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MIDEAST FEDERAL MILK ORDER NO. 33

PUBLIC HEARING

DOCKET NO. AO-166-A72; DA-05-01

VOLUME III

- - -

BE IT REMEMBERED, that upon the hearing of the above-entitled matter, held at the Shisler Conference Center, Ohio Agricultural Research and Development Center, Wooster, Ohio, before Peter M. Davenport, US Administrative Law Judge, and commencing on Wednesday, the 9th day of March, 2005, at 8:29 o'clock a.m., at which time the following proceedings were had.

- - -

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2

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3 Dennis Schad

4 Director of Marketing and Regulatory

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9 ALSO PRESENT: Tim Demland, Executive

10 Director of Ohio Dairy Producers; Carl Rasch,

11 Director, Milk Sales, Michigan Milk Producers

12 Association; Erick Metzger, General Manager,

13 National All-Jersey, Inc.; Gary Lee, Prairie

14 Farms Dairy, Inc.; Joe Weis, Foremost Farms

15 Cooperative; Charles Lausin, Producer in Geauga

16 County, Trustee of Ohio Farm Bureau; Paul

17 Rohrer, Wayne County farmer; Eddie Steiner,

18 Smith Dairy Products Company; Bruce Bloom,

19 Michigan dairy farmer; Gregory Speck, Operations

20 Manager, Continental Dairy Products and Sharon

21 Uther, Assistant to Market Administrator for

22 Mideast Marketing Area

23

24

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17 Exhibit 30 667

18 Exhibit 31 763

19 Exhibit 32 873

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1                   JUDGE DAVENPORT: We're back in  
2 session. I see as it's in everybody's interest  
3 to get Ms. Uther back to work in doing her  
4 normal duties instead of being here with us,  
5 we're going to take her first at this time.

6                   Ms. Uther, you're still under oath.  
7 Counsel?

8                   MR. STEVENS: Thank you, Your  
9 Honor.

10                   SHARON UTHER  
11 of lawful age, a Witness herein, having been  
12 previously duly sworn, as hereinafter certified,  
13 further testified and said as follows:

14                   REDIRECT EXAMINATION

15 BY MR. STEVENS:

16 Q. Good morning.

17 A. Morning.

18 Q. Did you prepare some statistical material  
19 with respect to requests of some of the parties  
20 at the hearing?

21 A. Yes, I did.

22 Q. And you brought that with you today?

23 A. Yes, I did.

24                   MR. STEVENS: We provided four  
25 copies for the reporter, Your Honor, a copy for



1 Your Honor and there are copies available at the  
2 back of the room for the parties. I guess, Your  
3 Honor, we would like this marked for  
4 identification -- I think we're up to --

5 JUDGE DAVENPORT: Exhibit 28.

6 MR. STEVENS: Thank you, Your  
7 Honor. Number 28.

8 (Thereupon, Exhibit 28 of the Mideast  
9 Federal Milk Marketing Order hearing  
10 was marked for purposes of  
11 identification.)

12 BY MR. STEVENS:

13 Q. And it's a document that is entitled  
14 Compilation of Statistical Data As Requested by  
15 Dean Foods, a supplemental request, right?

16 A. Yes.

17 Q. Now, why don't you just go through the  
18 document briefly page by page and describe  
19 what's in there and what you depicted.

20 A. Okay. Request Number 1 was the proposed  
21 Mideast transportation credits with selected  
22 rates by region, and it was requested that we do  
23 the calculation for the five regions at the same  
24 rates as previously done, but with no  
25 restriction for the first initial miles and for

1 no credit for miles in excess of 400. And there  
2 are dollar values depicted for each credit rate  
3 for the five regions.

4 Q. You have an explanatory footnote?

5 A. Yes. That the rates do apply to Class I  
6 milk received at pool distributing plants and  
7 are in dollars per hundredweight per mile.

8 Q. Okay.

9 A. Request Number 2 is Receipts of Producer  
10 Milk by State and County for the month of  
11 October 2004, and we listed by county number of  
12 producers in pounds by state, which correspond  
13 to the map in Exhibit Number 7, Request Number  
14 22 as requested.

15 Q. Okay. So this can be read in conjunction  
16 with other exhibits that were previously  
17 entered?

18 A. Yes.

19 Q. As all of it can, I guess, but this relates  
20 to that description that you just gave?

21 A. Yes.

22 Q. And that comprises the entire amount of  
23 documents responding to the request?

24 A. Yes, it does.

25 Q. Now, this was prepared from official

1 records of your office or the Department of  
2 Agriculture?

3 A. Yes, they were.

4 Q. Pursuant to your -- by you or pursuant to  
5 your supervision?

6 A. Yes.

7 Q. And they're not offered for or against any  
8 proposals, are they?

9 A. No, they're not.

10 Q. They're here for the use of the parties  
11 during the course of the hearing for the  
12 purposes they desire?

13 A. Yes.

14 MR. STEVENS: Thank you, Your  
15 Honor. I offer the document for admission  
16 subject to the cross-examination, if that's  
17 appropriate. Thank you.

18 JUDGE DAVENPORT: Objections as to  
19 admissibility? There being none, Exhibit 28 for  
20 identification will be admitted as Exhibit 28.

21 MR. STEVENS: I'll offer the  
22 witness.

23 JUDGE DAVENPORT: Cross-examination?  
24 Mr. English?

25 RE-CROSS-EXAMINATION

1 BY MR. ENGLISH:

2 Q. Good morning, Ms. Uther. This is Charles  
3 English for Dean Foods.

4 A. Good morning.

5 Q. I appreciate very much this, especially  
6 given the fact that this is your time for  
7 running the pooling. My questions are very  
8 brief.

9 There are other materials here where the  
10 numbers were run to 350 miles with some minimum  
11 limit, correct?

12 A. Yes.

13 Q. If one looks at the identical rates of  
14 \$0.30, 35 and 40 and takes the difference  
15 between a 75-mile limit with a 350-limit and a  
16 75-mile limit and 400, whatever that difference  
17 is, that delta, and if one took that delta and  
18 applied it to these, would it be fair to say  
19 that would probably give you the same -- would  
20 give you a result for what it would be if you  
21 had a 350 maximum and zero mile limit?

22 A. Yes.

23 Q. Thank you. So there's no need to -- we can  
24 run that for ourselves based upon that, correct?  
25 We can just do that delta, that calculation?

1 A. Yes, I believe so.

2 Q. Thank you. Turning just a moment to Table  
3 3 of Exhibit 11 and related tables, related in  
4 the sense of the data, Table 5 on Exhibit 11 at  
5 least with reference to a column for patron  
6 producers, and I apologize if it was clear to  
7 everybody else and it wasn't clear to me, so let  
8 me see in I can clear it up, for the listing of  
9 patron producers there's a footnote that says  
10 "Producer milk for which the distributing plant  
11 is the reporting handler." And I believe we  
12 agreed that would be what we considered to be  
13 non-member milk, correct?

14 A. Yes. There could be other milk on those  
15 handlers reports, also.

16 Q. Okay. And just like there could be other  
17 report -- producers reported on those other  
18 handler reports, is the column for patron  
19 producers all of the non-members --

20 A. No.

21 Q. -- associated with this Order?

22 A. No, it's not. Because there could be  
23 non-member milk pooled on 9(c) handlers, also.

24 Q. And, in fact, aren't there a significant  
25 number of non-member producers reported on

1 various 9(c) reports in this Order?

2 A. Yes, there are.

3 Q. What is the approximate total number of  
4 non-member producers in this Order?

5 A. It's approximately 3,000 over the years,  
6 producers.

7 Q. And it would be fair to say that a very  
8 significant portion of those 3,000 non-member  
9 producers are not listed under the patron  
10 producers category?

11 A. Yes. There are a number of them not listed  
12 in that category.

13 MR. ENGLISH: Thank you. That's  
14 all I have. Again, I appreciate your time.

15 JUDGE DAVENPORT: Other cross?

16 Mr. Vetne?

17 MR. VETNE: Your Honor --

18 Ms. Uther, thank you for coming back -- I wonder  
19 if I may indulge in asking a question on a prior  
20 exhibit that came to mind?

21 JUDGE DAVENPORT: You may ask.

22 RE-CROSS-EXAMINATION

23 BY MR. VETNE:

24 Q. Do you recall -- John Vetne for White  
25 Eagle, et cetera. In Exhibit 11, Table 17

1 there's a grouping of producers by 9(c) size  
2 groupings largest three and then everybody else.

3 A. Yes.

4 Q. Are you able to indicate who was -- what  
5 9(c) cooperatives that are listed on the bottom  
6 of Table 1 of Exhibit 6 are included in each of  
7 those size groupings?

8 A. Well, in further looking at that we did  
9 determine there are three co-ops or federations  
10 in each of those groups. And by divulging who  
11 is in those groups it would lead to giving out  
12 some restricted information, we feel.

13 Q. Okay. Now, if there were nine 9(c) co-ops  
14 reporting milk, you would have been able to put  
15 it in more than two groupings?

16 A. Yes.

17 Q. If there were nine or more?

18 A. Yes.

19 Q. And looking at the bottom of Table 1 of  
20 Exhibit 6, I count 1, 2, 3, 4, 5, 6, 7, 8, 9,  
21 10 -- 11. There are 11 9(c) cooperatives which  
22 more than intuitively might be required for  
23 three groupings of three or more in each group.

24 A. Yes.

25 Q. There were not, however --

1                   MR. STEVENS:        Which table are we  
2 talking, John? Six?

3                   MR. VETNE:            Table 1, Exhibit 6,  
4 at the bottom.

5                   MR. STEVENS:        Thank you.

6 BY MR. VETNE:

7 Q.   For purposes of responding to the request  
8 in Exhibit 11, Table 17, there were less than  
9 nine total 9(c) co-ops --

10 A.   Yes.

11 Q.   -- who pooled milk?

12 A.   (Witness nodding head up and down.)

13 Q.   So that the handler is reporting pooled  
14 milk; is that correct?

15 A.   Well, per your footnote on Table 17 the  
16 "Milk included in a federated cooperative report  
17 is treated as milk reported by single 9(c)  
18 handler."

19 Q.   Yes.

20 A.   And the 9(c) handlers listed on Table 1 of  
21 Exhibit 6, some of those are members of a  
22 federation. We list the cooperative handlers  
23 separately because we do allow them to file  
24 separately 9(c) reports.

25 Q.   But the milk is -- if the milk is pooled by



1 one of these cooperatives -- yeah. If the milk  
2 of one of these cooperatives is pooled through a  
3 federation and that cooperative does not  
4 independently pool milk, that reduces the number  
5 of cooperatives that you could have reported  
6 with Table 17?

7 A. Yes. Yes.

8 Q. So with 12 -- with 12 cooperative  
9 associations on the bottom of Table 1 of Exhibit  
10 6, and you need at least 9 to group them in 3,  
11 we have at least 4 cooperatives listed there who  
12 are not pooling on their own merits, but rather  
13 pooling through a federation?

14 A. Yes.

15 MR. VETNE: Thank you.

16 JUDGE DAVENPORT: Other cross? Very  
17 well. Ms. Uther, thank you again. You may step  
18 down.

19 THE WITNESS: You're welcome.

20 MR. STEVENS: Thank you. That's  
21 all we have, Your Honor.

22 JUDGE DAVENPORT: Very well.  
23 Mr. Vetne, I gather your witnesses are next.

24 MR. VETNE: They are and I  
25 would call Jeff Leeman if he were in the room.

1 He delivered his testimony to be copied to  
2 Staples yesterday at about 2:00 in the afternoon  
3 and they said it would be done by 8 or 9:00, it  
4 wasn't, he went there at 8:00 this morning to  
5 pick it up and should be here any minute. I  
6 don't know what to do about that.

7 JUDGE DAVENPORT: I guess we'll add  
8 it when we can.

9 MR. VETNE: If there's any  
10 procedural things, small witnesses to start, I  
11 guess that's the thing to do, or --

12 MR. ENGLISH: We could close the  
13 hearing.

14 MR. VETNE: I apologize for  
15 that, Your Honor.

16 JUDGE DAVENPORT: Is there -- are  
17 there other witnesses we can take at this time?  
18 Raise your right hand.

19 (Thereupon, Mr. Weis was sworn by  
20 Judge Davenport.)

21 JUDGE DAVENPORT: Please be seated.  
22 Why don't you give us your full name and spell  
23 it for the hearing reporter, please?

24 MR. WEIS: My name is Joseph  
25 Weis, W-e-i-s.

1                   JUDGE DAVENPORT: And, Mr. Weis, if  
2 you would, please tell me who you represent and  
3 by whom you are employed and your professional  
4 business address.

5                   MR. WEIS:                I'm employed by  
6 Foremost Farms USA Cooperative. Business  
7 address is E10889A Penny Lane in Baraboo,  
8 Wisconsin 53913. And I represent Foremost Farms  
9 USA and Alto Dairy Cooperative.

10                   JOSEPH W. WEIS  
11 of lawful age, a Witness herein, having been  
12 first duly sworn, as hereinafter certified,  
13 testified and said as follows:

14                   DIRECT EXAMINATION

15 BY MR. VETNE:

16 Q. Mr. Weis, I believe that the -- you have  
17 two documents, two separate stapled documents?

18 A. Yes.

19 Q. Okay. Your testimony and then an exhibit  
20 entitled Foremost Farms USA modified Proposal  
21 Number 9?

22 A. Right.

23                   MR. VETNE:                We have these  
24 marked consecutively the testimony and the  
25 exhibit that --

1                   JUDGE DAVENPORT: The testimony will  
2 be marked as Exhibit 29 and the proposal as  
3 29-A.

4                   (Thereupon, Exhibits 29 and 29-A of  
5 the Mideast Federal Milk Marketing  
6 Order hearing were marked for  
7 purposes of identification.)

8 BY MR. VETNE:

9 Q. And we have prepared testimony and you  
10 started to give it. Do you want to make any  
11 comments before you read it?

12 A. No.

13 Q. Would you please then proceed to continue  
14 with your prepared testimony for Exhibit 29?

15 A. My name is Joseph W. Weis. I'm employed by  
16 Foremost Farms USA Cooperative, Foremost, as  
17 Vice President of the Food Products Division.  
18 This testimony is given on behalf of Foremost  
19 Farms USA Cooperative and Alto Dairy  
20 Cooperative.

21                   Foremost Farms USA is a dairy farmer owned  
22 Capper Volstead cooperative representing 3,700  
23 milk producers located in seven states. In  
24 2004, Foremost member owners located in  
25 Wisconsin, Minnesota, Iowa, Illinois, Indiana,

1 Ohio and Michigan marketed 4.8 million pounds of  
2 milk through their cooperative. Foremost owns  
3 and operates manufacturing facilities in  
4 Wisconsin, Minnesota and Iowa, along with two  
5 distributing plants in Wisconsin. In addition  
6 to supplying milk to our own facilities, we also  
7 supply distributing plants in Federal Orders 5,  
8 30, 32 and 33.

9 Alto Dairy Cooperative, Alto, is a dairy  
10 farmer owned Capper Volstead cooperative  
11 representing 550 Grade A producers in Wisconsin  
12 and Michigan. In 2004, Alto Dairy Cooperative  
13 marketed 1.36 billion pounds of its member  
14 owner's milk. Alto owns and operates two  
15 manufacturing facilities in Wisconsin. Alto  
16 supplies milk to distributing plants in Orders  
17 30 and 33, as well as their own facilities.

18 Foremost Farms USA and the Morning Glory  
19 Farms Region of AMPI, which was acquired by  
20 Foremost in 1995, have supplied milk to meet the  
21 Class I needs of Mideast Order 43 and  
22 predecessor Order 49 for many years.  
23 AMPI-Morning Glory served as the agent for the  
24 Hoosier Superpool, a common marketing agency  
25 since its inception in the early 1970s.

1   Foremost Farms USA assumed that responsibility  
2   in 1995 until Federal Order consolidation was  
3   implemented on January 1st, 2000 when Foremost  
4   became the agent for the newly formed Mideast  
5   Milk Marketing Agency, MEMMA, in Order 33. The  
6   membership of MEMMA consists of Dairy Farmers of  
7   America, Foremost Farms USA, National Farmers  
8   Organization and Land O'Lakes, Incorporated.  
9   Foremost Farms USA has 538 member owner farms  
10  located in the Order 33 marketing area.

11         Foremost Farms USA and Alto Dairy support  
12  transportation credits on producer milk  
13  delivered to distributing plants for class --  
14  for use in Class I products as requested by  
15  Dairy Farmers of America at this hearing, but we  
16  do believe that transportation credits should  
17  also be given on pool supply plant milk. We  
18  ship -- Foremost, we ship to meet the needs of  
19  the Order 33 Class I market from our supply  
20  plant located in Elkhorn, Wisconsin. The needs  
21  of the market are highest during the months from  
22  August through November. During the past three  
23  years, we have supplied the following volumes  
24  from August through November: In 2002,  
25  20,545,000 pounds; 2003, 19,060,000 pounds; and

1 2004, 23,112,000 pounds.

2 In 2004, milk deliveries were made to Dean  
3 Foods at Rochester, Indiana, The Kroger Company  
4 in Indianapolis, Indiana, Eastside Dairy at  
5 Anderson, Indiana, Reiter Dairy at Springfield,  
6 Ohio and Tamarack Farms Dairy at Newark, Ohio.  
7 During 2004, Alto supplied 8.1 million pounds to  
8 Order 33 distributing plants from August through  
9 November.

10 Exhibit 29(a) contains our proposed Order  
11 language for transportation credit on producer  
12 milk as well as supply plant milk. The  
13 transportation credit rate per hundredweight per  
14 mile and mileage determination provisions are  
15 identical to Dairy Farmers of America's proposal  
16 presented in Exhibit 14 at this hearing. The  
17 method of determining the quantity of milk  
18 eligible to receive the credit has been modified  
19 to include both pool supply plant milk and  
20 producer milk using the same calculations  
21 applied in upper Midwest Order 30 to determine  
22 the pounds of direct ship producer milk and pool  
23 supply plant milk Class I eligible to receive an  
24 assembly credit.

25 And I will read from our Exhibit 29-A,

1 proposed language for a new Section 1033.55.  
2 Section 1033.55, Transportation Credits. A,  
3 each handler operating a pool distributing plant  
4 described in Sections 1033.7(a) or (b) that  
5 receives milk from dairy farmers, and each  
6 handler described in Section 1000.9(c) that  
7 delivers milk to a pool distributing plant, each  
8 handler operating a pool supply plant described  
9 in Section 1033.7(c) or (f) that delivers milk to  
10 a pool distributing plant, and each handler  
11 operating a cooperative plant or a plant with a  
12 cooperative marketing agreement described in  
13 Section 1033.7(d) or (e) that delivers milk by  
14 transfer to a pool distributing plant, shall  
15 receive a transportation credit on the portion  
16 of such milk eligible for the credit pursuant to  
17 paragraph (b) of this section.

18       The next two parts, one -- paragraphs 1 and  
19 2 are identical to the language in the DFA  
20 proposal, so I will not read those. Section B,  
21 the quantity of milk eligible to receive  
22 transportation credits shall be determined as  
23 follows, and this is from the Order 30 assembly  
24 credit computation language, number one, at each  
25 pool distributing plant, determine the aggregate



1 quantity of Class I milk, excluding beginning  
2 inventory of packaged fluid milk products; two,  
3 subtract the quantity of packaged fluid milk  
4 products received at the pool distributing plant  
5 from other pool plants and nonpool plants if  
6 such receipts are assigned to Class I.

7         Three, subtract the quantity of bulk milk  
8 shipped from the pool distributing plant to  
9 other plants to the extent that such milk is  
10 classified as Class I milk; four, subtract the  
11 quantity of bulk milk received at pool  
12 distributing plants from other Order plants and  
13 unregulated supply plants that is assigned to  
14 Class I pursuant to Sections 1000.43(d) and  
15 1000.44; five, if bulk milk was transferred or  
16 diverted from a pool distributing plant to a  
17 nonpool plant on the same calendar day the milk  
18 was received, then the pounds of transferred or  
19 diverted milk shall be subtracted from the most  
20 distant load of milk received, and then in  
21 sequence with the next most distant load of milk  
22 received until all of the transfers have been  
23 offset.

24         Six, assign the remaining quantity pro rata  
25 to physical receipts during the month from,

1 small Roman numeral one, producers, small Roman  
2 numeral two, handlers described in Section  
3 1000.9(c), and small Roman numeral three, other  
4 pool plants.

5 Part C, transportation credits for eligible  
6 milk shall be computed as follows: number one,  
7 determine an origination point for each Section  
8 7(c), (d), (e) and (f) pool plant, or for the  
9 origination point of each load of producer milk  
10 locate the county seat of the closest producer's  
11 farm from which the milk was picked up for  
12 delivery to the pool plant -- the receiving pool  
13 plant; two, determine the shortest hard surface  
14 highway distance between the receiving pool  
15 plant and the origination point.

16 Three, subtract 75 miles from the lesser of  
17 the mileage so determined in paragraph (c)(2) or  
18 350 miles; four, multiply the remaining miles so  
19 computed by \$0.31 or \$.0031; five, subtract the  
20 Class I differential specified in Section  
21 1000.52 applicable for the county in which the  
22 origination point is located from the Class I  
23 differential applicable at the receiving pool  
24 plant's location.

25 Six, subtract any positive difference

1     computed in paragraph (c)(5) of this section  
2     from the amount computed in paragraph (c)(4) of  
3     this section; and seven, multiply any positive  
4     remainder computed in paragraph (c)(6) by the  
5     hundredweight of milk described in paragraph  
6     (b)(6) of this section.

7             Parts (d) and (e) here are identical to the  
8     language proposed by Dairy Farmers of America in  
9     their Exhibit 14. And also the remaining  
10    section with regard to the amendment to Section  
11    1033.60, those are changes at the introductory  
12    paragraph, and new paragraph A that are on this  
13    exhibit, that language is also identical to the  
14    language in Dairy Farmers of America Exhibit 14.

15            Our proposal is not a new concept in the  
16    Federal Milk Market Order system. Federal Order  
17    30 has employed transportation credits for many  
18    years. Transportation credits on supplemental  
19    milk are also a part of Orders 5 and 7.

20            It is our belief that transportation  
21    credits should be allowed on all milk that is  
22    needed to serve the market so that all of the  
23    producers who share the benefits of serving the  
24    Class I market also share more equitably in the  
25    costs involved in servicing the market.



1 Wisconsin, as you described, was that plant a  
2 pool supply plant in Order 33?

3 A. Not at all times.

4 Q. Okay. Is it your intention that a -- that  
5 a credit should be available on an organization  
6 supplying transfer milk from a supply plant  
7 whenever that occurs?

8 A. Yes, it is.

9 Q. Okay. Including if it occurs at a time  
10 when the supply plant is -- is a supply plant  
11 under another Order?

12 A. At that time the milk that's being  
13 delivered from that area to Order 33 is being  
14 delivered as producer milk, and in that case it  
15 would receive the transportation credit under  
16 the proposal DFA has put forward.

17 Q. Okay. So -- I see. So the milk associated  
18 with that supply area when -- and Foremost, for  
19 example, does not qualify as a supply plant in  
20 Order 33, it may come directly to distributing  
21 plant customers in Order 33 from the farm to the  
22 buying distributing plant?

23 A. Correct.

24 Q. And when there is a supply plant pooled  
25 because of amendments made in 2002, it couldn't

1 come directly from the farm, but has to be  
2 transferred from the supply plant?

3 A. I believe that's correct.

4 Q. And you want credits for that performance  
5 on the same basis as direct from farm shipments  
6 to Order 33 customers?

7 A. That's our proposal, yes.

8 Q. And you -- you are the manager for MEMMA  
9 Foremost Farms, as I understand it?

10 A. Foremost Farms acts as the agent.

11 Q. As the agent?

12 A. For the Mideast Milk Marketing Agency.

13 Q. MEMMA is not a -- is not an organization  
14 that pools milk; am I correct?

15 A. Correct.

16 Q. It's an organization that establishes over  
17 order prices?

18 A. Correct.

19 Q. And then it's an organization that  
20 coordinates assembly and delivery of milk to  
21 customers receiving milk from MEMMA members?

22 A. Yes.

23 Q. You listed the members of MEMMA. Could you  
24 rank those members in terms of size, volume,  
25 participation?

1 A. I believe that's the order that they're  
2 listed in, yes.

3 Q. Okay. Does Foremost Farms pool milk in  
4 Order 33 on its own merits, or is its milk  
5 pooled through a pooling report of any other  
6 organization?

7 A. I believe it's pooled on its own merits.

8 Q. It doesn't pool milk through DMS?

9 A. No, not to my knowledge.

10 Q. Is there milk associated with the MEMMA --  
11 by the way strike that.

12 Does MEMMA operate an over order pool  
13 similar to that described by Carl Rasch to  
14 distribute proceeds of over order charges?

15 A. Yes.

16 Q. Do -- do the participants in MEMMA make  
17 their own decisions as to what milk to associate  
18 with the MEMMA pools?

19 A. Yes.

20 Q. So DFA, for example, may associate DMS  
21 milk?

22 A. Yes.

23 Q. Does MEMMA or its constituent members or a  
24 combination have contracts with the distributing  
25 plants MEMMA serves?

1 A. I have no knowledge of that. I should  
2 clarify that I do not have direct involvement  
3 with my responsibilities with Foremost in the  
4 operation in MEMMA. I'm involved in other  
5 marketing agencies in common, Central Milk  
6 Producers and so on, but as a result of the  
7 series of retirements and people leaving the  
8 cooperative I received this assignment, so there  
9 are others in the group who have a better, more  
10 detailed understanding of the operations of the  
11 agency.

12 Q. All right. Just a moment. Do you know --  
13 strike that.

14 The testimony yesterday by the DFA witness,  
15 DFA, Dairylea, et cetera, was to the effect that  
16 The Kroger Company in Indianapolis is partially  
17 supplied by DFA. Do you recall -- you were here  
18 for that testimony?

19 A. Yes.

20 Q. Okay. Would it be true that The Kroger  
21 Company is fully supplied by MEMMA?

22 A. To the best of my knowledge.

23 Q. Okay. And that would be true also for  
24 Prairie Farms in Ft. Wayne?

25 A. I -- they -- Prairie Farms may have some of



1 their own member milk.

2 Q. That would be true for Eastside Jersey?

3 A. I don't know.

4 Q. You don't know that. Dean Foods from  
5 Rochester, is that fully supplied by MEMMA even  
6 though partially supplied by DSA?

7 A. To the best of my knowledge.

8 Q. The testimony yesterday also described  
9 various supply combinations for a number of  
10 plants in Tables 8(a) through 8(e) of Exhibit 7  
11 and Exhibit 11 by DFA, DMS, others.

12 Is it correct that the MEMMA supply  
13 responsibilities overlap significantly with  
14 those organizations' individuals that supply to  
15 those plants?

16 A. Yes. There are a combination of individual  
17 supply agreements, longstanding arrangements and  
18 the over -- proceeds from those sales are pooled  
19 through MEMMA. MEMMA serves as an umbrella over  
20 those arrangements to manage to supply  
21 supplemental milk to meet the daily needs of the  
22 distributing plant customers.

23 Q. Okay. And is it correct that MEMMA serves  
24 as a -- a pricing and supply coordinating  
25 organization for the Mideast Market in Ohio,

1 Indiana and Western Pennsylvania, that area?

2 A. Yes.

3 Q. Okay. But not Michigan, or not to any  
4 significant extent in Michigan?

5 A. Correct.

6 MR. VETNE: Thank you very  
7 much.

8 JUDGE DAVENPORT: Other cross?

9 Mr. Beshore?

10 CROSS-EXAMINATION

11 BY MR. BESHORE:

12 Q. Morning, Mr. Weis.

13 A. Morning.

14 Q. Let's just talk a little bit more about  
15 MEMMA and the supply arrangements there. And I  
16 know -- I understand you haven't been directly  
17 involved with it in the way you have CMPC for  
18 many years, but in general a supply  
19 organization, an over order supply organization  
20 as MEMMA and CMPC has prices established to the  
21 distributing plants in the Order FOB the  
22 handler's plants?

23 A. Yes.

24 Q. Okay.

25 A. That's correct.

1 Q. And that's -- that's important because the  
2 handlers, in order to have an over order  
3 program, you've got to have prices that are --  
4 that keep the handlers in the same relative  
5 position, they are under the minimum Federal  
6 Order prices which are FOB prices?

7 A. Correct.

8 Q. Okay. So since they're FOB prices at the  
9 handler's plant, the supply organizations, the  
10 cooperatives, the dairy farmers are responsible  
11 for paying the freight to get the milk there?

12 A. That's correct.

13 Q. At those prices, correct?

14 A. Yes.

15 Q. Okay. And with MEMMA, for instance, as  
16 you've testified, as Mr. Gallagher testified,  
17 there are significant amounts of milk that is  
18 required to be brought at substantial cost to  
19 the suppliers from distances -- from substantial  
20 distances away from the distributing plants?

21 A. That's correct.

22 Q. Okay. And there are substantial  
23 transportation charges incurred -- costs  
24 incurred in making those deliveries to the  
25 handler in the Order?

1 A. Periodically, yes.

2 Q. Okay. Now -- and, of course, one of the  
3 things that Proposal 9 would do if it's adopted  
4 is spread just a very small portion of the cost  
5 of supplying that Class I Order 33 market over  
6 all producers in the pool, correct?

7 A. (Witness nodding head up and down.)

8 Q. Okay. So the producers in Order 33,  
9 distributing plant producers in Order 33 who may  
10 be two miles from the distributing plant such as  
11 one of the dairy farmers yesterday, have the  
12 same blend price that the producers in MEMMA do  
13 who bring milk in from hundreds of miles,  
14 correct? I mean, the same minimum Order price?

15 A. With the exception of the zone adjustment.

16 Q. Okay. If there is milk -- with the  
17 exception of any zone adjustments for the -- if  
18 it's brought from a plant there might be a plant  
19 point price?

20 A. You're right.

21 Q. Okay. To the extent that milk is  
22 delivered -- let's say you've got -- let's say  
23 you have the plant in Newark, Ohio, Tamarack,  
24 which you've indicated is one of the plants that  
25 has required supplemental milk supplies

1 delivered through Foremost and MEMMA from time  
2 to time, correct?

3 A. Yes.

4 Q. Okay. Now, deliveries -- deliveries to  
5 that plant in Newark, Ohio which are direct from  
6 the farm and at the -- whatever point you need  
7 to go to get the milk to get there, they're  
8 going to be priced under the Order at Newark,  
9 Ohio?

10 A. Correct.

11 Q. Okay. And if you have to bring the milk in  
12 there from 300 miles away and incur the cost of  
13 hauling it 300 miles, under the Order presently  
14 structured, you're going to receive the same  
15 price that a DFA farmer or a Foremost farmer  
16 who's 50 miles away from Newark, Ohio gets for  
17 delivering his milk, correct?

18 A. Correct.

19 Q. And I don't know whether Smith Dairy is --  
20 I forget the testimony with respect to whether  
21 it's supplementally supplied by MEMMA, the dairy  
22 in Orrville, Ohio, but if it were supplementally  
23 supplied by MEMMA and MEMMA member farmers  
24 delivered milk from 300 miles away to Orrville,  
25 Ohio, they get this -- presently they get the

1 same Federal Order price for the milk that the  
2 farmer is three miles away gets, correct?

3 A. That's correct.

4 Q. All right. And Proposal 9 would simply  
5 take about -- less than \$0.03 and allow the --  
6 all suppliers -- all producers in the Order to  
7 share a little bit of that cost of bringing that  
8 Class I milk in?

9 A. That's correct.

10 Q. Now, you've indicated that Foremost -- does  
11 Foremost occasionally sell milk in Orders 5 and  
12 7?

13 A. Occasional.

14 Q. Do you have -- do you have some knowledge  
15 of -- you've referenced the fact there are  
16 transportation credits in those Orders.

17 A. Correct.

18 Q. Okay. Do you have some knowledge of the  
19 difference in the way those credits work versus  
20 the way they work in Order 30?

21 A. I believe in Orders 5 and 7 there's some  
22 seasonal performance required during the short  
23 season to qualify milk to be eligible to receive  
24 transportation credits in the -- through the  
25 remainder of the year.

1 Q. Okay. Would you agree that Proposal 9 as  
2 you've indicated in your proposed language is a  
3 type of transportation credit that is very  
4 similar to that that exists in Order 30, as  
5 opposed to the type that exists down in Order 5  
6 and 7?

7 A. Similar except to the extent that in Order  
8 30, the distributing plant -- the milk is sold  
9 FOB the supply plant. The distributing plant  
10 receives the transportation credit out of the  
11 Order and pays the hauling bills.

12 Q. Okay. So there's a little different  
13 accounting for the transportation in Order 30,  
14 but --

15 A. But dollars are coming out of the pool.

16 Q. -- dollars come out of the pool the same  
17 way. That's what I'm getting at.

18 A. At a cost to all participants in the pool.

19 Q. Okay. You've had a lot of experience in  
20 Order 30 over the years, I gather?

21 A. Yes.

22 Q. And some experience in recent years in  
23 Order 33. Would you tend to agree that the  
24 marketing conditions in those areas are  
25 relatively similar in many ways as opposed to

1 Order 7, for instance?

2 A. Yes. Definitely.

3 Q. They're quite different from the high Class

4 I --

5 A. Much more detail and much lower Class I

6 utilization up here.

7 Q. Okay. On page 3 of Exhibit 29, the volumes

8 that you've indicated there for 2002, '03 and

9 '04, are those Foremost volumes delivered from

10 Wisconsin in Order 33?

11 A. Those are volumes delivered at the supply

12 plant in -- from the Elkhorn supply plant.

13 Q. Okay. And I think I understood your

14 response to a question or two from John Vetne

15 that if the Elkhorn supply plant and possibly

16 the Alto plants are pool plants under Order 30

17 in a given month and you need supplemental milk

18 from that area to come into Order 33, you

19 deliver at farm direct rather than through the

20 plant?

21 A. Yes.

22 Q. Okay. Do you have any -- you've testified

23 that Alto supplied 8.1 million pounds to Order

24 33 distributing plants for August through

25 November.



1 A. To clarify the answer to your previous  
2 question, we deliver it as producer milk. We  
3 may pump it over from a farm truck to a tanker.

4 Q. Okay. Thank you. That's what I meant, as  
5 producer milk.

6 A. Yes.

7 Q. As opposed to supply plant milk?

8 A. Correct.

9 Q. Okay. But it's possible -- logistically  
10 possible to assemble producer milk in Wisconsin  
11 through a -- what's sometimes called a  
12 pump-over --

13 A. Yes.

14 Q. -- situation or a reload plant --

15 A. Yes, it is.

16 Q. -- or a reload location, which does not  
17 become a supply plant or a pricing point under  
18 Order 33?

19 A. Correct.

20 Q. Okay. Now, with respect to the Alto  
21 suppliers in Order 33, your statements were  
22 presented on behalf of Alto and you've indicated  
23 that it supplied 8.1 million pounds during the  
24 months of August through November of 2004.

25 That's aggregate for the four months, I

1 take it?

2 A. Yes.

3 Q. Okay. Can you tell us to what distributing

4 plants in Order 33 Alto's supplies were

5 delivered to --

6 A. I don't know that information.

7 Q. Alto is not a member of MEMMA?

8 A. No, they're not.

9 Q. Okay. So those supplies were not made

10 through MEMMA or to MEMMA customers then?

11 A. I believe those supplies went to MEMMA

12 customers. I don't know the exact nature of the

13 arrangements as to how the milk was billed or if

14 it was pooled through the superpool or not.

15 Q. Okay. So it may have gone to customers

16 that MEMMA is a partial supplier to or a

17 supplier to?

18 A. Correct.

19 Q. But it's also supplied by sources outside

20 of MEMMA?

21 A. Correct.

22 Q. Okay. And, in fact, there are times when

23 MEMMA, in fact, regularly goes outside of its

24 own milk supplies to purchase supplies from

25 other organizations to meet the needs of its

1 customers in Order 33; is that correct?

2 A. I can't answer that question. I don't have  
3 sufficient knowledge to say with clarity yes or  
4 no.

5 Q. Okay. By the way, I'm drawing on your  
6 expertise in Order 30 since we've got you here.  
7 The -- are you familiar with the rate payment on  
8 transportation credits in Order 30?

9 A. It's \$.0028 per hundredweight per mile and  
10 payment is received on supply plant milk only.

11 Q. Okay. And on Class I allocated volumes?

12 A. Correct.

13 Q. Okay. Now, the assembly credit which also  
14 comes out of the pool in Order 30 is paid on  
15 farm direct minimum milk as well as --

16 A. It's paid --

17 Q. -- farm direct milk as well as other Class  
18 I deliveries, correct?

19 A. All Class I deliveries, yes.

20 Q. And that's \$0.10 a hundredweight, \$0.08?

21 A. I believe it's \$0.09 a hundredweight.

22 Q. Okay. It's in the Order language, in any  
23 event?

24 A. Yes.

25 THE WITNESS: Am I right?

1                   MR. STEVENS:            You're right, it's  
2    in the Order.

3    BY MR. BESHORE:

4    Q.    Do you recall that the -- the rate of .0028  
5    in Order 30 was established back in the mid to  
6    late 1980s when those credits were put in?

7    A.    I believe it was 1987 or '88.

8    Q.    Okay.  And at that time it was established  
9    at a rate that was less than the demonstrated  
10   cost at that time in order to -- for the same  
11   reasons that the Proposal 9 is less than cost  
12   presently today?

13   A.    Yes.  To promote efficiency.

14   Q.    Okay.  Are costs of transporting milk the  
15   same today as they were in 1987?

16   A.    No, they are not.

17   Q.    Okay.  They've increased substantially,  
18   have they not?

19   A.    Yes, they have.

20   Q.    Is it your view that the .0031 rate that is  
21   established in Proposal 9 is a rate that's low  
22   enough to assure efficiency and not abuse in  
23   those transactions?

24   A.    I believe it is.

25                   MR. BESHORE:            Thank you.

1 JUDGE DAVENPORT: Other cross?

2 Mr. Ricciardi?

3 MR. RICCIARDI: Al Ricciardi for

4 Sarah Farms.

5 CROSS-EXAMINATION

6 BY MR. RICCIARDI:

7 Q. Good morning, Mr. Weis, how are you?

8 A. Fine. Good morning.

9 Q. I'm going to ask you some questions more in  
10 the way of clarification. They mostly come from  
11 your statement Exhibit 29 page 3, if that helps.

12 You describe in the first portion of that  
13 particular page in the first paragraph an agency  
14 relationship with MEMMA for Foremost Farms.

