

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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

VOLUME XIX

TRANSCRIPT OF PROCEEDINGS

October 20, 2015

Myra A. Pish, CSR No. 11613

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BEFORE U.S. ADMINISTRATIVE LAW JUDGE
JILL S. CLIFTON

Tuesday, October 20, 2015

9:00 a.m.

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

TRANSCRIPT OF PROCEEDINGS

VOLUME XIX

Reported by:

Myra A. Pish CSR
Certificate No. 11613

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BY: KRISTINE REED, ESQ.

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1 TUESDAY, OCTOBER 20, 2015 - - MORNING SESSION

2 JUDGE CLIFTON: We're back on record on October 20, 2015,
3 it's a Tuesday. It is approximately 9:00 in the morning.
4 We're in Clovis, California. My name is Jill Clifton. I'm the
5 United States Administrative Law Judge whose been assigned to
6 take in the evidence in this milk hearing. Today is Day 19 of
7 the hearing.

8 I would like to take appearances now of others who will
9 be participating today, beginning with those who are
10 representatives of the United States Department of Agriculture,
11 as am I.

12 MR. CARMAN: Good morning, Clifford Carman, C-A-R-M-A-N,
13 Your honor, I'm here on time this morning -- Assistant to the
14 Dairy Administrator, Dairy Programs.

15 JUDGE CLIFTON: Great. And I do want each person to
16 state -- to state what his job is.

17 MR. RICHMOND: Good morning, William Richmond,
18 R-I-C-H-M-O-N-D, with USDA, AMS Dairy Programs, and I'm a
19 Marketing Specialist.

20 MS. MAY: Good morning, Laurel May, L-A-U-R-E-L, M-A-Y, I'm
21 a Marketing Specialist with USDA AMS Dairy Program.

22 MS. ELLIOTT: Hello, I'm Pam Elliott, E-L-L-I-O-T-T, I'm a
23 Marketing Specialist with USDA AMS Dairy Program.

24 MR. SWENSON: Good morning, Virgil Swenson, V-I-R-G-I-L,
25 S-W-E-N-S-O-N, and I'm the Assistant Market Administrator of

1 the Central Order in Kansas City.

2 MR. SCHAEFER: Henry Schaefer, H-E-N-R-Y. S-C-H-A-E-F-E-R,
3 I'm an Agricultural Economist for the Upper Midwest Milk
4 Marketing Order Federal Order 30, on detail with AMS Program.

5 MR. HILL: Good morning, I'm Brian Hill, B-R-I-A-N,
6 H-I-L-L, and I'm an attorney with Marketing Regulatory and Food
7 Safety Programs, Office of General Counsel.

8 MS. BECKER: Good morning, Lauren Becker, B-E-C-K-E-R and
9 I'm an attorney at the Office of the General Counsel.

10 MR. BESHORE: Good morning, Marvin Beshore, counsel for the
11 proponents of Proposal 1, California Dairies, Inc., Dairy
12 Farmers of America, Inc., Land O'Lakes, Inc., that's
13 M-A-R-V-I-N, B-E-S-H-O-R-E.

14 MS. OLIVER THOMPSON: Good morning, Megan Oliver Thompson,
15 Megan is M-E-G-A-N, I'm an attorney with the law firm Hanson,
16 Bridgett, H-A-N-S-O-N, B-R-I-D-G-E-T-T, I'm also co-counsel for
17 proponents of Proposal Number 1.

18 JUDGE CLIFTON: Ms. Oliver Thompson, you were also here
19 yesterday, but I didn't take your appearance right at 9:00. I
20 want to note the fact that you were here.

21 MS. OLIVER THOMPSON: I was here, I just arrived late,
22 unlike Mr. Carman.

23 MR. SCHAD: Good morning, Dennis Schad, S-C-H-A-D. I work
24 for Land O'Lakes.

25 MR. ENGLISH: Good morning, your Honor, my name is Chip

1 English, C-H-I-P, E-N-G-L-I-S-H, I'm a lawyer with the law firm
2 of Davis, Wright, Tremaine, in Washington DC. I'm here
3 representing the Dairy Institute of California, and this
4 morning recognizing the change in government in Canada,
5 Justin Trudeau.

6 MR. SCHIEK: Good morning, William Schiek, S-C-H-I-E-K,
7 Economist with the Dairy Institute of California.

8 MS. KALDOR: Good morning, Rachel Kaldor, R-A-C-H-E-L,
9 K-A-L-D-O-R, Dairy Institute of California.

10 MR. VETNE: John Vetne, representative for Hilmar Cheese
11 Company.

12 MR. DeJONG: James DeJong, D-E-J-O-N-G, I'm the Dairy
13 Policy and Economic Analyst for Hilmar Cheese, a dairy-farmer
14 owned manufacturer of cheese, whey, and milk powder.

15 MR. DRYER: Greg Dryer, D-R-Y-E-R, Senior Vice President
16 Industry in Government Relations for Saputo Cheese USA.

17 MR. ZOLIN: Good morning, Alan Zolin, A-L-A-N, Z-O-L-I-N,
18 I'm a Dairy Consultant representing Hilmar Cheese. I advise on
19 dairy policy and dairy supply chain matters.

20 MS. TAYLOR: Good morning, Sue Taylor, T-A-Y-L-O-R, Leprino
21 Foods, L-E-P-R-I-N-O.

22 MR. COVINGTON: Good morning, my name is Calvin Covington.
23 C-O-V-I-N-G-T-O-N, I'm here representing the Southeast Milk
24 Incorporated and Cobblestone Milk Producers Cooperatives. And
25 when I can get worked in the schedule, I'll be presenting a

1 brief statement on behalf of those two cooperatives.

2 JUDGE CLIFTON: Southeast Milk, Inc., is headquartered
3 where?

4 MR. COVINGTON: In Belleville, Florida; and Cobblestone
5 Milk Producers Cooperative is headquartered in Chatham,
6 Virginia.

7 JUDGE CLIFTON: And how is the town in Florida spelled?

8 MR. COVINGTON: B-E-L-L-E-V-I-L-L-E.

9 JUDGE CLIFTON: And how is the town in Virginia spelled?

10 MR. COVINGTON: C-H-A-T-H-A-M.

11 JUDGE CLIFTON: And, Mr. Covington, if you have a business
12 card, would you give one to the court reporter and give one to
13 the Laurel May, who is on the front row here?

14 MR. COVINGTON: Yes, ma'am, I will.

15 JUDGE CLIFTON: All right. Thank you.

16 MR. BLAUFUSS: Good morning, Rob Blaufuss, B-L-A-U-F-U-S-S,
17 and I'm the Senior Manager of Dairy Risk Management and
18 Economics at the Dean Foods Company.

19 MS. HANCOCK: Nicole Hancock, an attorney with Stole Rives,
20 H-A-N-C-O-C-K, Stole Rives is spelled S-T-O-E-L, R-I-V-E-S, and
21 I represent the California Producer Handlers Association and
22 Ponderosa Dairy.

23 MR. LAI: Good morning. My name is Victor Lai, spelled
24 L-A-I, I'm General Counsel with Producers Dairy Foods, a member
25 of the California Producer Handlers Association.

1 JUDGE CLIFTON: Come back to the podium, if you will,
2 please. So just when I learned to pronounce it "Lee" you are
3 now saying it is "Lai". What happened?

4 MR. LAE: I was trying to avoid confusion. It is casually,
5 personally it is pronounced Victor "Lee" has do with the
6 Chinese pronunciation, in Mandarin it's produced "Lee", in
7 Cantonese it is pronounced "Lie". But I was deferring to the
8 court reporter, just making it simple. I see in the transcript
9 it's -- I see in the transcript it is spelled, it's typed out,
10 Victor Lai, spelled L-A-I and I thought that was -- I wanted to
11 avoid that repetition.

12 JUDGE CLIFTON: No, no, we would like to call you as you
13 would like to be called.

14 MR. LAE: I appreciate that, your Honor, I will proceed
15 with Victor "Lee" but formally spelled L-A-I.

16 JUDGE CLIFTON: Thank you. I noticed that a few days you
17 came up to the microphone and you didn't say your last name,
18 you merely spelled it, and I didn't know what that was about.
19 All right.

20 MR. LAE: One of those cultural generational things. Thank
21 you.

22 JUDGE CLIFTON: All right. Others who are not part of a
23 proponent or opponent team but still are participating, if you
24 would come forward now.

25 MS. REED: Good morning, Kristine Reed, K-R-I-S-T-I-N-E,

1 R-E-E-D, I am with the Miltner law firm, M-I-L-T-N-E-R, and we
2 represent Select Milk Producers.

3 MR. VANDENHEUVEL: My name is Rob Vandenheuvel,
4 V-A-N-D-E-N-H-E-U-V-E-L, General Manager of Milk Producers
5 Counsel here in California.

6 JUDGE CLIFTON: Welcome back. All right. Is there anyone
7 else who has not yet come forward who anticipates testifying
8 today, other than the witness who is already seated in the
9 witness stand? All right. I see no one else at this time.

10 I would now like to turn to the witness in the witness
11 stand. Would you please, I just, at this time, want to have
12 him introduced as part of the participants and then I'm going
13 to have him again, state his name and spell it later.

14 So would you please state and spell your name for us?

15 MR. METZGER: Erick Metzger, E-R-I-C-K, M-E-T-Z-G-E-R,
16 General Manager of National All-Jersey, Inc.

17 JUDGE CLIFTON: Thank you. Now, as Mr. English is wise to
18 note, we should have preliminary matters and announcements. I
19 would like to begin with any from the USDA representatives.

20 MS. MAY: Laurel May with USDA. As always, we welcome you
21 to the hearing and we're glad that you are here with us and
22 hope that you will enjoy your time with us and feel free to
23 participate. We invite anybody who would like to, to witness
24 and to testify in this hearing. And also, anybody who would
25 like to ask questions of the witnesses, please just come on up

1 to the podium if you would like to ask questions, and the Judge
2 will acknowledge you.

3 We are broadcasting this session of the hearing via a
4 live audio feed that can be accessed at www.ams.usda.gov/live.
5 The court reporter is taking official transcripts of this
6 hearing and they will be available approximately two weeks
7 after the end of each hearing week. You can see those on our
8 AMS dairy website.

9 We do have some copies of previous exhibits from this
10 hearing and they are available on the table in the back of the
11 room and we have refreshments that we would invite you to enjoy
12 also.

13 Yesterday, at the end of the day, Mr. Bill Schiek or
14 Dr. Bill Schiek, was testifying. And this morning, before he
15 gets going we're going to hear from Mr. Metzger, and then, with
16 your indulgence, we would like to invite Mr. Covington to
17 testify next.

18 MR. ENGLISH: Good morning, again, Chip English. As we
19 went off the record yesterday we indicated, of course, that we
20 were prepared to have Mr. Metzger start today. And we were
21 aware of the possibility of Mr. Covington, and we are happy to
22 accede to allow him to be next, if that's what he wants to do.
23 After that, this is now sort of the pre-staging that I promised
24 everyday, so I was asked to give a pre-staging if I could.
25 When that is complete, if there are dairy farmers, we would

1 then return Dr. Schiek to the stand to complete his direct
2 exam, and discuss his exhibit. At which point, he would then
3 be made available for cross-examination.

4 If that doesn't complete the day, we do have another
5 witness available, Greg Dryer, whose introduced himself for
6 Saputo, would be prepared to go forward if there is time. I
7 don't think there will be time for yet another witness, and so
8 we don't actually have one necessarily lined up, but we could,
9 if we get to a point where suddenly things are speeding up,
10 we'll try to do what we can. I think realistically with people
11 we have in the room, that's what we have today.

12 And then just jumping forward tomorrow, we would,
13 assuming that we're done with that, and if not, I think we need
14 to interrupt, we would have the extended shelf life shrinkage
15 discussion lined up for first thing tomorrow morning, and we
16 have four witnesses to discuss that issue. The first witness
17 sort of setting the stage, would be Mr. Al Zolin, who has
18 introduced himself. The next witness would be a Mr. Carl
19 Herbein, H-E-R-B-E-I-N. Following Mr. Herbein would be a
20 Mr. Chuck Meek, M-E-E-K, and he's an engineer. So we'll mix up
21 experts here a little bit. And finally, we would have Mr. Mike
22 Suever, S-U-E-V-E-R for HP Hood, and that would be the ESL
23 issue. So doing the best I can to give people advance notice
24 of what our testimony looks like.

25 JUDGE CLIFTON: Now, you mentioned five witnesses and you

1 named four.

2 MR. ENGLISH: If I said five, I meant four, and I
3 apologize.

4 JUDGE CLIFTON: Okay. Very good. That's very helpful. I
5 appreciate the specificity.

6 MR. ENGLISH: I will do my best, without promises that I
7 won't change my mind. I don't think I will. This is very much
8 the line we could go in. And I guess if it gets to the point
9 where Mr. Dryer doesn't get on today, then he would go after
10 the ESL.

11 JUDGE CLIFTON: Are there any other announcements or
12 preliminary matters? I would like to repeat the docket number
13 as this case is known in the Hearing Clerk's office. I failed
14 to do that yesterday, but I know it is on the face page of
15 every transcript. It is, in brackets, [AO], that merely stands
16 for agreements and orders. The docket number is 15-0071.
17 We'll now resume testimony.

18 Mr. Metzger, I'll swear you in in a seated position.

19 Do you solemnly swear or affirm under penalty of
20 perjury that the evidence you will present will be the truth?

21 MR. METZGER: I do.

22 JUDGE CLIFTON: Thank you. Please, again, state and spell
23 your name.

24 MR. METZGER: Eric Metzger. E-R-I-C-K, M-E-T-Z-G-E-R. We
25 have provided 20 copies of my written statement, along with a

1 set of, we provided 20 sets of tables, 1 through 12. I will
2 say the tables should be accessed, should be in order 1 through
3 12. For the most part, my testimony refers to them in that
4 order, there are a couple of times where it got to jump around
5 to something else with another table. I fully appreciate that
6 there are a lot of numbers on these tables, as I reach them in
7 my testimony, I'll try to direct everyone to the numbers on
8 those tables that are most pertinent to this testimony.

9 JUDGE CLIFTON: Now, shall we give your testimony the next
10 number in order? It would be the first of your exhibits?

11 MR. METZGER: I believe that would be appropriate, yes.

12 JUDGE CLIFTON: All right. Then, I believe that is 81; is
13 that correct, Ms. Elliott?

14 MS. ELLIOTT: That's correct.

15 JUDGE CLIFTON: 81 then will be the testimony which starts
16 top line Notice of Hearing on a proposal. And I'm marking that
17 then as Exhibit 81.

18 (Thereafter, Exhibit 81 was marked
19 for identification.)

20 JUDGE CLIFTON: And I'm marking the exhibits as Exhibit 82.

21 (Thereafter, Exhibit 82 was marked
22 for identification.)

23 MR. METZGER: I would say that electronic copies of both
24 the testimony and the tables have been provided to Laurel May
25 electronically, and so if anyone wants them forwarded in that

1 manner, they can simply contact Laurel and get them. Thank
2 you.

3 JUDGE CLIFTON: I appreciate that very much. Sometimes
4 with these densely-populated tables, it is actually easier to
5 look at it online where you can magnify the resolution,
6 whatever you call that. All right. Good.

7 Then you are welcome to proceed in any manner you wish,
8 Mr. Metzger.

9 MR. METZGER: Thank you. And before I start with my
10 prepared testimony, I do want to express my appreciation to
11 everyone involved in this hearing to accommodate my time
12 schedule to work me in on rather short notice. I understand
13 some of you have been here five weeks, and may be here five
14 weeks longer, whereas I'm parachuting in -- and to borrow a
15 phrase from Chip English -- and leaving on short notice, and
16 that's noted and appreciated.

17 Also, I want to thank the Department as one who has not
18 been here for the entire hearing, I want to thank the
19 Department for their efforts to make the hearing available via
20 audio broadcast through the web. It's been helpful to me, and
21 when I'm in remote locations to be able to tune in from time to
22 time and understand what's going on in the hearing in that
23 manner. So it's a definite improvement and something I would
24 encourage for future Federal Order hearings as well.

25 That being said, I'll start in with my prepared

1 testimony. And I am an orphan, I don't have legal
2 representation, so I'll introduce myself.

3 My name is Erick Metzger and I serve as the General
4 Manager of National All-Jersey, Inc. (NAJ), a position I have
5 held for ten years. NAJ's business address is 6486 East Main
6 Street, Reynoldsburg, Ohio, 43068. I was raised on a dairy
7 farm in Indiana, earned a Bachelor of Science degree from
8 Purdue University in 1982 and an MBA from Franklin University
9 in 1999. I was employed by the American Guernsey Association
10 for ten years, including five years as its CEO. I have been
11 with the Jersey organizations for the past 22 years. I have
12 testified and filed comments in conjunction with previous
13 Federal Order hearings.

14 NAJ is a national membership organization of over 1,000
15 milk producers, including nearly 100 members in California, and
16 other people interested in supporting equitable milk pricing.
17 Approximately 20 percent of NAJ members own dairy cattle other
18 than Jerseys. NAJ's milk marketing policy is to advocate for
19 milk pricing programs that will price milk based on its most
20 valuable components in accordance with their use in consumer
21 products. It is this policy that compels NAJ to testify
22 regarding the proposals to establish a Federal Milk Marketing
23 Order (FMMO) in California.

24 Both the Dairy Institute and Cooperatives' proposals
25 for a California FMMO would utilize the multiple component

1 pricing (MCP) structure in place in six of the other ten
2 FMMO's. If adopted, producers will be paid for the pounds of
3 butterfat, protein, and other solids marketed, along with a
4 Producer Price Differential (PPD). The current California
5 Department of Food and Agriculture (CDFA) regulated milk price
6 combines pounds of producer protein and other solids pounds
7 into a single payment for pounds of solids nonfat (SNF).
8 Therefore, the price signal sent by CDFA to producers is that
9 protein and other solids have the same value. Historical FMMO
10 prices clearly show that protein carries far more value than
11 other solids (Table 9). From 2009 through 2014, the monthly
12 FMMO protein price averaged \$2.94 a pound, the other solids
13 price averaged \$0.31 cents a pound, and the Class IV SNF price
14 averaged \$1.22 a pound. A price of \$2.94 per pound of protein
15 is a much stronger incentive to increase protein production
16 than the SNF price of \$1.22 per pound.

17 Now, this is the first time I jump out of order on my
18 tables, and it's very basically very simple. Table 9, page 10
19 of 12, there is a block about two-thirds away across the page.

20 JUDGE CLIFTON: Now, let us find Table 9 before you tell us
21 about it. So it's the long pages, and not too deep in of the
22 long pages.

23 MR. METZGER: Actually, the page that I'm looking at, at
24 the bottom we have the footer 10 of 12.

25 JUDGE CLIFTON: Oh, all right. So once we found Table 9,

1 we look for page 10 of the 12 pages of 9.

2 MR. METZGER: And about two-thirds across the top of the
3 page it is a block of columns labeled FMMO prices, and these,
4 all of the FMMO monthly prices from 2009 through 2014 are
5 included in Table 9. The bottom line on page 10 of 12 has the
6 average prices, and that was the source of protein, the other
7 solids in the Class IV SNF price in my testimony. Just
8 providing a reference to where the -- where those figures came
9 from. And of course, the classes and component prices were
10 provided by USDA Dairy Program.

11 JUDGE CLIFTON: Thank you, this is very valuable.

12 MR. METZGER: We'll become more familiar with Table 9
13 later. Continuing testimony:

14 USDA has recognized the importance of incentivizing
15 protein production dating back to the 1973 report "Milk Pricing
16 Policy and Procedures, Part II, Alternative Milk Pricing
17 Procedures," Report of the Milk Pricing Advisory Committee,
18 U.S. Department of Agriculture. "(3) the long-term goal of
19 maximizing total milk solids consumption consistent with the
20 public interest. Such a policy should price milk to encourage
21 increased production and consumption of milk protein, while
22 valuing milk fat at a level more competitive with its
23 substitutes."

24 JUDGE CLIFTON: Would you like to us make those little
25 changes for the record copy, Mr. Metzger?

1 MR. METZGER: That would be fine, thank you.

2 JUDGE CLIFTON: All right. So, Ms. Elliott, on page 2 of
3 Exhibit 81, we are going to change the word, where is pricing,
4 which line are we in, Mr. Metzger, it's the fourth line, the
5 word "pricing" will instead be "price"?

6 MR. METZGER: Correct.

7 JUDGE CLIFTON: And then the other one is even a tinier
8 change, the last line we'll just add an "S" to "it", so that it
9 says with "its" substitutes.

10 MR. METZGER: Yes, ma'am, thank you.

11 JUDGE CLIFTON: You're welcome.

12 MR. METZGER: In addition, the only practical approach
13 available to producers to increase their SNF production is to
14 increase their protein production. The Market Administrator
15 Office for FMMO 30 (Upper Midwest) publishes an annual staff
16 paper, "Analysis of Component Levels and Somatic Cell Count in
17 Individual Herd Milk at the Farm Level." A summary of these
18 staff papers from 2009 to 2014, which shows the monthly
19 weighted average milk component levels for butterfat, protein,
20 other solids, and SNF, along with the standard deviations for
21 each component, is included as Table 1 to this testimony. Over
22 that six-year time period, the standard deviation of other
23 solids test averaged 0.09 percent, while the standard deviation
24 of protein test averaged 0.16 percent. The difference in the
25 standard deviations of the two components shows that producers

1 can impact protein tests significantly more than other solids
2 tests through their decisions regarding a herd's feeding,
3 genetics, and culling.

4 Data analysis later in this testimony also utilizes
5 Table 1 for the standard deviations of the these components,
6 along with the standard deviations for butterfat (0.29), and
7 SNF (0.18 percent). A data set with distribution that is
8 approximately normal, will have about 68 percent of the data
9 values within one standard deviation of the mean, and about 95
10 percent within two standard deviations. NAJ chose to use milk
11 that is two standard deviations higher than average to
12 represent high component milk and to demonstrate the positive
13 impact that incentivizing production of high component milk can
14 have on the California dairy industry. Later testimony and
15 analysis utilizes the month-to-month protein to SNF ratios from
16 these FMMO 30 annual summaries in order to convert CDFA SNF
17 pounds and tests, to pounds and tests for proteins and other
18 solids which are used in FMMO pricing.

19 And I'll stop there and make a couple of comments about
20 Table 1, understanding that it has the finest print, and I
21 apologize for that. I believe it is the finest print of any of
22 the tables I provide.

23 What I want to do is to draw your attention to the two
24 sets of numbers on this table that are most important to future
25 testimony. The first set of numbers is in the far right hand

1 column with the header 2009 to 2014 average protein to SNF
2 ratio. Each of the previous six months, 2009 through 2014,
3 have their own analysis of protein to SNF. For example, the
4 six years of January average 0.352 as is shown in the upper
5 right hand corner. If you go down that column of numbers, it
6 becomes apparent that the ratio changes from month to month,
7 and this was important as I got back into analyzing the PPD and
8 converting California SNF ratios to estimated California
9 protein levels needed to account for the variation from
10 month-to-month.

11 The second set of numbers that are important are in the
12 lower left hand column, a block of average standard deviation,
13 butterfat, protein, other solids, SNF, that is the average of
14 each of the annual averages for those four components for the
15 six years that are summarized. Okay?

16 Continuing testimony:

17 Protein production is critically important for the
18 California dairy industry. Higher protein milk increases
19 yields of cheese, protein-standardized whey products, skim milk
20 powder and whole milk powder, and also results in less
21 fortification needed for Class 1 products. Examples of each of
22 this situations follows.

23 Cheese Production

24 JUDGE CLIFTON: Shall we make that change on the record
25 copy, Mr. Metzger?

1 MR. METZGER: Yes.

2 JUDGE CLIFTON: All right. Ms. Elliott, at the very bottom
3 of page 2, we're just changing the Class Roman numeral I to
4 Class Arabic 1 as it was meant to be

5 MR. METZGER: And unfortunately, that will be, that
6 correction will be in several other points in this testimony.

7 JUDGE CLIFTON: No problem, but I would like the exhibit
8 to -- although, you know when we look at a 1, it's not, I guess
9 it's, I guess it is assumed to be Arabic unless it has its
10 Roman characteristics, so all right.

11 MR. METZGER: Would you prefer I continue to differentiate?

12 JUDGE CLIFTON: Yes.

13 MR. METZGER: Okay. Very well. From 2009 to 2014, 44
14 percent of California --

15 JUDGE CLIFTON: Now, did you read in the heading? I think
16 it's helpful if you read in the heading at the bottom of
17 Page 2.

18 MR. METZGER: Very well. Heading: Cheese Production.

19 From 2009 to 2014, 44 percent of California's pooled --

20 JUDGE CLIFTON: Go ahead and start it again from 2009 to
21 2014.

22 MR. METZGER: Okay. From 2009 to 2014, 44.7 percent of
23 California's pooled SNF production has been utilized in
24 Class 4b products, cheese and whey (Table 2). Protein's impact
25 on cheese yields is well-documented through the Van Slyke

1 Cheese Yield Formula.

2 A quick comment on Table 2. The only number of
3 significance in here is on page 2, the lower right hand part of
4 the page, average 44.7. The data in this table comes directly
5 from CDFA's website, and all I did was to average the Class 4b
6 SNF usage.

7 Returning to testimony:

8 The Van Slyke Cheese Yield Formula.

9 Cheese Yield = (((Butterfat*.90) + (True Protein *.827 - 0.1))
10 * 1.09)/0.62

11 JUDGE CLIFTON: Mr. Metzger, if I could stop you. I see
12 here something I saw in other formulas in prior testimony, and
13 that is that the little symbol which I would call an asterisk,
14 actually represents a multiplication symbol in this formula.
15 Is that common practice with these milk formulas?

16 MR. METZGER: I'm not sure about milk formulas, but I know
17 it's common practice in the realm in which I work.

18 JUDGE CLIFTON: All right. Is it -- is it a business thing
19 or an economics thing? I had not seen it, or at least had not
20 noticed it.

21 MR. METZGER: I picked it up, actually, from my high school
22 math, 140 years ago.

23 JUDGE CLIFTON: But I am older. So all right. Thank you.
24 That's very helpful. And that's why it's so helpful when a
25 witness will read a formula, because there are things in it

1 that we might not know. All right. Thank you. You may
2 proceed.

3 MR. METZGER: Thank you. Milk pooled in California from
4 2009 to 2014 averaged 3.68 percent butterfat and 8.87 percent
5 SNF. (Again, referring to Table 9.) Using the monthly protein
6 to SNF ratios from Table 1 to convert SNF to protein,
7 California pooled milk averaged 3.09 percent true protein. The
8 Van Slyke cheese yield formula predicts that average component
9 milk in the CDFA pool will yield 10.14 pounds of cheddar cheese
10 containing 38 percent moisture (Table 3). However, milk that
11 contains butterfat and true protein, two standard deviations
12 above average, (4.26 percent fat, 3.41 percent protein)
13 projects to yield 11.52 pounds of cheddar cheese.

14 And that is shown on -- if you take the data in the
15 testimony, and on Table 3, and process it through the Van Slyke
16 Cheese Yield Formula, those are indeed the numbers that are
17 produced.

18 Whey Production

19 Higher protein milk also results in higher protein
20 whey. The Van Slyke formula calculates the amount of protein
21 utilized by cheese, and by default, the amount of protein left
22 in the whey stream. The protein recovery portion of the Van
23 Slyke cheese yield formula, (True Protein * .827 - 0.1)
24 calculates the amount of milk protein that is utilized in the
25 cheese. Subtracting the amount of protein utilized cheese, in

1 the cheese, from the amount of protein in producer milk --

2 JUDGE CLIFTON: Start again and go a little more slowly.

3 MR. METZGER: Very well. Subtracting the amount of protein
4 utilized by the cheese from the amount of protein in producer
5 milk, determines the amount of protein in whey. The Van Slyke
6 cheese yield formula predicts that 100 pounds of average
7 protein milk (3.09 percent) will have 2.55 pounds of protein
8 utilized in cheddar cheese, leaving the difference 0.54 pounds,
9 in the whey stream. 100 pounds of milk with protein two
10 standard deviations higher than average (3.41) will have 2.81
11 pounds of protein utilized in cheddar cheese, leaving 0.60
12 pounds of protein in whey.

