UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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In re:	)	[AO]
	)	Docket No. 15-0071
	)	
Milk in California	)	
_____	)	

VOLUME XXVII

TRANSCRIPT OF PROCEEDINGS

October 30, 2015

Myra A. Pish, CSR No. 11613
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7

8   BEFORE U.S. ADMINISTRATIVE LAW JUDGE
                     JILL S. CLIFTON
9
                Friday, October 30, 2015
10
                       9:01 a.m.
11

12   Clovis Veterans Memorial District
                    808 4th Street
13   Clovis, California 93613

14

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16   TRANSCRIPT OF PROCEEDINGS

17   VOLUME 27

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23 Reported by:

24 Myra A. Pish CSR
    Certificate No. 11613
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TRANSCRIPT OF PROCEEDINGS - VOLUME XXVII

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 1        FRIDAY, OCTOBER 30, 2015 - - MORNING SESSION

 2      JUDGE CLIFTON:  We are back on record on October 30, 2015.

 3   It is a Friday.  It's approximately 9:01 in the morning.  This

 4   is Day 27 of the milk hearing.  We are in Clovis, California.

 5           My name is Jill Clifton.  I'm the United States

 6   Administrative Law Judge whose been assigned to take in the

 7   evidence in this hearing.  Evidence consists of testimony and

 8   exhibits.  We have had lots of both.

 9           I would like now to take the appearances of others who

10   are participating in the hearing, beginning with my fellow USDA

11   employees.

12      MR. FRANCIS:  Good morning, William Francis, F-R-A-N-C-I-S,

13   Dairy Marketing Specialist with USDA AMS Dairy Programs.

14      MS. MAY:  Good morning, Laurel May, USDA, AMS, Dairy

15   Program.

16      MR. CARMAN:  Good morning, Clifford Carman, C-A-R-M-A-N,

17   Assistant to the Deputy Administrator Dairy Programs

18   Agriculture Marketing Service.  Don't forget to fall back this

19   weekend.

20      MS. ELLIOTT:  Pamela Elliott, E-L-L-I-O-T-T, I'm a

21   Marketing Specialist with USDA AMS Dairy Program.

22      MR. MYKRANTZ:  John Mykrantz, M-Y-K-R-A-N-T-Z, Pacific

23   Northwest and Arizona Orders as an Agricultural Economist on

24   detail with Dairy Programs.

25      MR. SCHAEFER:  Henry Schaefer, H-E-N-R-Y, S-C-H-A-E-F-E-R,
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Agricultural Economist for the Upper Midwest Milk Marketing

Order Federal Order 30, on detail to AMS Dairy Programs.

MR. HILL: Brian Hill, B-R-I-A-N, H-I-L-L, an Attorney with

the Office of the General Counsel. Six weeks down, three,

four, five, six to go.

MS. CHILUKURI: Good morning, Rupa Chilukuri, R-U-P-A.

C-H-I-L-U-K-U-R-I, I'm also an Attorney with the Office of the

General Counsel.

MR. BESHORE: Good morning, Marvin Beshore, M-A-R-V-I-N,

B-E-S-H-O-R-E, Attorney for the Proponents of Proposal

Number 1, California Dairies, Dairy Farmers of America, and

Land O'Lakes.

MR. VLAHOS: John Vlahos, J-O-H-N, V-L-A-H-O-S, of the law

firm of Hanson Bridgett, H-A-N-S-O-N, B-R-I-D-G-E-T-T,

co-counsel for the same clients as Mr. Beshore.

MR. SCHAD: Good morning, my name is Dennis Schad,

S-C-H-A-D, I work for Land O'Lakes.

MR. ENGLISH: Good morning, my name is still Chip English,

C-H-I-P, E-N-G-L-I-S-H, I'm with the law firm of Davis, Wright,

Tremaine, with my principal office in Washington, DC, and I'm

here on behalf of Proponents of Proposal 2, the Dairy Institute

of California. And in case you have missed the signs, there's

a marathon on Sunday and most of the roads are shut down. I

think that's also why we're not in the main room in this

building, because that's where it is going to start.

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 1        MS. VULIN:  Good morning, Ashley Vulin, A-S-H-L-E-Y, V --

 2   as in Victor -- U-L-I-N, I'm also an Attorney with Davis,

 3   Wright, Tremaine, representing the Dairy Institute of

 4   California.  And I would like to wish everyone a Happy

 5   Halloween, including Mr. Miltner, my comrade-in-arms.

 6        MR. SCHIEK:  Good morning, William Schiek.  S-C-H-I-E-K,

 7   with the Dairy Institute of California.

 8        MR. MURPHY:  Good morning, I'm Barry Murphy, M-U-R-P-H-Y, I

 9   represent a consulting firm called BESTWHEY, LLC, based in

10   San Francisco, California.

11        MR. BLAUFUSS:  Good morning, Rob Blaufuss, B-L-A-U-F-U-S-S,

12   with the Dean Foods Company.

13        MR. DeJONG:  James DeJong, D-e, J-O-N-G, Dairy Policy

14   Economic Analyst with Hilmar Cheese Company, dairy farmer-owned

15   manufacturer of cheese, whey, and milk powder.

16        MR. ZOLIN:  Alan Zolin, A-L-A-N, Z-O-L-I-N, with Hilmar

17   Cheese.

18        MR. VETNE:  John Vetne, I'm also a representative for

19   Hilmar Cheese.

20        MR. RAMIREZ:  Good morning, Miguel Ramirez, R-A-M-I-R-E-Z,

21   with Leprino Foods in Denver, Colorado.

22        MR. VU:  Hi, I'm Bao Vu, that's B -- as in boy -- A-O, las

23   is Vu, V -- as in Victor -- U, I'm with the law firm Stoel

24   Rives and we represent the California Producer Handlers

25   Association and the Ponderosa Dairy.  Thank you.
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1   MR. VANDENHEUVEL: Good morning, Rob Vandenheuvel,

2 V-A-N-D-E-N-H-E-U-V-E-L, here with Milk Producers Council.

3   MR. MILTNER: Good morning, I'm Ryan Miltner with Select

4 Milk Producers.

5   There were a few comments earlier in the hearing about

6 whether I think Attorneys or Economists were more buttoned up,

7 and I think that Ms. Vulin and I have now settled that dispute.

8   JUDGE CLIFTON: Mr. Van Nortwick is expected to testify

9 today and he's been taking some photos for the website in which

10 the audio feed recordings are being posted, so we must have a

11 picture of the two of you in costume for Halloween.

12   All right. Other preliminary issues, announcements?

13   MS. MAY: Good morning, everyone. Laurel May with USDA.

14 Welcome to the day before Halloween session of our hearing.

15 Anybody that would like to, may witness at this hearing, and

16 anybody who would like to question any witness may do so. We

17 are broadcasting via our live audio feed at

18 www.ams.usda.gov/live. And we have a court reporter taking

19 transcripts of this hearing and the transcripts and exhibits

20 that are presented here, are available on our website

21 approximately two weeks after the end of each hearing week, and

22 that is the AMS dairy website.

23   We also have some copies of exhibits in the back of the

24 room that you are welcome to help yourself to, and we have

25 refreshments in the back for you, also.

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1   Yesterday we ended the day with Ms. Taylor on the

2   stand, and today, I believe we're starting with Mr. Murphy.

3   Does that sound good? And then Mr. Van Nortwick, whenever he

4   is, I think you are going to insert him when he comes, and then

5   Mr. Blaufuss is also on deck.

6   And Mr. Vetne has a question, oh, you want to talk?

7   I'm going away you can come and talk.

8   JUDGE CLIFTON: Mr. Vetne?

9   MR. VETNE: And for the last few weeks I have been

10 communicating off and on with the representative from Golden

11 Cheese, which is another dairy farmer-owned, Pacific Gold,

12 whatever, Leonard Vandenburg will be coming today, and he's

13 also going to present some testimony. So, that's it.

14   JUDGE CLIFTON: Do you know how to spell his name?

15   MR. VETNE: Yes.

16   JUDGE CLIFTON: Will you spell it for me, please?

17   MR. VETNE: L-E-O-N-G-A-R-D, V-A-N-D-E-N-B-U-R-G. Leonard,

18 V-A-N-D-E-R-B-U-R-G, no D -- you know how to spell Leonard.

19   JUDGE CLIFTON: We will spell Leonard L-E-O-N-A-R-D.

20 However, I must compliment Mr. Vetne, he just answered exactly

21 as witnesses ought to answer, and it's all right for a witness

22 to be wrong, but when you are asked a yes or no question you

23 should start your answer yes or no. All right. Mr. English.

24   MR. ENGLISH: Chip English. Thank you. And to make the

25 record clear, my understanding is Mr. Vetne learned that well

after closing last, yesterday -- I don't mean the spelling.

So, yes, today the Dairy Institute has Mr. Murphy, who we would like to go on first. And we have Rob Blaufuss. Mr. Blaufuss can go, he'll be happy to know, last, so obviously the other two witnesses could go between if they are here at that point.

I would also like to do a little restaging for next week. And let me start with Monday, and I don't have a complete list yet, I hope to have a complete list or at least a better list by the time we're done today. If we don't and I get a better list over the weekend, I commit myself to communicating with counsel and USDA as I learn things. But what I know for Monday, is a witness for Driftwood Dairy, witnesses for Clover Stornetta, and assuming there's time and at the moment there is, Mr. Zolin returns on Section 13 testimony.

Again, I am confident we'll have other witnesses, I just don't have all the names in place, and I will try to provide those before we're done today, otherwise over the weekend to people. I also would like to pre-stage one other thing. And that is that midweek next week, either Wednesday or Thursday, we do expect Dr. Mark Stephenson to be here. I need to provide two very important caveats or conditions. Dr. Stephenson is appearing to provide information for the record and not as a witness for or against any proposal or for

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1 or against any particular group of entities.

2   And second, as of my most recent communication with

3 Mr. Stephenson, he does not presently intend to testify about

4 the Cooperative study that has been discussed otherwise in this

5 proceeding, and we, for our part, that is to say the Dairy

6 Institute of California and its representatives, have, and

7 commit under those circumstances, to not ask him any questions

8 about the study. So I thought especially for those on the

9 Internet, those who might be interested, letting people know

10 that Dr. Stephenson is likely to be here and testifying either

11 Wednesday or Thursday, I thought that was important

12 information.

13   JUDGE CLIFTON: Thank you. We have a few people who

14 arrived after I asked people to identify themselves and I would

15 like them to add their participation at this time.

16   MR. HOLLON: Elvin Hollon, E-L-V-I-N, H-O-L-L-O-N, Dairy

17 Farmers of America, Proposal Number 1.

18   MS. KALDOR: Rachel Kaldor, R-A-C-H-E-L, K-A-L-D-O-R,

19 Executive Director Dairy Institute of California.

20   MS. TAYLOR: Sue Taylor, Leprino Foods, L-E-P-R-I-N-O, and

21 it is a lovely morning for a walk in Clovis.

22   JUDGE CLIFTON: Is there anyone else who has not yet come

23 to the podium who is here and expects to, well, first of all,

24 let me have anyone else who is here and has not come to the

25 podium who would like to be acknowledged or introduced.

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1   MS. KARLIN: Marni Karlin, M-A-R-N-I, K-A-R-L-I-N, I'm

2 General Counsel for the Organic Trade Association and I'm here

3 observing.

4   JUDGE CLIFTON: Thank you. And is there anyone now who has

5 not yet come to the podium who expects to testify today or who

6 would like to testify today? No one yet. All right.

7   And as always, we welcome people to come and testify,

8 and we welcome people to come and cross-examine. The only

9 other announcements that I have are, inquiring people want to

10 know whether it's Dairy Program or Dairy Programs.

11   MR. FRANCIS: Will Francis, USDA. We were recently

12 notified that it is Dairy Program, without the "S". That was

13 our policy change recently when we updated our website.

14   JUDGE CLIFTON: The case, as known in the Hearing Clerk's

15 office within the United States Department of Agriculture, is

16 in brackets [AO], which means agreements and orders, docket

17 number 15-0071.

18   Are there any other preliminary matters? There being

19 none, I invite Mr. Murphy to the witness stand which is to my

20 right.

21   MR. ENGLISH: Chip English. We'll be passing out

22 statements to be marked as an exhibit, and people might want to

23 have Exhibit 96 with them, or we have some copies to pass out

24 in case people traveling light today didn't bring it with them,

25 and Exhibit 96 is the one labeled pounds of processed into

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1   cheese, with sort number of whey plants.

2       JUDGE CLIFTON:  Ms. Elliott, I believe this will be

3   Exhibit 117; is that correct?

4       MS. ELLIOTT:  Yes.

5       JUDGE CLIFTON:  I'm marking mine as 117.

6           (Thereafter, Exhibit Number 117, was

7           marked for identification.)

8       JUDGE CLIFTON:  And tell me again, Mr. English, which

9   other?

10      MR. ENGLISH:  Exhibit 96, which was initially an exhibit

11  that Mr. Beshore asked questions of Mr. Greg Dryer about, and

12  has already been referenced in another testimony.  Again, we

13  just didn't want to add it yet again.  The witness, in

14  preparing his own testimony, had created a table, but we just

15  don't want to keep adding the same document to the record, so

16  we have referenced it as Exhibit 96, and I just thought it

17  would be easier if people knew that ahead of time.

18      JUDGE CLIFTON:  Mr. Murphy, I'll swear you in in a seated

19  position.  Would you raise your right hand, please?

20          Do you solemnly swear or affirm under penalty of

21  perjury that the evidence you will present will be the truth?

22      MR. MURPHY:  I do.

23      JUDGE CLIFTON:  Thank you.  Please state and spell your

24  name for us.

25      MR. MURPHY:  Barry Murphy, B-A-R-R-Y, M-U-R-P-H-Y.
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1   JUDGE CLIFTON: Thank you. And the distance you were from

        2   the microphone right then was quite good. And as you testify,

        3   even though you may be looking at Mr. English, you do need to

        4   speak to that microphone, to the extent that probably it's not

        5   a good idea to try to speak to me because then we can't pick up

        6   your voice.

        7   MR. MURPHY: Okay.

        8   JUDGE CLIFTON: All right. Mr. English, you may proceed.

        9   MR. ENGLISH: Thank you.

       10   DIRECT EXAMINATION

       11   BY MR. ENGLISH:

       12   Q. Could you read the introduction part of your statement

       13   and then stop, please?

       14   A. My name is Barry Murphy and I have worked in

       15   California's dairy industry for the past 25 years, first in

       16   Senior Management corporate environments, and for the past 15

       17   years, as a consultant to smaller cheese plants with specialty

       18   cheeses and whey handling disposal needs. My background

       19   includes Dairy Science and Business Postgraduate degrees,

       20   Technical and Operations Management, Sales and Marketing

       21   Management, and green field project development and financing.

       22   I live in San Francisco, California.

       23   Q. So sir, first, could you give us some more information

       24   about your educational background?

       25   A.   Yeah. I graduated with a Bachelor's degree in Dairy

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1 and Food Science in Ireland in 1984; graduated with a Master's

2 degree in Dairy Milk Protein Chemistry in 1987; and then after

3 coming to San Francisco in 1990, I graduated in '94 with an MBA

4 in Operations Management.

5   Q. And you have referenced 25 years in the dairy industry

6 in California. What did you do post-education, in well, tell

7 me where first and --

8   A. Yes, throughout my educational period I worked in the

9 Irish dairy industry during the summers, worked for cheese and

10 butter co-ops in more or less a technical environment in labs

11 and quality control. And after my first, before coming to

12 California, I spent three years in the UK working in the bakery

13 industry with United Biscuits, and in the soft drinks industry

14 with a company called AG Barr, both in -- both in operations

15 and technical management.

16   Q. So what brought you to California?

17   A. In the '80's, Ireland was going through a fairly steep

18 recession, so the Green Card was looking great, so I think I

19 actually applied for the Green Card while as an undergrad, and

20 then about five years later it showed up in the mail, so I was

21 gone.

22   Q. And then?

23   A. And then I had 90 days to execute.

24   Q. And was that what also brought you to the dairy

25 industry?

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1   A. Yeah, I worked -- I left college having spent a lot of

2   time in, my Master's program in Ireland was a protein research

3   project working on whey proteins and caseins from milk.

4   JUDGE CLIFTON: Let me interrupt. Let's go off record just

5   a minute. Let's take a two to three-minute stretch break while

6   we make sure the audio feed is established, and I would like

7   someone in the room to confirm before we go back on that you

8   can hear it.

9   (Whereupon, a break was taken.)

10   JUDGE CLIFTON: We're back on record at 9:33. The audio

11   feed was not working, it's now working. I'm not going to go

12   back and do the preliminary items, but I do want to begin from

13   the very beginning with our first witness whose name is

14   Barry Murphy.

15   Mr. Murphy, you remain sworn, I would like you to again

16   state and spell your name.

17   MR. MURPHY: Barry Murphy, B-A-R-R-Y, M-U-R-P-H-Y.

18   JUDGE CLIFTON: Mr. English, I want you to proceed as if

19   Mr. Murphy had not yet said anything. It will be repetitive in

20   the transcript, but I wanted to make sure that the audio feed

21   captures it.

22   MR. ENGLISH: I understand and thank you, Judge Clifton.

23   DIRECT EXAMINATION

24   BY MR. ENGLISH:

25   Q. So Mr. Murphy, could you read just the introduction,

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1 your one paragraph introduction, and then I will do a little of

2 your background.

3   A. My name is Barry Murphy and I have worked in

4 California's dairy industry for the past 25 years, first in the

5 Senior Management Corporate Environment, and for the past 15

6 years as a consultant to smaller cheese plants with specialty

7 cheeses and whey handling disposal needs. My background

8 includes Dairy Science and Business Postgraduate degrees,

9 Technical and Operations Management, Sales and Marketing

10 Management, and green field project development and financing.

11 I live in San Francisco, California.

12   Q. So first let's go over your educational background.

13 What's your degrees are in, from where?

14   A. Yeah, I graduated in 1984 from University College Cork

15 in Ireland with a degree in Dairy Food Science, then graduated

16 from same university in 1987 with a Master's degree in Milk

17 Protein Chemistry. And then later in San Francisco, at

18 San Francisco State University, I took a, I graduated with an

19 MBA in Operations Management.

20   Q. And while you were going to college or even working on

21 your Master's, what work experience do you have that would be

22 relevant for this proceeding?

23   A. Yeah, while taking the undergraduate degree, it was

24 mandatory to spend the summers working for the co-ops in

25 Ireland, so I worked mostly with the labs at the cheese and

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1 butter and powder plants in Cork in Ireland.

2   Q. And then before coming to California, what did you do

3 and where did you work?

4   A. And then my Master's program was a research project.

5 They make protein, a research project for Kerry Ingredients in

6 Ireland, I was funded by them. And then I moved on to work in

7 the UK for three years, where I had left the dairy industry for

8 a little bit to work in the baked goods industry for

9 United Biscuits and also in the soft drinks industry for a

10 company based in Glasgow called AG Barr.

11   Q. I know we're going to be asked, so how do you spell

12 Kerry, in Kerry Ingredients?

13   A. Kerry is K-E-R-R-Y, Ingredients.

14   Q. And then the other company you just mentioned?

15   A. AG and then B-A-R-R, publicly traded company in the UK.

16   Q. So what brought to you California?

17   A. In the 1980's, Ireland was going through a severe

18 recession, so everybody in, most people in Ireland, I get at

19 the time, were applying for Green Cards. So as I mentioned, I

20 think it was about five years later it just showed up. And

21 then as soon as we were, we had lived in England for a few

22 years, my wife and I, and as soon as the Green Card came our

23 decision was made.

24   Q. So -- so you came to California?

25   A. Came directly to California, yeah.

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1   Q. And how did you get involved in the dairy industry?

2   A. So my first job, my intention when I came to California

3 was to get back into the dairy industry having left it for

4 three years. So my first job was in San Jose as Quality

5 Control Manager with Sorrento, Sorrento Cheese had a plant,

6 Mozzarella whey powder plant in San Jose, California.

7   Q. And where did you go from there?

8   A. And then I spent about four and a half or five years

9 there, and then I moved up to Petaluma what was Cal Co-op,

10 California Cooperative Cream and it became California Gold,

11 California Gold --

12   Q. Cooperative Creamery.

13   A. Cooperative Creamery, right. Thank you. And I spent

14 another five years up there.

15   Q. And then where did you go from there?

16   A. And then while at California Gold in Petaluma, we began

17 working on whey. The whey industry was beginning to build, the

18 interest in whey proteins, so we started to research process,

19 processes and to look at market research for whey proteins. So

20 as soon as Cal Gold had merged DFA, then a few of us set out on

21 our own and we started building whey blends across the U.S.,

22 Wisconsin, Illinois, and we started consulting with cheese

23 companies throughout the states, the US, that were interested

24 in developing their whey protein businesses.

25   Q. Was that under a company name at that point?

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1   A. Yeah, that was under a cooperative called Evolutionary

2 Ingredients.

3   Q. And about how long were you with Evolutionary

4 Ingredient?

5   A. About three years.

6   Q. And then what did you do next?

7   A. So Evolutionary Ingredients lasted until about summer

8 or late 2002. The whey markets had collapsed in the middle of

9 2002, so I -- I ended up completely on my own then, and I

10 formed a company called BESTWHEY, LLC, which is a, which is me

11 basically, a consulting company based in San Francisco, to work

12 on whey protein projects.

13   So my first my first project in late 2002, early 2003,

14 was with Marquez Brothers International, which is based here in

15 Hanford, California. And then from there I worked with Rumiano

16 Cheese up in the North Coast of California.

17   Q. Could you spell that, please?

18   A. Rumiano Cheese, that's R-U-M-I-A-N-O, Cheese Company.

19 Then I worked for, I did a project with Farmdale Creamery in

20 Southern California. Let's see, I worked for a company called

21 Valley Gold out in Gustine, California, on whey powders, these

22 were all whey-related projects or project development. Did

23 some buying and selling of whey proteins from Land O'Lakes and

24 DFA. Started, I did some work with Saputo out of Montreal,

25 some consulting work. I worked on just in this state we worked

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1 on a couple of green field projects that had never really come

2 to fruition, massive green field projects.

3   Q. For this record, what is a green field project?

4   A. A green field is where you, where essentially you start

5 with a field, I mean, it is just an idea. And it generally

6 involves venture capital or high risk money to start a project

7 from scratch, with maybe a hundred acres, two hundred acres, or

8 five acres, whatever the size of the project is.

9   Q. Were those connected in any way to whey production?

10   A. Yeah, there was some interest. The interest at the

11 time was to build, was to build large-scale cheese plants,

12 probably to compete with say Leprino, Saputo, or Hilmar in the

13 state, and then to obviously build on value-added products

14 through either whey powder, or whey protein, or permeate or

15 lactose powders.

16   JUDGE CLIFTON: Gentlemen, you are talking as if you are in

17 ordinary conversation, but because of that, sometimes at the

18 end of one of yours conversation, the other one's already

19 talking. So I need each of you, please, to wait until the

20 other's voice dies down totally before you start to talk.

21 Thank you.

22   MR. ENGLISH: Thank you, your Honor.

23   Q. Is there anything else about your background that you

24 think we need to know before with we proceed further?

25   A. No, I think I have covered most of what I do at least

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 1  relative to the industry.

 2      Q.  Thank you.

 3      A.  Thank you.

 4      JUDGE CLIFTON:  In what city or area in California is

 5  Valley Gold located?

 6      MR. MURPHY:  That's in Gustine, California, it no longer

 7  exists.

 8      JUDGE CLIFTON:  All right.  And how is that Gustine

 9  spelled?

10      MR. MURPHY:  G-U-S-T-I-N-E.

11      JUDGE CLIFTON:  All right.  Thank you.  And we have your

12  statement so we know what your company, how your company looks

13  when it's written, BESTWHEY, LLC, but would you just describe

14  for the record how the word BESTWHEY appears?