15 Other than that agency relationship, is  
16 there any contractual relationship between  
17 Foremost and DFA?

18 A. No.

19 Q. Does Foremost supply any milk to DFA other  
20 than through this agency relationship?

21 A. We have milk trade arrangements with them  
22 in Order 30 as well as Order 32.

23 Q. Okay. Is there any contractual  
24 relationship between Foremost or Alto and  
25 Dean's?

1 A. No. I can't speak for Alto.

2 Q. Okay. You can say that there isn't,  
3 however, with regard to Foremost?

4 A. That's correct.

5 Q. Okay. In the last portion of that  
6 particular page you talk about the pounds of  
7 milk that were supplied in volumes for August  
8 through November.

9 Can you tell us for 2004 the total volume  
10 of milk that was supplied for that year?

11 A. I have a report here with me, but I don't  
12 have yearly totals on it. I don't have that  
13 information right at hand.

14 Q. Okay. And can you then -- can you then  
15 tell us -- you told us about some milk  
16 deliveries that were made to certain  
17 distributing plants in 2004, four of them --  
18 four or five that are described in the next to  
19 the last paragraph on page 3.

20 Can you tell us the pounds per milk -- of  
21 milk per distributing plant for those plants?

22 A. I believe that's proprietary.

23 Q. Okay. And lastly, you indicate that  
24 deliveries were made in 2004 to particular  
25 plants, one of those being the Reiter Dairy at

1 Springfield, Ohio. Is that a Dean's plant, to  
2 your knowledge?

3 A. To my knowledge it is.

4 Q. Thank you very much.

5 JUDGE DAVENPORT: Other cross?

6 Mr. Tosi?

7 CROSS-EXAMINATION

8 BY MR. TOSI:

9 Q. Good morning, Mr. Weis. Thank you for  
10 appearing today. If I'm -- if you would be kind  
11 enough to refer to page 3 of your written  
12 statement --

13 A. Yes.

14 Q. -- where you're showing the numbers of --  
15 you're saying that "During the past three years  
16 we have supplied the following volumes from  
17 August through November," does that include --  
18 is that just Foremost, or is that Foremost and  
19 Alto?

20 A. That's Foremost Farms' milk.

21 Q. That's just Foremost?

22 A. From the Elkhorn, Wisconsin plant,  
23 supply plant milk.

24 Q. Do these figures include diverted milk?

25 A. No, they do not.

1 Q. These are actual shipments to Class I  
2 plants?

3 A. Yes.

4 Q. With respect to your knowledge of MEMMA  
5 trying to obtain over order premiums on behalf  
6 of producers, can you tell me a little bit about  
7 what the over order premium structure is like  
8 here for the Mideast?

9 A. I can't quote -- I can't quote exact rates.  
10 I think it's similar to Mr. Rasch's description.  
11 There's an over order and a premium announced  
12 and there are credits available to pool Class I,  
13 and credits are available to plants that receive  
14 milk on a consistent basis, uniform receipts  
15 credit.

16 Q. Okay. And by "credits," you mean you'll  
17 actually rebate some of the over order premium  
18 back to your customer?

19 A. Correct.

20 Q. Okay. Do you know anything about the  
21 relationship between co-op members and  
22 independent producers that are pooled here in  
23 the Mideast, what percent, for example, would be  
24 represented by independent producers versus  
25 cooperatives?



1 A. No, I do not.

2 Q. If I understood your testimony, please  
3 correct me if I'm wrong, Order 33 distributing  
4 plants need to seek milk from longer distances  
5 during certain times of the year?

6 A. Well, they look to MEMMA to perform that  
7 responsibility for them.

8 Q. Okay. And in that regard then, that -- to  
9 the extent that your producers, for example,  
10 ship milk longer distances, it's in that regard  
11 that we're talking about a justification for  
12 transportation credit?

13 A. Correct.

14 Q. Okay. Does this happen in every month of  
15 the year?

16 A. It happens primarily in the fall season,  
17 the high demand season, where the milk  
18 production is at its lowest ebb and the demand  
19 for milk is the highest.

20 Q. Okay. And what you're saying, if I  
21 understand it correctly, is that the benefit  
22 of -- or excuse me, that the costs need to be  
23 more equitably shared with all producers that  
24 are supplying class -- the Class I market  
25 because there was a disproportionate incurring

1 of costs among different producer groups then?

2 A. It's a little bit more than that. The cost  
3 of servicing the Class I market by the producers  
4 who furnish the Class I deliveries to the  
5 distributing plants need to be borne more  
6 equitably by all producers in Order 32 to share  
7 in the blend price.

8 Q. My question then comes down to this. If  
9 transportation credits aren't -- excuse me. If  
10 the additional needs for supplemental milk  
11 supplies that go to Class I plants aren't needed  
12 all the time, isn't it accurate that since  
13 you're being pooled year-round that during those  
14 months when you're not incurring any additional  
15 cost that you are receiving the benefit of the  
16 Order's -- of the Order's blend price or PPD  
17 because there are other producers who continue  
18 to incur those costs day in and day out and  
19 month in and month out?

20 A. During the other months of the year there  
21 are supplemental milk supplies required. They  
22 come from a lesser distance; therefore, a lesser  
23 cost, and therefore the impact --

24 Q. Well, I guess my point is during those  
25 times when there's not that need for that milk

1 to come from longer distances, that the people  
2 who are located further away are receiving the  
3 benefit of the Order's blend price even though  
4 they're not incurring those additional costs?

5 A. Correct.

6 Q. So then --

7 A. But there are still costs incurred in --

8 Q. Why would you want those people who are  
9 performing those services, other producers, to,  
10 in essence, subsidize the other producers or to  
11 take money away from them to pay for these  
12 times, these occasional times, when supplemental  
13 milk supplies are needed when other times during  
14 the year they're basically carrying the people  
15 who don't need to incur those additional costs  
16 to supply those plants?

17 A. But even during the times of the year that  
18 you describe, the people who are servicing the  
19 Class I market making those deliveries are  
20 incurring costs during those times as well for  
21 the benefit of all producers who are sharing in  
22 the blend price.

23 The degree or level of those costs in  
24 aggregate are less, but there are still costs  
25 being borne by the producers who continue to

1 serve in the Class I market during the times --  
2 during the spring, during the times when it's  
3 not necessary to reach out to great distances.

4 Q. Do you think that there's a role here to --  
5 I would like your opinion on the role or the  
6 need for government intervention on behalf of  
7 producers as we see it in the Federal Order  
8 program.

9 Would you agree that Federal Orders  
10 establish minimum standards with respect to the  
11 terms of trade between producers and handlers?

12 A. Correct.

13 Q. Could you please share with us some of your  
14 views on when you think it's appropriate for the  
15 government to intervene on behalf of producers?

16 A. In this case, I think it is appropriate  
17 that, once again, all the producers who share in  
18 the blend price do so and benefit from it at the  
19 expense at times -- at the expense of those  
20 producers who are physically delivering and  
21 furnishing the milk to the Class I market and  
22 incurring costs that those other producers who  
23 receive the blend price pool proceeds from  
24 direct that smaller group's activities. We  
25 should all receive the same benefit.

1 Q. Okay. Can you explain what it is about the  
2 nature of the marketplace in the Mideast that  
3 prevents an organization like MEMMA that's able  
4 to negotiate over order premiums to the level  
5 that we've talked about so far here that's been  
6 offered, that they're able to negotiate that,  
7 but are unable to negotiate a couple of cents  
8 per hundredweight for transportation?

9 A. There are limits to the level of over order  
10 premiums that a marketing agency in common can  
11 negotiate because they supply milk. The  
12 handler's in competition with non-member  
13 supplies. And the distributing plant has -- has  
14 some flexibility with regard to alternative  
15 sources of milk, so the agency such as MEMMA has  
16 to be competitive with other sources of milk  
17 available to the distributing plant.

18 It also has to take note that the agency  
19 needs to keep the distributing plants that it's  
20 servicing competitive with other processors who  
21 those distributing plant customers compete for  
22 sales with. So we don't have an open checkbook  
23 as far as -- we negotiate, but we need to keep  
24 our customers competitive and we need to be  
25 competitive with other alternative sources of

1 milk supplies to distributing to those  
2 customers, so we have limitations.

3 Q. Well, with respect to transportation, it's  
4 such an important issue, okay, and to the extent  
5 that you're offering rebates back to your  
6 customers, wouldn't -- isn't there room there  
7 for --

8 A. The rebates --

9 Q. -- reducing the amount of rebate to cover  
10 the additional transportation costs that you say  
11 that you're incurring?

12 A. Rebates are designed to deliver a different  
13 type of market efficiency and that has to do  
14 with the cost of balancing. If distributing  
15 plants are able to -- are willing to make the  
16 capital investments to provide silo space and  
17 make changes in their operation that enables  
18 them to take milk on a more consistent basis, it  
19 is more cost effective to supply them than it is  
20 to supply them when they have more widely  
21 fluctuating needs and alternative needs -- uses  
22 needs to be followed through the milk supply  
23 that regularly services them. So we're dealing  
24 with a different issue.

25 Q. Do you market the milk of any non-member

1 producers? Do any non-member producers market  
2 their milk through Foremost?

3 A. No.

4 MR. TOSI: That's all I have.  
5 Thank you.

6 THE WITNESS: Thank you.

7 JUDGE DAVENPORT: Other cross?  
8 Mr. Beshore?

9 FURTHER CROSS-EXAMINATION

10 BY MR. BESHORE:

11 Q. Mr. Weis, in your experience in a market  
12 such as Order 30 -- it's Order 33, but let's  
13 talk about Order 30 a little bit where you have  
14 Class I utilization of what, 15 percent, 20  
15 percent, in that range?

16 A. Sixteen to eighteen percent, correct.

17 Q. Sixteen to eighteen percent. Okay. Is it  
18 useful and helpful to have the transportation  
19 credit or the assembly credits in that Order to  
20 make sure that milk is delivered for Class I  
21 purposes?

22 A. Yes, it is.

23 Q. How can that be when you only have  
24 utilization of 16 to 18 percent? I mean, what  
25 are the market dynamics that would help the

1 record here a little bit? Because you've got a  
2 lot of experience and knowledge up there.

3 A. In the case of Order 30, the distributing  
4 plants are located close to metropolitan areas  
5 and milk production there is declining rapidly.  
6 We have to reach out greater distances for it,  
7 milk supplies.

8 Q. So the average haul to the distributing  
9 plants is greater than it is to the  
10 manufacturing plants?

11 A. Correct.

12 Q. Okay. And therefore, if the producers are  
13 paying the haul in both cases to the plants or  
14 are responsible for it in some way, shape or  
15 form, the producers delivering the Class I in  
16 the marketwide pool are going to take home less  
17 than the producers delivering for Class III,  
18 correct?

19 A. Correct.

20 Q. So we've got a circumstance where the Order  
21 shares the Class I revenues equally, but because  
22 of the costs of servicing the Class I market,  
23 unless you've got a mechanism in the Order to  
24 equal out some of those costs, day in and day  
25 out the producers supplying Class I are going to



1 take home less than those delivering for cheese  
2 production?

3 A. Agree.

4 Q. And the same basic dynamic works in Order  
5 33, does it not?

6 A. Yes.

7 Q. Okay. And would it be your testimony from  
8 your knowledge of Order 33, that just as in  
9 Order 30, the average distance to the  
10 manufacturing plants for a producer sort of  
11 supplying the, you know, what, 60 percent of the  
12 milk that goes into manufacturing, for those  
13 producers the average haul for the plants is  
14 less than the average haul for distributing  
15 plants?

16 A. I would believe that -- that to be the case  
17 looking at the location of the plants relative  
18 to the location of the distributing plants.

19 Q. And that being the case, under the Order --  
20 with a uniform blending of Class I revenues,  
21 under the Order day in and day out, the Class I  
22 producers are going to take home less than the  
23 producers delivering to the manufacturing  
24 plants?

25 A. Correct.

1 Q. Okay. Unless we have at least some -- and  
2 what we propose in Proposal 9 is just some  
3 limited sharing under the Orders of these  
4 additional expenses to supply Class I day in and  
5 day out, correct?

6 A. Yes.

7 Q. And those differences in cost to supply  
8 Class I are greatest, as the record shows, in  
9 the short season, in the fall?

10 A. Right.

11 Q. Okay. But they're there year-round?

12 A. Yes, they are.

13 Q. The degree -- the amount, the magnitude may  
14 be different, but they're there nevertheless?

15 A. Correct.

16 Q. Okay. Let's talk about the MEMMA credits  
17 just a little bit so it's clear. The credits  
18 that you talked about off of the Class I price,  
19 and Mr. Rasch referred to the same kind of  
20 credits in the Michigan pool, are seven day  
21 receiving credits, correct, or uniform receiving  
22 credits?

23 A. That's correct.

24 Q. And the function of those credits is to  
25 encourage Class I distributors to take milk as

1 it's produced seven days a week as opposed to  
2 only three or four days when they may be running  
3 their plants at maximum production levels,  
4 correct?

5 A. Yes, it is.

6 Q. And if the Class I distributors do not  
7 receive the milk seven days a week as it's  
8 produced, the producers, their marketing  
9 organization or cooperatives, have to dispose of  
10 that milk in some other way at an expense to  
11 them, correct?

12 A. Yes.

13 Q. So are those credits set at the absolute  
14 lowest level you can in order to encourage  
15 that -- defray that cost?

16 A. Ideally, yes.

17 Q. Okay. In other words, when you're setting  
18 prices and credits in MEMMA, you want to have  
19 your net price after credits at the highest  
20 possible level --

21 A. That's right.

22 Q. -- that the market will bear?

23 A. Correct.

24 Q. And to meet the competition from the 3,000  
25 independent producers, for instance, that

1 Ms. Uther testified about earlier today in Order  
2 33?

3 A. That's right.

4 Q. Okay. And that's, on producer numbers, at  
5 least 30 percent or more of the Order, Order 33,  
6 correct?

7 A. Yes.

8 Q. Okay. And, of course, MEMMA also has to --  
9 has to try to be competitive with supply  
10 organizations that aren't a part of MEMMA and  
11 don't have any member costs such as the White  
12 Eagle Federation, for instance?

13 A. Yes.

14 Q. Okay. Or anybody else?

15 A. (Witness nodding head up and down.)

16 MR. BESHORE: Thank you.

17 JUDGE DAVENPORT: At this time --  
18 excuse me, Mr. Vetne.

19 MR. VETNE: Just a couple more  
20 minutes before we break, if I can finish up with  
21 this witness?

22 JUDGE DAVENPORT: Okay.

23 REDIRECT EXAMINATION

24 BY MR. VETNE:

25 Q. The credits that you described, are there

1 additional credits against a Class I premium  
2 such as competitive credits depending upon where  
3 your MEMMA customer sells milk?

4 A. I know there are -- there are competitive  
5 credits and there are also up charges when  
6 distributing plants have sales into adjoining  
7 markets where agencies operate and have higher  
8 amounts, over order premiums.

9 Q. And all of that is responsive to, as you  
10 described, MEMMA's ability to set Class I  
11 premiums for competition with non-member  
12 supplies and the needs of its customers to  
13 purchase milk in competition with plants  
14 receiving non-MEMMA milk?

15 A. Yes.

16 Q. The seven day receiving credit that you  
17 described, that's essentially a description for  
18 balancing costs. In other words, when the  
19 distributor receives the credit there assumes  
20 that balance of costs, and where the credit is  
21 not available, MEMMA or its members assume the  
22 balance in those?

23 A. True.

24 Q. Did you identify the range of over order  
25 premiums for MEMMA sort of like Carl Rasch?

1 A. No, I did not. I -- I -- I don't know if I  
2 can give an accurate answer, John.

3 Q. Okay. Are they comparable to the PEC  
4 premiums in Michigan?

5 A. I believe they're a little -- slightly  
6 higher, but comparable.

7 Q. And when you market -- when MEMMA markets  
8 milk to Order 5 and 7 as described in some  
9 cross, is that milk --

10 MR. BESHORE: Let me object to  
11 that as misleading. There's no such testimony  
12 that MEMMA markets milk in Orders 5 and 7,  
13 because it does not.

14 BY MR. VETNE:

15 Q. I'm sorry. Maybe you said Foremost markets  
16 milk in Order 5 and 7?

17 A. We may at times. I don't have any specific  
18 examples or recollection.

19 Q. So some of us are more attentive than  
20 others. If that happens -- if that happens,  
21 would the milk be marketed -- pooled through a  
22 supply organization in Order 5 and 7 that has  
23 commitments to customers in those markets?

24 A. I think the milk that we market in 5 or 7  
25 is the byproduct of sharing the milk hauler with

1 another organization, in this case DFA, so  
2 therefore, it's marketed to them. But for  
3 reasons of efficiency, we've got producers  
4 interspersed among their members and the same  
5 truck is picking up both organization's milk.

6 Q. So it makes economic sense for a DFA truck  
7 to pick up Foremost milk at the same time and  
8 deliver it to an Order 5 plant to meet  
9 commitments to the Order 5 customer?

10 A. Correct.

11 Q. Now, does MEMMA operate a -- an overall  
12 transportation pool similar to the one described  
13 by PEC?

14 A. Yes.

15 Q. You said that Foremost does not have any  
16 contract with Dean, but you also said that you  
17 don't know whether PEC itself has supply  
18 contracts superimposed over whatever other Dean  
19 DFA contracts might exist.

20 A. You mean the PEC or MEMMA?

21 Q. MEMMA. I'm sorry, MEMMA.

22 A. Okay.

23 Q. To the extent that there is a MEMMA  
24 contract between -- with Dean Foods, you don't  
25 know whether Foremost milk in indirect manner

1 has a contract to supply Dean?

2 A. There are no -- I don't believe there are  
3 any MEMMA contracts with Dean Foods.

4 Q. Okay. Do you know if there are MEMMA  
5 contracts with anybody?

6 A. I don't believe there are any contracts  
7 with anyone.

8 Q. Okay. You indicated in response to the  
9 question from Mr. Ricciardi that you don't have  
10 yearly totals of milk of MEMMA. Do you have  
11 some monthly totals or typical monthly totals?

12 A. We typically have -- what I'm referring in  
13 my data here are to deliveries of supply plant  
14 milk from the Elkhorn location that I gave for  
15 August to November. In 2004 we had 2.5 million  
16 pounds delivered in December. In 2003 we had  
17 some deliveries in December of 3,050,000 pounds  
18 and then in January, February and March a total  
19 of about 2.3 million pounds.

20 Q. Are you willing and able to share for the  
21 record a typical monthly volume or annual volume  
22 of milk that's marketed to Order 33 customers  
23 through MEMMA?

24 A. I don't have that information available.  
25 I'm not able to answer the question.



1 Q. All right. Is it true that MEMMA members,  
2 the participants in MEMMA, decide from which  
3 locations in the milkshed they will meet the  
4 demands of MEMMA customers?

5 A. DFA handles the logistics as well as  
6 Foremost as the agent handling some logistics.  
7 There's some joint work going on there to  
8 determine how best to efficiently supply the  
9 needs of the market.

10 Q. Is there milk diverted for manufacturing  
11 purposes by the MEMMA participants, the volume  
12 of which does not participate in the MEMMA pool?

13 A. Yes.

14 Q. Is there milk in the MEMMA pool that  
15 does -- that is used for manufacturing purposes?

16 A. No.

17 Q. Okay. All of the milk in the MEMMA pool is  
18 milk that -- MEMMA superpool is pounds that is  
19 delivered to Order 33 distributing plants?

20 A. Right. All revenues received and pooled  
21 are based on physical shipments.

22 MR. VETNE: Thank you.

23 JUDGE DAVENPORT: Mr. Tosi, do you  
24 have one additional question?

25 RE-CROSS-EXAMINATION

1 BY MR. TOSI:

2 Q. Thank you again, Mr. Weis. Does Foremost  
3 or Alto take any position on the proposals to --  
4 that address the depooling and the repooling of  
5 milk?

6 A. We remain neutral.

7 Q. Okay.

8 A. I can't speak for Alto.

9 Q. Okay. How about with respect to changing  
10 some of the performance measures for 9(d) --  
11 excuse me, 7(d) plants?

12 A. We're neutral on that as well.

13 MR. TOSI: Thank you very  
14 much. That's all we have.

15 JUDGE DAVENPORT: Thank you. At this  
16 time this is probably just an appropriate time  
17 to break just a little early. Let's get back at  
18 10:00, if that's all right.

19 (Thereupon, a recess was taken.)

20 JUDGE DAVENPORT: Raise your right  
21 hand.

22 (Thereupon, Mr. Leeman was sworn by  
23 Judge Davenport.)

24 JUDGE DAVENPORT: Mr. Vetne?

25 MR. VETNE: White Eagle

1 Cooperative Federation has called Jeff Leeman.

2 JEFFREY LEEMAN

3 of lawful age, a Witness herein, having been

4 first duly sworn, as hereinafter certified,

5 testified and said as follows:

6 DIRECT EXAMINATION

7 BY MR. VETNE:

8 Q. Would you spell your name for the record,

9 please?

10 A. Jeff, J-e-f-f-r-e-y, Leeman, L-e-e-m-a-n.

11 Q. Jeffrey?

12 A. Jeffrey.

13 Q. Okay.

14 A. Or Jeff.

15 MR. VETNE: Okay. Your Honor,

16 Mr. Leeman has a prepared statement with

17 attached -- with attachments that are numbered

18 and I would like to request that be -- that

19 entire document be marked as the next

20 consecutive exhibit.

21 JUDGE DAVENPORT: It will be marked

22 as Exhibit 30.

23 (Thereupon, Exhibit 30 of the Mideast

24 Federal Milk Marketing Order hearing

25 was marked for purposes of

1 identification.)

2 BY MR. VETNE:

3 Q. Okay. Mr. Leeman, you have Exhibit 30  
4 which is your statement and attachments to which  
5 you will refer and which illustrate some points  
6 that are part of that exhibit, correct?

7 A. Correct.

8 Q. And your statement identifies your  
9 affiliation as well as your vitae, correct?

10 A. Correct.

11 Q. Okay. Would you please proceed with your  
12 statement?

13 A. I would like to apologize to everybody this  
14 morning. I've had a little fiasco with Staples,  
15 but I didn't get charged for Staples putting  
16 this together, so I saved some money. That's  
17 nice of them.

18 This is the testimony of Jeff Leeman for  
19 White Eagle Cooperative Federation and its  
20 constituent members; Superior Dairy,  
21 Incorporated, United Dairy, Incorporated, Family  
22 Dairies USA, Dairy Support, Incorporated,  
23 Guggisberg Cheese and Brewster Cheese. My name  
24 is Jeff Leeman. I'm employed as General Manager  
25 of Dairy Support, Incorporated, a corporate

1 subsidiary of T.C. Jacoby and Company, which is  
2 dedicated to providing services to small  
3 cooperative associations and handlers operating  
4 in a federally regulated environment including  
5 accounting, pool compliance and risk management  
6 assistance.

7         Prior to February of this year I was  
8 employed as Executive Vice President of Brewster  
9 Dairy/Stockton Cheese, Incorporated and  
10 responsible for the coordination and procurement  
11 of milk, pooling agreements, cheese procurement  
12 from other manufacturers and the oversight of  
13 Brewster's transportation fleet. I previously  
14 served as a Brewster dairy farm specialist  
15 serving Brewster's independent patrons in the  
16 past.

17         I received a BS degree in Agriculture from  
18 the land where champions bleed scarlet and gray,  
19 the Ohio State University, in 1989, and have had  
20 responsibilities for Brewster's interests in  
21 Federal Milk Marketing Order regulations since  
22 my early employment with the company, including  
23 presenting testimony at hearing on components  
24 pricing in Ohio in the early '90s.

25         I present this testimony on behalf of White

1 Eagle and others in opposition of DFA/MMPA  
2 Proposal Number 2. The proposed rules, as  
3 designed and intended, would shrink the market  
4 share of small cooperatives not affiliated with  
5 DFA by rising its competitor's costs or reducing  
6 competitor revenues.

7 White Eagle Milk Marketing Federation was  
8 organized in 2003 to provide independent dairy  
9 farmers and cooperatives with a small share of  
10 the Mideast milk market with an efficient and  
11 effective option to market milk to Mideast  
12 plants without turning their milk supplies over  
13 to DFA, DMS or one of DFA's other marketing  
14 agencies in common. The federation began with  
15 the formation of White Eagle Cooperative  
16 Association by -- with formation of the White  
17 Eagle Cooperative Association by independent  
18 dairy farmers in Indiana, Ohio and Michigan. To  
19 maximize the marketing efficiencies, following  
20 the organizational lead of DMS, White Eagle and  
21 other cooperatives joined together to create the  
22 White Eagle Federation, an Indiana corporation.  
23 The White Eagle Federation finds its customers  
24 among the few remaining milk plants that are not  
25 committed to DFA and its affiliated agencies for

1 a full supply.

2 Today, White Eagle Federation markets about  
3 150 million pounds of milk each month under  
4 Federal Order 33 for producer members of White  
5 Eagle Cooperative Association, Alto Dairy,  
6 Scioto Cooperative, Erie Cooperative Association  
7 and non-member dairy farmers. White Eagle  
8 Federation supplies milk to distributing plants  
9 in Ohio, United Dairy and Superior Dairy, and  
10 West Virginia, United Dairy, and sells surplus  
11 milk to manufacturing plants in Ohio, Indiana,  
12 Michigan, Wisconsin and elsewhere.

13 Although United -- although United Dairy  
14 and Superior Dairy are located at some distance  
15 from federation member farms in Michigan,  
16 Indiana and Wisconsin, it is necessary to travel  
17 this distance because closer distributing plants  
18 in Indiana, Michigan and Ohio are fully supplied  
19 by others, primarily DFA and its agency  
20 affiliates, and therefore are not available to  
21 our farmers. Over the past 25 years, marketing  
22 choices available to producers have radically --  
23 have been radically reduced as the result of  
24 fewer plants, plant ownership consolidation and  
25 cooperative association consolidation. As shown

1 in Attachment 1, distributing plants in the  
2 market have declined from 78 to 42 since 1989,  
3 and supply plants from 19 to 3. Many of the  
4 nation's largest distributing plants are now  
5 under ownership of Dean Foods, National Dairy  
6 Holdings, Kroger and others who account for the  
7 lion's share of distributing plant volume in the  
8 Mideast. Attachment 2, and Exhibit 11, Tables 1  
9 and 2.

10 Cooperative consolidation has severely  
11 limited marketing choices. Describing the  
12 structure of the Mideast Milk Marketing Area,  
13 USDA's 1999 Milk Order Reform decision observed  
14 that as of December of 1997, 20 cooperative  
15 associations pooled milk under the 5 Orders to  
16 be consolidated, considering MMI and DFA as one  
17 entity. The percentage of cooperative milk  
18 pooled varied from 44 percent in Federal Order  
19 36, eastern Ohio/western Pennsylvania Order at  
20 the time, to 85.5 percent in Order 40, southern  
21 Michigan Order.

22 Q. Mr. Leeman, let me stop you there so we  
23 have a correction -- a possible correction close  
24 on the paper to the transcript. You stated in  
25 your oral testimony the parentheses considering



1 MMI and DFA as one entity MMI.

2 A. Oh, sorry.

3 Q. Did you intend to say it as it says in --

4 the written is correct, that --

5 A. The written is correct.

6 Q. Thank you.

7 A. Sorry about that.

8 Q. Please continue.

9 A. Okay. Today in Order 33 there are 11 9(c)  
10 cooperatives, Exhibit 6, Table 1, and fewer than  
11 9 cooperatives reporting as pool handlers. That  
12 is as of the testimony of Sharon Uther. The  
13 largest three cooperatives pooled 83 percent of  
14 milk -- of the market's milk in September of  
15 2004 while the remaining cooperatives pooled  
16 11.5 percent. Independent patron milk pooled by  
17 distributors accounted for only 6.5 percent of  
18 the pooled milk. Exhibit 11, Tables 5 and 17,  
19 and Exhibit 6, Table 5.

20 The three largest cooperatives or  
21 federations pooling milk in Federal Order 33, we  
22 believe, based on Exhibit 11, Tables 3 and 17,  
23 are, number one, DMS, pooling handler for DFA,  
24 Dairylea, Family Dairies USA, former Dean Foods  
25 patrons and a number of pay-to-pool

1 manufacturing plants; Michigan -- number two,  
2 Michigan Milk Producers Association, and number  
3 three, White Eagle Milk Marketing Federation,  
4 which is a distant third. Based on White  
5 Eagle's -- White Eagle Federation's own records,  
6 estimates of MMPA's production from its website  
7 and from Hoard's Dairymen's annual report of  
8 cooperative rankings, and DFA's website  
9 information, Attachment 3, we estimate  
10 approximately -- approximate monthly Mideast  
11 pool volumes of 9(c) cooperatives or federations  
12 to be as follows: Total pool, 1.3 billion  
13 pounds.

14 THE WITNESS: Would it be okay if  
15 I round these?

16 JUDGE DAVENPORT: That's estimating.

17 THE WITNESS: Pardon?

18 JUDGE DAVENPORT: That's estimating.

19 THE WITNESS: It will be 1.3  
20 billion pounds; it's 100 percent of the pool.  
21 Total 9(c) milk, 1.2 and a half billion pounds;  
22 93 percent. Of that we have DMS/FDA, 700  
23 million pounds or 52 percent of the pool.  
24 Michigan Milk Producers Association, 250 million  
25 pounds; 19 percent. White Eagle, 145 million

1 pounds for 11 percent. And all other 9(c) milk  
2 was 154 or 12 percent.

3           Even these estimates, however,  
4 understate the market domination of DFA because  
5 it does not account for the milk in the "all  
6 other" category marketed by DFA and marketing  
7 partners affiliated through the marketing  
8 agencies in common that are not 9(c) cooperative  
9 federations, like White Eagle and DMS, for  
10 pooling purposes. These include Mideast Milk  
11 Marketing Agency, MEMMA, a combination of  
12 DFA/DMS, Foremost Farms, Land O'Lakes and NFO  
13 that gain pooling base for constituent members  
14 by sales to distributing plants in Indiana, Ohio  
15 and West Virginia -- sorry, western  
16 Pennsylvania, including the large multiplant  
17 operations of Dean Foods, Kroger and National  
18 Dairy Holdings. And number two, the Producer  
19 Equalization Committee, a combination of  
20 Michigan Milk Producers Association and DFA/DMS  
21 and other cooperatives that gained pooling base  
22 by sales to Michigan distributing plants.

23           Proponents of Proposal 2 have said  
24 that their one, primary objective is to cause  
25 the disassociation from the pool of distant milk

1 from Wisconsin, Illinois, Minnesota and Iowa  
2 that has not historically been associated with  
3 the Mideast. This stated purpose is  
4 impermissible as a matter of lawful and  
5 inconsistent with past regulatory policy, which  
6 we will brief; plain wrong on the historical  
7 facts, and conveniently disregards distant milk  
8 newly associated with the market from the  
9 northeast, an area which DFA's market share and  
10 sphere of influence is even greater.

11           Milk from Wisconsin and Illinois has  
12 for many decades been shipped to and pooled on  
13 the Mideast Order and its predecessors, although  
14 the volume has ebbed and flowed as economic  
15 incentives varied, as shown in Attachment 4.

16           Alto Dairy, a White Eagle Federation  
17 member cooperative, as well as Family Dairies  
18 USA have marketed Wisconsin milk in the Mideast  
19 and predecessor Orders, included in Attachment 4  
20 data, for decades. Federal Order prices and  
21 price difference have contributed to the ebb and  
22 flow, as they should. In USDA's amplified  
23 decision from national milk Order hearings in  
24 1990 responding to a Minnesota federal court  
25 opinion, the USDA explained: "Producers make

1 the production and marketing adjustments on the  
2 basis of changes in blend prices and difference  
3 in blend price among Orders. It is not uncommon  
4 for supply areas of individual Orders to expand  
5 or contract in response to blend price changes  
6 over time. Also, because milk is free to move  
7 to handlers regulated under different Orders, it  
8 is not uncommon for milk to ship from one Order  
9 to another in response to blend price  
10 differences that result from changes in supply  
11 and demand conditions under different orders."

12 Family Dairies' historical  
13 association of Wisconsin milk in the southern  
14 Michigan market, indeed, was the subject of  
15 litigation in the early 1990s reported in two  
16 7th Circuit opinions when Family Dairies was  
17 known as Farmers Union Milk Marketing  
18 Cooperative.

19 Q. Jeff, if we might stop there for a minute,  
20 I'll make a representation of counsel. Having  
21 had represented the parties in that litigation  
22 at -- the circuit court was the 6th Circuit, not  
23 the 7th Circuit. I'll correct your -- with  
24 that, please proceed.

25 A. That is the 6th Circuit?

1 Q. The 6th Circuit, the one that sits in  
2 Cincinnati.

3 JUDGE DAVENPORT: Covering the states  
4 of Kentucky, Tennessee, Ohio and Michigan.

5 MR. VETNE: And Michigan, yeah.  
6 Thank you.

7 THE WITNESS: I'm going to start  
8 back a little bit. Family Dairies' historical  
9 association of Wisconsin milk with the southern  
10 Michigan market, indeed, was the subject of  
11 litigation in early 1990s reported in two 7th  
12 Circuit opinions when Family Dairies was known  
13 as Farmers Union Milk Marketing Cooperative.

14 At issue in those cases was a  
15 reduction in the blend price payable to  
16 producers in Wisconsin by an increase in the  
17 southern Michigan negative location adjustment.  
18 When the blend price dropped, so did Farmers  
19 Union Milk pooled in southern Michigan. Price  
20 discrimination between producers by location  
21 adjustment is expressly authorized by the act,  
22 as our attorney will brief, and was proposed by  
23 Continental Dairy for this hearing to address  
24 perceived problems with so-called distant milk  
25 pooled on the Order. Although White Eagle

1 Federation supported putting this issue on the  
2 table, USDA declined to include the Continental  
3 proposal in its notice of hearing. Attachment  
4 5. USDA's decision to foreclose even genuine  
5 debate on this alternative remedy to a perceived  
6 problem is inconsistent, we believe, and will  
7 further be argued in brief, with its obligations  
8 to small business entities under the Regulatory  
9 Flexibility Act and Executive Orders  
10 implementing that act to consider least  
11 burdensome alternatives if a regulatory burden  
12 adversely affecting small business is to be  
13 imposed at all.

14           Who are those that would be affected  
15 by the new burdens proposed by DFA and MMPA, now  
16 joined by Dairylea, a DMS marketing partner of  
17 DFA, and NFO? A net gain to DFA. Although the  
18 rule is facially one of general applicability,  
19 it is not, we believe -- it would not, we  
20 believe, create new burdens for Proponents  
21 because Proponents have a virtual lock on  
22 pooling base by full supply contracts to  
23 markets -- to the market's major distributing  
24 plant handlers, as illustrated by a 20-year  
25 supply agreement between DFA and Dean Foods in

1 which reference is made in Dean Foods' annual  
2 report filed with the SEC and reproduced on  
3 Dean Foods' website and the SEC website. The  
4 agreement, which includes liquidated damages of  
5 up to \$96 million to DFA should Dean renege on  
6 its commitments to buy raw milk from DFA was  
7 sweetened for DFA by Dean's payment of \$28.5  
8 million in the fourth quarter of 2001.

9 We have not been told of the details  
10 of the Dean/DFA deal, although it is highly  
11 relevant to this proceeding. We do recall,  
12 however, that early in the first quarter of 2002  
13 Dean announced that it would no longer be in the  
14 milk procurement business and turned its  
15 independent producers over to DFA/DMS for  
16 marketing, pooling and field services. We  
17 believe that DFA would benefit from proposed  
18 rule change in a number of ways beyond the mere  
19 PPD increase of \$0.02 per hundredweight as  
20 illustrated in Exhibit 7, Request 21.

21 Because DFA and its marketing allies  
22 have pooling base to spare, adoption of Proposal  
23 Number 2 would increase the value of pooling  
24 base to DFA and costs to its raw milk  
25 competitors due to sale of pool excess.



1 Typically, I have learned from a number of  
2 sources, DFA will market access to the pool to  
3 manufacturers for a split between DFA and the  
4 manufacture of the PPD value of pooling on  
5 Federal Order 33. That is, the difference  
6 between the Federal Order 33 PPD and the Federal  
7 Order 30 PPD.

8           Accommodation pooling of this nature  
9 is reflected in Exhibit 15 transportation  
10 invoices from various sources in Wisconsin and  
11 Minnesota. It is this type of accommodation  
12 pooling by DFA, I believe, that explains the  
13 gradual return to the Order 33 pool of milk from  
14 the Upper Midwest after -- from the Upper  
15 Midwest after Order 33 was last amended  
16 effective August of 2002. The significant  
17 increase since 2002 in milk from distant  
18 sources, as illustrated in Exhibit 7, Request  
19 1(a), in Exhibit 11, Table 24 cannot be  
20 explained by new milk added to the pool by the  
21 White Eagle Federation.

22           If the Upper Midwest pooling  
23 provision are also tightened as DFA has  
24 requested, the value of accommodation pooling  
25 may increase to the difference between the

1 Mideast PPD and Class III price because there  
2 may be no other alternative for pooling milk.  
3 Another competitor response of benefit to DFA,  
4 of course, is that the competitor, having no  
5 other choice, will join DFA or a DFA marketing  
6 partner and gain pooling at the expense of  
7 losing marketing choices that should be  
8 protected by the Secretary under the  
9 Agricultural Fair Practices Act.

10           A loss to White Eagle Federation and  
11 other small cooperatives. While DFA would gain  
12 \$0.02 in PPD prices from its proposed rule and  
13 gain immeasurably more by the rule's effect on  
14 market power, White Eagle and the few other  
15 smaller competitors of DFA would suffer higher  
16 costs, lower revenues and a loss of marketing  
17 choices far beyond the \$0.02 consequence to the  
18 pool. Yes, White Eagle's small share of the  
19 fluid milk market and its lack of pool  
20 manufacturing plants to receive milk treated as  
21 a pool plant receipt rather than a diversion  
22 makes it inevitable that its diversions of milk  
23 will represent a greater share of White Eagle's  
24 pool milk than that of DFA or its marketing  
25 partners. White Eagle would have to

1 disassociate milk from the pool, or perhaps more  
2 aggressively seek to displace DFA, if that is  
3 possible in some of its accounts, if Proposal 2  
4 is -- well, sorry, if Proposal 2 is adopted.

5           Although the proposal calls for a  
6 reduction of 10 percent in allowable diversions  
7 in the fall, the actual consequence is a  
8 reduction of 50 percent in the volume of milk  
9 for manufacturing uses that can be pooled. At  
10 the current time, 10 million pounds of pooling  
11 base, sales to distribute plants, allows a  
12 section 9(c) cooperative to pool 25 million  
13 pounds of milk; 15 million pounds, 60 percent  
14 for manufacturing use by nonpool plants.