13 JUDGE CLIFTON: Now, I think that 3.41 being a percentage
14 is important. So if you don't mind, I would like you to read
15 that sentence again.

16 MR. METZGER: Very well. 100 pounds of milk with protein
17 two standard deviations higher than average (3.41 percent) will
18 have 2.81 pounds of protein utilized in cheddar cheese, leaving
19 0.60 pounds of protein in whey.

20 Whey products are critically important to the
21 California dairy industry. Primary whey products are dry whey,
22 whey protein concentrates (WPC's) and whey protein isolates
23 (WPI's). Dry whey yields are minimally affected by the amount
24 of protein in whey, because dry whey is produced by simply
25 drying liquid whey. Dry whey is not protein standardized.

1 However, the amount of protein in liquid whey does have a
2 direct impact on the yields of protein standardized whey
3 products (WPC's and WPI's).

4 CDFA data on the state's whey product production only
5 differentiates two types of products. All WPC's and WPI's
6 comprise one category and other dry whey products comprise the
7 second category. Given the limitations of the CDFA whey
8 product data, NAJ turned to USDA's NASS Dairy Products Annual
9 Summary which differentiates four categories of whey products:
10 Dry whey, WPC 25.0-49.9 percent protein, WPC 50.0-89.9 percent
11 protein, and WPI's. This NASS report is summarized in Table 4.

12 * From 2009 to 2014, the U.S. produced approximately
13 5.8 billion pounds of dry whey. Assuming a protein
14 content of 12., on a wet basis, approximately 731
15 million pounds of whey protein were used in dry whey.

16 * During the same timeframe, 1.5 billion pounds of
17 WPC, 25.0 to 49.9 percent protein, were produced.
18 Assuming an average protein content of 33 percent, 508
19 million pounds of whey protein were used in WPC 25.0-
20 49.9 percent.

21 * 1.2 billion pounds of WPC 50.0 to 89.9
22 percent protein were produced. Assuming an average
23 protein content of 77 percent, 945 million pounds of
24 whey protein were used in WPC 50.0 to 89.9 percent.

25 * 406 million pounds of WPI were produced. Assuming a

1 protein content of 89 percent, 362 million pounds
2 of whey protein were used in WPI.

3 Nationally the six straight years from -- I'll start
4 again.

5 Nationally, the six years from 2009 to 2014 saw 731
6 million pounds of whey protein used in dry whey compared to 1.8
7 billion pounds of whey protein used in the protein standardized
8 whey products. More whey protein was utilized in whey proteins
9 is utilized -- start again.

10 More whey protein is utilized in protein standardized
11 whey products than in dry whey. Basic milk chemistry implies
12 that higher protein milk produces higher protein whey, which in
13 turn, results in increased yields of the whey, of the protein
14 standardized whey products of WPC and WPI

15 JUDGE CLIFTON: Read that one again, please. You got it
16 right, but I just want it all together right.

17 MR. METZGER: Very well.

18 Basic milk chemistry implies that higher protein milk
19 produces higher protein whey, which in turn, results in
20 increased yields of the protein standardized whey products of
21 WPC and WPI.

22 Milk Powder Production

23 The production of skim milk powder (SMP) and whole milk
24 powder (WMP), both of which are protein-standardized, is
25 increasing and becoming a larger portion of the milk powder

1 market. CDFA produces an annual report, "Annual Dairy Data"
2 which includes the state's production of nonfat dry milk and
3 other dry milk products. Results for the years 2009 to 2014,
4 are summarized in Table 5. Nonfat dry milk is not
5 protein-standardized. Most of the products included in the
6 other dry milk products category are either
7 protein-standardized or have a protein minimum. In 2009, other
8 dry milk products accounted for 13.0 percent of the combined
9 total production of NDM and other dry milk products. By 2013,
10 other dry milk products increased to 45.9 percent of the
11 combined production of NDM and other dry milk products before
12 tapering off to 35.1 percent in 2004.

13 JUDGE CLIFTON: In --

14 MR. METZGER: 2014, yes.

15 USDA's NASS dairy products annual survey provides separate
16 totals for NDM, skim milk powder and whole milk powder. The
17 NASS reports for 2009 through 2014 are included as Table 6.
18 National production of SMP and WMP as a percentage of total
19 milk powder production, is similar to California production.
20 In 2009, NASS reported SMP and WMP represented 15.7 percent --

21 JUDGE CLIFTON: Let me stop you and have you start that
22 sentence again, please.

23 MR. METZGER: In 2009, NASS reported SMP and WMP production
24 represented 15.7 percent of the combined total production of
25 NDM, SMP, and WMP. By 2013, SMP and WMP production had grown

1 to 32.2 percent of the total before declining to 26.8 percent
2 in 2014.

3 Skim milk powder production can serve as a proxy for
4 the other protein-standardized products, including whole milk
5 powder. Table 7 compares the yield of SMP from average and
6 above-average component milk. Average producer milk with 3.68
7 percent butterfat, 3.09 percent true protein, and 5.78 percent
8 other solids, will yield 8.78 pounds of nonfat dry milk (5
9 percent moisture and 35.3 percent crude protein) which in turn,
10 will yield 9.58 pounds of skim milk powder standardized to 34
11 percent crude protein. Crude protein is the international
12 standard for protein-standardized milk powders, and the vast
13 majority of SMP is produced for the export market. Crude
14 protein is 0.19 points higher than true protein, i.e., milk
15 that contains 3.01 percent true protein will contain 3.20
16 percent crude protein. The manufacturing process to produce
17 SMP is as follows:

18 And here we're going to go to Table 7. Basically,
19 what's outlined in the next steps, points 1 through 17, are
20 essentially on Table 7 of walking down through the calculation
21 process of, back to my high school days, I'm showing my work.

22 For the first step is to separate the cream from the
23 skim.

24 JUDGE CLIFTON: So you have already left Table 7?

25 MR. METZGER: No, I am on Table 7. Table 7, steps 1

1 through 17 describe the data that is in Table 7.

2 JUDGE CLIFTON: I see.

3 MR. METZGER: It shows the calculations that get from
4 producer milk through the skim milk powder calculation.

5 So step 1 is to separate cream from skim.

6 2. The separation process cannot isolate all the
7 butterfat in the milk into the cream. Industry standards are
8 that 0.05 percent butterfat will remain in the skim.

9 3. Pounds cream is calculated as --

10 JUDGE CLIFTON: Is that the same as cream pounds, same
11 thing?

12 MR. METZGER: Yes.

13 JUDGE CLIFTON: Okay.

14 MR. METZGER: Cream pounds, which in Table 7 there's a bold
15 header, Cream 40 percent fat, and the first subhead under that
16 is Cream, and the first column says 9.08, I'm describing the
17 calculation to get to that point. Okay?

18 Cream pounds is calculated as:

19 $(\% \text{ butterfat in milk} - \text{percent butterfat in skim}) / \% \text{ butterfat}$
20 in cream.

21 Pounds butterfat in cream equal cream pounds --

22 JUDGE CLIFTON: Let me stop you. I see the divided, it is
23 in point 3 on page 5. It's a little hard to see, because it's
24 in between a close parentheses and a percentage, but I see it
25 there. All right. Thank you. Go ahead.

1 MR. METZGER: Yes, I should have left spaces. Pounds
2 butterfat in cream equals pounds cream time percent butterfat
3 in cream.

4 Cream that contains 40 percent butterfat, by default,
5 contains 60 percent skim.

6 Pounds skim and cream = pounds cream - pounds
7 butterfat.

8 Pounds protein and cream = pounds skim in cream * %
9 protein in skim.

10 Pounds crude protein in cream = pound skim in cream * %
11 crude protein in skim.

12 Pounds SNF in cream = pounds skim in cream * % SNF in
13 skim.

14 Pounds skim available to produce NDM = pounds of milk -
15 pounds of cream.

16 Now we're down to the heading that says Skim After
17 Cream Removal.

18 Pounds butterfat in skim = pound butterfat in milk -
19 pounds butterfat in cream.

20 Pounds protein in skim = pounds protein in milk -
21 pounds protein in skim.

22 JUDGE CLIFTON: In what?

23 MR. METZGER: In cream.

24 JUDGE CLIFTON: Would you read number 12 again?

25 MR. METZGER: Pounds protein in skim = pounds protein in

1 milk - pounds protein in cream.

2 Pounds crude protein in skim = pounds crude protein in
3 milk - pounds crude protein in cream.

4 Pounds SNF in milk = I'm sorry, point 14 again --

5 Pounds SNF in skim = pounds SNF in milk - pounds SNF in
6 cream.

7 Pounds nonfat dry milk (5% moisture) made from skim =
8 pounds SNF in skim/0.95.

9 Crude protein in NDM = crude protein in skim/pounds
10 NDM.

11 And finally, pounds skim, SMP, at 34% protein and 5%
12 moisture = (crude protein in skim/0.34)/0.95.

13 JUDGE CLIFTON: Mr. Metzger, would you go back on page 5,
14 to point 17, and read it one more time for us?

15 MR. METZGER: Very well.

16 Pounds SMP at 34% crude protein and 5% moisture =
17 (crude protein in skim/0.34)/0.95.

18 Essentially, this methodology is taking producer milk,
19 producing, separating the cream, understanding that some of the
20 protein in SNF that is in the producer milk will end up in the
21 cream because of the skim portion of the cream. That let's us
22 calculate the amount of protein SNF that is in the skim portion
23 of the milk, that is available to produce nonfat dry milk and
24 skim milk powder.

25 Using the same methodology, producer milk that is two

1 standard deviations higher than average (4.26% fat, 3.41%
2 protein, 5.9%, 5.96% other solids) will yield 9.18 pounds of
3 nonfat dry milk (5% moisture, 36.7% crude protein) which, in
4 turn, will yield 10.42 pounds of skim milk powder standardized
5 to 34% crude protein. The additional yield of 0.84 pounds of
6 skim milk powder from each hundredweight of higher component
7 milk supports the importance of implementing a pricing program
8 that incentivize's protein production.

9 JUDGE CLIFTON: Now, in your testimony, if you said two
10 standard deviations, is that the equivalent of two standard
11 deviation units?

12 MR. METZGER: It is.

13 JUDGE CLIFTON: Thank you.

14 MR. METZGER: Solids-Not-Fat Requirement for Fluid Milk
15 California has set its SNF requirements for consumer fluid
16 milk at higher, at levels higher than national standards.

17 Citation:

18 ([https://www.cdffa.ca.gov/ahfss/milk_and_dairy_food_safety/milk_](https://www.cdffa.ca.gov/ahfss/milk_and_dairy_food_safety/milk_standards.html)
19 [standards.html](https://www.cdffa.ca.gov/ahfss/milk_and_dairy_food_safety/milk_standards.html)).

20 Ordinarily, whole milk and nonfat (skim) beverage milk
21 do not require fortification to meet California fluid milk
22 standards, since raw producer milk contains enough SNF to meet
23 the California standards for whole milk (8.7 percent) and for
24 nonfat skim milk (9 percent).

25 JUDGE CLIFTON: Now, the sentence as written says solids

1 fortification, and you just read fortification. Is
2 fortification for California milk always meant to be solids
3 fortification?

4 MR. METZGER: Yes, ma'am.

5 JUDGE CLIFTON: Okay.

6 MR. METZGER: But reduced fat (2 percent) milk and low fat
7 (1 percent) milk need to be fortified with more milk solids not
8 fat than cows ordinarily produce.

9 In order to meet California standards, producer milk is
10 fortified with additional SNF by adding condensed skim
11 (primarily) or nonfat dry milk (rarely).

12 While Class -- should be Arabic 1 -- pricing --

13 JUDGE CLIFTON: All right. Let us stop right there and
14 make that correction. We're on page 6 of Exhibit 81, and the
15 second paragraph, second line, has a Roman numeral I that we
16 will change to Arabic 1. Thank you, Ms. Elliott.

17 Mr. Metzger, you may start that sentence again.

18 MR. METZGER: While Class 1 pricing requires processors to
19 pay for the additional SNF pounds, processors are allowed a
20 fortification allowance where the cost of handling the nonfat
21 dry milk and condensed skim used in the fortification process.
22 The amount of the fortification allowance is deducted from
23 pooled receipts before producers are paid. Data from the CDFA
24 Milk Pooling Branch shows that for 2009 to 2014, the annual
25 average of the fortification allowance was \$6,079,931 (Table

1 8).

2 Producer milk that is higher in protein is also higher
3 in SNF and requires less fortification to meet the California
4 fluid milk standards, again, Table 8. CDFA's annual report,
5 "Summary of Pool Pounds, Component Pounds, Producer-Handler
6 Exempt Pounds" includes the pounds of SNF used in Class 1.

7 JUDGE CLIFTON: And Ms. Elliott, would you make that
8 change? Thank you.

9 MR. METZGER: -- products, along with the pounds of fluid
10 carrier in Class 1.

11 JUDGE CLIFTON: And Ms. Elliott, will you make that change?
12 Thank you.

13 MR. METZGER: CDFA's report of "Summary of Fortification
14 and Transportation Allowance" includes the pounds of SNF used
15 for fortification. NAJ used the following calculations to
16 determine how much less fortification would be required by
17 using higher component producer milk.

18 And this is where we are referring to Table 8, and I
19 realize that that the particular column headings of A, B, C, D,
20 etcetera, did not print. So if you will follow along with me
21 on Table 8, there is a general heading "Fortification" has
22 subheadings, "Powder, Condensed Skim" that is direct data from
23 CDFA, as is "Fortification SNF Pounds", the next column
24 "Fortification Dollars" and the next column "Total Class 1
25 SNF."

1 Now, when we get to the next column, it is where my
2 calculations come in beginning with point 1.

3 Pounds Class 1 SNF in producer milk.

4 JUDGE CLIFTON: Let me stop you. Ms. Elliott, would you
5 please make that change on page 6, his number 1 point?

6 MS. ELLIOT: Yes.

7 JUDGE CLIFTON: Thank you. And read it again, if you will,
8 Mr. Metzger.

9 MR. METZGER: Monthly Class 1 --

10 JUDGE CLIFTON: Monthly what?

11 MR. METZGER: SNF.

12 JUDGE CLIFTON: Start again, please.

13 MR. METZGER: Monthly pounds, Class 1 SNF in producer milk
14 (Column J)= total pounds Class 1.

15 JUDGE CLIFTON: Ms. Elliott?

16 MS. ELLIOTT: Yep.

17 JUDGE CLIFTON: Thank you.

18 MR. METZGER: SNF (Table 9) - pounds SNF from
19 fortification.

20 JUDGE CLIFTON: I think it would be helpful, since the
21 columns don't have the headings on Table 8, for us to put them
22 there now on our copies, if you don't mind, Mr. Metzger,
23 because you have, for example, a reference to Column J and we
24 could put the J there.

25 MR. METZGER: Yes, that is the only time that I reference

1 an Alpha column. The rest of the references are simply, if you
2 look at, for example, on point 2, % SNF in producer skim, that
3 is the heading of the next column. And I believe I follow that
4 process across the rest of the spreadsheet. So that the
5 heading of the column is, each of these points describes a
6 column, and the introduction of that particular point is the
7 actual heading of those columns.

8 JUDGE CLIFTON: All right. So there is only a reference
9 then to Column J, so as we look at Table 8, that Column J has
10 what heading as we can see it on the table?

11 MR. METZGER: Class 1 SNF from producer milk.

12 JUDGE CLIFTON: All right. I'm going to suggest,
13 Ms. Elliott, that you label that Column J. Are you looking at
14 it now?

15 MS. ELLIOTT: Yes.

16 JUDGE CLIFTON: And I'm going to do that on my copy as
17 well.

18 MS. ELLIOTT: For both pages?

19 JUDGE CLIFTON: Let's see, this has yes for both pages,
20 please. Thank you. Thank you, Mr. Metzger. You have
21 completed reading only number one; is that correct?

22 MR. METZGER: That's correct, I wanted to make sure that we
23 were ready to proceed.

24 JUDGE CLIFTON: You may resume.

25 MR. METZGER: Point 2 is the next column. % SNF in

1 producer skim milk=pounds producer SNF/pounds producer skim
2 milk.

3 Point 3 is the next column. Pounds producer skim milk in
4 Class 1.

5 JUDGE CLIFTON: Ms. Elliott, thank you.

6 MR. METZGER: = pounds producer SNF + pounds fluid carrier
7 in Class 1.

8 JUDGE CLIFTON: Thank you, Ms. Elliott.

9 MR. METZGER: Point 4 is the next column. SNF in producer
10 milk --

11 JUDGE CLIFTON: Start again.

12 MR. METZGER: Point 4. % SNF in producer milk that is two
13 standard deviation units higher than average producer milk =
14 percent SNF in producer milk + (2*0.18), referring back to
15 Table 1 for this standard deviation unit.

16 Point 5 is the next column. SNF pounds in producer milk +
17 2 SD = pounds producer skim * % SNF in producer milk + 2 SD.
18 And in this case, and in other cases as we get further into the
19 testimony, when I refer to producer milk + 2 SD, that is a
20 label, not necessarily a mathematical equation in of itself.
21 It is just the way I chose to label the higher component milk.

22 Okay. Point 6. Pounds SNF fortification required with
23 producer milk + 2 SD = pounds Class 1 SNF --

24 JUDGE CLIFTON: Ms. Elliott? Thank you.

25 MR. METZGER: - pounds SNF in producer milk + 2 SD.

1 Point 7. Fortification allowance required with producer
2 milk plus 2 SD SNF = pounds SNF fortification + 2 SD SNF * 9.87
3 cents per pound.

4 And finally, the last column,

5 Point 8. Fortification savings with producer milk + 2 SD
6 SNF = fortification allowance - fortification allowance
7 required with producer milk + 2 SD.

8 NAJ calculated the monthly impact on the amount of
9 fortification required that producer milk had been two standard
10 deviations higher than average milk. Annually from 2009
11 through 2014, producers would have saved an average of \$1.7
12 million per year in Class 1 --

13 JUDGE CLIFTON: Ms. Elliott?

14 MS. ELLIOTT: Yes.

15 JUDGE CLIFTON: Thank you.

16 MR. METZGER: Fortification allowance from using higher
17 component milk.

18 Summary of Importance of Protein to the California Dairy
19 Industry

20 Changing California's regulated milk pricing to pay
21 separately for pounds of protein and other solids will be an
22 improvement over the current system which pays for pounds of
23 SNF. Producers will be compensated for protein's greater value
24 and will be incentivized to increase their protein production.
25 The California dairy industry will benefit from increased

1 protein production through:

2 * Increased cheese yields.

3 * Increased yields of protein standardized whey products,
4 WPC's and WPI's, more whey protein is utilized when WPC's and
5 WPI's when it is utilized in dry whey.

6 * Increased yields of protein standardized milk powders,
7 primarily SNP and WMP. Production of SNP and WMP is increasing
8 as a percentage of the milk powder market and this trend is
9 expected to continue.

10 * Reduced need and expense of fortifying Class 1 --

11 JUDGE CLIFTON: Ms. Elliott?

12 MS. ELLIOTT: Yes.

13 JUDGE CLIFTON: Thank you.

14 MR. METZGER: -- products with SNF from condensed skim and
15 NDM.

16 JUDGE CLIFTON: I think we need a stretch break. This is
17 intense. Mr. Metzger is working very hard and the court
18 reporter is, too.

19 MR. METZGER: And it's about to get more intense. We're
20 heading into the mother load.

21 JUDGE CLIFTON: All right. So where we're stopping, we're
22 about to read a heading in the bottom one-third of page 7, and
23 let us take, I think we should take 15 minutes. Please be back
24 and ready to go at about 10:23, if you will. 10:23.

25 (Whereupon, a break was taken.)

1 JUDGE CLIFTON: We're back on record at 10:24. We're
2 resuming at the bottom of page 7, a new heading.

3 MR. METZGER: Analysis of Applying the Producer Price
4 Differential to Components

5 The six FMMO's utilizing multiple component pricing pay
6 producers for the Class III value of their milk (total pounds
7 of butterfat, protein, and other solids) along with a PPD to
8 account for the difference in the value of pooled Class Roman
9 I, II, and IV milk from the Class III value.

10 JUDGE CLIFTON: Now, Mr. Metzger, you won't have to point
11 out whether it's Roman or Arabic now. I mean, it might help
12 for the people in the audio feed, so you may, if you choose to,
13 but for the court reporter's purposes, she'll have this in
14 front of her and she'll -- you can just say Class III if you
15 would like.

16 MR. METZGER: Very well, thank you.

17 JUDGE CLIFTON: Now, you left out tiny word you left out
18 the word "sold" in the parentheses, so if you don't mind, I
19 would like you to take that sentence again.

20 MR. METZGER: Okay.

21 The six FMMO's utilizing multiple component pricing pay
22 producers for the Class III value of their milk (total pounds
23 of butterfat, protein, and other solids sold) along with a PPD
24 to account for the difference in the value of pooled Class I,
25 II, and IV milk, from the Class III value. The PPD is

1 calculated on a per hundredweight basis of all pooled milk, and
2 it can be positive or negative, although PPD's are positive the
3 vast majority of the time.

4 The Cooperatives' proposal for a California FMMO calls
5 for the PPD to be assigned to the component values --

6 JUDGE CLIFTON: Start that sentence again, please.

7 MR. METZGER: The Cooperatives' proposal for a California
8 FMMO, calls for the PPD value to be assigned to the component
9 values of butterfat, protein, and other solids that are paid to
10 producers. NAJ estimated what the monthly PPD's would have
11 been in a California FMMO from 2009 through 2014 using both the
12 conventional per hundredweight basis employed by the existing
13 MCP, FMMO's, and by adjusting producer component values as
14 outlined in the Cooperatives' proposal. The analysis is
15 included as Table 9 and employ the following data and
16 methodology:

17 Again, as previously, each of these points will
18 correspond with a column header in the spreadsheet. The
19 spreadsheet is the total of twelve pages, although the analysis
20 would be four pages wide by three pages deep. So what I'm
21 going to do, these points will flow from page 1, to page 2, to
22 3 to 4, okay?

23 And, again, on page, Table 9, page 1 of 12, if we will
24 mark on the left hand side at the top, there's a general header
25 of pool pounds, and the left hand column of that is titled

1 "Product." If you will mark that as C, and then moving to your
2 right --

3 JUDGE CLIFTON: Now, go slowly, I'm going to ask that we
4 capture this on the record copies as well. So I want you to go
5 slowly so that we can make sure that those notations are made
6 by Ms. Elliott simultaneously with your instruction. All
7 right. So under the word product, we write C, you may
8 continue.

9 MR. METZGER: Going to the right on that spreadsheet to
10 the --

11 JUDGE CLIFTON: Or maybe we write it above the word
12 product, what would you have in mind, Mr. Metzger?

13 MR. METZGER: My particular sheet has more room above than
14 below.

15 JUDGE CLIFTON: Okay.

16 MR. METZGER: And then as we move to the right, the next to
17 last column on that spreadsheet says total, and that's
18 equivalent is equivalent to Column R.

19 JUDGE CLIFTON: All right. So all the way over to the
20 right hand side, not the last column, but the next to the last
21 column is R?

22 MR. METZGER: Correct.

23 JUDGE CLIFTON: Thank you.

24 MS. ELLIOTT: Does that only apply to page 1?

25 MR. METZGER: That would also apply to page 5 and to

1 Page 9.

2 JUDGE CLIFTON: All right. We'll make those additions on
3 page 5 and page 9. All right. Now, as you walk us through
4 these points, I want you to remember, Mr. Metzger, to, when you
5 get to the point that is number 1, I think the best way to
6 express that is just number 1.

7 MR. METZGER: Very well.

8 JUDGE CLIFTON: And try to remember at each one of them to
9 repeat what number it is. I think it helps in the transcript
10 to see we have started something new.

11 MR. METZGER: Are you ready to proceed?

12 JUDGE CLIFTON: I think so. Just a minute. Yes, we are.

13 MR. METZGER: Okay.

14 1. CDFA summary of pooled pounds and component pounds
15 which includes pooled pounds of butterfat, SNF, and Class 1
16 fluid carrier --

17 JUDGE CLIFTON: Ms. Elliott? Thank you.

18 MR. METZGER: -- for California Class 1, 2, 3, 4a and 4b by
19 month. That is columns C through R. All of that data is
20 direct from CDFA. The next column refers to --

21 2. Pounds of Class 4b protein = 4b SNF *

22 JUDGE CLIFTON: Start again, please, on number 2.

23 MR. METZGER: Pounds of 4b protein = pounds 4b SNF *
24 monthly protein to SNF ratio from Table 1. (FMMO 30 analysis
25 of component levels.)

1 Moving to page 2. Obviously, the first two columns are
2 year and month, so point 3 pertains to the third column.

3 JUDGE CLIFTON: And just so it's clear, point 3 in your
4 testimony refers to the third column in your table?

5 MR. METZGER: On page 2, yes.

6 JUDGE CLIFTON: All right.

7 MR. METZGER: Pounds of 4b other solids = pounds of 4b SNF
8 - pounds 4b protein.

9 Point 4 is the next column. Pounds protein pooled =
10 pounds SNF pooled * monthly protein to SNF ratio from Table 1.

11 The next column is 5. Pounds other solids pooled --

12 JUDGE CLIFTON: Now, again, just to be clear, the next
13 column on your table is number 5 on your testimony.

14 MR. METZGER: Is point 5. Pounds other solids pooled =
15 pounds SNF pooled - pounds protein pooled.

16 The next column is point 6. Pooled butterfat percent =
17 total pounds pooled butterfat/total pooled pounds producer
18 milk.

19 The next column is point 7. Pool SNF percent = total
20 pooled pounds SNF/total pooled pounds producer milk.

21 The next column is point 8. Pooled protein percent =
22 total pooled pounds protein/divided by total pooled pounds
23 producer milk.

24 The next column is point 9. Pooled other solids
25 percent = total pooled pounds other solids/total pooled pounds

1 producer milk.

2 JUDGE CLIFTON: Now, when you say the next column is point
3 9, you don't mean for that to show in the transcript as .9, do
4 you?

5 MR. METZGER: I do not.

6 JUDGE CLIFTON: You mean it to show as point, P-O-I-N-T, 9?

7 MR. METZGER: Yes, ma'am.

8 JUDGE CLIFTON: Okay, good.

9 MR. METZGER: Very well. Then the next columns are FMMO
10 prices, which the column heading that has Class I skim, would
11 correspond to Column AA and going under across to the right,
12 under that general heading of FMMO prices, the column Class 4
13 SNF would be column AH.

14 JUDGE CLIFTON: Okay, I'm lost.

15 MR. METZGER: All right. That .9

16 JUDGE CLIFTON: Wait, let me back you up. At what page of
17 Table 9 am I looking?

18 MR. METZGER: Page 2.

19 JUDGE CLIFTON: Okay. And am I in the broad heading of
20 FMMO prices?

21 MR. METZGER: Yes, ma'am.

22 JUDGE CLIFTON: All right. And which of those am I in?

23 MR. METZGER: The column to the left of the broad heading
24 FMMO prices is titled Class I skim. That equates to column AA.

25 JUDGE CLIFTON: That equates to column 8A?

1 MR. METZGER: I'm sorry AA, double A.

2 JUDGE CLIFTON: Okay. So Ms. Elliott, you and I will put
3 Capital A, Capital A above Class I skim right about in the
4 middle on page 2.

5 MS. ELLIOTT: Okay

6 JUDGE CLIFTON: All right. Mr. Metzger, we do that on what
7 other pages in addition?

8 MR. METZGER: It would be page 6 and page 10.

9 JUDGE CLIFTON: All right. So we'll do that now. And
10 Mr. Vetne, you may approach, or do you want the microphone or
11 to show me?

12 MR. VETNE: No.

13 JUDGE CLIFTON: All right. Would you show that to
14 Mr. Metzger and ask him if I can instruct accordingly?

15 MR. METZGER: Yes, you may.

16 JUDGE CLIFTON: Good. We'll mark all these now, before we
17 go further, so going back to page 2, we have marked AA. The
18 next column we will mark AB; the next column AC; the next
19 column AD; the next column AE; the next column AF; the next
20 column AG; and the next column AH. So that takes us through
21 every column that's under the category FMMO prices.

