UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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

Public Hearing

Before: Administrative Law Judge
Jill S. Clifton

Date: May 18, 2009

Time: Commencing at 8:17a.m.

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

Before: S. Diane Farrell, RMR, CRR
Notary Public – State of Ohio
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Also present:

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Jack Rower, USDA
Clifford M. Carman, USDA
Gino Tosi, USDA
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JUDGE CLIFTON: Let's go back on record. We're back on record. It's 8:17 on Monday, May 18, 2009. This is day 11 of the milk rulemaking hearing. I'd like the transcript to be Volume XI and the pages to be numbered in sequence to those of Friday.

We started a bit later this morning because there are a number of exhibits being distributed, including some documents from our first witness who will either be -- I'm going to let you all help decide -- Mr. Taylor, the owner of Snowville Creamery, S-n-o-w-v-i-l-l-e; Mr. Carman, with regard to all the pending items, all things statistical.

So I -- and then we have a number of people who would like to testify later in the day, but are not available right this minute. So I would like some guidance and I would like to start with Mr. Ricciardi, if you have any preference as to whether we begin with Mr. Taylor or begin with Mr. Carman.

MR. RICCIARDI: Your Honor, I know that Mr. Yale has some limited time today, and I know that he's got documents he wants to put in, and wants to examine Mr. Carman on that. I also
note that Mr. Vetne is not here with us yet. I know he has questions. My thought would be that Mr. Yale goes ahead and deals with his documents and any questions he has with Mr. Carman. And then when he concludes, since Mr. Carman will remain with us, that we go ahead and start with Mr. Taylor from Snowville Creamery next.

Also, Judge, I have told you, and I mentioned to my brethren that Mr. Arkema, A-r-k-e-m-a, Paul Arkema, of Country Dairy intends to come in and to testify at some point later today.

JUDGE CLIFTON: All right. You will notice that Mr. Ben Carroll is not here right this minute; Mr. Woody Carroll informed me that he had some plane delay. But we expect he will be here by 9:00, and his testimony today will be brief, maybe ten minutes on direct, something of that nature. Mr. Yale.

MR. YALE: I'm going to be helpful and I can be flexible. My only requirement is that -- I will be storming out of the room at 4:00. No, I will have to leave at about 4:00, reluctantly, I might add, because I'd like to complete. It's been so long, I hate to come so close and not be
here. Maybe we'll be done, but I doubt it.

I do have some questions of Mr. Carman. They're not that long. It's a situation where he started in -- early in the afternoon, and I had the first shot. I don't have to be here through all of this cross, so -- I mean, whatever it takes to get the witnesses up and moving quickly into -- you know, that's fine.

And then I will at some point make a statement of counsel in terms of our positions because we're going to withdraw one of our proposals.

JUDGE CLIFTON: You want to give us a hint?

MR. YALE: Well, I think -- I was going to get my notes to do it. If we're on the record if everybody is ready, I can tell you what our position is.

This is on behalf of Select Milk Producers and Continental Dairy Products. The Proposals 1 and 2, Select and Continental are in support of those to this caveat.

The support exists if, and only if, provisions are provided that those existing producer-handlers at 3 million pounds or less
are left untouched by these regulations. Now, that can happen in one of three ways.

One, it can be in the form of the 26 Proposal, which is the proposal of National Milk. There are some difficulties with that that we do not accept, because it doesn't leave them as they are. It actually changes them. It removes the 150,000 pounds per month that they can purchase in some orders. It gets the Department involved in retail of the labeling, which we oppose, although we understand and really concur with some of the concerns they have that are behind that, but we don't -- first of all, we don't think that will be an answer; and because one of the provisions deals with Nature's Dairy.

Let the record reflect that the owners of Nature's Dairy also own a farm in Texas which is a member of Select Milk Producers. And under the provision as defined by National Milk, they would lose their exemption that they have held for many, many years. And we're opposed to that. So if it's just simply to take the existing PDs under their existing rules and grandfather them in as is, we support that.
MR. BESHORE: Your Honor.

JUDGE CLIFTON: It has gone on longer than I thought. I just thought you were going to tell me a number.

MR. YALE: I am. I was leading up to it. I can make it short. I'll tell you quick.

JUDGE CLIFTON: That's okay. I'll save it until you're testifying because you're going to testify.

MR. YALE: I'm just going to tell -- all right. We can make a statement. I mean, we could make an oral argument. I just was letting them know what our position was.

JUDGE CLIFTON: Let me hear from Mr. Beshore.

MR. YALE: All right.

MR. BESHORE: I thought I missed the premise, because I didn't understand what I was hearing. It sounded like a post-hearing brief.

And --

JUDGE CLIFTON: I just thought he was going to tell me which number he was withdrawing. But it's more complicated than that, so I'll defer that to a later time.

MR. YALE: I'll get there. We're
withdrawing Proposal 20, which is a grandfather clause. I was just trying to lead up to it to give the context. We're all warming up from the week. I apologize.

It's basically the same as 17. We stand by our proposal, I think it's 21, which would be an alternative that meets the goals. And I just wanted you to know why we were at where we were at. I wasn't trying to testify. I was just trying to give a context so people knew where we stood.

JUDGE CLIFTON: I know. It just went on too long.

MR. YALE: Well, that was -- we were about to the end. So we're done.

JUDGE CLIFTON: Okay. Thank you. All right. It sounds to me like Mr. Vetne is here now. And it sounds to me like our best first witness would be Mr. Carman. Mr. Carman, are you available to proceed at this time?

THE WITNESS: Good morning.

JUDGE CLIFTON: Good morning, Mr. Carman. Mr. Carman, you remain sworn. You're still under oath, and I would like you again to state and spell your name.
THE WITNESS: Clifford, C-l-i-f-f-o-r-d. Carman, C-a-r-m-a-n.

JUDGE CLIFTON: And I'd like you to begin by explaining to us why we have exhibits in addition to those that you had identified when you were last on the witness stand.

THE WITNESS: This morning I've brought with me copies of corrected Exhibit 6, corrected Exhibit 7, and corrected Exhibit 12. We found computational errors in those three exhibits and are today correcting the tables. Copies are available on the back. Each of the titles say, Corrected, in them.

JUDGE CLIFTON: All right. Mr. Carman, you had previously put some documents on the back table in a different day. Were those these, or were those other documents?

THE WITNESS: These are corrected documents from the first day of the hearing, and on Monday, when we put in Exhibit 5 through 20. So these are corrections to that first day exhibits.

On Friday of that same first week, I was back on the stand and we put in a number of exhibits that dealt with requests that we had
had from parties participating in this hearing.

JUDGE CLIFTON: Okay. What --

THE WITNESS: I believe those were Exhibit 52 through 70. Yes.

JUDGE CLIFTON: Have you distributed any corrections to any documents, 52 through 70?

THE WITNESS: No, I have not.

JUDGE CLIFTON: Okay. Now, Mr. Carman, I'm looking at the three documents that I've been given for today and I noticed that only one of them has four rectangles that are shaded. It's entitled Annual Route Sales by Handler Type, hyphen, Eight Orders, asterisk, Corrected. I'm going to label that document Exhibit 6-A so that it will appear in the record in the same place as 6, and people will be able to notice it right away. So that we'll call Exhibit 6-A.

(Exhibit 6-A was marked for identification.)

MR. BESHORE: Which one is that, your Honor?

JUDGE CLIFTON: It's noticeable because of the little shaded rectangles. Did you get three documents today, Mr. Woody Carroll?

MR. WOODY CARROLL: Yes, I got a bunch of
them today.

MR. VETNE: Your Honor?

JUDGE CLIFTON: Yes, Mr. Vetne.

MR. VETNE: John Vetne representing Mallorie's and others. If that's a one-page document that you're referring to --

JUDGE CLIFTON: It is.

MR. VETNE: -- it's not on the back table, and I haven't seen it.

MR. ENGLISH: It was handed out last week, and you've got one.

MR. VETNE: Oh, I got one from last week? I thought they were on the table.

JUDGE CLIFTON: Good. Thank you. All right. Then I'm going to look at Exhibit 7. 7 is entitled, Information on Producer-Handlers, Operating in Federal Milk Order Marketing Areas, Selected Time Periods, and I'm going to mark the one that has that same title but then says, Corrected, as Exhibit 7-A.

(Exhibit 7-A was marked for identification.)

And then I'm looking at Exhibit 12, which is entitled, Sales of Fluid Milk Products in Federal Milk Order Marketing Areas, by
Producer-Handler, by Order, 2000-2008. And then there's a footnote one, and I'm going to mark as Exhibit 12-A the document that has that same title with added to the title, hyphen, Corrected.

(Exhibit 12-A was marked for identification.)

JUDGE CLIFTON: Mr. Carman, are the computational errors that you referred to something that a student of the original documents would have discovered, or is it something other than just math?

THE WITNESS: Our individual Market Administrator offices looked at the data contained on Exhibit 12 and they saw some numbers that didn't seem to make sense to them, and so we started looking and found the computational errors, which carried over into Exhibit 7.

Exhibit 7-A -- pardon me, Exhibit 6-A is a change in the beginning point of the data. In order to be consistent, we changed from what was originally done in one of our regional offices to the database in Washington. It changes almost all the cells on 6-A, but the actual
underlying trends as displayed in the percentage
of sales changes and the percent changes from
year-to-year are almost identical.

JUDGE CLIFTON: Good. Is there anything
else you want to say about these three exhibits
we're discussing that have the A?

THE WITNESS: No, your Honor.

JUDGE CLIFTON: Is there any objection to
the admission into evidence of Exhibit 6-A, 7-A
and 12-A? There is none. Those are admitted
into evidence.

All right. Mr. Carman, is there anything
else you would like to say before
cross-examination begins?

THE WITNESS: No, your Honor.

JUDGE CLIFTON: The witness is available
for cross-examination. Who would like to begin
cross-examining Mr. Carman? Mr. Yale, thank
you.

CLIFFORD CARMAN

of lawful age, having been previously sworn, was
examined and testified as follows:

CROSS-EXAMINATION

BY MR. YALE:
Q. Benjamin F. Yale, Continental Dairy Products and Select Milk. Good morning.
A. Good morning, Ben.
Q. I want to -- I was so busy keeping notes from what was just happening I didn't have a chance to pull out the exhibits I wanted to go over. It has to do with the retail sales where you had compared costs to --
A. Exhibit 53.
Q. That's exactly the one. By the way, I appreciate the work. I tried to do this myself and it's -- even with spreadsheets, it's consuming.

As I understand it, you've done -- first of all, you're making two comparisons, and that is a co-op class price to a retail price and the Federal Order Class I price to a retail price, is that correct?
A. Yes, that's what's in those tables.
Q. Now, the Class I co-op price, how did you -- how was that derived?
A. It's from the website or monthly publication in Dairy Market News. I'm not sure which week it occurs, but it's our -- the co-op announced over-order Class I price. There's no verification that that price was actually paid. It's just the announced price and there may well have been credits or additional charges that occurred in that series.
Q. Now, in that series there also is listed the -- and for some of the marketing areas, a -- kind of a weighted average of over-order paid on Class I, is there not?

A. In another set of data using some of that same beginning information, we look at -- or the Market Administrative offices look at the range of over-order payments that were paid on Class I milk and calculates some weighted averages.

        It's another set of tables that I did not bring with me, but they're available on our website.

Q. Well, that was my next question. This information used is available on the website?

A. The co-op announced over-order Class I price is available on the website.

Q. First of all, it's in the -- whatever week of the month would be under Dairy Market News?

A. It would appear in Dairy Market News once a month.

Q. And then also there is a summary of the table and the data that is accumulated by Dairy Programs that is part of the website under the industry marketing?

A. Yes, there's a series of historical tables that would show each month for a number of years,
and then the current year that would show year-to-date monthly numbers.

MR. YALE: Your Honor, we would request that official notice be given of the data in Dairy Market News that covers the co-op announced prices and over-order premiums and the tables that Mr. Carman just described that are available on the Dairy Programs' website. And it can be gotten to through the various menu options on the website.

THE WITNESS: Yes, it's under the Federal Milk Marketing Order statistics subset on that website.

MR. BESHORE: What period of time?

MR. YALE: I would say, like he has, 2007 through today.

MR. BESHORE: Thank you.

JUDGE CLIFTON: Official notice is hereby taken, as requested.

BY MR. YALE:

Q. Now, this price is as at a 3.5 percent butterfat, right?

A. Yes, the co-op announced Class I price is at 3.5 as is the Class I Federal price.

Q. And the Class I price is the announced
price at Boston which would have been whatever the
Class I mover is for that month plus 3.25, right?
   A. Yes, that would be the first table of
Exhibit 53. The following tables would be for different
cities with appropriate differentials for the case of
those cities in this packet, the changes in those
differentials on May 1 of '08.
   Q. Okay. Now, does this include the PEP
fee, the 20 cents per gallon or per hundredweight that's
charged to Class I handlers?
   A. No, I have not included that in this.
   Q. And that would be an obligation whether
it's under the co-op Class I price or the Federal Order
Class I price?
   A. For plants selling more than 3 million
pounds per month, yes, that would be correct.
   Q. And that's the reason you didn't include
for PDs under 3 million, whether regulated or not, they
would not have that obligation?
   A. That's correct.
   Q. Okay. And then I guess, really, the
third column is just the math of the first subtracted by
the third -- or the -- the first -- second selected from
the first column?
   A. Yes.
Q. And then the next one is the retail price collected by MAs, and I think we already have testimony on how that is collected, that once a month the MAs go into specific stores and collect prices, right?

A. Yes, specific stores of specific outlets.

Q. Okay. And they're consistent month-to-month?

A. Yes.

Q. So the next price is a -- I take it you divided the co-op Class I price by -- you tell me what number.

A. 8.6 --

Q. Okay.

A. -- pound per -- per gallon of milk.

Q. And you do the same thing for the Federal Order Class I?

A. Yes.

Q. And the over-order then -- per gallon then was the difference between the Class I -- co-op Class I gallon price and the Federal Class I price, right?

A. Actually, what I did is I took the over-order and divided by the price per -- the weight per gallon.

Q. Okay. There may be a penny here or
there, but it should be the same?
   A. Yes, should be.
   Q. And the next two are just subtractions of
the over-order price minus the retail price and Federal
Order price per gallon minus the retail?
   A. The retail price minus --
   Q. The Federal price co-op --
   A. Yes --
   Q. And then the retail --
   JUDGE CLIFTON: Mr. Yale, stop talking
   over him.
   MR. YALE: I'm sorry.
   JUDGE CLIFTON: I know you are trying to
   speed it along, but let him finish.
   Q. So the retail price less comp is just a
simple subtraction, right?
   A. Yes.
   Q. And the second one is a simple
subtraction?
   A. Yes.
   Q. Your Honor, going back to the retail
price collected, we can do this one of several ways --
well, let me ask this. That information is on the
website, is that correct?
   A. Yeah, and in a similar location. It's
listed under prices under the Federal Order stats
section, as is in the over-order, now that you remind
me.

MR. YALE: Your Honor, I would ask -- I
can ask for official notice. It happens in
preparation for this hearing, I burned some
trees and actually made copies of some of those
documents, which I have made available. So I'm
game, either way. We can take official notice,
which might be the easiest way, or if people
would like to have exhibits they can identify,
that's available. And that would be for retail,
for whole milk, retail reduced fat, organic
whole milk, and organic reduced fat.

JUDGE CLIFTON: Now, my thought is that
it's very helpful when we have hard copies of
things we're taking official notice of.

Now, it's up to you whether you want them
to show on the website with all those other
exhibits that will be on the website.

MR. YALE: I would say, your Honor, let's
do official notice. And if somebody wants to
pick up one of these and use this to
cross-examine a witness specifically, then
they've got a copy and they can make it an
exhibit it at that time.

JUDGE CLIFTON: Excellent. Excellent.

MR. YALE: I thought it might go faster.

JUDGE CLIFTON: Is there more than that I need to take official notice of right now?

MR. YALE: No, just the official notice of the retail prices for whole milk, reduced fat, organic whole milk and reduced fat from 2007 to present, if available. The organic is only available from the middle of 2008.

BY MR. YALE:

Q. So whatever is available, from the middle of -- is that right, it's just from 2008, Mr. Carman?

A. Yes.

MR. YALE: So I would ask for official notice, as published on the USDA Dairy Programs website.

JUDGE CLIFTON: Official notice is taken as you have requested, Mr. Yale.

BY MR. YALE:

Q. Now, I have one final question on this, Mr. Carman. Whole milk is traditionally at 3.25 percent, right?

A. The Food and Drug standards of identity minimum is 3.25, so I would hope that it's just a little
better than 3.25.

Q. Would it disappoint you if the variance allows it to go below that in some plants, maximize that --

A. I understand that 2 percent is at 1.95 on average. And so 3.25 would probably be 3.2 is -- I'm not sure all of the variance that's allowed.

Q. But 3.25 is -- is the standard and that's fair. But the other butterfat was listed at 3.5, right?

A. Yes. The comparisons I've made here was at 3.25.

Q. And which, in fact, shows a slightly higher spread per gallon than what would be the case if you were to adjust to a 3.25?

A. Marginally higher, yes.

Q. Marginally higher. Now, so we get into the record if somebody wants to do the math, the formula to do -- to compute the Federal Order Class I price at 3. -- first of all, that -- there is a skim price, skim mover that's announced, right?

A. Yes. The advanced skim and advanced butterfat prices are announced.

Q. So to do 3.25, one would take 3.25 times the advance butterfat price, plus its differential?

A. Yes.
Q. And then you would add that to .9675, times the skim price with its location differential and that -- those two would give you a 3.25 butterfat price at the Federal Order minimum, right?
   A. Correct.
   Q. And then you could divide by 8.6 and do the same math you've done, if you wanted to?
   A. Yes.
   Q. Okay.
   A. 3.25 fat milk is going to weigh slightly less than 3.5 milk and so --
   Q. Okay.
   A. -- you may have to adjust slightly for the differences in weight, but --
   Q. There is -- I think it's already an exhibit, the containers; you have this fluid containers that you put out every two years. And what's the exhibit number on that?
   A. Exhibit 22.
   Q. And it has conversion values in there as well, right?
   A. Yes.

MR. YALE: All right. Your Honor, that's it. Oh, no, there is one other thing. Just I would like to do it while I'm here because it's
related.

I had asked him questions about some series on cost of production. ERS publishes and makes available on the website cost of production by various states. And if you'll hold on a second, I'll give you the list of states. I'll find the -- yes.

A. Pennsylvania.

BY MR. YALE:

Q. Okay. You have those? Okay.

A. New York, New Mexico, California, Iowa, Vermont, Ohio, Michigan, Missouri, Illinois, Wisconsin, Washington, Virginia, Georgia, Texas.

Q. Yes.

A. I believe those are the ones that the Economic Research Service are currently publishing on a monthly basis.

Q. And I have, again, made copies of 2007, 2008, and what they had for 2009 off that website. Again, I ask to have -- take --

MR. YALE: Can you go out of the room, please? It's kind of difficult to --

JUDGE CLIFTON: I know he's checking on the location of a lawyer we need here.

MR. WOODY CARROLL: It was wrapping up.
So I was checking out where he was.

JUDGE CLIFTON: Okay, Mr. Yale.

MR. YALE: The Economic Research Service of the USDA has these available on their website. And you have -- you have to specify. They're not -- you know, you have to put in the state and then they'll give a spreadsheet that shows, depending on how long they've been keeping them in recent years, it's available.

And all we're asking for is official notice of 2007 through -- through whatever is current on the website. And again, I have copies if somebody wants to use it as an exhibit. Otherwise, we just want official notice.

JUDGE CLIFTON: When you made copies, Mr. Yale, did you make copies of every one of the states that Mr. Carman said?

MR. YALE: Yes, I did. Yes, I did. And I did it for the three years if it was available for three years. There's a few they have just begun; they only did it in 2008. But the ones that were available in 2006, '7, I did that.

JUDGE CLIFTON: Okay. Mr. English, did you have a comment on this?

But I do want to comment before you take official notice that ERS, of course, is a different agency within USDA than the agency who the witness has testified, AMS.

There have been prior proceedings, one I can think of in particular 19 years ago now, in which a witness from ERS was on the stand for a half, three-quarters of the day explaining the vagaries, if you would, of how the data is collected and what it is and what it isn't. And we don't have that witness.

And I just wanted to note that as a result, we don't really know what goes in all of this. I'm not going to object to official notice, except the caveat of this statement that the data hasn't been subject to any kind of cross-examination unlike the data about the retail data about how it's collected. At least we know what its limitations are, such as it's three stores, you know, things like that; such as the fact that the co-op prices are not the
actual prices, they're announced prices, so we can all take that into consideration.

We don't have the opportunity to take into consideration what limitations there may be.

MR. YALE: Or may not be.

MR. ENGLISH: I have my views about ERS data.

JUDGE CLIFTON: Thank you, Mr. English. Mr. Yale, any response to that?

MR. YALE: Yeah, the response is that -- at the ERS website, there is an explanation of what they do and its limitations. And it would be -- whatever official notice would be subject to that. And that's also something if one refers to in a brief, the Department is going to take into the weight, you know, it is used.

The problem is we've had a lot of petitions at this hearing about transfer costs and costs of production, and there's no data in the record at all to speak to that. This is the best data we have. I kind of confer with Dr. -- I can concur to a degree with Mr. English that maybe we'd like better data. But it's the -- it is the -- it is the only official data that is
out there. And it does give some indication, a relatively accurate one, of what it is. And it's also information that was used by Dr. Knoblauch. Some of this information was used by Dr. Knoblauch in presentation as well.

JUDGE CLIFTON: When you say we have no data in the record, you mean the individual anecdotal examples --

MR. YALE: Right.

JUDGE CLIFTON: -- are not part of a systemwide study?

MR. YALE: You're absolutely right. I mischaracterized that; is that we do not have a systematic, monthly, over a period of time, data of specific regions of the country. We have anecdotes by some farmers, by some processors and others that the Department can use equally as well. It's just some additional information that we may want to use in our briefs to argue certain points and that's why the information is available and the Department can use it as the weight that they wish to use it.

JUDGE CLIFTON: Mr. English.

MR. ENGLISH: The only comment is Mr. Yale also used the phrase, transfer price,
with respect to this. And I think there's been quit a bit of dispute about transfer price, and I don't think this goes to transfer price except to the extent people have said what they think transfer price is. I don't think this data goes to that. That's what you said.

MR. YALE: I understand. Some people might use it as a basis. I'm just trying to get something in the record other than anecdote. This is a pretty important hearing. I think evidence of facts are pretty important.

So that's all I have. And I have no other questions of Mr. Carman -- and by the way, I do want to thank you on behalf of my clients and everybody else for the tremendous amount of work the Department did in taking some lawyer questions and converting them into numbers that we could read and understand and surprise us. So thank you very much.

JUDGE CLIFTON: Mr. Yale, before you leave, the data that you are asking me to take official notice of that ERS publishes on a monthly basis is cost of production data?

MR. YALE: It is, yes, cost of production data for dairy in selected states.
JUDGE CLIFTON: Thank you. Official notice is so taken.

MR. YALE: And here's the title they use is, Monthly Dairy Costs of Production Per Hundredweight of Milk Sold.

JUDGE CLIFTON: Thank you.

MR. YALE: Thank you, your Honor.

JUDGE CLIFTON: All right. Mr. Carroll has arrived. I'd like to take a five-minute stretch break while he coordinates with the other Mr. Carroll. And then we'll go back on record for further cross-examination of Mr. Carman, so please be ready to go at 8:58.

(A recess was taken from 8:53 to 9:02.)

JUDGE CLIFTON: All right. Let's go back on record. We're back on record at 9:02.

Mr. Carman is back in the witness stand.

When we complete Mr. Carman's cross-examination, I recommend that we have as our next witness, Dr. Carolyn Orr, O-r-r, who is present.

All right. Who next will cross-examine Mr. Carman? Mr. Vetne, thank you. You may come forward.

CROSS-EXAMINATION
BY MR. VETNE:

Q. Good morning, Mr. Carman. John Vetne, representing Mallorie's, et al. I just have some questions. And I wasn't here Friday, ten days -- nine days ago when the data requests were marked, so I don't necessarily have the numbers. But I'm going through -- I'm going through the response to request for data submitted by John Vetne. Do you have a copy of that?

A. Yes, I have it.

Q. All right.

A. I have that cover sheet marked as Exhibit 62.

Q. Oh, good. The -- item number 1, as to utilization by producer-handlers to which certain restrictions apply, to your -- to your knowledge, is the information for producer-handler Class II, III, and IV use reflected in Dairy Programs' response -- does that capture all Class II, III and IV use in the same way that Class II, III, and IV use of fully regulated handlers is captured?

A. My understanding that it is. However, subject to the fact that it may not have been audited to the extent that a fully regulated plant would have received an audit.

Q. So you're confident, at least in the
reports by producer-handlers that you receive, you have
the total representations at least by producer-handlers
about their Class II, III and IV use?

A. Yes.

Q. And plus you have some audit, but as I
understand it, not as intense as with fully regulated
handlers?

A. Yes.

Q. Okay. And with respect to item 4, which
essentially asked for producer-handler volumes of other
source milk, is this data similarly of a comparable
nature as data regularly collected and occasionally
reported for other source milk from fully regulated
handlers?

A. Yes, to the limit -- understanding that
for at least three orders, producer-handlers can receive
no other source milk.

Q. Okay. Other source milk in the Federal
Order System includes some dairy products, correct?

A. Correct.

Q. Would dairy product receipts by
producer-handlers such as skim powder -- would that be
collected and reported, included in that exhibit as --
in the same manner as that type of receipt for fully
regulated handlers?
A. Again, depending upon the accuracy of the receipts and utilization report of the producer-handler.

Q. Okay. Again, it is included in the reports by producer-handlers to Dairy Programs' offices but not necessarily audited with the same intensity as fully regulated handlers?

A. Yes.

Q. With respect to item number 6 which asks for information about producer-handler contributions to the producer-handler settlement fund for the -- and the question included direct and indirect. When a producer-handler buys supplemental milk from a pool source, and that includes a contribution, no data was provided. Data is all restricted. Can you explain why all the data should be restricted when some orders with multiple producer-handlers allow for some purchase of pooled milk?

A. I don't have a direct response to that.

Q. Item 7 asks for some information on packaged end use by producer-handlers and your response was, it's not included in any survey done by Dairy Programs?

A. Correct.

Q. Basically you have no idea -- well, you don't have any statistical idea?
A. Yes.

Q. And finally, the last item asked for some information on -- on issue correspondence, statistical correspondence concerning producer-handlers from February '06, which was the date of the Pacific Northwest final decision or final rule to the current time, other than that published on the website. And the response was that the request will not be satisfied. Publicly available correspondence is posted on the website.

My question here is, did Dairy Programs look for any additional information or correspondence meeting the request?

A. At the time we responded to your request, I was not aware. However, we have since received an FOIA request, and we are examining, as are the eight marketing administrative offices, examining the records concerning correspondence.

Q. Okay. So I'm correct that you did not ask the marketing area offices to examine their records to see if any documents met the subject matter of request number 8?

A. At that time we responded to you, that's correct.

Q. Okay. And Dairy Programs, Washington,
did not look within its files for correspondence that
would respond to the question either, is that correct?

A. I did not ask the deputy administrator or
the chief economist's office or the market information
branch for whether they had any correspondence that
would fit this or not. I just looked at my involvement
and whether I had anything.

Q. Okay. So when you use -- in response to
this request, when you use the term, publicly available
correspondence, you used it in a narrower sense than --
than the Freedom of Information Act uses information
that's available to the public on request?

A. I believe that would be a proper
interpretation.

Q. Based on preliminary examination, are you
aware of whether there are any additional documents that
are available that are not posted on the website?

A. I have not had any correspondence with
the deputy administrator or chief economist office or
the market information branch concerning whether they
have anything or not.

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

Thank you.

JUDGE CLIFTON: Thank you, Mr. Vetne.

Who next? Mr. English. Thank you.
CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Good morning. Charles English. Good morning, Mr. Carman.

A. Good morning, Chip.

Q. I just have a couple of follow-up questions from questions from Mr. Vetne and then I just want to ask some questions about Exhibit 12 and Exhibit 12-A.

Mr. Vetne asked you some questions with respect to the restricted data set on the purchases of milk. Do you remember that, those questions?

A. Yes.

Q. And you indicated that you don't have a direct answer, correct?

A. Correct.

Q. Now, since Friday, May 8th, other than last Monday, when you were not here, you've been at the proceeding every single day, correct?

A. Correct.

Q. Has anybody approached you as a procedural matter to ask that question before asking the question here today?

A. No.

Q. So no one has tried to say, gee, why is
that data restricted to give you a chance to look at it?

A. No one has asked me that question.

Q. Turning to Exhibits 12 and 12-A. And I tried to do the math and I succeeded mostly, I believe. First, as I see it, the changes between Exhibit 12 and 12-A are entirely in the years 2005, 2006, 2007 and 2008, is that correct?

A. Correct.

Q. I noted -- I tried to do some math, and it looked to me that for 2005, the difference -- the difference appears to be counted entirely by the Southwest Order, Order 126, is that correct?

A. That's correct.

Q. Okay. So no other data, whether restricted or unrestricted, was changed in 2005, and looking to do the math, the difference between order -- Exhibit 12, Southwest of 89.2 and Southwest for 12-A of 68.2 accounts for the difference between 744.5 and 723.5 in the two exhibits, correct?

A. I believe that's correct. There may have been some minor changes on some restricted data.

Q. If there were minor changes, and my math is right, they just all washed out then, correct?

A. Correct.

Q. But if there were any changes, they were
minor?

A. Yes.

Q. Now, I'm going to leave aside 2006 for a moment because it didn't quite work the same way.

Let me turn to 2007. For 2007, I did the math, and it appears to me that the changes -- first of all, I just looked at the columns with numbers and the changes are in the Mideast and the Southwest Orders, is that correct?

A. Correct.

Q. And I did the math, and 100 percent of the difference between Exhibit 12 of 610.2, and 12-A of 528.9 is accounted for in the difference of Mideast and Southwest, is that correct?

A. Again, there may have been minor changes in the restricted data sets.

Q. And if so, they washed out, correct?

A. That would -- you could --

Q. You could lead that conclusion?

A. You could lead -- be brought to that conclusion just looking at the gross numbers.

Q. And similarly, for 2008, it looks to me that the only number, set -- leaving aside restricted data, that changed is Mideast and Southwest, is that correct?
A. Correct.

Q. And again, math is math. It looks to me that the entire difference between Exhibit 12, 654.3 and Exhibit 12-A, 578.3, is accounted for leaving aside minor differences in restricted by Mideast and Southwest, correct?

A. Correct.

Q. Let's talk about 2006 for a moment. 2006, Southwest is different again, correct --

A. Correct.

Q. -- between the two exhibits. And in this case, Mideast is restricted data, correct?

A. Correct.

Q. Would it be fair to say that most -- given the fact that for '07 and '08, the Southwest -- I mean, that's -- the Mideast had the change -- I'm not trying to get some restricted data. I think the fact that it's different doesn't matter because they're all restricted, but you can tell me. But it is a fair characterization that most of the difference is in the Mideast again?

A. Yes.

Q. If there are other differences in other restricted data, they're very modest?

A. Yes.
MR. ENGLISH: That's all the questions I have. Thank you, sir.

JUDGE CLIFTON: Thank you, Mr. English.

Who next will cross-examine Mr. Carman?

Mr. Beshore, thank you.

MR. BESHORE: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. BESHORE:

Q. Marvin Beshore for National Milk Producers Federation and Dairy Farmers of America. Good morning, Mr. Carman. I just have a couple of question areas, two areas.

Going to first Exhibit 63, the response to -- the response to John Vetne, one of the responses --

A. Yeah, Exhibit 63, and it would also be the same as Exhibit 55 and 61.

Q. Okay. If you look at just, for example, 63, page 8, which is the Central Order, and you said that's -- it's the same exhibit as --

A. 55 and 61.

Q. Okay. Looking at the exhibit for the Central Order, producer-handler utilization by class, my question is, the producer-handlers that went into the universe to create these aggregate figures -- and I
assume it was done consistently in each order, is that correct?

