15 JUDGE CLIFTON: Who would like to begin
16 the cross-examination of Mr. Hettinga?

17 Mr. Beshore, thank you.

18 CROSS-EXAMINATION

19 BY MR. BESHORE:

20 Q. Good afternoon, Mr. Hettinga.

21 A. Good afternoon.

22 Q. We haven't seen each other for a couple
23 of years, I guess?

24 A. It's so nice.

25 Q. I didn't say that. You're here as a

1 member of the AIDA group?

2 A. Yes.

3 Q. Did you have anything to do with the
4 formation of that group?

5 A. Maybe a pinch. My son, Gerben, probably
6 took care of the bulk of that.

7 Q. Who exactly is a member of that group?

8 A. I don't know. I've seen a list.

9 Q. From your entities?

10 A. All of the PDs, all of the have-nots in
11 the system.

12 Q. Okay. Is Sarah Farms a member?

13 A. No.

14 Q. Is GH Dairy a member?

15 A. Yes.

16 Q. Okay. Now, does GH Dairy pay dues to
17 AIDA?

18 A. Gerben takes care of that. I don't know.

19 Q. You don't know when --

20 A. I don't know. I don't take care of that.
21 That's Gerben's deal. We have kind of like designated
22 stuff. He takes care of all paperwork.

23 Q. Does that include all checks?

24 A. All checks. I sign a few. I sign a few.

25 Q. How about the deposits, do you handle

1 those?

2 A. No.

3 Q. Gerben handles those also?

4 A. Yeah. If I seen these checks on these
5 attorneys, I would probably be upset. So he doesn't
6 want to upset me.

7 AUDIENCE MEMBER: That's right. That's
8 right.

9 Q. GH Dairy, is that a corporation or what
10 type of -- what type of legal entity is that?

11 A. Gerben and Hein Hettinga and my wife.

12 Q. Is that --

13 A. A partnership.

14 Q. It's a partnership?

15 A. Correct.

16 Q. And how many general partners are there?

17 A. The three of us.

18 Q. Are there any limited partners?

19 A. No. The bank, they're probably the main
20 stockholder or the main creditor or whatever you want to
21 say it, but that's -- we borrow money.

22 Q. Does that partnership own all of the
23 farms and cattle which supply it?

24 A. No, I do.

25 Q. You, individually?

1 A. Uh-huh.

2 Q. So you --

3 JUDGE CLIFTON: Now, just so the record
4 is clear, that was a yes?

5 THE WITNESS: Yes, I do.

6 Q. So Hein Hettinga individually owns the
7 farms and the cows which supply the milk to GH Dairy, a
8 partnership, which owns -- and owns the plant in El
9 Paso, is that correct?

10 A. I own the plant -- or GH owns the plant,
11 but I lent the money. How's that?

12 Q. Whatever you say.

13 A. That's what I think it is.

14 Q. I'm trying to learn. So you're the bank?

15 A. Correct.

16 Q. How many farms do you personally own
17 which supply GH Dairy, the plant?

18 A. I don't know. You tell me how much milk
19 DFA -- DFA puts out.

20 Q. I can tell you that.

21 MR. RICCIARDI: Your Honor --

22 A. That's -- that's my business.

23 JUDGE CLIFTON: Mr. Ricciardi, I'll hear
24 you.

25 MR. RICCIARDI: Two things. First of

1 all, the Market Administrator's already
2 determined that GH is a proper producer-handler
3 and it meets the status, and they have gone
4 ahead and filed the reports. Number one.

5 Number two, we're now getting into a
6 whole bunch of confidential information
7 unnecessary, and I'll instruct, if I need to,
8 with regard to -- Mr. Hettinga with regard to
9 these questions. So --

10 JUDGE CLIFTON: Thank you. No harm in
11 asking, Mr. Beshore.

12 MR. BESHORE: I'm wondering if that was
13 an objection or a speaking instruction to the
14 witness or --

15 JUDGE CLIFTON: That was a speaking
16 instruction to the witness.

17 BY MR. BESHORE:

18 Q. Okay. Let me ask you about GH Dairy.
19 You've testified about the school bid. By the way, who
20 put in the school bid to the El Paso school?

21 A. I went over it with my employee, and I
22 bid.

23 Q. Who's the employee that you went over it
24 with?

25 A. I think Raoul did that.

1 Q. Raoul?

2 A. Raoul.

3 Q. Does he have a last name?

4 A. Not that I know of.

5 Q. Is he Brazilian?

6 A. No, Hispanic. El Paso is 95 percent
7 Hispanic.

8 Q. Okay. Brazilian soccer players are the
9 only people I know that only have one name.

10 A. Raoul.

11 Q. Okay. You don't know his last name?

12 A. No.

13 Q. Do you sign his check?

14 A. No.

15 Q. Gerben signs those?

16 AUDIENCE MEMBER: Yes.

17 MR. STEVENS: Whoa, whoa. Your Honor --

18 JUDGE CLIFTON: Mr. Stevens.

19 MR. STEVENS: Could I have an instruction
20 to the audience that when there's a question --

21 JUDGE CLIFTON: Talk right into it.

22 MR. STEVENS: I'm sorry, Garrett Stevens,
23 Office of the General Counsel. Could I have an
24 instruction from you, your Honor, that when a
25 questioner asks a question and the answer is

1 given or not given from the stand, that no
2 answering is to be yelled out from the audience,
3 please.

4 JUDGE CLIFTON: Thank you, Mr. Stevens.
5 That's correct. If -- if anyone here is aware
6 that the witness is mistaken and you want very
7 quietly to alert his counsel, that would be
8 proper, but not to coach the witness.

9 Counsel will have an opportunity for
10 redirect examination and can revisit that area
11 and give the witness another chance. So that's
12 a better way to handle it, if you're aware of
13 any information that you believe is not correct.

14 So the answer to -- that question was,
15 who writes the checks to Raoul. Was that the
16 question?

17 MR. BESHORE: That was the question.

18 JUDGE CLIFTON: And your answer?

19 THE WITNESS: I do not.

20 MR. BESHORE: Okay. While I've got you
21 interrupted, Mr. Hettinga, how do you spell your
22 son's name, Gerben?

23 THE WITNESS: G-e-r-b-e-n.

24 JUDGE CLIFTON: Thank you.

25 Q. The El Paso school bid, in what business

1 name -- you know, what entity made that bid?

2 A. I believe it's GH Dairy.

3 Q. And at the time the bid was made, GH
4 Dairy Farm was not operating a plant in El Paso, is that
5 correct?

6 A. I believe so.

7 Q. Now, do you know anything about the --
8 you testified to the price of that bid.

9 A. Off the top of my head. I mean --

10 Q. Okay. You're not sure that what you
11 testified to is correct?

12 A. Not within -- not within mills because
13 that stuff is bid. You know, I remember like 22 cents
14 at that time.

15 Q. Okay. What do you mean by at that time?

16 A. Well, the milk fluctuates. It's based on
17 paper, milk, chocolate, sugar, so much to run it through
18 the plant, and it's formula pricing. And as the milk
19 prices change, the pricing to the schools change. It is
20 not that much for a year. It is a formula pricing. So
21 it's continuously changing.

22 I believe right today it's like 16 cents
23 today. Because milk has gone down, like everybody in
24 this room knows. So the school gets a better price.
25 Now, if it goes up, the school is going to get a higher

1 price.

2 Q. Okay. So the 22 cents --

3 A. Was based on the time of the bid.

4 Q. And what time was that?

5 A. I don't remember.

6 Q. Was it before the school year started?

7 A. I would say a year ago, approximately,
8 because the bids are coming up right now, but I don't
9 know the date. I don't know -- but I would say
10 approximately a year ago.

11 Q. So roughly May 2008?

12 A. The school bids come up at the end of the
13 school year for the following year. What the dates are,
14 all of them are different. They don't all do it on the
15 same day of the year. It's -- it's -- Arizona's bidding
16 right now. You know, everything, it's continuously
17 changing. But it's a formula pricing, basically paper,
18 milk, so much to run it through the plant, so much to
19 deliver it, and then that's the bid.

20 Q. Okay. And 22 was --

21 A. At the time of the bid. Because that I
22 remember, we said so much, you know, paper, so much
23 this, so much that. And certain things -- I can
24 remember numbers better than names --

25 Q. So --

1 A. -- and times.

2 Q. What was the amount for paper then?

3 A. 2 cents.

4 Q. And what was -- what are the other
5 elements in the price?

6 A. Running it through the plant.

7 Q. Processing?

8 A. Processing.

9 Q. What was that about?

10 A. You know, really, I would like to see
11 Dean's numbers and then we would put them together like
12 that. So since you're working for DFA and share it with
13 Dean's, it's about -- it ended up being -- you take the
14 milk at the time, 22 cents, and that took care of
15 delivery, everything, paper. But I know paper is right
16 at 2 cents.

17 Q. Okay. Let me just interrupt you there.
18 You said something -- you say DFA shares with Dean's?

19 A. Yes.

20 Q. Is that what you said?

21 A. Yeah, you do the -- you do Dean's work,
22 don't you?

23 Q. I don't.

24 A. Oh, okay.

25 Q. What are you talking about, DFA shares

1 with Dean's?

2 A. You guys are together.

3 Q. What do you mean, us guys are together?

4 A. Dean's and DFA are customer and supplier.

5 Q. DFA --

6 A. Yes. You work very, very diligently
7 together.

8 Q. Okay. So I could say you share with
9 Wal-Mart?

10 A. Yes.

11 Q. You share with Costco?

12 A. Yes.

13 Q. You guys are together?

14 A. Yes.

15 Q. Okay.

16 A. Customer -- customers and suppliers work
17 together.

18 Q. Okay. That's what you meant?

19 A. That's what I meant.

20 Q. Okay. Now --

21 A. What did you think I meant?

22 Q. I asked you what you meant.

23 A. Well --

24 Q. I had no idea, believe me.

25 JUDGE CLIFTON: Mr. Hettinga, we'll let

1 Mr. Beshore ask the questions.

2 THE WITNESS: Okay. That's fair.

3 Q. Now, in response to Mr. Ricciardi's
4 questions, you suggested that your bid on the El Paso
5 school milk was much less than the prior year's bid.

6 A. Absolutely.

7 Q. Okay. So you were contrasting your bid
8 for milk at 22 cents. That's for a half pint, right?

9 A. Correct.

10 Q. With May, roughly May of 2008, with the
11 bid from May 2007, correct?

12 A. I'm -- I believe so, yes. This was
13 all -- yeah, '08, '07, yes.

14 Q. Were the milk prices a little different
15 between '08 and '07?

16 A. The percentage, we're back on formula
17 pricing. When we came into El Paso, we saved the El
18 Paso -- and that's my -- my salesman, who wanted to be
19 patted on the back, we figured we saved El Paso School
20 Districts \$6 million.

21 Q. Now, did you hear -- are you aware of
22 Mr. Carrejo's testimony?

23 A. No.

24 Q. You're not?

25 A. No.

1 Q. Do you know what Dean's bid for milk was
2 this year?

3 A. Yes, that's why I'm here. Before I was
4 here, they were ripping them off.

5 Q. No, no. I mean for this year, the year
6 that you have --

7 A. Yeah.

8 Q. -- you bid -- you won the bid --

9 A. Correct.

10 Q. -- for the one district in El Paso?

11 A. Yes. What was their other district that
12 they renewed? How much was it?

13 Q. I'm asking you what -- if you know, what
14 Dean's bid was with respect to your bid for the district
15 that you won the bid?

16 A. I believe they were 2 cents higher.

17 Q. So that's the end -- you're saying 2
18 cents per half pint is \$6 million?

19 A. No, the year before -- when I came to
20 town, things changed. Not until I came to town. Prior
21 to that -- when I came to town, they lowered their
22 prices. Prior to that --

23 Q. I thought the milk price had something to
24 do with --

25 A. No.

1 Q. -- the Federal Order?

2 A. No, no.

3 Q. It doesn't?

4 A. Yes, it does. But it's -- it's a formula
5 pricing that changes and the formula stays the same.
6 The margin between the cost of milk and the cost of
7 product are the -- the finished -- the milk and 2 cents
8 are the two -- they're the ingredients. But the rest of
9 it was -- was just 8, 10 cents a unit higher than it is
10 today.

11 Q. For the non-milk factors?

12 A. For the non -- no, above and beyond --
13 running it through the plant, like right now it's 24.
14 It was -- or 22 -- or now it's 17 today. It's 17. 17
15 cents is what a half pint is today.

16 Q. Milk price?

17 A. Milk delivered to the school. We're
18 delivering half pints to the school right now for around
19 17 cents, because milk went down.

20 Q. What portion of that 17 cents is just the
21 milk value?

22 A. I believe 7 cents.

23 Q. Okay. And when it was at 22 cents, what
24 portion of that was just the milk value?

25 A. I would have to look at it on a piece of

1 paper, but I would say it was a nickel higher at that
2 time. I mean -- and then I got to look at a piece of
3 paper or something to see -- to see the fluctuation.
4 But the spread stays the same. It's the milk, the --

5 Q. The way it works, if it's 17 cents right
6 now for the half pint, and the milk value is 7 cents,
7 the packaging is 2 cents, you said, correct?

8 A. Correct.

9 Q. Okay. So the other 8 cents is
10 processing, markup, et cetera?

11 MR. RICCIARDI: Your Honor.

12 JUDGE CLIFTON: Mr. Ricciardi.

13 MR. RICCIARDI: Yeah. Mr. Beshore has
14 gone too far afield. He's asking for
15 confidential information. If everybody else in
16 this room wants to go ahead and disclose their
17 information about processing costs, percentages,
18 et cetera, then Mr. Hettinga will do the same.
19 I don't think it's fair to be asking him those
20 questions when other people have been trying to
21 hide behind confidentiality.

