UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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

VOLUME XX

TRANSCRIPT OF PROCEEDINGS

October 21, 2015

1   UNITED STATES DEPARTMENT OF AGRICULTURE

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5   )
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6   _____)

7

8   BEFORE U.S. ADMINISTRATIVE LAW JUDGE
                         JILL S. CLIFTON
9
                   Wednesday, October 21, 2015
10
                          9:00 a.m.
11

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

14

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16   TRANSCRIPT OF PROCEEDINGS

17   VOLUME 20

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23   Reported by:

24   Myra A. Pish CSR
     Certificate No. 11613
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1   WEDNESDAY, OCTOBER 21, 2015 - - MORNING SESSION

2   JUDGE CLIFTON: We're back on record on October 21, 2015,

3   it is a Wednesday, it is 9:00 in the morning. This is Day 20

4   of the milk hearing. We're in Clovis, California. My name is

5   Jill Clifton. I'm the United States Administrative Law Judge

6   who is assigned to take the evidence at this rule making

7   hearing.

8   I would like to take appearances of additional

9   U.S. Department of Agriculture employees and then other

10 participants in the hearing.

11   MR. RICHMOND: Good morning, William Richmond,

12 R-I-C-H-M-O-N-D, I'm with USDA AMS Dairy Programs, and I am

13 employed as a Marketing Specialist.

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

15 Assistant to the Deputy Administrator, Dairy Programs AMS USDA.

16   MS. ELLIOTT: Hello, I'm Pamela Elliott, E-L-L-I-O-T-T, I

17 am a Dairy Products Marketing Specialist with USDA AMS Dairy

18 Programs.

19   MS. MAY: Good morning, Laurel May, M-A-Y, with USDA AMS

20 Dairy Program.

21   JUDGE CLIFTON: We know that you are a Marketing

22 Specialist.

23   MR. SCHAEFER: Henry Schaefer, H-E-N-R-Y, S-C-H-A-E-F-E-R,

24 Agricultural Economist with the Upper Midwest Marketing Order

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

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1   MR. SWENSON: Good morning, Virgil V-I-R-G-I-L,

2 S-W-E-N-S-O-N, Assistant Market Administrator with the Central

3 Federal Order and on detail with Dairy Program.

4   MR. HILL: Hello, I'm Brian Hill, B-R-I-A-N, H-I-L-L.

5 Attorney with the Office of the General Counsel, Marketing

6 Regulatory and Food Safety Programs Division.

7   MS. BECKER: Good morning, Lauren Becker, B-E-C-K-E-R, and

8 I'm also an attorney in the Office of the General Counsel,

9 USDA.

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

11 B-E-S-H-O-R-E, counsel for the Cooperative Proponents of

12 Proposal Number 1, California Dairies, Dairy Farmers of

13 America, and Land O'Lakes.

14   MS. OLIVER THOMPSON: Good morning, Megan Oliver Thompson,

15 Megan is M-E-G-A-N. I'm with the law firm of Hanson Bridgett,

16 H-A-N-S-O-N, B-R-I-D-G-E-T-T, and I'm also co-counsel for the

17 Proponents of Proposal Number 1.

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

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

20   MR. ERBA: Good morning, Eric Erba, E-R-I-C, E-R-B-A, I'm

21 with California Dairies, and employed as a Senior Vice

22 President and Chief Strategy Officer.

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

24 Chip English, C-H-I-P, E-N-G-L-I-S-H, I'm a lawyer with the law

25 firm of Davis, Wright, Tremaine, my office is in Washington,

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1 DC, and I'm here representing the Dairy Institute of

 2 California, Proponents of Proposal 2.

 3   MS. VULIN: Ashley Vulin, A-S-H-L-E-Y, V -- as in Victor --

 4 -U-L-I-N, attorney with Davis, Wright, Tremaine, representing

 5 the Dairy Institute of California.

 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, Executive Director Dairy Institute of California.

10   MR. ZOLIN: Good morning, Alan Zolin, A-L-A-N, Z-O-L-I-N, I

11 am a Consultant here representing Hilmar Cheese.

12   MR. HERBEIN: Carl Herbein, C-A-R-L, H-E-R-B-E-I-N, I'm

13 here as a witness with Mr. English.

14   MR. DeJONG: James DeJong, D-E-J-O-N-G, Dairy Policy and

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

16 manufacturer of cheese, whey, and milk powders.

17   MR. VETNE: John Vetne, V-E-T-N-E, representative for

18 Hilmar Cheese Company.

19   MR. MEEK: Good morning. I'm Chuck Meek, M-E-E-K, I'm here

20 with CEM Consulting, here as a witness for Chip English on the

21 ESL shrinkage question.

22   MR. SUEVER: Good morning, Michael Suever, S-U-E-V-E-R, I'm

23 with HP Hood, LLC, Senior Vice President. I'll be speaking on

24 the shrinkage issue today.

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

1 Senior Manager of Dairy Risk Management in Economics at the

2 Dean Foods Company.

3   MS. HANCOCK: Nicole Hancock, H-A-N-C-O-C-K, at Stoel

4 Rives, S-T-O-E-L, R-I-V-E-S. I represent the California

5 Producer Handlers Association and Ponderosa Dairy.

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

7 R-E-E-D, I'm with the Miltner law firm and we represent

8 Select Milk Producers.

9   MR. VANDENHEUVEL: Good morning, Rob Vandenheuvel,

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

11   JUDGE CLIFTON: Is there anyone here who did not appear

12 just now who would like to testify today? Not at this time.

13   All right. We will now take announcements and any

14 other preliminary matters.

15   MS. MAY: Good morning, Laurel May with USDA. The first

16 announcement, as Ashley reminded us this morning, is that this

17 hearing is better than Junior High. And I share that -- I

18 share that sentiment, so welcome.

19   If you would like to testify at the hearing, please let

20 us know and we'll get you into the line up. If you would like

21 to question any of the witnesses, you are welcome to do so, and

22 you can approach the podium and the Judge can acknowledge you

23 and you can do that.

24   We are broadcasting this session of the hearing via

25 live audio feed, and if anybody would like to tune into that,

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 1  it is at www.ams.usda.gov/live.

 2          The court reporter continues to take transcripts and

 3  those are being provided to AMS at the -- two weeks after the

 4  end of each hearing week, and you can get to those on our AMS

 5  website.

 6          We also have some copies of past exhibits in the back

 7  if you would like to pick up and look at any of those.  And we

 8  have refreshments, as always, and you are welcome to enjoy

 9  those.

10          Today is moving day.  So after we get done this

11  afternoon, we will need to take everything out and then we'll

12  be relocating for tomorrow and Friday to the Piccadilly Inn at

13  the airport, and that hotel is pretty close to the corner, to

14  the northwest corner of Peach and McKinley Avenues, over here

15  by the airport, so take it with you tonight.

16          Yesterday, we ended with Mr. Herbein on the stand, and

17  at bat this morning we have Alan Zolin, I believe, and then on

18  deck we have Mr. Herbein again.  And then I'm going to let

19  Chip introduce the rest of the line up as it happens.

20      JUDGE CLIFTON:  Before you go, do we know what room we

21  should look for at the Piccadilly Inn?

22      MS. MAY:  We do not, but they make it pretty clear to you

23  when you get there.

24      JUDGE CLIFTON:  All right.  Very good.  Thank you.

25      MR. ENGLISH:  Thank you, your Honor.  Chip English.
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1   Having spent more than my fair share of time at the

2   Piccadilly, I think really there is only one place we could

3   possibly be, and I think they will make it clear.

4   So for today, Mr. Zolin is up first, I hope fairly

5   briefly. Mostly, this is the first time he's appeared, so

6   we're going to talk about his experience, and then he's going

7   to have a very short, one-page, direct. And then, for

8   scheduling purposes, and that's to sort of set the stage for

9   the ESL, which I would like to do. And that is the issue,

10 again, that is found in Proposal Number 2 in paragraph 43,

11 having to do with shrinkage at ESL facilities. So after

12 Mr. Zolin does that, we're going to interrupt him and take him

13 off the stand to allow Mr. Herbein to get back on the stand and

14 finish his cross, provide the list from Mr. Beshore asked, and

15 the other questions Mr. Beshore asked. He has a response to

16 the question asked yesterday by USDA about ESL versus aseptic,

17 and then of course he's available for whatever other cross and

18 redirect.

19   When Mr. Herbein is finished, Mr. Zolin will then

20 return to the stand and have some additional direct and then be

21 available for cross. After we have done that dipsy-doodle, we

22 will have Mr. Chuck Meek appear, as previously advertised,

23 followed by Mike Suever for HP Hood. That will then complete

24 the ESL portion of testimony.

25   At which point, Dr. Schiek will be lucky enough to

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1 return to the stand to hopefully today, complete his testimony

 2 on direct and cross on his opening statement.

 3   If for some reason that does not fill our time today,

 4 Mr. Dryer, who is not presently here, Greg Dryer from Saputo

 5 expects to be here after 2:00 p.m. and he would be available to

 6 give his opening statement today.

 7   If for some unforeseen reason we have all of that done,

 8 including Mr. Dryer, I don't think I have another witness

 9 today. But that's a lot of witnesses. And in previous

10 experience, I would think that would be unlikely. But be that

11 as it may, that's our day. At the end of the day I hope to

12 have at least some forecast for tomorrow, but it may be like a

13 weather forecast in Maine.

14   JUDGE CLIFTON: Are there any other preliminary matters?

15 I'll just read into the record the docket number. In brackets,

16 [AO], for agreements and orders, 15-0071. That is the number

17 by which the Hearing Clerk within the United States Department

18 of Agriculture keeps track of filings.

19   All right. Let us begin then with Mr. Zolin coming to

20 the stand. And now copies of the testimony of Alan Zolin are

21 being distributed.

22   MR. ENGLISH: So your Honor, what's being distributed is a

23 three-page document. The first page is a cover sheet with what

24 I think we now call the caption of this matter, with the date,

25 Clovis, California, 2015, the Testimony of Alan Zolin,

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1 Part 1, and then the next page is his one-page statement, and

2 the third page, well, it is number 2 because the cover page, is

3 the work background for Alan. So I would ask that that entire

4 document be marked as the next number.

5   JUDGE CLIFTON: Which I believe is 85, Ms. Elliott?

6   MS. ELLIOTT: That's correct.

7   JUDGE CLIFTON: We'll mark that as Exhibit 85.

8   (Thereafter, Exhibit 85 was marked

9   for identification.)

10   MR. ENGLISH: And I believe Exhibit 84, Mr. Herbein's, was

11 admitted yesterday; is that correct?

12   JUDGE CLIFTON: It was, yes. All right.

13   Mr. Zolin, I'll swear you in in a seated position.

14 Would you raise your right hand?

15   Do you solemnly swear or affirm under penalty of

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

17   MR. ZOLIN: I do.

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

19 name.

20   MR. ZOLIN: My name is Alan, A-L-A-N, Zolin, Z-O-L-I-N.

21   DIRECT EXAMINATION

22 BY MR. ENGLISH:

23   Q. Good morning, Mr. Zolin.

24   A. Good morning.

25   Q. If you would read just the introduction and then we're

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1   going to talk about your work history for a few minutes.

2   A. Sure.

3   Introduction

4   My name is Alan Zolin. I'm the owner and sole

5   proprietor of Zolin International, LLC, a Dairy Supply Chain

6   and Dairy Policy Consulting company. I have been retained by

7   Hilmar Cheese Company to work with Dairy Institute of

8   California (DIC) to develop an alternative proposal to

9   Cooperative Proposal Number 1. I have worked with a task force

10   made up a number of representatives from DIC member companies,

11   in order to develop and submit Proposal 2.

12   Q. So then if we could turn the page to your work

13   background, and actually, let's work our way up from the bottom

14   in a way, but let's start, before USDA FMMO Order 30, what is

15   your educational background?

16   A. I have a degree in Accounting from the

17   University of Illinois.

18   Q. So after you got that degree in Accounting from the

19   University of Illinois, was USDA your first employment?

20   A. It was my first full-time employment.

21   Q. Okay. And what was that employment, the timeframe, and

22   what did you do?

23   A. I started in July of 1977. I was a field auditor for

24   roughly six months. I was promoted, moved into a section

25   called the pooling and review section, which basically

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1 calculated the pool for Order 30, as well as reviewed all the

2 audits of all the plants that were in the market at that time.

3 The last few years of my career, I was in the Informational

4 Systems Department, where I actually was a programmer to write

5 language for the, or any changes to Federal Orders, not only in

6 Order 30, but across the country. I think the only job I did

7 not have was a job working in the lab.

8   Q. So let me just explore that just a little further.

9 First of all, since the present Order 30 is different from the

10 Order 30 that you worked at geographically, correct?

11   A. Correct. It's been changed.

12   Q. What was the Order 30 you dealt with and what was its

13 relative pool size and what did it cover?

14   A. It was primarily the State of Wisconsin, Northern

15 Illinois, a portion of Iowa, I believe, and I think that was

16 it. We butted up closely to Order 68, which covered some of

17 Western Wisconsin, Minnesota, and maybe going into

18 South Dakota. Somewhere along the line in order consolidation,

19 Order 30 and Order 68 were combined. Pool size, Chip, I don't

20 remember, but a billion pounds a month kind of comes to mind.

21   Q. For that time period it was large?

22   A. Yes.

23   Q. Relative to other orders?

24   A. Correct.

25   Q. And when you say that you did sort of information

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1 systems group and the coding for the language, what exactly do

2 you mean by that?

3   A. The way it was back then, and we're going pretty far

4 back in time, the Department, my office felt it was more

5 productive to take someone who understood the pooling aspects

6 and teach them how to program, rather than take a programmer

7 and teach them the Federal Order system. So basically I went

8 back to school and got a second degree in computer programming.

9   Q. And then you basically, based upon your understanding,

10 not only of Order 30 language, but other order language, helped

11 or actually wrote the code language for how those would be

12 implemented in basically helping the audit and track and

13 calculate the pool?

14   A. Correct. And if I can continue, Chip. Towards the end

15 of 1984 I believe there was a major hearing in the Order 30

16 area, and I was basically being prepared to be a programmer for

17 the Order changes.

18   Q. But by the time that proceeding was completed, you were

19 no longer USDA?

20   A. Correct.

21   Q. Okay. So what was your next employment?

22   A. I went to work for Kraft Foods in June of 1984, and

23 started out as a buyer and a milk marketing analyst. And

24 during that timeframe, I bought a number of dairy products,

25 they are listed on my work background, and also I was

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1 responsible for the milk marketing reporting for all Kraft

2 plants throughout the country.

3 At that time, Kraft had fluid milk plants, cheese

4 plants, ice cream plants, yogurt plants, I guess I forgot to

5 put sour cream plants. We pretty much had a spectrum of the

6 dairy product industry.

7 Q. If you can remember, approximately how many plants that

8 peaked at Kraft while you worked for them?

9 A. 37 was the number I had at peak.

10 Q. And were those nationwide?

11 A. Everywhere -- yes, nationwide. Not in every state, but

12 scattered throughout the country.

13 Q. Including California?

14 A. We did not have a plant in California. We had plants

15 in California in the '60's, Kraft did, and we re-opened the

16 plant in 1994, in Tulare, California.

17 Q. And I'm getting ahead of myself. So anything else you

18 want to tell me about your '84 to '88 timeframe employment?

19 A. No.

20 Q. So --

21 JUDGE CLIFTON: I would like you to look at your work

22 background where you talk about that, and just read me the

23 products, since some of them are abbreviated with initials.

24 MR. ZOLIN: Okay. The dairy categories that, when I was

25 starting at Kraft was; cream, whey, WPC, NFDM (nonfat dry milk)

1 international powders, AMF, and other storable butterfat.

 2   JUDGE CLIFTON: What does WPC mean?

 3   MR. ZOLIN: Whey protein concentrate.

 4   JUDGE CLIFTON: And what does AMF mean?

 5   MR. ZOLIN: Anhydrous milk fat.

 6   JUDGE CLIFTON: Thank you.

 7 BY MR. ENGLISH:

 8   Q. So what was your next employment at Kraft?

 9   A. My next role at Kraft was the National Milk Marketing

10 Manager, and that was the job that entailed the responsibility

11 for the direct procurement of milk for the Kraft plants.

12   Q. So how was this position different from the position

13 you had held through '88?

14   A. In the position through '88 I was just basically doing

15 reporting to the Market Administrator and other reporting

16 tasks. From '89 through '96 I had the responsibility of buying

17 the milk.

18   Q. Did that mean you still understood, though, what was

19 being reported to the Market Administrator in those tasks?

20   A. Actually, throughout my entire career at Kraft I never

21 lost the Milk Marketing Analyst position.

22   Q. Lost or they never let you let it go?

23   A. It was always on my desk, yes.

24   Q. So then what was your next position at Kraft?

25   A. After the Milk Marketing position, I went to, I became

the Director of Cheese and Dairy Ingredient Procurement for

North America, which includes, in Kraft's description of

North America, the U.S. and Canada. For some reason we didn't

include Mexico.

Q. And how was your position different for those final 13

or 14 years at Kraft?

A. In that timeframe I became involved in the cheese

industry, which up until that time I did not have experience.

I also took on the responsibility of the supply chain,

production planning, and inventory management for the raw dairy

ingredients that Kraft had.

Q. And were you involved at that point with any cheese

facilities in California?

A. Yes, we were. By that time we did have our own plant

running. I would also say, Kraft was a company that bought a

significant amount of cheese from other manufacturers, and all

through my work career, Kraft was buying cheese from other

companies that produced cheese in California.

Q. So in that light, you would have kept abreast of how

the California system worked, along with how the Federal Order

system worked. Even if you were not buying the milk, you were

buying the cheese, and therefore, it mattered how those

programs worked?

A. Exactly. In the hearings in California in the early,

well, late '80's, I was always present at those hearings just

1   to be aware of what was going on in the State of California.

2   Q. Do you have even a rough estimate of how many

3   proceedings, both California and Federal, you've participated

4   in over your career?

5   A. Well, certainly any hearing I would have gone on

6   through 1996, I would have participated, because it would have

7   somehow impacted our company. After '96, I would only attend

8   hearings casually I guess I'll say.

9   Q. We haven't had that many hearings since 1996. So then

10 you retired from Kraft in 2010. And what have you done?

11   A. I started my own consulting company, and working within

12 the dairy industry, helping folks on strategic sourcing of

13 dairy products, global dairy policy, and supply chain

14 efficiencies.

15   Q. And I'm certainly not looking for names and

16 confidential information, but approximately how many different

17 businesses have you represented in that timeframe?

18   A. I have an ongoing retainer client base of four clients,

19 and I have probably had, I'll use 1099's as my example, I have

20 probably had in the last five years, somewhere in the

21 neighborhood of 60 1099's, meaning I have been hired by about

22 60 companies over the last five years.

23   Q. And is that primarily involved with dairy and pricing

24 regulation and the issues inherent in this proceeding?

25   A. It is. And but also, keep in mind I do have the supply

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chain efficiencies, some transportation issues. It covers the

gamut, Chip.

    Q. And going back to your time at Kraft, when Kraft had

fluid milk plants and ice cream, throughout this time period,

have you been involved with all classes of milk?

    A. Yes, I have.

    Q. Okay. All right. With that in mind, let's go back to

your statement on page 1 and complete your direct, starting

with purpose.

    A. Okay.

                          Purpose

        My reason for testifying today is to offer background

information on the topic of ultra-pasteurized and aseptically

processed dairy products (commonly referred to as Extended

Shelf Life or ESL) shrinkage calculation, specifically focusing

on Section 1051.43(b). This section is commonly referred to as

the Shrinkage and Overage Classification Section. This section

provides the methodology for calculating the maximum allowable

shrinkage to be classified in the lowest class at pool plants.

What Proposal 2 is attempting to do is provide a modified

calculation for facilities that process ESL products. Under

Proposal 2, a plant that processes ESL products and qualifies

as a pool distributing plant under Section 1051.7(b), would

have a modified maximum allowable shrinkage assigned to the

lowest class. This modification, as it appears in the Hearing

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1   Notice, would increase the maximum allowed shrinkage assigned

2   to the lowest class to be 5 percent for an ESL producing plant

3   that receives all of its milk directly from dairy farmers on

4   farm weights and tests, as well as processes 100 percent of

5   those receipts into an ESL type product. That was a long

6   sentence.

7   Byway of example, that five percent is calculated by

8   the addition of the 2 percent contained in Section

9   1051.43(b)(1)(i) plus the full 3 percent additional percentage

10   allowed in Section 1051.43(b)(1)(v) in Proposal Number 2.

11   Q. As submitted and as published in the Federal Register

12   Notice?

13   A. Correct.

14   Rationale and Commentary

15   In my dairy consulting business, I have clients that

16   produce ESL-type products. In past evaluation of their

17   operations looking for dairy supply chain opportunities, I

18   observed the higher shrinkage that occurred in the portion of

19   their ESL operations versus their conventional HTST, which

20   stands for High Temperature Short Time, which is a terminology

21   referring to pasteurization technique operation. Some of my

22   clients operate plants that produce a very high percentage of

23   their output as ESL products. These plants qualify as a pool

24   distributing plant under Section 7(b). Other clients process

25   some milk into ESL products, but falls below the 15 percent

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1 trigger to qualify as a 7(b) distributing plant. These plants

2 qualify as a 7(a) distributing plant. For the purpose of

3 determining an additional excess shrinkage percentage for

4 Proposal Number 2, I reviewed the records of my ESL clients and

5 calculated that their total product pound shrinkage -- and

6 calculated their total product pound shrinkage -- excuse me.

7 The result of this analysis was my client's total product pound

8 shrinkage averaged above five percent. Relying on that

9 information, Dairy Institute used 3 percent as the additional

10 percentage added to the shrinkage calculation in Proposal 2.

11   The testimony that follows me, refines that information

12 and -- and I have a correction, the submitted proposal. This

13 concludes my testimony on this issue.

14   JUDGE CLIFTON: Let us address this one change on the

15 record copy, the very last sentence of rationale and

16 commentary, the very last line of that, and instead of

17 "substituted" we are writing the word "submitted".

18   Thank you, Ms. Elliott.

19   MR. ENGLISH: Actually, your Honor, before he leaves the

20 stand right now, there were a couple of places where he

21 correctly read things differently from the statement, so I

22 wanted to note them. They are both in the Purpose, so, in --

23   JUDGE CLIFTON: Now, note them or have them changed?

24   MR. ENGLISH: Actually have them changed, because he read

25 it correctly, and it seems to me it ought to be corrected. We

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1 can agree or disagree after I note it. So in the middle of

 2 Purpose, the seventh line down there is a sentence that starts,

 3 "under Proposal 2 a plant that" he had written "process ESL"

 4 but when he read it he correctly read "under Proposal 2 a plant

 5 that processes" so there would be an "ES" added to the word

 6 "process" before ESL in that line.

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

 8   MS. ELLIOTT: Yes.

 9   JUDGE CLIFTON: All right. We'll make that change.

10   MR. ENGLISH: Similarly, if you move four lines down to the

11 line that says, "five percent for ESL producing plant that

12 receives all" the way it reads "all its milk" he read more

13 properly "all of its milk." And so I would insert the word

14 "of" between "all" and "its." He read it the way it ought to

15 be read, and not the way it is written. I think the word "of"

16 should be correctly there on the statement.

17   JUDGE CLIFTON: And, Ms. Elliott, are you there?

18   MS. ELLIOTT: Yes.

19   JUDGE CLIFTON: All right. We'll make that correction.

20   MR. ENGLISH: And I will wait on moving admission and other

21 things of the exhibit for his return to the stand after

22 Mr. Herbein.

23   So I would propose that Mr. Zolin be excused from the

24 stand at this point, and return for additional direct,

25 admission of his exhibit, and cross-examination after

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1 Mr. Herbein's testimony is complete.

2   JUDGE CLIFTON: Thank you. I agree with that. Thank you,

3 Mr. Zolin, we'll see you again soon.

4   MR. ENGLISH: And to prepare Mr. Herbein, not saying he's

5 gonna go into the computer, but if a question comes up, he's

6 already got his computer plugged in and up by the stand to save

7 time.

8   So I believe at this point, Mr. Herbein is available

9 for the continued cross-examination by Mr. Beshore. I guess it

10 might be efficient if he also just takes quickly, the question

11 asked by USDA. Well, maybe not. Just give us a second.

12   I was trying to efficiently address the question that

13 was asked yesterday and not to cut you off for other things. I

14 thought it might help clean up things if he answered your

15 question yesterday with respect to whether his data went to the

16 issue of ESL divided from aseptic, all right? So I wanted to

17 have him answer that one question and then have Mr. Beshore

18 come up. I just thought it might be more efficient.

19   JUDGE CLIFTON: All right. Mr. Herbein, you remain sworn.

20 Please again state your name and spell your name.

21   MR. HERBEIN: Carl D. Herbein, C-A-R-L, the letter D.

22 Herbein, H-E-R-B-E-I-N.

23   JUDGE CLIFTON: Thank you. You may proceed with your

24 testimony in response to the question yesterday from USDA.

25   MR. HERBEIN: Yes, thank you. I have reviewed the raw data

1   that we utilized in the study, and it does not include a

 2   differentiation between aseptic and ESL.

 3   MR. RICHMOND: Okay. Bill Richmond, USDA.

 4   We appreciate you looking into it. I guess we don't have

 5   any additional questions, then, at this point.

 6   JUDGE CLIFTON: All right. You may after Mr. Beshore

 7   proceeds. Very fine.

 8   Mr. Beshore, you are welcome to come to the podium.

 9   And Mr. Herbein, do you want to start by giving the response to

10   the question Mr. Beshore left you with last night?

11   MR. HERBEIN: I'll be happy to.

12   JUDGE CLIFTON: That would be good.

13   MR. HERBEIN: So that the record is clear, my understanding

14   of the question was, part of which I answered, how many plants

15   were in our study, and by whom are they regulated, and where

16   are they located, and --

17   MR. BESHORE: By whom are they owned?

18   MR. HERBEIN: And by whom are they are owned, yes, thank

19   you.

20   And the 19 plants are, and I'm going to give you their

21   name. The name in many cases indicates who owns the plant, and

22   then I will give you the regulatory body.

23   The Western Quality is owned by Heritage and regulated

24   by Orders 124 and 131.

25   JUDGE CLIFTON: Now, go really slowly on this because we're

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 1  all writing it down, so Western Quality is owned by Heritage,

 2  and what orders?

 3      MR. HERBEIN:  124 and 131.

 4      MR. BESHORE:  And its location?  The plant location?

 5      MR. HERBEIN:  Utah.

 6      JUDGE CLIFTON:  Is that adequate location for you,

 7  Mr. Beshore?  You wanted a community, right?

 8      MR. BESHORE:  I was interested in the city, but that may be

 9  all that's available.

10      MR. HERBEIN:  In my data, I believe there is an address on

11  the cover page of the Federal Order report.  I did not note the

12  exact address.

13      MR. BESHORE:  Okay.  I don't want to dwell on that at this

14  point.  Probably in the Federal Order published plant list

15  likely.  So, go on.

16      MR. HERBEIN:  HP Hood, Oneida, regulated by Federal

17  Order 1.

18      MR. BESHORE:  Oneida, New York?

19      MR. HERBEIN:  Oneida, New York, yes.

20          HP Hood, referred to as Philly, located in

21  Philadelphia, regulated Federal Order 1.

22          Aurora Organic, it's in Colorado, I don't have the

23  city, regulated by Federal Order 32.

24          HP Hood, Sacramento, California, regulated by the State

25  of California Department of Food and Agriculture.
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1   Cumberland, regulated by Federal Order 1, located in

          2   New Jersey.

          3   Byrne-Ultra Plant --

          4   JUDGE CLIFTON: I'm sorry, I'm having trouble keeping up.

          5   So I would assume that HP Hood owns the HP Hood plant, and

          6   Aurora owns the Aurora one. Does Cumberland own the Cumberland

          7   one?

          8   MR. HERBEIN: Cumberland Dairies is the name of the

          9   corporation that owns Cumberland.

         10   JUDGE CLIFTON: Thank you.

         11   MR. HERBEIN: And they are in Bridgeport, New Jersey.

         12   Ultra Plant-Byrne Dairy, regulated by Federal Order 1,

         13   located in Suburban Syracuse, New York.

         14   HP Hood's Winchester plant, located in Virginia,

         15   regulated by Federal Order 1.

         16   Agropur, Grand Rapids, Michigan, owned by Agropur,

         17   regulated by Federal Order 33.