A. I would assume that until proven otherwise. However, I would point out that the Central Order has only got annual numbers. And some of the other numbers have monthly numbers.

Q. Well, what I'm specifically trying to determine, if you can -- if you can help me, is, you know, just get directly to the point. There's been testimony from a producer-handler in -- that's located physically in the Central Order, but which has -- in effect two of them, which have indicated they have sales in other orders as well as the Central Order?

A. Yes, there has been that testimony.

Q. Okay. Now, are those producer-handlers included in this aggregate data for Central Order producer-handler utilization because of their geographic location?

A. Those two producer-handlers are responsible to report to the Central Order, which then passes sales data onto the other orders.

Q. Okay. But would their aggregate sales be included in this aggregate for Order 32 or only their in area Order 32 sales be included in that data?

A. I believe it's their aggregate.
Q. And the same thing would apply, then, assuming the data is consistent, if there's a producer-handler -- and we've had some testimony that a producer-handler in Order 33 that possibly has some sales over in Order 30. All its sales would be shown -- if that's the case, all its sales would be -- since it reports to Order 33, all its sales would show in the Order 33 data?

A. That's my understanding of the way that we asked them to report that.

Q. Okay. Now, let's go then to Exhibit 59, and I don't know if this has -- has another -- another exhibit number or not. But this is an exhibit that was in response to data submitted by -- in response to the request for data submitted by AIDA.

And I'm looking at 59 -- well, yeah, what I have had marked as page 4 of Exhibit 59, which is Estimated Impact of Depooled Milk Due to Price Relationships - Federal Order 32 - Central Marketing Area. Can you --

A. For which area again?

Q. Central Order 32. Okay?

A. Okay.

Q. Now, as I -- as I look at that exhibit and look in the column to the right marked, Difference,
I notice just going down, there are both positive and negative numbers?

A. Yes.

Q. And, for instance, if you go to May or June of 2008, am I correctly -- take May 1st. I'm correctly reading this data to indicate in May 2008 there was a net positive difference of 32 cents on the PPD estimated impact of depooled milk?

A. Yes.

Q. Okay. And in June 2008 there was a net positive difference of 41 cents per hundredweight in the PPD because of net -- or estimated impact of depooled milk?

A. Yes.

Q. And so the other numbers, April of 2008, there was a net impact of negative 2 cents per hundredweight on the PPD there?

A. Yes. The one thing I'd point out, Marv, is that this is comparing a large negative to a smaller negative. So instead of being minus -- for example, for June of -- excuse me, May of '08, instead of being minus $1.10, if the milk had pooled, the differential would have been minus 78 cents. So it's a smaller negative. It would have added -- if the milk had pooled, it would have improved the pool value to producers.
Q. Right. And the negative -- the PPD would still have been negative because of the class price relationships?
A. Yes.
Q. Okay. But the pool would have -- if the milk had not been depooled, the pool would have actually been less valuable, the greater negative PPD?
A. If it had not been pooled?
Q. Had not been depooled.
A. You got too many negatives going on.
Q. Okay. Well, we'll assume the signs are correct here. And I just wanted to make sure that I understood them to be both positive and negative in that -- in the difference column.
A. Yes.
MR. BESHORE: Thank you. That's all I have.
JUDGE CLIFTON: Thank you, Mr. Beshore.
Who next will cross-examine Mr. Carman?
Mr. Ricciardi. Thank you.
MR. RICCIARDI: Al Ricciardi, AIDA.
CROSS-EXAMINATION

BY MR. RICCIARDI:
Q. Good morning, Mr. Carman.
A. Good morning, Al.
Q. I'm going to ask you questions about Exhibits 7, 7-A, and 12 and 12-A, so you can have those in front of you. But I want to ask a more general question first before we specifically deal with those exhibits.

As I understand it, the reason for corrected Exhibit 6-A, 7-A, and 12-A is basically computational errors?

A. Yes.

Q. Okay. And who discovered those?

A. Some of our marketing administrative offices.

Q. Okay. Let's talk then specifically for a moment about Exhibit 7 and 7-A. I too have compared them, and tell me where I'm wrong on this one, Mr. Carman. Hopefully you'll say not, but I see changes that -- three changes on Exhibit 7-A from 7 in the column, sales by producer-handlers, which went from 56,883 on Exhibit 7 to 51,227 on Exhibit 7-A, correct?

A. Correct.

Q. In percentage of sales by producer-handlers, which was reduced from 1.5 to 1.3 from Exhibit 7 to 7-A, correct?

A. Correct.

Q. And in the average sales for
producer-handlers in the time period for December of 2008, which went from 1,422,080 on Exhibit 7 to 1,280,686 in 7-A, correct?

A. Correct.

Q. Have I captured all the changes on those documents?

A. Yes.

Q. And explain to me then the percentage of sales by producer-handler column on Exhibit 7-A, which is now 1.3 percent. What does that mean exactly?

1.3 percent of what?

A. Producer-handler share of the Class I sales.

Q. In all Federal Milk Marketing Orders?

A. Yes.

Q. Then producer-handlers throughout the Federal Milk Marketing Order system have, according to the data on Exhibit 7-A, for the period through December of 2008, 1.3 percent of the sales, and the remaining sales would go to whom?

A. Regulated handlers, partially regulated handlers, and exempt plants.

Q. Okay. Did you break that out further, meaning the percentage by exempt plants, regulated handlers and partially regulated handlers?
A. Exhibit 7 -- 6. Pardon me, Exhibit 6 and what is now 6-A for eight of the ten orders.

Q. Okay. So we would be able to read those two together, 6-A and now 7-A, to be able to get those breakdowns, correct?

A. Understanding that 7-A is all ten orders. 6-A is just eight orders.

Q. And the reason for the distinction?

A. The publication of all ten orders as contained in 6-A, given the fact that the Pacific Northwest releases their data for their order, would result in the ability to get to the Arizona order, which is restricted data.

Q. Okay. And it's restricted data because there are -- there is only one current producer-handler in that order?

A. Limited numbers of producer-handlers and limited number of exempt plants.

Q. Okay. Then let's -- let's flip to Exhibit 12 and 12-A. And, again, this is -- at the risk of actually having lawyers do numbers, I looked at 12-A and compared it to 12. And for 2008 the changes -- the overall change obviously is a reduction from 654.3 to 578.3. And I found those reductions by looking in the Mideast and the Arizona-Las Vegas columns. Am I
correct?

A. The Mideast and the Southwest Orders.

There may have been some other minor changes in the restricted.

Q. Well, as I look at Exhibit 12 and Exhibit 12-A for the Southwest -- hang on a second. I apologize. You're correct, it is the Southwest and the Mideast.

MR. RICCIARDI: Okay. I don't have any further questions. Thanks.

JUDGE CLIFTON: Thank you, Mr. Ricciardi.

Who next will cross-examine Mr. Carman?

Mr. Miltner, thank you.

CROSS-EXAMINATION

BY MR. MILTNER:

Q. Good morning, Mr. Carman.

A. Good morning.

Q. Can we turn back to Exhibit 59, page 4, please? That's the chart you were discussing with Mr. Beshore on the Central Order.

A. Yes, I have it.

Q. Okay. The first question is related to the column labeled, Difference. That column, as I see, is calculated by subtracting the column labeled, Actually Pool Value, from the column labeled, Adjusted
Pool Value, is that right?

A. Yes, given that the adjusted numbers may have been rounded to the nearest penny.

Q. Okay. We'll settle for that. And in every one of those instances, the difference reflects additional money in the pool if the volumes that were depooled were included? Is that -- am I reading that correctly?

A. No, not in every instance. For example, for the first -- no.

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

(Off the record.)

JUDGE CLIFTON: Thank you. Let's go back on record. All right. We're back on record.

Mr. Miltner, proceed, please.

BY MR. MILTNER:

Q. Okay. I think Mr. Carman was answering. The question was, for every difference that reflects a positive addition to the producer settlement fund, is that right?

A. In a gross sense, yes. More milk would increase the total pool value. When you get over and start looking at the PPDs or the blend prices, whether they go up or down is a function of what milk pooled at
what class.

Q. Right. Now, let me ask specifically about a couple of months that Mr. Beshore had talked about, specifically the May 2008 and June 2008.

In those months under the Actual PPD and the Adjusted PPD, there was a negative PPD under both scenarios, correct?

A. Correct.

Q. But under the Adjusted PPD, it was a lower negative PPD?

A. How about a smaller magnitude?

Q. Thank you. The magnitude was smaller?

A. Yes.

Q. Still negative, but under the Adjusted PPD, the uniform price increased 32 cents for May and 41 cents for June, is that -- am I reading all that correctly?

A. To the extent that uniform means the Class III price plus the PPD.

Q. That's how I'm using that term.

A. Yes.

Q. Okay. And the same would be true for December 2008. For instance, the uniform price defined as Class III plus the PPD would have increased by 35 cents for that month, as it was adjusted?
A. Yes.

Q. Okay. Do you happen to have Exhibit 21 with you, Mr. Carman?

A. Uh-huh. No, I don't -- that's your --

Q. That's our series of requests.

A. Yes. The Judge has shared her copy with me.

MR. MILTNER: Thank you, Judge.

BY MR. MILTNER:

Q. I apologize. I've got to grab my notes. I think maybe the easiest way to go through this will be to start with what's the third page of Exhibit 21, which is the letter for Dairy Programs dated April 16th. And I want to try to match up the request with either an exhibit that's in the record or determine that -- that the information wasn't available.

For the first three requests, asking for the impact of Proposals 1, 2 and then 1 and 2, that's contained in Exhibit 56, is that -- is that right? If you need to look at Exhibit 56, that's fine.

A. Yes, I believe it is contained in Exhibit 56.

Q. And for some marketing areas, the data was restricted?

A. Yes.
Q. And for Orders 6 and 7, there was no impact, is that right?

A. For a limited number of months in Order 7, there was a producer-handler. There were none in Order 6.

Q. And the same with the exempt plants between 150 -- 150,000 pounds and 450,000 pounds?

A. Yes.

Q. If you would turn to the next page of Exhibit 21. For items 4, 5, 6, and 7 we asked for information on certain statistics for the same time period as what's in exhibit -- is that Exhibit 8, I believe; pardon me, Exhibit 7 -- as to what's numbered as request 5 and request 6, the Class I volumes handled by the average fluid handler for those time periods, and the total volumes handled by the average manufacturing non Class I volumes for that same time period. That data is not available from Dairy Programs, is that right?

A. Correct.

Q. And the average volume of milk marketed per producer for the same time period was not provided in a -- in a separate exhibit but some -- some of it can be calculated from other information in the record, is that right?
A. Correct. We show a total number of producers in marketings for members and nonmembers under a request that, I believe, Mr. Vetne received data for.

Q. Okay. And that data goes back to, I think, the year 2000 in most marketing areas?


Q. Okay. So the data is not directly available or not able to be calculated from what's in the record for October 1959, October 1964, October 1969, October 1974, October 1980, October 1987, and October 1992?

A. For the data that's in the record, that's correct. There is available the measures of growth data table that's published annually in the Market News and is available on the Dairy Programs website that would contain some of that data, but not all of it.

Q. Okay. So one could go through Dairy Market News, either the weekly reports or the annual information and find that data or something that's relatively close?

A. For the average size producer, yes, you could get something. Probably the easiest would be get the average growth off of the measures of growth table.

Q. Looking at what is request 7, that
information is provided on Exhibit 13, right?

A. Yes.

Q. For requests 8 through 12, we asked for the definition of disorderly marketing and characteristics of disorderly marketing conditions that the USDA would employ or utilize in determining whether it's appropriate to eliminate the producer-handler definition. And you declined to provide that information because it wasn't statistical data, is that right?

A. Yes, I declined.

Q. And when we asked in exhibit -- in request 9 for the specific economic factors and statistical measures USDA would utilize to determine whether producer-handlers are causing or contributing to disorderly marketing, and also asked for the threshold impact of producer-handler activity on the uniform price, that information was -- was not provided?

A. It's beyond the scope of the statistical data.

Q. And then because no response was provided to 8 and 9, there was no additional description provided in response to exhibit -- or request 10, is that right?

A. Yes.

Q. And the same response for requests 11
and 12?

A. Beyond the scope of providing the statistical data.

Q. May I ask who made the determination that only statistical data?

A. Excuse me?

Q. May I ask who made the determination that only statistical data requests would be responded to?

A. It wasn't me.

Q. Do you know who made that determination?

A. No, I don't.

Q. Do you know how that decision was reached?

A. I was not in that meeting.

Q. And then who -- how did you gain the knowledge to respond to my questions about requests 8 through 12 if you were not privy to that information?

A. It's contained in an e-mail that was sent to you. Item 2, items 8 through 12 are beyond the statistical requests.

Q. So your information and your responses are based on what's already contained in Exhibit 21?

A. Yes.

Q. If you could turn to the next page of Exhibit 21. For request 13, that information was
responded to in what's been marked as Exhibit 59, is that right?

A. Yes.

Q. In response to request 14, you had -- well, let me withdraw that question.

In response to questions in requests 15 and 16, Dairy Programs didn't have sufficient information to respond to those requests, is that right?

A. Yes. And item 14 should have been answered the same way in our -- in the cover memo as contained in Exhibit 21.

Q. And in response to the request for information on mailbox prices, you stated that that information was not available by marketing area but was available by milk shed. Where can that information by milk shed be found?

A. It is on Dairy Programs' website, again, under prices of the Federal Milk Marketing Order statistics section.

Q. If we could turn to the letter dated April 22nd in Exhibit 21.

A. Yes, I have it.

Q. Okay. Request number 1 in this letter was responded to in Exhibit 70, is that -- is that right? That's the same as Mr. Vetne's request for
members and nonmembers in each marketing area.

A. It turns out that you -- you are the requester in that, and Mr. Vetne.

Q. I think maybe we both requested it.

A. Okay.

Q. In response to request number 2, Dairy Programs does not collect that information or break it down by category, and instead you referred us directly to the ERS data, is that right?

A. Yes.

Q. In response to request number 3, that's in Exhibit 68?

A. Yes.

Q. And in response to requests 4, 5 and 6, Dairy Programs -- you stated that Dairy Programs does not have such data, is that right?

A. Yes.

Q. Now, does Dairy Programs administer the milk promotion program for producers?

A. A section of Dairy Programs has oversight for the National Milk Market -- National Promotion and Research Program, as well as oversight for the fluid promotion programs.

Q. And as part of administering that program, do you contract with companies to track demand
and supply for -- of milk in general and specific submarkets for milk?

    A. My knowledge of our oversight and what's happening there is very limited. What I'm involved in is reviewing sections of the annual report to Congress. I don't get involved in the contracting at all.

    Q. Our request number 6 requested data on the effective economic value to consumers of the competition as reflected in retail prices for fluid milk. Did anybody in Dairy Programs check with the national promotion program to see if any of the research that's done through that program was responsive to that request?

    A. I'm not aware of anyone checking on that issue.

    Q. Moving on to request number 7, we requested information on the administrative assessments on producer-handlers at various levels in each order, and each -- each order did it a little bit differently but for the most part that was provided in Exhibit 60, is that right?

    A. Yes. That would be -- in the case of producer-handlers, they would have to pay an admin fee, but they -- their marketing service fees would be exempt for own-farm milk. In the case of the Southeast and
Appalachian Order, they would be responsible for supplemental funding for -- or collection of money for supplemental milk to the marketing areas.

Q. And moving on to request number 8, we requested the number of distributing plants and supply plants for the system and for each marketing area for certain years and broken down into categories. And some of that information has been provided in Exhibits 14 through 20, is that -- is that right?

A. Yes.

Q. Okay. And, of course, I see now a typographical error in that request here, 1005. Of course it should be 2005.

A. That's the way I read it, although we didn't make any attempt to collect 1005 data.

Q. I appreciate that you didn't make that effort. For other years before 2005, for 1950, 1960, 1970, 1980, 1990 and 2000, is the information that we requested available through any of the Dairy Market News data or annual statistics or other information available through Dairy Programs?

A. Some of the data on the number of handlers would be available, and the measures of growth for December of selected years. I would point out handlers may or may not be different than the number of
distributing plants and the number of supply plants.

Q. And that information would not have information -- would not -- the information available would not provide a breakdown by size, is that correct?
A. That's correct.
Q. Okay.
A. I would point out that there is a five-year retention policy for records. So to go back more than five years, in a number of cases the data would no longer be available.
Q. And that's just a policy of Dairy Programs for all MA offices and the Washington office?
A. Yes.
Q. If you could turn to the letter dated April 24th. Request number 1 in that letter, I believe, is responded to in Exhibit 61, is that right? If you could check it and make sure I'm right on that point.
A. Yes. I would also point out it's the same as Exhibit 55 and 63.
Q. And we had requested for each year since 1999 each of the -- the different offices, each of the different marketing areas provided different years based on, I assume -- is that based on what data they had available to them?
A. Yes. That's that five-year retention
period. Some of that is showing up there.

Q. The Northeast Order, I understand, only
goes to 2008. Did they not have data before 2008?
A. Some of it was related to the pool
calculations. We were only doing 15 months, so they
only put those 15 months of data in.

Q. Okay. Moving on to the second and last
request, we requested that the exhibits at this hearing
include those -- anything that was posted to the USDA
website for this hearing. To your knowledge, has every
piece of statistical information that's been published
to the website been now admitted as an exhibit in the
hearing?
A. I believe so.

MR. MILTNER: Your Honor, to the extent
it hasn't, we would request official notice of
any document that hasn't been actually admitted
as an exhibit.

JUDGE CLIFTON: Now, any document what?
Referenced by your questions just now?
MR. MILTNER: I'm sorry. Any document
that Dairy Programs has posted to its Web page
for this hearing under requests for statistical
information. Mr. Carman believes that they've
all been admitted as exhibits. But to the
extent that they haven't, we would ask that official notice be taken.

JUDGE CLIFTON: Any response?

Mr. English.

MR. ENGLISH: I know we've all been here a long time, but I would hope that all parties could do their own -- look at that and instead of asking for a universe to be admitted that has not been identified, tell us what they are.

I'm afraid that this is now leaving ourselves coming and going from where we were at the beginning of the hearing about providing copies of documents to be officially noticed, things that may or may not be in the website.

I confess, I haven't looked every day to see what's up there. I can't remember now whether we've objected to some things that have been turned down.

I think if there are specific documents that Mr. Miltner knows have not been admitted that he wants to take judicial notice of, you know, we need to have him tell us what they are. Otherwise, I think the rule that you set down at the beginning of the proceeding to say we should have copies has been defeated.
JUDGE CLIFTON: Mr. Beshore.

MR. BESHORE: I join Mr. English's comments. I can't take notice -- shouldn't take notice of what we do not know.

MR. MILTNER: I think that -- that mischaracterizes the request. We -- the website has been referenced throughout this hearing. We're not asking to take notice of, you know, a universe of data that no one is aware of.

To the extent that we can look at the website and see if anything is out there, we can do so. But we're talking about USDA compiled statistical data directly relevant to this hearing posted for the specific purpose of this hearing. And there should be no issue as to whether it's noticeable. I mean, it's government-prepared data. There's no basis for excluding it from official notice. But -- I notice Mr. Vetne is coming.

JUDGE CLIFTON: What I like is the refining that we've done on the documents that we have paid some attention to. We lose all that if we go backwards and don't keep them in the context of how they've been evaluated here. Mr. Vetne.
MR. VETNE: I have a suggestion.

Official notice of data, things that have been published, things that have been posted is not limited temporally to this hearing.

If there are things that are posted on the website, which we have overlooked, parties may identify that in their brief and request official notice. After the transcript's been certified, the Department frequently takes official notice of things that happen between the date of the hearing and the date of decision. And I think that practice can be used here if we've overlooked something.

JUDGE CLIFTON: I think so, too. For example, if we have data through March of 2009 and something important happens before you submit your -- let's say not the first round of briefs. The first round of briefs is so there can be a recommendation to the Secretary; the second round of briefs, so you can comment on the recommendation. Who knows what might happen in the interim? And I think you could always ask the Secretary to take official notice of something.

MR. MILTNER: And then -- I appreciate
those comments, your Honor. And we will also
look at the website to see if we have
identified -- we can identify anything that
hasn't been admitted to the record.

   JUDGE CLIFTON: Thank you. Mr. Beshore.
   
   MR. BESHORE: I just one to make one
other quick point. I think there's a big
difference between routine statistical
publications for which the industry knows what
they are, they've been going on for years,
versus custom prepared materials by request,
which is why Mr. Carman is here to testify. And
I think there's a big difference in those. One
can be noticed routinely, nobody has any
problem. The other requires the witness's, you
know, explanation.

   JUDGE CLIFTON: I agree with you. That's
helpful. Mr. Miltner.

   MR. MILTNER: I have no other questions
of Mr. Carman.

   JUDGE CLIFTON: All right. Thank you,
Mr. Miltner. Any other cross-examination?
Mr. Vetne.

   MR. VETNE: Your Honor, I took some notes
during other cross-examination and have some
questions.

RE CROSS-EXAMINATION

BY MR. VETNE:

Q. Mr. Carman, look at what's been marked as corrected Exhibit 6-A. Under the column, Partially Regulated, that would be a number requesting millions of pounds for the -- for the year, correct?

A. Yeah. For 2008, it's 482.9 million pounds. And in the original exhibit it's 437.6 million pounds in 6-A.

Q. In 6-A, I have 437.6.

A. 437.6.

Q. That's the corrected amount?

A. That's the corrected table.

Q. Okay. I just want to make sure I understand what's included in there.

There are a couple of plants, at least -- actually, more than a couple of plants -- but at least two plants in Nevada that by -- by the wisdom of Congress are excluded from any milk order.

To the extent that those plants have distribution, say, in the Southwest Order -- I think we've heard some testimony that one of them did during one of these years. Is that included under the partially regulated volume?
A. Nevada is not in any marketing area anymore. When the Western Order was terminated April 1 of 2004, there were handlers that were fully regulated by the Western Order that became either fully regulated or partially regulated. Not all handlers that were in the Western Order fill those two categories. Some of them remained completely unregulated under the Federal Order System.

Q. My question related to Nevada in particular. And the question is, since Congress exempted Nevada from the Federal Order System, are those pounds coming from the Nevada plants included in those eight orders included under the partially regulated pounds?

A. Let me try again, John. Handlers are regulated either fully or partially depending on where their route sales occur, not based on their location.

Q. I understand.

A. So a handler in Nevada that has sales into Arizona would be either fully or partially regulated depending on how -- what extent those sales are of their total.

Q. Okay. I'm still not sure I have the answer to my question.

I'll give you a more concrete
hypothetical. Let's assume that a handler in Nevada packages milk in pints and those pints are distributed to schools in and around El Paso. Would that volume be included in any of the columns here for Class I sales?

Q. Okay. And what column would those sales be included under?

A. If the handler was partially regulated, it would be under the partially regulated column. If the handler was fully regulated, it would be under the fully regulated column.

Q. Okay. So all distribution in the eight marketing areas from any source of Class I packaged products is included in Exhibit 6-A?

A. Yes.

Q. Okay. Mr. Miltner asked you some questions about -- about promotion program. Are you not aware that the milk promotion program -- fist of all, it's also called MilkPEP, is that correct?

A. Yes.

Q. Are you not aware that the MilkPEP program has for many years contracted with ACNielsen to provide scanned -- fairly comprehensive scanned retail price information?

A. I'm aware of that. I believe it's
restricted to those who are contracted. For example, I do not have access to that data.

Q. Dairy Programs, however, as a supervising agency has access to that data, correct?
A. I'm employed by Dairy Programs. I don't have access.

Q. I know. You're in a different unit of -- that would be accessible to the MilkPEP administrators?
A. I can't answer specifics on that contract. I do not know what -- how far that data is available into Dairy Programs.

Q. Okay. MilkPEP is run by -- by whom? Who is the administering party?
A. Who's the administrating party? I do not know. I know we have oversight for their budgets and promotion activities. We approve or disapprove a specific promotion program if it's acceptable.

Q. Okay. Is not IDFA or one of its units involved in the administration of MilkPEP?
A. The fluid promotion program is administered by whoever it's administered. I don't know.

Q. You don't know. Okay. And it has a board, a nominated board, consisting of fluid processors, correct?
A. Correct.

Q. Okay. And excluded are plants of less than 3 million pounds, correct?

A. Plants of less than 3 million pounds do not pay the 20 cent promotion fee.

Q. Okay. Do you know whether the retail price information assembled and reported by ACNielsen through Milk PEP is available to the fluid processors that are members of the board?

A. I do not know.

Q. Okay. In response to requests for information about retail prices, is it correct to say that nobody in Dairy Programs sought to secure the retail price data produced for MilkPEP?

A. I did not.

Q. Is it correct to say that, as far as you know, nobody in Dairy Programs asked for that information?

A. I knew I wasn't -- it was not available to me, and I didn't ask.

Q. All right. And you're the only one who asked? Were you the conduit for all these requests?

A. I ended up being the pivotal point.

Q. Okay. So it's correct that you didn't ask and you're not aware of anyone else asking, is that
a fair statement?

A. That's a fair statement.

Q. And the Market Administrators additionally survey some retail prices, and that's reported and published?

A. Yeah. It's -- we collect from three -- or two outlets depending on the type of milk that we're collecting for. It's more useful for trend analysis than specific retail levels of prices.

Q. Okay. Are you aware of whether anybody has observed that the retail price information gathered by the Marketing Administrators is at variance with that gathered by ACNielsen for MilkPEP?


Q. Yes, that's another source.

A. Yes.

Q. Are you aware that anybody has commented or observed that the Marketing Administrator data is at variance, first of all, with MilkPEP data?

A. I have not compared them because I don't have access to the Nielsen data.

Q. My question was not whether you compared them, but whether anybody has observed and commented to Dairy Programs, to your knowledge, that the data is inconsistent?
A. I have -- I do not have that knowledge.

Q. Okay. Mr. Beshore asked you some questions about producer-handler milk usage for the -- for the Central Order and for the Pacific Northwest. I think that's Exhibit 63, was it?

A. 61, 55, and 63. They're all the same, I believe.

Q. Okay. Can you pull out the sheet that shows producer-handler utilization for the Pacific Northwest market, it's a one-page document, and for the Central Order, also a one-page document?

MR. BESHORE: What exhibit number?

MR. VETNE: I'm not sure. I wasn't here when these were marked.

JUDGE CLIFTON: Which one do you want to go with, Mr. Carman?

THE WITNESS: I have Exhibit 61 in front of me, and -- the Central Order and the -- and the producer-handler, the exempt plant for the Pacific Northwest and Arizona in front of me as part of Exhibit 61.

MR. VETNE: Thank you.

JUDGE CLIFTON: I may have written down the wrong numbers. But what you've told us before is that 61, 63 and 65 are the same, is
that correct?

THE WITNESS: 61, 55 and 63.

JUDGE CLIFTON: Thank you. Because I wrote 55 this time and then doubted it. 55.
Thank you.

BY MR. VETNE:

Q. Okay. Now, with respect to the Pacific Northwest market under the column Class I utilization by pounds, for 2008 there's a bit over 267 million pounds. Do you see that number?

A. For 2008? 267,555,000.

Q. Exactly.

A. Yes.

Q. Okay. Are you aware that this number of pounds of Class I use is the same number published by the Pacific Northwest Marketing Administrator in the February 2009 monthly report?

A. I have not compared those two numbers, but I would assume that they are the same.

MR. VETNE: Okay. Your Honor, do you happen to have Exhibit 82, Mr. Flanagan's testimony, accessible?

JUDGE CLIFTON: Yes.

BY MR. VETNE:

Q. Mr. Carman, I've handed you a copy of
Exhibit 82. The next to the last page is annual data on producer-handlers near the bottom of the page.

A. Yes. This looks to be a table that would be published by the market administrative office for the Arizona and Pacific Northwest orders.

Q. And Mr. Flanagan, when he testified, indicated that he had spoken with, I think Mr. Mycranz of the Pacific Northwest Order, and that the -- the volume information there is all of the Class I market volume for any producer-handler that has distribution, any distribution, within the Pacific Northwest. It is not the Class I volume of the five producer-handlers in that market?

A. I would believe that it's any producer-handler that had route sales.

Q. Okay. Based on that information, would you agree with me that there is considerable poundage duplication in the total volumes reported in Exhibit 61 for the Central Order and the poundage reported in Exhibit 61 for the Pacific Northwest order?

A. There's seems to be.

MR. VETNE: Okay. That's it. Thank you very much. Can I give this back to the Judge?

THE WITNESS: Yes, please.

JUDGE CLIFTON: Thank you, Mr. Vetne.
Who else has questions for Mr. Carman?

Mr. English.

RECROSS-EXAMINATION

BY MR. ENGLISH:

Q. Mr. Carman, do you have any estimate for how much time has been spent by the Department since the beginning of this hearing preparing data for response data requests?

A. No, I do not have a direct estimate. It's been substantial. There have been two to three people in each market administrative office that have been involved in filling my requests and then a couple of people in headquarters that have been involved in assembling and comparing the data and seeing if we can eliminate duplication or -- or correct for what seems to be a different assumption from one office to another.

Q. So two or three people in each of ten marketing areas?

A. It would be eight.

Q. Eight because --

A. Eight offices because the Florida Order is administered in Atlanta, along with the Southwest -- Southeast Order. And the Pacific Northwest and Arizona Order are administered in the Seattle office.

Q. And then how many people in Dairy
Programs?

   A. The Federal Order stats people -- I don't know, for Mr. Wetterau, whether he did all of the work himself or whether he assigned some of his staff to do that. I was involved along with other members of the order formulation staff also.

   Q. And I have just a couple of questions. I don't want to get mired in things.

      JUDGE CLIFTON: May I get the spelling of the gentleman you referred to, Mr. -- Mr. Rower?

      MR. ROWER: W-e-t-t-e-r-a-u, I believe.

      E-r-a-u, excuse me.

      JUDGE CLIFTON: W-e-t-t-e-r-a-u?

      MR. ROWER: Yes.

      JUDGE CLIFTON: Does that sound right to you, Mr. Carman?

      THE WITNESS: Yes, that does sound right.

      JUDGE CLIFTON: Thank you. Mr. English.

      MR. ENGLISH: Thank you, your Honor.

   BY MR. ENGLISH:

      Q. I think you sort of had an answer. I'm not sure it didn't cover over a period of questions. To your knowledge, is ACNielsen very protective of the data they produce?

      A. Yes.
Q. That ACNielsen, when it contracts with someone, inserts very strong confidentiality provisions, correct?

A. Correct.

Q. Now --

A. I've been on the fringe in two different organizations of USDA on that data and have never been able to look at it. When I worked in Dairy Programs of the Economic Research Service, there was Nielsen data available to the retail section of the ERS, but I couldn't see it.

And then in Dairy Programs, I don't see it when it -- when it's available, or it may not even be available to -- to the oversight function of Dairy Programs.

Q. And if you can't see it, what does that say, in your view, about whether or not USDA can publish it?

A. We wouldn't be able to publish it. I'm quite sure of that.

MR. ENGLISH: I have no further questions.

JUDGE CLIFTON: Thank you, Mr. Vetne.

MR. VETNE: Your Honor, I have a request for official notice at this time in response to
that last series of questions of the monthly and annual retail prices for fluid milk products reported by the California Department of Food and Agriculture on their website as reported to them by ACNielsen, and that is all identified on their website.

JUDGE CLIFTON: Does it cover just the California milk?

MR. VETNE: It just covers California milk.

JUDGE CLIFTON: And they're not subject to any Federal Order?

MR. VETNE: They're not subject to any Federal Order. However, it is not the price in California that -- that causes my request for official notice. It is the fact that the California Department of Food and Agriculture does, as USDA could, enter into a contract with ACNielsen that allows them to report that data.

The representation has been made by cross that it can't be reported. The CDFA data publicly available by a government agency reports monthly the retail prices and gives its source as ACNielsen.