22 JUDGE CLIFTON: Well, it's fair to ask.
23 You're just saying it's not fair to expect an
24 answer.

25 MR. RICCIARDI: I guess that's right.

1 Q. I asked the question.

2 A. I've been coached.

3 Q. Yes, you have.

4 JUDGE CLIFTON: So your answer,
5 Mr. Hettinga?

6 THE WITNESS: It's confidential.

7 Q. Can you tell me what 17 minus 9 is?

8 A. 12 -- or 8, I believe.

9 Q. Now, when you did that -- that school --
10 when you say something worked, you mean it makes money?

11 A. Correct.

12 Q. Okay. And that school bid worked from
13 the beginning of the school year, I take it?

14 A. It was difficult when I brought the
15 milk -- when I paid all the freight out of Anderson
16 Dairy.

17 Q. But it worked.

18 A. It didn't matter, I needed to get the
19 business, get going. I couldn't call the school up and
20 say, can you start in January? I had to start.

21 Q. You bid it without a plant, right?

22 A. Finished. I was building one. You know,
23 dairymen are used to milking cows for two years before
24 they ever get a gallon of milk. They're used to working
25 free.

1 Q. Does the plant in -- the Sarah Farms
2 plant, does that plant work for you right now?

3 A. The plant does.

4 Q. Okay. Profitable?

5 MR. RICCIARDI: Your Honor, I'll object
6 to that.

7 JUDGE CLIFTON: Mr. Ricciardi.

8 MR. RICCIARDI: Confidential.

9 MR. BESHORE: Your Honor, I object to the
10 instruction to the witness by Mr. Ricciardi per
11 witness now -- per question. It's not
12 appropriate. This hearing hasn't been conducted
13 that way, and I object to it.

14 MR. RICCIARDI: Well, I haven't -- I
15 haven't been up here asking confidential
16 information. Judge. Do you want me to shout it
17 from over here that what he's asking for is
18 issues about profitability concerning private
19 concerns? And if I need to get up all the time,
20 I will. But I just think -- I don't think it's
21 fair.

22 JUDGE CLIFTON: Mr. Beshore, you remember
23 the line, what am I, the potted plant? Do you
24 remember that line?

25 MR. BESHORE: Honestly, I don't.

1 JUDGE CLIFTON: The Oliver North
2 hearings? You remember Oliver North? Well, at
3 any rate --

4 MR. BESHORE: Yes.

5 JUDGE CLIFTON: I don't expect
6 Mr. Ricciardi to be the potted plant. And just
7 as you objected, Mr. Vetne gave me a little
8 lesson in how I'm not to sustain the objection,
9 but I can either instruct the witness not to
10 answer or allow his counsel to instruct him not
11 to answer if I fear that confidential
12 information that he does not want to reveal is
13 being asked for.

14 I think that is applicable here. I
15 expect Mr. Ricciardi to alert the witness that
16 he has called when confidential information is
17 being asked for by the question.

18 MR. BESHORE: Your Honor, unless my
19 memory is very deficient, your Honor just
20 recently stated that it's fair to ask.

21 JUDGE CLIFTON: It is fair to ask, but it
22 it's also --

23 MR. BESHORE: That's all I have done.

24 JUDGE CLIFTON: And it's fair for
25 Mr. Ricciardi to pop up and alert the witness

1 that that goes into confidential areas.

2 MR. BESHORE: I think at some point
3 witnesses can know whether it's confidential for
4 them or not.

5 JUDGE CLIFTON: Well, I know this one
6 does. I know this one does.

7 MR. BESHORE: As do I. That was the
8 basis for my objection.

9 JUDGE CLIFTON: I understand.

10 A. I will say this. The plants are doing
11 better than the dairies.

12 Q. Do you own any -- do you own or have an
13 interest in any plants which produce a million gallons a
14 week?

15 MR. RICCIARDI: Object to that, Judge.
16 Confidential.

17 JUDGE CLIFTON: Now, I expect you to
18 respond to each question.

19 A. That is confidential, but a million plant
20 works better than a smaller plant, let me tell you that.

21 Q. I think you've testified to that.

22 A. (Nodding head.)

23 Q. That wasn't my question.

24 A. The larger the plant, the more efficient.
25 It's just like the dairies. A 200-cow dairy is very,

1 very inefficient. A thousand cow dairy is more
2 efficient. A 2,000 cow dairy is more efficient, a
3 3,000-cow dairy is more efficient. And the plants,
4 the -- the plants that they're asking people to run with
5 is like trying to compete on a bicycle against a car
6 race. The PDs are on bicycles.

7 Q. All I'm asking is, are you, Hein
8 Hettinga, or any of your partnerships which operate at
9 least three dairy plants in the car race?

10 MR. RICCIARDI: Objection. That's a
11 back -- a back-end way of asking the same
12 question.

13 JUDGE CLIFTON: Actually, I like that
14 question. Mr. Hettinga, if you're able to
15 answer that question, I would like you to do so.
16 First of all, I'm not quite sure which three
17 plants. I know about GH in El Paso. I know
18 about Sarah Farms in Arizona. And what's the
19 third one?

20 THE WITNESS: I have another GH plant in
21 Arizona.

22 JUDGE CLIFTON: Close to the mic.

23 THE WITNESS: I have two GH plants. One
24 is in Arizona and one is in El Paso, Texas.

25 JUDGE CLIFTON: Okay, that's right. Now

1 I remember. So it's those three you're asking
2 about, Mr. Beshore?

3 MR. BESHORE: Yes, it is, your Honor.

4 JUDGE CLIFTON: And are all these of
5 those using cars in the race?

6 MR. BESHORE: That wasn't quite my
7 question. But --

8 JUDGE CLIFTON: As opposed to bicycles.

9 Q. Right. But my question was, considering
10 any of those plants, are you in the car race?

11 JUDGE CLIFTON: Mr. Ricciardi?

12 MR. RICCIARDI: Your Honor, I don't know
13 what car race we're talking about, either the
14 Indianapolis 500 or otherwise, but to the extent
15 that it tries to backwards re-engineer the
16 question about the amount of processing capacity
17 in a particular plant, then I object. That's
18 confidential.

19 MR. BESHORE: The car race -- just for
20 clarification, the car race I'm talking about is
21 the one that Mr. Hettinga referred to in his
22 last response to me.

23 JUDGE CLIFTON: It's a ballpark figure,
24 Mr. Hettinga. I would encourage you to respond
25 to that.

1 MR. RICCIARDI: I would maintain the same
2 objection, Judge.

3 JUDGE CLIFTON: So you can either be
4 guided by counsel --

5 THE WITNESS: We're thinking about
6 purchasing one. How's that?

7 JUDGE CLIFTON: Thinking about purchasing
8 a car?

9 THE WITNESS: Yeah.

10 MR. BESHORE: I'll stop right there.

11 JUDGE CLIFTON: Thank you, Mr. Beshore.
12 Mr. Hettinga, I have to caution you, some of
13 your best answers are a foot away from the
14 microphone. I want to make sure they're in the
15 transcript.

16 All right. Who will next cross-examine
17 Mr. Hettinga?

18 CROSS-EXAMINATION

19 BY MR. ENGLISH:

20 Q. Good afternoon, Mr. Hettinga.

21 A. Good afternoon.

22 Q. You have to speak up.

23 A. Hi, Chip.

24 Q. I haven't even gotten started yet. When
25 we last had the pleasure of a Federal Order hearing

1 together, your operation in Arizona, known as Sarah
2 Farms, was a producer-handler, correct?

3 A. That is correct.

4 Q. And today it is a fully-regulated pool
5 distributing plant on the Arizona Order, correct?

6 A. That is correct.

7 Q. So the alteration of status from
8 producer-handler to fully regulated plant has certainly
9 not put it out of business, has it?

10 A. No, it hasn't.

11 Q. And while the cause of the regulation was
12 different, when we last spoke on a record such as this,
13 your plant known as GH -- is it GH Processing in Yuma,
14 Arizona? Is that what it's called, the second plant in
15 Yuma?

16 A. That's correct.

17 Q. That plant was not regulated under any
18 Federal Order, correct?

19 A. That's correct.

20 Q. And today it is regulated under the
21 Arizona Order, correct?

22 A. That's correct.

23 Q. And it is hardly out of business today,
24 correct?

25 A. It's been damaged some.

1 Q. But it's in business today?

2 A. I work a little harder than most people.

3 JUDGE CLIFTON: Don't neglect, though, to
4 answer his question. Which is -- I presume the
5 answer is yes.

6 THE WITNESS: I'm still in business.

7 Q. In fact, the Sarah Farms operation is a
8 vital and competitive player in the marketplace, isn't
9 it?

10 A. I would say so.

11 Q. And the GH processing facility in Yuma is
12 a vital and competitive operation in the marketplace?

13 A. We do compete.

14 Q. And, in fact, you have gained volume in
15 those facilities since regulation, have you not?

16 A. I have gained volume because I didn't
17 want -- people said I was going to go out of business
18 when I became a PD, and I had to prove to them that I
19 wasn't going out of business. All of the competition
20 basically said, if he's no longer a PD, he won't be
21 here. So I had to make them pay.

22 Q. Isn't it fair to say that it was the
23 producer-handlers at the last proceeding who said they
24 would go out of business?

25 A. Who?

1 Q. The producer-handlers in the last
2 proceeding were the ones who testified that if they were
3 regulated, they would go out of business?

4 A. There were some in Washington that were
5 the salt of the earth that did go. They weren't big
6 enough. They need to be a million gallons a week to
7 really be tough. And until then, they should be PDs.

8 And there were people in Washington, that
9 were like the salt of the earth, people that worked
10 their cows and are no longer viable, no longer -- not
11 me, them. And they were good people. They were good
12 people, worked hard. And we put them out of business.
13 They didn't need to be. And they did go broke, and you
14 know.

15 Q. Your testimony is that producer-handlers
16 who appeared in this proceeding, this earlier
17 proceeding, regarding producer-handlers --

18 A. The three --

19 Q. -- are out of business?

20 A. There's two or three of them in
21 Washington that are out or quit. And yes, that were
22 PDs.

23 Q. Do you remember their names?

24 A. Edingas (phonetic) -- can Gerben help me,
25 please?

1 Q. No, I think --

2 A. I mean, he would know their names.

3 Q. Maybe if Gerben wants to get on the
4 witness stand with you.

5 A. How about my attorney?

6 Q. That seems to be what he wants.

7 A. How about my attorney, can he help?

8 JUDGE CLIFTON: What you should do is
9 testify to your own knowledge and the other
10 information --

11 THE WITNESS: I don't know their names.
12 I don't know -- I don't remember their names.

13 MR. RICCIARDI: What we need to do is to
14 proceed question and answer, and with regard to
15 any issues that you don't know, you don't know.
16 And then we'll move on.

17 MR. ENGLISH: Leaving aside the whole
18 confidentiality issue, I guess now we're going
19 to have coaching, but I don't know. That's
20 fine. I just think at some level -- I'll try.

21 The witness is the one who said that
22 these businesses are out of business, so I think
23 I'm allowed to test that.

24 Q. Does the name Edaleen Dairy mean anything
25 to you?

1 A. Yes.

2 Q. Does that refresh your recollection? Is
3 that one of the entities that was a producer-handler in
4 the last proceeding that you just were referring to?

5 A. Yes.

6 Q. And your testimony is they are out of
7 business?

8 A. I don't know if it's them or another
9 group, and some have quit being PDs. I just heard bad
10 stories about them. I got pieces and what have you.
11 And they're having a hard time.

12 Q. Now, quit being PDs is not the same thing
13 as being out of business, is it?

14 A. I believe one of them went out of
15 business, sold out.

16 Q. All right. Does the name Smith Brothers
17 mean anything to you?

18 A. I've heard of that one, that's one of
19 them.

20 Q. Is that out of business?

21 A. I don't know.

22 Q. Does the name Mallorie's mean anything to
23 you?

24 A. That's one.

25 Q. Do you know if they're out of business?

1 A. I don't know.

2 Q. So which one of these businesses or which
3 ones -- I think you're using plural -- in Washington are
4 out of business after the last proceeding?

5 A. I don't know. But I know there's big
6 problems with the people and I've heard it, so -- it's
7 just --

8 Q. You also heard they were out of business,
9 apparently?

10 A. Yes.

11 Q. You started building the facility in
12 El Paso when?

13 A. I would say probably 18 months before I
14 started. In November of '08, I got done, so I would
15 say 18 months earlier than that or a year earlier than
16 that.

17 Q. So 18 months earlier than that would be
18 in early '07?

19 A. I don't remember the dates. I don't
20 remember the dates. I know it took just about a year to
21 put it together.

22 Q. A year to put it together, and what, six
23 months for planning?

24 A. No, I don't think it took that long,
25 but --

1 Q. So -- but outside six months for the
2 plant?

3 A. It's not a -- planning wasn't the big
4 problem. It was permitting.

5 Q. When did you purchase the facility from
6 the United Dairymen of Arizona?

7 A. I never bought it from United Dairymen
8 from Arizona.

9 Q. I'm sorry. When did you purchase the
10 facility?

11 A. I don't remember that.

12 Q. Was the whole process longer than two
13 years?

14 A. I -- I don't -- I don't know. I don't
15 think so.

16 Q. You don't think so.

17 A. I don't think so.

18 Q. Was it -- was it shorter than 2 1/2
19 years?

20 A. I don't know. I can tell you after we
21 bought it, it probably took about 18 months to put it
22 together.

23 Q. Did you buy it after USDA issued its
24 decision in the prior proceeding regarding
25 producer-handlers in December of 2005?

1 A. No.

2 Q. You bought it before December 2005?

3 A. No. I didn't buy it prior to 2005.

4 Q. Okay. So you bought it after
5 December 2005?

6 A. I --

7 Q. I'm not -- I'm really not trying to trick
8 you, sir.

9 A. I'm going to say about two years ago we
10 bought it, I think.

11 Q. And two years ago is -- this is May 2009,
12 so around May 2007 you purchased it, correct?

13 A. I believe. Now, those are hard -- I
14 don't know. There's a record somewhere. I can dig it
15 up, if that's what you really need.

