UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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

- - -
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
APPEARANCES:

On behalf of the United States Department of Agriculture:

Garrett Stevens, Esq.
Brian T. Hill, Esq.
of
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343 South Building
Washington, DC  20250
Phone: (202) 720-5707

On behalf of Continental Diary Products and Select Milk:

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

On behalf of AIDA:

Alfred William Ricciardi, Esq.
of
Aiken, Schenk, Hawkins & Ricciardi
Suite 100
4742 North 24th Street
Phoenix, Arizona  85016
Phone: (602) 248-8203

Ryan K. Miltner, Esq.
of
The Miltner Law Firm, LLC
527 North Westminster Street
P.O. Box 477
Waynesfield, Ohio  45896
Phone: (419) 568-2920
APPEARANCES CONT'D:

On behalf of AIDA:

Nancy S. Bryson, Esq.
of
Holland & Hart
Suite 900
975 F Street NW
Washington, DC  20004
Phone:  (202) 654-6921

On behalf of the Florida Milk Producers Federation and Dairy Farmers of America, Inc.:

Marvin Beshore, Esq.
of
Law Office of Martin Beshore
130 State Street
P.O. Box 946
Harrisburg, Pennsylvania  17108
Phone: (717) 236-0781

On behalf of Aurora Dairy Corporation:

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

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

Charles M. English, Esq.
ofOber KalerSuite 5001401 H Street, NWWashington D.C. 20005-3324Phone: (202) 326-5009

On behalf of Mallorie's Dairy, et al.:
John H. Vetne, Esq.
ofLaw Office of John H. Vetne11 Red Sox LaneRaymond, New Hampshire  03077Phone: (603) 895-4849

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

John Benjamin Carroll, Esq.
andWoody Carroll, Esq.
ofCarroll & Carroll Lawyers, P.C.440 South Warren StreetSyracuse, New York  13202Phone: (315) 474-5356
APPEARANCES CONTINUED

Bill Richmond, USDA, AMS, Dairy Programs
Veronica Douglass, USDA, AMS, Dairy Programs
Michael Johnson, USDA, AMS, Dairy Programs
Clifford Carman, USDA
Gino Tosi, USDA, AMS, Dairy Programs
Jack Rower, USDA, AMS. Dairy Programs
Kate Fisher, USDA, AMS, Dairy Programs
# INDEX

<table>
<thead>
<tr>
<th>Name</th>
<th>Direct Exam. By</th>
<th>Cross Exam. By Mr. English</th>
<th>Cross Exam. By Mr. Beshore</th>
<th>Cross Exam. By Mr. Miltner</th>
<th>Cross Exam. By Mr. Carroll</th>
<th>Cross Exam. By Mr. Yale</th>
<th>Cross Exam. By Mr. Ricciardi</th>
<th>Redirect Exam. By Mr. Vetne</th>
<th>Recross Exam. By Mr. Miltner</th>
<th>Further Redirect Exam. By Mr. Vetne</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gerald Gilbert</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ricker Mallorie &amp; Charles Flanagan</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jim Docheff</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ron Kreider</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
HEIN HETTINGA

Direct Examination By Mr. Ricciardi 2690
Cross-Examination By Mr. Beshore 2704
Cross-Examination By Mr. English 2725
Cross-Examination By Mr. Carroll 2742
Recross-Examination By Mr. English 2747
Redirect Examination By Mr. Ricciardi 2762
Cross-Examination By Mr. Yale 2778
Cross-Examination By Mr. Beshore 2783
Cross-Examination By Mr. Vetne 2793
Cross-Examination By Mr. Carroll 2802

<table>
<thead>
<tr>
<th>EXHIBITS</th>
<th>MARKED</th>
<th>ADMITTED</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exhibit 81</td>
<td>2457</td>
<td>2495</td>
</tr>
<tr>
<td>Exhibit 82</td>
<td>2495</td>
<td>2588</td>
</tr>
<tr>
<td>Exhibit 83</td>
<td>2590</td>
<td>2622</td>
</tr>
<tr>
<td>Exhibit 84</td>
<td>2629</td>
<td>2667</td>
</tr>
<tr>
<td>Exhibit 85</td>
<td>2761</td>
<td>2761</td>
</tr>
<tr>
<td>Exhibit 86</td>
<td>2765</td>
<td>2778</td>
</tr>
</tbody>
</table>

---
PROCEDINGS

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

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

THE WITNESS: How's this?

JUDGE CLIFTON: I think it's good.

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

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

GERALD GILBERT

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

DIRECT EXAMINATION

BY MR. VETNE:

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

A. Correct.

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

A. Basically come from a farming family. My
father, his father, we've been in the agricultural
business all of our lives, moved to Washington from a
small town in Utah about 1958. Had a family, our
family's -- there's seven in our family. Most of us
went to college, got graduates -- college, I graduated
in agricultural economics. We've been kind of in this
business all our lives, so --

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

A. Correct, correct.

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

A. Correct.

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

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

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

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

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

(Exhibit 81 was marked for
identification.)

JUDGE CLIFTON: I've marked his statement
as Exhibit 81, 8-1.

MR. VETNE: Thank you, your Honor.

Q. Proceed, Mr. Gilbert.

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

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

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

In 19 -- in 2003, excuse me, our processing plant caught fire and was burnt and
destroyed. With some insurance money, a loan from the bank, which was no small task, we converted all of our employees to construction workers and rebuilt. We did have a construction company billed the main frame of our building. This enabled us to keep our employees employed. During this time, we found a home for our milk in Montana. If we would have taken our milk to a local dairy, they would have required a long-term contract or would have only paid us a low class price for the milk. We built our new plant with some expansion capabilities. Shortly after we rebuilt, we were limited to the 3 million pound cap on producer-handlers. Needless to say, that debt load became high.

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

We are unique in the state of Washington in that we are the only plant, processing plant in the state, that takes their product straight from the farm to the consumer without being mixed and blended with
milk from other farms.

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

The major plants in our area are Darigold and Safeway. One smaller plant, Edaleen Dairy, probably bottles about 600,000 gallons a month. Darigold, Safeway and Edaleen are our major competitors in
supplying dairy products to independent distributors of the.

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

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

THE WITNESS: Thank you for your correction.

A. Our costs of processing and delivery is approximately $5.11 per hundredweight. With an additional cost of $1.10 for debt service. This doesn't account for additional balancing costs. I do not know the operational costs of other plants. I do not know --

I do know that the large plants in our market all have their own blow-molding equipment and make their own jugs. We ship our jugs in from a little over 200 miles away. The cost difference is approximately six to eight cents per jug. The other factor is volume. Their
massive volumes compared to ours make a huge difference in the cost per unit.

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

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

In our market, the producer-handler issue was debated and settled with a USDA decision three years
ago. It does not need and should not be changed again.

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

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

BY MR. VETNE:

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

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

Q. You used some different words.

A. Okay.

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

A. No, not at all. I have a slight tendency for dyslexia, so my reading is somewhat difficult. If I
missed some words, it was only because of that.

Q. On the last page, you refer to a price to Darigold of $7.95 per hundredweight. Was that for milk or for cream?
A. That was for milk, excess milk.

Q. Excess milk, okay. Is there anything else you want -- observations or comments you wish to add before others ask questions of you?
A. I don't think so.

JUDGE CLIFTON: The witness is available, thank you.

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

JUDGE CLIFTON: Thank you, Mr. Vetne. I have one question before cross-examination begins, Mr. Gilbert.
At the bottom of page 2 when you talk about how Darigold pays you, and it's less than you used to receive --

THE WITNESS: Correct.

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

THE WITNESS: Well, like I said there, they used to pay us Class IV prices. Then in 2008, they went to a component pricing and paid us the one component, so it was on fats and
solids. But I think that particular month, the price dropped. I'm going from memory, but it dropped somewhere around $5 a hundredweight as a result of that price change.

JUDGE CLIFTON: Thank you. Mr. Vetne.

BY MR. VETNE:

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

A. Yes.

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

A. That, I don't know.

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

A. Standard milk.

Q. Okay.

A. Thank you.
Q. So you always received a hundredweight price, to your recollection, regardless of the components?
A. Correct.

MR. VETNE: Thank you.

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

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Good morning, Charles English. Mr. Gilbert, how far does your distribution get from your plant? And I guess let me start by saying, do you have distribution in Idaho?
A. No.

Q. Do you have distribution in Canada?
A. No.

Q. Do you have distribution in Oregon?
A. Ourselves, no. We distribute to distributors in the Seattle area. I do not believe they get into Oregon.

Q. If they got into Oregon, would it be western Oregon?
A. Correct.

Q. It would not be eastern Oregon?
A. You know, there again, I have a distributor in Spokane who distributes most of the eastern Washington. He could get down into eastern Oregon, but I'm not sure of that.

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

A. Very small.

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

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

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

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

Q. How is that spelled, sir?

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

Q. Thank you. The court reporter really thanks you, but I thank you as well. And you found that it was more economical for you to transport the milk from central Washington across, I guess the narrow
portion of Idaho, that's the northwest corner of Idaho, into Montana, than to try to have it processed in Washington, is that correct?

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

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

A. No.

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

A. Correct.

MR. ENGLISH: That's all I have.

JUDGE CLIFTON: Thank you, Mr. English.

Who will next cross-examine Mr. Gilbert?

CROSS-EXAMINATION

BY MR. BESHORE:

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

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

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

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

Q. And when was that?

A. I believe December.

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

A. Correct.

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

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

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

A. Correct.

Q. When did it come back online?

A. December -- I think December of 2004 or January of 2005.
Q. Since that time -- and did you intentionally build it to only use gallon equipment?

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

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

A. In pounds or gallons?

Q. Pounds or gallons.

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

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

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

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

A. Yes.

Q. If a family goes to the supermarket where the -- the stores where your milk is, and they want to buy, like my family does, a gallon of 2 percent and half a gallon of whole milk for the boys and a gallon of -- half gallon of skim for mom, you -- what would you --
well, the gallon could come from you?
   A. Correct.
   Q. But the others would come from a pool supplier, I take it?
   A. Correct.
   Q. Your cash costs of processing and delivery -- by delivery, does that include the -- that, I assume, includes getting the product to your distributors?
   A. Correct.
   Q. Can you tell us the wholesale price gallons to your distributor?
   A. It changes monthly. I don't have that price right now.
   Q. On the third page of your statement, you testified to an estimate of 50 to $60,000 into the pool each month. Did you make those calculations? Did you make that estimate?
   A. I did, and that was based upon the difference of blend price and what Class I price would be during the month, and it varies every month.
   Q. Okay. Do you know what month you did that?
   A. No specific month. It was just based on that -- it seems like it averages somewhere around $2 a
hundredweight.

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

Q. Did you -- what volume of surplus milk or
cream do you have on a monthly basis?
A. There again, it varies. We try to
balance that by production. You know, the amount of
milk -- or the dollar amount we're getting from our milk
now is less than our feed costs. So we try to balance
that down. But it will vary anywhere from zero to 500,
600,000 pounds a month depending on what the cows decide
to do.

Q. Okay. When you were calculating your
estimated monthly obligation to the pool, did you take
into account the pool draw you would have on your
surplus?
A. That was calculated. It's -- strictly on
the average, it looks like it's about a $2 difference.
And we're about 3 million pounds, so it's just a simple
calculation. I didn't do an extensive survey there.

Q. So you didn't take into account the fact
that any surplus -- if you had 500,000 of surplus and
you were pooled, you would draw out of the pool? Do you
know what I mean by that?
A. I believe I do.
Q. Okay.
A. But we're being paid on component prices, I don't know we're being drawn out of the pool.
Q. Okay. Have you ever heard of the PPD?
A. No.
Q. Thank you. I don't think I have any other questions.

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

CROSS-EXAMINATION

BY MR. MILTNER:
Q. Good morning, Mr. Gilbert.
A. Good morning.
Q. You say in your statement that you are unique in the state of Washington in that you're the only plant that takes their product straight from the farm to the consumer bottle without it being mixed and blended with milk from any other farms. Has that always been the case?
A. No, there's been other producer-handlers in the past. And that may be somewhat inaccurate because there are some very small producer-handlers there that do that. But of any size, we're the only ones left in the state that can -- that has that
opportunity.

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

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

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

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

Q. And what about Edaleen?

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

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

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

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

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

Q. Sure, sure. If you weren't a
producer-handler -- okay, if you didn't have a regulatory title called producer-handler --
   A. Okay.
   Q. -- you could still own your own herd, have your own plant?
   A. My understanding, yes.
   Q. Okay. But in reality, does the experience in Washington speak to something different than that?
   A. Sorry. Could you clarify that one, too?
   Q. Sure. Those that -- those that were producer-handlers but are no longer producer-handlers, have they been able to maintain a single source for their milk?
   A. The only two that I know of that are -- would fit that category there would be Smith Brothers and Edaleen.
   Q. Okay. Now, that -- pardon me. The distributors' customers, the small stores, convenience stores, espresso stands and pharmaceutical stores, are all of those customers generally served by all the bottlers in Washington?
   A. If I understand your question correctly, they are.
   Q. If I may ask, what is -- what is your
cost of production for your milk on your farm compared
to the Federal Order blend price?

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

Q. By a little bit or by a lot?

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

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

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

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

A. Both.

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

A. Well, the most important number is we can
keep our debts paid and the aggregate of all that is the
most important. Because it's an aggregated business.
And it -- which one makes the most money or loses money, it changes every year.

Q. What is the cost to your plant to get milk delivered to the plant?
A. Our dairy is five miles away. We own our own trucks and everything. The cost is relatively small.

Q. I'm sorry. My question was perhaps imprecise.
A. Okay.

Q. Not so much the delivery of the milk, but what does it cost you for the milk itself?
A. You're asking what the production costs on the dairy itself would be?

Q. I guess more generally, does it cost you any Federal Order regulated price or does it cost you whatever it cost you to produce milk on your farm?
A. I guess like all dairies, it costs what it costs. It's all relative on feed costs, and all those input costs.

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

Q. So for better than a year you could not
buy Country Morning Farms' milk, is that right?

A. That's correct.

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

A. Not very much.

Q. Okay. Why not?

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

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

A. That's our hopes, yes.

Q. Thank you very much.

JUDGE CLIFTON: Who next will
cross-examine Mr. Gilbert? Mr. Carroll.

CROSS-EXAMINATION

BY MR. CARROLL:

Q. Good morning, Mr. Gilbert.
A. Good morning.

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

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

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

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

Q. And then I take it you're not the cause
of any disorder at the large grocery chain level?

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

    Q. Right.

    A. -- it spreads that risk out.

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

    A. No, none.

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

    A. I have one brother.

    Q. One brother. And does he have children?

    A. Yes.

    Q. And do you have children?

    A. No.

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

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

    Q. And do you want to preserve the right of
that boy to continue in business?

A. Most definitely.

MR. CARROLL: Thank you very much.

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

CROSS-EXAMINATION

BY MR. YALE:

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

A. Good morning.

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

A. Correct.

Q. You don't have enough volume?

A. Correct.

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

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

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

A. Correct.

Q. Now, you also indicated the concept of
not having all your eggs in one basket. Why -- why is that a concern?

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

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

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

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

A. Correct.

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

A. Correct.

Q. So you're in support of allowing existing
producer-handlers to maintain their status if they're under 3 million pounds, and not allow new entries? Is that an acceptable point or a decision by the Secretary?

A. Yes, in our opinion, it is.

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

A. Correct.

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

A. That's my indication, yes.

Q. In full?

A. In full.

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

A. Yes.

Q. And did that include payments into the pool?
A. No, it did not.

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

A. I'm positive it would have.

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

A. I do not believe it does.

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

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

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

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

Q. You don't have any control. I mean, they come to you and order the milk and they tell you, this
is the label we want, and that's what you do, right?

A. Correct.

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

A. No.

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

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

Mr. Ricciardi.

CROSS-EXAMINATION

BY MR. RICCIARDI:

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

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

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

Q. Sure. Is it your position that producer-handlers should be left alone?
A. That's my first option, yes.

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

A. Correct.

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

A. That's what I understand.

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

A. That's what I understand.

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

A. Yes.

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

A. That's my understanding.

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

A. Very much so.

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

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

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

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

A. I would think it highly unlikely.
Q. Thanks.

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

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

JUDGE CLIFTON: Are you close enough?

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

THE WITNESS: Thank you.

MR. VETNE: Don't leave yet.

JUDGE CLIFTON: Mr. Vetne, any redirect?

REDIRECT EXAMINATION

BY MR. VETNE:

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

First, with respect to your finding a temporary home for your farm milk while the plant was being rebuilt, that home being in Montana, did you have an alternative market, temporary market for your producer milk in Washington that would allow you to bring it back online in the plant whenever you wanted to?
A. Not an economical one.
Q. The -- the market is mostly supplied by a very few large suppliers, including -- including Darigold or Northwest Dairy Association?
A. Correct.
Q. Did you have an option to temporarily be part of the Darigold supply, and rather than hauling your milk all the way -- or reach all the way to Montana for a customer?
A. You know, we never investigated with Darigold the possibilities. Just from past experience, we, in selling them our excess milk, so they would -- they would have taken all of our milk in the excess department. But we didn't explore any kind of contracts for doing anything else.
Q. Did you know whether Darigold accepts and markets nonmember milk that can enter its supply chain and leave its supply chain at will?
A. No.
Q. By the way, have you ever done anything like this before, appeared as a witness at any kind of proceeding?
A. This is the first opportunity.
Q. All right. And during '03 and '04 when you were rebuilding your plant, did you participate in
the proceedings out West at that time?

A. I did not.

Q. You were busy doing other things?

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

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

A. Yeah, that also.

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

A. Correct.

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

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

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

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

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

A. It's -- it's about -- yeah, it's pretty good size.
Q. It's not a 50,000 pound --
A. No, no.
Q. -- tanker?
A. Yes, it's 54,000 pounds.
Q. It's -- over-the-road tanker --
A. Yes.
Q. -- same as a gasoline truck?
A. Yes.
Q. Good. What about distribution trucks?
A. We use reefers. Actually, we use four-axle reefers to try to be efficient because we have a long way to travel.
Q. All the trucks are owned by you?
A. Correct.
Q. Is your tank -- tanker truck used for any other commercial purpose when it's not hauling milk for you?
A. No. Strictly our own use.
Q. Somebody asked you some questions about your loan arrangements with the bank and those arrangements include a projected cash flow that included your producer-handler revenue?
A. Correct.
Q. And you're not aware of any provision about calling the note if -- if those projections
changed, correct?

A. Well, if those projections changed --
Q. No --
A. -- then there's always --
Q. I mean, the --
A. If the regulatory -- no.
Q. If the regulatory status changed, and
your projections were based on regulatory status of
producer-handlers for some 70 years or so?
A. Correct.
Q. However, the note would be called if you
couldn't pay your monthly payment, correct?
A. That's my understanding.
Q. Okay. And it's your belief that if your
status as a producer-handler were terminated and your
investment was not grandfathered in some way, that you
would not be able to pay the note and therefore it would
be called?
A. That's correct.

MR. VETNE: Thank you very much.
JUDGE CLIFTON: Thank you, Mr. Vetne.

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

THE WITNESS: That's correct.
JUDGE CLIFTON: And does anybody know how to spell that?

THE WITNESS: Reefer.

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

JUDGE CLIFTON: All right. Thank you.

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

RECROSS-EXAMINATION

BY MR. MILTNER:

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

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

MR. MILTNER: Thank you.

JUDGE CLIFTON: Let's go off record for just a moment.
(Off the record.)

JUDGE CLIFTON: Back on record at 9:01.

Any other questions for Mr. Gilbert?

FURTHER REDIRECT EXAMINATION

BY MR. VETNE:

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

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

MR. VETNE: Thank you. No more questions.

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

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

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

MR. MILTNER: I have confidence in that.

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

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

THE WITNESS: Thank you.
JUDGE CLIFTON: You're welcome.

Mr. Vetne, who will be the next witnesses?

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

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

(Off the record.)

JUDGE CLIFTON: Back on record at 9:03.

Is there any objection of admission into
evidence of Exhibit 81, which is Mr. Gilbert's
statement? There is none, Exhibit 81 is hereby
admitted into evidence.

(Exhibit 82 was marked for
identification.)

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

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

MR. MALLORIE: My name is Rick Mallorie,
and that's R-i-c-k, M-a-l-l-o-r-i-e, president of Mallorie's Dairy.

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

MR. MALLORIE: Okay.

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

MR. MALLORIE: Yes, ma'am.

JUDGE CLIFTON: All right.

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

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

RICK MALLORIE AND CHARLES FLANAGAN of lawful age, being duly sworn, were examined and testified as follows:
JUDGE CLIFTON: Thank you, each answered yes. Mr. Vetne, you may proceed.

DIRECT EXAMINATION

BY MR. VETNE:

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

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

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

MR. FLANAGAN: My grandfather and my dad were both long-time dairymen. So I was raised in that industry. I studied animal science at Oregon State, got a bachelor's degree there. I
worked with my dad for a while and I worked on other dairies in Oregon and eventually worked on a large dairy in Arizona.

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

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

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

MR. MALLORIE: Rick Mallorie again. And I started to say earlier, my dad started the dairy in the early '50s -- he was a veterinarian -- and started bottling milk in '54 with nothing. And has built it up to where in
1979, we were milking right at 2,000 head of animals and did that until 2005, when we cut back -- or 2006, when the 3 million pound cap came into effect.

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

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

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

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

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

Mr. Flanagan, you have a -- you have a
prepared statement concerning Mallorie's, its business operations and the proposals, correct?

MR. FLANAGAN: That's correct.

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

MR. FLANAGAN: Not at this time.

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

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

MR. VETNE: There you go.

JUDGE CLIFTON: There.

MR. VETNE: I agree.

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

During 2008, our milk production averaged about 3.1 million pounds per month. Class I
packaged fluid milk use averaged 63 percent, 
Class II use averaged 15 percent per month, and 
Class IV ranged from 9 percent to 29 percent, 
with an average of 22 percent for the year. 
Production volume and Class utilization 
information for the years 2007 and 2008 are 
summarized below.

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

Selling excess cream is not a problem. 
We seldom have any surplus and if we do, 
Larsen's Creamery will always take it for a fair 
price. Surplus milk is a different story. 
Farmer's Co-op Creamery will take it if they 
have the capacity to handle it, and they will 
pay us the lowest class price less a $2 a 
hundredweight make allowance. Darigold also 
would probably take it at the same price but it 
would involve a 260 mile round trip to Chehalis, 
Washington for an additional transportation cost
of about a dollar per hundredweight. Our usual market for surplus milk is Valley Crest Foods in Myrtle Point, Oregon, which is a 400 mile round trip, which costs about $1.50 per hundredweight in transportation cost. They pay the lowest class price less a dollar to $2 a hundredweight.

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

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

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

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

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.
Mallorie's can comply with these concerns. Most
3 of the larger processors cannot, despite their
4 claims about being your local dairy, or that
5 their milk comes faster from the pasture. We do
6 have the advantage that our milk travels
7 directly from the milking parlor to the
8 processing plant through a pipeline.
9
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
25 If current customers were forced to buy
from competitors, they will pay higher prices.
Transportation costs alone would be substantial. All customers that we deliver to are within 50 miles of our plant. Mallorie's has always been competitive on price and has been the source of milk for hundreds of customers too small to be served economically by the large processors. Through our jobbers we serve a niche of small customers ignored or exploited by others.

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

Milk sales competition in the Willamette valley is intense. Safeway and Kroger have their own bottling plants and distribution networks. Darigold, Andersen Dairy, Alpenrose, Sunshine Dairy and others distribute throughout the area. They control most of the volume to national grocery chains, big box stores and wholesale grocery warehouses. All of these processors market very aggressively. At times we have been forced to lower our prices to meet their price offers. We have lost more than a
dozen independent stores due to price and marketing allowances that Mallorie's could not match. The lowest cost milk supplier in this area is Safeway, who sells to distributors as well through its own stores. Since Mallorie's does not have a complete line of dairy products, we can't penetrate some markets.

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

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

Our processing plant is old, undersized and poorly laid out. It started out as a hop dryer and has been added on to and expanded many times. Most of our equipment is fairly modern,
although much of it is used and was acquired from other processors. We don't have our own blow mold for making plastic jugs, which puts us at a cost disadvantage.

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

The processing cost-per-gallon of a small plant like ours is definitely higher than the large plants of our competitors. There are few, if any, other process or plants as small as the largest producer-handler plants in Federal Order 124. Because of the mixing of costs between the dairy and the processing operations on our farm, it is difficult to segregate accurate cost data. We currently add a processing charge of 71 cents per gallon, which includes the cost of the container. I have tried to find statistics on cost variation based on plant size, but so far the most recent I found was dated in 1987. That data showed that
a plant processing 300,000 gallons per month had a processing cost of about 40 cents per gallon, compared to a 2.5 million-gallon per month plant cost of less than 27 cents. That translates to a small plant processing cost disadvantage of nearly 50 percent. Although these numbers are old, I think modern numbers would reflect that the same economics of scale are still enjoyed by larger processors.

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

The Pacific Northwest Federal Order has already considered the producer-handler exemption in detail. The result of two years of hearings and administrative procedures was a ruling that limited the producer-handler exemption to only those producer-handlers with less than 3 million pounds of Class I utilization per month. This is the same
exemption that National Milk Producers Federation described as fair in a June 23rd, 2005 letter to Secretary Johanns. Now they are back asking for further restrictions on producer-handlers.

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

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

National Milk argues that the potential exists for producer-handlers to proliferate across the market, but history has shown that
the number of producer-handlers is steadily declining, not increasing. Despite what producer-handler opponents claim, it is not easy to start up or operate a producer-handler business. According to USDA statistics, there were 348 producer-handlers in October 1959 and only 79 left by December 2001. The number today is probably between 40 and 50. Only five producer-handlers still survive in Federal Order 124. The alleged producer-handler advantage and risk of proliferation have been greatly exaggerated.

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

Producer-handlers in Federal Order 124 do not threaten orderly marketing nor do they
undermine the pool. The calculated effect in 2007 was less than 4 cents per hundredweight on total pool utilization. In the NMPF request for hearing letter, they calculated the benefit that producer-handlers receive from Class I sales percentage greater than the pool Class I percentage, but they failed to consider the negative consequences of disposing of surplus milk by a producer-handler at the Class IV price, less a substantial penalty. The net advantage is such an insignificant amount that it does not support accusations of market disruption or unfair advantage by producer-handlers. The economic effect of eliminating the producer-handler exemption is the disruption of several family-owned businesses that have been here for many decades with very little compensating benefit to the pool.

NMPF states that producer-handlers were originally given special status for administrative reasons. One of the major reasons for the Agricultural Adjustment Act of 1933 was to remedy -- to remedy processor abuses and to eliminate processors from price gouging
producers. Minimum prices were established for payment by processors to producers. Since producer-handlers neither bought nor sold milk, they were exempt from these pricing regulations. Over the last 70 years, the producer-handler exemption has been reexamined numerous times. The fact that the exemption has remained in place is likely due to a lack of evidence that producer-handlers are disruptive, and because USDA wisely refused to destroy an innovative business model that has withstood the test of time, that meets contemporary customer preferences, and that serves as a viable alternative to the co-op system.

Proponents of the proposal to eliminate the producer-handler exemption argue that it is good policy to establish uniform provisions across all Federal Orders. While that sounds good in theory, it has historically never been the case. While there are similarities between the various orders, distinct differences have always been present. One such example is the 3 million pound limit applied to the Arizona and Pacific Northwest markets that do not exist in other Federal Orders. There is no good reason
why the Pacific Northwest can't continue under
the current rules that were approved less than
three years ago.

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

In summary, the producer-handler
exemption has been debated and decided in the
Pacific Northwest and the Arizona Federal Order.
There is no reason to re-open the issue. NMPF
and IDFA clearly have superiority in numbers and
political muscle. In a democracy, even though
the majority rules, the majority has a strict
obligation to protect the basic rights of the
minority. We ask USDA to do the same.
Operating as a pool plant would have catastrophic effects on our business. Based on sample charge computations provided by the Market Administrator's office, we were able to compute the hypothetical pooling charge we would have had to pay if we were a nonexempt -- if we were nonexempt. For the years 2007 and 2008, the pooling charges would have averaged $40,000 per month, with a high of 74,000 and a low of 10,000. Such a large cash flow drain would force us to reevaluate our entire business, if we could survive at all.

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

When the Federal Order 124 producer-handler exemption was set at a maximum of 3 million pounds, Mallorie's Dairy responded by reducing our herd size to 800 cows -- and -- excuse me, by 800 cows and 800 replacement animals in order to stay below the cap. We also
closed our heifer-raising facility in Central Oregon and closed a 300-cow dairy that we were leasing. About 25 employees lost their jobs and purchases of feed, other supplies and services were reduced by nearly one-third, or over $3 million a year.

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

If Mallorie's were to go out of business, 50 more employees would lose their jobs. Most have been here at least ten years, some over 20. The impact on the local and Oregon economy would be a loss of over $6 million a year. Many loyal
customers who appreciate locally owned and
controlled products would be forced to buy other
brands. Mallorie's has had relationships with
Roth's Fresh Markets, Spring Valley Dairy, and
Sun Star Dairy that go back over 40 years.
Through our jobbers, we also -- we are also the
economical source of milk for hundreds of small
businesses that previously were gouged by the
large processors with inflated prices and
minimum stop charges. These customers would be
seriously hurt, possibly leading to more
business failures and loss of jobs.