         18   And next we have the series of Saputo plants, all owned

         19   by Saputo;

         20   Frederick, Maryland, regulated by Federal Order 1.

         21   Sulfur Springs, I'm not sure of the town for

         22   Sulfur Springs, regulated by Federal Order 126.

         23   MR. BESHORE: Sulfur Springs, Texas, perhaps?

         24   MR. HERBEIN: I think it is. Yes. I'll agree that it is

         25   Texas.

                                        3874

1   Saputo, Tulare, regulated by the State of California

2   Food and Ag Department.

3   Saputo, Gustine, regulated by the State of California

4   Food and Ag Department.

5   JUDGE CLIFTON: Is how is Gustine spelled?

6   MR. HERBEIN: J-U-S-T-I-N-E. Gustine.

7   JUDGE CLIFTON: All right. With a G.

8   MR. HERBEIN: Yes, a G, I'm very sorry.

9   JUDGE CLIFTON: I'm not familiar with all these places in

10   California, either.

11   MR. HERBEIN: Saputo, Newington, Connecticut, owned by

12   Saputo, Regulated Federal Order 1.

13   Saputo, White Bear Lake, regulated by Federal Order 30,

14   and I'm not sure of the city where that's located.

15   MR. BESHORE: Minnesota, I believe.

16   MR. HERBEIN: I believe that's right, Federal Order 30

17   would --

18   Saputo, Decatur, Georgia, Federal Order 7.

19   Saputo, Fraser, New York, Federal Order 1.

20   JUDGE CLIFTON: And how is Fraser spelled?

21   MR. HERBEIN: F-R-A-S-E-R.

22   Saputo, Friendship, that's in New York, the state of

23   New York. Federal Order 1 is the regulatory organization.

24   And the last plant is Saputo, Murray, regulated by

25   Federal Order Number 7, and I believe that's in Kentucky.

1   JUDGE CLIFTON: And how is Murray spelled?

2   MR. HERBEIN: M-U-R-R-A-Y.

3   CROSS-EXAMINATION

4 BY MR. BESHORE:

5   Q. Okay. Thank you, Mr. Herbein.

6   Is it your professional opinion that although only

7 three of these 19 are in California, that the information with

8 respect to all of them is pertinent to a California Federal

9 Order?

10   A. Yes, I do.

11   Q. Now, in compiling your study, did you use, I'm not sure

12 if this was asked or whether it was clarified yesterday, but I

13 think you said that since you were using 2013 and 2014 data,

14 there were audited reports from the regulators.

15   A. I utilized, in the majority of the cases, the Federal

16 Order report submitted by the handler to the, to USDA. And in

17 some cases, we received both the as-submitted and the audit

18 results.

19   Q. Okay. But not in all cases?

20   A. Not in all cases.

21   Q. So would it be fair then, that a majority of it is just

22 unaudited reported information by the reporting handler?

23   A. I wouldn't characterize it as "just". I would

24 characterize it, and I think I said this yesterday, we made

25 inquiries where we didn't have the Federal Audit Report, were

                         3876

1 there any substantial changes made to the reports, and there

2 were changes. There almost always changes, but nothing that

3 caused us to not be able to use the data.

4   Q. Okay. So you need the just, the majority of the

5 information was as reported by the handler to the regulatory

6 agency?

7   A. That's correct.

8   Q. Now, in any of, in any of these instances, was there

9 excess, what we call excess overage, excess shrinkage?

10   A. In the 19 plants, 24 months for each plant, there were

11 numerous overages reported. There were a few plants in the 19

12 that did not have overages in the 24 months, but there were a

13 number of overages.

14   Q. Okay. Now, you are using the word overage in part 43

15 of the Order that has a precise definition. Is that how you

16 are using the term?

17   A. No. And I don't want to misread you or the record.

18 When I used the term overage, I'm in cost accounting, not

19 Federal Order, two percent or one and a half percent. So my

20 term of overage was where the milk receipts, when compared with

21 the utilization, there was, there was an excess that we didn't

22 have shrink, we had overage. That's my use of the term

23 overage.

24   Q. Do you mean that you showed more utilization coming out

25 of the plant than receipts went into the plant?

1   A. In few cases, that does happen. That's not an unusual

2   occurrence.

3   Q. Okay. Now, I think I asked you this yesterday, and I

4   don't know, I'm not sure what the answer was, so probably ask

5   for the repetition if it's there, but do some of these plants

6   have non-ESL production?

7   A. Yes.

8   Q. Do you know how many?

9   A. A small handful.

10   Q. The shrink percentages shown on the last page of

11   Exhibit 84, which is identified as Exhibit California Dairy

12   Institute-3. Do I understand correctly that those are total

13   shrinkage numbers for those plants? That is, that they include

14   the present so-called allowable amounts?

15   A. That's correct.

16   Q. So that for, if we, so the allowable, so-called

17   allowable for a plant receiving farm milk is two percent; is

18   that correct?

19   A. Yes, that's my understanding.

20   Q. And so in aggregate, these plants had shrinkage of 2.7,

21   3 percent product pounds, correct?

22   A. Yes.

23   Q. Now, if the plant is not receiving milk on farm weights

24   and tests -- well, what portion was received on farm weights

25   and tests versus other basis? Do you have that information?

1   A. I do not.

2   Q. Okay. So we don't know from your study then, whether

3 the allowable shrinkage at the plants was 2 percent or 1.5

4 percent?

5   A. We do not. That was not the, within the scope of my

6 engagement.

7   Q. Those are all the questions I have right now. Thank

8 you very much for digging out the information overnight, Carl.

9   A. You're welcome, Marv.

10   JUDGE CLIFTON: Who else has questions for Mr. Herbein?

11 Mr. Beshore, might you have some additional questions?

12   MR. BESHORE: I might, yes.

13   JUDGE CLIFTON: I don't want to let him head for the

14 airport. Let's take a five-minute stretch break. Don't go too

15 far.

16   (Whereupon, a break was taken.)

17   JUDGE CLIFTON: All right. We're back on record at 9:54.

18 Mr. Beshore?

19   MR. BESHORE: Thank you for the time, your Honor. I do

20 have one additional question, or area of inquiry for

21 Mr. Herbein.

22   CROSS-EXAMINATION

23 BY MR. BESHORE:

24   Q. Do you know, Mr. Herbein, of the plants, not the

25 California plants, but the ones that are associated with

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1   Federal Order, which ones are or are not 7(b) plants?

2   A. I do not know the identity of the 7(b) versus 7(a).

3   Q. Okay. So you don't know the precise status under any

4   Order that any of the plants are regulated, or are regulated?

5   A. That is correct.

6   Q. Okay. Thank you.

7   JUDGE CLIFTON: Are there any other questions for

8   Mr. Herbein? It appears not. Mr. Herbein, thank you so much

9   for your appearance and your information.

10   MR. HERBEIN: My pleasure to be here. Good luck with the

11 rest of the proceeding. And if I can have my cord untaped, I

12 will be out of here promptly.

13   JUDGE CLIFTON: Yes, we'll go off record for just a moment

14 while we do that.

15   (Whereupon, a break was taken.)

16   JUDGE CLIFTON: We now invite Mr. Zolin to return to the

17 witness stand. Mr. Zolin, I note you are without water so if

18 you need any water, alert us.

19   MR. ZOLIN: I will. Thank you.

20   JUDGE CLIFTON: All right. And again, state your name.

21   MR. ZOLIN: My name is Alan Zolin.

22   JUDGE CLIFTON: Thank you. Mr. Beshore?

23   MR. ENGLISH: Actually, it's Mr. English.

24   JUDGE CLIFTON: Mr. English. We didn't finish direct.

25   MR. ENGLISH: And during the brief recess for Mr. Zolin, it

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1 was pointed out to us that back on Exhibit 85 he also had yet

2 another, he read it correctly and I missed it. In the same

3 paragraph we were working with purpose on Exhibit 85, his

4 statement, which is page 1, three lines up, the one that says,

5 "farm weights and tests as well as" and as it's written "as

6 processed 100 percent" that also should be "as processes." I

7 have been advised that's how he read it, and that is also what

8 should be correct. So if he can add another ES after the

9 process in that line.

10   MR. ZOLIN: Okay.

11   JUDGE CLIFTON: It shall be done. And thank you,

12 Ms. Elliott.

13   MR. ENGLISH: So at this time, I would then, move admission

14 of Exhibit 85.

15   JUDGE CLIFTON: Does anyone wish to question Mr. Zolin

16 before determining whether you object? No one. Are there any

17 objections to the admission into evidence of Exhibit 85? There

18 are none. Exhibit 85 is admitted into evidence.

19   (Thereafter, Exhibit Number 85 was

20   received into evidence.)

21   MR. ENGLISH: Thank you, your Honor.

22   CONTINUED DIRECT EXAMINATION

23 BY MR. ENGLISH:

24   Q. So, Mr. Zolin, now that we're back in your statement

25 and you refer to, at the last, the last sentence before

3881

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1 concludes, that the testimony that follows will refine the

2 information, and we're still going to hear from Mr. Meek on

3 engineering issues, and we're going to still hear from

4 Mr. Suever from HP Hood as to their issues, but nonetheless,

5 some of this goes to some of the examination from Mr. Beshore

6 in sort of looking at the numbers and see if we can simplify

7 them and put them together and come up with some explanation of

8 what's going on.

9   When the, as you testified, what's in Exhibit 1 on

10 Page 47226, under point 43(b) was based upon sort of a

11 preliminary, sort of eyeball look at what had happened, and

12 that's what we ended up with, which is basically taking 3

13 percent more than what's the allowable shrink in existing

14 Federal Orders, correct?

15   A. That is correct.

16   Q. Okay. So after the proposal was submitted, we now have

17 two sets of data that we didn't have at the time the proposal

18 was submitted, correct?

19   A. That is correct.

20   Q. We have got Table 18 from, I believe that was

21 Exhibit 9, the Government's tables. And did you bring that

22 with you?

23   A. I have them with me.

24   Q. Okay. So we have Table 18, which is the total 7(a) and

25 7(b) plants with excess shrinkage, all orders, and we have now

3882

1 Mr. Herbein's study, which is Exhibit 84, correct?

2   A. That is correct.

3   Q. Now, let's talk about some differences in

4 methodologies, and Mr. Beshore was getting at this a little

5 bit. The testimony from Mr. Herbein that is Exhibit 84,

6 Exhibit California Dairy Institute-3, is his observed for the

7 study of 19 plants, actual total shrinkage, correct?

8   A. That is correct.

9   Q. All right. The information provided on Table 18 in the

10 last sort of six columns, talks about 7(b). And in fact, that

11 has 7(b) excess skim shrinkage in the third to the last column,

12 7(b) excess butterfat shrinkage in the next to the last column,

13 and 7(b) excess product pound shrinkage in the last column of

14 Table 18, correct?

15   A. I agree with you.

16   Q. Those two things are not synonymous, are they?

17 Mr. Herbein's total shrinkage and the Government's excess

18 shrinkage are different, correct?

19   A. They are different calculations.

20   Q. Okay. And as Mr. Beshore pointed out, in order to

21 understand what excess shrinkage is, you have to know how much

22 of that milk was farm weights and tests which would be subject

23 to what, a 2 percent?

24   A. Producer milk on farm weights and tests is the 2

25 percent. I consider plant transfers or some other type of

3883

1 movement of milk on stale weights to be the one and a half

2 percent allowable shrinkage, and I believe there's a third

3 category, a half of one percent, and I'm not a hundred percent

4 sure what makes that up, but I know there's three categories.

5   Q. Okay. So, in essence, in order to understand, you

6 know, excess shrinkage, you'd have to sort of know what the

7 base was in order to compare it to Mr. Herbein's study.

8   A. That's correct, Mr. English. And the shrinkage report,

9 or shrink, there's a calculation that every Market

10 Administrator does for every handler shrinkage every month.

11 They determine what that maximum allowable shrinkage is going

12 to be in the lowest class, and that lowest class could be

13 Class IV, Class III, Class II, depending on what it is for that

14 specific month, and then any shrinkage that is above that

15 maximum, falls into something called excess shrink. And

16 according to my understanding of Table 18, exhibit, from

17 Exhibit 9, those last three columns refer to just that excess

18 shrink calculation.

19   Q. Okay. So did you cause a quick analysis of Table 18

20 with respect to what those percentages, because what we have is

21 numbers as opposed to percentages?

22   JUDGE CLIFTON: Let me stop you. I need someone to close

23 that back door, please.

24   MR. ENGLISH: Thank you, your Honor.

25   JUDGE CLIFTON: Start again, and only then can determine

3884

1 excess?

 2   MR. ENGLISH: Well, I think that was his answer and I was

 3 moving to a slightly different place.

 4   JUDGE CLIFTON: Okay.

 5 BY MR. ENGLISH:

 6   Q. Table 18 gives raw numbers, correct?

 7   A. Correct.

 8   Q. It doesn't actually provide any percentages, correct?

 9   A. Correct.

10   Q. Okay. Did you create, or have on your behalf, created,

11 percentages for the full time period referenced on Table 18,

12 for 2009 through June of 2015, what those percentages would be

13 as opposed to raw numbers as an average?

14   A. To be fair, I asked someone to do it for me, James

15 DeJong from Hilmar Cheese is a computer whiz, and he did make

16 those calculations of getting percentages for what the total

17 excess skim shrinkage percentage would be, the total excess

18 butterfat shrinkage would be, and the total excess product

19 pound shrinkage would be for the years 2009 through June of

20 2015.

21   Q. Okay. And so just what, were those, let's provide

22 those percentages for the record, going in the same order, the

23 last three columns of Table 18. So starting with percent

24 excess skim shrinkage for all the months on Table 18.

25   A. On a weighted average basis, the 7(b) excess skim

3885

1 shrinkage number averages 2.47 percent.

2   Q. And the percent excess butterfat shrinkage for the

3 entire timeframe was?

4   A. Average is 1.54 percent.

5   Q. Again, on a weighted average basis?

6   A. On a weighted average basis.

7   Q. These are all -- all of these numbers are on a weighted

8 average basis?

9   A. Correct.

10   Q. And the total excess shrinkage --

11   JUDGE CLIFTON: Let him say again, the first number was

12 skim --

13   MR. ZOLIN: Yes.

14   JUDGE CLIFTON: -- 2.47 percent. The next number was

15 butterfat, what was it?

16   MR. ZOLIN: 1.54 percent.

17   JUDGE CLIFTON: Okay.

18 BY MR. ENGLISH:

19   Q. And then, again, we're going to the same columns as

20 Table 18, the total excess shrinkage, which is the last column

21 on Table 18, was?

22   A. 2.29 percent.

23   Q. Okay. Now, given the fact that that doesn't match up

24 with Mr. Herbein's study period, did we, last night, create

25 that same two-year period, so in analyzing instead the two-year

1 period, did James help you write, come up with those numbers?

2   A. James took the data and calculated the same percentages

3 for just the months of, I'm sorry, just the years of 2013 and

4 2014 to match up with Carl's study.

5   Q. Okay. So what did we come up with then, for the final

6 three columns of Table 18 if we used just the 2013 and 2014

7 data?

8   A. Okay. Again --

9   Q. Again, for weighted averages, all, correct?

10   A. Weighted averages for all.

11   Q. Okay. So percent excess skim shrinkage first, was?

12   A. 2.18 percent.

13   Q. Okay. For percent excess butterfat shrinkage for the

14 two-year period, that's the second column, you came up with?

15   A. 1.46 percent.

16   Q. And for total excess shrinkage, you came up with?

17   A. 2.09 percent.

18   Q. All three of those numbers are lower than the overall

19 average for the, for the six and a half years, correct?

20   A. Yes. The 2013, 2014 numbers are all lower than the

21 full time table in Exhibit 9, Table 18.

22   Q. Okay. And would some of that explanation be, we looked

23 at Table 18 and there were one or two, one I call outliers in

24 months outside of 2013 and 2014. So for instance, the month of

25 May 2011, would it be fair to say that the excess skim

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1 shrinkage jumped by four and a half million pounds and then

2 dropped back down by 4.3 million pounds in 2011, if you look at

3 Table 18?

4   A. Yes, there were a number of those instances where the

5 numbers changed dramatically. I don't know the reason for that

6 change, but it was -- it was a number that we saw that was

7 different than previous months.

8   Q. Okay. So looking at your analysis, then, taking table,

9 Exhibit 84, and thinking about your weighted average for a

10 moment of excess skim, and again, we don't know whether it's,

11 we don't know what combination of two percent, one and a half

12 percent, or potentially 0.5 percent was the base, correct?

13   A. We don't know in any of the shrinkage calculations.

14 Mine, that I testified to, as well as the Department's, as well

15 as Mr. Herbein's, what that base level was. We do not have

16 that information.

17   Q. In your experience, how much of that would be at one

18 and a half or two, one of those two? Would most of it be at

19 the one and a half or two or you just don't know?

20   A. I'll give my opinion. I would think it leans more

21 towards two percent the producer milk on producer weights and

22 tests versus the one and a half, but it certainly is a market

23 by market situation. I believe more milk might move via plant

24 transfers in the Upper Midwest than it does in let's say Texas.

25   Q. Well, let's just quickly look at the numbers and

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 1   compare them to Mr. Herbein's study.

 2         Using the numbers that you have for excess for 2013 and

 3   2014, and looking at Exhibit 84, Exhibit 84 has a weighted

 4   average for all pounds at 2.73 percent, correct?

 5      A.   That is correct.

 6      Q.   If you add the one and a half percent, which is a base

 7   that's obviously less than two percent, if you add the one and

 8   a half percent to the excess skim shrinkage, you would end up

 9   with 3.68 percent total pound shrinkage, correct?

10      A.   You went to the skim shrinkage?

11      Q.   Yeah, I'm looking at skim shrinkage only.

12      A.   Yeah, 2.6, and in Carl's study, 2.68 plus 1.5.  I

13   didn't do the math, but I agree with your number.

14      Q.   Okay.  His number is 2.73, but if you add 1.5 to your

15   calculation of 2.18 using Table 18 percentages, that would be

16   3.68, correct?

17      A.   Chip, I'm having a hard time following you.

18      Q.   Okay.

19      A.   All right.  So let's go, let's talk about Carl's study.

20   You are looking at the first one that's the has the 2.73, which

21   is the weighted average product pound shrink.

22      Q.   Right.  And that's total, correct?  It doesn't include

23   shrink?  It doesn't include -- it is not taking into

24   consideration --

25         JUDGE CLIFTON:  Mr. English, you have got to slow down.
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 1   You have got to slow down.  We're just trying to get our heads

 2   around this.  Okay.  So just start again, slowly.

 3   BY MR. ENGLISH:

 4       Q.  All right.  So let me explain what I'm trying to do,

 5   and I thought we did this.

 6       A.  We did it last night, but the math just doesn't work in

 7   my head all of a sudden.

 8       JUDGE CLIFTON:  It doesn't matter if the two of you

 9   understand each other, if --

10       MR. ENGLISH:  Well, apparently it does matter.  Because if

11   the two of us aren't understanding, it actually does matter,

12   your Honor.  If the two of us don't get it together, then I

13   guarantee you we're not going to have it right in the record.

14   So at a beginning point, he and I have to be on the same page.

15       JUDGE CLIFTON:  Okay.  Bring us along with you, though.

16       MR. ENGLISH:  Yes, I know.  I intend -- yes.  I intend to

17   bring you along, but I can't bring you along if he and I are

18   going in different directions.  So let me start.

19       JUDGE CLIFTON:  Well, you started with the total, and you

20   switched to skim, and you --

21       MR. ENGLISH:  I'm sorry, I was -- okay.  I apologize.

22       JUDGE CLIFTON:  All right.

23   BY MR. ENGLISH:

24       Q.  So let's look at the middle column of Exhibit 84,

25   Page 3, which is total skim pounds received.  And not
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TRANSCRIPT OF PROCEEDINGS - XX

1 considering excess, Mr. Herbein's study comes up with 2.68

2 percent, correct?

3   A. I agree.

4   Q. Okay. If all the milk were at the lowest, which is 0.5

5 percent, and you know it is not there, right?

6   A. I would think that's a very unlikely, yes.

7   Q. But if all the milk were at the lowest, which is 0.5

8 percent, and you add 0.5 percent to the weighted average number

9 for 2013 and 2014 for Table 18, which is 2.18, you would end up

10 at exactly Mr. Herbein's 2.68 percent, wouldn't you?

11   A. Correct.

12   Q. Okay. If instead, you added 1.5 percent to the 2.18

13 percent, you would end up with 3.68 percent, correct?

14   A. Correct.

15   Q. Okay.

16   A. And, Mr. English, I realize now why we were having

17 difficulty. I was looking at the wrong exhibit.

18   Q. Okay. Well, now you are looking at the wrong column,

19 so like I said for the Judge, I think we weren't on the same

20 page. So now looking at Exhibit 84 and looking at the

21 butterfat, if you look at the butterfat that Mr. Herbein has

22 for Exhibit 84, he has 3.35 percent, correct?

23   A. Correct. Correct.

24   Q. And for excess butterfat shrinkage using the two-year

25 total that you had calculated from Table 18 of 2013, 2014,

1 that's 1.46 percent, correct?

2   A. Correct.

3   Q. If you added 1.5 percent, you would end up with 2.96

4 percent, correct?

5   A. Correct.

6   Q. Okay. And finally, if you now look at the total, so

7 we're going up to the first line of Exhibit 84,

8 California Dairy Institute-3, you have a total shrink by

9 Mr. Herbein of 2.73 percent, correct?

10   A. Correct.

11   Q. And Mr. DeJong's number he provided you for total

12 excess shrinkage based on Table 18 of Exhibit 9 for 2013 and

13 2014 was 2.09 percent?

14   A. Correct.

15   Q. So if you add one and a half percent, you end up at

16 3.59 percent?

17   A. Correct.

18   Q. Which is, again, higher than the total pounds.

19   A. Yes.

20   Q. Okay. So now that you have this information, and

21 recognizing we're still going to hear from Mr. Meek about why

22 this may be going on, and Mr. Suever, what is it that you would

23 propose the Secretary do for this particular proposal?

24   A. In our initial proposal, the 3 percent was used based

25 on my survey of my clients. The number data points that I had

1 is nowhere near as large as those by Mr. Herbein or the

 2 Department's. So now with this information, the

 3 Dairy Institute is proposing that the Department look at both

 4 of these studies, they are fairly close, and they determine

 5 what is the appropriate excess shrinkage number to use in

 6 Section 1051.43 to treat ESL plants.

 7   Q. Do you have anything else to add at this time?

 8   A. No, I do not.

 9   Q. Okay. Then the witness is available for

10 cross-examination.

11   JUDGE CLIFTON: Who will begin?

12   MR. BESHORE: By default.

13   JUDGE CLIFTON: By default, Mr. Beshore.

14   CROSS-EXAMINATION

15 BY MR. BESHORE:

16   Q. Good morning, Mr. Zolin.

17   A. Good morning.

18   Q. Marvin Beshore.

19   Okay. I'm trying to get my head around what's going on

20 here.

21   JUDGE CLIFTON: I am glad to hear you say that.

22 BY MR. BESHORE:

23   Q. The Dairy Institute of California wants to, wants to

24 change the uniform, change the, change what is a Part 1000

25 provision, applies to all plants and all Federal Orders with

                        3893

1 respect to allocation and classification of producer milk, in

2 particular with respect to shrinkage, right?

3   A. Shrinkage as it applies to an ESL facility I would add

4 as a caveat to your statement.

5   Q. Okay. But it is an ESL facility that is a 7(b) plant

6 only?

7   A. Correct.

8   Q. Correct? So 7(b) plants have to have what, 15 percent

9 Class I?

10   A. Correct, I believe that's correct.

11   Q. So they can have 85 percent of their products going

12 into other than Class I, Class II products, correct?

13   A. That is true. There are some plants that have a

14 mixture of ESL and HST.

15   Q. HTST?

16   A. The conventional fluid milk.

17   Q. So isn't it the case that if you got a freestanding

18 Class II plant, nonpool, let's say for this purpose, the milk

19 that goes into that plant goes in on a use to produce basis,

20 does it not?

21   A. Who is supplying that milk, is it direct farmers or is

22 it a cooperative? I have to know --

23   Q. Nonpool plant.

24   A. But who is supplying the milk to that plant?

25   Q. Take your pick.

BARKLEY
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1   A. Okay. If it is a producer and they are nonpool, then

          2   there's no reporting to that, so that's why I'm confused with

          3   your question.

          4   Q. Well, my question is, when products are made, when

          5   Class II products are made in a plant that's on a use to

          6   produce basis, there's no shrinkage, right?

          7   A. I'm not sure I'm following the question that you are

          8   asking. You know, when you say to a use to produce basis, the

          9   milk to that plant doesn't carry a shrinkage calculation, but

          10   if it's a handler that's moving that milk to the plant, that's

          11   part of their total utilization and would be part of the

          12   shrinkage calculation.

          13   Q. The volume that goes into the plant is part of their

          14   total utilization, correct?

          15   A. Yes.

          16   Q. Okay. But it goes in there on a gross basis, right?

          17   Whatever they deliver to that plant is -- and it is all

          18   considered at whatever the utilization of that plant is, right?

          19   A. Correct.

          20   Q. And there's no, you know, I mean, if somebody delivers

          21   a million pounds to a freestanding, let's say a freestanding

          22   plant that does creamers, okay? Those kinds of Class II

          23   products, which are a lot them are aseptically processed,

          24   correct?

          25   A. Correct.

1   Q. Okay. It is a nonpool plant. So the volume that goes

2   in there is, a hundred percent of it is classified as Class II

3   on the selling handler's report?

4   A. I agree.

5   Q. And there's no calculation for shrinkage or anything

6   else.

7   A. At the nonpool plant?

8   Q. No, on the selling handler's report, that volume,

9   right?

10   A. Again, I will go back to the comment that that volume

11   is considered utilization on the reporting handler's report,

12   and is part of the overall shrinkage calculation for that

13   handler.

14   Q. That I understand. But the volume that goes into that

15   plant, that volume is a hundred percent at the utilization of

16   the plant, say Class II?

17   A. Yes.

18   Q. So would you, would, if that plant now is a 7(b) plant

19   under this proposal, would it be subject to 5 percent, up to 5

20   percent shrinkage on its total production?

21   A. If it is a hundred percent, let's go back to the ESL.

22   Q. Let's assume it is a hundred percent ESL.

23   A. And again, I'm struggling with, well, let's go with the

24   scenario that you presented. 5 percent under the

25   Dairy Institute Proposal 1, which we have with the II and the

3896

1 III, it would be 5 percent. And that was the kind of example I

2 was trying to give in my testimony that that would be the

3 maximum.

4   Q. I understand it is a maximum. Okay.

5   A. Okay.

6   Q. But I just want to make sure that I understand, the

7 record is clear, how this would operate. If that plant is a

8 7(b) plant because it has 15 percent Class I products?

9   A. Well, if I can stop you for a second, because we were

10 talking about a nonpool plant making creamers and now you are

11 bringing in a 7(b) so you are confusing me on the terminology.

12 Because a creamer plant isn't, I don't think it would be

13 qualified as 7(b), I think it is fluid milk.

14   Q. Well, here's what I'm trying to get at, Al. Okay? I'm

15 trying to get at the effect on the pool on the producer's milk,

16 right? I'm representing the dairy farmers. You understand

17 that?

18   A. I do.

19   Q. Okay. So the nonpool plant, the nonpool plant creamer

20 plant we just talked about, okay? A hundred percent of the

21 volume going into that plant is Class II in the pool, correct?

22   A. Correct.

23   Q. Okay. That plant could be making a hundred percent

24 ESL, correct?

25   A. Yes, it can.

1   Q. And it can have whatever spillage it wants, but a

        2 hundred percent of that volume is going to be Class II under

        3 the pool, correct?

        4   A. Correct.

        5   Q. Now, if that plant happens to be a 7(b) regulated pool

        6 plant, and instead of having a hundred percent Class II, it has

        7 15 percent Class I, and the other 85 percent are the creamers,

        8 Class II products. Okay?

        9   A. I'm with you.

       10   Q. Now, under your proposal, I just want to make sure this

       11 is clear, under your proposal, if the plant experienced 5

       12 percent shrinkage on a hundred percent of its products, all of

       13 that would be subject to pricing to the dairy farmers in the

       14 pool at the lowest class utilization?

       15   A. Correct.

       16   Q. Is there, other than under this proposal, are there

       17 shrinkage -- if you have, let's say you have a, if you have a

       18 -- a primarily Class II, if you have a plant that's got just

       19 less than 15 percent Class I, but it's an aseptic ESL plant,

       20 most of the products are Class II, creamers, etcetera, but it's

       21 got a little bit of Class I, let's assume it is a pool plant

       22 for these purposes. How would -- how would your proposal apply

       23 to that plant it is not a 7(b) plant?

       24   A. Mr. Beshore, I'm going to have to write down those

       25 assumptions because I kind of lost the first one.

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BARKLEY
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1   Q. Well, just take, I'm just moving on the last -- the

2 last question was you had a 7(b) plant, 15 percent Class I,

3 85 percent Class II. Okay. Same plant, but they don't have 15

4 percent Class I, they got 12 percent Class I, hypothetically.