16 Q. Now, the farm for -- that serves -- it
17 may be plural. The farm or farms that provide the milk
18 for the facility in El Paso -- which is GH Dairy, as I
19 understand it, is that correct?

20 A. That's the name it goes by.

21 Q. The farm or farms are located in
22 Muleshoe?

23 A. That's correct.

24 Q. Are there more than one farm?

25 A. There's only one farm that supplies that

1 El Paso property.

2 Q. Is that farm owned by you, your wife and
3 Gerben?

4 A. It's owned by me -- my wife and I.

5 Q. Okay. What about Gerben, does he own
6 that?

7 A. No, he does not.

8 Q. Do you sell milk into Mexico?

9 A. Where?

10 Q. Out of El Paso?

11 A. Not directly.

12 Q. Do you sell milk --

13 A. I sell milk to people. What they do with
14 it after they pick it up or after they get it at my
15 plant is -- I don't know what they do with it. Some of
16 them distribute, and I don't know where they distribute
17 to.

18 Q. So you have -- you -- you, yourself,
19 testified, I believe, that you have four distribution
20 routes, separate from -- four distributors? I'm sorry.

21 A. No.

22 Q. Four distribution routes, is that what
23 you said?

24 A. No.

25 Q. Separate and apart --

1 A. I have distributors.

2 Q. You have distributors.

3 A. Yes.

4 Q. How many distributors do you have?

5 A. I don't know.

6 Q. And you don't know where the milk goes
7 once you sell it to the distributor?

8 A. I have a pretty good idea.

9 Q. A pretty good idea that some of it goes
10 to Mexico?

11 A. Yes.

12 Q. Is it true that the plant in El Paso has
13 a higher butterfat usage than most plants in the United
14 States for their sales in your marketing area?

15 A. I would say so.

16 Q. And that is because the population that
17 you serve there has a large Hispanic element?

18 A. In Mexico, nobody drinks 2 percent
19 because they add water to make it. So when they move to
20 the U.S., they still don't buy 2 percent.

21 Q. Sir, I really appreciate that. That's
22 the same answer you gave three years ago, to the word.

23 A. When you don't lie, you don't have to
24 remember.

25 Q. Your plant manager at GH Dairy has been

1 quoted in the El Paso Times as saying that the plant has
2 plenty of room to expand. Is that correct?

3 A. Which plant manager?

4 Q. Mr. Byrne. Is he the plant manager there
5 in El Paso?

6 A. At present, I would call him the general
7 manager.

8 Q. I'm sorry, the general manager.

9 MR. RICCIARDI: Your Honor, I did have an
10 objection.

11 JUDGE CLIFTON: Mr. Ricciardi, you may
12 approach the microphone.

13 MR. RICCIARDI: Thanks. I wasn't sure
14 what the question was. It was ambiguous. Was
15 the, is that correct, that he was quoted in the
16 newspaper in El Paso, or was the, is that
17 correct, that the plant has plenty of room to
18 grow. So it was ambiguous to me. That's my
19 objection.

20 MR. ENGLISH: Happy to clarify.

21 BY MR. ENGLISH:

22 Q. Is the plant manager's statement that
23 appears in the El Paso Times, that there's plenty of
24 room to expand, correct?

25 MR. RICCIARDI: Objection.

1 A. The --

2 MR. RICCIARDI: Hang on. I have another
3 objection. That information is part of a
4 business plan and is confidential, especially
5 since this is a producer-handler operation.
6 That kind of information is something they're
7 not entitled to.

8 JUDGE CLIFTON: Well, if it's in the
9 newspaper, it's not being guarded.

10 MR. ENGLISH: I do think at some point
11 you can't simultaneously put it in the newspaper
12 and then claim confidentiality.

13 JUDGE CLIFTON: This is just the
14 beginning question. Perhaps your objection
15 would be best placed after this one's answered.

16 MR. RICCIARDI: I will wait for that,
17 Judge, I understand.

18 JUDGE CLIFTON: Thank you.

19 A. First of all, he's a general manager and,
20 yes, I would like to put more into the plant.

21 Q. Was his statement as quoted in the
22 El Paso Times that there is plenty of room to expand
23 correct?

24 A. I believe so.

25 Q. Thank you, sir. And was his statement in

1 the El Paso Times that additional acreage around the
2 plant has been purchased, correct?

3 A. We are farmers, we always buy the real
4 estate. We don't want to own the whole world, just
5 what's next to us. That was ten acres available. I
6 bought it. Okay?

7 Q. Good for you, sir. Thank you for
8 answering my question.

9 A. That's on the records. Besides, Dean's
10 comes by and takes pictures every week.

11 Q. Not at my request. This is going faster
12 because you're answering my questions, sir. Just one
13 second.

14 MR. RICCIARDI: First of all, hang on a
15 second, Chip. I don't mind you saying whatever
16 you're going to end up saying. Let me make a
17 point. I don't think that comment is fair,
18 because what it shows on the record is somehow
19 he hasn't -- or he's been evasive and has not
20 been answering questions, so I think that's an
21 unfair comment.

22 JUDGE CLIFTON: No, what that shows is,
23 in spite of your coaching, this witness is
24 willing to share some information, which is --
25 makes it much more fun for all of us sitting

1 here.

2 MR. ENGLISH: And may I actually say that
3 maybe the knee-jerk reaction was being up
4 here -- I was complimenting the witness. It was
5 a genuine compliment.

6 MR. RICCIARDI: Good deal.

7 THE WITNESS: Thank you.

8 BY MR. ENGLISH:

9 Q. You testified earlier about what you felt
10 the market was like in El Paso when -- before you came
11 in, correct? You testified about that.

12 A. I felt there was an opportunity there.

13 Q. Now, leaving aside the regulatory issues
14 for a moment, isn't it the case that Dean Foods
15 purchases milk from a cooperative that imposes
16 over-order premiums on Dean in El Paso?

17 A. I offered to become part of the MAC and
18 pay a premium as long as I get a premium. And we had an
19 agreement, and then they changed their mind. So now
20 I've become a PD and we can play this game.

21 Q. What was the premium you would have paid
22 to the MAC?

23 A. I believe 75 cents a hundredweight. But
24 I would have received it from my cows. I wasn't going
25 to pay it and not get it. I wasn't going to be milked

1 and not fed.

2 Q. Is Dean milked and fed?

3 A. Dean just milks. Dairymen milk cows,
4 cows milk dairymen.

5 Q. Does Dean get a premium back if it pays a
6 premium?

7 A. No.

8 Q. Do you know what the level of premium was
9 that was being charged to Dean by the MAC?

10 JUDGE CLIFTON: Please get a little
11 closer, Mr. Hettinga.

12 A. I know what was charged, but I don't know
13 what was rebated.

14 Q. Your business, Sarah Farms -- sorry about
15 that -- is a successful business, correct, sir?

16 A. I would like to think so.

17 Q. Did Sarah Farms undergo a restructuring
18 of its business after regulation in April 2006?

19 A. I would say so.

20 Q. What was that restructuring that you
21 underwent?

22 A. Get bigger, run more milk through the
23 plant, do it cheaper. And select and compete.

24 MR. ENGLISH: I have no further questions
25 of this witness.

1 JUDGE CLIFTON: Thank you, Mr. English.
2 Who next will cross-examine Mr. Hettinga? And
3 now, Mr. Hettinga, you let me know if you want a
4 short break. This may be somewhat fatiguing,
5 just because it's aggressive.

6 THE WITNESS: We're all laughing. I
7 would like to go pee, if I could.

8 JUDGE CLIFTON: This is very timely.
9 It's just about 5:00. Please be back and ready
10 to go at 5:10.

11 (A recess was taken from 4:59 to 5:11.)

12 JUDGE CLIFTON: We're back on record at
13 5:11. Who will next cross-examine Mr. Hettinga?
14 Mr. Tosi, do you have any questions for
15 Mr. Hettinga?

16 MR. TOSI: No, your Honor, we have no
17 questions. But it's always a pleasure to see
18 Mr. Hettinga, and especially so at this time
19 since he came all this way to participate with
20 us. Thank you. Thank you, Mr. Hettinga.

21 JUDGE CLIFTON: Any redirect?

22 MR. CARROLL: I have one.

23 JUDGE CLIFTON: I'm sorry, Mr. Carroll.
24 I didn't think you were responding when I asked
25 if there was any cross-examination.

1 MR. CARROLL: I started to get up and
2 Mr. Tosi asked.

3 JUDGE CLIFTON: Pardon?

4 MR. CARROLL: I say I started to get up
5 and then Mr. Tosi asked.

6 JUDGE CLIFTON: I see. I missed your
7 signal. All right. Then Mr. Carroll. And,
8 Mr. Beshore, I did see you as well. First I'll
9 start with Mr. Carroll who has not yet examined
10 the witness.

11 CROSS-EXAMINATION

12 BY MR. CARROLL:

13 Q. Mr. Hettinga, I'm John Benjamin Carroll.
14 I'm an attorney for the New England Producer-Handlers
15 Association. It's a collection of small
16 producer-handlers compared to you or anybody in the
17 West.

18 A. I'm a small producer-handler at this
19 time, but I plan to get a little bigger.

20 Q. Good. And I have also a person who wants
21 to be a producer-handler who is down in Virginia and
22 presently is small by any definition.

23 I want to ask you about your competitor
24 situation where you're -- let's take Texas first. Who
25 do you compete with in that market? Who are the names

1 of the persons, the major competitors for you?

2 A. Dean's.

3 Q. And who else?

4 A. There is some milk that comes out of
5 Lubbock that is a co-op. And I'm not sure it's coming
6 out of Lubbock. But basically it's Dean's that I
7 compete against. There's captive, like a co-op that has
8 different stores that sell only to their stores. And so
9 it's basically like competing against Dean's.

10 Q. Can you compare your size to Dean?

11 A. As far as what?

12 Q. Processing, the volume of processing.

13 A. As far as one plant or all the plants or
14 what?

15 Q. Whatever plants you're in competition
16 with.

17 A. I -- I don't know the real volume of
18 Dean's. I don't know the volume so I can't --

19 Q. Right.

20 A. I know they have -- I'm saying something,
21 I think, 86 or 87 plants. I have three. So let's say
22 one-third -- or 3 percent of their volume, maybe.

23 Q. It's true, isn't it, that they're listed
24 on the national exchanges, the stock corporations?

25 A. Yes.

1 Q. And they have access to -- to large
2 corporate lending, should they need it?

3 A. They have used that.

4 Q. All right. And is it your position that
5 your entry into the market was a benefit to the people
6 that you eventually served?

7 A. I believe I'm very, very good for the
8 consumer and very, very bad for the milk industry, or
9 the -- the organized milk industry.

10 Q. Can you explain why?

11 A. I think I -- I say this to my friends who
12 ship to co-ops. I say dairymen milk cows and co-ops
13 milk dairymen. That's -- that's how I feel. I think
14 everybody should be on their own. Co-ops aren't bad,
15 per se, but basically the dairymen do not have a choice.
16 You either be a PD or join a co-op. That's it.

17 Q. And you -- have you ever considered
18 buying milk from cooperatives?

19 A. I have. I do.

20 Q. You do?

21 A. I do.

22 Q. But in spite of that, you have purchased
23 your own cows and built your own farm. Why is that?

24 A. I did the cow and the farms first, and
25 when I got regulated in Arizona, I do buy milk from UDA.

1 Q. But is it your preference to raise your
2 own -- have your own cattle and do your own milk?

3 A. I will not sign a contract with them, if
4 that's -- I can do whatever I need to do.

5 The co-ops put contracts that don't allow
6 a person to leave for a year if it -- any kind of law
7 they probably wouldn't allow it except in a co-op. You
8 can't -- you can't leave a co-op for a year, once you
9 give them notice, in most cases. And I don't know the
10 co-op laws, per se, as well as I should.

11 I just don't -- I just do my own thing
12 and buy my own milk and sell my own milk.

13 Q. Do you have better quality control over
14 your product by raising it yourself?

15 A. You have total control, and better
16 quality.

17 Q. Do you have any position on the proposal
18 that there -- the producer-handler exemption should be
19 eliminated completely? Do you have a position on that
20 proposal?

21 A. Producer-handlers should be eliminated
22 completely?

23 Q. Yeah.

24 A. I honestly think producer-handlers should
25 be able to do 8 million gallons -- or 8 million pounds a

1 week. And if they want to start thinking about
2 regulating them, I would think about it. But basically
3 I think PDs should -- they -- really, I don't think the
4 milk business should be regulated. I would rather see
5 complete free enterprise, and -- but I think most
6 dairymen want co-ops and they want regulation, so that's
7 fair. But I think the ones that don't want it,
8 shouldn't have it.

9 Q. And would you have any concern about the
10 Department allowing or cutting off the right of any
11 farmer to become a producer-handler?

12 A. I would be very, very opposed to that.

13 Q. And can you tell me why?

14 A. In 1936 when these laws were generated,
15 half of all the milk was PDs. And today we've got a
16 problem because there's almost 2 percent PDs. And now
17 we've got a big problem.

18 The biggest problem we have is the big --
19 the total control of the co-ops and the big processors.
20 And to get diversification, every PD is more
21 diversified -- the co-ops basically just bundle
22 everybody and run us like sheep and shear us.

23 And the PDs do a great job of being
24 innovative. We heard about kosher milk. A big plant
25 won't fool with kosher milk. They won't fool with it.

1 Or anything special to get a customer, they won't do it.

2 So the little PDs do go the extra mile.
3 And all of a sudden, they do well, they get big, and
4 then they can't be PDs no more. I think probably every
5 dairy that you go to that is in the United States was a
6 PD one time in their life and started as a PD and
7 outgrew it.

8 But when you stop growth and you stop new
9 blood, you kill an industry. You kill it. And that's
10 what they're trying to do, so they can rape it.

11 Q. And do you believe that's in the consumer
12 interest?

13 A. No, it is not in the consumer interest to
14 not have PDs. The interest is new blood, new starting
15 up. To create a milk mafia is no good.