15           If Proposal 2 is adopted, only 20  
16 million pounds could be pooled, with 10 million  
17 pounds, or 50 percent, diverted to the region's  
18 manufacturing plants. It makes no -- it makes  
19 no difference whether such plants are within or  
20 outside of the Mideast Marketing Area. For the  
21 hypothetical cooperative having maximum  
22 diversions in September of 2004, this would have  
23 meant a loss of up to \$0.73 per hundredweight,  
24 the September PPD, Exhibit 7, Request 21, on 50  
25 million pounds representing the 20 percent of

1 the whole cooperative's milk supply.

2           For members of the cooperative as a  
3 whole, this loss would mean a revenue reduction  
4 of 14.6 cents per hundredweight on all milk.  
5 The Secretary should not, we believe, allow Milk  
6 Order amendment proceedings to be used as a tool  
7 to gain market power for dominant handlers where  
8 non-Order means, whether fair or foul, have  
9 failed to eliminate small competitors from the  
10 marketplace.

11           Now, I wish to say a few words on  
12 depooling Proposals. We endorse the views  
13 expressed by AMPI, Land O'Lakes and Foremost  
14 Farms USA and First District Association in  
15 their post hearing brief following the Central  
16 Market hearing including, one, that alternatives  
17 to pooling penalties such as -- excuse me, that  
18 alternatives to pooling penalties such as an  
19 adjustment of the timing of the Class III or IV  
20 price announcements should be considered; two,  
21 that the issue should be addressed nationally so  
22 that all Orders, if any, will be amended  
23 simultaneously to prevent multiregional  
24 cooperatives from parking milk in an unaffected  
25 nearby Order, such as Orders 5 or 7, to avoid

1 the penalties, as has happened in Order 33 with  
2 northeast milk last June and July; and three,  
3 the long-term practice of depooling combined  
4 with the uniquely new nature of the proposed  
5 rules compels rejection of Proponents' request  
6 to skip the procedural benefit of a recommended  
7 decision and consideration of exceptions before  
8 rendering a final decision.

9           A recommended decision should not be  
10 delayed, but a final decision on a new  
11 regulatory concept of depooling penalties should  
12 not be recommended until the industry and the  
13 Secretary have the benefit of comments on a  
14 proposed rule before the concrete is dry.

15           As the DFA/MMPP/Dairylea/NFO witness  
16 admitted, depooling is not new or recent. It  
17 has been common practice since 1989, as reported  
18 in the USDA's annual Federal Milk Order Market  
19 Statistics. What is new is the recent degree of  
20 price volatility. Cheese prices on the CME have  
21 been bid up rapidly and then drop rapidly.  
22 Recent newspaper articles reporting admissions  
23 by DFA's CEO and sources with -- sources with  
24 inside CME information indicate that DFA was the  
25 sole bidder causing rapid CME cash cheese price

1 increases and DFA's withdraw from the CME  
2 bidding produced a predictable collapse in  
3 cheese and milk prices.

4           Although long-term maintenance of  
5 artificially high prices on the CME is probably  
6 not possible, short-term volatility created by a  
7 deep pocket buyer who will enjoy secondary gains  
8 in short-term milk prices. Before amending Milk  
9 Orders at DFA's request due to the recent  
10 experience in short term and extreme price  
11 volatility, USDA should investigate whether the  
12 cause of the new price volatility was  
13 manipulation of the CME by DFA or any other  
14 buyer and whether CME manipulation also  
15 manipulated USDA's Milk Order rulemaking  
16 process.

17           There are other defects in the  
18 proposals of the DFA and MMPA, Dean Foods and  
19 others that create inequitable, unequal and  
20 unfair burdens following the depooling of milk.  
21 These aggravate the competitive problems that I  
22 have discussed in the response to Proposal 2.

23           For example, the proposal -- the  
24 proposal severity limits -- severely limits the  
25 ability of small Federal Order 33 cooperative

1 handlers to increase producer membership and  
2 milk volume from existing sources within the  
3 pool whether the handler depooled milk or not.  
4 Proposed Section 13(e)(2) would allow an  
5 increase in producer pounds above 115 percent  
6 for the prior month only if milk came from  
7 producers continuously pooled on any other  
8 Federal Order, but apparently not from this  
9 Order. Because of the small size of several  
10 cooperatives in the market, Exhibit 11, Table  
11 17, this part of the proposal uniquely burdens  
12 such small cooperatives and their small business  
13 farmer members.

14 Proposed Section 13(e)(1) provides a  
15 penalty avoidance opportunity uniquely  
16 benefitting DFA and its marketing partners by  
17 exempting from any penalty milk shipped to a  
18 distributing plant. With its large distributing  
19 plant customer base, multiregional markets and  
20 expansive supply system, DFA more than any other  
21 handler in the market can simply switch  
22 otherwise disqualified milk to distributing  
23 plants and temporarily pool any excess on a  
24 market unaffected by depooling penalties.

25 This does not mean that milk would

1 physically leave the Mideast, but it would  
2 rather touch base in the closest available Order  
3 and be diverted back to manufacturing plant  
4 customers in the Mideast, as before, without  
5 being subject to a depooling penalty beyond the  
6 cost of touching base elsewhere, offset by any  
7 higher blend price on the Order in which milk is  
8 paper parked for three months.

9 Thank you for your attention and that  
10 concludes my testimony.

11 BY MR. VETNE:

12 Q. Okay. Mr. Leeman, there are a few  
13 attachments, Attachments 1 through 5, and these  
14 attachments contain data upon which you relied  
15 in expressing some conclusions in your  
16 testimony.

17 And some -- and the sources are indicated  
18 either from website or USDA material; is that  
19 correct?

20 A. Yes.

21 Q. Okay. I would like to have Exhibit 30 be  
22 received.

23 MR. BESHORE: Objection.

24 JUDGE DAVENPORT: State the basis.

25 MR. BESHORE: I object to the



1 receipt of Attachments 2 and 3 to Exhibit 30.  
2 These are reprints from -- or printouts of  
3 portions of websites of various entities, DFA  
4 among others, and I guess magazines maybe.  
5 Printing out information from websites is  
6 placing in the record statements or parts of  
7 statements, publications, made by organizations  
8 in other context.

9           It requires -- and as far as, like,  
10 DFA's concerned, or MMPA for that matter, we're  
11 not running away from what's on our websites,  
12 but it requires -- because somebody's dumping it  
13 into the record for whatever purpose they might  
14 choose to -- whatever context they might choose  
15 to take the statements and argue them in brief,  
16 it requires if it's going to be part of this  
17 record to scrutinize the printout and put people  
18 up here to talk about the context in which  
19 they're made, which have nothing to do with the  
20 issues in this hearing. And I think it's -- to  
21 print out and dump websites into the record is  
22 an inappropriate way to make a record in these  
23 proceedings and the attachments should not be  
24 received and should be stricken.

25           JUDGE DAVENPORT: Mr. English?

1                   MR. ENGLISH:           Charles English for  
2 Dean Foods. I would specifically refer to  
3 Attachment 2, which is the source from an entity  
4 called -- well, www.dairyfoods.com, which on its  
5 face says, "In cases where the company did not  
6 wish to divulge dairy-specific sales figures,  
7 estimates were made using financial report  
8 information and industry experts;" none of whom,  
9 of course, are here to be cross-examined. We  
10 don't even know the names of the people who  
11 allegedly provided this information.

12                   And if I could conduct some brief  
13 voir dire, I could show that there are, in my  
14 very quick review of Attachment 2, at least  
15 three errors, manifestly clear errors listed on  
16 Attachment 2 contradicted by documentation  
17 provided from the marketing Administrator.

18                   If I could conduct that, fine. If  
19 you just accept my representation that there are  
20 three clear errors, the document is therefore  
21 unreliable and ought not to be admitted.

22                   MR. VETNE:           Responding to that,  
23 Your Honor, we spent many hours for unfortunate  
24 reasons, but many hours hearing and receiving a  
25 the 52-page statement that was largely based on

1 somebody else's knowledge for DMA -- DFA.

2 DFA --

3 JUDGE DAVENPORT: I'm going to  
4 short-circuit you, Mr. Vetne. The purpose of  
5 this hearing is to gather information. And that  
6 being the case, even though the material may or  
7 may not be reliable, it's going to be admitted  
8 for whatever purpose or to whatever weight the  
9 Administrator wishes to place upon it.

10 Certainly I don't mean to necessarily  
11 broaden the scope of this hearing, but any  
12 information that's discoverable to the  
13 Administrator certainly would be admitted.

14 MR. VETNE: And this is a good  
15 place in the record, I just have to say that  
16 the -- to the extent that this relates to DFA or  
17 Dean information, they are present in this room  
18 and can contradict the information. They are  
19 Proponents and in any judicial proceeding  
20 whatever they have put on their website would be  
21 an admission and admissible for any purpose.

22 JUDGE DAVENPORT: I've already ruled  
23 and said admissible.

24 MR. ENGLISH: Your Honor, Charles  
25 English. If you hadn't gone to that point I

1 wouldn't have to say anything more, but the  
2 website I refer to is not a Dean Foods website.  
3 It is a website of a third party and therefore  
4 it is certainly not admissible. The bizarre  
5 concept that because someone is in the room they  
6 have to contradict something that is said  
7 suggests that anybody can put anything they want  
8 to in the record no matter how inaccurate and  
9 then that puts the burden on someone else to  
10 stand up and say, "No, that's not true," some of  
11 which might then divulge confidential  
12 information.

13                   That is wrong and cannot be  
14 tolerated. And I understand your ruling, we'll  
15 just have to go through in great detail then the  
16 errors in the documents which apparently the  
17 witness may not know about.

18                   MR. VETNE:            I, again, move for  
19 receipt of Exhibit 30.

20                   JUDGE DAVENPORT: Very well. The  
21 statement and the attachments will be admitted  
22 into the record at this time.

23                   MR. VETNE:            The witness is  
24 available for cross. Thank you.

25                   JUDGE DAVENPORT: Mr. Beshore?

1                   MR. BESHORE:           Thank you.

2                                   CROSS-EXAMINATION

3 BY MR. BESHORE:

4 Q.    Good morning, Mr. Leeman.

5 A.    Good morning.

6 Q.    I would like to first inquire a little bit  
7 about the organizations on whose behalf you  
8 are -- your testimony has been presented this  
9 morning.

10       First of all, it is correct, is it not, as  
11 Mr. Gallagher testified and you referenced in  
12 part in your testimony, that three of the  
13 entities on whose behalf you are speaking  
14 presently, at least three, presently pool their  
15 milk through DMS? I'm talking about Guggisberg  
16 Cheese, Brewster Cheese and Family Dairies USA,  
17 correct?

18 A.    That would be correct.

19 Q.    Now, tell us a little bit about the  
20 White -- a little bit more about the White Eagle  
21 Cooperative Federation.

22       Are all of its members stated in your --  
23 listed in your testimony at page 2?

24 A.    Page 2? They were listed on page 1.

25 Q.    The members of -- maybe I missed it.

1                   JUDGE DAVENPORT: Mr. Leeman, there  
2 are some people out there that do have a little  
3 bit of a hearing problem. I ask you to keep  
4 your voice up, speak into the microphone so  
5 everybody here can hear what your answer is.

6                   THE WITNESS: Yes, Your Honor.

7 BY MR. BESHORE:

8 Q. Who are the cooperative members of the  
9 White Eagle Cooperative Federation?

10 A. We have White Eagle, Alto, Scioto, Erie  
11 Cooperative, and there are others that at this  
12 point would not like to have their -- would not  
13 be named.

14 Q. There are cooperative members of White  
15 Eagle for whom you are not authorized to  
16 disclose their entity? Do I understand your  
17 testimony correctly?

18 A. They would not like to be named at this  
19 point.

20 Q. Do you know their names?

21 A. Yes.

22 Q. Okay. But you are not willing to provide  
23 those names for this hearing record; is that  
24 correct?

25 A. Not for the additional, no.

1 Q. Can you tell us how many unnamed  
2 cooperatives are members of White Eagle  
3 Cooperative Federation?

4 MR. VETNE: Your Honor, I'm  
5 going to -- I'm going to object and instruct the  
6 witness not to answer that. That provides too  
7 much information. This is -- this is a highly  
8 competitive market, as the witness has  
9 testified, and there are proprietary reasons for  
10 somebody not to want to -- good proprietary  
11 reasons for somebody not to want to -- with the  
12 Proponents here, if that's what their concern is  
13 I don't know, but I object and instruct the  
14 witness not to answer that for proprietary  
15 reasons.

16 MR. BESHORE: I want to observe  
17 that we've now, you know, crossed some new  
18 barriers in the type of information that's to be  
19 presented for the Secretary in this hearing. We  
20 may now have anonymous persons speaking through  
21 a witness with respect to their alleged fears of  
22 the Proponents. I move to strike Mr. Leeman's  
23 testimony in full unless he discloses the  
24 entities on whose behalf he is speaking.

25 JUDGE DAVENPORT: Overruled. Move

1 on.

2 MR. VETNE: Are you?

3 JUDGE DAVENPORT: I ruled.

4 MR. VETNE: And what, pardon?

5 JUDGE DAVENPORT: I ruled. I said  
6 his motion to strike is overruled. I asked him  
7 to move on.

8 BY MR. BESHORE:

9 Q. Okay. Let's talk about -- let me move on  
10 then to the -- to Dairy Support, Inc. Is that  
11 a -- Dairy Support, Inc., is a corporate  
12 subsidiary -- subsidiary of T.C. Jacoby and  
13 Company you indicated; is that correct?

14 A. That is correct.

15 Q. Can you tell us for the record what the  
16 business of T.C. Jacoby and Company is?

17 A. T.C. Jacoby and Company is a merchant  
18 broker of dairy products, commissioned broker.

19 Q. And are you employed by T.C. Jacoby and  
20 Company as well as its subsidiary, Dairy  
21 Support, Inc.?

22 A. No.

23 Q. What is the business of Dairy Support,  
24 Inc.?

25 A. I think it was stated earlier here that we



1 do accounting -- we handle accounting functions,  
2 financial functions for the small cooperatives  
3 and offer risk management alternatives for dairy  
4 producers as well as small manufacturers.

5 Q. Is Dairy Support, Inc., contracted for  
6 services by the White Eagle Cooperative  
7 Federation?

8 A. Yes.

9 Q. Okay. Is it the general manager of White  
10 Eagle Cooperative Federation? In what capacity  
11 does -- is it retained by White Eagle  
12 Cooperative Federation? Dairy Support, Inc.,  
13 what does it do for White Eagle Cooperative?

14 A. We handle Federal Order reporting.

15 Q. Anything else?

16 A. And -- well, that's pretty much the extent  
17 of it. And we just put together the reports,  
18 and --

19 Q. Do you market its milk?

20 A. As Dairy Support, no.

21 Q. Who markets the milk of White Eagle  
22 Cooperative Federation?

23 A. The members within White Eagle market their  
24 milk.

25 Q. Okay.

1 A. They have federated together.

2 Q. Does Dairy -- is Dairy Support, Inc., hired  
3 by any of the individual members of White Eagle  
4 Cooperative Federation?

5 A. Meaning? I don't understand your question.

6 JUDGE DAVENPORT: Rephrase it if you  
7 can.

8 MR. BESHORE: If I can.

9 BY MR. BESHORE:

10 Q. Does Dairy Support, Inc., provide a  
11 service -- any services to the individual  
12 members for compensation to the individual  
13 members of White Eagle Cooperative Federation?

14 A. Yes.

15 Q. And what -- does it market milk as a  
16 service for any of the individual members of the  
17 White Eagle Federation??

18 A. No.

19 Q. Does T.C. Jacoby and Company market milk on  
20 a commission basis for the White Eagle  
21 Cooperative Federation?

22 A. For members within, yes.

23 Q. Okay. And which members of White Eagle?

24 A. That would be proprietary.

25 Q. Now, does Dairy Support, Inc., provide

1 services to Superior Dairy, Incorporated?

2 A. Yes.

3 Q. What services does it provide to Superior  
4 Dairy?

5 A. A function of Federal Order reporting.

6 Q. Does it provide any marketing services for  
7 which it is compensated by Superior Dairy,  
8 Incorporated?

9 A. No.

10 Q. Does T.C. Jacoby and Company provide any  
11 marketing services, milk brokering services for  
12 Superior Dairy, Inc.?

13 A. As a part of Dairy Support, that I could  
14 not answer.

15 Q. Well, do you --

16 A. I do not know.

17 Q. You don't know whether T.C. Jacoby brokers  
18 any milk for Superior Dairy?

19 A. No. That I do not know.

20 Q. Does Dairy Support provide any services to  
21 United Dairy, Inc.?

22 A. Yes.

23 Q. And what services?

24 A. That would be Federal Order reporting.

25 Q. Okay. Does it market any milk for United

1 Dairy, Inc.?

2 A. Dairy Support?

3 Q. Yes.

4 A. No.

5 Q. Does T.C. Jacoby and Company market any  
6 milk for United Dairy, Inc.?

7 A. I do not know.

8 Q. Superior -- United Dairy has two  
9 distributing plants and Superior Dairy has one  
10 in Order 33, correct?

11 A. Superior has one.

12 Q. Yes.

13 A. United has two, correct.

14 Q. Now, are all of the -- and all of those  
15 plants, those three plants are supplied in part  
16 by independent dairy farms, non-member dairy  
17 farms, are they not?

18 A. Correct.

19 Q. Okay. Are all of those non-member dairy  
20 farmers supplying Superior Dairy and the two  
21 United Dairy plants, non-member -- independent  
22 members of the White Eagle Cooperative  
23 Federation?

24 A. Could you run that question by me again?

25 Q. Well, does White Eagle have -- White Eagle

1 was -- I think you indicated that White Eagle's  
2 basically took the DMS template and has adopted  
3 it, correct?

4 A. Correct.

5 Q. Okay. And that includes having independent  
6 dairy farmers under the same marketing  
7 federation as cooperatives, correct?

8 A. Correct.

9 Q. Okay. And White Eagle has independent  
10 dairy farmers within its federation, correct?

11 A. Correct.

12 Q. Okay. Are the independent dairy farmers  
13 who supply the distributing plants of Superior  
14 Dairy, United Dairy in Martins Ferry and United  
15 Dairy in Uniontown, Pennsylvania members of the  
16 White Eagle Federation?

17 A. Definition of -- I mean, they -- the milk  
18 is reported through White Eagle, correct.

19 Q. Okay. All of the independent milk to  
20 United Dairy in Uniontown, United Dairy in  
21 Martins Ferry and Superior Dairy in -- where is  
22 it located? Help me.

23 A. Canton.

24 Q. Canton. Superior in Canton. All the  
25 independent milk is reported as part of the

1 White Eagle 9(c) report?

2 A. I could not tell you all of it is or not.

3 Q. Okay. Well, you're doing the Federal Order

4 reporting for all of those -- for those plants,

5 I think you testified.

6 A. They may be filing reports of their own,

7 too, for other portions of their independents.

8 I don't know. I can't sit here and say that

9 White Eagle is filing a report for all of their

10 volume.

11 Q. How do you know what volumes to report on

12 the White Eagle report for United and Superior?

13 A. We receive those numbers from the handlers.

14 Q. They tell you what to report for them?

15 A. Correct.

16 Q. Do you verify those numbers before you sign

17 a Federal Order report?

18 A. Verify those numbers before the Federal --

19 Q. Before you sign the Federal Order report?

20 A. As far as the numbers that they've

21 reported?

22 Q. I mean, as far as the numbers that you are

23 reporting to the Market Administrator? I

24 just -- you know, you're reporting numbers to

25 the Market Administrator and you sign those

1 reports, I assume?

2 A. These are the -- yes. These are the  
3 numbers reported.

4 Q. Okay. And you certify that they're  
5 accurate and complete and all of that sort of  
6 thing, correct?

7 A. As far as matching up to diversions and  
8 milk temp, yes.

9 Q. I just wondered if you verified that  
10 information from the sources of it?

11 A. Okay. Obviously, if there's diversions and  
12 that they've kept certain volumes of milk, I  
13 mean, those numbers are going to come together  
14 and tell you if they're correct or not.

15 Q. But you don't know if those reports  
16 represented all of the receipts of the plants?

17 A. No.

18 Q. Okay. How many non-members -- independent  
19 dairy farmers are reported as part of the White  
20 Eagle Cooperative Federation report?

21 A. I think that's proprietary information of  
22 the handlers.

23 Q. Okay. Well, you've told us that -- maybe  
24 we can -- you've told us that White Eagle  
25 reports around 150 a month, I think?

1 A. That's what it -- that's what I said, yes.

2 Q. Okay. What portion of that is non-member  
3 milk as opposed to White Eagle Cooperative milk?

4 A. I think that is proprietary information of  
5 White Eagle.

6 Q. And you're not prepared to provide that  
7 information?

8 A. I will not provide that information because  
9 I'm not going to provide information that  
10 segregates our handlers.

11 Q. How would that segregate the handlers?

12 A. Or separates -- separates out cooperative  
13 milk versus independent handler milk.

14 Q. Can you tell us what the -- and maybe this  
15 was in your testimony indirectly.

16 Can you tell us with White Eagle what  
17 portion of the 150 million pounds is delivered  
18 to distributing plants?

19 A. Roughly, and I can verify those numbers if  
20 that need be, this is off the top of my head, 42  
21 to 45 percent.

22 Q. And so 60 to 70 million pounds, if my  
23 arithmetic's correct?

24 A. I can look real quick and give you a better  
25 snapshot.



- 1 Q. Could you do that?
- 2 A. I don't want to --
- 3 Q. Sure.
- 4 A. I think I can. That would be correct.
- 5 Q. Okay. Now, does White Eagle market milk to  
6 any distributing plants other than Superior  
7 Dairy and the two United plants?
- 8 A. Yes.
- 9 Q. Okay. What other plants does it market?
- 10 A. Proprietary.
- 11 Q. How many other plants does it market to  
12 distributing plants?
- 13 A. One that I am aware of.
- 14 Q. Okay. Well --
- 15 A. That I understand at this point in time.
- 16 Q. Well, whatever marketing it has to  
17 distributing plants, you would show and report  
18 on those reports to the Market Administrator,  
19 correct?
- 20 A. Correct.
- 21 Q. And what you're saying is you've only  
22 reported sales to one other distributing plant?
- 23 A. Correct.
- 24 Q. Now, are you -- is it your testimony that  
25 you're maxing out the pooling under the present

1 rules in Order 33 of milk with that 60 to 70  
2 million pounds of distributing plant base?

3 A. Would you repeat the question?

4 Q. Is White Eagle presently -- you have 60 to  
5 70 million pounds of sales to distributing  
6 plants, correct?

7 A. Correct.

8 Q. Do you have sales -- let me ask this. Do  
9 you have sales to any other pool plants in Order  
10 33?

11 A. If there are, they are probably very  
12 minimal.

13 Q. Okay. So your base --

14 A. That's just an assumption, not looking at  
15 this report or anything, looking at a history of  
16 reports.

17 Q. Okay. So your base -- White Eagle's base  
18 for pooling, and you've used the term base, so  
19 I'll use it, also, base for pooling in Order 33  
20 is the 60 to 70 million pounds of sales per  
21 month to distributing plants?

22 A. Correct.

23 Q. Okay. Are you presently maxing out, I'll  
24 use that terminology, I think you know what I  
25 mean, are you pooling as much milk as you can

1 possibly pool in Order 33 under the terms -- the  
2 present pooling provisions of the Order with  
3 that pooling base?

4 A. Are we maxing out or are we pooling in?

5 Q. Are you pooling as much milk as you can  
6 possibly pool with those sales to distributing  
7 plants?

8 A. I think we're pooling as much milk as we  
9 can pool right now. Are we maxing out the  
10 diversion limitations?

11 Q. Yes.

12 A. No.

13 Q. All right.

14 A. No.

15 Q. Therefore, if the diversion limitations  
16 were reduced, you could still pool all the milk  
17 that you are presently pooling; isn't that  
18 correct?

19 A. No.

20 Q. How -- if you're not using all your  
21 diversion limitations, how would you be -- well,  
22 explain your response, please.

23 A. Explain to me what you're trying to ask me  
24 first.

25 Q. I'm asking you if you're not -- I asked you

1 whether you were pooling as much as you could,  
2 whether you were -- by diverting the maximum  
3 allowed in the Order and you said, "No."

4 A. That is correct.

5 Q. So that means that the diversion limitation  
6 could be reduced some amount and you can still  
7 pool all your milk, correct?

8 A. That is not the question you originally  
9 asked me.

10 Q. What did you understand me to ask?

11 A. You asked me with the new proposal, which  
12 my understanding is 50 percent, no, we could not  
13 pool what we currently have. Now, my math tells  
14 me the difference between 50 percent and 60  
15 percent is 10 percent.

16 So it is possible then that if we are under  
17 the current, but we could not do it under the  
18 new one, under the new proposal, that there's --  
19 there's room in there somewhere in between  
20 there.

21 Q. So you're diverting between 50 and 60  
22 percent presently?

23 A. That would be correct.

24 Q. All right. Now, since three of the groups  
25 on which -- on whose behalf you are speaking are

1 pooled through DMS -- by the way, White Eagle  
2 has never sought to -- never requested pooling  
3 through DMS, correct?

4 A. That I do not know. I started February  
5 1st. I do not know what the previous history  
6 was or if there was ever anything -- discussions  
7 that took place. I could not tell you.

8 Q. Has White Eagle requested or talked to DMS  
9 about a mutually beneficial pooling arrangement  
10 since February 1st?

11 A. No.

12 Q. Okay. Has White Eagle had any discussion  
13 with MEMMA about becoming a member of that over  
14 order agency?

15 A. What time frame?

16 Q. The time of which you have knowledge.

17 A. Prior to February 1st or after February  
18 1st?

19 Q. No. The time frame in which you have  
20 knowledge. Whatever --

21 A. From February 1st, no.

22 Q. Why not?

23 A. I've spent a whole lot of time preparing  
24 information for the Federal Order hearing, so I  
25 didn't have a lot of time to sit and talk with

1 people about that.

2 Q. Okay. Is there any --

3 A. I mean, we can sit down and talk with  
4 Dean's if you would like, but I haven't had  
5 time.

6 Q. Is White Eagle not -- scratch that.

7 You've -- I guess my question is you've --  
8 you've suggested in your statement that DMS or  
9 DFA -- not suggested. You have charged in your  
10 statement that DFA -- DMS and/or DFA and, I  
11 guess, MEMMA, as a marketing agency in common,  
12 that they're involved in would be locking you  
13 out of the Order, but you've never talked to  
14 them.

15 A. In the 40 days I've been there, no, I have  
16 not talked to them.

17 Q. But nevertheless, you felt able to make  
18 those -- make the allegations you've made in  
19 your testimony about those entities and their  
20 foreclosure of the market to the persons on  
21 whose behalf you're speaking?

22 A. Yes.

23 Q. Now, on page 3 of Exhibit 30, you have  
24 attempted to -- in the top paragraph you're  
25 quoting some market shares of, "The largest

1 three cooperatives pooled 83 percent of the  
2 market's milk, while the remaining cooperatives  
3 pooled 11.5, independents 6.5," and down below  
4 you break out the DMS/DFA, White Eagle, et  
5 cetera.

6 When you talk about White Eagle at the  
7 bottom, you're not including the volumes of  
8 Family Dairies USA, Guggisberg Cheese or  
9 Brewster Cheese on whose behalf you are  
10 speaking, correct?

11 A. I didn't catch that question.

12 Q. Okay. Here's my problem, Mr. Leeman. On  
13 page 3 you got a breakout of, you know,  
14 market -- of pooling pounds.

15 A. Uh-huh.

16 Q. Okay. And your whole statement is on  
17 behalf -- your statement's on behalf of a number  
18 of organizations and you're talking about the  
19 market dynamics here, you know, you guys against  
20 the world, being DMS and DFA in the Order.  
21 That's the context you're talking about. It's  
22 you guys and it's the Proponents here.

23 A. Got you.

24 Q. Okay. Now -- but in your table here under  
25 the label that you call DMS/DFA, included in

1 those volumes are volumes of Family Dairies USA,  
2 whom you're testifying for, correct?

3 A. I would assume that there is milk under  
4 those, under, being like everything else, of  
5 proprietary cheese plants, things like that that  
6 may be in those DFA/DMS numbers.

7 Q. Well, you told me about -- the first  
8 question I asked was that Family Dairies USA,  
9 Guggisberg Cheese and Brewster Cheese were  
10 pooled through DMS, correct?

11 A. Correct.

12 Q. And what I'm asking is now you go to page 3  
13 and you're showing us a table here that's  
14 depicting volumes, you know, White Eagle and the  
15 rest of the market --

16 A. Uh-huh.

17 Q. -- and then DMS, in those DMS volumes are  
18 included people that you're testifying for;  
19 isn't that correct?

20 A. Yes.

21 Q. Okay.

22 A. Yes.

23 Q. Family Dairies, correct?

24 A. Correct.

25 Q. Brewster Cheese, correct?



1 A. Correct.

2 Q. Which includes the Brewster operations in  
3 Ohio as well as the Brewster Stockton, Illinois  
4 operations, correct?

5 A. Correct.

6 Q. And Guggisberg Cheese, correct?

7 A. Correct.

8 Q. Okay. Now, if you -- what volume -- what  
9 volume of milk is pooled in the Order by Family  
10 Dairies, Brewster Cheese and Guggisberg Cheese  
11 whom you're representing, but including under  
12 the DMS label?

13 A. Let me back up here a little bit. Some of  
14 those have independent supplies of milk. Okay?

15 Q. Yes.

16 A. And if I'm reading these numbers correctly,  
17 and I feel that you're trying to twist here, the  
18 total pool that we're looking at here is the  
19 total pool of 1.3, and then we have 9(c) milk  
20 volume. That breakdown is the 9(c) milk volume.

21 Q. Yes.

22 A. Okay. Does that -- would the independent  
23 milk of Guggisberg, Brewster, people that are  
24 listed at the beginning of my testimony that I  
25 am representing that are part of this group,

1 would they be under -- would that independent

2 milk follow through the DFA, DMS, 9(c) --

3 Q. It's your testimony, Mr. Leeman. It's your  
4 testimony, you tell me.

5 A. Well, wait. We're saying this is 9(c)  
6 milk. This is our estimate. If you go back to  
7 the paragraph that begins this, it says, "The  
8 three largest cooperatives or federations  
9 pooling milk in Order 33, we believe." That was  
10 our best estimate. We don't have the pool  
11 numbers. We went off of what we believe.

12 Q. Well, when you made that estimate, did you  
13 include the volumes of Brewster Cheese, Family  
14 Dairies and Guggisberg Cheese?

15 A. I do not know how DFA/DMS reports that  
16 milk.

17 Q. Well, was that based --

18 A. Obviously -- obviously independent milk is  
19 not 9(c) milk.

20 JUDGE DAVENPORT: Let me see if I can  
21 clarify this. What you've done previously is  
22 you've said that DMS and DFA reports certain of  
23 your entities. What he's -- what his question  
24 appears to be, is that included in the 700  
25 million pounds that you have reported there, or

1 is it reported under White Eagle or under some  
2 other place?

3 THE WITNESS: We're going off  
4 Exhibit 11, Tables 3 and 17.

5 JUDGE DAVENPORT: Well, we're talking  
6 about your exhibit right now on page 3.

7 THE WITNESS: Correct. But these  
8 numbers were based off of Exhibit 11, Tables 3  
9 and 17.

10 JUDGE DAVENPORT: But you're still  
11 not answering my question or counsel's question.  
12 You're giving me a roundabout answer and  
13 referring me to the table. What I'm asking you  
14 is what is it?

15 THE WITNESS: I would not know if  
16 the Brewster numbers are in on those DFA/DMS  
17 numbers. I would not know that.

18 BY MR. BESHORE:

19 Q. Where are they on your numbers? Let me ask  
20 this. Is -- the table on page 3 of Exhibit 30  
21 to which you testified, did you prepare that?

22 A. No.

23 Q. You did not prepare it?

24 A. No.

25 Q. Who prepared that table?

1 A. That was prepared by counsel.

2 Q. Mr. Vetne. Is he going to testify to its  
3 preparation, do you know?

4 A. (Witness shaking head from side to side.)

5 Q. You don't know? Okay. Let me ask this  
6 about -- one more question about that  
7 information.

8 Are the volumes of Brewster Cheese, Ohio  
9 and Illinois, Guggisberg Cheese and Family  
10 Dairies USA included in the White Eagle 145  
11 million pounds on page 3?

12 A. No.

13 Q. Now, you have made some statements that --  
14 on page 6 that -- you've made statements that  
15 you base on having learned from a number of  
16 sources in terms of what DFA supposedly -- the  
17 terms of pooling milk through DFA.

18 Do you have personal knowledge of any of  
19 those arrangements?

20 A. Yes, I do.

21 Q. Okay. You have personal knowledge of the  
22 arrangement between Guggisberg and DMS for  
23 pooling its milk?

24 A. No, I don't.

25 Q. What, you're speaking for them?

1 A. Yes, I am.

2 Q. Are you making allegations on Guggisberg's  
3 behalf that DFA or DMS charges them half of the  
4 PPD for pooling?

5 A. The -- that --

6 Q. Yes or no? Yes or no --

7 A. No.

8 Q. -- Mr. Leeman?

9 A. The allegation I'm making is based off of  
10 the knowledge that I do have concerning some  
11 pooling deals or pooling fees or extortion fees  
12 that are charged to the market --

13 Q. Wait a minute. Did you just charge someone  
14 with extortion? You're under oath.

15 A. No. A pooling fee. I'm sorry. Strike  
16 that.

17 Q. Pooling fee.

18 A. A pooling fee charge.

19 Q. And what I'm asking -- you don't know what  
20 the pooling fee, if there is one, may be for  
21 Guggisberg, do you?

22 A. No, I don't.

23 Q. Do you know what the pooling fee for  
24 Brewster milk in Ohio is?

25 A. Yes, I do.

1 Q. That pooling fee is split between

2 T.C. Jacoby and Company and DMS, right?

3 A. Pardon? I don't get your question.

4 Q. Okay. What's -- who does Brewster pay --

5 who does Brewster pay to pool its milk,

6 Brewster, Ohio?

7 A. At this point I'm not at liberty to say.

8 Q. Okay. You're testifying for Brewster,

9 you're making allegations. You've testified

10 that Brewster pools through DMS, you made

11 allegations that DMS/DFA have what, extreme, if

12 not, extortionate charges for pooling, but

13 you're not at liberty to say what they charge

14 Brewster -- what Brewster pays for pooling?

15 A. No.

16 Q. Okay. Has White Eagle depooled milk

17 routinely in Order 33?

18 A. There has been milk depooled based off of

19 reports I've seen, yes.

20 Q. Well, since you've been -- have you only

21 been doing reports since February?

22 A. Actually, the February report's the first

23 one I've really been involved with, so --

24 Q. Is that -- have you only been employed by

25 or working for White Eagle since February?

- 1 A. I work for Dairy Support, Incorporated.
- 2 Q. Okay. Has Dairy Support only been working  
3 for White Eagle since February?
- 4 A. Yes.
- 5 Q. Who was doing its Federal Order reporting  
6 prior to Dairy Support taking that over?
- 7 A. That, I believe, was internally within  
8 T.C. Jacoby and Company.
- 9 Q. So T.C. -- okay. T.C. Jacoby and Company  
10 was doing the Federal Order reporting for White  
11 Eagle Federation before Dairy Support took over?
- 12 A. Correct.
- 13 Q. How long had T.C. Jacoby and Company been  
14 doing the reports for White Eagle?
- 15 A. I don't know. I do not know.
- 16 Q. Now, White Eagle's got 145, 150 million  
17 pounds pooled on the Order; 60 to 70 is to  
18 distributing plants, which leaves 80 to 90 to  
19 non-distributing plants, correct, 80, 90  
20 million?
- 21 A. To nonpool plants?
- 22 Q. Nonpool plants.
- 23 A. Correct.
- 24 Q. Where are those nonpool plants -- where is  
25 the milk that's marketed to the nonpool plants

1 physically located?

2 A. Where is the milk marketed to the nonpool  
3 plants physically located?

4 Q. Yes.

5 A. Well, Ohio, Indiana, Michigan.

6 Q. Wisconsin?

7 A. Wisconsin, yes.

8 Q. What portion of that 80 to 90 million is  
9 located in the State of Wisconsin?

10 A. What percent?

11 Q. Yes. Volume. We can do the arithmetic, I  
12 guess.

13 A. Wow, I would tend to -- I mean, I can  
14 supply that -- I can supply that number. I  
15 mean, I --

16 Q. Would you, please?

17 A. Wouldn't even be able to guess at this  
18 point in time.

19 Q. But you're willing to supply it?

20 A. Sure.

21 Q. Before you leave the stand? You don't have  
22 to do it this minute.

23 A. Okay.

24 Q. Now, I take it with your comments about  
25 depooling that -- by the way, White Eagle has



1 producer members in -- obviously in Ohio, I  
2 assume?

3 A. Correct.

4 Q. And probably in Pennsylvania, if you've got  
5 a Uniontown -- if you're supplying the Uniontown  
6 plant, correct?

7 A. I'm not sure if there are in Pennsylvania  
8 or not. I'm not sure.

9 Q. Okay.

10 A. I --

11 Q. So most of the milk to the Uniontown,  
12 Pennsylvania United Dairy plant is coming from  
13 sources outside the Commonwealth of  
14 Pennsylvania. Is that your understanding?

15 A. I could not comment on that. I have not  
16 looked at the -- actually matched up producer  
17 addresses with producer -- with farm tickets  
18 and -- I could not give a good answer to that at  
19 this point.

20 Q. Well, you've got producers in Ohio. I  
21 assume there might be some in, like, West  
22 Virginia, maybe some supplying the Martins Ferry  
23 plant?

24 A. Producers in --

25 Q. West Virginia.

1 A. I could not -- again, I have not looked at  
2 the addresses producers associated with White  
3 Eagle.

4 Q. Well, let me ask you this. Does White  
5 Eagle -- how did -- did White Eagle survey its  
6 producer members in Ohio with respect to the  
7 position it's taking on depooling in this area?

8 A. Not that I'm aware of.

9 Q. Okay. Well, then let me ask you this. Do  
10 the dairy farmers in Ohio supplying milk day in  
11 and day out to Superior Dairy, United Dairy,  
12 Martins Ferry, United Dairy in Uniontown,  
13 Pennsylvania -- by the way, you're purporting to  
14 speak on their behalf here today, correct?

15 A. Correct.

16 Q. Do they know that you're here opposing  
17 limitations on depooling in Order 33?

18 A. Do they know we're here opposing --

19 Q. Opposing --

20 A. -- limitations?

21 Q. -- limitations on depooling, opposing  
22 Proposal 7, which would limit depooling,  
23 Proposals 4, 5 -- you're opposing all of the  
24 proposals related to depooling, are you not?

25 A. I do not see where we are opposing

1 depooling.

2 Q. Are you -- well, let me ask you this. Are  
3 you supporting any of the proposals that would  
4 restrict depooling?