JUDGE CLIFTON: I can understand why you
might like the Department to enter into such a contract in the future, but you don't have any information that there is such a contract now, do you?

MR. VETNE: I don't know what that contract is, your Honor. But the record, based on this examination, suggests that USDA cannot report ACNielsen data. And I'm -- I'm representing to the court for this record and asking official notice of information that contradicts that series of questions.

JUDGE CLIFTON: Thank you, Mr. Vetne. I'm not sure it contradicts. Mr. Yale.

MR. YALE: Your Honor, I'm going to supplement Mr. Vetne's request and request that official notice be taken from the CDFA, the California Department of Food and Agriculture's website, U.S. retail average prices for whole, reduced fat, and skim milk as prepared for 52 U.S. cities, source ACNielsen Scantrack reports on refrigerated milk, and it is available on their website. I just pulled it down myself. It includes cities such as Albany, Boston, Atlanta, Chicago, Cleveland, Dallas, all cities which were reported in Exhibit 53.
JUDGE CLIFTON: So it doesn't -- that particular website does not restrict itself to California milk?

MR. YALE: No. It is called the -- the website is -- can be found at -- I apologize to the court reporter as we give these numbers, but I think it's important --

http://www.cdfa.ca.gov/dairy/retail_prices_main.html. And under that is a menu, Nielsen retail pricing, U.S. average retail for whole, reduced fat, reduced, and skim milk and is downloaded in an Excel format. And that's what I just identified.

JUDGE CLIFTON: Is there any objection to my taking official notice to that data? There is none. I take official notice of it.

MR. VETNE: For what years?

MR. YALE: Let's see what they have.

JUDGE CLIFTON: Thank you, Mr. Vetne. That's helpful.

MR. YALE: What I am seeing here -- and I'm looking to see if the other -- the one sheet took us to -- let me see what they got. It's just -- right now it's December 2008, January 2009, and February 2009. I will see
what other months are available. I know they have it for the cities of California for, really, an extended period of time. But for these cities, I will see if there's any additional information. But for the moment, that's what shows up on the thing I just downloaded.

JUDGE CLIFTON: So you are asking beginning of December of 2008?

MR. YALE: Yes.

JUDGE CLIFTON: Is that an annual figure or that's a monthly figure?

MR. YALE: That was the monthly figure for those periods. And that may -- I will look to see if there's anything else archived. They're not as thorough as USDA sometimes in saving things.

JUDGE CLIFTON: All right. Thank you Mr. Yale. Mr. Vetne.

MR. VETNE: Let me supplement that. The data has been clearly identified so let me supplement the request for official notice of that same data set on the CDFA website to the extent available from 2000 forward.

JUDGE CLIFTON: From 2000 forward, not
going back any earlier than 2000?

MR. VETNE: That's correct.

JUDGE CLIFTON: That's very helpful.

Thank you. I do take official notice as requested. All right. Any other questions for Mr. Carman? All right.

Mr. Carman, I stand in awe of the work that you and your coworkers accomplished for the purpose of this hearing. It would have seemed impossible to me. Thank you very much.

THE WITNESS: Thank you, your Honor.

JUDGE CLIFTON: All right. Let's take a 20-minute break now and then we'll have Dr. Orr's testimony. Please be back and ready to go at 10:47.

(A recess was taken from 10:27 to 10:50.)

JUDGE CLIFTON: All right. We're back on record at 10:50. Dr. Orr, would you state and spell your name please? Oh, and that microphone will have to be quite close to you.

THE WITNESS: Is that acceptable?

JUDGE CLIFTON: That's great.

THE WITNESS: My name is Dr. Carolyn Orr, O-r-r. And I am a Ph.D. scientist with nine years as a state agricultural policy analyst for
state governments.

    JUDGE CLIFTON: All right. Put that head of the microphone down in such fashion as this. And I realize it's conflicting with where your statement goes, but -- now, let's put it a little closer towards you and see if that works.

    THE WITNESS: Is that better?

    JUDGE CLIFTON: That's better.

    THE WITNESS: Okay.

    JUDGE CLIFTON: All right. I'm going to swear you in.

    (The witness was sworn.)

    JUDGE CLIFTON: Dr. Orr, tell me what you hold a doctorate in.

    THE WITNESS: My Ph.D. is in animal science from Texas A&M University.

    JUDGE CLIFTON: Thank you. You may proceed.

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

    DIRECT EXAMINATION

    THE WITNESS: Thank you. I grew up milking 100 cows in a stanchion barn in northern Pennsylvania. I work with state legislatures
today all over the nation that serve as leaders in agriculture in their legislature. They understand -- and since many are dairy producers themselves, they believe that the dairy producer works harder, longer hours for often less return than any other food producer.

I want to thank you today for allowing me to represent and testify on behalf of the Northeast States Association for Agriculture Stewardship. This is the agricultural arm of the Eastern Regional Conference of the Council of States Governments.

I want to remind you while you've been in here meeting, I've been continuing to communicate with the leadership of the state agriculture committees. I was present in Vermont last week when dozens of dairy farmers -- there's only 150 left in the state -- but dozens of dairy farmers came to the state legislature for a rally and met with the governor of the state legislature because they're in a crisis situation. They're losing dairies daily.

State legislators are the ones that have to go home to their communities and participate
firsthand in the decisions you all make here. You get to go home to your offices. They get to go home to hear the dairymen in their area complain about the collapse of the milk process.

The Northeastern legislatures have a history of commitment of effort to assist dairy farmers, what many consider the keystone industry for agriculture in the Northeast. Legislatures in the Northeast have provided low interest loans, cash subsidies, tax credits, price adjustment mechanisms for dairy producers over the last seven years. The Northeastern states have taken steps to support the dairy industry because the system for setting milk prices does not take into account the cost of milk production. Consequently, many times they are in a negative and unprofitable situation. It's why the Northeastern Interstate Compact was developed. And during the time of the Compact up to 2001, farmers were subsidized when prices were below target. Since the Compact has elapsed, states have resorted to a variety of efforts to support the industry.

States have created Milk Promotion Boards. They've created Milk Commissions.
They've held hearings. They've hired experts, and they've had proposed changes and several of the proposals have been implemented. And they continue to this day. I'm leaving on Wednesday morning for New Hampshire where the state legislature is having a summer study session on diary prices. States are working hard to try and help their dairy producers.

The Maine legislature has a state funded over-order premium and they proposed a tax on large retailers, with the proceeds to go to dairy farmers. They also proposed a property tax rebate for dairy farm real estate. Vermont is deliberating over-order premium. Pennsylvania has had one for years and now their state agriculture commissioner is taking their dairy board to court over recent decisions on over-order premiums.

The Massachusetts General Court instituted a tax credit based on a trigger price, a linked loan program and policies to increase locally produced dairy products. Massachusetts lawmakers also proposed a retail milk dealers fee, varying, depending on the price of milk.
Vermont, New York, New Hampshire, and Massachusetts have used state tax dollars, general funds, for dairy assistance programs. New York alone spent $30 million in cash subsidies for the dairy assistance program in 2007.

New Hampshire, Vermont, New York have focused on hauling and stop charges and identifying when ownership transfers for milk so that farmers are not charged for these stranded costs. It is interesting to note in many state legislatures, that National Milk Producers Federation and IDFA have testified against the efforts of state legislators to address Northeastern milk producer profitability.

Almost all of the Northeastern states have value-added programs, and even the USDA has a value-added producer program to encourage further processing to support the entrepreneur, the farmer that takes the risk and shortens the distance to the consumer. Yet it appears that many of these proposals seek to punish the entrepreneur for being successful.

All of these efforts by states -- all of these efforts by state legislatures to assist
their dairy producers, their keystone industry, when the real issue is the Federal Milk Marketing Order often leaves Northeastern dairy farmers without enough income to cover their expenses, compounded by reporting errors in nonfat dry milk prices that the USDA has failed to redress.

Section 1509 of Federal Public Law 110-246 provided for the continuation of Agricultural and Other Programs by the USDA and established a Federal Milk Marketing Order Review Commission which was to conduct a review of the Milk Marketing Order system, including consideration of competitiveness and transparency in dairy pricing and simplification of the Milk Marketing Orders. We were told there's been no funding to accomplish this.

All of this that I've said is a prelude to the Northeast State Association for Agriculture Stewardship response to the producer handling proposals being considered in this hearing. Many Northeastern state legislators are concerned about the funds and the time spent on these proposals when the real issue is the Federal Milk Marketing Order. The national
impact of producer-handler dairy operations is very small. Their impact in comparison to the companies requesting this hearing is minor. In fact, state legislators have significant concerns about the consolidation and concentrations among the largest cooperatives and handlers and its impact on the marketplace. Producer-handlers bear the true costs of production and delivery. They produce a product that meets the demand of their consumers or they don't stay in business. Their method is actually more transparent and a more accurate estimate of the consumer and economic demands than the Federal Milk Marketing Orders. The problems in the dairy industry cannot be blamed on a small number of producer-handlers, no matter how big they get.

Congress addressed National Milk Producers and IDFA's concerns when it enacted the Milk Regulatory Equity Act of 2005 and decided not to further regulate producer-handlers nationwide. We hope that the USDA follows Congress' lead and declines to make any changes as a result of these proposals until it takes on a more comprehensive review of the
challenges facing the entire dairy industry.

Some state legislators suggested that we chastise the USDA or that we question that if this hearing is a sensible way to spend scarce tax dollars when we believe that the current economic crisis that the dairy producers now face should preclude any changes to the system until the Milk Marketing Review Commission is established and reviews the entire program. The entire system must become more transparent and in line with consumer demands so that the producers do not have to endure the roller coaster price ride that has occurred since the Northeast Compact elapsed. It is important that we retain successful businesses, promote innovation and the jobs and communities they support. The timing is not right now to isolate the producer-handler exemption and make changes in any aspect of the dairy marketing processes until this has happened.

Thank you. I've also included in the material I've provided a letter from representative James Phinizy, a New Hampshire Chair of the House Agricultural Committee and president -- former president of the Northeast
State Association for Agricultural Stewardship.

    JUDGE CLIFTON: Now, I'm looking. The first attachment, then, is a two-page letter. We have it here front and back. And for those that do not have a copy of Dr. Orr's remarks, you don't have that to look at.

    Is there anyone that needs to look at a copy that doesn't have one? Mr. Carroll. Does anyone have an extra that -- Mr. Vetne, you don't have one either? And Mr. Tosi does not.

    Dr. Orr, I'm going to ask you to tell me, first of all, how you obtained a copy of this letter that is signed by James Phinizy?

    THE WITNESS: Representative Phinizy sent it to me to include.

    JUDGE CLIFTON: And what area is he a representative in?


    JUDGE CLIFTON: And it's dated May 12 and he addressed it to Dana Coale. And what is the other attachment?

    THE WITNESS: It's mainly for my information, but for those who are interested, it's an article from Forbes Magazine on the hearing in Vermont -- or on the rally in
Vermont, the dairy producers that rallied in Vermont last week while you all were here.

There was a large rally in Vermont that Governor Douglas and the legislators all attended.

JUDGE CLIFTON: And is this a printout from the website that's shown at the bottom?

THE WITNESS: Yes, ma'am.

JUDGE CLIFTON: And so that's a Forbes Magazine website?

THE WITNESS: Yes, ma'am.

JUDGE CLIFTON: All right. Let's go off record while those of o you have had not a chance to see this get a copy to look at. I think it won't take that long before we begin cross. It's now 11:00. Let's go off record.

(A recess was taken from 11:00 to 11:12.)

(Exhibit 94 was marked for identification.)

JUDGE CLIFTON: We're back on record at 11:12. Dr. Orr's statement has been marked as Exhibit 94 with its two attachments just being part of that exhibit. Is there anyone who needs a copy of Exhibit 94 that does not have one?

There is no one. Mr. Yale, thank you for solving that problem for us.
All right. I'd like to invite cross-examination of Dr. Orr. Who would like to begin? Mr. Carroll, thank you.

CROSS-EXAMINATION

BY MR. CARROLL:

Q. Good morning.
A. Good morning.
Q. I'm John Benjamin Carroll. I'm an attorney for the New England Producer-Handlers Association. The president of that association is Mr. James Stearns of Storrs, Connecticut.
A. Uh-huh.
Q. And we have members in Massachusetts, we have one in Maine, and we have New York, and some Pennsylvania. So we're not too far away from --
A. Actually, some of your members have been in many of our meetings.
Q. I'm glad to hear that. Now, directing your attention to your -- to your statement, do you know -- I'm not sure you're aware. Do you know in the state of New York, according to statistics that have been put in this hearing, there are only two producer-handlers of milk?
A. Uh-huh.
Q. Are you familiar with the history of it?
A. No, sir.

Q. In 1959, when the Milk Marketing Order came up in the state, there were 127. We have a feeling that Milk Marketing Orders are not too good for the little farmers that want to grow.

A. That's what state legislators say.

Q. Directing your attention to your statement, the next to the last paragraph in your statement which says, NMPF and IDFA have testified against efforts of state legislators to address NE milk producer profitability, could you expand on that and tell me what you mean?

A. Specifically New York, Vermont, and New Hampshire have had hearings all year focused on hauling and stop charges. Their concern is that those charges are stranded costs to the producer. They cannot be passed on.

And in almost every instance, we have had testimony against the -- the legislators have sought to transfer those costs from the farmers to the processors. And almost every instance they have testimony against that change has come from members of those organizations.

Q. Directing your attention to the next paragraph, almost all of the NE states have value-added
programs. Can you tell me what you mean by that?

A. Programs for producers of agricultural products to add value to their products, move their product closer from the farm to the consumer. And these exist everything from farmers' market programs to dollars for producers to add processing facilities. It's -- the USDA obviously has just released their value-added producer grant program for the 2009 year, which has additional funds in it.

So efforts have been made in almost every state to help producers move into the -- the -- to shorten the chain of ownership from their farmgate to the consumer.

Q. All right. And you continue on to say: And even the USDA has value-added producer programs to encourage further processing, to support the entrepreneur, the farmer that takes the risk and shortens the distance to the consumer. Can you tell me what you meant by that?

A. What I've just said, that many states have felt that the way to make their producers more profitable in all fields of food production is to shorten the distance from the farmgate to the consumer of that product. And the USDA has supported that system as well.
Q. And is that effort in the interest of the consumer as well as the interest of the farmer?

A. Absolutely. In fact, everything we do in agriculture is in the interest of the consumer or we don't exist.

Q. Now, you said even the USDA has value-added producer programs. Can you explain that?

A. The value-added producer grant program, which was just -- the 2009 version was just released last week, is a program that provides funds to farmers, agriculture producers, to add value to their products whatever that product may be.

Q. And is that the type of additional value described earlier?

A. Yes, sir.

Q. And that's a policy of the United States Department of Agriculture?

A. Yes, it is.

JUDGE CLIFTON: Dr. Orr, please allow counsel's question to die away.

THE WITNESS: Okay.

JUDGE CLIFTON: That way the typing will be easier.

BY MR. CARROLL:

Q. Could you explain again to me what the
Northeast States Association for Agricultural Stewardship of the Eastern Regional Conference of the Council of State Governments is?

A. Yes, sir. The Council of State Governments is a national organization made up of all three branches of government, the judicial, legislative, and gubernatorial or governor's branch. It exists based on payments made by the states to the organization, the Council of State Governments.

The Council of State Governments is then broken into four regions, the Eastern region, the Southern region, the Western region and the Midwestern region. The regions act autonomously, as well as being part of the Council of State Governments.

Within each region we separate based on issues. So the agricultural people in the Northeast have formed the Northeastern States Association for Agriculture Stewardship.

It is made up of the people in -- state legislators or -- or the Department of Agriculture that have an interest in agriculture and rural communities. It has additional dues paid by the agricultural committee of the state legislators in all Northeastern states, and that would be everywhere from Pennsylvania east and Maryland north.
Q. Well, could you -- itemize the states that you represent.

A. Actually, I work on a national basis for the Council of State Governments for other regions as well. But the Northeastern states would be everything from Pennsylvania east and Maryland north.

Q. Well, would that include Maine and Vermont?

A. Yes.

Q. New Hampshire?

A. Yes.

Q. Connecticut?

A. Yes. Rhode Island.

Q. Rhode Island?

A. Yes.

Q. And --

A. New York.

Q. -- New Jersey?

A. Yes.

Q. New York?

A. Yes.

Q. And then to Maryland but not to Virginia?

A. No. Virginia is in the south.

Q. That's in the Southern region?

A. Uh-huh.
Q. Okay. Now, directing your attention to the statement that you -- or the letter that you have attached from James Phinizy, with a carbon copy to the New Hampshire Department of Agriculture Commissioner Lorraine Merril, how did you obtain that letter?

A. Representative Phinizy sent it to me. He was the chair of the Northeastern States Association for Agricultural Stewardship, and as such has worked with dairy policy for the last two years. And he sent the letter to represent --

Q. Was he aware of the statements that you have made here today?

A. Yes, sir.

Q. And did he support that?

A. All of my statements come from the committee members of NSAS, not from myself.

Q. All right. Are you aware of the -- that -- at least in the New England market, there are two market suppliers of milk left, HP Hood and Dean? Are you familiar with that?

A. Yes, sir.

Q. Is it your thought that it is in the consumer interest to foster competition with those two people from the standpoint of the consumer?

A. My thoughts are the thoughts of state
legislatures. I represent state legislators.

Q. Yes, right.

A. In the state legislators' thoughts, the lack of competition has been damaging to both consumers and the producers in their area.

Q. All right.

MR. CARROLL: That's all. Thank you very much for coming. I deeply appreciate your time and effort.

THE WITNESS: Thank you.

JUDGE CLIFTON: Who next will cross-examine Dr. Orr? Mr. Vetne.

CROSS-EXAMINATION

BY MR. VETNE:

Q. Good morning, Dr. Orr.

A. Good morning.

Q. I'm John Vetne. I live on Red Sox Lane in Raymond, New Hampshire, and I represent two producer-handlers in the Pacific Northwest and one in Roswell, New Mexico. I just have a couple of -- not a couple actually, a few questions.

The Council of State Governments, is that affiliated in some way with the National Association of State Departments of Agriculture?

A. No, sir. National Association of State
Departments of Agriculture is made up by the State Department of Agriculture and paid for by the Department of Agriculture. The Council of State Governments is paid for by all three branches and represents all three branches. So NASDA does work with us, but they're just a small subset, because they're state department commissioners not legislators.

Q. My follow up to that, does -- I think you referred -- used the acronym NESA for the Northeast State Association?

A. NSAS.

Q. NSAS?

A. (Nodding head.)

Q. Okay. Does that agricultural stewardship association coordinate with the National Association of State Departments of Agriculture?

A. More so with NESDA, which is the Northeast State Department of Agriculture, on these issues. Dairy appears to be -- seems to be, among the legislators, a more regional issue. And so most of the work that NSAS does with departments of agricultural would be with NESDA, which is the Northeastern division of NASDA.

Q. Okay. Going down, you refer to the state of -- you say the legislature has a state funded
over-order premium and proposed a tax on large retailers. The state funded over-order premium is an existing program?

A. Uh-huh.

Q. And has existed for many years, is that correct?

A. (Nodding head.)

Q. Is that a farm level premium?

A. Yes, sir, it is.

Q. You nodded your head.

A. Yes, sir, it is.

Q. And proposed, so there is no tax currently existing?

A. It died in the Senate.

Q. Okay. Was there not -- has there not been a tax or a charge on retail sales within the state of Maine that has gone back into the general fund in turn, an equivalent amount going to dairy farmers?

A. Yes, there has been, but this was an additional tax on top of the current.

Q. Okay. So in addition to an over-order premium at the farm to processor stage of a transaction, there also exists within the state of Maine a tax or an assessment or charge on retail sales in the store regardless of where it comes from, the proceeds of which
30 go into the general fund? Yes?

A. Yes. To the best of my knowledge.

Q. Okay. And producers, dairy farmers in the state of Maine receive money from the general fund that corresponds more or less with the amount that goes into the fund from that tax?

A. That might have been true previously. This year they are much in deficit and have had to make some other arrangements.

Q. Ah-ha. So even if it goes into the general fund this year, because of the state of the economy, other fiscal demands within the state are looking at that money for -- for use, correct?

A. Yes, sir. To the best of my knowledge.

Q. Okay. Towards the end of your prepared testimony you refer to hauling and stop charges and you continue that paragraph with an observation: It is interesting to note that in many state legislatures, NMPF and IDFA have testified against the efforts of state legislators to address Northeast milk producer profitability. My question to you concerning that sentence is whether you intended that sentence to refer to the prior sentence, the efforts to legislate hauling and stop charge changes?

A. As they relate to producer profitability,
Q. Okay. Did you intend that last sentence to refer to any other legislative effort other than hauling and stop charges?

A. As of my knowledge, that is what legislators have so told to me for this hearing.

Q. Okay. And it is -- it is at least the opinion of those you represent that a change in hauling and stop charge practices will increase producer profitability?

A. Yes, sir.

Q. Okay. And is that also your personal opinion?

A. I don't have a personal opinion on it. I represent state legislators.

Q. All right. Do you know whether in the Northeast any dairy farmers have sought to secure grants under USDA's value-added producer grant program?

A. I would not have access to that information, sir.

Q. And with respect to similar state programs, do you know whether dairy farmers in the Northeast have sought to access funds from state value-added producer grant programs?

A. It is my understanding that in New
Hampshire, Vermont, and New York, at least -- oh, and Pennsylvania, at least, there have been attempts to use value-added programs by dairy producers.

Q. There are existing programs, correct?
A. There are existing valued-added programs in those states, yes.

Q. And dairy farmers have at least attempted to access those funds, correct?
A. To the best of my knowledge.

BY MR. VETNE:
Q. Got it. Okay. Thank you very much for coming.

THE WITNESS: Thank you.

MR. VETNE: We have long awaited your coming. Your name has been mentioned many times: When is Dr. Orr coming?

THE WITNESS: When it dried up, and I wasn't putting up hay.

JUDGE CLIFTON: When Dr. Orr arrived and saw that Mr. Carman was on the stand, she wondered if he'd been on the stand ever since she left.

THE WITNESS: He'd aged quite a bit.

JUDGE CLIFTON: Who next will cross-examine Dr. Orr? Mr. Rower. Thank you.
CROSS-EXAMINATION

BY MR. ROWER:

Q. Good morning.

A. Good morning. Good afternoon almost.

Q. Almost. I have a couple of questions.

One is regarding the attachment that you have from Mr. Phinizy.

A. Uh-huh.

Q. Is he currently a legislator?

A. Not this year. Actually, he's in line for a federal position in the FSA in New Hampshire, is my understanding.

Q. Okay. I was wondering because this letter was not on some official letterhead.

A. Right.

Q. So I wanted to get that. Do you agree with -- there are three points that he's made in his letter; one, two and three on the back. Are you supporting each of those?

A. I don't personally support anything. I represent state legislatures and provide their opinions. And they -- that is -- if -- their first choice is nothing to be done. This is their second or third choice, is if -- if something has to be done, this is their next step.
Q. Okay. But these are the opinions of Mr. Phinizy as a private citizen?
A. No, as a representative of NSAS. He's still --
Q. Oh, of this organization that you represent?
A. Yes. Yes, sir.
Q. Okay. What state legislators do you represent? You said you represent them.
A. As far as states or the people?
Q. Of both, actually.
A. Actually, in -- as an agriculture policy analyst for NSAS, I represent all of the Northeastern states east of Ohio and north of -- it would be Pennsylvania and east and north of Maryland. And typically our membership is the House and Senate agriculture committees, as well as the agricultural commissioner and in some cases, governors, agricultural liaisons.
Q. Of each of the individual states?
A. Of each of the individual states, yes.
Q. Excuse me. I'm sorry. And you're a paid analyst, is that correct?
A. Yes, sir.

MR. CARROLL: Okay. Thank you very much.
And thank you for coming.

JUDGE CLIFTON: Are there any other questions for Dr. Orr? Mr. Tosi. Thank you.

CROSS-EXAMINATION

BY MR. TOSI:

Q. Hi, Dr. Orr. Thank you for coming. I just had another thought here in looking over James Phinizy's letter. He identifies himself as the former chair of the Northeast States Association for Agricultural Stewardship. I understand that this is Mr. Phinizy's letter. But is this -- when someone is signing this letter and identifying themselves as somebody that used to be something, how are we to know that this represents the position of the organization?

A. The issue is timing. Our chairs change in May. And the new chairs have not been sworn in yet. But he's out of -- out of office. And so that the new chairs have not been sworn in. The new chairs have been selected. And as soon as they're sworn in, then we'll get letters and signatures from them to match his.

Q. I understand. So we just happened to catch the organization while it's between leaders?

A. We change when the sessions end in the slate legislature, which is just now coming to an end in most of the states in the northeast.
Q. A couple of other questions. In your direct testimony in the paragraph there that discusses the Massachusetts General Court instituted a tax credit based on a trigger price, in that one, in that paragraph --

A. Uh-huh.

Q. -- would this be a tax that would also be placed on producer-handlers in their capacity as a -- being a retailer of milk?

A. The tax credit would apply to all dairy producers based on the -- as Massachusetts proposed it, it'd be based on the price of milk. When milk dropped -- prices dropped to a certain level, they would automatically receive the tax credit, all producers.

Q. Okay. And does Massachusetts make a distinction there between someone that is a dairy farmer and someone that's a dairy farmer that's also selling, that's also a handler, if you will, or a processor?

A. The state's goal is to keep them all in business.

Q. Okay. And then in the next paragraph there where you talk about Vermont, New York, New Hampshire and Massachusetts using state funds to provide cash subsidies, would those subsidies also be applied to -- would a producer-handler also be eligible to
receive a subsidy from the state?

A. Once again, their goal is to keep all dairy producers in business.

MR. TOSI: Okay. That's all I have. I appreciate you coming. I was the fellow that called you and left a message and was glad to see that you were able to make it today.

THE WITNESS: Thank you.

MR. TOSI: Thank you very much.

JUDGE CLIFTON: Mr. Vetne.

RECROSS-EXAMINATION

BY MR. VETNE:

Q. Just one question here. Mr. Tosi referred to your paragraph that referred, in turn, to Massachusetts General Court. That is the name that Massachusetts uses for its legislature, is that correct?

A. Yes, sir, that is correct.

JUDGE CLIFTON: Thank you, Mr. Vetne.

That -- I'd have been confused. All right.

Any other questions for Dr. Orr?

Mr. Carroll.

RECROSS-EXAMINATION

BY MR. CARROLL:

Q. I think it's your second page. It is the second page of Exhibit 94. The sentence or the
paragraph just before the end, you state, Congress addressed NMPF and IDFA's concerns when it enacted the Milk Regulatory Equity Act of 2005 and decided not to further regulate producer-handlers nationwide. Could you explain that answer?

MR. ENGLISH: I object.

JUDGE CLIFTON: Mr. English?

MR. ENGLISH: I believe that calls for a legal conclusion. I didn't question the witness about this. But I believe that any explanation necessarily calls for a legal answer. And I object to the question and to any answer.

JUDGE CLIFTON: The objection is noted, but it is important for -- to know what the witness meant by that. And you may answer.

MR. CARROLL: Thank you, your Honor.

A. I'm not a legal scholar, but I do know what our Federal legislators tell us, and our Federal legislators tell us exactly what I wrote. And I'm going to leave it at that.

MR. CARROLL: Yes. Thank you very much.

JUDGE CLIFTON: Mr. Carroll, before you leave the microphone, how is Stearns spelled? You used the gentleman's name.

MR. CARROLL: S-t-e-a-r-n-s.
JUDGE CLIFTON: Thank you.

MR. CARROLL: James is his first name.

JUDGE CLIFTON: Thank you.

MR. CARROLL: Thank you.

JUDGE CLIFTON: Are there any other questions for Dr. Orr? There are none. Now, let's turn to the exhibit. The exhibit is 94. It's one piece. It contains Dr. Orr's statement and the two attachments. Is there any objection to all of 94 being admitted into evidence?

Mr. English?

MR. ENGLISH: Yes, your Honor. Let me start with what I think is -- I think is easiest at least. The third piece of paper, which is a newspaper article that the witness indicated was about a protest held in Vermont. Obviously, we all know milk prices are low. There's nothing remotely relevant about this particular newspaper article in this proceeding. And if relevancy has any bearing left, you know, this document just doesn't have anything to do with this proceeding.

She, herself, said she just included it as reference for herself. I object to it.

I'm a little on the margin about the
second page, the James Phinizy document. I appreciate the clarification from the questions from the government that Mr. Phinizy is actually presently sort of a private person, he's not a legislator, and he's the former chair.

On the other hand, I know that we have had documents from other government officials, and so I'm a little less certain but I still think we ought to ask about it. And I frankly move to strike the part about the Milk Regulatory Act. She said this is something she heard from someone else. She's not a lawyer. Basically, it's a legal statement coming in through a nonlawyer.

I move to strike the first sentence of the paragraph, Congress addressed NMPF and IDFA's concerns when it enacted the Milk Regulatory Equity Act of 2005 and decided not to further regulate producer-handlers nationwide. Those are my objections.

JUDGE CLIFTON: Thank you, Mr. English. Any other comments, either objections to Exhibit 94 being admitted or comments in support? Mr. Beshore.

MR. BESHORE: I join Mr. English's
objections and -- you know, in all respects.
This is -- and on the record will make the
hearing -- the record needs to be -- there need
to be distinctions, clear distinctions in the
record between sworn and unsworn statements.

JUDGE CLIFTON: Thank you, Mr. Beshore.
Who else would like to be heard on this issue?
Mr. Carroll.

MR. CARROLL: My comments in regard to
Exhibit 94, for the record, the testimony
clearly indicates -- as to the letter that
counsel indicates is marginal, it really isn't
marginal. She said that represents the policy
of the organization. The gentleman who wrote it
has clearly stated what that policy is. And
she's in a position to verify that as a policy,
and therefore it's proper to be admitted.

As far as the comment about legal, that's
beside the point. The question is, what did the
witness mean. The witness has told us what she
meant, and it cannot be stricken without a loss
of the essential purpose and thrust of her
testimony. Thank you very much.

JUDGE CLIFTON: She didn't exactly tell
us what she meant. She indicated that that was
the statement that she adopted from someone else.

    MR. CARROLL: Yes, but it is -- number one, hearsay is admissible; number two, has clearly indicated that she received that from an authoritative source, from a person whose job title was to be knowledgeable in those matters. And, frankly, it's self-evident from the legislation itself because they did nothing wherever -- in New England or anywhere else in the United States, except for the one simple problem they were presented with. I think it's an obvious decision. Thank you very much.

    JUDGE CLIFTON: Thank you, Mr. Carroll. Mr. Yale.

    MR. YALE: We would support the admission of all of it. I mean, obviously the Department can use it to the weight, to the degree that it wishes. We've had more extended hearsay submitted into this record than this even comes close to being.

    The witness was here, was available for cross-examination. The first attachment provides her, in a sense, the authority of why she's here. She's here in a representative
capacity, so that gives some weight to the authority.

She's explained the peculiarities of the chairmanships and how these things work. That does not undermine in any way, in my view, the authenticity of what's there.

The article at the end, I mean, I think just provides the kind of context in which they're here. I don't think it says anything more than that. I don't know anybody that's going to argue, my God, if you don't do this, we're going to have riots in the streets or anything.

I think it just provides the kind of contemporaneous context to the pressures that her people and her organization is under that they're trying to address.

And I really think the Department has to with some comity, Federal state comity needs to be respectful of the state organizations that are trying to address in a sense the same problem but from a different viewpoint. And I don't think we can discount their testimony because of the ability to actually represent them is so constrained.
Anybody who works with government -- I mean, it's one thing to represent what a representative says. It's something else to represent what a legislature says. And then to go so far as to represent what three branches of government from a dozen states do -- I mean, it sounds like some kind of foreign communique that has to come out.