5 88 percent Class II. Okay. So it doesn't qualify as a 7(b)

6 plant, okay? But it's a pool plant, let's assume. Okay?

7   A. Can you tell me what type of pool plant it would be?

8   Q. Could be part of a distributing plant unit perhaps, or

9 supply plant, I don't know.

10   A. Fine.

11   Q. Pool plant somehow. How would your proposal work for

12 that plant?

13   A. Well, we added the section that, that refers to only

14 plants that qualify under 7(b), so the traditional shrinkage

15 calculation would be applied to that facility, because it falls

16 below that 15 percent to be qualified for 7(b).

17   Q. Okay. So if a facility like that does the, do all the

18 the shrinkage allowances apply to its entire production?

19   A. I think of the shrinkage allowance applying to the

20 total receipts versus total, that you get to that total

21 shrinkage number first, and then you apply these allowances.

22 So I think I'm saying yes to your question, but I'm defining it

23 just a little bit differently.

24   Q. Okay. So what goes into the calculation of the total

25 shrinkage number?

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1   A. Total receipts minus total utilization, roughly. Then

2   you walk through these steps to determine what those receipts

3   are to get to what, you know, the 2 percent applies to milk

4   that's been received by producer weights and tests, and you

5   just kind of go through that process to get to what's the

6   maximum allowable lowest class shrinkage.

7   Q. Okay. So the total shrinkage is based off of total

8   receipts versus total utilization, irrespective of the class of

9   utilization?

10   A. Correct, that's my understanding.

11   Q. Okay.

12   A. And sometimes you should just be quiet. But Marv, when

13 you were going to the minus, the somewhat less than 15, because

14 we had quite a few discussions in our task force. We stopped

15 with 7(b) mainly because we felt that if we start getting to be

16 a too small of a utilization, it might be burdensome to make

17 the reporting. But if you are in that 7(b) category, it is

18 certainly worth your while to go through the reporting to give

19 the information to the Market Administrators what products were

20 ESL and what products were not.

21   Q. You mean it is worth your while because you are going

22 to get, the potential benefit is difference between Class I and

23 the lowest class?

24   A. And exactly right. It is a mathematical calculation,

25 and if you raise that minimum, the maximum number to a higher

1 level, it's going to change the overall classification of milk

2 in that handler's plant.

3   Q. Okay. I don't have any other questions at this time

4 for Mr. Zolin. Thank you.

5   JUDGE CLIFTON: Thank you, Mr. Beshore. Who will go next

6 with questions for Mr. Zolin?

7   CROSS-EXAMINATION

8 BY MR. RICHMOND:

9   Q. Bill Richmond, USDA. Thank you, Mr. Zolin, for your

10 testimony. We're going to bounce around a little bit.

11   A. That's fine.

12   Q. I think we're going to start with kind of following up

13 on some of Mr. Beshore's questions about the potential impacts

14 to dairy farmers that could result from adoption of your

15 proposal.

16   So you understand that by increasing the applicable

17 shrinkage percentage that the plant affected in question, they

18 have a reduced obligation to the Producer Settlement Fund or

19 the Federal Order in which they could be regulated?

20   A. I agree with that statement, yes.

21   Q. And you understand that by having a reduced

22 contribution to the Producer Settlement Fund, it would impact

23 producers by, in fact, lowering the regulated uniform price

24 that, that a pool producer would receive?

25   A. I agree that that's how the calculation would work,

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1 yes.

2   Q. Could you maybe expand for the record as to why the

3 dairy farmers should face a reduce uniform price as a,

4 resulting from a, you know, the differences in process of

5 manufacturing resulting from ESL, in case that would occur?

6   A. And not to take away any of the testimony from the

7 experts that are going to come back in. A layman's view of

8 this is that there is a certain attainable capability that an

9 ESL producer can attain for shrinkage, and the current limits

10 that are in the Order are too low for that type of processing.

11 They can't, they can't fall below 2 percent, so they are being

12 charged excess shrink because of the product they make does, is

13 just not capable of being that low. And I think the expert

14 witnesses are going to come and testify to that. That was my

15 opinion by talking to my clients about why their shrinkages

16 were so high, they have told me that they just can't get it any

17 lower than the levels that they were at.

18   Q. Okay. We have several questions regarding the ESL or

19 aseptic facilities that are located here in California. Would

20 it be best to go down the line of questioning regarding those

21 with you or to wait for additional witnesses?

22   A. I am not aware, none of the plants that are UHD aseptic

23 are my clients, so I have no knowledge about their operations.

24 I have knowledge about my clients' plants, but they are not

25 located here in California.

1   Q. Okay. One thing that we have had a little bit of

 2   trouble throughout the testimony this morning, is not

 3   distinguishing between ESL or ultra-pasteurized and UHD or

 4   aseptic. So as we kind of continue throughout the morning, I

 5   think we would really appreciate some explanation as to the

 6   differences in those practices, which I understand we're going

 7   to receive from Mr. Meek.

 8   And also, if we could somehow understand better exactly

 9   the process that occur in the plants that we're discussing.

10   Are they ESL or are they UHD? And if there are differences, if

11   there are HTST lines in those plants, what are the percentages,

12   and -- we would appreciate a little more detail.

13   A. And part of the reason there's three or four of us

14   coming up, is our last witness is actually from HP Hood that

15   happens to understand those plants, and I was just trying to

16   set the stage of how we got to the 3 percent and move our way

17   down the road. So in going in our preferred order, we would

18   have, at the end, I think we'll answer all your questions.

19   CROSS-EXAMINATION

20   BY MR. SCHAEFER:

21   Q. Thank you. Henry Schaefer with USDA.

22   Hello, Mr. Zolin.

23   A. Hello.

24   Q. A couple of questions here, and maybe I missed

25   something. In your statement under the category you have here

                          3903

1 of Purpose, you indicate that allowed shrinkage to the lowest

2 class to be 5 percent for an ESL producing plant that receives

3 all of its milk directly from dairy farms on farm weights and

4 tests, as well as processes a hundred percent of those receipts

5 into ESL-type product.

6 Doesn't that conflict really with the 7(b) plant who

7 may be getting milk from many sources rather than just farm

8 milk, and a hundred percent ESL products? So do you want that

9 that strictness of a hundred, of all the milk coming from dairy

10 farmers and a hundred percent in the ESL? Or are you looking

11 at applying this to 7(b) handlers?

12   A. Okay. And if I can -- I'll try to answer that

13 question, and if I miss a piece, come back to me.

14 What I was doing in the purpose was trying to show how

15 to get to that, how the math would work for a 7(b) plant. And

16 I used the producer milk, because that allowed 2 percent. And

17 our calculation for the additional percentage is based on its

18 percentage of ESL in the plant, and then we started with 3

19 percent. So when I said it is a hundred percent ESL, you take

20 a hundred percent times that three, get a percentage which is 3

21 percent, add it to the two, and that would be the maximum

22 allowable shrinkage to go into the lowest class for that

23 facility.

24 If they were 50 percent ESL and they received all of

25 their milk from producers, then the math would be 50 percent

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BARKLEY
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1 | times .03, which is one and a half percent, added to the 2,

2 | which is the shrinkage calculation for receipts into a, from

3 | producer weights and tests for producer milk, the math would

4 | then add up to a maximum 3.5. So that, I was just trying to

5 | show how the math works.

6 | Q. Okay. So that statement really has nothing to do with

7 | the qualifications of what plant this would apply to?

8 | A. It is an example of how the mathematics will work for a

9 | 7(b) plant, based on its ESL percentage.

10 | Q. Okay. And then I, again, I must have misunderstood

11 | then, because when you were talking with Mr. Beshore, I came to

12 | the conclusion that the 5 percent in the case that you are

13 | proposing, or at least that was what was in the proposal in

14 | this proposal, that that would be applied to all of the milk

15 | that was received at that plant, depending on, they add-on 3,

16 | let me put it that way, rather than 5, but they add on 3 would

17 | apply to all of the milk that a shrinkage, that that shrinkage

18 | computation would apply to in a plant, not just ESL milk.

19 | A. Henry, you are exactly right. So if you -- you are

20 | right that it would go through each one of those

21 | calculations -- ask the question again.

22 | Q. Okay. So I think what I'm getting at is, you just

23 | explained that the California, the producer milk and the

24 | hundred percent ESL receipts is a basis for calculating what

25 | part of the milk at the 7(b) plant would be covered by the

3905

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1   add-on that you are proposing.

 2   In listening to your discussion with Mr. Beshore, my

 3   conclusion from that discussion was, that that add-on would

 4   apply to all the milk at the 7(b) plant, not just specifically

 5   to the milk going into ESL products.

 6   A. I agree with that statement. As I'm listening to how

 7   you phrase it, yes.

 8   Q. Okay. So now the final, the real question then is,

 9   does it apply to, does the add-on apply to all the milk in a

10   7(b) plant or only to the ESL milk in a 7(b) plant?

11   A. Our intent is for it to apply only to the ESL product

12   in a 7(b) plant.

13   Q. Okay. I think you mentioned in our discussion here,

14   that there are plants that the 7(b) qualification is not the

15   same. Order 30 is a 15 percent, some orders have a 25 percent,

16   I think some orders actually have 50 percent ESL in the plant

17   to qualify them as a 7(b) plant. Do you see any problems with

18   that difference and the allowable shrinkage being a competitive

19   advantage or disadvantage to plants that have different

20   percentage qualifications for the 7(b) versus plants that would

21   not have that much?

22   A. I do not see that as a competitive advantage.

23   Q. Thank you. I think we're done, thank you.

24   JUDGE CLIFTON: Who else has questions for Mr. Zolin?

25   Mr. Beshore? If you need a little more time, take it.

                              3906

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1   MR. BESHORE: I do.

2   JUDGE CLIFTON: Yes, another five minute stretch break.

3 Don't go too far.

4   (Whereupon, a break was taken.)

5   JUDGE CLIFTON: We're back on record at 10:52.

6   Mr. Beshore?

7   MR. BESHORE: Thank you for the time, your Honor.

8 Marvin Beshore. Just a couple of further questions, Al.

9   CROSS-EXAMINATION

10 BY MR. BESHORE:

11   Q. Is this regulation intended to factor into the

12 calculations, pool obligations for partially regulated

13 distributing plants at all?

14   A. It would only qualify for 7(b) plants is our intent.

15   Q. Only pool plants?

16   A. Pool plants that qualify under 7(b).

17   Q. And not somehow roll into the calculations for pool

18 accountability for partially regulated plants?

19   A. And I didn't testify on those provisions for partially

20 regulated's, but as you go through those, those calculations

21 for partially regulated's, they follow the pool obligation, so

22 I guess by proxy if they are an ESL plant, they would fall into

23 that calculation as well is the way I would understand the way

24 it works.

25   Q. Okay. So they would then?

                        3907

1   A. I'm saying they would.

2   Q. As I read the language from the hearing notes,

3 Exhibit 1, the additional shrinkages would apply to

4 aseptically, or aseptically processed or ultra-pasteurized

5 fluid milk and cream products, both -- is it just fluid milk

6 and cream -- fluid milk products and fluid cream products is

7 that the --

8   A. Yes.

9   Q. No other Class II products, just fluid cream products?

10   A. Correct.

11   Q. And why is the equation or the fraction aseptically

12 processed over total processed, rather than aseptically

13 processed over total receipts?

14   A. Well, we were --

15   Q. Total production?

16   A. The math is to get that percentage, to change that 3

17 percent based on the percentage of its processing side, in

18 order to account for just the products that go into the ESL

19 type production.

20   Q. Okay. Now, one other question. The Herbein study

21 involved many, I think the majority of plants that are not 7(b)

22 plants. Are you aware of that?

23   A. I am not aware of the plants that he used until I heard

24 him talk today, so I do not know what the status of those

25 plants are.

3908

BARKLEY
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1   Q. But if they are not 7(b) plants they are not really

2   comparable to what you are proposing here, are they?

3   A. Again, I don't know what plants, what the status of

4   those plants are.

5   Q. Okay. But assuming, assume with me that they are not?

6   7(b) plants, it's a different ball of wax, isn't it?

7   A. From the standpoint of, if they are conventional plants

8   with just a small amount of UHT or ESL plants I would agree

9   with you. But I believe, and Carl's the one who testified,

10   that he felt that they, or said that there was a number of them

11   that would be under 7(b).

12   Q. But -- okay. So some might be. But I, certainly a

13   number, and I haven't counted or tried to count them and go

14   look at pool lists or whatever, but I think quite a number of

15   them are not pool plants at all. And if they are not pool

16   plants at all, wouldn't the whole reporting and accounting

17   accountability is a whole different thing, isn't it?

18   A. If they are not pool plants, they are not following

19   the, they are not audited and they are not part of the Market

20   Administrator, but I would say back to the 7(b) we do have the

21   data from Exhibit 9, Table 18 that specifically talks about

22   7(b) plants.

23   Q. Right, but I'm talking about the Herbein data.

24   A. Uh-huh.

25   Q. Which is another data set?

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1 A. It is another data set. And as we went through my

2 testimony, when you factor in different shrinkage and net

3 allowable shrinkage levels, the numbers seem to get close

4 together.

5 Q. Okay. Thank you.

6 JUDGE CLIFTON: Who else has questions for Mr. Zolin?

7 Mr. Zolin, before redirect, do you have anything you would like

8 to add to what you have explained to far?

9 MR. ZOLIN: I do not.

10 JUDGE CLIFTON: All right. Any redirect, Mr. English?

11   REDIRECT EXAMINATION

12 BY MR. ENGLISH:

13 Q. Briefly. So when, in your experience these many years

14 that you have worked in the Federal Orders, is it fair to say

15 that these 7(b) operations and their growth and expansion is a

16 relatively new phenomenon in the dairy industry?

17 A. I would say that it is certainly, the answer would be

18 yes. I'm not exactly sure when they started, but they are new

19 and they are growing.

20 Q. And so when when 7(b) was first created, perhaps people

21 didn't figure or understand the technologies that we might hear

22 back in a few minutes, and so we ended up with regulations that

23 acknowledge shrinkage in traditional plants, correct?

24 A. Correct. Yes.

25 Q. And that is already recognized by USDA, correct?

3910

1   A.   Correct.

2   Q.   Okay. And what is your understanding of the purpose of

3   understanding shrinkage in traditional plants, HTST?

4   A.   The shrinkage allowance, in my opinion, was put in

5   because the Secretary recognized that plants will have

6   operational inefficiencies and milk will be lost. And it was

7   more of a sharing process between producers and handlers on

8   what those levels of sharing should be. The two percent, the

9   one and a half, and the half percent. What we're suggesting

10 here is that with ESL technology, it is something different

11 than what the Secretary originally considered, and we're

12 suggesting the change to those numbers using the same

13 methodology and using the same rationale that the shrinkage

14 allowances were put in to begin with.

15   Q.   And it's not the case that if a new shrinkage number is

16 adopted, the dairy farmers will get nothing for the milk,

17 correct?

18   A.   No, it will be the lowest, it is what goes into the

19 lowest minimum class, so Class IV, Class III, whatever it would

20 be for that month.

21   Q.   And you understand shrinkage as being an up-to number?

22 In other words, you don't just automatically get it, you have

23 to show what your shrinkage is, correct?

24   A.   Correct, right.

25   Q.   So you don't just get that to be lower, if your

3911

BARKLEY
Court Reporters

1 shrinkage, if you do very well, you don't get that shrinkage,

2 correct?

3   A. Correct. It is a calculation of receipts minus

4 utilization, yes.

5   Q. And given your work with plants, if plants still have

6 to pay the lowest class utilization for milk that is lost, is

7 there still a financial incentive for them to get better and

8 figure out how to actually not lose that product?

9   A. Right. All plants that I have ever worked with are

10 trying to minimize the overall shrinkage in their operation.

11   Q. So the existence of a shrinkage provision doesn't sort

12 of just give handlers a free ride and we can just shirk it,

13 correct?

14   A. I agree.

15   Q. Okay. And just to sort of try to nail the door shut a

16 little bit.

17   Looking at 47226, which is Federal Register page,

18 Exhibit 1, and the third column, what was submitted was this

19 idea of 3 percent as the maximum increase, correct?

20   A. Correct.

21   Q. Okay. And if the testimony in evidence as it now

22 appears to be, supports a number of that is the less than 3

23 percent, we are certainly going to be supporting that, correct?

24   A. Correct.

25   Q. Okay. And looking above that and answering the

1   question that I think Mr. Schaefer really honed in on, and

2   we're appreciative of, the idea is you still have to take a

3   pro-ration, you are already at the very beginning calculating a

4   percentage of ultra-pasteurized or aseptically processed milk

5   as a percentage of all the fluid products, correct?

6   A. Correct.

7   Q. So it is not going to be on a hundred percent of the

8   milk, correct?

9   A. It would be a pro-ration. And that was the point when

10   Henry and I were having that dialogue, that mathematic wasn't

11   clicking in my head right away.

12   Q. That's all I have.

13   JUDGE CLIFTON: Does anyone else have any additional

14   questions for Mr. Zolin? Yes, Mr. Vandenheuvel?

15   CROSS-EXAMINATION

16   BY MR. VANDENHEUVEL:

17   Q. Good morning, Mr. Zolin.

18   Rob Vandenheuvel with Milk Producers Council.

19   A. Good morning.

20   Q. Forgive my ignorance, I'm learning about the shrinkage

21   overage issues here as we go, not an issue I have dealt with

22   very much. But I did have a question for some clarity. Does

23   ESL milk sell at a, typically at a premium price to traditional

24   HTST milk sold on the shelves?

25   A. I do not know what the selling prices are for ESL milk

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1   or conventional milk in the marketplace, so I can't answer that

2   question.

3   Q. So a manufacturer, though, would gain, not knowing what

4   the price premium could or could not be, another benefit they

5   could have would be a longer shelf life, therefore, opening up

6   some additional markets for their products?

7   A. Certainly ESL facilities, the whole concept of ESL is

8   to extend the shelf life. So yes, they do have that, and it

9   also gives them the ability to transport maybe, milk further

10 and other things unconventional.

11   Q. So it makes it generally a more marketable product

12 because of the longer time?

13   A. I would agree with that.

14   Q. Okay. And so what this is, as I'm listening here and

15 reading through the testimony, what this is essentially asking

16 for is for producers, through some sort of a pool adjustment,

17 to help co-fund some of the, some of the operational costs of

18 making ESL milk instead of High Temperature Short Time milk,

19 correct?

20   A. Already there's a sharing of that in the HTST because

21 of the percentages that are in there now. What we're asking

22 for is to change the modify for ESL type facilities because

23 they have a higher rate of loss than the conventional type

24 plants.

25   Q. Okay. But the manufacturer could make HTST milk and

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1 there's allowable, or there's an allowance for shrinkage in

2 that. If they choose to make a product that will give the,

3 gain them some market advantages perhaps through price, but

4 definitely through additional opportunities to market that

5 product because of the longer shelf life, what is being

6 proposed here is that producers go above what we're already

7 being asked to share in the cost on HTST milk, and to share

8 additional, to cover the costs of, the additional market costs,

9 of operational costs, I'm sorry, of the ESL milk, so it is an

10 addition to what we have been doing?

11   A. The proposal as written is an adjustment that increases

12 the allowance for ESL plants.

13   Q. Okay. Thank you very much for the clarification.

14   JUDGE CLIFTON: Are there any other questions for

15 Mr. Zolin? There are none. Thank you, Mr. Zolin, you may step

16 down. Mr. English, you may call your next witness.

17   MR. ENGLISH: Chip English. I call Chuck Meek. Your

18 Honor, USDA is asking, I'm pretty confident Exhibit 85 was

19 entered, but thank you, Mr. Richmond, for asking.

20   JUDGE CLIFTON: Yes, it was admitted.

21   MR. ENGLISH: So your Honor, what is being passed out is a

22 document that is a nine-page statement, plus two pages as part

23 of it, that are going to be a little different from our normal

24 exhibits. They are schematics. But I'm going to have the

25 entire document marked as one exhibit, if possible, your Honor.

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1   JUDGE CLIFTON: Yes. And Ms. Elliott, I show this as

 2 Exhibit 86; is that correct?

 3   MS. ELLIOTT: That's correct.

 4   JUDGE CLIFTON: Thank you. We will mark this as

 5 Exhibit 86.

 6   (Thereafter, Exhibit 86 was marked

 7   for identification.)

 8   JUDGE CLIFTON: Please raise your hand if you need copies

 9 of Exhibit 86. Let's make, why don't we make 10.

10   MR. ENGLISH: Okay. All right, your Honor.

11   JUDGE CLIFTON: I will swear you in. Would you raise your

12 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. MEEK: I do.

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

17 name.

18   MR. MEEK: My name is Chuck Meek, C-H-U-C-K, M-E-E-K.

19   JUDGE CLIFTON: We're ready to go. Any additional copies

20 can be placed on the table for those who have not yet arrived

21 and will want one.

22   All right. Mr. English, you may proceed.

23   DIRECT EXAMINATION

24 BY MR. ENGLISH:

25   Q. And, your Honor, what I'm going to do is ask Mr. Meek

                        3916

1 to read the first paragraph and then because Mr. Meek is a

2 little shy and hasn't told us about himself, I'm going to

3 interrupt him, and as we have with other witnesses, ask him

4 about himself and some of the questions about issues I think

5 are a little less familiar than this record. Okay.

6   And I note Mr. Meek was clever enough, since he didn't

7 know what time he testified, to leave a blank for a good

8 whatever. So go ahead and fill in the blank, Mr. Meek.

9   A. Good morning. My name is Chuck Meek. I have been

10 asked to provide some technical detail about the two processing

11 systems mentioned by Mr. Herbein in his discussion of product

12 losses in ESL high temperature systems and HTST pasteurization

13 systems. I have an Engineering Degree from Penn State

14 University and I retired in 2014, after spending 36 years in

15 the food process equipment industry. During those 36 years, I

16 worked for two companies, Cherry-Burrell (now called SPX) and

17 Tetra Pak, doing design and application engineering of

18 processing systems for fluid food products. These included

19 some design of HTST pasteurization systems, but mostly

20 concentrated in the design of high temperature ESL and aseptic

21 processing systems. Over the last 17 years, I have taught

22 numerous programs for FDA Advanced Milk Processing courses on

23 the regulatory aspects of ESL processing systems, and I have

24 been on the NCIMS Aseptic Program Committee for eight years.

25   Q. So -- thank you. After your, so you studied

1 engineering and got an Engineering Degree at Penn State,

2 correct?

3   A. Yes, sir.

4   Q. And since that time, your work, both now and after

5 Tetra Pak and Cherry-Burrell, who is specifically looking at

6 the engineering of these kinds of facilities that you are going

7 to discuss today, correct?

8   A. During those 36 years with those two companies, that's

9 correct.

10   Q. Okay. So you referenced having taught numerous

11 programs for FDA Advanced Milk Pricing Courses. What exactly

12 do you mean by that? What are those courses?

13   A. FDA puts on courses around the country to update state

14 regulatory personnel in advances and changes in regulations for

15 milk processing. Part of those courses are usually week-long

16 courses. I have presented, I believe it is 17 times now,

17 approximately a three-hour presentation on how the regulatory

18 aspects are handled on an ultra-pasteurization system.

19   Q. So when you say the regulatory aspects, would that be

20 how, would that be state regulations implementing what's known

21 as the Pasteurized Milk Ordinance?

22   A. That's correct.

23   Q. So sum up briefly what is the Pasteurized Milk

24 Ordinance?

25   A. The Pasteurized Milk Ordinance is the document that's

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the creation of an affiliated program between FDA and the dairy

industry to regulate the Grade A, production of Grade A dairy

products in the United States. It's a cooperative program so

that FDA and the processors and producers gather on a regular

basis to review this document, and it becomes the guideline for

all regulation of dairy product, Grade A dairy products in the

United States. It's a cohesive document that links the

regulatory aspects in each state across the country so they can

observe reciprocity in regulation from one state to another.

Q. So we, in this room, much more typically deal with

regulation of dairy products on an economic sense. You're

speaking about the world of food safety, correct?

A. This is a public health document, that's correct.

Q. And so the state regulatory agencies you deal with are

those who are implementing the Pasteurized Milk Ordinance for

the purpose of public health?

A. That's correct.

Q. And you have referenced the NCIMS Aseptic Program

Committee. So first, the NCIMS is what, sir?

A. The NCIMS is the National Conference of Interstate Milk

Shippers. This is the overall organization who coordinates the

regulation of dairy products from state to state within the

United States. They are the, again, coordinating body that

registers milk plants as being in compliance with the

Pasteurized Milk Ordinance, again, to allow reciprocity

3919

1 between, in milk shipments between the states.

2   Q. And would it be fair to say that that meets every other

3 year to look at updates Pasteurized Milk Ordinance?

4   A. Yes, there is a meeting every two years to review the

5 Pasteurized Milk Ordinance. It is, there are proposals made at

6 this conference, they are reviewed, discussed heavily, and any

7 changes that are approved by the representatives of all 50

8 states become a new part of this ordinance.

9   Q. And what is the Aseptic Program Committee?

10   A. The Aseptic Program Committee was formed to coordinate

11 the differing responsibilities and regulations between FDA

12 regulations of aseptic processes, the CFR regulations versus

13 the regulations that had appeared in the Pasteurized Milk

14 Ordinance. There were two different regulations, PMO, and the

15 CFR regulations, that both regulated aseptic milk products.

16 They didn't always agree on exactly how to do this regulation,

17 so there was conflicting inspection, or if it was done in the

18 plants, duplicate inspections. So the Aseptic Program

19 Committee was formed to try and coordinate between these, and

20 we arrived at a solution in which we simplified the process to

21 the joint agreement of both NCIMS and FDA. This committee now

22 oversees the ongoing efforts of that arrangement between NCIMS

23 and FDA.

24   Q. So when you say you have been on that committee for

25 eight years, can I just walk up and volunteer and be on the

1 committee?

2   A. You can walk up and volunteer to be on it. There is a

3 somewhat maximum limit of workable number of people, but it is

4 also limited in the scope that it must be an equal

5 representation between state regulatory personnel and dairy

6 industry people. So whether there would be an opening on one

7 side or the other to maintain equality would be an issue.

8   Q. And then if there's too many volunteers, somebody's got

9 to select, right? There's actually a selection process,

10 correct?

11   A. Yes.

12   Q. And so you have been selected by your peers and by the

13 state agencies as part of that conference to sit on the

14 committee, correct?

15   A. Yes.

16   Q. Your Honor, I would move that Mr. Meek --

17   A. May I?

18   Q. Absolutely, please. If I have left something out?

19   A. I left something out. I also sit on the NCIMS

20 Technical Review Committee, which is a committee that reviews

21 any of the proposals that are submitted to this biannual

22 conference that have to do with technical aspects of the PMO.

23 So this committee is the first line that reviews proposals,

24 then recommends either forwarding them on, or rejection of them

25 to the main body of the NCIMS.

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 1    Q.  And again, that's a selective, and that committee isn't
 2  just, you have to be selected by the body to --
 3    A.  Yes, that's based on a recommendation from the
 4  committee and the Chair of the committee, yes.
 5    Q.  Your Honor, I move that Mr. Meek be recognized as an
 6  expert in engineering with respect to design and application of
 7  processing systems for fluid food products.
 8      JUDGE CLIFTON:  Okay, tell me again?
 9      MR. ENGLISH:  As an expert engineer in design and
10  application engineering of processing systems for fluid food
11  products.
12      JUDGE CLIFTON:  One more time.
13      MR. ENGLISH:  As an expert engineer in design and
14  application engineering of processing systems for fluid food
15  products.
16      JUDGE CLIFTON:  For fluid food products.  And that's, you
17  don't want to limit it to milk because, why?
18      MR. ENGLISH:  Well, actually I'm reading from the middle of
19  his statement in that paragraph on Exhibit 86, so I didn't want
20  to limit it to milk.
21          He, himself, said he did design and application
22  engineering of processing systems for fluid food products.  I
23  would imagine that is partly because there is more than just
24  milk run through dairy plants.
25      MR. MEEK:  That's correct.
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1   JUDGE CLIFTON: And you don't want to use dairy products,

2   you want to use food products.

3   MR. ENGLISH: I want to use food products.

4   JUDGE CLIFTON: Okay. All right.

5   MR. ENGLISH: I guess I could add with particular --

6   JUDGE CLIFTON: No, don't add, please.

7   MR. ENGLISH: You kept asking, I just thought I better do

8   something more.

9   JUDGE CLIFTON: Is there anyone that would like to question

10   the witness before determining whether you have any objection

11   to this designation as an expert? No one. Is there any

12   objection to Mr. Meek being accepted as an expert as

13   Mr. English has asked? No one.

14   Mr. Meek, I accept you as an expert engineer in design

15   and application engineering of processing systems for fluid

16   food products.

