

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

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

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Linda S. Mullen, RPR, RMR, CRR