So I think we have to recognize that context and why it has to be said as it is. But I think it's very important for the Secretary to have in the record this voice of constituent states in this Federal government of how it feels about an issue that's important to them. They'll weigh it as they wish. The evidence was based on evidence that's in the record, you know, that will go. Because this gives them a context. And they've had the opportunity to cross-examine her to see the scope of that, and I think it all should be admitted.

JUDGE CLIFTON: Before I hear from Mr. Vetne, Dr. Orr, regarding the last page, did you testify that you were present during this demonstration?
THE WITNESS: Yes, ma'am, I was. And I heard Governor Douglas. The statement from Governor Douglas is the most important aspect of this, in our -- in the state legislature's view.

JUDGE CLIFTON: All right. Do you believe this Forbes article is an accurate reflection of what you observed when you were there?

THE WITNESS: Yes, ma'am, I believe it was.

JUDGE CLIFTON: Mr. Vetne.

MR. VETNE: I guess that takes care of the newspaper article. I'm going to join with Ben Yale for some slightly different reasons.

A number of witnesses have preceded Dr. Orr, Roger Cryan, Bob Yonkers, testifying what their organizations have decided and the positions their organizations have taken. The organizational sponsors of a position is the kind of thing that comes into this -- into these hearings frequently. And the organization's positions then are, in turn, sometimes tied to unique facts and sometimes just, you know, here's the position, here's our argument.

Some of this is, as many witnesses'
testimony, simply argument. But this is a place where positions and arguments can be tested and why.

USDA frequently writes its decisions on Federal Milk Orders, you know, Proposal X was supported by ABC Company or XYZ Cooperative, and here's why they did it, here's what they said.

This is of that nature. And I would specifically refer to the -- to the legislation -- what was it called? The -- referred to at the end.

JUDGE CLIFTON: Oh, the -- you're not talking about the Milk Regulatory Equity Act?

MR. VETNE: Yes, Milk Regulatory Equity Act of 2005. I mean, that legislation has been referred to by prior witnesses and prior witnesses have attributed various intents to -- to the legislature just as prior witnesses have referred to other legislation or decisions of the Secretary and attributed their belief of the intent. I think that's perfectly legitimate for a representative of an organization of state governments to express their view of what they thought Congress intended.

It doesn't mean that that view governs
the analysis of it. However, it helps focus the analysis, because one thing that the Department will do, and then subsequently a court might do, is to look to the legislative history. And I think that perspective might help focus that analysis. So I think all of it ought to be received in the same context that other live testimony has been received.

JUDGE CLIFTON: Thank you, Mr. Vetne.

Mr. Ricciardi.

Dr. Orr, you had no idea, did you?

THE WITNESS: I said earlier that I thought state legislatures run slow, but they run like jack rabbits compared to this one.

MR. RICCIARDI: We're moving with all glacial speed as best as we can.

THE WITNESS: You all do this full time. They only do it part time.

MR. RICCIARDI: I understand. They're going to get better at it. And I join with my colleagues, Mr. Vetne and Mr. Yale, and add just a few things. Yes, in fact, Dr. Orr is here on behalf of a substantial number of states, which also include the Northeast States Association for Agricultural Stewardship.
Yes, due to a quirk, Mr. Phinizy apparently is the former chair. But he effectively is representing, as the chair, the position of that organization. And she is here representing the position of that organization. And therefore, all of the information that's contained in her statement and the attachments is, in fact, the position of the organization that the Secretary should have the ability to be able to review.

The last point on this issue about the Milk Regulatory Equity Act paragraph on page 2 of Dr. Orr's statement. She, again, is representing the view of the state legislators on that issue. Whether it's correct or whether it's not, it's their view.

And by the way, with regard to the layman's perspective, if you recall Dr. Cryan's statement, riddled with references to legal issues, he told me that that was his layman's view of what those things might mean.

And so the Department has the ability to consider that. The Department should have the ability to consider this also. Thank you.

JUDGE CLIFTON: Thank you, Mr. Ricciardi.
I do admit into evidence Exhibit 94 in its entirety. I do not strike the reference to the Milk Regulatory Equity Act of 2005. But the Secretary is cautioned in line with the witness' answer about where that came from.

In other words, there's no right to cross-examine the people that asked her to relay that opinion.

With regard to Mr. Phinizy's letter, I have the same caution for the Secretary, and that is that Mr. Phinizy was not here for cross-examination.

With regard to the last page of the document, I indicate that the witness was present for the event that is written up in this publication, and that makes it different from an ordinary magazine article or newspaper article. But I agree with Mr. Yale that its value is for context, and it serves a valuable niche, I'll call it, in our understanding of the issues.

All right. Anything further? Thank you so much, Dr. Orr. You may step down.

All right. Now, let's see. I think we can do one more witness. It's 11:49. Would the next witness be Mr. Taylor perhaps? Would that
be good, Mr. Ricciardi?

MR. RICCIARDI: To the extent that we want to actually have another witness prior to lunch, I think that Mr. Taylor is probably a good selection.

JUDGE CLIFTON: All right. Let's do that. Do we have anything that will be marked as an exhibit in Mr. Taylor's case?

MR. RICCIARDI: We have, and you should have there, Judge, two items, actually; one, the testimony of Warren Taylor that has been provided to everyone, including the Court reporter and including the court, and also the record copy to USDA, as well as another document which is headed -- it's an attachment document. The document is FMMOS Hearing - Comments.

And my suggestion would be that we would mark the Exhibit which has Mr. Taylor's testimony as the next exhibit, which I believe is 95. Am I correct?

JUDGE CLIFTON: (Nodding head.)

MR. RICCIARDI: And that the other document, the FMMOS Hearings - Customer Comments be marked for identification as Exhibit 96.

JUDGE CLIFTON: Thank you. I have done
so.

(Exhibit 95 was marked for identification.)

(Exhibit 96 was marked for identification.)

JUDGE CLIFTON: Mr. Ricciardi, Exhibit 95 will be the testimony of Warren Taylor, and Exhibit 96 will be the attachment which includes, on its front page, customers and their e-mail addresses.

All right. Does anyone need a brief break to get ready for that testimony? No. I think we're ready to go.

MR. RICCIARDI: Good.

JUDGE CLIFTON: Mr. Taylor, if you would come forward and take a seat in the witness chair? Please be seated, and when you are comfortable, you can state and spell your name for us.

THE WITNESS: My name is Warren Taylor W-a-r-r-e-n, T-a-y-l-o-r.

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

(Off the record.)

JUDGE CLIFTON: All right. Let's go back
THE WITNESS was sworn.

JUDGE CLIFTON: Thank you.

Mr. Ricciardi, you may proceed.

MR. RICCIARDI: Thank you, your Honor.

WARREN TAYLOR

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

DIRECT EXAMINATION

BY MR. RICCIARDI:

Q. Mr. Taylor, you indicate in Exhibit 95 that you're the owner of Snowville Creamery. Can you tell us just a little bit about Snowville Creamery for a moment, please?

A. Yes. Snowville Creamery is an LLC, fully owned by myself. And we -- we built this dairy over about a year's period of time, started production about a year and a half ago to produce local, fresh, minimally processed milk from -- produced by a pasture grazing herd.

Q. And have you, in fact, prepared a written statement, marked now as Exhibit 95, outlining the background and information regarding Snowville as well as other positions that Snowville has with regard to the
issues raised at this hearing?

A. Yes, sir.

Q. Okay. Also we have marked as Exhibit 96 a document headed FMMOS Hearings - Customer Comments. And I just want to ask you a little bit of background information about this document. These are a compilation of either letters or e-mails from the customers of Snowville Creamery, is that correct?

A. That's correct.

Q. And related specifically to their views concerning the value of the Snowville Creamery product?

A. Yes.

Q. And the quality of the product?

A. Yes.

Q. And these were, as I think you mentioned here, unsolicited?

A. Yes, they are.

Q. Okay. And they're compiled in Exhibit 96, and you have received permission to share the comments of these customers with the Secretary?

A. Yes.

Q. Okay. At this point, why don't you go ahead and provide your testimony as reflected in Exhibit 95. I'll go sit down, and then when you're done, I may have some other questions before other people examine
A. Thank you.
Q. Thank you.
A. My name is Warren Taylor. I am the owner of Snowville Creamery in Pomeroy, Ohio. Snowville Creamery is an exempt plant, now processing about 130,000 pounds per month of Class I milk. We started construction of our plant after meeting with our Market Administrator and confirming plans to become a producer-handler as volume increased. We believed a reasonable payback would require at least 500,000 pounds per month in Class I sales. We began production and distribution of pasture-grazed minimum processed milk in December 2007. The business is owned entirely by myself and my wife, Victoria Taylor. It is now an informal partnership with the dairy farmer couple of Bill Dix and Stacy Hall, on whose 350 acre, 230 cow seasonal dairy farm the milk processing plant was built.

We are growing our business, constantly gaining sales. More importantly, stores see gains in their total milk sales, showing we are not just cannibalizing sales from other milk, but increasing per capita consumption in our new customers. Every week we receive additional testimonials from customers extolling the glorious taste of our milk. These testimonials
include people who had been drinking soy milk, parents
whose children refused to drink milk or drank very
little, and people who had lost their enthusiasm for
milk years ago. These testimonials demonstrate clearly
and convincingly that all milk is not the same. We are
producing milk that tastes dramatically different from
the vast majority of milk available, conventional or
organic. We have given consumers a new choice, and our
dairy farmers a price well above market.

You can call me a dairy nerd. My father
Bert was one of the gentlemen of the 1950 through 1985
American Dairy Industry. He earned a Dairy Technology
degree from Ohio State University in 1953, where he was
on the dairy products judging team that won the national
contest. He went on to help organize and run the annual
National Dairy products judging contest for 20 years,
and was honored with appointment to the Board of
Directors of DIFSA, the Washington, D.C. dairy
organization which preceded IDFA.

I grew up in a home where dairy products
were celebrated and appreciated. We had hand-cranked
ice cream regularly. Although meat was a Sunday treat,
there was always plenty of milk and cottage cheese.
Velveeta was unknown in our home. I was raised on fine
sharp Wisconsin, New York, and Vermont cheddar. The
owners of Columbus area dairy processing plants were regular visitors to our home, as we were OSU Dairy Tech professors and grad students. I received a dairy tech degree in 1974 and was at the headquarters of the world's largest fluid milk processor in 1977.

In my ten years at Safeway from 1977 to 1987, the dairy industry changed dramatically, as fluid milk consumption declined, farmer income declined, and gallon jugs became the norm. Child obesity rates began to rise as children's consumption of milk declined and 30 percent fat cheese and cheese like products became the principal end products of America's dairy cows, instead of Class I fluid drinking milk. Compromises in quality were made. We learned that when plastic jugs were introduced, widespread complaints about the flat oxidized flavor resulting from light exposure could be greatly reduced by pasteurizing at about ten degrees Fahrenheit higher temperature, say 175 instead of 165. The cooked flavor of the higher pasteurization masked the oxidized failure. Milk become a low cost commodity. After ten years at Safeway Dairy Division headquarters and a couple of years as the Director of Application Engineering for Cherry-Burrell, I started a process design consulting firm specializing in the dairy industry. It became the world's largest pure consulting
firm doing food process design. We were responsible for many major projects including the last high capacity fluid milk plant in America for Santee Dairies in Los Angeles, much of Dannon Yogurt Company's process design including the process for what became the Activa probiotics drink, Daisy Brand Sour Cream's new Dallas plant, which is the largest sour cream plant in the world, and the largest fluid milk plant in all of Europe for Aria Foods. Other projects included Land of Lakes first UHT and consolidated culture products plant and a $120 million aseptic facility for Slimfast. In all of these projects, my Safeway experience, knowledge of plant operations, and understanding of the economics of scale and facility operating costs were key to our unique contribution.

As American investment in dairy plants declined, I looked to apply my knowledge to design an efficient small scale farm milk bottling plant in my community. I hoped to learn whether providing a premium pasture grazed minimally processed milk might increase per capita consumption. Other hopes included: Supporting local family farms by providing a higher value outlet for raw milk than is offered by large national cooperatives. Providing jobs for local residents with safe and satisfying working conditions,
opportunity for progress and personal development, and
the pride of helping provide healthful food to the
community. Providing milk as fresh as practical from
cow to consumer, as contrasted with the common usage of
the word fresh to mean not spoiled. Promoting pasture
grazed dairy farming without the use of recombinant
bovine growth hormone, (rBGH), and providing customers
the choice of supporting these principles.

In one of the most impoverished and
unemployed counties in Ohio this is a model and
prototype for future arrangements in other rural
locations. The economic spinoff of this local economic
development is great. We have seven full-time employees
and seven part-time employees. The payroll of these
local workers contributes to the local economy and tax
base.

Our small local dairy is responsible
and responsive to the community. We believe that
providing -- we believe that providing basic needs of
life should be done in a way to contribute to the common
good. We give consumers the choice of supporting a more
rational, sustainable, and healthful world and self, by
consuming our dairy products. We believe this excellent
milk will reverse children's 30 year decline in fluid
milk consumption, and help solve the current
health/obesity crisis. I believe the current decline in fluid milk consumption is related to minimum cost production methods and more extreme processing for the longer shelf life required when distributing from large centralized facilities.

Snowville Creamery makes it possible to give consumers truly fresh milk, on their retail grocery shore shelves the day after the cows are milked. With daily deliveries and nearby responsive processing capability, our consumers enjoy our dairy products within days of the cows producing the milk. By contrast, today's dairy products usually reach consumers one or two weeks after milking. I believe we represent an exciting and promising future, especially for smaller family farms: Local differentiated premium milk.

Market access. The economics of retail grocery store delivery with refrigerated distribution trucks are brutal. The industry cost estimate for a single delivery with a 40 foot semi truck is $250. We believe our costs are between $25 and $50 per delivery, depending upon distance between stores, and distance between our production facility. Even then we simply cannot economically supply small mom and pop stores, health food stores, or convenience stores which commonly sell $100 worth of our milk a week. The cost of
delivery exceeds the profits until we are delivering at least $250 worth of milk a week. The proposals from NMPF and IDFA are based on the clear understanding that the only real cost effective high volume sales available are in the stores which are controlled and supplied largely by IDFA members. The restrictive verbiage proposed which prevents producer-handlers from co-branding is based on protecting the large lucrative supermarket business and relegating smaller producers to costly, less than desirable small regulators. That's not a level playing field.

At the typical local store our $2.99 per half gallon competes with milk which sells for $1.99 per half gallon. At that price we both probably make about 10 percent on the retail gross as profit. At least one week per month our typical store puts their half gallon milk on sale for $1.00. Our milk goes from costing 50 percent more to costing three times as much. When this happens, our sales drop about 15 percent. Unfortunately, we get no notification when the milk will go on sale, so we cannot be prepared to adjust our deliveries to the store. We routinely must take back unsold milk when half gallons are on sale. At least one other week per month the gallon milk is put on sale for $2.99 per gallon. When this happens, half gallon sales
also drop, usually about 10 percent. Again, this is disruptive to our marketing and results in unsold returns. It's not a level playing field.

One reason for low dairy farmer income is the below reasonable loss leader pricing set by vertically integrated grocery chains such as Kroger and Safeway. About 70 percent of fluid milk is sold in plastic gallon jugs at a price which is usually near cost. An indication of the disconnect between raw milk pricing and commodity fluid milk pricing is the common practice of a processing plant bottling a generic labeled milk which retails for perhaps 50 percent less than the identical milk in an identical jug with a different brand label.

JUDGE CLIFTON: Let me ask you -- you read that as 50 percent less.

THE WITNESS: Oh, excuse me. I'm sorry. 50 cents less. Thank you.

JUDGE CLIFTON: You're welcome.

A. While this is an amusing facade of consumer choice, it more accurately displays the relative impact of the alleged 15 cents per gallon raw milk difference -- raw milk cost difference which NMPF and IDFA purport cause disorderly marketing and unfair advantage. Nothing, really.
Market support. After struggling and failing to get access to large regional and national stores, we began to supply two Whole Foods Markets in Columbus last August. Within three weeks we were the biggest selling fluid milk in both stores. Whole Milk asked us to supply their two stores in Cincinnati.

JUDGE CLIFTON: Would you read that sentence again?

A. Whole Foods asked us to supply their two stores in Cincinnati. There again, we became the best selling milk in both stores in less than a month. We then began supplying the two Whole Foods Markets in Cleveland in November and were the best selling milk in those stores by December.

The difference between Whole Foods and the other grocery stores we have been serving was their sincere support of our milk, and their willingness to give Snowville Creamery shelf space commensurate with growing sales. Whole Foods is committed to encouraging local suppliers, and appreciates our principles of sustainability, animal welfare, and high quality, wholesome, minimally processed milk. As such, they are willing to allow us to succeed and even supplant their own house brand as their largest selling milk.

Given honest access to the market, and a
level playing field, we can excel. We are still looking to receiving the benefits of a level playing field from major grocery stores.

We recently began supplying a grocery store chain right here in Cincinnati. In one of their larger stores there are 75 shelves of milk in the dairy case. 73 of those shelves are filled with Dean Foods milk including the Trauth Dairy label, the grocery store generic label, Horizon Organic, Nature's Basket Organic, and Over The Moon. There are only two other shelves available there, both supplied with milk from Organic Valley. These two IDFA members completely monopolized the milk case until we arrived.

It will be interesting to see if we can establish a toehold in these stores and grow our market. This grocery store chain seems sincerely committed to encouraging local food producers. Unfortunately, they only have four stores in the entire Cincinnati area which have a demographic promising to our milk and the size large enough to support the twice weekly deliveries necessary to properly supply our fresh, relatively short shelf life milk.

The proposals. As an exempt plant, I support the principles of Proposal 2 from NMPF which explains that, quote, Given growth in farm size and
growing economics of size in milk processing, it is reasonable to increase the size exemption to 450,000 pounds per month, and we propose to do so, end of quote. In supporting this concept in Proposal 2, I also speak for two other Ohio exempt plants, Hartzler Family Dairy, Inc. in Wooster and H.D. Organics, Inc. in Utica. We all could serve an increasing consumer demand for local fresh premium milk if the exempt limit was raised.

While I agree with the basic premise, in today's world a fluid milk plant of only 450,000 pounds per month cannot be economically constructed and operated. Instead, I believe that 1 million-pounds per month is more realistic in providing sufficient volumes for an economical operation. Please refer to A Cost and Returns Evaluation of Alternative Dairy Products to Determine Capital Investment and Operational Feasibility of a Small-Scale Dairy Processing Facility, from the Journal of Dairy Science, 2007. This well prepared recent study found that even a facility processing 644 million pounds per month would have a substantially negative net present value or profitability. I quote the following: Fluid milk plants have closed due to inefficient economies of scale and because of the product -- because the product - beverage milk - is
essentially an indistinguishable commodity. It is very
difficult for a processor to position a fluid brand to
strategic advantage. The exceptions seems to prove this
rule.

The five farm (640,000-pound per month)
fluid plant would need a 6 percent increase in present
value of reserves, which translates to a 24 cents
increase in the price received per gallon of milk sold.
It is unlikely that the fluid processing plants would be
able to overcome the baseline revenue shortfalls or the
high level of expenses to reach a break-even point.

As a member of AIDA, I also support
Proposals 23, 24 and 25. Producer-handlers, especially
those operating below 10 million pounds per month, must
depend on their milk having a value added component, due
to lack of large scale efficiencies enjoyed by large
processors. This added value should be reflected all
the way back to producer-handler, without being diluted
by pooling.

The Organic Dairy Industry has proved
that value can be added on the farm by the production
method. The FMMOS has been an unfair market distorting
manipulation which has redistributed that wealth and
value to non-organic commodity lowest cost dairy
producers with which organic competes.
John Kennedy famously stated that life is not always fair. The marketplace favors the older established companies. The increasing consolidation and growing size of dairy handlers and processors confirms this fact. Neither Kroger nor Safeway have built a new high volume fluid milk plant in over 20 years. Their capital costs are long since paid off and depreciated. Any new producer-handlers entering the marketplace will find the cost of capital will likely exceed all other costs except raw milk itself. This economic disadvantage far exceeds 15 cents per gallon. There is no need to grandfather producer-handlers.

One of the last new fluid milk plants? Built in America was in Nevada, by Dean Foods, to take advantage of a market distorting manipulation of the 2005 Milk Regulatory Equity Act which was supposedly enacted to remove just such market distort advantages from producer-handlers.

Diversity and customer choice. While there always will be a commodity milk business based on lowest cost, there has always -- there also always -- should be has been other business
models based on value-added differentiation, which is what most producer-handlers follow. The lowest cost commodity milk business will always serve the vast majority of consumers. But a portion of consumers want differentiated milks, particularly locally produced milks from farms following business models other than lowest cost commodity production. These customers place value on knowing the specific farm producing the milk and the farming methods used. They increasingly value pasture grazed or grass fed milk, for instance.

Let's be honest. The commodity milk market is declining with a continuous decline in fluid milk consumption. There is no sign that this trend will change.

In contrast, our local, minimally processed pasture grazed milk is growing. I have brought 25 unsolicited testimonies from consumers who find our particular and different milk has led to their increased consumption. They know that all milk is not the same, and that this milk has a much higher value to them. That value belongs to the small local farmer -- farmer whose production method created it. It
will always be a small part of the fluid market, and no threat to the commodity processors or the FMMOS.

Testimony in these hearings has included the fact that smaller dairy farmers have a tremendous cost of production disadvantage, 4 to 5 dollars per hundredweight. If these farms are able to have any future, it must be through adding value or government subsidies. They cannot possibly compete with commodity milk. They are not on a level playing field. Is our future one that willingly eliminates all small dairy farms below 1,000 cows? Perhaps it is if Proposals 1 and 26 are accepted.

I believe in diversity, in a variety of business models, and choices for both dairy farmers and consumers in the marketplace. Most grocery store -- grocery stores, it should be, in Ohio offer between three and five different ultra pasteurized out of state organic milks, but few have a locally produced pasture grazed cream line milk, although customers want it. For those customers to be served, small vertically integrated producer-handlers must be an available position for entrepreneurial dairy
farmers. Thank you for the opportunity to present my outlook and experience.

BY MR. RICCIARDI:

Q. Thank you, Mr. Taylor. I actually want to go through a couple of items in your statement with you, where there were word changes, so that we can confirm what actual language you want in Exhibit 95.

On page 4, the middle paragraph beginning, Snowville Creamery. Did you find that?

A. Yes.

Q. It reads, Snowville Creamery makes it possible to give consumers truly fresh milk. You read, when you read it, the word customers instead of consumers.

A. Oh.

Q. Do you want --

A. Consumers is fine.

Q. -- consumers to remain? Thank you. The judge pointed out what you read on 5. I think you've corrected that.

You mentioned during the course of your testimony a cross-out, an additional word near the bottom of page 8, under the Diversity and Consumer Choice paragraph. After the first clause, after the comma, when you read it, you deleted the word, has, and...
you added it in between always and then, so that it would read: There also always has been other business models.

Is that the way that you want your statement to read?

A. I think that could -- there -- it could remain as it's typed. There has also always been, yes.

Q. Okay. Bottom of page 9 in the last -- next to last paragraph -- actually, the last full paragraph, you added the word S after store. So it reads most grocery stores. Is that a change you want to make?

A. Yes, it is.

Q. And then, again, in the last sentence where it says, for those consumers, you again read customers. Do you want it to say --

A. Consumers.

Q. Consumers. Okay. Fair enough. All right. Now, a few follow-up questions for explanation on your statement before I sit down and others ask you questions.

And for the -- jumping off point for this issue. Page 6, the middle part of the page you begin the sentence, given honest access to the market, et cetera. Do you see that?
A. Yes.

Q. All right.

A. Yes.

Q. In terms of a startup business like Snowville, is it difficult to be able to market your milk and obtain shelf space in the larger grocery chains?

A. It's -- it's extremely -- it's extremely difficult. Our experience with Kroger was that we visited corporate headquarters, talked to the national dairy buyer, were volunteered that we were welcome to serve our local store and see how we did.

Q. Okay.

A. We sold 80 to 100 cases a week within a month. And they refused to give us another store. It was clear that if we'd sold 10 cases a week, we could have had many more stores.

Q. All right. Now, you -- you also indicate that currently, at least, Snowville has a status of an exempt plant?

A. Yes.

Q. Correct? And you're not currently a producer-handler?

A. We're below the volume necessary to become one.
Q. Okay. And I think you discussed it at least in general in your statement but I want to ask you specifically. Is one of the reasons you're currently not a producer-handler in that status, leaving aside the volume you just referenced, the difficulties in balancing the producer-handler with --

A. Absolutely. We take milk from the dairy farm that our plant is located on. But at this point we're only using about half of the milk. So I recognize if we were -- if we had a producer-handler status, the additional milk that that plant right now is selling to an out of state processor would be sold at Class IV.

Q. Okay. And then, lastly, before I sit down, again, Exhibit 96 we've spoken about briefly and you've referenced it on page 9 of your statement. Again, the front sheet of it contains the names and e-mail addresses of some of the customers of Snowville Creamery, correct?

A. Yes.

Q. And the remainder of the document stapled together are the actual comments, unsolicited comments, received from those customers?

A. Yes, sir.

Q. And you have obtained their permission to share those comments with the Secretary?
A. Yes.

Q. In general, then, what is the purpose for providing this type of information to the Secretary at this hearing?

A. I think that the fundamental premise of the Federal Milk Marketing Order system is that all milk is the same, and the principle of fairness is that all farmers should be paid the same for milk. And I think that as a dairy technologist who got out of college when production methods were starting to change, there's no question but that there's -- there's tremendous differences in milk depending on breed and feed, let alone things like state of lactation.

The milk that is produced today in confinement dairies on -- with black and white cows producing C9 gallons of milk a day is fundamentally different from the milk that comes from brown cows on grass that are producing four or five gallons of milk a day.

And as such, I strongly believe that it's important that the dairy farmers that choose to use production methods that produce a more costly product, which may be more desirable to some consumers in the marketplace, receive the full value for that product.

If -- if the -- if they're forced into
the pool, the added value that they produce is actually -- a portion of that added value is taken from them and given to the very commodity producers with whom they have a very difficult time competing anyway.

So I think it's fundamental for us to recognize that this basic premise of the Federal Milk Market Order system is an anachronism. There is tremendous differentiation between the nature of milk that's been produced, and studies that were done over a decade ago at University of Wisconsin identified, for instance, five to one differences in conjugated linoleic acid between grass fed and grain fed milk.

Conjugated linoleic acid is one of the most potent immune boosting substances known to man. It's a powerful anti-inflammatory and it's widely recognized in the medical community that it's -- European studies show 70 percent reduction in women's breast cancer in women who have adequate levels of CLA.

These are things that consumers recognize and no amount of the Federal Milk Market Order System saying otherwise is going to convince consumers that there is not a value of milk from grass-fed cows.

Q. So Exhibit 96 is just an effort to provide at least the information from some representative comments from some of your customers
regarding the value of Snowville Creamery's milk?

A. Yes.

Q. Okay.

A. And our -- and our basic -- our most --
our greatest driver in building this plant -- my
greatest driver was to prove if the -- if the dairy
industry gave consumers better milk, they could reverse
the per capita -- the annual per capita decline in
consumption of fluid milk that has been occurring for 30
years.

MR. RICCIARDI: Okay. And then I don't
have any further questions at this point. Other
people may ask you questions. If I have
redirect, I'll come up and ask those questions
of you. Thank you.

THE WITNESS: Thank you.

JUDGE CLIFTON: Thank you, Mr. Ricciardi.
Who would like to begin the cross-examination?
Mr. Beshore, thank you.

CROSS-EXAMINATION

BY MR. BESHORE:

Q. Good afternoon, Mr. Taylor.

A. Good afternoon.

Q. I may just have a question or two. If my
notes are correct, I think I heard you say that, quote,
the basic premise of Federal Milk Marking Orders is an
anachronism?

A. That all milk is the same.

Q. So that's the basic premise, that all
milk is the same?

A. I believe that is a basic premise, yes.

Q. Okay. You're aware -- perhaps not -- of
the Federal Milk Order pricing programs which have
differentials for protein content?

A. Oh, certainly.

Q. Okay. And butterfat content?

A. Yes.

Q. Okay. And other solids content, also?

A. Yes.

Q. So that at least with respect to those
aspects of pricing, the Federal Milk Market Order System
does not price all milk the same, isn't that fair?

A. Oh, that's true. But that goes back --
that goes back several decades. The knowledge of the
compositional differentiation in milks from grain to
grass fed is -- is principally within the last ten
years.

Q. Okay. So the -- your concern is that the
system is based on knowledge of the contents of milk
that's about ten years old?
A. No, it's 30 years old.
Q. Okay.
A. I mean, I think -- I think component pricing began about 30 years ago and was probably roundly adopted about 20 years ago.
Q. I thought I understood you to say that the new knowledge about the compositional content of milk is about ten years old?
A. That's -- that's correct.
Q. Okay. Just one other -- one other question. In -- in one of the -- one of the communiques in Exhibit 96, it appeared that somebody was writing you with a concern that your milk was no longer in the store in New Albany?
A. Yes.
Q. What store was that?
A. This is a Giant Eagle store. One of the limitations in Giant Eagle stores is we can't sample milk in the stores without paying what's basically a $150 a day fee for somebody's grandmother to be there, for the taster to be there and pay for the service. It's very difficult. This is another one of our barriers to entering the market. It's very difficult. In Giant Eagle we can't taste, we can't sample, we can't let people experience the difference in
our milk without paying an exorbitant amount of money to the store.

Q. So when you were in the store -- when that condition of being there was implemented then, you're no longer in the store?

A. Well, we chose -- we chose to -- we chose to stop supplying the store because we weren't able to grow our sales there sufficiently. And another problem at that store is -- several other Giant Eagle stores was that it wasn't uncommon for us to come into the store, find our milk in the cold box, in the main storage cold box and the shelves empty.

You know, we were not -- we have tremendous problems being stocked in the stores. It's a common complaint that, we're out of milk, but the milk's in the main cold box and not being brought out by the store employees.

Q. Okay. So then you ceased providing your milk to the stores?

A. At that particular store. We had every intention of going back to it as we have a larger presence in Columbus.

MR. BESHORE: Okay. Thank you very much.

JUDGE CLIFTON: Mr. English, you may cross-examine Mr. Taylor.
CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Good afternoon, Mr. Taylor.
A. Good afternoon.

Q. Charles English. I only have one series of questions. You testified on page 8 of your testimony about a new plant built in Nevada by Dean Foods, and you say, to take advantage of a market distorting manipulation of the 2005 Milk Regulatory Act. Since you know a lot about milk plants, do you know that that milk plant that Dean Foods built was built in 2005?
A. No, sir.

Q. Do you know whether that plant was in operation prior to the Milk Regulatory Equity Act becoming effective in April of 2006?
A. No, sir.

Q. Do you know how it is that Dean Foods with that new plant in Nevada can take advantage of market distorting manipulation by the 2005 Milk Regulatory Equity Act?
A. Nevada is not in the Federal Order.

Q. Do you know, sir, how it is that Dean Foods can take advantage of the market distorting manipulation of the 2005 Milk Regulatory Equity Act?
A. Well, because they're in -- they're
not -- the plant is located in a state that is not regulated. They don't have to pay Class I premiums for milk which they can then export from that state into other states where they sell it as Class I milk, such as California, which is not regulated.

Q. Do you know for a fact that that plant in Nevada actually sells any milk into California?

A. I have to confess, I have no -- I have no -- I have no direct knowledge of that that I could -- that I could put in front of me.

Q. And do you know if that plant sells milk in Arizona, it becomes partially regulated?

A. No, I didn't know that, sir.

Q. Do you know that if it sells milk into New Mexico, it becomes partially regulated?

A. If you say so.

Q. But you didn't know that before you made the statement?

A. No, sir.

MR. ENGLISH: I have no other questions of this witness.

JUDGE CLIFTON: Thank you, Mr. English. Who would next like to cross-examine Mr. Taylor?

Mr. Carroll.