17   MR. MEEK: Thank you.

18   JUDGE CLIFTON: You're welcome.

19   BY MR. ENGLISH:

20   Q. So I'm going to ask Mr. Meek to proceed with his

21   statement, and I'm not going to interrupt during the statement

22   to discuss Exhibits A and B. He mentions them, but I will go

23   over them in greater detail after he's read his statement. So

24   if you proceed now, Mr. Meek, with the remainder of your eight

25   and a half page statement on Exhibit 86, and then we'll discuss

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1 further, the schematics on Exhibit A and B.

    2   A. Thank you.

    3   The information I would like to present to this hearing

    4 is related to the two different types of processing systems

    5 utilized for HTST and ESL dairy products and how those

    6 differences relate to the variations in product and fat loss as

    7 described by Mr. Herbein. We will see that these variations

    8 are related to several different aspects of these process

    9 systems and we will try to answer some questions about how

   10 these differences in the process systems contribute to the

   11 product loss variations.

   12   JUDGE CLIFTON: Now, does it make a difference, your

   13 statement says "processing systems" --

   14   MR. MEEK: I apologize.

   15   JUDGE CLIFTON: -- and you said process would that --

   16   MR. MEEK: Processing is correct.

   17   JUDGE CLIFTON: Processing is correct?

   18   MR. MEEK: -- how these differences in the processing

   19 systems contribute to the product loss variations.

   20   - What is the major source of product loss in HTST and

   21   ESL systems?

   22   - How do differences in system design contribute to

   23   additional product losses in the ESL systems?

   24   - How do the products being processed in these systems

   25   contribute to additional product losses in ESL systems?

1   - And how do factors of practicality and public health

2   contribute to additional product losses in ESL systems?

3   Both HTST pasteurizers and ESL processing systems

4 experience product loss in similar fashions. There are several

5 different areas of the processing plant where product losses

6 could occur, such as receiving stations, blending operations,

7 and packaging. However, these losses would be similar for both

8 HTST and ESL dairy product production. What I want to focus on

9 are the differences in product loss in the thermal processing

10 systems themselves.

11   Product could be lost because of spillage or leakage

12 from a processing system, but the primary source of product

13 loss is when there is a changeover from water to product, or

14 product to water. Whenever these dissimilar fluids (product

15 and water) are used to push one another through the process

16 system, there is invariably mixing that occurs at the boundary

17 between them. This area of mixing is often called the

18 "interface" or "interface layer". These changeovers occur

19 during initial start-up of the system when product is first

20 brought into the system after it has been sanitized, any time

21 there is a radical change of products being produced through

22 the system, whenever the system must be cleaned, and when the

23 system is finally shut down.

24   Whenever a changeover is taking place, the processor

25 must assure that none of the intermixed fluids in the interface

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reaches the final point of use, be it a pasteurized storage

tank or filling machine, and that only good product that meets

the appropriate quality standards passes on to that final point

of use. This means that when pushing water from the system

with product, the processor must wait until the interface layer

has passed the point of use and he is certain that only good

product is in the line at that point. To achieve that

certainty, the processor must necessarily allow some volume of

good product to pass the point of use before allowing the flow

forward to the tank or filler. All of the product mixed in the

interface layer, as well as whatever good product passes the

point of use before forward flow is initiated becomes lost

product. In the case of the changeover where water is pushing

product from the system, for example, prior to a CIP cleaning,

the process, excuse me, the access of the product flow to the

point of use must be terminated before the interface layer has

reached that point. Again, any good product ahead of the

interface when the point of use is closed off, as well as any

product mixed in the interface layer, is lost product. The

volume of product lost to the interface layer will depend on

the design of the processing system and the nature of the

product. The amount of good product lost before or after the

interface during the changeover, may very considerably

depending on the technology used in determining when the "good"

product has reached or passed the point of use. Certain

1 electronic sensors cane make this determination fairly

2 accurately, while manual timing will be much less accurate.

3   Therefore, our first consideration in the comparison of

4 losses between an HTST pasteurization system and an ESL

5 processing system is the relative amount of product that is

6 lost during each of these changeovers in each type of system.

7 The type of equipment in the process system and the total

8 length of piping, as well as the nature of the product, will

9 all have an effect on the amount of mixing that takes place

10 during each changeover through the system. Exhibit A is a

11 schematic depiction of a typical HTST processing system for

12 fluid milk. What I would like to point out on this drawing and

13 the following one, is the type of equipment that is involved

14 with the milk flow (the lines shown in red). The major pieces

15 of equipment involved in this HTST system that might contribute

16 to mixing the product in water are a product balance tank,

17 plate heat exchanger, centrifugal separator, homogenizer, and

18 two centrifugal pumps. Because of the small number of

19 components, they can generally be placed in a fairly compact

20 arrangement, minimizing the interconnecting piping.

21   Exhibit B shows a typical processing system for ESL

22 products. This figure illustrates a direct steam injection

23 type of system. ESL dairy products can be, and are, produced

24 on other types of systems which are less complex, but the dairy

25 product from a direct type of system are considered to have the

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1 product quality necessary to compete with HTST pasteurized milk

2 for color and flavor. Notice that in this system, the major

3 components are somewhat similar to what was shown in the HTST

4 pasteurization system, with the replacement of the centrifugal

5 separator from the HTST system with a steam injector and vacuum

6 flash cooling chamber in the ESL system. This substitution is

7 an important factor in the relative amount of product loss

8 experienced in these two types of systems. The centrifugal

9 separator by itself does not, in itself, create significant --

10   JUDGE CLIFTON: Start again with the "centrifugal

11 separator."

12   MR. MEEK: The centrifugal separator, by its nature, does

13 not, in itself, create significant mixing of product and water.

14 However, the vacuum vessel creates a pool of product or water,

15 depending on the original fluid in the line before the

16 changeover. Significant mixing will take place before all the

17 liquid in this pool is displaced by the following fluid coming

18 through the line. In addition, you can see that there are

19 significantly more valves, pipelines, pumps, and heat

20 exchangers required for the complete functioning of the high

21 temperature ESL system. This means that the ESL processing

22 system cannot be assembled in nearly as compact a fashion as

23 the typical HTST pasteurizer, resulting in significantly longer

24 interconnecting piping between the components. This additional

25 piping length adds even more opportunity for mixing of the two

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1 fluids in the ESL system.

2   Besides the differences in the components and layout of

3 the HTST and ESL systems contributing to additional mixing of

4 product and water, the actual products being processed will

5 affect the amount of product loss that occurs. ESL processing

6 systems are often required to handle a far wider range of

7 products than the typical HTST pasteurizer. ESL systems are

8 often used to process specialty products containing higher

9 solids and higher fat contents. Determining where the cut off

10 point is around the interface layer, is more difficult with

11 these specialty products, so the processors must allow for a

12 wider margin of safety when determining the arrival or passage

13 of the interface layer at the point of use during a changeover

14 to assure that the product going forward for sale meets the

15 proper specifications. While most dairy processors install

16 recovery systems to recover as much of the high value product

17 as possible, these issues of determining the transition point

18 between interface and good product, and when to open or close

19 access to the final point of use, mean that there is always

20 some good product that is lost.

21   Now that we have established the individual change

22 overs in ESL processing systems generally produce a higher rate

23 of product loss than changeovers in an HTST pasteurizer, we

24 also need to consider the relative frequency of these

25 changeovers between the two types of systems. To do this, we

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need to consider what situations would lead to changeovers

occurring in the two different types of systems. In both

systems there will be changeovers on the initial start-up of

production and shut-down of the systems. The differences in

frequency, however, arise from the operational reasons that

each type of system might be required to perform changeovers

during a production day.

The public health controls of both types of systems

look at temperature, flow, and pressure parameters to determine

that they are operating within the guidelines of public safety

as set forth by the Pasteurized Milk Ordinance, the PMO.

Failure to maintain the set standards of public safety require

corrective actions be taken to return the systems to a

condition in which they are again producing safe products. A

significant corrective action taken by both these systems is

the shifting of the flow diversion valve (FDV) to a divert

position to prevent compromised product from going forward to

the point of use. Whenever a system fault occurs that caused

the FDV to divert, the PMO requires that all product contact

surfaces between the holding tube and the FDV be brought up to

pasteurization temperature for pasteurization time to

"re-sanitize" the pasteurized portion of the system. The

automation action to achieve this "re-sanitizing" condition is

called "sequence logic".

In the case of an HTST pasteurizer, a pressure fault

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1   simply requires stopping a booster pump. Only a temperature

2   fault or a flow rate fault will cause the FDV to divert. When

3   this happens in the HTST system, the system will go into a

4   recycle mode with product circulating back from the FDV to the

5   product balance tank. Since the processing temperature in the

6   heater section of an HTST pasteurizer is only in the range of

7   170 degrees Farenheit, recirculation of the product for some

8   period of time would not be detrimental to the product quality.

9   In most cases, however, the temperature flow problem will

10   correct itself quickly and the system will try to perform the

11   sequence logic steps to reinitiate forward flow of the FDV. If

12   the HTST system experienced the low temperature fault at the

13   holding tube, the location of the FDV on an HTST pasteurizer

14   immediately following the holding tube (refer to Exhibit A),

15   means that the short amount of piping between the holding tube

16   and the FDV is returned to pasteurization temperature almost

17   immediately and the HTST system goes right back into forward

18   flow production. If there is a flow fault, there is a time

19   delay of only 15 or 20 seconds once legal flow has been

20   reestablished. In either case, there is no need for any

21   changeover between product and water.

22   In an ESL system, on the other hand, the PMO imposes

23   considerably more instrumentation requirements on the control

24   system. While only the holding tube temperature or flow meter

25   faults were cause for a diversion action in an HTST

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1 pasteurizer, there are five or possibly six different

2 parameters on an ESL processing system whose fault will trigger

3 a flow diversion. While all manufacturers do their best to

4 design their ESL systems to minimize these faults, the wide

5 range of products being processed, and the increased complexity

6 of ESL processing systems, does lead to more frequent processed

7 faults than might be seen on HTST pasteurizers. Once an FDV

8 fault occurs, the ESL system, like the HTST pasteurizer, could

9 go into recycle until the problem is resolved and then

10 re-sanitize through sequence logic. However, this

11 recirculation is simply not practical. As shown in Exhibit B,

12 the FDV in an ESL system is located at the end of the system

13 after the final cooler. This is done for safety purposes so

14 that if there is a diversion event, product is not being

15 diverted to the open product balance tank at 284 degrees. With

16 the FDV located at the end of the system --

17   JUDGE CLIFTON: If I might interrupt. After 284 degrees

18 you also have something else?

19   MR. MEEK: 284 degrees Farenheit.

20   JUDGE CLIFTON: Thank you.

21   MR. MEEK: With the FDV located at the end of the system,

22 that means that all the additional piping and equipment between

23 the holding tube and the FDV must be returned to pasteurization

24 temperature before resuming forward flow. This includes the

25 final portions of the system that were at refrigerated

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1   temperatures. Re-heating all this equipment and piping takes a

2   considerable length of time and would require many

3   re-circulations of the product in the system. Since the

4   product in the ESL system is being heated to approximately 284

5   degrees Farenheit, repeated heating to this temperature would

6   cause totally unacceptable changes to the color and flavor of

7   the product.

8   The point of an ESL processing system is, as the name

9   implies, to produce a product with Extended Shelf Life. The

10 processing goal that has been the target of the U.S. dairy

11 processors is to thermally process the product to a condition

12 approaching commercial sterility. This level of

13 microbiological purity is what is required to achieve the shelf

14 life needed to make the distribution of ESL products

15 successful. To approach this condition of commercial

16 sterility, extreme care must be taken to assure the cleanliness

17 of the system and piping with in the ESL system.

18   JUDGE CLIFTON: Do you want to read that line again? To

19 assure what?

20   MR. MEEK: To approach this condition of commercial

21 sterility, extreme care must be taken to assure the cleanliness

22 of the equipment and piping within the ESL system. Therefore,

23 it has been the practice of ESL processors to consider any FDV

24 fault a breach of the "sterility" of their system, requiring

25 the system to be cleaned and re-sterilized before production

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1 can be resumed. Therefore, any time there is a flow diversion

2 event, the ESL system must perform a product-to-water

3 changeover to prepare the system for CIP and re-sterilization.

4 Obviously, the frequency of these system faults is related to

5 many factors, such as products, system maintenance, operator

6 training, and system design. But the essential fact is that

7 there is much more opportunity for such faults to occur in an

8 ESL system compared to an HTST pasteurizer, and the severity of

9 each fault in terms of potential product loss is significantly

10 greater in the ESL processing system.

11   Another factor in the frequency of product-water

12 changeovers, is, as was mentioned, the fact that ESL processing

13 systems are asked to process a wider range of high solids and

14 high fat products, more frequently than are HTST pasteurizers.

15 These specialty products have the natural tendency to create

16 fouling in piping and heat exchangers of the process system

17 more readily than standard fluid milk products. This increased

18 fouling means that the ESL processing system must stop product

19 production more frequently than an HTST pasteurizer in order to

20 perform a CIP cleaning. Also, these specialty products are

21 often run in smaller batches than basic fluid milk products.

22 When there is an incompatibility between successive products, a

23 water flush (or even a cleaning in the case of allergens) must

24 be performed to prepare the system for the next product. Every

25 time the production is interrupted for cleaning or a product

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1 change, there are additional product to water and water to

2 product changeovers generating additional product losses.

3   So, we have said that the majority of product losses

4 occur during changeovers between water and product, that these

5 changeovers occur due to a variety of factors in each type of

6 processing system, and that the relative amount of product lost

7 in a changeover in an ESL processing system, is larger than

8 that lost in an HTST pasteurizer. We have also indicated that

9 the frequency of these product and water changeovers is higher

10 in the ESL systems than HTST pasteurizers due to several

11 factors, including increased regulatory requirements for public

12 safety monitoring, operational differences due to the location

13 of the FDV to meet safety standards, more frequent CIP cleaning

14 required due to processing and specialty products, and the need

15 for more separations between incompatible specialty products.

16 It seems clear that even a normally operated, well maintained

17 ESL processing system is going to experience a higher volume of

18 product loss than an HTST pasteurizer.

19 BY MR. ENGLISH:

20   Q. Thank you, Mr. Meek. There's a couple of places in

21 your statement that you use some terms that a number of people

22 here may understand, but, there's a record being a created, so

23 I want to -- because -- you used CIP. What is CIP?

24   A. CIP is clean in place.

25   Q. And is that part of the Pasteurized Milk Ordinance?

1   A. It is a typical process where cleaning detergent is

 2 circulated through a processing system without dismantling the

 3 piping or the process equipment.

 4   Q. Because it's now in the equipment, would be a whole lot

 5 more time spent in terms of the --

 6   A. A lot more work and effort involved so the circulation

 7 is done of the solutions through the system while it is in

 8 place.

 9   JUDGE CLIFTON: Mr. Meek, when Mr. English is asking you a

10 question, even though you know where he's going, wait until his

11 voice dies down before you begin to answer.

12   MR. MEEK: Yes, your Honor.

13 BY MR. ENGLISH:

14   Q. So, Mr. Meek, you also, and I think it may be somewhat

15 explanatory in the context, but still, you used the phrase

16 fouling in piping. What is fouling in piping?

17   A. Fouling is the deposition of minerals and proteins,

18 generally, that precipitate out of products due to, generally

19 to temperature. It is similar to the deposits you would get in

20 a pan where you burn, burn soup on the bottom of a pan. The

21 same type of thing can occur in a pipeline or in heat

22 exchangers in a process system due to the heat that's being

23 experienced.

24   Q. Now, a couple of occasions you talked about, for

25 instance on page 2, in the middle of the last paragraph, you

refer to a processor must wait until interface layer has passed

the point. When you used the word "must" in these contexts, is

that because of the requirements of the PMO?

     A. Yes, it is, in that the PMO stipulates that product

shall not be adulterated with water. And so if they do not

wait until this interface layer is passed and mixture of

product and water passes to the point of use, there could be a

mixture, an adulterated product, going forward to the point of

sale where product is adulterated with water.

     Q. And I should have said before you started, your Honor,

that as with the previous witness, we had him put his reference

notes at the end, and not have to read them in the record. And

since they are on Schematic B, or Exhibit B schematic, we're

certainly not expecting the court reporter to be writing those

into the transcript. But I wanted to note those end notes for

the record.

          And if you turn to that page 11 for a moment, Mr. Meek,

the last, the first three end notes refer to directly to the

Pasteurized Milk Ordinance for the 2013 revision, correct?

     A. Yes, sir.

     Q. And then the fourth end note, you define high flow

generator differential pressure. What exactly are you saying

in that end note?

     A. The reference was back in my testimony text to a number

of different possible conditions that could cause fluid

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1 diversion actions within an ESL system, and this is simply a

2 listing of those possible conditions that could cause those

3 different actions.

4   Q. And I know you may not have been here late yesterday,

5 but I think you may have heard some questions earlier today,

6 and so I want to see what you can do with them.

7   Mr. Richmond and the USDA have indicated an interest in

8 learning a little bit about, perhaps the difference between,

9 you have compared HTST and ESL, and I'm not sure whether your

10 testimony for ESL included aseptic or whether you have

11 additional commentary as to aseptic. So what, because of your

12 engineering experience, could you help provide the record with

13 respect to the issue of ESL and aseptic processing systems and

14 how there might be differences, if any, in the loss of product

15 there.

16   A. Okay. An aseptic system is going to look virtually the

17 same as what is shown in Exhibit B here. So the, my discussion

18 about the system that, the equipment that's involved, the

19 piping would be the same. The regulations between an ESL

20 system, ultra-pasteurized system, under the PMO, and an aseptic

21 system regulated by 21 CFR 113, they fall under different

22 regulations, but the effect of those regulations is virtually

23 the same. So I would see that there was, would be very little,

24 if any, difference in what I have said between an ESL system

25 and an aseptic system.

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1   Q. So now, I do want to get to the Exhibit A and Exhibit

2   B, but I guess one question that one might anticipate is,

3   looking at the bottom of page 7 and the top of page 8, you have

4   the statement that the practice of ESL processors is to

5   consider any FDV fault a breach of the sterility of the system,

6   requiring the system to be cleaned. Is that practice in some

7   way too conservative, and if there's going to be a financial

8   impact or sharing between producers and processors, what

9   commentary would you have with respect to whether the

10 processors effectively could do better?

11 A. Well, in the case, in the case of an ultra-pasteurized

12 system, a temperature fault is required at 280 degrees. There

13 must be some separation occurring at 280 degrees Farenheit,

14 that is the definition of ultra-pasteurized milk.

15   In general in these systems, if, a temperature fault is

16 not temporary, it's long-term. And so, yes, they could

17 theoretically go into some kind of recycle mode, but again,

18 because of the temperature that's involved, recycling products

19 is not really practical in these systems because of the rapid

20 damage to the product that would occur. So anytime there's a

21 temperature fault that it falls below that 280 degrees, from

22 practical product quality issues, they are pretty much forced

23 to go to a separation.

24   Now, could they bring it back? Yes, they could. But

25 they have already done the separation, so then they would have

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1 to re-separate coming back. So whether they go into a cleaning

2 and re-sterilizing or not, they have already done the

3 separation and would have to re-separate back, so that's

4 already there.

5   Q. So there's some real impracticalities there, is that

6 what you are saying? There are some real impracticalities if

7 you try to do that?

8   A. Yes.

9   Q. So let me now turn to the schematics, which are

10 Exhibit A and Exhibit B. And maybe if you just help me a

11 little bit, I mean, I have been in a number of plants, I have

12 looked at them, but this is certainly a much different way to

13 look at them than I have ever looked at them. So again,

14 thinking of the record, where is sort of the beginning point

15 and the ending point? So we can sort of walk our way through

16 where the milk is going, starting with Exhibit A?

17   A. Okay. On Exhibit A the beginning point is in the lower

18 left corner of the diagram, where the product, the red line is

19 coming into from the lower left into the lower corner of the

20 product balance tank. That is the buffer tank where product

21 enters the system. From there, the product is pumped out

22 through the centrifugal pump, depending on the start-up, or

23 whether you are in production, there are two centrifugal pumps

24 shown, I believe it's M2 and M6, whether you can read those

25 numbers or not.

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1   Pumped through the plate heat exchanger. From the

 2   plate heat exchanger it is pumped over to the centrifugal

 3   separator and the homogenizer. From those devices, it comes

 4   back through the plate heat exchanger again to the final

 5   heater, the last of those rectangular blocks on the right side

 6   of the plate heat exchanger, the final heater that heats it to

 7   the pasteurization temperature.

 8   It leaves the plate heat exchanger in the lower right

 9   corner of that symbol, goes up to the, kind of the up and down

10   squiggly lines -- technical term there, squiggly line -- that's

11   the holding tube where the product is held for essentially 15

12   seconds at the pasteurization temperature, comes out of there

13   to the flow diversion valves where it is determined that

14   whether the product has met all the public safety criteria. If

15   it has, or excuse me, if it has not, it is diverted through the

16   bottom of those valves back down to the product balance tank.

17   If the public health conditions have been met, it proceeds

18   forward to the left from the flow diversion valves down through

19   the two sections of the plate heat exchanger to be cooled down

20   to refrigerated temperature. Then it leaves, it exits the

21   system essentially in the center left of the system, of the

22   drawing.

23   Q.   All right. Thank you. And now turning to Exhibit B.

24   And if you could, walk us through the same process.

25   A.   Okay. Again, the product enters in the lower left into

                              3941

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 1   the product balance tank.  It's pumped by a centrifugal pump up

 2   to the first block there of the plate heat exchanger where it

 3   is preheated, then into the second block there where it is

 4   further preheated up to approximately 175 degrees.  Then up to

 5   the left, and up where it's labeled steam injector, the steam

 6   injector injects steam directly into the product to heat it

 7   from the 175 to 285 degrees.  Then to the right, back to our

 8   technical squiggly line, holding tube where it is held.  In the

 9   case of an ultra-pasteurization system, it is held for two

10   seconds.  Then to the right, into that big vessel, the vacuum

11   vessel, which as it says it is under vacuum.  The hot product

12   enters the vacuum chamber and boils, and the water that is

13   introduced into the product as steam when it was heated is

14   boiled back off as vapor, returning the product to its original

15   solids level.  And it is also cooled back down to approximately

16   180 degrees.  It leaves down through the lower left corner of

17   that vacuum vessel, down through a centrifugal pump.  And it is

18   pumped over to the homogenizer.  From the homogenizer back to

19   the first block of the plate heat exchanger where it is, the

20   regenerator section, where it is cooled over to the double

21   block of the plate heat exchanger which are final coolers where

22   it is cooled to refrigerated temperatures through the flow

23   diversion valve, then up and out the upper right corner,

24   heading toward generally a store -- well, case pasteurized

25   storage tank.
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1   Q. And again, as with Exhibit A, when it gets to the flow

2   diversion valve, that's where, again, the tests are run to make

3   sure it meets all the --

4   A. That's correct.

5   Q. -- product controls?

6   A. Yes.

7   Q. And if it doesn't, I just want to be clear with the

8   Exhibit A, when it didn't meet it it went back over to the

9   product balance tank; is that correct?

10   A. That's correct.

11   Q. So where does it go if it doesn't meet it here on

12   Exhibit B?

13   A. It would again return to the product balance tank. In

14   this case, on this drawing, that line is blue from the first,

15   from the first of those two flow diversion valves. There is an

16   additional heat exchanger section that's shown in here, it has

17   a safety feature. The sanitizing or the first, we refer to it

18   as a sterilization process, but again, we're not really

19   sterilizing the system, that's done at approximately 250

20   degrees. So there is, when that first sanitizing is done,

21   there's water at 250 degrees running through those flow

22   diversion valves.

23   If some thing would happen, an airline comes off or

24   something that would cause that valve to shift, that would

25   cause that very high temperature water to be diverted back

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1 toward the balance tank. There's a cooler section there just

2 as a safety feature, to cool water at that point in time, is

3 what that other heat exchanger section is. So yes, it does

4 divert back to the balance tank.

5   Q. Is there anything that I have missed on Exhibit A and

6 Exhibit B that would be important for understanding? Do you

7 want to -- go ahead, if you would, if Mr. Richmond wants to ask

8 a question now, I'm fine with that.

9   MR. RICHMOND: Bill Richmond, USDA. I appreciate it.

10 Mr. Meek, since we're here, so for a UHT process, would we need

11 get up higher than 285 degrees or hold product for longer than

12 two seconds?

13   MR. MEEK: The holding time would be slightly longer.

14   MR. RICHMOND: Everything else would be the same?

15   JUDGE CLIFTON: You were talking at the same time as each

16 other, would you just repeat your comment in response to his

17 question, please?

18   MR. RICHMOND: So for a UHT product, would we need to get

19 the product higher than 285 degrees or perhaps hold the product

20 for longer than two seconds?

21   MR. MEEK: The holding time for an aseptic system would be

22 slightly longer.

23   MR. RICHMOND: Other than that, everything else would be

24 the same?

25   MR. MEEK: That's correct.

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TRANSCRIPT OF PROCEEDINGS - XX

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1   MR. RICHMOND: I appreciate it. Thank you.

2   MR. ENGLISH: Thank you, Mr. Richmond.

3 BY MR. ENGLISH:

4   Q. I forgot to ask, I think I'm, in essence, done now with

5 Exhibit A and Exhibit B to Exhibit 86.

6   I forgot to ask one question. When you are talking

7 about the higher solids or the higher butterfat, is there

8 something about the ESL system that would lead to a difference

9 in the loss of butterfat versus skim?

10   A. I don't believe so, no.

11   Q. And finally, before I move admission of Exhibit 86 and

12 turn you over for cross-examination, how many Federal Order

13 hearings have you attended?

14   A. This is my first.

15   Q. Okay. And you are not intending to present evidence as

16 to what you should do with your information, you are

17 representing information about how the systems work, correct?

18   A. That is correct.

19   Q. I move admission of Exhibit 86, your Honor.

20   JUDGE CLIFTON: Does anyone wish to question the witness

21 about Exhibit 86 before determining whether you have any

22 objection? No one. Is there any objection to the admission

23 into evidence of Exhibit 86? There are none. Exhibit 86 is

24 admitted into evidence.

25   (Thereafter, Exhibit Number 86 was

                         3945

1   received into evidence.)

2   MR. ENGLISH: And I'm not sure whether court reporter is at

3 a point where she needs -- she is nodding yes, your Honor. So

4 I would propose we take a break for recharge, also a comfort

5 break. Or I guess it was called yesterday, nutrient

6 management.

7   JUDGE CLIFTON: And you don't prefer to break for lunch,

8 you want 15 minutes?

9   MR. ENGLISH: I would prefer 15 minutes and not breaking

10 for lunch.

11   JUDGE CLIFTON: All right. Let us be back and ready to go

12 at 12:20.

13   (Whereupon, a break was taken.)

14   JUDGE CLIFTON: We're back on record at 12:21.

15 Mr. English?

16   MR. ENGLISH: Chip English. I think we have admitted the

17 exhibit and the witness is available for cross-examination.

18   JUDGE CLIFTON: All right. I would have, Ms. Elliott, on

19 the record copy of Exhibit 81, just fill in the word morning on

20 good, good morning -- 86, I meant to say 86. Isn't it funny

21 what, how your mouth is not well-trained?

22   Who would like to ask the first questions of Mr. Meek?

23   CROSS-EXAMINATION

24 BY MR. BESHORE:

25   Q. Marvin Beshore. Good afternoon, Mr. Meek. I'm the

                              3946

1   attorney for the three dairy cooperatives which requested this

    2   hearing, which the proposal requested this hearing. That's

    3   California Dairies, Land O'Lakes, and Dairy Farmers of America,

    4   so we hadn't met before, and I think you might have attended a

    5   little bit of the hearing. Maybe you were here as I introduced

    6   myself this morning.

    7   But as I understand your response to Mr. English, you

    8   are not here to get involved in the discussion with respect to

    9   debate with respect to who should bear the losses involved with

   10   the product here?

   11   A.   That's correct.

   12   Q.   Just to talk about the engineering side?

   13   A.   Correct.

   14   Q.   Okay. So I won't get into the --

   15   A.   Thank you.

   16   Q.   Let me see if -- I have just a couple of questions.

   17   Are there, these products, products that are produced

   18   through the processes which you are familiar with have three

   19   different labels, UHT, aseptic, and ESL, at least those three

   20   labels have been used here. Are there three, is there a

   21   different set of regulations with respect to each of those

   22   labels?

   23   A.   What were the labels you mentioned again?

   24   Q.   UHT, ultra high temperature; aseptically processed; and

   25   ESF or Extended Shelf Life?

                                 3947

1   A.   Okay. You duplicated to two. UHT and aseptic are

2   synonymous.

3   Q.   Okay. And they are subject to the same set of

4   regulations?