22 MR. METZGER: Correct.

23 JUDGE CLIFTON: Mr. Metzger, do that on page 2 and what
24 other pages?

25 MR. METZGER: Page 6 and page 10.

1 JUDGE CLIFTON: Okay. Give us a minute before you go on.
2 Mr. Metzger, you may resume.

3 MR. METZGER: My point 10 on page 8 of my testimony.

4 USDA Dairy Programs announced prices for Class I skim,
5 Class I, II, III, and IV components, Columns AA through AH.

6 The next column refers to point 11. Class I receipts =
7 (pounds Class 1 fluid carrier = pounds Class Arabic SNF)

8 JUDGE CLIFTON: Arabic what?

9 MR. METZGER: Arabic 1.

10 JUDGE CLIFTON: And I think it might help if you will start
11 11 again, please.

12 MR. METZGER: Very well.

13 Class I receipts = (Pounds Class 1 fluid carrier +
14 pounds Class Arabic SNF --

15 JUDGE CLIFTON: Arabic what? 1?

16 MR. METZGER: Arabic 1. Some of --

17 JUDGE CLIFTON: Let's take it again from the top, so we're
18 on 11.

19 MR. METZGER: 11. Class I receipts = (Class pounds, Class
20 Arabic 1 fluid --

21 JUDGE CLIFTON: I'm sorry, let me stop you.

22 MR. METZGER: I've only got 31 points to go through.

23 10 -- I'm sorry -- 11.

24 JUDGE CLIFTON: If it will help, because you have the Roman
25 and the Arabic numbers the way you want them in this, you don't

1 have to read that part of it aloud.

2 MR. METZGER: So in other words, it would be acceptable
3 only to make changes where Mr. Beshore's gremlins got me?

4 JUDGE CLIFTON: Exactly. And I never called them
5 Mr. Beshore's gremlins, his good friend Mr. English called
6 them that. All right.

7 MR. METZGER: All right. That will make things much
8 simpler, thank you, your Honor.

9 Starting 11 again.

10 Class I receipts = (Pounds Class 1 fluid carrier +
11 pounds Class 1 SNF) * Class I skim price per pound + (Pounds
12 Class 1 butterfat * Class 1 butterfat price per pound).

13 JUDGE CLIFTON: All right. So just just explain to me what
14 you have done here, in this 11.

15 MR. METZGER: I have calculated the Class I receipts on the
16 milk that was pooled in California, for example, in that first
17 line, in January 2009, that is the Class 1 California milk that
18 was pooled, priced at the FMMO prices. I'm converting
19 California product volumes to Federal Order values.

20 JUDGE CLIFTON: Thank you.

21 MR. METZGER: The next column, which will be the last
22 column on page 2, Class 1 location differential.

23 Class I location differential = pounds Class 1 milk *
24 \$1.97 weighted average Class I differential.

25 Point 13 explains the weighted average Class

1 differential that I used in point 12.

2 Class 1 weighted average differential = (% Class 1
3 sales in -- I'll start that again.

4 Class 1 weighted average differential = (Class 1
5 Arabic, Class Arabic 1 --

6 JUDGE CLIFTON: You missed your percentage, I think. So
7 again, your point 13 on page 8 of your testimony.

8 MR. METZGER: Class 1 weighted average differential
9 = (% Class Arabic 1 sales --

10 JUDGE CLIFTON: Let us make that change. Ms. Elliott?

11 MS. ELLIOTT: Got it.

12 JUDGE CLIFTON: Thank you.

13 MR. METZGER: Northern California * \$1.80 per hundredweight
14 + % Class 1 --

15 JUDGE CLIFTON: Ms. Elliott?

16 MS. ELLIOTT: Yes.

17 JUDGE CLIFTON: Thank you.

18 MR. METZGER: -- sales Southern California * \$2.10 per
19 hundredweight)

20 CDFA's Milk Pooling Branch reports Class 1

21 JUDGE CLIFTON: Ms. Elliott?

22 MS. ELLIOTT: Yes.

23 JUDGE CLIFTON: Thank you.

24 MR. METZGER: Sales by region, and those data are included
25 as Table 11.

1 USDA's Class 1 differential by County shows
2 Northern California to be in the \$1.80 per hundredweight zone
3 and Southern California to be \$2.00 -- per hundredweight should
4 be added.

5 JUDGE CLIFTON: All right. So you are saying \$2.10/CWT?

6 MR. METZGER: Yes, ma'am.

7 JUDGE CLIFTON: Period. All right. So just reading "and
8 Southern California" picking up from there, read that remainder
9 of that point 13.

10 MR. METZGER: And Southern California to be in the
11 \$2.10/CWT zone, Table 11.

12 Now, point 14 starts on page 3. Again, would be the
13 third column from the left titled Class II, refers to point 14.

14 Class II receipts = ((pounds Class 2 SNF + pounds Class
15 3 SNF) * Class II SNF price per pound) + ((pounds Class 2
16 butterfat + pounds Class 3 butterfat) * Class II price per
17 pound of butterfat)

18 The next column, which will be 15. Class III receipts
19 = (pounds 4b butterfat, should be pounds Class 4b butterfat

20 JUDGE CLIFTON: Okay. So times is correct; is that right?

21 MR. METZGER: Let's start from the beginning.

22 JUDGE CLIFTON: Okay.

23 MR. METZGER: Class III receipts = (pounds insert the word
24 class --

25 JUDGE CLIFTON: Oh. All right. So all we're doing -- so,

1 Ms. Elliott, are you with me?

2 MS. ELLIOTT: Yes.

3 JUDGE CLIFTON: We're just inserting the word "class".

4 MS. ELLIOTT: Okay.

5 JUDGE CLIFTON: All right. Mr. Metzger?

6 MR. METZGER: Class 4b butterfat * Class III butterfat
7 price per pound) + (pounds Class 4b protein * Class III protein
8 price per pound) + pounds again class --

9 JUDGE CLIFTON: All right. Ms. Elliott, are you there?

10 MS. ELLIOTT: Yes.

11 MR. METZGER: 4b other solids * Class III other solids
12 price per pound)

13 JUDGE CLIFTON: All right. And just to be sure, would you
14 please re-read your point 15 on page 8?

15 MR. METZGER: Very well.

16 Class III receipts = (Class --

17 Point 15. Class III receipts = (Pounds Class 4b
18 butterfat * Class III butterfat price per pound) + (pounds
19 Class 4b protein * Class III protein price per pound) +
20 (Pounds Class 4b other solids * Class III other solids price
21 per pound).

22 Point 16, Next Column, refers to the next column
23 entitled Class 4.

24 Class 4 receipts = (Pounds Class 4a SNF times Class 4
25 SNF price per pound) + (pounds class

1 JUDGE CLIFTON: Ms. Elliott, are you there?

2 MS. ELLIOTT: No.

3 JUDGE CLIFTON: In 16, nearly the end of the first line,
4 there's a 4a but it needs the word Class in front of it.

5 MS. ELLIOTT: Okay.

6 JUDGE CLIFTON: So just starting from what's in that
7 parentheses, Mr. Metzger.

8 MR. METZGER: Very well. Pounds Class 4a butterfat * Class
9 4 price per pound butterfat).

10 And then the next column is 17. That column titled
11 Total. Total pooled receipts = sum of Class I, Class I
12 location differential, Class II, Class III, and Class IV
13 receipts.

14 The next column, 18. The next column is titled
15 Transportation Net. The transportation credits and allowances
16 used are the historical monthly totals provided by CDFA in
17 Table 10. NAJ did not attempt to recreate an estimate the
18 transportation credits as proposed in the Cooperative proposal.

19 Point 19, Fortification. Gives the column titled
20 Fortification. The fortification allowance used is the
21 historical fortification allowance provided by CDFA.

22 Next column, Quota, Net of RQA, is point 20. Quota
23 premium, net of Regional Quota Adjuster was provided by CDFA.

24 Next column, MA Fee, is point 21. The Market
25 Administrator fee is priced at \$750,000 per month. This total

1 reflects both the approximate monthly cost of CDFA's Milk
2 Pooling Branch and the typical MA office assessment rate of
3 2 cents per hundredweight for member milk and a variable higher
4 rate for independent milk.

5 The next column, Total, refers to point 22.
6 Total pool deductions = sum of transportation fortification
7 allowance quota and MA fee.

8 The next column, Net to Producers, point 23.
9 Net to producers = total pooled receipts - total pooled
10 deductions.

11 The next column, Class III Value is point 24.
12 Class III value = (pooled pounds protein * protein price per
13 pound) + pooled pounds butterfat * Class III butterfat price
14 per pound) + (pooled pounds other solids * other solids price
15 per pound)

16 The next column, PPD total, is point 25. Pooled PPD
17 value = net to producers - Class III value.

18 Next column, PPD per hundredweight is point 26. PPD
19 per hundredweight = pooled PPD/total hundredweight of pooled
20 milk.

21 Now, in Table 12, we can move to page 4.

22 JUDGE CLIFTON: Okay. Now, are you taking us to Table 12
23 or are we staying in Table 9?

24 MR. METZGER: We are in Table 9. We can go to --

25 JUDGE CLIFTON: Where do you want us to go?

1 MR. METZGER: Let's continue, I think, let's continue to
2 work through Table 9. I think Tables 10 and 11 are fairly
3 self-explanatory, and we can get back to them once we have
4 worked through the entire PPD calculation. I would rather do
5 that than jump back and forth, if that's okay.

6 JUDGE CLIFTON: Sure. So what page should I have open in
7 my tables?

8 MR. METZGER: In your tables you should be on Table 9,
9 Page 4.

10 JUDGE CLIFTON: Okay.

11 MR. METZGER: The columns following year and the month.
12 The next three columns are Percent PPD-F; Percent PPD-P; and
13 Percent PPD-OS, that refers to point 27.

14 The percentage of the PPD to be assigned to each of the
15 three components (butterfat, protein, and other solids) for
16 2009 through 2013 was obtained from analysis done by
17 Dr. John Newton and published by Dairy Markets and Policy
18 Information Letter Series, "Interpreting Proposed Language for
19 the California Federal Milk Marketing Order". NAJ calculated
20 the percentages for 2014.

21 The next column on Table 9, Dollars PPD Protein, refers
22 to -- references back to point 28.

23 Oops, I skipped a column. The column, Dollars PPD-F in
24 Table 9, refers to point 28 in my testimony on page 9.

25 $\text{PPD value assigned to butterfat} = \text{total PPD value} * \text{percent PPD}$

1 butterfat.

2 The next column is point 29. PPD value assigned to
3 protein = total PPD value * percent PPD protein.

4 The next column refers to point 30. PPD value assigned
5 to other solids = total PPD value * percent PPD other solids.

6 The next column, Dollars PPD/Per Pound Fat refers to
7 point 31. PPD per pound butterfat = PPD butterfat value/pounds
8 pooled butterfat.

9 The next column refers to point 32. PPD for pound of
10 protein = PPD protein value/by pounds pooled protein.

11 The next column refers to point 33. PPD for pound
12 other solids = PPD other solids value/pounds pooled other
13 solids.

14 The next column, Producers Fat Dollars, is point 34.
15 Producer butterfat price = Class III butterfat price + PPD per
16 pound butterfat.

17 The next column is point 35.
18 Producer protein price = protein price + PPD per pound of
19 protein.

20 The next column is point 36. Producer other solids
21 price = other solids price plus PPD per pound of other solids.

22 The next column that is titled Percent F + 2 SD is
23 point 37 in the testimony. Percent butterfat + 2 standard
24 deviation = pool butterfat percent + (2 * 0.29).

25 Next column is point 38, percent protein + 2 SD =

1 protein pool protein percent + (2 * 0.16).

2 The next column, Percent Other Solids + 2 SD = pooled
3 other solids percent + and that should be a plus not an equal.

4 JUDGE CLIFTON: All right. So Ms. Elliott, we're on page 9
5 of the testimony, we're in number 39, nearly at the bottom, and
6 nearly at the end of that line there's an equal before a
7 parentheses. And we're going to change the equal to plus.

8 MS. ELLIOTT: Okay.

9 JUDGE CLIFTON: So 39, again. Percent other solids + 2 SD
10 = pooled other solids percent + (2 times 0.09)

11 And column 40, PPD per hundredweight + 2 SD = ((percent
12 butterfat + 2 SD * PPD per pound butterfat) + (percent protein
13 + 2 SD * PPD per pound protein) + (percent other solids + 2 SD
14 * PPD per pound other solids))/hundred.

15 Now, before I go on with my testimony, let's refer
16 quickly to Tables 10 and 11. Table 10 is the transportation
17 allowance and credits. This information is direct from CDFA.
18 There is no NAJ analysis done on this, it's simply the data set
19 that which used in Table 9 for the PPD calculation.

20 Table 11, Class 1 sales, also comes direct from CDFA.
21 It shows Class 1 sales in Northern California and
22 Southern California. NAJ analysis starts about two-thirds down
23 the page with a row that is titled Northern to Southern ratio,
24 where I calculated the Northern, the sales in
25 Northern California to Southern California for each year, 2009

1 through 2014. I did an overall average ratio of those six
2 years, then incorporated USDA's Class I differentials for
3 Northern and Southern California, and that's where I came up
4 with the weighted average of \$1.97 per hundredweight, which was
5 used in the Class 1 differential calculation back in Table 9.
6 All right?

7 JUDGE CLIFTON: Good.

8 MR. METZGER: Very good. Restarting testimony on page 10,
9 at the top:

10 NAJ's analysis found the PPD to be negative 46 out of
11 the 72 months, or nearly two-thirds of the months included.
12 The average monthly PPD is -\$0.27 per hundredweight. When the
13 PPD is distributed across components, as requested in the
14 Cooperatives' proposal, the average monthly PPD is -\$0.03 per
15 pound of butterfat, -\$0.05 per pound of protein, and negative
16 less than \$0.01 per pound of other solids. The analysis
17 determined that the PPD would average -\$0.31 per hundredweight
18 for higher component milk that (+2 SD).

19 As outlined and documented earlier in this testimony,
20 changing California's regulated milk pricing to be based on
21 protein and other solids, instead of SNF, will send producers
22 the proper economic signal to increase their protein
23 production. However, the proposal to distribute the pool's PPD
24 value to component values will partially negate the incentive
25 to increase component production. Given that PPD's will be

1 negative nearly two months out of every three, component values
2 to producers will be discounted two-thirds of the time.
3 Furthermore, the Cooperatives' proposal that the PPD be
4 apportioned among the components relative to their value in the
5 total Class III value, results in the largest negative PPD
6 value being assisted to the most valuable component. Economic
7 convention and logic would be to incentivize production of
8 milk's most valuable component not to apply the largest
9 discount to its price. In addition, higher component milk
10 represented in this analysis by milk that is two standard
11 deviations higher than average milk on a per hundredweight
12 basis will be discounted more than average component milk, even
13 though the higher component milk provides greater benefit to
14 the California dairy industry.

15 NAJ urges the Secretary to reject the proposal to
16 assess the PPD value to milk components, because PPD's will be
17 negative most months. Production of milk components should be
18 incentivized in California, and this PPD proposal will,
19 instead, dis-incentivize proponent production. Instead, if an
20 FMMO is recommended for California, the PPD should be
21 calculated and distributed to producers on the basis of
22 hundredweights of milk pooled, as it is done in the other
23 FMMO's utilizing multiple component pricing.

24
25 Cooperatives Proposal for Pool Plant Provision

1 NAJ opposes the Cooperatives' proposal to classify all
2 plants in the marketing area receiving Grade A milk, as pool
3 plants.

4 First, while the Cooperatives' proposal provides
5 exemptions for certain Class I plants, similar exemptions are
6 not proposed for manufacturing plants. Specific pooling
7 exemptions are proposed for producer-handlers with less than
8 3 million pounds of Class I distribution per month, and other
9 Class I plants with route distribution less than 150,000 pounds
10 per month. These same Class I exemptions exist in the other
11 FMMO's. However, the Cooperatives' proposal does not provide
12 exemptions for any manufacturing plants. Such exemptions are
13 not needed in the other FMMO's because pooling manufacturing
14 milk is optional, and any manufacturing plant, regardless of
15 capacity, can simply opt not to pool their milk. NAJ believes
16 that at a minimum, the California FMMO should provide
17 exemptions from pooling to manufacturing plants that meet the
18 same milk source and monthly volume criteria as exempted
19 Class 1 plants.

20 NAJ proposes that producer-owned manufacturing plants
21 processing less than 3 million pounds of milk per month of only
22 their own milk, and any manufacturing plant processing less
23 than 150,000 pounds of milk per month, be exempted from
24 pooling. Due to FMMO price formulas that set the Class I price
25 as the higher of the advanced Class III or IV price, the

1 regulated price for Class I milk is higher than the regulated
2 price for manufacturing milk most months. NAJ believes that if
3 some of the marketing area's plants with the highest milk
4 value -- I'm sorry, I'll start that sentence again.

5 NAJ believes that if some of the marketing area's
6 plants with the highest value milk Class I warrant exemption
7 from pooling, the same pooling exemption should be provided to
8 manufacturing plants meeting the same criteria as the exempted
9 Class I plants.

10 NAJ's second objection to defining all plants in the
11 marketing area as pool plants is that this provision does not
12 exist, and has not been proposed in any other FMMO. In the
13 other FMMO's, manufacturing milk is incentivized to be pooled
14 in order to receive the order's PPD's, which are positive the
15 vast majority of months. About ten years ago, depooling
16 manufactured milk became problematic in some FMMO'S because
17 manufacturing plants had the option to depool all their milk
18 for any month that an Order's PPD was negative and then
19 immediately reassociate all their milk with the pool the
20 following month if the PPD became positive. This issue was
21 addressed by amending FMMO pooling provisions. The approved
22 changes did not reclassify all plants in the marketing area as
23 pool plants, and, in fact, that option was not part of any
24 hearing proposal. Instead, FMMO provisions were changed to
25 restrict how much milk a manufacturing plant could pool in a

1 given month to be based on a percentage of the milk the plant
2 pooled the previous month. The revised pooling provisions
3 incentivized manufacturing plants to pool a significant amount
4 of their milk in the occasional months that PPD's were
5 negative. While manufacturing plants and the producer
6 supplying those plants stand to make money by depooling milk in
7 months with negative PPD's, the strict repooling provisions
8 mean the plants and producers will forego PPD revenue the
9 following months when PPD's are likely to be positive. NAJ
10 supports implementing pooling provisions and restrictions
11 similar to those in other FMMO's for a California FMMO.

12 The ability to depool milk also serves a vital role in
13 balancing the milk supply. To quote a long-time colleague and
14 friend of the dairy industry, Ben Yale, "In order for there to
15 be enough milk all of the time, there needs to be too much milk
16 some of the time."

17 NAJ's analysis found PPD to be negative 46 out of the
18 72 months for -- whoa -- I went backwards instead of forwards.
19 Strike that. Let's go to 12 instead of 10, page 12 instead of
20 10, shall we? Thank you. Excuse me.

21 Some manufacturing plants exist primarily to balance
22 the milk supply during the times of too much milk. These
23 plants run at full capacity only part of the year when milk
24 supply outpaces conventional processing capacity. The rest of
25 the year, these balancing plants operate on reduced schedules

1 or may shut down entirely. Due to their irregular processing
2 schedules, their cost, and therefore, their make allowances,
3 are greater than those of manufacturing plants that can run at
4 full capacity nearly all the time. These balancing plants can
5 offset their higher costs by purchasing milk for less than
6 class value when surplus milk is abundant. The Cooperatives'
7 proposal requiring all plants to be pool plants, eliminates the
8 option for below class sales and will greatly hinder, if not
9 eliminate, the ability of balancing plants to be competitive.
10 The elimination of these balancing plants will lead to
11 increased disorderly marketing by requiring milk to be hauled
12 farther to find processing, available processing capacity, or
13 even an increase of milk being dumped.

14
15 Dairy Institute Proposal for Class III and IV Prices

16 Put a caveat in here in that I appreciate that the
17 Dairy Institute has not put in a proposal yet, but this
18 testimony is based on their proposal that was submitted as part
19 of the hearing request, so NAJ is anticipating that this will,
20 indeed, be part of their proposal presented. Back to my
21 prepared testimony:

22 Different price formulas between orders can, and do,
23 lead to disorderly marketing. The regulated prices in the
24 three FMMO's in the Southeastern United States, Orders 5, 6,
25 and 7, are based on fat and skim values, while the surrounding

1 FMMO's are based on multiple-component pricing. NAJ observes
2 milk movement into and out of Orders 5, 6, and 7 based on its
3 component levels and component prices instead of serving market
4 needs or to promote marketing efficiency. In the overlapping
5 milk sheds serving the three Southeast markets which use
6 fat-skim pricing, and the neighboring Southwest, Central,
7 Mideast, and Northeast markets, which use multiple component
8 pricing, incentives are created by regulation rather than
9 the -- should insert a word "the" so I'll start that sentence
10 again.

11 In the overlapping milk sheds serving the three
12 Southeast markets which use fat-skim pricing and the
13 neighboring Southwest, Central, Mideast, and Northeast markets
14 which use multiple-component pricing, the incentives created by
15 regulation, rather than efficiency can be significant.

16 JUDGE CLIFTON: All right. We'll be happy to insert that
17 "the". Page 12, in the middle of the page, we'll insert the
18 word "the" just between "pricing," and "incentives".

19 MR. METZGER: High-protein milk produced in the Southeast
20 market or in the nearby milk shed is encouraged by
21 multiple-component pricing to be marketed to maximize component
22 income. This draws available milk away from fluid use in the
23 Southeast market, aggravating the deficit production that
24 characterizes those markets. Conversely, low solids milk in
25 the common milk shed is encouraged by fat-skim pricing to be

1 marketed under the Southeast milk order pools, because greater
2 revenue is available under a pricing plan that does not account
3 for less value in low protein producer milk. These marketing
4 patterns, created by regulatory incentives, come at the expense
5 of marketing efficiency.

6 Establishing unique price formulas for a California
7 Order, which may, in turn, set precedence for other FMMO's,
8 holds the potential for similar and efficient milk movement
9 simply because of differences in regulated price formulas,
10 rather than market need, market value, or market efficiency.
11 Therefore, NAJ finds the Dairy Institute proposal which would
12 establish price formulas for Class III and IV milk that would
13 be specific to a California order, to be problematic.
14 Producers and processors in every FMMO can claim production,
15 marketing, and manufacturing conditions in their marketing area
16 that are unique to their order. Establishing separate price
17 formulas for a California Order would set a precedent that NAJ
18 expects will be lead to other Orders unique price formulas for
19 their Orders, most probably starting with the Pacific Northwest
20 and Arizona Orders, given their proximity to California and
21 their competition for similar markets.

22 The issues of price discovery and make allowances may
23 well need to be updated, and perhaps even regionalized. An
24 evaluation of a national surface map for milk used for
25 Class III and IV products may be in order. Any such analysis

1 should include exported milk solids, given that exports account
2 for 15 percent of milk solids produced nationally, including 30
3 percent of the milk solids produced in California (Table 12).
4 NAJ believes these issues are best addressed through a hearing
5 covering all FMMO's and not one individual order basis. Should
6 the Secretary recommend an FMMO for California which includes
7 Class III and IV price formulas specific to the order, NAJ
8 suggests a delay in implementation of a Final Order until USDA
9 can convene a national hearing covering the other Orders, to
10 afford them the same consideration granted to California.

11 Real quick, Table 12 is the simplest table in this
12 whole exhibit. It simply is the calculation showing that in
13 2013, U.S. milk solids exported at 15.5 percent, the source of
14 that is the National Milk Producers' Federation, then the NASS
15 USDA statistics published by California Ag Statistics, reported
16 that 40 percent of the dairy exports came from California, and
17 we have also established in this hearing that approximately 20
18 percent, 21 percent of U.S. milk production comes from
19 California. So 15.5 percent of U.S. milk solids exported,
20 times 40 percent dairy exports coming from California, divided
21 by 21 percent, of U.S. milk production from California, leads
22 us to 30 percent of California milk solids being exported. All
23 right?

24
25 Heading, and what we have all been waiting for:

1 Conclusion

2 Implementation of FMMO pricing in California will
3 provide a stronger price signal to produce protein than the
4 current CDFA pricing. However, as outlined in this testimony,
5 NAJ finds to be problematic, parts of the Cooperatives'
6 proposal dealing with PPD calculations and pooling, and the
7 Dairy Institute proposal requesting unique price formulas for
8 Class III and IV milk in a California order.

9 Seeing that there are no questions, I will step down.

10 JUDGE CLIFTON: Mr. Beshore, would you like to begin the
11 questioning of Mr. Metzger? Mr. Vetne, would you?

12 MR. VETNE: May I introduce a point of order?

13 JUDGE CLIFTON: Oh, admission of the exhibits?

14 MR. VETNE: Exactly.

15 JUDGE CLIFTON: Thank you. Mr. Vetne, I really do
16 appreciate your participation in here. All right.

17 Is there, does anyone wish to question Mr. Metzger
18 before determining whether you have any objection to the
19 admission into evidence of Exhibit 81, his testimony? No one.
20 Are there any objections of the admission into evidence of
21 Exhibit 81? There are none. Exhibit 81 is admitted into
22 evidence.

23 (Thereafter, Exhibit 81 was
24 received into evidence.)

25 JUDGE CLIFTON: With regard to Exhibit 82, the tables, does

1 anyone wish to question Mr. Metzger before determining whether
2 you have an objection? No one. Is there any objection to the
3 admission into evidence of Exhibit 82? There is none.
4 Exhibit 82 is admitted into evidence.

5 (Thereafter, Exhibit 82 was
6 received into evidence.)

7 JUDGE CLIFTON: Mr. Beshore, would you like to begin the
8 questioning?

9 DIRECT EXAMINATION

10 BY MR. BESHORE:

11 Q. Marvin Beshore.

12 Thank you, your Honor, and thank you, Mr. Metzger. You
13 are in a very select group of persons with your mastery of
14 component pricing values in the industry, and I appreciate your
15 contribution of that talent to the record here --

16 A. Thank you.

17 Q. -- and your testimony and exhibits. So I just got
18 questions on a number of, number of things, a number of areas.

19 First of all, can you tell us, you know, for this
20 hearing, a little bit about National All-Jersey -- a little bit
21 more about National All-Jersey? Is National All-Jersey a
22 participant in any capacity in the California market in terms
23 of marketing milk or being involved in negotiating contracts
24 for sales of milk?

25 A. No, we are not.

1 Q. Okay. You have about a hundred, nearly a hundred
2 members in California, let's say. Do you know -- do you know
3 their affiliations with other organizations in California?

4 The reason I ask is this. Okay? So we have got three
5 proposed, three, the Cooperatives, the three largest
6 Cooperatives, representing 75 percent plus of California's milk
7 production are the proponents of Proposal 1. The free-trade
8 associations of dairy farmers in California, California Dairy
9 Campaign, Western United Dairymen, and Milk Producers Council,
10 have all testified in support of Proposal 1 as well. Would
11 your hundred members be members of those groups, either the
12 trade associations and/or the cooperatives?

13 A. I can safely, I can't name particular members to
14 particular groups, but I am confident that we have numbers,
15 National All-Jersey, has members in California who are also
16 members of all six of the organizations you quoted.

17 Q. Okay. So is National All-Jersey supporting a Federal
18 Milk Marketing Order for the State of California?

19 A. Yes.

20 Q. Okay.

21 A. Because of its pricing incentive, it's beneficial, we
22 believe, to all.

23 Q. Okay. Thank you. Now, let's talk about some of the
24 particulars.

25 You know, I am not sure which exhibit it is here, but

1 Class 1 pricing, California's got this fluid carrier pricing
2 which shows up on one of your exhibits, but you are familiar
3 with that, I assume.

4 A. Not really with the Class 1 fluid carrier pricing. The
5 reason that is it is in my testimony is in order to calculate
6 total pounds of Class 1 milk, that being Class 1 -- California
7 Class 1 SNF plus California Class 1 fluid carrier.

8 Q. Okay. So maybe you have haven't analyzed this and
9 can't answer this question, but let me just throw it out. It
10 appears that one of the impacts of having a fluid carrier,
11 which is basically pricing a portion of the value, roughly, I
12 think it is 75 percent or so, skim value of Class 1 just on a
13 straight volume basis. You understand that, right?