CROSS-EXAMINATION
BY MR. CARROLL:

Q. I want to compliment you, Mr. Taylor. I am John Benjamin Carroll. I'm attorney for the New England Producer-Handlers Association, composed of people like yourself, many of them, in the states of New York, Pennsylvania, New Hampshire, Vermont, Connecticut, and we have one person in Virginia, but that's outside. That's a different marketing area.

Again, I want to compliment you on what you've done. I've spent probably 30 years with producer-handlers, and I -- I know how hard it is. And I know how hard you've worked.

I want to ask you just a few questions, if I can, on the major subject of the hearing, which is the extent of any increase in the exempt category for own-farm milk. And at page 7 of your statement, in the first -- or second full paragraph you state: While we agree with the basic premise, in today's world a fluid milk plant of only 4,000 -- or 450,000 pounds per month cannot be economically constructed and operated.

Can you explain that answer?

A. Well, I -- having just done this, I spent a million dollars to build the smallest plant that I could envision after 30 years in the industry and being an expert in such matters. And having constructed the
plant and operating it, operated -- operating it for a year and a half, there's very little I would do different.

If you're building a plant that's going to make a truly premium milk, I believe it has to be high temperature, short time pasteurized, for instance, as compared to vat pasteurizing. Vat pasteurizing has a cost in excess of $100,000.

You put together the infrastructure and the facility necessary to process any amount of milk, high temperature, short time process, any amount of milk and bottle, bring to market, skim milk, 2 percent and whole milk, you're spending over a million dollars. And depending on your -- your cost of money, and what -- what you're paying for milk, you put all those things together, and the economics at the half million pound per month level are -- are, I hope, about a three-year payback, if you can sell that much milk.

Q. All right.

A. But the -- but by the same token, the -- the real opportunity is doing something more than basic three-year payback. And there's tremendous risks and variabilities in the marketplace.

If we'd been given access to mainstream grocery stores, we probably would have been profitable
within six months. As it is, we've been operating 18 months. We've lost a third of a million dollars and we're still in the red. These are the kind of financial risks and costs you face in trying to enter the fluid milk market.

And so the -- to me, looking back now after a year and a half, our plant's easily capable of doing a million pounds a month. The dairy farm that we're on, plus a nearby dairy farm that Bill Dix and Stacy Hall also operate have -- has about three-quarters of a million pounds available.

I think to attract capital, to give an entrepreneur the confidence to proceed, there's got to be an up side to -- to any business opportunity. And to limit the exempt status to 450,000 pounds a month is to choke it. And to limit it to that, just barely that, could encourage someone to go into it. And to limit a facility, just about any facility you could build could probably do a million pounds a month; to limit arbitrarily to 500,000 seems to be a market distortion and a real impediment to encouraging what I think is a -- is a progressive and exciting opportunity to -- to change a declining fluid milk industry.

Q. And your next sentence is: Instead, I believe 1 million pounds per month is more realistic in
providing sufficient volumes for economical operation.

Is that what you've been saying --

A. Yes.

Q. -- that 1 million is the better figure?

A. I think so.

Q. On page 8 of your statement, you have a sentence in the third -- one, two -- third paragraph, last -- next to the last sentence: Any new producer-handlers entering the marketplace will find the cost of capital will likely exceed all other costs except raw milk itself.

Could you give us more information on that?

A. Well, that's been our experience. The building a fluid milk plant is -- it's a seven-figure operation. One of the -- one of the costs that I underestimated was distribution, for instance. We now own four milk delivery trucks and a milk tanker truck. Those -- those vehicles put together was just another eighth of a million dollars. Our expense of capital right now is in the neighborhood of $150,000 a year. It is our second greatest cost, so it's important to get a return to make a profit.

A lot of -- a lot of the producer-handlers that exist in the country right now
they're in the same position as -- as a lot of the large existing processing plants. They've been paid for and depreciated.

The entry into the marketplace and the capital that it requires is a tremendous burden and -- yeah.

Q. And is the exemption necessary in order to allow those entities to engage in that type of operation?

A. I think the -- I think that if you want to have a dairy industry that really fosters innovation, creativity, entrepreneurial spirit and differentiation, we have to have an up side. And so having a reasonable exemption limit is helpful in letting a dairy farmer vertically integrate and go directly to his community with a product.

By the same token, I think there's got to be a step above and beyond that to a producer-handler status that also has a meaningful volume, and that the volumes -- the volume limits for both exemption and producer-handler operations have to be reasonable in the current marketplace and with current economics to make those businesses practical and sustainable.

Q. Now, directing your attention to one of
your products, which is -- as I have -- I read your customer statement, apparently you sell a product where there's no homogenization?

A. None of our products are homogenized.

Q. Is there a reason for that?

A. Oh, yeah. Our basic premise is that -- is basically what I was taught in college in the early 1970s in dairy tech, which is that the milk comes perfect from the cow and it's our duty to mess with it as little as we can in getting it to our customer.

So we follow that premise. So we only do what is legally necessary to -- to process the milk. So we choose not to homogenize.

Q. Some years ago I participated in a study -- or one of my clients did, in a study of homogenized milk as a factor in the rising level of heart attacks in this country. And there was considerable print on it. Have you seen those studies or are you familiar with it?

A. I'm not -- I've not read actual studies on homogenization, per say, but I'm well aware of the idea that homogenized milk fat is detrimental to human health.

Q. And do you have customers that are aware of that fact and that are seeking your product for that
reason?

A. Yes, sir.

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

JUDGE CLIFTON: Thank you, Mr. Carroll. Who next would like to cross-examine Mr. Taylor? Mr. Tosi, do you have any questions for Mr. Taylor?

MR. TOSI: No, your Honor. We have no questions. But Mr. Taylor, thank you for coming. And I'm happy to see that you're a good Ohio State University graduate. We were there at about the same time.

THE WITNESS: Thank you. Thank you very much.

MR. TOSI: Thank you.

THE WITNESS: Yes, good to see another Buckeye here.

MR. TOSI: Yes, sir.

JUDGE CLIFTON: Is there any objection to the admission into evidence of Exhibit 95? There is none. Exhibit 95 is hereby admitted into evidence. Is there any objection to the admission into evidence of Exhibit 96? There is none. Exhibit 96 is hereby admitted into
MR. RICCIARDI: Thank you for doing my job for me, Judge. I don't have any further questions.

JUDGE CLIFTON: Mr. Carroll, did you think of something?

MR. CARROLL: I neglected one area which I've just been reminded of.

JUDGE CLIFTON: All right. You may.

RECROSS-EXAMINATION

BY MR. CARROLL:

Q. I remember you said about your positioning on grandfathering. There was a grandfathering proposal. Would you please explain that?

A. In its follow-up on your question about capital, having -- having -- having struggled to enter the marketplace and experiencing the economics over the last year and a half, I think there's tremendous barriers to entry for producer-handlers. And there's tremendous competition with commodity milk. And very few producer-handlers who are looking to capitalize on value added on-the-farm milk will actually be attempting to compete with commodity milk on a price basis.

I think that the -- I think that there's so many -- there's so many aspects to the unlevel
playing field that exists in the marketplace that risking producer-handlers by grandfathering is unnecessary, since I don't really see producer-handler plants threatening the commodity market, a different commodity market for one.

And secondly, that I think, again, to -- to foster customer choice, to give the opportunity for a -- a new changing growing dairy industry, we have to have the up side, the place to go for an exempt plant, if it is successful, if it does grow its market. The producer-handler model is an important part of our total diversified dynamic dairy industry of our future, I hope.

MR. CARROLL: Thank you, sir.

THE WITNESS: Thank you.

JUDGE CLIFTON: Thank you, Mr. Carroll. Mr. Taylor, is there anything else you'd like to add, for example, prompted by questions that you were asked?

THE WITNESS: It's been -- it's been an interesting several months. For the last two years I've worked 100 hours a week, and I can count the days I've had off on the fingers of one hand.

And when I received the letter from the
Federal Milk Market Order Administrator in February explaining what was coming in these proposals, it was extremely daunting. And the amount of time, effort, and money that's been involved in defending my right to continue doing what the law said I could do when I put my million dollars on the line has nearly broken me and our business.

I got out of bed yesterday morning at 6:00 and I haven't been to sleep since Sunday morning. We had two trucks break down on Friday. We had a delivery truck flip over on 270 in Columbus this morning. I think it's absolutely despicable that the dairy industry is doing this to us. And I can tell you that everyone I tell the story to feels the same way.

There's -- every citizen, every customer that you explain that a dairy company that controls 40 percent of the milk in America says I have an unfair advantage recognizes that it's wrong, that it's terribly wrong.

Our government is to serve our people. In this case, I believe our government is serving Dean Foods, and I could not be more upset about it.
My father was a pilot who commanded a medical evacuation squadron for the Pacific Theater, and he was fighting tyrannical forces that were threatening our democracy. I believe I'm fighting the same forces here today. Thank you.

JUDGE CLIFTON: Thank you very much, Mr. Taylor. I appreciate your taking the time away from your business to be here to testify.

THE WITNESS: Thank you.

JUDGE CLIFTON: Mr. Ricciardi, it's 12:47. This seems to me like a good time to take a lunch break.

MR. RICCIARDI: I think it is a perfect time to take a lunch break.

JUDGE CLIFTON: All right. Everyone please be back and ready to go at 1:47.

(Exhibits 97 - 101 were marked for identification.)

(A recess was taken from 12:47 to 2:01.)

JUDGE CLIFTON: We're back on record at 2:01. We have two witnesses at the witness stand and I'd like first for each of you to identify himself and spell his name. Would you begin please, Mr. Sharpe?
MR. SHARPE: I'm Charles N. Sharpe,
S-h-a-r-p-e.

MR. BUTTON: Timothy Button,
T-i-m-o-t-h-y, B-u-t-t-o-n, Sr.

JUDGE CLIFTON: All right. And the N in your middle name, Mr. Sharpe, that's N like never?

MR. SHARPE: Yes.

JUDGE CLIFTON: I'd like to have you both take the oath to tell the truth at the same time, each of you, and remain seated, and try to speak into the microphone when you answer me.

(The witnesses were sworn.)

JUDGE CLIFTON: Thank you. Each witness answered yes. We've marked these exhibits as follows. The testimony of Charles Sharpe is marked as Exhibit 97. The testimony of Tim Button is marked as Exhibit 98.

The Star-K Kosher Certification letter is marked as Exhibit 99. The Heartland Creamery website excerpt that has at the top right, When Taste Matters, is marked as Exhibit 100. And the other excerpt from the website, which begins with Iowa in a list of locations is marked as Exhibit 101.
Mr. Miltner or Mr. Ricciardi, which will proceed? Mr. Ricciardi, you may proceed.

CHARLES SHARPE, TIMOTHY BUTTON, SR. of lawful age, being duly sworn, were examined and testified as follows:

DIRECT EXAMINATION

BY MR. RICCIARDI:

MR. RICCIARDI: Good afternoon, your Honor. Al Ricciardi. And you have identified a number of documents that have been marked. I intend to start with what has been marked as Exhibit 97, which is the testimony of Mr. Sharpe, and then proceed through the testimony of Mr. Button, Exhibit 98.

And then we will deal, depending upon the other exhibits, with the respective witnesses as we go along in the examination.

But let me start with you first, Mr. Sharpe. And you've identified and also indicate that you are here making presentation on behalf of Heartland Creamery. Can you tell me, before you get into your specific statement, what is Heartland Creamery?

MR. SHARPE: We're a producer of milk that we -- or we're a processor of milk that we
produce there on the farm.

MR. RICCIARDI: Okay. And you identify it more specifically in the statement, which you'll get to in a moment, but you also are here on behalf effectively of Heartland Ministries. Can you at least just briefly describe what that is?

MR. SHARPE: Yes. Heartland Ministries is a ministry we started in 1995 to help people with drug and alcohol problems and also young people who had just lost their way and had no one to really take care of them.

MR. RICCIARDI: And in what way is Heartland Ministries involved with Heartland Creamery and the other way around?

MR. SHARPE: Well, Heartland Ministry is a separate entity, but we have a -- an organization, a corporation called Sharpe Holding that owns the creamery, and of course, I am the owner of Sharpe Holdings.

MR. RICCIARDI: Why don't you go ahead at this point and read your prepared testimony and then I'll be back up here to guide you next.

MR. SHARPE: All right. Heartland Creamery is a unique --
JUDGE CLIFTON: I'm sorry. Move that microphone to the left about 3 inches.

MR. SHARPE: All right. Heartland Creamery is a unique producer-handler located in northeast Missouri, about three miles -- or three hours, I'm sorry, north of St. Louis. Heartland Creamery is owned by Sharpe Holdings, Inc., and while organized as a for-profit corporation, supports the mission and operations of CNS International Ministries.

Heartland Ministries. I founded the ministry approximately 13 years ago as a Christian ministry engaged in outreach to at-risk people in need of assistance in dealing with substance abuse (drug and alcohol) and other issues. Heartland is an international -- or is an intentional community designed to help hurting people get a fresh start in life. The Heartland Community provides dedicated high school and college facilities on site in addition to counseling and other services. The Heartland program includes teaching job skills, providing work experience to assist with transition back into the larger community when program participants leave Heartland --
Heartland's physical environment. The Ministry has also become a center of economic activity in a very depressed rural area, providing numerous jobs to a region in need of them.

We first began operating a dairy, a working dairy farm, Heartland Dairy, to provide jobs and training opportunities to our students. Later, we added a milk processing plant, Heartland Creamery, and the creamery provides the same training and employment opportunities that our farm does.

Heartland Creamery. The Heartland Creamery is a for-profit business, the profits of which help support the ministry. Our farm is located in Newark, Missouri, and the creamery is in LaBelle, Missouri, about 15 miles apart. Heartland Dairy is now milking approximately 3,000 cows. All of our calves, heifers, and dry cows are also raised on this site. We also have a goat herd and produce goat milk and goat cheese. The combination of our cow herd and goat herd and processing plant makes our operation among the most unique in the country.

Heartland Creamery produces great milk. It is fresh, RSBT (sic) free and reliably
produced on a single farm. Our processing plant is very small, but we have distribution in multiple -- in multiple states, including Missouri, Kansas, Iowa and Illinois. We produce milk in glass bottles, in pints, quarts and half gallons, as well as milk in plastic gallons. Given our small size, we must purchase our milk jugs. Our volumes are not high enough to justify purchasing our own blow-molding equipment.

Our customers are supermarkets, both chains and independents. Our goal is to grow in tandem with the Heartland Community.

Heartland does not believe that we have any disruptive impact on the market, either in terms of effect on blend price to the farmers or through an unfair competitive advantage against fully regulated processing plants. We get our milk at our cost of production, not at the blend price. It is apparent that in the current market this puts us at a substantial disadvantage compared with regulated processors who are paying Class I prices. We would note that Dean Foods, for example, reported record-breaking profits last fall, crediting the
low price of milk. That was not the situation for us at Heartland Creamery.

We're also aware that several witnesses have -- had alleged that we have won business that they would like to have based on the allegation of unfair price and advantages we have as a producer-handler. This is nonsense. Heartland Creamery has no unfair price advantage and anyone who comes to our operation can see that very plainly. We are an extremely small operation. We -- the General Manager of our creamery, Tim Button, is here with me, and will provide more detail on the operation and the specific business that -- that others have referred to in this hearing. Tim spent his career working for Crowley Foods in upstate New York and for HP Hood in its bottling operation. He laughed when he saw our little bottling operation. He had -- we have no advantage of size and scale compared to the dominant processors.

I find it interesting that Gary Lee of Prairie Farms testified about the processing competition from Heartland. But in any event, the record should reflect the fact that the
business won by Heartland Creamery refers -- referred to by Mr. Lee was won in 2007, when we were a member of DFA and the cooperative community for which Mr. Lee expressed his support. Heartland Creamery did not become a producer-handler until January 1, 2008.

I also find it interesting that Warren Erickson of Anderson Erickson complained of Heartland winning an account from them. I don't think any producer-handler should have to apologize for winning any customer. Customer contracts are awarded on the base of quality, service, and price. We provide a winning combination of each, but in that instance also, the business that Mr. Erickson discussed was won principally when Heartland was not a producer-handler.

Competition is a two-way street, as anyone in the business of selling anything understands very well. As a producer-handler, we at Heartland Creamery have competitive constraints that the regulated market does not, and vice-versa. There is nothing whatsoever wrong with that - any more than there is anything wrong with partnerships competing
against corporations. Different business models have different advantages and disadvantages — and that is a strength of free enterprise.

It is simply not possible to look at the present situation in the dairy industry and conclude that producer-handlers have any unfair advantage over cooperatives or processors. For example, I cannot buy milk if anything goes wrong with our cows or our farm supply. The regulated market can. We have to find our own customers for our own milk; pool producers do not have that burden. We have to handle our own milk to — we have to haul our own milk to our bottling plant; pool producers do not — they do not have that burden. We each pay for the service in different ways, but that does not mean our competitive positions are inequitable.

I do not believe that national policy should eliminate choice of business models. I believe it should remain — maintain them. We need to help — to keep all options open to move agriculture businesses away from government support to independent viability. I oppose eliminating the producer-handler status, as I
believe that it provides an opportunity for
building new types of -- of productive economic
activity in the area that need them greatly.
And our area of Northeast Missouri is one such
area.

MR. RICCIARDI: Thank you, Mr. Sharpe. I
have some additional questions, but I think if
you would just move the microphone over to your
right, to Mr. Button, so I can ask a few
questions before you provide your statement,
Mr. Button.

You've been identified as someone who
works for the Heartland Creamery. Can you tell
us in general what you do there?

MR. BUTTON: I oversee the -- excuse
me -- the production, the maintenance,
distribution of the finished product, the
general operation.

MR. RICCIARDI: Okay. And that's for the
creamery or the processing portion of the
producer-handler operation?

MR. BUTTON: That's correct.

MR. RICCIARDI: How long have you been
working with the creamery?

MR. BUTTON: A year and nine months.
MR. RICCIARDI: Okay. So you were there at or about the time that you went from the -- a regulated processor actually to a producer-handler?

MR. BUTTON: Yes.

MR. RICCIARDI: Why don't you go ahead, if you would, and provide the testimony set forth in your statement which has been marked as Exhibit 98?

MR. BUTTON: My name is Tim Button. I'm the general manager of Heartland Creamery. As Mr. Sharpe described, before working as a general manager at Heartland, I worked in the bottling operation of HP Hood. Before that, I was employed in the bottling operations of Crowley Foods. Both of those companies are great organizations. And yes, I did chuckle when I saw the Heartland bottling operation.

Heartland became a producer-handler in January of 2008. Before we opened the Creamery, Heartland Farm was a producer member of DFA, the dominant cooperative operating in Missouri. We sold our milk to DFA, as other dairy producers do. When we opened Heartland Creamery, we became DFA's customer as well.
By late 2005, we were producing, handling, bottling and distributing our own milk. As a customer, DFA charged us a variety of fees on our milk sold back to us. Actually, during that time, we trucked our own milk from the farm to the plant. DFA picked up and marketed what we did not need at the plant. The difference in what we got paid for our milk we produced and what we paid for the milk we bought for the creamery significantly reduced the money that we could have reinvested in the business to grow and ultimately reduce our profits, which would be contributed to Heartland.

As a producer-handler, we continue to produce --

JUDGE CLIFTON: I'm sorry. You left off that last word, and I think it's important. What -- where would the profits go?

MR. BUTTON: Contributed to Heartland Ministry, I'm sorry.

JUDGE CLIFTON: Okay. Go ahead.

MR. BUTTON: As a producer-handler, we continue to produce, haul, bottle and distribute our own milk and we are no longer paying fees to the cooperative. Instead we have the full
responsibility of finding our own customers, and balancing our own milk supplies to ensure that we have sufficient volume to supply our own customers. We make some cheese and also sell the excess milk in compliance with the Central Order regulations, generally through a broker or customers that we find ourselves. The price we receive for excess milk sold on the open market is usually at or below Class III price.

Heartland Creamery produces a variety of fluid milk products: Gallon milk jugs, whole, 2 percent, 1 percent, skim, chocolate, half and half and heavy cream, milk in glass bottles, half gallons, quarts, pints, half and half and cream in pints. We also produce goat milk in quart bottles. We also produce some goat milk and cow milk cheese. Our customers choose us for the same reason customers choose any supplier - quality, service, and price. We do not have a price advantage over the regulated market. As I have said, our processing plant is very small, our setup is very labor intensive and our business is not even big enough to justify having a blow mold. Our bottle costs are about 10 cents higher than the larger
operation with blow molding. Every unit we
produce is handled by hand. We are not
automated.

Rather than growing as a result of our
producer-handler status, the opposite is true.
In fact, the size of our herd has shrunk since
we became a producer-handler. At our peak we
were milking approximately 4,200 cows; today we
are milking 3,000. Our Class I volumes have
similarly decreased.

We have also recently secured Star-K
Kosher Certification for all of our products,
which are sold under the Samuel Joseph's brand.
A copy of our certification is attached. Our
integrated farm and processing operation is very
well suited to the constant on-site supervision
required to secure and maintain certification
for this important niche mark.

I want to address specifically --
specific allegations from two witnesses in this
hearing about business dealings with Hy-Vee
stores. The implication is that we are selling
at a price that cannot be met by fully regulated
handlers. I know that that is not the case
because we serve those accounts as a regulated
handler. In many stores, our Heartland branded milk is priced below the Hy-Vee store brand price. But we began placing our gallon milk in Hy-Vee stores in 2005 and in Kansas City Hy-Vee stores in 2007, during the time when Heartland Creamery was buying our milk back from DFA and accounting to the Central Order Market Administrator as a fully regulated distributing plant.

We were able to place our milk in those stores for a number of reasons. First, despite our small plant and its associated higher costs, we do not have high overhead costs, as do handlers like Anderson Erickson. Second, because of the nature of our business, we are likely willing to operate at a lower margin than other bottlers, whether cooperative or proprietary. Third, where we can, we do look for efficiencies and savings in our operations. Since we transitioned to producer-handler status, our pricing strategy has not changed. It isn't the case that others cannot match our price, it is that they choose not to.

In addition, what we have learned from the testimonies in the hearing about Heartland
providing a small part -- provides a small part of a large picture. The retail price alone, which I understand was not even specifically mentioned, doesn't tell us anything about the markup by the retailer, the profit margin of the supplier, or the costs of the supplier. Any one of those factors, and possibly others, can be reflected in a retail price or explain why certain products or suppliers are selected.

Accountants move on price -- accounts move on price, product quality, service, and other intangible factors. Some customers have elected to stock our products in part because of our dedication to the Heartland community. Others have selected our product based on our accountability of the product from one single source. Both as a regulated handler and as a producer-handler, we gained customers and lost customers. But in all instances our price was not one that could not be met by a fully regulated plant.

Neither Mr. Sharpe nor I am an expert in Federal Milk Marketing Orders. We -- what we understand is that the combination of proposals of NMPF and IDFA will eliminate the current
producer-handler status and grandfather in only
certain producer-handlers operating at 3 million
pounds of Class I production per month, with
further limitation on labeling and marketing.
We oppose any change to the current
producer-handler definition. But if the
Secretary believes that the current
producer-handler regulations should be changed,
then in conjunction with our other members AIDA,
support the AIDA proposals to exempt own-farm
productions for all handlers or to establish
individual handler pools. While we have limited
retail sales, we support the AIDA proposal to
exempt retail sales by producer-handlers.

If the current producer-handler status is
eliminated, Heartland would be likely to be
forced into a situation similar to that we had
before. We would sell our milk to a cooperative
and buy back what we need, in addition to
accounting to the pool. We knew almost two
years ago that situation was our best -- was not
our best long-term option.

JUDGE CLIFTON: That's an important
addition, what you just did there.

MR. BUTTON: Yeah.
JUDGE CLIFTON: Okay. So on the statement that's part of the record, the record copy that will go on the website, you want us to insert the word, not, where?

MR. BUTTON: After was.

JUDGE CLIFTON: Okay. Next to the last line of Exhibit 98, the third word, situation was not --

MR. BUTTON: Our best long-term option. We hope to grow as the community grows and we intend to do so self-sufficiently. We should be afforded that opportunity.

JUDGE CLIFTON: Thank you, Mr. Button, and before you leave the room, if you will initial that change with the USDA representative sitting at the front table, the far end.

MR. RICCIARDI: Thank you, your Honor.

Why don't you go ahead and keep the microphone, Mr. Button, and let's go through a few items and also some documents, and then I'm going to ask Mr. Sharpe some questions, too.

Let me understand this so the record is clear. Prior to January of '08, Heartland was not a producer-handler, is that your testimony?

MR. BUTTON: That's correct.
MR. RICCIARDI: And prior to January of '08, Heartland was a member of DFA, is that your testimony?

MR. BUTTON: Yes, it is.

MR. RICCIARDI: And Heartland, prior to January of '08, actually paid into the pool?

MR. BUTTON: That is correct.

MR. RICCIARDI: Okay. Now, that being the case, why don't we take a look for a moment at what's been marked as Exhibit 100. It's actually a two-page document. I want to focus for the moment on the first page of that document. This is the -- a copy of the first page of the website for Heartland Creamery currently, and is the website part of the marketing that Heartland does?

MR. BUTTON: Yes.

MR. RICCIARDI: Okay. And I note on Exhibit 100, page 1, that Heartland Creamery emphasizes at the top, taste, When Taste Matters, correct?

MR. BUTTON: Correct.

MR. RICCIARDI: It also talks about, in bold, milk with no added hormones, flavor, and choice. Are all of those concepts important to
Mr. Ricciardi: And are all of those concepts one of the reasons why Heartland decided to switch in January '08 to a producer-handler status?

Mr. Button: Yes, it is.

Mr. Ricciardi: Tell me more specifically why.

Mr. Button: Well, we believed that we could take a high quality product and offer it in the market for a competitive price. And we realized that paying the -- some of the extra fees that were required by DFA, that that was limiting that ability.

Mr. Ricciardi: Limiting your ability, meaning Heartland's ability, to do what, sir?

Mr. Button: To offer the product at a more competitive price.

Mr. Ricciardi: And what about your ability to differentiate your taste, lack of rbST, flavor, and choice?

Mr. Button: Well, we have one -- one dairy. We know the health of all the cows. It's a consistent milk. It's fresher. We bring
it directly from the dairy to the creamery. And so that -- and obviously it's hormone free. And so that is allowing people to purchase a product that is rbST free, purchase a product that's high in quality and giving them a choice.

MR. RICCIARDI: Okay. Let's move on to kosher certification. Exhibit 99 appears to be a letter dated May 5, 2009 from Star-K Kosher and providing certification to Heartland Creamery.

Were you involved in the process recently for Heartland to obtain Star-K Kosher Certification?

MR. BUTTON: Yes, I was.

MR. RICCIARDI: Okay. And why did Heartland decide that Star-K certification for kosher products was important for its business model?

MR. BUTTON: Well, it was our understanding that there are not -- as far as the Star-K Kosher Certification, there were not many creameries able to do that. And part of the reason was the fact that we have one farm. Most larger producer-handlers have multiple farms, hundreds of farms. And it would be
nearly impossible for the rabbi, the mashigiach to be there and watch that operation. So it made us a favorable -- put us in a favorable position for them to be able to come and certify both the dairy and the creamery.

MR. RICCIARDI: And as Exhibit 99 states, as of May 5, 2009, did Heartland receive Star-K Kosher Certification?

MR. BUTTON: Yes, we did.

MR. RICCIARDI: And with regard to the products that are listed, the 11 products that are listed on the document, did Heartland creamery obtain certification on all 11 of those products?

MR. BUTTON: Yes, we did.

MR. RICCIARDI: And with regard to the brand that's indicated there, Samuel Joseph Dairy, with those products, those 11 products, is it the intention of Heartland to market the products listed under the Samuel Joseph Dairy brand?

MR. BUTTON: That is correct.

MR. RICCIARDI: And those would be marketed in what community, sir?

MR. BUTTON: These could be marketed
anywhere throughout the United States. We have a broker and distribution center that's working with us to open it up to any Jewish community that is interested -- or, excuse me, distributors of Jewish communities that might be interested in these particular products.

MR. RICCIARDI: Okay. Let's go back to some testimony that you've given in your statement with regard to some complaints that have been made about Heartland Creamery. And let's give a little bit more background. Does --

MR. BUTTON: The -- sorry.

MR. RICCIARDI: Does Heartland Creamery currently have as a customer the Hy-Vee stores in a variety of places, including Kansas City?

MR. BUTTON: Yes, we do.

MR. RICCIARDI: And as I recall your testimony, Heartland started to serve the Hy-Vee stores in different locations back in 2005, right?

MR. BUTTON: That is correct.

MR. RICCIARDI: And in 2005, what was the regulatory status of Heartland? You're regulated at that point?
MR. BUTTON: Yes.

MR. RICCIARDI: Okay. Thereafter as Heartland began to serve the Hy-Vee stores, did you receive other locations from them?

MR. BUTTON: Yes, we did.

MR. RICCIARDI: And starting sometime, I believe you said October of 2007, were you also able to obtain some of the Hy-Vee stores in the Kansas City market?

MR. BUTTON: Yes, we did.

MR. RICCIARDI: And at that time, prior to January of '08, was Heartland regulated?

MR. BUTTON: Yes, we were.

MR. RICCIARDI: And did Heartland pay into the pool?

MR. BUTTON: Yes, we did.

MR. RICCIARDI: And Heartland was able to obtain the Hy-Vee business without any alleged price advantage as a producer-handler. Is that your testimony?

MR. BUTTON: That is my testimony.

MR. RICCIARDI: Okay. Now, take a look at Exhibit 101. It's actually a four-page document that we stapled together. Is that a representative of store locations for Heartland
Creamery currently?

MR. BUTTON: Yes, it is.

MR. RICCIARDI: And is that, as far -- as best that you can tell, the current customer location or store locations?

MR. BUTTON: The best as I can tell.

MR. RICCIARDI: All right. Question then. Let's do a touchstone here. As of April of '08 being the point of reference, and we'll take it through April of '09, with this significant cost advantage that people keep claiming that you have, that, in fact, your total volume from April of '08 until April of '09 has gone through the roof because you've got that 15 cents a gallon advantage, right? Am I right?

MR. BUTTON: No, that's incorrect.

MR. RICCIARDI: Okay. Well tell me, then, in terms of the total volume of Heartland from April of '08 through April of '09, has it gone up or down?

MR. BUTTON: It's gone down by 10 percent.

MR. RICCIARDI: And would that be true with regard to the customers, too?
MR. BUTTON: That is true.

MR. RICCIARDI: When you were part of the regulated community, did you lose customers to other competitors?

MR. BUTTON: I'm sure we did.

MR. RICCIARDI: And did you lose them based upon a variety of factors?

MR. BUTTON: Of course.

MR. RICCIARDI: Did you win customers when you were part of the regulated community against competitors?

MR. BUTTON: Yes, we did.

MR. RICCIARDI: And did you win those on a variety of factors?

MR. BUTTON: Yes, I'm sure we did.

MR. RICCIARDI: Is the same thing true since you've had producer-handler status?

MR. BUTTON: Absolutely.

MR. RICCIARDI: Oh, yeah. Take you back to Exhibit 100. Flip to the second page. We put these together. Maybe they don't belong together, but we want to save a little bit of time. So I spent some time talking to Mr. Warren Erickson of Anderson Erickson who was complaining vociferously about Heartland and
some customers in Kansas City which he wouldn't identify. But let's see if we can help the record.

This is a document from the Anderson Erickson website entitled at the top, Where to Buy Anderson Erickson Products. And it talks about Kansas City. So let's see if we can be more specific about the complaints. Apparently Anderson Erickson serves the Wal-Mart neighborhood markets in that area. Do you serve them?

MR. BUTTON: We do not.

MR. RICCIARDI: Wal-Mart Supercenter, same question.

MR. BUTTON: No, we do not.

MR. RICCIARDI: The other -- I don't want to go through each one of them. Thriftway, do you serve them?

MR. BUTTON: No.

MR. RICCIARDI: Sunfresch?

MR. BUTTON: No.

MR. RICCIARDI: Price Chopper?

MR. BUTTON: No.

MR. RICCIARDI: Country Mart?