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

In conclusion, Proposals 1 and 2 should
be rejected. If some rules are necessary to
control industrial-sized producer-handlers, the
existing rules in the Pacific Northwest market
should be used as a model for other milk orders.
If Proposals 1 and 2 are adopted, existing
investment by producer-handlers, made in
reliance on 70 years of regulatory policy, should be grandfathered. We have made a reasonable grandfathering proposal in Proposal 17. We do not believe that a pool exempt volume for grandfathered plants should be employed regardless of whether -- regardless of possible future growth of the plant. That would potentially give a large plant with exempt volume a competitive advantage over plants of similar large size. That is not our intent.

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

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

MR. VETNE: Mr. Flanagan, that concludes
the statement written in Exhibit 82. But there
is an attachment to Exhibit 82, the first page
of which is a Market Administrator's report for
the Pacific Northwest and Arizona marketing
areas for February 2009. There's some
information copied from that report that's
attached to your statement, correct?

MR. FLANAGAN: That's correct.

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

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

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


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

MR. VETNE: Okay. Go ahead.

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

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

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

MR. FLANAGAN: Right.

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

MR. FLANAGAN: That's correct. And my
concern was that that could be very misleading if you didn't know all the background of where those numbers come from.

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

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

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

MR. FLANAGAN: I believe that's correct.

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

MR. FLANAGAN: Market Administrator's office.

MR. VETNE: Who did you talk to in the
Market Administrator's office for that?

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

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

MR. FLANAGAN: I don't think so.

MR. VETNE: Thank you very much.

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

MR. VETNE: That would be great.

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

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

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

Mr. English, thank you.
CROSS-EXAMINATION

BY MR. ENGLISH:

MR. ENGLISH: Good morning, gentlemen, my
name is Charles English.

Mr. Flanagan, I think you've -- I
hesitate to say had the pleasure, but
experienced one of these Federal Order
proceedings before, correct?

MR. FLANAGAN: That's correct. Though I
wouldn't want to make a career of it.

MR. ENGLISH: I don't have a lot of
questions for you. When you say in your
testimony that for 2008 your milk production
averaged 3.1 million pounds per month, was that
the milk production on-the-farm portion versus
what was processed through the plant?

MR. FLANAGAN: That's on-the-farm
production.

MR. ENGLISH: And you have testified
about a fairly limited distribution area, and I
just want to test it so the record is clear. Do
you have any sales directly or through
distributors into California?

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

MR. ENGLISH: Do you have any sales
directly or indirectly into Canada?

MR. FLANAGAN: No.

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

MR. FLANAGAN: No.

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

MR. FLANAGAN: No, we do not.

MR. ENGLISH: How about Nevada?

MR. FLANAGAN: No, no.

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

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

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

MR. FLANAGAN: Not that I know of.

MR. ENGLISH: And to the extent that distributor has some sales in the central part of the state, are you -- I don't want you to give confidential information, but are they a relatively small portion of your sales?
MR. FLANAGAN: Well, we sell -- we sell our milk, and we don't really know where it all goes, I mean, the volume amount.

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

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

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

JUDGE CLIFTON: Mr. Mallorie.

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

MR. ENGLISH: I'm sorry?

MR. MALLORIE: John Day, I believe.

MR. ENGLISH: How is that spelled?

MR. MALLORIE: J-o-h-n, D-a-y.
MR. ENGLISH: Is that two words?

MR. MALLORIE: I think so.

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

MR. MALLORIE: Yes.

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

MR. FLANAGAN: To some Thriftways, yes.

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

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

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

MR. FLANAGAN: Yes.

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

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

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

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

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: Yes.

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

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

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

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

Mr. Beshore. Thank you.
CROSS-EXAMINATION

BY MR. BESHORE:

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

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

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: Yes.

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

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

MR. ENGLISH: Just to get my question, I'm trying to discern if that is roughly 2.6 or
so million -- 6 or 7 million, what is the
difference between the 3.1 million per month
indicated above and the 2.6 or 7 million total
sales in the break out?

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

JUDGE CLIFTON: Let's go off record for
just a moment while you think about that.

10:10. We'll go off record.

(Off the record.)

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

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

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

MR. FLANAGAN: Right.

MR. BESHORE: All right. So the -- I
think the total of 32,302,176 on Exhibit 82 is
inaccurate in the totaling of the numbers.

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

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

MR. FLANAGAN: That's correct.

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

(Off the record.)

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

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

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

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

Now, you testified that when the current producer-handler regulations in Order 124, when the changes became effective, Mallorie's responded by reducing our herd size by 800 cows,
800 replacement animals in order to stay below the cap. That's on page 6 of Exhibit 82. How many cows were you milking prior to that time and how many cows are you milking now?

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

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

MR. FLANAGAN: Slightly less than 40 percent.

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

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: Correct.

MR. BESHORE: Can you tell us anything about -- about that -- that difference? I mean,
it appears that you're well under the cap, or are there monthly fluctuations that put you right at the cap?

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

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

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

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

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: To the Class I price.

MR. BESHORE: Okay. So when you're setting your wholesale -- wholesale price, you take the Class I prices as announced by the
Market Administrator in 124, I take it, and add 71 cents per gallon?

MR. FLANAGAN: That's correct.

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

MR. FLANAGAN: Yes.

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

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

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

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

MR. FLANAGAN: Yes.

MR. BESHORE: So that to the extent that the -- that those comments are different than the printed text of Proposal 17, you're in
essence modifying it slightly at the hearing?

MR. FLANAGAN: That's correct.

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

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

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

MR. FLANAGAN: Aurora Farms.

MR. BESHORE: Aurora Organic Dairies?

MR. FLANAGAN: Yes.

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

JUDGE CLIFTON: Thank you, Mr. Beshore.

Who will next cross-examine the members of the
CROSS-EXAMINATION

BY MR. YALE:

MR. YALE: Benjamin F. Yale for Continental Dairy Products and Select Milk.

Good morning.

MR. FLANAGAN: Good morning.

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

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: That's a distinct possibility.

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

    MR. FLANAGAN: Yes.

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

    MR. FLANAGAN: Yes.

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

    MR. MALLORIE: Yes.

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

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

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

MR. MALLORIE: That's correct.

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

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

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

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

MR. YALE: I want to, I guess, come down to a little more personal. When the point came that you had to sell off part of your herd, was
there more than just an economic decision, an
economic impact of selling that herd?

    MR. MALLORIE: Well, it was very
personal.

    MR. YALE: That's my point.

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

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

    MR. MALLORIE: Yeah.

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

    MR. MALLORIE: That's correct.

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

    MR. MALLORIE: That's correct.

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

    MR. MALLORIE: I would say a lot of
smaller ones do, but dairies our size, I think I -- I feel that my sister has a lot closer attachment than most people --

MR. YALE: Okay.

MR. MALLORIE: -- to the animals there.

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

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

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

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

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

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

MR. FLANAGAN: Most of them, no.

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

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

MR. YALE: Now, the -- there was a question regarding the fact that you don't quite reach the 3 million pound cap. I think part of
your answer was you just can't get any more
sales, is that -- is that what I understood you
to say?

MR. FLANAGAN: That's correct.

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

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

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

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

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

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

(Off the record.)

JUDGE CLIFTON: We're back on record at
10:34. Who will next cross-examine the panel?

Mr. Carroll. Thank you.
CROSS-EXAMINATION

BY MR. CARROLL:

MR. CARROLL: Mr. Flanagan?

MR. FLANAGAN: Good morning.

MR. CARROLL: I'm John Benjamin Carroll.

I'm an attorney for the New England Producer-Handlers Association and two producer-handlers located in New England and one in Virginia.

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

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

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: Business was founded by Bob and Juanita Mallorie, Rick's parents. Juanita is still involved, although she's elderly at this point. The active members are Rick and his sister, Terri. They are involved
in the day-to-day operation.

MR. CARROLL: And do they have children?

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: That's the hope.

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

Can you tell me what you meant by that statement?

MR. FLANAGAN: There seems to be a trend that customers are more concerned about the source of their food, whether it's local, how it's produced, if it's produced in an environmentally friendly manner, if the animals are humanely treated, all those kinds of things. And we get quite a few comments like that and so do some of our customers that -- we've been around -- we've been bottling under the
Mallorie's label for now almost 50 years. There are a lot of loyal customers. And we think, and so do a lot of customers, that there's a difference between our milk and other milk. And not on the basis of quality necessarily, but it's the way it's produced.

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

MR. FLANAGAN: They do.

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

MR. FLANAGAN: That's true.

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

MR. FLANAGAN: That's true.
MR. CARROLL: And that's your market?

MR. FLANAGAN: Yes.

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

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

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

And by carving their milk out of that large pool of groceries, they -- they -- it drops them to a lower rebate rate. And those have been created for a variety of reasons, but one is to compete with independents like us that we're selling them dairy products. Does that answer the question?
MR. CARROLL: That's fine. Thank you. And I think you said you just can't match that?

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

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

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

The -- some of our larger customers, if we weren't there, they -- well, we're -- we're a source of competition for one thing, but we also -- we are pretty efficient at what we do.
And so we can save some money -- save them some money by being efficient in our delivery system.

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

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

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

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

And then you state in that same paragraph that Mallorie's has always been competitive on price and has been the source of milk for hundreds of customers too small to be served
economically by the large processors. Is that what you have been saying?

MR. FLANAGAN: Yes.

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

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

When our distributors started entering that market, then those kind of stores started coming out of the woodwork all over the place. And it was not because of aggressive marketing on his part, it was because of negligence on the part of the bigger guys. There was no competition, so they were able to charge whenever they wanted, and these little guys either had to pay it or drop the dairy line.

And that's what I'm talking about, is that there
was a whole class of customers that were being neglected, a whole niche, if you want to call it that.

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

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

So if we decide to do something in the plant, that eliminates the ability to use those resources -- I'm talking mainly about financial resources, on the dairy and vice versa. It's always a -- they compete for the dollars but also time and management as well.
MR. CARROLL: Could you describe the management time problem that you have in mind?

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

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

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

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

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

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

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

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

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

MR. FLANAGAN: That would be NMPF and
IDFA. They seem to be the source of all of these requests.

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

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

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

MR. FLANAGAN: That would be my opinion.

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

MR. FLANAGAN: Based on their history, they buy out, take over other smaller businesses until they've grown to the size they are. I think this process of attacking producer-handlers is -- they would prefer that it would eliminate us entirely, but if not, that to at least restrict and/or disrupt our businesses.
MR. CARROLL: If you would turn to page 5, the first full paragraph, you state, the producer-handlers in Federal Order 124 do not threaten orderly marketing nor do they undermine the pool, period. The calculated effect in 2007 was less than 4 cents per hundredweight on total pool utilization.

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

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

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

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: I believe it is not.

MR. CARROLL: Directing your attention to the last sentence in that paragraph, you state, the economic effect of eliminating the producer-handler exemption is the disruption of
several family-owned businesses that have been here for many decades with very little compensating benefit to the pool. Do you want to explain that statement?

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

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

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

MR. CARROLL: Going on to the next paragraph, and the sentence in roughly the middle of it, starts with the word over.
Over -- you state, over the last 70 years, the producer-handler exemption has been reexamined numerous times. The fact that the exemption has remained in place is likely due to a lack of evidence that producer-handlers are disruptive, and because the USDA wisely refused to destroy an innovative business model that has withstood the test of time, meets contemporary customer preferences and serves as a viable alternative to the co-op system.

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

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

MR. CARROLL: I want to direct your attention further to the following paragraph and the sentence that starts, while. You state there, quote, while there are many similarities
between the various orders, distinct differences have always been present. Can you tell us what you meant by that?

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

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

MR. FLANAGAN: There have always been economies of scale in larger plants. They have bigger filling machines. They have blow molds
to make jugs. They have more automation. There's a lot of things that you can do on a large scale that you can't do on a small scale. And most of those type of things help to reduce the processing costs, and we kind of have to do the best we can with what we've got at the size we are.

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

JUDGE CLIFTON: USDA, Mr. Carroll?

MR. CARROLL: USDA. Thank you.

JUDGE CLIFTON: Thank you.

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

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

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

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

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

MR. FLANAGAN: Yes.

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

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

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

MR. FLANAGAN: Definitely not.

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

MR. FLANAGAN: Right.

MR. CARROLL: Right.

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

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

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

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

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

MR. FLANAGAN: They were not.

MR. CARROLL: At the bottom of page 6, you have the statement, through our jobbers we are also the economical source of milk for hundreds of small businesses that were previously gouged by the larger processors with
inflated prices and minimum stop charges. Could you tell me what you meant by that?

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

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

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

There is a lot of -- milk is available a lot of places at a pretty reasonable price. So
these stores with the real small volume, if they have to pay the small volume price, they would be at a real handicap.

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

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

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

MR. FLANAGAN: Yes.

MR. CARROLL: And you state, without our participation the economics and scale would be
negatively impacted. Would that negatively
impact those farmer producers of milk and affect
their costs negatively?

MR. FLANAGAN: I believe it would.

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

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

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

MR. CARROLL: Thank you very much.
JUDGE CLIFTON: Thank you, Mr. Carroll.
Who will next cross-examine this panel?
Mr. Miltner, please.

CROSS-EXAMINATION

BY MR. MILTNER:

MR. MILTNER: Good morning, Charlie.
MR. FLANAGAN: Good morning.
MR. MILTNER: Good morning, Rick.
MR. MALLORIE: Good morning.

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

MR. FLANAGAN: Yes.
MR. MILTNER: Would you be willing to share that with us?

MR. FLANAGAN: What we get for it is usually the Class IV price. At this time, it's minus a dollar -- sometimes it's minus $2 -- plus the shipping cost to get it there. Which I believe was $1.50 a hundredweight we figure to get it there. So basically we would get the Class IV price minus, either 2.50 or 3.50 for
MR. MILTNER: And if you would turn to the Market Administrator's report that's attached to your statement? I'm trying to find it. I think it's numbered page 4, which I think is the second page as attached. And for this particular month, the Class IV price is 14.65. So your -- your base receipt would be $13.65 and then you would have to subtract the transportation costs from that?

MR. FLANAGAN: And which --

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

MR. FLANAGAN: Okay.

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

MR. FLANAGAN: Yes.

MR. MILTNER: Okay. So as I understand, you would have received $8.59, less
transportation?

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

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

    MR. FLANAGAN: Yes.

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

    MR. FLANAGAN: Yes.

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

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

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

    MR. FLANAGAN: Sounds reasonable.

    MR. MILTNER: So the weighted cost of your Class IV dispositions on all your milk is $2.20?
MR. FLANAGAN: Yes, I think so.

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

MR. FLANAGAN: Yes.

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

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

MR. MILTNER: But the methodology would be similar?

MR. FLANAGAN: It would be the same.

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

MR. MALLORIE: Yes.

MR. MILTNER: Rick says yes.

MR. MALLORIE: Yes.

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

MR. MALLORIE: Yes, yes.

MR. MILTNER: Rick, are they an
independent bottler or are they owned by another larger company?

MR. MALLORIE: They're independent.

JUDGE CLIFTON: Go ahead and pull the mic closer.

MR. MALLORIE: Sorry. They are independent.

MR. MILTNER: They are independent.

Larger plant than you guys?

MR. MALLORIE: Considerably, yes.

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

MR. MALLORIE: I don't know.

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

MR. MALLORIE: Yes.

MR. MILTNER: Are they an independent?

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

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

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

MR. MILTNER: Any guess as to how many
employees they might have? More or less than 500?

MR. MALLORIE: I would imagine less than 500.

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

MR. MALLORIE: Yes.

MR. MILTNER: How is their size?

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

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

MR. MALLORIE: Less.

MR. MILTNER: Considerably less?

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

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

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

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

MR. MALLORIE: Just a little.

MR. MILTNER: They're regulated handlers
right now, as you understand, correct?

MR. MALLORIE: Correct.

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

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

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

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

MR. MALLORIE: What do you think, Charlie?

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

MR. MILTNER: You can answer that question.

JUDGE CLIFTON: He asked if it was fair.

MR. FLANAGAN: No, I don't think it is.
MR. MILTNER: Is it consistent?

MR. FLANAGAN: No.

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

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

MR. MILTNER: Yes.

MR. FLANAGAN: No, I don't.

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

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

Mr. Ricciardi.

CROSS-EXAMINATION

BY MR. RICCIARDI:

MR. RICCIARDI: Good morning, gentlemen.

MR. FLANAGAN: Good morning.

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

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

JUDGE CLIFTON: Yes.

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

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

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: Yes.

MR. RICCIARDI: And you gave a number in
that paragraph. The number today is probably between 40 and 50, and that's why I handed you Exhibit 13. And I want you to make a comparison.

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

MR. FLANAGAN: Yes.

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

Does that -- in looking at the document, and you can take the time to do it, does that
seem accurate to you?

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: That sounds reasonable.

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

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

MR. RICCIARDI: In fact, it would be the
opposite, wouldn't it?

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

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

MR. FLANAGAN: That's true.

MR. RICCIARDI: Which is what they want?

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

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

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

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

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

MR. MALLORIE: Thank you.

MR. RICCIARDI: Same question. Do you
see any need to change the status of producer-handlers? And you can limit yourself to the Order 124 as Mr. Flanagan did.

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

MR. RICCIARDI: Thank you very much.

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

MR. BESHORE: I did.

RECROSS-EXAMINATION

BY MR. BESHORE:

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

MR. FLANAGAN: That's correct.

MR. BESHORE: So they didn't go to slaughter?
MR. FLANAGAN: No.

MR. BESHORE: Did they stay locally?

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

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

MR. FLANAGAN: Like the surplus milk?

MR. BESHORE: Surplus milk.

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

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

MR. FLANAGAN: Probably around 3.6.

MR. BESHORE: What's your average protein?

MR. FLANAGAN: Oh, slightly over 3.

MR. BESHORE: In solids, not fat?

MR. FLANAGAN: Or not --

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

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

MR. BESHORE: Your milk production per cow is -- you know, is quite outstanding,
excess, apparently, I take it, of 30,000 pounds per cow. I'm just dividing 12 -- you know, you're at 37 million for the year. You have 1,200 milking.

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

MR. BESHORE: Per day?

MR. FLANAGAN: Per day, average.

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

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: Oregon Dairymen's Association.

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

MR. FLANAGAN: No.
MR. BESHORE: Do you understand that National Milk is a trade association?

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: I do.

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

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

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

MR. FLANAGAN: They represent people that do.

MR. BESHORE: That do market milk?

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: That's true.
MR. BESHORE: Pardon?

MR. FLANAGAN: Yes.

MR. BESHORE: Okay. Thank you.

JUDGE CLIFTON: Thank you, Mr. Beshore.

Who next has questions for the panel?

Mr. Rower.

CROSS-EXAMINATION

BY MR. ROWER:

MR. ROWER: Good morning.

MR. MALLORIE: Good morning.

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

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

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

MR. FLANAGAN: They're independent.

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

MR. FLANAGAN: No. They've been
independent for 30 plus years.

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

MR. FLANAGAN: Yes, wholesale.

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

MR. FLANAGAN: And that is our proposal?

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

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

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

There's a term, individual persons, that's used there. And persons or person is a defined term with a very special meaning in our regulations. And it's -- it's in 7 CFR 1000.2(e), which means nothing to you, but
it will mean something to the attorneys.

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

JUDGE CLIFTON: Mr. Vetne.

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

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

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

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

MR. VETNE: Person is already in the
order, and it did not intend to -- to
incorporate a different meaning than that
already in the order. There was only one
amendment here and that amendment used the term
that's defined. So that would be the definition
that controls, I'll make that a representation
of counsel.

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

JUDGE CLIFTON: Thank you, Mr. Rower.

MR. ROWER: Thank you for coming.

JUDGE CLIFTON: Mr. Vetne, any redirect?

REDIRECT EXAMINATION

BY MR. VETNE:

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

MR. FLANAGAN: I believe it is, yes.

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

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

MR. FLANAGAN: Yes.

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

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

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

MR. FLANAGAN: Right.

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

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

MR. FLANAGAN: No, they were not because they're home-grown animals so they were not depreciated.
MR. VETNE: Was any equipment sold as part of that process that had been depreciated?

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

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

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

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

MR. FLANAGAN: Yes.

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

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

MR. FLANAGAN: Yes.

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

MR. FLANAGAN: Probably closer to 4 million.

MR. VETNE: So you are at about half?

MR. FLANAGAN: Yes.

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

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

MR. FLANAGAN: Yes.

JUDGE CLIFTON: All right. I would ask that during a break, you find Kate Fisher, who is with the USDA group -- she'll raise her hand -- so that you can initial that change on the record copy exhibit. And I commend you for this very comprehensive document, which I know
also took time away from your normal duties.

Thank you both.

MR. MALLORIE: Thank you.

MR. FLANAGAN: Thank you.

JUDGE CLIFTON: You may step down.

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

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

MR. STEVENS: 11:30.

MR. VETNE: All right. These -- these two witnesses had some important -- what they felt to be important statements and information and facts to give to the Department decision-makers. And the format here, where you can see the people and talk to USDA, I think, is important. This proceeding is run sort of like a jury trial. The judge doesn't have the
decision-making function but acts as a traffic cop, and the jury is over here at the government table.

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

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

MR. VETNE: Thank you.

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

MR. VETNE: Gentlemen?

MR. MALLORIE: 10 minutes.

MR. VETNE: Okay.

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

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

MR. VETNE: If there is a desire for further examination for that reason, if we know
early afternoon, we can make them available.
Thank you.

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

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

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

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

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

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

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

Secondly, I would like to comment on Mr. Vetne's concern about Mr. Tosi not being
here for the hearing thus far today.

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

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

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

Mr. Tosi, unfortunately, is ill and has been ill through the night and that's why he is
not here. I regret that he is not here for the testimony we've had this morning, which I thought was like all the testimony we've had, valuable. But he'll have the transcript and he'll have the exhibits and the USDA team has indicated that it is not essential that Mr. Mallorie and Mr. Flanagan, Mr. -- is it Gilbert -- that any of them remain for the purpose of being recalled because we won't recall them, we'll just keep going. All right. Anybody with any comment further on that?

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

(Exhibit 83 was marked for identification.)

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

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

JIM DOCHEFF

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

JUDGE CLIFTON: Mr. Miltner, you may
Mr. Docheff's statement, which was just marked as Exhibit 83, was distributed to the attorneys and to the representatives of USDA, the court reporters and a copy for your Honor. There are additional copies in the back of the room for anybody who would like one.

DIRECT EXAMINATION

BY MR. MILTNER:

Q. Good morning, Mr. Docheff.

A. Good morning.

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

A. Yes, sir.

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

A. Correct.

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

A. No, I'm not.

Q. Okay. And you are not a member of the American Independent Dairy Alliance, is that right?
A. No, sir, that's correct.

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

A. Yes.

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

A. No.

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

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

In September 2007 we began building a milk processing plant on the dairy that began in operation in March of 2008. We started business from ground zero, built the plant, hired a sales and delivery
staff and began running the plant, and began sales in
January of 2008 and began accumulating sales. We are
not a producer-handler yet, but we do not want to have
the door closed on us as we have invested in the
bottling plant with a capacity of 3 1/2 to
4 million pounds of milk per month.

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

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

Diamond D is both a producer member and
a processor customer of Dairy Farmers of America. As a
producer member, I pay all the normal fees and charges
associated with marketing my milk. These include
balancing plant, milk hauling, forward haul,
administrative and milk promotion fees. Administrative
fees are 10 cents a hundredweight, typically described to us as nothing by DFA as management. As a processor customer, I purchase my milk back to bottle it. When I purchase this milk back, I pay a handling charge and a service charge that consists of an over-order premium and a balancing charge. DFA charges me approximately $5 a hundredweight for this service, which is simply an out-of-pocket cost to us. As a reference point, our cost of production is around $17 a hundredweight.

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

BY MR. MILTNER:

Q. Thank you Mr. Docheff. Now, your statement, was it drafted by you?
A. Yes.

Q. Okay.

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

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

A. Yes.

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

A. Correct.

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

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

When my son stated he wanted to come back to the dairy, basically I had two choices, you get bigger or try to extract a little higher price for the
product. It wasn't feasible to make our dairy bigger where we're at, so I felt this was the time to build a processing plant.

Some of economic factors in that, historically when you look at your cost of production on your dairy, feed cost is the highest cost. Historically, it's been around $6 a hundredweight. With what's happened in the last couple years, that's crept up to 8 to 8 1/2 dollars. Next has always been labor. That historically's been $1.60 to $1.70 a hundredweight. Next was probably debt service of around 90 to a dollar a hundredweight. Next in line was co-op marketing costs, that was historically around 70 to 75 cents. Then the rest of the things fell in. Your vet services of around 30 cents, your semen costs of 15 cents. Milk supply is 25 cents. When I looked at that over the last four to five years, all of those have come up some. The most drastic was my charges for having my milk marketed through the co-op. They rose basically from 70 to 75 cents to up around $1.75. And currently that's my second highest cost on the dairy, behind feed, is my cost to get my milk marketed.

So in my mind, I justified for what I was paying the co-op to sell that milk and haul that milk to
the customer, I think I could do the same for probably a little less and hopefully get a little higher price for my milk at the end of the day.

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

A. That's correct.

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

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

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

A. I wish I would have, but no.

Q. Okay. So you had to obtain financing for
that?

A. Correct.

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

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

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

A. Over the years, there were numerous co-ops in Colorado and they just consolidated. Probably the last consolidation was in to Western Dairymen Cooperative in the early to mid '80s. And there was Colorado Springs Milk Producers, Empire Dairymens, Fort Collins Milk Producers, a few on the western slope that I don't recall the names. They conglomerate or came together and formed Western Dairymen Cooperative. Then Western Dairy Cooperative a few years later merged with the co-op producer in Utah and became Western Dairy Cooperative. And then Western Dairy Cooperative merged into the now Dairy Farmers of America.

Q. In your statement, you say that you sell half of your milk through your plant and the other half
is sold to DFA.

A. Correct.

Q. I want to examine how that actually takes place. You actually sell all of your milk production to DFA, correct?

A. Yes, we do.

Q. And then buy?

A. We purchase what we process through the plant back from DFA.

Q. And when you say that DFA charges me approximately $5 a hundredweight for this service, are you describing the spread between what you sell your milk to DFA for and what you receive -- sorry. Are you describing the difference between what you receive when you sell your milk and what you pay to get it back?

A. Yes, that's correct.

Q. Now, when you say you sell your milk to DFA and then buy it back, does the farm -- the milk you process, does it actually get into the possession of the cooperative?

A. A physical possession, no. It's just a paper transfer. It goes from the milk parlor, the measure of the tank, and that milk gets pumped to the plant.

Q. Gets pumped to the plant. There's no
truck involved?

A. No.

Q. It's a pipeline?

A. Yes, a pipeline.

Q. Are you saying that even -- you say for every bad year like the current one, a producer needs two to three years to get back even. This year is, I would say, exceptionally bad. Would you agree with that?

A. I agree. My dad's been in the business for almost 45 years and he's never seen it, that the cost between what it -- the price with what it costs to produce the milk and the price we're receiving, he's never seen that spread this big.

Q. When you say it takes two to three years to get back even, is that based on prior bad years that aren't as bad as this one?

A. Yes.

Q. When -- when was the last bad year, in your recollection?

A. 2006 was kind of tough.

Q. And before that?


Q. Okay. How was 2003 for you?

A. It was a marginal year.
Q. So in 2001, were you able to catch up by, say, 2004?

A. No.

Q. Okay. When do you think things caught up after 2001?

A. 2003 put us a little behind there and 2006 put us a little further behind. 2007, 2008, we were getting close but we still hadn't completely recovered from 2001.

Q. 2008 was actually a historically high year for milk prices, correct?

A. Actually, 2007 were probably higher. We had some historically high prices in 2008, but it wasn't for a sustained period. When you look at the average price over the year, 2007 was actually better than 2008.

Q. So at the end of 2007, were you saying that you were caught up from the downturn in 2001?

A. We were probably caught up for the downturn in 2001, but the slim years in 2003, 2006, we were starting to rebuild from those years.

Q. And if you were just operating a farm, how long would you expect to recover from 2009, if and when it recovers?

A. If we were -- if we didn't have the processing plant, we would have probably filed
bankruptcy before the end of the year.

Q. You're familiar with the other dairies in your area?

A. Yes.

Q. Do you believe your farm situation is any different from the others in your area?

A. On the cow end of it, no. The fact that we have a processing plant, yes. That is different.

Q. I didn't -- I meant to limit that question to the farm side of the operation.

A. Our production is probably a little better than the typical farm.

Q. And the financial situation would be comparable on average?

A. On average, comparable.

Q. And you're not taking any position on any formal proposals here, as I understand?

A. Correct.

Q. But do you believe that the producer-handler regulations, in particular in your order, the Central Order, need to be changed?

A. I do not.

Q. And there's one proposal, Proposal Number 2, that would expand an exempt plant limit to 450,000 pounds of Class I sales. And in testimony that
you weren't here for, the number of cows to reach that
has been variously described between 2 and 300 cows.
You said your operation is a 500 cow operation?
   A. Correct, yes.
   Q. And so an expansion of the exempt plant
limit to 450,000 pounds, would that help you?
   A. No, it would not.

MR. MILTNER: Thank you.

JUDGE CLIFTON: Mr. Docheff, I don't
recall whether you said that both the farm and
the plant are in Longmont. Are they?

THE WITNESS: Yes, they are.

JUDGE CLIFTON: All right. And about how
far is the location of the farm and the plant
from the Denver area?

THE WITNESS: We're 20 miles north of
Denver.

JUDGE CLIFTON: Thank you. Who next will
cross-examine Mr. Docheff? Mr. English. Thank
you.

CROSS-EXAMINATION

BY MR. ENGLISH:
   Q. Good afternoon, sir. My name is Charles
   English. I don't have a lot of questions but I have a
   few.
Do you have neighbors, dairy farmer neighbors --

A. Yes.

Q. -- in your area?

A. Yes.

Q. And are they having trouble staying in business themselves?

A. Yes. Currently there are two that are in Chapter 11 bankruptcy. And I can't tell you the exact finances. They're all struggling.