15      MR. MURPHY:  I'm sorry, your Honor?

16      MR. ENGLISH:  I think --

17      JUDGE CLIFTON:  All one word with no space?

18      MR. MURPHY:  Yes.

19      JUDGE CLIFTON:  If you could spell it?

20      MR. MURPHY:  Yes, it is all one word, no space.  BESTWHEY,

21  B-E-S-T-W-H-E-Y, LLC.

22      JUDGE CLIFTON:  Thank you.  And you show it in all

23  capitals, is that how you typically write the name of BESTWHEY,

24  LLC?

25      MR. MURPHY:  Yes.
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1   JUDGE CLIFTON: Thank you.

2   MR. ENGLISH: Thank you, Judge Clifton.

3 BY MR. ENGLISH:

4   Q. Mr. Murphy, at this point if you would read the

5 remainder of your statement.

6   A. Position on Proposals

7   BESTWHEY, LLC, opposes the proposal (Proposal 1) from

8 the three producer cooperatives, California Dairies,

9 Land O'Lakes, and Dairy Farmers of America, and strongly

10 believes that this proposal will restrict the growth of

11 California's cheese industry and eliminate most small cheese

12 businesses in the state. BESTWHEY, LLC, supports the

13 Dairy Institute of California's alternative proposal

14 (Proposal 2) because it provides a more realistic value for

15 whey in the other solids price calculation based on the value

16 of liquid whey sold by cheese plants. The Class III formula

17 used in the Cooperatives' proposal assumes that cheese plants

18 receive a dry whey finished product value for their whey

19 stream. Based on my experience, this pricing formula

20 overvalues milk for most cheese makers in the state because

21 they do not, do not recover that assumed value from their whey

22 operations.

23 Whey Powder and Whey Protein Concentrate

24   Of the 57 cheese plants in California, one plant

25 manufacturers sweet whey powder (Kraft, Tulare) and the next

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three major cheese companies (Leprino, Saputo, Hilmar) process

most of the whey solids into products other than dry sweet

whey, as described in Proposal 1, Class III with whey

valuation, and for which the current markets are weak. Ten

other cheese companies process a liquid reverse osmosis whey or

ultra-filtered whey, for sale as liquid to animal feed to other

whey processors, and in four of these plants as dried whey

protein. All ten of these companies dispose of greater than 85

percent of whey solids as animal feed at little or no value.

Facts:

       1. 13 of the 57 cheese plants in California can

          process whey to some degree per most recent CDFA data

          (Hearing Exhibit 96).

       2. Use of the dry whey powder market value for

          Class III pricing formula does not make sense and it

          assumes that all plants utilize a hundred percent of

          whey solids producing sweet whey, when in fact, one

          plant in the state can achieve this. A handful of

          additional plants can capture the value from the bulk

          whey -- from the bulk of the whey solids, while the

          vast majority have minimal or no recovery of whey

          solids.

       3. ROA solids sold in liquid form by two plants in the

          state, and achieve 50 to 70 percent of the whey powder

          value, minus freight costs. Longer distances separate

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1   plants further in California than most other states,

2   and thereby make freight costs a significant issue.

3   For example, the Land O'Lakes, WPC-34 liquid haul from

4   Orland, California to Kings County, California is over

5   300 miles at a cost of $1200 per load, or 12 cents per

6   pound of solids of WPC-34. To haul from Industry,

7   California to Tulare, California is 182 miles, at a

8   backhaul cost of $475 per load, or 4 to 6 cents per

9   pound of ROA solids. Distances between plants and

10   freight costs in California are such that there is no

11   inner plant movement of raw unconcentrated whey in the

12   entire state when this is commonplace in Wisconsin.

13   4. Whey Protein Concentrate (WPC-34) liquid solids are

14   sold by three plants in the state to dryers at 20 to 30

15   cents under or at 50 to 70 percent USDA Central/western

16   average of the Mostly Series WPC-34, delivered.

17   5. The smallest cheese companies, representing at

18   least 70 percent of the 50 plus cheese plants in the

19   state, have no ability or economies of scale to process

20   whey, and actually pay up to a dollar per hundredweight

21   to dispose of way. I work with a small cheese company

22   now that pays $250 per load of whey for disposal costs.

23   Conclusions

24   A. Using the Dairy Institute's proposal to index the

25   other solids value in Class III to WPC-34 market value

1   makes more sense than using the dry whey market value

2   since only one plant in the state can utilize a hundred

3   percent of whey solids into sweet whey powder. I

4   understand that the Dairy Institute will be presenting

5   this proposal next week. The concept of basing the

6   Class III other solids price on the value attainable by

7   cheese plants that sell some form of liquid whey, makes

8   sense, and is a much better approach than using dry

9   whey prices for representing the whey value, the value

10   of whey.

11   B. Adopting the three cooperatives' proposal will wipe

12   out a substantial portion of smaller cheese plants and

13   may result in reduced processing levels by larger

14   cheese plants, since they can move some of their volume

15   to other states.

16

17   The cheese business is a tough, small-margin business,

18   and for small cheese companies without the ability to

19   create value from the whey, it is even tougher. For

20   the smaller plants, even with the higher gross margins

21   value less milk cost, all the cheese sales, on cheese

22   sales, making a profit is a struggle. The relative

23   overhead costs are so high with smaller cheese plants

24   that they don't have the economies of scale to cover

25   the base overhead comfortably.

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1   I have been told that the proposed Class III milk price

2   increased -- excuse me -- I have been told that the

3   proposed Class III milk price increase by the

4   cooperatives would have average as much as a $1.80 per

5   hundredweight for milk at times over the past few

6   years. This would be roughly 18 cents per pound of

7   cheese value, and would likely wipe out a substantial

8   portion of smaller cheese plants, because this 18 cent

9   per pound would eliminate any potential profitability.

10   California's specialty cheese business competes with

11   products from across the US and some of these cheese

12   businesses must be buying milk outside the Federal

13   Pool, since their cheese pricing does not match Federal

14   Order Class III pricing in some cases.

15

16   My understanding is that many of these plants located

17   in Federal Order areas operate as nonpool plants and can pay

18   for milk based on the market. When milk is in excess, these

19   nonpool plants are able to buy milk below class in order to

20   help the market clear. These below class sales have been noted

21   in USDA's Dairy Market News. My understanding is that both

22   California's current system and Proposal 1 do not have the kind

23   of options to buy milk below regulated class prices that exist

24   in Federal Order areas.

25   Under the current California regulated system,

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1 cooperatives have the ability to assess plant losses back to

2 farmer members. In other words, if the regulated prices are

3 too high for the plant to operate profitably, the cooperatives

4 can reblend and pay their farmer owners on the basis of what

5 the milk is really worth to the plant. The non-Cooperative

6 cheese business milk buyers do not have such an option when the

7 regulated price is set too high. This is clearly inequitable

8 and provides no mechanism to clear milk with respect to cheese

9 plants, which are owned primarily by non-Cooperative

10 businesses.

11 Cooperatives Versus Private Cheese Companies

12   Whey-derived products markets' have collapsed in recent

13 months, as have nonfat dry milk powder markets. The private

14 cheese industry cannot assess losses to producers, and

15 therefore, must absorb these losses.

16   Dairy Farmers of America and Land O'Lakes have one

17 cheese plant each in California. Based on my knowledge, both

18 sell liquid WPC below market to private cheese plant dryers.

19 Why have DFA and Land O'Lakes not invested in WPC dryers, not

20 to mention lactose or whey permeate handling dryer systems?

21 One likely reason is the tens of millions of dollars required

22 for investment in whey processing. If the three Cooperative

23 proposal is adopted with its higher regulated price for cheese

24 milk, then both DFA and Land O'Lakes cheese plants will lose

25 money or break even at best, based on my knowledge of the kind

1 of operations they have and the normal costs associated with

2 such operations.

3 Why have the California Dairy Cooperatives sold or

4 closed down their large California cheese plants and not

5 developed their remaining cheese making operations? One has to

6 conclude that this is because they could not profitably operate

7 large cheese plants, yet now, producers and the cooperatives

8 are proposing an increase that will force cheese plants to pay

9 more for milk, despite the fact that when cooperatives were

10 operating these cheese plants, they, in all likelihood, could

11 not operate them at a profit. Their math simply does not work.

12 There is only so much money available with which to pay

13 for, pay for a cheese plant, run the cheese making operation,

14 pay dairy farmers for milk, and remain competitive with other

15 cheese suppliers in the marketplace. The cooperatives propose

16 Class III formula would simply increase the milk price too much

17 for many cheese plants.

18 Final Conclusions

19 Many of California's smaller cheese plants will be

20 forced out of business should the Cooperatives' Class III milk

21 pricing proposal be adopted. Several of the cheese plants that

22 I have consulted for over the past several years will be forced

23 out of business. The larger cheese plants may reduce milk use

24 levels, as they have the ability to move some cheese production

25 out-of-state. If a modest percentage of cheese manufacturing

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1 is moved out of the state or disappears due to plant closure,

2 then this will likely provide for an oversupply of milk in

3 California, with no ability to sell below minimum mandated

4 pricing to clear the market.

5   BESTWHEY supports the concepts advanced by the

6 Dairy Institute of California at the Class III other solids

7 price should be based on the value of liquid whey. BESTWHEY

8 opposes the Cooperatives' proposal, with its too high for

9 California Class III price and mandatory pooling.

10   Thank you.

11   Q. Thank you, Mr. Murphy. Chip English.

12   First, would it be fair to say that your expertise is

13 in understanding, helping plants be built, and otherwise

14 dealing with the costs of operating whey facilities, correct?

15   A. Yes.

16   Q. And you are not a Federal Milk Order expert, correct?

17   A. Correct.

18   Q. Have you testified at CDFA hearings on these pricing

19 issues?

20   A. Yes.

21   Q. Have you ever testified before at a Federal Milk Order

22 hearing?

23   A. No.

24   Q. Okay. And to be clear, in order to have at least a

25 couple witnesses today, you are effectively appearing out of

1 order in our presentation, correct? It would have been more

2 ideal had we already presented the proposal for valuing whey,

3 correct?

4   A. Correct.

5   Q. But because you were in San Francisco, you were able to

6 come down as a favor to us today and testify to help put a

7 witness on the stand, correct?

8   A. Correct

9   Q. So you are not the witness to talk about what Dairy

10 Institute is actually proposing, correct?

11   A. Correct.

12   Q. Okay. Yeah.

13   Your Honor, I move admission of Exhibit 117.

14   JUDGE CLIFTON: Does anyone wish to question Mr. Murphy

15 before determining whether you have any objections to the

16 admission into evidence of Exhibit 117? There is no one.

17   Are there any objections to the admission into evidence

18 of Exhibit 117? There are none. Exhibit 117 is admitted into

19 evidence.

20   (Thereafter, Exhibit Number 117, was

21   received into evidence.)

22   MR. ENGLISH: Your Honor, the witness is available for

23 further examination, although I may object if Captain America

24 does it.

25   JUDGE CLIFTON: All right. I have one question,

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1 Mr. Murphy, would you look at the bottom of page 3?

2   MR. MURPHY: Okay.

3   JUDGE CLIFTON: And I'm looking at the phrase that begins

4 on the second line up from the bottom and continues onto the

5 last line on that page, "since only one plant in the state can

6 utilize a hundred percent of whey solids into sweet whey." And

7 I believe when you read it you said sweet whey powder or

8 something like that.

9   MR. MURPHY: That's correct, your Honor.

10   JUDGE CLIFTON: Tell me the different names by which that

11 product, that product that only one plant in the state, can

12 utilize A hundred percent of whey solids into. What are the

13 various names by which that product is known?

14   MR. MURPHY: Let me see, to mention a few, sweet whey

15 powder would be one, extra grade whey powder, Grade A whey

16 powder, animal feed whey powder, and most contexts, at least

17 when it is dried, obviously I would put the word powder after

18 it.

19   JUDGE CLIFTON: Thank you. Who next has questions for

20 Mr. Murphy? Mr. Beshore?

21   CROSS-EXAMINATION

22 BY MR. BESHORE:

23   Q. Marvin Beshore.

24   Good morning, Mr. Murphy, we have not met but I am the

25 attorney for the three cooperatives in this hearing, one of the

1 attorneys for the three cooperatives.

2   Let's start with your responses to the questions that

3 Mr. English asked you after you read your testimony. And after

4 you read your testimony and you made a number of comments about

5 plants in the Federal Order system, what their cost of milk

6 might be, you told Mr. English, if I understood you right, that

7 you really don't know a lot about the Federal Order system,

8 correct

9   A. Correct.

10   Q. And, therefore, do you -- you wouldn't know much about

11 what the, you know, what the average cost of milk for cheese in

12 the Federal Order system would be, would you?

13   A. Yeah. The way I look at the, when I look at

14 Federal Order Class III pricing of milk, and it's true to say

15 I'm not an expert on it, but I just look at broadly. So if I

16 see a Class III $18 milk price, I'm running with a $1.80 cheese

17 price or something along those lines. I'm working with kind of

18 very broad assumptions. But as far as any detail goes, no, I

19 would not be the right person for that.

20   Q. Okay. Although you felt free in your statement to make

21 comments about how cheese plants outside of California could

22 buy milk for less than class prices, etcetera, you really don't

23 have any knowledge of what the cost of milk for cheese is on

24 average for plants in the Federal Order system; isn't that

25 true?

1   A. Yeah, the general assumption I'm using is it's a broad

2   assumption, it is relatively accurate, it assumes ten percent

3   cheese yield on standard milk price.

4   Q. But you're making comments about buying milk at less

5   than class price in your testimony, right? What was your basis

6   for those comments?

7   A. My basis for that is I sell cheese in California. So I

8   sell whey proteins, I put deals together on whey, and on RO

9   whey, I sell powders, I market powders, that's part of my

10   business. And I also sell cheese products, specialty cheese

11   products in California. And my basis for that was, is I have

12   looked at price lists from some companies that compete with

13   some of the companies I work in California, and when I have

14   looked, on those price lists I have seen published Class III

15   prices, and I can't figure out how they can get the cheese into

16   California at the prices that they get it into California at,

17   given that we have maybe 15 or 20 cent haul rates for some of

18   the specialty items out to California. That leads me to

19   believe that there's something, either the company has some

20   significant technology I'm not aware of, or they are buying

21   milk below class

22   Q. Okay. That is helpful. You are basing your judgments

23   off of product price lists, correct?

24   A. Correct.

25   Q. Okay. So what products?

1   A.   Products I'm speaking to would be most, well

2   predominantly feta cheese and fresh Mozzarella, so specialty

3   cheese items.

4   Q.   Okay. That are being offered for sale in California

5   from manufacturing plants outside California in the

6   Federal Order marking areas, correct?

7   A.   Correct.

8   Q.   Okay. Okay. Good. That's yeah, that's very helpful.

9   So as you have indicated, you are not aware of the

10 operations of those plants, what technologies they may have

11 available or those sorts of things, correct?

12   A.   Yeah, I have a broad understanding, but, yeah, of

13 course I wouldn't know any of the confidentiality or the some

14 of the specific technologies.

15   Q.   Okay. Now, what, when you currently, and as in

16 BESTWHEY, do you, do you consult with plants outside California

17 or just plants in California?

18   A.   Yes, I consult with plants, less so these days, but

19 yes, over the years I have worked with a lot companies,

20 predominantly in Wisconsin, maybe half a dozen whey protein

21 plants in Wisconsin. In fact, I have built them from scratch,

22 three or four plants in Wisconsin. Yeah.

23   Q.   Presently, when you testify that you are a, when your

24 page one of Exhibit 117 indicates that your company works with

25 small cheese plants and smaller cheese plants in California.

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1 What, like what's the largest size or size range of your

2 clientele?

3   A. So today it would be maybe million, 1.4 million pounds

4 of milk a day.

5   Q. And under?

6   A. And below, yes.

7   Q. Okay. And what -- do you work with any cheddar

8 manufacturers or just other specialty cheese manufacturers?

9   A. Yes, I do.

10   Q. Cheddar manufacturers?

11   A. One of my clients makes cheddar, correct.

12   Q. Is it -- is it fair that bulk cheddar is the, basically

13 the base price for cheese products, base price for pricing

14 cheese products, bulk cheddar?

15   A. I think that's fair, yeah.

16   Q. That's sort of the low price in everything is high

17 cheddar plus?

18   A. Yes, correct.

19   Q. And as far as specialty cheeses go, it's depending on

20 how specialty they are, I guess it is plus, plus, plus.

21   A. Correct.

22   Q. Okay. And you make some comments about cooperatives,

23 cooperatives versus private cheese companies, etcetera. And I

24 guess you had a little bit, you worked for a couple years with

25 a co-op, before it, with Cal Gold or whatever, when you were

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1 working for Cal Gold, you were in, I think you testified you

2 were the technical side of the cheese, whey, part of their

3 operations?

4   A. Correct.

5   Q. Okay. You weren't in the business, business side,

6 finance side?

7   A. Yeah, actually, Cal Gold is where I made the transition

8 from the, we developed a whole bunch of technologies, and

9 that's where I made the transition into the business world. So

10 at Cal Gold actually is where it all started for me starting to

11 sell whey proteins. I did, in fact, transition at that

12 business to the whole, kind of brought the technology over to

13 the economics and business side of the industry. Yeah.

14   Q. Okay. But you understand a cooperative is a business?

15   A. It was all about making money, yeah.

16   Q. Just like the private companies?

17   A. Right.

18   Q. And business, a Cooperative, just like a private

19 company, operates on capital?

20   A. Right.

21   Q. Right. And so when you are talking about, you know,

22 it's easy for co-ops to assess losses to members or whatever,

23 versus private companies, what you are really saying is that

24 you think it's easier to get money, capital, from farmers than

25 from private lenders or banks or whatever.

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JUDGE CLIFTON: Let me hear from Mr. English before you

    answer, Mr. Murphy.

        MR. ENGLISH: I object to the characterization. The

    witness never used the word easy.

        JUDGE CLIFTON: I -- yeah. I didn't think the predicate to

    your question was helpful, Mr. Beshore, so what you want to

    know from him is on what assumption he says that co-ops should

    just build whey --

        MR. BESHORE: No, I'm asking about this. The private

    cheese industry cannot assess losses to producers, and

    therefore, must absorb those losses. That's part of what I'm

    asking about. The sentence at the bottom of page 5.

        JUDGE CLIFTON: All right. So try your question again,

    please.

    BY MR. BESHORE:

        Q. Okay. SO do you see that sentence, Mr. Murphy?

        A. Where is this?

        Q. I'm sorry, the very last sentence on page 5.

        A. Yes, I see it.

        Q. Okay. So I guess my question is, is there some

    difference between producers being assessed losses and private

    non-Cooperative plants absorbing losses?

        A. Yeah, I think my point is that there's less escape

    valves for the private cheese industry. And really what I'm

    referring to here is, so we have had a nonfat milk powder

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collapse since January of 2014 we had $2.05 price or somewhere

around the $2 mark, and today's I think the CME or NASS is

around 88 cents. So we have had a massive correction.

The same goes for the the nonfat market is kind of the

undertone of all these powder markets, whey powder included,

WPC's included, lactose, permeate, anything to do with dairy

powders is the undertone of the market is, in my opinion at

least, and it's only an opinion, is nonfat milk powder. My

point is that when nonfat market over the course of which is

over 20 months now, goes from $2.05 all the way down to 88

cents, or beyond, apparently it had gone down into the low

70's, my point is that the cooperatives who were drying these

powders such as CDI, and I'm really only familiar with the CDI

plants in California that dry nonfat, I think Land O'Lakes does

as well in Tulare, there's going to be losses. There's going

to be severe losses because milk is coming in at one price and

you are selling the powder at a lower price and this has gone

on for 20 odd months. So it's lost month after month, while

the markets are sliding. There has to be losses, there's no

other way around it.

My point is that the co-ops have the, at least the

ability to go in and do some reblends. And I don't really

understand this, but if my understanding from what I hear is

that they can reblend the milk price and they can put an

assessment back into the dairy farmer on the milk price where

1 they can deduct so many cents per hundredweight of milk.

2   My point is that the cheese businesses have no such

3 ability, and yet whey powder and WPC-80 pricing, and you know,

4 lactose, and permeate, and all these prices are collapsing just

5 like nonfat.

6   Q. And so you're, while you have indicated you don't

7 really understand the internal operations of the cooperatives,

8 you seem to think that taking those losses from dairy farmers

9 is easier or less painful than taking it from private owners of

10 companies or borrowing it from a private bank or some other

11 source; is that correct?

12   A. Yeah, that's -- I think, yeah -- that's really not the

13 point. The point is more of what the value of milk that the

14 reblend is about really capturing the true value of milk. And,

15 you know, the dairy cooperatives can obviously do that with

16 their dairy farmer members, and the cheese companies have no

17 ability whatsoever to do that because they are buying at

18 minimum mandated prices plus a premium.

19   Q. Plus premiums?

20   A. Yeah.

21   Q. Yeah. In California, in fact, premiums are paid for

22 milk for basically all uses, are they -- to your knowledge?

23   A. Yeah, I'll be honest, I'm only familiar with the 4b

24 premiums. 4b is just premiums on all 4b milk into every cheese

25 plants into the state from what I understand, yeah.

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1   Q.   Okay. You have testified to atop of page 6, your

2   knowledge of the prices, I guess, of the transactions between

3   DFA and Land O'Lakes and some -- the plant to which they sell

4   liquid WPC, correct?

5   A.   Correct.

6   Q.   And how is it that you have knowledge of those

7   transaction prices?

8   A.   So the DFA plant is in Turlock, California, so I was

9   one of the project managers building that plant before it was

10 DFA, when it was a joint venture between Cal Gold Cooperative

11 Creamery, and I can't remember if it was DCCA or Land O'Lakes,

12 but it was back in the late '90's. So I was involved in the

13 contract negotiations for that plant, and kind of how we sold

14 that liquid whey. And over the years, I stayed in touch with

15 the people that run that plant, and have never actually

16 purchased that WPC liquid, but I, we have, I have entered into

17 negotiation to purchase it.

18   And then for the Land O'Lakes plant, which is based in

19 Orland, California, I have, in fact, been instrumental in

20 purchasing 50 to 80 percent of that WPC over the last four to

21 five years for another client of mine.

22   Q.   Okay. So you are an agent for the buyer of the whey?

23   A.   Correct.

24   Q.   Is that correct?

25   A.   Yeah.

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1   Q. Okay. Now, when you say it's sold or purchased below

2   market, I'm -- I'm not aware, so no one whose testified so far

3   in this hearing has testified that any publicly available or

4   published anywhere information about WPC prices, other than the

5   range published in Dairy Market News. Is there, are there

6   other publicly available sources of market prices for WPC of

7   any form?

8   A. No, no everything here is driven off of AMS USDA

9   published data, the weekly Thursday morning publications.

10   Q. Okay. So when, and the weekly Thursday morning,

11   meaning Dairy Market News?

12   A. Dairy Market News.

13   Q. Okay. So the WPC, you know, range that's published in

14   that is what you are talking about here?

15   A. Yes.

16   Q. And so what do you mean by below market? I mean,

17   there's a range that's published there.

18   A. Yes. So we, most people, and certainly any, all of my

19   clients work off the average of the Mostly from that

20   publication, Dairy Market News. But the below market is, we

21   buy the WPC from Land O'Lakes, certainly today. DFA, I just

22   know through negotiations that it's all purchased below market,

23   so there's some discount off that market to the buyer.

24   Q. Okay. Okay. Now, the closing of Cooperative cheese

25   plants in California that you are referencing here, one of the

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1 one of them I guess you are talking about is the Golden Cheese

2 Plant?

3   A. Correct.

4   Q. Which was in what the Los Angeles area?

5   A. Corona, Corona, California.

6   Q. Which is?

7   A. Southern California.

8   Q. Yeah. Okay. Now, it's pretty, it is clear, is it not,

9 that there's not a lot of milk down there for cheese?

10   A. I believe it's shrinking, yeah. I can't speak to the

11 numbers, but yeah. Chino Valley certainly doesn't have much

12 milk.

13   Q. Okay. And that was a fairly substantial plant,

14 correct?

15   A. Yes, I believe it was like 6 million pounds plus a day.

16   Q. Okay. And in order to operate that plant, you would

17 have to be profitably, you would have to be running it at a

18 very high level of capacity, a good level of capacity like any

19 other cheese plant, correct?

20   A. Correct.

21   Q. And if there's not enough milk to run a plant at a good

22 level of capacity, it doesn't make a lot of sense to keep it

23 operating, does it?