MR. BUTTON: No.
MR. RICCIARDI: Hen House?
MR. BUTTON: No.
MR. RICCIARDI: Chas-Ball?
MR. BUTTON: No.
MR. RICCIARDI: Apple Mart?
MR. BUTTON: No.
MR. RICCIARDI: Hy-Vee?
MR. BUTTON: Yes.
MR. RICCIARDI: Apparently Anderson Erickson serves Hy-Vee and Heartland Creamery also serves Hy-Vee. And I think you testified previously that you started serving them in '05, correct?
MR. BUTTON: Not in the Kansas City area.
MR. RICCIARDI: Not in Kansas City. I apologize. You're correct. Faster than me today. But in '07, you started in the Kansas City area?
MR. BUTTON: That is correct.
MR. RICCIARDI: And, again, as a regulated -- part of the regulated community?
MR. BUTTON: Yes.
MR. RICCIARDI: Able to compete with Anderson Erickson as a regulated -- a regulated handler paying into the pool?
MR. BUTTON: Yes.

MR. RICCIARDI: Why don't you pass the microphone over?

Mr. Sharpe, what is the importance of the Heartland Creamery farm and the Heartland Creamery processing plant to the members of your community?

MR. SHARPE: Well, it's -- it's very important from the standpoint of when people come to us, and we have about 240 people today in our program in our -- in CNS International Ministries that are problem -- troubled people, all of them. And we have to have jobs for them.

We originally -- we've had a farm for many years. As a matter of fact, I was born on the farm. And we -- we had a large beef herd, about 7,000 cows, and we spent many years building the herd. But there's just not enough work among beef cattle. So we sold the beef cattle and got into the dairy business strictly to give jobs to the people that was coming, because they just -- they keep coming.

So it takes about five times the people, certainly four times the people to run the same number of dairy cows as it does to run the beef
cows. So we went to switch to dairy cows strictly for -- I really didn't want to be in the dairy business, but because of these people that we need jobs for, we switched to dairy.

And then we started another business, the goat dairy. We're the only -- to our knowledge, we're the only goat and cow dairy and processor in the United States. I can't guarantee that's true. But we don't know of another. So that makes us quite unique.

And it gives lots of jobs. The goat dairy produces a lot of jobs. And, of course, the creamery produces a lot of jobs. So it's important to our people, because you can't have people coming and telling them you're going to help them when you don't have work for them. So we have to have work for them.

MR. RICCIARDI: So the dairy farm and the creamery presents an opportunity for people in their community -- in your community, those people who are disadvantaged to try to have an opportunity to learn and work at a trade?

MR. SHARPE: Almost all of our people that work in the dairy, the cow dairy and the creamery and the goat dairy are either in the
program or they have graduated and have stayed there.

MR. RICCIARDI: Okay. And with regard to the producer-handler integrated operation, to the extent that any money is made in that operation, what's to happen to it?

MR. SHARPE: It goes to the ministry.

MR. RICCIARDI: Okay.

MR. SHARPE: 100 percent of it.

MR. RICCIARDI: Okay. I want to go over a few items with you. I think there was a document in the back of the room. I wanted to ask you some questions on it. It hasn't been admitted or identified yet, but I'm sure you'll get questions on it, so let me see if I can get some of them answered.

Does the dairy currently have 4,500 milking cows, or is it 3,000, as you described?

MR. SHARPE: We, today -- at one time we had right at 45. We may have hit 45. But today we have 3,000. As a matter of fact, it's 29, I think, 83 yesterday or Saturday.

MR. RICCIARDI: Okay. At 3,000 cows is the dairy able to produce 24,000 gallons of milk a day?
MR. SHARPE: No, it cannot.

MR. RICCIARDI: How much?

MR. SHARPE: Well, we're producing about nearly 200,000 pounds of milk a day, 190 to 200 thousand pounds of milk a day.

MR. RICCIARDI: Okay. I want to ask you about -- well, first of all, let's do it this way. You don't pretend to be an expert in Federal Milk Marketing Orders, do you?

MR. SHARPE: I'm not even close.

MR. RICCIARDI: Okay. Let me ask you a question about when Heartland was with DFA.

MR. SHARPE: Yes.

MR. RICCIARDI: Did you ever -- do you recall having a conversation with a representative of DFA who called you about some complaints from other people in the regulated community about Heartland?

MR. SHARPE: Yes.

MR. RICCIARDI: And that happened sometime in 2007?

MR. SHARPE: I believe that's right.

MR. RICCIARDI: Can you tell me, based upon that conversation, what the representative from DFA told you?
MR. SHARPE: Well, the call was simply to try to help us to know what the price of the market was and -- and to be sure that we was not losing money that we should be making, because it was -- I feel it was a sincere call. They was actually trying to bring us up to speed on -- on pricing.

MR. RICCIARDI: Did they tell you your prices were too low?

MR. SHARPE: Well, some people thought it was low. I don't know as -- as DFA necessarily thought it was low. But some -- there was others that thought it was low.

MR. RICCIARDI: Some other competitors --

MR. SHARPE: Competitors, yes.

MR. RICCIARDI: -- thought it was too low?

MR. SHARPE: Yes.

MR. RICCIARDI: So back in 2007, you had competitors when you were in the regulated community complaining about your pricing, and now in 2009, as a producer-handler, you've got competitors complaining about your pricing?

MR. SHARPE: Yeah, it's a little bit strange to me, but I don't -- I don't understand
that. Because we lose -- the thing that's amazing about it, if we're low, why do we lose customers quite often because of our price?

MR. RICCIARDI: And let's talk about that for a moment. I don't know if it's better for you or for Mr. Button to deal with that. Recently, very recently -- actually pass the microphone over to Mr. Button. I think he's more knowledgeable here.

You attempt to compete for customers throughout the area that you market?

MR. BUTTON: That's correct.

MR. RICCIARDI: And recently were you attempting to get into a location that you don't currently serve?

MR. BUTTON: Well, it's stores that we don't currently serve.

MR. RICCIARDI: Stores. And that's a better question. Thank you. And can you tell me what occurred with regard to your attempts to get into a store that you -- you don't currently serve?

MR. BUTTON: Our sales representative went to a store. There was about five stores in a general location. And we were trying to get
our milk -- them to purchase our milk. We had placed a price with them, and we were waiting for an answer. This happened within the past month. And they contacted our salesman back and said that there was only 2 cents difference, and they didn't tell us if it was 2 cents high, 2 cents low, just 2 cents difference, and it wasn't worth it to them to change suppliers. And we did not go back and make a counteroffer.

MR. RICCIARDI: So I understand it, you are trying to compete for a new store, you gave them an offer and the response back is, there's only a 2 cent difference, it's negligible, we're going to keep our current supplier?

MR. BUTTON: That's correct.

MR. RICCIARDI: And you didn't go back and say, I can beat this, I've got this 15-cent cost advantage, remember?

MR. BUTTON: No, we didn't do that.

MR. RICCIARDI: Your Honor, I think for the time being I am done. I will deal with the exhibits after cross-examination.

JUDGE CLIFTON: All right. Don't leave the podium yet. Mr. Sharpe, you indicated that 24,000 gallons a day is not accurate.
MR. SHARPE: That's right.

JUDGE CLIFTON: But 190 to 200 thousand pounds a day is accurate?

MR. SHARPE: That's right.

JUDGE CLIFTON: Now, what factor do you use for how many pounds a gallon weighs?

MR. SHARPE: 8.6 pounds per gallon.

JUDGE CLIFTON: 8.6 pounds, okay.

MR. SHARPE: We're producing close to 20,000 gallons of milk -- 18 to 20,000 gallons of milk a day.

JUDGE CLIFTON: Okay. Good. Thank you. That helps. Mr. Ricciardi, anything else about that?

MR. RICCIARDI: No. I will deal with that on redirect once the cross is done, Judge.

JUDGE CLIFTON: Okay. Good. All right. Who would like to begin the cross-examination of this panel of Mr. Sharpe and Mr. Button?

Mr. Beshore, thank you.

CROSS-EXAMINATION

BY MR. BESHORE:

MR. BESHORE: Good morning, gentlemen.

My name is Marvin Beshore, and I represent the National Milk Producers Federation and Dairy
Farmers of America. I have just a few questions.

Both of you -- I'll address this to Mr. Sharpe first, and if you have anything to add, you are welcome to, Mr. Button. Both of you, but Mr. Sharpe in particular, have identified Heartland Creamery as being supportive of the Christian ministries that you operate.

MR. SHARPE: That's right.

MR. BESHORE: In fact, you've indicated that all of the proceeds from the creamery, all of the profits go to the ministry.

MR. SHARPE: If there are any profits.

MR. BESHORE: If there are any. I take it there have been some?

MR. SHARPE: No, there hasn't.

MR. BESHORE: There have not been any profits from the creamery?

MR. SHARPE: Not at this point. We expect to do something about that, but we haven't at this point.

MR. BESHORE: Okay. And when did the creamery first start?

MR. SHARPE: In '05.
MR. BESHORE: Now, my question really is, are -- are you asking the Secretary of Agriculture to take into consideration the fact that if you do have any profits, they're going to go into your Christian ministry?

MR. SHARPE: No, I'm -- no, I'm not asking them to take into consideration that at all.

MR. BESHORE: Okay. Well, I -- I asked that question because you've made quite a point of presenting that information.

MR. SHARPE: Well, we're just telling what the facts are.

MR. BESHORE: And, Mr. Button, do you have anything to add to that?

MR. BUTTON: No, I don't.

MR. BESHORE: When you -- when you obtained -- this is for Mr. Button, I think first, and if Mr. Sharpe has anything to add. When you first made your sales to the Hy-Vee stores, when you were a regulated plant, were those sales made at a profitable level?

MR. BUTTON: Yes, they were.

MR. BESHORE: Okay. And is that -- let's see. Was there another account besides the
Hy-Vee stores that -- that you mentioned -- I
guess the -- maybe the account wasn't named.
But you had some comments with respect to
Mr. Lee's testimony. Is that also with respect
to Hy-Vee?

    MR. BUTTON: I don't think I made comment
to that. I believe Mr. Sharpe did.

    MR. BESHORE: I'm sorry.

    MR. BUTTON: But we do believe that that
was Hy-Vee.

    MR. BESHORE: Your understanding is that
both Mr. Lee's testimony and Mr. Erickson's
related to your sales to Hy-Vee?

    MR. BUTTON: Yes.

    MR. BESHORE: Okay. They were just at,
what, different geographic locations --

    MR. BUTTON: Yes.


    MR. BUTTON: And if I might, for the
record, take a half a step back. You asked me
about the pricing. I was not a part of the
creamery. It's my understanding that the milk
was sold at a profitable price.

    MR. BESHORE: And I assume you've
continued to --
MR. BUTTON: Yes.

MR. BESHORE: -- price your products that way because you intend to make a profit?

MR. BUTTON: We're hoping to.

MR. BESHORE: Now, were you involved, Mr. Button, in the decision to go from a regulated plant to a producer-handler?

MR. BUTTON: That was already in play when I arrived on the scene at Heartland.

MR. BESHORE: Okay. Would you pass the microphone to Mr. Sharpe then?

MR. BUTTON: Yes.

MR. BESHORE: Now, Mr. Sharpe, were you involved in that decision?

MR. SHARPE: Yes, I was.

MR. BESHORE: Okay. And would it be fair to say that the costs -- if you look at costs involved and cost pluses and minuses in that analysis, that one of the costs you say you avoided were some costs of being a member of the cooperative? Did you say you saved -- by going -- becoming a producer-handler, you saved some expenses of the cooperative?

MR. SHARPE: I think overall, I'm not sure that we saved a penny. I really am not.
The cost from other things -- first, I'd just like to clear the air on one thing. We --

MR. BESHORE: Maybe you can answer my question first. And then if you have something to add.

MR. SHARPE: Well, I don't know that we saved any money.

MR. BESHORE: Did you expect to or intend to?

MR. SHARPE: Well, yes, of course, we expect to. And we still expect to, but we have to get to a larger volume before that can happen. Our relationship with DFA was the very best. I have no complaints whatsoever. They treated us very well, had wonderful -- was with them about nine or ten years.

But we felt that we needed to move to another level and process all of our own milk, which we not yet have done. So we naturally don't get near as much money for the milk that we have to sell on Class III as we was before. So the savings -- from that standpoint up to this point, there really hasn't been a great deal of savings. But we intend for that to happen as we go forward --
MR. BESHORE: Okay.

MR. SHARPE: -- selling -- bottling all of the milk that we produce.

MR. BESHORE: Okay.

MR. SHARPE: But we're not doing that at this point.

MR. BESHORE: And you're doing even less than you were when you switched over --

MR. SHARPE: That's right.

MR. BESHORE: -- if I understood you.

MR. SHARPE: That is right.

MR. BESHORE: Okay. I don't have any other questions right now. Thank you.

JUDGE CLIFTON: Mr. English, you may cross-examine the panel next.

CROSS-EXAMINATION

BY MR. ENGLISH:


MR. SHARPE: Good afternoon.

MR. BUTTON: Good afternoon.

MR. ENGLISH: I represent Anderson Erickson and Prairie Farms. You've indicated that you went into the Hy-Vee stores in Kansas City in 2007. Is it true that your volume of
milk sold in those Hy-Vee stores in Kansas City stores went up in 2008?

MR. SHARPE: Yes, it did.

MR. ENGLISH: In fact, by the end of 2008, Hy-Vee in the Kansas City area has discontinued the Midwest County Fare, F-a-r-e, label, is that correct?

MR. BUTTON: We'd have to take your word for it. I haven't been to any of those supermarkets to determine that.

MR. ENGLISH: But you don't have any information to contradict that?

MR. BUTTON: No.

MR. ENGLISH: I have no other questions.

MR. BUTTON: And one other point that I would make, it would only be expected that the sales in 2008 would go up, being we didn't start in Kansas City until October of 2007. So we would expect to sell more in 2008.

MR. ENGLISH: What I mean is sales adjusted for month. Did they go up in 2008 over 2007 for Hy-Vee stores in Kansas City?

MR. BUTTON: We were only there in three months in 2007.

MR. ENGLISH: I understand. But a
monthly volume. Isn't it true in December of 2008 -- you were selling more in December of 2008 than you were in 2007?

MR. BUTTON: I would presume that would be true.

MR. ENGLISH: Thank you.

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

CROSS-EXAMINATION

BY MR. VETNE:

MR. VETNE: Good afternoon. My name is John Vetne. I represent two producer-handlers in the Pacific Northwest and one in Roswell, New Mexico. And I make my home in New Hampshire.

MR. SHARPE: Good afternoon.

MR. VETNE: Mr. Sharpe, I want to ask you a question. In response to a question from Mr. Beshore, you said that the creamery has not seen any profits yet. Do you recall that?

MR. SHARPE: That's right.

MR. VETNE: Okay. And you were sitting next to Mr. Button when he said that the sales to Hy-Vee were made at a profitable -- profitable level. Did you hear his testimony?

MR. SHARPE: I did.
MR. VETNE: Can you reconcile his testimony with yours, please?

MR. SHARPE: I am sure he had great intentions. I just have not seen the profit.

MR. VETNE: All right. Can you pass the microphone over to Mr. Button?

Mr. Button, what do you mean by that?

MR. BUTTON: Well, we were selling the milk at what we believe to be a profitable level. Because of inefficiencies and stuff and breakdowns in the creamery and what have you, accidents of trucks and truck repairs, that impacted the bottom line.

MR. VETNE: When you used the word, profitable level, were you looking just at the bottling part of the operation as opposed to sales to cheese plants and -- and your balancing costs?

MR. BUTTON: Well, what we were looking at is the actual milk market and what the price of the milk was on the -- what the -- Class I milk prices.

MR. VETNE: Okay. So the contract that you had with your buyer, you thought was at a good price?
MR. BUTTON: Correct.

MR. VETNE: Okay. You did not intend, as I understand now your testimony -- tell me if I'm correct -- you did not intend to state that at that price your producer-handler operation made a profit?

MR. BUTTON: That is correct. And I would like to clarify that I don't believe there's any contract.

MR. VETNE: Okay. By that, you mean there's no written document?

MR. BUTTON: (Nodding head.)

MR. VETNE: I believe if you sell milk and you get paid for it, you probably have a contract.

MR. BUTTON: Yes.

MR. VETNE: That's a different -- different issue. Okay. Let's see who -- that was Mr. Sharpe. You said you produce around 200,000 pounds per day. Is that your farm production?

MR. SHARPE: That's the farm production.

MR. VETNE: Okay. And your Class I use of that farm production is 18 to 20 thousand gallons per day, is that correct?
MR. SHARPE: No. Say that again, please.

MR. VETNE: Okay. You responded -- later on, you used a reference of 18 to 20 thousand gallons per day?

MR. SHARPE: Yes.

MR. VETNE: Multiplied by 8.6 is quite a bit less than 200,000. So my question to you is, is 18 to 20,000 the amount that you bottle?

MR. SHARPE: No. We -- we are producing about 190 to 200 thousand pounds of milk a day.

MR. VETNE: At the farm?

MR. SHARPE: At the farm.

MR. VETNE: And what portion of that goes into a consumer package as Class I?

MR. SHARPE: We're probably producing about -- well, you -- I'll let him answer that question.

MR. BUTTON: It's probably closer to 13 to 15 hundred.

MR. VETNE: 13 to 15 hundred what?

MR. BUTTON: Gallons, sorry.

MR. VETNE: Gallons. And that 13 to 15 hundred gallons of the 18 to 20 thousand gallons produced at the farm, does that 13 to 15 hundred gallons include your half and half and creams?
MR. BUTTON: Yes, it does.

MR. VETNE: So even of the 13 to 15, not all of is it Class I?

MR. BUTTON: That's correct. We also manufacture ice cream mix and different style cheeses.

JUDGE CLIFTON: Make sure that microphone is closer in the next answer.

MR. BUTTON: Sorry.

MR. VETNE: Mr. Button, of your total production on a monthly average basis, what portion is Class I under the Federal Order --

MR. BUTTON: It's approximately 50 percent.

MR. VETNE: 50 percent. And are any of the gallon figures either one of you provided inclusive of your goat milk gallons?

MR. BUTTON: It is not considering the goat.

MS. SHARPE: (Shaking head.)

MR. BUTTON: No.

MR. VETNE: Your Honor, both witnesses answered no. I just want the record to reflect that.

JUDGE CLIFTON: Yes. And to the extent
Mr. Sharpe's was not audible, he affirmed what Mr. Button said with the shaking of his head.

MR. SHARPE: It's no.

MR. VETNE: Mr. Sharpe, what do the initials CNS stand for?

MR. SHARPE: Charles N. Sharpe.

MR. VETNE: CNS International Milk Ministries, okay. And Sharpe Holdings, Mr. Sharpe, does it hold anything else?

MR. SHARPE: Well, Sharpe Holding has an insurance company.

MR. VETNE: No other agriculture business?

MR. SHARPE: Oh, yes. We have about 17,000 acres of land that we farm.

MR. VETNE: For crop?

MR. SHARPE: Yes. And to support the dairy.

MR. VETNE: Okay. Do you sell crops from that land or is it used for feed for the cows?

MR. SHARPE: Mostly used for the feed. We sell some, but not much.

MR. VETNE: I'm not sure which one of you answered this. We've now clarified that -- I think, that Heartland has not shown a profit.
Compared to the time when you were operating as a regulated handler and after you became a producer-handler, has the profitability improved or the losses decreased?

MR. SHARPE: No. We -- there has been no change.

MR. VETNE: And that's because, as I understand one of your answers, that the percentage of Class I is relatively low?

MR. SHARPE: That's right. If we can -- if we can bottle all that we produce on the farm, it'll make a great difference.

MR. VETNE: I understand that you started processing milk in 2005, is that correct?

MR. SHARPE: That's right.

MR. VETNE: Okay. And when you started processing milk in 2005, when did you start planning to process milk? Or did you develop a business plan to be a bottler?

MR. SHARPE: Well in -- well, actually 2004 is when we started the plan. And we built the plant in 2004.

MR. VETNE: Okay. And when did your business plan include becoming a producer-handler --
MR. SHARPE: Well, from the -- from the beginning, but we just was not prepared to do that, so it took till 2008 to make that happen.

MR. VETNE: Okay. I'm not familiar with the Hy-Vee stores, so let me ask you this. Are the Hy-Vee stores -- is the Hy-Vee store chain a grocery chain similar to Kroger, Meijer market, the big grocery store?

MR. SHARPE: Yes, it is. It's a fairly high-end chain.

MR. VETNE: Okay. Mr. Sharpe -- could be all -- what percentage of the -- the employees that are on the farm or in the plant are employees who are there for recovery purposes?

MR. SHARPE: I would say 95 percent and maybe more than that. It would be at least 95.

MR. VETNE: Okay. Is the -- is the wage scale for those employees union scale or anything close to that?

MR. SHARPE: No. We -- they're all there in rehab. We pay a minimum wage.

MR. VETNE: You pay a minimum wage across the board to --

MR. SHARPE: Across the board, yes.

MR. VETNE: You pay more than minimum
wage to those who are not in rehab, is that --

MR. SHARPE: Yes, yes.

MR. VETNE: Which that would include some
of the senior management and technicians and so
forth, is that correct?

MR. SHARPE: That's right.

MR. VETNE: Okay. Now I have a few
Button questions.

Your testimony, Mr. Button, indicated
that DFA picked up and marketed what you did not
need at the plant; that is, milk from your own
farm, correct?

MR. BUTTON: Correct.

MR. VETNE: And on that milk, when you
were paid, was there not a hauling deduction on
your milk check from DFA?

MR. BUTTON: As it turned out, they hired
our people to haul the milk for them because the
tankers were at our facility.

MR. VETNE: So you took your milk to
somebody else?

MR. BUTTON: Through DFA.

MR. VETNE: And you were paid as a hauler
by DFA?

MR. BUTTON: That is correct. That was
part of the equation as far as the milk pricing.

    MR. VETNE: Okay. So your farm milk
    check when you received the check from DFA, that
did not include hauling?

    MR. BUTTON: They credited it back.

    MR. VETNE: Okay. So it was taken care
of on both ends?

    MR. BUTTON: Correct.

    MR. VETNE: Net zero?

    MR. BUTTON: To the best of my knowledge.

    MR. VETNE: Mr. Button, at -- at which of
the Crowley operations were you employed?

    MR. BUTTON: I actually worked over 28
years for the same corporation. I worked out of
Binghamton, New York, for their corporate
office.

    MR. VETNE: That was my question, the
corporate office. Is Hood also in the Northeast
or --

    MR. SHARPE: Hood is in the Northeast.

    MR. VETNE: All of your experience prior
to moving to Missouri. Don't you like the way I
said that?

    MR. BUTTON: Yeah.

    MR. VETNE: All of your experience has
been in the Northeast?

MR. BUTTON: That is correct.

MR. VETNE: Every unit we produce is handled by hand. What does that mean? Does that mean you've got somebody following the bottle filling it?

MR. BUTTON: No. As it comes off the filler machine, we are actually catching it by hand and physically placing it into each crate. We don't have an automatic caser. We don't have an automatic stacker. We stack them. We don't have an automatic conveyor strip to transport them to the warehouse. We transport physically.

MR. VETNE: The automation does, however, include the filling and the capping, is that correct?

MR. BUTTON: Yes.

MR. VETNE: So it's after that process that the --

MR. BUTTON: Yes.

MR. VETNE: -- jugs are picked up by hand?

MR. BUTTON: Yes.

MR. VETNE: Your -- the St. Joseph's brand that you hope to -- or that you are
marketing as kosher, is that a brand that's owned by the Star-K kosher people?

    MR. BUTTON: It is not.

    MR. VETNE: Who owns that brand?

    MR. BUTTON: I prefer not to answer that question.

    MR. VETNE: Well, let me ask you this. That's a good answer, by the way. Do you know whether any regulated processor is packaging milk under the St. Joseph's kosher brand?

    MR. BUTTON: They are not.

    MR. RICCIARDI: Your Honor --

    JUDGE CLIFTON: Mr. Ricciardi, would you like to be heard?

    MR. RICCIARDI: I would only mention this to my friend.

    MR. VETNE: I'm a nosy guy.

    MR. RICCIARDI: I know. I'm not bothering you about that. It's a koshered product, it can't possibly be St. Joseph.

    MR. VETNE: Well, why not? He was Jewish.

So in response to my last question, yes or no, whether the Samuel Joseph brand is processed by any other regulated handler and --
and as to that, you know that it is not processed?

    MR. BUTTON: It is not processed.

    MR. VETNE: So your answer was not that -- you did not intend to say you don't know. You do know and is it not? Is that correct?

    THE WITNESS: It is not.

    JUDGE CLIFTON: He asked you is that correct, and you said, it is not.

    MR. VETNE: That's good. Thank you.

Okay.

    MR. SHARPE: Do it one more time.

    MR. BUTTON: Yeah.

    MR. VETNE: You do know whether it is and, in fact, it is not processed by any regulate handler, is that correct?

    MR. BUTTON: That is correct.

    MR. VETNE: Okay. I know -- you know, just talking here, I know what you mean and we have a sense of what we're saying, but when that -- those black and white transcript come out, there's no interpretation. And sometimes the meaning is totally opposite of what was intended.
The bottom of the -- looks like the second page of your testimony, you said some customers have elected to stock our product in part because of our dedication to the Heartland community. By Heartland community, you are referring to the faith-based recovery program?

MR. BUTTON: Yes.

MR. VETNE: And do you believe or know that some customers purchase your product because of that connection?

MR. BUTTON: We know.

MR. VETNE: We know. And, in fact, anybody that goes to your website would know because that is at the top of your home page in the italics near the bottom of that line: The profits from Heartland Creamery is used to support our faith-based work with troubled adolescents and adults. It's right there on the home page.

MR. BUTTON: Correct.

MR. VETNE: And, again, at the end of your testimony, Mr. Button, you say: We hope as our community grows -- we hope to grow as our community grows.

Again, you are referring to the
faith-based community, not to the neighborhood
in which you're located?

    MR. BUTTON: That is correct.

    MR. VETNE: With respect to the kosher
certification, one more question. You recently
received a letter certifying your products as
kosher in Exhibit 99, dated May 5, 2009. When
did that process of seeking and getting kosher
certification start?

    MR. BUTTON: I couldn't tell you exactly.
It was probably sometime around March.

    MR. VETNE: You first thought of doing
kosher milk in March? Mr. Sharpe, you have an
answer to that?

    MR. SHARPE: Yeah. These folks really
sought us out because of the uniqueness of our
layout. They were as interested in our goat
milk as they are our cow milk. And because of
the high -- what is considered high kosher --
there's several levels of kosher. This is high
kosher. The rabbi has to be on the site all the
time. So it -- because of the uniqueness of our
layout, the closeness of all the dairies and the
creamery, one man can oversee all of it, and
that's -- that's how this come about.
MR. VETNE: All right. Now, let me ask you the question that I asked Mr. Button. Bring the microphone back, Mr. Sharpe.

My question was, when did this process start? You've told me that they came to you, they sought you out. When did that first happen? When was the first contact made?

MR. SHARPE: I -- I'm not -- I'm not sure. But it was early this year or late last year.

MR. VETNE: That's good enough. Thank you very much.

JUDGE CLIFTON: Mr. Sharpe, I would like you to look at your statement, Exhibit 97, at the paragraph that is right in the middle. The paragraph begins with: We first began operating as a working dairy farm --

MR. SHARPE: Yeah, yes.

JUDGE CLIFTON: -- and so forth. I think when you read that sentence, you said as your last word, students, to provide jobs and training opportunity to our students. And I see what is actually on your statement is residents. So my question is, the at-risk people to whom you provide these jobs and training
opportunities, are all of them residents who live at the farm?

MR. SHARPE: Yes. Yes, they are.

They -- they live there. It's an 18-month program. And then many, of course, stay on after.

JUDGE CLIFTON: Okay. Thank you.

Mr. Vetne.

MR. VETNE: Mr. Sharpe, for residents that stay on after, after they finish the 18-month program, are those residents part of the minimum wage workforce that you referred to?

MR. SHARPE: No, they're not.

MR. VETNE: And when they stay after, do they pay rent?

MR. SHARPE: No, we furnish all housing and utilities for everyone.

MR. VETNE: For everyone?

MR. SHARPE: Yes.

MR. VETNE: Do some people that graduate live off campus?

MR. SHARPE: No, they all live there. If they work there, they live there.

MR. VETNE: How many -- what's the residency capacity?
MR. SHARPE: Well --

MR. VETNE: How many people do you have living and working there?

MR. SHARPE: We have -- we have over 200 employees in Heartland and the farm. It's a -- it's -- it's over 200. I would say maybe 260.

MR. VETNE: Okay. How many -- how many residents do you have that are in treatment at any one time?

MR. SHARPE: We, right now, we have 240 in treatment.

MR. VETNE: So you have some folks in treatment that don't live on the farm?

MR. SHARPE: No, they all live there.

MR. VETNE: They all live there?

MR. SHARPE: They live there.

MR. BUTTON: The missing equation are some of those are minors.

MR. SHARPE: Yes, some of them are children, so that doesn't count.

MR. BUTTON: Some of them are minors, so they don't physically work. They're going to school.

MR. SHARPE: They go to school.

MR. VETNE: Okay. Thank you.
MR. SHARPE: We have about 120 in the program that are children. They go to school, so that's not part of it.

MR. VETNE: Got it. Thank you.

JUDGE CLIFTON: I do believe you have taken on more than anybody else I've heard testify. That's quite an undertaking indeed.

MR. SHARPE: I would like to just say this since you've mentioned it. My wife and I have had an average of 12 teenage girls that lived in our home for the last ten years, that live with us, not our children.

JUDGE CLIFTON: Who would next like to cross-examine the panel? Mr. Rower.

CROSS-EXAMINATION

BY MR. ROWER:

MR. ROWER: I believe my question might best be answered by Mr. Button. As a faith-based business, do you receive any real estate tax reductions that a commercial dairy farm or a commercial bottler would not expect normally to receive?

MR. BUTTON: No. We're taxed just as any other, not a --

MR. ROWER: Just to follow up. Excuse
me. I apologize for interrupting. Do you receive any wage subsidies in addition to paying minimum wage for most of your labor?

MR. BUTTON: I don't think so.

MR. ROWER: I'm aware of some businesses --

MR. SHARPE: We receive nothing. We finance everything ourself. We get no help from the government or anyone else.

MR. ROWER: That answers the question. Thank you very much. I have no other questions.

JUDGE CLIFTON: Are there any other questions for Mr. Sharpe or Mr. Button? There are none. Mr. Ricciardi? Mr. Miltner.

CROSS-EXAMINATION

BY MR. MILTNER:

MR. MILTNER: Mr. Sharpe, I want to make sure the record has a clear picture of everything that Heartland encompasses so just a couple of questions.

MR. SHARPE: All right.

MR. MILTNER: CNS International Ministries administers Heartland Ministries?

MR. SHARPE: That's right.

MR. MILTNER: And Heartland Ministries
has a planned community in Northeast Missouri that's called Heartland, is that right?

MR. SHARPE: That's right.

MR. MILTNER: And so Heartland encompasses the farm and the dairy group, is that right?

MR. SHARPE: Yes.

MR. MILTNER: And a school?

MR. SHARPE: Yes.

MR. MILTNER: And a church?

MR. SHARPE: And a church.

MR. MILTNER: And a Bible college?

MR. SHARPE: And a Bible college, yes.

MR. MILTNER: And some other business that provide for a little bit of tourism in the area?

MR. SHARPE: We have two restaurants and a museum, car museum. Of course the biggest event, the biggest attraction in the community is the dairy because it's a carousel. We milk 60 cows at a time every eight minutes and that's kind of unusual.

MR. MILTNER: And so when you talked about the Heartland community, it's -- it's not just the people in the community, it's not just
a group of people we're talking about, but it's actually a small town, is that right?

MR. SHARPE: Yes. There's about 500 people there.

MR. MILTNER: Okay. And that part of Northeast Missouri is -- is impoverished, to give it a description, generally?