Q. You have one to two neighbors that one of the two are Chapter 11 who are dairy farming?

A. There's two of them that are in Chapter 11.

Q. But are there other dairy farmers in your immediate vicinity who are not in Chapter 11 right now?

A. Yes.

Q. And when you say, in order to make it possible to continue dairying, the economics of dairy farming require opening a processing plant, does that also mean that in order to stay in dairying, they need to open a processing plant?

A. No. In my particular situation, I had -- I needed to. That was my best option, to open a processing plant.
Q. Do you have any reason to believe that their options are different from yours?
A. If they have the ability to increase cow numbers, they probably wouldn't need to put the processing plant in.
Q. But you don't have the ability to put more cows on where you are now?
A. Correct.
Q. And you didn't want to make the financial investment in the additional herd, correct?
A. Correct.
Q. Do you understand that there is a proposal to have a -- what is it -- a cap of 3 million pounds for producer-handler?
A. Yes, sir.
Q. And you're presently nowhere near that cap, correct?
A. Correct.
Q. Let me backtrack. Are you paying into the pool now?
A. Yes, I am. I'm classified as a distributing plant at the current time.
Q. I'm sorry?
A. A distributing plant I'm classified as.
Q. A fully regulated distributing plant?
A. Yes, sir.

Q. And can you tell us, for the most recent month, approximately -- and you don't have to, by the way -- could you tell us approximately what your pool payment was for the last month?

A. More than I would like.

Q. Okay. But in order to -- you're milking 500 cows, correct?

A. Yes.

Q. But then you say you're selling half the milk to DFA, correct?

A. Correct.

Q. So would it be fair to say that only milk from 250 cows right now are running through the plant, correct?

A. Correct.

Q. Is that somewhere in the neighborhood of 700 to 750,000 pounds a month?

A. About 475,000 pounds.

Q. Okay. I went at the high end of milk production. So 475,000 pounds a month is where you are today?

A. Correct.

Q. And can you add any cows in the existing facility?
A. No. We are maxed out.

Q. So in order to go to a thousand cows, 500 more cows, you're going to have to have a different farm facility, correct?

A. Correct.

Q. And you determined that would have to be in a different location, is that correct?

A. Yes.

Q. How far away?

A. Probably, populationwise, you could probably go 30 to 40 miles east. But in that area there's not very good feed or water resources. So you're looking at 75 to a hundred miles east, around Fort Morgan, Yuma area.

Q. Yuma, Colorado?

A. Yes.

Q. Yuma, Arizona has been -- but this is Yuma, Colorado?

A. Yuma, Colorado, right.

Q. So in order -- if your -- you could, of course, with your 500 cow herd run, I guess, double 475, or 950, through the plant, correct?

A. Yes.

Q. You just don't have the customers right now for that?
A. State that again.
Q. You're processing 475,000 pounds at the plant, correct?
A. Right.
Q. But that's half of your volume, because half the volume is being sold to DFA, correct?
A. Correct.
Q. So if you had the customers, you could actually process -- because you already have twice that much milk, 950,000 pounds, correct?
A. Correct, yes.
Q. But in order to get to 3 million pounds, which is a limit that some people are discussing at this hearing, you would have to triple the size of your herd, correct?
A. Correct.
Q. And that couldn't be on the existing facility, correct?
A. Correct.
Q. And that's exactly the investment you decided not to make in additional cows, correct?
A. Correct.
MR. ENGLISH: I have no further questions, thank you, sir.
JUDGE CLIFTON: Thank you, Mr. English.
CROSS-EXAMINATION

BY MR. CARROLL:

Q. Good morning, sir.
A. Good morning.

Q. I'm John Benjamin Carroll, I'm an attorney for New England Producer-Handlers Association and several independent persons who are owners or processors of milk.
A. Okay.

Q. I think you indicated that you're in a family relationship in this business. Could you expand on that and tell us who's in the business and tell us what they do?
A. My wife and I manage the business. Our oldest son, who just graduated from college, is the herd manager of the cows. And we have a younger daughter and son that are involved. My daughter's in college, my son's in high school, so they help out wherever they can. And then we have about 40 employees that help milk the cows, process the milk, deliver the milk, sell the milk.

Q. And is it part of your business plan to attempt to continue as a family business, give the
opportunity to your children to continue in the tradition of your family?

A. I'm very hopeful. We're the only dairy in Colorado in the fourth generation. And the prospect of my son making it the fifth, I'm pretty excited about that, so I would love to see this thing going.

Q. Well, we all need things like that to get up in the morning for, don't you agree?

A. I agree totally.

Q. Now, directing your attention to the home delivery that you have started. Are you a principal person in home delivery? Are there others that compete with you or is that a market you developed yourself?

A. No, in Colorado there's three other home delivery companies. And we're all basically in the same area.

Q. And when you put your plant up, did you engage in financing of any kind?

A. Yes.

Q. To finance that plant?

A. Yes, sir.

Q. And I don't know that you want to reveal the cost, but if you want to, could you tell us whether that was an expensive investment or not, basically?

A. I revealed it a few minutes ago. It was
about $2 million.

Q. Right. And are you -- is your family or yourself a guarantor on that loan?
A. I am.

Q. If that loan's not paid, what impact, if any, would it have upon you or your family?
A. It would -- I would have to pay for it somehow. If I didn't pay for it, I would probably have to file bankruptcy.

Q. As a citizen of this country, do you believe -- do you have an opinion as to whether it's your right to attempt to enter into a business, and if you fail, fail, and if succeed, succeed, and that the government ought not be in a position deciding whether or not you have that right?
A. I totally agree with that.

Q. And do you need this exemption in order to engage in the business as you designed and planned for?
A. Yes, I do.

MR. CARROLL: That's all. Thank you.

JUDGE CLIFTON: Thank you, Mr. Carroll.

Who will next cross-examine Mr. Docheff?

Mr. Beshore.

CROSS-EXAMINATION
BY MR. BESHORE:

Q. Good afternoon, Mr. Docheff.

A. Good afternoon.

Q. I'm Marvin Beshore, I'm an attorney. I represent National Milk Producers Federation and Dairy Farmers of America.

A. Okay.

Q. Just one question at this time, I think, or one area. The 175 wholesale accounts which you have indicated you service at the present time, can you tell us about those, what types of accounts they are?

A. The majority of them, amazingly, are coffee shops and small restaurants. We have a few independent grocers, I want to say mom-and-pop grocers, I don't know if that's the right term. Family grocers. There's one in Berthoud, which is a town north of us. It's been in the family two or three generations.

There's a couple of them in Fort Collins, three of them in Boulder we have. Just independent, not chain stores. Lucky's Market, Haye's Market, Beaver's Market. Geez, I'm drawing a blank here. That's the gist of it. But the biggest percentage are restaurants, coffee shops, that nature.

Q. Now, you've just been operating since March of 2008 --
A. Correct.

Q. -- as far as your processing business is concerned? Who was supplying those wholesale accounts prior to your obtaining that business?

A. It was a wide variety in Colorado. We have Sinton's Dairy, Robinson, Meadow Gold, then Longmont Dairy Farm, Morning Fresh Dairy Farm, Royal Crest. And to tell who each of them were, it was a mix of every one.

Q. And are the Sinton's and Meadow Gold, Royal Crest, those are all pool handlers?

A. Correct.

JUDGE CLIFTON: May I interrupt? Would you spell Sinton's? I'm not sure we've had that.

THE WITNESS: S-i-n-t-o-n apostrophe S.

JUDGE CLIFTON: Thank you.

Q. I think, is Longmont a producer-handler?

A. Yes, it is.

Q. Are any of the others?

A. Morning Fresh.

Q. Morning Fresh is also a producer-handler?

A. Yes.

MR. BESHORE: Your Honor, I do not have any other questions for Mr. Docheff at this
time. However, my DFA representative, Mr. Hollon, who has been at the hearing throughout is not in the room at this time. There's certain business, non-hearing business, which he must be taking care of, which he is taking care of and he's out of the room. So he hasn't been able to hear Mr. Docheff.

I've not been able to speak with him concerning his testimony. I would like the opportunity to speak with him to determine that. And I don't know that we have any other questions, but you know, in the event that he might have some, I would like that opportunity to -- before Mr. Docheff is completed.

JUDGE CLIFTON: Don't leave the podium yet. Mr. Docheff, what is your current plan as to when you would leave the room? Oh, good. Mr. Hollon just walked in the room. That may solve the problem. But go ahead, Mr. Docheff, and tell me your plan as to when you would depart the room.

THE WITNESS: I have a flight leaving at 3:30, so I need to leave by about 2:00.

JUDGE CLIFTON: Or earlier, actually.

THE WITNESS: Okay.
MR. BESHORE: I'll take the opportunity to consult with Mr. Hollon immediately.

JUDGE CLIFTON: Great, all right.

MR. BESHORE: Thank you. I don't have any other questions at this time.

JUDGE CLIFTON: Thank you, Mr. Beshore, we'll see you again when you've had an opportunity to consult.

All right. Who next has questions for this witness? It's a very concentrated statement. I'm still digesting it. Is there anyone else that has some particular questions right now? Mr. Rower, do you?

MR. ROWER: No, your Honor.

JUDGE CLIFTON: Thank you. All right. Why don't we just a -- I think Mr. Beshore and Mr. Hollon will be fairly brief. If they would be the only other ones cross-examining, I would like to have that before we do anything else. This time, try not to go too far, this truly is like a five-minute stretch break, would take us to 12:30. Do you have another suggestion, Mr. Miltner?

MR. MILTNER: My only suggestion is starting another witness before lunch. And
if -- if Mr. Beshore has anything or if he needs
more time --

    JUDGE CLIFTON: Mr. Beshore, would you
come to the podium? No one else had any
cross-examination, wouldn't you know.

    MR. BESHORE: Well, I do need some more
time. Mr. Hollon has just -- has just now seen
Mr. Docheff's statement. And we need some
time --

    JUDGE CLIFTON: All right.

    MR. BESHORE: -- just to get or check
some information.

    JUDGE CLIFTON: To get some basic
information, is what he said. Okay. If this
witness should be leaving the room in a half
hour or 45 minutes, something like that, then we
could have another witness for a short time and
then interrupt that witness. Mr. Ricciardi, a
suggestion, please?

    MR. RICCIARDI: Your Honor, my suggestion
is that what we do is we give Mr. Hollon the
opportunity to read the statement, we take a
five or ten minute break, that should be
sufficient. If they have questions, they should
ask them so that Mr. Docheff, since he came here
on his own, should be allowed to wing his way back to Colorado. Then we could take our lunch break and start our next witness.

JUDGE CLIFTON: Mr. Miltner, would that work for you?

MR. MILTNER: It would, your Honor.

JUDGE CLIFTON: All right. It would for me, too. Let's -- okay. You all can have ten minutes, because it will take Mr. Hollon that long to digest this very concentrated statement and talk with Mr. Beshore. So please be back, ready to go at 12:36.

(A recess was taken from 12:26 to 12:37.)

JUDGE CLIFTON: All right. Let's go back on record. Back on record at 12:37.

Mr. Beshore?

MR. BESHORE: Your Honor, Mr. Hollon is still on the phone with his office, but I do have a question for clarification that I want to ask of Mr. Docheff.

BY MR. BESHORE:

Q. You referenced the fact that formerly you had a 75 cent per hundredweight account -- or amount with the cooperative, and that has recently gone to a $1.75 per hundredweight?
A. Over the last two to three years it's risen. You know, I realize fuel costs and stuff like that. But historically, it had been 65 to 75 cents a hundredweight. And the last, probably, year, we've been as high a $1.95, but right around $1.75 per hundredweight.

Q. Now, are you referring to the capital account --

A. No.

Q. -- with the cooperative?

A. No. The charges, hauling charges, our intermountain haul charge, our balancing plant costs, promotion. Which I -- you know, I'm going to have that cost no matter what. 10 cents administrative fee.

Q. Okay. I think Mr. Miltner may have clarified this, but I want to make sure.

When you say DFA charges me approximately $5 a hundredweight for this service, you're comparing the price that you're charged for the Class I milk used at your processing plant, that's the top number, is that correct?

A. No. For all the milk that we put through our plant that we get from DFA, there's about a $4.90 charge per hundredweight.

Q. Is some of that milk not Class I?
A. Some of it is Class II.

Q. Okay. But you're comparing that amount to the, what, the blend price you receive?

A. No. That's on the bill that I get for that milk, that's what the charges are. There's a service charge of $2.70, there's a location adjustment of 45 cents. And then basically the difference between what they charge and what I get, there's about $1.75 in there.

Q. Did you take into account the equal receiving credit you get?

A. I'm not familiar with that.

Q. Did you look at all the entries on your invoice?

A. Okay.

Q. Did you?

A. I don't understand the equal receiving charge.

Q. Okay. If you're credited an amount on your invoice for taking a level amount of milk on a daily basis --

A. Right.

Q. -- okay? Are you aware of that?

A. They failed to put it on my bill if I qualified for it.
Q. Okay. So that's the top -- the top number -- well, how do you get the $5? You said it was $2.70 -- 45 cent location adjustment, that's set by the Federal Order, right?

A. Correct.

Q. Okay. Now, that's not $5. What's the rest of the charges? Is that the basic differential, Class I differential under the order?

A. There's a service charge, and that's how it is, service charge of $2.70 a hundredweight.

Q. I understand that. Then you said there's a 45 cent location differential?

A. Right.

Q. Okay. Now, that's $3.15.

A. And then there's another $1.75.

Q. Is that the Class I differential under the order?

A. No, I wouldn't classify it as a Class I differential. It's the price that I'm getting paid for my milk as a member. And then there's about an 80 cent premium that I'm paying as a processor. So there's $1.75 -- $1.50, $1.75 there.

Q. That's where the $1.75 comes from? You're being paid an 80 cent premium as a member.

A. No, deduct of 75 cents. We have an -- an
intermarket haul charge and a balancing plant cost that
is coming off our federal -- minimum Federal Order
price.

Q. Okay. But the two -- 2.70 over -- 2.70
service charge, you said, is what you charged?

A. Correct.

Q. Plus the 45 cent location differential?

A. Correct.

Q. Correct?

A. Correct. I'm digging a little deep
there. Well, not -- I don't think I'm digging a little
deep. I'm looking at the figures of what they're
selling their milk for and what they're paying me for,
and there's $1.50 to $1.75 there.

Q. Okay.

A. Enough said.

Q. You understand you get paid a blend
price. But when you're buying it, you're buying it at
the class value?

A. Yes, I understand.

Q. Okay.

MR. BESHORE: I don't have any other
questions for Mr. Docheff at this time.

JUDGE CLIFTON: Thank you, Mr. Beshore.

Is there any other cross-examination? There is
none. Mr. Miltner.

MR. MILTNER: Your Honor, I don't have any questions, unless Mr. Docheff has anything he would like to state before he leaves the stand.

A. Well, I would urge the USDA to leave the rules as they are. The 3 million cap, granted that's not going to affect me, it still is the United States of America. And if my son wants to eventually milk 2,500 cows or 25,000 cows or drop back to 200, it bothers me that the government can tell him if he can do that.

I do not like the grandfather clause, that if you were a handler in 2008 you could stay that. Because if that is in effect, then that would exclude me from this. So I would urge you to throw that out. And that's all I have to say.

MR. MILTNER: Your Honor, we would move admission of his statement, please.

JUDGE CLIFTON: Is there any objection to the admission into evidence of Exhibit 83, which is Jim Docheff's statement? There is none, Exhibit 83, 8-3, is hereby admitted.

MR. MILTNER: Thank you. And thank you very much, Mr. Docheff.

JUDGE CLIFTON: I think it's helpful that
Mr. Vetne's client had not arrived or Mr. Docheff might not be able to take that plane, so that worked out well. Is there anything else? Well, let's decide who will testify when we come back from lunch before we go to lunch. Do you have another witness right after lunch, Mr. Miltner?

MR. MILTNER: We do, your Honor, Mr. Kreider is here, and his statement was distributed first thing this morning to the attorneys, to USDA, to the court reporter. And I believe I gave one to your Honor as well. If I did not, I reserved one that I could give you now.

JUDGE CLIFTON: I think I do not have it. How does he spell his name?

MR. MILTNER: K-r-e-i-d-e-r.

JUDGE CLIFTON: Good.

MR. MILTNER: Thank you.

JUDGE CLIFTON: That will be our first witness when we come back. Mr. English?

MR. ENGLISH: We didn't begin the day the way we had begun most days, your Honor. It would be nice for all of us to have had the same opportunity everyone else has had, to know the
rest of the witnesses who expect or want to or
need to or are available to testify today.

JUDGE CLIFTON: Okay. We know for sure
that if Mr. Sapp comes, Jeff Sapp --

MR. VETNE: Your Honor --

JUDGE CLIFTON: Do you have an update,
Mr. Vetne?

MR. VETNE: Yes, he will not be coming.
He's either got a stricter doctor or a more
compliant patient than Mr. Ricciardi.

JUDGE CLIFTON: So not at all? Okay.
Thank you. I'm sorry that he's unable to
attend.

Now, the category that I have,
Mr. English, is six AIDA witnesses, but you
would like names.

MR. ENGLISH: We've been providing names,
usually many days in advance, your Honor. It
would be helpful to have an idea. I think it
would help preparation.

JUDGE CLIFTON: Very fine. Is such a
list available now Mr. Miltner?

MR. MILTNER: Your Honor, today we have
Mr. Kreider, and Mr. Heine Hettinga,
H-e-t-t-i-n-g-a. And then the others are either
in transit or would be available by tomorrow or Friday. And tomorrow we expect Mr. Tony Bostwick, B-o-s-t-w-i-c-k, of Braum's Dairy, B-r-a-u-m.

Tomorrow our economists will be here and I think it probably would behoove us to try to get them on, Dr. Knutson and Dr. Knoblauch.

JUDGE CLIFTON: You've spelled those before for me before, would you mind doing it again?

MR. MILTNER: Sure, K-n-u-t-s-o-n, K-n-o-b-l-a-u-c-h.

JUDGE CLIFTON: All right. Good. What I know, in addition to the AIDA witnesses -- let's see. Do we know for sure, Mr. Miltner, that Mr. Boyd will be testifying at all?

MR. MILTNER: He will not be available this week.

JUDGE CLIFTON: But might be if we go into next week?

MR. MILTNER: We don't know.

JUDGE CLIFTON: Oh. And what else I know is that Dr. Yonkers is available to testify today and tomorrow, but only up to through noon Friday. And I also know that we have not yet
had the cross examination of Mr. Carman. So what else should we all know?

MR. MILTNER: We have Sally Keefe, K-e-e-f-e, from Aurora Organic Dairy; Warren T-a-y-l-o-r, T-a-y-l-o-r, of Snowville Creamery; and Tim Button, B-u-t-t-o-n, and Charles Sharpe, S-h-a-r-p-e, of Heartland Dairy. And as to the gentlemen from Heartland, we need to advise them whether to be here Friday or Monday.

JUDGE CLIFTON: Now, is that two people from Heartland?

MR. MILTNER: Yes.

JUDGE CLIFTON: Both Sharpe and Button?

MR. MILTNER: Yes.

JUDGE CLIFTON: And either Friday or Monday, but they need to know.

MR. MILTNER: And we can -- yes. I'll try to find out over lunch what their schedules are and when we could get them here.

But I think it's -- I think it's highly likely we are going to go past Friday. Would counsel agree that we are, in fact, going to go past Friday at this point?

MR. ENGLISH: I believe I made my views crystal clear yesterday. I thought yesterday we
are going past Friday. I have not changed my views.

JUDGE CLIFTON: In spite of the Judge's hope, deep hope?

MR. MILTNER: I will say maybe for Mr. English as well, despite all of our hopes.

MR. ENGLISH: I agree with Mr. Miltner.

MR. MILTNER: Please let the record reflect that Mr. English has agreed with me. And that will give us some flexibility in advising the folks from Heartland, and we appreciate that.

JUDGE CLIFTON: All right. Mr. Rower?

MR. ROWER: We also had Carolyn Orr and Mr. Metzger, I believe, Erick Metgzer was interested in testifying.

JUDGE CLIFTON: And he's here, Mr. Metzger is here. I would like to work him in today. And he said he's flexible, and if we don't get him today, he doesn't want to take the place of someone who has a plane to catch. Which is very helpful to us all. Mr. English?

MR. ENGLISH: Can I have clarity then, your Honor? I understand we have Kreider, Kreider Dairy. I heard we have Heine Hettinga
for today. The other names I wasn't sure. Any of them available for today in terms of what we prepare for during lunch?

MR. RICCIARDI: No.

JUDGE CLIFTON: Mr. Ricciardi says no.

MR. RICCIARDI: They will not be -- we can make some decisions on what we do at that point, whether or not we proceed with the continued examination of Carman, whether or not we get Dr. Yonkers on, perhaps Mr. Metzger can also testify at that point. Let's see where we go after Messrs. Kreider and Hettinga.

JUDGE CLIFTON: Okay. Good.

MR. ENGLISH: Thank you for that clarity.

JUDGE CLIFTON: I think we will not run out of witnesses, which is great. All right. I would like to take an hour now for lunch. It's almost 12:55. Please be back at 1:55 ready to go.

(A recess was taken from 12:55 to 2:05.)

JUDGE CLIFTON: All right. We're back on record at 2:05. Mr. Miltner?

MR. MILTNER: Thank you, your Honor.

Mr. Ron Kreider is taking the stand.

JUDGE CLIFTON: Hello. Thank you, and
please be seated, Mr. Kreider.

THE WITNESS: Thank you, your Honor.

JUDGE CLIFTON: If you'll state and spell your name for us?

THE WITNESS: My name is Ron Kreider, R-o-n, K-r-e-i-d-e-r.

JUDGE CLIFTON: Thank you. If you'll raise your right hand, I'll swear you in.

RON KREIDER

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

DIRECT EXAMINATION

BY MR. MILTNER:

Q. Good afternoon, Mr. Kreider.
A. Good afternoon.

Q. You have a prepared statement which has been distributed in the room, and your Honor indicated that we marked it as an exhibit.

MR. MILTNER: And I apologize, your Honor, I wasn't at the statement when you gave the number. What is it now?

JUDGE CLIFTON: 84.

(Exhibit 84 was marked for identification.)

MR. MILTNER: 84, thank you.
Q. Mr. Kreider, if you want to read your statement for the record? And then I'll have some follow-up questions for you.

A. Okay. Thank you.

My name is Ron Kreider. I own and operate Kreider Farms which is located in Manheim, Pennsylvania in Lancaster County. Kreider Farms was started by my grandfather over 70 years ago. Our family has continually operated the farm since that time and became a producer-handler in 1972 when my father and uncle opened our milk processing plant. We also produce and distribute our own Kreider Farm eggs. Our business and our farm brand is well-known in Lancaster County. Kreider Farms is a member of the American Independent Dairy Alliance and opposes elimination of producer-handler status.

Kreider Farms does not in any way create disorderly marketing conditions in the area in which we operate. We grow our own crops, milk our own cows, bottle and make ice cream from our own milk and distribute it in our own trucks. When we became a producer-handler in 1972, we were processing milk from 400 cows. Today, our plant processes milk from about 1,400. We have worked hard to keep our farms independent and economically viable. We have a
diversified operation that includes an egg business as well as our milk business. We also provide farm tours for fun and for education about our farming operations.

We sell the majority of our milk to small independent local supermarkets in Pennsylvania. We are a price leader in the dairy case and our market is based on local recognition of our farm brand, our reputation for high quality milk, which has been built over many years, and consumer desire for readily identifiable local milk. Data provided for this hearing suggests that we are one of the largest seven producer-handlers in the country. To put this into perspective, our customer list fits on one page; half of our customers are less than 350 gallons per week.

In addition, we produce a substantial amount of kosher milk for Jewish communities in Maryland, Pennsylvania, Washington, D.C. and New Jersey. Kosher milk must be certified as conforming to all aspects of Jewish law. Many children from this community also participate in our farm tours during the summer. We have a mashgiach who lives on the farm to supervise our milk production. He is present at every milking, monitors our cows and their health care to assure continuous kosher status, witnesses the filling of the milk tankers and supervises transportation and
bottling. All of these requirements must be met on a continuous basis to maintain our kosher certification. Our certifying authority is the Star-K Kosher Certification and Rabbi Tzvi Rosen. The kosher milk we provide is sold under the Pride of the label -- I'm sorry, the Pride of the Farm label. As explained in the letter from Rabbi Rosen attached is my statement. Vertically integrated producer-handler operations and are our farm specifically are especially well suited to the production of kosher milk.

I would like to address two points - why I believe that the existing producer status gives us an equitable opportunity to exist in the milk market and why Kreider Farms sales in our area cannot be considered to be disruptive. First, with respect to our opportunity to exist. My father and uncle built our processing plant to provide Kreider Farms with the opportunity to bottle and sell our own milk. The purpose was to keep our local farm operation going and to ensure its economic viability. We don't buy milk from anyone else because we want to have complete control of our milk supply. Being a member of a pool plant with access to other milk would therefore be of no benefit to Kreider Farms. In order to meet our contractual obligations to customers, we do need to
balance our own production. We make some ice cream, and we also sell our extra milk as required under the regulatory constraints of the producer-handler exemption at whatever price we can get for it – always less than the blend price.

We get our milk from our cows at the cost of production, not a regulatory price set by the FMMO system. I believe that our production costs are higher than average given our production system.

Kreider Farms can in no way be viewed as a disruptive market force or as a threat to the large cooperatives and processors that dominate the regulated market. We have certainly grown over the years (from milking 400 cows to 1400) but in a slow and steady fashion essential to our economic survival. No one is asking us to expand our farm or processing plant to provide a captive supply for a major chain, nor would we expect them to. We operate in a niche market – our local region – and our customers are people who are willing to pay above-average prices for the value they perceive in the milk we produce and sell to them.

Just this month, Kreider Farms has been forced to lower its price to an existing customer to respond to a price from a Dean Foods plant. This customer reported a price from Dean at 7 cents a gallon.
below the Kreider price. We have been able to respond partially, but not completely on price, and are waiting to see if we can keep the account.

We do not believe as a matter of national policy that the government should close the door to the opportunity for other farms like us to become producer-handlers, nor that it should impose an artificial size cap that is very low in today's marketplace. A 3 million pound cap is very low in today's marketplace. Had a size cap been imposed on our original producer-handler operation when we were 400 cows, we would not exist today, neither would the jobs, tax revenues and economic value provided by our farm operation. And a 450,000 pound cap for an exempt plant is simply unworkable for a business such as Kreider Farms.

I'm aware that earlier testimony in the proceeding was offered on behalf of the Pennsylvania Department of Agriculture in support of a cap on producer-handlers at 2 million pounds of monthly Class I route disposition. I was unaware of this proposal prior to the presentations of this proposal, and immediately contacted our state Secretary of Agriculture, Dennis Wolff. He was equally surprised to learn that we would be adversely affected by this proposal, and has said
that he does not support a cap that would restrict
Kreider Farms current operations. To me, this
demonstrates a widespread lack of understanding about
the actual impacts of the proposal under discussion.

We respectfully request that USDA deny
the NMPF/IDFA petitions and make no change to the
existing producer-handler provisions. Thank you.

BY MR. MILTNER:

Q. Now, Mr. Kreider, at the end of your
statement is a -- is a two-page letter from Star-K
Kosher Certification. It's dated April 30th, 2009, and
addressed to Judge Clifton. A copy was provided to you,
and it's -- although there's no signature, it's from
Rabbi -- is it Tzvi, is that how it's pronounced? Tzvi
Rosen, and Tzvi is spelled T-z-v-i. To your knowledge,
was this letter actually mailed to Judge Clifton?

A. No.

Q. Okay. Did you get your copy on
April 30th --

A. Yes, I did.

Q. -- or thereabout?

A. Yes.

Q. Was it provided to you with the intention
that it be appended to your statement and submitted as
part of the record?
A. That's correct.

Q. And actually, you had asked Rabbi Rosen or another one of the rabbis from Star-K to come to the hearing, is that right?

A. Yes, we did.

Q. And were they able to attend?

A. No, they were not.

Q. They had other obligations during the period of the hearing?

A. That's correct.

Q. Can you summarize what the letter conveys, your understanding of what Kreider Farms has to go through to obtain this particular kosher certification?

A. Yes, this Pride of the Farm label goes to a strict Jewish population and it requires fully supervised product and inspection. They're there for every surgery that we do on cows and live right on the farm. And also with milk processing, there's specific rules for milk segregation at the milk plant, and so I think the overall intent in what he is trying to display, this is very difficult to develop a brand for this population and run the milk through a large dairy, because they would have to turn the machines on for, you know, a few minutes and shut them down and disinfect
them, wash the system down.

Q. And you have certifying rabbis on your farm, is that right?
A. Yes, that's correct.

Q. Do you have rabbis at the plant as well?
A. The same rabbi, which I think is -- technically is a mashgiach, but he travels back -- he travels the one mile between the milk plant and the dairy farm to do the overall daily supervision.

Q. He has to supervise at the farm and the plant?
A. That's correct.

Q. And there's no distinction among any different loads of milk or shipments of milk that you bring from your farm to your plant, it's all equally observed by Star-K?
A. That's correct.

Q. Now, if you were a plant acquiring milk from many sources, you've described that they would have to shut down the plant to receive kosher milk and run it through, is that -- is that your description?
A. Yes.

Q. And that's some of what Rabbi Rosen describes in this letter?
A. I think that was the intent, for him to
spell out all the extra layers of inspection that --
that he requires with this Pride of the Farm label.

Q. And so it's not that it would be
impossible for a pool plant to do it, but there is a
certain amount of efficiency that's achieved through the
producer-handler doing that?