24   A. In that context, no.

25   Q. Okay. I -- are there, do you know, you testified you

5375

1 are not here to talk about the details of the Proposal 2, the

2 Dairy Institute proposal when whey pricing, but do you know

3 what it is?

4   A. I have a general idea, yes.

5   Q. And what's your general idea?

6   A. So, again, these are my opinions, at least. Based on

7 the fact that in California we have one plant that processes

8 dry whey, so the idea of basing it off just strictly off dry

9 whey does doesn't make any sense. The concept of maybe basing

10 it off liquid WPC-34 may make some sense since I have stated in

11 my testimony that 13 of the 57 plants in California can, in

12 fact, do at least some minimal processing with whey.

13 Therefore, although it does leave the other 40 odd plants or

14 whatever out in the dry because they can't, they are paying up

15 to a dollar a hundredweight to remove the whey. So my

16 understanding is that for the movement of liquid whey, liquid

17 WPC, that we could pull put a value on that in California

18 discounting for chilling costs, freight costs, and then

19 whatever the sell price would be, which would be below the

20 market. And then we, then the Dairy Institute would convert

21 that back for the purposes of Federal Order, to a dry whey

22 basis, that would be appropriate for California.

23   Q. And are you aware of any publicly available sources of

24 any of those data, if any, of the data that you have mentioned

25 other than the Dairy Market News published WPC price?

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1   A. Well, no. I guess the, the trades below market, of

2   course, are all confidential. But, of course, liquid WPC is

3   not going to trade at the powder price, it is going to trade

4   below the market.

5   Q. But I mean, other than WPC, the other elements of the

6   formula that you understand, where is that information

7   available?

8   A. I think the, my understanding of the Dairy Institute's

9   proposal is that the only piece of data we need is the

10 published dry whey price.

11   Q. Okay. Very good. Thank you.

12   JUDGE CLIFTON: Mr. Murphy, I need help with a couple of

13 places in California that I don't know about. You were

14 involved in the building of a plant in the late 1990's, in what

15 sounded to me like Toro, California?

16   MR. MURPHY: Turlock, T-U-R-L-O-C-K.

17   JUDGE CLIFTON: Okay. Good. And the other one, you

18 mentioned a Land O'Lakes facility based in and it sounded like

19 Orin?

20   MR. MURPHY: It's Orland, O-R-L-A-N-D.

21   JUDGE CLIFTON: Good. Who next has questions for

22 Mr. Murphy? Mr. "Captain America" Miltner.

23   Mr. Van Nortwick, would you please get a photo of this,

24 because it may not last the entire day of the hearing.

25   MR. MILTNER: It likely will not, and I bring this shield

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1 only to perry off Mr. English's objections.
        2   CROSS-EXAMINATION
        3 BY MR. MILTNER:
        4   Q. Good morning, Mr. Murphy.
        5   A. Good morning.
        6   Q. My name is Ryan Miltner and I'm an Attorney and I work
        7 for Select Milk Producers.
        8   Among the products that you, I don't know if broker is
        9 the right word, but does that include feta cheese in the fresh
       10 Mozzarella you referenced in your testimony?
       11   A. Yes.
       12   Q. It does. Okay. Feta cheese and fresh Mozzarella,
       13 would you consider those to be high-moisture cheeses?
       14   A. Yes, I suppose given that cheddar is 38, everything
       15 yeah, anything above 38 is high-moisture, correct.
       16   Q. Feta, does it fall somewhere in the 56 percent moisture
       17 range? 55?
       18   A. No, we're, the products I'm talking about are more high
       19 40's.
       20   Q. High 40's?
       21   A. Yeah.
       22   Q. Okay. And the fresh Mozzarella, would that be similar
       23 or higher?
       24   A. No, that is a little higher, maybe in the mid to high
       25 50's.

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1   Q. Okay.

2   JUDGE CLIFTON: Mr. Miltner, I hate to interrupt, but would

3   you lift your shield?

4   MR. MILTNER: Yes, I will. Would you like me to get the

5   mask, too, your Honor?

6   JUDGE CLIFTON: You have a mask?

7   MR. MILTNER: I do, I can get that.

8   JUDGE CLIFTON: Yes, please. And you had gloves on

9   earlier.

10   MR. MILTNER: It is hard to be taken seriously with a mask

11 on. Very well.

12   JUDGE CLIFTON: I wrote down high 40's moisture.

13 BY MR. MILTNER:

14   Q. Yeah, we're right where I think we should be, then.   In

15 today's current market, Mr. Murphy, what's the, what would an

16 expected wholesale price be for feta cheese?

17   A. You know, I think that price would be confidential.

18   Q. Okay. Where might one want to look if they wanted to

19 research that?

20   A. Depends what level of the market. So you are talking

21 about from a cheese plant?

22   Q. Yes.

23   A. From a -- I guess you would call the cheese plant and

24 see if they would sell you some. I think most of these prices

25 would be confidential. I mean, even cheddar and jack and

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1 Mozzarella would be confidential, even though they trade in and

2 around the CME, so it would be plus or minus a few cents.

3   Q. For those products, the cheddars and the like, there

4 are sources out there where we can get some information about

5 the prices, whether it's from the CME or USDA. I guess my

6 question is, are you aware of any sources like that for either

7 feta or Mozzarella?

8   A. I'm not, no.

9   Q. Okay. Do those, you refer to them as specialty

10 cheeses, and when I think of specialty cheeses, I think that, I

11 think of cheeses produced, number one, typically in volumes

12 lower than commodity products. Would you agree with that?

13   A. Yes.

14   Q. And that sell at a premium to commodity products.

15 Would you agree with that?

16   A. Yes.

17   Q. And for a cheese that has a 45 percent moisture

18 content, I would expect that the yields on a cheese like that

19 would be somewhat higher than for a 38 percent moisture cheddar

20 also. Am I correct there?

21   A. No.

22   Q. Okay.

23   A. Believe it or not, no. I know what you are saying that

24 Van Slyke would indicate otherwise, but that is not true for

25 fresh Mozzarella. Absolutely not.

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1   Q.   How about for feta?

2   A.   For feta, there would be a marginal increase in yield,

3 yes.

4   Q.   You get somewhere closer to 12 or 13 pounds per

5 hundredweight?

6   A.   Well, something higher than cheddar for sure. I mean,

7 a Van Slyke equation will give you some idea.

8   Q.   Yeah. So if you move the moisture content to 55

9 percent, you are going to add 20 percent or so or more?

10   A.   Well, the fat level, it depends on the fat and so

11 forth.

12   Q.   Sure. Okay. Would the Van Slyke formula give you

13 similar results for the fresh Mozzarella or is that different?

14   A.   No, it doesn't apply to fresh Mozz.

15   Q.   Would you have to use the modified Van Slyke formula

16 for that?

17   A.   No, I don't think any formula would work for that.

18 There's losses associated with fresh Mozz, and there's other

19 issues with marketing, you've got 45-day shelf life so you have

20 a lot of product returns. There's other nuances in that market

21 that, you know, that really you can't account for under some

22 simple, you know, you can't put an equation on it.

23   Q.   Yeah. And as noted, it's not a commodity product, it

24 is certainly not a market clearing product or anything of the

25 like, correct?

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1   A. Right. Right.

2   Q. I have a couple questions about your written statement.

3 Do you have a copy of that in front of you still?

4   A. Yes.

5   Q. I think the first question I had was on page 4. And

6 this is under the heading of your statement called Conclusions,

7 or titled Conclusions. First paragraph under bullet or

8 Section B.

9   JUDGE CLIFTON: Did you say page 4?

10   MR. MILTNER: I did.

11   JUDGE CLIFTON: Okay. Oh, okay, I'm with you now.

12 BY MR. MILTNER:

13   Q. So under B there, the last line of that paragraph, you

14 say, "since they" -- let me read the whole thing so we have

15 context. "Adopting the three cooperatives' proposal will wipe

16 out a substantial portion of the smaller cheese plants, and may

17 result in reduced processing levels by the larger cheese

18 plants, since they can move some of their volume to other

19 states."

20   Can you expand on that, "since they can move some of

21 their volume to other states." What do you envision happening

22 there?

23   A. What I think will happen is, so the three big cheese

24 companies, Leprino, Hilmar and Saputo, all have plants

25 out-of-state. I'm not sure, if you give me ten minutes I can

1 probably figure it out, but we know that Leprino has plants all

2 over the U.S.; Hilmar has at least one plant in Texas; and

3 Saputo has plants across the U.S., particularly in the Midwest.

4 And this is also based on what I heard at a CDFA hearing, it

5 was a comment, I believe, by Hilmar that milk will move

6 out-of-state, that they would move milk out-of-state. And I

7 think, my opinion is that Hilmar certainly has plenty of plants

8 around the rest of the U.S., in Colorado and New Mexico and so

9 forth, that I just think it will be more beneficial for them to

10 get closer to their markets with milk at other plants. I just

11 don't see any further expansion of cheese plants in California

12 if Proposal 1 was to be adopted.

13   Q. And the three companies you have mentioned, Leprino,

14 Saputo and Hilmar, they are, you have stated, they are large

15 processors, I don't think anybody would disagree with that. I

16 think your answer indicates that you believe they act

17 rationally economically, correct?

18   A. Correct.

19   Q. And as a result they seek efficiencies, which has led

20 partly to their success, correct?

21   A. Correct.

22   Q. Do you have any information to suggest that they have

23 the capacity to move their production from plants in California

24 to their other plants?

25   A. No, no specific information or intelligence. I believe

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1 Leprino has finished a recent construction, or is in the middle

2 of a major construction in Colorado. My understanding, and I

3 don't know this for a fact, is that Hilmar has capacity in

4 Texas. And as far as Saputo goes, I'm really not sure where

5 they have capacity, yeah.

6   Q. Part of what you do is you advise cheese makers on whey

7 processing capacity and abilities, correct?

8   A. Correct.

9   Q. And part of that, would it include a cheese plant

10 saying to you, "we want you to evaluate how large of a whey

11 processing component to incorporate into our plant"?

12   A. Or if they even make that decision, correct. Yeah.

13   Q. Okay. So if they decided they did want to add some

14 whey processing capacity, would you work with them to determine

15 how big it needs to be and what type of volume it should be

16 able to handle and things along those lines?

17   A. Yes.

18   Q. Would you ever advise a client to put in a whey

19 processing capability that had unused capacity in the hopes

20 that California would change regulation so that whey could flow

21 over, a product would flow over and you could capitalize on it?

22   A. Just to understand your question. Would I advise a

23 plant, a company to build more capacity than what they needed

24 so that they could take in outside whey?

25   Q. Well, so that they would have capacity to take

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1 advantage of regulatory changes that might happen in the

2 future?

3   A. No.

4   Q. Yeah. Okay. I think I have just one more question and

5 this is on the top of page 5. My understanding, I'm going to

6 read the first sentence there, "my understanding is that many

7 of these plants located in Federal Order areas operate as

8 nonpool plants and can pay for milk based on the market."

9   Okay. So that's what you have said. I'm trying to

10 figure out what you want to encompass with your the words

11 "these plants". Because in your previous paragraph you are

12 talking about California's specialty cheese business, and so

13 when you talk about "these plants" in the next paragraph that

14 are in Federal Order areas, are those also specialty cheese

15 plants, or does it encompass something more than that?

16   A. Yeah, I think it encompasses the entire spectrum of

17 cheeses.

18   Q. Okay. Thank you very much. I appreciate your answers.

19   A. Thank you.

20   JUDGE CLIFTON: Mr. Beshore?

21   CROSS-EXAMINATION

22 BY MR. BESHORE:

23   Q. Marvin Beshore.

24   Just a couple more questions, Mr. Murphy.

25   A. Okay.

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1   Q. In terms of the pricing relating to, the pricing of

2 milk as it relates to the product markets. We talked about,

3 you talked about the price of powder having come down from

4 highs a year or more ago and being, you know, at a lower level

5 now, and that that involves the buyers, the makers of powder

6 absorbing losses. Do you recall that colloquy we had?

7   A. Yes.

8   Q. Do you understand that milk pricing, the pricing of

9 milk for powder is not determined until after the end of the

10 month when the milk is actually processed?

11   A. Yes.

12   Q. Okay. And so that the price is determined based on the

13 actual product prices of powder that occurred during the month?

14   A. Yes.

15   Q. So that processors of milk for powder are not required

16 to pay a minimum price based on a powder value some months

17 previously, but on the value of powder actually sold, actually

18 sold during the month for which they are charged for the raw

19 milk, correct?

20   A. Right.

21   Q. So that keeps their price at, right with the market,

22 the milk price, with the market price of the manufactured

23 products being sold, does it not?

24   A. No.

25   Q. Does not?

1   A. No.

2   Q. Okay. You are assuming that the products, that the

3 powder being sold was processed some months before?

4   A. No. Well, well, actually, yes, I guess. What I'm

5 presuming is that when the market, when the market's coming

6 down, no one is selling powder. It ain't moving. So the

7 inventory is building, and that's really my point. And so

8 there's losses no matter which way you slice it.

9   Q. Because the inventory is building --

10   A. So as the inventory devaluation every month, yeah, and

11 that's not captured in the milk price.

12   Q. So you are assuming that the milk being processed is

13 not being sold?

14   A. In a down market, it's not being sold. There's no way.

15   Q. Even though there are transactions reported --

16   A. Sure. There are, the market just slims up, right.

17 Sure there's transactions, but you are not clearing your

18 warehouse, so inventories are building. That data is probably

19 publicly available, I don't look at it myself, but I think it

20 is available.

21   Q. Okay. But so when you are talking about losses, you

22 are primarily talking about, or maybe you are basically talking

23 about losses on inventory as opposed to losses relating to the

24 current manufacturer of the product?

25   A. Yeah, I think it is a matter of mixing words. I

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1 believe that P and L statements month-to-month in the sliding

2 market are going to be upside down, there's no way around it,

3 because inventories are building.

4   Q. If inventories are market-to-market, correct?

5   A. Yeah.

6   Q. Yes.

7   A. Yes, correct

8   Q. Okay. And when a market turns around, it works the

9 other way?

10   A. Correct.

11   Q. Okay. Let's look at Exhibit 96 a bit. And you have

12 referred to it in your testimony. I just want to, want to

13 understand. If you go from top to bottom, you know, you, I

14 think your testimony referenced a number of plants that -- that

15 do not have whey processing capacity in California. So the

16 first, the first category, Group 1 on Exhibit 96, is 17 of the

17 57 plants in California, correct?

18   A. Correct.

19   Q. Okay. And of course they don't process whey, but they

20 don't process enough milk to reach a rounded percentage of the

21 total milk processed into cheese, correct?

22   A. Correct.

23   Q. Okay. That's 17 of the 57. Now, the next 8 process in

24 aggregate .2 percent of the milk for cheese in California,

25 correct?

1   A. Correct.

2   Q. And they don't have whey processing capacity, correct?

3   A. Correct.

4   Q. Okay. So that's 25. Now, the next Group 3 of five

5   plants, those plants, again, in aggregate process .2 percent of

6   the milk processed into cheese and they do not have whey

7   processing capacity, correct?

8   A. Correct.

9   Q. That's what, 30? That's more than 50 percent of the 57

10   plants in California, and we have not reached one half of one

11   percent of the volume of milk processed into cheese in

12   California, correct?

13   A. Correct.

14   Q. Now, the next category, Group 4 has six plants, which

15   do not have whey processing capacity, and they, in aggregate,

16   represent .7 percent of the milk possessed into cheese in

17   California, correct?

18   A. Correct.

19   Q. Okay. So now we have got 25, 30, 36 of the 57 plants.

20   Is that, am I adding that right? 17 and 8 is 25, and 5 is 30,

21   and 6 is 36, correct?

22   A. Let's see,

23   MR. ENGLISH: Getting into calculations.

24   MR. MURPHY: We have 40 with the 4, or including number 4

25   Group 5?

1   MR. BESHORE: Oh, I wasn't at Group 5.

2   MR. MURPHY: So 36 before that, yeah.

3   BY MR. BESHORE:

4   Q. Okay. 36. And we have just a little over one percent

5   of the milk processed into cheese in California, correct?

6   A. Right.

7   Q. Okay. And if you go into the next group which does

8   have a whey processor, you get the 40 percent, and we could go

9   on down. You have some --

10   JUDGE CLIFTON: You said you get to 40 percent. You meant

11 40 plants?

12   MR. BESHORE: I did, thank you.

13   JUDGE CLIFTON: Okay. You're welcome

14   MR. BESHORE: Thank you, your Honor. I meant 40 plants, as

15 Mr. Murphy had added.

16 BY MR. BESHORE:

17   Q. And of course, skipping down to Group 9, the three

18 large plants which have whey processing capacity account for

19 56.4 percent of the milk processed into cheese, correct?

20   A. Correct.

21   Q. Now, the groups in between, that is Groups 5, 6, 7, and

22 8, which have, some of the plants process whey, but not all, is

23 it, in your knowledge of the plants and the industry in

24 California, is the whey processing roughly proportionate in

25 those groups? In other words, where you have got 1 and 4 that

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1 might account for roughly 25 percent of the volume in that

2 group? Where you have 1 and 3 it might account for roughly a

3 third?

4   A. I'm sorry, I don't understand the question.

5   Q. If you take Group 5 where you have 1 of the 4 plants

6 processes whey.

7   A. Okay.

8   Q. If we were just going to use this to come up with as

9 good an estimate as we could of the relationship of whey

10 processing to total production of cheese in California, would

11 it be reasonable to take 25 percent of the volume represented

12 in aggregate in Group 5 and consider that that was available

13 for whey processing?

14   A. Yes.

15   Q. Okay. And Group 6, a third of the volume we could use.

16   A. Yes.

17   Q. And it would be two-thirds for Group 7?

18   A. Right.

19   Q. And 80 percent for Group 8?

20   A. Correct.

21   Q. Okay. Thank you very much. That's all the questions I

22 have.

23   A. Thank you.

24   JUDGE CLIFTON: Mr. Vetne?

25   MR. VETNE: Thank you, your Honor. John Vetne, I am a

1 representative for Hilmar Cheese Company.

2   CROSS-EXAMINATION

3 BY MR. VETNE:

4   Q. I have enjoyed your testimony.

5   You indicated in response to some questions, that you

6 helped build a whey processing plant, or at least one in

7 Wisconsin, and worked with, consulted with whey manufacturers

8 in Wisconsin?

9   A. Correct.

10   Q. Okay. And if you look on page 3, numbered paragraph 3,

11 the sentence that concludes that paragraph, "movement of raw

12 unconcentrated whey in the entire state," you are referring to

13 the State of California. And then you go on, "when this is

14 commonplace in Wisconsin." Your testimony as to what is

15 commonplace in Wisconsin, is that based on your observed

16 experience in Wisconsin?

17   A. Yes, that's based on my direct experience.

18   Q. Thank you.

19   A. Yeah.

20   Q. So unlike Wisconsin, whey does move from cheese plant

21 to other plants for processing in California, but it's

22 concentrated in some form before it so moves; is that correct?

23   A. That's correct.

24   Q. Okay. And as I read your testimony, there are at least

25 three plants, I mean five plants, maybe only five plants, in

1 which some form of water removed or concentrated whey is

2 shipped from cheese plants to another plant or other plants for

3 processing, and those five are made up of the two plants that

4 you refer to in paragraph 3, RO whey solids, correct?

5   A. Correct.

6   Q. Plus the three plants that dehydrate the whey and

7 produce a liquid form of WPC-34, correct?

8   A. Correct.

9   Q. And the RO in paragraph 3, means reverse osmosis, which

10 is a means of taking the water out of whey; is that correct?

11   A. That's correct.

12   Q. Okay. Are you aware of a plant in Visalia known as

13 Milk Specialties?

14   A. Yes.

15   Q. Yes. That is a California plant that receives water

16 removed whey from other plants; is that correct?

17   A. That's correct.

18   Q. Okay. Are you aware of any other plants in California

19 that receive water removed whey from cheese plants?

20   A. Yes.

21   Q. There are others?

22   A. Yes.

23   Q. Are you able to identify them?

24   A. One is a direct client of mine, so just keep that

25 confidential for now. They receive liquid WPC-34, and another

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1 is, actually it is an animal feed company, that again, I'm the

2 broker on the deal, it receives RO whey into their plant.

3   Q. Okay. To further process the dehydrated whey or

4 partially dehydrated whey into animal products, correct?

5   A. Yes.

6   Q. Okay. Going back to your experience in Wisconsin, you

7 indicate that unconcentrated whey might move from a cheese

8 plant, or does move from cheese plants to whey processing

9 facilities in Wisconsin. Is the California practice of

10 dehydrating or partially dehydrating whey also used, that is,

11 taking some of the water out and moving it to whey plants in

12 Wisconsin?

13   A. I'm sorry, I'm mixed up on the question about whether

14 it is California or Wisconsin.

15   Q. The question is about Wisconsin. We have discussed

16 something that's commonplace in Wisconsin and that is, taking

17 unconcentrated whole whey and moving it from a cheese plant to

18 a whey specialty plant. In Wisconsin, is it also an

19 alternative practice at a cheese plant to RO or take some of

20 the water out and move it to a whey specialty plant?

21   A. Yes.

22   Q. So both methods are used?

23   A. Yeah, very common in Wisconsin, yeah.

24   Q. Okay. And whether we're talking about Wisconsin or

25 California, does the receiving plant, the whey specialty plant,

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1 engage in transactions with the cheese plant that supplies the

2 whey, there is a purchase and sale of the concentrated or

3 unconcentrated form of whey?

4   A. Yes.

5   Q. Okay. And although those transactions are not publicly

6 reported someplace in the aggregate, there are, nevertheless,

7 business transactions that are discoverable if a government

8 agency asked for them to be discoverable required for them to

9 be discovered, are there not?

10   A. Yes.

11   Q. Thank you. I think I heard from you two different

12 answers on commonplace use of cheddar prices to price other

13 forms of cheese. In response to one question I think

14 Mr. Beshore asked, you agreed that other cheeses are frequently

15 priced on cheddar price plus. And then later on, I think I

16 heard you say cheddar price plus or minus. Would it be more

17 accurate to say it's plus or minus depending upon the cheese?

18   A. It is more accurate to say plus or minus.

19   Q. Because moisture content may vary, fat content may

20 vary, and other things, correct?

21   A. Correct.

22   Q. At the bottom of page 3, you are talking about one

23 plant that can utilize your testimony says, a hundred percent

24 of whey solids into sweet whey.

25   A. Correct.

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1 Q. You are talking about the whey solids that come out of

2 the cheese making operation?

3 A. Yes.

4 Q. And is not the production of whey solids into sweet

5 whey, a process like any other process that involves some loss

6 of solids through the pipes, so a hundred percent is

7 unachievable, isn't it?

8 A. Yes, that's true.

9 Q. That's true. And when whey is transferred from a

10 cheese plant to a whey specialty plant for further processing

11 into whatever market they want, there are losses of solids in

12 the process of transferring the whey from the plant into a

13 truck, and then from a truck again, into the whey specialty

14 plant, correct?

15 A. Correct.

16 Q. And those losses by that process would rationally

17 exceed losses incurred by a cheese plant that had a

18 side-by-side whey processing facility, correct?

19 A. That's correct.

20 Q. Okay. All right. Now, do you have that exhibit, what

21 is it, 56, 96?

22   MR. ENGLISH: 96.

23   MR. VETNE: Exhibit 96 in front of you?

24   MR. MURPHY: Yeah.

25 BY MR. VETNE:

1   Q. I am asking you to, I will be asking you to infer to

2   your best ability, if you can, what product or product mix is

3   represented by the next to the last column. You see average

4   monthly pounds per plant, the next to the last column on that

5   exhibit?

6   A. Yes.

7   Q. Okay. We are there. Okay. Let's go to the bottom.

8   The total average monthly pounds per plant for all groups is 27

9   million pounds, closer to 28 million pounds, and the column

10   immediately preceding that has a total of almost 1.6 billion

11   pounds. I did the math and come up with a percentage that the

12   27 million pounds represents 1.75 percent of the 1.5779 billion

13   pounds.

14   Can you infer from that what product is represented by

15   the column, the totals 27, 28 million pounds? Let me precede

16   that with maybe another question. If you are just making sweet

17   whey powder you get about five percent from incoming milk,

18   correct?