MR. SHARPE: Yes, it is.

MR. MILTNER: And so the work you've done has provided a good number of jobs, not just for the people that are going through your program but for some other folks in the area as well, is that right?

MR. SHARPE: Oh, yes.

MR. MILTNER: And is it safe to say a lot of people in that area would be happy to get a steady job that paid even minimum wage?

MR. SHARPE: We have -- we have people coming every day wanting work. Now, we only pay minimum wage to the people in the program.

MR. MILTNER: And those that are not in the program get a different wage?

MR. SHARPE: Yes, they do.

MR. MILTNER: With those folks, would many of them take the job even if it paid
minimum wage?

MR. SHARPE: Yeah, there'd be a lot of them that would, yes.

MR. MILTNER: I want to make sure the record is clear on this point, too.

You said your cows put out 190,000 pounds of milk a day, is that right?

MR. SHARPE: That's right.

MR. MILTNER: And about half of that is bottled at the plant, is that right?

MR. SHARPE: I think close to half, yes.

MR. MILTNER: Okay. Roughly 50 percent of what you produce on the farm goes into your bottle, is that right?

MR. SHARPE: Yes, is used in some form, cheese or whatever.

MR. MILTNER: Okay. So some of it actually goes into cheese?

MR. SHARPE: Yes.

MR. MILTNER: The cheese is a small fraction of what you do?

MR. SHARPE: That's right.

MR. MILTNER: Now, that doesn't go into either your bottle products or your cheese you sell. I think in your statement it says the
Class III price, but it's the Class III price or lower, is that right?

MR. SHARPE: That's right.

MR. MILTNER: And the volumes at Hy-Vee have grown since you first got into those stores, especially in the Kansas City area at the end of 2007?

MR. SHARPE: I imagine they have grown some. When you first start up, they're never as good as they are a little bit later on.

MR. MILTNER: That's what I want to get into. Do you find generally, as you get into a new store, the volume of your product picks up as people become more familiar with it?

MR. SHARPE: Oh, yes.

MR. MILTNER: And as to a customer that has multiple outlets, is it your experience that they'll allow you to kind of test market your product in a few stores and see how it goes, and then offer you the possibility of serving other outlets?

MR. SHARPE: That's the way it usually works, yes.

MR. MILTNER: Is that the way it's happened with Hy-Vee?
MR. SHARPE: Hy-Vee, usually if we go in a place like Kansas City, isn't long till all the stores accept us. But we -- we don't start with all of them. But we get there pretty quick.

MR. MILTNER: So you can get in to the market, you get your foot in the door, you prove that your product is desired by consumers, and in return, they've offered you the opportunity to sell at other stores?

MR. SHARPE: Yes. Well, when we go in a store, the first thing we do is take our people, our promotional people, and we promote our milk in the store, and just have a taste and have the people, as they come through the dairy area, to try our milk. And most everybody will try it.

MR. MILTNER: And after that, do you find that the sales pick up?

MR. SHARPE: Well, they usually buy a gallon if they've tasted it.

MR. MILTNER: And does that effect continue on even after that weekend tasting?

MR. SHARPE: Well, yeah. We do very well once we get in a store.

MR. MILTNER: Thank you. Can I ask
Mr. Button a couple of questions?

Mr. Button, when you operate a dairy plant, are you familiar with the concept of the fixed costs of the plant and the variable costs of the plant?

MR. BUTTON: Yes.

MR. MILTNER: And every gallon that goes out the door has a -- has a cost attached to it, is that right?

MR. BUTTON: Yes.

MR. MILTNER: There's a value of the milk that's in the bottle?

MR. BUTTON: Yes.

MR. MILTNER: There's a cost to the bottle and the cap and the label, and there's a cost to process it through?

MR. BUTTON: (Nodding head.)

MR. MILTNER: And you have to add on some overhead costs, some fixed costs of the plant, is that your experience?

MR. BUTTON: Yes.

MR. MILTNER: So when you price your product, obviously if it costs you $350,000 to operate your plant for a year, you can't slap all that on, all that cost on the first gallon
that goes out the door, right?

MR. BUTTON: Correct.

MR. MILTNER: So Mr. Vetne asked you to reconcile your statement that you tried to sell your product at a profitable level, but the plant didn't make a profit that year.

So when you price your product, you try to come up with a cost and a price that covers the cost of the milk, the cost of the packaging, the cost to process it, and some allocation of overhead, is that right?

MR. BUTTON: Yeah, that's correct.

MR. MILTNER: And if you misjudge values, or things happen as you described, your fixed costs change, and could that result with the plant not being profitable at the end of the year even though every sale was priced at a cost you believe to be profitable?

MR. BUTTON: Yes.

MR. MILTNER: Thank you. I have nothing else.

JUDGE CLIFTON: You are going to move the exhibits in?

MR. MILTNER: I was. I always forget to do that and was reminded to do it and I didn't.
So I would like to move admission of all the exhibits, please.

JUDGE CLIFTON: All right. Let me see if Mr. Beshore wants to ask his question before or after I ask if there are any objections.

MR. BESHORE: After is fine.

JUDGE CLIFTON: After. Let me first start with the two statements. Is there any objection to Mr. Sharpe's testimony, which is Exhibit 97, or Mr. Button's, which is Exhibit 98? There is none. Exhibit 97 and 98 are hereby admitted into evidence.

And now the Star-K Kosher Certification. That's Exhibit 99. Is there any objection to being admitted into evidence? There is none. Exhibit 99 is hereby admitted.

Now, the next two are from the Heartland Creamery website, Exhibit 100. Let me ask first about it. Is there any objection to the admission into evidence of Exhibit 100? There is none. It is admitted into evidence.

Exhibit 101 is a list of stores starting with Iowa locations. Is there any objection to the admission into evidence of Exhibit 101? There is none. Exhibit 101 is admitted.
Mr. Beshore, you may inquire.

RECROSS-EXAMINATION

BY MR. BESHORE:

MR. BESHORE: Just one item I wanted to ask you about, the first page of which is from your Heartland Creamery website. And it indicates it's printed yesterday, I guess.

It says, the first line of text after the heading, Located in northeast Missouri, amid fields of corn and soy beans, our farm land is home to over 6,000 Holstein cows and 750 goats. Do you see that?

MR. SHARPE: Yes.

MR. BESHORE: Now, Dr. Cryan from the Federal Milk Producers Association testified earlier and he testified that he had accessed your website, both of them, Heartland Creamery and Sharpe Holdings, Inc., on May the 2nd and at that time it indicated that you're milking about 4,500 cows although the total number was around 6,000, I think. Is your website a little behind in terms of numbers of head?

MR. SHARPE: It's very definitely behind. We're milking 3,000 cows. And at one time we were milking -- I didn't even realize this
myself. I don't look at this website very often.

MR. BESHORE: Right.

MR. SHARPE: So we will correct that immediately. But we're milking 3,000 cows.

MR. BESHORE: Okay. And I don't question that. I mean, you are here to testify now and we're trying to use the best information prior to that time which was your published website. The 6,000 cows is not -- that's not up to date either, I take it?

MR. SHARPE: Well, we have -- this is cows, calves, everything on the farm. We have about 7,000 head on the farm.

MR. BESHORE: So you've got more young stock than milking stock?

MR. SHARPE: Yes. We're keeping all of our calves and heifers to put back in the herd.

MR. BESHORE: In anticipation of building the herd back?

MR. SHARPE: That's right.

MR. BESHORE: Okay. Thank you very much.

JUDGE CLIFTON: Thank you, gentlemen. Is there anything else you would like to add before you step down, either of you?
MR. SHARPE: Thank you.

MR. BUTTON: Thank you.

JUDGE CLIFTON: Thank you very much. You may step down. I appreciate it. It's time for a break. But before we take it, I want to determine who will be our next witness. Is Mr. Arkema here? Would he logically be our next witness? Our next witness is Paul Arkema from Country Dairy in Michigan. Mr. Yale.

MR. YALE: Your Honor, I would like to excuse myself. I'm going to be leaving during this break, and I object to anything I don't like that comes in after this and move to strike.

But I say that facetiously. I just want to share the Department -- the set up for the hearing was excellently done. Your Honor has done a wonderful job. The Department has so far done a good job. I'll save that grade until we see the decision. But I appreciate all the courtesies that have been done in this, and wish I could be here for the decision, which I hope is sooner rather than later. Thank you very much.

JUDGE CLIFTON: Mr. Yale, I thank you.
you. I will be thanking everyone else later.
And I don't mean to leave you out of that just
because you're not here. Please be back in 15
minutes. Please be back at -- we'll call this
3:35. Please be back at 3:50.

(A recess was taken from 3:35 to 4:00.)

JUDGE CLIFTON: All right. We're back on
record. It's 4:00. I'd like the witness,
please, to identify himself and spell his name.

THE WITNESS: My name is Paul Arkema.

JUDGE CLIFTON: What association do you
have with Country Dairy, Mr. Arkema?

THE WITNESS: Would it be okay, your
Honor, if I just read my statement?

JUDGE CLIFTON: Sure. Let me swear you
in.

(The witness was sworn.)

JUDGE CLIFTON: Thank you. You may
proceed.

PAUL ARKEMA

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

DIRECT EXAMINATION

THE WITNESS: Good afternoon. My name is
Paul Arkema, and I'm here to speak to the proposals and the issue before this hearing and on behalf of Country Dairy. I and my brother-in-law, Rob Eekhoff, function as the managing owners of this fourth generation family farming operation. And we are actually located in New Era, Michigan, north of -- north and west of Grand Rapids about an hour. We're located in Oceana County, which is the second or third poorest county in the State of Michigan.

In 1983, our father-in-law, Wendell Van Gunst, frustrated by the disparity in the value he saw charged for milk at retail versus the price he received in his mailbox, built his own processing facility.

In doing so, he shouldered the risk of marketing his milk entirely on his own, a point that was driven home to him at the time through a letter from his co-op, stating that his milk would have no home through them when he processed his first gallon of milk.

26 years later, our family still faces the same challenge, to profitably market the milk we produce, knowing that if we don't, the Federal Market Order rules provide that we only
need receive the lowest possible class value, less any handling, discount, or balancing fee if a plant or co-op choses to pick up that milk for us.

So I sit before you today as a fourth generation family farmer and a second generation producer-handler. My family bears the same risks and costs that all dairy farmers face when we set out to produce a gallon of milk: Weather uncertainty, radical cost fluctuations in fuel, fertilizer and seed, market volatility in milk prices.

But in addition we face the risks and costs of processing and marketing our milk, processing facility and equipment maintenance costs, quality assurance fees and expenses, packages costs fluctuation; essentially the same challenges other processors in our state face.

And while our facility may be less expansive than the processors who see us as a threat, we process in a week only a fraction of what they process in day. Frankly, we face the challenge to achieve a lower cost of production per gallon and it's a challenge that we'll probably never achieve. We face that challenge
to produce -- to produce a cost -- or produce a gallon of milk for the same cost that our more efficient, larger competitors are able to do.

But these risks are all challenges of farming and processing and all of those are ones in which we chose to engage. But we chose to do that under the rules of the Federal Marketing Order system. And now in the hearing that seeks to eliminate producer-handlers and the so-called unfair marketing opportunity that we supposedly exploit, I find it ironic that changing the rules is being considered and that doing so could be considered fair.

But I'm thankful that I live in a country where such changes are discussed and thoughtfully deliberated upon by reasonable people, and I thank the panel for the opportunity to speak to the specifics of how Country Dairy operates as a producer-handler and to offer a little different view of the situation than what was provided last week by one of our competitors, Jim Wernet of Bareman's Dairy, which has always proved themselves to be a very respectable competitor. We enjoy working up against them. They do a good job.
I mentioned earlier that as a dairy farmer, I face the risk of market volatility in milk prices. For as long as Country Dairy has processed milk we have adjusted our prices to our customers to follow the change in the Federal Market Order pricing.

Have we always gone up or down exactly as the FMO price moved? No, we have not. But based on the 15 years that I've been involved in marketing milk in Michigan, our competition doesn't always either.

In a free market economy, a person with something to sell should be able to set the price at which they are willing to sell it. Both we and our competitors take advantage of that opportunity.

From time to time, our cows bless us with higher production. Or if we, as managers, earn our keep and do a good job and manage those cattle well and they produce more, then we have more milk to deal with.

We're faced with the choice of disposing of milk and receiving no value or taking less for our milk. Pragmatically, historically, we've chosen to market our milk, and being
optimists, we look at the reduced revenue that we might receive as an investment in our valued retail partner and as an opportunity to market our brand to the retailer's customers. But we also are capitalists and the so-called fire sales are not a part of our business plan. Makes absolutely no sense.

Our goal. Our goal is to sell our milk at the best profitable price that our customers still consider to be a value worth paying. For 26 years, our family has pursued offering our customers value.

Like many dairy farmers across the nation, we take excellent care of our cows, because they are our livelihood. When our cows are clean and healthy and well-fed and happy, they produce very high quality milk.

When we bring this extremely good milk into a rigorously clean dairy plant and process it, we know our customers can count on, and that they appreciate the taste and longevity of the milk we process.

We know because they tell us. They call or write or e-mail and communicate to us their feelings about our product. And we've listened.
We listened when our customers called nearly nonstop when recombinant bovine somatotropin, also known as rbST, or bovine growth hormone was approved for use in dairy cattle in 1994. We listened to them express their concerns about the use of this technology to produce the milk they bought for their family.

They told us that they wanted the choice to choose milk produced without this product, and we listened. With the oversight of the Michigan Department of Agriculture, we signed and filed affidavits promising not to use rbST in our cows, and we labeled our product as such.

The increase in the size of our herd that Mr. Wernet mentioned in his testimony last week has occurred during that last decade. That growth is due largely to customer driven demand for our product because our customers perceive and experience quality and value in our products, not because our products are cheap.

In fact, Country Dairy pursued its goal of selling our milk at the best profitable price that our customers considered to be a value worth paying specifically during this period,
achieving a 15 to 20 percent -- or, I'm sorry, a
15 to 25 cent premium for our products because
we produce them without rbST.

In 2001, this distinctive aspect of our
product became a talking point for discussions
with a distributor interested in distributing
our products for us. Up until this time,
Country Dairy's vertical integration had
included distribution. But Hudsonville,
Michigan based Cedar Crest Dairy wanted a line
of dairy products to sell that was unique, and
Country Dairy fit that bill. Our two companies
penned an exclusive distribution agreement and
worked out a pricing formula that is based
directly on the Class I value of milk.

Through diligent and consistent marketing
to the end user, an increasing appreciation for
the unique nature of Country Dairy milk has been
embraced. We have pursued and received higher
retail shelf premiums because our customers
consider our milk a valuable purchase.

And each month, Country Dairy's price to
Cedar Crest fluctuates with the Class I value of
milk. So from Country Dairy and Cedar Crest's
perspective it was with some amazement that we
read Mr. Wernet's rendition of the competitive issue that he said he recently faced.

He indicated that a C store customer received an offer from Cedar Crest to sell milk for $1.90 if the customer would retail that milk for $1.99. In fact, this customer approached Cedar Crest asking for a price at which they could market milk for a two-week promotion at 1.99. And I have e-mail documentation confirming that that was the way that transpired.

Now, I really bring this back to the panel's attention for two reasons, the first of which is to present the situation from what I believe is a decidedly different angle. But more significant than the he said-she said nature of what I've just told you is the light that this marketing conversation between a supplier, Cedar Crest, and a C store or a customer, shines on what is occurring in our markets in Michigan right now.

Major grocers in Michigan are marketing milk at retail prices below the promotional price just discussed. These grocers are buying their milk from the largest processor in the
nation.

I'm obviously not privy to the pricing between those two parties, so I can't confirm at what price the processor is selling to the grocer. The grocer may be exercising his right in a free market economy to sell a product at a loss. But it is also possible that the processor may be selling to the grocer very close or below Class I value plus premiums, plus processing, and delivery costs. I don't know.

However, when customers like the C store I just discussed see those prices week in and week out in on the shelves of the bigger players, they believe they -- there must be a better price that they can get. They're business people. They should be asking that question of their suppliers.

But let me clearly state, Country Dairy, as a producer-handler, is not the disruptive marketing force setting the tone for market in these areas. If anyone is setting that tone, it is the larger grocers with their own processing facilities or grocers buying from the nation's largest processors.

Indeed Country Dairy and Cedar Crest had
been seeking to expand in the marketing areas where we presently have little market share.

Cedar Crest's sales team is being told that its delivered prices are too high in comparison to the largest national processor's regional brand when it is delivered.

There are prospects who are intrigued by the uniqueness and the value that the Country Dairy brand could bring to their business, but the price they require, from our perspective, is untenable long term.

Might Cedar Crest see if they can get an inroad with that prospect short term? They might. But only as an investment in what could be a valuable customer, an option that they have every right to exercise, and is no more disruptive than what is occurring to the large processors right now.

In conclusion, I don't believe that producer-handlers present a disruptive force in the market. And with our pricing model, I truly believe Country Dairy's prices typically are at parity or higher than our competition.

While we may not pay into the pool values for milk, in exchange we shoulder a significant
risk without the safety net of the pricing orders that other producers have. And as with any investment, with higher risk should come the potential for greater reward. Producers who step up to the challenge of marketing their own milk as processors and do so profitably have engaged the American Dream, played within the rules, and benefit the economy every bit as much as any other enterprise.

We believe the allowance for the producer-handler status should remain in the Federal Market Order provisions. Thanks for listening to my statement.

JUDGE CLIFTON: Thank you very much, Mr. Arkema. The court reporters will need some spellings of the names you used, both locations and people, and if you'll do that when we go off record.

All right. I'd invite cross-examination. Who would like to begin cross-examination of Mr. Arkema? Mr. Vetne, thank you.

CROSS-EXAMINATION

BY MR. VETNE:

Q. Good afternoon, Mr. Arkema.

A. Good afternoon.
Q. Just for a geographical reference, I grew up in Battle Creek. There used to be a Sullivan's Dairy there, buy their ice cream. You might know them.

A. I don't. I invite you to come up and try some of our ice cream.

Q. Now, I live in New Hampshire, and I represent folks in the Pacific Northwest. Am I correct that you have on occasion -- Country Dairy has on occasion sold milk for which it did not have -- produced on its farm for which it did not have a market in its bottles?

A. In raw form, are you asking?

Q. Yes.

A. Yes.

Q. And I think you mentioned something about cooperatives being willing to take that?

A. They -- they have worked with us. Yes, they have.

Q. Is that basically your only outlet for surplus milk?

A. If we have raw or surplus milk, we approach the market and see what we're able to achieve on-the-spot basis.

Q. Just south of your location in New Era is one of the largest cheese plants, if not the largest, in
Michigan, the Leprino cheese plant?

A. Correct.

Q. Did you offer milk to them?

A. We have sold milk to them.

JUDGE CLIFTON: What is the name of that plant, Mr. Vetne?

MR. VETNE: Leprino, L-e-p-r-i-n-o.

Q. Do you sell milk direct to them or through cooperatives?

A. It would be through Michigan cooperatives.

Q. Usually the milk has an exclusive supply contract with Leprino?

A. I'm not aware of that.

Q. You don't know that? Do you package anything other than beverage milk, such as creams?

A. We do.

Q. Heavy cream, whipping cream, half and half?

A. Correct, all of those.

Q. What portion of your total farm production is in Class I, i.e., cream is not Class I, so I'm looking for the beverage mix.

A. Without having my last Federal Market Order report in front of me, it's going to be 98 to
99 percent.

Q. From your last or is that typical of every month?

A. Typically.

Q. 98 to 99 percent. So all of your creams are from the 2 -- 1 or 2 percent left over?

A. Are you asking about all -- all of the milk that we market? Rephrase that question for me so I --

Q. Okay. Yeah. There are two steps involved in my question. One is, you produce milk on the farm, some of which may go to manufacturing plants on occasion. You take milk to your plant, some of which is used in Class II products, such as heavy cream, whipping cream, half and half?

A. Correct.

Q. What portion of the total produced on your farm, on a typical basis, goes into Class I fluid milk products?

A. In bottled form through our plant?

Q. Yes.

A. Again, without looking at the last report, it's going to be a high percentage. I mean, it will not be, you know, more than 2 percentage points off of the 98 percent.
Q. So you have some -- you have some losses in your plant, some shrinkage between the farm and your plant --
A. Sure.
Q. -- in the pipes?
A. (Nodding head.)
Q. You have some cream, half and half, and you have occasional sales for manufacturing. All of that would be encompassed in the 4 percent that's not in the bottle as beverage milk?
A. No. Typically, because we don't like to ship milk out in raw form, I don't think about it that way. I mean, honestly, the numbers that I'm talking about there would refer to a typical month in which we don't have one of those big silver tankers in our yard.
Q. Do those silver tankers come on a seasonal basis when they come or holidays?
A. It tends to be. Tends to be.
Q. I'm not sure if I wrote this down correctly but you used the term, I think 15 to 25 --
A. Cents.
Q. -- cents, okay. A premium price over the competition. Is that the wholesale price that you believe that you offer milk for compared to what the large regulated processors offer milk for?
A. I actually referenced two different -- well, I referenced a period in there where we were marketing our milk with a premium. And that was actually prior to Cedar Crest's involvement with us in the exclusive marketing arrangement.

   During that period of time prior to that agreement with them, we were about a dime to 25 cents higher, depending on the market that we were going into.

Q. Okay. And where did you acquire your knowledge about your competitors' wholesale pricing?

A. The same place everybody gets our pricing. It's out on the streets.

Q. Okay. People that you sell to would tell you, here's what they're charging us, how close can you come, something like that, is that true?

A. Something like that.

Q. When did Cedar Crest -- that Cedar Crest arrangement with Country Dairy start?

A. That was about 2001.

Q. Okay. Prior to that, was all of your milk marketed under a Country Dairy brand, your own unique brand?

A. Yes.

Q. And subsequent to 2001 has that continued?
A. We have additional labels in the mix that we use right now.

Q. Okay. A portion of it is -- is the majority Country Dairy?

A. The majority is Country Dairy.

Q. Okay. And some of it is the store brand?

A. Correct.

Q. Is some of it a brand for any other -- co-packed for any other processor?

A. Not for another processor.

MR. VETNE: Okay. That's all the questions. Thank you very much for coming.

JUDGE CLIFTON: Thank you, Mr. Vetne.

Who next will cross-examine Mr. Arkema?

Mr. English, thank you.

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Good afternoon, sir. Charles English.

A. Good afternoon.

Q. Following up on some of the questions from Mr. Vetne, your answer on the label was, not from another processor. Do you sell milk under a label to a retailer where the same retailer gets the same label from another processor?

A. Not in the same region. So in other
words, I have a relationship with -- with a grocer who
has different regions from which he purchases milk.

Q. When you use the word, region, within
Michigan or within different parts of -- geographic
parts of the United States?
A. Within different parts of the United
States.

Q. Okay. So within the Michigan area, you
do not have a label that is being -- that is shared in
the sense that a retailer has another processor using
that label within Michigan?
A. There is a label that would have that.
Q. In Michigan?
A. Yes.
Q. Okay. And is that product also sold
through your exclusive distributorship?
A. Yes.
Q. Now, I understand that there was a time
when some individual processor were rbST free, but it
would be fair to say that many processors now claim
their milk is rbST free? Correct?
A. Correct.
Q. Are there any processors in Michigan who
are not making that claim today?
A. I would not be the authority to answer
that question.

Q. Are you aware of any processors who are not making that claim today?
A. I'm not sure what Prairie Farms' status is.

Q. Is April the flush season, part of the flush season in Michigan, or has the flush not come on yet?
A. The flush season can vary depending on just when the animals have been bred back and when they decided to calf them. In general, April through May is probably a pretty good flush time line.

Q. And during that time you are at 98 percent Class I? For April 2009, you were 98 percent Class I?
A. For April, probably not. I mean, April would have been one of the months where there were some of those nasty tankers in the yard.

Q. I'm sorry, empty what?
A. Empty tankers in the yard, those big silver things we don't like to see.

Q. Were you still above 93 percent for April?
A. I think we were. Again, I don't have those numbers in front of me. And I'm not sure what
that would indicate.

MR. ENGLISH: I have no further questions. Thank you.

JUDGE CLIFTON: Thank you, Mr. English. Who next has questions for Mr. Arkema?

Mr. Beshore.

CROSS-EXAMINATION

BY MR. BESHORE:

Q. Good afternoon, Mr. Arkema. My name is Marvin Beshore. I represent National Milk Producers Federation and Dairy Farmers of America. Just a couple of questions.

Mr. -- Mr. Wernet testified, I think, that you had around a thousand cows. Is that -- is that correct? Or how many cows are you milking there at Country Dairy these days?

A. We have about 1,400 right now.

Q. Okay. So what -- what's your monthly gross volume of -- of milk from those 1,400 cows?

A. It will run between 2.4 and 2.6 million pounds.

Q. Okay. Besides the Country Dairy label, what other labels do you package under?

A. One of them I'm not at liberty to say based on the arrangement I have with the customer. But
we have a label that we do under the Cedar Crest brand.

Q. Okay, Cedar Crest. Now, so Cedar Crest, that's the distributor's brand, I take it?
A. Correct.

Q. What other dairies do they distribute for?
A. There are several.

Q. Okay. Could you tell us who those are?
A. I know they have some product that they purchase for their school business from Country Fresh and perhaps also from Paririe Farms. I'm not sure if there are others in addition to them or not.

Q. What size packages do you package at Country Dairy and types?
A. Packaged sizes or --

Q. Both, sizes and types of container.
A. We do gallons, half gallons, and quarts in high density polyethylene and we do pints in HD -- or in PET, polyethylene.

Q. Okay. What products, in terms of the -- the various fluid milk products, flavored milk products, what's your product line?
A. What do we do?

Q. Whole milk?
A. Whole milk.
Q. 2 percent?
A. Whole milk, 2 percent, 1 percent, fat free, strawberry, chocolate, half and half, whipping creams that we've discussed.
Q. All of those in all sizes of containers?
A. Not necessarily. It's market driven, depending on what the customer needs or what makes the most sense for us to bring to market.
Q. Okay. Now, the recent communications with the convenience store -- between the convenience store and Cedar Crest, were you personally involved in any of those communications or is this just something you learned about from Cedar Crest, or how'd that go?
A. That was something that I learned about through being made aware of the testimony from Mr. Wernet.
Q. Okay. So you weren't aware of it before that time?
A. I was not.
Q. Did you get the sale? Did Cedar Crest get the sale?
A. To my knowledge, I don't know. I assume they did, because Cedar Crest is a customer-driven company. And if a customer called and requested that and they thought it was going to be a benefit to the
customer, yeah, they probably gave it to them.

Q. Okay. And what's the cost of the milk that's going to go out of the store there at $1.99?
What was the in-the-store asking price; $1.90 a gallon, is that correct?

A. That's the understanding that I have from the -- from the testimony and from the e-mails that I've seen.

MR. BESHORE: I think that's all I have.

Thank you very much.

JUDGE CLIFTON: Thank you, Mr. Beshore.
You may also have to help with the spelling of those materials that the jugs are made from.

THE WITNESS: Okay.

JUDGE CLIFTON: All right. What other questions for this witness? Mr. Ricciardi, thank you.

CROSS-EXAMINATION

BY MR. RICCIARDI:

Q. Mr. Arkema, Al Ricciardi on behalf of AIDA. Is -- you were talking about the competitive situation in your marketing area with the supermarkets. Is Meijer, M-e-i-j-e-r, one of the larger supermarkets in your area?

A. Yes.
Q. And are you familiar who supplies Meijer with their private label milk?
   A. To the best of my knowledge, it's Dean Foods.

Q. Now, in your market in the Sunday newspapers are there flyers that are provided by the various supermarkets, including Meijer, regarding costs of the products that they intend to market at the stores, including milk?
   A. Yes.

Q. And have you seen the flyers from yesterday at Meijer with regard to the Meijer gallon milk in all varieties excluding chocolate and organic?
   A. I have, from my conversation, heard that they exist. I've not seen them personally.

Q. Okay. Are you familiar that they -- the marketing for Meijer is at $1.98 a gallon?
   A. We're -- we're accustomed to seeing that, when the value of raw milk goes as low as what it is, that the big grocers tend to put on those kind of specials fairly regularly. And actually $1.98 is not as aggressively as they will sometimes tend to do.

Q. Have you seen it at a lower price?
   A. 1.70, $1.78. Those kind of prices are not unheard of.
Q. Shelf price?
A. Correct.

Q. Are you familiar with Family Fare, F-a-r-e, supermarkets?
A. Yes.

Q. And tell us who Family Fare is in the Michigan market.
A. They are one of the largest grocer, wholesale, both distributors and owners of grocery stores, throughout Michigan.

Q. And who supplies them, to your knowledge, with their Spartan label milk?
A. I believe that's Dean Foods.

Q. And are you familiar that Family Fare has been advertising their gallon milk at $1.98?
A. I'll take your word for it.

Q. Okay. With regard to your marketing area in Michigan, the type of pricing that we're talking about, is that something that you have to deal with on a competitive basis?
A. When -- when those kind of flyers exist in the newspaper, does that affect how our customers respond, is that your question?

Q. A much better question. Why don't you go ahead and answer it?
A. Yes. The -- you know, it's not unusual for customers to call, you know, on a regular basis. And I'm getting this information now from Cedar Crest, because they're the ones for responsible the price out to the customer. But my understanding is that that's a regular occurrence, when prices like that are advertised in the papers.

Q. A couple of other follow-up points. I think Mr. English asked you about whether or not, at least currently, most people that are processing milk in Michigan are processing rbST free milk. Let me ask you about a specific time frame and Whole Foods back in '06 and '07. At that point were you requested by Bareman Dairy to become involved in supplying milk to Whole Foods?

A. Yes, we were.

Q. And was one of the reasons because in '06 and '07, at least, they didn't have rbST free milk?

A. That's correct.

Q. And did you actually pay a commission to Bareman Dairy?

A. That was not a commission that Country Dairy was involved with.

Q. Okay. To the extent there was one, Country Dairy didn't pay it?
A. Correct.

Q. You've had the opportunity to read the statement from Mr. Wernet marked and admitted as Exhibit 77?

A. Yes.

Q. Which is one of the reasons you're here?

A. Correct.

Q. Directly and indirectly, he indicated that Country Dairy effectively had fire sales to their customers as part of their marketing practice. It's in his statement. It's what he said. Is that true?

A. Fire sales is a curious term to me.

Q. Why?

A. Because typically when I think of a fire sale, I think of something that is unusable and is going to be dramatically discounted, almost to the point of being, you know, pennies on the dollar. If a 10 or 15 cents or 20 cent discount on milk when we were long during the time where we were doing the distribution directly ourselves would be considered a fire sale, then we probably ran a fire sale every now and then.

Q. In attempting to meet the competitive marketplace in Michigan?

A. In attempting to meet the competitive marketplace, yeah.
Q. You are asking the Secretary to take into consideration the real competitive issues in Michigan and the competition in the milk industry in making any decision?

A. That's essentially what is a concern to me that -- indicating that producer-handlers are a disruptive influence in the marketing situation that exists in Michigan, I believe is really a very -- a very small, almost significant component of the disruption in the marketing that I would see going on for our business that's occurring from the larger producers and processors.

Q. Which would -- which would include, as you testified, the largest processor in the country, Dean Foods?

A. Correct.

MR. RICCIARDI: I don't have any further questions. Thanks.

JUDGE CLIFTON: If I might inquire, what disorderly marketing do you see in Michigan?

THE WITNESS: At this point, you know, our product would be on shelves in some of those grocery stores at a price that would -- would not be at all disruptive in undercutting the value of milk in the marketplace. So, you know,
in certain cases, our product could be, you know, 50 cents to, you know, in some cases a dollar and a half higher on the shelf than what a house brand might be. And when the house brands goes on special at $1.98 or $1.79, to me that's a disruptive influence in the market.

It's one that they have, you know, the option to do, I would say. But it does create a situation in which I think that's more disruptive to the overall value of milk than what the higher price is.