5 A. Supporting proposals? No, we're not  
6 supporting these, per se, proposals on  
7 depooling -- on restricting depooling.

8 Q. Are you opposing? Are you telling the  
9 Secretary he should not adopt the proposals in  
10 this hearing that would restrict depooling?

11 A. I feel that depooling should be, again,  
12 handled on a national basis and implemented into  
13 all Orders simultaneously so that we don't have  
14 the problems we've had with northeast milk  
15 coming into 33 because it was depooled there  
16 that needed a home for the time being and  
17 parked.

18 Q. And the --

19 A. The same thing can happen going down into 5  
20 or 7 if things aren't taken care of there at the  
21 same time it is here. All we're going to do is  
22 have a domino effect with this.

23 Q. Well, depooling milk is not -- we're not  
24 talking about moving milk from one Federal Order  
25 to another when we're talking about depooling,

1 are we? Is that what you understand the debate  
2 to be?

3 A. No, no, no, no, no, sir. Depooling and  
4 then reattaching it -- after the milk has been  
5 depooled, if this went into place, milk could  
6 still be depooled in this Order. It could be  
7 reattached into another Order that doesn't have  
8 penalties to depooling and slowly brought back  
9 into here. Why should -- this is something that  
10 needs to be handled on a national basis and  
11 implemented into all Orders at the same time.

12 Q. Have you made any -- any of the  
13 organizations on whose behalf you're speaking  
14 made a proposal to ask the United States  
15 Department of Agriculture to convene a national  
16 hearing to address a proposal?

17 A. I would have to defer to counsel on that.

18 Q. You don't know whether you have or you  
19 haven't?

20 A. I personally have not, no.

21 Q. Okay. But you personally are asking the  
22 Secretary to refuse to adopt these proposals on  
23 the basis that some unknown potential hearing at  
24 some unknown time in the future could possibly  
25 address the issues, correct?

1 A. That a hearing on national basis is the way  
2 it should go to address this issue, correct.

3 Q. Well, could you agree that depooling is a  
4 disorderly marketing practice?

5 A. I don't -- I -- yes. Yes.

6 Q. And that practice should continue in Order  
7 33 until there is a national -- an uncalled  
8 national hearing to address it, correct?

9 A. Correct. It will not eliminate depooling  
10 if it's not handled on a national basis.

11 Q. Now, turn to page 8 of your testimony,  
12 Mr. Leeman.

13 A. Page?

14 Q. Eight.

15 A. Okay.

16 Q. Top.

17 A. Yes.

18 Q. Are you testifying today under oath that  
19 DFA was the sole bidder on the Chicago  
20 Mercantile Exchange causing rapid CME cash  
21 cheese price increases?

22 By the way, what time period are you  
23 talking about there?

24 A. That was -- those periods were last year.

25 Q. In 2004?

1 A. Correct.

2 Q. And you're testifying under oath, the  
3 statement that you read, that DFA was the sole  
4 bidder causing rapid CME cash cheese price  
5 increases; is that correct?

6 MR. VETNE: Objection. That  
7 misstates the prior testimony dramatically. The  
8 testimony presented under oath was that  
9 newspaper articles reported that that happened,  
10 not that Mr. Leeman has knowledge of that.

11 MR. BESHORE: So the only --  
12 well, let me see if I understand counsel's  
13 statement then.

14 BY MR. BESHORE:

15 Q. The only thing you are testifying to is  
16 that recent newspaper articles have reported  
17 allegedly that DFA was the sole bidder causing  
18 rapid CME cash cheese price increase. Is that  
19 it?

20 A. Newspaper articles, yes. Yes.

21 Q. So we should rely on websites and newspaper  
22 articles to make the decisions in this hearing  
23 that affect the income of Ohio dairy farmers,  
24 correct, and other dairy farmers, correct?

25 A. I think that's part of -- part of all

1 information.

2 Q. Okay. Now, are you -- on the basis of  
3 newspaper articles, are you under oath today  
4 requesting USDA to investigate manipulation of  
5 the CME by DFA?

6 A. We're asking them to consider the actions  
7 that have happened on the CME as to -- and  
8 consider this information when making these  
9 decisions that affect milk pricing in Federal  
10 Orders.

11 Q. Okay. Do you personally participate in any  
12 of the CME trading sessions?

13 A. You need to define that a little further.

14 Q. Well, help me.

15 A. "CME trading session"? Ask the question.

16 Q. Cash cheese trading sessions. Do you  
17 personally participate in those?

18 A. No.

19 Q. Do you participate through a broker?

20 A. No.

21 Q. Does Dairy Support, Inc., participate  
22 through a representative in those sessions?

23 A. No.

24 Q. Does T.C. Jacoby and Company participate in  
25 those sessions?

1 A. Maybe from -- I think they have from time  
2 to time.

3 Q. Okay. I have just one final question at  
4 this time, Mr. Leeman. What -- what risk  
5 management assistance does Dairy Support, Inc.,  
6 provide and to whom?

7 A. Fixed pricing contracts to help producers  
8 fix their -- fix their base portion of their  
9 price which can be done several different ways  
10 through handlers as well as using the futures  
11 market.

12 MR. BESHORE: Okay. Thank you.

13 JUDGE DAVENPORT: Other cross?

14 Mr. English?

15 CROSS-EXAMINATION

16 BY MR. ENGLISH:

17 Q. Good morning. My name is Charles English.

18 I represent Dean Foods.

19 A. It's still morning.

20 Q. Sorry?

21 A. It's still morning.

22 Q. Let me turn to page 6 of your testimony for  
23 a moment. In the middle paragraph when you were  
24 discussing this so-called accommodation that may  
25 or may not be based upon what you've heard be



1 charged, you referenced the value of -- I'm  
2 sorry.

3 The sentence starts, "If the Upper Midwest  
4 pooling provisions are also tightened, as DFA  
5 has requested, the value of accommodation  
6 pooling may increase to the difference between  
7 the Mideast PPD and the Class III price." Do  
8 you see that?

9 A. Yes.

10 Q. You're saying -- I'm looking at January  
11 2004 when the PPD was \$0.90 and the Class III  
12 was 11.61.

13 You're saying the accomodation could rise  
14 to the difference between those two numbers, so  
15 \$11.01?

16 A. We were at 11.61?

17 Q. If the Class III is 11.61, and --

18 A. And PPD --

19 Q. -- according to Exhibit 6, Table 3, and the  
20 PPD was \$0.90 for January 2004 as on Request  
21 Number 5, Exhibit 7, you're saying that the --  
22 it's your testimony that the value of so-called  
23 accommodation would rise to the difference  
24 between those two, which in my math is \$11.01.  
25 That's your testimony?

1 A. \$11.01?

2 Q. Yes. That's what I'm asking you. I'm  
3 substituting 60 -- \$0.90 for PPD -- Mideast PPD  
4 in your sentence, and 11.61 for the Class III  
5 price in your sentence, and asking you: Does  
6 that mean it's your testimony that the so-called  
7 accommodation would rise to 11.01?

8 A. An 11.61 Class III?

9 Q. Yes, sir.

10 A. Okay. And the PPD -- the Mideast PP --

11 Q. Was \$0.90. I'm sorry, \$10.71?

12 A. So we are looking at a Class III. I think  
13 what was meant there was the blend, in essence.

14 Q. So now you're saying the difference between  
15 the PPD --

16 A. No, that's not what I'm now saying. That's  
17 what was meant there.

18 Q. Well, I understand, but meant -- what you  
19 said, what you said was Mideast PPD?

20 A. Mideast PPD. I'm sorry. There was a  
21 typographical error there. Okay?

22 Q. Was that your typographical error or  
23 counsel's typographical error?

24 A. That would have been counsel's  
25 typographical error.

1 Q. In addition to that typographical error and  
2 the table that appears on page 3 that was  
3 prepared by counsel, or subtracting that, what  
4 portions of the remaining statement did you  
5 actually write?

6 A. Counsel -- counsel wrote the majority of  
7 this with the input of members of the group that  
8 I am speaking on behalf of.

9 Q. Now, going back to the question I just  
10 asked, subtracting the portions on page 3 of the  
11 table and the typo that we just discussed on  
12 page 3, what portion did you, sir, testifying  
13 today actually write?

14 A. Actually write?

15 Q. Yes, sir.

16 A. I did not write any of it.

17 Q. Not any of it?

18 A. It was information as a group that was put  
19 together by counsel. It was a conglomeration of  
20 information.

21 Q. What portions can you tell me that you  
22 provided yourself for this statement?

23 A. Ouch. Wow. Well, my name, one.

24 Q. Other than your name, what portions did you  
25 provide?

1 A. I think mostly general information  
2 throughout.

3 Q. General information throughout.

4 A. Correct.

5 JUDGE DAVENPORT: Mr. Vetne, would  
6 you and counsel approach?

7 (Thereupon, a discussion was held off  
8 the record.)

9 JUDGE DAVENPORT: We're going to take  
10 about five minutes at this time. We'll be back  
11 in session in about five minutes.

12 (Thereupon, a recess was taken.)

13 JUDGE DAVENPORT: If you would,  
14 please take your seats. We are back in session.  
15 Mr. English?

16 MR. ENGLISH: Thank you, Your  
17 Honor.

18 BY MR. ENGLISH:

19 Q. Sir, in answer to a question from  
20 Mr. Beshore, I believe I heard you say that  
21 obviously independent milk is not 9(c) milk. Do  
22 you remember saying that?

23 A. Yes.

24 Q. Is that correct?

25 A. Independent milk can fall under a 9(c)

1 report, though. Okay?

2 Q. And so if it falls under 9(c) report, it  
3 would be reported as 9(c) milk, correct?

4 A. Correct.

5 Q. And, in fact, to the extent you have  
6 independent producers that are part of White  
7 Eagle, are they reported as a 9(c) report?

8 A. They are on the 9(c) report.

9 Q. Can you tell me approximately how many  
10 independent producers are associated on the 9(c)  
11 report by White Eagle, or would that be  
12 proprietary?

13 A. The number of producers?

14 Q. The number of producers.

15 A. I couldn't tell you the number of  
16 producers, no.

17 Q. Is it your understanding that the former  
18 Dean Foods patrons are also independent  
19 producers to this day?

20 A. My understanding is the Dean Foods -- Dean  
21 Foods' producers are associated with Dairy  
22 Marketing Services.

23 Q. Just as independent producers are  
24 associated with White Eagle?

25 A. No. That is not -- that's not my

1 understanding.

2 Q. But your understanding could be wrong,  
3 right?

4 A. Yes.

5 Q. Were you here earlier today for the  
6 testimony of the Market Administrator's office  
7 who said that a significant number of producers  
8 in this market are not found under the reporting  
9 of independent patron milk pooled by  
10 distributors, but instead are found under 9(c)?

11 A. No. Unfortunately, I missed that this  
12 morning.

13 Q. If you heard that, might that lead you to a  
14 different conclusion at how DMS independent  
15 producers are treated?

16 A. Could you repeat --

17 Q. Had you been here for that testimony, that  
18 a significant number of farmers are independent  
19 producers, a number -- close to 3,000 dairy  
20 farmers are still considered to be independent  
21 farmers by this Market Administrator, doesn't a  
22 number of the DMS producers have to be  
23 independent producers by default?

24 A. No. I would agree with your -- with that  
25 statement.

1 Q. Do you understand that USDA's conclusion  
2 not to hear the proposal along the Continental  
3 lines -- Continental Dairy lines that was  
4 submitted was a permanent decision or one at  
5 this time?

6 A. My understanding is it was one at this  
7 time.

8 Q. Do you know why at this time they  
9 concluded? Do you recall?

10 A. No, I do not recall.

11 Q. Do you know whether such a zone out  
12 proposal would necessarily require opening part  
13 1000 of the Federal Orders?

14 A. No.

15 Q. Do you know what part 1000 Federal Orders  
16 is? Do you know what part 1000 of the Federal  
17 Orders is?

18 A. That's the -- that is the basic portion  
19 that's applicable to all Federal Orders.

20 Q. Assuming the Secretary were to conclude  
21 that depooling did, indeed, need to be dealt  
22 with now for this Order, you have concluded  
23 that, in your view, there are some defects in  
24 the proposals, correct?

25 A. Correct.

1 Q. The defects that you list do not exist,  
2 however, in Proposal 5 made by Continental Dairy  
3 Products, do they?

4 A. I would have to reread 5.

5 Q. If the defects are defects, and if they do  
6 not exist in Proposal 5, and if the Secretary  
7 concluded that depooling needed to be dealt with  
8 now, would you conclude then that that proposal  
9 should be adopted?

10 A. If it -- if it takes care of the situation  
11 and it was equal over all Federal Orders, yes.  
12 I mean, I -- I would have to look at it. I hate  
13 to comment too far on that because I would  
14 really like to read it over again.

15 Q. Let me go now to your purported defect in  
16 Proposals 6 and 7. I'm referring to page 8.

17 One of the defects, in your view, is that  
18 the limit would not apply to milk that had been  
19 previously pooled on any other Federal Order  
20 for -- continuously for the last three to six  
21 months, correct?

22 One of the proposals is three months and  
23 the other proposal is six months.

24 A. Six months, I believe it was.

25 Q. But it's your conclusion that it's unfair



1 that the language is "any other Federal Order,"  
2 correct?

3 A. Correct.

4 Q. Would there therefore be no problem, in  
5 your view, if the word "other" was stricken, so  
6 it's any Federal Order?

7 A. That would -- that would greatly be  
8 appreciated.

9 Q. So the 115 percent limit would not apply to  
10 milk that's been continuously pooled for at  
11 least six months on any Federal Order? That's  
12 the standard. It's not just the last month,  
13 it's six months for any one and it's all -- then  
14 everybody's treated the same?

15 A. Six months instead of three months is what  
16 you're saying?

17 Q. No. Well, there's two different proposals;  
18 one is three months, one is six months.

19 A. Right.

20 Q. I don't see you objecting to the three  
21 months or six months issue. I see you objecting  
22 to the word "other."

23 A. "Other," correct.

24 Q. So for now I'm trying to parch this a  
25 little bit and say if your objection is to the

1 word "other," does your objection go away if you  
2 strike the word "other," at least as to that  
3 portion of your objection?

4 A. If it is continuously pooled on any Federal  
5 Order.

6 Q. Any Federal Order.

7 A. That would not be a problem.

8 Q. Now, I'm going to try to craft a little bit  
9 of what lawyers call legislative or  
10 administrative history here for a moment.

11 In your next objection you talk about  
12 13(e)(1), talking about "a penalty avoidance  
13 opportunity uniquely benefitting," in this case  
14 you claim "DFA and its marketing partners by  
15 exempting from any penalty milk shipped to a  
16 distributing plant."

17 And then you have a statement, "With its  
18 large distributing plant customer base,  
19 multiregional markets and expansive supply  
20 system, DFA more than any other handler in the  
21 market, could simply switch otherwise  
22 disqualified milk to distributing plants and  
23 temporarily pool any excess on a market  
24 unaffected by depooling penalties." Do you see  
25 that?

1 A. Yes.

2 Q. Have you read Proposals 6 and 7 enough to  
3 see that there's a statement at the end that the  
4 Market Administrator shall be permitted to look  
5 for abuses that are designed to avoid the  
6 dictates of this section?

7 A. I would be more comfortable in -- our group  
8 would be more comfortable if there was something  
9 more concrete put in there rather than relying  
10 solely on the Market Administrator to make that  
11 determination.

12 Q. So, for instance, something more concrete  
13 to the point that if a handler switches volume  
14 between markets, that that could be -- that  
15 could -- and depools -- he's got to depool here  
16 to be a problem, right?

17 A. Right. You got to depool.

18 Q. If they didn't depool it, then they can  
19 continue to depool under any Federal Order they  
20 come under then?

21 A. Over another Federal Order.

22 Q. Right?

23 A. They can add another Federal Order?

24 Q. This is only if they depool milk, right?

25 It doesn't matter if they switch the milk to

1 another Federal Order and depool it, correct,  
2 because then the depooling hasn't occurred.  
3 It's only if they switch it --  
4 A. Correct. Yes. If it was switched from  
5 here, taken off of 33, put on 5.  
6 Q. Then if you deal with that issue --  
7 A. For that length, yes. So in June, instead  
8 of it being here, it was on, say, Federal Order  
9 5 is what you're saying?  
10 Q. Well -- okay. Yeah, that's right.  
11 A. Right.  
12 Q. But now it's being pooled.  
13 A. Right.  
14 Q. It's okay if it's pooled. That's not the  
15 abuse, right?  
16 A. That's not the abuse, no.  
17 Q. So it's only if the milk has been switched  
18 to another Order and depooled?  
19 A. Depooled --  
20 Q. Because it can -- can it be switched to  
21 another Order if it's been depooled, it's not  
22 anywhere?  
23 A. Depooled in a given month.  
24 Q. Right.  
25 A. And then the following month re-pooled on a

1 different Order.

2 Q. Would it be fair to say that you're looking  
3 at a situation like occurred in this market in  
4 June of last year?

5 A. The milk you're referring to would be?

6 Q. Vermont milk.

7 A. Yes.

8 Q. Okay. You think that is an abuse, correct?

9 A. That is an abuse.

10 Q. Okay. So if we help correct that, if we  
11 find a solution that helps correct that and  
12 avoids that kind of market switching, then your  
13 objection in this instance would also be  
14 addressed, correct?

15 A. Yes.

16 Q. Let me turn to Attachment 2. Did you  
17 download Attachment 2?

18 A. No, I did not.

19 Q. Did you check it for accuracy before you  
20 included it in the statement?

21 A. I always felt that Dairy Foods has been a  
22 fairly accurate -- accurate periodical,  
23 magazine.

24 Q. For the listing for company, just for  
25 clarification, under "Sales," you certainly do

1 not suggest that the sales for Dean Foods for  
2 either '03 or '02 as listed would be the sales  
3 for the Mideast Order, correct? Those numbers  
4 would be national total company sales --

5 A. I --

6 Q. -- or you don't know?

7 A. I really don't know.

8 Q. You don't know?

9 A. I didn't really look at those numbers.

10 Q. So you don't know what those numbers are?

11 A. I didn't look at those numbers.

12 Q. So we can discount what those are. Then  
13 you have a listing for plants in -- under Dean  
14 Foods, plants in Mideast Federal Milk Order  
15 Marketing Area, do you see that?

16 A. Yes.

17 Q. Under "Ohio," at the very end it has the  
18 words, "Oklahoma; Borden, Tulsa, culture and  
19 fluid." I know that sometimes my geography gets  
20 the best of me, but, to your knowledge, is  
21 Tulsa, Oklahoma in the Mideast Marketing Area?

22 A. No. That one I did notice.

23 Q. So that plant is inaccurately listed as  
24 being a plant in the Mideast Federal Milk  
25 Marketing Order?

1 A. I sure hope so, yes.

2 Q. You notice under "Michigan" -- and the  
3 Market Administrator put in information and to  
4 our not great delight all of our suppliers have  
5 now disclosed everything about our plants, but  
6 one thing they didn't tell you anything about  
7 was a plant called Melody Farms in Detroit.

8 To your knowledge, is there at the present  
9 time a plant called Melody Farms in Detroit?

10 A. Not that I know of.

11 Q. So that also is inaccurate on this page,  
12 correct?

13 A. Right.

14 Q. On the next page under "Kroger, Plants in  
15 the Mideast Marketing Area," the last one listed  
16 is Winchester Dairy Farms, Winchester, Kentucky.  
17 The Winchester Dairy Farms, Winchester, Kentucky  
18 plant is not in the Mideast Marketing Area, is  
19 it?

20 A. No. That would be a Federal Order 5 plant.

21 Q. So another inaccuracy on this otherwise  
22 reliable Dairy Foods, correct?

23 A. As far as the Mideast Marketing Area, yes.

24 Q. The next page, the second one listed,  
25 Number 60, Upstate Farms Cooperative, Inc., to

1 your knowledge, is Upstate Farms a Mideast pool  
2 plant?

3 A. Not to my knowledge.

4 Q. So that is an inaccurate statement by the  
5 otherwise reliable Dairy Foods, correct?

6 A. Yes.

7 Q. Is this even information that's on that web  
8 page, or is this somehow cut and pasted from  
9 something?

10 A. This is information that was on the web  
11 page.

12 Q. But you didn't download it, so you don't  
13 know exactly what it was?

14 A. I don't know if it was cut and pasted.

15 MR. ENGLISH: Your Honor, I'm  
16 finished with my cross-examination. I move to  
17 strike Attachment 2 again. Those are the  
18 inaccuracies I could find and the witness didn't  
19 even download it himself.

20 JUDGE DAVENPORT: Your objection's  
21 noted. Other cross? Recross?

22 MR. BESHORE: Recross?

23 FURTHER CROSS-EXAMINATION

24 BY MR. BESHORE:

25 Q. Mr. Leeman, page 8 of your statement,



1 Exhibit 30, the bottom paragraph which --  
2 Mr. English had just asked you a question or two  
3 about it, but it says, "Proposed Section  
4 13(e)(1) provides a penalty avoidance  
5 opportunity uniquely benefiting DFA and its  
6 marketing partners by exempting from any penalty  
7 milk shipped to a distributing plant."

8 Now, are you talking about proposed 13(a)  
9 of Proposal 7?

10 A. Where are we again?

11 JUDGE DAVENPORT: The bottom of page  
12 8.

13 BY MR. BESHORE:

14 Q. The bottom of page 8. The last paragraph  
15 beginning the bottom of page 8.

16 A. Page 8.

17 Q. The first full sentence. Okay? Is that  
18 commenting on Proposal Number 7? Well, Proposal  
19 7 is the DFA proposal. I assume you're  
20 commenting on the DFA proposal?

21 A. On the depooling issue?

22 Q. Okay. Yes.

23 A. Yes.

24 Q. Okay. Now, did you read -- have you read  
25 the notice of hearing and the language in

1 proposed Section 13(e)(1)?

2 A. That I believe, not having it in front of  
3 me, involved giving the Market Administrator the  
4 right to look into --

5 Q. No.

6 A. No.

7 Q. It does not.

8 A. Okay. Well, that was off the top of my  
9 head.

10 Q. Well, let me read you proposed Section  
11 13(e)(1), which is what you're commenting about  
12 here in your testimony, from the hearing notice,  
13 and I'll just read nothing before that -- that  
14 subsection.

15 "Subsection (e)(1), Milk shipped to and  
16 physically received at pool distributing plants  
17 and -- and allocated to Class I use in excess of  
18 the prior month's volume allocated to Class I  
19 use shall not be subject to the 115 percent  
20 limitation."

21 A. Okay.

22 Q. Okay. Now, that limitation is not the --  
23 the exemption is not what you say in your  
24 statement, is it?

25 A. If milk is brought back in and shipped into

1 distributing plants, they can still repool that  
2 milk.

3 Q. Well, it does not exempt -- you say in your  
4 statement it's "uniquely benefiting to DFA and  
5 its marketing partners by exempting from any  
6 penalty milk shipped to a distributing plant."

7 Now, by its very terms, proposed 13(e)(1)  
8 only exempts -- it doesn't exempt any milk  
9 shipped to distributing plants. It's only milk  
10 shipped in excess of the prior month's volume  
11 allocated to Class I use, correct?

12 A. In excess of -- 115 percent in excess of  
13 the prior month's Class I if milk was moved back  
14 in there as different producer milk.

15 Q. Where does it say "different producer  
16 milk"?

17 A. I mean, different milk going in there  
18 rather than what was going into those plants the  
19 prior month.

20 Q. Oh, it's your interpretation that it  
21 exempts any milk that -- milk that would just be  
22 shifted in there?

23 A. Shifted.

24 Q. But it doesn't do that, does it? If that's  
25 within the same Class I volume, it's not exempt?

1 A. If it's within the -- no. I want to dig up  
2 a copy.

3 Q. You want to look at the hearing notice?

4 A. Yeah.

5 Q. Look at the hearing notice. Look at the  
6 proposed language.

7 A. Okay.

8 Q. Now, isn't it correct that the exemption in  
9 proposed 13(e)(1) is not for any milk delivered  
10 to distributing plants, it's only for milk in  
11 excess of the prior month's volumes?

12 A. "Milk shipped and physically received at  
13 pool distributing plants and allocated to Class  
14 I use in excess -- "

15 Q. "In excess."

16 A. "-- of the prior month's volume allocated  
17 to Class I use shall not be subject to the  
18 limitation."

19 Q. So the only way this DFA or anyone else can  
20 have deliveries exempted from the limitation is  
21 to have additional sales to distributing plants,  
22 correct?

23 A. I don't know if I understand it that way.

24 Q. Well, it says "sales in excess of the prior  
25 month's volume," does it not?

1                   MR. VETNE:           Your Honor, may I  
2 interrupt Mr. Beshore? I understand that  
3 Mr. Beshore is taking some time here to ask  
4 about this witness's interpretation of DFA's own  
5 ruling of the proposal. Obviously the proposal  
6 is what it says.

7                   JUDGE DAVENPORT: It sounds more like  
8 he's objecting, or, in other words, asking into  
9 the basis of his objection.

10                  MR. VETNE:           Well, that is based  
11 on the interpretation of the rulings. If he's  
12 got an interpretation that's wrong, I think it  
13 could be briefed, but -- I'm looking to save  
14 time.

15                  MR. BESHORE:        I'll stop there  
16 with that -- with that point. I think the  
17 proposal -- the proposed language speaks for  
18 itself as well as Mr. Leeman's comments or  
19 whoever's comments at the bottom of page 8.

20 BY MR. BESHORE:

21 Q.   Now, let's look at Attachment 2 again.  
22 Just one more question on Attachment 2. Through  
23 the -- through the marvels of wireless  
24 technology, the wireless internet connections,  
25 Mr. Gallagher has pulled up the Dairy Foods web

1 page on the computer, and I would represent to  
2 you that there is no itemization on that web  
3 page of Dean Foods plants in the Mideast Federal  
4 Milk Marketing Area.

5 Now, if that's the case, what's the source  
6 of this purported printout from the web page, do  
7 you know?

8 A. The source, as I see it, is Dairy -- it's  
9 from Dairyfoods.com.

10 Q. And does the web page skip from number 1 to  
11 number 6 on its list?

12 A. No.

13 MR. BESHORE: That's all I have.

14 JUDGE DAVENPORT: Very well,  
15 gentlemen and ladies. Let's break for lunch at  
16 this time. Let's be back at -- is 1:00 too  
17 soon?

18 MR. BESHORE: Sorry?

19 JUDGE DAVENPORT: I was proposing a  
20 break for lunch at this time. Is 1:00  
21 acceptable?

22 MR. BESHORE: We're -- I would --  
23 I would propose no earlier than 1:30, and I  
24 would -- I would like 2:00 for purposes of  
25 checking out and attempting to prepare a

1 rebuttal testimony that may need to be presented  
2 this afternoon.

3 JUDGE DAVENPORT: Well, how about  
4 1:30, and then if -- this will likely go into  
5 tomorrow. We are going to be limited by this  
6 space here. We have to be out by six tonight.

7 MR. VETNE: Let me make a  
8 general announcement. Dr. Cotterill's testimony  
9 is on the back table. It will be available, and  
10 although I will be gone, it may be useful to  
11 receive his testimony as if read, allow him to  
12 summarize it and then let the record reflect it.  
13 Thank you.

14 JUDGE DAVENPORT: We'll be in recess  
15 until 1:30.

16 (Thereupon, a luncheon recess was  
17 taken at 12:04 p.m., with the  
18 proceedings to be continued at 1:30  
19 p.m.)

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1                                   AFTERNOON SESSION

2   1:28 p.m.

3                   JUDGE DAVENPORT:   Mr. English --  
4 ladies and gentlemen, if you would, please take  
5 your seats.  It appears Mr. Leeman is not back  
6 yet.  I would like to get started.

7                   Mr. English, do you have your  
8 witnesses ready to proceed?

9                   MR. ENGLISH:           My feeling is  
10 Dr. Cotterill.  I mean, I'm ready to go, but I  
11 think that's not consistent with what  
12 Dr. Cotterill's plan was.

13                  JUDGE DAVENPORT:   Do we have other  
14 cross of Mr. Leeman?

15                  MR. TOSI:            Yes.

16                  MR. DAVENPORT:    Very well.  
17 Mr. Tosi?

18                                   CROSS-EXAMINATION

19 BY MR. TOSI:

20 Q.   Thank you for appearing, Mr. Leeman.  I  
21 would like to draw your attention to a couple of  
22 things that you said in your written statement.

23       The first one has to do with -- on page 8  
24 where you're asking that the Department  
25 investigate whether the cause of new price



1 volatility was a manipulation of the CME by DFA  
2 or any other buyer.

3 Is it your testimony that -- are you of the  
4 opinion that DFA manipulated the CME?

5 A. Yes. I think it has happened, yes.

6 Q. Okay. And in that regard, that they  
7 manipulated to keep the prices high?

8 A. Correct.

9 Q. If they have this ability to manipulate,  
10 why would they let prices fall?

11 A. I don't think you can, on a long-term  
12 basis, continue buying product and on a  
13 long-term basis continue to hold the market up  
14 by buying product on the CME short term.

15 Q. I would like to ask some of your -- I would  
16 like to ask some questions about your opinions  
17 about Proposal 2.

18 A. Okay.

19 Q. Okay. As you understand the purpose of  
20 pooling provisions, can you tell us in your own  
21 words what you think they're -- what they should  
22 do?

23 A. Proposal 2, I don't think that the  
24 diversion limitations -- or the diversion  
25 limitations in tightening those up are going to

1 make a huge difference in the market. I don't  
2 see any reason -- I just don't see any reason  
3 that they need to be changed whatsoever.

4 Q. Would you agree that one of the purposes of  
5 pooling provisions is to make sure that the  
6 Class I market's adequately supplied?

7 A. Correct.

8 Q. Would you also agree that another major  
9 purpose of pooling provisions is to properly  
10 identify the milk of those producers as  
11 regularly servicing that market?

12 A. Yes.

13 Q. And that if the Secretary finds that this  
14 proposal does a better job of that and adopts  
15 it, that that would be okay with you?

16 A. Yes.

17 Q. Okay. Also on page 8, I was a little  
18 confused. If I could refer to your second full  
19 paragraph that begins, "For example," the sense  
20 that I take from that statement is that somehow  
21 adoption of Proposal 2 would limit producers --  
22 that it would limit the ability of small co-ops  
23 to increase their membership and milk volume --

24 A. Yes.

25 Q. -- from existing sources. Do you think

1 it's one of the purposes of pooling standards to  
2 allow co-ops, for example, to get bigger versus  
3 co-ops that are smaller?

4 A. Well, as far as larger getting larger and  
5 smaller --

6 Q. Well, let me ask it another way. Do you  
7 think it's the purpose of pooling standards  
8 to -- well, let me rephrase it again now.

9 The current pooling standards that we have  
10 are what they are and Proposal 2 asks that those  
11 provisions be tightened a little bit by lowering  
12 diversion limits and increasing the shipping  
13 standards. Okay?

14 So would you be saying that the current  
15 provisions somehow limit small co-ops to  
16 increase their membership and milk involve?

17 A. To the extent of the amount of milk  
18 available -- the amount of diversions they have  
19 available above servicing the Class I markets.

20 Q. Are you suggesting then that pooling  
21 standards -- or that the Department should  
22 consider some other dimension of what pooling  
23 standards should do to provide more favorable  
24 terms for small co-ops versus large co-ops?

25 A. No. I -- I just -- I get concerned -- I am

1 concerned that by continuing to tighten them it  
2 puts the smaller cooperatives at a disadvantage  
3 because they can increase -- I mean, they can  
4 increase their supply, but they have to gain  
5 more access to the Class I market in order to be  
6 able to take care of that other milk as far as  
7 they have to divert it to other source cheese  
8 plants, for instance. That they would have to  
9 be able to gain access to more Class I market  
10 and that market is becoming more and more  
11 constricted, you know, through mergers and  
12 everything else.

13 I mean there's -- there's less and less  
14 players in the market. There are less  
15 opportunities to go to a Class I market without  
16 having to go through a larger cooperative that  
17 has contracts with those handlers.

18 Q. Okay. Do you see that those increased  
19 concentration in processors --

20 A. Yes.

21 Q. -- and co-ops --

22 A. Yes.

23 Q. -- has been a result of Federal -- excuse  
24 me, Federal Order pooling provisions?

25 A. I don't think it -- I -- the industry in

1 general is coming together -- I mean, it is  
2 getting smaller. I mean, larger buying out  
3 smaller. It's becoming more concentrated. But  
4 I also feel that there are -- that these do not  
5 attribute to it, but they help the larger  
6 cooperatives and processors that have more  
7 diversity throughout the market to tighten up  
8 that part of the Order as far as their options  
9 as far as -- you know, as far as options out  
10 there for people that do not have access to  
11 them.

12 Q. But if the pooling provisions are applied  
13 equitably without regard to size, how is it  
14 that -- how are you differentiating between  
15 Proposal 2's -- excuse me, Proposal 2's revised  
16 standards versus one co-op competing with  
17 another for business?

18 A. If they do not have the market access for  
19 the class -- for the -- to the distributing  
20 plants because of other agreements that -- say,  
21 like DFA/DMS have with, say, Dean Foods or  
22 Kroger's with pool supply contracts.

23 Q. Okay. I think I understand. One other  
24 thing -- one last thing. Actually, two other  
25 things. On page 7 of your statement when you

1 were talking about depooling, it would be in the  
2 middle of the page with the paragraph that  
3 begins, "Now, I wish to say a few words," I  
4 was -- you made a comment that kind of caught my  
5 attention. You sort of singled out from the  
6 northeast milk coming from Vermont.

7 A. Yes.

8 Q. How is that different from what others  
9 believe to be Wisconsin milk doing the same  
10 thing in the Mideast Order?

11 A. I think that was being used more as an  
12 example of -- it was being used more as an  
13 example of depooling milk. Okay? The depooling  
14 of milk in an Order that has provisions to say  
15 well, if you depool, there's a penalty if you  
16 do, so you need to decide whether it's worth  
17 doing that.

18 This is an example of what could happen or  
19 may happen down the road if this wasn't handled  
20 on a national basis and I'm going to use Federal  
21 Order 5, for example.

22 Q. Okay.

23 A. Okay.

24 Q. I think the context of what you're saying  
25 is that you were just using that as an example

1 of what could happen --

2 A. Yes.

3 Q. -- as an example of what happens when -- if  
4 you don't do everything all in one -- all in one  
5 action?

6 A. Correct.

7 Q. Okay. I understand. And one last thing.

8 On page 8 on the bottom paragraph it talks about  
9 "Proposed Section 13(e)(1)." What is a -- what  
10 is penalty avoiding by offering a unique ability  
11 that benefits DFA by exempting any penalty for  
12 milk shipped to a distributing plant?

13 Isn't that the whole point of -- one of the  
14 whole -- one of the major, major points of  
15 pooling standards? How is that -- how are we  
16 avoiding penalty here?

17 A. This goes back -- this goes back to that  
18 their broad base of distributing plants that  
19 they supply can be in other Federal Orders that  
20 do not allow for -- or, you know, have nothing  
21 to do with depooling. There's no penalties for  
22 them for depooling. That as they come back onto  
23 this Order, that they can do up to the 115  
24 percent, or if there's -- you know, if it's  
25 above that, whatever, but there's an excess that

1 may -- that was depooled that may not be able to  
2 come back onto this Order without penalty. By  
3 placing that excess into another Order that  
4 doesn't -- isn't -- doesn't have these  
5 provisions, they can -- they can filter that  
6 back over, in this case, say, in three months  
7 back onto the Order, into 33.

8 Q. And you're linking that back into the  
9 general theme that if we're going to have a  
10 depooling provision --

11 A. Yes.

12 Q. -- that it be put in as many Orders at the  
13 same time as possible?

14 A. Yes.

15 Q. Okay.

16 MR. TOSI: That's all I have.  
17 Thank you. I appreciate your patience. Thank  
18 you.

19 JUDGE DAVENPORT: Other examination  
20 of this witness? Very well, Mr. Leeman, you may  
21 step down. Excuse me.

22 MR. TOM VETNE: I do have some  
23 redirect if there are no other cross.

24 JUDGE DAVENPORT: I said "other  
25 examination." That includes re-cross --



1 redirect, rather.

2 MR. TOM VETNE: Your Honor, my name  
3 is Tom Vetne. I'm here on behalf of my father  
4 who has to be away for surgery. I wonder if I  
5 could meet with the witness for about five  
6 minutes before I do my redirect?

7 JUDGE DAVENPORT: Well, I think if  
8 that's the case, then we'll go on to other  
9 witnesses and put him back on the stand  
10 afterwards. I don't want to inconvenience the  
11 semblance here when you were given an hour and a  
12 half for lunch. Also, this witness was not here  
13 at 1:30 when I was ready to reconvene this  
14 meeting, so I trust that it is not going to be  
15 regular conduct.

16 MR. TOM VETNE: It won't be, Your  
17 Honor.

18 JUDGE DAVENPORT: Very well. You  
19 want to take your witness and take whatever time  
20 you need? Mr. English, are you ready to  
21 proceed?

22 MR. ENGLISH: I'm ready, but I  
23 thought Dr. Cotterill was the next witness.

24 MR. TOM VETNE: We are ready to go  
25 with Dr. Cotterill.

1                   JUDGE DAVENPORT:  Why don't you  
2 recall Mr. Leeman then after you take  
3 Dr. Cotterill?

4                   MR. TOM VETNE:  That will be great.

5                   JUDGE DAVENPORT:  Raise your right  
6 hand.

7                   (Thereupon, Dr. Cotterill was sworn  
8 by Judge Davenport.)

9                   DR. COTTERILL:  I need a copy of  
10 Exhibit 2 as well.

11                   DR. RONALD W. COTTERILL  
12 of lawful age, a Witness herein, having been  
13 first duly sworn, as hereinafter certified,  
14 testified and said as follows:

15                   DIRECT EXAMINATION

16 BY MR. TOM VETNE:

17 Q.  Dr. Cotterill, would you introduce yourself  
18 for the record, please?

19 A.  Yes.  My name is Ronald Cotterill, and I'm  
20 a Professor of Agricultural and Resource  
21 Economics at the University of Connecticut at  
22 Storrs, and I also direct the Food Marketing  
23 Policy Center there.

24 Q.  I've got a copy of your statement with  
25 attachments.  And it looks like your CV is part

1 of the -- attached to your statement?

2 A. Yes, it is. It's Exhibit 1.

3 Q. And it's true and complete?

4 A. Yes.

5 Q. Okay.

6 MR. TOM VETNE: Your Honor --

7 JUDGE DAVENPORT: His statement here  
8 will be admitted -- or will be marked Exhibit 31  
9 for identification. His CV and the Attachment  
10 2, we'll just include as all part of Exhibit 31.

11 (Thereupon, Exhibit 31 of the Mideast  
12 Federal Milk Marketing Order hearing  
13 was marked for purposes of  
14 identification.)