16 MR. CARROLL: Thank you very much, sir.

17 JUDGE CLIFTON: Now, Mr. Beshore, do you
18 want to go first? Mr. English.

19 MR. BESHORE: I don't have any other
20 questions.

21 JUDGE CLIFTON: All right.

22 Mr. English.

23 RE-CROSS-EXAMINATION

24 BY MR. ENGLISH:

25 Q. Mr. Hettinga, in addition to our

1 experiences in Federal Order hearings, we've also had
2 experience in federal court, correct, with respect to
3 the rulemaking after it was adopted in 2006?

4 A. We've had different -- yes, I don't
5 remember the issue, but yes, we've done all kind of
6 things together, Chip.

7 Q. Do you recall filing a lawsuit, you and
8 your wife and Sarah Farms, against the Secretary of
9 Agriculture in the United States District Court for the
10 District of Texas, Lubbock Division?

11 A. Yes, I do believe something to that
12 effect.

13 Q. And do you recall a declaration that was
14 submitted with your name on it dated March 13th, 2006,
15 with respect to that litigation?

16 A. I probably signed something, but I don't
17 remember. Do you want to read it to me?

18 Q. Well, I'll hand it to you, and --

19 A. I can't read.

20 Q. And also -- I do recall that --

21 A. Okay.

22 Q. -- Mr. Hettinga. Although I -- I think
23 that you are one of the smartest men I know, for the
24 record.

25 And so I will certainly hand it to you,

1 and maybe your counsel can assist, but I only have
2 really an authentication question. Let me -- let me
3 hand it and I'll explain what I'm going to do.

4 JUDGE CLIFTON: You may, Mr. English.

5 MR. ENGLISH: Your Honor, I will ask for
6 it to be marked, but first let me indicate that
7 I have handed the witness a six-page document
8 copied on front and back, as I believe it
9 actually appeared front and back rather than
10 separate pages.

11 It is entitled United States District
12 Court, for the District of Texas, Lubbock
13 Division, Hein Hettinga and Ellen Hettinga
14 versus Michael Johanns, defendant, civil case
15 number, and there's a blank. Declaration of
16 Hein Hettinga. And I would like to have this
17 marked, your Honor.

18 JUDGE CLIFTON: Mr. English, when you
19 were asking about the case, did you mention in
20 your question what the case number was?

21 MR. ENGLISH: I did not, your Honor. And
22 this is a copy from the file. When it was filed
23 and served, we didn't have a case number on this
24 particular document. My version of this
25 document doesn't have a case number on it. If

1 you need the case number, I'm sure I can get it.

2 JUDGE CLIFTON: Only if you just happen
3 to have it in front of you.

4 MR. ENGLISH: I do not have it in front
5 of me.

6 JUDGE CLIFTON: I know we can find it.
7 Okay.

8 MR. ENGLISH: I would like it marked.
9 I'm going to ask the witness merely to
10 acknowledge that this is his declaration. And
11 then I'm going to move its admission under
12 801(d)(2) of the Federal Rules of Evidence as a
13 prior statement of a party. It does not need to
14 be inconsistent. If I need to talk about why it
15 may be inconsistent, I can, but I'm moving its
16 admission in its entirety. I am not picking out
17 parts. But it is admissible under 801(d)(2).

18 To save us time, since Mr. Ricciardi has
19 risen, I would point out that the witness in
20 that declaration, in two paragraphs, 9 and 12,
21 said the following: The new regulations will
22 force Sarah Farms to abandon the business model
23 which I invested substantial financial resources
24 and many long hours over the past decade. The
25 new regulations will cause immediate changes to

1 the operation of Sarah Farms and will force a
2 fundamental restructuring of the business, which
3 cannot be repaired even by a later decision
4 striking down these new limitations.

5 My last question of this witness was, did
6 the regulation --

7 JUDGE CLIFTON: You don't need to go into
8 that. Go ahead and go to number 12, tell us
9 what that says.

10 MR. ENGLISH: Number 12 has a number of
11 statements in it. A potential customer, a
12 nationwide retailer, has informed us that they
13 will not purchase milk from Sarah Farms due to
14 the uncertainty of Sarah Farms' operations under
15 the new USDA regulations. Moreover, Sarah Farms
16 has not been able to obtain new customers or
17 expand its customer base since the decision was
18 announced by USDA in December of 2005. And it
19 goes on about putting a cloud over the business.

20 JUDGE CLIFTON: Go ahead and read that as
21 well, please.

22 MR. ENGLISH: This decision has put a
23 cloud over my business, and Sarah Farms has been
24 under attack from competitors in the
25 marketplace, including Shamrock Foods, the

1 largest independent milk distributor in Arizona.
2 And supermarket chains Kroger and Safeway, who
3 both own large captive milk bottling plants in
4 Arizona.

5 Sarah Farms is one of four processors of
6 milk in Arizona and has the smallest milk
7 processing factory in the market.

8 And his testimony was that he has grown,
9 your Honor. So I don't think -- the Rule 80 --
10 802(d)(1) -- at 801(d)(2), I'm sorry, absolutely
11 does not require an inconsistent statement. It
12 is a prior statement, it is a sworn statement of
13 this witness for litigation purposes.

14 JUDGE CLIFTON: And the date of
15 declaration is what, Mr. English?

16 MR. ENGLISH: March 13, 2006.

17 JUDGE CLIFTON: And the effective date of
18 the regulation that he feared is what date?

19 MR. ENGLISH: Was April 1, 2006.

20 JUDGE CLIFTON: After the declaration?

21 MR. ENGLISH: After the declaration.

22 JUDGE CLIFTON: So he had no experience
23 yet.

24 MR. ENGLISH: But he testified what his
25 experience was going to be, your Honor.

1 JUDGE CLIFTON: He anticipated.

2 MR. ENGLISH: He anticipated.

3 JUDGE CLIFTON: I understand.

4 Mr. Ricciardi.

5 MR. ENGLISH: I understand

6 Mr. Ricciardi -- at some point he needs to
7 identify it. I don't want to lose that.

8 MR. RICCIARDI: Your Honor, what I object
9 to -- I mean, we can argue about the question of
10 whether it's admissible under Rule 801. I
11 didn't know we were playing by the Federal Rules
12 anymore. That's good, let's go back then. I
13 got a lot more objections to make.

14 But the fact of the matter is, this is
15 not relevant to this proceeding for this reason.
16 The litigation that was filed for which this
17 declaration was, in fact, proposed and prepared
18 was the change in the producer-handler
19 regulation for which a motion for a preliminary
20 injunction was filed in Lubbock. That was
21 denied, Judge. One of the reasons it was denied
22 is because Congress, the night before, passed
23 the Milk Regulatory Equity Act targeted at that
24 gentleman that's sitting in the witness stand.

25 MR. STEVENS: Your Honor, I object to

1 that statement. The decision of the court
2 stands for itself. No representation by counsel
3 here can replace any decision of the federal
4 judge, or any of that. Let's let the record
5 stand on the --

6 MR. RICCIARDI: That --

7 MR. STEVENS: -- of what -- please, sir.

8 MR. RICCIARDI: I had not finished, sir.
9 Can I finish my statement?

10 MR. STEVENS: Well, no.

11 MR. RICCIARDI: Then you can go ahead and
12 make your objection.

13 MR. STEVENS: Sir, sir, please, I get to
14 make an objection, I get to complete my
15 objection. Then you get to finish your
16 sentence.

17 MR. RICCIARDI: Oh, you get to interrupt
18 me?

19 MR. STEVENS: To make an objection,
20 absolutely.

21 MR. RICCIARDI: Thank you.

22 JUDGE CLIFTON: Wait, now. We've been
23 doing so well. Mr. Stevens, finish your
24 objection.

25 MR. STEVENS: Well, it's very simple.

1 Counsel cannot make statements here about what a
2 court decided when the decision of the court is
3 public record for everyone to see.

4 I can -- I can characterize, paraphrase.
5 Let's have the decision stand for itself. He's
6 making representations that the decision either
7 stands for it or not. If you would like to put
8 a copy of it in the record for official notice
9 or take official notice of it, I have no problem
10 with that.

11 JUDGE CLIFTON: However, he was
12 explaining for me and everyone else that if this
13 was for injunctive relief, and if in the
14 meantime, Congress stepped in, that's relevant
15 information. Do you agree?

16 MR. STEVENS: But when it's characterized
17 as the court decided, and then uses this
18 interposed with that, the impression is left
19 that the court somehow is bound by something
20 Congress did. That -- that certainly is not the
21 case.

22 And the decision of the court is the
23 decision of the court. To -- to put it together
24 with some act of Congress to give that
25 impression -- which is not the correct

1 impression.

2 JUDGE CLIFTON: Thank you, I understand
3 the objection. Go ahead, Mr. Ricciardi.

4 MR. RICCIARDI: Thank you, Judge. Let me
5 see, before I was interrupted, so I can get my
6 place and my train of thought back.

7 The purpose for the filing of the action
8 in the federal district court in Lubbock was to
9 attempt to get an injunction against what was
10 going to then be the effective date of the
11 change in the producer-handler regulation.

12 Obviously, one of the bases for an
13 injunction, and always is, is that you're going
14 to be potentially irreparably harmed. The
15 purpose for this affidavit was to state at that
16 point, based upon what was known, that we
17 believed that Sarah Farms would be irreparably
18 harmed.

19 Now, what happened afterwards and what
20 happened in the market or how he changed his
21 operation or whether he increased the volume is
22 not relevant to what we're talking about now.
23 This is an attenuated attempt to take a piece
24 of -- an affidavit that was used for a specific
25 purpose and to state that maybe your projections

1 were wrong.

2 The problem with it is, if you get into
3 this, now I have the collateral matter of
4 dealing with this case, the litigation that I
5 then filed as a result of the Milk Regulatory
6 Equity Act, which just got sent back on appeal
7 from the U.S. Court of Appeals in D.C., I have
8 to explain the interrelationship of that to this
9 case.

10 JUDGE CLIFTON: Now, is that the one that
11 found that you do not, under these
12 circumstances, have to exhaust administrative
13 remedy?

14 MR. RICCIARDI: That would be true. And
15 all of it is obviously interrelated. It's not
16 relevant to our proceeding. It does nothing to
17 advance the ball. This being marked as an
18 exhibit would be the same as me saying, okay,
19 we're going to go ahead and mark copies of all
20 the pleadings in the two or three lawsuits that
21 are out there.

22 I just don't think it's relevant to
23 anything, Judge, and I think it just puts us in
24 a position where we put something in the record
25 that shouldn't be there, and now I have to go

1 explain it again.

2 JUDGE CLIFTON: Let me -- let me -- I'll
3 hear from counsel. I know -- don't leave, don't
4 leave.

5 But let me tell you what I'm thinking.
6 Throughout this entire proceeding, people who
7 are anticipating what might happen to them in
8 the marketplace if producer-handler exemptions
9 stay the way they are, have been pinned down
10 about the fact that nothing bad has happened yet
11 in most of their cases; they just recognize that
12 something bad could happen in the future.

13 So, to me, it seems fair if this was a
14 situation where the Hettinga Enterprises
15 feared -- anticipated what bad would happen if
16 they lost their producer-handler exemption could
17 well be evaluated in similar fashion.

18 MR. RICCIARDI: On the other hand, Judge,
19 why do you need the document in your hand for
20 that? The witness has been asked questions.
21 He's given whatever answers there are. And to
22 the extent it's relevant to the issue you
23 raised, it's already in the record.

24 JUDGE CLIFTON: Well, don't leave yet.
25 The other concern I have is it doesn't seem to

1 me that putting this declaration in -- and I
2 recognize it's for a very limited purpose, it
3 shows that the sky did not fall -- why that
4 would require the whole record and the record of
5 other litigation to be understood, which, by the
6 way, the Secretary already does understand,
7 having been a party to it.

8 MR. RICCIARDI: Perhaps.

9 JUDGE CLIFTON: Perhaps.

10 MR. RICCIARDI: Yes.

11 JUDGE CLIFTON: So why would all that
12 other information have to come in, too?

13 MR. RICCIARDI: Your Honor, what I would
14 have to end up doing, if you're going to put
15 this in, is I have to consider whether or not I
16 need to go through paragraph by paragraph and
17 talk about some of the things that he
18 anticipated, whether they occurred, whether they
19 didn't occur; if, in fact, he had to make
20 changes in operation; if, in fact, when he was
21 signing this, the customer that he related it
22 to, whether they ended up losing that customer
23 or not.

24 I mean, it is that type of a collateral
25 matter that may end up extenuating the record

1 even further than we have it now. But, you
2 know, you're going to make your decision. I
3 understand.

4 JUDGE CLIFTON: Okay. I'm inclined to
5 mark it and let it in. I don't want to prolong
6 this hearing any more than anybody else does.
7 But that's how I'm inclined. Mr. English.

8 MR. ENGLISH: I don't want to belabor the
9 point. It really doesn't matter what the court
10 ruling was. What matters is if this witness had
11 said this somewhere else, not in a court
12 proceeding, he would just be -- it would be just
13 as admissible under the Rules of Evidence.

14 The only reason I reference the Rules of
15 Evidence, by the way -- which, by the way, are
16 more stringent than this hearing is. If it be
17 admissible in a federal court, and I submit that
18 this document is admissible in a federal court
19 as an exception to hearsay. It is not hearsay.
20 It simply is not hearsay, then it's certainly
21 admissible here. I'm not going to belabor the
22 point. I would like to have the document
23 marked.

24 I do not intend to spend this much time
25 on it. I'm not surprised. But be that as it

1 may, if the witness can identify it and it can
2 be admitted, I can sit down.

3 JUDGE CLIFTON: All right. I'm marking
4 it as Exhibit 85.

5 (Exhibit 85 was marked for
6 identification.)