19   A. Correct.

20   Q. So if 1.7 percent is less than 5 percent, this would

21   represent some form of concentrated protein product from the

22   whey stream, correct?

23   A. Correct.

24   Q. Okay.

25   A. Yeah.

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1   Q. And so go back up to the top, so the very first number

2 in Group 1, is 561,000 pounds of milk, of which, pounds per

3 plant for the whey stream is apparently 33,000 pounds. That's

4 also about 1.7 percent, so that was some concentrated form of

5 whey represented in the usage of that milk, correct?

6   A. Correct.

7   Q. Reasonable to infer?

8   A. That sounds correct.

9   Q. Go down the average monthly pounds per plant, 1, 2, 3,

10 4, 5, 6 -- to the 6th number down, 21 million.

11   Do you see that?

12   A. Yes.

13   Q. Okay. That's pounds for that group average and the

14 average incoming milk is 65 million. That represents about 30

15 percent. Would that, would it be reasonable to infer that that

16 represents the whey stream?

17   A. Yes.

18   Q. Okay. Okay.

19   JUDGE CLIFTON: I think we need to take a break.

20   MR. VETNE: I think we need to consult.

21   JUDGE CLIFTON: Yeah, that is very curious. All of that is

22 quite curious. Now, what I propose is this. Mr. Murphy, can

23 you stay with us for another hour or two?

24   MR. MURPHY: Yes.

25   JUDGE CLIFTON: You said, Mr. English, not two?

1   MR. ENGLISH: He does need to get back to San Francisco and

2   so I would like to get him done.

3   JUDGE CLIFTON: Okay. Mr. Van Nortwick would you come to

4   the microphone for just a minute? Mr. Van Nortwick? Before we

5   take our break, I just want to get the order of witnesses that

6   we're going to have. Mr. Van Nortwick, could you come to the

7   microphone? I just -- I just want to determine your

8   availability. All right. So I hear he's good and when I'm

9   ready, he's ready. Then I would like to finish Mr. Murphy

10   before I begin Mr. Van Nortwick. And that requires another

11   gentleman whose arrived to wait and I hope that will work. So

12   please confer during the break. We'll go back on record at

13   11:15. We go off record at 10:58.

14   (Whereupon, a break was taken.)

15   JUDGE CLIFTON: We are back on record at 11:15. Mr. Vetne?

16   MR. VETNE: Yes, your Honor. During the break, everybody

17   in the room reached a consensus that John was wrong in the

18   assumptions built into the last series of questions. Now I

19   have a Rosanne-Rosanna-Danna moment, "Never mind."

20   What those two columns show is actually milk pounds in

21   both cases. One is the pounds by group and the other is per

22   plant. So it's milk pounds in both cases, there are no product

23   pounds either indicated or inferred or inferrible. Thank you.

24   That's all. My questions are done. Thank you, Mr. Murphy.

25   MR. MURPHY: Thank you.

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1   JUDGE CLIFTON: Who next has questions for Mr. Murphy?

2 Mr. Vandenheuvel?

3   CROSS-EXAMINATION

4 BY VANDENHEUVEL:

5   Q. Rob Vandenheuvel, I'm with Milk Producers Council.

6   Good morning, Mr. Murphy.

7   A. Good morning.

8   Q. Just a couple of questions to clarify some items for

9 the record, and I will start with page 2 of Exhibit 117 of your

10 written testimony.

11   On the bottom half of page 2 you have got listed what

12 you qualify as facts, and there are five spreading from page 2

13 into the second half of page 3. I wanted to focus particularly

14 on number 2 there, and I'll go ahead and just read the part

15 that I was going to ask the question about or that I am going

16 to ask the question about. "Use of the dry whey powder market

17 value in the Class III pricing formula does not make sense and

18 it assumes that all plants utilize a hundred percent of whey

19 solids producing sweet whey." I'll stop there.

20   Is that really what the Federal Order Class III price

21 and USDA assumes in setting that formula? Do you believe

22 that's what they assume that a hundred percent of the plants

23 under the Federal Order formulas produce the products embedded

24 in those formulas?

25   A. My assumption assumes that if we're all going to pay

1 for whey, one would have to assume that one is processing whey.

2   Q. Do manufacturers who purchase milk, pay for whey or do

3 they pay for milk? What is delivered to their plants?

4   A. They pay for milk.

5   Q. They pay for milk. So whey is not something they pay

6 for, but rather dry whey is a component of the formula which

7 ultimately calculates that cost of milk, correct?

8   A. Correct.

9   Q. And so when we look at other end-product pricing

10 formulas in the Federal Order, and in fact, in the California

11 system, there are what we could call surrogate prices, would

12 you agree? Cheddar cheese, nonfat dry milk, Grade A butter,

13 and I think Grade AA butter I think actually and dry whey,

14 correct?

15   A. Correct.

16   Q. So these are surrogates, they are not representative of

17 what every manufacturer in either the Federal Orders or

18 California manufacturers, correct?

19   A. Correct.

20   Q. So, in fact, it's not a fact that USDA in structuring

21 the Class III pricing formula assumes that a hundred percent of

22 the plants make dry whey as part of their operation?

23   A. It's kind of like asking, does a butter powder plant

24 throw away the cream because you don't make butter? It's the

25 same difference on fat component. And it's, you know, the

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1 point is, that you are paying for your components. But in the

2 case of whey, the argument that Dairy Institute has always made

3 is that well, we got 13 plants here processing whey out of a

4 total of 57. I think that's kind of the argument that I'm

5 making.

6   Sometimes -- and I -- you are, in terms of the fact

7 that I guess the Federal Order is sure, they must be presuming

8 that everybody is processing whey, otherwise, why would we want

9 to pay for whey?

10   Q. Have we not established that manufactures don't pay for

11 whey, they pay for milk?

12   A. They pay for milk, correct.

13   Q. So again, it's -- it's not an assumption that, you are

14 not assuming, scratch that. Again, it is not a fact that USDA

15 is assuming every manufacturer that buys milk for cheese making

16 purposes is making sweet whey, as the statement suggests?

17   A. Correct.

18   Q. Okay. The page I would like to focus next on page 4,

19 the last full paragraph. And this is more of a clarification

20 for the record. Let me go ahead and read the sentence I'm

21 going to ask about: "I have been told that the proposed

22 Class III milk price increase by the cooperatives would have

23 averaged as much as $1.80 per hundredweight milk at times over

24 the pass few years."

25   The term there that I'm going to focus on is Class III

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milk price increase. Are you aware of the fact that the

formulas in Proposal 1 put forth by the cooperatives, is not an

increased Class I milk price, but rather the same Class III

milk price calculation as in all the other ten orders?

A.   Right.

Q.   So this could be read as, as a Class III milk price

increase, but you are acknowledging that this is not an

increase in milk price, regulated milk price above the current

Class III prices already used in all the other ten Federal

Orders?

A.   My indication here is for 4b.

Q.   Okay. So this is an increase above the --

JUDGE CLIFTON: I'm not happy. So you are talking, and you

are talking. I want to go back to your question, because you

inserted Class I in your question while you were talking about

Class III, just inadvertently. We all do it. So start again

and take turns.

BY MR. VANDENHEUVEL:

Q.   Okay. Well, I assume the part where I read that

sentence in is okay, and so I'll start at that point. You are

aware that the Class III milk price calculation in

Proposal Number 1 is the same milk Class III milk price

calculation that exists in the other ten Federal Orders?

A.   Yes.

Q.   And then you explained, so I'll let you explain what

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1 you meant by increase there?

2   A. So I meant, yeah. I meant comparing this with

3 Class III with Class, California Class 4b.

4   Q. Okay. So the reference to the word increase there,

5 even though California Class 4b does not appear in that

6 sentence, the word increase is compared to the California

7 Class 4b price?

8   A. Correct.

9   Q. Okay. Later in that sentence, or in that paragraph,

10 you use the term, you calculate that $1.80 and it appears you

11 divide that by 10, which gets you to an 18 cents per pound of

12 cheese value. Am I doing that calculation, correct?

13   A. Yes.

14   Q. Okay. And that is based on what you are estimating as

15 a cheese yield, ten pounds per hundredweight of milk?

16   A. Correct.

17   Q. And then you go on and say that that 18 cents per

18 hundredweight would eliminate any potential profitability.

19   Do you see that?

20   A. Yes.

21   Q. Now, I'm going to focus on the $1.80 per hundredweight.

22   JUDGE CLIFTON: Now, when you are talking about the 18

23 cents, are you wanting to ask him about 18 cents per

24 hundredweight or are you wanting to ask him about 18 cents per

25 pound?

5404

1   MR. VANDENHEUVEL: Well, I was referencing the 18 cents per

2 pound would eliminate any potential profitability, that clause

3 in the statement.

4   JUDGE CLIFTON: Okay. Go ahead and ask it again, please.

5 BY MR. VANDENHEUVEL:

6   Q. Okay. Well, do you see the statement that you make

7 that the, "for the smaller cheese plants, because this," okay.

8 "Wipe out a substantial portion of the smaller cheese plants

9 because this 18 cents per pound would eliminate any potential

10 profitability."

11   Do you see that statement?

12   A. Yes.

13   Q. Now, I'm going to focus actually on the $1.80 per

14 hundredweight, because as we discussed in an earlier question,

15 cheese manufacturers buy milk, they don't, and it is on a per

16 hundredweight basis. But what you have basically stated, would

17 it be fair to say that your claim is that an increase of $1.80

18 per hundredweight in the milk cost of a cheese manufacturer

19 would eliminate any profitability? Can I make that same

20 characterization, since it's just a difference of whether you

21 convert it into cheese or whether it is measured in milk?

22   A. Yes.

23   Q. Do you, when a cheese manufacturer decides to build a

24 plant in any location, they make a calculation as to what their

25 cost of operation would be, including operational cost, input

1 of raw materials, labor, overhead and all that sort of thing,

2 correct?

3   A.   Correct.

4   Q.   And they would then make estimates as to what the

5 market value or what the sellable value is of the products they

6 are making, correct?

7   A.   Correct.

8   Q.   And they would hopefully have a margin in between

9 there, correct?

10   A.   Correct.

11   Q.   So with that assumption, do you have data beyond a

12 general statement about 18 cents per pound that we referenced?

13 Do you have data that shows that the overall margins of a

14 cheese manufacturer or of the small, smaller cheese plants you

15 reference, that that would eliminate, an increase of $1.80 per

16 hundredweight in milk, would eliminate any potential

17 profitability. That's a pretty strong statement. Do you have

18 data showing what the margins are for some of these smaller

19 cheese manufacturers? Data that can be shared?

20   A.   I don't have any data here with me today. But just to

21 give you, I'll give you two examples. One is, I have worked on

22 some large projects, just I know the discussion here is on

23 small specialty cheese plans, but I have worked on large cheese

24 projects, and adoption of Class III in California, would

25 absolutely, without a doubt, just kill any potential

5406

1 investment, in say a hundred to 2, $400 million project, any

2 major cheese plant. It would absolutely just kill the project,

3 number one. And then number two, now for that I do have data,

4 I would have to get that to you. However, where I have looked

5 at various projects over the years where I could show that, it

6 would just kill the return on investment. It would just would

7 knock the project off its rails completely.

8   My experience with that, just to give you some

9 reference that people may be aware of, the most common kind of

10 well-known project that I have worked on over the years is a

11 project called Blue Ribbon Cheese Company. I have done a lot

12 of work on that. Now, as far as smaller specialty cheese

13 plants go, specialty cheese plants, so I don't have any data

14 again with me, and I would need permission, since this data

15 would be confidential. I consult and work with a smaller

16 cheese company in California today, that makes some specialty

17 cheeses. It's about two and a half year-old business. And my

18 belief, my strong belief is that the adoption of a Class III

19 Federal Order type pricing proposal as in Proposal 1, would

20 absolutely cripple this company. It would just take it down.

21   Even some of my clients, my whey protein clients, I'm

22 going to mention one here even without permission, it would be

23 Farmdale Creamery. I don't think that they would survive this

24 because they make cheddar cheese. There's just no way they

25 would survive a Class III-type Order. It's not going to

1 happen. That's my genuine belief.

2   And, you know, like I said, some of this data it's is

3 not my data, it is confidential proprietary company data, and

4 perhaps I could ask for it if it was required at a later date.

5 I don't know if I can get my hands on it or not.

6   JUDGE CLIFTON: You are not required to try. First of all,

7 we have honored the proprietary nature or trade secret nature

8 of such data, and you are not testifying on behalf of the

9 client, you are testifying on your own behalf and based on your

10 own experience. So it is not necessary for you to try to get

11 the data.

12   MR. MURPHY: Okay. Thank you.

13   JUDGE CLIFTON: And we appreciate the experience you bring.

14 It is very helpful to us.

15   MR. MURPHY: Okay.

16 BY MR. VANDENHEUVEL:

17   Q. Thank you, your Honor. And yeah, I wasn't asking to

18 breach any confidentiality. In your response, however, is it

19 fair to say that while you reference data that maybe you have

20 access to, you are not able to provide the data, so it is

21 largely characterizations that are included in your testimony,

22 and even in your statement just now, this is not data that you

23 are sharing, it is your opinion of your interpretation of that

24 data.

25   A. Correct.

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1   Q. You mentioned Blue Ribbon Cheese Company, you worked on

2 that project?

3   A. Yes.

4   Q. Can you tell us a little bit more about what that

5 project was? I believe that was in California?

6   A. I think it's been a few years, that was a three

7 million, I think, start up, maybe going to six million pounds

8 of milk a day, encompassed, it was for Mozzarella, so it was,

9 it would have competed with Hilmar, oh, sorry, it would have

10 competed with Saputo and Leprino. There were some partners

11 involved in that project at the time, so big pizza companies

12 that would want the Mozzarella, and there was a European

13 investor on the whey side, the whey protein side. And it did,

14 the project actually collapsed in the financial crisis of '08,

15 '09, in that timeframe due to just project financing vanished

16 overnight, obviously, with the financial collapse.

17   Q. During the time that that plant was being considered,

18 the plans were being developed to build that plant, the

19 California Class 4b price that was in place at the time, and

20 part of all the assumptions going into building that plant, do

21 you know the relationship the Class 4b price had compared to

22 the Federal Order Class III price at that particular moment?

23   A. Back in '08, I don't remember. It is all, obviously it

24 is driven by the whey market, wherever the whey market was at,

25 I think, so anything above the make allowance obviously would

1 have an impact on it, or above the 4b formula. And the 4b

2 formula was different than what it is now, so I don't remember

3 exactly now, no.

4   Q. The planning that went into Blue Ribbon Cheese, do you

5 remember the approximate time when that idea started to develop

6 and some of the work in developing the plans to build a plant,

7 do you know approximately the time period? Was it 2007, 2006,

8 earlier?

9   A. Yeah, it was, let's see, it would have been, it would

10 have been the early 2000, like 2004, 2005 to like 2008, 2009,

11 yeah.

12   Q. So a good portion of that planning period would have

13 been at a time when the California Class 4b price maintained an

14 end-product pricing formula for dry whey in our Class 4b

15 formula, not a scale that we operate now?

16   A. I'm not sure. I don't remember that.

17   Q. Do you recall a hearing, which I believe you testified

18 in, in 2007, in October, when CDFA decided to change to a fixed

19 dry whey factor in the Class 4b formula?

20   A. Is that when the 4b, so that's when there was just,

21 there was a total change in how the 4b whey factor --

22   Q. This is a hearing in the 2007 when the small cheese

23 manufacturers petitioned for a hearing. Do you remember that?

24   A. I don't remember, but if I testified, I testified,

25 yeah.

5410

1   Q. So you don't remember if prior to that hearing we

2 operated an end-product pricing formula that kept our Class 4b

3 price closer to the Federal Order -- wait for me to finish,

4 because I don't want to talk over you -- you if you don't

5 recall the details of that hearing, do you recall that a

6 hearing took place at some point, and prior to that hearing we

7 operated in California an end-product pricing formula for dry

8 whey that maintained the closer relationship, that allowed our

9 Class 4b price to keep a closer relationship to the Federal

10 Order Class III price?

11   A. I have some recollection of that, I just don't remember

12 the timing.

13   Q. Okay. And then finally, just to follow up, when I had

14 asked you about data on the small cheese businesses, some of

15 the early comments you made in the response to me was with

16 regard to some larger operations. I mean, Blue Ribbon Cheese

17 Company you mentioned was a 3 to 6 million pound per day

18 operation. But in terms of your comment, which as I noted on

19 page 4 was related to smaller cheese plants, you have testified

20 earlier that the smaller cheese plants often make specialty

21 products, correct?

22   A. Yes.

23   Q. And that an analysis of that plant's margins could not

24 be fairly assessed based on cheddar assumptions that we often

25 talk about in the regulated prices, but they have their own

1 market prices for those specialty products and their own cost,

2 to be fair --

3   A. Sure.

4   Q. -- but their own margin calculations for those plants,

5 correct?

6   A. Correct.

7   Q. And that specialty cheese plants of that nature with

8 higher value end-products operate all over the country in

9 Federal Order areas and outside of Federal Order areas,

10 correct?

11   A. Correct.

12   Q. That's all I have. Thank you.

13   JUDGE CLIFTON: Thank you, Mr. Vandenheuvel. Who next has

14 questions for Mr. Murphy? Mr. Zolin?

15   MR. ZOLIN: Alan Zolin.

16   CROSS-EXAMINATION

17 BY ZOLIN:

18   Q. Mr. Murphy, just one follow up question about

19 Blue Ribbon Cheese. Is there another entity that picked up

20 that cheese plant in Tulare, California, that you are aware of?

21   A. Yes. I'm not very aware of it, but yes, I have heard

22 that.

23   Q. Do you know the, do you know the name of who that would

24 be?

25   A. The new entity name?

                        5412

1   Q. Yeah?

2   A. No, I don't.

3   Q. Are you involved with the group that's working there?

4   A. No.

5   Q. Okay. Thank you.

6   JUDGE CLIFTON: Who else has questions for Mr. Murphy? I

7 would invite redirect and then I will ask if Mr. Francis has

8 questions.

9   REDIRECT EXAMINATION

10 BY MR. ENGLISH:

11   Q. Thank you, your Honor. Chip English.

12   Just a couple of questions.

13   In discussing with Mr. Beshore the conversation about

14 inventories being carried into a down market with losses, he

15 then said, and I'm not sure if it was an implication or not,

16 but he said, "but then in an up market, you know, you will make

17 money on the up market." You remember that part of the

18 discussion?

19   A. Yes.

20   Q. In your experience, in the market that you have dealt

21 with, buyers look for the bottom of the market, and as soon as

22 they think it's going to go up, what do they do?

23   A. They want to buy all around them.

24   Q. So you get the full loss going down, right? Correct?

25   A. Correct.

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1   Q. And you don't necessarily get the full gain going up

2   because your buyers are trying to get you down at the bottom of

3   the market, correct?

4   A. Correct.

5   Q. Okay. So then, and I think Mr. Vandenheuvel sort of

6   got to clearing this up a little bit, we're appreciative, but

7   Mr. Beshore asked you some questions relative to cheddar

8   prices, and specialty cheese, and I think he asked you one

9   question, well, if you have a specialty product, it might get a

10   cheddar plus price, correct?

11   A. Correct.

12   Q. Would it be true that it also then has a cost plus

13   element?

14   A. Yes.

15   Q. And he then said, "Well, if you have a really specialty

16   cheese, you might get price plus, plus, plus." And you agreed.

17   Right?

18   A. Yes.

19   Q. Would you also have cost plus, plus, plus, in your

20   experience?

21   A. Of course, yes.

22   Q. That's all I have.

23   JUDGE CLIFTON: Mr. Beshore?

24   RECROSS-EXAMINATION

25   BY MR. BESHORE:

                              5414

1   Q. Marvin Beshore.

2   Just one real quick follow up. Whether you make money

3   or lose money on selling those inventories depends on how well

4   you price them, right?

5   A. Right.

6   Q. Yeah, it's not just automatic that, you know, you sell

7   it all at the low, and you buy it, and you make it all at the

8   high, correct?

9   A. Sorry, would you rephrase?

10   Q. No, I'll leave it at that. Summary, whether you make,

11   whether it's profitable selling inventories depends on how you

12   price them with respect to the market movements of price,

13   correct?

14   A. Sure. Correct.

15   JUDGE CLIFTON: Mr. Francis, do you have questions for

16   Mr. Murphy?

17   MR. FRANCIS: Yes.

18   RECROSS-EXAMINATION

19   BY MR. FRANCIS:

20   Q. Yes. Thank you. Will Francis, USDA.

21   Thank you, Mr. Murphy, for appearing in our hearing and

22   your testimony. I just want to clarify a few things. In your

23   direct testimony, in your written document you clearly indicate

24   you are opposing Proposal 1, and you're supporting the

25   Dairy Institute of California's alternate proposal, Proposal 2.

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1 And from the context of the rest of your testimony, my

2 understanding is that you are, we have introduced a separate

3 Exhibit 15, so in the Notice of Hearing we had some language

4 that we included as Proposal 2 that referenced dry whey

5 products in the formula. And in Exhibit 15 there was an

6 additional proposal which the Judge is allowing in to be

7 discussed relative to liquid whey values. And so I wanted to

8 clarify, are you here testifying to that additional alternate

9 proposal to price the formula using those liquid whey values?

10   A. Yes.

11   Q. Okay. And maybe, I want to try to pick your brain

12 because you have knowledge and experience in brokering or

13 buying and selling both liquid whey products and dry whey

14 products. So if we can explore that a little bit.

15   To your knowledge, are there publicly available sources

16 of market information, meaning reported prices for those

17 products? And if so, can you help us by describing some of

18 those sources of information?

19   A. For --

20   Q. For both liquid whey and dry whey products?

21   A. Okay. No, there is, there are no published prices.

22 They are generally indexed, indexed off the published AMS Dairy

23 Market News prices for either western whey, or in California at

24 least it's western whey, or western WPC-34.

25   Q. Okay. And that would be a liquid WPC-34?

1   A.   Yes.

2   Q.   Okay. How about sources of information for dry whey

3 products?

4   A.   If you are to sell liquid whey in California? So it

5 would be again, if it was to be indexed, it would be indexed

6 off the, off the western average of the Mostly for dry whey as

7 published by the Dairy Market News.

8   Q.   Okay. So we're talking about two separate price

9 series, both reported in AMS Dairy Market News?

10   A.   Yes, so there's a dry whey powder western average and

11 there's a WPC-34, Whey Protein Concentrate 34 western average.

12   Q.   And those are a price series that you routinely track

13 and have knowledge of in the course of your business?

14   A.   Yes.

15   Q.   And do those prices tend to move together or what is

16 their, is there a relationship between those prices?

17   A.   Yeah. Long-term there's a good correlation, but in the

18 short-term, no, they do de-couple.

19   Q.   Okay. On page 2 of your testimony, where you, before

20 the section labeled Facts, in that last sentence says "all ten

21 of these companies dispose of greater than 85 percent of whey

22 solids as animal feed at little or no value." Can you help me

23 understand what you mean by "greater than 85 percent"?

24   A.   Yes. So if you look at milk solids, so typical

25 Holstein milk is running 12 plus percent milk solids, so when

5417

1 you make your cheese, you end up with whey from that cheese

2 with 6 percent of those solids, or 6.25 or 6.35, they are

3 typically the standard numbers, so half the solids end up in

4 the whey. But in that 6.25 percent whey solids, 0.6 percent of

5 it is recoverable protein. For either, whether it is 34 or

6 whether it is WPC-80 or any other product. So then that's

7 really what I'm referring to as the 85 percent the other

8 solids. So of the, of say 6.25 percent solids in whey, if I,

9 if we can recover 0.6 as protein, so that leaves 5.-something,

10 which represent, that's where that 85 percent number comes

11 from. And typically, typically almost a hundred percent of the

12 time or anywhere where UF is used, you are going to have that

13 85 percent for disposal.

14   Q. Okay. And that's typically in a liquid form?

15   A. Yes.

16   Q. That gets shipped out?

17   A. Yeah.

18   Q. And where you say little or no value, is there a market

19 price for that?