15 MR. TOM VETNE: And in order to  
16 save time, Your Honor, we would ask that the  
17 statement and attachments be -- be included in  
18 the transcript as if they were read and then  
19 we're going to ask the doctor to maybe summarize  
20 the highlights.

21 MR. BESHORE: Your Honor, I have  
22 not had the opportunity to read Dr. Cotterill's  
23 statement and I would like to either have him  
24 read it in full as testimony or give everyone  
25 here -- take time off the record if we need to

1 to read it, but I'm not prepared to  
2 cross-examine if it's just accepted as read and  
3 we're ready to cross.

4 JUDGE DAVENPORT: Very well, counsel.  
5 Why don't you have him read his statement.

6 THE WITNESS: I would be happy to  
7 read it. I would say that Exhibit 2 was not  
8 attached and we just handed it out, so Exhibit  
9 1, 2 and 3 are the exhibits.

10 All right. I will be glad to read it  
11 and then entertain questions afterwards. Well,  
12 the title is "Vertical Foreclosure: The Impact  
13 of the Proposed Reduction in Diversion Limits on  
14 the Exercise of Market Power and the Economic  
15 Performance of Milk Marketing Channels in the  
16 Mideast Federal Milk Marketing Area."

17 My name is Ronald Cotterill. I am a  
18 Professor of Agricultural and Resource Economics  
19 at the University of Connecticut and Director of  
20 the University of Connecticut's Food Marketing  
21 Policy Center. My curriculum vitae is attached  
22 as Exhibit Number 1. I've been asked by  
23 Attorney John Vetne, attorney for White Eagle  
24 Milk Marketing Federation and other interested  
25 parties, to analyze the impact of proposed

1 changes to pool qualification rules on pricing  
2 conduct and the economic performance of markets  
3 in the Midwest Milk Marketing channels.  
4 Proposal Number 2 at this hearing would tighten  
5 pool performance standards by reducing the  
6 diversion limits for Section 9(c) cooperatives  
7 and other handlers from 60 percent to 50 percent  
8 in each of the months of August through  
9 February, and from 70 percent to 60 percent in  
10 each of the months of March through July.  
11 Federal Register cite. Pool supply and  
12 cooperative plants would also experience  
13 tightening of pool standards, but the burden of  
14 these changes would fall more heavily on supply  
15 plants because supply plants qualify for pool  
16 participation on the merits of the individual  
17 plant's conduct while cooperative plants qualify  
18 by paper designation based on the cooperatives  
19 system-wide performance. Dean Foods has  
20 proposed additional and more restrictive pool  
21 qualification rules.

22 Milk cooperatives and proprietary  
23 handlers have expressed concern throughout the  
24 United States Federal Milk Market Order system  
25 about the impact of paper pooling and of

1 depooling in response to milk and commodity  
2 price volatility, on the stability, fairness and  
3 logistical efficiency of the Order system. In  
4 response to these concerns, USDA has entertained  
5 a series of proposals to tighten milk pool  
6 qualification standards in the Federal Milk  
7 Marketing Order system. Leading Proponents of  
8 these changes are Dairy Farmers of America, the  
9 nation's largest milk cooperative, and Dean  
10 Foods, the nation's largest fluid milk  
11 processor.

12           As I reviewed the hearings and  
13 arguments of the parties leading up to this  
14 hearing, I've come to understand that paper  
15 pooling is an elusive concept. It's both an  
16 esoteric term of art unique to the Federal Milk  
17 Order system, and a term of derision employed to  
18 describe someone else's milk marketing  
19 practices. As an aside, that's an attempt at  
20 humor. It always applies to milk used to make  
21 manufactured milk products produced by dairy  
22 farmers that participate in the Federal Order  
23 milk pool by paper designation of the reporting  
24 handler, usually Section 9(c) cooperative  
25 association. However, only milk that is

1 delivered on pool distributing plant must be  
2 pooled. All other milk is pooled by paper  
3 designation, whether it's a paper reporting  
4 diverted milk, a paper designating a cooperative  
5 plant as a pool plant, or a paper agreement  
6 between a manufacturer and a cooperative in  
7 Order 3 allowing the Section 7(e) manufacturer's  
8 plant to be pooled --

9 JUDGE DAVENPORT: That's Order 33.

10 THE WITNESS: In Order 33?

11 JUDGE DAVENPORT: Yeah.

12 THE WITNESS: Yeah -- - without  
13 plant specific performance, i.e., shipments to  
14 distributors. I see no functional difference  
15 between milk that is diverted day after day to a  
16 nonpooled cheese plant and milk that is  
17 delivered day after day to Leprino's 9(e) plant  
18 or a cooperative's 9(d) plant. The 9(e) and the  
19 9(d) plants have a great advantage of form over  
20 substance, however. Milk delivered to those  
21 plants gets credit for producer touch base  
22 purposes and does not count against the  
23 diversion limits of the cooperative. Therefore,  
24 I will use paper pooling to refer to all milk  
25 that participates in the pool, but is not

1 delivered to a distributing plant. The  
2 objective of the proposals in this hearing and  
3 predecessor hearings is to reduce the volume of  
4 milk that is pooled on paper for some, but not  
5 all market participants. As discussed below,  
6 this would have the effect of foreclosing pool  
7 access to some milk and enhance the value of  
8 paper held by those who remain on the pool.

9           Vetne, 2005, and others on behalf of  
10 several cooperatives with a minor share of  
11 regulated markets to the west have criticized  
12 these proposed changes in prior hearings from  
13 the perspective of producer equity, the  
14 legislative intent of the 1937 Agricultural  
15 Marketing Agreement Act, the Nourse Commission,  
16 1962, a study of Market Orders and the relevant  
17 case law. The essence of that argument is that  
18 Federal Market Orders are not intended to limit  
19 access of non-fluid use milk to a Market Order  
20 pool by non-economic means such as diversion  
21 limits. Even under Market Orders,  
22 transportation economics, plant location and  
23 location of raw milk determine the farm gate  
24 value of milk. Several cites; Vetne 2002b,  
25 Black, that's John D. Black, 1935, who issued a



1 book on milk Orders, Cassels, 1937, milk  
2 distribution study, Pratt, et al., the Cornell  
3 study that underlined the Federal Market Order  
4 Reform process that we had culminated in 2000.  
5 All farmers share in the pooled value of milk  
6 sales across fluid and manufacturing classes of  
7 use on an equitable basis based upon the  
8 components of their milk and the location of  
9 their milk or their customer's market -- the  
10 location of their market or their customer's  
11 market.

12           To date there's been relatively  
13 little discussion in the hearings or post  
14 hearing briefs about the impact of the proposed  
15 reductions in diversion limits upon the  
16 allocative efficiency of milk marketing  
17 channels. That is the issue I will address in  
18 this paper. Federal Market Orders were never  
19 intended to contribute to the monopolization of  
20 milk market channels either by cooperatives or  
21 proprietary firms or by such firms acting in  
22 concert, although Orders have been used to  
23 create and maintain monopolies in the past, US  
24 Department of Justice, 1977, and continue to  
25 provide powerful tools to stifle competition by

1 increasing costs or reducing revenues for  
2 competitors. All right?

3           The unique potential for Federal  
4 Market Order pooling rules to be used by a  
5 dominant cooperative to disadvantage a  
6 competitor was recently illustrated when DFA's  
7 National Dairy Holdings processing company  
8 proposed a merger with the H.P. Hood Company in  
9 New England, with DFA or its designee to provide  
10 the full supply of milk to the merged Hood  
11 plants. If that merger had gone through as  
12 NDH/DFA intended, Agri-Mark Cooperative would  
13 have lost its primary distributing plant outlet  
14 and therefore its primary source of Federal  
15 Order pooling base for member milk used to  
16 produce Cabot cheese and other manufactured  
17 products, as explained in the testimony for the  
18 House Judicial Committee by Robert Wellington,  
19 Agri-Mark's economist, attached hereto as  
20 Exhibit 3. Faced with loss of pool access for  
21 much of its milk supply, Agri-Mark would have  
22 probably joined forces with DFA, as it did its  
23 sister cooperatives Dairylea and St. Albins in  
24 the marketing agency in common, DMS, Dairy  
25 Marketing Services. This incident is an example

1 of what economists call vertical foreclosure.  
2 The merger in the processing market created  
3 competitive problems in the milk assembly  
4 market.

5           At this hearing as in prior  
6 proceedings, I submit that one of USDA's most  
7 important decision-making functions in  
8 addressing paper pooling issues is to consider  
9 the competitive impact of proposed rules. If at  
10 all possible, the USDA should avoid rule  
11 amendments that would contribute to the  
12 acquisition or exercise of market power by  
13 dominant milk assembly cooperatives and dominant  
14 milk processors.

15           Now, understand -- this is an aside.  
16 Now, understand, please, that such firms may  
17 acquire market power through competition on the  
18 merits, they may do that, or economies of scale  
19 and scope; however, they should not acquire it  
20 via violation of antitrust law or by  
21 administrative fiat in a regulatory process such  
22 as this one. So I want to stress that I'm not  
23 saying that no firm -- I'm not saying that firms  
24 in the milk industry should be intensely  
25 competitive and have no market power. I'm not

1 saying that. They may have market power, they  
2 may gain it on the merits, they may gain it  
3 through their competitive success or failures.  
4 What I am saying is they should not gain it  
5 through regulatory or administrative fiat in a  
6 process like this.

7           Impact Analysis. I have read several  
8 post hearing briefs from the recent Central  
9 Market Order hearing and have read the factual  
10 documentation requested from the market -- the  
11 Mideast Market Administrator by the parties  
12 participating in this hearing. In response to a  
13 request from DFA and Michigan Milk Producers  
14 Association and a request from White Eagle, et  
15 al., the Mideast Order Market Administrator  
16 completed an impact analysis of the proposed  
17 reduction in diversion limits for October 2003  
18 and for all months of 2003-2004. That's the  
19 White Eagle production as opposed to the DFA  
20 production.

21           Table 1 reproduces the quantitative  
22 impact analysis of the reduction in diversion  
23 limitations for October 2004. It should have  
24 been October 2004 earlier in the text. It was a  
25 mistake. So it's October 2004 or the entire

1 two-year period. We're looking at October 2004  
2 which is what DFA requested -- or DFA/MMPA  
3 requested.

4 Well, the market pool was 1.545  
5 billion pounds and the 10 percent reduction in  
6 diversion limits would have reduced that pool by  
7 63.8 million pounds. This 4.1 percent reduction  
8 would increase the producer price differential,  
9 and the blend or statistical uniform price, only  
10 \$0.02 per hundredweight. This suggests that the  
11 policy change is trivial. Proponents should  
12 then be relatively unconcerned about this  
13 proposal. However, the projected -- the  
14 projected \$0.02 impact on producer prices  
15 ignores the competitive consequences of the  
16 proposed changes on the performance of raw milk  
17 assembly, fluid milk processing and ultimately  
18 retail fluid milk markets. Proponents'  
19 competitive benefit from their proposal and  
20 corresponding disbenefit to competitors, is more  
21 profound than a \$0.02 impact on the producer  
22 blend price.

23 Precise quantitative analysis of  
24 these competitive impacts is not possible  
25 because the necessary data are not currently in

1 the public domain. I requested market share  
2 data for fluid bottlers and handlers that supply  
3 them in the Mideast Market Area from the Market  
4 Administrator. Such information is confidential  
5 and unavailable from USDA sources for hearings  
6 such as this one. Industry sources, however,  
7 suggest that Dairy Farmers of America and its  
8 partner cooperatives in Capper Volstead  
9 sanctioned marketing agencies in common or  
10 cooperative federations dominate raw milk sales  
11 in the Mideast Order. These agencies are, one,  
12 Dairy Marketing Services, a Section 9(c)  
13 cooperative federation dominated by DFA with  
14 fluid milk sales throughout the Mideast; two,  
15 the Mideast Marketing Agency, MEMMA, a  
16 combination of DFA/DMS, Foremost Farms,  
17 Land O'Lakes and NFO in the Mideast area other  
18 than Michigan, and three, the Producer  
19 Equalization Committee, consisting primarily of  
20 DFA and Michigan Milk Producers Association for  
21 sales in the State of Michigan.

22 For example, in September 2004 the  
23 three largest cooperatives marketed 1.095  
24 billion pounds of raw milk, fully 82 percent of  
25 the Mideast Federal Order 33 milk pool. That's

1 from the FMO Statistical Response to White Eagle  
2 Federation Request, this hearing, Table 17. One  
3 of the top three is White Eagle Federation with  
4 pooled milk of about 145 million pounds, as  
5 explained in testimony by Jeff Leeman, leaving  
6 DFA/DMS and MMPA with 950 million pounds. The  
7 remaining cooperatives pooled 154 million  
8 pounds.

9           However, the testimony at this  
10 hearing reveals that of the remaining  
11 cooperatives on the handler list, Exhibit 6,  
12 Table 1, Dairylea, Foremost Farms, NFO, Prairie  
13 Farms and Upstate all marketed their milk  
14 through one of the DFA/DMS dominated agencies in  
15 common. Their reported 9(c) milk, therefore,  
16 should be added to the total of 950 million  
17 pounds of DFA/DMS/MMPA, bringing the pooled milk  
18 within the control of these dominant suppliers  
19 to about 82 -- 82 percent of the market. Only  
20 Lanco and Steamburg cooperatives are not  
21 accounted for, and I understand that they pool a  
22 negligible volume of milk in Order 33.

23           Now, at the fluid processing level,  
24 large consolidated processors dominate the fluid  
25 milk industry. These include, one, Dean Foods,

1 which has a long-term strategic alliance, full  
2 supply contracts with DFA and operates 12 plants  
3 in the Mideast and processes an estimated 250 to  
4 300 million pounds of milk per month at these  
5 plants; two, National Dairy Holdings, with two  
6 plants, which is 50 percent owned by DFA, and  
7 three, Kroger, the region's largest grocery  
8 retailer, with Mideast distributing plants and  
9 an estimated 120 million pounds of receipts per  
10 month. Kroger is also fully supplied by the  
11 DFA/DMS and MMPA or their marketing agencies in  
12 common.

13                   Map-Tables 8(a) through 8(e) of  
14 Exhibits 7 and 11 show 41 pool distributing  
15 plants remaining in Order 3 -- 33 and their  
16 locations. Twelve of the plants on the Market  
17 Administrator's list are very small, having an  
18 average of 2 million pounds per month of milk  
19 receipts, White Eagle requested data Table 1.  
20 DFA/DMS and its marketing agents in common  
21 provide full supplies to about 23 of the  
22 remaining 29 larger and very large Order 33  
23 distributing plants according to testimony by  
24 witnesses at this hearing on March 8, 2005.

25                   The White Eagle Federation



1 provides -- supplies milk to four distributing  
2 plants. The total receipts of milk by all  
3 distributing plants, in millions of pounds, were  
4 637 during December 2003, 630 in May of 2004 and  
5 659 in December of 2004, including 22 to 25  
6 million pounds of other source nonpool bulk  
7 milk, identical spot Table 3. Producer milk  
8 received at distributing plants during October  
9 2004 was 610 million pounds, also the same cite,  
10 Table 7. These receipts represent the aggregate  
11 pooling base for all market participants.

12           Now, the largest cooperatives,  
13 DFA/DMS and MMPA and their agency in common  
14 partners have sufficient pooling base to be  
15 unaffected by the proposed 10 points reduction  
16 in the diversion limit, as I understand the  
17 testimony of Mr. Gallagher and Mr. Rasch. Yet,  
18 if 63.8 million pounds of manufactured milk to  
19 nonpooled plants is cut out of the pool, the  
20 corresponding amount of distributing plant  
21 receipts affected is 127.6 million pounds.  
22 Currently, 127.6 million pounds of distributing  
23 plant receipts would allow 1.5 times that equals  
24 191.4 million pounds of manufacturing milk into  
25 the pool. As proposed, that same fluid milk

1 base would allow only 127.6 million pounds of  
2 milk into the pool. This assumes a reduction of  
3 the diversion limit from 60 to 50 percent, i.e.,  
4 manufactured milk pooled can only be 60 percent  
5 or post change 50 percent of the pool.

6 This reduction in the ability to pool  
7 milk makes it more costly for any supplier with  
8 a limited share of fluid supply to supply  
9 Mideast fluid plants. And I will provide you  
10 with an example of that later in discussion, if  
11 you would like, a numerical example to drive  
12 that home because that's a very important point.

13 Since distributing plant receipts for  
14 the October 2004 pool was 610 million pounds,  
15 the proposed change in the diversion limit  
16 potentially affects 20.9 percent of the fluid  
17 market. Now, note that this is just a bit more  
18 than the market share of small cooperatives and  
19 the independent producers not represented by DFA  
20 led marketing agencies which I estimate to be  
21 roughly 18 percent. These are the suppliers  
22 basically who are targeted by the Proposal 2 and  
23 who will be short of pooling base to meet the  
24 proposed change. Okay?

25 Plants supplied by White Eagle will

1 also be disadvantaged by the lowering of the  
2 diversion limits because the ability to pool  
3 diverted milk has value to the plant that  
4 provides pooling base and to the producers who  
5 negotiate to supply the plant and thereby gain  
6 pooling base. Producers that would supply 68  
7 million pounds of milk withdrawn from the pool  
8 under Proposal Number 2 are economically  
9 disadvantaged in a direct fashion. Moreover,  
10 farmers who are part of the DFA led supply  
11 system may also be disadvantaged because of a  
12 reduction in competition for their raw milk,  
13 i.e., a reduction in milk marketing  
14 alternatives.

15           Let's address the impact on farmers  
16 first. Salop recently described a phenomenon  
17 that he labels predatory overbuying as follows:  
18 Predatory overbuying consists of overbuying  
19 inputs as a predatory strategy to cause  
20 buyer-side competitors in the input market to  
21 exit from the market or permanently shrink their  
22 capacity in order to gain monopsony power in the  
23 input market.

24           Now, the reduction in diversion  
25 limits is not necessarily predatory, but it may

1 be employed as a predatory tool and has a  
2 similar impact on the buying structure of the  
3 raw milk assembly market in the Mideast  
4 milkshed. The DFA led buying combinations in  
5 this market already are the dominant buyers.  
6 Okay? And the change in the rule limits the  
7 ability of other milk assemblers in the milkshed  
8 to compete for farmers' milk because it reduces  
9 their ability to qualify for the pool.  
10 Numerical example later on that.

11           Now, examining the impact on milk  
12 assemblers competition in the sale of milk to  
13 fluid bottlers in this market area, Salop  
14 describes a second consequence from an increase  
15 in buyers' market power such as that arising  
16 from the proposed reduction in diversion limits.  
17 Raising Rivals' Costs overbuying consist of  
18 overbuying inputs as an exclusionary strategy to  
19 raise rivals' input costs and thereby gain  
20 market power in the output market.

21           The impact on milk assemblers of  
22 reducing diversion limits is equivalent to  
23 overbuying. Assemblers that are not in the DFA  
24 sphere have higher costs to qualify for the  
25 pool. This suggests that they must charge fluid

1    bottlers higher prices. Consider the experience  
2    of Central Equity Cooperatives in the Central  
3    Marketing Order.

4                    The absence of fluid milk marketing  
5    opportunities is illustrated by Central Equity  
6    Co-op whose producer members are clustered near  
7    the intersection of Oklahoma, Missouri and  
8    Kansas state boundaries. In order to pool its  
9    member milk, Central Equity sells milk to Wells  
10   Dairy in Iowa, about 400 miles away. This long  
11   distance hauling obviously would not take place  
12   if a closer distributing plant, or cooperative  
13   pool plant, were made available to Central  
14   Equity.

15                   The primary strategic alternatives  
16   for cooperative assemblers such as Central  
17   Equity in the Central Order and for White Eagle  
18   in the Mideast Order are to merge with DFA or to  
19   affiliate with their agency in common and pay  
20   for access to their dominant raw fluid supply  
21   system.

22                   Fluid milk bottlers, or distributors,  
23   who are not in the DFA sphere of influence also  
24   face these higher costs and their ability to  
25   compete in the packaged fluid milk market is

1 reduced. Moreover, switching to the DFA led  
2 supply system may not be a viable alternative.  
3 This is true to the extent that the web of  
4 vertical strategic alliances favors the largest  
5 firms at each stage of the milk market channel.  
6 This insight also suggest that smaller fluid  
7 processors currently supplied by the DFA led  
8 system may not be receiving the same terms as  
9 larger processors.

10               So now I'm going to explain vertical  
11 strategic alliance to you because this is an  
12 important concept. Vertical strategic alliances  
13 between large milk cooperatives and the nation's  
14 largest fluid processors are often touted as  
15 efficiency -- as enhancing logistic efficiency.  
16 If that is indeed the case, then they should  
17 compete on the merits of their product and their  
18 efficiencies and not seek advantages by changing  
19 Market Order regulations. Again, recall the  
20 estimated \$0.02 per hundredweight advantage of  
21 this proposed 10 percent point change in the  
22 diversion limit. Clearly, if the large co-ops  
23 and distributors want this change, it must be  
24 more important to them than \$0.02.

25               So what's going on? There's another

1 side to vertical strategic alliances that  
2 suggests that, indeed, it is more important than  
3 \$0.02 a hundredweight. Vertical strategic  
4 alliances between milk cooperatives and fluid  
5 processors and between processors and leading  
6 supermarket retailers in many regions of the  
7 country lead to vertical foreclosure games that  
8 benefit the dominant partners at each stage of  
9 the system, and there are several quotes there,  
10 cites that document this.

11           These foreclosure games are of two  
12 general types. First, the dominant players at  
13 each stage can use their power to benefit their  
14 vertical alliance partners by imposing costs on  
15 their partners' rivals, for example, DFA/DMS,  
16 MEMMA and DFA/MMPA and PEC at the milk assembly  
17 stage in the Mideast Market Area, Dean Foods and  
18 NDA, DFA, at the fluid processing stage and  
19 Kroger or other dominant supermarket chains at  
20 retail in local retail market areas are the ones  
21 that are the dominant leaders in the system.  
22 Okay? Processors can, for example, benefit  
23 dominant retailers by making only high cost milk  
24 available to would be retail competitors forcing  
25 them out of the retail market.

1                   Alternatively, as we have seen in the  
2 New England Market Area, a system of vertical  
3 alliances can impose higher costs on rivals, and  
4 rather than drive them out it can implement a  
5 price leadership scheme at retail, Cotterill  
6 2005, relevant elections attached here as  
7 Exhibit 2. The result is higher retail prices  
8 that are shared by all key players in the  
9 channel.

10                   Smaller fluid processors and smaller  
11 retailers that have higher costs are not about  
12 to challenge the dominant firms' price  
13 leadership because these dominant firms are --  
14 have the ability to discipline the smaller firms  
15 in a price war or in the non-price dimension.  
16 Recall dominant firms have lower costs  
17 throughout the system due to their positive  
18 buying power, and if approved in this hearing due  
19 to regulatory impact they would also have lower  
20 costs. As Wellington Exhibit 3, Miyakawa 2004  
21 and Cotterill Exhibit 2 explain, it's entirely  
22 possible that vertical foreclosure games can be  
23 played against farmers in raw milk product  
24 markets just as they're played against consumers  
25 in retail markets. All right?



1                   DFA and its agencies in common most  
2 likely claim superior milk assembly efficiencies  
3 as the source of their competitive advantage.  
4 On this point, the Dairy Marketing Services,  
5 DMS, website states, and I quote: "Dairy  
6 Marketing Services, DMS, is a milk marketing  
7 organization formed for the purpose of creating  
8 efficiencies and reducing costs of milk  
9 assembly, field services and transportation. It  
10 serves farmers by working to streamline the milk  
11 marketing system, and serves processors by being  
12 better able to meet their needs."

13                   It also, however, is entirely  
14 possible that their dominant position is based  
15 upon their vertical contracts and their  
16 participation in vertical collusion schemes such  
17 as those contemplated and observed in New  
18 England milk markets.

19                   Conclusion. Well, if large milk  
20 assemblers and fluid processors are efficient in  
21 a spatial milk economy, why do they need this  
22 regulatory change to benefit them and the  
23 farmers that they serve? The answer, as implied  
24 in the testimony by Mr. Gallagher, lies not in  
25 the benefit of a \$0.02 gain to DMS/DFA members,

1 but rather, in the harm caused by the proposed  
2 rules to DFA's small competitors who stand to  
3 lose, and I would add here, as much as \$0.73 per  
4 hundredweight producer price differential on the  
5 63.8 million pounds of milk forced to exit the  
6 pool -- exit the market if the proposals are  
7 adopted.

8 I remain skeptical at this point and  
9 would recommend that the Secretary not approve  
10 Proposal 2 until a more careful analysis of the  
11 competitive impact demonstrates that  
12 anti-competitive consequences, upon nondominant  
13 and small business processors, upon the small  
14 cooperatives who assemble milk and the small  
15 business farmers that who supply them and upon  
16 the nondominant retailers and even upon  
17 consumers do not offset the \$0.02 per  
18 hundredweight gain to producers remaining in the  
19 pool as a result of this proposed change.

20 MR. TOM VETNE: Your Honor, to the  
21 extent it hasn't already been admitted, I ask  
22 that Dr. Cotterill's report and attachments be  
23 admitted as an exhibit.

24 MR. BESHORE: There was a request  
25 to admit the exhibit and the attachments. I

1 want to make an objection if this is the  
2 appropriate time.

3 JUDGE DAVENPORT: Well, let's reserve  
4 ruling on the -- do you wish to voir dire?

5 MR. BESHORE: No. I have a  
6 specific objection to Exhibit 3.

7 JUDGE DAVENPORT: Okay. As to  
8 Exhibit 3. What about it?

9 MR. BESHORE: Exhibit 3, and I'll  
10 state very clearly, it's a -- it's a very  
11 important evidentiary point in these  
12 proceedings. Exhibit 3 is a statement of a  
13 person in another proceeding. It's an  
14 out-of-court statement that -- whereby the  
15 declarant is not available for  
16 cross-examination. It's just like -- and it's  
17 being presented here for facts, it's relied upon  
18 as fact by Dr. Cotterill. It should not be  
19 accepted under any circumstances in this hearing  
20 as a matter of law.

21 The Secretary of Agriculture cannot  
22 possibly base any decisions upon out-of-the  
23 hearing statements unsworn -- whether sworn or  
24 not unable to be cross-examined in this  
25 proceeding.

1                   MR. TOM VETNE:     If I can just  
2 respond to that, Judge, I think it's a clear  
3 matter of federal law that experts are permitted  
4 to rely upon evidence and materials that have  
5 not been admitted into evidence.

6                   JUDGE DAVENPORT:   Mr. English?

7                   MR. ENGLISH:         Two points.  First,  
8 experts can't just rely on anything.  There are  
9 certain limits.  And I submit and agree with  
10 Mr. Beshore, that this is beyond that limit and  
11 that this is a statement made by a person  
12 outside of this room that is not subject to  
13 cross-examination.  But second --

14                  JUDGE DAVENPORT:  Are you saying --

15                  MR. ENGLISH:         -- I have not heard  
16 yet -- I'm sorry.  Go ahead, Your Honor.  You  
17 were going to ask a question?

18                  JUDGE DAVENPORT:  Are you saying that  
19 statements made to the Senate Judiciary  
20 Committee is never going to be admissible?

21                  MR. ENGLISH:         Not if they  
22 aren't -- they're not going to be admissible in  
23 a court of law.

24                  JUDGE DAVENPORT:  This is not a court  
25 of law.

1                   MR. ENGLISH:           I understand it's  
2 not a court of law, Your Honor, but it's not a  
3 statement of a person who is available for  
4 cross-examination. But if it's being relied  
5 upon by an expert, that presupposes something  
6 that has not been cited yet. And I certainly  
7 would like to voir dire about that issue and  
8 I've heard no motion to that effect.

9                   MR. RICCIARDI:       Your Honor, I  
10 would like to be heard on the issue. First of  
11 all, with regard to these particular rules, we  
12 are not in a court of law. The decision as to  
13 whether it's admissible is up to you. The rules  
14 of hearsay are not applied in this context,  
15 number one.

16                   Number two, with regard to this  
17 particular statement, Judge, experts can  
18 obviously rely upon items that experts generally  
19 rely upon that are, in fact, other statements  
20 provided by an economist. And if you read the  
21 introductory section to this particular  
22 statement, it's clear that this individual who  
23 provided this, is, in fact, a Senior Vice  
24 President of Economics and -- for Agri-Mark, and  
25 therefore, it is something like Dr. Cotterill

1 normally relies upon in their opinions and  
2 testimony and certainly you can admit it and the  
3 Secretary should take whatever weight is  
4 necessary.

5 JUDGE DAVENPORT: Mr. Stevens?

6 MR. STEVENS: I would say that  
7 this exhibit can be admitted, but I think it  
8 might well be admitted for a limited purpose to  
9 be considered by the Secretary. Is it a  
10 document that should be admitted for the truth  
11 or falsities of the statement in there, I'm not  
12 sure. And I would --

13 JUDGE DAVENPORT: I don't think it's  
14 being offered for that purpose.

15 MR. STEVENS: Right. So it would  
16 not. And then, therefore, it would be -- it  
17 would be -- if accepted, it would be offered as  
18 an exhibit to a statement by this witness and  
19 would be given any accordable weight that it  
20 should be accorded by the Secretary and then  
21 certainly subject to further review back in  
22 Washington as the proceedings continue.

23 MR. BESHORE: If I understand  
24 what I've heard from Your Honor and from  
25 Mr. Stevens, Exhibit 3 is not being offered for

1 the truth of the statements therein and it would  
2 not be so taken by the Secretary. It's just  
3 being offered as proof that allegations have  
4 been made about DFA by someone in testimony.

5 JUDGE DAVENPORT: Mr. Beshore, if I  
6 might clarify the way I view this, I see this as  
7 nothing more or less than someone referring to  
8 Black's Law Dictionary as treatise or some other  
9 type of secondary source, and not being admitted  
10 for the truth of it, but merely as a reference  
11 to it, what might be accepted by some as a  
12 learned paper or other reference.

13 MR. BESHORE: If -- Dr. Cotterill  
14 has not been -- as Mr. English has offered, as  
15 an expert in any particular field, and if it is  
16 to be a learned treatise such as would be relied  
17 upon by agricultural economists in their field  
18 of expertise, we haven't heard about that.

19 JUDGE DAVENPORT: Very well. In  
20 other words, the exhibits, of course, are being  
21 accepted only as -- the CV, obviously you can  
22 examine him on those, but the other exhibits are  
23 offered not for the truth, but for the, in other  
24 words, merely reference purposes as related in  
25 his testimony. Certainly you can ask him any

1 questions as to those that you feel are  
2 appropriate.

3 But in other words, Exhibit 31 at  
4 this time will be admitted, as well as Exhibits  
5 1, 2 and 3.

6 MR. TOM VETNE: Thank you, Your  
7 Honor. In at that case, I would offer  
8 Dr. Cotterill for cross-examination.

9 JUDGE DAVENPORT: Very well.  
10 Mr. Beshore?

11 MR. BESHORE: I yield to Mr.  
12 English.

13 JUDGE DAVENPORT: Mr. English?

14 MR. ENGLISH: Just one second. I  
15 apologize.

16 CROSS-EXAMINATION

17 BY MR. ENGLISH:

18 Q. Good afternoon, Dr. Cotterill.

19 A. Good afternoon to you.

20 Q. I can't say that before today I've ever met  
21 you, have I?

22 A. No, you haven't.

23 Q. Either you haven't been unfortunate enough  
24 or we haven't been fortunate enough to ever see  
25 you at one of these proceedings, have we?



1 A. I've tried to avoid them for 25 years, but  
2 now I'm here, so hello.

3 Q. So in addition to being the first time  
4 you've testified at one of these proceedings,  
5 would it be fair to say it's the first time  
6 you've attended one?

7 A. Yes. That's true. I think that's true.  
8 There may have been one over 25 years that I  
9 have been at, but --

10 Q. But it doesn't spring to mind?

11 A. No. It does not, no.

12 Q. Funny, all of mine spring to mind. Well, I  
13 appreciate that.

14 JUDGE DAVENPORT: Would that be  
15 because of the central role that you play?

16 MR. ENGLISH: If you say so, Your  
17 Honor.

18 BY MR. ENGLISH:

19 Q. And I realize certainly that as an ag  
20 economist and as a person who's studied a lot of  
21 these areas -- you've studied a number of  
22 things, but have you made it your business to  
23 study the agricultural marketing agreement out  
24 of 1937?

25 A. Yes. In various ways I've looked at the

1 issue of -- of discriminating pricing Market  
2 Orders and their impact on agricultural markets.

3 Q. And as to Federal Milk Marketing Orders,  
4 the provisions that require the Secretary to  
5 create Orders that have uniform prices paid by  
6 processors, correct?

7 A. Yes.

8 Q. And uniform prices paid to dairy farmers,  
9 correct?

10 A. The principle of equity is very high on the  
11 list of goals and objectives of the Marketing  
12 Order, yes.

13 Q. Goals and objectives or a mandate?

14 A. Mandate, if you like.

15 Q. You have submitted on page 4 of your  
16 testimony that the Secretary should consider  
17 competitive impact to proposed rules, correct?

18 A. Yes.

19 Q. And can you tell me where in the  
20 Agricultural Marketing Agreement Act 8(c)(5)(a),  
21 you can find competitive impact as opposed to  
22 uniformity provisions?

23 A. Well, I think the issue of competitive  
24 impact goes to uniformity. As I've explained in  
25 this paper, vertical foreclosure is producing an

1 inequitable result depending upon whether  
2 farmers are in the DFA/DMS system or not, and  
3 depending on whether processors are in or out of  
4 that vertical strategic alliance, so it goes to  
5 the inequitable treatment.

6 Q. Well, let's talk about inequitable  
7 treatment. But first let me ask you on page 1  
8 you have identified in your statement, you say  
9 "Dean Foods has proposed additional, and more  
10 restrictive, pool qualification rules." Can you  
11 identify those?

12 A. I believe those are in the Federal  
13 Register, the list there. There were several  
14 proposals before this hearing. I just focused  
15 on Number 2 because I thought it was a central  
16 one, but I think they have other -- other things  
17 that they would like.

18 Q. Am I correct, though, that your testimony  
19 is addressing solely Proposal 2?

20 A. Yes.

21 Q. And at the present time, you can't  
22 identify, in your view, what were the Dean Foods  
23 additional and more restrictive pool  
24 qualification rules that are identified in your  
25 statement on page 1?

1 A. Well, if I went to my briefcase and pulled  
2 out the Federal Register I could find them. I  
3 think their proposals -- they were up to, like,  
4 12 proposals there and there were several of  
5 them that talked about various things.

6 Q. Were you here earlier in the hearing --  
7 actually you weren't here earlier for the  
8 hearing, were you? You arrived yesterday  
9 afternoon?

10 A. Yes, yesterday after lunch.

11 Q. You left before the hearing was over  
12 yesterday afternoon?

13 A. I left at five minutes to five. The  
14 hearing went until five, I understand.

15 Q. You've made a statement about comparing the  
16 provisions 7(c), 7(d) and -- actually, you say  
17 9(d) and 9(e). I assume you mean 7(e) and 7(d),  
18 correct?

19 A. Yeah. It probably is --

20 Q. That's sort of the same error that  
21 Mr. Vetne made --

22 A. That was the same area of what's the issue  
23 of producer milk.

24 Q. You sort of picked up the same error that  
25 Mr. Vetne made when he submitted his request to

1 the Market Administrator for --

2 A. Yeah.

3 Q. Okay. And you make a comparison of what

4 now we understand to be 7(c), 7(d) and 7(e).

5 First you make a statement that milk that is

6 delivered day after day to Leprino's 9(e),

7 meaning 7(e), plant. Is milk delivered today to

8 a 7(e) plant under this Order?

9 A. A Leprino Foods plant?

10 Q. Is it delivered to a 7(e) plant? Is there

11 any milk in this Order delivered to a 7(e) plant

12 today, present tense?

13 A. I -- I don't know right today whether

14 that's, indeed, the case or not. Leprino's is a

15 mozzarella cheese plant that has been supplied

16 by Michigan Milk over a period of time.

17 Q. But you don't know whether or not the

18 Leprino plant is today, or has been even for the

19 most recent months, a 7(e) plant?

20 A. I believe it is a 7(e) plant.

21 Q. Okay. If the record reflects differently,

22 then you're wrong, right?

23 A. Then I would be wrong. That's correct.

24 Q. And you made a statement that there's no

25 real difference between deliveries to a 7(e)

1 plant and to other supply plants, correct, in  
2 your view?

3 A. This -- this section was just by way of  
4 prolog for me to talk about paper pooling and  
5 the issue of what I regard as pooled milk, as  
6 opposed to distributor milk. And so what I'm  
7 saying here is it's pretty much the conclusion  
8 that the -- you know, the -- basically I use the  
9 paper pooling to refer to all milk that  
10 participates in the pool, but is not delivered  
11 to a distributing plant. That's the most  
12 important sentence in that whole paragraph, by  
13 my way of thinking.

14 Q. I understand, but I'm asking now the  
15 question --

16 A. Yes.

17 Q. -- did you not conclude that there was no  
18 difference, in your view, for the pooling of  
19 milk to what is a 7(e) plant and a 7(c) plant,  
20 that is the same? You actually lumped them  
21 together and called them all paper pooling,  
22 correct?

23 A. That's correct. I've said that there's no  
24 functional difference for purposes of what I  
25 want to talk about.

1 Q. Well, is there a functional difference as  
2 to what is required by the entity in order to  
3 pool under 7(e)?

4 A. Well, yes, I mean, there are. I'm not an  
5 expert. I'll be the first to say I'm not an  
6 expert on the intricacies of all these technical  
7 pooling regulations between and among plants; I  
8 am not.

9 Q. Well, if you're not a technical expert and  
10 there may be differences, how can it  
11 functionally be the same if the requirements for  
12 shipping to a 7(e) plant might, for instance,  
13 have a 12-month -- prior 12-month delivery  
14 requirement that isn't required under 7(c)?

15 A. Well, for purposes of my analysis, the  
16 question is how -- how does the pooling rules  
17 and regulations affect people who are in the DMS  
18 system or outside of the DMS system.

19 Now, you're talking about intricacies of  
20 what's inside the DMS system. Okay?

21 Q. Actually, I was talking about the  
22 intricacies of the Federal Orders.

23 A. Yeah, you are, but also those people are  
24 inside -- they're pretty much inside the  
25 Federal -- the DFA/DMS system in the Mideast

1 Order. The people who are outside, the White  
2 Eagle Federation and a few small independents,  
3 they don't operate these kinds of plants. These  
4 plants are operated by DFA/DMS and MMPA.

5 Q. And so you ultimately -- you ultimately  
6 equate all of these entities -- by the way, were  
7 you here yesterday to hear the number of  
8 entities that ship through DMS?