7 BY MR. ENGLISH:

8 Q. Mr. Hettinga, do you recognize what has
9 been marked as Exhibit 85?

10 A. I recognize my signature on the back.

11 Q. Is that your signature on the back?

12 A. Yes.

13 MR. ENGLISH: Your Honor, I move
14 admission of Exhibit 85.

15 JUDGE CLIFTON: Is there any additional
16 objection other than that already made? Exhibit
17 85 is hereby admitted into evidence.

18 JUDGE CLIFTON: Mr. Stevens.

19 MR. STEVENS: Could I inquire? Your
20 Honor, I was looking at my notes here, and I --
21 was Mr. Kreider's statement admitted?

22 JUDGE CLIFTON: It was.

23 MR. STEVENS: Okay. Thank you very much.

24 JUDGE CLIFTON: You're welcome. That's
25 the one I admitted with the rabbi's attachment.

1 Okay. Let's see. Who else would like to
2 cross-examine Mr. Hettinga? Any redirect?
3 Mr. Ricciardi.

4 MR. RICCIARDI: Thank you, Judge. I just
5 have a couple of points.

6 REDIRECT EXAMINATION

7 BY MR. RICCIARDI:

8 Q. Mr. Hettinga, I think it was when
9 Mr. English was asking you questions the first time, and
10 you referenced the producer-handlers in the Pacific
11 Northwest, and I think you said something about them
12 being out of business. What did you mean by that?

13 A. As it was basically, I believe -- and
14 I've heard bits and pieces and Gerben talked to me a
15 little bit during the break. Edaleens are having a
16 very, very hard time. I don't know if they're peak --
17 the names and what have you.

18 All of the people that were involved,
19 some of them quit milking cows, some of them quit
20 processing milk. And there's been a real destruction in
21 their way of life. And they had a very, very
22 family-oriented type life prior to the legislation.

23 And it disrupted it very, very hard. The
24 families started fighting because it wasn't one family
25 anymore. They broke it up into different issues. But

1 how it all -- it's not a blow-by-blow. I don't know
2 exactly what it is, but I know Gerben is very close to
3 them people because -- and basically said that they're
4 all having a hard time.

5 Q. I understand. I have one other area that
6 I think we need to clarify a bit, and I want to go back
7 to it just so I understand. And I think it's based, in
8 part, upon some questions that were asked of you by
9 Mr. Beshore. It goes back to the school bid process.

10 As I remember the questions, he was
11 asking you about whether or not there were, in fact,
12 milk price variations depending upon the month in the
13 contract period. Do you remember that?

14 A. Yes.

15 Q. And you told him, as I recall, that when
16 you were looking at the school milk bid and school milk
17 business, you're looking at milk, paper, transportation,
18 and also some type of processing margin?

19 A. Yes.

20 Q. Okay. When you looked, then, at the
21 previous milk bid that was made by Dean Foods in trying
22 to make a decision, were you looking at a fixed number
23 or were you looking at the margin?

24 A. The spread. They call it the spread.

25 Q. Okay, the spread. And is it your

1 testimony, then, that after your entry into the school
2 milk business in El Paso, that the spread or the margin
3 for school milk is 10 cents less than before you came
4 in?

5 A. The year before, yes.

6 MR. RICCIARDI: Thank you.

7 JUDGE CLIFTON: Good. Any other
8 questions of Mr. Hettinga? No. Mr. Hettinga, I
9 thank you so much and you may step down.

10 All right. Let's see where we are and
11 how tired we are and who wants to follow
12 Mr. Hettinga. It's 5:41. We could have one
13 more witness, perhaps. Mr. English? Oh, yes,
14 yes, yes, we could have -- I don't know if he
15 wants to follow Mr. Hettinga, but we could have
16 Mr. Metzger, if Mr. Metzger is willing.

17 MR. MILTNER: He says yes.

18 JUDGE CLIFTON: Great. I think nobody
19 needs a stretch break, right? I think
20 everybody's ready to go. All right. Let's take
21 five minutes so Mr. Metzger can get positioned
22 next to a microphone and so don't go very far,
23 we'll just reposition.

24 (A recess was taken from 5:42 to 5:46.)

25 JUDGE CLIFTON: All right. We're back on

1 record at 5:46.

2 Mr. Metzger, would you state and spell
3 your last name, please?

4 THE WITNESS: Erick, E-r-i-c-k, last name
5 Metzger, M-e-t-z-g-e-r.

6 JUDGE CLIFTON: Thank you. If you will
7 raise your right hand, I'll swear you in.

8 (Exhibit 86 was marked for
9 identification.)

10 ERICK METZGER

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

13 JUDGE CLIFTON: Thank you, Mr. Metzger.

14 You may proceed.

15 A. Thank you. My name is Erick Metzger, and
16 I serve as the General Manager of National All Jersey,
17 Incorporated, NAJ, a position I have held for the past
18 five years. I was raised on a dairy farm in Indiana,
19 earned a bachelor of science degree from Purdue
20 University in 1982 and an MBA from Franklin University
21 in 1999. I was employed by the American Guernsey
22 Association for ten years, including five years as its
23 CEO. I have been with the Jersey organizations for the
24 past 16 years. I have testified and filed comments in
25 conjunction with previous Federal Order hearings.

1 NAJ is a national membership organization
2 of over 1,100 dairy producers and others interested in
3 supporting equitable milk pricing. Approximately
4 30 percent of NAJ members own cows other than Jerseys.
5 NAJ's milk marketing policy is to advocate for equitable
6 milk pricing and for programs that price milk based on
7 its most valuable components in accordance with their
8 use in consumer products. NAJ is an affiliate member of
9 both the National Milk Producers Federation and the
10 International Dairy Foods Association.

11 Most NAJ members market their milk
12 through cooperatives. Some members market their milk
13 directly to pool distributing plants. Other members
14 market directly to proprietary nonpool plants. Some
15 members opt to process their own milk, and we expect
16 that more may choose to do so in the future. It is
17 important to note that members who have chosen to
18 process their own milk fall into two broad categories.
19 One group can be defined using the common definition of
20 producer-handler, in that they process their milk for
21 fluid consumption. Others process their own milk into
22 other products, particularly artisan cheese, which they
23 market for premium prices. Given that the proposals
24 being considered in this hearing will impact many of its
25 members, NAJ is compelled to voice its support of and

1 opposition to certain of these proposals.

2 In broad terms, NAJ agrees with the two
3 concepts put forth in Proposal 2, that some Class I milk
4 needs to be exempt from Federal Order pooling and that
5 there needs to be a limit on the exemption. NAJ's
6 producer-handler members operate in several of the
7 Federal Orders, are of varying sizes, have vast
8 differences -- and have vast differences in operating
9 histories -- in operating history. Some of these
10 handlers rely only on their own farm milk, others
11 regularly supplement their own farm milk with purchased
12 milk, while others only purchase outside milk on an
13 as-needed basis. Looking to the future, if they are
14 able to grow sales, these producer-handlers will need to
15 weigh the options of growing the supply of their own
16 farm milk versus purchasing milk from other producers.

17 In preparing for this hearing, I
18 consulted with the following NAJ producer-handler
19 members. These six operations are not the only NAJ
20 producer-handler members, but provide a representative
21 sample of those members.

22 Mapleline Dairy in Hadley, Massachusetts
23 has Class I sales in Order 1. Their own-farm milk comes
24 from their 75-cow herd and they regularly supplement
25 this production with milk purchased from a neighboring

1 herd. Mapleline started their bottling operation in
2 1995. Most months Mapleline qualifies as an exempt
3 plant, keeping their sales under the 150,000 pounds per
4 month threshold. However, there have been months when
5 distributions have exceeded 150,000 pounds. The
6 existing 150,000 pound limit on exempt plants serves as
7 an impediment to them being able to grow their business.

8 High Lawn Farm in Lee, Massachusetts, has
9 Class I sales in Order 1. Their own-farm milk comes
10 from their 190-cow herd. High Lawn Farm's bottling
11 operation began in 1923. Most months High Lawn Farm's
12 herd produces all the milk needed for their sales, and
13 they are exempt from pooling and pricing provisions as a
14 producer-handler. However, there have been a few months
15 when the herd's production has needed to be supplemented
16 with purchased milk.

17 Bush River Farm in Newberry, South
18 Carolina has Class I sales in Order 5. Bush River
19 Farm's own-farm milk comes from their 400-cow herd.
20 This dairy started bottling in 2004 and has not relied
21 on any purchased milk. They are exempt from order
22 pooling and pricing provisions as a producer-handler.

23 Kilgus Dairy in Fairbury, Illinois, will
24 have Class I sales in Order 32. Slated to begin
25 operation in June 2009, Kilgus Dairy will process milk

1 from their 100-cow herd. Initially they do not plan to
2 buy any milk from other producers and will be exempt
3 from current order pooling and pricing provisions as a
4 producer-handler and/or as an exempt plant.

5 Garry's Meadow Fresh Jerry Milk in
6 Mulino, Oregon will begin their bottling operation this
7 month. Their sales will be in Order 124. The milk will
8 come from their 60-cow herd. They do not plan to buy
9 any outside milk. They will be exempt from order
10 pooling and pricing provisions as a producer-handler
11 and/or an exempt plant.

12 Fish Trap Dairy Number 2, doing business
13 as Twin Book Creamery in Lynden, Washington and Class I
14 sales in Order 124.

15 JUDGE CLIFTON: Mr. Metzger, is that
16 supposed to be Twin Brook?

17 THE WITNESS: Yes.

18 JUDGE CLIFTON: Or Twin Book with an R?

19 THE WITNESS: Yes, it is, with an R.

20 JUDGE CLIFTON: We'll make that change on
21 the record copy and have you initial before you
22 leave.

23 A. They began their bottling operation in
24 February 2007 with six cows. The business has grown to
25 include 60 cows today. They use only their own-farm

1 milk with no outside milk purchased. They are exempt
2 from order pooling and pricing provisions as a
3 producer-handler and/or an exempt plant.

4 While NAJ did not submit any proposals
5 for this hearing, we did review the proposals included
6 in the hearing notice. In considering how the proposals
7 would impact the current and future operations of
8 existing and potential NAJ producer-handlers, as well as
9 the membership in general, the NAJ board of directors
10 approved the following concepts:

11 To support proposals advocating that
12 producer-handlers with own-farm milk production be
13 regulated as partially regulated distributing plants by
14 the Federal Milk Market Orders. Own-farm milk
15 production up to 3 million pounds per month should be
16 exempt from order pooling provisions. Own-farm milk
17 production in excess of 3 million pounds per month and
18 any purchased milk should be subject to the respective
19 order's pooling provisions.

20 To oppose provisions in proposals that
21 would base pooling exemptions on historical handler
22 sales, also known as grandfathered exemptions.

23 To oppose proposals seeking to establish
24 individual handler pools across all orders.

25 Number one, partially regulated

1 distributing plants. NAJ supports, with qualification,
2 Proposals 17 and 23. The qualifications are as follows:

3 In Proposal 17, NAJ would replace the
4 language that calculates a volume of exempt own-farm
5 milk dependent on historical sales limited to 3 million
6 pounds per month with a simple limit on the exemption at
7 3 million pounds per month of own-farm milk.

8 In Proposal 23, NAJ would add a limit on
9 exempt own-farm milk of 3 million pounds per month,
10 whereas Proposal 23 has no limit on exempt own-farm
11 milk.

12 NAJ believes the current regulations
13 covering producer-handlers and exempt plants to be
14 inequitable. Handlers with own-farm milk can be treated
15 very differently depending on the order in which they
16 have sales, whether or not they purchase any outside
17 milk, and the volume of outside milk purchased. For
18 example, consider the situations outlined by NAJ's
19 current producer-handlers. As long as High Lawn Farm
20 relies only on their own-farm milk, they can remain
21 exempt from order pooling and pricing obligations
22 regardless of how much of their own farm milk they
23 market. Meanwhile, their neighbor, Mapleline Farm, has
24 to limit their sales to less than 150,000 pounds per
25 month to retain their exemption due to buying milk from

1 another farm.

2 By expanding the existing regulations
3 pertaining to partially regulated distributing plants to
4 include handlers with own-farm milk, all handlers
5 utilizing own-farm milk will be treated the same.
6 Handlers processes their own-farm milk will see no
7 current change to their current -- will see no change to
8 their current order pooling regulations for their first
9 3 million pounds of milk per month if the NAJ
10 modification is included. Handlers utilizing more than
11 3 million pounds of own-farm milk will have their pool
12 obligation based only on the amount of milk over the 3
13 million pound exemption, instead of on all their
14 own-farm milk.

15 Handlers who regularly rely on purchased
16 milk in addition to their own farm milk will be treat
17 more equitably as partially regulated distributing
18 plants. Current regulations allow producer-handlers in
19 some orders to retain their exemption as long as
20 purchased milk remains less than a set amount.
21 Producer-handlers in other orders lose their exemption
22 if any outside milk is purchased. The partially
23 regulated distributing plant option will allow own-farm
24 milk under 3 million pounds per month to be exempt from
25 order pool obligation even if outside milk is purchased.

1 Yet, the pool will be compensated for the purchased milk
2 the same as if it had been received by a pool
3 distributing plant.

4 NMJ believes that exempting the first
5 3 million pounds of own-farm milk is equitable for
6 producer-handlers that use: Less than 3 million pounds
7 of own-farm milk, more than 3 million pounds of
8 own-farm milk, and a combination of own-farm milk and
9 purchased milk.

10 Producers who do not process their own
11 milk will benefit from the pool receipts of own-farm
12 milk in excess 3 million pounds per month, plus any milk
13 purchased by producer-handlers. In addition, if
14 regulations are changed so that purchasing outside milk
15 will not cause handlers to lose the exemption for their
16 own-farm milk, those processors may be more likely to
17 purchase outside milk.

18 Point 2. Basing pool exemption on
19 historical sales. NAJ opposes the section of Proposal
20 17 that outlines the calculation of the amount of
21 own-farm milk to be considered exempt, all of Proposal
22 20 and all of Proposal 26. These proposals advocate
23 using a handler's historical processing and sales
24 volumes of own-farm milk to establish an exemption from
25 future pool obligations.