14 A. Right.

15 Q. Okay. So one of the effects of that is that it
16 devalues the solids value in Class 1, whether solids not fat,
17 protein, whatever. Devalues, depreciates the portion of
18 Class 1 value that is reflected in the solids prices. And I
19 wonder if you have any thoughts about that from, you know,
20 national -- from your perspective as promoting valuation of,
21 you know, the solids in milk?

22 A. No, I really don't. I can't provide any specific
23 analysis on that.

24 Q. Okay. So you haven't really looked at that?

25 A. No, I have not.

1 Q. You haven't prepared, for instance, the price of solids
2 under that fluid carrier system, both presently in California
3 and in the Dairy Institute proposal, that the price of Class 1
4 solids, for instance, are less than the price of Class 2
5 solids, Class 3 solids, Class 4 solids?

6 A. I have not looked at that.

7 Q. Let me ask you then, about the PPD concern. So as you
8 indicated in your testimony on page 1, under an FMMO, the price
9 per protein, which is presently included in SNF in California
10 system at \$1.22 a pound, would increase to \$2.94 under an FMMO
11 for the five or six-year period?

12 A. In that six-year time period, yes.

13 Q. Okay. And your analysis in, what is it, Exhibit 10?

14 A. PPD analysis is Table 9.

15 Q. Table 9?

16 A. Yes.

17 Q. Okay. The PPD analysis in Table 9 basically shows that
18 instead of the protein price under the Cooperatives' proposal,
19 instead of protein price being \$2.94, it would be \$2.91,
20 correct?

21 A. I believe it would have been \$2.89. It was a nickel
22 difference.

23 Q. \$2.89?

24 A. Yeah. The butterfat price difference was three cents.

25 Q. Okay. So if it were the case that when you did the

1 analysis of how this worked out, more months showed a positive
2 PPD than a negative PPD, it would actually be on, the protein
3 value would have been on the plus side. That is, it would be
4 greater than \$2.94, correct? I mean, in the months where the
5 PPD is plus, the protein value is greater than \$2.94; correct?
6 In your analysis?

7 A. In the months that the PPD is correct, the PPD would
8 add to the protein value.

9 Q. Okay. And --

10 A. In the one-third of the months where the PPD is shown.

11 Q. Right. But that would be a good thing, from your
12 perspective.

13 A. It would be even better if they were positive
14 two-thirds of the time.

15 Q. Okay. But -- but, I mean, you have testified it's
16 positive a great majority of the time the rest of the system,
17 but it is pretty obvious they are not going to be positive a
18 great majority of the time in a California Federal Order,
19 correct?

20 A. That's correct.

21 Q. Okay. So basically since they are minus, you would
22 rather see it priced on, you would rather see that minus value
23 priced on a fat-skim basis than, or just a straight volume
24 basis?

25 A. Just a straight volume basis, as is done in the other

1 Federal Orders, yes.

2 Q. So what works your way you want it on protein, and when
3 it doesn't, it's better to have it on fat-skim?

4 A. On volume.

5 Q. On volume, I'm sorry. Correct?

6 A. Correct.

7 Q. Let's talk about pooling a little bit, or maybe -- so
8 there are two issues regarding pooling.

9 JUDGE CLIFTON: I'm sorry, I want to go back to your
10 question, Mr. Beshore.

11 Mr. Metzger, you are not advocating a different system
12 for the months --

13 MR. METZGER: I'm not.

14 JUDGE CLIFTON: Right. So the predicate to Mr. Beshore's
15 question was a little misleading, suggesting that in the months
16 where it was to the advantage of the Association, they wanted
17 it to be different.

18 MR. BESHORE: I guess I meant if it were to the advantage
19 the majority of the months, I think they would support.

20 MR. METZGER: If it were, if it were to the plus side the
21 majority of the months, it would incentivize protein production
22 for all California producers.

23 MR. BESHORE: Okay.

24 BY MR. BESHORE:

25 Q. And you would support that?

1 A. I would support that.

2 Q. Okay

3 A. But since it is negative, it is going to
4 dis-incentivize, and actually butterfat production, and that's
5 not to the benefit of the California Dairy Industry.

6 Q. Okay. The differences of, you know, five cents a pound
7 protein and three cents a pound butterfat, by your calculations
8 in Table 9?

9 A. That is correct.

10 Q. Okay. So on pooling and I think -- I think you had two
11 issues there, one is the, you have the exempt plant or
12 producer-handler --

13 A. Yes.

14 Q. -- perhaps situation, the other is inclusive pooling or
15 mandatory pooling?

16 A. Yes.

17 Q. So if we can separate those out. You are not, in terms
18 of the request to exempt small manufacturing plants, there's,
19 that doesn't, the language for producer-handlers or exempt
20 plants in other Orders doesn't provide that now, correct?

21 A. Correct. And it doesn't need to because small-scale
22 manufacturing plants would not be, are not required to be
23 pooled. If they opt not to be part of the pool, they simply
24 opt not to be part of the pool.

25 Q. Right. But they can opt to be part of the pool now.

1 A. By meeting the qualifications as far as touch base
2 days, diverting percentages, etcetera, they do have to meet
3 criteria in the other Orders if they want to be associated with
4 the pool.

5 Q. Correct. And they would, and I know a lot of artisan
6 cheese plants in other Orders that just make a portion of their
7 milk into cheese, or like to be pool producers. Isn't that a
8 common thing?

9 A. I'm sure that it happens on the artisan cheese makers,
10 some may choose to associate them with the pool. I have no
11 idea what percentage of such plants that represents.

12 Q. Okay. So how would you expect that, how would you want
13 that to work in California?

14 A. In California, at a minimum, the small-scale
15 manufacturing plants that meet the same criteria as exempted
16 Class 1 plants, should also be exempted, is our position. So
17 if you have got someone who is, as I read the proposed
18 language, if you have got someone that's milking 30 cows and
19 converting all their milk into artisan cheese, they don't
20 balance, they require no balancing and they provide no
21 balancing to anyone else. As I read the language, that plant
22 will be a pool plant in California, even though it would be
23 below the, even though if that plant were distributing fluid
24 milk instead of artisan cheese, they would be exempted because
25 it would be less than 150,000 pounds of milk.

1 Q. Correct. But if they are less than 150,000 pounds and
2 they make all their milk into cheese, they are just not part of
3 the pool, right?

4 A. That would not be my interpretation as the co-op
5 language as proposed, that all plants are pool plants, with
6 exception, with exemptions provided for certain Class 1
7 processors, but I don't see where those exemptions are provided
8 for manufacturing plants.

9 Q. So you are looking for that in the exempt plant
10 category?

11 A. I am, at a minimum.

12 Q. Okay. Okay. Now, with respect to, with respect to
13 pooling. First of all, your analysis in Table 9 of negative
14 PPD's and such, didn't do any analysis of class, of the
15 incentive in the California FMMO for Class 4 or Class 2
16 depooling, right? You were just looking at the Class 3 issue
17 with respect to negative PPD's and depooling?

18 A. I'm not sure I understand your question, I'm sorry.

19 Q. Well, when we look at -- when you calculated that 46
20 out of 72, well, a negative PPD is one way to look at when
21 there's an incentive to depool Class III milk, right?

22 A. Yes.

23 Q. Okay.

24 A. In the other Federal Orders, yes.

25 Q. In the other Federal Orders, and would be the same here

1 if that option was available?

2 A. If it were available, yes.

3 Q. Okay. But that doesn't -- that doesn't make any
4 calculation of whether Class 2 or Class 4 plants would want to
5 depool if they could?

6 A. I did not analyze that, that is correct.

7 Q. Okay. That's what I, that's what I tried to get out
8 that first question, which wasn't very good.

9 If you were to analyze that, just from your experience
10 in other orders, and the way this one works in terms of the
11 quota, and other deductions that come off the pool, there's
12 certainly times when Class 2 and Class 4 would want to depool,
13 wouldn't you agree?

14 A. There may be, those times may exist, yes.

15 Q. Okay. As they do in other Orders now?

16 A. Yes.

17 Q. So that would mean, would it not, that there would be
18 in a California Order, essentially not just two-thirds of the
19 time, where Class 3 would want to depool, but you would have
20 even depooling even higher percentage of time when you look at
21 Class 2 and Class 4 data?

22 A. Perhaps.

23 Q. There's some question in your mind there.

24 A. Well, I don't want to say absolutely because I have not
25 analyzed it.

1 Q. But in other Orders where we don't have the additional
2 factor that leads to greater, more negative PPD's here, that's
3 what you have analyzed, in fact, you have done a really good
4 job at analyzing that because you put the MA fee in there as
5 well as the fortification allowance and chargeable allowance
6 going in there. I appreciate that.

7 Since in other Federal Orders that don't have those
8 negatives before the PPD is calculated, Class II and Class IV
9 presently depool, isn't it absolutely certain that there would
10 be times in California that they would depool?

11 A. Yes.

12 Q. Okay. Did you do any, so in opposing the inclusive
13 pooling when it comes to Class III, you want producer supply in
14 these Class III plants to be able to keep their protein value
15 when it is higher than pool price -- correct -- by depooling?

16 A. If the milk is -- essentially that would be correct. I
17 mean, if the milk is depooled, then there is no required
18 regulated minimum price to be paid on those milk components.

19 Q. And that's the reason why people depool?

20 A. Exactly.

21 Q. Okay. They want to keep all the value for themselves
22 and not share it with the pool, right?

23 A. Right. And that's why in the other Federal Orders,
24 when depooling became a problem six, eight, ten years ago,
25 amendments to the Orders were made so that yes, you could still

1 depool your manufactured milk, but the process to get it
2 reassociated with the pool was limited to like 115 percent of
3 your previous month's pooling. So if you saw a "windfall", by
4 depooling milk in a particular month with a large negative PPD,
5 you had to temper your decision with potential that you would
6 be foregoing positive PPD's in the ensuing months because of
7 the restrictions on the amount of milk you could reassociate
8 with the pool.

9 Q. Okay. But you haven't done any analysis here given
10 quota, transportation pool, MA fees, all the factors that you
11 have put into your table? You haven't, which don't exist in
12 other Federal Orders, you haven't done any analysis to see
13 whether a repooling limitation of 115, or 25, or 35, whatever
14 it is, to see whether repooling limitation would actually work
15 in this marketplace with the utilizations and all the other
16 factors that go into this pool?

17 A. I have not analyzed that.

18 Q. That's all I have right now. Thank you very much,
19 Erick.

20 JUDGE CLIFTON: Who next has questions for Mr. Metzger?
21 Ms. Vulin?

22 CROSS-EXAMINATION

23 BY MS. VULIN:

24 Q. Good morning, Mr. Metzger.

25 A. Good morning.

1 Q. So I have some questions.

2 JUDGE CLIFTON: Just state your name, please.

3 MS. VULIN: Sorry, Ashley Vulin.

4 BY MS. VULIN:

5 Q. So I kind of want to go through and make sure I
6 understand everything that you have been presenting, as it is
7 incredibly complex. Just a simple question on page 1 of
8 Exhibit 81, which is your testimony. When referring to other
9 solids, are those -- what are the other solids?

10 A. The other solids is primarily the lactose in milk, also
11 consists of some mineral content. Essentially, it is any, as
12 the name implies, it's any solids in the milk, excepting
13 protein and butterfat.

14 Q. And in all Federal Orders, is that considered all those
15 kind of catch-all categories, those aren't broken out?

16 A. Other solids is not broken out into subcategories.

17 Q. Now I'm on page 3 of your written testimony. At the
18 very top you discuss the Van Slyke Cheese Yield Formula. Who
19 is Van Slyke?

20 A. The fella who invented this cheese yield formula.

21 Q. Do you -- where did this cheese yield formula come
22 from?

23 A. Golly, now you are pre-dating my involvement with
24 National All-Jersey. I could Google it.

25 Q. Is it a generally accepted --

1 A. It is a generally accepted formula throughout the
2 industry for many, many, many years. The yield formulas
3 predict the yield of cheddar cheese, specifically, generally a
4 38 percent moisture.

5 Q. And then just below that you discuss a true protein.
6 What's a true protein and how is that different than the other
7 types of protein that you have described? The crude protein in
8 the statement?

9 A. For a long time the industry relied on the testing
10 equipment in the industry measured what was referred to as
11 crude or total protein, which also included the non-protein
12 nitrogen that was in the milk. And when the non-protein
13 nitrogen is not beneficial to cheese yield, the true protein is
14 more representative of the casein that's in the milk that is
15 captured in the cheese making process. And so, as testing
16 equipment became more sophisticated and was able to measure
17 more of the casein in the milk, then that's what became the
18 industry standard, and the difference between the two is
19 outlined is 0.19 percent, fairly consistent across milks.

20 Q. So throughout your testimony when you are referring to
21 protein, are you referring to true protein or basic? What's
22 the better term for not true but not --

23 A. Right. Crude protein and, yes, everywhere in my
24 testimony where I refer to protein it is true protein, except
25 for where I specifically designate crude protein.

1 Q. And crude protein is the international standard for
2 analyzing the protein content?

3 A. At least for the international, for basing
4 international trade on skim milk powders.

5 Q. So now I'm on page 4 of your testimony, the bottom
6 paragraph. So in this paragraph you discuss that SMP and WMP
7 production was 15.7 percent of total production in 2009, it
8 grew in 2013, and then declined in 2014. What was driving
9 these changes?

10 A. Primarily the export market. Virtually all SMP and WMP
11 is made for the export market, and in 2013, that market was
12 very strong, and so there was quite an incentive to produce
13 those products. In 2014, international market for those
14 products declined so production of those products declined
15 also.

16 Q. So in looking at Table 6 of Exhibit 82 where you go
17 through the production, this is driven, if not just by U.S.
18 pricing models, but by international prices and the commodities
19 as sold in the international market?

20 A. Yes, they play a strong role in that, in production of
21 those products.

22 Q. So now I'm on page 5. So here you list out steps 1
23 through 17. Just generally to summarize, these steps show how
24 skim milk powder is made and priced; is that correct?

25 A. Not necessarily priced, but it is a proof, it is a

1 proof of concept that higher-component milk will yield higher,
2 will have greater yields of skim milk powder. And that is
3 because skim milk powder is protein-standardized. And so what
4 is shown in the column average milk, shows that when you take
5 producer milk, separate out the skim, or separate out the cream
6 to a level of 40 percent butterfat, that cream is going to be
7 sick by default, is going to be 40 percent butterfat, 60
8 percent skim. But when you take, make the cream from the
9 producer milk, the skim portion of that cream is going to take
10 with it some solids nonfat and some protein, making those
11 components not available in the overall skim portion of the
12 milk to manufacture nonfat dry milk and skim milk powder. So
13 when you are manufacturing skim milk powder and you want to
14 project your yields, you have to account for the amount of milk
15 solids that are going to be, shall we say, siphoned off with
16 the cream, along with the butterfat that obviously goes with
17 the cream.

18 Q. And the process for doing that is standardized.
19 There's no way to capture more of that butterfat or less?

20 A. Well, if you want to get really complex, we could get
21 into manufacture handler.

22 Q. I don't want to get that complex.

23 JUDGE CLIFTON: All right. So nobody could hear either of
24 you in that exchange. So let's have Mr. Metzger finish his
25 sentence about if you want to get really complex --

1 MR. METZGER: If you want to get really complex, we could
2 have gone into the analysis of making skim milk powder when the
3 fat is taken off as anhydrous milk fat, which would, which is
4 99 percent butterfat, leaving much more skim to make
5 manufactured, to manufacture skim milk.

6 We have gotten to, for a proof of concept, I thought
7 this was sufficient.

8 MS. VULIN: And I apologize for interrupting. I think I
9 was trying to avoid going too down into the complex aspects of
10 it.

11 BY MS. VULIN:

12 Q. So now I'm on page 6 of your written testimony. And in
13 the first, I -- the second paragraph, I have a question. Who
14 pays the fortification costs for fortifying milk?

15 A. The extra solids that go into the Class 1 product are
16 paid for by the processor. However, there is additional
17 handling required at the processor level in order to add those
18 solids to the fluid milk, and so there is a fortification
19 allowance credited back to the processor for their cost of
20 handling the condensed skim in order to bring the producer milk
21 up to the solids level required by State of California
22 minimums.

23 Q. Does milk, so I'm in your third paragraph now and you
24 say, "Producer milk that is higher in protein is also higher in
25 SNF and requires less fortification to meet the California

1 fluid milk standards."

2 Does SNF and protein in milk move up and down in
3 conjunction or can they, can they exist and move independently
4 of each other?

5 A. The primary variable in SNF is protein. Other solids,
6 if we refer back to Table 1, the analysis from the Order 30
7 FMMO office on the annual summary they put out on component
8 levels in producer milk, the standard variation of other solids
9 is much lower than the standard variation of protein. And
10 protein and other solids combine to make SNF, so the primary
11 variation in SNF is going to be the protein content of the
12 milk.

13 Q. So --

14 JUDGE CLIFTON: So, in answer to her question, then they do
15 move up or down together or not?

16 MR. METZGER: Yes, they do.

17 BY MS. VULIN:

18 Q. But not a perfect ratio since other components affect
19 the SNF?

20 A. Correct. There is some variation in other solids, in
21 the other solids portion of milk, so it's not going to be a
22 perfect correlation, but it is highly correlative.

23 Q. What -- what creates the protein content in milk?
24 Like, what factors go into increasing or decreasing protein
25 yields to the cow?

1 A. To the cow? Her genetics, the feeding regimen, the
2 weather. Protein tests generally are depressed in hot, humid
3 weather. I would say those would be the primary -- the primary
4 movers.

5 Q. So there are costs that go into producing higher
6 component milk in terms of the breed and the feed?

7 A. Well, the main variable cost would be the feed. There
8 are strategies to feed for higher protein content of milk. As
9 far as, you know, and those results would be more immediate.
10 The genetic changes in a herd would take longer term, but, yes,
11 any, you know, prime, most of the dairy cattle in the
12 United States are bred via artificial insemination, and in
13 selecting genetics for use in your herd you can select for
14 increased protein content, it's one of the many variable
15 genetic selection tools that are available to producers.

16 Q. So now I'm at the top of page 8, which is the beginning
17 of your highly impressive 40-part formula. So tell me if this
18 summary is correct. So this formula essentially shows what
19 monthly PPD would have been if the Cooperatives' proposal had
20 been in place? Is that what you are showing here?

21 A. It actually does two things, actually maybe perhaps
22 three. What it does is it takes the milk pooled in the
23 California Order and applies Federal Order pricing formulas and
24 values to that pooled milk and components. Then, using the PPD
25 process that exists in the other multiple component orders, it

1 calculates what the PPD would be in the other component orders.
2 Then, the next step, it applies the Cooperatives' proposal on
3 PPD calculation to those same pool values and shows what
4 those -- shows the results of the Cooperative proposal, PPD
5 proposal. And then, lastly, I added in, I analyzed milk that
6 would be two standard deviations on component levels higher
7 than average milk to show what the PPD would be on -- would
8 have been on high component milk.

9 Q. Okay. And the PPD relates to the protein because the
10 protein affects what your PPD is, correct?

11 A. Well, it is, it is a factor in that the protein value
12 impacts the Class III value, and the Class III value is the
13 base value from which the PPD is calculated. The PPD is
14 calculated on, using the relative values of pooled Class I, II,
15 and IV milk to the value of pooled Class III milk. And so
16 protein being one of the three drivers of Class III value.
17 Protein does impact, protein values can impact the PPD.

18 JUDGE CLIFTON: What are the other two drivers?

19 MR. METZGER: Of Class III value?

20 JUDGE CLIFTON: Yes, please.

21 MR. METZGER: Butterfat and other solids.

22 JUDGE CLIFTON: Oh, okay. So it is no different from any
23 other place we're talking about PPD?

24 MR. METZGER: Correct.

25 JUDGE CLIFTON: Okay.

1 BY MS. VULIN:

2 Q. Now I'm on page 9, but still looking at this formula,
3 and I'm on step 27. So here you said you obtained some of your
4 data from Dr. John Newton in a paper published in, by
5 Dairy Markets and Policy Information Letter Series, entitled,
6 "Interpreting Proposed Language for the California Federal Milk
7 Marketing Order." Who is Dr. John Newton?

8 A. Currently Dr. John Newton is an Economist on staff at
9 the National Milk Producers Federation. Prior to that he
10 worked at the University of Illinois; and prior to that he has
11 experience in two Market Administrator offices, one being the
12 Mideast Order and the other being the Appalachian Order.

13 Q. Can you summarize for us what this analysis of paper,
14 "Interpreting Proposed Language" that he wrote?

15 A. As it pertains to the PPD, what the Cooperatives are
16 proposing is that the PPD value be assigned to the three
17 component values, milk, fat, and other solids, relative to
18 those components' contribution to the Class III value the
19 previous year. For example, let's say in 2008, if you look at
20 the Class III value of the year, for the year, if that
21 Class III value, you know, we talked about protein, butterfat,
22 and other solids contributing to the Class III value. If that
23 total Class III value, if 50 percent of that value came from
24 protein, and 40 percent of that value came from butterfat, and
25 10 percent of the value came from other solids, the

1 Cooperatives' proposal is that you take the PPD, and whether
2 it's positive or negative, you take that PPD value, let's say
3 in a given month it was a million dollars positive. You would
4 assign half of that value, the 50 percent, to the value of
5 protein, or half a million dollars; and 40 percent, or the
6 \$400,000, to the overall pool value of butterfat; and 10
7 percent of that value, \$100,000, to the overall pool value of
8 other solids.

9 Q. And that's what his paper was about?

10 A. That was part of what his paper was about.

11 Q. That's the part you focused on?

12 A. Yes.

13 Q. Is the paper publicly available?

14 A. Yes.

15 Q. So in regards your proposal on page 11 regarding
16 manufacturers who, or excuse me, producer-owned manufacturing
17 of Class III, for example, or IV products, as opposed to just
18 limiting this three million pound exemption to Class I
19 products, would it matter in your proposal where the milk came
20 from? Would it have to be producer-owned or could it just be a
21 smaller cheese plant that purchases milk from elsewhere?

22 A. What I am proposing, at a minimum, for manufacturing
23 exemption would mirror the exemptions provided for Class I. In
24 other words, a processor who is using up to three million
25 pounds of only their own milk would be exempt, or a processor

1 processing up to 150,000 pounds of milk per month, regardless
2 of source, be exempt.

3 Q. Now I'm on page 12 of your testimony. So I thought
4 this was an interesting point about the overflow plants. Can
5 you tell me a little bit more about how those work?

6 A. Essentially, you can have plants that, there are some
7 plants exist that, in existence, that only operate in times of
8 surplus milk, some butter powder plants have been that way.
9 And in doing what was typically referred to as the "spring
10 flush" when production is high in the country, those plants
11 will crank up and receive milk and produce butter and powder.
12 Other times of the year, say the hot summer months, when
13 overall production is down and there's not surplus milk in the
14 area, those plants may shutdown entirely.

15 There are other plants that may run on, let's say, two
16 shifts a day, six days a week. But when milk becomes surplus,
17 they may go to running three shifts a day, seven days a week.
18 Obviously, that change in production schedule increases their
19 cost. And the way they can recoup that cost in times of
20 surplus milk, is to be able to -- let's say it's a cheese
21 plant. They have the option in the other Federal Orders to buy
22 excess milk for less than the Class III value. And by buying
23 that milk for less, what's known as under class or less than
24 Class III value, that's how they offset their increased cost in
25 adding another days' production or adding another shift of

1 workers to their production schedule.

2 Q. And so it's really kind of the market at work to ensure
3 that no milk is wasted, but if you are asking a plant to
4 operate at these higher costs, then they need to be given some
5 sort of incentive, like being able to purchase milk at a lower
6 price.

7 A. If they can't offset their cost, they simply won't
8 produce. They won't receive the milk.

9 Q. And you said the Cooperatives' proposal would
10 essentially make that happen, so that it would no longer be
11 profitable for these plants to operate, to be able to take on
12 the surplus milk.

13 A. There will be situations where I would expect that
14 plants would not take on excess milk that is available because
15 it would not be profitable for those plants to operate, given
16 what other, whatever additional cost they would incur for
17 processing that additional milk.

18 Q. Now I'm at the bottom of that page. And the first
19 sentence of the last paragraph. So would you agree with my
20 summary that one of the problems with the Cooperatives' price
21 formula is that it doesn't properly or adequately track market
22 need, market value, and/or marketing efficiency, the three
23 elements that you highlighted in that sentence?

24 A. So you are at the last sentence of the first paragraph
25 under Dairy Institute Proposal.

1 Q. I'm sorry, I'm on the first sentence of the last
2 paragraph.

3 A. Establishing unique price formulas for a California
4 order. Actually, that is, shall we say, a critique of the
5 Dairy Institute, what is expected to be the Dairy Institute
6 Proposal, that separate Class III and IV price formulas be
7 established for a California Order based only on Western
8 product sales and Western plant make allowances.

9 Q. So -- thank you. Now I'm on Exhibit 82, the first
10 table. And so these variations month-to-month in the average
11 protein content, is this due to the variations you explained
12 earlier, that weather and feed and those things can change that
13 content?

14 A. Yes.

15 Q. And, last question. I'm just on the last table now,
16 Table 12. And if you could just point out each of these four
17 statistics that you have. Which of these two sources did they
18 come from?

19 A. The U.S. Milk Solids Export Percent came from National
20 Milk Producers Federation; the next two data points came from
21 the web reference listed on that table; and then the third
22 number, the 30 percent, is a calculation based off of the first
23 three data selections.

24 Q. Okay. So the first three came from the sources and
25 then the third is your calculation?

1 A. Yes.

2 Q. Thank you. No further questions.

3 JUDGE CLIFTON: Who next has questions for Mr. Metzger?
4 Mr. English?

5 MR. ENGLISH: I'm happy to go, your Honor -- Chip English.
6 I was just wondering whether, we have been going like an hour
7 and 45 minutes, whether the court reporter -- who is nodding
8 her head -- the witness. I'm not proposing lunch break,
9 because I actually prefer to go a little longer in the morning
10 so we have a shorter afternoon, but I'm wondering if now would
11 be appropriate for at least a ten-minute break or something,
12 and the court reporter is clearly nodding her head.

13 MR. METZGER: I believe we refer to it as nutrient
14 management in our board meetings.

15 JUDGE CLIFTON: All right. I like it.

16 So a quick show of hands. Your choices are 15-minutes
17 or 10. 15 minutes, how many of you want that? How many of you
18 want 10? The majority want 10.

19 Please be back and ready to go at 12:20.

20 (Whereupon, a break was taken.)

21 JUDGE CLIFTON: We're back on record at 12:24.
22 Mr. English?

23 CROSS-EXAMINATION

24 BY MR. ENGLISH:

25 Q. Thank you, your Honor. Chip English.

1 I don't have very many questions, Mr. Metzger. Just
2 for a moment on page 5, a clarification issue. When you
3 discuss SMP or skim milk powder, on the top paragraph. You
4 said that SMP is, that the vast majority of SMP is produced for
5 the export market. In fact, there is no standard of identity
6 under FDA regulations for skim milk powder, is there?

7 A. That is correct. However, I do notice when I went to
8 the NASS annual product survey summary, there's a category SMP
9 for animal feed.

10 Q. Okay. So the animals aren't subject to standards of
11 identity, correct?

12 A. That would be correct.

13 Q. Okay. So basically, the skim milk powder that is
14 marketed for commercial use, because of FDA law, pretty much
15 has to be exported, correct?

16 A. Correct.

17 Q. So turning to page 10, and the last paragraph just
18 before your discussion about the Cooperatives' proposal for
19 pool plant provisions. You don't actually have language to
20 propose today, what you are saying is that if there is going to
21 be a Federal Order in California, if you go down that road,
22 look to the existing Federal Orders for how that language works
23 for calculating the PPD, correct?

24 A. That is correct.

25 Q. Okay. And let me see if I can -- in talking now

1 exemption versus -- or you know, Mr. Beshore focused on two
2 issues, the exemption or depooling -- and you talked about, at
3 a minimum, would it be fair to say that if plants, like they
4 can in existing Federal Orders, can voluntary pool or not pool,
5 then you wouldn't need an exemption, correct?