9 A. Yeah, I heard that.

10 Q. Approximately 15?

11 A. Yep.

12 Q. And then MMPA is another entity, correct,  
13 that's a 16th entity?

14 A. Well, I thought they were one of the 15,  
15 but maybe that's --

16 Q. You think that Michigan Milk Producers is  
17 part of DMS?

18 A. Well, with the Producer Equalization  
19 Committee, they work together there in Michigan.

20 Q. Whether or not they work together, which by  
21 the way you're not implying in any way that  
22 working together by these co-ops and federations  
23 is illegal or improper or anything, are you?

24 A. Not at this point, no. I think, you know,  
25 Capper Volstead marketing agencies in common are



1 sanctioned and allowed, and these people can  
2 certainly come together to do things jointly.  
3 That is allowed.

4       There are certain conditions when it's not  
5 allowed. Like, if you deal with proprietary  
6 people in the context of those organizations you  
7 lose your Capper Volstead exemption.

8 Q. I'm certainly aware of that. But what I'm  
9 getting at is you lump all these entities  
10 together. Let's do a count of all of these  
11 entities for a moment. Okay?

12       Do you agree there are 15 entities that  
13 ship through DMS?

14 A. Yes.

15 Q. Then milk -- Michigan Milk Producers is  
16 another entity, correct?

17 A. Yes.

18 Q. Then you have MEMMA, and MEMMA has four  
19 entities, only one of which is DFA. So you have  
20 three more entities, correct? You have  
21 Land O'Lakes, you have NFO and you have  
22 Foremost, correct?

23 A. I'm not sure on that.

24 Q. Okay. You're not sure. But you made a  
25 statement about how all these entities work

1 together and how this somehow works to the  
2 detriment of the smaller player, but you're not  
3 sure of all those entities, correct?

4 A. No. I'm sure that these people work  
5 together and they account for between 80 and 85  
6 percent of the market pool, and that gives them  
7 the -- basically a dominance on -- on the Class  
8 I pooling base. They have it.

9 Q. But if there are 16 -- so far we have 15  
10 DMS, 1, Michigan Milk Producers, and 3 more  
11 entities part of MEMMA that are not part of the  
12 others. Now you're up to 19 different entities,  
13 correct?

14 A. Yeah, sure.

15 Q. Okay. And, oh, by the way, were you here  
16 for the testimony that we have 3,000 independent  
17 dairy farmers, many of whom ship through one of  
18 these federated cooperatives?

19 A. Yes.

20 Q. So now we have 19 entities plus a  
21 significant number of independent farmers, and  
22 then you conclude that they have 82 percent of  
23 the market and therefore are dominant?

24 A. Yes. Because of the vertical foreclosure  
25 and the tie to the fluid Class I base that DFA

1 and others have. The fact of the matter is, is  
2 that if you want to sell your milk in the  
3 Mideast Milk Marketing Order, you have to, to a  
4 large degree, work through this group.

5 Q. This group of 19 entities plus almost 3,000  
6 dairy farmers?

7 A. Yep, yep. That's right.

8 Q. And those entities are, as you've just  
9 acknowledged under Capper Volstead, permitted to  
10 work together, so they're doing exactly what the  
11 statute says they can do.

12 A. They're permitted to to a certain degree.  
13 Not -- I'm not -- I'm not here to say whether  
14 they are doing things according to Capper  
15 Volstead law or not, but they -- yes, they are  
16 permitted to join together and to market.

17 That's not the issue. The issue is whether  
18 they can come to the Federal Market Order and  
19 change the regulations to give them an  
20 additional advantage as a group relative to the  
21 people who are not in the group. That's the  
22 issue I see here.

23 Q. The issue isn't perhaps that one might  
24 conclude that there is too much milk pooled on  
25 this market to meet the objectives of the Order?

1 A. Too much milk pooled on this market?

2 Q. Yes.

3 A. Well, I listened to the comments --

4 Mr. Gallagher talked yesterday about inadequate  
5 supply of milk on this market for Class I use as  
6 the need to somehow procure more milk.

7 Q. Was he talking about the segment of the  
8 market or the overall market?

9 A. I thought he was talking about both;  
10 various segments and overall market.

11 Q. If the Secretary were to conclude that  
12 there were -- there was more milk being pooled  
13 on this market that could be considered properly  
14 associated with the market, shouldn't the  
15 Secretary take action and apply the rules so  
16 that some of that excess milk will not be  
17 pooled?

18 A. That is true, but the devil is in the  
19 details, sir. You said, "apply the rules." And  
20 the question is: What rules? How are you going  
21 to -- how are you going to restructure the  
22 Orders to provide an equitable relief of the  
23 issue that's at hand?

24 Q. Well, you referenced the use of, in some  
25 pejorative tone, on page 3 as non-economic means

1 such as diversion limits, and I take it that  
2 means you think that's somehow improper?

3 A. Yes, I do. My basic supposition is that  
4 this large and dominant group of 15  
5 organizations plus Michigan Milk who should have  
6 all the economies of scale and scope and all the  
7 benefits of logistical efficiencies, why in the  
8 world do they need to come to this body and ask  
9 for a change in diversion rules in order to deal  
10 with this economic problem?

11 Q. Sir --

12 A. I don't see it.

13 Q. -- isn't it true that pool standards that  
14 are performance based provide the only viable  
15 method for determining those eligible to share  
16 in the marketwide pool?

17 A. No, that's not true.

18 Q. That statement is not true?

19 A. No. I -- before Federal Order Reform we  
20 had the ability to zone people out by changing  
21 costs of -- basically if you had milk that was  
22 delivered into Detroit, for example, that you  
23 backed it off all the way to Eau Claire,  
24 Wisconsin from Detroit so that milk in Eau  
25 Claire simply wouldn't be delivered to Detroit

1 because it wasn't economical. There are reasons  
2 on the --

3 Q. Let me try another one, sir, and maybe if  
4 you could say "yes" or "no" it might move this  
5 along.

6 A. Oh, okay.

7 Q. Is it not the case that primarily the Class  
8 I use of milk that adds additional revenue, and  
9 it is reasonable to expect that only those  
10 producers who consistently supply the market's  
11 fluid needs should be the ones to share in the  
12 distribution of pool proceeds?

13 A. You want to repeat that again to me? I'm  
14 sorry, that was a little long.

15 Q. It's primarily the Class I milk that adds  
16 additional revenue and it is reasonable to  
17 expect only those producers who consistently  
18 supply the market's fluid needs should be the  
19 ones to share in distribution of pool proceeds?

20 A. I don't agree with that. If you go back  
21 and look at John D. Black or Cassels work in the  
22 '30s, if you look at the Nourse report and all  
23 of these, the Federal Milk Marketing Orders are  
24 charged to deal with all milk that's produced  
25 and for all classes.

1           Yes, the Class I producers in a particular  
2 urban area like New York City provide value to  
3 the pool. There's no doubt about that. But the  
4 question is how do you distribute that value  
5 over all farmers that are out there in the inner  
6 land, in the milkshed? And how you define the  
7 milkshed is important and should be defined  
8 based upon economics. You should allow market  
9 economics as much as possible to do that. You  
10 shouldn't do it through administrative fiat with  
11 these kind of rules.

12 Q.   Okay. But, sir, again, I understand that  
13 you may want to explain and that's, of course,  
14 why you have counsel if he wants to redirect,  
15 but again "yes" or "no."

16 A.   All right.

17 Q.   My question was, and I take it you said,  
18 "No," --

19 A.   Yes, "No."

20 Q.   -- that statement was inappropriate? I  
21 take it, by the way, from your statement that  
22 you've never read the Secretary's decision in --  
23 dated Monday, April 12th, 2004, "Milk in the  
24 Mideast Marketing Area Decision of Proposed  
25 Amendments to Marketing Agreement as to the

1 Order Proposed Rule," for a hearing here in Ohio  
2 a couple of years ago resulting in some  
3 tightening of the pooling provision.

4 You've never read that, have you?

5 A. No. But I'm aware the pooling provisions  
6 were tightened.

7 Q. So you're not aware that these statements  
8 you just disagreed with were statements of the  
9 Secretary made in 2004, are you?

10 A. No, perhaps not. I'm a professor.

11 Q. And as you said, you're not an expert in  
12 milk marketing pools, correct?

13 A. No, I did not say that.

14 Q. You've now said, once in your examination  
15 and I believe once in your statement, that all  
16 producers should be able to share. You also  
17 referenced the Nourse report in your statement?

18 A. Yes.

19 Q. And I don't know if that was a reference  
20 because Mr. Vetne read it or a reference because  
21 you read it. Have you read the Nourse report?

22 A. I've only looked at it in passing, but I'm  
23 familiar with Edwin Nourse and his work over the  
24 years.

25 Q. Would it surprise you that the Nourse



1 report did not think that all producers should  
2 be able to share at all times in the milk -- in  
3 the pool?

4 A. Well, no. You know, people in California  
5 shouldn't be able to share in the pool out here.  
6 I mean, if you're talking about all places, I'm  
7 sure there are limits as to who should be in the  
8 pool.

9 Q. But aren't there rules that producers  
10 should have to serve the market?

11 A. Well, yes, there are, and we have them.  
12 And there's a degree of discretion on how you  
13 define them.

14 Q. And isn't the purpose -- one purpose of the  
15 rules so that regular -- producers are protected  
16 from the transient onslaught of dumping by  
17 outsiders?

18 A. I suppose you could use that language,  
19 "transient onslaught of dumping."

20 Q. "By outsiders"?

21 A. That sounds like what happened in  
22 California and the kind of depooling we've seen.

23 Q. So you would agree that depooling would be  
24 transient dumping by outsiders?

25 A. No, I wouldn't agree with that. I'm not

1 here to talk about depooling.

2 Q. The statement also referenced, I believe in  
3 the context of Mr. Vetne's work, ongoing  
4 efforts, in addition to the Nourse Commission,  
5 relevant case law. Does that mean you've read  
6 the relevant case law?

7 A. I've read you and Vetne and Beshore and  
8 others in the Central Order where you all talked  
9 to the case law in your briefs.

10 Q. Did you go look at the case law itself as  
11 opposed to --

12 A. No, I did not.

13 Q. -- relying on unreliable lawyers telling  
14 you what the case law said?

15 A. No.

16 Q. I mean others, of course. Not me, no. Did  
17 you actually go read the cases?

18 A. No. I have not read law cases in the last  
19 two weeks on this stuff. I have read law cases  
20 in the past related to Federal Market Orders  
21 like "Nebia versus New York," one of the  
22 classics and some others.

23 Q. Certainly, yes, but, for instance, you  
24 haven't looked at the Alto Dairy case versus  
25 Veniman decided in 2003 --

1 A. No, I have not.

2 Q. -- having to do with that prior proceeding  
3 here in Ohio?

4 A. No.

5 Q. You haven't read the Lamer's Dairy case  
6 recently of the --

7 A. I've seen reference to it in various scans.  
8 It's been cited in various briefs, but I have  
9 not read it, no.

10 Q. You've -- on page 4 you make a statement,  
11 and you went out of your way to sort of draw it  
12 out a little bit, that the "firms may acquire  
13 market power through competition on the merits  
14 and/or economies of scale and scope," and then  
15 you said, "however, they should not acquire it  
16 via violation of antitrust law or by  
17 administrative fiat in a regulatory proces such  
18 as this one."

19 Are you just stating the law as you  
20 understand it, or are you suggesting in any way  
21 that anybody in this industry presently has  
22 acquired market power through violations of the  
23 antitrust law?

24 A. I'm not implying that anyone has acquired  
25 market power through violation of the antitrust

1 laws. No, I'm not. But I'm stating the general  
2 basic precept for public policy in this area and  
3 to market power and its existence in industries  
4 like the milk industry and when it becomes a  
5 problem and when it's not a problem.

6 It does exist. There is market power in  
7 this industry. It exists as we speak. That  
8 doesn't mean that somebody has violated laws to  
9 get it to this point, although people are  
10 looking, as we speak, in the US Department of  
11 Justice and elsewhere.

12 Q. Now, you reference on the bottom of page  
13 6 -- as a matter of fact, you take great  
14 pleasure in referencing alleged full supply  
15 contracts DFA has with Dean Foods.

16 Have you been here for the hearing to hear  
17 that there are multiple suppliers of milk for  
18 Dean Foods plants in this Order?

19 A. The bottom of page 6?

20 Q. The bottom of page 6.

21 A. Right, yes, there are. But I don't  
22 understand entirely exactly how the pool supply  
23 contract works as to how they share off various  
24 plants or not. We're not privy at this point to  
25 the inner workings of the strategic alliance.

1 I think at some point somebody should  
2 become privy to them and to lay to bed, maybe  
3 for the benefit of your clients as opposed to  
4 mine, this whole issue. But now it's just a  
5 big, black box.

6 Q. But just as the Market Administrator was  
7 unable or unwilling to supply information about  
8 pool plant information as confidential, perhaps  
9 would have confidential competitive information  
10 for Dean Foods, correct?

11 A. Yes. But I'm sure that the court of law  
12 can obtain that information. I'm not sure  
13 whether this court can, but --

14 Q. But I'm also certain that -- you know,  
15 wouldn't the competitors of any entity like to  
16 know about the private contracts that entity  
17 has? Isn't it an advantage to a competitor to  
18 know what its competitor's contract is?

19 A. That's not my point. My point is that the  
20 US Department of Agriculture ought to know.  
21 Maybe they can find out without telling White  
22 Eagle Federation what's going on. The Secretary  
23 of Agriculture ought to have access to more than  
24 what the general public has in order to  
25 determine this kind of adjudication.

1 Q. We'll decide whether the rules permit that.  
2 But now go back to my question I asked, please,  
3 as opposed to the one you wanted to answer.

4 A. What's that?

5 Q. Don't you suppose, given the fact that  
6 you're an economist and you went to look for  
7 that information, you couldn't get it, don't you  
8 suppose that the kind of information that this  
9 contract contains is a valuable information to a  
10 company like Dean Foods that Dean Foods would  
11 naturally wish to keep confidential from its  
12 competitors?

13 A. Sure. Absolutely.

14 Q. Okay. Thank you. Now, I mostly want to  
15 have -- I have a couple more questions on the  
16 statement and then a couple of other things.

17 On page 7 of your statement at the  
18 bottom --

19 A. Uh-huh.

20 Q. -- you do an analysis of -- you say, "Yet,  
21 if 63.8 million pounds of manufacturing milk to  
22 nonpool plants is cut out of the pool, the  
23 corresponding amount of distributing plant  
24 receipts affected is 127.6 million pounds of  
25 milk." Do you see that?

1 A. Yep.

2 Q. Can you tell me how you got from the 63.8  
3 to the 127.6?

4 A. Well, maybe I should work the other way for  
5 you. I started with a conclusion and went to  
6 the premise. If you have a --

7 Q. Started with -- I just want -- started at  
8 the conclusion and went to the premise?

9 A. In this explanation. Okay?

10 Q. Thank you.

11 A. Okay. I know it doesn't sound good, does  
12 it, but that's -- I really -- when I did it I  
13 started with the premise and went to the  
14 conclusion, but the way it's written here I put  
15 the conclusion first.

16 The premise is that there's 120 -- well,  
17 actually the premise -- the 63.8 came --  
18 actually it was from the conclusion to the  
19 premise, because the conclusion -- the 63.8  
20 comes from the Market Administrator. It doesn't  
21 come from me. Okay?

22 So the question is, if you currently have  
23 diversion limits of 60 percent and so -- and you  
24 go to 50 percent diversion, you tighten the  
25 limit, tighten the performance standard and you

1 exclude 63 million pounds, what is the  
2 underlying fluid component in that exercise?

3 And the underlying fluid component is 127.6  
4 million pounds.

5 Q. All right.

6 A. Because if you take 127.6 and you multiply  
7 it by 1.5, you come to 191. That's at the 60  
8 percent. And then if you go to the 50, you  
9 reduce that by 63 to get back to 127. So those  
10 are just the numbers that fall out of the Market  
11 Administrator's impact assessment.

12 Q. But if I had 127 million pounds of milk --

13 A. Right.

14 Q. -- or let me start with 191, and I used to  
15 be able to divert 60 percent and now I can only  
16 divert 50 percent --

17 A. That's right.

18 Q. -- I've really only lost 10 percent, so  
19 it's only the 19 million. Isn't the 63.8 really  
20 the total pool rather than the 127.6?

21 A. No, it isn't. No. The fact is that the  
22 total pool in this kind of exercise is 191  
23 million pounds. The total pool is 40 percent  
24 fluid and 60 percent -- 60 percent -- no. The  
25 total pool is actually 191 plus the 127. This



1 is the amount you can divert, you divert 191.4  
2 million pounds, if you, in fact, send  
3 distributing plants 127.6 million pounds. So  
4 basically if you sum those two together, that's  
5 the total amount of milk pooled, 40 percent is  
6 fluid, 60 percent is manufacturing pooled. All  
7 right?

8 Then if you change the regulations to  
9 50/50, you're going to go to 127 fluid and 127  
10 manufacturing. Okay? And that -- so you've  
11 reduced or you've cut out of the pool 63.8  
12 million. That's what the Market Administrator  
13 said would be cut out based on his impact  
14 analysis.

15 So all I've done is elaborate to the  
16 size -- I was interested in getting at the size  
17 of the fluid component that would be effective  
18 by this change. And the size of the fluid  
19 component is 127 million pounds, which is 20  
20 percent, 21 percent of the fluid market of 610  
21 million, which is awful close, if anything a  
22 little bigger, than the fluid component that  
23 White Eagle and the others outside of the  
24 marketing agency accounting system have.

25 Q. And then you conclude that by definition

1 that's all going to apply to them and not to  
2 anybody else?

3 A. Yeah.

4 Q. They're the ones --

5 A. Pretty much so.

6 Q. Were you here for their testimony, though?  
7 Were you here for their testimony?

8 A. This morning?

9 Q. Yes.

10 A. I was, yeah.

11 Q. And let's see, did you hear how much milk  
12 they actually deliver to fluid processing  
13 plants?

14 A. They -- 150 million pounds a month, and  
15 then it was 40 to 60 million pounds a month.

16 Q. Sixty-five to seventy?

17 A. Sixty-five to seventy, yeah.

18 Q. So if they had 65 to 70, then they could --  
19 still at 65 they could pool 65, which is 130, so  
20 they've only lost 20. But because you work  
21 backwards from the premise, you actually  
22 assigned all 40 to them, right -- or all 68 to  
23 them?

24 A. Well, there's more people involved in this  
25 than just White Eagle as well.

1 Q. Oh, but you assigned it all to White Eagle?

2 A. Well, I meant to assign it to people  
3 outside of the federation.

4 Q. Well -- but you've also -- you've basically  
5 said everybody outside the federation is -- I  
6 mean, the federation is 82 percent, so you're  
7 assigning it to 18 percent --

8 A. Right.

9 Q. Well, this is 20 percent and yet what I'm  
10 getting at here is, from their own statements --

11 A. Yeah.

12 Q. -- they're only going to lose 20 million or  
13 less than a third, so you've assigned 40 million  
14 more loss to them that can't possibly happen.

15 A. Well, it happens to somebody. It could --

16 Q. But does it happen to the very people  
17 you're accusing of being the ones monopolizing  
18 the market?

19 A. Well, I -- basically the fact is the pool  
20 will be restricted by this amount and somebody  
21 will not receive the blend price basically for  
22 the milk. Sixty-three million pounds will be  
23 excluded.

24 I don't deny that some of that possibly  
25 could be under the -- under the DFA/DMS

1 Federation, but I would submit that it's quite  
2 unlikely. And also, again, I would ask -- I  
3 think that kind of information needs to be  
4 provided as to exactly who would be impacted,  
5 beyond White Eagle are there independents or are  
6 there others.

7 Q. You know, you've said that there's this 82  
8 percent that's represented by them?

9 A. Yes.

10 Q. We've got the testimony of White Eagle that  
11 they've got 65 to 70 million Class I. Even if  
12 you reduce it to 50 percent at their lower  
13 number of 65 million, they can still divert 65  
14 million pounds, correct?

15 A. That is correct, if those numbers are  
16 correct.

17 Q. You have 65 million, you have 130 million,  
18 correct?

19 A. Yes.

20 Q. So now at the worst case scenario, assuming  
21 their numbers are correct, the difference  
22 between 150 and 130 is 20 million pounds,  
23 correct?

24 A. That is -- if your numbers are correct,  
25 that would be true.

1 Q. That's assuming all of that goes against  
2 them, the 20 million, and they can't find ways  
3 of associating milk, they can't pump over or any  
4 of the things that people do to associate milk  
5 with a plant, correct?

6 A. May I give you an example of somebody who's  
7 not in their federation entirely who could be  
8 hurt by this?

9 Q. Well, I prefer you answer my question. If  
10 you want to do that later, you can do that  
11 later --

12 A. Okay.

13 Q. -- but I prefer you answer my question.

14 A. Well, it's related to your question, but  
15 I'll wait.

16 Q. You reach another conclusion that seems to  
17 be supported or maybe by the premises backwards  
18 or whatever, but that somehow the very fact that  
19 people are here to make a change for \$0.02, you  
20 say, "Clearly, if the large co-ops and  
21 distributors want this change, it must be more  
22 important to them than \$0.02." Do you see that  
23 statement on page 10?

24 A. Yes.

25 Q. Well, since you don't attend a lot of these

1 hearings or practically any of these hearings,  
2 you wouldn't know then that that we fight  
3 regularly over, you know, pennies. A whole lot  
4 less than \$0.02.

5 A. You do?

6 Q. Yeah. So if that's the case, then why is  
7 it clear that if people want this change it must  
8 be more than important than \$0.02?

9 A. Well, because what Gallagher said the other  
10 day, amongst other things, he said that we  
11 need -- we need to put this into effect in order  
12 to get the blend price up so that we can attract  
13 more Class I milk into the Order. And I don't  
14 see how a \$0.02 change in the blend price, given  
15 the overall way things work with over order  
16 premiums and over order pools and these agencies  
17 and transportation credits up there and all of  
18 the things at that are going on, I don't see how  
19 \$0.02 a hundredweight in the Federal Order blend  
20 price is going to -- is going to move a lot of  
21 milk into Class I. I just don't see that. I  
22 think the way it's going to move is the other  
23 way.

24 Q. But if the Secretary has had lots of fights  
25 over less than \$0.02 in the past, maybe you're

1 wrong about that, too, right?

2 A. No. The Secretary's fights are some other  
3 issue, something else.

4 Q. Well, I mean, in these hearings.

5 A. I -- whatever. I'm not privy to the  
6 Secretary's fights in these hearings over the  
7 last ten years. That's true.

8 MR. ENGLISH: Your Honor, may I  
9 have one minute? Your Honor, I have nothing  
10 further at this time. Thank you, Dr. Cotterill.

11 THE WITNESS: You're welcome.

12 JUDGE DAVENPORT: It appears to me  
13 there are some people squirming, so this would  
14 be a good time to take a break. How long? What  
15 is your pleasure?

16 MR. BESHORE: 3:15.

17 JUDGE DAVENPORT: 3:15.

18 MR. BESHORE: Thank you.

19 (Thereupon, a recess was taken.)

20 JUDGE DAVENPORT: It's 3:15. Ladies  
21 and gentlemen, if you would take your seats.  
22 Mr. Beshore.

23 MR. BESHORE: Thank you, Your  
24 Honor.

25 CROSS-EXAMINATION

1 BY MR. BESHORE:

2 Q. Good afternoon, Dr. Cotterill.

3 A. Good afternoon.

4 Q. You're an agricultural economist. Is that  
5 how you would refer to yourself --

6 A. Yes, sir.

7 Q. -- professionally?

8 A. An agricultural economist.

9 Q. Okay. And would you agree with me that  
10 just speaking generally, an agricultural  
11 economist's conclusions based on data are just  
12 as good as the data that they're based on?

13 A. Well, I guess that could be the case, but  
14 then maybe you need more data to get those  
15 conclusions. But I think that conclusions can  
16 also be based on economic theory. That if  
17 you're willing to give me the assumption that  
18 people want to maximize profit, I can tell you  
19 about how markets would operate.

20 Q. But we're talking about specific  
21 conclusions drawn about the specific results of,  
22 you know, potential regulations, for instance.  
23 The validity of these conclusions is going to  
24 depend upon, in part, upon the factual  
25 assumptions upon which they are based?



1 A. In part they will depend on that. They  
2 also depend in a very important way on the way  
3 you conceptualize the economic analysis of the  
4 problem in and of itself.

5 There's an agricultural economic analysis,  
6 especially in the milk policy area is ripe with  
7 poor models; models that don't even give the  
8 data a chance to say what they could say.

9 Q. Okay. Well, let's assume you have a valid  
10 model, but you have invalid factual premises.

11 Could you have a valid conclusion from the  
12 factual -- from the invalid factual premises?

13 A. I don't know what an invalid premises is  
14 unless you say the data -- you know, you've got  
15 data that somehow has errors in them, the number  
16 says 55 and it should be 20, something like  
17 that, that would certainly cause problems for  
18 your analysis.

19 Q. Okay. That's kind of what I was --

20 A. Okay.

21 Q. -- asking about.

22 A. Sure.

23 Q. Okay. Now, have you ever done any studies  
24 that establish a percentage of milk pooled in  
25 Federal Orders which is equivalent to a position

1 of market power in the Federal Order?

2 A. A position of milk pooled? Would you  
3 repeat that question?

4 Q. Percentage of milk pooled, is there a  
5 certain percentage at which you consider to  
6 be -- which you have concluded from studies is  
7 the percentage at which an entity has a position  
8 of market power in that pool?

9 A. What's the percentage you're talking about?

10 Q. That's what I'm asking you. Percentage of  
11 the milk pooled on the Order.

12 A. Are you -- I'm -- a percentage of the milk  
13 pooled on the Order. I don't know what the  
14 numerator is, I don't know what the denominator  
15 is of the question. I'm --

16 Q. Okay. The denominator is the pool, the  
17 Federal Milk Order pool?

18 A. The Mideast Milk Marketing pool.

19 Q. Any pool.

20 A. Let's take Mideast.

21 Q. Any pool. The pounds -- the denominator is  
22 the pounds in the pool.

23 A. Okay.

24 Q. Okay. The numerator is the pounds pooled  
25 by a market participant.

1 A. By a market participant. Okay. Right.

2 Q. Okay.

3 A. Okay.

4 Q. So the numerator of the denominator  
5 represents a percentage.

6 A. Okay.

7 Q. All right. Now, is there a percentage,  
8 based on economic studies which you have done,  
9 which represents market power?

10 A. Sure. There are percentages.

11 Q. What is that percentage?

12 A. Well, the area that I work in is industrial  
13 organization economics, which is a subdiscipline  
14 of economics and agricultural economics. And in  
15 that area over the last 30 or 40 years we've  
16 looked at many different markets and tried to  
17 look at the market position of the players in  
18 the market and the impact on performance of the  
19 market, the pricing efficiencies, the power.

20 And those kind of studies typically find  
21 that of a -- if you've got 4 firms in the market  
22 with a 60 percent share, that, indeed, that's  
23 when pricing power becomes real. Or a single  
24 firm with a 40 percent share is a measure of  
25 dominance when pricing power becomes an issue.

1 And these are in homogeneous product markets as  
2 opposed to differentiated product markets.

3 Q. But those are concentration ratios in  
4 traditional -- in industrial markets generally?

5 A. Yes. But there have been studies that  
6 related it to the fluid milk market and other  
7 things.

8 Q. To Federal Milk Order pools?

9 A. Well, I wouldn't want to go back and quote  
10 them, but Robert Masson and Ipolito and many  
11 others in the 1970s looked at the issue of  
12 market power in Federal Order pools. They  
13 found, indeed, that, you know, there is a  
14 possibility of exercising power in various ways.

15 Q. At what -- at what percentage?

16 A. Well, I'm not -- I'm not -- I can't give  
17 you an exact percentage, but let's put it this  
18 way: If, indeed, you've got a group of firms  
19 that are cooperating to set prices and a group  
20 of firms have an excess of 80 percent of the  
21 market share, that's a pretty good -- pretty  
22 good cartel arrangement in terms of ability to  
23 set price.

24 Q. So you think 80 percent?

25 A. Eighty percent certainly would be good

1 enough. And lesser numbers would come into play  
2 as well.

3 Q. How much less?

4 A. I said, you know, a dominant firm at 40  
5 begins to -- begins to have some say in the  
6 marketplace.

7 Q. And a market defined as a Federal Milk  
8 Order pool?

9 A. Could be that.

10 Q. At the pooling level?

11 A. Yes.

12 Q. You think 40 percent is sufficient to --

13 A. That's when concerns begin to be raised.  
14 We're talking here about a combination of firms  
15 that have 80 percent, and that certainly is a  
16 level where industrial organization economists  
17 would certainly raise the question as to their  
18 ability to price. After all, that's one of the  
19 things they want to do, over premiums, is get a  
20 higher price for the farmer.

21 Q. But you're not concerned in your testimony  
22 here about the ability to price, are you? I  
23 didn't --

24 A. No, I'm not. I made it very clear that  
25 market power exists and is legal in many

1 industries including this one, and this  
2 organization of marketing agencies in common, as  
3 long as they don't violate Capper Volstead or  
4 antitrust laws, they have the right to exert  
5 power to capture premiums.

6 My point is, is that they -- it should stop  
7 when they use the regulatory process such as  
8 this to enhance that power. Let me do it  
9 through having a better trucking arrangement,  
10 but let's not have it in the room here.

11 Q. Well, let's look at your calculations with  
12 respect to market share. The 80 percent figure  
13 that you're quoting is on page -- page 6, I  
14 think of your statement?

15 A. Yes.

16 Q. That's one place. And to get to that 80  
17 percent, you relied upon the information -- in  
18 part upon the information testified to by  
19 Mr. Leeman this morning, correct?

20 A. Primarily I relied upon what the Market  
21 Administrator provided in the statistics, and  
22 the testimony of Mr. Gallagher and others  
23 yesterday who said who was in the federation and  
24 who wasn't.

25 Q. Well, you understand that -- so you

1 included in your 82 percent all of the  
2 organizations that were pooled through DMS, I  
3 assume?

4 A. Yes.

5 Q. Including the organizations such as -- that  
6 Mr. Leeman was testifying on behalf of such as  
7 Brewster Cheese?

8 A. Yes. There are organizations that are  
9 currently pooled by DMS that, in fact, support  
10 my position as I'm speaking here today. So that  
11 goes to the issue of whoever has the 60 million  
12 pounds could be heard. Some of it is in your  
13 own organization. There are people in your  
14 organization who aren't entirely happy with the  
15 way this is going right now.

16 Q. And you would agree then perhaps that the  
17 impact of Proposal 2 may well fall on -- on the  
18 very Proponents as well as others?

19 A. Proponents by a majority of rule in a  
20 co-op. And the fact is that you've got a huge  
21 federation there and there are people that --  
22 you know, they may be with you because that's  
23 the way they can market their milk, but they may  
24 not be with you and being in support of Proposal  
25 2. As a matter of fact, they're not. Family

1 Dairies in Madison, Wisconsin, I just had lunch  
2 with the general manager. He pools his milk  
3 through your organization, but he's here in  
4 support of what I have to say.

5 Q. And you included Family Dairies in the  
6 80-plus percent market power calculation that  
7 you generated?

8 A. That's correct. They may be unwilling  
9 participants, but that's where they're going.

10 Q. They can opt out of that pooling  
11 arrangement any time they choose; isn't that  
12 correct?

13 A. Well, not really.

14 Q. What do you know about how they pool --

15 A. You opt out of buying Microsoft Windows for  
16 your home computer? Yeah, you can, but what are  
17 you going to use? You know, the fact of the  
18 matter is, you know, if you have a very large  
19 dominant vehicle for the marketing of milk,  
20 that's -- that's the primary deal. That's the  
21 primary choice they're facing today. They may  
22 have other choices, but they're not as strong.  
23 This change would make them weaker.

24 Q. You have included in your 82 percent then  
25 Family Dairies, Brewster Cheese, Guggisberg



1 Cheese, et cetera.

2 A. Yes.

3 Q. Okay. And have you included the  
4 independent producers at Carl Colteryahn Dairy  
5 in Pittsburgh?

6 A. To the extent that they're supplied by DMS,  
7 and there are Dean independent producers, I  
8 understand from the testimony here, and, of  
9 course, there are a number of DMS independent  
10 producers that came along, so these people --  
11 their agents, their marketing agents --

12 Q. Have you included them?

13 A. Yes.

14 Q. You have?

15 A. I have. If they're in that. I don't know  
16 that -- if they're completely independent.  
17 There are a few independents that are outside of  
18 the DMS and not part of White Eagle. Like, 5 or  
19 6 percent is our best estimate of that.

20 Q. Okay. Well, you included -- if I read your  
21 testimony correctly on page 6, you included  
22 various entities that aren't, indeed -- various  
23 entities such as Upstate. Do you know that  
24 they're in DMS?

25 A. I believe they are.

1 Q. What's the basis for that belief?

2 A. Well, if I didn't hear it yesterday it was  
3 based upon talking with people in the industry  
4 who had that opinion.

5 Q. And who provided that information to you?

6 A. Mr. Vetne and Mr. Jacoby. I talked with  
7 them, and --

8 Q. Okay. And if it's incorrect, then to that  
9 extent, then the conclusion that you reached  
10 with respect to that is not correct?

11 A. No. I would not -- I would not go that far  
12 at all. The fact of the matter is, is that you  
13 want a very precise measure of 82.356 percent --

14 Q. It's your number, Dr. Cotterill.

15 A. I know it's my number, but I'm disavowing  
16 the number to that level of precision. All I  
17 need to know is it's between -- if it's 40  
18 percent or higher in terms of some kind of  
19 dominant coalition you begin to have pricing  
20 problems in the market. And we're talking about  
21 a number that's more around 75 to 85 percent,  
22 and you have real problems when you have that  
23 level. Which is -- which is why people join  
24 Capper Volstead. They want that kind of power  
25 to bargain for price. There's no doubt about

1 that.

2 Q. But Proposal 2 doesn't relate to pricing at  
3 all, does it?

4 A. Yes, it does. Because it enhances the  
5 market power of that dominant coalition at the  
6 expense of others and large members of that  
7 coalition who would be willing go elsewhere if  
8 they had the option. So the pricing in this  
9 industry is -- is intimately affected by this  
10 ruling, because it's going to make it harder for  
11 people to actually supply fluid milk which is  
12 what Ed Gallagher was suggesting you need to  
13 have here is more fluid in the market. Well,  
14 these guys are not going to be able to do that  
15 as easily from afar or even up close because  
16 you're making it very difficult.

17 Q. Well, maybe you have missed the -- some of  
18 the testimony here. Isn't the problem in that  
19 there's not enough milk in the pool --

20 A. Yeah.

21 Q. -- but that the milk isn't readily made  
22 available for Class I?

23 A. Yeah.

24 Q. Isn't that the problem?

25 A. That is the problem.

1 Q. And isn't that what Proposal 2 addresses,  
2 that if you want to be part of the pool you got  
3 to make more of it available to Class I?

4 A. Well, yes and no. It doesn't, because --

5 Q. That's what it requires, doesn't it?

6 A. Well, it requires that, but that means that  
7 some people from some place like southern  
8 Wisconsin might not even be in the pool at all  
9 because their performance requirements are so  
10 stiff that they simply are not going to come  
11 over here, and if they're going to come it's  
12 going to be in a -- they're going to have to pay  
13 for more pooling to come. I guess that would be  
14 true. They would have to pay more, yeah.

15 Q. So in other words, if DFA is pooling to the  
16 extent of its capabilities, if it's in its  
17 economic interests now to pool to the extent of  
18 its capability, it ought to be doing that,  
19 right, just like any other good co-op, if it  
20 works?

21 A. Any other profit maximizing firm.

22 Q. Yes.

23 A. To the extent that the pooling base is  
24 valuable and they can sell it to people, they're  
25 going to sell.

1 Q. How about using it for their own members?

2 A. Yeah. But also Guggisberg Cheese and  
3 Brewster Milk, and Family -- Family Dairies out  
4 of Madison, they all pool through DFA and DMS  
5 and there's some cost to them by that.

6 Q. By the way, are you assuming that DFA or  
7 DMS or one of these people determines the pay --  
8 pay price for producers at Guggisberg Cheese?

9 A. Determines the pay price for producers?

10 Q. Yeah. What producers get for their milk?

11 A. No. I just said what Guggisberg Cheese  
12 had -- the example before this -- this rule, if  
13 Guggisberg Cheese had 150 pounds of milk for  
14 cheese, they had to supply 100 pounds fluid.  
15 All right? After the rule, if they wanted 150  
16 pound of milk for cheese, now they have to  
17 supply 150 pounds to the Order, right?

18 Q. In order to get the blend price on all  
19 their milk.

20 A. That's correct. In order to get the blend  
21 price, and, of course, they need the blend price  
22 for their farmers, otherwise they're going to be  
23 paying \$7 or \$8 after they add everything up,  
24 you know. The Amish are cheap, but they're not  
25 that cheap, you know. They need money, too.

1           So the fact of the matter is, is that  
2 these -- they're going to have to buy another 50  
3 pounds of pooling from DFA in order to keep in  
4 business. It's an added cost for them. They're  
5 going to have to buy, yeah.

6 Q.    You mean they're going to have to make  
7 available for fluid use another 10 pounds of  
8 their milk that they're manufacturing into  
9 cheese then?

10 A.    Another 50. If they -- they -- they're  
11 going to have to find another 50 pounds to pool.  
12 Before they had 100 pounds fluid and 150 cheese.  
13 That's the 60/40 split. Afterwards, they need  
14 150 pounds for cheese and it's 50/50. So now  
15 they need 150 pounds of fluid. So they got to  
16 have another 50 pounds of milk to go in the  
17 fluid market. And you say well --

18 Q.    To make -- to manufacture the same --

19 A.    To keep the cheese plant going, yeah.

20 Q.    To manufacture the same amount of cheese  
21 and pay a fluid milk blend price for the milk  
22 they make into cheese?

23 A.    Absolutely.

24 Q.    They're going to have to make more of it  
25 available for fluid, correct?

1 A. You say "They're going to have make more of  
2 it available."

3 Q. Yes.

4 A. I say they're going to have to pay DFA in  
5 order to get into the market, you know, because  
6 they are the -- the pooling base is not free;  
7 it's not there.

8 Q. How about paying White Eagle to get in the  
9 market?

10 A. White Eagle doesn't have a pooling base.  
11 If they do, then they may have to pay them.

12 Q. Did you miss Mr. Leeman's testimony this  
13 morning?

14 A. No, I didn't. They do pool, but I don't  
15 think they have access.

16 Q. Sixty to seventy million pounds --

17 A. Yeah.

18 Q. -- of distributing plant sales to the  
19 plants which he would identify --

20 A. Yeah.

21 Q. -- and which he wouldn't discuss volumes,  
22 so we know it's 60, 70 million, plus whatever  
23 amount -- the unidentified unknown supply  
24 plants?