20   A. So if it's in its own concentrated form, it will cost,

21 as I mentioned in my testimony, about $250 just to haul it off,

22 if it is in the 5 and a half percent solids form. If it's

23 reverse osmosis concentrated, it has some value as animal feed,

24 limited. And I'm not sure that there's any profit in it

25 because of the cost of running those reverse osmosis systems.

5418

1 I'm not convinced that there's actually any real, I mean, sure

2 there's an environmental benefit, you do reduce the number of

3 loads that need to be hauled off, there is some revenue from

4 selling it as animal feed solids, but I'm, I'm not convinced

5 that there's any profit in it. My guess is it is break even.

6   Q. Okay. And that's consistent with some earlier

7 testimony that we have heard. So you are really talking about

8 sort of the net. There's some savings involved in

9 environmental benefits and foregone costs associated with that,

10 you do receive and revenue but --

11   A. Especially haul rates. So you save in haul rates.

12   Q. Okay. And continuing on the next page, on page 3, you

13 do reference some haul rates, and I was trying to follow along.

14 First, in item 3 on page, the top of page 3. You talk about

15 whey powder value, and I think you are talking about that in

16 reference to the RO'd liquid, and it seems like you are

17 implying there's a price relationship somehow between a

18 powdered value and the liquid value. Maybe -- I'm trying to

19 understand.

20   A. Oh, yeah, so what I'm -- excuse me -- what I'm saying

21 here at the top of the first sentence, RO whey solids, so in

22 reverse osmosis you capture almost all of the whey solids.

23 Okay? So the relationship of ROA solids would be to whey

24 powder, there's somewhat of a direct relationships because you

25 have got all of the solids, that's really what I'm saying

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1 there, is that the, if you take ROA solids and deliver them to

2 the, let's say a calf medical replacement plant, which is what

3 I do, the value is 50 to 70 percent of the whey powder market,

4 that's what I'm saying there.

5   Q. And then you have got some hauling costs?

6   A. Yes.

7   Q. That you are netting out?

8   A. Yes.

9   Q. That helps. And later on in that section you do refer

10 to some specific values of cost of moving liquid whey products.

11 And so maybe just to explain a little more, there's, you

12 referenced in comparison what happens in Wisconsin. Is it, you

13 know, typically you are not moving liquid whey out of a cheese

14 making plant, that there are facilities that dry it in-house,

15 and so that hauling portion doesn't really come into play. But

16 in California, the typical, if there is revenue to be obtained

17 from the market, you are hauling some form of liquid whey

18 through the market, either to a further drying facility or some

19 other facility. So I'm trying to understand some of the

20 relationships here.

21   So your example is that you are hauling WPC-34 300

22 miles and that's $1,200 per load, and I'm assuming that's a

23 full truck load of liquid WPC-34?

24   A. Yes.

25   Q. Okay. And then you talk about, in the next sentence,

hauling from City of Industry, California to Tulare, at a

different miles and you reference a backhaul cost. So what was

on the original haul versus how this compares to the backhaul,

and what are you hauling both ways?

A. I believe there's milk going down and whey coming back.

And the reason I put the back, I just wanted to be fair because

I know the freight rate is $475, which is actually low, and

then my question was why is it so low? It's because it is a

backhaul. Whereas, on the Land O'Lakes out of Orland, it's a

direct haul, there's no backhaul from what I understand on

that.

Q. Right. And so milk, farm milk, goes down, and

somebody's already paid for that haul?

A. Yes.

Q. And you're back hauling an RO'd liquid whey product

back to Tulare?

A. Correct.

Q. Okay. And that 475 is specific to that distance for a

full truck load?

A. Yes. Specific to that particular deal where there's

maybe a load a day of RO whey or a load, I forget the number

now. It is a specific, so the deal is set up on the number of

loads per week.

Q. Yeah. Okay. And then just finally later on in that

section, on number 5, you talk about small cheese plants that

1 pay $250 per load. Is that a full truck load or a partial, or

2 a different type of hauling?

3   A. For this particular example?

4   Q. Yes.

5   A. It, yeah, it is a full truck load, but it doesn't

6 matter. It could be a partial or a full it is going to be

7 $250.

8   Q. It is a flat rate for hauling?

9   A. Yeah.

10   Q. Okay. I think that's all the questions we have at this

11 time. Thank you very much.

12   A. Thank you.

13   JUDGE CLIFTON: Mr. Murphy, I need help understanding your

14 response to Mr. Francis' first question. You gave an example

15 of the Holstein milk having 12 percent protein content? Did I

16 get that right?

17   MR. MURPHY: No.

18   JUDGE CLIFTON: 12 percent what content?

19   MR. MURPHY: 12 percent total solids.

20   JUDGE CLIFTON: Total solids. Now I understand. Okay.

21 Thank you. Do you have any comments to make, since you

22 understand these prices, do you have any comments to make about

23 California's fortification of milk and how that changes things?

24 When you have to price milk and so on, and determine whether a

25 plant would be profitable, does the fact that California

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1 requires fortification of milk enter into your analysis at all?

2   MR. MURPHY: No. Fortification of milk doesn't apply to

3 the cheese side. It is my understanding is that that's Class I

4 milk solids for drinking milk only.

5   JUDGE CLIFTON: Okay. All right. So else has questions

6 for Mr. Murphy? Any further redirect? Mr. Murphy, you have

7 been an extremely valuable witness and I thank you so much for

8 coming. And you are free to step down.

9   MR. ENGLISH: Chip English for the Dairy Institute. We

10 would yield at this point to whoever is next, whether it's

11 Mr. Vandenburg or whomever.

12   JUDGE CLIFTON: I would like to call Mr. Van Nortwick.

13 Mr. Van Nortwick, if you will have a seat in the witness stand

14 to my right. Welcome.

15   MR. VAN NORTWICK: Thank you.

16   JUDGE CLIFTON: I'll swear you in in a seated position. If

17 you would raise your right hand, please.

18   Do you solemnly swear or affirm under penalty of

19 perjury that the evidence you will present will be the truth?

20   MR. VAN NORTWICK: Yes, your Honor.

21   JUDGE CLIFTON: Thank you. Please state and spell your

22 name.

23   MR. VAN NORTWICK: Tom Van Nortwick, T-O-M, V-A-N,

24 N-O-R-T-W-I-C-K.

25   JUDGE CLIFTON: What are your connections to Agribusiness

1 Publication?

2   MR. VAN NORTWICK: This is a 40 year-old company that I

3 took over for my father in 2002 for him, operated his company

4 until he passed away. And we are publishers of farm magazines,

5 including the Agribusiness Dairyman magazine for the last 35

6 years. Approximately.

7   JUDGE CLIFTON: I have mentioned your website several

8 times. And I'm the one who asked you to come and testify

9 today. I'm very grateful for the capturing of the audio feed

10 in pieces of recording so that we can play those from the

11 website.

12   I also asked you to testify because I'm involved in an

13 e-mail chain with you and Laurel May. And I just wanted to ask

14 you about that.

15   I started this e-mail chain that included you and me

16 and Laurel May, with regard to looking at the website that

17 included exhibits and transcripts and so on, and I had some

18 suggestions; is that correct?

19   MR. VAN NORTWICK: That is correct, your Honor.

20   JUDGE CLIFTON: All right. And so Ms. May and I were

21 included in another communication that included more than just

22 the three of us, it included one of the witnesses this that had

23 testified.

24   MR. VAN NORTWICK: That is correct.

25   JUDGE CLIFTON: All right. And you included us because it

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1 had to do with the audio feed; is that correct?

2   MR. VAN NORTWICK: Yes, two reasons. That, and the witness

3 had mentioned the atmosphere that had existed when she

4 testified which contributed to her, that witness, being better

5 able to share her testimony here at that time. And so I was

6 anxious to -- it's something that needs to be said, I'll talk

7 briefly about it just very quickly, so for those two reasons.

8 The audio that we will provide for her of her testimony and

9 then as it relates to the entire hearing.

10   JUDGE CLIFTON: Very good. Well, I am very grateful for

11 what you are doing to enhance the ability of others to see what

12 goes on here, though they may not have the opportunity to be

13 here in the room at any point during the hearing. Did I

14 explain to you that I was concerned that being included in that

15 e-mail involved more than just procedural items, it actually

16 was you presenting a viewpoint that others here should hear and

17 have the ability to cross-examine you on?

18   MR. VAN NORTWICK: That is correct, your Honor.

19   JUDGE CLIFTON: All right. And so I also invited you,

20 while you are here, to address that issue, to read that e-mail

21 into the record, but also to testify about anything you would

22 like to about the dairy industry in California; is that

23 correct?

24   MR. VAN NORTWICK: You did, you did make that invitation.

25   JUDGE CLIFTON: All right. Well, let's start with the

1 e-mail. My point in asking you to read it to everyone is so

2 that if there's anything in there that anyone would like to ask

3 you questions about, they have the right to cross-examine you.

4 This is my way of curing what would be an ex parte

5 communication. So I would like to explain right now before you

6 read the e-mail, what the difference is between an ex parte

7 communication and a procedural one.

8   A procedural communication is something like an e-mail

9 to Jill Clifton saying, "I'm late", "I'm running late", or an

10 e-mail to William Francis saying, "we have just gotten word

11 that one of our witnesses for tomorrow will be Joe Dokes".

12 Those are just about timing or we call them non-substantive.

13 They don't -- they don't have an opinion about the proceeding

14 and the way it should come out. Those are fine. But when a

15 communication is persuasive, it has to be shared with everyone,

16 so that is what this is about to begin with.

17   Now, we're distributing a copy of the e-mail. Thank

18 you, Mr. Van Nortwick, for bringing copies. I think we should

19 mark this as the next exhibit, that would be Exhibit 118; is

20 that correct, Ms. Elliott?

21   MS. ELLIOTT: That's correct.

22   (Thereafter, Exhibit Number 118, was

23   marked for identification.)

24   JUDGE CLIFTON: Raise your hand if you need a copy of

25 Exhibit 118? Are there anymore? Please raise your hand if you

1 need one, there are more. If the copy machine is having

2 trouble don't worry about it, everyone has a copy.

3   And I thank you very much, Mr. Van Nortwick, for making

4 these copies and bringing them to us. All right. So let's

5 start with your testimony just reading into the record your

6 e-mail, if you don't mind.

7   MR. VAN NORTWICK: Can I do a little preamble to this?

8   JUDGE CLIFTON: Certainly.

9   MR. VAN NORTWICK: I'm reminded of a time my father got me

10 a Timex watch, I was 10 or 11 years old. It was really great

11 because it had to be wound. Remember, some of you can still

12 remember when we wound our watches. And dad said to me, "Tom,"

13 because that was my name, of course, and so he -- just for

14 Chip's clarification -- he called me Tom, and so he said, "Tom,

15 only wind that once a day and just enough. Not too much, just

16 enough." And so a day or two had gone by, but that winding was

17 just too much fun and I had wound it and wound it and wound it,

18 and pretty soon, guess what? The watch no longer worked.

19   So I got the brilliant idea to take out my pocketknife,

20 turn that watch over, bend the band back, because the band

21 would flip over, and laid the watch down. And about the time I

22 used my blade of my pocketknife to pop the back of that watch

23 off, my dad walks in the room. And he said to me, as only

24 fathers can, he said, "Tom, there are only two kinds of people

25 that pull the back off a watch." He said, "One is a jeweler

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1 and the other is a fool." "I did not know you were a jeweler,"

2 he said.

3   And so I liken today's experience, and in fact, this

4 entire hearing as me pulling the back off of the milk watch.

5 And there's only my father saying to me, "There's only two

6 kinds of people, Tom, that would pull the back off of a milk

7 watch, and one would be Mr. Vetne and the other would be a

8 fool." And so I have pulled this watch cover off. But it is

9 fun to come here because you have done an excellent job, and I

10 have to extend to you my compliments to Judge Clifton, and to

11 the staff, and to the people from the USDA, the attorneys, for

12 the work that you are doing, and the leadership provided by the

13 co-ops. I have not always been the biggest fan of co-ops. If

14 you read my stuff, we have butted heads before. But the

15 leadership exhibited, which is so huge, the vacuum of

16 leadership in this industry from the producer sector on in our

17 local and state county governments on, I am a big advocate that

18 we have all got to step up and do more and lead when we, in the

19 vacuum of leadership. So my compliments.

20   And I don't think it is by chance that Judge Clifton is

21 here. I don't know how that process happens, but in my

22 opinion, it has made all the difference. And I have had that

23 expressed to me many times from other people. And that was

24 part of Barbara's conversation with me after this e-mail was

25 sent, that she was so grateful that this Judge was here on that

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1 day for her. She felt that. And I was listening, and I could

2 hear in Judge Clifton's voice, the empathy necessary to

3 understand what Barbara was going through that day. And that

4 the gentle nature that she used in dealing with that. And the

5 complimentary positive nature she really does for all of us who

6 have witnessed her efforts on behalf of this hearing. So my

7 congratulations from the private sector.

8   It's reaffirmed a tremendous appreciation I have for

9 what you are all doing. It's amazing to come this far and to

10 have this many people that know this much, in one place at one

11 time. And I wish everybody could gain a greater appreciation

12 for what is transpiring. And regardless of the outcome, you

13 have been able to assemble what is probably undoubtedly the

14 most in-depth group of people relative to milk. And I don't

15 know why it is so complicated, I still don't get that part,

16 but, oh boy, is it complicated.

17   So from that, I have opened this back of the watch, and

18 I'm still learning. And five years ago, six years ago, seven

19 years ago, I worked with a group of dairy producers to form the

20 National Dairy Producers Organization with Doug Maddox and Bill

21 Rowell, and some great men who felt there needed to be a

22 change, and there needed to be a change in the way producers

23 represented themselves and what they did. And it was a great

24 learning experience for me.

25   But I, by no means, have any educational background in

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milk. Agriculture was my major, I wanted to be a veterinarian,

didn't work out. I have been in publications and publishing

through most all of my career one way or the other. And so

sales and marketing is my expertise. And if you will, you

don't know this, but IBM once commissioned a study by

consultants, and I make no disparaging remarks about

consultants, but they were called in and paid $4 million by IBM

to figure out what was wrong. And they studied, and they

studied, and they came back and everybody gathered together in

a big room and IBM was there, and the consultant came, and they

said, "Gentlemen, we have figured out the problem and the

problem is low sales. And the solution to that problem is,

more sales." Four million bucks to find out the solution to

the problem.

And so, and I think that from a marketing standpoint,

milk suffers from that. Only one time did I hear somebody -- I

was so grateful to hear it, somebody sat right here and talked

about the taste of milk. Do you know that in 49 states in this

country we do not fortify milk to California standards, and

therefore reduce the nutritional value and the taste of milk?

Why would we do that and then expect that sales are going to

grow. And then most of all, I want you guys to envision

Valentine's Day. You have got a special young lady or, in my

case we're a lot older now, that you are going to buy

chocolates for. And you go and purchase a box of chocolates,

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1 but you specifically look for the one that on the front of the

2 box it says lowfat chocolate.

3   Now, what kind of response do you think you are going

4 to get from your significant other, or the one you are intended

5 to impress if the front of the box says lowfat chocolate.

6 Chocolate's not meant to be lowfat. We're not supposed to put

7 our garbage milk into chocolate milk. You drink Barbara's

8 chocolate milk back there, you know you got something worth

9 having. So there's some little marketing things that we could

10 be working on. We spend a lot of money on marketing and sales

11 are going down in a lot of areas where they shouldn't be, and

12 so there's some issues.

13   Anyway, but I'm in sales and marketing. It's all about

14 getting something sold and getting a fair price for it.

15   Barbara,

16   I just -- me and the former speaker -- I just wanted

17 you to know how impactful your testimony was today at the FMMO

18 hearings in Clovis. I have now listened to hundreds of hours

19 of testimony, and no one has done a better job of putting to

20 voice these words that are so tender and so near one's heart so

21 as to almost be unspeakable. You did, without exception, what

22 so badly needs to be done to properly represent the levels of

23 heartache and heartbreak that producers and their families have

24 faced in this state, and, in fact, throughout the entire

25 country. It was an honor to hear it as you said the words

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1   while I was not in the room not having known you were to

2   testify. I am so grateful to have been listening here in the

3   office and to share in your tears in a private setting so as to

4   not to have to divulge to others just how much your story meant

5   to me and I am sure so many more.

6   I have captured that testimony on an audio file and

7   will see that you have a copy for your family to have and keep

8   for many years to come. I will get it into an MP4 file and

9   bring it to you so you can have it for those future days when

10 it will do some good to remember how it was that you scaled

11 such a high mountain. And then having reached the top, was

12 provided from that vista a clear vision of what was to come,

13 and even the trail that likened the poem by Robert Frost is

14 "less travelled by". Then someday, like his traveler in the

15 poem, you will look back and say, "I believe or even you will

16 know, that that has made all the difference."

17   Thank you for the pleasure of working with you and to

18 have witnessed for myself how much it has all meant, and I know

19 still means. I know from experience, these things will heal

20 over time. While I can only imagine the important highs and

21 the deep despair that has accompanied your journey, I am

22 grateful to know that this important story of a family's

23 commitment and their resolve to work together. I know that

24 important aspect of what you have gone through will help you,

25 your family, and all of us cherish even more the many victories

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1 that will still lie ahead, that still lie ahead. I am grateful

2 that you took the time to share such personal experiences,

3 feelings, and even the tender mercies, that have accompanied

4 the difficult decision you have made together. Your example of

5 family, and what should, what that should mean to all of us, is

6 likewise not wasted on those who have eyes to see and ears to

7 hear.

8   I am likewise grateful for your questioning of

9 producers and others within the industry. How have we come to

10 this? How have we allowed this to happen? How is it that we

11 find ourselves in this situation? Not exactly your words,

12 those will come, but know that these, that those were powerful

13 words phrased in a question, and expressed as maybe only you

14 were able to express them at this time having gone through all

15 you have gone through. Your questions are a clarion call that

16 every procedure and industry leader in the US dairy industry

17 should be prepared to answer and hold themselves and others

18 within their respective organizations accountable for, as well

19 as the needed progress that must be made by everyone in order

20 to stop this madness. I am grateful to know that in reality

21 there are more than, that can and will stand with you, than

22 those that will stand against you and all of the producers, but

23 it will take an unparalleled effort to change the course that

24 has wreaked such devastation on so many for no gain at all,

25 only loss and destruction.

1   JUDGE CLIFTON: And you signed off Tom.

2   MR. VAN NORTWICK: Tom. I have known Barbara for many

3   years. In 2009, she was on the cover with four other, three

4   other women, I believe it was. Because I believe that if we

5   had turned this over to the girls, I tell producers this all

6   the time, if the women of dairy had had the responsibility of

7   deciding how much milk to produce at any given time, in any

8   market whether the demand was high or the demand was low, and

9   they simply said, wait a minute, if we make more we get less,

10 the girls would have made the decision long ago to set pride

11 and vanity aside and go for the money. They would have not let

12 us go this far. And so I went to the women of dairy that

13 particular month, in May of 2009, and we had a conversation

14 about that. So Barbara was on the cover and I have watched

15 from afar as she has developed her cheese business, her milk

16 and chocolate business, and, and I, through an organization

17 that Wisconsin called Dairy Pricing, which is Designed American

18 dairy farmers helping dairy farmers. They purchase all the

19 milk from Barbara that I can give away to everybody that I see,

20 wherever I go. And I try and do just that. Because number

21 one, it's one of the best milk products. We have three of the

22 best chocolate milk products right here in the Central Valley,

23 and Barbara happens to be one of them.

24   But farmers from all over the country are contributing

25 money specifically to help promote milk products of better

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quality and taste, higher nutrition in particular, and taste.

Taste in the long run, gang, is everything. It's everything.

And it means everything to kids, too. So, but those are some

other things that are Marketing 101, we'll get there someday.

Your Honor, that's all I have.

JUDGE CLIFTON: I'd invite any questions of

Mr. Van Nortwick.

MR. VAN NORTWICK: Good decision.

JUDGE CLIFTON: Mr. Van Nortwick, I appreciate very much

your coming.

MR. VAN NORTWICK: You're welcome.

JUDGE CLIFTON: I know this was meant as a personal

communication, and I know it was with the great deal of emotion

that you shared it with us. I think it's a very valuable

communication. It's not proper to share this with USDA

employees without sharing it here with all the group, so we

have now cured that problem.

MR. VAN NORTWICK: Glad I could help. And I apologize for

the unintended consequence.

JUDGE CLIFTON: Not a problem at all. Thank you.

Mr. Vetne, oh -- I'm sorry, I need a two-minute break before

Mr. Van Nortwick leaves. Mr. Van Nortwick, don't leave quite

yet. Two minutes off the record. We go off record at 12:16.

(Whereupon, a break was taken.).

JUDGE CLIFTON: We're back on record at 12:19. I would

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1 like to admit into evidence Exhibit 118. Is there any

2 objection? There is none. Exhibit 118 is admitted into

3 evidence.

4   (Thereafter, Exhibit Number 118, was

5   received into evidence.)

6   JUDGE CLIFTON: All right. Now, we have been given another

7 exhibit, I will mark it, Ms. Elliott, 119; is that correct?

8   MS. ELLIOTT: That's correct.

9   JUDGE CLIFTON: All right. Exhibit 119.

10   (Thereafter, Exhibit Number 119, was

11   received into evidence.)

12   JUDGE CLIFTON: Thank you for waiting.

13   MR. VANDENBURG: You're welcome.

14   JUDGE CLIFTON: I'm going to swear you in in a seated

15 position. If you would raise your right hand, please.

16   Do you solemnly swear or affirm under penalty of

17 perjury that the evidence you will present will be the truth?

18   MR. VANDENBURG: Yes, I do

19   JUDGE CLIFTON: Thank you. Please speak into the

20 microphone and state and spell your name for me?

21   MR. VANDENBURG: My name is Leonard Vandenburg,

22 L-E-O-N-A-R-D, V-A-N-D-E-N-B-U-R-G.

23   JUDGE CLIFTON: Thank you. Mr. Vetne, you may proceed.

24   DIRECT EXAMINATION

25 BY MR. VETNE:

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1   Q. Mr. Vandenburg, first, what is the location, town, city

2 of your business?

3   A. Riverbank, California.

4   Q. And what county is that in?

5   A. San Joaquin.

6   Q. Okay. Before you -- before you start, tell us

7 something about yourself, your history with the dairy business?

8   A. I was born in the Netherlands. We moved here to this

9 country in 1955 and my father has been in the dairy business

10 all his life, and then I followed thereafter. I started in the

11 dairy business myself when I was 20 years old and I milked

12 cows, up to 1,000 cows in New Mexico and also in California

13 until about 15 years ago.

14   In the meantime, while I was in the dairy business, I

15 was, started handling milk approximately 20, 25 years ago. I

16 was involved with the National Farmers Organization. I ended

17 up being their National Dairy Director for three years. I also

18 started a dairy program for them in California. I ended up

19 being their national Vice President for seven and a half years.

20   Since I left them, I started a company called Milk

21 Movers of America, which is now a consulting company. I manage

22 a new cooperative called Pacific Gold Milk Producers based in

23 Ripon, and we handle milk across the State of California.

24 Those producers have then since started a specialty cheese

25 plant called Pacific Gold Milk Products, also known as Pacific

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1 Gold Creamery.

2   I am also third owner of a company called Organic West

3 Milk, which we handle milk in numerous states on the West

4 Coast. I'm also a partner in Visalia Dairy Company, and we

5 still feed 700 cattle at home.

6   JUDGE CLIFTON: How many head?

7   MR. VANDENBURG: 700 head.

8 BY MR. VETNE:

9   Q. What is Visalia Dairy Company?

10   A. It is a fluid and yogurt plant.

11   Q. Okay. Processing plant?

12   A. Yes, sir.

13   Q. And you mentioned National Farmers Organization, that's

14 a farmer's cooperative that markets milk of its members?

15   A. It is a bargaining organization, but it is registered

16 as a cooperative, yes..

17   Q. Okay. Proceed with -- you have prepared testimony, let

18 me ask you about that. You previously appeared and gave

19 testimony at a hearing before CDFA in June of this year,

20 correct?

21   A. Correct.

22   Q. Okay. And that hearing involved a proposal or

23 proposals, to raise the price of California 4b, Class 4b milk,

24 by adjusting the whey factor, the price that handlers pay for

25 milk by increasing the revenue attributed to whey; is that

1 correct?