JUDGE CLIFTON: And why is a price like $1.98 a gallon or $1.79 a gallon a disruptive price?

THE WITNESS: Essentially that's a price below where we would feel like we can make a profit.

JUDGE CLIFTON: Thank you. Mr. Vetne.

RECROSS-EXAMINATION

BY MR. VETNE:

Q. When you just now referred to the house brand being on sale for $1.79 to $1.98, would that be a house brand produced, processed, bottled by somebody other than Country Dairy?

A. Yes.
Q. Okay. And in response to a question by Mr. Ricciardi concerning fire sales, you said when you used to distribute your own product, you may have offered milk at a 15, 20 cent discount when you were long, and if that's considered a fire sale, you used to do that?
A. Correct.
Q. You recall that? Since 2001, you have been distributing through Cedar Crest. Since 2001 do you sell milk to Cedar Crest at fire sale prices?
A. I do not.
Q. Okay. So if there's any fire sale it would be Cedar Crest's own marketing strategy?
A. Correct.
Q. If there's any discount, let's put it that way. Your price doesn't vary based on their marketing strategy?
A. Correct.

JUDGE CLIFTON: Who else has questions for Mr. Arkema? Mr. Tosi.

CROSS-EXAMINATION

BY MR. TOSI:

Q. Good afternoon, Mr. Arkema.
A. Good afternoon.
Q. I didn't catch -- the spelling of your
last name, Arkema, please?
   A. It's A-r-k-e-m-a.
Q. Thank you, Mr. Arkema. A few questions.
Do you consider yourself to compete with Dean Foods, for example? You've mentioned Dean several times in your cross-examination. Do you consider yourself in competition with Dean on the basis of price?
   A. I consider us in competition with them by virtue of the fact that they're in the marketplace and so are we. We're competitors by virtue of trying to sell to the same customer. I think the product that we are trying to sell and bring to a customer is of a -- of a value that we try very diligently to get a value for that our customers are willing to pay.
   So I'm not sure I exactly understand the nature of your question. Are we a competitor on the basis of price? Every ounce of our marketing desire is to not be that. Do we have to occasionally? Yeah.
Q. Yeah. One of the reasons that I asked that question, I've heard a mix of issues that I think that -- that I think that you have raised.
   For example, some of the questions that Judge Clifton asked you about, you know, what's disruptive about $1.79 sale price on a gallon of milk, or $1.99, for example. And I was trying to put that in
context with, you know, there's certain things that a
grocery store will do to try to attract customers into
the store --

A. Certainly.

Q. -- with an attractive price on milk, for
example, knowing that once they're in the store, the
likelihood of them buying something else in the store at
a higher markup would probably occur. That's why I was
asking that question.

A. And I think the consistency with which
that occurs in those larger grocers would lead me to
ask, are they really willing to lose that much money on
a consistent basis purely for the sake of door swings?

Q. Yeah, it's an interesting question. You
probably would like the answer to that. We probably all
would.

A. Exactly.

Q. In the beginning of your testimony, you
said things about the high quality of your milk. If we
were to go into a grocery store that you supplied and
let's say that it was also supplied by Dean Foods, for
example, a brand that you know to be -- having been
supplied by Dean Foods, would -- would we notice a price
difference between your milk and a similar -- like a
gallon of milk from your label versus one that's been
supplied by Dean Foods?

A. Yes. And we're alongside other -- other producer or other processors. Our milk typically is going to be 50 cents to, in some cases, a dollar and a half higher.

Q. So in that regard, when you are selling your product to, like, a major chain, for example, that there's this understanding, if you will, or the perception of that, that your product is a higher quality product?

A. Yes.

Q. Okay. With regard to the other proposals we had, there were something like 28 proposals, I think, that have been noticed in our hearing notice. If the Secretary decided that perhaps something needed to be done, are there any other proposals that you have an opinion on or that you would support?

A. It's been a while since I've read though all the proposals. Most of the time my day is taken up with keeping the processing plant running and overseeing the rest of the operations of our business.

From my perspective, the basis of the capitalism of our society and what drives it is providing incentives and not imposing disincentives to growth and opportunity. And when caps and limits are
put on what a producer-handler can feasibly do profitably, I think that is something that should be allowed to be pursued.

Q. Okay. Are you aware of any other handlers in Michigan in the area where you market your milk -- are you aware of anybody that you are competing with that would be of a size that's similar to you that's fully regulated?

A. Producer-handlers or just --

Q. Just any handler that does the same sort of business as you, who bottle milk and sell it to the stores.

A. Bareman's Dairy, I would be somewhat familiar with. I'm not intimately familiar with any of them.

Q. Do you think they're probably about the same size as you?

A. Oh, no. They're significantly larger than we are.

Q. Are you aware of anybody else you are competing with that you know to be regulated that is about the same size as you?

A. I believe that there may be a couple of operations on the east side of the state, but I honestly don't know what their volumes are in comparison to ours.
I know that their prices typically tend to be higher than what would be seen in a lot of the grocery stores. They would also be seen as more of a premium quality brand.

MR. TOSI: Okay. That's all I have. I appreciate you taking the time to come all the way down from Michigan and participate with us.

THE WITNESS: Thank you for hearing me.

MR. TOSI: Thank you.

JUDGE CLIFTON: Mr. Vetne.

FURTHER RE CROSS-EXAMINATION

BY MR. VETNE:

Q. I forgot one question, Mr. Arkema. How many employees do you have in your combined farm and packaging bottling operation?

A. With all of the activities that we have under the Country Dairy activity, we've got about 105 to 120 depending on the season of the year.

Q. Some are part-time employees?

A. Some would be part-time employees, yes.

MR. VETNE: Thank you.

THE WITNESS: Okay.

JUDGE CLIFTON: And, Mr. Arkema, what is your job within the dairy?

THE WITNESS: What day is it today? It
ranges. My -- my area is primarily in oversight of the processing plant, the final operations, the processes and then just general management with my partner and brother-in-law.

JUDGE CLIFTON: Are there any other questions for Mr. Arkema? There are none. Thank you so much, Mr. Arkema.

THE WITNESS: Thank you.

JUDGE CLIFTON: Let's go off record while he helps the court reporters with some spellings.

(A recess was taken from 4:50 to 4:55.)

JUDGE CLIFTON: Mr. Carroll, would you come to the podium, please? Mr. Carroll, before you begin, I'd like you to explain what it is that you intend to do and then see if there's any objection.

MR. CARROLL: Well, I intend to make a short statement, covering the prehearing position of our parties -- which we already had a prehearing proceeding -- and also our refinement of our position on our proposals for the clients that I represent. And then we have always taken the position that Orders Numbers 1 and Number 5 needed specific findings and on
facts relevant to them, their own area. That's all I have to say.

JUDGE CLIFTON: All right. And the reason you want to do this as a statement now rather than in a brief is what?

MR. CARROLL: Well, I want to give everyone notice of our position while we're all here. Secondly, I think it's important for my clients that I rephrase -- or not rephrase -- reincorporate the statements that I made in the prehearing and so that there's no question that we have not waived those claims.

And then the other matters are just housekeeping so that everybody knows how we have come out of this. I think changes have been made by others at the podium, and I just want to do the same.

JUDGE CLIFTON: Is there any objection to Mr. Carroll proceeding in that fashion?

Mr. English.

MR. ENGLISH: Actually, your Honor, it's not an objection. It is in the form of a recognition of the Rules of Practice under 900.9 A provide what is effectively an opportunity for a oral statement or oral
argument separate from briefing and in the
discretion of the judge. And I just note, of
course, since it's not evidence or anything I
don't want to get up today and disagree with
anything. Obviously I'll reserve our right for
briefing, but I also appreciate what Mr. Carroll
is doing as opposed to getting in the witness
stand. I think it's appropriate.

JUDGE CLIFTON: I wish you all could work
out the proposals in similar fashion to the
procedures. All right. Is there anyone else
that would like to be heard on the manner in
which Mr. Carroll wishes to proceed?

Mr. Carroll, do you have any objection to
my considering this an oral statement?

MR. CARROLL: No, not at all.

JUDGE CLIFTON: All right.

MR. CARROLL: No thank you.

JUDGE CLIFTON: You're welcome. You may
proceed.

ORAL STATEMENT

MR. CARROLL: For the record, I'm John
Benjamin Carol. I've appeared through these
proceedings on behalf of the New England
Producer-Handlers Association, Mountain Dairy,
and Monument Farm Dairies, one in Vermont, the
other in Connecticut and the dairies in Virginia
that I've previously appeared for.

Prior to this point in time and in the
prehearing, I entered what really amounts to a
special appearance pointing out in my view that
there were certain claims we did not waive by
way of proceeding. I just want to make a
statement that those claims we still have not
waived and we are resting our claim in part on
that.

The -- there was a proposal by
Mrs. Cooper, who is Secretary of the New England
producers, which she made independently. And I
have a -- when I do my brief, I will have a
letter -- I have a letter already from her
authorizing me to represent the New England
Producer-Handlers. I'll attach that to my
brief. But I'll also dispose of her proposal as
part of the New England Producer-Handlers
proposal because that happened after she sent
the letter.

I thought everybody would want to keep
this thing as cleaned up as possible.

Our position for the two handlers in
Vermont and Connecticut, it's obvious, their testimony is that they can't survive the regulation and of course they want to maintain the present exemption, number 1.

Failing remaining -- obtaining the present exemption, they would need some form of protection under the exempt provision, and so we'll be briefing that in light of the testimony and the record which we'll review. But we'll be putting a number on that just to protect them on the down side.

I expect the Virginia exempt person presently will rise up in wrath at the thought that he could never be a producer-handler unless he was clever enough to have known that they were going to pick a date in 2009, based upon 2008. So that -- I will be briefing that.

From a legal viewpoint, we have always pointed out, and we do again, that our version of the regulatory authority of the Secretary over own-farm milk differs from the Secretary. I have taken numerous cases to court. I have never -- I had a cert to the United States Supreme Court on that question, was held for two years, which shows that somebody was thinking
about it and then it was denied. So that issue is still, from our viewpoint, an open issue, which we would litigate without thinking if we are forced to do so.

Everyone has talked about the Small Business Act. We'll be briefing that as well. But it is our view that under the record that's been developed, that the problem of regulation needs to be referred to the small business committee, the joint small business committee.

And we also have pointed out in earlier times, the Sherman Anti -- Anti Clayton -- Sherman Clayton Antitrust Acts, under that decision, the Noerr-Pennington case, reserving all rights under those actions. That's all I have and I thank you very much.

JUDGE CLIFTON: What is that case, please that you just cited?

MR. CARROLL: Noerr-Pennington.

JUDGE CLIFTON: Which is spelled how?

MR. CARROLL: N -- I believe it's N-o-r-r, dash, P-e-n-n-i-n-g-t-o-n.

MR. BESKORE: N-o-e-r-r.

MR. ENGLISH: He's got Pennington right, but not Noerr. N-o-e-r-r. And those of us
participating are relying on Noerr-Pennington.

JUDGE CLIFTON: Mr. Carroll, thank you so much. I appreciate the brevity, and I appreciate that you found a way to accomplish what your clients need without becoming a witness. I think that's helpful.

All right. Mr. Vetne, would you come to the podium as well? And, Mr. Vetne, you've distributed two documents. Exhibit 102 should be the longer document.

MR. VETNE: Right.

JUDGE CLIFTON: I'm going to mark that as Exhibit 102, and then the one-page document, which is on the letterhead of National Milk Producers Federation, a letter dated in 2005, I'll mark that as Exhibit 103.

(Exhibit 102 was marked for identification.)

(Exhibit 103 was marked for identification.)

JUDGE CLIFTON: Mr. Vetne, do you want to proceed? Do you want to proceed in a similar fashion to Mr. Carroll?

MR. VETNE: No, I do not. I want to proceed in a similar fashion as Roger Cryan,
which will serve much of the same purpose as Dr. Hollon or Bob Yonkers in tying the proposed regulations to existing regulations and explaining how they work. I don't want to risk having my explanation being given less weight because I wasn't sitting up front.

JUDGE CLIFTON: All right. You may take the position in the witness chair and I'll swear you in.

THE WITNESS: Can I do this without a jacket?

JUDGE CLIFTON: You may.

JUDGE CLIFTON: Do you need a clean glass?

MR. VETNE: No, I don't. I'm not going to talk that long.

JUDGE CLIFTON: All right. Please state and spell your name.

THE WITNESS: John H. Vetne, V-e-t-n-e.

JUDGE CLIFTON: Will you raise your right hands, please?

(The witness was sworn.)

JUDGE CLIFTON: Thank you. Mr. Vetne, you may proceed.

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

DIRECT EXAMINATION

MR. VETNE: Okay. My name is John Vetne, as you all know. And this record reflects I'm counsel for three small producer-handlers. These producer-handlers do not have on staff economists or milk marketing experts. I previously mentioned Roger Cryan.

Many of the larger processors and trade associations do and are able to explain how proposals fit into the current scheme of things and what was intended and what is intended.

So I have taken the opportunity to have the proposals and explanatory material submitted to the Department on my letterhead, all of which I drafted and have those marked collectively.

There were two. On the top of page -- Exhibit 102, there's a date, February 16, and the date was March 16. That was a temporal error, not a typographical error. It was submitted March 16. And then it was supplemented again on March 25. That's collectively Exhibit 102, which contains the language of the proposal and reasons for the
proposal made.

And Exhibit 103 is a letter written by National Milk Producers to then Secretary of Agriculture, Mike Johanns, concerning the Pacific Northwest recommended decision. Charlie Flanagan, when he gave his testimony, referred to a letter that NMPF had written to the Secretary in which it -- NMPF characterized the Pacific Northwest and Arizona decision as fair.

And this is that letter. And I'll tell you where it can be found. It's a copy printed off the USDA website. The website -- through AMS Dairy, one can access rulemaking and then access dairy rulemaking, and then access regional rather than national hearings. And under regional hearings for the Pacific Northwest and Arizona, the most recent one there, as you click on it, is the Pacific Northwest and Arizona producer-handler hearing.

And under that there are multiple pages for comments, exhibits, post-hearing briefs and so forth.

Exhibit 103 appears on a page of that record under ex parte communications. It's -- ex parte communication number 5, letter from
Jerry Koazk. My understanding, it was listed as an ex parte communication. It doesn't show a copy to the hearing clerk, but it was apparently submitted after the date of the briefing. There was also on the -- the government rulemaking site comments, a stamped receipt for comments from National Milk Producers post recommended decision and that does not appear on the AMS site under comment.

So my assumption is that they submitted this as comments to the rulemaking site but it was posted as an ex parte communication on the AMS site because it's on timeliness. I'm not sure. But that's where I found it. It's on the AMS site for that proceeding underneath ex parte communication number 5.

JUDGE CLIFTON: And would you spell Jerry Kozak's name?

MR. VETNE: K-o-z-a-k.

JUDGE CLIFTON: Thank you. So on Exhibit 102, the date of the first page, the date of the letter actually should be March rather than February.

MR. VETNE: The actual date it was sent was March 16, 2009. It was in response to the
invitation to submit proceeds. And this was the
response on behalf of Mallorie's.

JUDGE CLIFTON: Now, you say that's the
date it was sent.

MR. VETNE: That's the date -- the date
of transmission and the date of the letter were
actually March 16. The month shown on there was
my error.

JUDGE CLIFTON: All right. And are you
going to ask that Exhibit 102 be displayed on
the website?

MR. VETNE: Well, they're currently on
the website but not as an exhibit. So, yes, I
would like -- I would like that because, as I
indicated previously, it serves the same
explanatory purpose and content purpose and
context purpose, historical purpose as
Mr. Kozak's testimony, for example. So I
request that both 102 and 103 be received.

JUDGE CLIFTON: All right. So would you
like the copy that would appear on the website
to show March with your initials?

MR. VETNE: No.

JUDGE CLIFTON: You want to leave it
February?
MR. VETNE: This is as submitted. I don't propose -- I don't propose to correct it. Let the whole world see my error. Just leave it as it is.

JUDGE CLIFTON: All right. All right. And you indicated that in addition to what we now see in Exhibit 102, you would explain any change in position by any of your clients?

MR. VETNE: Yes, that's my purpose. Not just change in position but for answering questions such as Mr. Rower had the other day about what the meaning of person is. Typically there are questions as to, you know, what was intended here, what's the basis for that, how's this fit in.

As well as Mr. Flanagan testified concerning a modification of a proposal, I want to explain how that fits in. Because he's -- he's, frankly, not competent to do that. He doesn't have the experience that staff experts have or that I have in this.

Let me proceed with a couple of things there. First of all, listening to the testimony this last couple of weeks and going back and looking at the -- at the various rules, I
developed a little concern about all of the proposals that call for some kind of cap or some kind of grandfathering. When that cap or that grandfather exemption no longer applies, when somebody goes over the cap or otherwise doesn't comply with the cap or grandfather provision, what would be the impact under various dairy farmers for other markets provisions?

There are some rules for dairy farmers of other markets under which -- under which a producer might not be pooled in a month or in a -- in -- in a next month or a following month. If milk were received at a nonpool plant and a producer-handler defined as a nonpool plant, an exempt plant is a nonpool plant -- I haven't -- I haven't looked at those in detail, but I do want to express what I think was an implicit part of the proposal here, that should a -- should a cap be adopted, should the rules be changed, should there be a grandfather provision, that a dairy farmers for other markets provision in any order should not be applied so as to disqualify that producer's milk as producer milk during a month in which that producer's plant becomes regulated.
And I -- frankly, I admit I'm not sure that would happen, but I'm concerned that it might. So I mentioned it for benefit of the record and USDA.

Secondly, Mr. Flanagan suggested at the end of his testimony that there be a second cap. The terms hard cap and soft cap have been used. I think soft cap has been used with derogatory intention.

Hard cap, as -- the cap, as used in our proposal, that is Mallorie's Proposal Number 17, is a hard cap on the amount -- on the volume of milk that can be exempted if -- if there is a grandfathering.

The primary position, as Mr. Mallorie explained, of all three is that there be no change.

The secondary position is if there needs to be a change elsewhere, none is needed for the Pacific Northwest, and the other markets might do well following the example of the solution adopted at Pacific Northwest.

But if producer-handlers are eliminated by the adoption of Proposals 1 and 2 and if, in addition, a grandfathering provision is
considered to protect the investment of those
who are existing producer-handlers, and were
existing producers when the invitation to submit
proposals came out, then the grandfathering
provision as proposed by Mallorie's is
preferable to that proposed by National Milk for
a number of reasons. I think that's explained
by -- in the testimony.

That has actually a hard cap. But in
addition, it also provides for graduated -- the
amendment proposed by Mr. Flanagan, rather than
have perpetual volume of exempt milk, and I
think the folks from California talked about
the -- well, in their view talked about the
competitive disadvantage that could exist if
there was a 20 or 30 million-pound plant that
had a large volume that was exempt. Quite
frankly, that hadn't -- hadn't occurred to folks
that have 1 or 2 or 3 million pounds.

But we could understand -- Mr. Flanagan
could understand the -- the need to guard
against that. So the proposal was made to cap
any exemption at 6 million pounds, which means
that if -- if a plant becomes regulated at
3 million pounds Class I, and then grows to
6 million pounds, Class I, either from his own production or somebody else's production, rather than -- if the contribution to the pool is 86 cents for a fully regulated plant, rather than go from zero to 86 cents for an extra gallon or extra pound, that plant would gradually pay -- pay more as it grew to 6 million pounds.

So by the time it got to 6 million pounds, for all of its milk it would be paying 43 cents. That's -- half of it would be exempt and half of it would be nonexempt. And at that point -- beyond that point the exemption would no longer be available. I think that takes care of the problem described by the California witnesses.

Larger than that -- there's plenty of reason for it to be larger than that, because of the extra costs of small plants compared to large plants. This is a very conservative level. It addresses the small -- the Regulatory Flexibility Act, because these plants are really a subset of small handler businesses, small business being defined as 500 employees or less. Many of these have only a handful of employees.

So this small set -- subset of businesses
has high expenses, high costs of processing, and as they grow larger, they start to approach, but cannot achieve, according to Mr. Hettinga, comparable cost efficiencies until they get to about 30 million pounds. The proposal is to cut it off at 6 million pounds. So that's how those two things fit together. Sort of a return to a graduated tax.

So the reason I'm up here is to -- to see if there's any questions about how this -- how this works, how this fits in. If there are any, I'll be happy to be take them. And if not, I'll be even happier to step down.

JUDGE CLIFTON: Who would like to ask Mr. Vetne questions? Mr. English, thank you.

MR. ENGLISH: Actually, I don't want to ask questions if -- although he strayed a little farther than I wanted him to, if this is limited to an explanation of the proposal.

If the Exhibit 102, other than the explanation and the alternative, the text in the alternative is being -- is going to be admitted for the truth of the assertions -- there are -- the first at least 4 1/2, 4 2/3 pages; I'm not sure about the explanation piece, that is sort
of in the form of argument; fact sort of applied to argument that might have been better guised as what I was discussing with Mr. Carroll. And that's why I appreciate what Mr. Carroll did under the rule.

If that is going to be admitted for the truth of the assertion, then the very thing I warned about last week is of some concern. I think we have probably some extensive cross-examination coming.

But if we can have some clarity as to what's going to happen here -- this is why I'm concerned about counsel coming on as witnesses. If the first part is going to be just what was submitted and is not being submitted for the truth of the assertion that needs to be questioned here today, I have no questions.

JUDGE CLIFTON: Mr. Beshore, let me hear from you and then I'll -- after I've heard from everyone, then I'll hear from Mr. Vetne.

MR. BESHORE: Our position and my thoughts are in line with those of Mr. English. I think the line -- the line for attorneys testifying should be no argument, period.

If attorneys are going to argue from the
stand -- well, that's a line that we think should not be crossed with respect to these proceedings. If they have factual testimony, fine. Otherwise, it should be statement as Mr. Carroll made in brief.

The first, I don't know however many pages after the opening letter of Exhibit 102 is, I think, fairly described as arguments, substantial portions of it, quoting -- you know, citing cases and interpreting them, et cetera. If it's going to come in, it should not come in, in our view, as sworn testimony. Or, you know, we'd be obligated, I suppose, to look at it as being necessary to cross-examine. So if that doesn't come in, I don't know that I have any questions.

But I certainly join Mr. English's statements of concerns and objection.

JUDGE CLIFTON: Mr. Miltner.

MR. MILTNER: Before I say a whole lot, I think it's Mr. Vetne's decision on what he wants to introduce into the record. I think the idea that attorneys cannot argue from the stand is not entirely true. But I think that if they do so without qualification, they would be subject
to cross-examination.

And so no one needs to be an attorney to stand at this podium, nor does somebody need to be a nonattorney to sit in the witness chair. And we have had experts at many hearings sit on both sides, both -- I've seen attorneys do it and I've seen economists do it, and I've seen plant managers do it.

So the decision is Mr. Vetne's about what he wishes to have admitted into the record and incorporated into his statement.

But I think it would be wrong to say that simply because Mr. Vetne holds a law license or simply because he's asked questions in this proceeding, he cannot sit in the witness stand. But if chooses to do so, he should be subject to the same cross-examination as any other witness.

JUDGE CLIFTON: Thank you, Mr. Miltner. Does anyone else want to comment before I inquire of Mr. Vetne whether he wants portions of Exhibit 102 treated as his evidence?

Mr. Ricciardi.

MR. RICCIARDI: Your Honor, you asked the relevant question, which is what are the documents intended to be utilized for?
Obviously we'll hear from Mr. Vetne on that in a moment.

But I will join with my colleague, Mr. Miltner, to say two things. First, the fact that you do have a law license may disqualify you from some things, but it should not disqualify you from being able to go ahead and present the information at this hearing.

Secondly, apparently not having a law license does not disqualify anyone from giving their opinion with regard to what the law is. So I think that we have to end up applying whatever standard we're going to apply.

And to the extent that Mr. Vetne intends to introduce Exhibits 102 and 103 in an unqualified manner, then the court needs to -- your Honor needs to deal with that -- that issue. But he should be able to go ahead and make whatever statement he wants to.

JUDGE CLIFTON: Thank you, Mr. Ricciardi. Mr. Vetne, how do you want to proceed?

MR. VETNE: Your Honor, I requested that the exhibits be marked and ask that they be received on an unqualified basis. And I have explained that before I got up here.
The larger players in this industry have on-staff economists, on-staff lawyers. Steve Rowe for Northwest Dairy Association is a lawyer, advises that organization. He came up here as a witness.

Roger Cryan came up here. And actually his testimony is very much like Exhibit 102: Here's where we think things fit, here's why we're doing it, here are some observations we made, here's what I think the law is.

I have three small clients, your Honor. The suggestion -- the suggestion that my clients cannot use somebody who has experience, who can represent them in this proceeding -- and I don't have to be a lawyer to be their advocate in this proceeding, I just happen to be a lawyer. But I also have 35 years of experience in this industry and with these regulations. That a small player cannot have somebody with experience, who happens to have a law degree, do for them what Mr. Cryan has done for National Milk Producers or Mr. Rowe did for Northwest Dairy Association, it's abhorrent. It's another effort to use the power of the market and the power of the purse, just as I think these
proposals are, to disadvantage small businesses to the advantage of large businesses.

So if that there are questions concerning the facts submitted -- submitted on behalf of Mallorie's and on behalf of Nature's Dairy and on behalf of Country Morning, the parties have had this information concerning them and concerning the reasons for their proposal in their possession for over a month. I announced on the first day that I would rely on these submissions and provide some explanation in the past.

Anybody could have asked any of my witnesses concerning the content of these and what they understood them to mean and how that -- how that fit. And if they were able to answer, they could have answered. They might have deferred to me or not. But the opportunity has been here to ask the principals about their business concerning everything here.

Like I said, this is -- this is no different than Mr. Cryan. And if -- if the hair is going to be split so that I cannot do something comparable for my small clients that -- that other witnesses have done for their
clients or employers, that would be very
disappointing.

So we're talking about Exhibit 102. I
haven't heard any objection to 103. So that's
my take on 102.

JUDGE CLIFTON: All right. We -- we took
Dr. Cryan's testimony, direct testimony, on one
day. And then when we did cross-examine
Dr. Cryan, we went to 9:00 that night. I don't
want to do that tonight. So the big issue now
is should Mr. Vetne's cross-examination proceed
now? It's 5:33, or should we take that up at
8:00 in the morning?

And Mr. Vetne, I presume you're here
tomorrow?

MR. VETNE: I am.

JUDGE CLIFTON: All right. How does
everyone want to proceed? Mr. English.

MR. ENGLISH: I don't know what plans
people have made. I don't -- I think I can take
care of it because I can get a reservation at
the Hilton. My understanding is this hotel
doesn't have rooms tomorrow night. So if people
have counted on getting out tomorrow night, that
may be difficult.
If we're going to go forward and
cross-examine 102, then Mr. Vetne is going to
get cross-examined like any other witness and
that may take a while.

JUDGE CLIFTON: Mr. Carroll.

MR. CARROLL: Could I raise a problem or
a personal --

JUDGE CLIFTON: Yes, please. Please come
to the microphone.

MR. CARROLL: My plane leaves tonight at
8:00. And I'm waiting for the Dairy Farmer of
America witness. My good friend here can handle
cross-examination without any help whatever from
us, but my son would be here if it were needed.
I would like to get that testimony in and done
and then go home. I'm not saying it's
comfortable for other people. It's just what I
would like to do.

JUDGE CLIFTON: You think that we could
complete Mr. Hollon's testimony tonight?

MR. WOODY CARROLL: There's
cross-examination.

MR. CARROLL: I think I can get my cross.
The statement is nine pages long. It'll
probably take 15 minutes to read it. I'm
guessing.

JUDGE CLIFTON: All right. Thank you for that suggestion. Let me hear from some others.
Mr. Beshore.

MR. BESHORE: I object to him proposing Mr. Hollon, you know, while Mr. Vetne is on the stand. Mr. Hollon's testimony has been distributed this morning as the rules provide. So Mr. Carroll has, I think, provided cross-examination to his co-counsel who will be here tomorrow.

JUDGE CLIFTON: All right. Mr. Miltner.

MR. MILTNER: Your Honor, as I have my list, the only witness remaining other than -- than Mr. Vetne is Mr. Hollon. Is that the same as you have?

JUDGE CLIFTON: Yes.

MR. MILTNER: I would hope that, despite 30 years of being an advocate in this proceeding, we would come nowhere close to spending an entire day cross-examining Mr. Vetne on this limited statement, and that Mr. Hollon and Mr. Vetne could both be completed by mid-afternoon tomorrow. If that's not the case, then there's something terribly wrong.
JUDGE CLIFTON: Mr. English.

MR. ENGLISH: I have been very slim in my cross-examination. And maybe if I'm given the evening I will try to see if I can cut it down. I had hoped that the approbation about this issue could have dealt with this.

I do think there is a way of dealing with this issue, distinguishing from the legal argument attached to it. That's the real problem here is that, yes, a lawyer gives something more imprimatur.

Therefore, a lawyer cross-examining a lawyer is going to have a difficult time with the cross-examination. I'm not going to promise how long it's going to take. I know that in the past instance this took six or seven hours. That wasn't my fault. Mr. Stevens objected to it at the time.

I think it was a mistake then. I think everyone in the room thought it was a mistake then. And I think it's a mistake now. But if that's what's going to happen, that's what's going to happen. It's not my fault. I will protect my clients' interests and I will cross-examine this witness.
JUDGE CLIFTON: Mr. Beshore.

MR. BESHORE: I think we should adjourn for the evening, continue with Mr. Vetne's cross in the morning followed by Mr. Hollon. Maybe overnight we can sort it out a while, but this problem has been foisted upon us by Mr. Vetne.

And I would say his testimony is no different than Mr. -- I mean, Mr. Rowe's testimony is not at all like Mr. Vetne's statement and argument, legal arguments. I mean, that argument was raised and there was nothing to it. And Dr. Cryan's testimony is not legal argument of this nature either.

JUDGE CLIFTON: Mr. Ricciardi.

MR. RICCIARDI: I step to the podium as the voice of reason this evening, Judge. And actually, until he started to go to the point of arguing about this testimony of Mr. Rowe and Dr. Cryan, I was actually going to get up here and say, I agree wholeheartedly with my colleague, Mr. Beshore. But I agree wholeheartedly with half of what he said.

We need to stop for the evening, get back into this at 8:00 in the morning, deal with the issue with regard to Mr. Vetne and then
Mr. Hollon. And I do have -- and I handed the copy out to my colleagues.

I do have one issue on the letter from Dennis Wolff, Office of the Secretary, Commonwealth of Pennsylvania, concerning Kreider, which I think we can deal with fairly -- fairly briefly. But I wanted to make sure that the -- that you're aware of that -- make sure that we do that tomorrow when we dot the Is and cross the Ts, Judge.

JUDGE CLIFTON: All right. Thank you. I'm going to allow Mr. Vetne to put on Exhibit 102 as evidence and he'll be subject to cross-examination just like any other witness. So it may take us a while. I agree that we should call it a day. So we'll -- it's now almost 5:40. And we'll come back at 8:00 in the morning. We'll complete Mr. Vetne before we go on to Mr. Hollon.

MR. VETNE: Your Honor.

JUDGE CLIFTON: Who is talking?

Mr. Vetne?

MR. VETNE: May I ask 103 be received? I don't think there's any issue about that.

JUDGE CLIFTON: Is there any objection to
the admission into evidence of Exhibit 103?

There is none. Exhibit 103 is hereby admitted into evidence.

JUDGE CLIFTON: All right. Thank you all. And I'll see you at 8:00 in the morning.

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PROCEEDINGS ADJOURNED AT 5:39 p.m.

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CERTIFICATE

I, S. Diane Farrell, RMR, CRR, the undersigned, a court reporter for the State of Ohio, do hereby certify that at the time and place stated herein, I recorded in stenotypy and thereafter had transcribed into typewriting under my supervision the foregoing pages, and that the foregoing is a true, complete and accurate report of my said stenotype notes.

_______________________________
S. Diane Farrell, RMR, CRR