1 NAJ opposes these so-called grandfather
2 clauses for two reasons. First, several of NAJ's
3 producer-handler members are new processors. Fittingly,
4 they began or will begin their operations on a limited
5 scale in order to mitigate the risk associated with the
6 enterprise. To their credit, they have been (or may be)
7 able to grow their sales and -- their sales and praises.
8 Previous months' sales volume will not adequately
9 reflect their current sales, which are in excess of the
10 average from previous months. These handlers would be
11 penalized for their success if historical sales are used
12 to establish a volume exemption to be used from a given
13 point in time. In addition, new processors do not have
14 previous sales figures to grant them a base although
15 they planned their bottling operations under current
16 regulations.

17 Second, NAJ does not believe it is
18 equitable to treat existing producer-handlers
19 differently than producers who may want to become
20 producer-handlers in the future. Granting pool
21 exemption to existing producer-handlers would, in
22 essence, be giving them an advantage over others who may
23 want to become producer-handlers in the future.

24 Number 3. Establishing individual handle
25 pools. NAJ opposes Proposal Number 25 to establish

1 individual handler pools across all orders. In 2008,
2 FMMO Class I utilization was 39 percent across all
3 orders. NAJ believes that having the higher Class I
4 receipts shared only among producers serving the Class I
5 market will result in two classes of producers. The
6 haves will have access to Class I markets and will
7 receive higher operations for their milk. The have
8 notes, without access to Class I market, will receive
9 lower prices for their milk.

10 Individual handler pools will require a
11 limited amount of manufacturing milk to be associated
12 with the Class I plants as a reserve supply of milk.
13 However, without marketwide pooling, there will be
14 little incentive for most manufacturing milk to be
15 qualified for a milk marketing order and subject to
16 regulated pricing. In fact, it is easy to envision
17 approximately half of the milk currently in the Federal
18 Milk Marketing Orders becoming unregulated milk. A
19 system with half the milk regulated and half not is
20 essentially an unregulated system and would embody the
21 very definition of disorderly marketing. NAJ echos the
22 concerns on this issue provided during previous
23 testimony from Dr. Roger Cryan and Bob Yonkers, Robert
24 Yonkers.

25 That concludes my written statement. I

1 guess at this point I would like to borrow from a fine
2 tradition of our U.S. Congress and take the opportunity
3 to revise and extend my previous comments. It may, in
4 fact, help cross-examination go a bit quicker. And I'll
5 make three points. And yes, Mr. English, you can count
6 down the three points, if you would like.

7 Number one, we fully realize that what we
8 are advocating here will exempt from pooling some milk
9 that is currently pooled. It will also bring into the
10 pool some milk that is currently exempt. It is our
11 belief that we would be -- that what we are advocating
12 here would actually result in more milk being added to
13 pooling provisions across all orders than would be
14 exempted.

15 Number two, our statement is, in regards
16 to our membership, is forward looking. And it has a lot
17 to do with our -- our current producer-handlers who are
18 of admittedly limited size and scale. However, as
19 several of these are new entrants into this business, if
20 you talk to them about their hopes, their dreams, their
21 plans and what may become available to them, they're
22 concerned about the possible, shall we say, thwarting of
23 future opportunities that some proposals would include.

24 By the same token, we also have members
25 who milk several thousand cows, dairies, 4,000 cows,

1 5,000 cows, 6,000 cows. And the membership in general
2 or the board of directors also sees the opportunity for
3 those as possible entrants into the producer-handler
4 realm and believe that establishing a 3 million pound
5 cap prior to that potential development would certainly
6 for -- shall we say prevent the potential for perhaps
7 disorderly marketing from a large entrant such as that.

8 And finally, there has been on breaks, et
9 cetera, some discussion about that allocation of class
10 for milk for perhaps the producer-handlers that are
11 using more than 3 million pounds of their own-farm milk,
12 so that they would have some milk that was pooled and
13 some that was not.

14 And I guess, you know, while we didn't
15 think of this eventuality, while discussing -- the
16 board, I do know our board well enough and their
17 interest in equitable handling, that the most equitable
18 way to handle that would be to take a handler's overall
19 utilization. Let's say it's 80 percent Class I and
20 20 percent the other classes. Both the exempt milk and
21 the pooled milk should be treated as 80/20.

22 I wasn't here for testimony yesterday,
23 but I understand that there was some testimony to the
24 effect that the current system that provides for both
25 pooled and non-pooled milk, the down allocation of class

1 could all go towards the pooled milk and the high or
2 Class I could all be applied towards the exempt milk.
3 And I know our board well enough that they would not
4 support that type of allocation of exempt and pooled
5 milk among classes.

6 So with that, I would now be ready for
7 questions.

8 JUDGE CLIFTON: Mr. Metzger, this is an
9 extremely thoughtful statement and I thank you
10 for contributing it. Is there any objection to
11 the admission into evidence of Exhibit 86, 8-6?
12 No objection, Exhibit 86 is hereby admitted into
13 evidence.

14 JUDGE CLIFTON: Who would like to begin
15 cross-examination of Mr. Metzger? Mr. Yale.

16 CROSS-EXAMINATION

17 BY MR. YALE:

18 Q. Benjamin F. Yale, Continental Dairy
19 Products and Select Milk. Good afternoon, Erick.

20 A. Good afternoon, Ben.

21 Q. I would echo the Judge's comments, for
22 the very well thought out and very helpful decision.

23 JUDGE CLIFTON: Not the decision yet,
24 just the statement.

25 MR. YALE: Their decision, the board's

1 decision.

2 JUDGE CLIFTON: Thank you.

3 MR. YALE: The board's decision and
4 comments.

5 Q. The issuing of the grandfathering is the
6 fact -- I think what you're saying is that, first of
7 all, there are in process today operations, farm
8 operations, that are moving towards and are at various
9 stages of processing milk as part of their operations
10 that were not in 2008, is that right?

11 A. That -- that is correct, yes.

12 Q. And that's one of the reasons that you
13 find the grandfathering objectionable, because it would
14 provide those who were in operation the benefit, but new
15 ones would not have an operation, right?

16 A. That's correct.

17 Q. Was there any discussion about those who
18 have not yet started those steps of becoming processors
19 having or not having that opportunity?

20 A. Yes. There was discussion along those
21 lines. And the board did not want to support exemptions
22 that would preclude others who wanted to -- might want
23 to start their operation in 2010, or you know, 2011, et
24 cetera.

25 Q. You mentioned there towards the end this

1 issue of down allocation and allocation. As I
2 understand it, your proposal and modifications of
3 whatever is already in the record, would be that if
4 there was a -- first of all, you understand what we mean
5 by the term soft cap?

6 A. Yes.

7 Q. And you are in a sense supporting a soft
8 cap?

9 A. A very -- yes.

10 Q. Right. And so there's -- the exempt milk
11 would be 3 million pounds or less, whatever the Class I
12 sales would be, the lesser of those two, right? That
13 would be the cap?

14 A. Yes.

15 Q. So if the Class I sales exceeded the cap,
16 then it is your recommendation that that exempt milk be
17 down allocated first, is that right?

18 A. I believe -- I'm -- on number one, our
19 board did not specifically discuss the situation. There
20 would be -- I understand it, there would be three ways
21 to handle it.

22 Number one would be to down allocate the
23 exempt milk first. Number two would be to down allocate
24 the pool milk first. A third option would be to take
25 that handler's overall utilization. And the example I

1 used was, let's say it's 80 percent Class I and
2 20 percent Class II, and allocate both the pool milk and
3 the exempt milk along that same -- that same ratio.

4 Again, I'm getting rather dangerous here
5 trying to, you know, interpret or read the mind of the
6 board of several individuals. I believe their -- their
7 first option would be to allocate it, both the pool milk
8 and the exempt milk, in the same manner.

9 If that were not acceptable, I'm
10 reasonably sure that they would then down allocate the
11 exempt milk first. And their least favorable option
12 would be to down allocate the pooled milk first.

13 Q. I know you didn't talk to the board, but
14 did you do any research on this issue to see how milk is
15 allocated when a handler purchases milk from a
16 producer-handler today?

17 A. No, I did not do any research.

18 Q. Okay. You're not aware that that
19 requires any purchases from a producer-handler be down
20 allocated with the plant that purchases?

21 A. No, I'm not aware of.

22 Q. Now, all of these people who you talk
23 about are Jersey -- have Jersey milk, right?

24 A. Most of them. There is one handler in
25 there that's got a combination of Jersey milk and

1 Holstein milk.

2 Q. Now, one of the advantages of Jersey milk
3 is that it does have a distinct flavor and color profile
4 that distinguishes it from the more common milk that's
5 sold today, is that correct?

6 A. Yes. And thank you for noticing.

7 Q. Is there a sense that if consumers are
8 offered this distinct kind of milk, that it would
9 actually increase sales of bottled milk under these
10 producer-handler situations?

11 A. That is one of the reasons that these --
12 these folks have -- have opted to go the route that they
13 have. You know, we can give anecdotal evidence, but I'm
14 sure other producer-handlers have the same experience
15 that, you know, once people start buying their milk,
16 they buy more of it.

17 We do have a branded program, the
18 all-Jersey program, and some of these producer-handlers
19 participate in that branded program as well. But yeah,
20 it's -- part of the reasoning is that it's a higher
21 quality product, and a higher quality product could lead
22 to increased sales.

23 Q. Were you here today during the testimony
24 of Charles Flanagan?

25 A. Yes.

1 Q. And did you hear his testimony that they
2 were unable to get much above 2 million pounds per month
3 because of the -- to actually -- to arrive at a 3
4 million pound limit?

5 A. Yes.

6 Q. And part of that reason was, is that once
7 you're over your -- by a pound, you're fully regulated,
8 and the next customer might put them over. Is that what
9 you understood?

10 A. Yes, that's what we understood. And when
11 the board was discussing this issue -- we actually have
12 a couple of producer-handlers on our board of directors,
13 and one of them said, you know, that was -- the 2 pounds
14 that it would take you from 2,999,999 to 3,000,001 are
15 two very expensive pounds.

16 MR. YALE: Again, thank you very much,
17 Erick. And your Honor, I have no other
18 questions.

19 JUDGE CLIFTON: Thank you, Mr. Yale.
20 Mr. Beshore.

21 CROSS-EXAMINATION

22 BY MR. BESHORE:

23 Q. Good evening, Erick.

24 A. Good evening, Marvin.

25 Q. Can you first give us some profile

1 information about your membership, if you have it? Of
2 the 1,100 farms, what portion of them are in the Federal
3 system in the Federal Orders? Or 1,100 members.

4 A. 1,100 members. The ones that wouldn't be
5 would be our California members, which would in the
6 neighborhood of 150. And then we have others in Idaho
7 and Utah, would comprise another, I'll go on the high
8 side here, of 40 to 50.

9 Then I'm not -- I mean, I realize there
10 are some unregulated portions of Pennsylvania and a
11 donut hole in Missouri that might encompass another very
12 few members, but I'm not going to try to get on those
13 countyline.

14 Q. If we take out for a minute the
15 California members and the Idaho members, can you give
16 us any average size for your -- the 900 or so producer
17 members who are in the Federal system, average size,
18 range of sizes?

19 A. Average size would be 175, maybe 200,
20 somewhere in that neighborhood.

21 Q. How many Federal Order Jersey herds or
22 members of National All Jersey have more than a thousand
23 cows?

24 A. I would say 10 to 12.

25 Q. Okay. Now, how many -- how large of a

1 Jersey herd do you need to have 3 million pounds a
2 month?

3 A. Well, I mean, back-of-the-envelope math
4 would say 2,000 cows at 50 pounds a day times a 30-day
5 month would be 3 million.

6 Q. With respect to -- let's kind of go back
7 to the front of some of your comments. On individual
8 handler pools, this -- am I correct that this is a very
9 important issue for Jersey producers because the
10 overwhelming majority of them deliver milk to
11 manufacturing plants?

12 A. It is a very important issue to Jersey
13 producers, yes. We do have a -- a very sizable portion
14 of the milk that goes to manufacturing plants.

15 Q. And the reason that much of that milk is
16 marketed to manufacturing plants is because it's -- it's
17 high in solids, and in particular high in protein, which
18 generates high -- high yields of manufactured products,
19 cheese in particular?

20 A. That is correct.

21 Q. And, in fact, National -- one of National
22 All Jersey's major activities has been piloting
23 contracts and negotiating and making arrangements for
24 your members' sales to manufacturing plants in
25 particular?

1 A. That is correct.

2 Q. So if there were -- if you would lose
3 marketwide pools, your membership would lose a
4 tremendous amount of income?

5 A. That potential certainly exists. You
6 know, as you gaze into your crystal ball, you can
7 concede that eventuality.

8 Q. Now, the producer-handler examples -- the
9 examples, not all producer-handlers, of situations that
10 you've described in pages 2 and 3 of your statement,
11 Number 86, if the National Milk Proposals 1, 2 and 26,
12 which are packaged and were adopted as presented, all of
13 those operations would be exempt from pooling either as
14 exempt plants or handlers, isn't that -- isn't that
15 correct?

16 A. The operations as they exist today would
17 be. They could -- those -- those proposals, if adopted,
18 could provide some constraints for where these folks
19 might want to go in the future.

20 Q. Okay. But as you've described them -- as
21 they are today and as you've described them, depicted
22 them on pages 2 and 3 of Exhibit 86, they would all
23 be -- be exempt -- in fact, they would have -- with the
24 increase in the exempt plant volume, they would have
25 greater flexibility than they do today?

1 A. Some of them would, yes.

2 Q. Well, any of them that are under 150,000
3 would have -- by the way, are any of these operations
4 more than -- more than 450,000 today, any of these
5 examples?

6 A. I don't believe so today that any are
7 over 450. I believe the -- the Bush River plant may --
8 may get there before too terribly long.