5   A.   UHT is the official labeling term for aseptic products.

6   Q.   Okay.

7   A.   The other category, two categories we have been talking

8   about here, we have talked about ESL, which in, again, general

9   official terminology would be ultra-pasteurized.

10   Q.   Okay.

11   A.   Then the other final one is HTST pasteurization.

12   Q.   Which is just, that's just standard homogenized milk?

13   A.   Pasteurized, low temperature, pasteurized milk, yes.

14   Q.   Okay. Now, you have mentioned specialty products a

15   number of times in your discussion here. And is it fair to say

16   that producing specialty products is what the use of this,

17   these processing systems are pretty much all about.

18   A.   Not necessarily. It depends very much on the

19   processor. Some processors are very highly concentrated in,

20   I'll say fluid milk, be it different fat contents or flavors.

21   Others are more interested in specialty products where they

22   might vary protein contents or they might add other ingredients

23   to the dairy product.

24   Q.   Okay. So when you talk about, when you refer to

25   specialty products in your descriptions here, what are you

1 talking about? How do you describe those? How do you

2 differentiate those, I guess?

3   A. I was essentially lumping everything together that

4 wasn't a little more standard fluid milk product being -- I say

5 fluid milk products being milk products of varying fat

6 percentages, skim, two percent, whole milk, or, you know, basic

7 flavored milks.

8   Q. Okay. And on page 8, it may be elsewhere also, but on

9 page 8 you talk about specialty products, in the middle of the

10 page, have a natural tendency to create fouling of piping,

11 etcetera. And you also further down say, specialty products

12 are often run in smaller batches than basic fluid milk

13 products. And that, I take it, requires changeover in the

14 system when they are, when you change from one product to

15 another?

16   A. Generally, yes.

17   Q. Okay. And so smaller batches, changeover to the

18 system, all of those things contribute to losses?

19   A. Yes.

20   Q. Okay. So more, the more products you are running, the

21 more specialized the products are, the more losses you tend to

22 have, all other things being equal?

23   A. In a general statement, yes.

24   Q. And specialty products generally are value-end

25 products. Would you agree?

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1   A. Yes.

2   Q. Now, what, also on page 8 perhaps, somewhere you talk

3 about FDV faults as one of the circumstances involving --

4 probably page 7 -- involving losses -- maybe it is not, I don't

5 know what page I'm on -- anyway, you now what you are talking

6 about, I don't.

7   A. FDV faults.

8   Q. In an ordinary situation, what portion of the losses in

9 a plant would be attributable to those circumstances?

10   A. I really don't have that information.

11   Q. Okay. Have you ever calculated the losses involved in

12 any plant?

13   A. No, sir.

14   Q. Were you involved in your career in sales of these

15 systems?

16   A. Yes.

17   Q. Okay. Did your sales materials and your sales efforts

18 involve representations to the buyers of how efficient the

19 products would be, and the standards would be, and that sort of

20 thing?

21   A. We tried to emphasize that the equipment was capable of

22 higher efficiencies. However, we never tried, we never made

23 any specific statements because of a lot of the factors that I

24 included in my testimony, that would affect any final numbers

25 that we had no control over as manufacturers of the systems

3950

1 themselves.

2   Q.   Okay.   So as manufacturers of the system, however, you

3 had control over what they are capable of?

4   A.   To a large degree, yes.

5   Q.   Okay.   And did you represent, did you tell your

6 perspective buyers what they are capable of, in terms of

7 efficiencies?

8   A.   In general terms, yes.

9   Q.   Did you make any representations, or any, I don't want

10 to put that connotation on it.   Did you make any, did you

11 discuss what the systems were capable of in terms of efficient

12 use of product and limitation of loss?

13   A.   We never made, we never discussed specifics of, in the

14 terms of this hearing, shrinkage through our systems, no.

15   Q.   You didn't, you didn't -- did you use another

16 terminology such as --

17   A.   No, we never discussed specifics on the product loss.

18   Q.   Okay.   So you didn't talk about that at all?

19   A.   Only from the standpoint that we tried to design our

20 systems to minimize that product loss on a changeover.

21 However, we had no control over how many changeovers would be

22 made on that particular system.

23   Q.   Okay.   So if I understand you, from a, the losses are,

24 most -- the losses are, that are involved in making these

25 products are operational, come from operational issues as

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 1   opposed to the equipment itself?

 2      A.  Within the systems we're discussing, yes, that's true.

 3      Q.  Very good.  Thank you.

 4       JUDGE CLIFTON:  Who next has questions for Mr. Meek?  Is

 5   there any other?  Yes?

 6                       CROSS-EXAMINATION

 7   BY MR. RICHMOND:

 8      Q.  Thanks again.  Bill Richmond, USDA.  Thanks again,

 9   Mr. Meek for the testimony.  We appreciate it.

10           Just to follow up a little bit or on Mr. Beshore's line

11   of questions.  On page 8, you, in the second full paragraph,

12   you describe the wide range of high solids and high fat

13   products.  Could you give, perhaps, some examples of what those

14   products might be?

15      A.  There are, I'm thinking -- I'm thinking, for example,

16   maybe of some smoothies that are being run.  When you get high

17   fat, when you get into creams, creamers, those types of

18   products.

19      Q.  That's fine.  I appreciate it.  Thank you.

20       JUDGE CLIFTON:  Are there any other questions before I call

21   for a redirect?  You see how just by saying you weren't

22   actually in the controversial part -- do you see?

23       MR. MEEK:  Thank you.

24       JUDGE CLIFTON:  Mr. English?

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 1                    REDIRECT EXAMINATION

 2   BY MR. ENGLISH:

 3      Q.   Chip English.   I'm not sure if maybe the record got a

 4   little muddy.   In answers to the questions that Mr. Beshore,

 5   looking back at Exhibit A and Exhibit B, once there are either

 6   changeovers or as a result of a temperature fault, a need to do

 7   something different, there is, inherent in the system, because

 8   of the longer piping and everything else you told us about

 9   these systems, there's inherently the need to have more loss;

10   is that correct?   Relative to HTST?

11      A.   For each changeover that occurs, yes, there is somewhat

12   more loss in an ESL system due to the more extensive equipment

13   and more extensive piping, yes.

14      Q.   You tried to make those systems in Exhibit B as short

15   and as efficient as possible, but by their very nature there's

16   going to be some differences as you describe in Exhibits A and

17   B?

18      A.   Correct.

19      Q.   And going to related issue, and is there a difference

20   in the capital investment in an ESL facility versus HTST

21   facility?

22      A.   Typically, ESL facility, as shown in Figure B, the

23   capital investment will probably be four to five times higher

24   than the Figure A.   And operational cost will probably be

25   roughly four times higher.
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1   Q. Thank you. That's all I have.

2   JUDGE CLIFTON: Are there any other questions for Mr. Meek?

3   There are none. You may step down, Mr. Meek, and thank you so

4   much. This is -- I wish you had started, actually, this whole

5   subject area, but that's just me.

6   MR. ENGLISH: I'm not sure what's the people's pleasure.

7   We can take a break, or maybe we can go forward and have at

8   least the direct of Mr. Suever, and in which case, Ms. Vulin is

9   going to take charge.

10   JUDGE CLIFTON: The only nods I saw were yes, let's keep

11   going. So I'm in agreement with that.

12   We're now having distributed a document that is

13   entitled Testimony of Mike Suever. I believe this will be

14   Exhibit 87. 87. Thank you, Ms. Elliott.

15   (Thereafter, Exhibit 87 was marked

16   for identification.)

17   JUDGE CLIFTON: Please raise your hand if you do not have a

18   copy of Exhibit 87 and want one. Good.

19   I'm going to swear you in in a seated position. Would

20   you raise your right hand, please?

21   Do you solemnly swear or affirm under penalty of

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

23   MR. SUEVER: I do, your Honor.

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

25   name.

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1   MR. SUEVER: Michael Suever, M-I-C-H-A-E-L, last name

2   Suever, S-U-E-V -- as in Victor -- E-R.

3   JUDGE CLIFTON: Thank you. Ms. Vulin, you may proceed.

4   DIRECT EXAMINATION

5   BY MS. VULIN:

6   Q. Thank you. Ashley Vulin here.

7   Mr. Suever, before we begin with your statement, or

8   actually, you have in front of you a statement that we have

9   just distributed and I would ask that it be marked Exhibit 87.

10   JUDGE CLIFTON: Yes, it shall be.

11 BY MS. VULIN:

12 Q. And before we have you begin with your statement, could

13 you tell me just a little bit about your personal background

14 and involvement in the dairy industry?

15 A. Yes. I am a graduate of Ohio State University in food

16 technology. Dairy science, at that time, back in the dark

17 ages, you could still get a dual degree in food science and

18 dairy science both, so you got the benefits of the farm side

19 and the processor side, all in one educational cycle.

20   From there, I went to work in the dairy industry after

21 leaving the dairy farms growing up, and worked for processors

22 and dairy cooperatives for the last 30 plus years.

23 Q. And currently you are working for HP Hood?

24 A. For the last 15 years, yes.

25 Q. Can you tell me what your role or roles have been at

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1 HP Hood?

2   A. Yes, when I was first hired at HP Hood 15 years ago, I

3 was responsible for the extended shelf life and cultured

4 product processing plants, and I was VP of Operations, as well

5 as procurement, milk procurement for HP Hood. Since then I

6 have moved on to be in charge of research and development for

7 our facilities, our overall purchasing supply chain for our

8 plants, and I still retain milk procurement responsibility as

9 well.

10   Q. And can you tell me what kind of products HP Hood

11 produces?

12   A. Yes, we produce a wide range dairy products. The only

13 things that we don't really produce today that would be

14 generally connoted as dairy products, are butter, powder, and

15 hard cheese. Beyond that, we produce just about everything

16 else in our twelve dairy operations throughout the country.

17   Q. Thank you. I would ask that now you begin and read

18 your testimony into the record.

19   A. Testimony of Mike Suever, Representing HP Hood, LLC and

20 Supporting the Dairy Institute of California.

21   I'm responsible for milk procurement, R&D, and

22 purchasing. Our company has substantial capital invested in

23 facilities that process and package milk into spoonable

24 products -- I'm sorry, into fluid and spoonable products.

25   Q. What do you mean by spoonable products? Literally

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1 products you eat with a spoon?

2   A. Correct.

3   These operations include an extended shelf life/aseptic

4 plant in Sacramento, California, and three other ESL/aseptic

5 plants located in the Eastern U.S. I have testified at several

6 Federal and state regulatory hearings during the last 30 years.

7   Q. Can I stop you there? I have a question. We have

8 heard a lot of discussion about ESL and aseptic products. Just

9 on a basic level, if I go into a grocery store, what am I going

10 to see on the shelves that is an ESL product?

11   A. Unless you look closely on the labelling, they would be

12 virtually indistinguishable to the average consumer. The only

13 designation that you might see is the word ultra-pasteurized

14 milk, or ultra-pasteurized product as a designation that it was

15 ESL process. It would still be refrigerated, it would have

16 much longer shelf life.

17   Q. Okay. So the only way I could tell in the grocery

18 stores if I was looking at the expiration date on the products?

19   A. Or looking for that designation of the terminology

20 ultra-pasteurized product.

21   Q. Thank you. And I have the same question for aseptic.

22 If I'm in the store, what am I going to see on the shelves

23 that's an aseptic product?

24   A. There is no required designation or labeling, per se,

25 for an aseptic product. But an aseptic product by its nature

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1 does not require refrigeration until opening, so you may often

2 see those dairy products, if you will, on a shelf that is

3 un-refrigerated as opposed to the typical dairy case. So

4 expanded marketing opportunities within the retail outlets.

5   Q. And lastly, you haven't used this term yet, but we have

6 been hearing it throughout the morning, HTST. Can you tell me

7 again what that stands for, and what what in the grocery store

8 am I going to see that is an HTSD product?

9   A. Sure. High temperature, short time processing is a

10 what would be termed a conventional processing approach. The

11 milk has to be pasteurized at at least 161 degrees for 16

12 seconds by law. And as such, would ordinarily have a shelf

13 life somewhere around 18 to 21 days under refrigeration.

14   Q. So those are also traditional dairy products, but they

15 won't have the designation and they will have a shorter

16 expiration date?

17   A. Correct.

18   Q. You may continue.

19   A. Extended shelf life/aseptic processing operations yield

20 dairy products that generally have 60 to 90 days of acceptable

21 code life on them when produced.

22   Q. I'm going to interrupt you again.

23   A. Certainly.

24   Q. Just as you got going. So you said 60 to 90 days.

25 Does that apply to both ESL products and aseptic?

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1   A. The 60 to 90 days refers to extended shelf life product

2   under refrigeration. Aseptically processed and packaged

3   products would often times have up to a year shelf life

4   un-refrigerated until opening.

5   Q. Okay. So they both would last at least 60 to 90 days,

6   but the aseptic products are going to last probably

7   significantly longer than that.

8   A. And would not require refrigeration until opening.

9   Q. Thank you. You may continue.

10   A. This stands in stark contrast to conventional HTST

11 plants that would typically place a code date of between 18 to

12 21 days.

13   Q. Excuse me, you said code date, and you have written

14 here "code life." Do those mean the same thing?

15   A. I'm sorry, code life. They are one in the same.

16   Q. Okay.

17   A. As you can imagine, a great deal of additional effort

18 is required to achieve longer code date, code dates. Once such

19 effort is in the initial quality testing and release protocol

20 that is associated with ESL/aseptic product. Product produced

21 in this manner will often be held in quarantine while microbial

22 and other tests are conducted.

23   Q. And I'll interrupt you really quick. I see there

24 manner might have snuck in as the incorrect manner, not the

25 house manor, M-A-N-O-R, but perhaps M-A-N-N-E-R?

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1   A.   That would, in fact, be correct. And my mother-in-law

 2   who is an English teacher and probably should have failed me in

 3   high school, would be ashamed.

 4   JUDGE CLIFTON: Ms. Elliott, will you please, on

 5   Exhibit 87, about six lines up from the bottom, strike "manor"

 6   and insert "manner".

 7   MS. ELLIOTT: Yes.

 8   JUDGE CLIFTON: Thank you.

 9   BY MS. VULIN:

10   Q.   You may continue, Mr. Suever.

11   A.   The results of these tests can take 2 to 10 days before

12   product can be released for sales and distribution, while HTST

13   plant, while an HTST plant would move product in 24 hours. The

14   presence of a single microbial colony in these products is

15   usually cause for placing the product on permanent hold and

16   then, if possible, reworking.

17   The vast majority of HTST processed dairy products are

18   released for sale and distribution between 24 and 48 hours from

19   packaging.

20   Q.   So can I stop you right there?

21   A.   Sure.

22   Q.   Can you tell me, so what you just stated is that the

23   quarantine time for an ESL product is much longer than a

24   quarantine time for an HTST product; is that correct?

25   A.   They are, yes.

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1   Q. And can you tell me what increased costs or risks an

2 ESL plant might have considering that their product is in

3 quarantine for much longer?

4   A. Sure. For an ESL plant, even though we've applied, at

5 least in our own operations, the latest technology,

6 unfortunately it still takes 2 to 10 days in order to get

7 viable results back that are predictive of what shelf life

8 would be, either through the 60 to 90 days or refrigerated

9 products in the case of extended shelf life, or for a years'

10 shelf life, if it were aseptically un-refrigerated product. So

11 you have got tremendous warehouse, either refrigerated or

12 un-refrigerated warehouses, that need to build while holding

13 these products before you can send them into the distribution

14 system.

15   Secondly, as you can imagine, if, in fact, you

16 encounter, unfortunately, a microbial contamination through

17 that quarantine period, not only do you have the product that

18 you have now identified as not meeting specification to maybe

19 your own standards, but also Federal standards or state

20 standards, but conceivably depending on what the cause of that

21 incident was, you could have product from intervening

22 productions, through that quarantine period that would also

23 potentially be faulty and would need to be, in turn, reworked,

24 if possible.

25   Q. So in an HTST plant if a microbial is discovered, they

1 would have likely 24 to 48 hours worth of product that they

2 would have to examine and possibly get rid of?

3   A. Correct.

4   Q. Whereas in an ESL plant, you could have ten days' worth

5 of product that you would have to possibly destroy or at least

6 treat?

7   A. It certainly can happen.

8   Q. Thank you. Please continue.

9   A. I apologize, I'm not sure where I left off.

10   Q. HTST products often, second line down from the top. I

11 started for you, but I'll have you start, too.

12   A. The vast majority of HTST dairy products are released

13 for sale and distribution between 24 and 48 hours from

14 packaging. HTST products often get released for sale with tens

15 or even hundreds of microorganisms. The stringent quality

16 standard associated with ESL/aseptic processing, leads to much

17 more reworked product and related cling/loss involved.

18   Cling is the dairy product that sticks to the inner

19 surfaces of every stainless steel pipe, pump, and vessel that

20 we use while processing and filling. A coating of dairy

21 products will wet the entire surface area of any batching,

22 processing, and filling equipment. Dairy products that have

23 higher solids and butterfat will cause a thicker layer of cling

24 in the inner surfaces due to the higher viscosity of those

25 products.

1   Q. And I see there, before you begin, you added an "a"

2 after the "and" so will cause an thicker layer of cling? It

3 should be "a thicker".

4   A. Please.

5   JUDGE CLIFTON: All right. Ms. Elliott, you have got that?

6   MS. ELLIOTT: Yes.

7   JUDGE CLIFTON: Thank you. Striking the "ND", from "and"

8 so that the word is "A", on page 2, near the end of the first

9 partial paragraph.

10 BY MS. VULIN:

11   Q. And I understand that you have a small demonstration to

12 show exactly how cling works. Now, I know that the court

13 reporter cannot write down visually what you are doing, so I

14 would ask that you explain the effects of your small

15 demonstration as you are doing it.

16   A. What I have tried to do is simplistically, beyond

17 words, and, in fact, show what cling is when I talk about the

18 coating on the inner surface of all the piping materials and so

19 on. This cling, if you will, would also be associated with any

20 of the rework that you have to engage in if product didn't meet

21 your quality standards through the quarantine period. So

22 imagine thousands, hundreds of thousands of individual

23 containers having this cling which will not come out of the

24 product when you rework the product. You may, in fact, be able

25 to harvest the bulk of the product, but the cling for all of

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1 that surface area would be lost as would be disposed of to

2 proper locations.

3   Q. So cling is all those tiny droplets of milk that are

4 still inside your glass even after you empty it out?

5   A. That's correct.

6   Q. And the same happens for pipes, both with the milk that

7 was originally in the pipe, and any water you need to flush out

8 the pipe.

9   A. You bet. And although it would appear that there's

10 fairly limited amount of cling here as I described in my

11 direct, when you have much thicker viscosities because of

12 higher solids or more cream content, or in some cases both

13 higher solids and more cream content, the cling will be much

14 greater because of that higher viscosity. It wants to reside

15 on the inner surfaces of materials or packaging material much

16 longer, and therefore, would also be associated loss or

17 shrinkage.

18   Q. Thank you. You may continue.

19   A. Another area that is unique when comparing ESL/aseptic

20 processing to HTST is the level of sophisticated controls that,

21 controls required to assure product quality. These time,

22 temperature, and pressure controls are reliant on electrical

23 impulses sent throughout the system. A simple electrical pulse

24 which could be only enough to cause the lights to blink, is

25 sufficient to cause the ESL/aseptic process to shift out of

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1 forward flow and divert to pumping water through the processor.

2 Even with the application of solenoids and battery backups, you

3 cannot stop this from happening, but one can keep already

4 processed products sterile in the surge tank. These slight

5 power interruptions are often caused by lightening or high

6 winds. Our view, and that of the health authorities, is that

7 we have "lost control" of the process and must re-sterilize.

8 The associated water and steam interfaces leads to product loss

9 and shrinkage that does not happen as often in a conventional

10 HTST operation when a more pronounced electrical interruption

11 would be needed to cause the same reaction.

12   Q.   So, in summary, even the smallest interruption in

13 electricity can lead to the ESL or aseptic product having to be

14 reprocessed?

15   A.   That's correct.

16   Q.   But that is not true for conventional HTST plants?

17   A.   That's correct.

18   Q.   Please continue.

19   A.   The added complexity of ESL/aseptic processing

20 equipment, often leads to more control valves and longer pipe

21 runs when compared to conventional HTST operations. The more

22 valves and piping you have, the more cling and loss/shrinkage

23 you encounter. Even though we employ air blows and water to

24 push product through the system at the end of each product

25 type, the sheer complexity of the system leads to more product

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1 loss than a conventional HTST plant.

2   JUDGE CLIFTON: Let me stop you there. I would like us to

3 change the word "though" to "through" this is on page 3, the

4 first full paragraph, third line up, the sentence reads, "push

5 product" and we'll make that next word "through".

6   MS. VULIN: Thank you, your Honor, I didn't catch that one.

7 BY MS. VULIN:

8   Q. You may continue.

9   A. The portfolio of dairy products or dairy containing

10 products in an ESL/aseptic plant are much more extensive than

11 that of the typical conventional, should read HTST facility.

12   JUDGE CLIFTON: Yes. So, Ms. Elliott, do you see where he

13 is?

14   MS. ELLIOTT: Yes.

15   JUDGE CLIFTON: So we'll strike the second "ESL/aseptic"

16 and instead insert what, Mr. Suever?

17   MR. SUEVER: HTST, please.

18   JUDGE CLIFTON: HTST, thank you.

19   MR. SUEVER: Thank you.

20   This then requires more product to water flushes and

21 increases the amount of shrinkage that is experienced.

22   The product that we produce at an ESL/aseptic plant

23 typically have, on average, higher solids and greater butterfat

24 content than would be the majority of product produced in a

25 conventional HTST operation. So when we have a production

1 interruption -- I'm sorry -- so when we have product

2 interruptions due to --

3   JUDGE CLIFTON: One more time.

4 BY MS. VULIN:

5   Q. Production interruption?

6   A. Start again. So when we have product --

7   JUDGE CLIFTON: Go ahead and take it from the top.

8   MR. SUEVER: So when we have production interruptions due

9 to any of the issues that I have previously noted, the impact

10 is greater.

11   HP Hood's ESL/aseptic plants participated in the survey

12 data collected by Carl Herbein. The physical and operational

13 differences described by Engineer Chuck Meek, explained why

14 Accountant Carl Herbein's data shows a difference between a

15 conventional HTST facility and that of an ESL/aseptic plant.

16 We agree that Carl Herbein's data is representative of our

17 operational experiences and request that USDA utilize this data

18 when establishing the "allowable shrinkage factors" for

19 ESL/aseptic facilities.

20 BY MS. VULIN:

21   Q. Thank you. So I just want to ask a little bit about

22 the decision to produce ESL. When did HP Hood begin producing

23 ESL or aseptic products?

24   A. HP Hood began producing ESL/aseptic products in the

25 1980's. Originally limited to cream products, as food service

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1 chains became more integrated and decided to take less

2 deliveries locally and started to deliver to their franchises

3 through a warehouse distribution system, cream products were

4 desirable for longer shelf life in order to meet that new

5 distribution channel, and so that's where we began our ESL

6 processing.

7   Q.   And have you increased your ESL processing system?

8   A.   Well, we have. We have invested significant dollars as

9 our customers, both wholesale and retail have consolidated,

10 through the consolidation process, they don't want to have as

11 many direct store delivered products and they want to have

12 their product as much as possible delivered to warehouses.

13 Because of that additional distribution channel and time

14 necessary to go through that process, they have asked us, as

15 producers, to provide them with longer shelf life. So we have

16 invested heavily in the equipment necessary to be able to give

17 them both refrigerated and aseptic long shelf life products to

18 meet their growing demand for a distribution system that has

19 changed markedly over the last 20 years.

20   Q.   So the push towards more ESL products is really coming

21 from retailers and, arguably, consumers as well for these

22 products that will last longer?

23   A.   That's been the original impetus. We have taken

24 advantage while having invested already in the equipment to

25 produce some additional products, but the original impetus has

1 been driven by our wholesale and retail customers.

2   Q. Thank you. No further questions.

3   JUDGE CLIFTON: Who will be the first to question

4 Mr. Suever? Mr. English, we'll let you go first since you are

5 on that same team.

6   MR. ENGLISH: Chip English.

7   CROSS-EXAMINATION

8 BY MR. ENGLISH:

9   Q. As a follow up to the last question asked by Ms. Vulin.

10 Would it be fair to say that because you have these ESL

11 products, that it's an effort to expand markets in the Class I

12 fluid market?

13   A. Yes. It gives us ability to produce products where,

14 and distribute products where we here fore wouldn't have been

15 able to, either because of geography or the revised

16 distribution system that now exists.

17   Q. And how does that compare to the growth or lack of

18 growth in the conventional market?

19   A. Yes, unfortunately, Class I sales continue to decline

20 across the country, much to our chagrin. Through the ESL

21 processing, we're seeing that area grow, even though it's not

22 compensating fully for the loss of Class I sales in general, we

23 continue to see that area of our business grow, ESL processing,

24 because of the inherent benefits that both the wholesaler,

25 retailer, and consumers see, it has been a growing part of the

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1   dairy industry and our business.

2   So both our wholesale, retail, and the consumers

3   benefit, but so do our dairy farm suppliers by virtue of being

4   able to reach markets that they wouldn't have been able to with

5   the conventionally processed products.

6   Q.   And that's what I was getting at, because I know we're

7   going to have the debate here in a few minutes about sharing

8   these costs. But the fact of the matter is, in the first

9   instance, if this is a growing market where all the rest of the

10   Class I is shrinking, there's a benefit to the entire industry

11   because of this, correct?

12   A.   From farm to consumer, yes.

13   Q.   Thank you. That's all I have, your Honor.

14   And I do note it is 1:00 now, I don't know whether

15   Mr. Beshore wants to go and do his questions, that's fine.

16   JUDGE CLIFTON: Let's first ask Mr. Suever. Will you be

17   here this afternoon?

18   MR. SUEVER: I will, your Honor.

19   JUDGE CLIFTON: All right. So it's up to you, Mr. Beshore,

20   whether you want to begin your cross now or if you want to take

21   lunch now.

22   MR. BESHORE: I'm perfectly willing to go, I don't

23   anticipate being real lengthy.

24   JUDGE CLIFTON: Very good. What Mr. Beshore said, since

25   you might not have heard it, is he's willing to go now. He

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 1   does not anticipate this questioning being lengthy.

 2                   CROSS-EXAMINATION

 3   BY MR. BESHORE:

 4       Q.   Good afternoon, Mr. Suever.

 5       A.   Good afternoon, sir.

 6       Q.   Marvin Beshore.

 7            Let me ask the first question about the, we're focused

 8   on processing efficiencies and that sort of thing.  My question

 9   is about hearing efficiencies.  Why are we taking this up in

10   this hearing, when in order to, for it to be in uniformity

11   throughout the Federal Order, you would have to to have at

12   least two hearings.  Assuming it was adopted in this one, we

13   would have to have another one for all the other Orders, when

14   we could have taken it up in one rifle shot hearing for all

15   orders?

16       A.   Well, because your clients asked for a hearing in

17   California, this gave us an opportunity to bring this issue

18   that we have been festering with for quite a long time, this

19   was a hearing to deal with all issues, because it's a new

20   promulgation of an order.  And it was a perfect opportunity to

21   deal with an issue that has long festered in our industry.

22       Q.   But have you filed a request for a national hearing on

23   this rifle shot issue where it would affect all orders?

24       A.   Not at this time.

25        JUDGE CLIFTON:  What do you -- I'm sorry, I didn't mean to
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1 talk over you. What do you mean by "rifle shot issue",

2 Mr. Beshore?

3   MR. BESHORE: Just a very narrow specific issue.

4   JUDGE CLIFTON: And now you may respond.

5   MR. SUEVER: We have not filed for a national hearing

6 request on this topic.

7 BY MR. BESHORE:

8   Q. So instead, if I can characterize it this way, you

9 chose to hitchhike on our proposal?

10   A. I don't accept your characterization whatsoever. As I

11 explained, your clients asked to promulgate an entire order.

12 As part of that order is this type of language, important, very

13 important part of the overall order. And so we're not

14 piggybacking on anything. We're simply articulating a concern

15 that is dissimilar from the existing orders that have already

16 been promulgated.

17   Q. Okay. Let me go on to the question or two about the

18 substance of the thing here.

19   I think you have, I think you have acknowledged, it's

20 pretty clear that these are, these products, the products in

21 this ESL/aseptic category are value-end products that cost more

22 to produce then they are sold for higher prices, and at all the

23 levels of the chain, correct?

24   A. Think do, as I have explained, for reasons, they do

25 definitely cost more, both from an investment perspective and

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1 all the way through the process. Mr. Meek explained that

2 processing costs are some four times what they would be for an

3 HTST operation.

4   Q. Right. And so you sell them for more, correct?

5   A. We try to recapture some of our costs, yes.

6   Q. Some? Just some?

7   A. Well, your eluding to margin differences and I'm trying

8 to explain cost coverage, which --

9   Q. Okay. So my question is, you know, there are higher

10 cost products, they are higher priced products, they're

11 value-added products. Basically, this proposal would make,

12 would put them in a lower class from the producer perspective,

13 would it not?