6 A. That is correct.

7 Q. So it is -- would it be the case that when you keep
8 saying a minimum, that your preference would be to have the
9 rule as it exists in existing Federal Orders, and not
10 voluntarily pooled, correct?

11 A. That is correct.

12 Q. Turning to page 12 and your discussion of, underneath
13 the Dairy Institute proposal for Class III and IV prices, when
14 you discuss the observing your, you have observed milk
15 movements in and out of Orders 5, 6 and 7, correct?

16 A. Yes.

17 Q. Okay. And those are, in your view -- and I would agree
18 with you -- inefficient movements of milk, correct?

19 A. Yes.

20 Q. Have you, do you have information for this record, have
21 you observed currently in 2014 or 2015, those kinds of
22 inefficient movements with respect to California?

23 A. I have not. Doesn't mean they don't exist, but I have
24 not observed them.

25 Q. And on the bottom of page 12, and I think that

1 Ms. Vulin was trying to get at this, but maybe let me see if I
2 can get at this a different way. With respect to the
3 Cooperatives' proposal and the inclusive or mandatory pooling
4 issue, when you reference a criticism of the Dairy Institute
5 proposal as being based not on market need, market value, or
6 market efficiency, would you agree with me that that is
7 similarly a problem as to the Cooperatives' proposal with
8 respect to pooling?

9 A. It does have that potential if excess milk has problems
10 finding a processing home.

11 Q. And, finally, looking at page 13, looking at your
12 discussion about the price formula issue. Your criticism of
13 the Dairy Institute proposal would be cured if this was done on
14 a national basis; is that correct? If pricing were done on a
15 national basis, a national hearing?

16 A. If we had a national hearing, yes, to address all
17 Federal Orders. You know, the concept of regional pricing for
18 manufacturing milk is starting to surface in the industry, and
19 it seems as if what I'm anticipating the institute will put
20 into their proposal is that we kick that off with a special
21 price formula for California, which would inevitably, in my
22 opinion, go elsewhere. And so my, NAJ's position would be
23 let's do them all at once instead of doing them piecemeal.

24 Q. You understand that unfortunately the nature of this
25 beast is, that it's not national hearing, it is a California

1 hearing, so it may have prevented Dairy Institute from doing
2 that, correct?

3 A. I do.

4 Q. And so in a way, what you are saying is, you know, if
5 we're going to do these things, everybody should be up-to-date,
6 correct?

7 A. Yes.

8 Q. That's all I have.

9 CROSS-EXAMINATION

10 BY MR. VETNE:

11 Q. John Vetne for Hilmar Cheese Company.

12 I'm looking, Mr. Metzger, on your, on page 3 of your
13 statement where you share with us the Van Slyke formula.

14 A. Yes.

15 Q. And near the top of the page, just before the heading
16 Whey Production, the sentence reads, "The Van Slyke formula
17 cheese yield formula, predicts that average component milk in
18 the CDFA pool will yield 10.14 pounds of cheddar cheese."

19 Do you see that?

20 A. Yes.

21 Q. Okay. Would you agree with me that the Van Slyke
22 formula is a formula that predicts cheese yield in a controlled
23 laboratory setting? That is, it does not include losses,
24 shrinkage, incurred by most cheese plants?

25 A. Correct, it's a theoretical yield.

1 Q. And on the bottom of page 4, the second to the last
2 line from the bottom of the text when you are talking about
3 additional yield of .84 pounds of SMP, skim milk powder, you
4 are also dealing with a theoretical yield that doesn't include
5 losses, shrinkage, incurred by manufacturing plants, correct?

6 A. Yes. Table 7 is, shall we say, proof of concept. You
7 know, obviously it would be possible to include, you know, the
8 different moisture contents, shrinkage, losses, etcetera, but I
9 felt perhaps we were getting complex enough already. The
10 bottom line was, they were all, the thrust of this was a proof
11 of concept that higher component milk will lead to yield of
12 higher yield of skim milk powder.

13 Q. Okay. So your testimony shows direction, not result,
14 in an actual manufacturing plant?

15 A. Correct.

16 Q. In your testimony on incentive to increase protein
17 production, you are not, no doubt aware that Federal Orders
18 have included protein in at least some Orders, from the late
19 1980's, early 1990's, correct?

20 A. Yes.

21 Q. And have you observed in those markets that the protein
22 content of producer milk has been measurably increased over
23 time?

24 A. Yes, it has been.

25 Q. In response to a question, a question from Mr. Beshore,

1 you indicated that you support the proposal for a Federal Milk
2 Marketing Order in California.

3 Am I correct that your response in the affirmative was
4 primarily driven by the fact that the proposal includes protein
5 pricing, which is important to your organization?

6 A. Yes. It sends a better signal for component production
7 than does the existing CDFA Order.

8 Q. Okay. So your answer was based on the concept of
9 protein pricing, not whether protein pricing came from a
10 Federal sovereign or a state sovereign; is that correct?

11 A. That would be correct.

12 Q. And you were also asked a question, the premise for
13 which is, about depooling. The premise for which was producers
14 want to keep the high protein value in their milk checks and
15 not share it with others.

16 Do you recall that?

17 A. Yes.

18 Q. Are you aware that there, in the Federal Order systems,
19 in the system, that extra revenue that might be available from
20 depooling may, on occasion, be retained by plants to offset
21 their losses and not shared fully with the producer-suppliers?

22 A. Yes.

23 Q. Okay. And that's, would you agree that that's a
24 function in the Federal Order system that allows a recovery,
25 where for a particular plant, the make allowance may not be

1 sufficient?

2 A. Yes, that is a possibility.

3 Q. Okay. And are you aware that in the Pacific Northwest,
4 plants and producers may depool, and do depool, and have
5 depooled in 2014?

6 A. I would imagine that is indeed the case. I haven't
7 looked at the specifics for that particular Order.

8 Q. So with the opportunity to depool in that market, which
9 has not been limited by any Federal Order hearing, to the
10 extent revenue is available there, the political economic drive
11 to change the Federal Order to accommodate regional lower milk
12 values, would not be quite as strong as it would be in
13 California if everybody must be pooled?

14 Would you agree with that?

15 A. Yes.

16 Q. Thank you. That's all I have.

17 JUDGE CLIFTON: Who else has questions for Mr. Metzger?
18 Mr. Beshore?

19 REDIRECT EXAMINATION

20 BY MR. BESHORE:

21 Q. I'll try to be quick. Just a couple of follow up
22 clarifications.

23 On Table 11, where you calculate the, assume the PPD,
24 assume Class 1 differential value in a California Order.

25 A. Yes.

1 Q. Okay. You used only like two plant locations there. I
2 think \$1.80 and \$2.10.

3 A. Correct.

4 Q. So there are other plants located in other zones in
5 California. You are aware of that?

6 A. Yes.

7 Q. Okay. So that the resulting differential might be
8 different if you used different imputed differentials to come
9 up with that calculation?

10 A. Yes. The weighted average differential could be
11 different if all plants at all locations were included, along
12 with their volumes, and their zone differentials didn't have
13 access to that data. I wasn't really sure how much it might
14 change that.

15 Q. Right. Well, we don't have that data and so we can
16 only, I mean, you made one stab at it, Mr. Hollon made another
17 stab at it. That's about what we can do with what we have.

18 A. Right.

19 Q. Okay. You used Order 30 component ratios, rather than
20 California component ratios, because you don't have, CDFA
21 doesn't provide that data?

22 A. CDFA does not provide protein data.

23 Q. Okay. Did you think of using, like,
24 National All-Jersey producers in California as another way to
25 estimate those values, or was that, was that a kind of data

1 that might be available to you?

2 A. It would be such a subset of the overall data. For
3 example, I did consider using Dairy Herd Improvement
4 Association data for, you know, herds that opt into that
5 service.

6 Q. In California?

7 A. Well, in California -- yes, in California. But that
8 would be a select subset of herds as, you know, not
9 all-inclusive of all herds in California. And so it would only
10 represent maybe half the milk in California, so I opted not to
11 go that route.

12 Q. So you just took all of the Order 30 milk instead,
13 basically?

14 A. It's the most detailed analysis that I'm aware of on
15 month-to-month herd component levels. I actually did look at
16 DHI data from California, Minnesota and Wisconsin. And of cows
17 enrolled in Dairy Herd Association testing, the California data
18 actually has a higher protein percent than does Wisconsin or
19 Minnesota.

20 Q. Okay. How does butterfat compare in Order 30 versus
21 CDFA butterfat data?

22 A. Did not look at that.

23 Q. Okay. If CDFA data showed slightly higher butterfat,
24 that would imply, potentially, a slightly higher protein level.

25 A. Yes.

1 Q. Okay. And that would, in turn, factor into your
2 40-step blend calculation in however it would factor?

3 A. Should we re-work that, sir?

4 Q. No, I didn't really want to go there.

5 On the standard deviation information you provided,
6 just for clarity, I'm told by my statistical consultants from
7 my consulting statistician or something, that the percentage of
8 the total that would be represented by the two standard
9 deviation difference, which you have calculated for, is 2.5
10 percent of the population.

11 A. There would be 2.5 percent at that level or higher, but
12 also on the lower end of the tail, there would be another 2.5
13 percent. Two standard deviations less than the mean or below.

14 Q. But for what you calculated, that would be the 2.5
15 percent highest solids protein part of the --

16 A. Yes.

17 Q. -- data base. Okay. And one final question.

18 With respect to the question on how your thoughts on a
19 small, less than 150,000 pounds exempt manufacturing plant
20 would work, would that exempt entity, as you conceive it, have
21 a limit on how much, on the volume of milk that it could buy
22 from other entities?

23 A. Well, the understanding is that the 150,000 pounds
24 wouldn't matter milk source, whether it all came from the own
25 herd, or whether it came from two different neighborhood

1 suppliers.

2 Q. Right. That's all hard cap, so-to-speak?

3 A. Yes.

4 Q. Thank you very much, Mr. Metzger.

5 JUDGE CLIFTON: Mr. Zolin?

6 CROSS-EXAMINATION

7 BY ZOLIN:

8 Q. Hello. Alan Zolin, A-L-A-N, Z-O-L-I-N.

9 Mr. Metzger, you talked a lot about Order 30 data in
10 both cross-examination and in your testimony, but are you
11 familiar with the type of pricing that milk producers are
12 receiving in the Upper Midwest, Minnesota-Wisconsin area?

13 A. It's Federal Order milk multiple component pricing,
14 plus whatever over order premiums may be available.

15 Q. And are those over order premiums, would they include
16 protein premiums that are being paid by handlers in that area?

17 A. Some of them are, yes.

18 Q. Okay. Can I ask you if you remember, going back in
19 time, when component pricing was put into the Order 30
20 marketing area?

21 A. I remember when it was put into Orders in general, not
22 necessarily the Order 30 market. I'm from Northern Indiana,
23 and I'm old enough to remember -- came from a Guernsey herd --
24 I remember when we received milk protein payment, and I
25 remember when we received a protein premium, and then I

1 remember when component price, Federal Order component pricing
2 came in.

3 Q. That's fine. Where I'm heading is that there were
4 protein premiums being paid in Wisconsin before component
5 pricing; is that correct?

6 A. That's correct.

7 Q. And do you know what would have happened, or what did
8 happen, to the level of those protein premiums that were being
9 paid after component pricing went in that had a protein price
10 in it?

11 A. The potential existed for some protein premiums to
12 either be reduced or even eliminated depending on, you know,
13 what the receiving plant was able to extract out of the
14 marketplace for their product.

15 Q. Thank you, sir. That's all I have.

16 JUDGE CLIFTON: What else?

17 RE-CROSS-EXAMINATION

18 BY MS. TAYLOR:

19 Q. Good morning, Mr. Metzger.

20 A. Good morning, Ms. Taylor.

21 Q. Sue Taylor from Leprino Foods. Just one item of
22 clarification and it might be a nit. But on page 12, top, it
23 is four lines down. You note, and this is the sentence
24 starting with "due to their irregular processing schedules,
25 their cost, and therefore, their make allowances are greater

1 than those of manufacturing plants that can run at full
2 capacity nearly all the time."

3 I want to clarify, because I think there may be some
4 confusion that gets created by the term "make allowance." And
5 make allowance, of course, is used to describe a factor in the
6 regulated milk price formula.

7 I want to clarify your use of make allowance in that
8 case, and confirm that it is not to infer that the regulated
9 milk price gets adjusted because of their increased cost. What
10 you are really referring to is the increased cost.

11 A. Yes, each, you know, each plant does have its own make
12 allowance, regardless of what product they are making, being
13 their cost to produce the product. That was my use of the term
14 make allowance in that particular context, was that plant's
15 particular cost to make product. But yeah, that particular
16 plant would not impact the overall make allowance in the
17 Federal Order formulas, unless they somehow got included in the
18 plant survey that's used for the overall Federal Order formula
19 make allowances.

20 Q. Okay. Thank you.

21 RE-CROSS-EXAMINATION

22 BY MR. VANDENHEUVEL:

23 Q. Good afternoon.

24 A. Good afternoon, Rob.

25 Q. It is afternoon. Thank you for coming out and

1 testifying. We appreciate the detailed nature. I had just a
2 couple of --

3 JUDGE CLIFTON: Mr. Vandenheuvel?

4 MR. VANDENHEUVEL: I'm sorry, Rob Vandenheuvel, it's been
5 more than a week, so I haven't been up here in awhile.

6 Rob Vandenheuvel, V-A-N-D-E-N-H-E-U-V-E-L.

7 BY MR. VANDENHEUVEL:

8 Q. On the same paragraph that's Ms. Taylor was just asking
9 you about, I had a couple of follow up questions with regard to
10 the idea of balancing, and its interrelations with pooling.

11 You mentioned in the top of page 12, that some
12 manufacturing plants exist primarily to balance the milk supply
13 during the times of too much milk. Are you aware in
14 California, of how many balancing plants that it would be a
15 true balancing plant we have, or their volumes have substantial
16 movements in periods of either surplus or deficit, or there are
17 truly balancing?

18 A. I do not.

19 Q. To, and so following up on that, you wouldn't know if
20 we had any, if there were any balancing, whether that was,
21 whether those plants and those assets were owned by
22 cooperatives or whether they were owned and operated by private
23 companies?

24 A. Yeah, I don't know which plants would exactly fit your
25 definition of a balancing plant, so it's, therefore, I wouldn't

1 have --

2 Q. Well, it is not my -- to be clear, it's not my
3 definition, in the next line, these plants run at full capacity
4 only part of the year. So that's what I'm trying to aim at.
5 Do we know, in California, are there plants that run a full
6 capacity intentionally part of the year, and only partial
7 capacity intentionally other parts of the year?

8 A. I do not know of that.

9 Q. Okay. In California, we have, are you aware that
10 approximately 80 percent of our milk is managed through three
11 Cooperatives, DFA, CDI, and Land O'Lakes?

12 A. Yes.

13 Q. And those are the three proponents of Proposal
14 Number 1?

15 A. Yes.

16 Q. And would it be fair to say that some of their
17 investment in processing capacity or processing assets, could
18 have been aimed at getting more control over this idea of
19 balancing, having their own assets to lean on when they end up
20 having additional milk that needs to be processed?

21 A. That certainly is a fair possibility. I can't speak to
22 specific plants or specific ownership.

23 Q. So I guess, you know, what my point would be in asking
24 that would be the very folks that could be operating these
25 balance, these balancing assets, are the same folks that are

1 putting forth Proposal Number 1 in this hearing. Would you say
2 that's a possibility?

3 A. That is a possibility.

4 Q. All right. We have heard testimony earlier in this
5 hearing about those same Cooperatives taking a slightly
6 different approach to trying to balance their supplies, and
7 that is through base plans. Are you aware that base plans have
8 been established by the three co-ops in California?

9 A. I know they exist, I do not know the specifics.

10 Q. Would it be fair that the operation of a base plan
11 could be more of a preventive measure to balancing, as opposed
12 to trying to process excess milk and have that be your method,
13 sole method of balancing?

14 A. Yes.

15 Q. You have mentioned that National All-Jersey has -- I'm
16 going to shift gears a little bit -- National All-Jersey has a
17 membership of over a thousand milk producers, including a
18 hundred members in California.

19 Is your membership exclusively producers? You are a
20 producer-based organization?

21 A. We are primarily a producer-based organization.
22 However, any individuals who want to support our work can
23 join -- can join the organization as well. For example, we
24 have retired producers who opted to continue to support
25 National All-Jersey through membership, we have a few industry

1 folks who do as well. I would say probably at least 90 percent
2 of our membership is milking cows in some way, shape, or form.

3 Q. And the policies of National All-Jersey is established
4 by a Board of Directors?

5 A. Yes.

6 Q. And the Board is also made up of producers that are
7 members of your organization?

8 A. Yes.

9 Q. So I noticed on page 12, and leading into 13, the
10 discussion about a national price grid on manufacturing milk,
11 and we've talked about this a little bit in previous questions
12 about the possibility that that would be a national discussion.
13 I also notice that on page 13 in the second paragraph, so the
14 first paragraph, "the issues of price discovery in make
15 allowances may well need to be updated." Your use of the word
16 "may" there leads me to believe that National All-Jersey
17 doesn't have a specific policy yet with regard to a national
18 price grid, but this is rather some opining on your behalf.

19 A. It is a, it is a concept that's being discussed, yes.

20 Q. But there's no official policy at this point by
21 National All-Jersey in favor or in opposition?

22 A. Correct.

23 Q. That's all I have.

24 JUDGE CLIFTON: Thank you, Mr. Vandeneuvel. Who else has
25 questions for Mr. Metzger?

1 CROSS-EXAMINATION

2 BY MR. RICHMOND:

3 Q. Bill Richmond, USDA.

4 Thank you, Mr. Metzger, for your testimony, we
5 appreciate it. Do you have any idea approximately the
6 percentage of the membership of National All-Jersey that may be
7 considered a small business?

8 A. Give me the official definition of small business.

9 Q. Approximately 315,000 pounds of production a month,
10 maybe 175'ish cows?

11 A. I'm going to say 60 to 65 percent.

12 Q. Is that on a national basis?

13 A. It is a national basis.

14 Q. Is that approximately the same percentage in
15 California?

16 A. No. The California percentage would be lower. The
17 average herd size in California is much larger than the
18 national.

19 Q. Okay. So perhaps --

20 A. I'm going to say 30, 35 percent.

21 Q. Okay. Do you happen to have any idea of the
22 approximate number of Jersey cows in the State of California or
23 approximate production from Jersey cows in California?

24 A. I have seen industry estimates that the population
25 percentage of Jerseys or Jersey-influenced cattle, given that

1 crossbreeding is becoming more prevalent, that the Jersey
2 population in California, or Jersey-influenced genetics, would
3 represent perhaps 20 percent of the total.

4 Q. Approximately 20 percent. Okay. So I, this gets back
5 to Ms. Vulin's line of questioning just about kind of the basic
6 fundamentals of whey -- low protein producer and a high protein
7 producer, what their operation looks like. Is it primarily a
8 function of genetics or can you just help us better understand
9 what, if I'm a producer and say I want to increase the protein
10 content of my milk, what are the basic steps that I should
11 follow?

12 A. I would say there would be four primary options. One,
13 obviously, would be genetic selection. Regardless of breed,
14 there are genetics available to producers that will increase
15 protein content of milk.

16 Q. It is just not a Jersey cattle thing, there's other
17 breeds that would also --

18 A. Correct.

19 Q. Okay.

20 A. Correct. Because just through herd culling you can
21 decide to remove from your herd low-producing, protein
22 producing cows. Feed rations can influence, as well as can
23 environment. For example, if someone were to put in a fan
24 misting system or something, those protein levels can be
25 impacted by heat and humidity, so keeping the cows more

1 comfortable can also have a positive impact on protein
2 production.

3 Q. So generally that would represent some type of capital
4 expenditure investment to increase protein content?

5 A. In that last example, certainly.

6 Q. Would it also apply to perhaps changing a feed ration?
7 Is there any way for the, maybe the feed price to decrease
8 while still experiencing an increase?

9 A. Probably not.

10 Q. Okay. That's all we have. I appreciate it.

11 JUDGE CLIFTON: Does anyone else have questions for this
12 witness before he is allowed to be excused? No one.

13 You have provided a unique perspective and I appreciate
14 very much the hard work that went into your study and your
15 tables and your testimony, Mr. Metzger.

16 MR. METZGER: Thank you, your Honor.

17 JUDGE CLIFTON: I also liked your reference to Ben Yale.

18 MR. METZGER: We all miss him.

19 JUDGE CLIFTON: All right. Before we break for lunch, I
20 would like to know if Mr. Covington wants to testify today or a
21 different day?

22 MR. COVINGTON: Your Honor, I prefer going today, if I
23 could.

24 JUDGE CLIFTON: All right. Shall we take Mr. Covington
25 when we return from lunch?

1 MR. ENGLISH: We're happy to do that, your Honor.

2 JUDGE CLIFTON: All right. Mr. Covington, we'll take your
3 testimony as soon as we get back from lunch. And we normally
4 take about an hour and 15 minutes, so let's do that again
5 today. It's almost 1:00. Please be back and ready to go at
6 2:15. 2:15.

7 (Whereupon, the lunch recess was taken.)

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1 TUESDAY, OCTOBER 20, 2015 - - AFTERNOON SESSION

2 JUDGE CLIFTON: We're back on record at 2:17. And just now
3 we're distributing copies of an exhibit. Please raise your
4 hand if you need Mr. Covington's exhibit and do not yet have
5 it.

6 Mr. Covington, I don't want you to actually get into
7 your testimony until we have the other copies made, but I would
8 like to swear you in. I'll do that in a seated position, and
9 then after I have done that, I would like you to state and
10 spell your name. And in that process we can see if that
11 microphone is in a good place for your testimony. When you are
12 testifying, since you will want to be able to see what you are
13 reading from while speaking into the microphone, we'll test
14 that. All right. Would you raise your right hand, please?

15 Do you solemnly swear or affirm under penalty of
16 perjury that the evidence you will present will be the truth?

17 MR. COVINGTON: Yes, ma'am.

18 JUDGE CLIFTON: Thank you. Please state and spell your
19 name.

20 MR. COVINGTON: Calvin Covington, C-A-L-V-I-N,
21 C-O-V-I-N-G-T-O-N.

22 JUDGE CLIFTON: Good. Now that's good and strong volume,
23 so that's great.

24 We will be marking these, I realize the record copies
25 are not yet with the record keeper, but I believe this will be

1 Exhibit 83. All right. Thank you, Ms. Elliott. We'll mark
2 this as Exhibit 83.

3 (Thereafter, Exhibit 83 was marked
4 for identification.)

5 MR. HILL: Your Honor, this is Brian Hill. I see that
6 there is an address at the top of that. I want to make sure
7 that's not a personal address there before we start.

8 JUDGE CLIFTON: All right. Good. If that's a business
9 address, we're not violating any privacy interests by making it
10 part of our website of exhibits, but if it is your own private
11 home address, then we will probably redact it.

12 MR. COVINGTON: Yes, it is.

13 JUDGE CLIFTON: All right. Thank you, Mr. Hill, for
14 bringing that to our attention. Then when you read that and
15 identify yourself if you are going to read that part, please do
16 not read into the record your street address, just your city
17 and state.

18 MR. COVINGTON: Thank you.

19 JUDGE CLIFTON: You're welcome. Now, to redact it,
20 Ms. Elliott, what you will want to do for the copies that will
21 go on the USDA website, you will want to blot out the line that
22 has the street address.

23 MS. ELLIOTT: Okay.

24 JUDGE CLIFTON: And it appears not only as part of the top
25 identification, but it is also in the first paragraph.

1 MS. ELLIOTT: Okay.

2 JUDGE CLIFTON: And we do that whether or not you mind it
3 being disclosed, simply because we have these rules about
4 personally identifying information, and we're not to disclose
5 that, so we disclose business addresses, but not residences.
6 All right.

7 Is there anyone else who needs copies of Exhibit 83?
8 It appears everyone who needs one, has it. All right. Then,
9 Mr. Covington, do you want to say anything preliminary to
10 reading into the record the statement you have prepared?

11 MR. COVINGTON: Your Honor, I guess the first thing, I
12 would like to thank you and USDA personnel and also all the
13 participants of the various proposals for working me in,
14 letting me testify. I sure appreciate that.

15 JUDGE CLIFTON: Well, you are quite welcome, and we're
16 delighted you came. You came from some distance, as did the
17 people from the Washington, DC, area and that's a lot of us
18 here, but everyone who has travelled here, has done so out of a
19 willingness to contribute, and I appreciate that very much.

20 MR. COVINGTON: Thank you.

21 JUDGE CLIFTON: You may proceed.

22 MR. COVINGTON: My name is Calvin Covington. My address is
23 in Clemmons, North Carolina. I worked full-time in the dairy
24 industry for about 35 years before retiring in 2010 as the CEO
25 of Southeast Milk, Incorporated. My formal education includes

1 a Bachelor of Science Degree from North Carolina State
2 University, and a Master of Science Degree from Ohio State
3 University. Both degrees are in agriculture. Over the years I
4 have prepared proposals for, and presented testimony, including
5 expert testimony, in several Federal Order hearings.

6 Currently, on a part-time basis, I provide assistance to dairy
7 cooperatives and proprietary plants in the areas of milk
8 pricing, Federal Order regulations, dairy policy, plus speak
9 and write on those subjects.

10 My testimony is presented on behalf of two southeast
11 based dairy cooperatives; Cobblestone Milk Producers
12 Cooperative, based in Chatham, Virginia; and Southeast Milk
13 Incorporated, based in Belleview, Florida.

14 Cobblestone markets approximately 550 million pounds of
15 milk annually, primarily to fluid milk processing plants in the
16 Appalachian and Southeast Federal Milk Marketing Orders.

17 Cobblestone's 19 members are located in Georgia,
18 North Carolina, and Virginia. Southeast Milk markets
19 approximately 2.5 billion pounds of milk annually, primarily to
20 fluid milk processing plants in the Florida and Southeast
21 Federal Milk Marketing Orders, including two processing plants
22 and one balancing plant owned by the Cooperative. Southeast
23 Milk's 158 members are located in Florida, Georgia, and
24 South Carolina. Combined, both cooperatives market about
25 one-third of the fluid milk in the ten southeast states.

1 Let me state from the outset, Cobblestone and
2 Southeast Milk operate in the milk market almost opposite from
3 the California milk market. Class I -- and when I use, your
4 Honor, when I say Class and the number following, I'm referring
5 to a Roman numeral. Class I utilization last year in the
6 Florida Order was 85 percent; Southeast Order 74 percent; and
7 the Appalachian order 68 percent. On the other hand,
8 California Class I utilization is about 13 percent. From 1995
9 to 2014, the southeast saw its milk production decline from
10 13.5 to 9.5 billion pounds. And let me add here, if it is
11 okay, your Honor, it's not in the print here, that also during
12 this same period of time from 1995 to 2014, the number of
13 licensed dairy farms in the southeast declined from about 8600
14 to about 2650, about a 70 percent decline. During this same
15 timeframe, California milk production went from 25 to 42
16 billion pounds.

17 Even though the two cooperatives I represent operate in
18 a market significantly different from California, this hearing
19 has the potential to economically impact these two cooperatives
20 and their dairy farmer members, plus the processors and
21 consumers the cooperatives serve. This is the reason
22 Cobbleston and Southeast Milk submit this testimony.

23 Considering the impact of one Federal Order on another
24 Order is not without prior acknowledgement. The often cited
25 Federal Milk Order Study Committee, December 1962 Report to the

1 Secretary of Agriculture, commonly referred to as the
2 "Nourse Report" speaks to this need as follows, and I quote:

3
4 ...a recognition that the outlook of the Secretary
5 of Agriculture and his aides should not be
6 parochial but industry-wide and national in its
7 scope. The Secretary is empowered and entrusted
8 to develop a system of fluid milk marketing
9 orders, integrated as to their relations with each
10 other and with all the uses in which milk goes,
11 not merely orderly as internal housekeeping."

12 End of quotation. And the source of this is Report to
13 the Secretary of Agriculture by the Federal Order Study
14 Committee, December 1992, page 10.