A. That's correct.

Q. At the bottom of page 1 of your
statement, I want to point out what was a typographical
error. And I think you read it as typed and I want to
make sure the record is clear. It says, I would like to
address two points - why I believe that the existing
producer status gives us an equitable opportunity.
Should that read, producer-handler status?

A. That's correct.

Q. Okay.

MR. MILTNER: I suppose, your Honor, we
could make that change on the record copy and
have Mr. Kreider initial it.

JUDGE CLIFTON: Yes. I knew what he
meant, but I also noticed that, and I would like
it to be reflected on Exhibit 84. This is
page 1, the next to the last line. Producer
should read producer-handler.

And, Mr. Kreider, before you leave the
room, I would like you to initial that change.

Ms. Fisher will make it on the record copy.


BY MR. MILTNER:

Q. Another -- well, first of all, Ron, the
statement you read, was that prepared by you?

A. That's correct.

Q. Okay. And other than word processing and
things of the like, those are your words and your
statements?

A. That's correct.

MR. MILTNER: And, your Honor, could you
hand the witness Exhibit 20?

JUDGE CLIFTON: Yes.

MR. MILTNER: Thank you.

Q. Mr. Kreider, you've seen that page
before, correct?

A. Yes.

Q. Did you and I have a chance to look at
that page together --

A. Yes.

Q. -- after you arrived here?

A. Yes.

Q. And you are a sworn witness under oath.

We want to be not just honest, but also as clear as we
can be, right?

A. That's correct.

Q. You said in your statement you believe you're one of the seven largest producer-handlers in the country?

A. That's correct.

Q. Look at that chart at the top. And it breaks producer-handlers into size categories. You can see that producer-handlers between 2 million and 20 million pounds, there are seven of them in March 2009.

A. Yes.

Q. Now, you understand you're under no obligation to disclose confidential information about your business, right?

A. Yes.

Q. But we want to be clear, right?

A. That's correct.

Q. Okay. To that extent, you're going to have to share a little something about your business. Depending on -- every plant, including producer-handlers, has various sales each month, right?

A. That's correct.

Q. And depending on any particular month, is it possible that you would fall into one of these
categories or another and not stay in the same category each month?

A. Yes, that's correct.

Q. Thank you. If you can hand that back to Judge Clifton?

I want to ask you about your operation when you -- when you became a producer-handler. In 1972, what was your involvement with the operation, if at all, back then?

A. Well, actually, I would process milk occasionally.

Q. Okay. Do you have a bit of a recollection about what the farms looked like in Lancaster County back in that time period?

A. Well, fortunately, not a lot has changed. There are still a lot of small farms.

Q. Not as many?

A. Not as many.

Q. In 1972, was a 400-cow farm in Lancaster County extremely large?

A. It was one of the largest.

Q. And today with 1,400 cows, is it still relatively large for that area?

A. Yes.

Q. So in 1972, compared to everybody else,
you guys were pretty darn big?

    A. That's correct.

    Q. So in that respect, your relative size
over the past 37 years hasn't changed so much, even
though you've added cows? You were relatively big then
and you're relatively big now, is that right?

    A. Yeah, that's a good point. I would view
us as being about the same size relative to the rest of
the county.

    Q. I know this term is used a lot. I don't
want to try to define a term everybody knows. In your
third paragraph, second sentence, you say, we are a
price leader in the dairy case. What do you mean by
we're a price leader?

    A. We are a higher quality milk, we feel.
We're a local, sustainable, grain company which demands
a higher price. We -- we have a quick-chill glycol
chiller on the farm to chill the milk down to 33 degrees
in eight seconds. There's just things like that that we
do to try to produce a higher quality milk, as long as
the -- as well as what I just mentioned, where a lot of
local consumers are looking for local, sustainable
farms, and it's a benefit to them to know exactly where
their milk comes from, and they come to the barn to
visit.
Q. When you say price leader, you're not the cheapest milk in the dairy case?

A. We're not the cheapest milk in the dairy case. In a lot of instances our milk is priced at a premium to the store brand price.

Q. What is that premium to the store brand, usually?

A. 30, sometimes greater. When it gets higher than that, we try to convince the store to lower it.

Q. You also state on page 2 of your statement that you believe your production costs are higher than average given your production system. Are you talking about your farm costs of production there?

A. Yes.

Q. Why do you believe that you have a higher cost of production? What do you do that results in that higher cost?

A. Well, all the things associated with the kosher business add cost, being 100 percent rbST free, adds cost. And the -- some of the extra things we're doing, like I mentioned the milk chilling and putting time and effort into innovative manure technology, to be more environmentally friendly and promote the green status.
Q. Later on in that page, you say, had a size cap been imposed on our original producer-handler operation when we were 400 cows, we would not exist today. And what you are saying is, if they had capped you at that level, then you don't believe you would have been able to survive until today?

A. No, absolutely. I'm sure we would be out of the milk processing business.

Q. Okay. I just wanted to make sure. When you talk about that size cap, you're saying had they put a cap on then. You're not talking specifically about anything that's been proposed today?

A. That's correct.

Q. I want to ask you about your statement about the Pennsylvania Secretary of Agriculture, Dennis Wolff. You had a conversation with Secretary Wolff?

A. My marketing director had a conversation with him.

Q. So when you say I -- I immediately contacted our state Secretary of Agriculture, that's a Kreider Farms reference. You had somebody in Kreider Farms, you did not have a personal conversation?

A. That's correct.

Q. And the individual at Kreider Farms relayed to you what he had heard from the Secretary?
A. That's correct.

Q. Mr. Kreider, you're a member of the American Independent Dairy Alliance, is that right?

A. That's correct.

Q. Give us just a quick description of what that organization is.

A. It's a group of producer-handlers and one exempt plant that formed a group to try to keep things as they are.

Q. And common interest among that group is opposition to the producer-handler status change proposals?

A. That's correct.

Q. And you know that AIDA as a group has submitted three proposals in this hearing?

A. Yes.

Q. The first proposal, which as I recall is Proposal 23, deals with exempt from pool obligations, the own-farm production of any handler regardless of their status as a producer-handler or not. And if the Secretary chose -- found there was a need to make changes to the marketing orders, would an adoption of that proposal be acceptable to Kreider Farms?

A. Yes.

Q. Proposal 24, which AIDA submitted, deals
with the exemption from pool obligations for volumes of milk retailed, sold at retail by a producer-handler. Does Kreider Farm currently sell any milk to retail customers, direct to consumer through home delivery or farm store or otherwise?
   A. No.
   Q. And the last deals with a proposal to adopt individual handler pools. And do you have a general understanding of how the individual handler pool would work?
   A. Yes.
   Q. And if the Secretary found a need to make changes to the marketing order, would Kreider Farms support the adoption of individual handler pools?
   A. Yes, we would.
   Q. You're not an expert in marketing order or marketing order regulation, are you?
   A. No.
   Q. Let me reflect the witness has also smiled ear-to-ear as he said that.

   JUDGE CLIFTON: Yeah, big grin.
   Q. And there are economists, people with backgrounds in Federal Orders that will be testifying about specifics about regulatory language. Do you understand that?
A. Yes.

Q. And asking you specific questions about regulatory language probably wouldn't give much, is that right?

A. That's absolutely correct.

Q. Kreider Farms is located in Federal Order 1, that is right?

A. That's correct.

Q. Do you see any need to change the producer-handler regulations in Order 1?

A. No, I do not.

Q. And there's also a proposal to -- a couple of proposals that would put a 3 million pound cap on existing producer-handlers and not allow any new producer-handlers and grandfather -- grandfather in those existing producer-handlers. Would you support any of -- any of those -- any of those proposals? Would they be workable for Kreider Farms?

A. No.

MR. MILTNER: Your Honor, I may have some redirect, obviously, but I don't believe I have any questions for Mr. Kreider right now.

JUDGE CLIFTON: Thank you very much, Mr. Miltner. Who will begin the cross-examination of Mr. Kreider? Mr. English.
Thank you.

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Charles English. Good afternoon, Mr. Kreider.
A. Good afternoon.
Q. Among others, I represent the Pennsylvania Association of Milk Dealers. Are you a member of the Pennsylvania Association of Milk Dealers?
A. Not at this time.
Q. Yesterday, it was sort of suggested that the Pennsylvania Association of Milk Dealers had not consulted with you about their position. Since you're not a member of the association, does it surprise you if they didn't consult you about their position?
A. No, it doesn't. And they also didn't remind me when my membership dues weren't paid either.
Q. When were you last a member of the Pennsylvania Association of Milk Dealers?
A. I can't answer that exactly.
Q. Was it last year?
A. I'm not sure.
Q. When did you join AIDA?
A. Within the last year.
Q. Do you know when it was formed?
A. I don't have that date in front of me, no.

Q. Was it in 2008?
A. No.

Q. So it was the last several months?
A. 2009, yes.

Q. Do you pay dues to AIDA?
A. I'm not sure what the dues structure is. It just formed.

Q. Have you paid any fees to date?
A. No, I did not.

Q. Other witnesses, both entities who are regulated and a number who are not presently regulated, have indicated an estimate of what the pool payment would be, on average, round numbers. Have you made any such estimate of what would be required if you were a regulated handler?
A. No, I have not.

Q. I, too, like your counsel, really am not looking for very specific information, especially when it comes to confidential information. I'm not trying to get at that, but your counsel opened the door just a little bit by asking you the question about Exhibit 20, but I'm going to be as general as I can.

Would it be fair to say that the Class I
operation -- the Class I pounds operating through your plant is less than 3 million pounds per month?
   A. That's correct.
   Q. You said your customer list fits on one page, half of your customers are less than 350 gallons per week. Can you tell us the approximate size of your largest customer, per week?
   A. Our largest customer is the Jewish kosher business, which is significantly larger than the number two customer.
   Q. Is that sold through one distributor?
   A. I'm not sure.
   Q. Do you know that there are other entities in the fluid milk business who are also kosher, produce kosher milk products?
   A. Producer-handlers?
   Q. Other entities, whether or not they are producer-handlers.
   A. Yes.
   Q. Do you know any of the names of those entities that are -- that put up a kosher product?
   A. No, I don't.
   Q. Would it be fair to say -- let me ask this. You don't sell in New York City?
   A. I think some of this milk does go into
New York City, but once again, like previous
testimonies, we can't track where every gallon of milk
goes when we're selling milk to distributors.

Q. Do you know that there are other kosher
milk products being sold in New York City, other than
your own?

A. Well, kosher is a very general statement.
There's a different certification of kosher, but if
you're using kosher as a general statement, that's
correct.

Q. Now, you talked about Star-K Kosher
Certification. Are there other certification -- kosher
certified organizations?

A. Of Star-K?

Q. Are there entities -- well, first of all,
does Star-K, to your knowledge, certify other milk or
dairy products?

A. I learned today that they do have another
plant. So if the information I looked at was correct,
yes, then I am aware of that.

Q. Do you know what that other plant is that
they certified?

A. I think it's the plant -- I'm sorry, the
farm in our group, Heartland Creamery.

Q. Okay. So they aren't limited to central
Pennsylvania or southeastern Pennsylvania, are they, if they are also certifying Heartland, which is in Missouri, right?

A. That's correct.

Q. Okay. So it is possible that Star-K is also certifying product from New York, correct?

A. Not with the Pride of the Farm label.

Q. I see. So the Pride of the Farm is a specific kosher label?

A. I really can't -- I'm also not an expert in the Jewish certification, labels and processes.

Q. Has anyone told you that a witness who has already appeared at this lengthy proceeding has testified that they, too, put up a kosher milk product produced in New York state?

A. I don't remember the details of that testimony.

Q. Is it your testimony that because you put up kosher milk, that is one reason why producer-handler status should be maintained?

A. Theoretically, that's correct. It just happens to be a part of our business model. But if we lose the kosher business, we're not going to -- we're going to continue as an entity.

Q. And are you aware that you compete,
whether it's you or your distributors, for sales in New York and New Jersey with kosher milk products from regulated operations?

A. Yes, I'm aware. However, they're competing with a different product. They're competing with this highly supervised kosher symbol, to my knowledge.

Q. You don't know whether they're highly supervised as well?

A. My understanding is that this is a unique brand.

Q. Are there -- hard to put it this way. Are there sort of competing kosher certifying organizations?

A. That's my understanding.

Q. And so another kosher certifying organization may also have its own strict standards, correct?

A. It's possible.

Q. Just a couple more questions, sir, and I thank you for your time.

You mentioned having been forced to lower your price to an existing customer. Is that customer inside Pennsylvania?

A. Yes.
Q. And is the Dean Foods plant against whom you're competing also from inside Pennsylvania?
A. Yes.

Q. And Pennsylvania maintains a minimum pricing system for milk produced, processed and sold in Pennsylvania, correct?
A. That's correct.

Q. And so if a customer reported price from Dean at 7 cents a gallon below the Kreider price, then the Kreider price had to be at least 7 cents above the Pennsylvania minimum price in order for the Dean Foods price to be legal, correct?
A. Are you talking about just the specific price on whole milk?

Q. You understand that Pennsylvania Milk Marketing Board maintains and publishes monthly a schedule of minimum prices charged to wholesale customers within Pennsylvania, correct?
A. Correct.

Q. And this sale is within Pennsylvania, correct?
A. That's correct.

Q. And your plant's located in Pennsylvania, correct?
A. That's correct.
Q. Is the Dean Foods plant located in Pennsylvania?
A. Yes, it is.
Q. And that schedule that Pennsylvania puts out every month for minimum prices for wholesale is broken down by product, correct?
A. That's correct.
Q. By size of product, correct?
A. That's correct.
Q. Okay. So my question is, is it not the case that the price that Kreider was charging prior to Dean -- at least a customer reporting a price from Dean at 7 cents a gallon below the Kreider price -- does that not mean that the Kreider price was at least 7 cents a gallon higher than the minimum regulated price for wholesale sale in Pennsylvania?
A. No, that's not correct. What I based that statement on was a document, was a comparison that we made on the total account, including drinks, orange juice. And what I simply did was took the overall package and calculated what the per gallon of milk difference would be.
Q. So -- so were you selling things other than milk --
A. Yes.
Q. -- to this customer?
A. Yes.

Q. And Dean was selling products other than milk to this customer, correct, or was offering to sell?
A. Offering to sell, that's correct.

Q. And you have looked at sort of the total value of the whole deal and divided it out and come up with 7 cents a gallon on milk, is that what you've done?
A. Yes.

Q. And for all you know, Dean Foods was being very aggressive on a nondairy product within that total value that you happen to divide out to be 7 cents, correct?
A. That's correct.

MR. ENGLISH: Thank you, sir. I have no further questions.

JUDGE CLIFTON: Thank you, Mr. English.

MR. ENGLISH: I do, just before -- I don't think the motion has been made, but I certainly do not object to the letter from Rabbi Rosen to accompany the record. But it's, unfortunately, of course, on the back of this exhibit. If an exhibit is admitted, it gives it a certain mark as being part of the record.

I don't think that an unsworn statement,
even from a rabbi, should become part of the record without being subject to the same opportunity to be cross-examined. So I don't object to the document, per se, as accompanying the record, but I don't think it should become part of the exhibit.

And I appreciate the fact that whether it was Mr. Kreider or representatives of AIDA were being green and copying on front and back, but I do know that I don't think it should be formally part of the record.

JUDGE CLIFTON: Stay right there, Mr. English. You think it should be part of the record but not a part of the formal record?

MR. ENGLISH: It can be a 42-A if it's not admitted as an exhibit. It's not sworn, so it ought not to be given the same imprimatur as sworn statements, subject to your Honor's swearing in witnesses.

It certainly can accompany the record, but it is no different from any other letter submitted by a person who has not actually appeared.

And I do think it's different from the nature of the state representatives who are
doing what they were doing, but I don't think it should become -- become part of the exhibit.

JUDGE CLIFTON: Don't leave. What you're saying is, that if it's not admitted into evidence, then it's not evidence in the case. And what good does it do in the record if it's not evidence?

MR. ENGLISH: I think, your Honor, there have been many times at Federal Order proceedings that a letter is received from a person who doesn't appear. And --

JUDGE CLIFTON: Received in what manner?

MR. ENGLISH: Received in that people bring it with them up to the -- up to the lectern or up to the witness stand and they testify about it. And/or the judge, in other proceedings, for instance, receives this in the mail as opposed -- let's say this -- as opposed to having been handed to you by Mr. Kreider, had actually been sent to you in the mail. And let's say, unlike what actually happened here, you went home this weekend and had time to go into your office and here was this letter. It's not ignored. It is not sworn testimony, but I'm not standing here saying, let's exclude it
entirely. But I am saying it's different and it's not sworn testimony.

So I was trying to draw the line between what it is and what it isn't. But I don't -- I'm not asking -- far from that -- that it should be excluded entirely. I'm saying it's just not testimony.

JUDGE CLIFTON: Now, you raised an interesting point. You see, had I been the one who received it, I would have to testify to get it in. And I don't have even the knowledge that this witness has that it legitimately came from the rabbi that attends the production of milk on his farm.

So it would have actually been less valuable. I knew this would be an issue because the rabbi is not here testify. We require people to be here to testify and subject themselves to cross-examination. But my dilemma is, that I think -- and I'm going to hear from counsel. My dilemma is that I think this kind of exhibit bears certain marks of reliability that are often not accompanied by hearsay.

And if the Secretary is cautioned that no one had an opportunity to cross-examine the
rabi, it may be better to just let it in as part of this exhibit.

The very vocabulary that he used is somewhat authenticating. I think we're all aware that Kreider produces kosher product. So I appreciate what the normal way of handling it would be, and I fear that it would do more harm than good to keep it out of the evidence.

So I would invite counsel to suggest guidance for me.

MR. ENGLISH: Your Honor, maybe I can short-circuit it. If all the people will agree, I'm willing to accept the characterization you have given it and are prepared to have it treated in the way you've just indicated. If it shortens things, that's great.

JUDGE CLIFTON: Mr. Miltner?

MR. MILTNER: I appreciate that, Mr. English. I would like to see it treated no differently than the letters that were attached to, I believe, Exhibit 36, which were -- accompanied the statement from the state Departments of Agriculture, and as I recall admitted without any qualification.

I mean, the record is clear as to why the
rabbı couldn't be here and it provides
information that Mr. Kreider has about his farm
and amplifies his nontheological understanding,
perhaps, of what happens. And so we'd like to
see it admitted on the same grounds.

It's frequent that people refer to
something in their statement and amplify it and
it gets included as part of the record. And I
think the dialogue back and forth is pretty
clear for the Secretary to determine what weight
it should be afforded.

JUDGE CLIFTON: Thank you, Mr. Miltner.

Mr. Vetne.

MR. VETNE: I, too, agree that it should
be admitted as part of Exhibit 84 without
qualification. We've had -- we've had
considerable testimony over the course of a week
and a half where a witness on the stand has
referred to what a customer or a plant or a
consumer or somebody told them that influenced
processing behavior or competitive reaction.

It seems that the hair that we're trying
to split here -- the hair we're trying to split
here is that if that type of hearsay comes in
oral form from the witness, it's perfectly okay,
even though you're not sure the witness is interpreting it correctly when testifying about it.

But if it comes more reliably in paper form, so you know exactly what the hearsay is, it's objectionable. I don't see that. And there is, even under the Federal Rules of Evidence, a reliability catchall, as I think -- which is what your Honor referred to.

If it has context, that makes it reliable, the kind of thing that a reasonably prudent person would rely upon, it can be admitted under that catchall.

And thirdly, although this all comes back to the right of cross-examination, the right of cross-examination is essentially a right to -- to test material facts that are in dispute. It's just not an open, oh, well, you said something, we get to talk about it. I haven't heard any part of the objection that any portion of what the rabbi says in this letter is a -- includes a fact that is both material and in dispute. And, in fact, if there's nothing in dispute, there's nothing to cross-examine him, what's the problem?
JUDGE CLIFTON: The one issue that I wish the rabbi were here to be cross-examined on is, does it require a producer-handler to provide kosher products. And we have some evidence that regulated handlers provide kosher products, too. I would like to explore that a little further through the rabbi or someone like that.

So the fact that we do not have cross-examination is a bit of a problem. I would have to agree with Mr. Miltner, we've let in a lot less reliable hearsay than this. Okay. Let us deal with whether Exhibit 84 will be admitted in its entirety.

Are there any other objections to Exhibit 84 being admitted into evidence?

Mr. Stevens.

MR. STEVENS: Your Honor, Garrett Stevens, Office of General Counsel, U.S. Department of Agriculture. I guess you and I are familiar with the admission of evidence in hearings before our agency, and certainly unsworn statements, statements that are not subject to cross-examination, are entitled to a little weight by anyone considering them.

If this were presented in another context
within the Department's hearing process, a letter may well be admitted, but it certainly wouldn't be admitted for the truth or falsity of the statements in the letter, because the person that made it is not here to be cross-examined to examine the truth or falsity of those assertions.

So I don't have a problem with it accompanying the record, but in terms of how it will be considered -- and this would apply to anyone's sworn statement or any statement that the -- that the person making the statement is not here and subject to cross-examination. It is unsworn, and cannot be admitted for the truth or falsity of the assertions.

JUDGE CLIFTON: You and I differ somewhat there. As an Administrative Law Judge, I do allow hearsay to be admitted into evidence, and I judge the reliability of it. And I rely on it if I deem it to be reliable. And I would ask that the Secretary do the same thing in this case.

MR. STEVENS: The only thing I would say about that, your Honor, is that we're all bound by the determinations of the Department.
Secretary has made rulings on these matters in the past, and I would say that those rulings apply in this situation.

JUDGE CLIFTON: It is true that the very Notice of Hearing cautioned all people that they had to be present here at the hearing to present evidence. In other words, there aren't any phone calls in and there aren't any -- there is no solicitation of letters to come in. A person had to be here to present evidence.

And if we -- if we vary from that, we've -- we've changed the proceeding entirely. Fortunately here, we have Mr. Kreider here and he has established some foundation for the admissibility of Rabbi Rosen's letter.

So, Mr. Stevens, it is your job to guide the Department in this matter, and I'm -- I'm confident that the Secretary will make the wise decision in that case. Mr. Yale.

MR. YALE: Let me add one other aspect to the -- to the discussion. By the way, we are in support of 84 being admitted entirely as it is and the Department can deal with it, weigh it as it wishes.

I'm sure that it's even had sworn
testimony under cross-examination that it's decided not to give any weight at all, so that's the Secretary's prerogative. Hopefully, it's none of my witnesses, but you know, it can happen.

What we really have here, and I can't put, really, the name to it. But there's something that says, there's reliability about this.

First of all, Mr. Kreider has testified into the general aspects of how the kosher affects his operation and that it's an important market for his milk. That's sworn and subject to cross-examination. The letter from the rabbi merely gives detail and gives us some kind of cultural, religious Torah background as to the why, the general things that Mr. Kreider testified under oath, are meaningful to the observant Jews. So I just think it really adds to that. And they can always bring in evidence to show that's not the case.

I would agree that the issue of whether it is required or not is a -- is one that would be subject to cross-examination. The Department can do what it wants with that, so --
JUDGE CLIFTON: Thank you very much. I think we've made adequate record for the secretary. And based on that record, I do admit it in its entirety, Exhibit 84. I do caution the Secretary that Rabbi Rosen's statement was not subject to cross-examination and therefore the weight to be accorded should be approached by the Secretary with some caution.

All right. Now, other cross-examination of Mr. Kreider? Mr. Vetne.

CROSS-EXAMINATION

BY MR. VETNE:

Q. Mr. Kreider, my name is John Vetne. I represent two producer-handlers in the Pacific Northwest and one in Roswell, New Mexico. Good afternoon.

A. Good afternoon.

Q. As long as we're on the kosher part of your business, I have some questions on that. The Pride of the Farm label, it's not your plant, Kreider Farms' label, it is a label that you put on your kosher products for somebody else, is that correct?

A. Correct.

Q. And do they also have a Star-K label or is Star-K part of the label?

A. I'm not sure.
Q. Okay. There was some question, I believe it was perhaps Mr. Beshore, is the term competing kosher certifying organizations. Do you recall that? Do you recall some discussion about other kosher certifying organizations?

A. In a previous --

Q. It was Chip English that asked the questions.

A. Yes.

Q. Other kosher certifying organizations?

A. Yes.

Q. Isn't it the case that within the kosher -- within the observant Jewish community that desires kosher products, there's some kosher that's different from other kosher?

A. Yes.

Q. So it's not simply certifying organizations that are competing for the same consumer population; there are subgroups of consumer populations that will look for kosher milk from only one certifying organization?

A. That's true.

Q. Okay. So you -- your product is specifically packaged for a subset of the consumer market -- of the consumer kosher market?
A. That's correct.

Q. You indicated that this market is primarily in Maryland, Pennsylvania, Washington and New Jersey?

A. Yes.

Q. Okay. My assumption is -- correct me if I'm wrong, agree with me if I'm right -- that Washington means the District of Columbia?

A. That's correct.

Q. You don't go to the state of Washington?

A. No, we do not.

Q. Is the distribution area for your nonkosher milk as large as for your kosher milk?

A. Yes.

Q. Your nonkosher milk goes to those same states?

A. Yes.

Q. Is it distributed and marketed differently than kosher milk?

A. Yes.

Q. You distribute -- that is, Kreider, distributes its nonkosher milk?

A. That's correct.

Q. And for your nonkosher milk, is that all under a Kreider brand or is it multiple brands?
A. Mostly Kreider Farms. I think we have one other private label.

Q. Okay. Kreider Farms is a private label?
A. Kreider Farms is a branded.

Q. Is it your branded label?
A. And we have one other private label in addition to Pride of the Farm.

Q. The Pride of the Farm is somebody else's label?
A. Yes.

Q. But it's not a label that's associated with a particular milk distributor, correct?
A. I'm not sure.

Q. Like Dean's. Dean's label is associated with Dean Foods. Do you know whether Pride of the Farm has a similar affiliation to a milk distributor other than your own?
A. We deal with one distributor and he may use smaller distributors to deliver the kosher product into certain markets.

Q. I understand. Is the milk distributor that you deal with, is that a person that also receives raw milk and packages it into --
A. No.

Q. No? It's just a person that markets milk
that somebody else packages, correct? Your
distributor --

    A. It's the Jewish trucks that come and pick
up the milk at our plant to take to their Jewish
centers.

    Q. Okay. And that label is on there at
their request?

    A. Yes.

    Q. Did you say approximately what percentage
of your milk was in the kosher subset category, kosher
category?

    A. Yeah, it's about 30 percent for Class I
sales.

    Q. 30 percent, okay. And you answered a
question about your Class I sales less than 3 million.
What was it on average in 2008?

    A. I'm not sure what the average was. Less
than 3 million.

    Q. More than 2.5?

    A. No.

    Q. Somewhere between 2 and 3?

MR. MILTNER: Your Honor, I want to
remind the witness he doesn't have to disclose
confidential information if he chooses not to.

JUDGE CLIFTON: Thank you, Mr. Miltner.
Could you hear that? Could you hear that, Mr. Kreider?

THE WITNESS: Oh, yes. I'm sorry, your Honor.

JUDGE CLIFTON: No, I wasn't asking you first, but I am now.

A. Okay.

Q. Okay. I'm going to ask you some questions. I have the option to ask and you have the option not to answer, do you understand?

A. Thank you.

Q. So is your Class I between 2 and 3 million pounds?

A. Our Class I is less than 2.5.

Q. What portion of your total production is non-Class I? That is, ice cream, cream, excess milk sold to manufacturing, what portion is not Class I?

A. I think the only numbers that I have memorized is that Class I sales are between 64 and 77 percent.

Q. Okay. Is that a range that's based on a year?

A. I'm not sure.

Q. It varies from month to month, doesn't it?
A. That's correct.

Q. Other than ice cream, do you produce any non-Class I products, such as creamers or cream, yogurt, that kind of thing?

A. We produce some cream, some heavy cream, some half and half.

Q. Do you produce any cultured products?

A. No. Is buttermilk cultured?

JUDGE CLIFTON: Yes.

A. I apologize.

Q. As a matter of fact, it is.

A. We produce a little buttermilk, I think.

Q. You produce a cultured Class I product? Are you producing -- other than ice cream, do you produce any spoonable products or any hard products?

A. No, we do not.

Q. When you sell what you call extra milk, to what -- to what plants do you market that? If you have surplus you can't use, where does it go?

A. We sell -- historically, we've sold a lot of it to Turkey Hill, Turkey Hill Dairy.

Q. Turkey Hill is an ice cream maker -- or what else do they use it for?

A. I don't know what they use it for, but it's predominantly an ice cream product.
Q. They are a soft product manufacturer, Class II manufacturer?
A. I'm not sure what their class is.
Q. Are there other markets for your excess milk, cheese, powder, butter that you can recall?
A. We've sold some milk to Land 'O Lakes, some surplus milk.
Q. Do you have occasion to market excess cream?
A. Yes.
Q. And where would your excess cream be marketed?
A. I don't recall the names of those companies.
Q. Okay. But you do market excess cream as --
A. From time to time, yes.
Q. And your fluid milk products, what kind of packaging do you use for that?
A. Mostly plastic.
Q. Plastic?
A. Plastic.
Q. Exclusively plastic?
A. Yes.
Q. Okay. And you market in what sizes?
A. One gallon, half gallon, quarts, pints.

Q. Could you explain a little bit more your response to a question? As I recall, you responded a 3 million pound cap would not work for you. And you've testified that your current Class I sales are less than 2.5. In that situation, why would it not work?

A. It may work in the short term, but any sustainable long-term business plan allows some room for growth. And so in that respect, I don't think it's a successful -- it would be a successful long-term profitable business for us to be, if we were capped at 3 million.