9 Q. Okay. Well, 400 cows at 50 a day is
10 what? What is that? How much -- how much is that a
11 month?

12 A. Do you have a calculator?

13 Q. You're pretty good at your mental math
14 there. 50 pounds a day is a good proxy.

15 A. That would be 20,000 -- yeah, 20,000
16 pounds a day, times 30 days, would be 600,000 in a
17 month.

18 Q. Okay.

19 A. Yeah.

20 Q. Okay. So any that are -- that were --
21 that had Class I sales less than 450,000 would have
22 additional flexibility under Proposals 1, 2 and 6
23 because they would be able to freely -- as exempt
24 plants, they can be able to freely purchase milk from
25 other herds without affecting the exempt status, and

1 they can't do that today if they're producer-handlers in
2 any Order, really, can't freely purchase, correct?

3 A. That's correct.

4 Q. So your -- National All Jersey's support
5 for the 3 million soft cap is really premised on the
6 thoughts of some members that -- that they would like to
7 get -- get up to the 2,000 cow or so production level
8 and be exempt from any pool, any obligation for their
9 Class I to a marketwide pool?

10 A. I would say, in remembering the
11 discussion of the board, the 3 million cap came -- or
12 figure came about because, in addition to a couple of
13 producer-handlers on our board, we have a board member
14 from Arizona who serves on the board of United Dairymen
15 of Arizona. We have a board member from Oregon who
16 serves on the board for Tillamook, T-i-l-l-a-m-o-o-k,
17 Cooperative Creamery Association. And they've been
18 involved in those areas and on those boards long enough
19 that they remember the producer-handler hearings of,
20 what, three or four years ago, five years ago.

21 And so in the discussion of all this,
22 part of the discussion was those two gentlemen relating
23 how the producer-handler hearing in their Orders, why it
24 came about, why it was needed, why it went through, what
25 the impact has been since then. And the fact that

1 you've got 3 million, a cap as it were, you know,
2 already in place in two orders, and shall we say, court
3 tested, that the rest of the board relying on their
4 experience said, well, perhaps 3 million makes -- makes
5 sense for elsewhere.

6 There was also concern voiced during this
7 discussion that here we had a 3 million cap put in less
8 than five years ago, and now we're back -- we're back as
9 an industry thing, no, that's too high, we need to go
10 down to 450.

11 And that raised some concern among the
12 board members as well. Some of them, even from the
13 standpoint of, well, what should our position on the cap
14 be at all, because once it's in place, then it can be,
15 you know, lowered rather easily. So that was kind of a
16 good comfortable settling point, shall we say, on the
17 board and how they came up with the 3 million number.

18 Q. Okay. The 3 million that you propose is
19 different than the 3 million in Arizona and the Pacific
20 Northwest?

21 A. That is correct.

22 Q. Okay. Let me just explore that. Did you
23 have any discussions at the board level about how that
24 affects the uniform price among handlers in an Order,
25 how the soft cap would?

1 A. It was -- yes. It was not viewed as
2 being, shall we say, disruptive. I assume you mean by
3 that question you were implying handlers that don't have
4 own-farm milk?

5 Q. Handlers that don't have own-farm milk,
6 and handlers that do, isn't it correct -- here's my
7 question. Isn't it correct that if you allocate -- if
8 you take the pool payment that a -- I guess you're going
9 to call them partially regulated handler -- if you take
10 the pool payment that those handlers with own-farm milk
11 make and allocate it over their Class I sales, that
12 the -- take the -- I'm using pool payment as a proxy for
13 Class I value, that they're required to account to the
14 pool for, okay?

15 If you allocate their Class I obligation
16 to the pool over their Class I sales, it's going to be a
17 different number basically for every handler, because
18 it's a function of their exempt volume and their
19 nonexempt volume? Do you understand the math?

20 A. Yeah. For example, if you've got a
21 producer-handler with 4 million and another
22 producer-handler with 8 million --

23 Q. Yes.

24 A. Yes, I understand, and I would agree with
25 you.

1 Q. Okay. It's a different Class I number in
2 essence for every one of those handlers?

3 A. As they relate it back to their overall
4 Class I sales, yes.

5 Q. Now, I think your supplemental point 2,
6 if I got it right, or maybe it's part of supplemental
7 point 1, that you realize under your proposal, you would
8 be exempting new milk from marketwide -- exempting new
9 Class I sales from marketwide pool obligations, correct?

10 A. That's not exactly what I meant to say.

11 Q. Well, let me finish. You were going to
12 exempt new sales but you were going to bring in -- you
13 were going to exempt existing -- some existing Class I
14 volumes, but you felt you were going to bring into the
15 system more currently exempt volumes than you were
16 exempting, so you would have a net gain. You felt like
17 you would still have a net gain to the system?

18 A. That would be our belief, yes.

19 Q. Okay. How did you estimate the exempt
20 volumes that would be lost from the system when you are
21 granting to handlers, who don't have any exempt volumes
22 now but have own-farm milk, exempt sales, or handlers
23 who don't have any own-farm milk now, but who would
24 bring on own-farm milk because it's exempt from pooling?
25 How did you figure out what those volumes might be to

1 assume that you might have a net gain?

2 A. Okay. We were -- the assumption was that
3 producer-handlers currently in the Arizona Order and the
4 Pacific Northwest Order that are over 3 million pounds,
5 that, you know, currently carry a pool obligation for
6 all their milk, it is those, under what other -- what we
7 are advocating for, those producer-handlers with over 3
8 million pounds of milk would each gain 3 million pounds
9 of exemption.

10 By the same token, and we weren't -- we
11 didn't have an exact count of how many handlers those
12 were. We would estimate between the two Orders there
13 might have been four or five, okay?

14 And then from, I believe it was
15 Dr. Cryan's testimony, there was -- there was a
16 footnote -- no, I'm sorry, not a footnote, but actually
17 said -- there was a statement that at least three
18 producer-handlers in the remaining Federal Order System,
19 who are as of now completely exempt, have monthly sales
20 of 15 million pounds or more. So if we take that
21 15 million pounds and exempt 3 of it, that leaves 12,
22 which 12 million pounds across 3 would be 36 on a
23 monthly basis that would be in the pool that's not
24 currently in the pool. And if you've got, say, four
25 producer-handlers in Arizona, in the Pacific Northwest

1 Order that would each gain 3 million, that would be 12
2 that you're -- that you're exempting, and the 36 that
3 you would be gaining is greater than the 12 that you
4 would be exempting.

5 Q. Okay. So you made no assumption for the
6 loss of own-farm milk presently delivered to fully
7 regulated handlers anywhere else that could be exempt
8 under the own-farm milk exemption?

9 A. I'm not sure I understand the
10 description.

11 Q. Would not in your Proposal 17 or 23
12 provide an exemption for own-farm milk of plants?

13 A. That is correct.

14 Q. Okay.

15 A. I was not aware of any, shall we say,
16 volumes of that.

17 Q. Okay. Thank you.

18 MR. BESHORE: Thank you very much.

19 JUDGE CLIFTON: Thank you, Mr. Beshore.

20 Who will next cross-examine Mr. Metzger?

21 Mr. Vetne. Thank you.

22 CROSS-EXAMINATION

23 BY MR. VETNE:

24 Q. Mr. Metzger, good evening.

25 A. Good evening, John.

1 Q. You've been involved in -- in dairy
2 associations for about 26 years, as I read your
3 testimony, is that correct?

4 A. That is correct.

5 Q. Would it be fair to characterize each of
6 these producer-handlers or exempt plant or prospective
7 exempt producer-handler entities that you've described
8 as small businesses?

9 A. I believe so. The one that might be on
10 the borderline in my description would be the Bush River
11 Farm.

12 Q. But Bush River does not, as a plant
13 operator, have or expect to have 500 employees?

14 A. That is correct.

15 Q. Okay. In fact, by reference to number of
16 employees, it's a very tiny business subset of the small
17 business definition, correct?

18 A. If the threshold is 500, that would be
19 correct.

20 Q. And with respect to having -- you were
21 here portions of last week and have been here portions
22 of this week, correct?

23 A. I was here Monday afternoon and Tuesday
24 of last week, and I have been here today.

25 Q. And do you recall hearing some testimony

1 at this hearing involving economies of scale of plants
2 by size?

3 A. I don't believe so.

4 Q. Okay. Are you familiar with the concept
5 of economies of scale for plant processing costs?

6 A. Yes.

7 Q. Okay. And you're aware that very small
8 plants of the kind that you have described, either
9 existing or prospective, have substantially higher costs
10 to put milk in a gallon than a large plant of 20 or
11 30 million pounds?

12 A. I would agree with that, yes.

13 Q. Would it not be the case that by
14 exempting a portion of milk for an entity with own-farm
15 production, that as the entity grows, it would pay a
16 larger and larger amount to the producer settlement fund
17 as a percentage of its total?

18 A. That's correct, yes.

19 Q. So as the plant -- as the plant with high
20 cost grows, it -- at the same time it achieves lower
21 costs by virtue of its growth, it's paying more into the
22 pool?

23 A. Yes, that would be correct.

24 Q. As a percentage. So in effect this
25 proposal would tend to mitigate the small plant

1 disadvantage by a one-size-fits-all pool payment, by
2 graduating that pool payment as the plant grows?

3 A. Yes, sir.

4 Q. Now, did you -- I think you referred to
5 allocation of own-farm milk and purchased milk or own --
6 own-farm milk, exempt milk, and own-farm milk above the
7 exemption. And you referred to treating it as a
8 partially regulated plant, which would be a plant blend?

9 A. Yes.

10 Q. So the exempt milk would be subject to a
11 plant blend and the nonexempt would be subject to a
12 plant blend?

13 A. Yes.

14 Q. So there would be non -- there would be
15 no nonuniformity in class prices between such a plant
16 and handlers without exemption, they would all be
17 subject to the same class prices as plants?

18 A. Based on, you know, that plant
19 utilization, yes.

20 Q. The same Class I price applies to a
21 partially regulated plant and a fully regulated plant?

22 A. Yes, sir.

23 Q. The difference would be not in the class
24 price, which I think you discussed with Mr. Beshore, but
25 in the variability of the pool obligation, correct?

1 A. Help me just a little bit.

2 Q. Okay. The pool obligation for a plant
3 with some exempt milk would be different from another
4 plant with identical uses that doesn't have exempt milk?

5 A. That's correct.

6 Q. The same class prices would apply, but
7 the net pool obligation would not apply?

8 A. That is correct.

9 Q. Because for some of the class prices,
10 that plant would be paying its own farm, correct?

11 A. That's right.

12 Q. And variable pool obligations is a fact
13 of life now for every plant in the system, depending
14 upon their total uses?

15 A. Yes, sir.

16 Q. Now, your proposal or your preference
17 here for an exempt volume, that exempt volume is fixed
18 as a ceiling that can't be exceeded, no more than
19 3 million pounds can be exempt, correct?

20 A. That is correct.

21 Q. Okay. So that's a hard number?

22 A. Yes.

23 Q. Okay. And when somebody uses the term
24 soft cap, what they're -- what they're talking about --
25 let me see if you agree with that -- what you understand

1 them to be talking about is not a soft cap on exempt
2 volume, but really a soft cap on the size that a plant
3 can grow to, even if it contributes to the pool?

4 A. That is correct. The soft cap, as I
5 understood it, was not on exempt volume but on plant
6 volume, and there really is no cap on what the plant can
7 grow to.

8 Q. Okay. When a plant that has some exempt
9 milk, say 3 million pounds, grows to 4 million pounds,
10 wherever it comes from, that plant would be paying into
11 the pool fully the same amount that anybody else pays to
12 the pool on the fully regulated nonexempt 1 million
13 pounds, correct?

14 A. That's correct.

15 Q. And if that -- if that is new business
16 because of a unique product put out, the pool would
17 benefit from that additional Class I sales volume?

18 A. Yes, it would.

19 Q. And if it's not new business, just
20 happens to be milk taken from, you know, a larger plant,
21 the pool would not be harmed because the same -- the
22 same volume of Class I milk would be in the pool?

23 A. That is correct.

24 Q. Okay. And let's see. Oh yes. And then
25 finally, I just have a question on your association's

1 position on individual handler pools. You conclude that
2 individual handler pools could result in half the milk
3 being unregulated?

4 A. Yes.

5 Q. You assume in that conclusion that milk
6 going to a manufacturer is not going to a regulated
7 handler, am I correct?

8 A. It would be my assumption that a
9 manufacture -- currently -- let me explain where that
10 comes from.

11 Q. Okay.

12 A. Currently manufacturing plants have the
13 option to associate with a pool or not. And that one of
14 the primary drivers currently for doing that is to
15 share -- currently is to share in the marketwide pooling
16 of receipts. And if that were no longer available, then
17 the manufacturing plant would have potentially little
18 incentive to do that.

19 Q. Okay. During your 26 years of
20 involvement in trade associations, all but the last nine
21 years there have been individual handler pools in the
22 Federal Order market system, correct?

23 A. I don't know. I might have to -- you
24 know, you typically don't lead me astray, John.

25 Q. Okay.

1 A. But my marketing background only goes
2 back maybe about five years.

3 Q. Oh, okay. You are drawing -- you are
4 making some assumptions in your conclusion that half of
5 the milk would be unregulated based on current
6 marketplace and current regulatory behavior, correct?

7 A. That is correct.

8 Q. You're not aware of any reason why, in an
9 individual handler pool regulatory system, manufacturers
10 cannot be designated the handlers to which classified
11 prices apply, so that everybody is regulated if they
12 produce Class I milk and send it to the buyer?

13 A. I'm sorry, would that be Class I milk?

14 Q. Everybody who produces -- I'm sorry, not
15 Class I, Grade A milk.

16 A. Grade A milk.

17 Q. And send it to any buyer. There's no
18 reason why every buyer cannot be a handler that has to
19 pay class prices?

20 A. The regulations could be changed to do
21 that. I believe that somewhat mimics the situation in
22 California now.

23 Q. Exactly.

24 A. And I'm also aware in California that
25 there are cheese plants who are encouraging producers to

1 opt for Grade B status so that the cheese plant does not
2 have to pay them regulated pricing.