14   A. No, what I think it does is it more economically

15 advantages the producers to garner markets that they wouldn't

16 be able to access without this.

17   Q. Well, setting, you know, that's, you know, you can sell

18 more, I understand that, and we hope we certainly hope you can.

19   A. And we have been.

20   Q. And that's wonderful. But from the producer pricing

21 perspective, if the milk, the raw milk going into this product

22 has a greater shrinkage allowance, and therefore, more of it is

23 in the lowest price classes, it is, in effect, you have

24 established a subclass of Class I that has a lower producer

25 price; isn't that correct? I mean, it's just arithmetic.

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1   A.   What we are proposing is that we share in the burden of

2   producing this type of product.   So not only do the producers

3   share in the benefit, they will share in the cost of it, as

4   we're suggesting.

5   Q.   Okay.   Do you require, or does the product, aseptic

6   product, require a different bacterial specification than the

7   PMO for milk to be used for the products?

8   A.   I'm not clear.   I am not sure I follow your question.

9   Q.   Do you need to have lower, or are the raw milk

10 specifications plate count, bacteria, etcetera, are they

11 required to be higher for this, for these products than just

12 any ordinary Grade A product?

13   A.   We set the, for our operations, we set the same

14 standards for conventionally processed plants as we do for our

15 aseptic/ESL operations.   We have the same raw milk

16 specification sheet.

17   Q.   Do you know, do you know whether the, I think you

18 indicated all your plants participated in the Herbein study.

19 Do you know if they are all 7(b) plants, the ones, not

20 California, of course, but the ones that are in the Federal

21 system?

22   A.   They are.

23   Q.   When you -- when you have purchased, have you been

24 involved in the purchasing of these systems for the Hood

25 plants?

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1   A. Yes.

2   Q. Okay. When you purchase, this is the question I asked

3 Mr. Meek, okay? When you buy them from, are there competing

4 manufacturers?

5   A. Yes.

6   Q. And you're looking for the best product, and the

7 competition. Do they, are the representations or, take that

8 baggage word out. Are there performance standards indicated

9 with respect to the products and their loss limiting

10 capabilities?

11   A. When they present their specifications they will do so

12 in terms of product flow rates, product capabilities. You can

13 produce these products but not these products because of

14 viscosity limitations and so on, but they don't provide us with

15 specifications related to shrinkage.

16   Q. Have you ever asked them about that?

17   A. When asked, they defer as, Mr. Meek testified, because

18 they can't, and won't, determine what products you are

19 producing in every plant is different. Everyday is different

20 in our operations.

21   Q. Because the shrinkage and loss are operational

22 basically on this?

23   A. They are not just operational, they are linked, as

24 Mr. Meek described, to the processing equipment themselves. So

25 they are intrinsically built into the process. It's not just

1 operational.

2   Q. But operational is a substantial factor, is it not?

3   A. It has an effect, day-to-day changeovers and so on,

4 certainly has an effect as I have articulated in my direct.

5   Q. Very good. Thank you.

6   JUDGE CLIFTON: Who next has questions for Mr. Suever?

7 Mr. Vetne?

8   CROSS-EXAMINATION

9 BY MR. VETNE:

10   Q. John Vetne, representative for Hilmar Cheese Company.

11   This isn't cheese, but we do have an interest in making

12 sure that all of the provisions are interpreted, a Federal

13 Order interpreted similarly, and people understand what they

14 mean. So my question is this. Mr. Suever, a few years ago,

15 post-Federal Milk Reform, there was a hearing to look at

16 product to be included as Class I fluid milk product definition

17 products.

18   Do you recall that process?

19   A. I do.

20   Q. And I don't have my CFR in front of me, but are you

21 aware generally that Class I is captured in a product

22 classification that's described of fluid milk products disposed

23 of in the form of packaged fluid milk products, which is

24 different from Class II, III and IV, milk used to produce

25 certain products? Are you aware of that distinction?

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1   A. I hadn't paid attention to the distinction, no.

2   Q. Okay. If I tell you that there is such a distinction,

3 and that the history of AMS Dairy Programs pricing for Class I

4 looks at the content of the Class I package, and for a

5 Class II, III, and IV, looks at the incoming milk. It doesn't

6 matter where it goes, if it is used to produce, it is in that

7 classification.

8   So with that in mind, what you are looking for for ESL

9 products is for classification of the content of the package

10 and to have milk that doesn't get into the package through

11 either the same way as HTST plants, correct?

12   A. I agree.

13   Q. Thank you.

14   JUDGE CLIFTON: Mr. Vandenheuvel?

15   CROSS-EXAMINATION

16 BY MR. VANDENHEUVEL:

17   Q. Rob Vandenheuvel, Milk Producers Council.

18   I just had a couple of questions. You quoted Mr. Meek

19 on the cost of operating and investing in these ESL/aseptic

20 facilities. Mr. Meek made his comment at the end of redirect,

21 it kind of caught me off guard, I didn't get a chance to come

22 back and ask it.

23   But since you brought it up again, do you plan to

24 submit any kind of documentation validating the claim that this

25 process costs, on an operational basis, four times more than a

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1 standard HTST facility?

2 A. No, I was simply trying to address the question that

3 was asked about additional costs.

4 Q. Okay. And you claim, your statement was that you did

5 agree with the claim that four times the cost was something in

6 line with what you believe, but you don't have any documents to

7 demonstrate that here today?

8 A. I was simply pointing out that the issue of cost

9 related to operations had already been addressed.

10 Q. Okay. Your testimony on page 2 talks about a couple

11 operational issues that potentially increase cost. One is this

12 cling and another is the issues with electric or electricity

13 variations.

14   Cling, I appreciate you demonstrating there on your

15 cup. On HP Hood's website I notice that you have a link to our

16 farmers, have you been to a dairy farm, one of your supplier

17 farmers before?

18 A. Of course.

19 Q. You know that when a, you've seen a cow being milked?

20 A. I have. I have milked many.

21 Q. You have milked many. You know that the typical

22 standard practice for milking a cow, before you can put a

23 machine on a cow is to prime the udder and actually get the

24 milk flowing to have the milk drop and be available to be

25 milked in the machine?

1   A. You may also strip the udder in order to determine

2 whether there's somatic cells or other things present as well.

3   Q. Well, correct, there are, that is one pre-milking

4 method. But, in essence, you do need to prime it. When you

5 prime a cow, there is loss, there is a volume of milk, I'll be

6 it miniscule, that is disposed of. Do you know if dairy

7 farmers, in their milk checks, are accounted for that loss?

8   A. Based on the accounting system, they would not be.

9   Q. So there are certain operational mechanisms that at a

10 dairy or that any business would operate in, that they have to

11 account for as part of their business, that are not necessarily

12 picked up directly in some sort of a regulated pricing system,

13 since we are regulated on the dairy end, the purchase that

14 doesn't capture every single ounce of milk that's dropped on

15 the ground?

16   A. It doesn't, and we didn't attempt to try and capture

17 every ounce of milk that drops on the ground either. We were

18 simply trying to deal with the current regulation.

19   Q. Well, current regulation does account for some level of

20 shrinkage, correct?

21   A. It does and we're asking that to be modified.

22   Q. Increased, correct?

23   A. Correct.

24   Q. You've mentioned the growth that we have already seen

25 in this market and that you have responded to some additional

3979

1 consumer demand by expanding this ESL or aseptic volume that

2 you run every year?

3   A. Yes.

4   Q. And that growth has occurred under the current

5 regulation of course, so there's been a business decision that

6 there is adequate additional revenue to cover the additional

7 cost and investment, additional operating cost, and of course

8 current related price, that does account for some level

9 shrinkage?

10   A. What we're trying to address here is a fairness in the

11 way that the Federal Order system operates, and that

12 recognizing costs are an appropriate and acceptable approach

13 within the Federal Order, and we're asking that they be

14 modified to recognize the cost associated with this approach.

15 When regulations were promulgated, they were done so at a time

16 where, when ESL/aseptic production was not being used. And so

17 didn't contemplate nor apply these current approaches, so we're

18 asking that they simply be modernized to meet today's

19 activities.

20   Q. And I think you were in the room when I questioned a

21 previous witness, so I'll characterize the same way, but its

22 modification. You do understand that this is essentially

23 asking for producers to share in this additional cost

24 associated with shrinkage?

25   A. Yes, as they share in the benefit of reaching new

markets and new opportunities that they heretofore wouldn't be

able to achieve with conventional processed milk.

Q. Those additional markets that garner a higher revenue,

is your company, or any other company that you are aware of,

associated with this, according to the proposal, also

advocating an upward price adjustment to help share in some of

the additional revenues? Because as we have talked about,

additional revenues above costs are being garnered?

A. Well, I haven't talked about additional

revenues/margins, I have talked about additional costs. I have

not characterized ESL or aseptic production as generating

additional margins.

Q. So it's your testimony that the additional revenue that

HP Hood garners from, or that HP Hood receives from the sale of

these products only covers the additional operational costs

associated with making that product?

A. What I said was that I didn't try to address that

issue.

Q. Didn't try to address it. Would it, so would you find

it reasonable if producers are willing to share in some of the

costs, that producers should share in some of the additional

marginal revenue that's garnered from the sale of these

products?

A. They do already share, because of the products that we

produce, many of which are Class I, that additional increased

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1 value directly impacts their blend price, and enhances it

2 significantly compared to Class II, III, and IV.

3   Q. So just the general Class I, you are talking about, you

4 are not talking about, or you are saying, I get what you are

5 saying, it's clear, but you are not advocating that producers

6 should share anything above the Class I price, due to the fact

7 that we're sharing some of the additional costs specific to

8 these plants?

9   A. I say what I have said.

10   Q. All right. Thank you very much.

11   CROSS-EXAMINATION

12 BY MR. RICHMOND:

13   Q. Bill Richmond, USDA. Thank you, Mr. Suever, for your

14 testimony.

15   I think we're interested in understanding a little more

16 about HP Hood's investments here in California. If you could

17 maybe walk us through the, is the Sacramento plant the only

18 HP Hood plant here?

19   A. It is.

20   Q. It is. Okay. Could you maybe, if you are willing,

21 describe the operations of the plant for us?

22   A. Sure. When we bought the facility from Crystal

23 Creamery and Butter Company, it was a combined ESL (extended

24 shelf life) and HTST operation. Upon purchase, we sold the

25 HTST portion of the plant to Foster Farms and reconditioned the

1 facility to solely produce extended shelf life/aseptic

2 products. It's been experiential within the industry that

3 trying to produce both conventionally pasteurized products and

4 extended shelf life/aseptic products often times leads to

5 inadvertent problems, mostly associated with human error. So

6 to have an operator, if you will, move between conventionally

7 processing and extended shelf life processing, and maybe not

8 fully being locked into what they are doing in a given day, and

9 on that, this morning I was doing this and this afternoon I'm

10 doing that, it has been found to be difficult. And so we have

11 seen over the last 20 years where plants have tried to run

12 both, often times move to solely producing extended shelf life

13 products, because of what I just described.

14   So we did that in advance because we have seen that

15 happen to others. And so once reopening the facility, it has

16 now solely produced extended shelf life and aseptic products

17 for the last seven years.

18   Q. Okay. And in your experience, are the product losses

19 in that facility, do they correspond with what was generally

20 described by Mr. Meek?

21   A. They are included in Carl Herbein's study and

22 consistent with the aggregate weighted average that he

23 presented.

24   Q. Okay. I think that's all we have. I appreciate it.

25   JUDGE CLIFTON: What other questions are there for

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1 Mr. Suever? Mr. Beshore?

2   MR. BESHORE: Just a quick follow up.

3   On the Sacramento facility, is that strictly Class I or

4 Class I and Class II, and if both, what's the mix there, if you

5 are prepared to share that?

6   MR. SUEVER: I won't share utilization information, but I

7 will describe it as majority of it is Class I, with some

8 Class II.

9   MR. BESHORE: Okay.

10   JUDGE CLIFTON: What other questions are there for

11 Mr. Suever? Ms. Vulin, any redirect?

12   MR. VULIN: No, your Honor.

13   JUDGE CLIFTON: All right. Mr. Suever, you are an

14 amazingly articulate witness. I admire very much how you kept

15 very clear, and it's a complex subject, and I appreciate very

16 much what you brought to us.

17   MR. SUEVER: Thank you, your Honor.

18   JUDGE CLIFTON: All right. Let's go to lunch. Please be

19 back and ready to go at 2:45. 2:45.

20   (Whereupon, the lunch recess was taken.)

21   ---oOo---

22

23

24

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1   WEDNESDAY, OCTOBER 21, 2015 - - AFTERNOON SESSION

2   JUDGE CLIFTON: We're back on record at 2:46. Mr. English?

3 Ms. Vulin, please let me know what you have in mind for our

4 afternoon.

5   MS. VULIN: I was going to ask first about Exhibit 87.

6   JUDGE CLIFTON: Yes.

7   MS. VULIN: Ashley Vulin. I would like to move for the

8 admission of Exhibit 87.

9   JUDGE CLIFTON: Thank you. Is there any objection to the

10 admission into evidence of Exhibit 87? There is none.

11 Exhibit 87 is admitted into evidence.

12   (Thereafter, Exhibit Number 87 was

13   received into evidence.)

14   MS. VULIN: Thank you, your Honor.

15   JUDGE CLIFTON: Thank you. And now Mr. English, what do

16 you have in mind for us?

17   MR. ENGLISH: Chip English on behalf of the Dairy Institute

18 of California. I would now ask that Dr. Schiek return to the

19 stand to continue with his statement, Exhibit 79 and discussing

20 exhibit 80. And I think it is fair to say that given the fact

21 that what time it is and we're not yet done with the direct,

22 that I would be somewhat surprised if Dr. Schiek is done by the

23 end of the day, so I think this will be our witness for the

24 rest of the day.

25   So let me sort of set the stage a little bit. We're going

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1 to be on Exhibit 79, and I'm going to actually start on

2 Exhibit 80, because he was in the midst of discussing some text

3 that relates to the materials in Exhibit 80, then return to

4 Exhibit 79. And we took a break at 4:00 yesterday and then we

5 did some other things, and I think it makes sense for him

6 actually to pick up one paragraph because he started a new

7 section, so I would actually like to repeat that paragraph just

8 for flow.

9   JUDGE CLIFTON: Good. Dr. Schiek, you remain sworn. Would

10 you again state and spell your name?

11   DR. SCHIEK: Yes, my name is William, W-I-L-L-I-A-M,

12 Schiek, S-C-H-I-E-K.

13   JUDGE CLIFTON: Thank you. Mr. English, you may proceed.

14   CONTINUED DIRECT EXAMINATION

15 BY MR. ENGLISH:

16   Q. Thank you. So I don't believe yet, Dr. Schiek, that we

17 had discussed either Figure 7 or Table 9, but you have referred

18 to them in your testimony. So could you discuss what Figure 7

19 shows?

20   A. Okay. Figure 7 is a graph that shows or plots

21 California milk production and beverage fluid milk sales from

22 1970 to 2014. Those would be beverage milk, fluid milk sales

23 for California.

24   Q. And so the red section is the beverage fluid milk

25 sales?

3986

1   A. Correct.

2   Q. And then the blue isn't just the blue, it is the blue

3 plus the red to get up to the top of the blue line, correct?

4   A. Exactly. That's correct.

5   Q. All right. And so what you are depicting here is the

6 growth of milk production, and the scale may not show it, but

7 at best, flat maybe looking downward on the class of fluid milk

8 sales, correct?

9   A. Correct.

10   Q. So then you also discussed, I think you'd just gotten

11 into it but rather went back into the text. When you talk

12 about movements of milk, Table 9, you just started referencing

13 that. So why don't you, Table 9 looks a little bit like an

14 exhibit from the Cooperatives, but I think it is different. So

15 why don't you tell us what Table 9 is?

16   A. Yeah, Table 9, again, shows milk moving under

17 transportation allowances, so these are, these are from

18 transportation allowance areas, I'm sorry, that's not

19 necessarily milk moving from transportation, that earns a

20 transportation allowance, but it is milk moving from

21 transportation allowance areas into deficit areas. And this

22 would be branch to plant milk movement. This does not include

23 plant to plant milk movement.

24   And it is a little different from the ranch to plant

25 table that I believe Mr. Hollon introduced, in that it breaks

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1 it down, not so much by the location of the milk supply, or the

       2 name of the milk supply area, but strictly on a mileage basis

       3 and different mileage categories.

       4   Q. So what does it show?

       5   JUDGE CLIFTON: Let me stop you. I'm going to put on my

       6 glasses. Okay. I'm glad he's going to read it to us.

       7 Nevertheless.

       8 BY MR. ENGLISH:

       9   Q. Why don't you tell us what you would like to look at

      10 and run across it and tell us what it shows.

      11   A. Okay. I'm going to focus just on the top portion of

      12 the right hand section. Those are the sections labeled for

      13 April 2015, just to kind of focus in on one set of numbers.

      14 And I'm going to focus for each area, like the Bay Area or the

      15 Sacramento receiving area, I'm just going to focus on the first

      16 grouping, and, but certainly one could look at the other ones,

      17 but let's focus on the first grouping. So if I look at the

      18 Bay Area receiving area, which is the very first receiving area

      19 on the top of Table 9, you will see that the bulk of the milk

      20 moving into that area comes from less than 200 miles away.

      21 There's a certain grouping of over 1,000 loads that is coming

      22 from 78 miles or closer to the receiving area, and then another

      23 grouping between 78 miles through 199 miles. And if you look

      24 at, and I think that's in that second grouping, mileage

      25 grouping, there's 471 loads for that month coming from that,

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1   that mileage grouping.

         2   And if you look, if I think it is the second column in

         3   from the right, you can see the average miles travelled, the

         4   average miles travelled for each of the loads in these

         5   groupings. So in the 0 to 78 mile grouping, the average miles

         6   travelled was 65. And in the 78 to 199 mile grouping, the

         7   average number of miles travelled for those loads was 90.

         8   Okay?

         9   You can do the same thing looking at the Sacramento

        10   receiving area. That one's fairly simple. All the milk

        11   shipments are from 0 through 59 miles, and the average miles

        12   travelled was 29. You could go down to the North Bay receiving

        13   area, which is, just as it says, it is the area north of the

        14   San Francisco Bay Area. And you can see that most of the loads

        15   in this one actually come from over 96 miles. There's 112

        16   loads coming from over 98, 96.

        17   Q. Is that the loads or the average miles for that?

        18   A. The -- oh, I'm sorry. I got that wrong. Yeah, you are

        19   right. So looking at from 0 to 45 miles, in that sort of

        20   mileage bracket, there were 430 loads that moved into the

        21   North Bay area, traveling an average of 19 miles. From 45

        22   through 96 miles, there were 304 loads traveling an average of

        23   70 miles; and for over 96 miles, there were 79 loads traveling

        24   an average of 112 miles. And then --

        25   JUDGE CLIFTON: You have a little asterisk by average

                                    3989

1 miles, is there something we need to know about that?

 2   MR. ENGLISH: Well, let me first clarify, your Honor, this

 3 isn't Dr. Schiek's document, this is a CDFA table. Is that

 4 correct, Dr. Schiek?

 5   DR. SCHIEK: It is a CDFA table.

 6   MR. ENGLISH: Nonetheless, could you then, do you know what

 7 the asterisk refers to?

 8   DR. SCHIEK: Well, is it asterisk or a footnote? I think

 9 it is a --

10   MR. ENGLISH: It is a footnote 4.

11   DR. SCHIEK: Footnote 4, if you turn to the second page, if

12 you can read that, it says, "The average miles travelled from

13 ranch to plant, one way destination is weighted on pounds

14 shipped." So that's what that refers to.

15   JUDGE CLIFTON: Thank you very much. I would not have even

16 known that was a number.

17   DR. SCHIEK: It is hard. And Mr. English raised a good

18 point. This is a table that's produced by CDFA as part of

19 their hauling cost survey. They released three tables, the

20 ones that Mr. Hollon included in his exhibits. There's another

21 set of tables that cover plant to plant movements, and there's

22 this one that covers the ranch to plant movements broken down

23 by mileage zone as opposed to shipping area.

24 BY MR. ENGLISH:

25   Q. All right. Now, there's a second page?

                        3990

1   A. Right. So the second page covers the

2 Southern California receiving area, there's the Southern

3 California receiving area and the San Diego receiving area. I

4 want to look first down at the San Diego receiving area. And

5 you can see, again, looking at the April column, the average,

6 the number of loads traveling from 0 to 79 miles was 171, and

7 the average haul was 56.

8   Q. 58?

9   A. 58, okay. 58 miles. And there really weren't any

10 others that were beyond 79 miles, so again, those were from

11 fairly close in. The one that probably has more milk moving

12 from farther distances is the Southern California receiving

13 area. And of course, this is the largest Class I market in the

14 state. The population density in the Southern California

15 receiving area is high and there's a lot of people living down

16 in the LA basin. And so you can see that in this one they have

17 the categories broken down into 0 to 93 miles, and you will

18 note that 2,246 of the loads are coming from that distance, 93

19 miles or less. And then over, over 93 miles there's 215 loads

20 coming into the region.

21   Q. Those are only for shipments from Riverside and

22 San Bernardino, correct?

23   A. That's right. This is in Riverside and San Bernardino,

24 and they travel an average of 109 miles. Then if you look at

25 the second part, which is the second grouping for shipments

3991

1 from all other areas beyond, other than Riverside and

2 San Bernardino, you can see that from 0 to 79 there's 0.

3 Right. Because the only ones that would come in that closely

4 would be the ones that are in Riverside and San Bernardino.

5 And then there's 43 loads from the next mileage bracket, and

6 then you get into thousands of loads going up to where there's

7 even a substantial number, I believe, at 1670 coming from over

8 155 miles with an average mileage haul of 181 miles. So it's a

9 little different than what we see in the other receiving areas,

10 in that there's milk coming from farther away.

11   Q. All right. So with that in mind, now if you could

12 return to Exhibit 79, and the audience is on page 34, milk

13 movements in California are largely efficient, and you and I

14 are on the bottom of page 36.

15   A. Correct.

16   Q. So if you could start, and again, for the record, this

17 would be a repeat of the paragraph that was left off at 4:00,

18 and I just think for flow purposes this makes sense.

19   A. Okay. The heading is Milk Movements in California Are

20 Largely Efficient.

21   The quantity of California milk moved into the state's

22 fluid deficit areas is detailed in Table 9. This data is

23 published twice per year by CDFA as part of its milk hauling

24 survey. The reported hauling data largely illustrate milk

25 movements that are efficient, with close-in milk, if it is

3992

1 available, serving the bulk of the needs. The vast majority of

2 Bay Area milk from comes from the Northern San Joaquin,

3 North Bay, and Solano areas. Most of the milk moving into

4 Southern California is from Southern California or the

5 South Valley. Milk moving longer distances does happen, but

6 these are mostly organic milk or some type of concentrated bulk

7 product, and volumes are generally small compared to the total

8 milk moving to Class I uses in the market.

9   The current situation in Southern California deserves

10 some explanation. Southern California, formerly -- that should

11 be formerly instead of frequently.

12   JUDGE CLIFTON: Let us make that change now. Ms. Elliott,

13 are you there?

14   MS. ELLIOTT: Yes.

15   JUDGE CLIFTON: Thank you. Formerly; is that correct?

16   THE WITNESS: Correct.

17   Southern California formerly produced an abundant

18 supply of milk, with much of it concentrated in the Chino

19 basin. These ample supplies allowed for manufacturing plants

20 to locate in the region that previously was dominated by plants

21 whose primary business was packaged fluid milk or cultured and

22 frozen products. A large cheese plant located in the region

23 during the mid-1980's, and others (not so large) followed. The

24 milk supply began to decline in Southern California over the

25 past 20 years as real estate values rose rapidly.

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BY MR. ENGLISH:

Q. So I want to stop you there and talk about the
Southern California situation. Given your history with dairy
in California, what was driving that exodus from
Southern California?

A. Okay. My history goes back, with California, goes back
to 1997. The start of this story is obviously before that.
But there used to be a significant number of dairy producers in
Los Angeles County. And as Los Angeles grew, those dairies
eventually had pressures with surrounding communities
encroaching on them, to move. And many of them initially sold
their operations in LA County and moved out to Chino, and set
up dairy there. Well, LA has been a story of growth, and so --

Q. Farming in the path of development.

A. Farming in the path of development. It's actually been
a very helpful thing, I think, for the terms of the growth of
the California milk supply. And in Chino, eventually the urban
encroachment came in, and there were pressures, pressures from
nondairy folks who maybe weren't thrilled about dairy being
right next door to them, even though they bought the house
knowing full well that the dairy was there. But the other
thing that went along with that was that the land values rose.
And it provided an opportunity for some dairymen to move out of
the region and locate elsewhere. And to, frankly, you know,
they did fairly well, some of them did very well on their land

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1   appreciation and were able to, was able to use that money to

2   relocate.

3   Now, in some cases they would relocate up into the

4   Central Valley and build a dairy, maybe they had a smaller

5   dairy in Chino and they built a larger dairy in the

6   South Valley. And in some cases they moved out of the state to

7   places like New Mexico or Washington or Idaho or other places.

8   Q. So before I became a, want of a better phrase, a milk

9   lawyer, I was a tax lawyer, and the business, that was a whole

10   lot simpler. And were there certain tax aspects of these sales

11   and reinvestments?

12   A. Yeah, I'm not a tax expert, so keep that in mind. I

13   don't know the particulars of what kind of exchange was

14   involved. My understanding in talking with people in the

15   industry was that to avoid some of the taxes, and I'm talking

16   about legal tax avoidance, to not have to write the check --

17   Q. We're not discussing any other than legal fact here.

18   A. Not have to write the check to Uncle Sam on those land

19   sales proceeds that they could reinvest in a like enterprise

20   and they could use that money to expand. And that, as I

21   observed, and as people have commented on, both in the industry

22   meetings and outside the state, I have seen some public, some

23   of the dairy publications that have written on this, you know,

24   that fueled a lot of the growth in the California dairy

25   industry over the years. Because that extra income from real

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1 estate sales has allowed them to grow, allowed dairy farms to

2 grow.

3   Q. So why don't you turn to your statement?

4   A. Okay. Consequently, larger quantities of milk began to

5 move from the Southern San Joaquin Valley into Southern

6 California to meet the processing demand in the region. Even

7 though the largest cheese plant in Southern California closed

8 at the end of 2007, a few stranded mid-sized and smaller cheese

9 plants continued to operate in the region despite the fact milk

10 continues to move from the South Valley under the state's

11 transportation allowance system.

12   California Milk Production Costs Remain Below the

13 Averages for the Country

14   Dairy farming returns in California have had their ups

15 and downs in recent years. Figure 8 contains an illustration

16 of how margins, dairy farm income over production costs, have

17 varied since 2003. While there has been much testimony at CDFA

18 hearings in the past that milk production costs are rising in

19 California, there has been no discernable trend in margins, as

20 good years have been followed by bad years in a somewhat

21 cyclical pattern. The data in Figure 8 were calculated from

22 cost of production information reported by CDFA on its website.

23 https://www.cdfa.ca.gov/dairy/uploader/postings/copcostcomp/

24 Default.aspx

25   Q. And we ask, your Honor, that that just be, that website

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1   be printed into the transcript as if read, rather than having

2   the witness read it with forward or backward slashes.

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

4   All right. Back on record.

5   MR. ENGLISH: And I'm not going to interrupt, in about a

6   paragraph, the same thing, so we'd ask for that as well.

7   JUDGE CLIFTON: All right. So what you have done,

8   Dr. Schiek, is you have gotten to the point where there is a

9   website, and you may resume your testimony, and when you get to

10 the point where there's another website if you can point that

11 out to us as well.

12   DR. SCHIEK: While the weighted average returns of the CDFA

13 sample of farms have fluctuated over time, there is also

14 considerable variability of cost and returns among the dairy

15 farm sample in CDFA survey. In Figure 9, feed costs and cost

16 of production are shown for almost all of the farms in the

17 sample. Data on farms that produce organic milk and those that

18 appear to have high component herds (most likely Jersey herds)

19 were eliminated so that what is displayed in the graph are

20 herds of the same general type. The data are from fourth

21 quarter of 2014 and were extracted from CDFA's milk cost of

22 production feedbacks, which can be found at the following

23 website:

24 https://www.cdfa.ca/gov/dairy/uploader/postings/copfeedback/

25   JUDGE CLIFTON: All right. So here the court reporter will

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1 insert that website in your testimony as if you had read it.