15 The basis of our Cooperative's concern are the results
16 presented in the Preliminary Regulatory Impact Analysis of
17 Proposals to Establish a California Federal Milk Marketing
18 Order, emphasis of proposal to establish a California Federal
19 Milk Marketing Order, released by the Department in August of
20 this year and presented earlier in this hearing. Our concerns
21 focus on producer milk prices and milk production.

22 Depending upon the specific proposal, the impact on the
23 blend prices at test for the three orders in the southeast
24 varies. The following three tables show the average minimum
25 and maximum impact on blend prices at test for the three
southeast orders for the period 2017 to 2024. Data in all
three tables is taken from the Impact Analysis report.

The first table here is the Appalachian - Changes in
Blend Price at Test (2017-2024). I have listed in the first

1 column there, each of the proposals. I'll start with the
2 Cooperatives' proposal. Average impact there is minus 13
3 cents, the minimum is minus 15, the maximum, minus 9.

4 The CPHA, which is the producer-handler proposal, the
5 average impact is minus 13 cents, the minimum minus 15, the
6 maximum minus .09.

7 For the Ponderosa, minus 13 the average, minus 15 the
8 minimum, minus 9 the maximum.

9 And then the Dairy Institute, minus 4 on the average,
10 minus 27 on the minimum, plus 23 on the maximum.

11 The source for this and the two tables that will
12 follow, your Honor, are from Tables B2, B18, B34, and B50 from
13 the Preliminary Regulatory Impact Analysis of Proposals to
14 Establish a California Federal Milk Marketing Order.

15 The next table shows for the Florida Order, Changes in
16 Blend Prices at Test, same period of time, (2017-2014). The
17 Cooperatives' proposal of average, minus 22 cents; the minimum
18 minus 31 cents; the maximum minus 10.

19 The producer-handler, minus 22, minimum minus 30,
20 maximum minus 10.

21 The Ponderosa average, minus 21, the minimum minus 29,
22 the maximum minus 10.

23 The Dairy Institute minus 1 cent, minimum minus 44,
24 maximum positive 41.

25 Again, the same source I just read for the previous

1 one.

2 For the Southeast Order, Changes in Blend Price at Test
3 for that same time period, (2017-2024). The Cooperatives',
4 minus 26 cents, minimum minus 34, maximum minus 13.

5 The producer-handler, minus 25 for the average, the
6 minimum minus 34, the maximum minus 13.

7 The Ponderosa, average minus 25, minimum minus 32, the
8 maximum minus 13.

9 The Dairy Institute, minus 24, the minimum minus 75,
10 the maximum positive 33 cents. Again, the same source.

11 For all four proposals, the average blend price at test
12 over the eight-year period is projected lower in the three
13 southeast orders. Using the lowest average change in milk
14 price from the four proposals, the average Southeast Milk
15 producer marketing milk in the Florida Order, could expect a
16 drop in annual revenue of about \$35,000. For a Cobblestone
17 producer marketing milk in the Southeast Order, the annual
18 revenue decline it is about \$70,000.

19 And, your Honor, let me add, it is not in my written
20 report here, that for producers that in these two cooperatives,
21 especially producers in Florida and South Georgia and producers
22 in Virginia, because of their dairy farm structure, they react
23 very quickly and responsibly to changes in price because they
24 can add cows quickly or they can decrease cows quickly because
25 of their set up. So these kind of changes in price, either

1 plus or minus, could have a big impact on how many cows they
2 milk, as well as how much milk they produce.

3 According to the analysis, milk production declines or
4 remains flat under the Cooperative, Producer-Handler, and
5 Ponderosa proposals. While under the Dairy Institute proposal,
6 milk production is projected to remain flat in the Appalachian
7 Order, and to increase slightly in the Florida and Southeast
8 Orders. This in marketing areas that, annually, do not produce
9 the milk volume needed to meet consumer fluid demand.

10 A major objective of Federal Milk Marketing Orders is
11 to ensure consumers have access to adequate and dependable
12 supplies of high-quality milk from the sources best suited,
13 both technologically and economically, to supply these demands.
14 Meeting this objective is a major challenge in the Southeast.
15 Lower producer prices and less milk make the challenge more
16 difficult.

17 The U.S. Census Bureau estimates the population of the
18 ten southeast states at 76.5 million in 2014, which is about
19 twice the population of California. Using the recently
20 released 2014 per capita fluid milk consumption number of 159
21 pounds, results in a total southeast fluid milk consumption of
22 12.2 billion pounds in 2014. Total southeast milk production
23 during this timeframe was about 9.5 billion pounds. This is a
24 deficit of 2.7 billion pounds. If we consider balancing and
25 standardization requirements, the annual deficit easily grows

1 to 4.5 billion pounds.

2 Each year the Central Milk Market Administrator
3 publishes per capita milk production data by state. The
4 Central administrator uses a number, 300 pounds per capita
5 production needed to meet a State's Class I and II plus reserve
6 milk needs. Not a single one of the ten southeast states hits
7 the 300 pound mark.

8 The additional milk needed to meet the southeast fluid
9 milk deficit must be transported into the area, either as bulk
10 or packaged milk. Producing less milk than needed to meet the
11 consumer fluid milk demand, increases expense of transporting
12 milk into the market. This transportation adds additional
13 expense to the cost of milk which is borne by producers,
14 processors and consumers.

15 Thanks to previous decisions by the Department and the
16 efforts by many groups, milk production in the southeast has
17 been on a slight upward trend since 2010. It is important to
18 all segments of the dairy industry in the southeast, producers,
19 processors, and consumers, this upper trend in production
20 continue to increase in order to provide the fluid milk needed
21 by the market.

22 In some summary, we encourage the Secretary to do the
23 following:

- 24 1. In formulating a recommendation, take into
25 consideration the potential impact a decision in

1 one Federal Order has on other orders.

2 2. If a decision is made that makes it more difficult
3 for the three southeast orders to provide consumers
4 an adequate and dependable supply of high-quality
5 fluid milk, be receptive to considering future
6 proposals to help the Orders meet the objective of
7 supplying consumers with an adequate and dependable
8 supply of fluid milk.

9 That's my testimony, your Honor.

10 JUDGE CLIFTON: What, Mr. Covington, do you understand to
11 be the mechanism by which the proposals would have the economic
12 impact in your region that is depicted by the models?

13 MR. COVINGTON: If, again, if I am following your question
14 correctly, and based upon the information that we had, the
15 preliminary economic analysis showed for each Order, including
16 the three orders that I represent, with producers it showed
17 that the milk price from those years, 2017 to 2024, would
18 change, in most all cases, be a lower price level as I had here
19 in my tables for each of the four proposals.

20 JUDGE CLIFTON: Who has questions for Mr. Covington? Does
21 anyone want to question Mr. Covington about Exhibit 83 before
22 determining whether you object to its being admitted into
23 evidence? No one. Is there any objection to Exhibit 83 being
24 admitted? There is none. Exhibit 83 is admitted into
25 evidence.

1 (Thereafter, Exhibit 83 was
2 received into evidence.)

3 JUDGE CLIFTON: Now, who has questions for Mr. Covington?

4 CROSS-EXAMINATION

5 BY MS. HANCOCK:

6 Q. Good afternoon, Mr. Covington.

7 My name is Nicole Hancock and I represent the
8 California Producer Handlers Association and Ponderosa Dairy.
9 I just want to talk with you a little bit about your
10 understanding of how USDA's Preliminary Regulatory Impact
11 Analysis evaluated the proposals.

12 You have on here that you, I think you pulled out three
13 different charts that affect the Southeast, Florida and
14 Appalachian. Those are the three areas that you are looking
15 at?

16 A. Yeah, Florida, the Appalachian, and the Southeast.

17 Q. Okay. You say it different -- Appalachian.

18 A. Well, that's sort of where I live, and that's the way
19 we always call it -- Appalachian.

20 Q. Well, I apologize for --

21 A. No, that's fine.

22 Q. Okay. So I want to talk about -- so the numbers that
23 you have in here where you talk about, you have averaged the
24 impact in each one of these areas on page 3 of Exhibit 83.

25 A. Okay. I didn't average, I just lifted the number off

1 of those particular tables that showed the average.

2 Q. And in the first paragraph on page 3 it talks about the
3 average blend price over the eight-year period is projected
4 lower. Did you do any kind of analysis using those numbers?

5 A. Well, what I did is that I took, like I said, I took
6 the worst case scenario. And for those producers, Southeast
7 Milk, who markets milk primarily in Florida, I took the average
8 year annual volume that a southeast milk producer produces,
9 which is about 16 million pounds a year, and just did the
10 multiplication and rounded it off to 35,000.

11 For Cobblestone, I took the Southeast Order and took
12 the 26 cents. Their average producer produces about 30, about
13 28 million pounds of milk a year, and just did the
14 multiplication and rounded of to \$70,000.

15 Q. Okay. Thank you. Then, I just want to clarify, and
16 you weren't here for the testimony when the U.S. presented this
17 data?

18 A. No, ma'am.

19 Q. So when the USDA presented the data, they had their
20 Economist, Ms. Steeneck, come on and discuss this data. And
21 what she talked about were the numbers reflected. She helped
22 provide some clarification, and I want to tell you about that
23 and then ask you if that has any impact on what you are talking
24 about.

25 But under the California Producer Handlers Association

1 Proposal and Ponderosa Dairy Proposal, those are not
2 stand-alone proposals. Those are supplemental topics is what I
3 would consider them to be, that if a Federal Order is adopted,
4 they would like certain aspects included as well that address
5 their, each of their business models.

6 And so when the USDA conducted that economic analysis
7 as they explained it, or as I understand they explained it,
8 they didn't determine that the impact, the financial impact was
9 unique to that proposal, but was instead, because it was
10 reliant on, say for example, the Cooperatives' Proposal, it
11 adopted those same numbers or changes or economic impact in
12 other areas. Does that make sense?

13 A. Yes, ma'am. And again, I just, I put it in my tables
14 the way they had it presented in theirs. But what you say
15 makes sense.

16 Q. Is that how you understood it when you read it?

17 A. Yes. But again, I wanted to make sure I didn't, I
18 wanted to use the data the way they presented it.

19 Q. Okay. So it doesn't, in any way, affect your analysis.
20 You are just pulling out the information --

21 A. That they had, yes.

22 Q. Okay. Thank you.

23 A. Thank you.

24 JUDGE CLIFTON: Who next would like to question
25 Mr. Covington?

1 CROSS-EXAMINATION

2 BY MR. VETNE:

3 Q. John Vetne for Hilmar Cheese Company.

4 Mr. Covington, we had some, quite a bit of information
5 here from milk producers in California and different ways of
6 responding to milk price signals and alternative uses of land.
7 In the areas that you are familiar with, are there alternative
8 crops in which milk producers do, or make, participate, as
9 revenue streams to compare dollars coming in, one use versus
10 another?

11 A. Yes, there are and it would vary depending upon the
12 area.

13 Q. In Florida, for example, what might one look at?

14 A. In Florida, especially in South Florida, at one time
15 you had some dairy farmers, when the citrus industry was
16 strong, moved from dairy to citrus. Also, you had you had some
17 dairy farmers, if they had a land base, would move to beef
18 cattle production. Then, as you move further up into Florida,
19 you had, going from dairy farming into crop farming, or either
20 going into timber. And then moving on up, Southern Georgia and
21 so forth, get more into crop farming, especially cotton or some
22 small grains. Moving on further up into Virginia would be in
23 tobacco or moving in some other animal industry, for example,
24 like poultry or swine.

25 Q. And of the producers with which you are familiar, are

1 there milk producers that do, on their farms, have more than
2 one income producing enterprise?

3 A. Yes, some of them do.

4 Q. With respect to the impact on, estimated impact, is it
5 your understanding that the way U.S. Dairy Programs estimated
6 the impact, is that the proposal, if adopted, would result in
7 higher milk prices in California?

8 A. Yes, sir.

9 Q. And is it your understanding that as a result of the
10 higher milk prices, California dairy farmers would be
11 stimulated to produce more milk?

12 A. Yes, sir.

13 Q. And that as a result of more milk being produced, more
14 cheese and nonfat dry milk and butter would be produced.

15 A. Yes, sir.

16 Q. And that in turn, that the availability of more dairy
17 products on the national marketplace would adversely affect the
18 basic formula price used in the Federal Order system; is that
19 correct?

20 A. Yes, sir.

21 Q. Okay. And at the bottom of your page 1 of your
22 testimony, you've referred to growth of California milk
23 production, and during the same period, a decline in milk
24 production in the southeast states. Would it be the same
25 dynamic, essentially, that between the two regions that has an

1 affected decline in southeast production, that's California
2 production has grown and made more products available, prices
3 for the commodities used to set Federal milk prices were
4 affected adversely?

5 A. Well, the primary reason for declining in milk
6 production in the southeast during that period of time would be
7 profitability. This wasn't, a lot of farms just didn't make
8 enough money profit-wise, so they would exit the business.

9 Q. So I think you estimated during that period of time
10 farm numbers, the approximately 6,000 farmers who decided not
11 to dairy anymore?

12 A. A licensed dairy farms, according to the published
13 information, about 6,000 less today or in 2014, than there were
14 in 1995.

15 Q. And with declining milk production, I guess we cannot
16 assume that if somebody went out of business, their cows just
17 went to somebody else and kept producing; is that correct?

18 A. That is correct, yes.

19 Q. The number of dairy cows in the southeast have reduced
20 also, which is reflected in the lower production numbers?

21 A. I can't recall from memory the actual number, what the
22 dairy cow numbers have during that time period, but they have
23 declined, yes.

24 Q. Okay. Do you know if during that period of declining
25 production in the southeast, when somebody went out of

1 business, some of the cows were marketed to buyers in
2 California?

3 A. It very doubtful because just the distance.

4 Q. The distance?

5 A. Again, I don't know, but I would -- I would be
6 doubtful.

7 Q. Where would be the market for southeast cows?

8 A. Well, a good chunk of those cows that went out would
9 have went to slaughter. A lot of them went to slaughter. Then
10 you would have had some dairy farmers in the southeast buying
11 the better cows, but a high percent of them, generally when a
12 dispersal herd is held in farms down there, a good percent of
13 them are culled and sent to slaughter and they just sort of
14 sell the better ones.

15 Q. So cows that are finished with their milking cycle just
16 aren't replaced. That explains the drop in cow numbers.

17 A. Yes, you have, just, again, with farms going down, and
18 again, some current farms not expanding, and total cow numbers
19 would decline.

20 Q. Thank you.

21 JUDGE CLIFTON: Who next would like to question
22 Mr. Covington?

23 CROSS-EXAMINATION

24 BY MR. BESHORE:

25 Q. I just want to, just one follow up question,

1 Mr. Covington. In response to Mr. Vetne --

2 JUDGE CLIFTON: Your name?

3 MR. BESHORE: Marvin Beshore.

4 BY MR. BESHORE:

5 Q. In response to Mr. Vetne's questions about assumed
6 increases in California milk production of the proposal, if the
7 Federal Order came into California, did you happen to hear any
8 of the testimony relating to the USDA projections where it was
9 shown that, for instance, in 2014, which are actual numbers,
10 the USDA projections that generate the numbers that give you
11 concern, which I understand completely, that they already, in
12 2014, they got 2.3 billion pounds more produced in California
13 than actually occurred? Did you pick up any of that testimony?

14 A. Okay. I didn't hear the testimony, but I did see some
15 of that in the transcript.

16 Q. Okay. And then for 2015 the baseline projections in
17 the economic model showed a, the numbers are in there, roughly
18 a six percent increase, I think, in milk production in
19 California? I might be off on the percentage, but a
20 substantial increase from 2014 to 2015 in California, whereas
21 we're actually down three to four percent for the year. Do you
22 remember seeing that also?

23 A. Again, I read that transcript, and I guess, I'm sure, I
24 guess, Mr. Beshore, I would have to probably go back and tell
25 you specifically. But I remember a little bit what you are

1 talking about, I don't have it in front of me.

2 Q. So, in any event, if those are the realities of,
3 currently, of milk production in California, that could
4 possibly have some impact on what we foresee going forward with
5 a Federal Order?

6 A. Yes.

7 Q. Thank you.

8 JUDGE CLIFTON: How user-friendly is that website?

9 MR. COVINGTON: Well, I just went to the transcripts and I
10 just pulled them up and read them.

11 JUDGE CLIFTON: Sounds good. Thank you. There are a
12 couple of features that are unique in my experience with regard
13 to these rule making hearings. The first is the availability
14 of the audio feed, and the second is having transcripts and
15 exhibits as we go along instead of waiting until weeks after
16 the end, which was the timetable that I was used to. So having
17 you be able to access and have information, and then come with
18 your knowledge about your area, is, I think, a wonderful thing.

19 MR. COVINGTON: It speeds the process up and hopefully
20 makes it more accurate.

21 JUDGE CLIFTON: Who else has questions for Mr. Covington?

22 CROSS-EXAMINATION

23 BY MS. MAY:

24 Q. Laurel May, USDA. Thank you so much for testifying
25 today. We really appreciate you coming here and sharing your

1 thoughts with us.

2 We have a couple of questions about your testimony.
3 First of all, one of the things that USDA is required to do is
4 to consider the impact of our regulations on small businesses,
5 and you have told us that you represent two Cooperative
6 associations of producers. And so our question would be
7 whether you could tell us what percentage of each of those
8 organizations would be comprised of small businesses as defined
9 by the Small Business Association, which is, we have calculated
10 to be about 315,000 pounds of milk a month.

11 A. Okay. None of Cobblestone producers would classify as
12 small business.

13 Q. Okay.

14 A. Because they are producing, the average producer is
15 producing about 28 billion pounds a year. On Southeast Milk,
16 the average producer is between 16 and 17 million a year, and
17 the 158, again, I'm just giving my best estimate, of the 158,
18 may be three or four of them might qualify.

19 Q. Okay. That helps us. Thank you so much.

20 A. Yeah.

21 Q. And on your charts, the tables, I'm wondering if the
22 labels for the columns "minimum" and "maximum" reflect what's
23 really being shown there. As I recall, these were, the changes
24 were the minimum impact and the maximum impact to the baseline
25 numbers. So I'm thinking that negative 15 cents is more of an

1 impact than negative 9 cents per hundredweight. Am I reading
2 that right?

3 A. Okay. I had the same question that you had when I read
4 those tables, because I thought it ought to be reversed.

5 Q. Good, then maybe you are going to straighten me out
6 here.

7 A. No, because I felt the same way you did. And so since
8 I took the information right from the tables, I felt I better
9 use the same way that they had it in the tables. They had it
10 in the tables. Because if I were doing it, I would have
11 reversed it, but I didn't.

12 Q. I would, too.

13 A. But again, but I, you know, that's the data I had, so I
14 didn't feel like I was, I felt I should change what they had.

15 Q. I totally agree with your viewpoint and I appreciate
16 you pointing that out to us, so I'll have to find out more
17 about that.

18 On page 2 you cited the Federal Milk Order Study
19 Committee Report from December of 1962, and then below the
20 quotation you list as the source, the Report to the Secretary
21 of Agriculture dated December 1992.

22 A. Yes, that's a good catch. I just left out the first
23 part of it. I should have had the Federal Milk Order Study
24 Committee, I should have had the, as a source, I should have
25 had the identical to what I have cited up there. My apologies.

1 Q. Okay. So it should be 1962, then?

2 A. Yeah, good catch. I don't know how many times I have
3 read that, and my apologies.

4 Q. Cliff caught it.

5 A. I don't know how many times I've read that. That's the
6 reason it is difficult to edit your own.

7 Q. It is.

8 A. But I have got the, actually, your Director gave me
9 that book, so I think ya'll been trying to get rid of them, so
10 I have actually got it back there.

11 Q. All right. Thank you so much.

12 A. A lot of good information in it.

13 JUDGE CLIFTON: Mr. Covington, do you want us to make the
14 change to your exhibit to reflect as your citation below the
15 quote, 1962?

16 MR. COVINGTON: Yes, ma'am, that's what it should be.
17 Again, I even read it right here and didn't catch it.

18 JUDGE CLIFTON: All right.

19 MR. COVINGTON: Thank you.

20 JUDGE CLIFTON: Ms. Elliott is making that change now, and
21 I'm making it on my copy to 1962.

22 Who else has questions for Mr. Covington?

23 Mr. Covington, I think you are done.

24 MR. COVINGTON: Okay. Thank you, your Honor.

25 JUDGE CLIFTON: Is there anything you would like to add?

1 MR. COVINGTON: No, ma'am, not at this time. I just
2 appreciate this opportunity for working me in.

3 JUDGE CLIFTON: Thank you for being here and giving us your
4 testimony.

5 Then I believe we have come to the point where
6 Dr. Schiek returns to the witness stand.

7 MR. ENGLISH: This is Chip English.

8 That's correct, your Honor.

9 JUDGE CLIFTON: Dr. Schiek, I thank you for waiting to
10 resume your testimony so that we could take the testimony of
11 others. You remain sworn. Would you again state and spell
12 your name?

13 DR. SCHIEK: My name is William, W-I-L-L-I-A-M, Schiek,
14 S-C-H-I-E-K.

15 MR. ENGLISH: So again, this is Chip English.

16 And before -- when Dr. Schiek ended his testimony at
17 5:00 yesterday, he had just completed page 30 of Exhibit 79.
18 So in a moment, but not quite yet, he's going to start back on
19 page 31 of Exhibit 79. But before he does that, I have one
20 preliminary issue, and then because his testimony on page 30
21 referenced Table 2 of Exhibit 80, I want to discuss some more
22 of that table, because we didn't have a chance to do that at
23 5:00 yesterday. So let me start with a preliminary issue that
24 was addressed yesterday to some extent, and I think your Honor,
25 you asked a question, and let me just ask.

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CONTINUED DIRECT EXAMINATION

BY MR. ENGLISH:

Q. With respect to the issue of Grade A milk and then term market milk in California, do you have some additional information for the record today, Dr. Schiek?

A. Yes, I do. I think maybe some clarification. This issue has come up, I think it would be good to at least get some additional information on the record. The definitions of market milk and Grade A milk under the California Food and Ag Code, are contained in the California Food and Agricultural Code, Sections 35781 through 35928.

And just to, I guess, clarify my comments from yesterday that I was a little uncertain of, market milk meets Grade A requirements. In other words, the bacteriological counts and chloroform counts and everything of market milk basically meet Grade A requirements. There are some categories of market milk, and the extent to which they are still used, I am not certain, but they have more stringent requirements, lower bacteria counts, lower chloroform counts in some cases. And these are, these additional sort of classes of market milk are certified milk and guaranteed milk. Those are both, under the California, defined under the California Food and Ag Code. And if you look at the the descriptions there, these are, have standards and requirements that go beyond just regular Grade A milk. And I think that's primarily because they were designed

1 for raw milk consumption.

2 Q. Anything else you would like to add on the issue of
3 Grade A or market milk?

4 A. Well, then the general question was, how do we
5 interpret market milk versus Grade A milk? And I think what we
6 can say is, in terms of usage, the way we normally use them,
7 they are equivalent.

8 Q. Okay. Thank you. So now you referenced on page 30,
9 Table 2 of Exhibit 80. And we discussed very briefly your
10 development of Table 2 as taking Exhibit 61 from CDFA Table X,
11 and adding up the data and creating a table with the annual
12 counts, correct?

13 A. Correct.

14 Q. So can you, so as we're looking at this, we start with
15 sort of the interesting situation of 1996 volumes, and this is
16 total bulk milk imports in California -- perhaps for those on
17 the Internet or whatever -- and so you are at a situation where
18 coincidentally or however, the volume in 1996 is a little over
19 a 100,000 pounds more than the 2014, correct?

20 A. Correct.

21 Q. But -- but in between, there's been, you know, there
22 was looked like an upward trend until you get to 2004, and then
23 there's been a downward trend from 2004 to 2014, correct?

24 A. Correct.

25 Q. So in your 18 years at the Dairy Institute, you have

1 obviously been here for that same timeframe, what would you say
2 was going on with respect to that trend and why it's gone in
3 two different directions?

4 A. Yeah, the main issue with that trend was changing price
5 relationships with contiguous states. And in particular, in
6 the early 2000's there were some lower prices in some of the
7 contiguous states that led to, or at least a lower price than
8 price relationship that has historically been in place, had
9 historically been in place. And there was opportunity to
10 essentially, create some economic advantage for certain players
11 to import milk or to buy, essentially, buy milk from
12 out-of-state and bring it into California. And so we saw those
13 numbers decline.

14 Dairy Institute basically tried to get a Class I price
15 adjustment over that period where the numbers were really
16 starting to grow, and eventually we were able to get an
17 adjustment. And around that time, prices, the imports started
18 declining again. I think there were also some changes taking
19 place in terms of the market as well in terms of just how
20 different markets were supplied and how different areas in
21 nearby states at the same time, just business decisions that
22 different players were making that also contributed.

23 Q. So -- thank you. Would you then pick up your testimony
24 on 31 of Exhibit 79, and read at least the first paragraph and
25 then we'll talk about Exhibit 80 again.

1 A. Okay.

2 Q. It is 33 for us.

3 A. So Changing -- the new heading, right?

4 Q. Yes.

5 A. Okay.

6 Changing milk production trends in California are not
7 disorderly marketing.

8 Milk production in California has had a history of
9 rapid expansion (Figure 3, Table 3). The CDFA Milk Pooling
10 plan was implemented in the state in 1969. For the ensuing
11 four decades, the state's milk production growth rate exceeded
12 that of the rest of the country as shown in Figure 4 and Table
13 4. The recent slow down in the growth of California's milk
14 output is not a particularly unusual occurrence when looking at
15 other states. Milk production in the U.S. and several selected
16 states is shown in Table 4 as an index, where each state's milk
17 output is expressed in relation to its milk production in 1985
18 (100=1985). Major milk producing states like Wisconsin,
19 Minnesota, and New York have all experienced declines in milk
20 production at various times since 1985. FMMO regulated minimum
21 prices have changed throughout the period as well, but there
22 does not appear to have been a focus by USDA on increasing
23 Class III or Class IV/III-A regulated prices to deal with
24 declining milk production in these states or in the orders
25 covering these states.

1 California's average annual milk output growth exceeded
2 4 percent in the 1980's and 1990's, before slowing in the
3 period from 2000 to 2009, and slowing further since 2010 (see
4 Table 5) as a combination of high cost for feedstuffs that are
5 now declining (shown in Table 6) and the impact of the state's
6 three-year drought took hold. This year, milk production has
7 declined substantially from last year's record high, but unlike
8 the 2009 downturn, USDA data suggests that cow numbers have
9 declined little and the bulk of the decrease in milk output
10 drop is due to lower milk per cow (Table 7).

11 Q. Actually, as I looked at it, why don't you complete the
12 next paragraph and then we'll talk to that.

13 A. Still, for the first four decades after pooling was
14 introduced in California, milk production expanded much more
15 rapidly than in the rest of the U.S., denoting milk production
16 returns that were, on balance, sufficient to encourage strong
17 milk production growth. Another key point to remember in
18 examining milk output growth percentage rates, is that a large
19 milk production base means that a small percentage increases in
20 milk -- that means that -- small percentage increases a milk
21 output can be substantial in terms of the extra milk pounds
22 produced. For example, a one percent annual growth rate based
23 on California's 2014 milk output of roughly 42.3 billion
24 pounds, results in 423 million pounds per year of additional
25 milk. While a one percent growth rate in Florida's milk

1 production of 2.5 billion pounds, results in additional milk of
2 only 25 million pounds. Put another way, Florida would have to
3 grow by 17 percent to produce as much additional milk as
4 California does by growing at a one percent rate.

5 Q. So now please stop. Let's go to Exhibit 80. And in
6 those previous paragraphs you referred to a number of tables
7 and figures. So let's start with Figure 3 and Table 3.

8 A. Right.

9 Q. And Figure 3 is based on the data in Table 3, so why
10 don't you first start with Table 3 and tell us what Table 3 is
11 and where it came from.

12 A. Okay. So Table 3 shows California milk production,
13 U.S. milk production, and the rest of the U.S., that's the U.S.
14 excluding California. It shows the production in millions of
15 pounds for each of those regional delineations for the years
16 1969 to 2014.