2   A. Correct.

3   Q. Okay. And the exhibit that's been marked is

4 Exhibit 119, is the same testimony that you gave before the

5 CDFA hearing panel?

6   A. Yes.

7   Q. Correct?

8   A. Correct.

9   Q. And you understand that the Proposal Number 1 in this

10 proceeding, similarly involves raising the portion of what

11 would be, now become a Federal Class III price attributable to

12 whey, correct?

13   A. Correct.

14   Q. And you understand that in addition to that, it would

15 also just increase the general price attributable for revenue

16 for selling cheese based on what is used in the Federal Order

17 system basically, a Central Market price, or wherever it's set,

18 correct ?

19   A. Correct.

20   Q. Okay. Proceed with your testimony, please.

21   A. Yeah. And before I even, write or read this testimony,

22 I just want to make a point of making a statement that, maybe I

23 have had, maybe the only one or one of the only ones who have

24 had the privilege and the honor to be a dairy producer, a

25 broker, a processor, and I have seen every element out of every

1 side.

2 And when I was a dairy producer, you know, we -- we

3 testified in dairy on behalf of dairy producers because we

4 didn't understand the other side. And I am blessed with the

5 opportunity at least to understand now both sides.

6 Q. Thank you.

7 A. I want to thank the hearing panel for allowing us the

8 opportunity to express our views and our facts.

9 I am representing Pacific Gold Milk Products, also

10 known as Pacific Gold Creamery, which owners consist of 30

11 dairy producers and several private investors, myself included.

12 I have also been a dairy producer all my life, until 15 years

13 ago. I have served as the National Dairy Director for the

14 National Dairy Farmers Organization for three years, and the

15 National Vice President for seven and a half years. I am

16 currently manager for Pacific Gold Milk Producers, a

17 Cooperative, a partner and manager of Organic West Milk,

18 partner in Visalia Dairy Company, and currently President of

19 Pacific Gold Milk Products, a specialty cheese plant, which I

20 am representing today with testimony for our cheese plant.

21 Many of our producers since 2008 were told there was no

22 room for their milk. All the big co-ops denied these producers

23 a cry for help. CDFA and trade organizations told them to sell

24 out because there was nothing that could be done. They were

25 also told that the bigger producers could use their dairies to

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1 feed heifers. These producers were faced with selling at a

2 depressed market, possibly losing everything they worked for

3 over their entire life time, not have the next generation take

4 over and the opportunity for, and the opportunity to have a

5 career in the business their families worked so hard for. Many

6 producers faced with processors delinquent payments or

7 processors terminating their contracts. Many of these

8 producers joined the new start up co-op named Pacific Gold Milk

9 Producers. Pacific Gold Milk Producers saved many producers

10 and their farms from extinction.

11   Most of these producers have decided to invest in their

12 own future by starting a specialty cheese plant called Pacific

13 Gold Creamery. They did not ask for a hearing to bail them

14 out. No, they did it the old-fashioned way, they took risk,

15 investments, debt, guts, vision, determination, can-do

16 attitude, and decided to be market-oriented, rather than be

17 production driven, and took matters in their own hands, through

18 relentless effort.

19   Now that I live, and breathe, and own a part of a

20 specialty cheese plant, I have developed a real appreciation

21 for the remarkable challenge it takes everyday to make and

22 satisfy the customer's demand for perfection. The increasing

23 cost of higher quality standards, the regulatory standards from

24 every facet of our industry. These continued increased costs

25 and demands from retailers, distributors, cut and wrap

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1 operations, brokers, FDA, USDA, local and state inspectors, and

2 above all, the consumers. We, as a specialty cheese plant,

3 embrace these quality requirements, as we wish to protect our

4 dairy food image for each other. If only one plant has a

5 quality issue, everyone suffers consequences, but there is a

6 real increasing in cost. What are the costs?

7   JUDGE CLIFTON: Let me ask you to just read little more

8 slowly.

9   MR. VANDENBURG: Sorry.

10   MR. VETNE: The reporter has to take down what you are

11 saying. Thank you.

12   MR. VANDENBURG: Okay. If you get behind, just stop me.

13   COURT REPORTER: I don't have time to stop you.

14   JUDGE CLIFTON: Beginning with "where are the costs."

15   MR. VANDENBURG: In addition, lab technicians, increased

16 internal and third party testing, upgrading equipment,

17 upgrading the facilities, water quality, and the list goes on,

18 to meet the ever-demanding requirements.

19   I have also learned to appreciate the challenge in

20 trying to make money in the specialty cheese business in

21 California. Pacific Gold Creamery has invested for nearly two

22 years of losses through the challenge of developing markets,

23 proving we can make perfect cheese everyday for over two years.

24 The cost of needed equipment for every type of cheese. The

25 specialty cheese does, in fact, have higher premiums. However,

much of these premiums are absorbed through the higher cost.

The additional cost come from labor not being a single type

streamline cheese operation, additional packaging cost,

additional handling, and multiple days to make a single type

cheese. The additional cost to make these cheeses are as much

as 20 cents per pound, or $2.44 per hundredweight. The single

largest reason we finally turned a profit is because of organic

milk sales. If we were to make a profit in conventional

market, it would take another 18-plus months of investments.

        The other hidden fact in cheese business is a start-up

cost and the constant upgrading of cheese making equipment. In

an ideal world, under the reliable Van Slyke cheese formula, we

could capture 90 percent of the fat and 78 percent of the

protein, and that would be with a $1.87 per hundredweight loss.

However, with older equipment and used equipment, we are lucky

to capture 85 percent of the fat and 75 percent of the protein,

which would translate into $2.50 per hundredweight loss. This

can be found in Exhibits A and B.

BY MR. VETNE:

    Q. Okay. You have exhibits attached to your statement?

    A. I do.

    Q. Can you describe in summary fashion what is shown on

Exhibit A and B?

    A. This is, in a given time on a month, and I can't

recall, I think it was probably in May of this past year, I

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believe, so you would have the California price of fat and the

California price of solids nonfat, which would constitute a pay

price, a blended pay price here in California. You take those

same numbers with the value of the same number in fat

percentage. Being that this is Holstein milk, your average

protein more than likely will be 3.3 percent protein. And you

run those calculations through the Van Slyke formula, you can

see on the bottom, you would have a negative $1.87 a

hundredweight. You take the same formula, I believe it is in

the next exhibit.

Q. In the next page of your attachment to your testimony?

A. Yes.

Q. Which you have labeled Exhibit B.

A. Where you might capture 85 percent of the fat and 75

percent of the protein, you would lose $2.50 a hundredweight.

Just as a side note, we have priced cheese vats, and cheese

tables. And in this particular case, cheese vats, you know,

you could spend anywhere between, depending on the size, 50 to

$150,000 in one single cheese vat.

Q. Okay. Are you prepared to continue reading your

prepared testimony?

A. I am.

Q. Thank you.

A. Forgive me, your Honor, I'm trying to remember where I

left off.

1   JUDGE CLIFTON: At the bottom of page 2, and you are about

2 to say "the core reason for the hearing."

3   MR. VANDENBURG: Thank you so much.

4   The core reason for the hearing is discussing the whey

5 values in California cheese plants. When I was managing the

6 National Farmers Organization Dairy Department in various

7 Federal Orders, it was commonplace to pay anywhere from a

8 dollar to two dollars under the Federal Order announced price.

9 Most milk handling companies would share their pay price and

10 almost all the cooperatives paid under the announced price.

11 Are the USDA facts regarding nonpooled milk in the Federal

12 Orders --

13 BY MR. VETNE:

14   Q. Excuse me, you, after the announced price on the second

15 line, you reference Exhibits C and D. What is contained in

16 Exhibits C and D? The attachments to your statement?

17   A. This is information that I got from USDA and I relied

18 on their expertise and their information regarding pool

19 dollars, or pool pounds rather, and nonpool pounds. And so in

20 California, all the milk for the most part is pooled. In

21 Federal Orders, there are many, many pounds that are nonpooled,

22 and so we're trying to, you know, we're assuming we are

23 comparing apples to apples, and I think we're comparing

24 sauerkraut to bananas, really, so it doesn't work.

25   Q.   Okay. And the point you want to make from Exhibits C

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1 and D is that there is a lot of milk that is sold, traded in

2 the Federal Order system that is not subject to the minimum

3 price?

4   A. Yes, that's true.

5   Q. Whether something more or something less is paid is not

6 revealed, but it is outside the system, correct?

7   A. That is correct.

8   Q. Okay. Now, you, at, starting at the end of the second

9 line on the third page of your statement.

10   A. In the past ten years, the nonpool pounds average --

11   Q. Start with the second line, are the USDA --

12   A. Are the USDA facts regarding nonpooled milk in the

13 Federal Orders?

14   Q. That's referring to Exhibit C and D, correct?

15   A. Right. In the past ten years, the nonpool pounds

16 averaged 28 billion pounds, or 14.83 percent for the years

17 2014, in which 34 billion pounds or 16.66 percent.

18   JUDGE CLIFTON: Now, you have given us the overview by

19 talking about 12 billion pounds or 36 billion pounds, but I

20 would like you to read in the record all the numbers involved.

21 And you may do it just by 28,387, and so on, so that we

22 actually have the numbers that are in your testimony. So if

23 you would read it, "in the past ten years, the nonpool pounds

24 averaged" and then give us that actual figure.

25   MR. VANDENBURG: 28,387,648,042 pounds, or 14.83 percent.

1 And for the year 2014 it was 34,320,535,045 pounds or 16.66

2 percent. The total Class III average volumes in the Federal

3 Order is 57,655,012,004 pounds, or 49 percent of the Class III

4 from nonpooled milk. The price difference between Federal

5 Order Class III and California 4b in the past ten years, is

6 $1.45 a hundredweight. It is completely unreasonable to try

7 and compare the Federal Order Class III differential against

8 4b, when approximately 50 percent of the Federal Order

9 Class III was severely underpriced compared to pool milk. Just

10 for the last four to five months, and I just want to reference,

11 I mentioned this testimony in June, so we're talking four,

12 five, six months prior to June. Months -- several thousand

13 loads of milk was dumped and millions of pounds sold to cheese

14 plants from $7 to $10 under the announced price. The $1.45 per

15 hundredweight differential number is a very misleading figure,

16 as nearly 15 percent of the lower price milk is not part of the

17 equation.

18   I just recently spoke with an Idaho plant cheese maker,

19 which incidentally as a side note, was just last week, said

20 that the average, Idaho cheese maker said that they paid an

21 average of $5 per hundredweight under the Class III for over

22 six months.

23   JUDGE CLIFTON: Under the Class III price?

24   MR. VANDENBURG: Under the Class III Federal Order price,

25 yes.

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1   JUDGE CLIFTON: So -- so normally we write that Federal

2 Class III with Roman numerals, so we could consider that class

3 Roman numeral III?

4   MR. VANDENBURG: Yes, your Honor.

5   JUDGE CLIFTON: Could I make that change now?

6   MR. VANDENBURG: Yes.

7   JUDGE CLIFTON: So Ms. Elliott, on the third page of the

8 testimony, we're near the end of that first paragraph, next to

9 the last line, you see class Arabic 3 price? We'll just strike

10 the Arabic 3 and make that a Roman numeral III?

11   MS. ELLIOTT: Okay.

12   MR. VETNE: May I suggest, your Honor, that the same would

13 apply in the 5th line, the 6th line, and the 7th line, with

14 reference to class, and the 9th line off in the left margin.

15   JUDGE CLIFTON: Yes. So throughout, Ms. Elliott, this

16 particular paragraph, each place you see Class Arabic 3, if you

17 would strike through that and make that a Roman III?

18   MS. ELLIOTT: Okay.

19   JUDGE CLIFTON: And the other change I would like to make

20 in this paragraph, with your permission, is about seven lines

21 up where you say "severely underpriced" I would like the

22 spelling to be changed, it actually looks like "severally"

23 Ms. Elliott. If you will strike that and insert "severely".

24 Okay?

25   MR. VETNE: thank you.

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BY MR. VETNE:

Q.   We're starting now with the second full paragraph on
that page.

A.   Pacific Gold Creamery has turned our whey into Ricotta
Cheese. What most producers don't realize, is much of the
cheese sold is sold at nearly a break even price or even a
loss, depending on type and volumes, while the dried whey
products, and in our case, Ricotta, subsidizes the cheese
sales. If it was not for our Ricotta sales from whey, we would
continue to lose money. To increase the whey values to
producers equal to the Federal Order pricing, would be
devastating to the cheese plants in California and especially
small or mid-size cheese plants, such as ours. The real
concern and unfairness that faces cheese plants are the whey
values that are going down due to increased volumes entering
into the marketplace. Setting a flat dollar amount rather than
a percentage of the whey factor price is grossly unfair to the
cheese plants. One other factor of unfairness is the
consideration of carving out and -- carving out the income from
California cheese plants from higher valued byproducts,
however, this is ignored in the specialty dry powders, powders
other than the whey powders, and why?

I am completely dumbfounded as to why we are here
asking for a greater portion of the whey value. Over 80
percent of the milk is represented by producer controlled

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1 cooperatives in California. Over 95 percent of the producer

2 pool in these cooperatives are not in the cheese business. If

3 there is so much money in the cheese and whey, why are these

4 same producer controlled cooperatives not collecting 100

5 percent of the whey income by investing and risking for the

6 rewards, rather than taking it away from those that had earned

7 it.

8   The other facts in the market, our current domestic

9 price is very strong compared to the global price.

10   I just wanted to stop here, just kind of ad lib a

11 little bit. We see this more and more, and especially in the

12 last 20 years, and it's become more and more prevalent. We

13 have a global price. We always come in here looking for a

14 local solution, and it makes it very, very difficult to do

15 that, if not impossible.

16   The other factors in the market, our current domestic

17 price, is very strong compared to the global price. The major

18 plant constructions in the past ten years have come in

19 non-regulated areas. In regulated areas, we have witnessed

20 plant closures and no major expansion due to poor potential

21 economical returns to the increased prices would further

22 jeopardize exports.

23   Instead of coming to CDFA or Federal Milk Marketing

24 Order and pleading their case, I strongly believe that the case

25 should be confronted with Cooperative board and management and

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1 revisit their own business model and plan.

2   Many producers have chosen to use rBST, which has given

3 the public the image and the belief of all milk is tainted with

4 hormones. Some producers are using sex semen to increase herd

5 size and production, but when the supply and demands gets out

6 of balance, driving milk prices down, then we all end up at a

7 milk hearing seeking relief. We, as an industry, must need to

8 take some responsibility and ownership.

9   We strongly support the need for dairymen to get a fair

10 price through meeting the consumer marketing demands. We,

11 however, oppose a production driven model that ultimately

12 lowers prices and creates oversupply.

13   Pacific Gold Creamery do not support the proposed

14 Federal Milk Marketing Order in California. And I would just

15 ad lib here that we would support the Dairy Institute proposal.

16 BY MR. VETNE:

17   Q. Okay. And you end your prepared statement with the

18 words, thank you, and your name as president of Pacific Gold

19 Creamery, as well as your signature, correct?

20   A. Yes, thank you.

21   Q. I wanted to ask you just a couple questions. Pacific

22 Gold Creamery is the company that operates the cheese plant; is

23 that correct?

24   A. Correct.

25   Q. And is that primarily producer-owned?

1   A. It is.

2   Q. Okay. And the producers are those you described in the

3 bottom of your first page of your testimony that had trouble

4 finding a market or a good market for their milk about eight or

5 nine years ago?

6   A. 2008, 2009, 2010.

7   Q. Five, six and seven years ago?

8   A. Uh-huh.

9   Q. Okay. What was the problem? What, you said that they

10 asked for help and they didn't get any. Who did they ask and

11 what what was the problem?

12   A. In 2007, in 2008, there was a glut of milk. There was

13 one company that decided to close the doors, which was Crystal

14 Creamery in Sacramento.

15   Q. Yes.

16   A. They informed all their producers that as of, they

17 closed their doors or made the announcement in January of 2008,

18 and I think they told them in July 1st of that same year they

19 would no longer be picking up those producers. Those same

20 producers literally scrambled and begged in unison from other

21 cooperatives and milk plants to help, help them, and if they

22 would pick up their milk. None of them would do it. They

23 said, no we're not going to pick up your milk. There's no need

24 for it, there's no room for it, we can't process it, you might

25 as well just sell out.

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1   Q. So the producers that got together and collectively

2   decided to take economic risks and encumber their assets to

3   make the cheese plant, they were producers that were formerly

4   shipping to Crystal, and all of a sudden found themselves

5   without a market for their milk; is that correct?

6   A. That's correct. And it's not only Crystal, it was, you

7   know, F and A Cheese, it was Foster Farms, many producers were

8   let go there as well because there were no markets for it. I,

9   as a broker, was buying up to 60 loads a week from F and A

10   cheese just to keep them from having to freeze it and marketing

11   that milk, while they were three months behind in producer

12   payments. Even though it's illegal, but there was no choice

13   and everybody just kind of tolerated at the moment, so we took

14   on many of those producers as well.

15   Q. Okay. In the second page of your statement you, near

16   the, just below the middle you said, "we finally turned a

17   profit because of organic milk sales." Who was the "we" that

18   you are referring to there? Is that the cheese company or the

19   producer Cooperative?

20   A. No, the cheese company.

21   Q. Okay. The cheese company markets the milk of patrons

22   that, and Cooperative members that ship to the plant; is that

23   correct? Is that where the organic milk comes from?

24   A. They don't market the milk, they convert the milk into

25   cheese, and we sell the cheese.

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Q.   You sell the cheese as organic cheese?

A.   Yes, sir.

Q.   Okay. So you weren't selling organic raw milk, you were selling a product produced from organic raw milk?

A.   That's correct.

Q.   Okay. So you, do you produce cheese that is both organic and non-organic?

A.   Yes, we do.

Q.   Okay. So how do you work that? Do you have two different silos or receive organic milk on different days or what?

A.   We do, in fact, have two different silos. We have methods and procedures to keep everything segregated, and we run all of our organic milk first, and our convention milk later.

Q.   All right. Good. Do you have anything more you want to add before taking questions from folks in the room?

A.   No, not right now.

Q.   You can add anytime.

A.   Okay.

Q.   Thank you. Can we receive Exhibit 119, please?

JUDGE CLIFTON: Thank you, Mr. Vetne. I do have a couple of questions for Mr. Vandenburg about the wording of it. Mr. Vandenburg, on page 1, in the second paragraph where you mention that you are the Dairy Director for the National

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Farmers Organization, and then later on in your statement you

also mention that the National Farmers Organization has a dairy

component. And what is that dairy component called of the

National Farmers Organization? Is it the Dairy Division or

something like that?

    MR. VANDENBURG: I may have mentioned that they had, that

we started a Dairy Division here in California, which I did

start that for them here.

    JUDGE CLIFTON: All right. And on page 3 of your

testimony, on the beginning of the last paragraph, it is just a

partial paragraph, I just want Ms. Elliott to conform the word

after "I am completely" that's to be "dumb" founded, "D-U-M-B".

If you would make that correction. And there was --

    MR. VANDENBURG: Thank you.

    JUDGE CLIFTON: Certainly. And at, on your signature page,

the first full paragraph, Ms. Elliott, second line up from the

bottom, that sentence is, the way it was read by

Mr. Vandenburg, beginning with the third line up from the

bottom of that paragraph was, "in regulated areas we have

witnessed plant closures" so I would like you to strike the

word "closers" and just insert "closures".

    MS. ELLIOTT: Okay.

    JUDGE CLIFTON: All right. Is there any objection to the

admission into evidence of Exhibit 119? There are none.

Exhibit 119 is admitted into evidence.

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 1              (Thereafter, Exhibit Number 119, was

 2          received into evidence.)

 3      JUDGE CLIFTON:  Who would like to ask the first questions

 4  of Mr. Vandenburg?  Mr. Beshore?

 5                     CROSS-EXAMINATION

 6  BY MR. BESHORE:

 7    Q.  Marvin Beshore.

 8         Good afternoon, Mr. Vandenburg.

 9    A.  Good afternoon, Marvin.

10    Q.  Just a couple of questions.  First of all, with respect

11  to the National Farmers Organization, can you clarify, you are

12  not currently in a position of any office with National

13  Farmers?

14    A.  That's correct.

15    Q.  So when -- when were, the positions you have indicated

16  here, National Dairy Director, National Vice President, when

17  did those capacities end?

18    A.  They ended in 2007.  I don't recall exactly what month.

19    Q.  The years?

20    A.  Yeah.

21    Q.  Okay.  So since 2007, you have not had any capacity

22  with NFO?

23    A.  That's correct.

24    Q.  Okay.  With, your Honor, I would like to show

25  Mr. Vandenburg Exhibit 96.
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1   That's an Exhibit prepared by CDFA, and it was probably

2   used, I think it was used in that June hearing when this

3   testimony was presented. Have you seen that before?

4   A. No.

5   Q. Okay. Can you just -- it groups plants by size, and I

6   wonder if you could tell us which group your cheese plant would

7   fall in.

8   A. I'm just -- I'm just looking to see when the

9   information. So this information is from January through March

10 of this year?

11   Q. Correct.

12   A. It would be -- I'm trying to think here. The second

13 group.

14   Q. Okay. Group 2 from the top?

15   A. Yes.

16   Q. Okay. Thank you. That is all I had on that exhibit.

17 Thank you, your Honor, for use of your copy.

18   On Exhibit C, no, wait, I'm not sure if it is C.

19   JUDGE CLIFTON: I think there may be two C's? Maybe?

20 BY MR. BESHORE:

21   Q. Okay. Maybe C is a front and back. I'm looking at the

22 side of C that's not the e-mail from Mr. Stoker, but the table.

23   A. Uh-huh. Got it.

24   Q. Okay. So I think I have figured out these numbers, but

25 I want to make sure. The column, the second column from the

                        5457

1 right, "all Federal Order milk not pooled," now, that doesn't

2 show up in the e-mail from Mr. Stoker on the other side, so is,

3 that's a column you calculated?

4   A. No, that is, in fact, an e-mail from Mr. Stoker. It

5 may not show on his e-mail, but that's the information that he

6 sent me.

7   Q. Okay. Well, do you know how that column was

8 calculated?

9   A. Not offhand.

10   Q. Okay. And at the bottom of that column there is, it

11 says, "Class III not pooled", what is that supposed to apply

12 to?

13   A. The 49 percent to the right.

14   Q. Okay. And does that, is that to -- does that relate in

15 some way to those totals in that column?

16   A. I believe that's the number of the 28 billion against

17 the 57.

18   Q. Okay. So does it, basically it's assuming that all of

19 the 28 billion or 57 billion is Class III?

20   A. Correct.

21   Q. So if that number is actually all the milk in the

22 United States that is not pooled on either the Federal Orders

23 or California, it's not really -- it's not really correct to

24 consider that all Class III, is it?

25   A. Like I said, this is the information that I have got

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1 from USDA. I specifically asked them for what non, what the

2 total pounds were that are not pooled in the U.S., and that's

3 the numbers they gave me.

4   Q. Okay. Okay. I get -- I think I can get to the numbers

5 of total US production that are not in Federal Orders or in

6 California, but what I'm, what I'm specifically asking about

7 is, it is not, well, on what basis would you consider that all

8 Class III?

9   A. Because I would based on that if it -- if it is

10 nonpooled milk, generally it ends up in a cheese plant in

11 Class III.

12   Q. Okay. But like, back in Pennsylvania we got nonpooled

13 milk that's in unregulated Class I plants. That would be

14 included in there too, right?

15   A. Okay.

16   Q. Okay.

17   A. And so the price might be different, too, then.

18   Q. Absolutely.

19   A. Absolutely.

20   Q. Okay. And in any event, that's just all the milk, and

21 it is just assumed that it all the milk goes to cheese plants.

22   A. Right.

23   Q. Okay. The plant in Idaho that was paying $5 under,

24 they weren't paying that to their producers, were they?

25   A. They don't have producers.

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1   Q. Okay. That's all I have. Thank you, Leonard.

2   A. You're welcome.

3   JUDGE CLIFTON: Mr. English?

4   CROSS-EXAMINATION

5   BY MR. ENGLISH:

6   Q. Good afternoon, sir, Chip English for the Dairy

7   Institute of California. And when I heard the answer to one of

8   your questions from Mr. Beshore, something occurred to me

9   that's not in the record. For USDA purposes, there's a

10   definition for small businesses for manufacturing facilities

11   that's based upon, for all the connected businesses with that.