Q. Okay. You want to retain the option to grow beyond 3 million, is that what you're saying?

A. That's correct.

Q. And at your size and with your discrete customer base, you cannot survive without pool exempt milk, is that also correct?

A. Long term, I feel as though that's correct.

MR. VETNE: Thank you. That's all I have, your Honor.

JUDGE CLIFTON: Thank you, Mr. Vetne.

Who will next cross-examine Mr. Kreider?

Mr. Carroll. Thank you.
CROSS-EXAMINATION

BY MR. CARROLL:

Q. Good afternoon, Mr. Kreider.
A. Good afternoon.

Q. I'm John Benjamin Carroll. I represent the New England Producer-Handlers Association and two producer-handlers like yourself, one in Vermont and one in Connecticut, and also a handler who would be interested in becoming a producer-handler in Virginia.

I also want to say before I start that for the better part of 25 years, I represented a kosher producing producer-handler along with other sales, and I know exactly what your -- what you've been going through.

I want to go back a little in some of the things you've said. Does your -- does your consumer in your local area recognize your dairy as a local asset; in other words, a place that they would like to buy their milk from? Do you have customers that feel that way?

A. Yes, most definitely. That's what they -- that's our main selling point, really.

Q. And is that your main business?
A. That's our main business.

Q. And over the years, that's the trade that
you built up, I take it, in doing that?

A. That's correct.

Q. And should you go out of business, they would lose a local supplier of that milk, isn't that correct?

A. I would assume that's correct.

Q. Now, in view of that relationship and your close association with the consumer, have you attempted to manage your farm so the product was the highest quality product you could produce?

A. Yes.

Q. And in doing that, did you incur costs that you would not have otherwise incurred?

A. Yes.

Q. And in addition, the consumer, I take it, is interested in maintaining competition?

A. Yes.

Q. This proposal, if enacted, would prohibit any -- that is Proposal Number 1, if enacted -- do you understand that would prohibit anybody for all time ever becoming a producer-handler?

A. Yes.

Q. Do you understand that? Do you think that's in the consumer's interest, that no one can ever enter and compete?
A. Yes, I do. I think the mere fact that --
that people are coming to our farm and wanting to know
where their milk comes from is an indication that they
are concerned about it, and I think the consumer would
lose if they don't have that milk supply.

Q. And in order to do business the way
you've described it, I take it your management has to
manage not one entity but two entities simultaneously;
one, the plant, and the other the farm, is that correct?

A. Well, I have two site managers so they
are specifically -- one oversees the milk processing and
one oversees the dairy farm.

Q. And someone has to oversee them?

A. That's correct.

Q. And that person has to watch two
operations, isn't that correct?

A. Yes, I do.

Q. And that's what you do?

A. That's correct.

Q. Okay. And you really run a -- virtually
no surplus or a small surplus -- or what is your surplus
situation? If you took it for a year and averaged it
out, would you have any substantial amount of surplus
that you didn't market some other way? By surplus, I
mean -- let me start again.
Aside from your Class I milk, you take your own milk and you make ice cream out of it and so forth.

A. Yes.

Q. And you make some other products?

A. Yes.

Q. Right. Does that constitute the vast majority of your sales; that is, your own-farm production?

A. No, we're producing about 25 percent surplus milk on the dairy farm.

Q. You are?

A. That's been -- unfortunately, that's been pretty consistent over the last couple of years.

Q. Okay. Is that your long-term plan?

A. No, it's not.

Q. And the reason for it is that it's not very remunerative, is that correct?

A. Yeah, that's correct. I mean, lots of years we pretty much analyzed it and say that all the benefit we gained, if any, of being a producer-handler, we gave away by selling cheap surplus milk.

Q. Right. Some of our members in New England have a bakery that they market the milk through in the form of baked goods. Have you done that at all?
A. No, we have not.

Q. Okay. Have you done anything that's disorderly in handling of your pricing or any of your other activities? Disorderly to the market, I mean, at any time?

A. Not to my knowledge.

Q. Rabbi Rosen has made some statements in his letter. I take it you've read his letter?

A. Yes.

Q. Are you in agreement with his statements that he's made in his letter?

A. Yes.

MR. CARROLL: That's it. Thank you, your Honor.

JUDGE CLIFTON: Thank you, Mr. Carroll, that was clever. I know we still have perhaps a little cross-examination and some redirect, but I need to take a break. If we could take ten minutes and please be back and ready to go at 3:32.

(A recess was taken from 3:22 to 3:38.)

JUDGE CLIFTON: All right. We're back on record at 3:38. What other cross-examination is there for Mr. Kreider? Mr. English.

RECCROSS-EXAMINATION
BY MR. ENGLISH:

Q. Thank you, I just have a few clarifying questions. Charles English again. I just want to be perfectly clear. Has Kreider Dairy Farms been kosher since 1972?

A. I don't remember which year we went kosher.

Q. But kosher was something you did because you perceived it as a valuable niche market, is that correct?

A. That's correct.

Q. And kosher, because of the way things are set up in this country, that the kosher designated entities are entirely private entities, correct?

A. I'm not a kosher expert.

Q. Do you know if Star-K Kosher is a private company?

A. I don't know that.

Q. Do you know whether kosher certification is performed by the United States Government?

A. I don't know that.

MR. ENGLISH: I have no further questions.
JUDGE CLIFTON: Thank you, Mr. English.

Who next will cross-examine Mr. Kreider?

Mr. Tosi.

CROSS-EXAMINATION

BY MR. TOSI:

Q. Good afternoon, Mr. Kreider. Thank you for coming. Is your father Noah Kreider?

A. My grandfather's Noah Kreider and my father is Noah Kreider, Jr.

Q. Okay. I remember I met your father years ago, a very nice man.

A. Thank you.

Q. And your -- okay. For the -- just to probe a little bit here about a letter from the rabbi to Judge Clifton. Do you know where the rabbi lives?

A. No, I do not.

Q. Does he live on the farm, on your farm?

A. Rabbi Rosen?

Q. Yes.

A. No, Rabbi Rosen does not.

Q. Who pays the mashgiach fee for his supervision?

A. You know, we pay for some things. I'm not sure what fee you're talking about. I don't know what all the fees are. I mean, I know when the water
pump cuts out on Christmas Day, we fix it.

Q. But this isn't -- I mean, the fact that the production and the handling of milk there on your farm is supervised by Rabbi Rosen, this isn't something that Kreider itself pays for then?

A. We pay for some fees. And like I say -- what I want to say is, you know, if we pay -- we pay a certain amount of the fees, and everybody looks at their bottom line anyway for what their bottom line cost is.

Q. Okay. Are you and the rabbi like -- are you guys, you know, friends where you talk business and that kind of stuff about --

A. We're friendly.

Q. Friendly. Okay. Do you know why the rabbi reached the conclusion that he makes in his letter? He seems to suggest that if somehow you were to lose your producer-handler status, that -- that you would lose your ability to produce kosher milk? Do you know how it was that the rabbi arrived at that conclusion?

A. Which paragraph are you looking at?

Q. It would be, like, on the second page, the second paragraph that begins the cholov Yisroel milk known as -- known to all as Pride of the Farm --

A. Thank you. I was wondering how you
pronounced those words.

Q. Well, I don't know if I have it quite right. I tried.

A. I don't think he was speaking specifically about a producer-handler or producer-handler status, but more in the overall aspect of trying to outline how expensive it would be for him to supervise his little bit of milk through a gigantic plant.

JUDGE CLIFTON: Mr. Tosi, your sentence is actually in the next paragraph, the last sentence.

MR. TOSI: Excuse me, your Honor. I was -- I jotted a few notes there in the margin, and I wrote a little higher on the paper.

JUDGE CLIFTON: So, Mr. Kreider, if you'll look at the next paragraph and read that last sentence.

A. And specifically what's your question?

Q. Yeah. I'm just wondering why he -- if you know why the rabbi takes the position that if somehow you had to pay what he describes as an exorbitant fee. And I would take from reading the letter that what he meant by that was your payment if you lost your producer-handler status, and that now you
were going to be required to be subject to the pooling and pricing provisions of the order, you were going to pay into the pool.

And I'm just wondering why he developed those -- you know, the opinions that he makes there about what the financial and economic implications would be with someone that seems to be -- spoke quite -- quite in detail about the -- the religious aspects of what it means to be kosher.

A. I think he's just reemphasizing the fact that his costs would go up, in his view, if he had to buy his milk from another larger dairy. Right now he's a big fish in a little pond.

Q. I mean, is he referring to himself or is he referring to -- he seems to be referring, to me, to the -- what's going to happen to Kreider, not what's going to happen to himself as the attending rabbi.

A. Well, he says it would affect the viability of Kreider Dairy and Pride of the Farm milk. So obviously we would lose -- I mean, his costs would go up, is what he's saying.

Q. Okay. How -- how do his costs go up? I mean, if he's being paid to do something, how does his costs go up?

A. Well, once again, I think he views -- and
I don't know all the aspects of his supervision rules. But he is, I think, indicating that his costs would go way up if he would have to try to run that same level of supervision at a large plant. He realizes it's going to be disruptive at a large milk plant and so the cost to him inevitably will flow back. The increased cost from a large dairy would flow back to his company.

Q. So we could interpret, then, that really what this letter is about is the effect on -- the effect to rabbis -- the effect on rabbis supervising kosher milk if a producer-handler -- if a producer-handler loses that status? That's really what he's talking about here. He's not talking about Kreider, per se?

JUDGE CLIFTON: Do you agree with what Mr. Tosi just said, Mr. Kreider?

THE WITNESS: Yes.

MR. TOSI: Thank you, Mr. Kreider. And we appreciate that you came all this way to testify at this proceeding.

THE WITNESS: Thank you.

JUDGE CLIFTON: Mr. Miltner, any redirect?

REDIRECT EXAMINATION

BY MR. MILTNER:

Q. Mr. Kreider, you're going to have to help
me with terminology. The gentleman from Star-K who lived at your facility that I referred to as rabbi before, what's the term I should be using?

A. The way I understand it, technically he's a mashgiach.

Q. Mashgiach?

A. Yes.

Q. I want you to assume a very large -- well, given what I will call a medium-sized processing facility, larger than yours, okay? Assume we have that. Assume it buys its milk from a cooperative association that delivers milk from multiple members at a time, okay?

A. Okay.

Q. Assume that plant wanted to supply the same type of kosher milk that you provide to the Jewish community today. Would you need to use more mashgiach in numbers than you currently have today? Would you need more people to achieve the same result?

A. I would assume that he would, yes.

Q. Why do you make that assumption?

A. You're talking about a regulated plant that would buy milk from multiple farmers?

Q. I am.

A. Well, somehow they're going to have to
get around to all the dairy farms every day, authorize
each milking start up, monitor all DA operations, 24
hours a day, in the middle of the night, and then it
would be quite labor intensive.

Q. There's a certain efficiency with having
you do that today as a producer-handler, is that
correct?

A. That's correct.

Q. Given the volumes of milk that you're
able to market as kosher milk, if you were doing so in a
larger plant and you were not sourcing all the milk from
kosher farms, would it acquire additional shutdown of
the plant to run a kosher line, kosher run?

A. I would assume that that's the case.

Q. You couldn't run kosher milk through --
and bottle that and then bring in regular milk and run
it right through, right? I assume the mashgiach would
have a problem with that?

A. Yes, there needs to be complete
wash-down, and once again, I don't know all the rules,
but it's intensive.

Q. Not your job to know all the rules,
that's the mashgiach's job, right?

A. That's correct.

Q. Kreider Farms actually lost its
producer-handler status several years ago, correct?

A. In a specific order, yes.

Q. For a short period of time?

A. Yes.

Q. You had to make pool payments for that period?

A. Yes, up until the law changed in 2000.

Q. And when you had to make the pool payments, what did it do to the profitability of your enterprise?

A. Pretty much robbed the enterprise of any profits -- of all profits.

Q. So if you're pooled, would you be able to continue processing kosher milk, or any milk for that matter, under your current business model?

A. I'm sure that we would shut the milk plant down.

MR. MILTNER: Thank you, your Honor, I have nothing else. Thank you, Mr. Kreider.

JUDGE CLIFTON: Thank you, Mr. Miltner. All right. Mr. Kreider, that completes your testimony. Thank you so much.

THE WITNESS: Thank you, your Honor.

JUDGE CLIFTON: Mr. Miltner, you may call your next witness. Mr. Ricciardi, you may call
your next witness.

MR. RICCIARDI: Good afternoon, your Honor. Al Ricciardi on behalf of AIDA, and our next witness will be Hein, H-e-i-n, H-e-t-t-i-n-g-a.

JUDGE CLIFTON: Yes, please, Mr. Hettinga, if you'll take the chair in the witness box and be seated, I'll swear you in. Now, do you want to pour a glass of water before we begin? Please -- even though counsel has just spelled your name, please state it into the microphone and spell it again.


JUDGE CLIFTON: Thank you. If you will raise your right hand, please?

HEIN HETTINGA

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

JUDGE CLIFTON: Thank you.

Mr. Ricciardi, you may proceed.

MR. RICCIARDI: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. RICCIARDI:

Q. Mr. Hettinga, you have already provided
your name for the record. Tell us your address for the record.

A. El Paso -- no, I'm not El Paso. Muleshoe, Texas. I have to look at it. 1140 --

JUDGE CLIFTON: You need to be about two inches from that mic.

THE WITNESS: My eyes won't reach that far.

A. 1140 U.S. Highway 84.

Q. Thank you, sir.

JUDGE CLIFTON: What was the town in Texas?

THE WITNESS: Muleshoe, Texas.

JUDGE CLIFTON: How is that spelled?

THE WITNESS: I don't know.

MR. RICCIARIDI: Just like it sounds, M-u-l-e-s-h-o-e.

JUDGE CLIFTON: Muleshoe. Thank you.

THE WITNESS: No problem.

BY MR. RICCIARIDI:

Q. What is your position with GH Dairy, El Paso, sir?

A. I run it.

Q. And does that -- will that be your day-to-day responsibility, too?
A. I have people that help.

Q. Okay. Gerben Hettinga, your son, being one of them?

A. Correct.

Q. What's the mission of GH Dairy, El Paso?

A. To put out a better product, higher quality, for a better price.

Q. Can you describe for us the operations of GH Dairy, El Paso?

A. You mean the products we put out?

Q. Well, that would be good. That was actually my next question, but let's take it now.

A. Gallons, half gallons. We're not doing quarts. We're doing pints, half pints for the school business. That's it right now.

Q. And where -- where can customers find your products?

A. Wal-Mart, Costco, schools, and then we have distributors that sell all over.

Q. Okay. That's out of El Paso?

A. That's out of El Paso.

Q. Now, Exhibit 13 that's been admitted in this case, shows that GH Dairy, El Paso, became a producer-handler as of January of this year, in '09, is that correct?
Q. That's correct. Did the plant actually operate as a pool plant in Order 126 before becoming a producer-handler in January of '09?

A. I believe we started in November.

Q. And when it started in November, did GH, El Paso have its milk from its own farms available at that time?

A. No, it did not.

Q. And why not?

A. All my milk was contracted. The contracts were up in '01 or -- of the new year, January.

Q. Okay. Now, why is GH Dairy, El Paso, organized as a producer-handler operation?

A. I like running my own business.

Q. Okay. Tell me, having your own milk supply, what kind of benefit does that provide to GH Dairy, El Paso and it is customers?

A. The customers really like source verification. It's very big. Even on the cattle we kill today, they're -- all have implants and the packers want source verification, the processors want source verification. It's going to be the next step.

Q. What do you mean by source verification?

A. Where the product was originally coming
from. So they can run it all the way back if there's a quality issue or so forth.

Q. So if a customer were to have a problem, they know where to look. If they look to you, they know where the milk came from?
A. Correct.

Q. Now, why did you choose to locate the GH Dairy, El Paso operation in El Paso?
A. UDA started to build a plant there or had intentions of building a plant there. And they had started doing some distributors and so forth, and I went there, looked at the operation. And they basically had a lot of accounts receivable for it. I said, I'll take it over and that way you'll get paid on your accounts receivable. And I took it over and started distributing there. And I brought the milk from Arizona, which is a regulated plant, and it had 35 cents freight, and I could make a profit.

So I realized if I built a plant there, I would have 35 cents a gallon. I had a 35 cents disadvantage when I hauled it than if I bottled there, I could make a profit.

Q. Let's follow up on that point. Did you come to some conclusion as to why it was possible for regulated plants to ship milk all the way in from
Arizona into El Paso and still be able to make money?

A. There's only one plant that's selling milk in the area, which is Price's Dairy, which belongs to Dean's, and they were ripping the general public off.

Q. Okay. Now, let's turn to a specific issue that has been raised by another witness to this hearing, a Mr. Carrejo, who's testified. And I want to talk specifically first about the school -- El Paso school milk bid and the El Paso school milk that GH supplies.

Was one of the first contracts that GH got for the El Paso School District?

A. Was that one of the first contracts that we made? Yes. As far as the school, we bid that contract first.

Q. Okay. Now, let's talk about timing, because it's important. When that bid was made, were you a producer-handler operation?

A. No.

Q. Did you even have any type of supply of milk at that point?

A. No.

Q. When you bid for that contract, was it a public bid process?

A. Yes.
Q. And did you submit a bid for the El Paso School District?

A. Yes.

Q. And where did you intend to source the milk for that bid if you were to receive it?

A. I was building a plant. I had bought real estate, and I had started to build. And it always takes longer than you think. So I had to make do. I hauled the milk out of Andersen Dairy, made a mutual agreement, if they ever break down, I will sell them milk, because we don't have many friends; and they will sell me milk and we will haul it, pay the freight.

Q. Okay. You, on behalf of GH Dairy, El Paso, made an agreement with Andersen out of Nevada?

A. Las Vegas, Nevada.

Q. For them to ship milk --

A. No, me to pick up milk.

Q. You to pick up milk, I apologize. For you to pick up milk in Nevada, transport it over to El Paso, if you were to receive the El Paso school bid, right?

A. I had already received it. Then I made it work.

Q. Got you. Now, when you made the bid, can you tell me approximately how much per half pint you
were willing to supply the El Paso School District with?

A. I believe -- and this is off the top of
my head, I believe I bid it for 22, and prior to that it
was like 32, the previous year. And the year before
that, or a couple years before that, it was like 17, 18
cents.

Q. Okay. So let's step back.
A. Okay.

Q. The year before you made the bid and
received the bid for El Paso, your testimony is that
they were charged about 32 cents per half pint --
A. Uh-huh.

Q. -- under the contract?
A. Uh-huh.

Q. Who had that contract?
A. Dean Foods.

Q. So when you made the bid, looking at what
it previously had been charged, did you believe that by
shipping the milk in, if you received the bid, that you
could make profit?
A. I could make it work.

Q. All right. So you did not use
producer-handler milk for that bid?
A. No.

Q. You did not use your producer-handler
status at GH, El Paso, because you didn't have it yet, right?

A. Correct.

Q. By the way, how long was the duration of that school milk bid contract?

A. It was a year with two years probable renewal. I mean, basically if you did a good job the first year, because we were spending -- to do a proper line of half pints, it's almost a $2 million investment. And we told them we would play, if they guaranteed us, you know, two or three years. And this was all done much earlier. And they said that they would give us a contract for one year, and if we like it, we'll give you another year, and if we like it, we'll give you another year.

Q. Has that been renewed?

A. Yes.

Q. There's also an issue that was raised by Mr. Carrejo about serving the military base at Fort Bliss. And he indicates -- he says that GH had been selling some milk there beginning in early 2008. Did GH, even before the plant was operational, go ahead and sell milk in El Paso on Fort Bliss?

A. I believe I hauled milk out of Yuma,
Arizona into El Paso, probably 14 months before I ever started bottling in there. And that was part of the reason that I built the plant there, because it worked. I mean, if I had 35 cents freight and able to compete in that market, I was going to play there.

Q. So hang on a second so I can understand it and everybody else here can, too. You had a 35 cent per gallon freight charge, you were taking care of that customer through a regulated plant, and you were able to be competitive?

A. Correct. Actually cheap.

JUDGE CLIFTON: Mr. Hettinga, you've relaxed back away from the microphone. I'm sorry, it's not comfortable, but we need your mouth to be very close to it.

Q. I want to get to another issue that was raised by Mr. Carrejo with regard to what he described as a national retailer which GH apparently replaced in some stores in El Paso. And let me at least summarize what I believe Mr. Carrejo said, and I've got Exhibit 41 in front of me to make sure I get it correctly.

He indicated that GH Dairy had replaced Dean, a national retailer, in March of this year. And he further testified that, I think, he saw some shelf prices upon GH Dairy's entry into the store that he
claims fell from $2.62 for whole milk per gallon to
$2.28. Now, has GH, in fact, been given some of the
stores of the national retailer in El Paso in March of
this year that were previously supplied by Dean's?

A. Yes.

Q. And tell me whether or not GH, El Paso is
supplying those stores through its producer-handler
operation?

A. Yes.

Q. Does Sarah Farms in Arizona also supply
the same type of national retailer stores customer in
Arizona?

A. Yes.

Q. And is the Sarah Farms customer supplied
by the regulated -- now regulated plant in Arizona?

A. Uh-huh. Yes.

Q. Is that a yes? And can you tell me
whether the price that is being paid by that retailer in
El Paso is higher or lower than the regulated plant in
Arizona is selling to the same customer in that market?

A. In Arizona, I am probably from 8 to 15
cents a gallon cheaper than in El Paso. And the reason
it's higher in El Paso, I have a new structure and I
need to depreciate it out and get refunds on it, so I
can get it paid off and be tough.
Q. So that I understand it, the Sarah Farms plant pays into the pool as required now under Order 131?

A. Correct.

Q. And your testimony is that the regulated plant paying into the pool is actually getting less for the same customer than the one -- than the unregulated Sarah Farms plant in El Paso?

A. That's correct.

Q. And it's somewhere between 8 to 15 cents higher in El Paso?

A. Correct.

Q. Can you give us a reason why you're actually able to charge more money in El Paso from a producer-handler operation than a regulated plant?

A. There's less competition in Texas.

Q. Okay. There's been a number of claims made by the proponents here with regard to a producer-handler operation having some type of unfair advantage because it doesn't pay into the pool. Can you tell us whether or not having producer-handler status is, in fact, some type of unfair competitive advantage?

A. I think anybody who doesn't put out a million gallons a week is at a disadvantage. You need -- to be efficient today with the equipment we have
today, they're talking here about 3 million pounds. I think that they're -- they're living in the Stone Age when they used to milk cows by hand. These new plants will run a million gallons through there. If you want to be tough, you've got to have a million gallons a week, not -- not these small numbers. And a PD is not competitive until it gets over a million gallons a week.

Q. With regard to plant operations as you just described, if that's all the case, then why would you choose to start a producer-handler operation in El Paso rather than simply become a regulated plant?

A. I don't have enough volume. I don't have a million gallons. When I've got a million gallons, I'll quit being a PD because then I can't produce the milk.

Q. There have been a number of alternative proposals that have been made by various groups, some including AIDA. One of those proposals, Proposal 25, deals with individual handler pools. I'm not asking you the technical issues regarding those, but based upon your understanding of Proposal 25 and the individual handler pooling proposal, is that something that you would be in favor of, and why?

A. You're going to have to give the rule to me because I don't remember which is which.
Q. Okay. Individual handler pools, effectively what they mean is each plant being supplied by the dairy farms would be effectively a producer-handler.

A. I could live with that.

Q. Okay. I understand that. Now, with regard to another Proposal 23, which deals with exempting own-farm production, is that something also that you would support?

A. I would support that.

Q. And while it's not directly attributable to your business model, Proposal 24, that deals with an exemption for retail stores and also home delivery, is that something that you're in favor of?

A. I don't do home delivery.

Q. I understand. Does that mean that you -- do you take no position on it?

A. I take no position on that.

MR. RICCIARDI: Okay. I think for the moment that's all I have of this witness, Judge.

JUDGE CLIFTON: Thank you. Mr. Hettinga, can you help me equate either a million gallons a week to 3 million pounds a month or the other way around?

THE WITNESS: There's 8.5 pounds in a
gallon. So you get 8.5, it would 8 million 500
gallons a week times 4, would be what I would
say should not be a PD.

JUDGE CLIFTON: 8,400,000 --

THE WITNESS: Gallons or pounds per week.

JUDGE CLIFTON: Pounds per week.

THE WITNESS: 16, 32, 34 million pounds a
month.

JUDGE CLIFTON: Good grief. Wow.

THE WITNESS: Yes. They're asking for
peanuts. With all the PDs, all they get is
crumbs, that's all they get and they won't even
give them to them.

AUDIENCE MEMBER: Amen.

JUDGE CLIFTON: Who would like to begin
the cross-examination of Mr. Hettinga?

Mr. Beshore, thank you.

CROSS-EXAMINATION

BY MR. BESHORE:

Q. Good afternoon, Mr. Hettinga.

A. Good afternoon.

Q. We haven't seen each other for a couple
of years, I guess?

A. It's so nice.

Q. I didn't say that. You're here as a
member of the AIDA group?

A. Yes.

Q. Did you have anything to do with the formation of that group?

A. Maybe a pinch. My son, Gerben, probably took care of the bulk of that.

Q. Who exactly is a member of that group?

A. I don't know. I've seen a list.

Q. From your entities?

A. All of the PDs, all of the have-nots in the system.

Q. Okay. Is Sarah Farms a member?

A. No.

Q. Is GH Dairy a member?

A. Yes.

Q. Okay. Now, does GH Dairy pay dues to AIDA?

A. Gerben takes care of that. I don't know.

Q. You don't know when --

A. I don't know. I don't take care of that.

That's Gerben's deal. We have kind of like designated stuff. He takes care of all paperwork.

Q. Does that include all checks?

A. All checks. I sign a few. I sign a few.

Q. How about the deposits, do you handle
those?

A. No.

Q. Gerben handles those also?

A. Yeah. If I seen these checks on these attorneys, I would probably be upset. So he doesn't want to upset me.

AUDIENCE MEMBER: That's right. That's right.

Q. GH Dairy, is that a corporation or what type of -- what type of legal entity is that?

A. Gerben and Hein Hettinga and my wife.

Q. Is that --

A. A partnership.

Q. It's a partnership?

A. Correct.

Q. And how many general partners are there?

A. The three of us.

Q. Are there any limited partners?

A. No. The bank, they're probably the main stockholder or the main creditor or whatever you want to say it, but that's -- we borrow money.

Q. Does that partnership own all of the farms and cattle which supply it?

A. No, I do.

Q. You, individually?
A. Uh-huh.
Q. So you --
JUDGE CLIFTON: Now, just so the record is clear, that was a yes?
THE WITNESS: Yes, I do.
Q. So Hein Hettinga individually owns the farms and the cows which supply the milk to GH Dairy, a partnership, which owns -- and owns the plant in El Paso, is that correct?
A. I own the plant -- or GH owns the plant, but I lent the money. How's that?
Q. Whatever you say.
A. That's what I think it is.
Q. I'm trying to learn. So you're the bank?
A. Correct.
Q. How many farms do you personally own which supply GH Dairy, the plant?
A. I don't know. You tell me how much milk DFA -- DFA puts out.
Q. I can tell you that.
MR. RICCIARDI: Your Honor --
A. That's -- that's my business.
JUDGE CLIFTON: Mr. Ricciardi, I'll hear you.
MR. RICCIARDI: Two things. First of
all, the Market Administrator's already
determined that GH is a proper producer-handler
and it meets the status, and they have gone
ahead and filed the reports. Number one.

Number two, we're now getting into a
whole bunch of confidential information
unnecessary, and I'll instruct, if I need to,
with regard to -- Mr. Hettinga with regard to
these questions. So --

JUDGE CLIFTON: Thank you. No harm in
asking, Mr. Beshore.

MR. BESHORE: I'm wondering if that was
an objection or a speaking instruction to the
witness or --

JUDGE CLIFTON: That was a speaking
instruction to the witness.

BY MR. BESHORE:

Q. Okay. Let me ask you about GH Dairy.
You've testified about the school bid. By the way, who
put in the school bid to the El Paso school?

A. I went over it with my employee, and I
bid.

Q. Who's the employee that you went over it
with?

A. I think Raoul did that.
Q. Raoul?
A. Raoul.

Q. Does he have a last name?
A. Not that I know of.

Q. Is he Brazilian?
A. No, Hispanic. El Paso is 95 percent Hispanic.

Q. Okay. Brazilian soccer players are the only people I know that only have one name.
A. Raoul.

Q. Okay. You don't know his last name?
A. No.

Q. Do you sign his check?
A. No.

Q. Gerben signs those?

AUDIENCE MEMBER: Yes.

MR. STEVENS: Whoa, whoa. Your Honor --

JUDGE CLIFTON: Mr. Stevens.

MR. STEVENS: Could I have an instruction to the audience that when there's a question --

JUDGE CLIFTON: Talk right into it.

MR. STEVENS: I'm sorry, Garrett Stevens, Office of the General Counsel. Could I have an instruction from you, your Honor, that when a questioner asks a question and the answer is
given or not given from the stand, that no
answering is to be yelled out from the audience,
please.

      JUDGE CLIFTON: Thank you, Mr. Stevens.
That's correct. If -- if anyone here is aware
that the witness is mistaken and you want very
quietly to alert his counsel, that would be
proper, but not to coach the witness.

Counsel will have an opportunity for
redirect examination and can revisit that area
and give the witness another chance. So that's
a better way to handle it, if you're aware of
any information that you believe is not correct.

So the answer to -- that question was,
who writes the checks to Raoul. Was that the
question?

      MR. BESHORE: That was the question.
      JUDGE CLIFTON: And your answer?
      THE WITNESS: I do not.
      MR. BESHORE: Okay. While I've got you
interrupted, Mr. Hettinga, how do you spell your
son's name, Gerben?