17 Also included are the percent changes in each of the
18 years from the prior year, in 1970 through 2014, and the actual
19 production changes in each of those regional delineations for
20 each of the years from the prior year, 1970 to 2014.

21 And these data were drawn from USDA, sort of final
22 estimates of milk cow numbers and milk per cow that are
23 contained in the publications as they are cited at the bottom
24 of the table

25 Q. Which is page 8?

1 A. Which is page 8, yes.

2 Q. So then how did that translate over to Figure 3, which
3 is page 7?

4 A. So Figure 3 on page 7 is simply the California milk
5 production data from 1970 through 2014, and it's just an
6 illustration of the sort of steep rise in rapid growth in
7 California milk output during the entire period.

8 Q. So then you also referenced Figure 4 and Table 4. And
9 again, looks like Figure 4 on page 9 is based on data from
10 Table 4, which is Page 10, correct?

11 A. Correct.

12 Q. So could you tell us what Table 4, Page 10, how it's
13 developed and what it shows?

14 A. Okay. So Table 4 on Page 10 includes some of the same
15 information that was on Table 3, but also includes milk
16 production data for the states of Wisconsin, New York, Florida,
17 and Minnesota, as well as the U.S. as a whole, and California.
18 And it has the same set of data from the same years, from 1969
19 to 2014. And then what's been done is to take the year 1985
20 for each of those states and divide every other production
21 number for every other year within that state, by that year's
22 production in 1985. So it creates an index of production, with
23 a base year of 1985. And the reason for doing that is so that,
24 because there's large differences in total milk produced, it
25 would be very difficult to create a graph that would have a

1 scale that you could really see comparisons in terms of how
2 milk production is changing in one state versus another, so
3 this gets everything onto a common scale so that you can see
4 the changes relative to each other.

5 Q. And that's a common method of economic analysis to use?

6 A. It's a common method to show data in this particular
7 way.

8 Q. So then that data from Table 4 is then depicted on
9 Figure 4, which is Page 9, correct?

10 A. Correct. And I would note that again, the sources of
11 the data, they are actually the same publications as the
12 sources in Table 3, and they are listed at the bottom of
13 Table 4.

14 Q. Now, I note that in, say one timeframe from '97-'98 it
15 looks like, California leveled off, and also, is it 2008 to
16 2009, production went down?

17 A. Correct.

18 Q. What was going on in 2008-2009 that caused that drop,
19 in your opinion?

20 A. Well, that was the, I guess some people have called it
21 the dairy crisis. It is also more broadly known as the
22 financial crisis. The two events sort occurred at the same
23 time, but essentially, during that timeframe, in part because
24 of the financial crisis, global demand was damaged by the
25 financial crisis, and a couple of years of high prices prior to

1 that, 2007 to 2008, had resulted in large milk production
2 volumes, not just in the U.S., but in other areas. And so
3 there were excess supplies on the market as to excess
4 inventories and less demand, and so milk prices fell, say dairy
5 commodity price values fell, consequently milk prices fell as a
6 result. And that led to lower, because of the negative margins
7 that dairy farmers were experiencing, that led to lower milk
8 output eventually.

9 Q. But looking at the index comparison, would it be fair
10 to say California's drop was more significant than other states
11 or the national index?

12 A. Yes, it was.

13 Q. And yet California recovered after that?

14 A. It did. And I think the drop in California, that sort
15 of more extreme drop during that timeframe, had to do with the
16 high feed costs, and there were a lot of dairymen who, in 2008,
17 saw feed costs rising, and I think locked in prices thinking
18 that they may continue to go up. And what happened is that
19 milk price was also going up, you know, in 2007-2008 as feed
20 costs were rising, and the thought was maybe lock in feed costs
21 and keep your feed from escalating, and perhaps that would be a
22 more profitable venture because maybe the milk cost would
23 continue to go up. So folks did lock in feed costs. I'm not
24 saying everybody did, but there were numbers who did. And so
25 they kind of got saddled with the higher feed costs as milk

1 prices then declined, and that had a real dramatic impact on a
2 lot of folks. Even those who didn't lock in feed costs still
3 saw really bad margins. That was just a really bad year for
4 everybody in the industry.

5 Q. So then you next reference Table 5, which is on Page 11
6 of Exhibit 80. Were you done talking about Figure 4 or --

7 A. Well, yeah, just looking at Figure 4 a little bit more,
8 the purple line on the graph, I'm assuming everybody has color
9 graphs. The purple line is the U.S. milk production index.
10 You can see that sort of trends in a more gradual but steady
11 upward direction, but you see other things happening in various
12 states of Wisconsin from 1985, actually down to about the early
13 2000's, experienced a downward trend. And somewhere around
14 2004, that trend reversed and they started experiencing
15 production increases.

16 New York kind of was steady, not seeing much growth at
17 all throughout much of the period from '85 to the late '90's,
18 but after the late '90's, maybe began to see sort of an upward
19 trend.

20 Florida, during the early part of the time period was
21 growing. And then from, say around 1994 to maybe down to
22 around 2008, saw its trend move downward in terms of milk
23 production, but then it's turned around since that time and
24 resumed an upward trend.

25 And Minnesota declined, and to this date, still hasn't

1 got back to the production that they had in 1985.

2 Q. So what conclusion did you draw from that relative to
3 this proceeding?

4 A. Well, in a lot of the major dairy states, and I'm not
5 counting Florida as a major dairy state, but they just happen
6 to be representative, maybe, of the Southeast, you know, there
7 have been periods where production is declined, and in some
8 cases, has gone on a downward trend for a number of years. And
9 so California is, having had a long history where it really
10 didn't experience downward trends and growth, has had its
11 upward trend modified, and you know, this year, again, milk
12 production is down. We don't know whether that's the beginning
13 of a new trend or whether that's one of a couple of declines we
14 have had in the last eight or nine years, where afterwards, the
15 industry recovers and grows again.

16 Q. Anything else you want to say about Figure 4 at this
17 point?

18 A. No.

19 Q. So turning to Page 11, Table 5, how is this produced
20 and what does this show?

21 A. So this comes from the data in Table 3. So you see
22 that each of the areas, California, U.S., and rest of the U.S.,
23 the production is listed, but also there's the percent change
24 on the prior year listed next to each of those in the 3rd, 5th,
25 and 7th columns. So it's basically taking an average of the

1 decade, so we have '70 to '79, it is an average of those annual
2 numbers from '70 to '79, and that becomes the sort of ten-year
3 average, average per year change. It is not a compound average
4 growth rate, it's a simple average of the annual changes.

5 Q. And what do you think this shows?

6 A. Well, in the decades of the 1970's, 1980's, 1990's and
7 the first decade of the 2000's, California milk production grew
8 at a faster rate than the U.S. milk production as a whole. And
9 as the U.S., except California, which would be all the other
10 states in the U.S., and in a period since that time,
11 California, at least through, from 2010 to 2014 California milk
12 production still grew, but it was at a smaller rate than the
13 U.S., or the rest of the U.S.

14 Q. Anything else you want to say about Table 5 at this
15 point?

16 A. No.

17 Q. So you also discussed in the same paragraph, Table 6,
18 which is on page 12.

19 A. Uh-huh.

20 Q. So what does Table 6 show, and well, how was it
21 developed?

22 A. Okay. So what I tried to do here, these are not
23 monthly average prices for the most part. What I did was to
24 try to track the prices by looking at the first week of the
25 month, the first weekly report from AMS, California Grain and

1 Feed report. And occasionally there would be no reported sales
2 that month, so with alfalfa in particular, I would looked to
3 try to find the first reported price that was nearest the first
4 of the month.

5 Basically, the idea is to just to kind of see how those
6 prices have moved and changed over the period August 2012 to
7 June 2015. This was actually a table I prepared for another
8 proceeding, but, you know, since it has data from 2015 as well
9 as the recent couple of years, I felt that it was relevant to
10 basically show what's been going on with feed prices. And
11 certainly, if you look back through that table, you will see
12 very high corn prices in 2012. You remember there was a
13 drought that year in the Midwest, great midwestern drought, and
14 corn prices spiked very high. And so you can see that impact
15 of corn prices in the Northern San Joaquin Valley, for example,
16 at over \$300 a ton. Alfalfa was still pretty expensive. I
17 look at supreme and premium alfalfa. If there was a supreme
18 number there, I would get it. If it was, if there was not a
19 supreme number in the first couple of months, I would report
20 the premium number.

21 So it's not a real pure table in that regard as far as
22 alfalfa prices. But again, the idea was to try to track just a
23 picture of movement in those numbers. And you can see that,
24 well, corn prices have fallen substantially from where they
25 were in 2012. Alfalfa prices, you know, not as much.

1 Especially for the top quality grades of alfalfa.

2 I have noticed, in looking at this publication, there's
3 been less supreme alfalfa reported this year. It's been more
4 scarce to find reports of sales of supreme alfalfa. And I
5 don't know what to conclude about that, whether it means that
6 there's less supreme alfalfa, which is the highest quality
7 alfalfa for feeding a dairy cow, there may be less of that
8 available this year, I don't really know. But prices have
9 ranged through this period between \$240 a ton into \$350 a ton.
10 So those prices haven't, they started in the 250 range, they
11 have ended closer to the same range, but at times have been
12 much more expensive.

13 And then Canola meal is included, because as I look at
14 the feedstuffs sheet that's developed by the CDFA Cost of
15 Production Unit, that Canola is a feed, that's becoming more
16 used more often in California. It is still not, there's not
17 one dominant feed ration in California. California dairymen
18 are great at kind of figuring out different ways to construct
19 feed rations and so they look at prices and will rebalance
20 their feed rations. But Canola is something that's been used
21 more and more. And at times that's been very expensive, over
22 \$400 a ton. Currently, the most recent data I have, is that
23 the numbers are down somewhat for Canola as well from where
24 they have been at times. So that's just a picture of what's
25 happening with feed prices.

1 Q. And again, if it was blank, that means you just
2 couldn't find anything?

3 A. Yeah, there wasn't any data at that particular point in
4 time.

5 Q. So what do you conclude from Table 6?

6 A. Well, that some feed, costs of feed have come down from
7 their very high levels a few years ago, and some are still
8 reasonably expensive.

9 Q. And let's turn, I think in this particular section you
10 had one more table, Page 13, Table 7.

11 A. Right.

12 Q. So let's look at this. And first, tell me what it is
13 and then we'll talk about its implications for a moment.

14 A. Okay. So this just looks at the period from 1996
15 through 2014 in terms of annual data, and then we look at the
16 January through August data for 2014 and 2015, and it shows the
17 California milk production during that period, we also have
18 USDA's number from, for the number of cows in California, dairy
19 cows, and the annual average of milk per cow, or the production
20 per cow that it's sometimes called, in the state as well, and
21 the percent changes from prior year for each of those three
22 variables.

23 Q. So there's been, you have been here, again, since the
24 beginning of the hearing, and you have certainly heard a lot of
25 testimony from a number of witnesses with respect to 2015, and

1 you have heard about milk cows being sold, and leaving the
2 state, or whatever. When you compare January to August 2014,
3 to January through August of 2015, what do the numbers actually
4 tell you?

5 A. Well, these numbers suggest that most of the production
6 decrease this year in 2015 has been due to reduction in milk
7 per cow, the output per cow. There has been a modest reduction
8 of .1 percent in cow numbers from the prior year, but most of
9 the 3.1 percent average, January through August average, drop
10 in milk production has been due to a drop in milk per cow.

11 Q. What do you conclude from that?

12 A. Well, it's difficult to know for sure what's going on
13 there because the numbers are simply just the numbers, so you
14 have got to have some insight into what's going on in farming.
15 In talking to some consultants, and this sort of is borne out
16 by some of the things that you see in the California dairy
17 feed, it does seem like the quality of feed that's being fed
18 this year is somewhat lower. I have heard that, that's been,
19 similar statements have been made in Dairy Market News, and
20 this year looking at the California Fluid Milk Report, or the
21 Western Fluid Milk Report, and they have a few sentences on
22 California in there every week. There has been some talk about
23 feed quality, particularly hay quality, and that's probably an
24 element in that they have something to do with the drought.
25 But the reality is, I don't know exactly what's driving the

1 milk per cow number. Normally, when there are really, a real
2 reduction in dairy farm margins for extended period of time, we
3 see cow numbers go down or contract as a result. And I haven't
4 seen that this year.

5 If you look back into 2009-2010, you can see the
6 reduction in cow numbers at that time. And in 2013, in
7 response to the really high feed costs we had beginning in the
8 second half of 2012, you also saw a modest reduction in the
9 number of dairy cows, but since that time, you know, we have
10 seen some this year, but it is pretty modest.

11 Q. All right. So returning now briefly to Exhibit 79,
12 would you read the next section, it is two paragraphs, and
13 return to Exhibit 80.

14 A. Okay.

15 Q. Dairy farm consolidation.

16 A. Okay. Thank you.

17 Dairy farm consolidation in California is not evidence
18 of disorderly marketing.

19 Despite the existence of an upward trend in milk
20 output, the number of dairy farms in the state has declined in
21 recent years, as it has in most states. The rate of decline in
22 the number of dairy farms appears to have increased since 2006.
23 (Figure 5), as California dairy farmers, with their relatively
24 large reliance on purchased feed, were challenged by higher
25 corn, hay, and oil seed costs. They have also endured a severe

1 milk price decline in the wake of the global financial crisis
2 in 2009, and the resulting reduction in dairy product demand,
3 which were events that impacted dairy farmers throughout the
4 U.S. More recently, the severe drought impacting California
5 and other parts of the West has increased competition for land
6 and water resources, and that development has created
7 additional challenges for dairy farmers.

8 The more rapid consolidation of producers is not
9 necessarily a sign of disorderly marketing or a problem that
10 must have a regulatory remedy. Indeed, if preventing farmers
11 from exiting the industry -- preventing dairy farmers from
12 exiting the industry were a goal of FMMO's or of California's
13 state dairy program, we would have to consider both of them to
14 be abject failures. Rather, consolidation of dairy farms is a
15 natural outgrowth of differences in individual producers cost
16 structure, risk tolerance, access to capital, and life goals.
17 As I just indicated, many milk producing states have
18 experienced farm consolidation, that is a declining number of
19 dairy farms. In fact, in recent years, dairy farm
20 consolidation elsewhere in the U.S. has occurred at a more
21 rapid rate than in California. (Figure 6 and Table 8).

22 Q. So as you finish that section, let's now discuss, go
23 back to Exhibit 80. You referenced in the first paragraph of
24 that section, Figure 5, so why don't you tell us what Figure 5
25 in, I guess at the same time you might as well tell us about

1 Table 8.

2 A. Okay. So Figure 5 is simply a graph with two scales.
3 On the left hand Y axis, or vertical access, is milk production
4 listed in millions of pounds, and on the right vertical access
5 is the number of dairies in California.

6 And that data, both in terms of milk production and the
7 number of cows, number of dairies, comes from USDA's Milk
8 Production Report. And I have February 2015, that's when the
9 annual production numbers come out in the USDA Milk Production
10 Report, and so it's that one, February 2015, and earlier issues
11 to capture all the data that's in this table.

12 So the Figure 5 illustration here shows that number of
13 dairy farms in California declining from 2,324 in 1996, to
14 2,043 in 2005, and then to 1,470 in 2014. But at the same
15 time, milk production reached an all-time high in 2014.

16 Q. And Figure 6 is also based on Table 8. You discuss
17 that in the next paragraph, so why don't you tell us about
18 Figure 6?

19 A. Okay. So Figure 6, again, what I did, I'll probably
20 have to look at Table 8 first. And you will see from 2003 to
21 2014 I have listed the number of licensed dairy herds for
22 California, Idaho, Wisconsin, and the U.S. as a whole. And
23 then similar to what I did a couple of tables earlier, because
24 there is big differences in those numbers, I expressed it as an
25 index with 2003 being the 100 value on the index. In other

1 words, each of those columns, each number in the column is
2 divided by the production, or the number of herds in 2003, and
3 multiplied by 100 to come up with an index of 100 base. And so
4 that data, the index data is what is plotted on Figure 6.

5 One more point about Table 8. Why 2003? Why didn't I
6 could include a longer timeframe? USDA began reporting a
7 different series in terms of what we would call farm numbers,
8 beginning with data in 2003. Prior to that time, there were, I
9 believe it was either farms with milk cows or operations with
10 milk cows, and I'm not quite sure what the technical term was,
11 but they basically defined a farm as anyplace having one or
12 more milk cows. Beginning in 2003 they started reporting
13 licensed dairy herds, which is a bit of a different
14 nomenclature, and a different method of determining number. So
15 if you were to include prior numbers published by USDA that
16 reflected the number of farms, they wouldn't be consistent with
17 the data since 2003. So that's why this data begins with 2003.

18 Q. Indeed about 45 minutes ago we heard Cal Covington
19 talking about the number of licensed dairy herds, correct?

20 A. We did. So going back to Figure 6, we have expressed
21 each of the dairy farm numbers in each of the four regions,
22 Wisconsin, California, U.S., and Idaho, as a percentage
23 basically of its 2003 level. And basically, if we look down in
24 2014, the number of dairy herds in California was at 72.1
25 percent of its 2003 level; the Idaho number was 68.4 percent;

1 the U.S. as a whole was 64.4 percent; and Wisconsin was 62.7
2 percent. So that -- that's, I mean, the data is what the data
3 is, and I think it basically says it is a percentage of the
4 number of herds that were there in 2003, consolidation has
5 occurred more rapidly in these other regions than in
6 California.

7 Q. All right. So why don't you continue with your
8 statement on Exhibit 78?

9 A. Okay. New heading. Milk supplies are more than
10 adequate for Class 1 use.

11 One thing that is clear, is that despite consolidation
12 at the farm level and a much slower growth trend in the state's
13 milk output, milk supplies in California are adequate for
14 Class 1 use. Beverage milk sales, a proxy for Class 1 use, are
15 shown in comparison to total milk production in the state for
16 the period 1969 through 2014, in Figure 7. While beverage milk
17 sales do not constitute the entirety of Class 1 use, the change
18 in sales relative to production is useful for illustrating the
19 trend. It should be noted that there are differences in how
20 CDFA and USDA calculate California Class 1 and FMMO Class I
21 utilization respectively. The differences are, and insert
22 likely small, relative to the total number of pounds in the
23 highest class use under each system -- sorry, on the highest
24 class under each system.

25 JUDGE CLIFTON: And, Ms. Elliott, I would like you to make

1 the change on the record copies. On page 33, we're merely
2 inserting the word likely.

3 MS. ELLIOTT: Okay.

4 DR. SCHIEK: California pool Class 1 usage excludes the
5 exempt quota held by Type 70 producer-handlers in the state
6 that would ordinarily be regulated under an FMMO. The state's
7 pool Class 1 use also excludes bulk milk imports from
8 out-of-state dairy farms that are used to make fluid products,
9 which would also be regulated under an FMMO. Finally, there
10 are minor differences in Class 1 product definitions.
11 Buttermilk is Class 2 in California, while it is Class I under
12 FMMO's. Half and half is Class 1 in California, but Class II
13 in FMMO's. However, almost 90 percent of what would be Class
14 Roman numeral I milk under a California FMMO, is used in whole,
15 reduced fat, lowfat, and nonfat milk, and, therefore, the
16 general trends are not substantially impacted by the
17 differences in CDFA and FMMO data.

18 Milk production in California and then, delete two
19 words, because there's a double in California there, so delete
20 the second in California.

21 JUDGE CLIFTON: Thank you, Ms. Elliott.

22 DR. SCHIEK: The milk production in California has grown
23 rapidly since the inception of pooling, and that should say
24 and.

25 JUDGE CLIFTON: All right. Do you see that, Ms. Elliott,

1 we're changing the as to and?

2 MS. ELLIOTT: Okay.

3 DR. SCHIEK: Okay. Start the sentence again.

4 Milk production in California has grown rapidly since
5 the inception of pooling and is now more than five times the
6 Class 1 use in the state, with a reserve supply now more than
7 four times as large as the usage for fluid purposes. Today,
8 most of the milk in California is Grade A, with only 1.1
9 percent of milk in the January through August of 2015, in
10 January through August of 2015, designated as Grade B.

11 Milk movements in California are largely efficient.

12 The quantity of California milk moved into the state's
13 fluid deficit areas is detailed in Table 9. This data is
14 published twice per year by CDFA as part of its milk hauling
15 survey. The reported hauling data largely illustrate milk
16 movements that are efficient, with close-in milk, if available,
17 serving the bulk of the needs. The vast majority of Bay Area
18 milk comes from Northern San Joaquin, North Bay, and Solano
19 areas. Most of the milk moving into Southern California is
20 from Southern California or the South Valley. Milk moving
21 longer distances does happen, but these are mostly organic milk
22 or some type of concentrated bulk product, and volumes are
23 generally small compared to the total milk moving to the
24 Class 1 uses in the market.

25 MR. ENGLISH: Let me stop you there.

1 DR. SCHIEK: Yeah.

2 JUDGE CLIFTON: Let's see -- it's -- let's come back ready
3 to go at 4:00. That gives you a little bit more than 15
4 minutes. Come back at 4:00.

5 (Whereupon, a break was taken.)

6 JUDGE CLIFTON: We're back on record at 4:01. When we
7 finished last night at a little bit after 5:00, Dr. Schiek had
8 completed page 30, and today he completed almost page 34. And
9 we're going to ask him to resume again at a later time because
10 we're interrupting his testimony to take another witness.

11 Mr. English, would you explain to us?

12 MR. ENGLISH: Yes, during the break, the train went off the
13 tracks.

14 What we have here is, I said earlier this morning we
15 were going to have four witnesses with respect to what we call
16 the extended shelf life issue. And to set the stage,
17 Exhibit 1, page 47226, Section 1051.43, General Classification
18 Rules, the testimony we're about to hear, out of order, has to
19 do with shrinkage. And for scheduling issues, and I thank
20 Dr. Schiek obviously, I talked to Mr. Beshore, and your Honor,
21 and the court reporter, and others, for scheduling purposes I
22 would like to call, out of order, Mr. Carl Herbein,
23 H-E-R-B-E-I-N, to the stand.

24 And I have already provided three copies to USDA, and
25 one to the court reporter, and one to the judge. So

1 Ms. Elliott already has three.

2 JUDGE CLIFTON: Mr. Herbein, if you will be seated, I'll be
3 swearing you in in a seated position after we have gotten these
4 exhibit copies distributed.

5 MR. ENGLISH: And I'll explain what it is after it's been
6 distributed.

7 JUDGE CLIFTON: And Ms. Elliott, I believe I will be
8 marking this, and you will be marking this, as Exhibit 84; is
9 that correct?

10 MS. ELLIOTT: That's correct.

11 (Thereafter, Exhibit 84 was marked
12 for identification.)

13 JUDGE CLIFTON: This will be Exhibit 84. If anyone wants
14 to be sure you have a copy, we can have you make that on the
15 copy machine at the end. Do you still have -- you need three
16 more? Good.

17 MR. ENGLISH: I'm sorry, your Honor, I was watching the
18 passing out, what do we mark this as? Exhibit?

19 JUDGE CLIFTON: 84. 84.

20 MR. ENGLISH: So Exhibit 84 exists of actually three
21 pieces. Part 1, a two-page statement expert report, and it
22 looks like the Gremlins have migrated over the weekend, because
23 Mr. Herbein's name is misspelled in the very first line. So
24 insert a "B", if possible, on the first line of expert report
25 of Carl D. Herbein, CPA. And that's a two-page statement of

1 Mr. Herbein. Followed by Part 2, which is six pages of his
2 curriculum vitae. And followed by Part 3, which is a one-page
3 numerical report entitled, Shrinkage - Ultra-Pasteurized and
4 Aseptically Processed Fluid Milk at 7(b) Distributing Plants.

5 JUDGE CLIFTON: Very good.

6 MR. ENGLISH: Just have to be all one exhibit.

7 JUDGE CLIFTON: All right. So, Ms. Elliott, would you, on
8 page 1 of Exhibit 84 insert a "B" in the name, and you may have
9 to just strike "Herein" and write "Herbein", H-E-R-B-E-I-N, in
10 order to make that clear. All right.

11 Mr. Herbein, I'll swear you in. If you would raise
12 your right hand, please.

13 Do you solemnly swear or affirm under penalty of
14 perjury that the evidence you will present will be the truth?

15 MR. HERBEIN: Yes, I do.

16 JUDGE CLIFTON: Thank you.

17 DIRECT EXAMINATION

18 BY MR. ENGLISH:

19 Q. Mr. Herbein, why don't you read the first two
20 paragraphs, sort of your introduction, qualifications, and then
21 stop so we can discuss a little more of your curriculum vitae,
22 please.

23 MR. HILL: Your Honor, Brian Hill.

24 Just quickly, would I be correct in assuming that this
25 address that's here is --

1 MR. ENGLISH: This is a business address.

2 MR. HILL: Okay. Just want to make sure.

3 MR. ENGLISH: I'm confident that's a business address, I
4 have been there. I have also been to the other address, but
5 I'm not going to tell you what that one is.

6 JUDGE CLIFTON: Yes. And thank you. Mr. Herbein, what
7 that's about is, we're happy to include in the record your
8 business address. For privacy reasons, we do not want to
9 include it if it was your residence.

10 MR. HERBEIN: It is my business address.

11 BY MR. ENGLISH:

12 Q. Go ahead.

13 A. I'm Carl D. Herbein, CPA, President and CEO of Herbein
14 and Company, Inc., and my business address is 2763 Century
15 Boulevard, Reading, PA 19610. I wish to present testimony on
16 behalf of Agropur, Inc., Aurora Organic Dairy, Byrne Dairy,
17 Ultra Dairy, Cumberland Dairy, HP Hood, LLC, Saputo, and
18 Western Quality Foods. I attach my Curriculum Vitae as Exhibit
19 California Dairy Institute-2, which outlines my education and
20 experience in the dairy industry.

21 QUALIFICATIONS AND BACKGROUND OF CARL D. HERBEIN, CPA

22 Carl D. Herbein, CPA, is President and CEO of Herbein
23 Company, Inc., a regional CPA firm headquartered in Reading,
24 PA. I founded this firm in 1972 after working for
25 Ernst & Young. Herbein and Company, Inc., is a general

1 practice CPA firm with a number of specialized practice areas,
2 including the dairy industry. Our practice in dairy includes
3 representing dairy farmers, dairy cooperatives, and dairy food
4 manufacturers and distributors, as their auditors, tax
5 accountants and consultants. I'm personally responsible for
6 this part of our practice and spend more than 50 percent of my
7 time representing dairy clients in rate making cases, valuation
8 assignments, mergers and acquisitions, and as partner
9 responsible for company audits, tax services, and other
10 business-related consulting issues.

11 Q. So why don't you stop now. And this is not the first
12 time you have appeared at a Federal Milk Order hearing, is it?

13 A. It is not.

14 Q. Do you recall how many times you appeared at Federal
15 Milk Order hearings as a witness?

16 A. I believe three times.

17 Q. Okay. What was the most recent time?

18 A. The producer-distributor hearing.

19 Q. Producer-handler?

20 A. Producer-handler, yes.

21 Q. Was it the national hearing?

22 A. Yes.

23 Q. Did you also appear at the earlier producer-handler
24 hearing, the regional version?

25 A. Yes, I think I did.

1 Q. Okay. And what other hearing did you appear at?

2 A. I appeared at a Federal Order, at two Federal Order 33
3 hearings some years ago.

4 Q. Would those have been in the 2000-era, we call those
5 the pooling hearings?

6 A. No, they were prior to Federal Order Reform.

7 Q. Okay.

8 A. One had to do with payment terms, time period for
9 payments, and the other had to do with, I'm not exactly, I
10 don't remember the third, but there have been three.

11 Q. And were you qualified as an expert in dairy cost
12 accounting at those proceedings?

13 A. Yes, I believe so.

14 Q. Now, other than the Federal proceedings, is there
15 something called the Pennsylvania Milk Marketing Board?

16 A. Yes, there is.

17 Q. And does that board have a number of minimum price
18 proceedings involving producer prices, wholesale prices, and
19 retail prices?