3 Currently, in the California system the
4 cheese plants subsidized the butter powder plants
5 because the volume of butter powder plants or milk going
6 into butter powder production out there, they can
7 actually pay their producers -- the cheese plants can
8 pay their producers better outside the pool than inside
9 the pool. And are encouraging producers to go Grade B
10 status, so there would be another way around that.

11 Q. Cheese plants, can -- would it be more
12 correct to say they can in some months?

13 A. I'm sorry?

14 Q. Would it be more correct to say that
15 California cheese plants can out pay in some months?

16 A. Yes.

17 Q. Is it not true that the volume of -- that
18 nevertheless, notwithstanding -- strike that.

19 Notwithstanding the encouragement by
20 California cheese makers for producers to move from
21 Grade A to Grade B, that a very, very, very small
22 portion of the milk produced in California is Grade B?

23 A. That would be correct.

24 MR. VETNE: Thank you.

25 JUDGE CLIFTON: Who next will

1 cross-examine Mr. Metzger? Mr. Carroll.

2 Let's go off record for just a moment.

3 (Off the record.)

4 JUDGE CLIFTON: We're back on record at
5 6:44. Mr. Carroll.

6 CROSS-EXAMINATION

7 BY MR. CARROLL:

8 Q. I'm going to say, good evening.

9 A. Good evening, Mr. Carroll.

10 Q. Good evening, Mr. Metzger. I want to
11 compliment you, as the others have, on a thoughtful,
12 definitive, well-written statement. And I'm
13 particularly pleased that your board thoughtfully
14 considered what was said. I just have a few questions
15 for clarification purposes. Your organization is known
16 as All Jersey?

17 A. National All Jersey.

18 Q. National All Jersey. For the record,
19 does that mean they are people that breed and own Jersey
20 cows?

21 A. For the most part, that is correct;
22 However, 30 percent of our membership does own cows of
23 other breeds, either instead of or in addition to their
24 Jerseys.

25 Q. But directing your attention to the

1 Jersey label, is that advertised? Do you have a program
2 for that?

3 A. The All Jersey label, which is our
4 trademark product or our branded product, is something
5 we were trying to, say, reinvigorate.

6 Q. And is it in the advertising? Do you
7 attempt to show that there's something of quality in the
8 Jersey -- in the All Jersey or the Jersey name?

9 A. Well, not just in the name, but also in
10 the product. And as was alluded to, the Jersey milk,
11 particularly for fluid consumption, the skim portion of
12 the milk has higher protein, which gives it a different
13 flavor, a different mouth feel. It also tends to be
14 higher in calcium, which can provide nutritional
15 benefits that consumers are interested in.

16 Q. Are there consumers that value those
17 qualities?

18 A. Yes, there are.

19 Q. And do you attempt to develop a market
20 for that purpose?

21 A. We are working with these folks to try to
22 do that, yes.

23 Q. There are numbers of your members that
24 you surveyed apparently, but basically it appears to me
25 that they are all serving fairly rural areas. I don't

1 know if that's true or not. But I'm interested
2 particularly in Lee, Massachusetts. That's not a major
3 area.

4 A. That is the very westernmost part of
5 Massachusetts. You can almost throw a stone and hit New
6 York.

7 Q. It's in the Berkshire --

8 A. Yes, it is.

9 Q. -- Mountains? And Hadley, Massachusetts,
10 I take it that's not a major urban center?

11 A. Actually, yes. Hadley, Massachusetts, is
12 on the outskirts of Springfield, and one of their -- one
13 of the major customers of that is folks associated with
14 the University of Massachusetts, who either come to
15 their farm store or take home delivery from Mapleline
16 Dairy.

17 Q. Okay. You say they do farm delivery?

18 A. They do home delivery --

19 Q. Home delivery.

20 A. -- in addition to an on-farm store, in
21 addition to the servicing stores.

22 Q. All right. I take it that from the
23 consumer viewpoint, are you in favor of having a free
24 entry and open competition in the sale of fluid milk?

25 A. Well, yes, as long as it meets, you know,

1 health regulations, et cetera.

2 Q. And now directing your attention to page
3 2 of your statement, and the portion that's marked
4 Mapleline Farm, Hadley, Massachusetts. At the last
5 sentence of that last -- in that paragraph, the last
6 sentence of that paragraph says, the existing 150,000
7 pound limit on exempt plants serves as an impediment to
8 them being able to grow their business. Could you tell
9 us more about that?

10 A. Right now, for them to go much beyond the
11 150,000 pound limit, which would then require producer
12 settlement fund payments on all the milk, would be
13 prohibitive to them from a cost standpoint.

14 Q. And is it your request to the Secretary
15 that he recognize that as an adverse impact and alter
16 the regulations so that they are not subject to that
17 impact?

18 A. Yes.

19 Q. Then directing your attention to page 3
20 of your statement, at the first full paragraph under
21 Garry's Meadow Fresh Jersey milk, you have here that,
22 they'll begin their bottling operation this month.

23 Do you recognize that the proposal that
24 is -- has been made would adversely affect Garry's
25 Meadow's ability to either be grandfathered or to be --

1 have a producer-handler exemption if their proposal --
2 if the Proposal Number 1 was enacted?

3 A. Proposal Number 1 by itself, yes, would
4 have an adverse effect.

5 Q. And I think they have a 60-cow herd, is
6 that correct?

7 A. That's correct.

8 Q. And is it your request to the Secretary
9 that he recognize that inequity and remedy it in this
10 proceeding?

11 A. Yes.

12 Q. I think you were asked these questions
13 and if I have, I will withdraw it. But I have not yet
14 clearly understood that you have taken into account what
15 effect, if any, on the pool there would be if your
16 proposal was adopted; in other words, what effect it
17 would have in the blend prices?

18 A. We've not done any, shall we say, very
19 refined statistical analysis of that. And in my
20 conversation with Mr. Beshore, was a general impression
21 that -- our thought process that it would be adding more
22 milk to the pool than it would be subtracting, and
23 therefore it would be adding to total pool value.

24 Q. And I'm not sure you are aware of it, but
25 there were some statistics, at least for Order Number 1

1 where Mapleline Farm is located, also High Lawn Farm,
2 both are Massachusetts producers, they're within that
3 Order, that there's approximately, if you totaled
4 producer-handlers and exempt milk, it would be about
5 1 percent of the Class I sales. And directing your
6 attention to that, do you have an opinion as to whether
7 that would have any serious effect on the return of
8 producers if there was a small increase in that figure?

9 A. A small increase of the 1 percent?

10 Q. Yes. If it had any increase, really.

11 A. Any increase?

12 Q. Yeah.

13 A. Well, I guess you would have to define
14 any. But currently the 1 percent producer-handler and
15 exempt milk is not having adverse affect on -- it would
16 be our belief it would not be having an adverse effect
17 on producers in general. If that were increased to
18 1.5 percent, it probably would still not have an adverse
19 effect on producers in general.

20 Q. As a result of your survey, or otherwise,
21 do you have any opinion as to whether or not there's
22 evidence of disruptive competitive practices by
23 producer-handlers or exempt milk persons?

24 A. As part of this proceedings, I've
25 probably missed enough of it that I couldn't --

1 shouldn't really comment on that.

2 I will say during our board's
3 deliberation of these proposals, again going back to our
4 board member from Arizona who serves on the NDA board,
5 the discussions at the time of that producer-handler
6 hearing, you know, four or five years ago, I believe
7 that board member relayed to us that a large
8 producer-handler in that area was actually -- was
9 calculated to have reduced the blend price in that Order
10 by perhaps 10 or 12 cents a hundredweight. And that, we
11 believe, would be -- would be significant.

12 Now, there are some large
13 producer-handlers in other Orders, whether the magnitude
14 of their exemption is causing that magnitude of impact
15 on the blend price, I don't know.

16 But again, harkening back to the previous
17 producer-handler hearing for the Arizona and the Pacific
18 Northwest Orders, at that time there was an adverse
19 effect on very large producer-handlers.

20 Q. Have you had any reports about the
21 dairies you've mentioned here being engaged in
22 disruptive competitive practices? That would be
23 Mapleline, High Lawn, Bush River, Garry's Meadow or Fish
24 Trap.

25 A. No, we have not.

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

2 JUDGE CLIFTON: Thank you, Mr. Carroll.

3 Is there any other cross-examination of
4 Mr. Metzger? Mr. Tosi.

5 MR. TOSI: The government has no
6 additional questions, but we would like to thank
7 Mr. Metzger for coming. We think his statement
8 was extremely well written, extremely thoughtful
9 and we very much appreciate National All
10 Jersey's participation.

11 THE WITNESS: Thank you.

12 JUDGE CLIFTON: Thank you, Mr. Tosi.
13 Mr. Metzger, is there anything else you would
14 like to add?

15 THE WITNESS: No, your Honor.

16 JUDGE CLIFTON: Mr. Metzger, again thank
17 you very much. I'll see you all at 8:00 in the
18 morning. Mr. Beshore.

19 MR. BESHORE: May we -- before we
20 adjourn, I would really like to have an order of
21 witnesses for tomorrow. And I would like to
22 know what witness statements will be present in
23 the room tomorrow morning for all witnesses who
24 may appear tomorrow as required by the rules of
25 practice.

1 We've kind of sloughed on that. This
2 isn't aspersions meant on anyone, particularly
3 Mr. Metzger, but we haven't had rigid compliance
4 with that requirement and it's helpful.

5 JUDGE CLIFTON: Yes, it's very helpful.
6 I agree. Mr. Miltner.

7 MR. MILTNER: Your Honor, I think that,
8 first of all, as to the rule on witness
9 statements, it's required of proponents and
10 we've provided those statements from our AIDA
11 member -- member that's testified thus far in
12 the morning. But I agree those statements are
13 helpful.

14 JUDGE CLIFTON: Now, your economists
15 particularly, when will your economists'
16 statements be available?

17 MR. MILTNER: They will be available in
18 the morning.

19 JUDGE CLIFTON: Okay. And will your
20 economists kick off our testimony, or should
21 this person from Braum Dairy?

22 MR. MILTNER: Mr. Bostwick from Braum's
23 Dairy, will probably be best to start him first.
24 I believe he will have a statement, which will
25 be available in the room before the day starts,

1 as will the economists' statements.

2 JUDGE CLIFTON: All right.

3 MR. MILTNER: And my presumption is that
4 that will take the day.

5 JUDGE CLIFTON: Could well. So we start,
6 number one, Tony Bostwick, number 2,
7 Dr. Knutson.

8 MR. MILTNER: It's pronounced Knutson.

9 JUDGE CLIFTON: Knutson. And number 3,
10 Dr. Knoblauch.

11 MR. MILTNER: It's also pronounced
12 Knoblauch.

13 JUDGE CLIFTON: Oh.

14 MR. MILTNER: Pronounce the Ks for both
15 of them.

16 JUDGE CLIFTON: All right. Thank you.
17 And if we should have more daylight, even after
18 they're finished, we will go with Dr. Yonkers or
19 Mr. Carman or someone like that.

20 MR. BESHORE: Well, I'm wondering if the
21 statements -- in the event that we reach them,
22 the statements would be available for the other
23 AIDA witnesses that are planning to come. I
24 think they should made available tomorrow, we
25 would like to see them. I would ask that.

1 JUDGE CLIFTON: Well, as I recall, Sally
2 Keefe from Aurora, when do we think she might be
3 available?

4 MR. MILTNER: Your Honor, at this point I
5 don't know the answer to that.

6 JUDGE CLIFTON: Okay.

7 MR. BESHORE: She's here. She's been
8 here.

9 MR. MILTNER: And I may be able to have
10 a statement from Mr. Taylor tomorrow again. We
11 will provide those statements before they
12 testify in the morning they testify, as required
13 by rule.

14 JUDGE CLIFTON: Earlier is better, of
15 course, so if you can, Mr. Miltner. You're
16 welcome.

17 DR. YONKERS: Your Honor, while earlier
18 this week after reading my testimony --

19 JUDGE CLIFTON: Don't bail on me,
20 Dr. Yonkers.

21 DR. YONKERS: -- I mentioned I was
22 leaving. I've got a plane a little after
23 2:00 on Friday afternoon. My plan at this time
24 is not to come back next week. So I've been
25 here all last week and this week and still hope

1 to get on. I know you've got a full day, it
2 sounds like, tomorrow. And if I'm put on Friday
3 morning and go too long -- I just wanted to
4 point that out. Thank you.

5 JUDGE CLIFTON: Friday may be your lucky
6 day.

7 DR. YONKERS: Maybe.

8 JUDGE CLIFTON: I would hope we would
9 have -- I find your statement quite meaty,
10 m-e-a-t-y, and I would hope we would have
11 adequate cross-examination time.

12 So, Mr. Miltner, I don't know whether you
13 would consider interrupting your own economic
14 expert in order to be sure we cross-examine
15 Dr. Yonkers. But just think about it, you don't
16 have to answer now.

17 MR. MILTNER: Thank you.

18 MR. BESHORE: Can they go as a panel?

19 MR. MILTNER: I think that will save time
20 for everybody involved, but we would like them
21 to go as a panel.

22 JUDGE CLIFTON: Thank you, Mr. Miltner.
23 Thank you, Mr. Beshore.

24 All right, well, I'm sorry that you don't
25 get to spend the evening going over those

1 statements, I do know that would help tomorrow's
2 questioning. But we'll give you a break if you
3 need to consider those statements. Thank you
4 all. We go off record at 6:59.

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8 PROCEEDINGS ADJOURNED AT 6:59 p.m.

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C E R T I F I C A T E

I, Linda S. Mullen, RPR, RMR, CRR, the undersigned, a court reporter for the State of Ohio, do hereby certify that at the time and place stated herein, I recorded in stenotypy and thereafter had transcribed into typewriting under my supervision the foregoing pages, and that the foregoing is a true, complete and accurate report of my said stenotype notes.

Linda S. Mullen, RPR, RMR, CRR