2 All right?

3   DR. SCHIEK: Milk production costs in the CDFA sample for

4 2014, quarter 4, varied from a low of $14.60 per hundredweight,

5 to a high of $25.79 per hundredweight, a range of $11.19 per

6 hundredweight between the lowest and the highest cost, and had

7 a simple average cost for the sample of $18.82 per

8 hundredweight. Feed costs in the sample varied from $8.71 per

9 hundredweight to $16.26 per hundredweight for a range of $7.55

10 per hundredweight of milk.

11   Similarly, net margins show a great deal of variability

12 as well (Figure 10). Margins for the fourth quarter of 2014 in

13 the CDFA cost of production sample, ranged from a high of $4.89

14 per hundredweight, to a low of, and this should be -$5.84 per

15 hundredweight.

16   JUDGE CLIFTON: All right. Ms. Elliott, I think you will

17 just want to just put that figure in parentheses to show that

18 it's a negative, that will be the easiest way to show it. So

19 we're on page 36, we're in the first full paragraph, it's

20 roughly, what, eight lines down from the top, and we're making

21 the ($5.84) figure negative by putting it in parentheses.

22   MS. ELLIOTT: Okay.

23   DR. SCHIEK: Okay. Margins for the fourth quarter of 2014

24 of the CDFA cost of production sample, ranged from a high of

25 $4.89 per hundredweight to a low of ($5.84) per hundredweight,

3998

1 and had a simple average of $2.06 per hundredweight. The point

2 here is that individual dairy farmers experience a range of

3 costs and profitability.

4   According to USDA's economic research service, total

5 milk production costs in California in 2014 were well below the

6 national average (Figure 11 and Table 11). California's lower

7 cost of milk production is driven by scale economies as it is

8 in many Western states. For each of the years 2010 through

9 2014, ERS data indicate that total milk production costs in

10 California were below both Wisconsin's cost by an average of

11 $8.70 per hundredweight and average U.S. costs by an average of

12 $4.19 per hundredweight.

13 BY MR. ENGLISH:

14   Q. Let me interrupt again. Before we go back and look at

15 Exhibit 80 and figures and tables, I want to take a moment or

16 two to discuss USDA's cost data calculations. I think over the

17 years there have been a lot of discussion in these hearings,

18 and I have certainly asked some witnesses about it. What is

19 your understanding about what you are looking at here with USDA

20 costs, and in particular, what they may include, what they

21 might not include, for the record.

22   A. Yeah, my understanding in looking through the costs

23 that are published on their website and the source data that

24 they use is the ARMS data that is sort of jointly collected

25 with, by the National Agricultural Statistic Service and ERS.

3999

Those provide the base numbers, that's a survey of individual

farms that they do in a stratified sample to try to get a

sample of farms in various size categories at various regions.

And by doing that, and kind of knowing what the probabilities

are in terms of the distribution of farm sizes in those

regions, they can then create an aggregate or a weighted

average sort of type cost for the region.

And one of the issues with the data is the costs are

meant to show total economic costs, which include a full

allocation of all overhead costs, including any unpaid family

labor. And it's the unpaid family labor that probably creates

some cost numbers that are higher than what people would expect

to see. So when we look at this data, sometimes those cost

numbers seem higher. They seem to suggest that, you know,

people just are never making any money in the dairy business.

And I think if that were totally true, we wouldn't have any

dairy farmers. So I think part of the issue is the allocation

of those family labor costs at some alternative wage rate that

they claim from an economic perspective that has to be earned

in order to, in order to fully allocate the economic cost of

dairy production.

Q. Now, whatever they do they do consistently throughout

the United States, correct?

A. Yeah. So one of the reasons to look at this data is

there are other collections of production cost information that

4000

1 are done by accounting firms and by individual states using

2 different methodologies. The International Farm Comparison

3 Network includes, I think, two or three production regions as

4 well. But this is the only one that uses a consistent

5 methodology, the only one that I'm aware of that uses a

6 consistent methodology across all the regions that they are

7 looking at.

8   Q. Anything further on the issue here about USDA costs?

9   A. No, unless you want to look through the, go through

10 the --

11   Q. I will go through the tables. But, yes, so turning

12 back to Exhibit 80, I think we have now gone through a number,

13 so let's, we have not yet looked at Figure 8. You discussed

14 Figure 8, so let's look at page 20 of Exhibit 80 which has

15 Figure 8, and tell us what you are showing here?

16   A. Okay. So Figure 8 is pulled from, or put together from

17 the data that is in Table 10. Table 10 is some milk cost of

18 production data that is published by CDFA. Now, this is not

19 the sum total of all the data, these are selected line items in

20 their, what they call the milk production, cost of production

21 cost comparison. That's in Table 10. And so what I have put

22 in here for each quarter going forward from first quarter of

23 2003 to the first quarter of 2015, is a number that they report

24 called income over feed cost. We also have the feed cost,

25 total cost, and then a calculated dairy farm income, marketing

4001

1 costs, and then dairy farm income less total costs. And those

2 are all expressed on a per hundredweight of milk basis. They

3 also, I think, list cost on a per cow, per month basis, or

4 something, some other parameter.

5   Q. So is that last column of Table 10 that you plotted --

6   A. Right.

7   Q. -- on Figure 8?

8   A. Right. The dairy farm income, less total cost is

9 what's plotted on Table 8. And then there's a solid red line

10 that has the average of that number through the sample period.

11 And that number average is a $1.45 per hundredweight.

12   Now, a note on calculated dairy farm income, which is

13 on Table 10. That is equal to the income over feed cost

14 number, plus feed costs, and then also plus marketing costs.

15 Now, that may seem a little counterintuitive, but you have to

16 kind of know where the income number for income over feed cost

17 comes from. My understanding from talking to the folks who put

18 that data together, is that that number is basically the

19 producers in the sample's mailbox price. A mailbox price

20 already has things like your hauling cost and your assessments

21 for marketing services and check off program and things

22 deducted from it. That is also a line item in the total cost.

23 So if you didn't adjust that income number by adding the market

24 cost back in, you would be double counting the cost, the

25 marketing cost. You would be essentially subtracting them

4002

1 twice. So you have got to either adjust the cost number

2 downward by the marketing cost or add them back into the income

3 side. So what I have done here is add them back into the

4 income side so that the marketing costs aren't being double

5 counted. Does that make sense?

6   Q. Makes sense to me, don't know if it makes sense to

7 everybody else.

8   All right. Is that everything on Figure 8 and

9 Table 10?

10   A. Yes, I believe so.

11   Q. All right.

12   JUDGE CLIFTON: Would you go to Figure 8 and tell me why

13 this average line is so consistent over this period of time?

14 This is like twelve years of time. I don't quite understand

15 why it stayed in the same place all that time.

16   DR. SCHIEK: Oh, that is the average for the period. So

17 it's basically taking all the numbers in all those dots and

18 simply doing simple average over the whole period. It is

19 designed to be flat. It just kind of shows where the

20 individual years are relative to the mean return through the

21 period, the mean margin through the period.

22   JUDGE CLIFTON: All right. Okay. Good. Thank you.

23   MR. ENGLISH: Thank you, your Honor.

24 BY MR. ENGLISH:

25   Q. So does that take us to Figure 9?

4003

1   A. Yes, Figure 9.

2   Q. Which is on page 22 of Exhibit 8.

3   A. So both Figure 9 and Figure 10 come from the CDFA's

4 cost of production feedback, sample feedback, cost of

5 production feedback I guess is what it's officially referred

6 to. And these are available on CDFA's website under their cost

7 of production section. And I have the address, web address at

8 the bottom of each of Figure 9 and Figure 10. And so what I'm

9 looking at here is, in Figure 9, the yellow dots with sort of a

10 red circle around each of them, that's the cost of production.

11 Total cost of production number. And you can see it ranges

12 from a high of $25.79, and actually, the lowest number is sort

13 of down close to the middle of the page, $14.60 for

14 hundredweight.

15   So the purpose, as I said, is just to kind of show how,

16 there is sort of a central tendency. You will notice that

17 there's a lot of dairies that are clustered along a line, or

18 clustered close to the simple average. But then there's

19 obviously outliers. And that just shows the sort of spread

20 that we see in those total costs.

21   The blue diamonds are the feed costs, and we see a

22 similar spread, maybe not quite as wide, but a spread

23 nonetheless, between the lowest, which was $8.71 per

24 hundredweight just to pay for the feed, and $16.26 per

25 hundredweight is at the high end. And then over on the right

4004

1 hand side of that graph, the $18.62 is the simple average of

2 all those total costs of production for that quarter of the

3 sample. And then $11.22 is the average feed cost for all the

4 farms in the sample for that quarter.

5   Q. Now, you indicate in your testimony that data on farms

6 that process organic milk was eliminated. Was that eliminated

7 by CDFA or by you?

8   A. That was eliminated, actually, I did not prepare this

9 table.

10   Q. CDFA?

11   A. No, CDFA did not prepare it either. I did something

12 very similar to this for an earlier hearing, and we had a

13 hearing recently and I suggested to Mr. James DeJong, who will

14 be probably testifying at sometime during the hearing, that he

15 prepare tables like this, so I know exactly how he did it, what

16 he did, so.

17   Q. Effectively did it under your direction and control?

18   A. He did it under my suggestion, and I explained to him

19 how I did it the first time I did it. He actually improved on

20 it, I think, by eliminating the organic milk and the high

21 component milk to get it kind of more into a very consistent

22 apples to apples type of comparison.

23   Q. The kind of things that you, as an expert, would rely

24 on?

25   A. Yes.

4005

1   JUDGE CLIFTON: What is the high component milk?

2   DR. SCHIEK: So we have talked a lot about tests of fat,

3 and solids not fat in producer milk, milk from dairy farms.

4 And we have a sort of standard test that we report prices at,

5 which is 3.5 percent fat, and 8.7 percent solid not fat. When

6 you have dairy cows of a different breed, you often have higher

7 component milk. So like Jersey dairy cows have different,

8 higher components, higher levels bulk fat and solids not fat,

9 particularly the protein content of the solids not fat is

10 higher. But what also goes along with that, with the Jersey

11 herd, for example, is a higher cost of per hundredweight,

12 because there's a higher component content, less total volume

13 produced from the cows. And we end up with a higher cost of

14 production on a hundredweight basis, although not necessarily

15 on a component basis.

16   So you are kind of mixing that with a Holstein herds

17 that are higher volume but somewhat lower solids content, it

18 muddles the picture in terms of the distribution of the cost,

19 because what you are looking at different data, different type

20 of farm when you are looking at those high component herds.

21 BY MR. ENGLISH:

22   Q. And we heard that from Mr. Metzger yesterday.

23   A. Yes, we did.

24   Q. All right. So turning to Figure 10 on page 23.

25   A. Right. So this IS simply the, again, the total cost,

1 minus the adjust, what I call the adjusted mailbox price, or

2 what did I call it -- calculated dairy farm income. And it

3 just shows the distribution of that, that's more the margin,

4 that's why it is labeled net margin. It shows that for the

5 same quarter for the sample, and ranges from high of $4.89, to

6 a low of that ($5.84), which definitely appeared to be quite an

7 outlier from the total.

8   Q.   And is the source of this data CDFA?

9   A.   It is the same source as Figure 9.

10   Q.   You mean that Mr. DeJong helped on this as well?

11   A.   Yes, he helped, he prepared this as well.

12   Q.   And in the same way you would rely on him for that?

13   A.   I would.

14   Q.   And then before we return to the text, I think you

15 referred to both Figure 11 and Table 11, so Figure 11 is based

16 on the data from figure 11, Table 11, so please talk about

17 Table 11 and then talk about Figure 11.

18   A.   Yeah. Table 11 comes from USDA milk production cost by

19 state, published by the Economic Research Service, and they

20 have on their website the data by year. For the 2010 base

21 year, they adjust the base year, there will be another base

22 year coming up this year, 2015, but they will have, they have

23 the data from 2010 and 2014 in a spreadsheet on their website.

24 Again, the link is down there at the bottom of the page. And

25 this is just taking the total cost, total production cost

4007

1 number from different selected states. Actually, I think

2 there's a bunch of states on there, I just picked California,

3 Wisconsin, and the U.S. average. And so you see for 2010,

4 California cost, $16.44, up to 2014, it was $23.90 per

5 hundredweight.

6   And at the far right hand side, I have taken the

7 California cost and subtracted the Wisconsin cost, and then the

8 California cost minus the U.S. average cost to show how much

9 California was under those costs during that time period.

10   Q. All right. I think we're now ready to go back to your

11 statement, and the new section California's Class 1 Market,

12 which is on page 36 of Exhibit 79, and 39 of the one we're

13 looking at, you and I.

14   A. Okay.

15   California's Class 1 Market

16   As we have already noted, fluid milk sales represent a

17 small portion of the total market for dairy farmers' milk

18 (Figure 7). Data contained in hearing Exhibit 61, Table

19 CDFA-D, indicate that California's Class 1 pool utilization of

20 milk fat in 2014 ranged from a low of 7.2 percent in March, to

21 a high of 8.6 percent in September, while the Class 1 pool

22 utilization of solids not fat ranged from a low of 13.7 percent

23 in March to a high of 16.3 percent in October.

24   Dairy Institute members represent a substantial portion

25 (approximately 65 percent) of Class 1 milk processing in

4008

California, and I have regular discussions with representatives

of member companies regarding marketing conditions in the

state. I have not heard any discussions from member companies

regarding difficulty in obtaining milk supplies, inadequate

supplies, large fluctuations in premiums, or inefficient or

otherwise disorderly milk movements. The largest concerns that

my members share pertain to the downward trend in fluid milk

sales and what they view is the "unfair" nature of the current

Type 70 producer-handler exemption in California's Milk Pooling

laws. Later testimony from member companies will address

producer-handler issues.

Fluid milk sales in California peaked in 1990 and 1991,

at almost 6.7 billion pounds annually (Table 12). Since then,

aggregate fluid milk sales fell sharply in the early 1990's,

and then stabilized somewhat being higher in some years and

lower in others, until 2009. The period of since 2009 has been

remarkable for its sharp downward trend in fluid milk sales

(Figure 12). In 2009, California beverage milk sales were

6.496 billion pounds, but declined to 5.826 billion pounds for

calendar year 2014. This five-year decline in California

beverage milk sales was approximately 10.3 percent. Data in

Table 12 for U.S. beverage milk sales indicate that this

downward trend is evidenced in other parts of the country as

well.

The downward fluid milk sales trends have also been

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1 evident in per capita sales of beverage milk (Figure 13). Per

2 capita sales in both California and the rest of the U.S. have

3 been trending lower for decades, beginning in the early 1980's

4 for California, and as far back as the early 1970's for the

5 rest of the U.S. In more recent years, the rate of decline in

6 per capita beverage milk consumption has accelerated in

7 California and elsewhere. Declining beverage milk sales pose

8 challenges for fluid milk processors. Plant capacity does not

9 necessarily shrink in direct proportion to, nor at the same

10 time as fluid milk sales

11   JUDGE CLIFTON: Help me at the bottom of what I am looking

12 at, page 37. I'm looking at "plant capacity does necessarily

13 not shrink" and you read it --

14   DR. SCHIEK: Does not necessarily shrink.

15   JUDGE CLIFTON: And the way you read it is the way it is

16 supposed to be?

17   DR. SCHIEK: Yes, it is.

18   JUDGE CLIFTON: All right. So Ms. Elliott, at the bottom

19 of page 37, can, I think the, whatever is easier for you,

20 however you want to show it, but it should read how,

21 Dr. Schiek?

22   DR. SCHIEK: Plant capacity does not necessarily shrink in

23 direct proportion to.

24   MS. ELLIOTT: Okay.

25   JUDGE CLIFTON: All right. And now, Dr. Schiek, you may

1 read the sentence in its entirety, please.

2   DR. SCHIEK: Plant capacity does not necessarily shrink in

3 direct proportion to, nor at the same time as, fluid milk

4 sales. The competitive environment caused by excess fluid milk

5 plant capacity chasing a smaller market, is likely to put

6 margin pressures on plant operators. Dairy Institute member

7 companies are concerned about any changes in the regulatory

8 environment that would increase the cost of milk for fluid

9 uses. They are concerned that such increased costs would

10 compound the challenges they are facing, and passing those

11 costs on to consumers would not, would certainly not improve

12 beverage milk sales.

13   Retail prices for fluid milk in California are high in

14 some markets and lower in others (Figure 14 and Table 13).

15 Data from AC Nielsen Scantrack Reports is published by CDFA on

16 its website. The published average price per gallon represents

17 the weighted average of specific brands of milk within the

18 specified market, and includes organic milk. From the monthly

19 data reported by CDFA, I calculated five month simple average

20 prices for the January through May 2015 period, for whole,

21 2 percent, 1 percent, and nonfat milk for selected markets.

22 The summary data suggests that San Francisco and Sacramento

23 have some of the highest average retail prices for fluid milk

24 in the country. However, prices for fluid milk in Los Angeles,

25 and San Diego, where regular, where the regulated minimum

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 1  Class 1 price is actually higher, then strike "show fluid milk

 2  prices that".

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

 4       MS. ELLIOTT:  Yes.

 5       JUDGE CLIFTON:  And say again, Dr. Schiek, what we strike.

 6       DR. SCHIEK:  "Show fluid milk prices that."

 7       JUDGE CLIFTON:  Thank you.

 8       DR. SCHIEK:  So I'll read that sentence again.

 9           However, prices for fluid milk in Los Angeles and

10  San Diego, where the regulated minimum Class 1 price is

11  actually higher, are fairly close to the U.S. average.  While

12  the reason for the disparity between Northern and Southern

13  California's retail price data is not clear, cost and

14  competitive factors often play a role in explaining such

15  differences.

16  BY MR. ENGLISH:

17    Q.  Before you go to the -- before you go to the summary,

18  that's now go back to Exhibit 80 one last time and examine

19  Table 12 through Table 13, for figures on pages 26 through 31.

20  So please tell us what is on Table 12, which is on both pages

21  26 and 27.

22    A.  Yes.  So this has U.S. and California population and

23  sales of beverage fluid milk from the years 1970 through 2014.