12   So anything connected to Pacific Gold, that's 500, it is

13   actually fewer than 500 employees. Would Pacific Gold meet

14   that definition?

15   A. Absolutely.

16   Q. Thank you. That's all I have.

17   JUDGE CLIFTON: I did want to clarify, Mr. Vandenburg, when

18   you started to testify, but before you went onto your exhibit,

19   let me find it. I don't know how to spell the place where

20   Pacific Gold is, and I think you said Ripon.

21   MR. VANDENBURG: The cheese plant is in Riverbank.

22   JUDGE CLIFTON: The cheese plant is in Riverbank. So if I

23   thought I heard something like Ripon, that's not true?

24   MR. VANDENBURG: Our cooperative, Pacific Gold Milk

25   Producers is in Ripon.

                          5460

1   JUDGE CLIFTON: Pacific Gold --

        2   MR. VANDENBURG: We have a secondary location there.

        3   JUDGE CLIFTON: Okay. And that's called Pacific Gold Milk

        4   Producers?

        5   MR. VANDENBURG: Yes.

        6   JUDGE CLIFTON: That's in Ripon, R-I-P-P-O-N?

        7   MR. VANDENBURG: R-I-P-O-N.

        8   JUDGE CLIFTON: Just one P?

        9   MR. VANDENBURG: Yes.

       10   JUDGE CLIFTON: Okay. And what is made there?

       11   MR. VANDENBURG: It is strictly an office and we broker

       12   milk from that office.

       13   JUDGE CLIFTON: Okay. So is there more than one plant?

       14   MR. VANDENBURG: No.

       15   JUDGE CLIFTON: One plant. All right. Who next has

       16   questions for Mr. Vandenburg? Captain America, Mr. Miltner.

       17   MR. VANDENBURG: I probably should profusely apologize,

       18   maybe I overdressed and shouldn't have come like this.

       19   JUDGE CLIFTON: You know, from the beginning, and we're

       20   just completing our sixth week, I have declared Fridays casual

       21   Friday. I'm so sorry we didn't let you know.

       22   MR. VANDENBURG: Had I know, I would have come in my rubber

       23   boots.

       24   MR. MILTNER: You should blame your counsel, not the Judge.

       25   I just note it's 1:00, I don't know how long I'm going to take,

                                      5461

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1 but I'm happy to begin if you would like to begin.

2   JUDGE CLIFTON: Yeah, I would like to try to have this

3 witness be allowed to have lunch with the group if he wants,

4 but with no pressure, so let's finish his testimony.

5   MR. MILTNER: Very good.

6   DIRECT EXAMINATION

7 BY MR. MILTNER:

8   Q. Mr. Vandenburg, Mr. Vetne, when he introduced you, he

9 noted that you had testified at the June CDFS hearing.

10   A. Correct.

11   Q. And that this testimony was similar to that testimony,

12 correct?

13   A. That's correct.

14   Q. In fact, it's almost exactly the same, right?

15   A. Correct.

16   Q. Okay. I wanted to look at Exhibit A of your statement

17 and ask some questions of you about how you put that together.

18 If you want to turn to that page and let me know when you are

19 ready.

20   A. Okay. Ready.

21   Q. For the record, I'm Ryan Miltner, I represent Select

22 Milk Producers. I only dress as Captain America once a year.

23   Mr. Vandenburg, for which month did you pool the prices

24 used in compiling Exhibit A?

25   A. I failed to put that on there, but I believe it was in

                              5462

1 May of this year.

2   Q. And the prices you used, were they prices that were

3 published by USDA, or CDFA, or some other source?

4   A. CDFA.

5   Q. Let's look at the first line where it is the, where

6 it's labeled fat. Am I correct that that's just a straight

7 multiplication across that line, you multiply the fat price

8 times 3.7 percent fat to get --

9   A. Correct.

10   Q. -- to get 693?

11   A. Correct.

12   Q. Similar with solids not fat?

13   A. Correct.

14   Q. Okay. Let's move onto your Van Slyke formula there.

15 You have got 90 percent butterfat recovery on this exhibit,

16 correct?

17   A. Correct.

18   Q. And you have pulled the same 3.7 percent butterfat down

19 from the top, right?

20   A. Correct.

21   Q. Okay. On the protein side, the 3.3, where did that

22 figure come from?

23   A. Our Cooperative average all their members, averaged 3.3

24 protein, so that's the number that I used.

25   Q. Okay. And does your cooperative also average them 3.7

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1 butterfat?

2   A. Yes.

3   Q. Okay. So is Exhibit A -- well, strike that.

4   You have testified that your butterfat recovery is 85

5 percent or so, correct?

6   A. Correct.

7   Q. And you have utilized the fat and solids not fat and

8 protein figures for your cooperatives members, correct?

9   A. Correct.

10   Q. And you have a make allowance in there of 35 cents and

11 it says for PGC. So can I assume that that is approximately

12 what you guys realize?

13   A. For the cheese plant.

14   Q. Okay. So I guess other than the butterfat recovery,

15 does Exhibit A accurately represent the actual results for your

16 company?

17   A. Yes.

18   Q. Okay. And so, if we turn to Exhibit B, is the only

19 difference between Exhibits A and B the butterfat recovery and

20 the protein factor?

21   A. Yes.

22   Q. With those two changes, does Exhibit B then, represent

23 the actual or close approximation of the actual results for

24 your company?

25   A. Yes, with the clarification.

1   Q.   Okay.

2   A.   With the moisture of that cheese standard there of 38,

3   like with the cheddar.

4   Q.   Yeah, you have got dry matter at 62 hundredths there,

5   so 38 percent moisture.

6   A.   That's correct.

7   Q.   Okay. You are either prescient or we're just lucky

8   because that's where I was going to go next and ask if your

9   plant in aggregate produces cheese with 38 percent moisture.

10   A.   There's times that we do, there's other times that we

11   don't. This is just an example to illustrate that if we didn't

12   get involved in higher-ended cheeses and Ricotta, there's no

13   way in the world that we would even break even, let alone make

14   money. So these type of cheeses is prohibitive from our plant

15   without a very large premium.

16   Q.   What do you mean when you say these types of cheeses?

17   A.   Cheddar.

18   Q.   Cheddar? Okay. Do you manufacture any cheddar?

19   A.   We do.

20   Q.   You do. Okay. I was looking at your website and I,

21   and the website it shows Mozzarella and Ricotta, and it shows

22   Greek cheeses. I didn't see any cheddar on the website and

23   that's why I was, that's why I asked.

24   A.   Because when we lose that kind of money, we're not

25   trying to make cheddar. You know, we do it for a special

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customer at a special rate, at a very small volume. But this

is just as a comparison for our plant. We cannot make, can't

even come close to cash flowing with that kind of cheese.

    Q. Yeah, I would think that with 85 percent butterfat

recovery and a make cost at 35 cents that would be difficult.

    A. It would be difficult. The only way to get around it

is spend, go in debt for another half a million or a million

dollars, which is prohibitive right now for us.

    Q. Sure. Thank you. I don't think I have any other

questions, your Honor.

        Your Honor, you were perhaps right in trying to get him

done before lunch. So, thank you.

     JUDGE CLIFTON: Who else has questions for Mr. Vandenburg?

Shall I ask for redirect, Mr. Francis, before I ask for your

questions? Is there any redirect? Apparently not. Mr. Vetne

is not in the room. Mr. Francis.

                    CROSS-EXAMINATION

BY MR. FRANCIS:

    Q. Will Francis, USDA. Just a couple quick things.

        I think I understand, Pacific Gold Milk Products is a

separate company that is the operator of a cheese plant.

    A. Yes. And if I may, just for the record, the 30

producers, they are members of Pacific Gold Milk Producers as

cooperative members, they have invested and bought shares into

Pacific Gold Milk Products so they are, they have skin in the

1 game and that's the relationship.

2   Q. Okay.

3   A. And we are a private corporation.

4   Q. And that was my next question. Is the entire

5 membership of the cooperative owners of the plant?

6   A. The entire membership for the exception of three

7 individuals.

8   Q. Okay. So the entire co-op is 33 producers?

9   A. No. No. I misunderstood your question. I thought if

10 the entire ownership of the plant is all producers. They are

11 all producers except three.

12   Q. Okay.

13   A. And of the members of the cooperative, there's probably

14 85 percent of those members are owners of the cheese plant.

15   Q. Okay. And what's the name of your cooperative, Pacific

16 Gold Milk Producers?

17   A. Yes.

18   Q. And how many members are in the cooperative?

19   A. Approximately 40.

20   Q. Okay. Okay. And then just, the last statement says,

21 "Pacific Gold Creamery," meaning that operator of the cheese

22 plant, "does not support the proposed Federal Milk Marketing

23 Order," but then in response to a question you said but you

24 would support the Dairy Institute proposal.

25   A. Correct.

1   Q. And so what we have before us are two alternate

2   proposals, both related to establishing a Federal Order in

3   California. So Proposal 1 is from the three cooperatives, and

4   there's specific language associated with their proposal, and

5   the Dairy Institute has proposed a Federal Order for California

6   with different language. So do you support either of those?

7   A. We do not support the cooperative one. And I could

8   expand on that a little bit and I would like to do that.

9   Q. Yes, thank you.

10   A. Because quite frankly, what I think is been in hearings

11   for many, many years, you know, the agenda for the past 30

12   years is exactly the same, the only thing different in the

13   agenda, is the date. We come and argue the same subjects year,

14   after year, after year. And I think the two things that are

15   missing is really understanding what is the problem. And it is

16   pretty hard to figure out a solution if we don't even

17   understand the problem. And I think we're missing the problem.

18   And it's so easy to target the, lately glamorous whey price,

19   lately, a year prior, and everybody wants to go after it.

20   It just amazes me that in 1968, when the Milk Pooling

21   Gonsalves Act was enacted in California, 95 percent of our milk

22   was Class I sales, and so the quota system worked great. And

23   now we got a 13 percent Class I sales with the same quota

24   system, and it is broken. And that's the real pink elephant in

25   the room. And I'm not belittling the quota holder, and I'm not

belittly the guy that tries to buy it when he gets a 13 to 17

percent return on the quota, if I was him, I would do the same.

But now we have created two classes of dairymen in the state of

California that doesn't work.

The other thing is, it's amazing to me that we price

our cheese off the CME, we price our butter off the CME, but we

don't price our powder offer the CME or the NASS. Why? Well,

the CWAP is a wonderful procurement tool and I don't think it

works, but nobody wants to talk about that big pink elephant in

the room.

I was asked very first when I came to this hearing to

tell the truth, and that's what I'm going to do. And I think

it's very hard to fix a problem if you can't even understand

what the problem is. And I think we're missing the boat. And

it's really handsome and it is kind of glamorous to go after

all these cheese plants because "whey" but I think that's a

very minor part of it. I think we need to look at a bigger

picture.

Q. Thank you. That's all the questions we have.

A. Thank you.

JUDGE CLIFTON: Mr. Vetne?

REDIRECT EXAMINATION

BY MR. VETNE:

Q. To clarify, Mr. Vandenburg, you are speaking for the

cheese company, and with respect to your preferences, it would

1 be correct to say if there is going to be a Federal Order, it

2 ought to be Proposal 2; is that correct?

3   A. That's correct.

4   Q. Okay. Do you intend to say there should be a Federal

5 Order rather than a State Order?

6   A. Could you ask that question again, I'm sorry?

7   Q. Is it your intention to say there should be a Federal

8 Order in California rather than a State Order, or simply that

9 if there is a Federal Order, Proposal 2 ought to be the one?

10   A. I would prefer to see a State Order, I really do. If

11 it was up to me, I think all the quota holders ought to get

12 paid. We create equality among all the producers, and I think

13 we can figure out our solutions here within the state. I think

14 the Federal Order is a very difficult process. I have been in

15 Federal Order hearings before down in Dallas. I think if we

16 can't fix them in the State Order, I'm not sure how we're going

17 to fix them all in the Federal Order.

18   Q. And one more. You have, the cheese company has less

19 than 500 employees. Let's get specific, how many employees do

20 you have?

21   A. 30.

22   Q. 30? How many employees does the cooperative have?

23   A. 5.

24   Q. Thank you.

25   JUDGE CLIFTON: Ms. May?

RECROSS-EXAMINATION

BY MS. MAY:

    Q. Thank you. Laurel May from USDA.

        I just have a couple of questions about your testimony,

and I was hoping that you could help flush those statements out

for me a little bit.

    A. Sure.

    Q. On the third page in the second paragraph from the

bottom, you say that "the other real concern and unfairness

that faces cheese plants are the whey values are going down due

to increased volumes entering the marketplace."

        Is that international or national whey values in the

international marketplace or the national marketplace?

    A. I think both. It's an international market, and it's,

you know, more and more, you know, whey proteins is entering

the market, and I think it's lower, it certainly has something

to do with nonfat. You know, a couple years ago you see nonfat

pricing at $2 per pound, it's got into the 70's here in

California, you know, that's dry pushing pressure on all the

commodities. And so I think that has a bearing on it as well.

    Q. Okay. My other question is on the next page, your

first full paragraph you say, "our current domestic price is

very strong compared to global prices." And my question there

was were you talking about the current domestic cheese price?

    A. Cheese price.

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1   Q.   Thank you.   Just a little confused.   Thank you so much.

      2   A.   You're welcome.

      3   JUDGE CLIFTON: Are there other questions of

      4   Mr. Vandenburg?   I see none.   Mr. Vandenburg, is there anything

      5   you would like to add before you step down?

      6   MR. VANDENBURG: No, I just thank you for the opportunity.

      7   I think sometimes, I have had the opportunity to travel and be

      8   around different countries, been on radio stations, done many

      9   speeches around the U.S., and sometimes we take for granted the

     10   due process that we have in our country compared to other

     11   places in the world, and I'm grateful for that.   And I'm

     12   grateful for your time and everybody else.   So thank you.

     13   JUDGE CLIFTON: Thank you.

     14   MR. VANDENBURG: You're welcome.

     15   JUDGE CLIFTON: Mr. English, would you come to the podium,

     16   please?

     17   MR. ENGLISH: Chip English.

     18   JUDGE CLIFTON: Is there only one witness remaining today,

     19   to your knowledge?

     20   MR. ENGLISH: There is.   I might have thought we would

     21   already be done today, so a little Maine fog showed up, but

     22   that's okay.   We have Mr. Blaufuss for after lunch.

     23   JUDGE CLIFTON: Very fine.   And is there a document that

     24   could be distributed before we break for lunch?

     25   MR. ENGLISH: If that's what people want.   I mean, if, you

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1 know, if Mr. Beshore wants it enjoy his lunch with a document,

2 we'll certainly pass it out.

3   JUDGE CLIFTON: They would just as soon work with a

4 document beside them through their lunch.

5   MR. ENGLISH: We will distribute it right now.

6   JUDGE CLIFTON: Very good. Please remain seated until you

7 get your copy and then you are free to go to lunch.

8   At this point, I've got to determine when we come back.

9 Please be back and ready to go at 2:35. 2:35. So we go off

10 record at 1:18.

11   (Whereupon, the lunch recess was taken.)

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1   FRIDAY, OCTOBER 30, 2015 - - AFTERNOON SESSION

2   JUDGE CLIFTON: We're back on record at 2:35. I would like

3   to invite Mr. Blaufuss to take the witness stand. Mr. Francis,

4   I presume that when we're finished here this evening, that we

5   have to take everything with us; am I correct?

6   MR. FRANCIS: Will Francis, USDA. We are checking to see

7   if that room that we usually have available is going to be

8   available to us over the weekend, so we will get back to you.

9   JUDGE CLIFTON: That's like a storage closet?

10   MR. FRANCIS: Yes, it will be locked up over the weekend.

11   JUDGE CLIFTON: Yeah, that's a very helpful place.

12   MR. FRANCIS: Yep. Thanks.

13   JUDGE CLIFTON: Ms. Elliott, I'm looking at testimony of

14 Rob Blaufuss, Part 2, will that be Exhibit 120?

15   MS. ELLIOTT: Yes.

16   JUDGE CLIFTON: I'm marking mine as Exhibit 120.

17   (Thereafter, Exhibit Number 120, was

18   marked for identification.)

19   JUDGE CLIFTON: And Mr. Blaufuss, you remain sworn. I

20 would like you to again state and spell your name.

21   MR. BLAUFUSS: Rob Blaufuss, B-L-A-U-F-U-S-S.

22   JUDGE CLIFTON: Thank you. Mr. English.

23   DIRECT EXAMINATION

24 BY MR. ENGLISH:

25   Q. Thank you, your Honor. Chip English.

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1   Mr. Blaufuss, you have a statement, and I note at the

2   end there are end notes, which we do not, as usual, for the

3   court reporter, we're just asking the exhibit to contain those,

4   and so those do not have to be typed in. And I have no

5   additional direct at the moment, so Mr. Blaufuss, would you

6   read Exhibit 120?

7   A.

8   Introduction

9   My name is Rob Blaufuss and I will testify today on

10 pool distributing plant, pool distributing plant units, supply

11 plant shipping requirement, and producer milk qualification

12 language found in Proposal 2.

13   Pool Distributing Plant Language

14   Proponents of proposal 2 agree with the Cooperatives'

15 proposal, in that a 25 percent route distribution threshold for

16 a Section 1051.7(a) plant is more appropriate for a California

17 Federal Order. The proposed language for a Section 1051.7(a)

18 in Proposal 2, has been revised to as follows:

19   (a) A distributing plant, other than a plant

20   qualified as a pool plant pursuant to paragraph

21   (b) of this Section or Section .7(b) of any

22   Federal Milk Order, from which during the month 25

23   percent or more of the total quantity of fluid

24   milk products physically received at the plant

25   (excluding concentrated milk received from another

1   plant by agreement for other than Class I use) are

2   disposed of as route disposition or are

3   transferred in the form of packaged fluid milk

4   products to other distributing plants. At least

5   25 percent of such route disposition and

6   transfers, must be to outlets in the marketing

7   area.

8   JUDGE CLIFTON: Now, you read on line 2 of the section,

9   "any" is that how that should read?

10   MR. BLAUFUSS: Yes.

11   JUDGE CLIFTON: Ms. Elliott, do you see where I am?

12   MS. ELLIOTT: Line 2?

13   JUDGE CLIFTON: Of the indented paragraph.

14   MS. ELLIOTT: Okay.

15   JUDGE CLIFTON: Right now it says "an" and you will make it

16   "any". Thank you.

17   MS. ELLIOTT: Okay.

18   JUDGE CLIFTON: Thank you. You may continue.

19   MR. BLAUFUSS: The Class I route distribution level at

20   which a plant attains pool distributing plant status is set by

21   each of the individual orders. Pool distributing plant sales

22   qualification standards are higher no those orders which have

23   higher Class I utilization levels. In Federal Order 5, 6, and

24   7, the Federal Orders with the highest Class I utilization

25   rates, the Class I route distribution at which a plant becomes

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1 a fully regulated pooling distributing plant, occurs when a

2 plant sells 50 percent or more of the milk physically received

3 at the facility as Class I. In Federal Orders 1, 32, 124, 126,

4 and 131, that qualification standard is set as 25 percent of

5 total sales. As the result of a 2012 hearing, FMMO 33 has a

6 pool distributing plant qualification of 30 percent. Finally,

7 an FMMO 30, the qualification standard is met when 15 percent

8 of the milk physically received at the plant is sold as

9 Class I.

10   Class I handlers are regulated by where their sales

11 occur, not by where their plant is physically located. In

12 order for a plant to be a Section 1051.7(a) distributing plant,

13 it must sell a set percentage of their total Class I sales

14 within an FMMO. Should a pool distributing plant fail to sell

15 25 percent of their total route dispositions into an individual

16 Federal Order, they would then be considered a partially

17 regulated plant. Both Proposal 1 and Proposal 2 call for, call

18 for a 25 percent in-area shipping requirement. Dean Foods

19 supports this in-area sales percentage, as it is consistent

20 with language found in other orders.

21   JUDGE CLIFTON: In other?

22   MR. BLAUFUSS: In other Federal Orders, thank you.

23   The Dairy Institute of California proposal provides

24 language in its California Federal Order proposal, which allows

25 for a formation of a distributing plant unit. Proposal 2

1 language with regard to unit pooling, mirrors that of the Upper

2 Midwest Order. The language in Section 1051.7(d) allows for

3 two or more plants operated by the same handler and located in

4 the marketing area, to qualify for pool status as a unit, by

5 meeting the total and in-area route disposition requirement of

6 a pool plant. Pool distributing plant language requires that

7 at least one of the plants qualifies pursuant to Section

8 1051.7(a). Provision language also requires that other plants

9 in the unit must process Class I or class II products. Using

10 50 percent or more of the total Grade A fluid milk products

11 received in bulk from such plants or diverted therefrom by the

12 plant operator in Class I or Class II products.

13   Ensuring an Adequate Supply of Milk for Fluid Purposes

14   A supply plant is a plant which receives milk directly

15 from dairy farmers and transfers or diverts fluid milk products

16 to other plants or manufacturers dairy products on its

17 premises. A supply plant ships a set percentage of the Grade A

18 milk received from dairy farmers to pool distributing plants.

19 In return for supplying Class I plants with milk, supply plants

20 are eligible to share in the Order's Class I revenues. The

21 shipping percentages -- the shipping percentages for an

22 individual order are typically set at or near the Class I

23 utilization level of that, of the order. Supply plant shipping

24 percentages are an important provision in the Federal Order

25 system. They ensure that pool distributing plants have access

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1 to an adequate milk supply, and allow for a reserve supply of

2 milk available to serve the needs of the Class I market.

3   Dean Foods supports the Dairy Institute of California's

4 regulations around supply plant shipping percentages. A key

5 part of the Dairy Institute proposal is that it allows for

6 shipping percentage to adjust over time, should changes occur

7 in the Class I utilization in the California FMMO pool. The

8 adjustable shipping requirements will ensure that pool

9 distributing plants will continue to receive an adequate milk

10 supply should the Class I utilization in the California pool

11 increase. Federal Orders currently require a request to be

12 submitted to the individual Market Administrator offices in

13 order for shipping percentages to be adjusted. This process

14 can be inefficient and puts the burden of proof on those

15 parties which seek to maintain the status quo rather than those

16 parties requesting the change.

17   The Dairy Institute proposal would be more efficient in

18 that all parameters for shipping percentage adjustments have

19 been already, have been already been provided in Section

20 1051.7(c)(2), although the Market Administrator could still

21 adjust the levels. The adjustment would no longer be at the

22 sole discretion of the Market Administrator and would be based

23 entirely on the most current Class I utilization of the pool.

24 Should additional milk be needed for Class I purposes, the

25 quota or non-quota equivalent pounds, milk shipping percentage

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1 would be adjusted further.

2   When the quota plan was initially set up in California,

3 the base pool quota was established as 110 percent of the

4 Class I utilization accounted for during the base period

5 divided by the number of days in that period the producer

6 actually had Class I utilization. The amount by which the

7 production base exceeded pool quota was designated as daily

8 base. The Gonsalves Milk Pooling Act of 1969, eliminated the

9 direct incentive to supply milk to fluid milk processors.

10 Unlike the Federal Orders, there are no direct requirements to

11 ship milk to Class I plants in the California state regulatory

12 system. However, the underlying statutory regimes and

13 regulatory policies developed are unique. Instead, California

14 relies on a call provision should milk not be made available to

15 fluid processors. This provision requires that when milk is

16 needed, call handlers may place a call for milk to be used for

17 Class I purposes from designated supply plants. To a certain

18 degree, historic tradition also plays a role in why Class I

19 markets remain supplied. Since its introduction, quota and

20 Class I have shared a close link. While there is no

21 requirement to supply fluid milk bottlers, there has long been

22 a historic sense of tradition to do so.