      THE WITNESS: G-e-r-b-e-n.
      JUDGE CLIFTON: Thank you.
      Q. The El Paso school bid, in what business
name -- you know, what entity made that bid?

  A.  I believe it's GH Dairy.

  Q.  And at the time the bid was made, GH Dairy Farm was not operating a plant in El Paso, is that correct?

  A.  I believe so.

  Q.  Now, do you know anything about the -- you testified to the price of that bid.

  A.  Off the top of my head. I mean --

  Q.  Okay. You're not sure that what you testified to is correct?

  A.  Not within -- not within mills because that stuff is bid. You know, I remember like 22 cents at that time.

  Q.  Okay. What do you mean by at that time?

  A.  Well, the milk fluctuates. It's based on paper, milk, chocolate, sugar, so much to run it through the plant, and it's formula pricing. And as the milk prices change, the pricing to the schools change. It is not that much for a year. It is a formula pricing. So it's continuously changing.

    I believe right today it's like 16 cents today. Because milk has gone down, like everybody in this room knows. So the school gets a better price.

    Now, if it goes up, the school is going to get a higher
price.

    Q. Okay. So the 22 cents --
    A. Was based on the time of the bid.
    Q. And what time was that?
    A. I don't remember.
    Q. Was it before the school year started?
    A. I would say a year ago, approximately, because the bids are coming up right now, but I don't know the date. I don't know -- but I would say approximately a year ago.
    Q. So roughly May 2008?
    A. The school bids come up at the end of the school year for the following year. What the dates are, all of them are different. They don't all do it on the same day of the year. It's -- it's -- Arizona's bidding right now. You know, everything, it's continuously changing. But it's a formula pricing, basically paper, milk, so much to run it through the plant, so much to deliver it, and then that's the bid.
    Q. Okay. And 22 was --
    A. At the time of the bid. Because that I remember, we said so much, you know, paper, so much this, so much that. And certain things -- I can remember numbers better than names --
    Q. So --
A. -- and times.
Q. What was the amount for paper then?
A. 2 cents.
Q. And what was -- what are the other elements in the price?
A. Running it through the plant.
Q. Processing?
A. Processing.
Q. What was that about?
A. You know, really, I would like to see Dean's numbers and then we would put them together like that. So since you're working for DFA and share it with Dean's, it's about -- it ended up being -- you take the milk at the time, 22 cents, and that took care of delivery, everything, paper. But I know paper is right at 2 cents.
Q. Okay. Let me just interrupt you there. You said something -- you say DFA shares with Dean's?
A. Yes.
Q. Is that what you said?
A. Yeah, you do the -- you do Dean's work, don't you?
Q. I don't.
A. Oh, okay.
Q. What are you talking about, DFA shares
with Dean's?

A. You guys are together.

Q. What do you mean, us guys are together?

A. Dean's and DFA are customer and supplier.

Q. DFA --

A. Yes. You work very, very diligently together.

Q. Okay. So I could say you share with Wal-Mart?

A. Yes.

Q. You share with Costco?

A. Yes.

Q. You guys are together?

A. Yes.

Q. Okay.

A. Customer -- customers and suppliers work together.

Q. Okay. That's what you meant?

A. That's what I meant.

Q. Okay. Now --

A. What did you think I meant?

Q. I asked you what you meant.

A. Well --

Q. I had no idea, believe me.

JUDGE CLIFTON: Mr. Hettinga, we'll let
Mr. Beshore ask the questions.


Q. Now, in response to Mr. Ricciardi's questions, you suggested that your bid on the El Paso school milk was much less than the prior year's bid.

A. Absolutely.

Q. Okay. So you were contrasting your bid for milk at 22 cents. That's for a half pint, right?

A. Correct.

Q. With May, roughly May of 2008, with the bid from May 2007, correct?

A. I'm -- I believe so, yes. This was all -- yeah, '08, '07, yes.

Q. Were the milk prices a little different between '08 and '07?

A. The percentage, we're back on formula pricing. When we came into El Paso, we saved the El Paso -- and that's my -- my salesman, who wanted to be patted on the back, we figured we saved El Paso School Districts $6 million.

Q. Now, did you hear -- are you aware of Mr. Carrejo's testimony?

A. No.

Q. You're not?

A. No.
Q. Do you know what Dean's bid for milk was this year?
A. Yes, that's why I'm here. Before I was here, they were ripping them off.
Q. No, no. I mean for this year, the year that you have --
A. Yeah.
Q. -- you bid -- you won the bid --
A. Correct.
Q. -- for the one district in El Paso?
A. Yes. What was their other district that they renewed? How much was it?
Q. I'm asking you what -- if you know, what Dean's bid was with respect to your bid for the district that you won the bid?
A. I believe they were 2 cents higher.
Q. So that's the end -- you're saying 2 cents per half pint is $6 million?
A. No, the year before -- when I came to town, things changed. Not until I came to town. Prior to that -- when I came to town, they lowered their prices. Prior to that --
Q. I thought the milk price had something to do with --
A. No.
Q. -- the Federal Order?
A. No, no.
Q. It doesn't?
A. Yes, it does. But it's -- it's a formula pricing that changes and the formula stays the same. The margin between the cost of milk and the cost of product are the -- the finished -- the milk and 2 cents are the two -- they're the ingredients. But the rest of it was -- was just 8, 10 cents a unit higher than it is today.
Q. For the non-milk factors?
A. For the non -- no, above and beyond -- running it through the plant, like right now it's 24. It was -- or 22 -- or now it's 17 today. It's 17. 17 cents is what a half pint is today.
Q. Milk price?
A. Milk delivered to the school. We're delivering half pints to the school right now for around 17 cents, because milk went down.
Q. What portion of that 17 cents is just the milk value?
A. I believe 7 cents.
Q. Okay. And when it was at 22 cents, what portion of that was just the milk value?
A. I would have to look at it on a piece of
paper, but I would say it was a nickel higher at that
time. I mean -- and then I got to look at a piece of
dpaper or something to see -- to see the fluctuation.
But the spread stays the same. It's the milk, the --

Q. The way it works, if it's 17 cents right
now for the half pint, and the milk value is 7 cents,
the packaging is 2 cents, you said, correct?

A. Correct.

Q. Okay. So the other 8 cents is

processing, markup, et cetera?

MR. RICCIARDI: Your Honor.

JUDGE CLIFTON: Mr. Ricciardi.

MR. RICCIARDI: Yeah. Mr. Beshore has
gone too far afield. He's asking for
confidential information. If everybody else in
this room wants to go ahead and disclose their
information about processing costs, percentages,
et cetera, then Mr. Hettinga will do the same.
I don't think it's fair to be asking him those
questions when other people have been trying to
hide behind confidentiality.

JUDGE CLIFTON: Well, it's fair to ask.

You're just saying it's not fair to expect an
answer.

MR. RICCIARDI: I guess that's right.
Q.     I asked the question.
A.     I've been coached.
Q.     Yes, you have.

JUDGE CLIFTON: So your answer, Mr. Hettinga?

THE WITNESS: It's confidential.

Q.     Can you tell me what 17 minus 9 is?
A.     12 -- or 8, I believe.
Q.     Now, when you did that -- that school -- when you say something worked, you mean it makes money?
A.     Correct.
Q.     Okay. And that school bid worked from the beginning of the school year, I take it?
A.     It was difficult when I brought the milk -- when I paid all the freight out of Anderson Dairy.
Q.     But it worked.
A.     It didn't matter, I needed to get the business, get going. I couldn't call the school up and say, can you start in January? I had to start.
Q.     You bid it without a plant, right?
A.     Finished. I was building one. You know, dairymen are used to milking cows for two years before they ever get a gallon of milk. They're used to working free.
Q. Does the plant in -- the Sarah Farms plant, does that plant work for you right now?
A. The plant does.
Q. Okay. Profitable?

MR. RICCIARDI: Your Honor, I'll object to that.

JUDGE CLIFTON: Mr. Ricciardi.

MR. RICCIARDI: Confidential.

MR. BESHORE: Your Honor, I object to the instruction to the witness by Mr. Ricciardi per witness now -- per question. It's not appropriate. This hearing hasn't been conducted that way, and I object to it.

MR. RICCIARDI: Well, I haven't -- I haven't been up here asking confidential information. Judge. Do you want me to shout it from over here that what he's asking for is issues about profitability concerning private concerns? And if I need to get up all the time, I will. But I just think -- I don't think it's fair.

JUDGE CLIFTON: Mr. Beshore, you remember the line, what am I, the potted plant? Do you remember that line?

MR. BESHORE: Honestly, I don't.
JUDGE CLIFTON: The Oliver North hearings? You remember Oliver North? Well, at any rate --

MR. BESHORE: Yes.

JUDGE CLIFTON: I don't expect Mr. Ricciardi to be the potted plant. And just as you objected, Mr. Vetne gave me a little lesson in how I'm not to sustain the objection, but I can either instruct the witness not to answer or allow his counsel to instruct him not to answer if I fear that confidential information that he does not want to reveal is being asked for.

I think that is applicable here. I expect Mr. Ricciardi to alert the witness that he has called when confidential information is being asked for by the question.

MR. BESHORE: Your Honor, unless my memory is very deficient, your Honor just recently stated that it's fair to ask.

JUDGE CLIFTON: It is fair to ask, but it's also --

MR. BESHORE: That's all I have done.

JUDGE CLIFTON: And it's fair for Mr. Ricciardi to pop up and alert the witness
that that goes into confidential areas.

MR. BESHORE: I think at some point witnesses can know whether it's confidential for them or not.

JUDGE CLIFTON: Well, I know this one does. I know this one does.

MR. BESHORE: As do I. That was the basis for my objection.

JUDGE CLIFTON: I understand.

A. I will say this. The plants are doing better than the dairies.

Q. Do you own any -- do you own or have an interest in any plants which produce a million gallons a week?

MR. RICCIARDI: Object to that, Judge. Confidential.

JUDGE CLIFTON: Now, I expect you to respond to each question.

A. That is confidential, but a million plant works better than a smaller plant, let me tell you that.

Q. I think you've testified to that.

A. (Nodding head.)

Q. That wasn't my question.

A. The larger the plant, the more efficient. It's just like the dairies. A 200-cow dairy is very,
very inefficient. A thousand cow dairy is more
efficient. A 2,000 cow dairy is more efficient, a
3,000-cow dairy is more efficient. And the plants,
the -- the plants that they're asking people to run with
is like trying to compete on a bicycle against a car
race. The PDs are on bicycles.

Q. All I'm asking is, are you, Hein
Hettinga, or any of your partnerships which operate at
least three dairy plants in the car race?

MR. RICCIARDI: Objection. That's a
back -- a back-end way of asking the same
question.

JUDGE CLIFTON: Actually, I like that
question. Mr. Hettinga, if you're able to
answer that question, I would like you to do so.
First of all, I'm not quite sure which three
plants. I know about GH in El Paso. I know
about Sarah Farms in Arizona. And what's the
third one?

THE WITNESS: I have another GH plant in
Arizona.

JUDGE CLIFTON: Close to the mic.

THE WITNESS: I have two GH plants. One
is in Arizona and one is in El Paso, Texas.

JUDGE CLIFTON: Okay, that's right. Now
I remember. So it's those three you're asking about, Mr. Beshore?

MR. BESHORE: Yes, it is, your Honor.

JUDGE CLIFTON: And are all these of those using cars in the race?

MR. BESHORE: That wasn't quite my question. But --

JUDGE CLIFTON: As opposed to bicycles.

Q. Right. But my question was, considering any of those plants, are you in the car race?

JUDGE CLIFTON: Mr. Ricciardi?

MR. RICCIARDI: Your Honor, I don't know what car race we're talking about, either the Indianapolis 500 or otherwise, but to the extent that it tries to backwards re-engineer the question about the amount of processing capacity in a particular plant, then I object. That's confidential.

MR. BESHORE: The car race -- just for clarification, the car race I'm talking about is the one that Mr. Hettinga referred to in his last response to me.

JUDGE CLIFTON: It's a ballpark figure, Mr. Hettinga. I would encourage you to respond to that.
MR. RICCIARDI: I would maintain the same objection, Judge.

JUDGE CLIFTON: So you can either be guided by counsel --

THE WITNESS: We're thinking about purchasing one. How's that?

JUDGE CLIFTON: Thinking about purchasing a car?

THE WITNESS: Yeah.

MR. BESHORE: I'll stop right there.

JUDGE CLIFTON: Thank you, Mr. Beshore.

Mr. Hettinga, I have to caution you, some of your best answers are a foot away from the microphone. I want to make sure they're in the transcript.

All right. Who will next cross-examine Mr. Hettinga?

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Good afternoon, Mr. Hettinga.

A. Good afternoon.

Q. You have to speak up.

A. Hi, Chip.

Q. I haven't even gotten started yet. When we last had the pleasure of a Federal Order hearing
together, your operation in Arizona, known as Sarah Farms, was a producer-handler, correct?
   A. That is correct.
   Q. And today it is a fully-regulated pool distributing plant on the Arizona Order, correct?
   A. That is correct.
   Q. So the alteration of status from producer-handler to fully regulated plant has certainly not put it out of business, has it?
   A. No, it hasn't.
   Q. And while the cause of the regulation was different, when we last spoke on a record such as this, your plant known as GH -- is it GH Processing in Yuma, Arizona? Is that what it's called, the second plant in Yuma?
   A. That's correct.
   Q. That plant was not regulated under any Federal Order, correct?
   A. That's correct.
   Q. And today it is regulated under the Arizona Order, correct?
   A. That's correct.
   Q. And it is hardly out of business today, correct?
   A. It's been damaged some.
Q. But it's in business today?
A. I work a little harder than most people.

JUDGE CLIFTON: Don't neglect, though, to answer his question. Which is -- I presume the answer is yes.

THE WITNESS: I'm still in business.

Q. In fact, the Sarah Farms operation is a vital and competitive player in the marketplace, isn't it?
A. I would say so.

Q. And the GH processing facility in Yuma is a vital and competitive operation in the marketplace?
A. We do compete.

Q. And, in fact, you have gained volume in those facilities since regulation, have you not?
A. I have gained volume because I didn't want -- people said I was going to go out of business when I became a PD, and I had to prove to them that I wasn't going out of business. All of the competition basically said, if he's no longer a PD, he won't be here. So I had to make them pay.

Q. Isn't it fair to say that it was the producer-handlers at the last proceeding who said they would go out of business?
A. Who?
Q. The producer-handlers in the last proceeding were the ones who testified that if they were regulated, they would go out of business?

A. There were some in Washington that were the salt of the earth that did go. They weren't big enough. They need to be a million gallons a week to really be tough. And until then, they should be PDs.

And there were people in Washington, that were like the salt of the earth, people that worked their cows and are no longer viable, no longer -- not me, them. And they were good people. They were good people, worked hard. And we put them out of business. They didn't need to be. And they did go broke, and you know.

Q. Your testimony is that producer-handlers who appeared in this proceeding, this earlier proceeding, regarding producer-handlers --

A. The three --

Q. -- are out of business?

A. There's two or three of them in Washington that are out or quit. And yes, that were PDs.

Q. Do you remember their names?

A. Edingas (phonetic) -- can Gerben help me, please?
Q. No, I think --
A. I mean, he would know their names.
Q. Maybe if Gerben wants to get on the witness stand with you.
A. How about my attorney?
Q. That seems to be what he wants.
A. How about my attorney, can he help?

JUDGE CLIFTON: What you should do is testify to your own knowledge and the other information --

THE WITNESS: I don't know their names.
I don't know -- I don't remember their names.

MR. RICCIARDI: What we need to do is to proceed question and answer, and with regard to any issues that you don't know, you don't know. And then we'll move on.

MR. ENGLISH: Leaving aside the whole confidentiality issue, I guess now we're going to have coaching, but I don't know. That's fine. I just think at some level -- I'll try.

The witness is the one who said that these businesses are out of business, so I think I'm allowed to test that.

Q. Does the name Edaleen Dairy mean anything to you?
A. Yes.

Q. Does that refresh your recollection? Is that one of the entities that was a producer-handler in the last proceeding that you just were referring to?

A. Yes.

Q. And your testimony is they are out of business?

A. I don't know if it's them or another group, and some have quit being PDs. I just heard bad stories about them. I got pieces and what have you. And they're having a hard time.

Q. Now, quit being PDs is not the same thing as being out of business, is it?

A. I believe one of them went out of business, sold out.

Q. All right. Does the name Smith Brothers mean anything to you?

A. I've heard of that one, that's one of them.

Q. Is that out of business?

A. I don't know.

Q. Does the name Mallorie's mean anything to you?

A. That's one.

Q. Do you know if they're out of business?
A. I don't know.

Q. So which one of these businesses or which ones -- I think you're using plural -- in Washington are out of business after the last proceeding?

A. I don't know. But I know there's big problems with the people and I've heard it, so -- it's just --

Q. You also heard they were out of business, apparently?

A. Yes.

Q. You started building the facility in El Paso when?

A. I would say probably 18 months before I started. In November of '08, I got done, so I would say 18 months earlier than that or a year earlier than that.

Q. So 18 months earlier than that would be in early '07?

A. I don't remember the dates. I don't remember the dates. I know it took just about a year to put it together.

Q. A year to put it together, and what, six months for planning?

A. No, I don't think it took that long, but --
Q. So -- but outside six months for the plant?
A. It's not a -- planning wasn't the big problem. It was permitting.
Q. When did you purchase the facility from the United Dairymen of Arizona?
A. I never bought it from United Dairymen from Arizona.
Q. I'm sorry. When did you purchase the facility?
A. I don't remember that.
Q. Was the whole process longer than two years?
A. I -- I don't -- I don't know. I don't think so.
Q. You don't think so.
A. I don't think so.
Q. Was it -- was it shorter than 2 1/2 years?
A. I don't know. I can tell you after we bought it, it probably took about 18 months to put it together.
Q. Did you buy it after USDA issued its decision in the prior proceeding regarding 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 December 2005?

5. A. I --

6. Q. I'm not -- I'm really not trying to trick you, sir.

7. A. I'm going to say about two years ago we bought it, I think.

8. Q. And two years ago is -- this is May 2009, so around May 2007 you purchased it, correct?

9. A. I believe. Now, those are hard -- I don't know. There's a record somewhere. I can dig it up, if that's what you really need.

10. Q. Now, the farm for -- that serves -- it may be plural. The farm or farms that provide the milk for the facility in El Paso -- which is GH Dairy, as I understand it, is that correct?

11. A. That's the name it goes by.

12. Q. The farm or farms are located in Muleshoe?

13. A. That's correct.

14. Q. Are there more than one farm?

15. A. There's only one farm that supplies that
El Paso property.

Q. Is that farm owned by you, your wife and Gerben?

A. It's owned by me -- my wife and I.

Q. Okay. What about Gerben, does he own that?

A. No, he does not.

Q. Do you sell milk into Mexico?

A. Where?

Q. Out of El Paso?

A. Not directly.

Q. Do you sell milk --

A. I sell milk to people. What they do with it after they pick it up or after they get it at my plant is -- I don't know what they do with it. Some of them distribute, and I don't know where they distribute to.

Q. So you have -- you -- you, yourself, testified, I believe, that you have four distribution routes, separate from -- four distributors? I'm sorry.

A. No.

Q. Four distribution routes, is that what you said?

A. No.

Q. Separate and apart --
A. I have distributors.
Q. You have distributors.
A. Yes.
Q. How many distributors do you have?
A. I don't know.
Q. And you don't know where the milk goes once you sell it to the distributor?
A. I have a pretty good idea.
Q. A pretty good idea that some of it goes to Mexico?
A. Yes.
Q. Is it true that the plant in El Paso has a higher butterfat usage than most plants in the United States for their sales in your marketing area?
A. I would say so.
Q. And that is because the population that you serve there has a large Hispanic element?
A. In Mexico, nobody drinks 2 percent because they add water to make it. So when they move to the U.S., they still don't buy 2 percent.
Q. Sir, I really appreciate that. That's the same answer you gave three years ago, to the word.
A. When you don't lie, you don't have to remember.
Q. Your plant manager at GH Dairy has been
quoted in the El Paso Times as saying that the plant has plenty of room to expand. Is that correct?

A. Which plant manager?

Q. Mr. Byrne. Is he the plant manager there in El Paso?

A. At present, I would call him the general manager.

Q. I'm sorry, the general manager.

MR. RICCIARDI: Your Honor, I did have an objection.

JUDGE CLIFTON: Mr. Ricciardi, you may approach the microphone.

MR. RICCIARDI: Thanks. I wasn't sure what the question was. It was ambiguous. Was the, is that correct, that he was quoted in the newspaper in El Paso, or was the, is that correct, that the plant has plenty of room to grow. So it was ambiguous to me. That's my objection.

MR. ENGLISH: Happy to clarify.

BY MR. ENGLISH:

Q. Is the plant manager's statement that appears in the El Paso Times, that there's plenty of room to expand, correct?

MR. RICCIARDI: Objection.
A. The --

MR. RICCIARDI: Hang on. I have another objection. That information is part of a business plan and is confidential, especially since this is a producer-handler operation. That kind of information is something they're not entitled to.

JUDGE CLIFTON: Well, if it's in the newspaper, it's not being guarded.

MR. ENGLISH: I do think at some point you can't simultaneously put it in the newspaper and then claim confidentiality.

JUDGE CLIFTON: This is just the beginning question. Perhaps your objection would be best placed after this one's answered.

MR. RICCIARDI: I will wait for that, Judge, I understand.

JUDGE CLIFTON: Thank you.

A. First of all, he's a general manager and, yes, I would like to put more into the plant.

Q. Was his statement as quoted in the El Paso Times that there is plenty of room to expand correct?

A. I believe so.

Q. Thank you, sir. And was his statement in
the El Paso Times that additional acreage around the
plant has been purchased, correct?

    A. We are farmers, we always buy the real
estate. We don't want to own the whole world, just
what's next to us. That was ten acres available. I
bought it. Okay?

    Q. Good for you, sir. Thank you for
answering my question.

    A. That's on the records. Besides, Dean's
comes by and takes pictures every week.

    Q. Not at my request. This is going faster
because you're answering my questions, sir. Just one
second.

    MR. RICCIARDI: First of all, hang on a
second, Chip. I don't mind you saying whatever
you're going to end up saying. Let me make a
point. I don't think that comment is fair,
because what it shows on the record is somehow
he hasn't -- or he's been evasive and has not
been answering questions, so I think that's an
unfair comment.

    JUDGE CLIFTON: No, what that shows is,
in spite of your coaching, this witness is
willing to share some information, which is --
makes it much more fun for all of us sitting
MR. ENGLISH: And may I actually say that maybe the knee-jerk reaction was being up here -- I was complimenting the witness. It was a genuine compliment.

MR. RICCIARDI: Good deal.

THE WITNESS: Thank you.

BY MR. ENGLISH:

Q. You testified earlier about what you felt the market was like in El Paso when -- before you came in, correct? You testified about that.

A. I felt there was an opportunity there.

Q. Now, leaving aside the regulatory issues for a moment, isn't it the case that Dean Foods purchases milk from a cooperative that imposes over-order premiums on Dean in El Paso?

A. I offered to become part of the MAC and pay a premium as long as I get a premium. And we had an agreement, and then they changed their mind. So now I've become a PD and we can play this game.

Q. What was the premium you would have paid to the MAC?

A. I believe 75 cents a hundredweight. But I would have received it from my cows. I wasn't going to pay it and not get it. I wasn't going to be milked
and not fed.

Q.    Is Dean milked and fed?
A.    Dean just milks. Dairymen milk cows, cows milk dairymen.

Q.    Does Dean get a premium back if it pays a premium?
A.    No.

Q.    Do you know what the level of premium was that was being charged to Dean by the MAC?

JUDGE CLIFTON: Please get a little closer, Mr. Hettinga.

A.    I know what was charged, but I don't know what was rebated.

Q.    Your business, Sarah Farms -- sorry about that -- is a successful business, correct, sir?
A.    I would like to think so.

Q.    Did Sarah Farms undergo a restructuring of its business after regulation in April 2006?
A.    I would say so.

Q.    What was that restructuring that you underwent?
A.    Get bigger, run more milk through the plant, do it cheaper. And select and compete.

MR. ENGLISH: I have no further questions of this witness.
JUDGE CLIFTON: Thank you, Mr. English.
Who next will cross-examine Mr. Hettinga? And now, Mr. Hettinga, you let me know if you want a short break. This may be somewhat fatiguing, just because it's aggressive.

THE WITNESS: We're all laughing. I would like to go pee, if I could.

JUDGE CLIFTON: This is very timely. It's just about 5:00. Please be back and ready to go at 5:10.

(A recess was taken from 4:59 to 5:11.)

JUDGE CLIFTON: We're back on record at 5:11. Who will next cross-examine Mr. Hettinga? Mr. Tosi, do you have any questions for Mr. Hettinga?

MR. TOSI: No, your Honor, we have no questions. But it's always a pleasure to see Mr. Hettinga, and especially so at this time since he came all this way to participate with us. Thank you. Thank you, Mr. Hettinga.

JUDGE CLIFTON: Any redirect?

MR. CARROLL: I have one.

JUDGE CLIFTON: I'm sorry, Mr. Carroll. I didn't think you were responding when I asked if there was any cross-examination.
MR. CARROLL: I started to get up and
Mr. Tosi asked.

JUDGE CLIFTON: Pardon?

MR. CARROLL: I say I started to get up
and then Mr. Tosi asked.

JUDGE CLIFTON: I see. I missed your
signal. All right. Then Mr. Carroll. And,
Mr. Beshore, I did see you as well. First I'll
start with Mr. Carroll who has not yet examined
the witness.

CROSS-EXAMINATION

BY MR. CARROLL:

Q. Mr. Hettinga, I'm John Benjamin Carroll.
I'm an attorney for the New England Producer-Handlers
Association. It's a collection of small
producer-handlers compared to you or anybody in the
West.

A. I'm a small producer-handler at this
time, but I plan to get a little bigger.

Q. Good. And I have also a person who wants
to be a producer-handler who is down in Virginia and
presently is small by any definition.

I want to ask you about your competitor
situation where you're -- let's take Texas first. Who
do you compete with in that market? Who are the names
of the persons, the major competitors for you?
   A.     Dean's.
   Q.     And who else?
   A.     There is some milk that comes out of
Lubbock that is a co-op. And I'm not sure it's coming
out of Lubbock. But basically it's Dean's that I
compete against. There's captive, like a co-op that has
different stores that sell only to their stores. And so
it's basically like competing against Dean's.
   Q.     Can you compare your size to Dean?
   A.     As far as what?
   Q.     Processing, the volume of processing.
   A.     As far as one plant or all the plants or
what?
   Q.     Whatever plants you're in competition
with.
   A.     I -- I don't know the real volume of
Dean's. I don't know the volume so I can't --
   Q.     Right.
   A.     I know they have -- I'm saying something,
I think, 86 or 87 plants. I have three. So let's say
one-third -- or 3 percent of their volume, maybe.
   Q.     It's true, isn't it, that they're listed
on the national exchanges, the stock corporations?
   A.     Yes.
Q. And they have access to -- to large corporate lending, should they need it?

A. They have used that.

Q. All right. And is it your position that your entry into the market was a benefit to the people that you eventually served?

A. I believe I'm very, very good for the consumer and very, very bad for the milk industry, or the -- the organized milk industry.

Q. Can you explain why?

A. I think I -- I say this to my friends who ship to co-ops. I say dairymen milk cows and co-ops milk dairymen. That's -- that's how I feel. I think everybody should be on their own. Co-ops aren't bad, per se, but basically the dairymen do not have a choice. You either be a PD or join a co-op. That's it.

Q. And you -- have you ever considered buying milk from cooperatives?

A. I have. I do.

Q. You do?

A. I do.

Q. But in spite of that, you have purchased your own cows and built your own farm. Why is that?

A. I did the cow and the farms first, and when I got regulated in Arizona, I do buy milk from UDA.
Q. But is it your preference to raise your own -- have your own cattle and do your own milk?
A. I will not sign a contract with them, if that's -- I can do whatever I need to do.

The co-ops put contracts that don't allow a person to leave for a year if it -- any kind of law they probably wouldn't allow it except in a co-op. You can't -- you can't leave a co-op for a year, once you give them notice, in most cases. And I don't know the co-op laws, per se, as well as I should.

I just don't -- I just do my own thing and buy my own milk and sell my own milk.

Q. Do you have better quality control over your product by raising it yourself?
A. You have total control, and better quality.

Q. Do you have any position on the proposal that there -- the producer-handler exemption should be eliminated completely? Do you have a position on that proposal?
A. Producer-handlers should be eliminated completely?

Q. Yeah.
A. I honestly think producer-handlers should be able to do 8 million gallons -- or 8 million pounds a
week. And if they want to start thinking about
regulating them, I would think about it. But basically
I think PDs should -- they -- really, I don't think the
milk business should be regulated. I would rather see
complete free enterprise, and -- but I think most
dairymen want co-ops and they want regulation, so that's
fair. But I think the ones that don't want it,
shouldn't have it.

Q. And would you have any concern about the
Department allowing or cutting off the right of any
farmer to become a producer-handler?
A. I would be very, very opposed to that.
Q. And can you tell me why?
A. In 1936 when these laws were generated,
half of all the milk was PDs. And today we've got a
problem because there's almost 2 percent PDs. And now
we've got a big problem.

The biggest problem we have is the big --
the total control of the co-ops and the big processors.
And to get diversification, every PD is more
diversified -- the co-ops basically just bundle
everybody and run us like sheep and shear us.

And the PDs do a great job of being
innovative. We heard about kosher milk. A big plant
won't fool with kosher milk. They won't fool with it.
Or anything special to get a customer, they won't do it.