25 A. Well, we only supply Superior and United

1 Dairy plants and those and -- yeah, true. He  
2 does have some pooling base, but the whole  
3 premise of this is that there's vertical  
4 foreclosure in the fluid channel in that -- that  
5 Dean and National Dairy Holdings and these  
6 companies have acquired all of the -- all of the  
7 processors and they've made the pooling base  
8 available on an exclusive primarily through  
9 these full supply contracts to DFA. And that's  
10 the vertical -- that's the whole title of my  
11 whole presentation, vertical foreclosure.

12 We used to just be able to look at this raw  
13 milk assembly market as to what's going on in  
14 raw milk assembly, not anymore. You have to  
15 look at what's going on up at the processing  
16 market level, too, and who has -- owns the  
17 processing plants and what that means for access  
18 to those plants.

19 Q. By the way, you assume if there's -- if  
20 people are not foreclosed, there's not  
21 foreclosure; isn't that fair?

22 A. Well, there's -- there's lesser versions of  
23 foreclosure, lesser versions. For example, the  
24 60 million pounds, that could be foreclosed out.  
25 You know, it's out of the pool, those guys are



1 gone. Or they might still stay in the pool, but  
2 they have to pay DFA/DMS more money for that  
3 additional pooling base.

4 So it's -- there's a raising rivals' cost  
5 impact. It's not perfect foreclosure. There's  
6 this raising cost idea that strategically  
7 disadvantages some players at all stages, the  
8 smaller processors and the smaller milk  
9 assemblers and the farmers that serve you.

10 Q. Now, do you assume, and I gather you do  
11 because you refer to it at the top of page 6,  
12 that the Mideast Marketing Agency is a pooling  
13 foreclosure vehicle here, MEMMA?

14 A. It's a pooling vehicle. A foreclosure  
15 vehicle, I -- you know, I think that to the  
16 extent that they control the Class I base, the  
17 pooling base, then they can either foreclose or  
18 they can sell. They can say, "We don't sell to  
19 you any more at any price," you know. That's  
20 foreclosure.

21 Q. What if I were to tell you that the Mideast  
22 Marketing Agency is not a Federal Order pooling  
23 vehicle at all?

24 A. Well, it's -- well, you're quibbling on  
25 terms with a professor who doesn't know those

1 terms. What I'm getting at, they are -- they  
2 are an over order -- over order premium  
3 bargaining agency.

4 Q. Right.

5 A. But they -- they bargain for all of those,  
6 and they have a pool. They have an over order  
7 premium pool, don't they?

8 Q. It's not the Federal Order pool, is it?

9 A. No, it isn't. No, it isn't. No, it's not.  
10 But they do -- they do represent a very large  
11 block of milk and give the large block of milk  
12 economic advantages that are not available to  
13 others.

14 And there's nothing wrong with that. Okay?  
15 It's just that if in this proceeding you use the  
16 changing of the Orders to get at this distant  
17 milk problem, okay, in a way that disadvantages  
18 small producers like Guggisberg Cheese or  
19 elsewhere, it's not right.

20 Q. But your testimony on the top of page 6,  
21 you're identifying the Mideast Marketing Agency  
22 and the Producer Equalization Committee in  
23 Michigan as -- I see it as, you know,  
24 instruments of this Federal Order pool  
25 foreclosure; is that correct?

1 A. That is essentially correct.

2 Q. Did you hear Mr. Rasch's testimony --

3 A. Yes.

4 Q. -- yesterday?

5 A. Yes.

6 Q. You did?

7 A. Yes. I heard parts of it.

8 Q. Okay. Did you --

9 A. In fact, he doesn't have a whole lot of

10 access to fluid except through the DFA/DMS.

11 Q. Did you hear his testimony about the

12 Producer Equalization Committee in Michigan?

13 A. I'm not so sure what you're getting at.

14 Q. I just asked you whether you heard his

15 testimony about the Producer Equalization

16 Committee in Michigan?

17 A. I heard parts of his testimony. I assume I

18 heard that. I don't know exactly what you're

19 getting at.

20 Q. Well, did you hear his testimony that they

21 distribute over order proceeds --

22 A. Yes.

23 Q. -- to independent dairy farmers and others

24 in Michigan who are not members of the pool?

25 A. Not members of what pool?

1 Q. Producer Equalization Committee.

2 A. They distribute it to all farmers that are  
3 in the Federal Order pool in Michigan or that?

4 I'm not aware of that, but to the extent that  
5 they do that, that's -- you know, that's  
6 laudable.

7 Q. And it's a little different than the  
8 paradigm that you --

9 A. No, it's not different.

10 Q. It's not?

11 A. No. Not from the standpoint of this  
12 regulation on -- on small milk assemblers and  
13 small milk processors.

14 Q. Now, at the bottom of page 6 you have  
15 testified to an estimate of Dean Foods 12 plants  
16 processing 250, 300 million pounds per month.  
17 What's the basis for that estimate?

18 A. Again, that is obviously not evidence from  
19 Dean Foods. And it's -- it's based, again, on  
20 industry sources and the -- that I mentioned and  
21 the -- you know, the various kinds of trade  
22 documents that are available from like Dairy  
23 Foods magazine or, of course, Dairymen's or  
24 others. So it's basically a trade industry  
25 estimate.

- 1 Q. The Dairy Foods website?
- 2 A. Could be there, yes.
- 3 Q. Was it?
- 4 A. Yes.
- 5 Q. Are you saying Dairymen's published  
6 information about Dean Foods volumes in the  
7 Mideast Order?
- 8 A. I'm not so sure they have. I think they've  
9 just published as to plants, number of plants,  
10 locations and Orders and things like that.
- 11 Q. Now, at the top of page 7 you've indicated  
12 that The Kroger Company has an estimated 120  
13 million pounds --
- 14 A. Yeah.
- 15 Q. -- in this Order. What's your basis for  
16 that estimate?
- 17 A. Again, it would be discussion with the  
18 industry executives that I've talked to that are  
19 involved.
- 20 Q. Kroger executives?
- 21 A. No, not Kroger.
- 22 Q. Kroger supplier executives?
- 23 A. No, not Kroger suppliers either.
- 24 Q. That's three -- do you -- is that -- Kroger  
25 has three plants in this Order, are you aware of

1 that, three distributing plants?

2 A. I believe that's correct.

3 Q. Okay. So your testimony -- the basis for  
4 your testimony is that those plants average 40  
5 million pounds per month each?

6 A. I guess that would be the division, yeah.

7 Q. Okay. Now, did you -- I assume you looked  
8 at the --

9 A. That's not a very big milk plant, although  
10 it's pretty modern size. Cameron Thraen was  
11 here and looked at milk plants. I mean, in New  
12 England we have a plant that does over a billion  
13 pounds a year. So we're talking about 480  
14 million pounds a year through the process.  
15 That's a pretty good sized plant. It's not  
16 small, but it's not huge by any stretch of the  
17 imagination.

18 Q. But you're comfortable with your testimony  
19 being based on Kroger's three plants averaging  
20 40,000 pounds a month each?

21 A. I'm comfortable -- for purpose of my  
22 testimony, I'm comfortable with these numbers,  
23 yes. I don't need exact, precise numbers to  
24 make the arguments that I've made. They're  
25 based on economic theory and economic motivation

1 and the economics of the industry as much as the  
2 absolute last pound estimate of this or that.

3 Q. Now, did you -- can you tell me in your  
4 calculation of dominance how you considered the  
5 independently supplied plants in western  
6 Pennsylvania identified by Mr. Gallagher,  
7 Schneider's Dairy, Turner Dairy Farms --

8 A. Yep.

9 Q. -- Marburger Farm Dairy and Carl Colteryahn  
10 Dairy?

11 A. I don't think they're included. Those  
12 Pennsylvania plants -- you're from Pennsylvania.  
13 You know Pennsylvania's different. Those guys,  
14 they're very independent out there. I think  
15 they're probably independent producers. I  
16 don't -- I don't imagine they're -- they're --  
17 they're part of the DMS/DFA system. I suspect  
18 they've got independent producers that ship in  
19 there.

20 Q. You don't imagine, but where did you count  
21 them?

22 A. I don't think we did.

23 Q. Well, they're either in the 82 or the 18,  
24 right? That's 100 percent.

25 A. Well, they would be in the 18 because

1 the -- the White Eagle Federation was only about  
2 11 or 12.

3 Q. You know what the volumes of those plants  
4 are?

5 A. No, I don't. My impression is that they're  
6 relatively small, but I don't know them.

7 Q. You make a statement at the top of page 10  
8 that "smaller fluid processors currently  
9 supplied by the DFA led system may not be  
10 receiving the same terms as larger processors."

11 First of all, let me ask you, what do you  
12 refer to when you say "the DFA led system"?

13 A. Well, I'm referring to the 82 percent  
14 that's in the group; the 15 members plus  
15 Michigan Milk. And those -- those people,  
16 they're bargaining over order premiums and  
17 setting prices to fluid processors. And, of  
18 course, in New England --

19 Q. Now, we're talking about the Mideast Order,  
20 Dr. Cotterill.

21 A. Okay. Good.

22 Q. You're making an allegation that the  
23 smaller fluid milk processors currently supplied  
24 by the DFA led system which you have now defined  
25 as MMPA, which --



- 1 A. Yep.
- 2 Q. -- and all of the 15 suppliers in the DMS  
3 system, correct?
- 4 A. It's basically the PEC plus MEMMA. That's  
5 the easiest way to get at it. Those are the two  
6 agencies in common. Everybody's involved with  
7 them.
- 8 Q. Okay. Who you calculated to have 82  
9 percent?
- 10 A. Roughly.
- 11 Q. Okay. Now, you're making the allegation  
12 that PEC and MEMMA may be treating the smaller  
13 fluid milk processors differently from larger  
14 processors. What is the basis for that  
15 allegation, Dr. Cotterill?
- 16 A. The basis is as pure, simple economics of  
17 power. That they might well price discriminate;  
18 and the vertical foreclosure game that I talked  
19 about between processors and retailers is based  
20 upon that kind of discrimination. And we see  
21 that in New England as we speak.
- 22 Q. We're talking about your allegations in the  
23 Mideast Order?
- 24 A. I know.
- 25 Q. In the Mideast Order.

1 A. I suggest that --

2 MR. RICCIARDI: Your Honor, I'm  
3 sitting here and I apologize and trying to watch  
4 the colloquy go on, but I don't think it's fair  
5 for the question to be asked and then to  
6 interrupt the witness. I think that the  
7 Secretary and I would like to know what he's  
8 going to say. If he's going to use as an  
9 example what happened in New England, the  
10 Secretary should know that.

11 THE WITNESS: Right.

12 JUDGE DAVENPORT: Let's try to let  
13 him answer the questions.

14 MR. BESHORE: Okay.

15 BY MR. BESHORE:

16 Q. My question, Dr. Cotterill, is what is your  
17 basis for alleging that MEMMA and the PEC are  
18 discriminating against smaller processors that  
19 they supply or price milk to?

20 A. The basis is, is that you have market power  
21 in different stages of the system and that price  
22 discrimination can be profitable in those kinds  
23 of situations. And it's profitable because it  
24 supports the idea of vertical collusion that  
25 elevates prices that benefits the larger and the

1 dominant players in the system rather than the  
2 smaller people who are in it but not happy.  
3 That's my basis.

4 And I tried to give you an example from New  
5 England. If you look in Exhibit 2, it has that  
6 at wholesale and the retail level, but the --  
7 the big -- the big processor out there, Dean  
8 Foods, charges a Stop and Shop, a dominant  
9 retailer, \$0.10 a gal less than it charges all  
10 the other supermarket chains in New England.

11 Q. Okay. I --

12 A. \$0.53 versus \$0.63. That's the big guy a  
13 cheaper price, and that lets the big guy lead in  
14 a price leadership game. They can discipline  
15 those other retailers because they got lower  
16 costs. They can make them pay if they don't  
17 follow.

18 Q. Now, let me see if I understand your answer  
19 to my question.

20 JUDGE DAVENPORT: Let him finish.

21 THE WITNESS: I am.

22 BY MR. BESHORE:

23 Q. Okay. So the answer to my question is --  
24 what is the basis for your allegation that MEMMA  
25 and PEC are discriminating in their sale of raw

1 milk to fluid milk processors in the Mideast?

2 The basis for that is the fact that in New

3 England large -- you have observed what you

4 believe to be price discrimination on wholesale

5 packaged fluid milk products --

6 A. Yep.

7 Q. -- by a processor to a supermarket,

8 correct?

9 A. Right.

10 Q. Is there any other basis for the statement

11 you've made that MEMMA and PEC discriminate in

12 their raw milk prices against smaller fluid milk

13 processors in Order 33?

14 A. That's a very good question. Very well put

15 and I give you credit for understanding what

16 I've said.

17 Q. And the answer to my question is?

18 A. Yes, there are other things.

19 Q. And the other basis for this allegation is

20 what?

21 A. Okay. You can look at Exhibit 2 and the

22 idea of -- of buyer power being exercised back

23 against the Agri-Mark Cooperative where they're

24 basically forced them into accepting possibly --

25 this didn't necessarily occur, but people think

1 it occurred, they think it might have occurred,  
2 and it's economically rational what we're  
3 talking about here, that, in fact, the Agri-Mark  
4 members were forced to cut their over order  
5 premiums in order to keep the higher cost  
6 processors and to keep the fluid market that was  
7 available through that processor for their  
8 co-op.

9 It's different than what Welling was  
10 talking about. There's an issue of where buyer  
11 power was being exercised perhaps a year ago.  
12 It might have been, it's not. You know, people  
13 were talking about it and a lot of people were  
14 talking about it, but it's not -- it has not  
15 been verified, I want to say that. But I'm just  
16 telling you it could happen and it did. You can  
17 exercise buyer power back to result in more  
18 blend prices. The other reason --

19 Q. That's your second basis that -- let's make  
20 sure I understand your second basis.

21 A. Okay.

22 Q. And that is that there have been unverified  
23 reports --

24 A. That's correct.

25 Q. -- unconfirmed reports --

1 A. Yep.

2 Q. -- that in New England a large fluid milk  
3 processor --

4 A. Yep.

5 Q. -- required its supplier to grant it  
6 concession, price concession, to reduce its  
7 prices?

8 A. That's correct.

9 Q. Okay.

10 A. Yep.

11 Q. That was unverified reports with New  
12 England. Now, what's your third basis for this  
13 allegation?

14 A. The third basis is, is that in fact, the  
15 economics of this kind of a situation leads to  
16 this kind of behavior. Because firms want to  
17 maximize profits and they want to keep their  
18 power. They will, in fact, vertically cooperate  
19 to make sure that at each stage of the system  
20 the leader of the system doesn't face a lot of  
21 competition from others. And so it -- indeed,  
22 it's possible that -- that the -- to benefit the  
23 Dean and the National Dairy Holdings fluid  
24 plants who, after all, want to make some money,  
25 right, it's entirely possible that DFA, who's

1 the full supply contractor to these people and,  
2 indeed, beholding to them because they've given  
3 them the pooling base, to give them the power at  
4 the assembly level, okay, they can turn around  
5 and elevate prices to smaller processing plants  
6 to make it harder for those smaller processing  
7 plants to compete against the bigger ones. And  
8 the bigger ones wouldn't necessarily drive those  
9 little guys out of business, they would just let  
10 the prices go up. And they need money. Okay?

11 Q. So your third basis for that statement is  
12 that in economic theory --

13 A. That's correct.

14 Q. -- it might be profitable?

15 A. That's right. That's right. That's not  
16 good enough for you?

17 Q. No. Is there any other factual basis for  
18 that statement?

19 A. Any other factual basis for that statement?

20 Q. Or theoretical basis?

21 A. Well, factual basis for that statement  
22 would be the fact that some people who are privy  
23 to this Order and on this Proposal 2 currently  
24 are having their milk pooled by DFA/DMS, but  
25 they support the White Eagle position, my

1 position. They're concerned about the impact of  
2 Proposal 2 on their ability to compete.

3 So that suggests to me that this regulatory  
4 process in and of itself will elevate costs to  
5 some of these players that are not central  
6 leaders in the vertical strategic alliance.  
7 They're here. They're paying my bill.

8 Q. And that's -- because they're paying your  
9 bill you believe that --

10 A. What do I believe?

11 Q. You believe that that's a factual basis  
12 that PEC and MEMMA currently may not be charging  
13 the same terms to smaller fluid milk processors  
14 as the larger fluid milk processors?

15 A. Yes. With the added explanation in  
16 between.

17 Q. Now, do you routinely, in your economic  
18 studies, quote and rely upon legal briefs for  
19 factual premises?

20 A. If, in fact, the legal briefs are findings  
21 of fact or proposed findings of fact, which is  
22 what they were. There was a brief by yourself,  
23 by Mr. English and by Mr. Vetne as if proposed  
24 findings of fact under the Central Order  
25 hearing. I read those. And I would think if



1 that's what they're there for, you guys are  
2 putting findings of fact in there, they're  
3 reasonably accurate.

4 Q. My question was --

5 A. Yes.

6 Q. Do you routinely -- do you routinely --

7 A. Yes.

8 Q. -- as an economist rely upon factual  
9 assertions of legal briefs in your economic  
10 publications?

11 A. I rely upon findings of fact from legal  
12 cases, court cases where there is a finding of  
13 fact, and relying upon facts in legal briefs is  
14 a little different than findings of fact. I  
15 make a distinction there.

16 Q. Okay. So your assertion -- your reliance  
17 on Mr. Vetne's brief, you'll understand, is not  
18 a legal finding?

19 A. Not at this point. It was a submission to  
20 the Federal Order as a proposed finding of fact.  
21 Is that not right? And --

22 Q. And there were other submissions on the  
23 other side of the issue; is that right?

24 A. Yes, there were and I read them all. Yours  
25 and Mr. English's and one from Continental

1 Dairy, I believe. And I didn't use everything I  
2 saw there either, you know. I just said I read  
3 them. I'm trying to understand what's going on  
4 here.

5 MR. BESHORE: May I? I have no  
6 other questions at this time.

7 JUDGE DAVENPORT: Thank you, sir.  
8 Other cross? Mr. Ricciardi?

9 MR. RICCIARDI: I don't have  
10 anything at this time, Judge.

11 JUDGE DAVENPORT: Mr. Miltner

12 MR. MILTNER: (Counsel shaking  
13 head from side to side.)

14 JUDGE DAVENPORT: Very well,  
15 Mr. Tosi?

16 CROSS-EXAMINATION

17 BY MR. TOSI:

18 Q. Thank you for appearing, Dr. Cotterill. My  
19 name is Gino Tosi. I'm with the Order  
20 Formulation branch of Dairy Programs.

21 A. Right.

22 Q. I would like to ask a few more questions on  
23 your intents looking at your written statement.  
24 I would like to just pose a few examples to you  
25 and ask you to say whether or not you think

1 that's an example of paper pooling.

2 I'll give you a little scenario and ask you  
3 if you think that's an example of paper pooling  
4 going on. Okay?

5 A. Sure.

6 Q. A producer sending enough milk to a  
7 distributing plant to meet what's called the  
8 touch base, the minimum association with an  
9 Orders Market?

10 A. Yes.

11 Q. And then thereafter the rest of that  
12 producer's milk is diverted?

13 A. Right.

14 Q. Okay. Would that be an example then -- and  
15 that diverted milk is pooled, would that be an  
16 example of paper pooling, in your mind?

17 A. Well, the way I defined paper pooling was  
18 any and all diversion of milk, so, yes, that  
19 would be. I'm not trying to make a distinction  
20 by the term paper pooling as a good diversion  
21 and bad diversion.

22 Q. Okay.

23 A. I'm not, no.

24 Q. Okay. I'm glad to understand that then.

25 Okay. So I'm going to ask you some questions

1 about diversions.

2 A. Right. Sure.

3 Q. Could you please describe what your  
4 understanding is of the purpose of why the  
5 Federal Order program permits diversions for  
6 milk that's diverted to share in the plant price  
7 to be pooled?

8 A. Right. Well, my understanding is that the  
9 fluid market without -- typically is a high  
10 value market and farmers want to supply it.  
11 That's where the value is, in the commodity.  
12 And there are various economic reasons for that.  
13 But that the -- there's variability in the  
14 demand for fluid milk, so there's a need for  
15 reserve supply to come into the market at  
16 certain times, but to exit the market at other  
17 times. So you've got to -- you've got to allow  
18 for manufacturing milk as well as -- as well as  
19 fluid milk in your pool.

20 There is a need for some kind of minimal  
21 performance standard for that reserve supply  
22 milk. At some point it does have to touch base  
23 and it does have to be used in that system,  
24 but -- and the other -- the other extreme of it  
25 is that you can exclude manufacturing milk that

1 could in some way be available to fluid handlers  
2 in that reserves contingency, because if you do,  
3 you have disorderly marketing, they'll go find  
4 it and they'll bring it in and create problems.

5 Q. So would you be an advocate of not having  
6 diversion limits?

7 A. I think within reason diversion limits  
8 are -- are acceptable. You know, I think that,  
9 you know, that -- to require some performance  
10 by -- by the handler that shipping milk into a  
11 market is good, but the idea of cutting the  
12 diversion limit from 60 to 50 in the Mideast,  
13 given the current structure of the market and  
14 its implications for pricing performance and  
15 power and consumer choice and long run producer  
16 equity, I don't think the current proposed  
17 regulation is needed. The current -- the  
18 current -- the current diversion limit at 60 or  
19 70, as the case may be, I think it should stay  
20 there.

21 Q. Okay. On page 8 of your statement you  
22 identified -- that is the small producers --  
23 excuse me, small cooperatives and independent  
24 producers who you think are the targets of  
25 Proposal 2.

1 A. Yes. I -- I do -- I do maintain that  
2 that's the case. That the -- and also I would  
3 add that some of the -- some of the -- some of  
4 the producers who are currently pooled in the  
5 DMS/DFA system are also targets.

6 I think that they -- I think there's a  
7 possibility of, you know, differential --  
8 they're concerned about this, too. They think  
9 that this is not a wise move, to tighten the  
10 performance standard.

11 Q. Okay. Then are you of the opinion then  
12 that the Federal Order pooling standards or that  
13 the Federal Order 33, the Mideast Order pooling  
14 standards --

15 A. Yeah.

16 Q. -- should somehow take into account when a  
17 small cooperative or independent producer's  
18 disadvantaged relative to a larger cooperative,  
19 for example, like DFA?

20 A. I think -- I think you should take it into  
21 account when you're considering the equity of a  
22 rule change like this, because I think it goes  
23 to the issue of producer equity and processor  
24 equity.

25 I've focused a lot on market power and

1 foreclosure and differential pricing issues, but  
2 that all goes to the issue of equity under the  
3 Order. So I think -- I don't think -- I don't  
4 think you should try to design an Order to  
5 benefit small farmers rather than big farmers or  
6 try to design an Order that benefits small  
7 producers rather than big Orders -- big  
8 producers; but I do think that you should take  
9 into consideration, when you're making a change  
10 like this, the current market structure of the  
11 fluid milk marketing industry that you're facing  
12 and the interaction with it and its impact on  
13 producer and processor equity. That's what I  
14 think you should do.

15 Q. Okay. If we -- I would like to go back a  
16 little bit more here to diversions. If we allow  
17 milk that's not part of the legitimate reserve  
18 supply --

19 A. Yeah.

20 Q. -- of a plant, if we don't set a limit on  
21 that --

22 A. Uh-huh.

23 Q. -- would you agree that then it becomes  
24 possible that then --

25 A. Then you get bad paper pooling, right.

1 Q. Well, that you would have so much of a  
2 pool --

3 A. Yeah.

4 Q. -- that there would be absolutely no  
5 relationship between --

6 A. I agree. There is -- yeah. That's -- I  
7 guess you would call that bad paper pooling if  
8 you want to go to good versus bad. I've talked  
9 about paper pooling as the idea that milk is  
10 associated with it. And I'll agree with Ed and  
11 others the last few days, you know, you need to  
12 identify a reserve supply.

13 And -- but this -- this -- they've also  
14 talked a lot about distant milk and the need to  
15 limit distant milk. That's the concern.  
16 California milk, no problem with that Proposal 1  
17 to eliminate California milk from being pooled  
18 between California and here. Huh-uh, that sure  
19 sounds fair to me. Although I haven't looked at  
20 the thing in great detail, but the point is that  
21 distant milk, this -- this performance  
22 requirement affects Guggisberg Cheese down here  
23 in Holmes County just as much as it affects  
24 Family Dairies in Madison, Wisconsin.

25 It's not -- it's a blunt instrument to get



1 at the distant milk idea. There have to be  
2 better instruments. If you wanted to limit milk  
3 from central Minnesota or Vermont or wherever,  
4 zone that stuff out, you know, yeah.

5 Q. Okay. If we took the term distant milk and  
6 if I said to you that the Secretary in the past  
7 has interpreted that to mean --

8 A. Yeah.

9 Q. -- to mean that it's the milk that's not  
10 regularly and consistently supplying the Class I  
11 needs of the market --

12 A. Yeah. Then I stand corrected. I guess  
13 then that Guggisberg Cheese milk would be  
14 distant if it's never regularly and consistently  
15 supplied to the Class I needs of the market.

16 Q. And if the Secretary would determine, for  
17 example, that milk in Vermont that may be  
18 pooled --

19 A. Yeah.

20 Q. -- on the Mideast Order is not regularly or  
21 consistently supplying the market, the Class I  
22 needs of the market --

23 A. Yeah, right. I would hope he would  
24 conclude that. That sounds economically  
25 sensible to me.

1 Q. Okay.

2 A. I mean, being from New England, I know  
3 northern Vermont, I've been up there. I can't  
4 believe that they regularly ship fluid milk to  
5 Cleveland. That just kind of boggles my mind.

6 Q. Okay. And what if the same were true for  
7 Wisconsin milk?

8 A. Well, certain parts of Wisconsin maybe it  
9 is true, but there also has been a historical  
10 relationship between central and southern  
11 Wisconsin and Indiana and Michigan. You know,  
12 they've been -- they've been long-term suppliers  
13 and -- under the old Order system all the way  
14 along and so my concern there is that we -- that  
15 the -- this Order Reform is based upon that  
16 Cornell study of fluid milk price differentials  
17 which apparently wasn't even that. But Congress  
18 decided that you're going to set this  
19 differential surface across the country and  
20 that's going to determine how milk moves. And  
21 it's obvious, we're here, we're in these  
22 hearings because it's not working.

23 So there needs to be some kind of a zoning  
24 out or some kind of adjustment for cost, like in  
25 the old system, you know, where you could back

1 it out from Cleveland, back it out from Detroit,  
2 you know.

3 Q. Yes, sir. The Department's aware that many  
4 people share that same view.

5 A. Yeah. Okay.

6 Q. Did you happen to hear the testimony of  
7 Mr. Rasch and Mr. Weis talking about the over  
8 order premiums that --

9 A. Mr. Rasch I did.

10 Q. -- of PEC and MEMMA?

11 A. Yeah. Rasch said over order premiums were  
12 140 to 160.

13 Q. Did you hear mentioned that depending on  
14 certain -- certain shipments, size, certain  
15 factors like a client willing to accept milk  
16 seven days a week --

17 A. Right.

18 Q. -- at some specified pointed?

19 A. Yep.

20 Q. Would you see that as a -- and offering a  
21 rebate on the over order premium --

22 A. Yeah.

23 Q. -- would that be an example of the economic  
24 power that small co-ops --

25 A. No. Absolutely not, no. That's a real

1 cost based difference and that's actually  
2 efficiency enhancing. We see that in all the  
3 Orders, that, you know, the -- that I'm familiar  
4 with some of the other Orders, the Southeast  
5 Order, the Florida Order, the Northeast Order.

6 You know, if -- you know, the balancing  
7 function, if the guy's willing to take milk  
8 regularly, that's worth something to the co-op  
9 and they will give discounts for that kind of  
10 behavior. Yeah, so no problem with that, no.

11 Q. Okay. If it should be determined from an  
12 analysis of the statistics that the Secretary  
13 finds that we have significant volumes of  
14 milk --

15 A. Uh-huh.

16 Q. -- wherever that's not demonstrating a  
17 consistent servicing of the Class I needs of the  
18 market, and came to the conclusion that the way  
19 to address that would be to change the pooling  
20 standards of the Order, you know, that is the --

21 A. Yep.

22 Q. -- that is the shipping standards and  
23 diversion limits, then you would think that  
24 would be an appropriate conclusion to reach?

25 A. Oh, I -- I wouldn't. That goes to the very

1 core of my testimony. I would hope that the  
2 Secretary could find some other instrument that  
3 would have less impact on the small businesses,  
4 the smaller processors, the smaller assemblers.

5 At a minimum, they ought to do an analysis  
6 of that, you know, and kind of a regulatory  
7 flexibility approach and -- and you may -- the  
8 Secretary may be able to answer my questions and  
9 say, "Well, we looked at this and this is the  
10 only way to do it." You know, "We considered  
11 all of this and this is the only way to do it,"  
12 but I think he should consider.

13 Q. Okay.

14 A. That's it.

15 MR. TOSI: Thank you,  
16 Dr. Cotterill. I appreciate it.

17 THE WITNESS: Thank you.

18 MR. TOSI: One more question.

19 Excuse me, I have one more.

20 BY MR. TOSI:

21 Q. Is it your opinion that this proceeding is  
22 an example of administrative fiat?

23 A. Yes. I -- I guess maybe my law's not  
24 perfect. I'm not a lawyer, I'm an economist,  
25 but I think this is a rulemaking and regulatory

1 process and in graduate school my good friend  
2 Alfred Conn at Cornell, he taught a class on the  
3 economics of regulation, a volume book. You  
4 either have tough antitrust laws to promote  
5 pricing efficiencies and effective competition  
6 or you regulate.

7         And this is not a regulatory agency  
8 designed to deal directly with market power.  
9 This is a regulatory agency, a regulatory effort  
10 designed to deal with the whole problem of  
11 pricing fluid versus manufacturing milk in a  
12 spatial market. That's what it started as in  
13 the '20s and then in the '30s with the marketing  
14 act that went under the Order.

15         So it's to deal with the externalities  
16 related to the nature of the product. So it's  
17 not directly to deal with market power. No,  
18 it's not that way, but it is a -- it is an  
19 administrative regulatory agency that influences  
20 the performance of the industry by  
21 administrative fiat. And all I'm saying is that  
22 if you can avoid disadvantaging competition in  
23 the industry, get more flexibility to smaller  
24 assemblers and handlers while still achieving  
25 the goals of the '37 act, you should do that.

1 Q. Okay. I mean, if we found a way to -- some  
2 other method --

3 A. Yep.

4 Q. -- on the basis of this record to factor --  
5 come up with some factor to deal with  
6 independent and small cooperatives, I mean,  
7 through this same process, then wouldn't that be  
8 administrative fiat then?

9 A. It would, indeed, but you're not using  
10 administrative fiat to create market power.  
11 You've found another way to go at it and you've  
12 avoided the market power. The Chicago School --  
13 I'm usually from Wisconsin, but the Chicago  
14 School, you know, in this area of economics,  
15 they maintain that the only source of market  
16 power and evil in the markets is regulation by  
17 people such as you. Usually I'm on the other  
18 side with Chicago, but today I'm actually  
19 enjoying arguing for Chicago.

20 MR. TOSI: Well, thank you.  
21 I've been accused of fiat before, so that's  
22 good.

23 THE WITNESS: Oh, you have?

24 MR. TOSI: Thank you. I  
25 appreciate your testimony.

1                   JUDGE DAVENPORT:   May Dr. Cotterill  
2   be excused?  Apparently so.  Dr. Cotterill,  
3   thank you for being here --

4                   THE WITNESS:        My pleasure.

5                   JUDGE DAVENPORT:  -- and your  
6   testimony.

7                   MR. STEVENS:         Thank you for  
8   coming.

9                   JUDGE DAVENPORT:   I have had a  
10   request to allow Mr. Steiner to address us.  
11   Mr. Steiner, why don't you come forward.  You  
12   have a statement as well?

13                  MR. STEINER:        Yes, Your Honor.  
14   My name is Eddie Steiner, and I'm from Smith  
15   Dairy Products Company and I would like to share  
16   a statement.

17                  JUDGE DAVENPORT:  Do you have the  
18   statement with you in written form?

19                  MR. STEINER:        I do.

20                  JUDGE DAVENPORT:  Why don't you give  
21   me a copy and the other copies to the court  
22   reporter.

23                  MS. TAYLOR:         She needs three  
24   more copies.  She only got one copy.

25                  JUDGE DAVENPORT:  Mr. Steiner, do you



1 have three more for the court reporter?

2 MR. STEINER: Three more, no.

3 JUDGE DAVENPORT: Perhaps this table  
4 is supplying her.

5 MR. STEINER: All right. Who's  
6 got the one with my initials on it?

7 JUDGE DAVENPORT: Would you raise  
8 your right hand?

9 (Thereupon, Mr. Steiner was affirmed  
10 by Judge Davenport.)

11 (Thereupon, Exhibit 32 of the Mideast  
12 Federal Milk Marketing Order hearing  
13 was marked for purposes of  
14 identification.)

15 JUDGE DAVENPORT: Very well. Have a  
16 seat. Mr. Steiner, your statement has been  
17 marked Exhibit 32 for identification.

18 Would you give us your statement,  
19 please?

20 MR. STEINER: My name is Eddie  
21 Steiner. I am employed by Smith Dairy Products  
22 Company and am the person primarily responsible  
23 for Smith Dairy's milk handling program. I do  
24 not consider myself an expert on Federal Orders.  
25 My testimony today is on behalf of Smith Dairy

1 an its subsidiary Wayne Dairy Products,  
2 Incorporated of Richmond, Indiana.

3 I also believe that the views  
4 expressed in this testimony are consistent with  
5 the desires of the vast majority of independent  
6 producers who ship their milk to Smith Dairy.  
7 However, the positions our company takes today  
8 have not been reviewed with every independent  
9 Smith producer, nor with the majority of Smith  
10 producers and I have not been appointed or  
11 elected by these producers to represent their  
12 views.

13 My belief that this testimony  
14 represents the majority viewpoint of producers  
15 shipping to Smith's is based on numerous phone  
16 calls received from and personal conversations  
17 with Smith producers and haulers over the past  
18 several years, and with several producers who  
19 contacted me personally subsequent to the  
20 announcement that this hearing was being held.

21 Company background. As background,  
22 Smith Dairy operates two handling plants, both  
23 located in the Mideast Order. The first plant  
24 is in Orrville, Ohio, which is in the northeast  
25 portion of the state, about an hour's drive

1 south of Cleveland, and 20 minutes  
2 east/northeast of here. Smith's second plant is  
3 in Richmond, Indiana, which is on the eastern  
4 edge of Indiana straight west of Dayton and  
5 Columbus.

6                   At Orrville, Class I sales account  
7 for approximately 71 percent of the volume with  
8 Class II contributing about 14 percent. At  
9 Richmond, Class I sales account for about 70  
10 percent of the volume with Class II at about 15  
11 percent. Thus, Class I and Class II sales in  
12 total account for about 85 percent of the sales  
13 volume at each of our plants.

14                   Smith Dairy employs about 325 people  
15 at Orrville, 100 people at Richmond and 70  
16 people at 5 distribution branches in Ohio  
17 localities. Company-wide employment averaged  
18 about 490 persons in 2004 including seasonal and  
19 part-time workers.

20                   The majority of milk supplied to  
21 Smith's two handling plants comes from  
22 independent producers, farms that are not  
23 members of a cooperative. In December of 2004,  
24 213 producers supplied 80 percent of the milk  
25 receipts at Orrville. An additional 3 percent

1 of December's volume was supplied from our  
2 Richmond plant surplus, with the remaining  
3 balance of receipts supplied by the DFA  
4 cooperative.

5           We believe our producer base has  
6 similar characteristics to the overall producer  
7 base in Order 33 as most of our farms are small  
8 entities. The average monthly milk shipped by  
9 each Orrville producer was about 108,000 pounds  
10 in December.

11           At Richmond, 94 percent of its  
12 December milk receipts were supplied from 78  
13 independent producers located primarily in  
14 eastern Indiana and western Ohio with the  
15 remainder received from DFA. In addition, to  
16 balance its milk supply and demand, the Richmond  
17 plant diverted approximately 13 percent of its  
18 independent producer milk in December.  
19 Approximately two-thirds of the diversions were  
20 sent to our Orrville, Ohio plant for bottling  
21 with the remainder sent to other Mideast area  
22 plants.

23           In 2004 Smith Dairy's Orrville plant  
24 balanced excess milk supplies by diverting an  
25 average of 4 percent of its independent milk

1 supply to a Mideast Order cheese plant with  
2 monthly amounts ranging from less than 1 percent  
3 to just under 7 percent. Smith Dairy's Richmond  
4 plant also diverted some of its non-member milk  
5 supply with portions ranging from zero to 9  
6 percent diverted to our Orrville, Ohio facility  
7 and zero to 16 percent diverted to other Mideast  
8 Order outlets in Ohio, Indiana and Michigan.  
9 Monthly diversions of Richmond's independent  
10 milk supply averaged 9 percent in 2004.

11           We have a statement of support for  
12 the conceptual intent of Proposals 1 through 8  
13 as we understand them. In relation to the  
14 primary matters being heard at this hearing,  
15 those of pooling performance requirements, the  
16 ability to simultaneously pool on both the  
17 Mideast Order and a State Order and voluntary  
18 depooling due to pricing anomalies, Smith Dairy  
19 supports the expressed intent of Proposals 1  
20 through 8 to address these practices which have  
21 resulted in reduction of producer pay price in  
22 the Mideast Order. We consider such practices  
23 to be manipulative of the Order and harmful to  
24 the producers located in the Order area who  
25 consistently serve this Order and he

1 marketplace.

2           We believe that pool riding, also  
3 referred to as paper pooling, and voluntary  
4 depooling for the purpose of taking economic  
5 advantage of short-term price inversions are  
6 materially harmful to producers in the Mideast  
7 Order including independent producers supplying  
8 Smith Dairy's plants.

9           Rather than speak in specific support  
10 of any of the individual Proposals 1 through 8,  
11 Smith Dairy urges the Secretary to amend Mideast  
12 Order provisions in such a manner as to  
13 eliminate, to the fullest extent possible, those  
14 referenced practices which result in dilution of  
15 the Order 33 PPD. We, therefore, request the  
16 Department to modify the performance standards  
17 and rules regarding dual pooling and depooling  
18 in such a way as to limit milk pooled on the  
19 Mideast Order to that milk which continuously  
20 supplies regulated plants within the Order area  
21 and to require continuous pooling of such milk  
22 on the Order.