23   As I stated earlier, the cooperative proposal makes me

24 exceedingly anxious about our ability to track a milk supply

25 long-term. A California Federal Order would likely represent a

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 1  reset of the status quo in California.  A reset of historic

 2  milk supply relationships would have dramatic implications for

 3  a Class I handlers' ability to source milk.  With no basic

 4  performance requirement on either quota or non-quota milk,

 5  supply plants may opt to ship milk to manufacturing plants

 6  which tend to be located closer to the milk production areas

 7  rather than Class I plants, which tend to be further away from

 8  the farms and closer to urban population centers.  Under the

 9  co-op proposal, all milk would enjoy the privileges of being in

10  a Federal Order pool, without ever actually having to meet any

11  of the basic shipping requirements found in all other Federal

12  Orders.  The co-op proposal would ultimately lead to increased

13  "pool riding" in California.  Pool riding occurs --

14      JUDGE CLIFTON:  Let me have you read that sentence again,

15  please.

16      MR. BLAUFUSS:  The co-op proposal could ultimately lead to

17  increased "pool riding" in California.  Pool riding occurs when

18  milk is allowed to attach itself to a Federal Order without

19  ever actually performing.  Non-performing supply plants are

20  allowed to enjoy the same privileges as those plants which are

21  serving the Class I market, in most instances, the higher blend

22  price.

23          Producer Milk Qualification Standards

24      All Federal Orders require producers to meet basic

25  requirements in order for producer milk to be associated with
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an individual Federal Order. In order for their milk to be

considered pool milk, they must first "touch base" with a pool

plant. The touch base requirements are not meant to be onerous

to the producer. Producer requirements vary significantly from

order to order, with higher requirements in place in higher

Class I markets, and smaller requirements in those markets with

low Class I utilization.

JUDGE CLIFTON: Let me stop you there. I would like for us

to make the change as you stated it. We're on page 5, we're

the third line, fourth line down, in the section that has the

heading "Producer Milk Qualification Standards." And I want to

know, Mr. Blaufuss, for the sentence that begins "the touch

base requirements are not meant" you want us to insert "be"

after the word "to"; is that right?

MR. BLAUFUSS: Yes.

JUDGE CLIFTON: All right. Do you see that, Ms. Elliott?

MS. ELLIOTT: Yes.

JUDGE CLIFTON: All right. Would you begin again,

Mr. Blaufuss, and read beginning with "the touch base

requirements."

MR. BLAUFUSS: Certainly.

The touch base requirements are not meant to be onerous

on the producer. Producer requirements vary significantly from

order to order, with higher requirements in place in higher

Class I markets, and smaller requirements in those markets with

1 lower Class I utilization. In Florida, for example, in any

2 month not less than ten days production must be physically

3 received at a pool plant during the month in order for that

4 milk to be eligible to be diverted. Given the lower Class I

5 utilization level, we are supportive of a touch base

6 requirement that mirrors that of the Upper Midwest Order. The

7 the Dairy Institutes's Proposal does not allow for producer

8 association to occur unless at least the lesser of one day's

9 production or 48,000 pounds of milk of a dairy farmer is

10 physically received at a pool plant.

11   In order to ensure orderly marketing, there must also

12 be repooling requirements in place to limit a handler's ability

13 to bring a significant amount of milk back onto the order that

14 had previously been removed from the pool, also known as

15 depooling. The Dairy Institute proposal does exactly that. By

16 limiting the amount of milk reported by a handler to no more

17 than 125 percent of producer milk receipts pooled by the

18 handler during the prior month between April and February.

19 It may not exceed 135 percent in March. Dean Foods feels that

20 these are appropriate repooling percentages, given the dynamics

21 of today's California dairy market.

22   The co-ops are trying to have it both ways in

23 Proposal 1. In a Federal Order hearing in the Upper Midwest,

24 an order similar to California, and another hearing in the

25 Mideast, Dean Foods proposed inserting a true Dairy Farmer for

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1 Other Markets provision into the respective Order language.

2 These Dairy Farmers for Other Markets provisions were similar

3 to the language currently found in Federal Order 1. Like it

4 does in Federal Order 1, this provision would have severely

5 limited plant's ability to depool in the Upper Midwest and the

6 Mideast by making it difficult for milk to return to the pool

7 once the choice to remove it from the pool was made. In both

8 hearings the cooperatives, two of which are Proponents of

9 Proposal 1, did not support our position. With respect to the

10 Federal Order hearing, Federal Order 30 hearing, in fact,

11 Mr. Marvin Beshore, the Attorney representing DFA, Inc., LOL

12 Inc., etcetera, stated the following in his post-hearing brief:

13 "Furthermore, we do not advocate the adoption of proposals

14 which are more nearly prohibit depooling. We do not believe

15 that such a radical change in the operations of Order 30 is

16 necessary at this time to correct the abuse of open repooling.

17 Dean Foods proposals would require more radical changes in

18 Order 30. Proposal 2 represents an effective but modest

19 solution for the problem."

20   It is worth noting that the Proposal 2 in that Federal

21 Order 30 hearing called for the 125 percent repooling

22 limitations that proponents of Proposal 2 in this proceeding

23 have proposed. Dean supports the Dairy Institute petition with

24 respect to repooling limitations, as it ensures uniformity

25 amongst all Federal Order and does not create a special

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1 exemption. This concludes part 2 of my testimony.

2   JUDGE CLIFTON: Mr. Blaufuss, on that page, when you read

3 you added the word "is" page 6 up about five lines, when you

4 read "it is worth noting," shall Ms. Elliott insert the word

5 is?

6   MR. BLAUFUSS: Yes.

7   JUDGE CLIFTON: Thank you. Then I have one other tiny --

8   MR. BLAUFUSS: You have a very good eye.

9   JUDGE CLIFTON: Thank you. It's my job.

10   MR. ENGLISH: While you are looking, your Honor, on page 3,

11 four lines from the bottom, there was an extra "been" and he

12 caught that, and I think he changed it. So it is the sentence

13 that says, "The Dairy Institute proposal would be more

14 efficient in that all the parameters for shipping percentage

15 adjustments have already been provided." And I think he first

16 stumbled over it then re-read it without the first "been". So

17 I would ask that we strike the word "been" that appears before

18 the word "already".

19   JUDGE CLIFTON: Thank you, Ms. Elliott. So we have done

20 that. We have stricken the first "been". And that was my only

21 other one, Mr. English, so we're good.

22   MR. ENGLISH: Your Honor, at this time I move admission of

23 Exhibit 120?

24   JUDGE CLIFTON: Does anyone wish to question Mr. Blaufuss

25 before determining whether you have any objection? No one. Is

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1 there any objection to the admission into evidence of

2 Exhibit 120? There are none. There is -- there is, I think, I

3 don't know what this is.

4   MR. MILTNER: Ryan Miltner. I don't think this is an

5 objection. I think it is a point of clarification. In the

6 final paragraph there's a sentence where the witness has

7 referred to Mr. Beshore. And as attorneys, we make arguments

8 and we file briefs, and the words maybe crafted by us, but they

9 are not our own. And I would suggest that a better phrasing of

10 the sentence that I would request the witness adopt, would be

11 that "with respect to the Federal Order 30 hearing, DFA, Inc.,

12 Land O'Lakes, Inc., stated the following in their post-hearing

13 brief. That is my only comment.

14   JUDGE CLIFTON: Mr. English, your response?

15   MR. ENGLISH: I mean, it is up to the witness if that's

16 when he wants to do. It doesn't say it is attributing the

17 statement to Mr. Beshore in the sense that it is somehow going

18 to come back for him. Obviously, he is speaking for DFA and

19 Land O'Lakes, but it is up to the witness as to what he wants

20 to do. I don't think it's up to ya'll. I don't think it

21 creates an objection, it is his statement.

22   JUDGE CLIFTON: I actually do think the words in a brief

23 are the words of the attorney.

24   MR. ENGLISH: Okay. That's fine.

25   JUDGE CLIFTON: My opinion. So I think it is fine the way

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 1  it is.  I mean, we have --

 2      MR. ENGLISH:  I accept your correction.

 3      JUDGE CLIFTON:  It is not a correction, I mean --

 4      MR. ENGLISH:  Well, correction of my view that it is not

 5  the words.  That's fine.  I -- I don't think it is, I don't

 6  think it is an objection, actually, to the statement anyway.  I

 7  would ask that it be left the way it is.

 8      JUDGE CLIFTON:  All right.  Very fine.  Thank you.  I

 9  appreciate, Mr. Miltner, your pointing that out.  Obviously,

10  attorneys have different viewpoints, for different clients, and

11  different situations, and so forth.  But I see nothing wrong

12  with the way this is laid out.  Is there any objection to the

13  admission into evidence of Exhibit 120?  There are none.

14  Exhibit 120 is admitted into evidence.

15          (Thereafter, Exhibit Number 120, was

16           received into evidence.)

17      MR. ENGLISH:  Your Honor, before I turn the witness over

18  for further examination, I would just point out to everybody

19  that that examination is what is standing between you and a

20  somewhat early Friday.

21      JUDGE CLIFTON:  Who will begin?  These are extremely

22  important provisions, as we all know.  I know you are just

23  teasing.  Mr. Beshore?

24                  CROSS-EXAMINATION

25  BY MR. BESHORE:
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1   Q. Marvin Beshore.

2   I think we will safely beat that 5:00 whistle this

3 Friday.

4   Okay. Mr. Blaufuss, the first, where we have some

5 agreement here. Can you pool distributing plant language, can

6 you talk a little bit about why you decided to change the terms

7 in Proposal 2 to confirm, to conform to those in Proposal 1 for

8 distributing plants?

9   A. Well, I guess full honesty, I thought in our proposal

10 we had 25 to start with. I didn't know that was actually a

11 change. But I think to a certain point as well, I don't know

12 how much milk is coming into the state that become regulated as

13 as a Class I, but I know the number is north of zero. And I

14 think compared to where we are today, you are going to have a

15 higher Class I utilization should there be a Federal Order in

16 California, assuming, of course, you also get the exempt PD

17 pounds added to the pool as well.

18   Q. Okay. So your, a factor is that you think the

19 utilization is going to end up being higher than it is today in

20 a California Federal Order, if there is one. Higher than it is

21 today in the State Order.

22   A. Yeah. I think the pounds, some of the exhibits put

23 forth by CDFA, I think it would speak to, I don't know what the

24 magnitude would be, but I believe it would be higher, yes.

25   Q. Okay. So this is an instance where you think it's

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1 legitimate to have one view in Order 30 and another one in

2 California Order here, distributing plant in Order 30 is 15

3 percent, right?

4 A. Yeah, but I think we'll also have a higher utilization

5 for Class I in California than we do in Federal Order 30.

6 Q. Okay. And therefore, the provisions of the California

7 Order should be tailored to its, to its characteristics?

8 A. I think, as I stated in my testimony, is the Class I

9 that, not utilization, but the shipping requirement on the 25

10 percent is what we're proposing, and I think generally it is

11 reflective of the Class I utilization in the Order. And I

12 think today you are looking at probably a 14 percent. I think

13 you get closer to maybe 20 percent if you add out-of-state

14 potentially with the PD's as well, and I think 25 percent is

15 generally reflected. Whereas in the Upper Midwest, I'm kind of

16 guessing on numbers that can vary, but you're maybe ten percent

17 roughly. So I think, yeah, you do have a noticeable difference

18 in a Class I, so it's not just I'm cherry picking. I generally

19 feel that's going to be more reflective of the Class I in

20 California than the go forward.

21 Q. Okay. Somebody else might think that repooling

22 provisions in California ought to be different than Order 30,

23 too, right?

24 A. I'm not sure I understand the question.

25 Q. You're not just cherry picking, you are tailoring what

5489

1 you recommend for California to the provisions of California

2 as you understand them, correct?

3   A. I'm tailoring the Class I as I'm talking about in 7(a),

4 to be generally reflective of the Class I in the Order. Which

5 is, I think, consistent with what I said in my testimony.

6   Q. Okay.

7   A. I don't think I'm creating a special exemption to have

8 it been 25 percent.

9   Q. No, I mean, we support 25 percent. I was just

10 exploring that it is different, for California, versus Order 30

11 in this case in your view.

12   A. It's because you have a different level of Class I in

13 the pool.

14   Q. Okay.

15   JUDGE CLIFTON: So the answer to Mr. Beshore's question

16 was, yes, because, right?

17   MR. BLAUFUSS: Not quite sure here. I thought I answered

18 the question.

19   JUDGE CLIFTON: Would you ask it again, Mr. Beshore?

20   MR. BESHORE: I will move on. I think --

21   JUDGE CLIFTON: Okay.

22   MR. BESHORE: I think we covered it.

23 BY MR. BESHORE:

24   Q. Let me ask you about the unit pooling, distributing

25 plant unit provision. Are there plants that you are aware of

5490

1 in California that are likely to want to associate in that way?

2   A. I don't know. I don't know how many stand-alone

3 Class 2 are even in the State of California.

4   Q. Okay. So that is a provision you are supporting, not

5 because you are aware of any particular circumstances that

6 might apply, but because you think it's generally appropriate

7 to an Order, is that fair?

8   A. I think that's fair.

9   Q. Okay. Let's go to Performance Requirements or Shipping

10 Requirements. Etcetera. Have you been involved in any Federal

11 Orders that had call provisions?

12   A. I'm not sure what you mean by involved.

13   Q. Well, have you been, while you have been working with

14 Dean and have some consultative role with Dean operational

15 personnel with respect to pooling issues, you have such a role,

16 I take it?

17   A. I'm involved. I'm not the guy but --

18   Q. That was the word I used. Okay? Have you been

19 involved --

20   A. I'm more the numbers guy.

21   Q. Have you been involved in any, in pooling situations or

22 in, in the participation in any federal orders with call

23 provisions?

24   A. Not in anytime at dean.

25   Q. Okay. That's all I wanted to understand, so I won't

1 ask you how they worked or didn't work. Okay.

2   Supply plant shipping percentages. 7(c) in your

3 proposal. Have you, and use the word gained, have you tested

4 the provisions in Proposal 2, Section 7(c), with the

5 anticipated utilizations and other factors in the California

6 pool?

7   A. So I was listening yesterday with your cross with

8 Mr. Zolin.

9   Q. Yes?

10   A. I do know we seem to have a numbers problem and I

11 believe we're going to plan to address that before the end of

12 the hearing, and put forward, you know, a appropriate. Our

13 intent wasn't to have all this extra shipping requirement that

14 it be more than necessary for the Order. Of course we'll, what

15 the numbers or how that will be, I don't know, but we plan to

16 address that.

17   Q. Okay. So I could just drop that for now and somebody

18 else will pick up on that at some later time?

19   A. I believe that's our intent.

20   Q. With that understanding, I will drop it, or not ask

21 anymore questions about that.

22   Would that, that would include the 125 percent

23 repooling provisions, that sort of thing?

24   A. I don't know that I see the tie there.

25   Q. Okay. Well, let's explore that maybe just a little

5492

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 1   bit.  Have you been involved in running the numbers like with

 2   pooling and repooling in Order 30 where you have got the 125

 3   percent limitation?

 4       A.  I know that it is operating in the Order, but I don't

 5   know exactly what you are asking with that question.

 6       Q.  Okay.  So it operates in that Order but Dean doesn't

 7   pool any, Dean Foods, doesn't pool any supply plants in that

 8   order, correct?

 9       A.  I don't believe so.

10       Q.  Okay.  So you wouldn't have just personal experience in

11   figuring out how much milk you can, if you want to depool, how

12   much you depool this month and how it would work in repooling?

13       A.  Well, even if we did, we're Class I so we can't out of

14   the pool anyway.

15       Q.  Okay.  So you haven't gained out --

16       A.  Or I guess I should say --

17       Q.  Let me ask the question.  So you haven't gained out, to

18   use a colloquialism, I guess, how 125 percent might work with

19   volumes of milk that could be involved in a California Federal

20   Order?

21       A.  Need to correct part of my statement there.  We do have

22   a stand-alone Class II plant in Illinois that can elect to pool

23   or not pool.  We do not -- that's a Cooperative plant supply.

24       Q.  That plant is, Dean Foods owns and operates a

25   stand-alone Class II plant which is supplied by cooperatives?
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5493

1   A. Correct.

2   Q. Okay. Now, let me -- let me go back. You were picking

3 up on a prior question and correcting what you said, which I

4 appreciate. Let me get back to the question I tried to pose.

5 Since you don't have any supply plants in Order 30 which would

6 be subject to the 125 percent repooling, you haven't had

7 occasion to personally work with that experience, correct?

8   A. Correct.

9   Q. And you have not or have you gamed out, to use a

10 phrase, how that would work with volumes that we know are

11 involved in the California marketplace?

12   A. We haven't done modeling work or economic work to say

13 here's what happens with the 125.

14   Q. Okay. That's all, thank you.

15   JUDGE CLIFTON: Who would next like to ask questions of

16 Mr. Blaufuss?

17   I'll invite redirect. No redirect. Mr. Francis, do

18 you have any questions?

19   CROSS-EXAMINATION

20 BY MR. SCHAEFER:

21   Q. Good afternoon. Henry Schaefer, USDA.

22   On page 2 of your testimony, in the first full

23 paragraph, I believe it is the third sentence, it starts out,

24 "should a pool distributing plant fail to sell 25 percent of

25 their total route dispositions." Are you referring to the

5494

1 provision here that that would only be in California or are you

2 referring to the Federal Orders in general, because obviously

3 Order 30 has a 15 percent qualification for that first

4 percentage, and the other Orders have various percentages, as

5 you have pointed out. So if a plant was shipping into one of

6 those orders, that would be the particular percentage relative

7 to that order.

8   A. Let me see if I have Federal Order 30 language here, I

9 just might.

10   Q. It's on page 116. I think what you are looking for on

11 the right, bottom of the right hand column, it is actually

12 Section E in our Order, rather than Section D in the proposal.

13   A. No, I don't think.

14   Q. Well, that's for the unit, I'm sorry. The 15 percent

15 is at, is in, right in (a). And in Order 30 it says, "from

16 which during the month 15 percent of fluid milk products

17 physically received at the plant."

18   A. I'm trying to reference here with the -- I think what

19 you are asking is the partially regulated status. So most

20 Orders that I'm used to dealing with is, if I don't sell 25

21 percent into an individual Order, then I'm a partially

22 regulated plant. That's what I think I was trying to discuss

23 here.

24   Q. But, in, for instance, if you shipped 16 percent into

25 Order 30, and 20 percent into a 25 percent order you would be

5495

1 related by Order 30.

2   A. You are correct.

3   Q. Okay. In your discussion of the supply plants you

4 talked about the steps outlined in the Order, in the proposal

5 using the step process that Mr. Zolin talked about yesterday

6 with regards to changing shipping percentages at a supply

7 plant, he had mentioned that they reflects to other

8 alternatives do you feel the same way?

9   A. Yes, to an extent. Obviously, I have a pretty strong

10 opinion of shipping requirements, I think there's discretion

11 there, but there also needs to be ensuring an adequate supply

12 of fluid milk. So I think there is, obviously we have a little

13 bit of a numbers problem that I think we plan to adjust, or, to

14 adjust moving forward at some point here. But I still think

15 you need a strong shipping requirement in a Federal Order

16 structure.

17   Q. Thank you.

18   JUDGE CLIFTON: What other questions are there by anyone,

19 for Mr. Blaufuss? Mr. Blaufuss, is there anything you want to

20 add before you step down?

21   MR. BLAUFUSS: Not that I can think of.

22   JUDGE CLIFTON: All right. And will we see you again on

23 another topic?

24   MR. BLAUFUSS: I think that's the safe assumption.

25   JUDGE CLIFTON: I'm glad to hear it thank you you may step

1 down. Ms. May, I would invite any announcements. If you would

        2 come to the podium, please.

        3   MS. MAY: Laurel May, USDA.

        4   I think this really probably only pertains to USDA, but

        5 we can store our boxed up stuff in the closet in the boardroom

        6 this weekend, but we won't be able to put it in there because

        7 there's a group using that room until 4:00, so if we, if we

        8 were to disband early, we would just stack our stuff up back

        9 there and the staff will move it back for us, and then they

       10 will bring it into the auditorium on Monday. So for the rest

       11 of you, look forward to seeing you in the auditorium on Monday

       12 morning.

       13   JUDGE CLIFTON: And the sound man, what do you propose?

       14   MS. MAY: I was under the impression that Tyler had worked

       15 something out with them kind of on his own so I don't know-

       16 what.

       17   JUDGE CLIFTON: All right. So they may have their own

       18 arrangement. So for the rest of us, we should take everything

       19 with us, bring it to the auditorium Monday morning, aware that

       20 our laptops need to be fully charged and we need to have

       21 adequate liquid already consumed because there will be no

       22 refreshments.

       23   MS. MAY: Right. You can still come out into the main

       24 lobby to have coffee or whatever, but no food or drink in the

       25 auditorium itself.

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 1        JUDGE CLIFTON:  All right.  And if we are drinking in the

 2   lobby, it's something we brought ourselves?

 3        MS. MAY:  Correct.  The caterers are not scheduled to come

 4   on Monday.

 5        JUDGE CLIFTON:  All right.  And then so far as you know, on

 6   Tuesday what room will we be in, do you know?

 7        MS. MAY:  Tuesday through Friday we should be back in this

 8   room here.

 9        JUDGE CLIFTON:  In the Independence Room.

10        MS. MAY:  Yes.

11        JUDGE CLIFTON:  All right.  All right, then.  Does anyone

12   have any questions for Laurel May?   Ms. Beshore, can you come

13   forward?  This is true, I would like for you state and spell

14   your name, please.

15        MRS. BESHORE:  Anne Marie Beshore, A-N-N-E space M-A-R-I-E.

16   B-E-S-H-O-R-E, does the staff of this beautiful hall care if we

17   leave coolers and lunch bags sitting in the lobby with our

18   personal refreshments?

19        MS. MAY:  I think you can probably -- it is my opinion that

20   there is the little walkway before you actually get into the

21   auditorium.  I think we can probably put stuff out there.  The

22   copier out in the hall.

23        JUDGE CLIFTON:  Thank you, I appreciate it.  I'm delighted

24   to announce we'll be leaving now.  There's more?  Mr. English?

25   Oh, I forgot, I need a preview, I'm so sorry.
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1   MR. ENGLISH: You don't have to have one.

2   JUDGE CLIFTON: I want one.

3   MR. ENGLISH: Actually, before I do the preview and this

4 is I think long overdue, Laurel May, I know you have taken the

5 lead, I know others have been involved, but seriously, for

6 those us who have attended Federal Order hearings, we have

7 never experienced the kind of facilities, catering, and I mean

8 that in a good sense. And I know, I'm especially saying this

9 in advance of going to the auditorium on Monday, so I really

10 think that it has been outstanding. And this is a difficult

11 process for all of us, and you and your team have made this so

12 much more bearable and really, you deserve a real vote of

13 thanks. A round of applause, whatever people want to do.

14   And now, I'll do the preview. This morning I indicated

15 that we expected to have a witness from Driftwood Dairy, and we

16 are still expecting to have a witness from Driftwood Dairy.

17 This morning I indicated that we expected to have witnesses,

18 plural, I suspect as a panel kind of thing, from

19 Clover Stornetta, and we are still anticipating that. Just

20 one? Okay. I have misunderstood. Just one witness. I'll

21 talk about Al Zolin in a moment. We do expect to have

22 Mr. Pat Fish, F-I-S-H, the Vice President of Operations from

23 Saputo, to be here on Monday. And by definition, we are moving

24 into the pricing discussion with Mr. Fish. And it would be

25 logical for Dr. Schiek to be connected to that testimony, and

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 1   we're still working exactly how we're going to put that

 2   together, but Mr. Fish is obviously coming in from, I say

 3   obviously, he's coming in from Wisconsin, so we would like to

 4   get him on the stand on Monday.  What that then says about

 5   Mr. Zolin, is that since he's here, in his own words, for the

 6   long-term, he is flexible as to his time.  As to whether he

 7   gets on Monday or not, it will depend on getting through the

 8   testimony on pricing, and you know, in those immortal words, if

 9   you think we have had some dense material, you ain't seen

10   nothing yet.  So that's what I anticipate for Monday.

11        JUDGE CLIFTON:  Very well.  Remember Cliff Carman's

12   admonition to fall back.  We will no longer have any hearing on

13   daylight savings time and it will be dark when we leave this

14   building.  We'll be sad.

15        All right.  Very good.  We go off record at 3:23.

16        (Whereupon, the evening recess was taken.)

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