So the little PDs do go the extra mile.

And all of a sudden, they do well, they get big, and then they can't be PDs no more. I think probably every dairy that you go to that is in the United States was a PD one time in their life and started as a PD and outgrew it.

But when you stop growth and you stop new blood, you kill an industry. You kill it. And that's what they're trying to do, so they can rape it.

Q. And do you believe that's in the consumer interest?

A. No, it is not in the consumer interest to not have PDs. The interest is new blood, new starting up. To create a milk mafia is no good.

MR. CARROLL: Thank you very much, sir.

JUDGE CLIFTON: Now, Mr. Beshore, do you want to go first? Mr. English.

MR. BESHORE: I don't have any other questions.

JUDGE CLIFTON: All right.

Mr. English.

RE CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Mr. Hettinga, in addition to our
experiences in Federal Order hearings, we've also had experience in federal court, correct, with respect to the rulemaking after it was adopted in 2006?

A. We've had different -- yes, I don't remember the issue, but yes, we've done all kind of things together, Chip.

Q. Do you recall filing a lawsuit, you and your wife and Sarah Farms, against the Secretary of Agriculture in the United States District Court for the District of Texas, Lubbock Division?

A. Yes, I do believe something to that effect.

Q. And do you recall a declaration that was submitted with your name on it dated March 13th, 2006, with respect to that litigation?

A. I probably signed something, but I don't remember. Do you want to read it to me?

Q. Well, I'll hand it to you, and --

A. I can't read.

Q. And also -- I do recall that --

A. Okay.

Q. -- Mr. Hettinga. Although I -- I think that you are one of the smartest men I know, for the record.

And so I will certainly hand it to you,
and maybe your counsel can assist, but I only have
really an authentication question. Let me -- let me
hand it and I'll explain what I'm going to do.

                  JUDGE CLIFTON: You may, Mr. English.

                  MR. ENGLISH: Your Honor, I will ask for
it to be marked, but first let me indicate that
I have handed the witness a six-page document
copied on front and back, as I believe it
actually appeared front and back rather than
separate pages.

                  It is entitled United States District
Court, for the District of Texas, Lubbock
Division, Hein Hettinga and Ellen Hettinga
versus Michael Johanns, defendant, civil case
number, and there's a blank. Declaration of
Hein Hettinga. And I would like to have this
marked, your Honor.

                  JUDGE CLIFTON: Mr. English, when you
were asking about the case, did you mention in
your question what the case number was?

                  MR. ENGLISH: I did not, your Honor. And
this is a copy from the file. When it was filed
and served, we didn't have a case number on this
particular document. My version of this
document doesn't have a case number on it. If
you need the case number, I'm sure I can get it.

JUDGE CLIFTON: Only if you just happen to have it in front of you.

MR. ENGLISH: I do not have it in front of me.

JUDGE CLIFTON: I know we can find it.

Okay.

MR. ENGLISH: I would like it marked. I'm going to ask the witness merely to acknowledge that this is his declaration. And then I'm going to move its admission under 801(d)(2) of the Federal Rules of Evidence as a prior statement of a party. It does not need to be inconsistent. If I need to talk about why it may be inconsistent, I can, but I'm moving its admission in its entirety. I am not picking out parts. But it is admissible under 801(d)(2).

To save us time, since Mr. Ricciardi has risen, I would point out that the witness in that declaration, in two paragraphs, 9 and 12, said the following: The new regulations will force Sarah Farms to abandon the business model which I invested substantial financial resources and many long hours over the past decade. The new regulations will cause immediate changes to
the operation of Sarah Farms and will force a
fundamental restructuring of the business, which
cannot be repaired even by a later decision
striking down these new limitations.

My last question of this witness was, did
the regulation --

JUDGE CLIFTON: You don't need to go into
that. Go ahead and go to number 12, tell us
what that says.

MR. ENGLISH: Number 12 has a number of
statements in it. A potential customer, a
nationwide retailer, has informed us that they
will not purchase milk from Sarah Farms due to
the uncertainty of Sarah Farms' operations under
the new USDA regulations. Moreover, Sarah Farms
has not been able to obtain new customers or
expand its customer base since the decision was
announced by USDA in December of 2005. And it
goes on about putting a cloud over the business.

JUDGE CLIFTON: Go ahead and read that as
well, please.

MR. ENGLISH: This decision has put a
cloud over my business, and Sarah Farms has been
under attack from competitors in the
marketplace, including Shamrock Foods, the
largest independent milk distributor in Arizona. And supermarket chains Kroger and Safeway, who both own large captive milk bottling plants in Arizona.

Sarah Farms is one of four processors of milk in Arizona and has the smallest milk processing factory in the market.

And his testimony was that he has grown, your Honor. So I don't think -- the Rule 80 -- 802(d)(1) -- at 801(d)(2), I'm sorry, absolutely does not require an inconsistent statement. It is a prior statement, it is a sworn statement of this witness for litigation purposes.

JUDGE CLIFTON: And the date of declaration is what, Mr. English?


JUDGE CLIFTON: And the effective date of the regulation that he feared is what date?

MR. ENGLISH: Was April 1, 2006.

JUDGE CLIFTON: After the declaration?

MR. ENGLISH: After the declaration.

JUDGE CLIFTON: So he had no experience yet.

MR. ENGLISH: But he testified what his experience was going to be, your Honor.
JUDGE CLIFTON: He anticipated.

MR. ENGLISH: He anticipated.

JUDGE CLIFTON: I understand.

Mr. Ricciardi.

MR. ENGLISH: I understand

Mr. Ricciardi -- at some point he needs to identify it. I don't want to lose that.

MR. RICCIARDI: Your Honor, what I object to -- I mean, we can argue about the question of whether it's admissible under Rule 801. I didn't know we were playing by the Federal Rules anymore. That's good, let's go back then. I got a lot more objections to make.

But the fact of the matter is, this is not relevant to this proceeding for this reason. The litigation that was filed for which this declaration was, in fact, proposed and prepared was the change in the producer-handler regulation for which a motion for a preliminary injunction was filed in Lubbock. That was denied, Judge. One of the reasons it was denied is because Congress, the night before, passed the Milk Regulatory Equity Act targeted at that gentleman that's sitting in the witness stand.

MR. STEVENS: Your Honor, I object to
that statement. The decision of the court stands for itself. No representation by counsel here can replace any decision of the federal judge, or any of that. Let's let the record stand on the --

MR. RICCIARDI: That --

MR. STEVENS: -- of what -- please, sir.

MR. RICCIARDI: I had not finished, sir.

Can I finish my statement?

MR. STEVENS: Well, no.

MR. RICCIARDI: Then you can go ahead and make your objection.

MR. STEVENS: Sir, sir, please, I get to make an objection, I get to complete my objection. Then you get to finish your sentence.

MR. RICCIARDI: Oh, you get to interrupt me?

MR. STEVENS: To make an objection, absolutely.

MR. RICCIARDI: Thank you.

JUDGE CLIFTON: Wait, now. We've been doing so well. Mr. Stevens, finish your objection.

MR. STEVENS: Well, it's very simple.
Counsel cannot make statements here about what a
court decided when the decision of the court is
public record for everyone to see.

I can -- I can characterize, paraphrase.
Let's have the decision stand for itself. He's
making representations that the decision either
stands for it or not. If you would like to put
a copy of it in the record for official notice
or take official notice of it, I have no problem
with that.

JUDGE CLIFTON: However, he was
explaining for me and everyone else that if this
was for injunctive relief, and if in the
meantime, Congress stepped in, that's relevant
information. Do you agree?

MR. STEVENS: But when it's characterized
as the court decided, and then uses this
interposed with that, the impression is left
that the court somehow is bound by something
Congress did. That -- that certainly is not the
case.

And the decision of the court is the
decision of the court. To -- to put it together
with some act of Congress to give that
impression -- which is not the correct
impression.

JUDGE CLIFTON: Thank you, I understand the objection. Go ahead, Mr. Ricciardi.

MR. RICCIARDI: Thank you, Judge. Let me see, before I was interrupted, so I can get my place and my train of thought back.

The purpose for the filing of the action in the federal district court in Lubbock was to attempt to get an injunction against what was going to then be the effective date of the change in the producer-handler regulation.

Obviously, one of the bases for an injunction, and always is, is that you're going to be potentially irreparably harmed. The purpose for this affidavit was to state at that point, based upon what was known, that we believed that Sarah Farms would be irreparably harmed.

Now, what happened afterwards and what happened in the market or how he changed his operation or whether he increased the volume is not relevant to what we're talking about now. This is an attenuated attempt to take a piece of -- an affidavit that was used for a specific purpose and to state that maybe your projections
were wrong.

The problem with it is, if you get into this, now I have the collateral matter of dealing with this case, the litigation that I then filed as a result of the Milk Regulatory Equity Act, which just got sent back on appeal from the U.S. Court of Appeals in D.C., I have to explain the interrelationship of that to this case.

JUDGE CLIFTON: Now, is that the one that found that you do not, under these circumstances, have to exhaust administrative remedy?

MR. RICCIARDI: That would be true. And all of it is obviously interrelated. It's not relevant to our proceeding. It does nothing to advance the ball. This being marked as an exhibit would be the same as me saying, okay, we're going to go ahead and mark copies of all the pleadings in the two or three lawsuits that are out there.

I just don't think it's relevant to anything, Judge, and I think it just puts us in a position where we put something in the record that shouldn't be there, and now I have to go
explain it again.

JUDGE CLIFTON: Let me -- let me -- I'll hear from counsel. I know -- don't leave, don't leave.

But let me tell you what I'm thinking. Throughout this entire proceeding, people who are anticipating what might happen to them in the marketplace if producer-handler exemptions stay the way they are, have been pinned down about the fact that nothing bad has happened yet in most of their cases; they just recognize that something bad could happen in the future.

So, to me, it seems fair if this was a situation where the Hettinga Enterprises feared -- anticipated what bad would happen if they lost their producer-handler exemption could well be evaluated in similar fashion.

MR. RICCIARDI: On the other hand, Judge, why do you need the document in your hand for that? The witness has been asked questions. He's given whatever answers there are. And to the extent it's relevant to the issue you raised, it's already in the record.

JUDGE CLIFTON: Well, don't leave yet. The other concern I have is it doesn't seem to
me that putting this declaration in -- and I recognize it's for a very limited purpose, it shows that the sky did not fall -- why that would require the whole record and the record of other litigation to be understood, which, by the way, the Secretary already does understand, having been a party to it.

MR. RICCIARDI: Perhaps.

JUDGE CLIFTON: Perhaps.

MR. RICCIARDI: Yes.

JUDGE CLIFTON: So why would all that other information have to come in, too?

MR. RICCIARDI: Your Honor, what I would have to end up doing, if you're going to put this in, is I have to consider whether or not I need to go through paragraph by paragraph and talk about some of the things that he anticipated, whether they occurred, whether they didn't occur; if, in fact, he had to make changes in operation; if, in fact, when he was signing this, the customer that he related it to, whether they ended up losing that customer or not.

I mean, it is that type of a collateral matter that may end up extenuating the record
even further than we have it now. But, you
know, you're going to make your decision. I
understand.

JUDGE CLIFTON: Okay. I'm inclined to
mark it and let it in. I don't want to prolong
this hearing any more than anybody else does.
But that's how I'm inclined. Mr. English.

MR. ENGLISH: I don't want to belabor the
point. It really doesn't matter what the court
ruling was. What matters is if this witness had
said this somewhere else, not in a court
proceeding, he would just be -- it would be just
as admissible under the Rules of Evidence.

The only reason I reference the Rules of
Evidence, by the way -- which, by the way, are
more stringent than this hearing is. If it be
admissible in a federal court, and I submit that
this document is admissible in a federal court
as an exception to hearsay. It is not hearsay.
It simply is not hearsay, then it's certainly
admissible here. I'm not going to belabor the
point. I would like to have the document
marked.

I do not intend to spend this much time
on it. I'm not surprised. But be that as it
may, if the witness can identify it and it can
be admitted, I can sit down.

JUDGE CLIFTON: All right. I'm marking
it as Exhibit 85.

(Exhibit 85 was marked for
identification.)

BY MR. ENGLISH:

Q. Mr. Hettinga, do you recognize what has
been marked as Exhibit 85?

A. I recognize my signature on the back.

Q. Is that your signature on the back?

A. Yes.

MR. ENGLISH: Your Honor, I move
admission of Exhibit 85.

JUDGE CLIFTON: Is there any additional
objection other than that already made? Exhibit
85 is hereby admitted into evidence.

JUDGE CLIFTON: Mr. Stevens.

MR. STEVENS: Could I inquire? Your
Honor, I was looking at my notes here, and I --
was Mr. Kreider's statement admitted?

JUDGE CLIFTON: It was.

MR. STEVENS: Okay. Thank you very much.

JUDGE CLIFTON: You're welcome. That's
the one I admitted with the rabbi's attachment.
Okay. Let's see. Who else would like to cross-examine Mr. Hettinga? Any redirect? Mr. Ricciardi.

M. RICCIARDI: Thank you, Judge. I just have a couple of points.

REDIRECT EXAMINATION

BY M. RICCIARDI:

Q. Mr. Hettinga, I think it was when Mr. English was asking you questions the first time, and you referenced the producer-handlers in the Pacific Northwest, and I think you said something about them being out of business. What did you mean by that?

A. As it was basically, I believe -- and I've heard bits and pieces and Gerben talked to me a little bit during the break. Edaleens are having a very, very hard time. I don't know if they're peak -- the names and what have you.

All of the people that were involved, some of them quit milking cows, some of them quit processing milk. And there's been a real destruction in their way of life. And they had a very, very family-oriented type life prior to the legislation.

And it disrupted it very, very hard. The families started fighting because it wasn't one family anymore. They broke it up into different issues. But
how it all -- it's not a blow-by-blow. I don't know exactly what it is, but I know Gerben is very close to them people because -- and basically said that they're all having a hard time.

Q. I understand. I have one other area that I think we need to clarify a bit, and I want to go back to it just so I understand. And I think it's based, in part, upon some questions that were asked of you by Mr. Beshore. It goes back to the school bid process.

As I remember the questions, he was asking you about whether or not there were, in fact, milk price variations depending upon the month in the contract period. Do you remember that?

A. Yes.

Q. And you told him, as I recall, that when you were looking at the school milk bid and school milk business, you're looking at milk, paper, transportation, and also some type of processing margin?

A. Yes.

Q. Okay. When you looked, then, at the previous milk bid that was made by Dean Foods in trying to make a decision, were you looking at a fixed number or were you looking at the margin?

A. The spread. They call it the spread.

Q. Okay, the spread. And is it your
testimony, then, that after your entry into the school milk business in El Paso, that the spread or the margin for school milk is 10 cents less than before you came in?

A. The year before, yes.

MR. RICCIARDI: Thank you.

JUDGE CLIFTON: Good. Any other questions of Mr. Hettinga? No. Mr. Hettinga, I thank you so much and you may step down.

All right. Let's see where we are and how tired we are and who wants to follow Mr. Hettinga. It's 5:41. We could have one more witness, perhaps. Mr. English? Oh, yes, yes, yes, we could have -- I don't know if he wants to follow Mr. Hettinga, but we could have Mr. Metzger, if Mr. Metzger is willing.

MR. MILTNER: He says yes.

JUDGE CLIFTON: Great. I think nobody needs a stretch break, right? I think everybody's ready to go. All right. Let's take five minutes so Mr. Metzger can get positioned next to a microphone and so don't go very far, we'll just reposition.

(A recess was taken from 5:42 to 5:46.)

JUDGE CLIFTON: All right. We're back on
Mr. Metzger, would you state and spell your last name, please?

THE WITNESS: Erick, E-r-i-c-k, last name Metzger, M-e-t-z-g-e-r.

JUDGE CLIFTON: Thank you. If you will raise your right hand, I'll swear you in.

(Exhibit 86 was marked for identification.)

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

JUDGE CLIFTON: Thank you, Mr. Metzger.

You may proceed.

A. Thank you. My name is Erick Metzger, and I serve as the General Manager of National All Jersey, Incorporated, NAJ, a position I have held for the past five years. I was raised on a dairy farm in Indiana, earned a bachelor of science degree from Purdue University in 1982 and an MBA from Franklin University in 1999. I was employed by the American Guernsey Association for ten years, including five years as its CEO. I have been with the Jersey organizations for the past 16 years. I have testified and filed comments in conjunction with previous Federal Order hearings.
NAJ is a national membership organization of over 1,100 dairy producers and others interested in supporting equitable milk pricing. Approximately 30 percent of NAJ members own cows other than Jerseys. NAJ's milk marketing policy is to advocate for equitable milk pricing and for programs that price milk based on its most valuable components in accordance with their use in consumer products. NAJ is an affiliate member of both the National Milk Producers Federation and the International Dairy Foods Association.

Most NAJ members market their milk through cooperatives. Some members market their milk directly to pool distributing plants. Other members market directly to proprietary nonpool plants. Some members opt to process their own milk, and we expect that more may choose to do so in the future. It is important to note that members who have chosen to process their own milk fall into two broad categories. One group can be defined using the common definition of producer-handler, in that they process their milk for fluid consumption. Others process their own milk into other products, particularly artisan cheese, which they market for premium prices. Given that the proposals being considered in this hearing will impact many of its members, NAJ is compelled to voice its support of and
opposition to certain of these proposals.

In broad terms, NAJ agrees with the two concepts put forth in Proposal 2, that some Class I milk needs to be exempt from Federal Order pooling and that there needs to be a limit on the exemption. NAJ's producer-handler members operate in several of the Federal Orders, are of varying sizes, have vast differences -- and have vast differences in operating histories -- in operating history. Some of these handlers rely only on their own farm milk, others regularly supplement their own farm milk with purchased milk, while others only purchase outside milk on an as-needed basis. Looking to the future, if they are able to grow sales, these producer-handlers will need to weigh the options of growing the supply of their own farm milk versus purchasing milk from other producers.

In preparing for this hearing, I consulted with the following NAJ producer-handler members. These six operations are not the only NAJ producer-handler members, but provide a representative sample of those members.

Mapleline Dairy in Hadley, Massachusetts has Class I sales in Order 1. Their own-farm milk comes from their 75-cow herd and they regularly supplement this production with milk purchased from a neighboring
herd. Mapleline started their bottling operation in 1995. Most months Mapleline qualifies as an exempt plant, keeping their sales under the 150,000 pounds per month threshold. However, there have been months when distributions have exceeded 150,000 pounds. The existing 150,000 pound limit on exempt plants serves as an impediment to them being able to grow their business.

High Lawn Farm in Lee, Massachusetts, has Class I sales in Order 1. Their own-farm milk comes from their 190-cow herd. High Lawn Farm's bottling operation began in 1923. Most months High Lawn Farm's herd produces all the milk needed for their sales, and they are exempt from pooling and pricing provisions as a producer-handler. However, there have been a few months when the herd's production has needed to be supplemented with purchased milk.

Bush River Farm in Newberry, South Carolina has Class I sales in Order 5. Bush River Farm's own-farm milk comes from their 400-cow herd. This dairy started bottling in 2004 and has not relied on any purchased milk. They are exempt from order pooling and pricing provisions as a producer-handler.

Kilgus Dairy in Fairbury, Illinois, will have Class I sales in Order 32. Slated to begin operation in June 2009, Kilgus Dairy will process milk
from their 100-cow herd. Initially they do not plan to buy any milk from other producers and will be exempt from current order pooling and pricing provisions as a producer-handler and/or as an exempt plant.

Garry's Meadow Fresh Jerry Milk in Mulino, Oregon will begin their bottling operation this month. Their sales will be in Order 124. The milk will come from their 60-cow herd. They do not plan to buy any outside milk. They will be exempt from order pooling and pricing provisions as a producer-handler and/or an exempt plant.

Fish Trap Dairy Number 2, doing business as Twin Book Creamery in Lynden, Washington and Class I sales in Order 124.

JUDGE CLIFTON: Mr. Metzger, is that supposed to be Twin Brook?

THE WITNESS: Yes.

JUDGE CLIFTON: Or Twin Book with an R?

THE WITNESS: Yes, it is, with an R.

JUDGE CLIFTON: We'll make that change on the record copy and have you initial before you leave.

A. They began their bottling operation in February 2007 with six cows. The business has grown to include 60 cows today. They use only their own-farm
milk with no outside milk purchased. They are exempt from order pooling and pricing provisions as a producer-handler and/or an exempt plant.

While NAJ did not submit any proposals for this hearing, we did review the proposals included in the hearing notice. In considering how the proposals would impact the current and future operations of existing and potential NAJ producer-handlers, as well as the membership in general, the NAJ board of directors approved the following concepts:

To support proposals advocating that producer-handlers with own-farm milk production be regulated as partially regulated distributing plants by the Federal Milk Market Orders. Own-farm milk production up to 3 million pounds per month should be exempt from order pooling provisions. Own-farm milk production in excess of 3 million pounds per month and any purchased milk should be subject to the respective order's pooling provisions.

To oppose provisions in proposals that would base pooling exemptions on historical handler sales, also known as grandfathered exemptions.

To oppose proposals seeking to establish individual handler pools across all orders.

Number one, partially regulated
distributing plants. NAJ supports, with qualification, Proposals 17 and 23. The qualifications are as follows:

In Proposal 17, NAJ would replace the language that calculates a volume of exempt own-farm milk dependent on historical sales limited to 3 million pounds per month with a simple limit on the exemption at 3 million pounds per month of own-farm milk.

In Proposal 23, NAJ would add a limit on exempt own-farm milk of 3 million pounds per month, whereas Proposal 23 has no limit on exempt own-farm milk.

NAJ believes the current regulations covering producer-handlers and exempt plants to be inequitable. Handlers with own-farm milk can be treated very differently depending on the order in which they have sales, whether or not they purchase any outside milk, and the volume of outside milk purchased. For example, consider the situations outlined by NAJ's current producer-handlers. As long as High Lawn Farm relies only on their own-farm milk, they can remain exempt from order pooling and pricing obligations regardless of how much of their own farm milk they market. Meanwhile, their neighbor, Mapline Farm, has to limit their sales to less than 150,000 pounds per month to retain their exemption due to buying milk from
another farm.

By expanding the existing regulations pertaining to partially regulated distributing plants to include handlers with own-farm milk, all handlers utilizing own-farm milk will be treated the same. Handlers processes their own-farm milk will see no current change to their current -- will see no change to their current order pooling regulations for their first 3 million pounds of milk per month if the NAJ modification is included. Handlers utilizing more than 3 million pounds of own-farm milk will have their pool obligation based only on the amount of milk over the 3 million pound exemption, instead of on all their own-farm milk.

Handlers who regularly rely on purchased milk in addition to their own farm milk will be treat more equitably as partially regulated distributing plants. Current regulations allow producer-handlers in some orders to retain their exemption as long as purchased milk remains less than a set amount. Producer-handlers in other orders lose their exemption if any outside milk is purchased. The partially regulated distributing plant option will allow own-farm milk under 3 million pounds per month to be exempt from order pool obligation even if outside milk is purchased.
Yet, the pool will be compensated for the purchased milk the same as if it had been received by a pool distributing plant.

NMJ believes that exempting the first 3 million pounds of own-farm milk is equitable for producer-handlers that use: Less than 3 million pounds of own-farm milk, more that 3 million pounds of own-farm milk, and a combination of own-farm milk and purchased milk.

Producers who do not process their own milk will benefit from the pool receipts of own-farm milk in excess 3 million pounds per month, plus any milk purchased by producer-handlers. In addition, if regulations are changed so that purchasing outside milk will not cause handlers to lose the exemption for their own-farm milk, those processors may be more likely to purchase outside milk.

Point 2. Basing pool exemption on historical sales. NAJ opposes the section of Proposal 17 that outlines the calculation of the amount of own-farm milk to be considered exempt, all of Proposal 20 and all of Proposal 26. These proposals advocate using a handler's historical processing and sales volumes of own-farm milk to establish an exemption from future pool obligations.
NAJ opposes these so-called grandfather clauses for two reasons. First, several of NAJ's producer-handler members are new processors. Fittingly, they began or will begin their operations on a limited scale in order to mitigate the risk associated with the enterprise. To their credit, they have been (or may be) able to grow their sales and -- their sales and praises. Previous months' sales volume will not adequately reflect their current sales, which are in excess of the average from previous months. These handlers would be penalized for their success if historical sales are used to establish a volume exemption to be used from a given point in time. In addition, new processors do not have previous sales figures to grant them a base although they planned their bottling operations under current regulations.

Second, NAJ does not believe it is equitable to treat existing producer-handlers differently than producers who may want to become producer-handlers in the future. Granting pool exemption to existing producer-handlers would, in essence, be giving them an advantage over others who may want to become producer-handlers in the future.

Number 3. Establishing individual handle pools. NAJ opposes Proposal Number 25 to establish
individual handler pools across all orders. In 2008, FMMO Class I utilization was 39 percent across all orders. NAJ believes that having the higher Class I receipts shared only among producers serving the Class I market will result in two classes of producers. The haves will have access to Class I markets and will receive higher operations for their milk. The have notes, without access to Class I market, will receive lower prices for their milk.

Individual handler pools will require a limited amount of manufacturing milk to be associated with the Class I plants as a reserve supply of milk. However, without marketwide pooling, there will be little incentive for most manufacturing milk to be qualified for a milk marketing order and subject to regulated pricing. In fact, it is easy to envision approximately half of the milk currently in the Federal Milk Marketing Orders becoming unregulated milk. A system with half the milk regulated and half not is essentially an unregulated system and would embody the very definition of disorderly marketing. NAJ echos the concerns on this issue provided during previous testimony from Dr. Roger Cryan and Bob Yonkers, Robert Yonkers.

That concludes my written statement. I
guess at this point I would like to borrow from a fine
tradition of our U.S. Congress and take the opportunity
to revise and extend my previous comments. It may, in
fact, help cross-examination go a bit quicker. And I'll
make three points. And yes, Mr. English, you can count
down the three points, if you would like.

Number one, we fully realize that what we
are advocating here will exempt from pooling some milk
that is currently pooled. It will also bring into the
pool some milk that is currently exempt. It is our
belief that we would be -- that what we are advocating
here would actually result in more milk being added to
pooling provisions across all orders than would be
exempted.

Number two, our statement is, in regards
to our membership, is forward looking. And it has a lot
to do with our -- our current producer-handlers who are
of admittedly limited size and scale. However, as
several of these are new entrants into this business, if
you talk to them about their hopes, their dreams, their
plans and what may become available to them, they're
concerned about the possible, shall we say, thwarting of
future opportunities that some proposals would include.

By the same token, we also have members
who milk several thousand cows, dairies, 4,000 cows,
5,000 cows, 6,000 cows. And the membership in general or the board of directors also sees the opportunity for those as possible entrants into the producer-handler realm and believe that establishing a 3 million pound cap prior to that potential development would certainly for -- shall we say prevent the potential for perhaps disorderly marketing from a large entrant such as that.

And finally, there has been on breaks, et cetera, some discussion about that allocation of class for milk for perhaps the producer-handlers that are using more than 3 million pounds of their own-farm milk, so that they would have some milk that was pooled and some that was not.

And I guess, you know, while we didn't think of this eventuality, while discussing -- the board, I do know our board well enough and their interest in equitable handling, that the most equitable way to handle that would be to take a handler's overall utilization. Let's say it's 80 percent Class I and 20 percent the other classes. Both the exempt milk and the pooled milk should be treated as 80/20.

I wasn't here for testimony yesterday, but I understand that there was some testimony to the effect that the current system that provides for both pooled and non-pooled milk, the down allocation of class
could all go towards the pooled milk and the high or
Class I could all be applied towards the exempt milk.
And I know our board well enough that they would not
support that type of allocation of exempt and pooled
milk among classes.

So with that, I would now be ready for
questions.

JUDGE CLIFTON: Mr. Metzger, this is an
extremely thoughtful statement and I thank you
for contributing it. Is there any objection to
the admission into evidence of Exhibit 86, 8-6?
No objection, Exhibit 86 is hereby admitted into
evidence.

JUDGE CLIFTON: Who would like to begin
cross-examination of Mr. Metzger? Mr. Yale.

CROSS-EXAMINATION

BY MR. YALE:

Q. Benjamin F. Yale, Continental Dairy
Products and Select Milk. Good afternoon, Erick.

A. Good afternoon, Ben.

Q. I would echo the Judge's comments, for
the very well thought out and very helpful decision.

JUDGE CLIFTON: Not the decision yet,
just the statement.

MR. YALE: Their decision, the board's
decision.

JUDGE CLIFTON: Thank you.

MR. YALE: The board's decision and comments.

Q. The issuing of the grandfathering is the fact -- I think what you're saying is that, first of all, there are in process today operations, farm operations, that are moving towards and are at various stages of processing milk as part of their operations that were not in 2008, is that right?

A. That -- that is correct, yes.

Q. And that's one of the reasons that you find the grandfathering objectionable, because it would provide those who were in operation the benefit, but new ones would not have an operation, right?

A. That's correct.

Q. Was there any discussion about those who have not yet started those steps of becoming processors having or not having that opportunity?

A. Yes. There was discussion along those lines. And the board did not want to support exemptions that would preclude others who wanted to -- might want to start their operation in 2010, or you know, 2011, et cetera.

Q. You mentioned there towards the end this
issue of down allocation and allocation. As I understand it, your proposal and modifications of whatever is already in the record, would be that if there was a -- first of all, you understand what we mean by the term soft cap?

A. Yes.

Q. And you are in a sense supporting a soft cap?

A. A very -- yes.

Q. Right. And so there's -- the exempt milk would be 3 million pounds or less, whatever the Class I sales would be, the lesser of those two, right? That would be the cap?