23           We recognize that such rule  
24 construction would need to allow for significant  
25 changes in market conditions, either marketwide

1 or potentially with an individual handler or  
2 supply organization. As one example, a  
3 significant shift in Class I volumes triggered  
4 by a change in customer base should be able to  
5 be accommodated under the revised rules in such  
6 a way as to not preclude a supplier or handler  
7 from being able to pool milk to meet those  
8 needs. We believe the Department should retain  
9 the right to make such adjustments on a specific  
10 case basis as it deems appropriate.

11 We have a statement in opposition to  
12 Proposal 9, transportation credits. On another  
13 matter, Smith Dairy wishes to comment on  
14 Proposal 9 which would establish a  
15 transportation credit provision on some milk  
16 delivered from farms to pool distributing  
17 plants. We believe transportation credits would  
18 further reduce producer pay prices, that such  
19 credits are unnecessary in the Mideast Order and  
20 would likely create significant administrative  
21 burden for the Department with resulting costs  
22 that would need to be borne in some manner by  
23 the dairy sector. We believe the Department  
24 should recognize that physical movement of Class  
25 I milk within the Mideast Order is more a

1 handler issue than a producer issue and ask the  
2 Department to consider the following.

3           First, the vast majority of Class I  
4 milk sales are the result of producer milk being  
5 transported originally from the farm to the  
6 handler and then on to the point of retail sale.  
7 The proposed transportation credit speaks to the  
8 segment of transportation where milk moves from  
9 producer to handler, but is silent on the  
10 segment where milk moves from handler to point  
11 of retail sale.

12           There are several problems with such  
13 an approach. The movement of milk from producer  
14 to handler occurs in bulk tankers which can  
15 efficiently transport larger quantities than can  
16 be accommodated by vehicles moving packaged  
17 product from handler to retail outlet. The  
18 ability to move milk efficiently from the farm  
19 to Class I handlers supplying the Mideast Order  
20 is demonstrated by the regular patterns of milk  
21 movement that have developed in the marketplace.

22           For example, Smith Dairy's Orrville,  
23 Ohio plant receives the majority, though not  
24 all, of its independent producer milk from farms  
25 located within 75 miles of its plant. While we



1 don't have a precise breakdown, we know that  
2 about 23 percent of our daily patron milk is  
3 transported between 50 and 90 miles to reach our  
4 Orrville, Ohio plant.

5           At the same time, transportation  
6 costs for delivery of product from our Orrville  
7 plant to its retail destination are substantial.  
8 A fair portion of our customer base is located  
9 in the greater Columbus area and points west of  
10 Columbus. We have customers located throughout  
11 Ohio including the northwest and southwest  
12 corners of the state, and a few wholesale  
13 delivery customers across state lines. As a  
14 result, about 44 percent of our Class I milk  
15 sales are to delivery points in excess of 75  
16 miles from our bottling plant.

17           The same is true for our Richmond,  
18 Indiana bottling facility where over one-third  
19 of its independent producers are located more  
20 than 50 miles from our plant. We should note,  
21 however, that at Richmond no current independent  
22 producer is located more than 75 miles from our  
23 plant. On the delivery side, approximately 37  
24 percent of Richmond's Class I sales are  
25 transported to outlets more than 70 miles from

1 the bottling plant.

2           We believe similar distance issues  
3 are faced by quite a number, if not most, of the  
4 Class I handlers in the Mideast Order.  
5 Sometimes these conditions are related to supply  
6 relationships with large multilocation  
7 customers; sometimes simply from competitive  
8 market conditions. Various examples can be  
9 cited from general industry knowledge of current  
10 market conditions and relevant previous  
11 testimony and exhibits from this hearing.

12           A few such examples are a large  
13 supermarket chain in northern Ohio being served  
14 from a plant in Sharpsville, Pennsylvania, (with  
15 some raw milk apparently moving from the  
16 Wayne/Medina County, Ohio area to Sharpsville,  
17 and some bottled milk moving from Sharpsville to  
18 Medina County, Ohio.)

19           Another example, a large supermarket  
20 chain in the greater Detroit area being served  
21 with milk from Canton, Ohio. A supermarket  
22 chain located around the State of Ohio being  
23 served by a plant in Newark.

24           Many school districts around the  
25 State of Ohio are served with milk that has been

1 bottled at a point more than 75 miles distant  
2 from the school. The same holds true for many  
3 restaurants, hospitals, nursing homes and other  
4 points of Class I disposition.

5           Thus, each Class I handler plant has  
6 its own set of dynamics when it comes to  
7 proximity to its milk supply and to its  
8 customers. In some case, a handler will be  
9 located generally closer to its supply base than  
10 to its customer base. In other cases, the  
11 reverse will be true. Yet, in many cases and  
12 with almost constant frequency, Class I handlers  
13 in Order 33 compete against each other  
14 regardless of their particular set of  
15 circumstances relative to location of milk  
16 supply and customer base.

17           The geographic location of a  
18 particular handling plant is a handler decision.  
19 If a handler chooses to locate a plant in  
20 proximity to supply base and at a distance from  
21 their customer base or vice versa, close to  
22 their customer base, but at a distance from  
23 existing milk supplies, that is a handler  
24 decision. Either way, the handler's business  
25 model needs to account for total transportation

1 costs from farm to customer market.

2           A second point to be considered  
3 relative to the handler nature of the  
4 transportation credit issue is that of milk  
5 supply agreements. A number of handler plants  
6 in this Order have milk supply agreements,  
7 sometimes full supply agreements, with a given  
8 agency or cooperative. This appears to be true  
9 for a number of the plants in the southern Ohio  
10 region. These supply agreements are the result  
11 of two parties, a milk supplier and a milk  
12 handler determining that it is in the best  
13 interests of their respective entities to enter  
14 into such an arrangement.

15           These entities have, through process  
16 of negotiation or other price discovery methods,  
17 determined the fees that the supplier will  
18 charge and the handler will pay for performance  
19 according to the supply agreement. The  
20 financial terms of those agreements must have  
21 been acceptable to both parties or one or both  
22 parties would not have entered into such  
23 agreement. We do not know the particulars  
24 specified in the existing supply agreements, but  
25 we are aware that across the industry some

1 supply agreements specify how additional costs,  
2 foreseen or unforeseen, should be handled.

3           For example, if a handler needs more  
4 milk than contracted for, he may have to pay  
5 additional transportation costs, or on a spot  
6 basis costs which could include what are  
7 commonly known as give up fees. And some raw  
8 material -- some raw milk suppliers have added  
9 or negotiated fuel surcharges during periods of  
10 high fuel costs.

11           We believe that if a party to such a  
12 raw milk supply agreement now finds that the  
13 fees involved are not acceptable, it should be a  
14 matter handled within the context of that supply  
15 agreement by the two entities directly party to  
16 that agreement. The impact of Proposal 9 in  
17 situations where there are supplier agreements  
18 of the nature just described, would be to  
19 introduce additional parties to share in the  
20 cost of the agreement negotiated between the  
21 original two parties. In fact, Proposal 9 would  
22 require producers whose milk never serves that  
23 particular handler's needs to subsidize the cost  
24 of the supply agreement that has been made.  
25 This reduces the pay price for producers not

1 involved in the supply agreement, something that  
2 we do not believe to be appropriate.

3           Proposal 9 could also potentially  
4 have another harmful unintended consequence.  
5 That consequence would be that a Class I handler  
6 located in the southern part of the Mideast  
7 Order could be able to have a portion of its  
8 total transportation cost for milk, the cost  
9 from farm to dairy to store, subsidized and this  
10 could result in a competitive advantage for that  
11 Class I handler over other Class I handlers who  
12 serve the same milk consumption market.

13           In other words, a Class I handler  
14 located in northern Ohio and supplying accounts  
15 in southern Ohio may be able to compete  
16 effectively today, in the absence of  
17 transportation credits, but could find its  
18 ability to compete effectively in southern Ohio  
19 reduced due to the subsidized transportation  
20 cost afforded to a handler located in southern  
21 Ohio. Thus, Proposal 9 risks an  
22 anti-competitive impact in the marketplace  
23 giving a cost average to plants located in  
24 certain geographic areas by transferring some  
25 milk transportation costs away from that

1 handler's supply arrangements.

2           Some of the Proponents of a  
3 transportation credit believe all pooled  
4 producers should share in the transportation  
5 costs of the marketplace. I believe we have  
6 heard testimony to that effect at this hearing,  
7 yet the proposal at hand does not equally  
8 apportion all transportation costs of the  
9 Mideast Market, nor does it preclude such costs  
10 in being inflated due to inefficient movement of  
11 milk or costs incurred as a result of milk  
12 movements not directly benefitting the Mideast  
13 Order area.

14           For example, as we understand the  
15 language of Proposal 9, a supply organization  
16 would not be precluded from shipping milk out of  
17 the Mideast area to meet another area's needs  
18 and then need to transport milk further within  
19 this Order or even from another Order to replace  
20 the milk it shipped out of the order. The  
21 impact of such action could likely be that  
22 transportation credits would be generated for  
23 milk moved to serve the Mideast Order, yet the  
24 root cause of the transportation expense  
25 incurred or credit incurred could have been the

1 original decision to move existing Mideast area  
2 milk to another Order. The end result of such  
3 action is that producers across the Mideast  
4 Order would receive a lower PPD because of  
5 someone's decision to send milk out of the  
6 Mideast Order.

7               Based on all of the above reasons,  
8 Smith Dairy opposes adoption of a transportation  
9 credit provision in the Mideast Order.

10               Emergency situation. Over the past  
11 several years, a number of independent producers  
12 shipping to Smith Dairy's two handling plants  
13 have told us that depooling and paper pooling  
14 practices are causing financial harm to their  
15 farm operations. Events in 2004 appear to show  
16 that the situation is worsening. We believe  
17 such practices have led to conditions that  
18 constitute an emergency situation in the Mideast  
19 Order. We therefore ask the Secretary to  
20 expedite the process of amending these rules.  
21 However, we also recognize that constructing  
22 sound regulation that yields intended results  
23 and avoids material unintended consequences is  
24 not an easy process. As such, we believe the  
25 Secretary should use all resources at the



1 Secretary's disposal to place very high and  
2 constant priority on these matters.

3           Our concluding statement. In  
4 summary, Smith Dairy supports in general the  
5 stated intent of Proposals 1 through 8. Rather  
6 than speaking in favor of certain specific  
7 proposals, we urge the amendment of Mideast  
8 Order regulations in such a way as to  
9 effectively eliminate dual pooling, paper  
10 pooling, also known as pool riding, and  
11 voluntary depooling that takes economic  
12 advantage of price related to class pricing  
13 inversions.

14           Smith Dairy opposes the concept of a  
15 transportation credit where such monies come out  
16 of the pool, and therefore we speak in  
17 opposition to Proposal 9.

18           We express our appreciation to the  
19 Secretary, USDA staff and especially the Mideast  
20 Market Administrator's office for each of their  
21 roles in conducting this hearing and for  
22 providing us the opportunity for input in this  
23 process. Thank you.

24           JUDGE DAVENPORT: Very well.  
25 Objections to Mr. Steiner's statement into

1 evidence? It will be admitted into the record  
2 at this time then. Cross-examination?  
3 Mr. English?

4 EDDIE STEINER

5 of lawful age, a Witness herein, having been  
6 first duly affirmed, as hereinafter certified,  
7 testified and said as follows:

8 CROSS-EXAMINATION

9 BY MR. ENGLISH:

10 Q. Afternoon, Mr. Steiner.

11 A. Afternoon.

12 Q. I want to thank you for an excellent  
13 statement.

14 A. Thank you.

15 Q. Let me ask a couple questions without  
16 trying to get into confidential business  
17 matters, but according to your testimony and  
18 Exhibit 1, which discusses small businesses,  
19 your business averaged 490 employees in 2004,  
20 which is less than the 500 employee threshold.

21 Do you consider yourself a small business  
22 for purpose of this proceeding?

23 A. As we understand what was written in the  
24 published register, we would be a small business  
25 for purposes of this proceeding.

1 Q. And regarding the dairy farmers who are  
2 independent farmers shipping to your plants,  
3 would you know, based upon the payroll that you  
4 do on an annual basis, whether some, most, many,  
5 whatever adjective you would like to give, would  
6 qualify as small businesses, and in that case  
7 the standard is an annual gross revenue of less  
8 than \$750,000?

9 A. Based on my knowledge, I'm sure that over  
10 90 percent of our independent producers in  
11 number would meet that standard.

12 MR. ENGLISH: That's all I have.  
13 Thank you.

14 JUDGE DAVENPORT: Mr. Beshore?

15 CROSS-EXAMINATION

16 BY MR. BESHORE:

17 Q. Good afternoon, Mr. Steiner.

18 A. Good afternoon.

19 Q. I want to ask a couple of questions about  
20 your supply of milk at your plants in Orrville  
21 and Richmond.

22 Are the independent producers who supply  
23 your plant responsible for the cost of  
24 transporting milk from their farms to your  
25 plant?

1 A. Yes.

2 Q. Okay. Do you make the arrangements with  
3 the trucking company that does that, or is that  
4 made directly by the farmers? How does that  
5 work?

6 A. Directly by the producer.

7 Q. Okay. Do you -- when you -- you pay your  
8 independent producers directly, I assume?

9 A. Yes, we do.

10 Q. Okay. Do you check off amounts on their  
11 milk check or assign amounts of the milk check  
12 directly to the company that hauled their milk  
13 to pay the hauler?

14 A. The producer and hauler inform us of the  
15 transportation costs, generally hauling rates  
16 per hundredweight that they have agreed upon,  
17 and generally we are instructed to -- by the  
18 producer to withhold that amount and remit it  
19 directly to their chosen hauler.

20 Q. Okay. Do you know the average cost per  
21 hundredweight that your independent producers  
22 are paying to have their milk delivered FOB to  
23 your plant?

24 A. I do not.

25 Q. Can you tell us anything about that, you

1 know, a range?

2 A. I have personal knowledge in general of  
3 those ranges. I have seen those rates; however,  
4 I was not involved in the negotiation of any of  
5 those rates nor has any individual producer  
6 given me permission to share those rates, so I'm  
7 not comfortable revealing information that  
8 they've negotiated.

9 Q. Okay. So you don't feel like you could  
10 share that range of information for the record?

11 A. I did not think to ask any of our producers  
12 if it would be okay to share those particulars.

13 Q. Are any of them in the room?

14 A. Yes.

15 Q. Would you mind checking with them?

16 THE WITNESS: Is that an  
17 appropriate question?

18 JUDGE DAVENPORT: It's appropriate if  
19 you wish to answer it.

20 THE WITNESS: May I ask you a  
21 question first?

22 BY MR. BESHORE:

23 Q. Yeah. You might not get an answer.

24 A. Do you know where I could get a good  
25 attorney? I'm just looking around the room and

1 I'm looking for heads nodding and I'm not going  
2 to identify individual producers.

3 Q. I don't want any individual producers.

4 A. I'm just looking for an indication yes or  
5 no, whether that particular producer would want  
6 me to share a rate, and I'm not seeing -- I see  
7 multiple producers who ship to us, each of the  
8 heads I see moving is shaking their head no, so  
9 they must not be comfortable at this point, sir.

10 Q. Okay. Can you tell us about your payment  
11 program to your independent producers? You  
12 pay -- do you pay more than the minimum Federal  
13 Order values for components and volume of milk?

14 A. Yes. We pay what are commonly called over  
15 order or above order premiums.

16 Q. Okay. And could you tell us what those  
17 over order or above order premiums average to  
18 your independent producers?

19 A. I have some idea. Due to the fact that  
20 there is a competitive nature in our sourcing  
21 our supply with some parties who are in this  
22 room, I'm not comfortable divulging that. It  
23 would essentially share what our over order cost  
24 is, what premiums we're paying. Someone who  
25 would want to cannibalize that milk supply would

1 know what we're averaging out there in the  
2 marketplace.

3 Q. Do you think there are fieldmen out there  
4 that check that information out? You have field  
5 staff yourself, do you not?

6 A. The answer to your --

7 Q. Employed by your plants?

8 A. The answer to your first question is yes.

9 I think there are field -- as you know. And the  
10 answer to the second question is yes, we do have  
11 field representative staff.

12 Q. And they -- for competitive reasons, they  
13 check what your competitors are paying other  
14 dairy farmers so you can be aware of that, do  
15 they not?

16 A. I have received reports that would seem to  
17 indicate that they were either checking or were  
18 given that information, learned it somewhere.

19 Q. Okay. Well, as a good business, you would  
20 like to know what your competitors are paying  
21 their suppliers --

22 A. Yes, sir.

23 Q. -- so you could keep yours in line. I've  
24 heard it reported that, you know, Smith Dairy  
25 has one of the very best payment programs to

1 producers in the market. Is that correct?

2 A. Thank you.

3 Q. Keep your producers happy?

4 A. We try.

5 Q. Okay. Now, your supplemental supply that  
6 you -- you purchase supplemental supplies at  
7 Orrville, as I understand it, from -- from DFA;  
8 is that correct?

9 A. Yes, sir.

10 Q. Okay. And do you purchase supplemental  
11 supplies on a year-round basis?

12 A. At Orrville we do, yes.

13 Q. Do those volumes fluctuate from month to  
14 month throughout the year?

15 A. There is some fluctuation, yes.

16 Q. Do they -- do the fluctuations tend to  
17 reflect an increase in the fall, around the fall  
18 months of the year versus the demand in the  
19 spring months of the year?

20 A. I am not aware of such a relationship as I  
21 look at our particular business. I would have  
22 to look to see, but I do not believe that our  
23 biggest volume months would tend to be in the  
24 period you're asking about. I can't state that  
25 for an absolute certainty, but I don't believe



1 that's the case.

2 Q. Well, okay. Is it fair to say that DFA  
3 supplies the volumes that you Order and require  
4 from them to balance your needs at Orrville each  
5 month of the year?

6 A. As best I can recall, I'm comfortable  
7 stating that DFA as our, I think you called it  
8 supplemental supplier, does a very admirable job  
9 and makes every effort to supply milk that we  
10 order from them per terms of whatever  
11 arrangement we have with them.

12 Q. Well, thank you.

13 A. You're welcome.

14 Q. You were here while Dr. Cotterill was just  
15 testifying, were you not?

16 A. I was in the room for the vast majority of  
17 the time.

18 Q. Okay. He talked about -- talked a lot  
19 about pooling privileges and pooling regs and  
20 selling them and bartering them and that sort of  
21 thing.

22 A. Yes, he did.

23 Q. Do you have any idea what he was talking  
24 about?

25 A. I think I have some concept of what he was

1 saying goes on or what he believes goes on in  
2 some parts of the market.

3 Q. Has Smith Dairy ever accommodated other  
4 participants in the market by pooling their milk  
5 through your fluid milk plant, through  
6 deliveries to your fluid milk plant?

7 A. We're aware that our supplemental supplier,  
8 DFA, does qualify some of their producers at our  
9 plant during months that require that type of  
10 touch base, which we have no objection to.

11 We have also had milk shipped in on  
12 occasion that was not DFA milk that I believe  
13 the reason that particular load of producers  
14 came in was probably to touch base or pool --  
15 meet the pooling requirement.

16 Q. I gather by your answer that -- well, are  
17 you aware that other fluid milk plants in Order  
18 33 have sole qualification rights, so to speak?

19 A. I have no personal knowledge of that. I  
20 did hear testimony here.

21 Q. In any event, you have not -- Smith Dairy  
22 has not done that?

23 A. The closest thing that I can think of in  
24 our history is that at times where we have  
25 needed to balance out surplus milk, we have

1 contacted plants who might be interested in that  
2 and we have reached some type of financial  
3 arrangement as to what we would receive from  
4 that plant for the milk that we would physically  
5 balance to them. And there have been occasions  
6 where a request has been involved and we have  
7 agreed to, in response, allow during certain  
8 portions of the year some milk to come in in  
9 exchange.

10 Q. Okay. So that's the awareness you have --  
11 you want to sell X loads of milk to X -- to Y's  
12 cheese plant, and they say, "Okay, we'll take  
13 those loads if you buy a number of loads of our  
14 milk at another time"?

15 A. Similar in nature to what you're  
16 describing.

17 Q. You make a comment on page 9 with respect  
18 to transportation credits that I -- that I do  
19 not understand. And this is the last sentence  
20 of the first full paragraph.

21 You say, "Thus, Proposal 9 risks an  
22 anti-competitive impact in the marketplace,  
23 giving a cost advantage to plants located in  
24 certain geographic areas by transferring some  
25 milk transportation costs away from that

1 handler's supply arrangements."

2 In what way do you understand  
3 transportation 9 -- Proposal 9 to favor given  
4 geographic areas, and what geographic areas do  
5 you consider that it favors?

6 A. Our understanding of the risk that is  
7 involved is that if a plant in southern Ohio --  
8 subsequent to implementation of the  
9 transportation credit, if a plant in southern  
10 Ohio has an independent supply base and they  
11 bring milk in more than, I think, 75 miles, less  
12 than 350 or 400, that they could receive  
13 transportation credit for -- for that milk, that  
14 portion of the milk that comes in in some  
15 fashion. And I'm not sure that they have to  
16 remit that back to the producer base. That  
17 would then lower their costs essentially.

18 And also, if there would be a case where a  
19 supply organization owned and operated or had  
20 some type of equity interest in a plant, could  
21 have that situation in southern Ohio, we believe  
22 that the supply organization would be able to  
23 retain those dollars or extract them back from  
24 the plant that they have an equity interest in.

25 Q. If a produce -- if the producers own the

1 plant, they would have the money on both sides?

2 A. You mean the producers through a  
3 cooperative agency?

4 Q. (Counsel nodding head up and down.).

5 A. I believe that they -- this would be  
6 constructing a situation where their advantage,  
7 this anti-competitive advantage would be that  
8 producers not serving their plant, producers not  
9 directly involved in moving that milk would be  
10 subsidizing a portion of their transportation  
11 cost by having that money drawn out of the pool.

12 Q. Okay. My question was, but wouldn't it  
13 work under Proposal 9? Doesn't it work the same  
14 no matter where the plant is located? You seem  
15 to say that certain geographic areas --

16 A. Oh, I'm sorry.

17 Q. -- would have an advantage.

18 A. I misunderstood your question. We used  
19 southern Ohio, northern Ohio as an example, not  
20 as a primary focus for our testimony, but as an  
21 example partly because that was the distinction  
22 that was drawn during extended testimony earlier  
23 in this hearing as an example of where  
24 transportation credits are needed by one of the  
25 Proponents of transportation credits. We just

1 said, well, you're continuing to use that  
2 example, here's what could happen.

3 But I do not intend to imply that it would  
4 only apply in southern Ohio. That same type of  
5 anti-competitive nature could be risked anywhere  
6 within the Mideast Order if we were to put in a  
7 transportation credit and there were handler  
8 plants in this situation.

9 Q. Okay. But the plants would be entitled to  
10 the credit -- or the cooperative supplying the  
11 plant would be entitled to the credit on the  
12 same basis anywhere, at your plant or any other  
13 plant; isn't that correct?

14 A. Geographically?

15 Q. Yes.

16 A. Yes, sir. We agree with that.

17 Q. One other question on page 7. I don't  
18 understand the statement you make at the large  
19 paragraph in the middle of the page. The last  
20 sentence, "The handler's business model needs to  
21 account for total transportation costs from farm  
22 to customer market."

23 Now, my question is if the farmer is  
24 responsible such as at your plant for delivering  
25 milk and incurring the cost of delivery from

1 farm to plant, what -- why does that have to be  
2 accounted for in the handler's business model?  
3 He's getting his milk FOB his plant from his  
4 suppliers, is he not?

5 A. Yes, he is.

6 Q. So what -- what did you mean in that  
7 statement, or is it not correct?

8 A. No. What -- what -- what we were trying to  
9 point out is that we view this transportation  
10 cost issue as a supply chain issue. We view it  
11 from the point of milk production on the farm to  
12 the end delivery point of the bottled cost.

13 The statement that we're making is that no  
14 handler can afford or can successfully sustain  
15 paying a producer a low enough cost that the  
16 producer cannot recover his transportation  
17 costs. So whether it's through an over order  
18 program or another arrangement, every handler  
19 has to somehow offset the producer's  
20 transportation costs or that producer will no  
21 longer choose to ship milk to that handler.  
22 That would be our belief.

23 So therefore, each handler needs to pay,  
24 through its price to the farm or the supply  
25 agency, a price which covers those fees one way

1 or another, as well as the handler needs to  
2 absorb and account for the transportation costs  
3 from its processing plant through whatever  
4 supply chain to the retail outlet.

5 I'm not sure that I'm articulating that  
6 well, but we view it as a total supply chain and  
7 the costs have to be covered.

8 Q. Okay. But you pay your producers all the  
9 same irrespective of what they're paying the  
10 hauler to get their milk to your plant?

11 A. We pay -- if -- in theory, yes. In  
12 practice, no two producers are paid exactly the  
13 same, but they are paid consistently based on  
14 their components and certain other aspects of  
15 the milk they ship to us, such as quality, as an  
16 example.

17 Q. Right. Thank you.

18 A. You're welcome.

19 JUDGE DAVENPORT: Other examination?  
20 Counsel?

21 CROSS-EXAMINATION

22 BY MR. TOM VETNE:

23 Q. Mr. Steiner, my name is Tom Vetne. I'm  
24 here on behalf of White Eagle. How long has  
25 Smith Dairy Products had an independent supplier



1 or primary independent supply?

2 A. At Orrville, Ohio we began an independent  
3 supply in late '97 with one producer, and it has  
4 just gradually grown from there to where it is  
5 today. I do not know how long that's been the  
6 majority of our milk, but it was obviously at  
7 some point substantially after that date.

8 At Richmond, Indiana, when we acquired  
9 Wayne Dairy Products Company and it became a  
10 wholly owned subsidiary of our company in the  
11 spring of '94, it had an existing independent  
12 base, which I believe was a minority of the  
13 milk, but a substantial minority. And over some  
14 period of at least a few years it grew to where  
15 it was a substantial majority of the supply  
16 base.

17 Q. Are there many other handlers like Smith  
18 Dairy Products in this Order that receive their  
19 milk from a primarily independent supply?

20 A. I'm not sure I'm qualified to answer that.  
21 I know I've been told by people in the industry  
22 that this Mideast Order has compared to other  
23 Orders an outsized percentage, in other words, a  
24 larger than normal percentage of independent  
25 producers; however, I also believe that some

1 producers who think that they are independent  
2 may actually be marketed through some supply  
3 organization, so I don't know. I've not had  
4 conversations with other plants as to do you  
5 have an independent supply base or -- or a co-op  
6 supply base. I don't feel qualified to answer  
7 that.

8 Q. I'm just asking you based on your personal  
9 knowledge, your personal information.

10 A. I do not have personal knowledge. I think  
11 the question was "are there many." I do not  
12 have personal knowledge of many other plants in  
13 this market Order and the particulars of their  
14 supply.

15 Q. At Orrville how did you obtain your supply  
16 before if it was primarily from independent  
17 sources?

18 A. It was 100 percent from Milk Marketing,  
19 Incorporated until the merger, which must have  
20 been '96 or '97, and then briefly 100 percent  
21 with DFA, who was the successor party to Milk  
22 Marketing, and then we began our independent  
23 milk program.

24 Q. What led you to do that?

25 A. We felt it was in our best interests as a

1 company.

2 MR. TOM VETNE: Thank you.

3 THE WITNESS: You're welcome.

4 JUDGE DAVENPORT: Other cross?

5 Mr. Tosi?

6 CROSS-EXAMINATION

7 BY MR. TOSI:

8 Q. Thank you, Mr. Steiner, for appearing  
9 today. Do you have any idea what your  
10 competitors pay in an over order premium?

11 A. On a dollars-and-cents basis per  
12 hundredweight, no. I do know from our field  
13 services staff and from observing the addition  
14 and subtraction of producers that it is  
15 generally, and most all times, a very  
16 competitive market out there for a handler to  
17 procure additional milk supplied on an  
18 independent basis.

19 In other words, if we go out to a farm  
20 because they call us and they would like to talk  
21 to us, it would be most unusual to find out that  
22 they had not or were not talking to other  
23 potential sources, and the numbers that they  
24 quote to our field staff or to me would seem to  
25 indicate that most everybody's having to pay a

1 fair amount of over order premiums.

2 Q. Okay. When you -- during times of the year  
3 that you have an adequate supply from your  
4 independent producers and you're diverting  
5 milk -- in your statement there I think you said  
6 you diverted milk as far away as Michigan --

7 A. (Witness nodding head up and down.)

8 Q. -- who pays for that, the delivery of that  
9 milk to a plant in Michigan?

10 A. To the best of my knowledge, we pay for  
11 that delivery.

12 Q. Okay. When you purchase supplemental milk  
13 supplies from a cooperative, what do they charge  
14 you for milk?

15 A. What does a cooperative charge us per  
16 month?

17 Q. Yeah.

18 A. If I'm not compelled to divulge that, I  
19 would rather not.

20 Q. I mean, you can talk to me in -- I'm not  
21 asking you to, you know, specify, for example,  
22 \$10 a hundredweight or anything like that, but  
23 just can -- can you tell me something about the  
24 nature --

25 A. How it works?

1 Q. -- of what it is that you pay.

2 A. Up until maybe two years ago the amount  
3 that we were charged was off of a, I think what  
4 the co-op would consider, a published MEMMA  
5 sheet that showed full supply, partial supply  
6 plants and they charged us exactly according to  
7 that.

8 Subsequent to that time, based on  
9 continuing discussions that we had had with them  
10 indicating an interest in trying to negotiate a  
11 known fee for service, we negotiated a portion  
12 of that supplemental milk, which admittedly is  
13 not a lot of milk, but we negotiated a portion  
14 of that supplemental milk on a fixed basis to  
15 come to our plant every day and have negotiated  
16 a rate for that, a fee to be charged for that.  
17 Anything else goes by other terms, whether it's  
18 on a spot market basis or whatever else, but --

19 Q. And in that charge, has that ever been  
20 explained to you as a cost of transporting milk  
21 to your plant?

22 A. Sometimes, yes.

23 Q. Are you of the opinion that you are paying  
24 costs to haul to your plant for that  
25 supplemental milk?

1 A. I am of the opinion that the rate we pay  
2 the provider of our supplemental milk includes  
3 costs to cover transportation, at least over the  
4 course of any given period of time if not on a  
5 particular individual load basis. I am not  
6 aware that in every case that a load has to come  
7 from a greater distance and they choose to  
8 supply it to us whether or not those costs are  
9 fully covered or not by the rate that we are  
10 charged.

11 I mean, we do not have an agreement that  
12 says the co-op will charge Smith Dairy any  
13 amount of dollars that it incurs in sending a  
14 particular load to Smith Dairy. I just believe  
15 we've negotiated a rate that covers their  
16 transportation costs.

17 MR. TOSI: Okay. Thank you,  
18 Mr. Steiner. I appreciate --

19 THE WITNESS: You're welcome.

20 JUDGE DAVENPORT: Other questions for  
21 Mr. Steiner? Mr. Steiner, you may step down.  
22 Ladies and gentlemen, it's after five. There is  
23 a witness that would like to testify, however, I  
24 understand that the hour is -- we are going to  
25 have to vacate the building by -- before 6:00,

1 so I guess I'll listen to whatever.

2 MR. METZGER: I can be quick if  
3 the cross-exam can be quick.

4 JUDGE DAVENPORT: Very well.

5 Mr. Metzger, why don't you come on up.

6 Mr. Metzger, would you raise your right hand?

7 (Thereupon, Mr. Metzger was sworn by  
8 Judge Davenport.)

9 JUDGE DAVENPORT: Very well. Please  
10 tell everybody your name and would you spell  
11 your name for the hearing reporter?

12 MR. METZGER: My name is Erick  
13 Metzger, the last name is M-e-t-z-g-e-r, and I  
14 appreciate Your Honor's indulging me this  
15 evening and I also beg your forgiveness in that  
16 I don't have a written statement to distribute  
17 due to printer problems. However, I just have a  
18 few quick comments to make in regards to  
19 Proposal 2 and I think they are succinct enough  
20 that anyone with note paper could follow along  
21 with what those points are.

22 My title is General Manager of  
23 National All-Jersey. Our business address is  
24 6486 East Main Street, Reynoldsburg, Ohio 43068.  
25 NAJ is a national membership organization with

1 approximately a thousand members across the  
2 country. Roughly 45 percent of those members  
3 reside within the Order 33 marketing area and  
4 its contiguous states. Approximately 90 percent  
5 of these members are small businesses.

6 I have a bachelor's degree in Animal  
7 Science from Purdue University and an MDA from  
8 Franklin University as well. I've been general  
9 manager of NAJ since May of 2004. That's my  
10 latest position in a 20-plus-year career in the  
11 dairy industry. I was also born and raised on a  
12 dairy farm.

13 My statement is to urge the Secretary  
14 to consider how decreasing diversion limits will  
15 negatively impact producers of high solids milk.  
16 Milk Marketing policy, to the larger extent, is  
17 basically formulated considering industry  
18 average milk, which is 3.5 percent butterfat,  
19 2.99 percent protein.

20 That was the reason for my  
21 cross-examination of Mr. Gallagher yesterday, to  
22 point out that Order 33 has a natural pricing  
23 advantage over Order 5 in terms of high solids  
24 milk due to 33 being a Multiple Component  
25 Pricing Order and 5 being a Fat Skim Order.



1                   However, we believe that the proposed  
2 decreases in diversion limits in Proposal 2 will  
3 adversely affect high solids milk. Order 33 has  
4 a robust milk manufacturing industry. High  
5 solids milk serves this industry very well while  
6 also being able to the Class I market and is, in  
7 fact, serving the Class I market through the  
8 Order's current performance standards.

9                   Please understand we are not  
10 advocating that performance standards be  
11 eliminated. We are not advocating that  
12 performance standards be relaxed. We are,  
13 however, opposing enhanced performance standards  
14 for the following reasons. Increased  
15 performance standards will move more high solids  
16 milk from its best use, which is manufacturing,  
17 into its less than optimal use, which is fluid.

18                   Many producers of high solids milk  
19 receive over order premiums for the extra solids  
20 in their milk. In addition to Order 33 minimum  
21 regulated prices, handlers pay these premiums  
22 because of the added processing efficiencies  
23 they realize from using high solids milk. If  
24 more high solids milk is required to be  
25 delivered to distributing plants, the milk

1 manufacturers will not realize the added  
2 efficiencies of this high solids milk and will  
3 have no incentive to pay overloaded premiums for  
4 the extra solids in the high solids milk going  
5 to a distributing plant.

6           If the current over order premiums  
7 are reduced or are limited, producers of high  
8 solids milk will be disadvantaged. In addition,  
9 any high solids milk moved from manufacturing  
10 plants to distributing plants will need to be  
11 replaced in manufacturing plants by lower solids  
12 milk. This will reduce the operating efficiency  
13 and increase the cost of these plants.

14           As a result, the manufacturing plants  
15 in Order 33 could be at a competitive  
16 disadvantage to manufacturing plants in other  
17 Orders that retain more of the available high  
18 solids milk for their manufacturing purposes.

19           Why is that important for the Class I  
20 market? Because a robust manufacturing base is  
21 needed to serve as a reserve supply and serve in  
22 balancing needs of the Class I market.

23           For these reasons, we urge the  
24 Secretary to reject Proposal 2 and not to  
25 disadvantage producers of high solids milk by

1 forcing more of that milk away from its optimal  
2 use and price. Thank you.

3 JUDGE DAVENPORT: Cross-examination?

4 Yes, sir. Mr. Beshore?

5 ERICK METZGER

6 of lawful age, a Witness herein, having been  
7 first duly sworn, as hereinafter certified,  
8 testified and said as follows:

9 CROSS-EXAMINATION

10 BY MR. BESHORE:

11 Q. Mr. Metzger, when you talk about the  
12 advantage -- pricing advantages for Order 33  
13 versus Order 5 for high solids milk because it's  
14 a multiple component pricing Order as opposed to  
15 a Fat Skim, correct?

16 A. That's correct.

17 Q. And the component values are derived from  
18 manufactured products as opposed to fluid  
19 values, correct?

20 A. That's correct. Please understand that  
21 comparison was made to illustrate that not all  
22 milk is created equal or treated equal within  
23 the Federal Order system.

24 Q. But I guess my -- as I understand your  
25 point, the ideal world for high solids producers

1 is to be pooled in an Order where they share the  
2 Class I values, but deliver their milk for  
3 manufacturing purposes where their milk's  
4 particular components can bring the highest  
5 value?

6 A. That would be correct understanding that  
7 the producers of high solids milk understand  
8 they have an obligation to serve the Class I  
9 market, and in Order 33 they are, in fact,  
10 serving the Class I market as outlined by the  
11 terms and provisions of the Order.

12 Q. Okay. Now, you're not -- National  
13 All-Jersey is not a marketing organization under  
14 Order 33, correct?

15 A. No, we are not.

16 Q. Or under any Order, correct?

17 A. That is correct.

18 Q. So your producers for whom you are speaking  
19 are marketing their milk through other channels?

20 A. Correct.

21 Q. And the perfect world for them might be to  
22 be part of an organization that was large enough  
23 that can segregate their milk on segregated high  
24 solids loads to go to manufacturing plants that  
25 pay component premiums while the qualification

1 for the whole unit of the milk comes from  
2 Holstein farms that deliver for the fluid  
3 market?

4 A. That could have its advantages, yes, sir.

5 MR. BESHORE: That's all.

6 JUDGE DAVENPORT: Mr. English?

7 MR. ENGLISH: No, sir.

8 JUDGE DAVENPORT: Any other counsel?

9 Mr. Tosi?

10 MR. TOSI: (Shaking head from  
11 side to side.)

12 JUDGE DAVENPORT: Thank you,  
13 Mr. Metzger. Let's recess for the day, and  
14 what's your pleasure for tomorrow, gentlemen?

15 MR. ENGLISH: What about eight  
16 a.m.? Can we do it at eight?

17 JUDGE DAVENPORT: Our hearing  
18 reporter is shuttering.

19 MR. ENGLISH: 8:30.

20 (Thereupon, the proceedings were  
21 adjourned at 5:19 o'clock p.m.)

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C E R T I F I C A T E

STATE OF OHIO, )  
                  ) SS:  
SUMMIT COUNTY, )

I, Christina A. Arbogast, a Registered Professional Reporter and Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that these proceedings were taken by me and reduced to Stenotypy, afterwards prepared and produced by means of Computer-Aided Transcription and that the foregoing is a true and correct transcription of the proceedings so taken as aforesaid.

I do further certify that these proceedings were taken at the time and place in the foregoing caption specified.

I do further certify that I am not a relative, employee of or attorney for any party or counsel, or otherwise financially interested in this action.

I do further certify that I am not, nor is the court reporting firm with which I am affiliated, under a contract as defined in Civil Rule 28(D).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Akron, Ohio on this 21st day of March, 2005.

\_\_\_\_\_  
Christina A. Arbogast, RPR

My commission expires December 7, 2005.

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