20 A. Yes, they do.

21 Q. And have you appeared at those proceedings over the
22 last several decades?

23 A. Yes, I have.

24 Q. As an expert in dairy cost accounting?

25 A. Yes.

1 Q. Okay. Do you, as a part of those proceedings, conduct
2 surveys of plants so as to be able to provide combined data for
3 the record to mask confidentiality?

4 A. Yes, we, I refer to that as cross-sections. We
5 accumulate price and -- cost data, strike price -- cost data
6 for a series of companies, and we put those companies together
7 on a weighted average basis and present various economic
8 statistics to the Pennsylvania Milk Marketing Board, which are
9 then incorporated into their process of developing into and out
10 of store prices.

11 Q. And is one of the purposes of doing a cross-section
12 analysis, the ability to provide data that would otherwise be
13 subject to confidentiality restrictions?

14 A. That's correct.

15 Q. Your Honor, I would move that Mr. Herbein be recognized
16 as an expert in dairy cost accounting.

17 JUDGE CLIFTON: Is there anyone who wishes to question
18 Mr. Herbein before determining whether you have any objection
19 to his being qualified as an expert in dairy cost accounting?
20 No one. Is there any objection to Mr. Herbein being accepted
21 as an expert in dairy cost accounting? There are none.
22 Mr. Herbein, I accept you as an expert in dairy cost
23 accounting.

24 MR. HERBEIN: Thank you.

25 BY MR. ENGLISH:

1 Q. So now returning to your statement, which is exhibit
2 California Dairy Institute-1, Exhibit 84, why don't you
3 complete your statement?

4 A. BACKGROUND AND PURPOSE OF HEARING.

5 The Agricultural Marketing Service, Dairy Programs, has
6 called a hearing to consider establishing a California Milk
7 Marketing Order. The Dairy Institute of California is party to
8 this hearing and has requested adding additional provisions for
9 shrinkage for ultra-pasteurized or aseptically processed fluid
10 milk at a 7(b) distributing plant or at a 7(a) distributing
11 plant. This testimony is developed to provide historical
12 shrinkage levels in 7(b) plants.

13 STUDY CONDUCTED

14 I entered into non-disclosure and engagement letters
15 with the above cross-section of 7(b) plants. I obtained their
16 monthly federal and/or state milk report which reflects
17 shrinkage incurred for each month. The study conducted covered
18 the time period of January 1, 2013, to December 31, 2014. My
19 calculations utilized all pounds received at the cross-section
20 plants, including farm receipts, receipts from sellers of bulk
21 cream, and transfers. Proper cost accounting requires that all
22 milk in a plant be utilized when calculating a shrink factor.
23 I then summarized the reports and calculated a weighted
24 percentage average shrink based on total product pounds, skim
25 pounds, and also a weighted average shrink percentage for

1 butterfat. This weighted average calculation was performed so
2 that the cross-section members with the most volume carry the
3 most weight in the average calculation. It is my opinion that
4 a weighted average calculation is preferable to a simple
5 average for a proceeding such as this.

6 CROSS-SECTION

7 The cross-section of Agropur, Inc., Aurora Organic
8 Dairy, Byrne Dairy, Ultra Dairy, Cumberland Dairy, HP Hood,
9 LLC, Saputo, and Western Quality Foods is representative of
10 7(b) plants located in California, and also elsewhere in the
11 United States. The cross-section of dealers has increased the
12 pounds of milk received and processed by approximately 10
13 percent from 2013 to 2014. Thus, this is a portion of the
14 dairy industry which is changing and the related regulation
15 should also be adjusted for this dairy segment.

16 FINDINGS

17 My analysis and results are presented on Exhibit
18 California Dairy Institute-3 and shows that shrinkage in 7(b)
19 plants on a total pound basis is 2.73 percent on --

20 JUDGE CLIFTON: Is that on a total product pounds basis?

21 MR. HERBEIN: Yes, excuse me. On a total product pound
22 basis is 2.73 percent; on skim, 2.68 percent; and the butterfat
23 shrinkage is 3.35 percent.

24 The Dairy Institute requests that the California
25 Federal Milk Order should include shrinkage levels for 7(b)

1 plants and for 7(a) plants that process ultra-pasteurized or
2 aseptically processed fluid milk at the percentages as
3 reflected on Exhibit California Dairy Institute-3. These
4 percentages shall be used in determining the payment
5 requirement for pounds of skim and pounds of butterfat lost by
6 plants.

7 SUMMARY

8 Based upon my review, analysis, and calculations, I
9 find that the "allowable shrinkage factors" for 7(b) plants
10 should be updated to reflect the findings presented on Exhibit
11 California Dairy Institute-3.

12 REPORT QUALIFICATIONS

13 I understand that this report will be used in
14 connection with this hearing, and may not be used for any other
15 purposes. This report is based on information provided to me
16 as of the date of this report and is subject to change as a
17 result of additional information which may be provided in the
18 future. My opinions included in this report have been stated
19 to a reasonable degree of professional and accounting
20 certainty. I reserve the right to respond to any additional
21 expert reports or additional information provided.

22 This will confirm that my fee is a product of the time
23 spent by me and my staff on this engagement, and are at, and
24 are applicable billing rates. Our fee is no way based on the
25 outcome of this hearing.

1 BY MR. ENGLISH:

2 Q. Could you read that last sentence again?

3 A. Our fee is in no way based on the outcome of this
4 hearing.

5 Q. Does that conclude your --

6 JUDGE CLIFTON: Would you please read the submitted by and
7 tell me what's contained there?

8 MR. ENGLISH: Go ahead and read the rest of it.

9 MR. HERBEIN: I'm sorry. Submitted by Carl D. Herbein, and
10 my signature appears as is my name, and the CPA designation,
11 and it's dated October 16th, 2015.

12 BY MR. ENGLISH:

13 Q. So let's now turn to the last page of Exhibit 84, which
14 is labeled Exhibit California Dairy Institute-3, and describe
15 what's in your text. Why don't you walk us through what the
16 cross-section numbers are and what it shows?

17 A. Yes. I'll be glad to.

18 First of all, the time period covered by my study was
19 January 1st of 2013 to December 31st, 2014, a 24-month period.
20 The cross-section of processors involved, as I mentioned
21 earlier, Agropur, Aurora Organic Dairy, Byrne Dairy, Ultra
22 Dairy, Cumberland Dairy, HP Hood, LLC, Saputo, and Western
23 Quality Foods. And the summary of the cross-section --

24 JUDGE CLIFTON: Would you please read the title, which is
25 above what you've told us so far?

1 MR. HERBEIN: Shrinkage Ultra-Pasteurized and Aseptically
2 Processed Fluid Milk at 7(b) Distributing Plants.

3 BY MR. ENGLISH:

4 Q. So actually, before you give me the numbers, why don't
5 we, for the record, discuss briefly what is ultra-pasteurized
6 and how is that different from aseptically processed fluid
7 milk?

8 A. Ultra-pasteurized milk, as I understand it as an
9 accountant as opposed to a scientist, as an accountant, is a
10 product that has a shelf life of 45 or 50, sometimes more days
11 than that, requires refrigeration to continue its shelf life.
12 Aseptically packaged products, prior to opening, do not require
13 refrigeration. And the biggest difference that I have seen in
14 this product versus a fresh product, is the temperature at
15 which the product is pasteurized and the conditions in which it
16 is pasteurized.

17 Q. So now tell us about what the three sets of numbers are
18 and what they mean?

19 A. The 24-month period, the total pounds received at the
20 cross-section dealers are 10,959,937,353. The shrink pounds on
21 total pounds of pounds received was found to be 299,206,000.
22 And that, as a percentage, is 2.73 percent. And that
23 percentage is arrived at by dividing 299,206,000 by
24 10,959,937,353. The total skim pounds received are
25 10,104,823,281. The skim shrink pounds for the cross-section,

1 270,578,691. And again, the same math that I just described
2 for total pounds received gives you a skim shrink percentage of
3 2.68 percent.

4 And lastly, total butterfat pounds received by the
5 cross-section, 855,114,072. Butterfat shrink pounds,
6 28,627,319. Again, the same math gives us a weighted average
7 butterfat shrink of 3.35 percent.

8 Q. So --

9 JUDGE CLIFTON: I'd just like to point out for the benefit
10 of the court reporter, he went very quickly through those
11 numbers, but he recited exactly what he has on the last page of
12 Exhibit 84.

13 BY MR. ENGLISH:

14 Q. Now, you understand that there's going to be Chuck
15 Meek, who is an engineer, is going to be testifying, and if
16 this had all worked the way the train wanted it to work, he
17 would be right after you, correct?

18 A. Yes, I understand that, Mr. English.

19 Q. And so you are not here to testify about why these
20 numbers may be different or, either from HTST, or why, say,
21 skim shrink is different from butterfat shrink, correct?

22 A. That's correct. My engagement was to have a
23 representative cross-section of processors from whom I obtained
24 information, so that we could present at this hearing, the
25 historically incurred shrink factors.

1 Q. Okay. So just a couple of other questions. At the
2 bottom of page 1 of your statement that is Exhibit 84, you have
3 indicated that it is your opinion that a weighted average
4 calculation is preferable to a simple average for a proceeding
5 such as this. On what basis do you reach that conclusion?

6 A. My many years of experience in putting cross-sections
7 of milk processors together. And just to give a quick example,
8 if we have five processors, and they have shrink levels, and
9 assuming that in that five we have one very large processor and
10 one very small processor, if the very small processor has a
11 very abnormal or a very high or a very low number, they would
12 carry 20 percent of the value in a simple average, whereas in a
13 weighted average, they are carrying percentage, their
14 contribution percentage, could be one or two percent. So you
15 could, you can skew the numbers significantly by using simple
16 average. And the Pennsylvania Milk Marketing Board work that
17 was mentioned earlier, focuses and utilizes weighted average
18 for many years, and it has been, I guess as they say, tested
19 many times.

20 Q. So one final question. You were not involved in the,
21 or one set of questions I should say. You were not involved in
22 the formulation of the proposal that was actually submitted by
23 the Dairy Institute of California, were you?

24 A. I was not.

25 Q. And to the extent that, when did you do this

1 cross-section study?

2 A. After the California Institute's proposal was submitted
3 I was contacted by HP Hood and discussed this particular
4 process, this portion of the Institute's proposal, the
5 shrinkage institute, and I was asked if we were available
6 without conflict to do this, and did we have the expertise to
7 gather this information, understand the reports. And I studied
8 the proposal and concluded that we were without conflict and
9 were in a position that we could accept this assignment.

10 Q. So the cross-section that you created with the results
11 on the last page of Exhibit 84, which you have labeled Exhibit
12 California Dairy Institute-3, was created after the Dairy
13 Institute submitted a proposal that would have the additional
14 shrinkage percentage be basically another three percent?

15 A. Yes. It was -- it was several months, 60, 75 days
16 after the proposal was submitted that we began working on this
17 project.

18 Q. And again, even as there's going to be, Chuck Meek is
19 an engineer, to talk about sort of the why's these differences
20 may exist on Exhibit 84, Exhibit California Dairy Institute-3,
21 there's going to be a follow-up witness to talk about what the
22 proposal may modify based upon your actual study, correct?

23 A. Yes, that is my understanding.

24 Q. Your Honor, I have no further questions, and I would
25 move the admission of Exhibit 84.

1 JUDGE CLIFTON: Does anyone wish to question Mr. Herbein
2 before determining whether you object to Exhibit 84 being
3 admitted? There is no one. Is there any objection to
4 Exhibit 84 being admitted? There is none. Exhibit 84 is
5 admitted into evidence.

6 (Thereafter, Exhibit 84 was
7 received into evidence.)

8 MR. ENGLISH: And the witness is available for
9 cross-examination.

10 JUDGE CLIFTON: Who will ask the first questions of
11 Mr. Herbein?

12 CROSS-EXAMINATION

13 BY MR. BESHORE:

14 Q. Marvin Beshore.

15 Good afternoon, Carl.

16 A. Hello, Marvin.

17 Q. From the other coast, along the other coast, or
18 whatever. Okay.

19 Can you tell me how many plants were actually involved
20 in this study?

21 A. Let's see, that --

22 Q. Maybe we can just go through the entities, then you
23 can --

24 MR. ENGLISH: No, let's not do that.

25 MR. BESHORE: Well --

1 JUDGE CLIFTON: Mr. English, please voice that again.

2 MR. ENGLISH: Well, I mean, I would be, I obviously want
3 the witness to consider his confidentiality obligations,
4 whether actually a plant is listed by the requisites of 7(b) or
5 not. In other words, if an entity has more than one, it may be
6 a confidential matter, so I just want to make sure -- I mean, I
7 want him to answer the question, Mr. Beshore, but I just want
8 to make sure Mr. Herbein deals with his confidentiality issues,
9 that's all.

10 I think you are entitled to a total number. I just don't
11 know whether if the Jones Company has two and somebody else has
12 one, I'm not sure if that really -- but I'll let the witness
13 decide. I'm just letting him decide that.

14 JUDGE CLIFTON: All right. So Mr. Beshore was going to
15 have you go by entity because he thought it might be easier for
16 you to read your total. Are you able to start with the total,
17 Mr. Herbein?

18 MR. HERBEIN: Without referring to my work papers, I'm not
19 a hundred percent sure. Several of the cross-section members
20 had multiple plants, some did not.

21 JUDGE CLIFTON: Are your work papers in this room?

22 MR. HERBEIN: No.

23 JUDGE CLIFTON: Are they on a computer?

24 MR. HERBEIN: They are.

25 JUDGE CLIFTON: Do you have your computer with you?

1 MR. HERBEIN: I do.

2 JUDGE CLIFTON: Would you like to access it?

3 MR. HERBEIN: I can, if that's, if that's acceptable. It
4 would be a simple matter of counting.

5 JUDGE CLIFTON: Yes. I think it would be helpful. So
6 let's go off record for a few minutes while you retrieve your
7 computer and bring it to the witness stand. And the rest of
8 you may stretch in place.

9 (Whereupon, a break was taken.)

10 JUDGE CLIFTON: We're back on record at 4:38.

11 I have asked the witness to access his own private
12 computer to answer these questions. This, in no way, opens up
13 anything in his computer, or anyone to review to determine what
14 other questions you may want to ask him. So this is different
15 in that manner from a trial. All right.

16 Mr. Beshore, your question was how many plants?

17 MR. BESHORE: Yeah, and if I could just telescope maybe.
18 What I'm interested in is the location of the plant, the
19 company of the plant, and the regulatory entity by which it is
20 regulated, if it is. So, for instance, you know, put Suever's
21 back there, Hood, Winchester, Virginia, Order 1. That's what
22 I'm interested in for the plants that were in the study.

23 JUDGE CLIFTON: Can you provide that?

24 MR. HERBEIN: The first part of -- the first part of
25 Mr. Beshore's question was the number of plants. And my

1 summary spreadsheets, there are 19 plants in the study. To
2 identify them by location will require further digging into the
3 individual Federal Order or State Order reports, because the
4 summary simply has the name of the plant, and I don't recall --
5 of course the example of Winchester in Federal Order 1, I
6 certainly know that, and that is one of the plants. But I'm
7 not sure where all of the others are without going into, deeper
8 into my files where I have the reports themselves.

9 BY MR. BESHORE:

10 Q. You are not sure of the physical location or the
11 regulatory stats?

12 A. I obviously knew that when we did this study, but I
13 don't know that looking at the summary sheet which I just
14 counted the plants.

15 Q. I would like as much of that information as
16 Mr. Herbein's able to provide.

17 MR. ENGLISH: May I make a recommendation? This is
18 Chip English. Rather than spending -- I mean, we have got a
19 schedule problem, and that's our problem, I realize that. But
20 rather than spending the next 20 minutes having him go through
21 the files, I suspect he's not going to get off the stand
22 tonight anyway, why don't we get him to do that kind of
23 research tonight and merely answer the question tomorrow
24 morning more efficiently.

25 And I want to go on the record as apologizing, I think

1 quite correctly, USDA is what is this testimony about? And
2 unfortunately I had a witness to talk about that, but I had to
3 take him out of order so he hasn't give that information. I
4 promise I'll give that as soon as I can. And I apologize to
5 USDA for changing up the schedule.

6 JUDGE CLIFTON: No, I mean, we knew this was coming.

7 MR. ENGLISH: It is the fact that Mr. Herbein had to go
8 before Mr. Zolin, because I think that maybe it is out of
9 context is a problem.

10 JUDGE CLIFTON: Okay. Trials are always like that.
11 Hearings are always like that. You never can get it, you can
12 never get everything you need to know before you have the next
13 witness. So -- all right.

14 So, Mr. Beshore, be sure while we're here tonight to
15 alert the question to all the things you want to know so that
16 when he comes back tomorrow he has a chance to respond.

17 MR. BESHORE: Okay. I'll try.

18 MR. HERBEIN: May I comment?

19 JUDGE CLIFTON: You may.

20 MR. HERBEIN: On the first question, so that we're in sync,
21 there are 19 plants. I will provide the location of the
22 plants, the identity of the owner of the plant, because all of
23 the cross-section companies know they are in the cross-section,
24 and the regulatory body to whom they report; Federal Order 1,
25 Federal Order 33. Is that what you are looking for?

1 MR. BESHORE: Yes.

2 MR. HERBEIN: That will be a simple schedule.

3 MR. BESHORE: Okay. And may I just refine that? The
4 regulatory body being the entity the reports to which you used
5 in the study. As I understand, let me ask that question.

6 As I understand your statement on page 1, that your
7 study involved obtaining and reviewing and compiling, I assume,
8 the monthly federal and/or state milk reports which reflect
9 shrinkage incurred. So if a plant by chance reported to more
10 than one regulatory body, I'm interested in which report was
11 utilized in the study.

12 MR. HERBEIN: I have in my files all of the reports that
13 were provided to me and my discussion and analysis, so that,
14 that should be very easy for me to extract this evening.

15 BY MR. BESHORE:

16 Q. Okay.

17 A. I'm happy to do that.

18 Q. So with that, maybe a couple more general questions
19 not related to any specific other information that we just
20 talked about.

21 Did any of the plants have, produce
22 non-ultra-pasteurized or aseptically processed products, as
23 well as ultra-pasteurized and aseptically processed products?

24 A. Many of these companies have production in addition to
25 ESL and aseptic, but these reports were for those activities,

1 for the extended shelf life activities only. So for example,
2 Byrne Dairy has a fresh milk business and they have an extended
3 shelf life business, they are separate entities and separate
4 reports. So that -- that's how I handled those.

5 Q. Okay. So would any of the, would any of the physical
6 plants for which you, as you indicated, used the total, you
7 know, total plant accounting, did any of them produce non,
8 within that total plant accounting, produce
9 non-ultra-pasteurized or aseptically processed products?

10 A. My recollection is that there was nothing significant,
11 I'll look at that this evening.

12 Q. Okay. Did your study go beyond the compilation
13 assembly of the reports that you were presented, that you
14 requested and were presented with?

15 A. I'm not sure what going beyond.

16 Q. Did you audit them in any manner or verify the
17 information in any manner or simply were you engaged to
18 aggregate it and compile it?

19 A. Well, I told you, my professional responsibility to
20 look carefully at the reports, make sure that we understood the
21 reports. We asked questions of the report preparers to make
22 sure that we understood, you know, what was on line 77, just as
23 an example. And we also inquired, we had, in our original
24 submission there was one cross-section company that didn't have
25 access to one or two months' reports, and we excluded them from

1 the study because they didn't find the reports, and so we, you
2 know, we did a reasonable assessment.

3 Q. Okay. So for the 9th you had 24-months of reports for
4 each of the 19 plants?

5 A. Yes.

6 Q. Your summary is, summary reports prepared on a
7 butterfat, skim, and total pounds basis, were any of the, any
8 of the reports, the data in the reports on a component basis as
9 opposed to a butterfat, skim basis?

10 A. Yes. There were, in the cross-section there were a
11 number of different reports so that California reports have the
12 fluid carrier, and so we converted everything to total product
13 pounds skim and butterfat so that we had an apples to apples
14 comparison.

15 Q. Okay. Subject to the further information tomorrow, I
16 don't have any other questions at this time, your Honor.

17 Thank you, Mr. Herbein.

18 A. You're welcome.

19 JUDGE CLIFTON: We still have some more minutes. It's
20 4:48. Who else has questions, especially if they might require
21 digging into those reports overnight?

22 CROSS-EXAMINATION

23 BY MR. SCHAEFER:

24 Q. Henry Schaefer. Thank you for coming, Mr. Herbein.

25 A. My pleasure.

1 Q. Just a couple of quick, I think, clarification things
2 from my point of view.

3 You indicated that you used the numbers that were shown
4 as receipts at the plants. Do you know if that was physical
5 receipts only, or was there diverted that there were producer
6 receipts that reported on the plant that were diverted and
7 never received in the plant?

8 A. I believe the information I utilized was received at
9 the plant, because we were studying shrink at the plant as
10 opposed to shrink from the, that would occur during a
11 diversion.

12 Q. Okay. And the second question I had as from what
13 Mr. Beshore's question previously indicated to me was that you
14 basically used the plant reports that were submitted to the
15 Market Administrator or the regulatory agency that these plants
16 were abiding by. Did you do any looking at make records or
17 anything like that to see what milk moved through the plant to
18 make sure that everything that was on the front end in the
19 record so to speak, were actually used that way in the plant?

20 A. We did -- we did no review of the reports other than
21 inquiry if there were any serious audit adjustments that had
22 occurred, because most of these reports, since they were 2013
23 and '14, had been audited.

24 Q. Okay. Thank you very much. I appreciate it.

25 A. You're welcome.

1 CROSS-EXAMINATION

2 BY MR. RICHMOND:

3 Q. Bill Richmond, USDA.

4 Thank you, Mr. Herbein, appreciate it very much.

5 To the extent that there are differences between
6 ultra-pasteurized and aseptically processed products, did you
7 break out the different shrinkages by the difference, by the
8 different products or did -- were the --

9 A. I did not.

10 Q. Okay. And we would really be interested in knowing if
11 there are, in fact, differences. So perhaps tonight, if you
12 have the opportunity or inclination to dig a little bit deeper,
13 we would be interested in seeing those results. It is up to
14 you.

15 A. I'll check. I think that may be a difficult task with
16 the data that I have.

17 Q. I understand. That's all we have. Appreciate it very
18 much.

19 JUDGE CLIFTON: When you talk about ESL, you are talking
20 about extended shelf life?

21 MR. HERBEIN: Correct.

22 JUDGE CLIFTON: And your heading says ultra-pasteurized and
23 aseptically processed. Does extra or extended shelf life
24 extend to both of those categories?

25 MR. HERBEIN: Yes. I think in terms of the cost accounting

1 work that I did, an extended shelf life product could be either
2 what we conventionally call extended shelf life, the 45, 60-day
3 version which requires refrigeration, or the aseptically
4 packaged, which does not. I studied them together.

5 JUDGE CLIFTON: Who else has questions? I see none.
6 Mr. Herbein, thank you very much. I'm going to have you stay
7 there for right now while we do a few housekeeping things,
8 because I know that in order for you to leave we have to untape
9 the cord to your laptop, so we'll do that after we have gone
10 off record.

11 MR. ENGLISH: Well, I wasn't aware -- this is Chip English.
12 I guess I was wondering whether, partly because USDA had the
13 question and partly because I agree it is a little confusing,
14 whether we had time for Mr. Zolin to read into the record a
15 one-page explanation of what we're trying to get at.

16 JUDGE CLIFTON: That's a good idea. So would you -- all
17 right.

18 Ms. Vulin, this would be a good time for you to note a
19 housekeeping item.

20 MS. VULIN: Ashley Vulin. So I have one edit to
21 Exhibit 78, this was the Memorandum on Negative Inference of
22 Failure to Introduce Relevant Evidence. And I believe I've
23 spoken with all the attorneys on this point, but I want to make
24 sure that the correction is made on the record.

25 JUDGE CLIFTON: All right. Has everyone had a chance to

1 obtain Exhibit 78? All right. We're ready.

2 MS. VULIN: On page 1, the second paragraph, on the fifth
3 line there is a citation to a case Paudler V Paudler. Now, the
4 quote that follows from this case is actually from another case
5 that, in fact, itself quoted from Paudler V Paudler, so the
6 entire quote that I included was mistakenly not from that case,
7 but only included excerpts from that case. So I would like to
8 provide a correct citation on the record for this entire quote
9 that's provided.

10 JUDGE CLIFTON: So the place for this citation, then, would
11 be at the end of the second full paragraph?

12 MS. VULIN: It would, in fact, be after the See Also, and
13 then the citation to Paudler V Paudler would have to go after
14 the quoted material, and would correctly say, "Quoting Paudler
15 V Paudler."

16 JUDGE CLIFTON: All right. Why don't you, before we try to
17 write it, why don't you just read it, so that I can see where
18 it goes.

19 MS. VULIN: Okay. So I'll start at U.S.C. Robertson.

20 U.S.C. Robertson, 233 F.2d, 517, 519, Fifth Circuit 1956.
21 (See also) and now I'm inserting the new citation.

22 JUDGE CLIFTON: Now I get it. All right. So I'm going to
23 ask that we use an arrow to the backside of the page to insert
24 this language, or if not to the backside of the page, to the
25 margin, maybe that would be better. All right. So we will

1 copy and then we will put it on our copies so you may begin to
2 dictate.

3 MS. VULIN: Welcome-American Fertilizer Company,
4 169 NLRB 862, 870, (1986) quoting from, and then it will
5 continue, Paudler V Paudler.

6 JUDGE CLIFTON: Very good. And how do you spell
7 Welcome-American Fertilizer Company?

8 MS. VULIN: W-E-L-C-O-M-E - American, A-M-E-R-I-C-A-N,
9 Fertilizer, F-E-R-T-I-L-I-Z-E-R, Company, C-O-M-P-A-N-Y.

10 JUDGE CLIFTON: Very good. Ms. Elliott, do you need
11 anything further on that?

12 MS. ELLIOTT: The NLRB?

13 MS. VULIN: Yes, National Labor Relations Board.

14 MS. BECKER: Lauren Becker, USDA. Ashley, is that 1968 or
15 1986 for the year?

16 MS. VULIN: I believe 1968, but considering so far, let me
17 double check.

18 MS. BECKER: You said 1986.

19 MS. VULIN: It should be 1968. I apologize for that. And
20 I apologize for the inadvertent citation in the original
21 record, it was not intended and in there.

22 JUDGE CLIFTON: All right. Ms. Elliott, did you get where
23 the 1986 is eliminated and 1968 goes in?

24 MS. ELLIOTT: Yes.

25 JUDGE CLIFTON: -- in parentheses representing the year of

1 the case.

2 MS. ELLIOTT: Yes.

3 JUDGE CLIFTON: All right. Good. Thank you so much.

4 MS. VULIN: Thank you, your Honor.

5 JUDGE CLIFTON: All right. Mr. English?

6 MR. ENGLISH: You know, your Honor, we have gotten so close
7 to 5:00, I'm not sure it matters at this point. I would rather
8 make sure that everything is correct. And I don't want to just
9 put it on. I apologize again, Mr. Richmond. I understand the
10 confusion but we'll fix it in the morning. All right?

11 JUDGE CLIFTON: That sounds good. So it's your intention
12 then, tomorrow, that we have first, well, let me ask you,
13 Mr. English, do you want to put on any testimony before
14 Mr. Herbein completes his?

15 MR. ENGLISH: I guess I have to talk to him because it is
16 all about his travel schedule. And I really feel like it would
17 have been better if Mr. Zolin could have gotten on first, and
18 so we're going to try to see what we can do about all of that
19 tonight obviously. We're going to visit about that. The goal
20 remains finishing Mr. Herbein, having Mr. Zolin, whichever
21 order that is, then Chuck Meek, and then Mike Suever, and then
22 we'll get back to Dr. Schiek. And if we have time, we'll get
23 to Mr. Dryer, which is like the schedule this morning.

24 JUDGE CLIFTON: All right. And I just remind all of us
25 that tomorrow is our last day this week where we are now, and

1 that we will have to shut down tomorrow evening, break
2 everything down and take it with us, because the following day
3 we're in a different location.

4 All right. See you all tomorrow. You are welcome to
5 come as early as 8:00 in the morning here. We'll go on record
6 at 9:00. We now go off record at 5:00 p.m.

7 (Whereupon, the evening recess was taken.)

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