A. Yes.

Q. So if the Class I sales exceeded the cap, then it is your recommendation that that exempt milk be down allocated first, is that right?

A. I believe -- I'm -- on number one, our board did not specifically discuss the situation. There would be -- I understand it, there would be three ways to handle it.

Number one would be to down allocate the exempt milk first. Number two would be to down allocate the pool milk first. A third option would be to take that handler's overall utilization. And the example I
used was, let's say it's 80 percent Class I and
20 percent Class II, and allocate both the pool milk and
the exempt milk along that same -- that same ratio.

Again, I'm getting rather dangerous here
trying to, you know, interpret or read the mind of the
board of several individuals. I believe their -- their
first option would be to allocate it, both the pool milk
and the exempt milk, in the same manner.

If that were not acceptable, I'm
reasonably sure that they would then down allocate the
exempt milk first. And their least favorable option
would be to down allocate the pooled milk first.

Q. I know you didn't talk to the board, but
did you do any research on this issue to see how milk is
allocated when a handler purchases milk from a
producer-handler today?

A. No, I did not do any research.

Q. Okay. You're not aware that that
requires any purchases from a producer-handler be down
allocated with the plant that purchases?

A. No, I'm not aware of.

Q. Now, all of these people who you talk
about are Jersey -- have Jersey milk, right?

A. Most of them. There is one handler in
there that's got a combination of Jersey milk and
Holstein milk.

Q. Now, one of the advantages of Jersey milk is that it does have a distinct flavor and color profile that distinguishes it from the more common milk that's sold today, is that correct?

A. Yes. And thank you for noticing.

Q. Is there a sense that if consumers are offered this distinct kind of milk, that it would actually increase sales of bottled milk under these producer-handler situations?

A. That is one of the reasons that these -- these folks have -- have opted to go the route that they have. You know, we can give anecdotal evidence, but I'm sure other producer-handlers have the same experience that, you know, once people start buying their milk, they buy more of it.

We do have a branded program, the all-Jersey program, and some of these producer-handlers participate in that branded program as well. But yeah, it's -- part of the reasoning is that it's a higher quality product, and a higher quality product could lead to increased sales.

Q. Were you here today during the testimony of Charles Flanagan?

A. Yes.
Q. And did you hear his testimony that they were unable to get much above 2 million pounds per month because of the -- to actually -- to arrive at a 3 million pound limit?
A. Yes.
Q. And part of that reason was, is that once you're over your -- by a pound, you're fully regulated, and the next customer might put them over. Is that what you understood?
A. Yes, that's what we understood. And when the board was discussing this issue -- we actually have a couple of producer-handlers on our board of directors, and one of them said, you know, that was -- the 2 pounds that it would take you from 2,999,999 to 3,000,001 are two very expensive pounds.

MR. YALE: Again, thank you very much, Erick. And your Honor, I have no other questions.

JUDGE CLIFTON: Thank you, Mr. Yale.

Mr. Beshore.

CROSS-EXAMINATION

BY MR. BESHORE:

Q. Good evening, Erick.
A. Good evening, Marvin.
Q. Can you first give us some profile
information about your membership, if you have it? Of the 1,100 farms, what portion of them are in the Federal system in the Federal Orders? Or 1,100 members.

A. 1,100 members. The ones that wouldn't be would be our California members, which would in the neighborhood of 150. And then we have others in Idaho and Utah, would comprise another, I'll go on the high side here, of 40 to 50.

Then I'm not -- I mean, I realize there are some unregulated portions of Pennsylvania and a donut hole in Missouri that might encompass another very few members, but I'm not going to try to get on those countyline.

Q. If we take out for a minute the California members and the Idaho members, can you give us any average size for your -- the 900 or so producer members who are in the Federal system, average size, range of sizes?

A. Average size would be 175, maybe 200, somewhere in that neighborhood.

Q. How many Federal Order Jersey herds or members of National All Jersey have more than a thousand cows?

A. I would say 10 to 12.

Q. Okay. Now, how many -- how large of a
Jersey herd do you need to have 3 million pounds a month?

A. Well, I mean, back-of-the-envelope math would say 2,000 cows at 50 pounds a day times a 30-day month would be 3 million.

Q. With respect to -- let's kind of go back to the front of some of your comments. On individual handler pools, this -- am I correct that this is a very important issue for Jersey producers because the overwhelming majority of them deliver milk to manufacturing plants?

A. It is a very important issue to Jersey producers, yes. We do have a -- a very sizable portion of the milk that goes to manufacturing plants.

Q. And the reason that much of that milk is marketed to manufacturing plants is because it's -- it's high in solids, and in particular high in protein, which generates high -- high yields of manufactured products, cheese in particular?

A. That is correct.

Q. And, in fact, National -- one of National All Jersey's major activities has been piloting contracts and negotiating and making arrangements for your members' sales to manufacturing plants in particular?
A. That is correct.

Q. So if there were -- if you would lose
marketwide pools, your membership would lose a
tremendous amount of income?

A. That potential certainly exists. You
know, as you gaze into your crystal ball, you can
concede that eventuality.

Q. Now, the producer-handler examples -- the
examples, not all producer-handlers, of situations that
you've described in pages 2 and 3 of your statement,
Number 86, if the National Milk Proposals 1, 2 and 26,
which are packaged and were adopted as presented, all of
those operations would be exempt from pooling either as
exempt plants or handlers, isn't that -- isn't that
correct?

A. The operations as they exist today would
be. They could -- those -- those proposals, if adopted,
could provide some constraints for where these folks
might want to go in the future.

Q. Okay. But as you've described them -- as
they are today and as you've described them, depicted
them on pages 2 and 3 of Exhibit 86, they would all
be -- be exempt -- in fact, they would have -- with the
increase in the exempt plant volume, they would have
greater flexibility than they do today?
A. Some of them would, yes.

Q. Well, any of them that are under 150,000 would have -- by the way, are any of these operations more than -- more than 450,000 today, any of these examples?

A. I don't believe so today that any are over 450. I believe the -- the Bush River plant may -- may get there before too terribly long.

Q. Okay. Well, 400 cows at 50 a day is what? What is that? How much -- how much is that a month?

A. Do you have a calculator?

Q. You're pretty good at your mental math there. 50 pounds a day is a good proxy.

A. That would be 20,000 -- yeah, 20,000 pounds a day, times 30 days, would be 600,000 in a month.

Q. Okay.

A. Yeah.

Q. Okay. So any that are -- that were -- that had Class I sales less than 450,000 would have additional flexibility under Proposals 1, 2 and 6 because they would be able to freely -- as exempt plants, they can be able to freely purchase milk from other herds without affecting the exempt status, and
they can't do that today if they're producer-handlers in any Order, really, can't freely purchase, correct?

A. That's correct.

Q. So your -- National All Jersey's support for the 3 million soft cap is really premised on the thoughts of some members that -- that they would like to get -- get up to the 2,000 cow or so production level and be exempt from any pool, any obligation for their Class I to a marketwide pool?

A. I would say, in remembering the discussion of the board, the 3 million cap came -- or figure came about because, in addition to a couple of producer-handlers on our board, we have a board member from Arizona who serves on the board of United Dairymen of Arizona. We have a board member from Oregon who serves on the board for Tillamook, T-i-l-l-a-m-o-o-k, Cooperative Creamery Association. And they've been involved in those areas and on those boards long enough that they remember the producer-handler hearings of, what, three or four years ago, five years ago.

And so in the discussion of all this, part of the discussion was those two gentlemen relating how the producer-handler hearing in their Orders, why it came about, why it was needed, why it went through, what the impact has been since then. And the fact that
you've got 3 million, a cap as it were, you know, already in place in two orders, and shall we say, court tested, that the rest of the board relying on their experience said, well, perhaps 3 million makes -- makes sense for elsewhere.

There was also concern voiced during this discussion that here we had a 3 million cap put in less than five years ago, and now we're back -- we're back as an industry thing, no, that's too high, we need to go down to 450.

And that raised some concern among the board members as well. Some of them, even from the standpoint of, well, what should our position on the cap be at all, because once it's in place, then it can be, you know, lowered rather easily. So that was kind of a good comfortable settling point, shall we say, on the board and how they came up with the 3 million number.

Q. Okay. The 3 million that you propose is different than the 3 million in Arizona and the Pacific Northwest?

A. That is correct.

Q. Okay. Let me just explore that. Did you have any discussions at the board level about how that affects the uniform price among handlers in an Order, how the soft cap would?
A. It was -- yes. It was not viewed as being, shall we say, disruptive. I assume you mean by that question you were implying handlers that don't have own-farm milk?

Q. Handlers that don't have own-farm milk, and handlers that do, isn't it correct -- here's my question. Isn't it correct that if you allocate -- if you take the pool payment that a -- I guess you're going to call them partially regulated handler -- if you take the pool payment that those handlers with own-farm milk make and allocate it over their Class I sales, that the -- take the -- I'm using pool payment as a proxy for Class I value, that they're required to account to the pool for, okay?

If you allocate their Class I obligation to the pool over their Class I sales, it's going to be a different number basically for every handler, because it's a function of their exempt volume and their nonexempt volume? Do you understand the math?

A. Yeah. For example, if you've got a producer-handler with 4 million and another producer-handler with 8 million --

Q. Yes.

A. Yes, I understand, and I would agree with you.
Q. Okay. It's a different Class I number in essence for every one of those handlers?

A. As they relate it back to their overall Class I sales, yes.

Q. Now, I think your supplemental point 2, if I got it right, or maybe it's part of supplemental point 1, that you realize under your proposal, you would be exempting new milk from marketwide -- exempting new Class I sales from marketwide pool obligations, correct?

A. That's not exactly what I meant to say.

Q. Well, let me finish. You were going to exempt new sales but you were going to bring in -- you were going to exempt existing -- some existing Class I volumes, but you felt you were going to bring into the system more currently exempt volumes than you were exempting, so you would have a net gain. You felt like you would still have a net gain to the system?

A. That would be our belief, yes.

Q. Okay. How did you estimate the exempt volumes that would be lost from the system when you are granting to handlers, who don't have any exempt volumes now but have own-farm milk, exempt sales, or handlers who don't have any own-farm milk now, but who would bring on own-farm milk because it's exempt from pooling? How did you figure out what those volumes might be to
assume that you might have a net gain?

A. Okay. We were -- the assumption was that producer-handlers currently in the Arizona Order and the Pacific Northwest Order that are over 3 million pounds, that, you know, currently carry a pool obligation for all their milk, it is those, under what other -- what we are advocating for, those producer-handlers with over 3 million pounds of milk would each gain 3 million pounds of exemption.

By the same token, and we weren't -- we didn't have an exact count of how many handlers those were. We would estimate between the two Orders there might have been four or five, okay?

And then from, I believe it was Dr. Cryan's testimony, there was -- there was a footnote -- no, I'm sorry, not a footnote, but actually said -- there was a statement that at least three producer-handlers in the remaining Federal Order System, who are as of now completely exempt, have monthly sales of 15 million pounds or more. So if we take that 15 million pounds and exempt 3 of it, that leaves 12, which 12 million pounds across 3 would be 36 on a monthly basis that would be in the pool that's not currently in the pool. And if you've got, say, four producer-handlers in Arizona, in the Pacific Northwest
Order that would each gain 3 million, that would be 12
that you're -- that you're exempting, and the 36 that
you would be gaining is greater than the 12 that you
would be exempting.

Q. Okay. So you made no assumption for the
loss of own-farm milk presently delivered to fully
regulated handlers anywhere else that could be exempt
under the own-farm milk exemption?

A. I'm not sure I understand the
description.

Q. Would not in your Proposal 17 or 23
provide an exemption for own-farm milk of plants?

A. That is correct.

Q. Okay.

A. I was not aware of any, shall we say,
volumes of that.

Q. Okay. Thank you.

MR. BESHORE: Thank you very much.

JUDGE CLIFTON: Thank you, Mr. Beshore.

Who will next cross-examine Mr. Metzger?

Mr. Vetne. Thank you.

CROSS-EXAMINATION

BY MR. VETNE:

Q. Mr. Metzger, good evening.

A. Good evening, John.
Q. You've been involved in -- in dairy associations for about 26 years, as I read your testimony, is that correct?

A. That is correct.

Q. Would it be fair to characterize each of these producer-handlers or exempt plant or prospective exempt producer-handler entities that you've described as small businesses?

A. I believe so. The one that might be on the borderline in my description would be the Bush River Farm.

Q. But Bush River does not, as a plant operator, have or expect to have 500 employees?

A. That is correct.

Q. Okay. In fact, by reference to number of employees, it's a very tiny business subset of the small business definition, correct?

A. If the threshold is 500, that would be correct.

Q. And with respect to having -- you were here portions of last week and have been here portions of this week, correct?

A. I was here Monday afternoon and Tuesday of last week, and I have been here today.

Q. And do you recall hearing some testimony
at this hearing involving economies of scale of plants by size?

A. I don't believe so.

Q. Okay. Are you familiar with the concept of economies of scale for plant processing costs?

A. Yes.

Q. Okay. And you're aware that very small plants of the kind that you have described, either existing or prospective, have substantially higher costs to put milk in a gallon than a large plant of 20 or 30 million pounds?

A. I would agree with that, yes.

Q. Would it not be the case that by exempting a portion of milk for an entity with own-farm production, that as the entity grows, it would pay a larger and larger amount to the producer settlement fund as a percentage of its total?

A. That's correct, yes.

Q. So as the plant -- as the plant with high cost grows, it -- at the same time it achieves lower costs by virtue of its growth, it's paying more into the pool?

A. Yes, that would be correct.

Q. As a percentage. So in effect this proposal would tend to mitigate the small plant
disadvantage by a one-size-fits-all pool payment, by
graduating that pool payment as the plant grows?

A. Yes, sir.

Q. Now, did you -- I think you referred to
allocation of own-farm milk and purchased milk or own --
own-farm milk, exempt milk, and own-farm milk above the
exemption. And you referred to treating it as a
partially regulated plant, which would be a plant blend?

A. Yes.

Q. So the exempt milk would be subject to a
plant blend and the nonexempt would be subject to a
plant blend?

A. Yes.

Q. So there would be non -- there would be
no nonuniformity in class prices between such a plant
and handlers without exemption, they would all be
subject to the same class prices as plants?

A. Based on, you know, that plant
utilization, yes.

Q. The same Class I price applies to a
partially regulated plant and a fully regulated plant?

A. Yes, sir.

Q. The difference would be not in the class
price, which I think you discussed with Mr. Beshore, but
in the variability of the pool obligation, correct?
A. Help me just a little bit.

Q. Okay. The pool obligation for a plant with some exempt milk would be different from another plant with identical uses that doesn't have exempt milk?

A. That's correct.

Q. The same class prices would apply, but the net pool obligation would not apply?

A. That is correct.

Q. Because for some of the class prices, that plant would be paying its own farm, correct?

A. That's right.

Q. And variable pool obligations is a fact of life now for every plant in the system, depending upon their total uses?

A. Yes, sir.

Q. Now, your proposal or your preference here for an exempt volume, that exempt volume is fixed as a ceiling that can't be exceeded, no more than 3 million pounds can be exempt, correct?

A. That is correct.

Q. Okay. So that's a hard number?

A. Yes.

Q. Okay. And when somebody uses the term soft cap, what they're -- what they're talking about -- let me see if you agree with that -- what you understand
them to be talking about is not a soft cap on exempt volume, but really a soft cap on the size that a plant can grow to, even if it contributes to the pool?

A. That is correct. The soft cap, as I understood it, was not on exempt volume but on plant volume, and there really is no cap on what the plant can grow to.

Q. Okay. When a plant that has some exempt milk, say 3 million pounds, grows to 4 million pounds, wherever it comes from, that plant would be paying into the pool fully the same amount that anybody else pays to the pool on the fully regulated nonexempt 1 million pounds, correct?

A. That's correct.

Q. And if that -- if that is new business because of a unique product put out, the pool would benefit from that additional Class I sales volume?

A. Yes, it would.

Q. And if it's not new business, just happens to be milk taken from, you know, a larger plant, the pool would not be harmed because the same -- the same volume of Class I milk would be in the pool?

A. That is correct.

Q. Okay. And let's see. Oh yes. And then finally, I just have a question on your association's
position on individual handler pools. You conclude that individual handler pools could result in half the milk being unregulated?

A. Yes.

Q. You assume in that conclusion that milk going to a manufacturer is not going to a regulated handler, am I correct?

A. It would be my assumption that a manufacture -- currently -- let me explain where that comes from.

Q. Okay.

A. Currently manufacturing plants have the option to associate with a pool or not. And that one of the primary drivers currently for doing that is to share -- currently is to share in the marketwide pooling of receipts. And if that were no longer available, then the manufacturing plant would have potentially little incentive to do that.

Q. Okay. During your 26 years of involvement in trade associations, all but the last nine years there have been individual handler pools in the Federal Order market system, correct?

A. I don't know. I might have to -- you know, you typically don't lead me astray, John.

Q. Okay.
A. But my marketing background only goes back maybe about five years.

Q. Oh, okay. You are drawing -- you are making some assumptions in your conclusion that half of the milk would be unregulated based on current marketplace and current regulatory behavior, correct?

A. That is correct.

Q. You're not aware of any reason why, in an individual handler pool regulatory system, manufacturers cannot be designated the handlers to which classified prices apply, so that everybody is regulated if they produce Class I milk and send it to the buyer?

A. I'm sorry, would that be Class I milk?

Q. Everybody who produces -- I'm sorry, not Class I, Grade A milk.

A. Grade A milk.

Q. And send it to any buyer. There's no reason why every buyer cannot be a handler that has to pay class prices?

A. The regulations could be changed to do that. I believe that somewhat mimics the situation in California now.

Q. Exactly.

A. And I'm also aware in California that there are cheese plants who are encouraging producers to
opt for Grade B status so that the cheese plant does not have to pay them regulated pricing.

Currently, in the California system the cheese plants subsidized the butter powder plants because the volume of butter powder plants or milk going into butter powder production out there, they can actually pay their producers -- the cheese plants can pay their producers better outside the pool than inside the pool. And are encouraging producers to go Grade B status, so there would be another way around that.

Q. Cheese plants, can -- would it be more correct to say they can in some months?
   A. I'm sorry?
   Q. Would it be more correct to say that California cheese plants can out pay in some months?
   A. Yes.
   Q. Is it not true that the volume of -- that notwithstanding, notwithstanding -- strike that.

   Notwithstanding the encouragement by California cheese makers for producers to move from Grade A to Grade B, that a very, very, very small portion of the milk produced in California is Grade B?
   A. That would be correct.

   MR. VETNE: Thank you.
   JUDGE CLIFTON: Who next will
cross-examine Mr. Metzger? Mr. Carroll.

Let's go off record for just a moment.

(Off the record.)

JUDGE CLIFTON: We're back on record at 6:44. Mr. Carroll.

CROSS-EXAMINATION

BY MR. CARROLL:

Q. I'm going to say, good evening.

A. Good evening, Mr. Carroll.

Q. Good evening, Mr. Metzger. I want to
compliment you, as the others have, on a thoughtful,
definitive, well-written statement. And I'm
particularly pleased that your board thoughtfully
considered what was said. I just have a few questions
for clarification purposes. Your organization is known
as All Jersey?

A. National All Jersey.

Q. National All Jersey. For the record,
does that mean they are people that breed and own Jersey
cows?

A. For the most part, that is correct;
However, 30 percent of our membership does own cows of
other breeds, either instead of or in addition to their
Jerseys.

Q. But directing your attention to the
Jersey label, is that advertised? Do you have a program for that?

A. The All Jersey label, which is our trademark product or our branded product, is something we were trying to, say, reinvigorate.

Q. And is it in the advertising? Do you attempt to show that there's something of quality in the Jersey -- in the All Jersey or the Jersey name?

A. Well, not just in the name, but also in the product. And as was alluded to, the Jersey milk, particularly for fluid consumption, the skim portion of the milk has higher protein, which gives it a different flavor, a different mouth feel. It also tends to be higher in calcium, which can provide nutritional benefits that consumers are interested in.

Q. Are there consumers that value those qualities?

A. Yes, there are.

Q. And do you attempt to develop a market for that purpose?

A. We are working with these folks to try to do that, yes.

Q. There are numbers of your members that you surveyed apparently, but basically it appears to me that they are all serving fairly rural areas. I don't
know if that's true or not. But I'm interested particularly in Lee, Massachusetts. That's not a major area.

A. That is the very westernmost part of Massachusetts. You can almost throw a stone and hit New York.

Q. It's in the Berkshire --
A. Yes, it is.
Q. -- Mountains? And Hadley, Massachusetts, I take it that's not a major urban center?
A. Actually, yes. Hadley, Massachusetts, is on the outskirts of Springfield, and one of their -- one of the major customers of that is folks associated with the University of Massachusetts, who either come to their farm store or take home delivery from Mapline Dairy.

Q. Okay. You say they do farm delivery?
A. They do home delivery --
Q. Home delivery.
A. -- in addition to an on-farm store, in addition to the servicing stores.
Q. All right. I take it that from the consumer viewpoint, are you in favor of having a free entry and open competition in the sale of fluid milk?
A. Well, yes, as long as it meets, you know,
health regulations, et cetera.

Q. And now directing your attention to page 2 of your statement, and the portion that's marked Mapleline Farm, Hadley, Massachusetts. At the last sentence of that last -- in that paragraph, the last sentence of that paragraph says, the existing 150,000 pound limit on exempt plants serves as an impediment to them being able to grow their business. Could you tell us more about that?

A. Right now, for them to go much beyond the 150,000 pound limit, which would then require producer settlement fund payments on all the milk, would be prohibitive to them from a cost standpoint.

Q. And is it your request to the Secretary that he recognize that as an adverse impact and alter the regulations so that they are not subject to that impact?

A. Yes.

Q. Then directing your attention to page 3 of your statement, at the first full paragraph under Garry's Meadow Fresh Jersey milk, you have here that, they'll begin their bottling operation this month. Do you recognize that the proposal that is -- has been made would adversely affect Garry's Meadow's ability to either be grandfathered or to be --
have a producer-handler exemption if their proposal -- 
if the Proposal Number 1 was enacted?

A. Proposal Number 1 by itself, yes, would have an adverse effect.

Q. And I think they have a 60-cow herd, is that correct?

A. That's correct.

Q. And is it your request to the Secretary that he recognize that inequity and remedy it in this proceeding?

A. Yes.

Q. I think you were asked these questions and if I have, I will withdraw it. But I have not yet clearly understood that you have taken into account what effect, if any, on the pool there would be if your proposal was adopted; in other words, what effect it would have in the blend prices?

A. We've not done any, shall we say, very refined statistical analysis of that. And in my conversation with Mr. Beshore, was a general impression that -- our thought process that it would be adding more milk to the pool than it would be subtracting, and therefore it would be adding to total pool value.

Q. And I'm not sure you are aware of it, but there were some statistics, at least for Order Number 1
where Mapleline Farm is located, also High Lawn Farm, both are Massachusetts producers, they're within that Order, that there's approximately, if you totaled producer-handlers and exempt milk, it would be about 1 percent of the Class I sales. And directing your attention to that, do you have an opinion as to whether that would have any serious effect on the return of producers if there was a small increase in that figure?

A. A small increase of the 1 percent?
Q. Yes. If it had any increase, really.
A. Any increase?
Q. Yeah.
A. Well, I guess you would have to define any. But currently the 1 percent producer-handler and exempt milk is not having adverse affect on -- it would be our belief it would not be having an adverse effect on producers in general. If that were increased to 1.5 percent, it probably would still not have an adverse effect on producers in general.

Q. As a result of your survey, or otherwise, do you have any opinion as to whether or not there's evidence of disruptive competitive practices by producer-handlers or exempt milk persons?
A. As part of this proceedings, I've probably missed enough of it that I couldn't --
shouldn't really comment on that.

    I will say during our board's
deliberation of these proposals, again going back to our
board member from Arizona who serves on the NDA board,
the discussions at the time of that producer-handler
hearing, you know, four or five years ago, I believe
that board member relayed to us that a large
producer-handler in that area was actually -- was
calculated to have reduced the blend price in that Order
by perhaps 10 or 12 cents a hundredweight. And that, we
believe, would be -- would be significant.

    Now, there are some large
producer-handlers in other Orders, whether the magnitude
of their exemption is causing that magnitude of impact
on the blend price, I don't know.

    But again, harkening back to the previous
producer-handler hearing for the Arizona and the Pacific
Northwest Orders, at that time there was an adverse
effect on very large producer-handlers.

Q. Have you had any reports about the
dairies you've mentioned here being engaged in
disruptive competitive practices? That would be
Mapleline, High Lawn, Bush River, Garry's Meadow or Fish
Trap.

A. No, we have not.
MR. CARROLL: That's all. Thank you.

JUDGE CLIFTON: Thank you, Mr. Carroll.

Is there any other cross-examination of
Mr. Metzger? Mr. Tosi.

MR. TOSI: The government has no
additional questions, but we would like to thank
Mr. Metzger for coming. We think his statement
was extremely well written, extremely thoughtful
and we very much appreciate National All
Jersey's participation.

THE WITNESS: Thank you.

JUDGE CLIFTON: Thank you, Mr. Tosi.

Mr. Metzger, is there anything else you would
like to add?

THE WITNESS: No, your Honor.

JUDGE CLIFTON: Mr. Metzger, again thank
you very much. I'll see you all at 8:00 in the
morning. Mr. Beshore.

MR. BESHORE: May we -- before we
adjourn, I would really like to have an order of
witnesses for tomorrow. And I would like to
know what witness statements will be present in
the room tomorrow morning for all witnesses who
may appear tomorrow as required by the rules of
practice.
We've kind of sloughed on that. This isn't aspersions meant on anyone, particularly Mr. Metzger, but we haven't had rigid compliance with that requirement and it's helpful.

JUDGE CLIFTON: Yes, it's very helpful. I agree. Mr. Miltner.

MR. MILTNER: Your Honor, I think that, first of all, as to the rule on witness statements, it's required of proponents and we've provided those statements from our AIDA member -- member that's testified thus far in the morning. But I agree those statements are helpful.

JUDGE CLIFTON: Now, your economists particularly, when will your economists' statements be available?

MR. MILTNER: They will be available in the morning.

JUDGE CLIFTON: Okay. And will your economists kick off our testimony, or should this person from Braum Dairy?

MR. MILTNER: Mr. Bostwick from Braum's Dairy, will probably be best to start him first. I believe he will have a statement, which will be available in the room before the day starts,
as will the economists' statements.

JUDGE CLIFTON: All right.

MR. MILTNER: And my presumption is that
that will take the day.

JUDGE CLIFTON: Could well. So we start,
number one, Tony Bostwick, number 2,
Dr. Knutson.

MR. MILTNER: It's pronounced Knutson.

JUDGE CLIFTON: Knutson. And number 3,
Dr. Knoblauch.

MR. MILTNER: It's also pronounced
Knoblauch.

JUDGE CLIFTON: Oh.

MR. MILTNER: Pronounce the Ks for both
of them.

JUDGE CLIFTON: All right. Thank you.
And if we should have more daylight, even after
they're finished, we will go with Dr. Yonkers or
Mr. Carman or someone like that.

MR. BESHORE: Well, I'm wondering if the
statements -- in the event that we reach them,
the statements would be available for the other
AIDA witnesses that are planning to come. I
think they should made available tomorrow, we
would like to see them. I would ask that.
JUDGE CLIFTON: Well, as I recall, Sally Keefe from Aurora, when do we think she might be available?

MR. MILTNER: Your Honor, at this point I don't know the answer to that.

JUDGE CLIFTON: Okay.

MR. BESHORE: She's here. She's been here.

MR. MILTNER: And I may be able to have a statement from Mr. Taylor tomorrow again. We will provide those statements before they testify in the morning they testify, as required by rule.

JUDGE CLIFTON: Earlier is better, of course, so if you can, Mr. Miltner. You're welcome.

DR. YONKERS: Your Honor, while earlier this week after reading my testimony --

JUDGE CLIFTON: Don't bail on me, Dr. Yonkers.

DR. YONKERS: -- I mentioned I was leaving. I've got a plane a little after 2:00 on Friday afternoon. My plan at this time is not to come back next week. So I've been here all last week and this week and still hope
to get on. I know you've got a full day, it
sounds like, tomorrow. And if I'm put on Friday
morning and go too long -- I just wanted to
point that out. Thank you.

   JUDGE CLIFTON: Friday may be your lucky
day.

   DR. YONKERS: Maybe.

   JUDGE CLIFTON: I would hope we would
have -- I find your statement quite meaty,
adequate cross-examination time.

   So, Mr. Miltner, I don't know whether you
would consider interrupting your own economic
expert in order to be sure we cross-examine
Dr. Yonkers. But just think about it, you don't
have to answer now.

   MR. MILTNER: Thank you.

   MR. BESHORE: Can they go as a panel?

   MR. MILTNER: I think that will save time
for everybody involved, but we would like them
to go as a panel.

   JUDGE CLIFTON: Thank you, Mr. Miltner.

   Thank you, Mr. Beshore.

   All right, well, I'm sorry that you don't
get to spend the evening going over those
statements, I do know that would help tomorrow's questioning. But we'll give you a break if you need to consider those statements. Thank you all. We go off record at 6:59.

---

PROCEEDINGS ADJOURNED AT 6:59 p.m.

---
CERTIFICATE

I, Linda S. Mullen, RPR, RMR, CRR, the undersigned, a court reporter for the State of Ohio, do hereby certify that at the time and place stated herein, I recorded in stenotypy and thereafter had transcribed into typewriting under my supervision the foregoing pages, and that the foregoing is a true, complete and accurate report of my said stenotype notes.

_______________________________
Linda S. Mullen, RPR, RMR, CRR