24  On the left hand columns after the year, I have the U.S.

25  population, that's July 1 of the year listed, except when
```

4012

1   there's a census year, then apparently it is April 1, that's

2   what was reported. And also has California population on

3   July 1 of the year. Sources of both that data are the

4   U.S. Census Bureau.

5   Then we have data from CDFA for sales of fluid whole

6   milk, 2 percent milk, 1 percent milk, and skim, and those have

7   been aggregated into all fluid sales, in, and those were all

8   expressed in thousands of gallons. And then those sales in

9   thousands of gallons are converted to million pounds by looking

10   at the weight of whole milk, sort of weighted average of the

11   weight of whole milk, times the volume, 2 percent milk, 1

12   percent milk, and skim, because they have slightly different

13   weights because they are slightly different solids content and

14   different specific gravity, so those were included to come up

15   with a number that's sales of California fluid milk in millions

16   of pounds.

17   Then that number of sales in millions of pounds is

18   divided by the California population to come up with a per

19   capita number. Now, this is somewhat different a lot of times

20   per capita is, some people do some adjustments to per capita

21   sales to the population to try to express it on an adult

22   population basis, so they, you know, try to look more deeply at

23   the numbers. I did not do that. This is just a straight

24   division by the population.

25   Q. So that's page 26?

1   A.   That's page 26.

2   Q.   And what did you do on page 27?

3   A.   Page 27, again, looks at much of the same data.

4 Initial U.S. beverage milk data, and again, the source for this

5 was, the U.S. data was, is a publication from the International

6 Dairy Foods Association called Dairy Facts. Prior to that it

7 was called Milk Facts. And they had a collection of data for a

8 number of years on fluid milk sales in the U.S. I believe

9 their source data for that is AMS USDA. It's also, more recent

10 years the data I got were from Dairy Market News where that

11 information is published in a summary table. So there's

12 selected issues where that information gets published.

13   And so we have U.S. beverage milk sales, but they are a

14 little different in California because buttermilk sales are

15 Class I in the federal orders and they are Class 2 in

16 California. So to get apples to apples, I decided to just keep

17 it on beverage milk.

18   Q.   That was Arabic 2, right?

19   A.   Arabic 2. Unless I say Roman numeral, we assume it is

20 Arabic.

21   And so I subtracted out the buttermilk sales to get

22 basically U.S. milk sales, less buttermilk on a million pounds'

23 basis. And then I subtracted out the California milk sales,

24 which now we should have apples to apples, because the other

25 Class 1 product in California, that's class Roman numeral II in

4014

1 Federal Orders is half and half. And this data from California

2 excluded half and half.

3 　　　So it's just beverage milk sales. It is whole, 1

4 percent, 2 percent, skim, for both U.S. and California. And

5 then I divided the U.S. milk sales, less butterfat, less

6 California milk sales, that's my rest of the U.S. number, and

7 divided that by the U.S. population, with California

8 subtracted, to come with up with the per capita number for the

9 rest of the U.S.

10 　Q. At the risk of asking a question to which I don't know

11 the answer, I nonetheless note on page 26 and 27, for one, in

12 the good news department for California, apparently per capita

13 fluid milk sales is somewhat higher than per capita milk sales

14 in the United States, outside, leaving outside of California?

15 　A. That has been the case and still seems to be the case.

16 It is. So you want to move on to figures?

17 　Q. Yes.

18 　A. Figure 12 is from 1991 to 2014, just California

19 beverage fluid milk sales on an annual basis, and this shows,

20 you can see there was a sharp fall in the early part of the

21 '90's. And then a fairly period where it was just kind of up

22 and down, not a clear trend upward or downward.

23 　　　I think beginning in 2004, interestingly, 2004 or 2005,

24 it did look like gosh, maybe we're making some headway, it

25 looked like fluid milk sales were starting to come back a

1 little bit. But then you see since 2009, that's the situation.

2 We have been facing very sharp fall in fluid milk sales. So

3 that's -- that's managed to hit Class 1 utilization in the

4 state, it's not a trend we like to see.

5   Figure 13 just shows the per capita fluid milk sales

6 for both California and the rest of the United States, that

7 portion of the United States that excludes California, and you

8 can see that yes, per capita income was much higher in

9 California.

10   Q. Not income.

11   A. Per capita sales of fluid milk was much higher in

12 California at the early part of the period, it is still higher

13 than the rest of the U.S. as of 2014, although the gap has

14 narrowed.

15   JUDGE CLIFTON: Now, if you could prove a correlation

16 between income and fluid milk consumption, I think we would

17 have something.

18   DR. SCHIEK: Yeah, maybe so. Unfortunately, fluid milk is

19 one of those categories that is consumed a lot by families that

20 have children at home. And as we have households with smaller

21 families, and as we have more households with no children, and

22 as we have an aging population, it's not a good demographic for

23 fluid milk sales.

24 BY MR. ENGLISH:

25   Q. So turning to Figure 14, and based on Table 13 so you

4016

1 want to talk about Table 13 first?

2   A. Yeah, let's talk about Table 13. As I said, this is --

3 this is a table that I constructed from the monthly information

4 that CDFA publishes on its website. And that, again, that

5 website is shown at the bottom of the page on Table 13. And so

6 these are, this is the Nielsen data for whole milk, 2 percent

7 milk, 1 percent, and skim. And this is a simple average of the

8 monthly data reported on the CDFA website for January through

9 May of this year.

10   And I think the interesting issue here is that, you

11 know, we see a range of prices. If we look at Sacramento, look

12 at San Francisco. Let's look at that one. Whole milk at $4.68

13 a gallon, 2 percent milk at $4.54 a gallon, 1 percent milk at

14 $4.76, and nonfat at $4.63. I think, if not the highest,

15 San Francisco milk prices are one of the two highest in the

16 terms of the markets that were reported. I don't know about

17 you, that's not a tremendous shock to me. Everything is

18 expensive in San Francisco, it's an expensive place to live.

19   What's more surprising, I guess, is that Sacramento

20 prices aren't far behind, and I live in the greater Sacramento

21 area. It's not as an expensive, as expensive a place to live

22 as San Francisco, so I would have maybe expected it on a cost

23 of living standpoint that the numbers might be lower.

24   But what's interesting, Los Angeles, also a very

25 expensive place to live, but fluid milk prices are much lower.

4017

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1   If we look at the Los Angeles number, $3.25 a gallon for whole

2   milk, $3.16 a gallon for 2 percent, $3.33 for 1 percent, and

3     $3.12 for nonfat. And if you look at the national average at

4   the bottom of the table, total U.S., you could see that the LA

5   numbers, Los Angeles numbers, prices are actually lower than

6   the U.S. average. And as I pointed out in my text of my

7   testimony, you know, Los Angeles regulated minimum prices are

8   actually slightly higher than those in Northern California, but

9   the prices are lower.

10   And like I said, cost and competitive factors,

11   competition level in the retail sector may have something to do

12   with that, those cost of living things that I talked about also

13   may have something to do with that, wage contracts may be

14   different between Northern California and Southern California.

15   There could be a variety of factors that explain that

16   difference.

17   Q. So you have now talked about Exhibit 80, and why don't

18   you read the summary and the final two paragraphs of

19   Exhibit 79.

20   A. Okay. Okay.

21   SUMMARY

22   We see no evidence that a Federal Milk Marketing Order

23   is needed to address disorderly marketing. The state of

24   California currently has an effective pricing and pooling

25   system for fostering orderly marketing. If, however, the

4018

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1   Secretary concludes that an FMMO is warranted, we believe that

2   it should promote orderly marketing via the following

3   provisions that are typical and operative in most Federal Milk

4   Marketing Order orders. These provisions will be discussed in

5   more detail by other witnesses, but the subjects are introduced

6   here.

7   There should be appropriate pool plant and handler

8   definitions for the California market. As in other orders,

9   performance requirements for supply plants and handlers, which

10 require them to supply the Class I market in order to pool

11 their milk, should be used in California, as they are the best

12 mechanisms for assuring that the Class I market is served. The

13 notion of mandatory or "inclusive" pooling should be rejected,

14 as it does not provide any positive economic incentive to

15 supply the Class I market.

16   Any California Order should also include a

17 producer-handler definition like those currently in place in

18 other Federal Milk Marketing Orders. The California Order

19 should have pooling regulations that treat California producer

20 quota appropriately and in a manner that does not create

21 disorderly marketing. Pooling provisions under the Order

22 should be consistent with the other requirements of the Act,

23 and should not discriminate against out-of-state producers or

24 producers in California that do not own quota. The Order

25 should provide for appropriate classification of milk usage and

1 shrinkage (recognizing that certain plant technologies result

2 in higher shrinkage). Furthermore, it is crucial that the

3 Order established, excuse me, that the order establish -- it

4 should be establish instead of establishment.

5   JUDGE CLIFTON: Thank you, Ms. Elliott.

6   DR. SCHIEK: Further, it is crucial that the Order

7 establish accurate and economically reasonable minimum Class

8 prices that are represented of California marketing conditions.

9   JUDGE CLIFTON: Could I ask why minimum is underlined?

10 Why -- why are you emphasizing that in that way?

11   DR. SCHIEK: When another witness, who may be familiar to

12 you, comes to testify about Class prices, we'll emphasize our

13 philosophy that regulated prices need to be minimum prices in

14 the market.

15   JUDGE CLIFTON: Thank you.

16   MR. ENGLISH: Thank you, your Honor.

17 BY MR. ENGLISH:

18   Q. So before I move admission of Exhibit 79 and 80 and sit

19 down, what, summarize, there's a lot of history, a lot of

20 issues. What is the point of talking about all this history,

21 and the California markets and how they work, and the

22 population, and the capita consumption, and all your tables in

23 Exhibit 80. What's the summary of what you are trying to do?

24   A. I think what I wanted to show is that this has not been

25 a state regulatory program where operating in California for

4020

milk, where the state has left the field and really not been an

active participant in maintaining or attempting to maintain

orderly marketing. And some of the decisions that they have

made over the years, which maybe producers didn't like, maybe

we didn't like, and there have been some of those, too, quite a

few, they have done and they had a justification for them. We

may not always agree with their justification or the reasons

that they have done them, but they have justified them based on

the legislative mandates they have to run the program. And so

all the history was to kind of late the groundwork and show

that this is a program with a lot of history, where both the

legislature and the regulators have been responsive, and they

have made the decisions they have made to maintain orderly

marketing in California as they see it.

        And the section on the, all the graphs and charts is

basically to get the picture of how the industry looks today,

how it has looked and how it looks today, and we don't see

anything in that data that suggests that there is significant

disorderly marketing going on. Not that, not at a level that

would undermine the integrity of the program or the ability of

the state to operate an effective program.

   Q. Thank you. With that, I move the admission of

Exhibits 79 and 80.

   JUDGE CLIFTON: Ms. Elliott, I want to ask you to look at

page 4 of Exhibit 79. I marked a little change and I'm not

4021

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 1   positive that we made it.  On page 4, working up from the

 2   bottom of the page, about seven lines, the line reads,

 3   "Consumers, by not requiring them to pay milk prices that were

 4   higher than those need" is there, have you made any change to

 5   the word need on the record copy?

 6       MS. ELLIOTT:  No, I have not made any changes to that page.

 7       JUDGE CLIFTON:  All right.  Would you look at that page,

 8   Dr. Schiek, and tell us if there needs to be a change to the

 9   word need?

10       DR. SCHIEK:  Okay.  How many lines up?

11       JUDGE CLIFTON:  About seven on page 4.

12       MR. ENGLISH:  Let me hand him --

13       DR. SCHIEK:  I have got --

14       JUDGE CLIFTON:  Oh, you have got a different version.

15       DR. SCHIEK:  No, I have the right version.  What does the

16   sentence begin with?

17       JUDGE CLIFTON:  Okay.  The sentence is long.  The sentence

18   begins with "The agriculture Department director set minimum

19   resale prices so as to cover all reasonable costs."

20       DR. SCHIEK:  Including a reasonable return on investment

21   for reasonably efficient distributors of various types and a

22   product consumers by not requiring them to pay milk prices that

23   were higher than those -- should have been needed.

24       JUDGE CLIFTON:  All right.  So would you add the "ED" to

25   that for us, Ms. Elliott?  And so Dr. Schiek, just read that
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4022

1 line, if you will.

 2   DR. SCHIEK: Consumers, by not requiring them to pay milk

 3 prices that were higher than those needed for the maintenance

 4 of adequate and efficient distribution facilities.

 5   JUDGE CLIFTON: Thank you. Now, I know that was a quote,

 6 that is in quotations, isn't it?

 7   MR. ENGLISH: No, that's a footnote, that's an end note

 8 there, your Honor. It may look like quotes, but it is an end

 9 4. It turned out when we converted, we did the easy convert

10 from number, from footnotes to end notes, the system converted

11 them from numeric to Roman.

12   DR. SCHIEK: And small Romans.

13   MR. ENGLISH: Turned it to a Federal system.

14   JUDGE CLIFTON: All right. So is there anyone that wishes

15 to question Dr. Schiek regarding Exhibit 79 before you

16 determine whether you have any objections? No one. Are there

17 any objections to the admission into evidence of Exhibit 79?

18 There are none. Exhibit 79 is admitted into evidence.

19   (Thereafter, Exhibit 79 was

20   received into evidence.)

21   JUDGE CLIFTON: With regard to Exhibit 80, does anyone wish

22 to question Dr. Schiek before determining whether you have any

23 objections? No one. Is there any objection to the admission

24 into evidence of Exhibit 80? There are none. Exhibit 80 is

25 admitted into evidence.

                              4023

1   (Thereafter, Exhibit 80 was

2   received into evidence.)

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

4   cross-examination. I know we have been going for an hour and

5   ten minutes, it's five to four, do you want to start some cross

6   and then do a quick break or whatever, I'm happy to go either

7   way. I assume Dr. Schiek is happy on that.

8   JUDGE CLIFTON: Those of you who will have questions for

9   Dr. Schiek, would you like a break first? No need. Let's keep

10 going.

11   CROSS-EXAMINATION

12 BY MR. BESHORE:

13   Q. Marvin Beshore. Good afternoon, Dr. Schiek.

14   A. Good afternoon.

15   Q. I have some good news for you to start. Mr. English

16 started his examination of Mr. Hollon the first time with 12

17 topics. I only have 11 to start.

18   A. Oh, thank goodness.

19   Q. All right. Let's start at the beginning.

20   Dairy Institute of California, who you are employed by,

21 appearing on behalf of, interested in learning for the record

22 who that is. Your testimony here, first page or so, says you

23 have 25 companies in the Dairy Institute. And I noted in your

24 testimony in June, CDFA, that you were testifying there on

25 behalf of 30 dairy companies. Has the membership shrunk since

4024

1　June?

2　　A.　We have had some consolidations in our member list.

3　Okay?　So what I mean by that is that we had multiple company

4　members, some of which were under common ownership, and those,

5　there's been some consolidation in terms of those companies.

6　　Q.　And --

7　　A.　And we did lose a member as well.

8　　Q.　Okay.　So you lost one member and four others have been

9　consolidated into the current 25 members?

10　　A.　Correct.

11　　Q.　And I noticed also that in June you were testifying on

12　behalf of 70 percent of the State's fluid milk products.　Today

13　you are testifying on behalf of 65 percent of the State's fluid

14　milk.　Can you account for that?

15　　A.　Yes.　I believe some of CDFA's published data, I was

16　able to get a more accurate percentage of the market.

17　　Q.　So you overstate that a bit to CDFA?

18　　A.　Overestimated.　70 percent was what it was at for a

19　long time, but marketing conditions change.

20　　Q.　Your members have lost market share?

21　　A.　Yes.　I would say that's the outgrowth of that.

22　　Q.　Now, can you tell us who those 25 dairy companies are?

23　　A.　Not from here, no.

24　　Q.　Because you don't have the list in front of you?

25　　A.　Because I don't have the list in front of me.

4025

1   Q. Okay.

2   A. But as a general policy of ours not to give out our

3 pool membership list.

4   Q. Is it a trade secret? Considered to be a trade secret?

5   A. Yeah, I mean, we have a general policy that we don't,

6 we don't do that.

7   Q. But do your members not want to be identified for this

8 hearing record?

9   A. That's just our policy. I can't tell you, you know,

10 whether, many times people will testify, member companies will

11 testify and identify themselves as member of the Institute.

12   Q. I understand that. You have been working for the

13 Institute for 18 years. What's the basis of that policy?

14   A. That policy existed when I got there.

15   Q. Has it been discussed or reviewed in the time you have

16 been there?

17   A. No.

18   Q. Okay. Do you have any idea what the basis of it is?

19   A. I really don't.

20   Q. So you can't enlighten the record with respect to why

21 the dairy companies that you are representing in this hearing

22 will not provide their identity for the hearing record?

23   A. I suspect that the dairy companies who are going to

24 testify at this hearing will probably provide their identity

25 for the hearing record.

4026

1   Q. Will all of your members testify?

2   A. I do not believe every member will testify.

3   Q. Okay. Let me ask you if you can associate the names

4 with the dairy company, if you are familiar with them, if I

5 give you some names. David Ahlem, A-H-L-E-M?

6   A. Yes.

7   Q. What company is he?

8   A. Hilmar Cheese Company.

9   Q. And is Hilmar a member of the Dairy Institute of

10 California?

11   A. They are.

12   Q. Mack Berry, B-E-R-R-Y?

13   A. Driftwood Dairy.

14   Q. Is Driftwood Dairy a member of Dairy Institute of

15 California?

16   A. They are.

17   Q. And what sector of the industry do they represent?

18   A. They are a fluid milk processor.

19   Q. Michael Anthony.

20   A. Michael Anthony is with Unified Western Grocers, I

21 believe is the name of the company.

22   Q. Is that company a member of the Dairy Institute of

23 California?

24   A. They are. They have testified at hearings to that

25 effect.

4027

1   Q. And is that a processing dairy company?

2   A. That's a fluid milk processor, yes.

3   Q. Okay. Marcus Benedetti, B-E-N-E-D-E-T-T-I?

4   A. Clover Stornetta Farms.

5   Q. And is that company a member of the Dairy Institute of

6 California?

7   A. They are.

8   Q. And what sector of the industry are they in?

9   A. Mostly fluid milk products.

10   Q. Other products, also?

11   A. I believe so.

12   Q. Which are?

13   A. I believe they do some Class II products.

14   Q. Okay.

15   A. And they may provide products under their own label

16 that are custom processed by someone else.

17   Q. Okay. Dennis Brimhall?

18   JUDGE CLIFTON: Mr. Beshore, what was the first name on

19 Benedetti?

20   MR. BESHORE: Marcus, M-A-R-C-U-S.

21   JUDGE CLIFTON: Thank you.

22   DR. SCHIEK: Super Store Industries.

23 BY MR. BESHORE:

24   Q. Mr. Brimhall?

25   A. Is who he was employed by.

                        4028

1   Q.   Okay. And is that, The Super Store Industries a member

2 of the Dairy Institute of California?

3   A.   They are.

4   Q.   And what is their business?

5   A.   They do, they have a fluid, they process fluid milk

6 products, they also process cultured and frozen products.

7   Q.   Okay. Randall Dei, or D-E-I?

8   A.   "Day" D-E-I, Safeway, Safeway Stores.

9   JUDGE CLIFTON: I'm trying to keep up, but I need the name

10 again for the Super Store person?

11   MR. BESHORE: Dennis Brimhall, B-R-I-M-H-A-L-L.

12   JUDGE CLIFTON: Thank you. And Randall "Day" how is that

13 spelled?

14   MR. BESHORE: D-E-I, Randall is R-A-N-D-A-L-L.

15   JUDGE CLIFTON: And "Day" is D-E-I?

16   MR. BESHORE: Yes.

17   JUDGE CLIFTON: All right. Then what was your response to

18 that, Dr. Schiek?

19   DR. SCHIEK: He's with Safeway Stores.

20   MR. BESHORE: Which is a fluid milk processor?

21   DR. SCHIEK: Fluid milk and, I think they do frozen and

22 cultured products as well.

23 BY MR. BESHORE:

24   Q.   Okay. And they are a member of the Dairy Institute of

25 California?

4029

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 1      A.  They are.

 2      Q.  Greg Dryer, I think we're going to hear from him

 3  shortly.

 4      A.  With Saputo Cheese.

 5      Q.  Evan Kinser, K-I-N-S-E-R.

 6      A.  Dean Foods Company.

 7      Q.  They are a member of the Dairy Institute?

 8      A.  Uh-huh.

 9       JUDGE CLIFTON:  That was a yes?

10       DR. SCHIEK:  Yes.

11  BY MR. BESHORE:

12      Q.  Jeff Malbon, M-A-L-B-O-N?

13      A.  Yoplait.

14      Q.  And is Yoplait a member of the Dairy Institute?

15      A.  Yes.

16      Q.  What is their business?

17      A.  Yogurt.

18      Q.  Renee Peets, R-E-N-E-E, P-E-E-T-S.

19      A.  I am not sure who she works for now.

20      Q.  Was, did she, in 2013, work for a member of the

21  Dairy Institute of California?

22      A.  Yes, Kraft Foods.

23       JUDGE CLIFTON:  Dr. Schiek, you are cutting him off a

24  little.  So even though I'm amazed at how you can recall all of

25  this, slow down a bit.
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 1        DR. SCHIEK:  Kraft Foods.

 2   BY MR. BESHORE:

 3       Q.  And what is Kraft's milk processing business in

 4   California?

 5       A.  Cheese and cultured products.

 6       Q.  And they are a member of the Dairy Institute?

 7       A.  Yes.

 8       Q.  Tom Murray, M-U-R-R-A-Y?

 9       A.  Formerly with a division of Dean Foods.

10       Q.  Okay.  Mike Newell, N-E-W-E-L-L.

11       A.  HP Hood.

12       Q.  Which is a member of the Dairy Institute?

13       A.  Yes.

14       Q.  Sue Taylor, I think we know her.

15       A.  I think you know her.

16       Q.  Michael Shotts, S-H-O-T-T-S?

17       A.  Farmdale Creamery.

18       Q.  Is Farmdale Creamery a member of the Dairy Institute of

19   California?

20       A.  Yes.

21       Q.  And what is the business of Farmdale Creamery?

22       A.  Cheese and cultured products.

23       Q.  Rob Byrne, B-Y-R-N-E.

24       A.  I believe Mr. Byrne is with Schreiber Foods.

25       Q.  Schreiber?
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 1    A.  Schreiber.

 2    Q.  That's S-C-H-R-E-I-B-E-R?

 3    A.  Sounds right.

 4    Q.  Okay.  And is Schreiber Foods a member of the Dairy

 5  Institute?

 6    A.  They are not.

 7    Q.  Were they at one time?

 8    A.  At one time they were.

 9    Q.  As recently as 2013?

10    A.  Yes.

11    Q.  Gil DeCardenas, De C-A-R-D-E-N-A-S?

12    A.  Yes, Cacique.

13    Q.  Could you spell that?

14    A.  C-A-C-I-Q-U-E.

15    Q.  And is Cacique a member of the Dairy Institute of

16  California?

17    A.  They are.

18    Q.  What is their business in California, milk processing

19  business?

20    A.  They have a line of products, Hispanic cheese being

21  one.  I think they also do some cultured products.

22    Q.  Okay.  Patrick Dryer, D-R-Y-E.

23    A.  Formerly with Nestle.

24    Q.  And is Nestle a member of the Dairy Institute of

25  California?
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4032

1   A. They are.

2   Q. Did I miss any members?

3   A. Off the top of my head, I can't tell you. You have got

4 quite a few of them, though.

5   Q. Okay. And are you prepared to provide the rest that I

6 missed?

7   A. I'll check with the Executive Director and see whether

8 I can.

9   Q. Thank you. Let's turn to legal economic history.

10 First of all, is prima facie an economic term?

11   A. No, not particularly.

12   Q. Okay. You used it on page 2 of your testimony, I was

13 curious, is that a term commonly used in the everyday

14 discourse?

15   A. You know, there's a lot of terms in here that I don't

16 commonly use in everyday discourse, but no, I'm not one to use

17 that very often. It seemed to fit that's why I put it in.

18   Q. Let me see if I understand. You start -- you start

19 your discussion of the, you know, history, the regulation of

20 milk marketing in California back in the '30's and you bring it

21 up-to-date.

22   So a substantial portion of your statement, as I

23 understand the thesis, you are, or the story as you have

24 presented it, in the early '30's there were federal agreements,

25 the feds botched it, California stepped in in '35 with the

4033

1 Young Act, and has successfully, from your perspective,

2 regulated the marketing of milk in California since that time

3 and to the present. Reasonably fair?

4   A. Well, I don't know if I would say the feds botched it.

5 That's not what I, I don't, I don't believe I said that. But,

6 but, state regulation came about, and there have been

7 additional acts passed, and new programs to deal with changing

8 market conditions in California.

9   Q. So the starting point that I was referencing, you say,

10 and you, you know, it is your starting point, under the '33

11 Agricultural Adjustment Act, I'm on page 3, I'm not reading

12 every sentence, or not every word, but marketing agreements

13 were set up in the state. And you say, when the U.S. Supreme

14 Court held that these original marketing agreements were

15 invalid, California was left without any regulatory programs to

16 address the state dairy industry's problems at the time. And

17 that's what I refer to as you describing the feds as having

18 botched it.

19   MR. ENGLISH: Well, I think that's a mischaracterization.

20   MR. BESHORE: I'm just telling him that's what I was

21 referring to.

22   MR. ENGLISH: Okay. But I think that if the Supreme Court

23 ruled on something, that's hardly called botching it.

24 BY MR. BESHORE:

25   Q. Okay. That's my question. What is the source of your

4034

1 statement, when the U.S. Supreme Court held that these original

2 marketing agreements were invalid, what's your source for that?

3   A. Well, I think there's multiple sources. It is

4 discussed in a paper by Alden Manchester, "Milk Pricing in the

5 United States", Manchester and, I think I cite that, Manchester

6 and Blaney. A lot of my early education, "Coming to

7 California" was from Larry Maes, who had been Executive

8 Director of Dairy Institute, and prior to that was with the

9 Alameda County Milk Dealers. He's a source of a lot of the

10 history that I have. He talked about that. I think it's been

11 discussed in CDFA publications about milk pricing program in

12 California. I believe there are several on the website that

13 they have put up, historic documents where it is discussed as

14 well.

15   Q. Okay. What Supreme Court case are you referring to

16 there?

17   A. I don't know the case.

18   Q. But you are sure there is one?

19   A. Okay. That's what I read. I'll admit to you,

20 Mr. Beshore, I was not there in the 1930's.

21   Q. But that's your testimony?

22   A. It is my testimony of the history as I know it.

23   Q. Okay.

24   JUDGE CLIFTON: Now, let me stop you there, Mr. Beshore. I

25 see the spelling of Blaney in the end notes, B-L-A-N-E-Y, I

4035

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 1  don't know the spelling of Larry Maes' name.

 2      DR. SCHIEK:  M-A-E-S.

 3      JUDGE CLIFTON:  M-A-E-S.  Thank you.

 4  BY MR. BESHORE:

 5      Q.  Your testimony, as it goes on to discuss the status of

 6  regulation of the milk marketing in California, talks about

 7  orderly and disorderly quite a little bit, correct?

 8      A.  Yes, it does.

 9      Q.  Okay.  Now, and as I, as I gather, your conclusion is

10  that because California has a regulatory system that involves

11  minimum pricing in market-wide pooling, it's orderly, and

12  therefore, there is no basis for a Federal Milk Marketing

13  Order, correct?

14      A.  No, I wouldn't really say that's my conclusion.

15      Q.  Oh, you concluded it is not orderly?

16      A.  No, I am not concluding that those features are the

17  reason why I was, the sole reason that I'm saying it is

18  orderly.

19      Q.  Okay.  The other features that, from which you conclude

20  that it is orderly are?

21      A.  Okay.  The issues that I just went through; milk

22  movements, production levels, adequate supplies of Class I milk

23  for fluid use.

24      Q.  Okay.  Is that pretty much it?

25      A.  Okay.  Well, let me go back to the testimony.  I can
```

4036

1 read it again, if you would like.

2   Q. No. No.

3   A. Adequate milk supplies for fluid use, orderly milk

4 movements. I think the Class I market being served, and I

5 believe I talked a little bit in there about sort of a working

6 definition of orderly marketing, it is my working definition,

7 although --

8   Q. And that is?

9   A. It is basically.

10   JUDGE CLIFTON: Mr. Beshore, I have got to caution you, you

11 know, you are asking him to summarize these 40 pages in a

12 nutshell. Give him time to think. Don't push.

13   MR. BESHORE: I apologize, Dr. Schiek, go ahead.

14   JUDGE CLIFTON: All right. So you were telling us about

15 your working definition, Dr. Schiek.

16   DR. SCHIEK: Yes. My definition is basically that the

17 fluid milk market is being adequately served and that milk is

18 moving in an orderly fashion to serve that market. Milk is

19 moving where it is needed, when it is needed and at a

20 reasonable cost, and in an efficient manner. That's my working

21 definition of orderly marking.

22 BY MR. BESHORE:

23   Q. Okay. So your working definition focuses on the fluid

24 market and its service?

25   A. It does.

1   Q. Okay. And when you say it is adequately served in

2   California ordinarily. The fluid market uses a little more

3   than 10 percent of the milk production in the state, therefore,

4   there's enough milk to serve it?

5   A. There's enough milk to serve it, and it is being

6   served.

7   Q. So can you, and when you talk about production, the

8   system providing for enough production, is that what you mean?

9   That the California regulatory system has allowed more than

10   enough milk to be produced in California to serve that fluid

11   market?

12   A. Yes, that's the result.

13   Q. And that's the test for orderly, in your view?

14   A. That's having adequate supplies of Grade A milk for

15   fluid use is one of the, one of the requirements, I guess, for

16   a market to be orderly under the purposes of the orders, as I

17   understand them.

18   Q. Can you, so if California's milk production were

19   reduced by 50 percent, half the farmers went out of business,

20   and there was still some Class I utilization was then about 20

21   percent rather than 10 now. There would be plenty of milk to

22   supply the fluid market, correct?

23   A. Yes, there would.

24   Q. And would that be an orderly marketing situation?

25   A. I think it would depend on the manner in which that

4038

happened. If it happened over a long period of time, and in a

fashion where that was, that was the economic result because of

changing comparative advantage in the marketplace, that could

be orderly. There are places in this country that produce less

than half the milk that they used to. So it really will depend

on what kind of conditions that reduction in production creates

in the marketplace and how it disrupts milk movements and milk

movement patterns and the ability of plants to secure supplies.

     Q. So if half the farmers in California went out of

business in an orderly fashion, that would be an orderly

regulatory program?

     A. I would say half the farmers in California have gone

out of business over the last, you can go back and look at the

farm numbers, but that's happened. It's happened in every

state.

     Q. And if half the production, I was only focusing on

farmers, okay? If half of the production in California left

the state, was reduced, no longer was there, and it happened in

a, what, an orderly fashion, that would be an acceptable

regulatory program?

     A. Well, I think it depends on the reasons that it is

happening. You know, there's a lot about California that is

potentially changing. California has never really had a

comparative advantage in milk production, it's had an absolute

advantage in terms of cost at different points in its history,

4039

1 and the growth, I think, has always been driven by that. But

2 let's face it, milk can be made in many locations. Milk can be

3 produced in many locations. There are other agricultural

4 enterprises in California that are not really able to be

5 carried out in other parts of the country. And this is just an

6 economic concept, but when resources are constrained, so

7 there's tighter conditions for land or water, generally you are

8 going to see a region begin to adapt so that its comparative

9 advantage is expressed. So maybe we're starting to see some of

10 that here in California. You know, will half the production

11 leave the state? I don't think so. But I think what we are

12 seeing is that, you know, there's other agricultural

13 enterprises that are going to be able to command more of the

14 scarce resources in the state.

15 Q. So you would anticipate production will continue to

16 decline because of the factors you have just mentioned, that

17 is, that there are other more favorable factors competing, the

18 pursuits of commodities competing for those resources?

19 A. I'm not saying it necessarily will continue to decline,

20 I certainly hope that it doesn't. But I think what we have

21 seen is that there's changing economic conditions. When I was

22 coming out to work at Dairy Institute, almonds were kind of a

23 money loser. People were plowing up their almond groves. Now

24 people are planting almond groves like crazy. And part of that

25 has to do with the demand for almonds, but another part of that

4040

1 is that almonds, on a commercial level, aren't able to be

2 produced in a lot of other areas of the country.

3   Q. Is there any condition other than the interruption of

4 flow of milk to the Class I market that you would view as

5 sufficiently disorderly to support the promulgation of the

6 Federal Milk Marketing Order in California?

7   A. My view is Federal Milk Marketing Orders are about

8 assuring adequate supplies of fluid milk.

9   Q. Period?

10   A. Period. Now, and keeping that marketing of that milk

11 orderly. Now, would I say that, you know, there's a, there

12 wouldn't be a problem if there was a rapid drop in the number

13 of, in the amount of milk production in the state? No. Is it

14 an issue that needs a Federal Order regulatory solution? I

15 don't think that's what Federal Orders are designed to address.

16   Q. In your view, they are only designed to address getting

17 an adequate flow of milk to the 10 percent, to the fluid

18 handlers in California that process about 10 percent of the

19 milk?

20   MR. ENGLISH: I object, that's not what he said.

21   MR. BESHORE: That's a question.

22   JUDGE CLIFTON: Yeah. So you can ask the question, but the

23 way you phrased it, it sounds like you were suggesting that

24 that's what he just said. And I don't think he necessarily

25 meant supply handlers.

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1   MR. BESHORE: Fluid milk processing plants.

2   JUDGE CLIFTON: Well, all right. Well, when he says

3 ensuring adequate supplies of fluid milk, I think you ought to

4 ask him whether any of that is supposed to get to the

5 consumers. If you don't think that, if you think it's, as long

6 as it gets to a plant it is okay -- at any rate, go ahead and

7 ask a new question, if you will.

8 BY MR. BESHORE:

9   Q. I think if I remember, my question was whether there's

10 any condition other than -- no. I can't remember what the

11 question was, honestly. Let me -- let me just ask you this.

12   If it were the case that a state regulatory program,

13 state milk marketing program, established minimum prices to

14 farmers, dairy farmers in the state, which were inadequate to

15 support their operations, which were below their cost, would

16 that be a reason, would that be a system that was supporting

17 orderly marketing conditions in your view?

18   A. Okay. I believe that regulated prices are not

19 necessarily, and don't necessarily need to cover all producer's

20 costs, all the time. I think there's a role that market plays

21 as well through premiums that will, if there's inadequate

22 supplies of milk for the marketplace, those premiums will

23 develop and pay what's needed to be paid to keep dairy farmers

24 in the business to supply the market. And I think that's true

25 whether it is a fluid market or whether it is manufactured

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1 market.

2   Q. Okay. So in your view, no regulated price is too low

3 because there can be premiums above it to make the supplies

4 get, to bring the supplies along and make them get to market;

5 is that correct?

6   A. No, that's not my view. That's not what I said.

7   Q. Okay. What I heard you say was that minimum prices do

8 not need to cover costs, at least certain producers' costs,

9 because you can have over order premiums that will preserve the

10 milk supply.

11   A. First of all, I think we probably have to talk about

12 what we really mean by cost. Are you talking about all

13 producer's costs, are you talking about average costs, are you

14 talking about efficient producer's costs, are you talking about

15 their costs all the time or their cost in a given month?

16   Q. Okay.

17   A. Okay? What do you want to talk about?

18   Q. Well, let me ask it this way. Is there a regulated

19 price, a state minimum regulated price, related to any cost you

20 choose, which, in your view, would be too low so that it did

21 not preserve orderly marketing conditions?

22   A. I think that if you had a really, really low regulated

23 price so that it was sort of never, never coming into play,

24 meaning prices were always above the regulated minimum and you

25 have to ask yourself the question why you would have the

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1   system. Is the system necessary? Because the regulated, the

2   premiums are always kicking in. So I kind of view regulated

3   minimum prices as kind of an undergirding of the system, not

4   creating the price at which all business is transacted, but

5   being kind of in the range but on the low side. Because I

6   think the danger is in always setting minimum prices too low

7   because there is a market mechanism to correct prices that are

8   under the market-clearing level, and that's premiums. If you

9   set them above market-clearing levels, then they are too high.

10 And you know, particularly, under a system of mandatory

11 pooling, there's no correction available for that, other than

12 people to go out of business or move elsewhere.

13   Q. Okay. Let me just ask one final question here and then

14 move on. If I understand your testimony correctly with respect

15 to the purpose of Federal Orders, their purpose only

16 legitimately relates to serving the Class I market?

17   A. I think that's what they were designed for. That's

18 what I was always taught from the time I worked in Order 2,

19 through my two leaves under my major professor and folks I

20 worked with in Dairy Marketing. That's kind of how I learned

21 the order system, was that they were about ensuring adequate

22 supplies of fluid milk to consumers at reasonable prices, and

23 in ensuring orderly marketing.

24   Q. And the only that?

25   A. That's my understanding.

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1   Q. Okay. Let's talk about your, your views that on

2   pricing of other than Class I milk. Because Orders price all

3   classes of milk but the current California Order and Federal

4   Orders, correct? Minimum prices?

5   A. The price, they -- they force the minimum price on milk

6   that is pooled that participates, that voluntarily participates

7   in the Order.

8   Q. Well --

9   A. People want to pool the milk, they have got to pay the

10 prices. If they don't want to pool the milk, they don't have

11 to pay the prices, they can operate as a nonpool plant outside

12 the system. They can operate as a nonpool plant and receive

13 milk from others where they pay less than minimum price. And

14 it's the paying of the minimum prices exists if you elect to

15 participate in sharing Class I revenues.

16   Q. We will get to pooling, I was asking about pricing,

17 okay?

18   A. I think I answered your question about the pricing. I

19 think the two go together, you can't really respond without

20 talking about both.

21   Q. Pooling and pricing? You can't respond, you have to

22 have them -- you can't respond to one without talking about the

23 other, is that --

24   A. I believe so, yeah, they are a package.

25   Q. Okay. Let's talk about your testimony that there are

1 spatial values to minimum class prices. Do you recall that?

2   A. What page are we looking at?

3   Q. I wasn't looking at any particular page, but 27 is one

4 place I think the, that that concept is discussed.

5   A. What part of 27? I have to look at your 27 not my 27.

6   Q. There's a reference at the bottom, but I think there's

7 multiple, multiple references.

8   A. So is this where I'm talking about the disparity

9 between where products are produced and where they are consumed

10 creates a spatial value this is lower in the West and higher in

11 the East, and that regulated pricing formulas should account

12 for the spatial value of finished dairy products.

13   Q. That's, you're reading, what, from the bottom of page

14 27?

15   A. 27, yeah.

16   Q. Yeah. And I think somewhere, probably in the top,

17 there was some reference to spatial, you know, equilibrium and

18 that sort?

19   A. Oh, spatial equilibrium.

20   Q. Does that apply to all classes of use?

21   A. I do think there's a spatial value, yes, in all, in all

22 products and all classes of use.

23   Q. And with respect to minimum pricing policy, is it your

24 testimony that the policy maker must recognize each price point

25 of spatial value and minimum prices?

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1   A. I think there's a variety of ways a policy make can

2 address that, Mr. Beshore. I think there's a, you could have

3 pricing that's different at different locations like we do for

4 Class I, that would be one example. You can extend that, I

5 think, to manufactured classes. It becomes a little more

6 difficult, I think, because when you get people who are close

7 to the line, whatever that line is, that can be an issue.

8 Another way is to figure out where the spatial value is lowest

9 and that becomes the minimum price for the system.

10   Q. So the policy maker has to make that determination,

11 correct?

12   A. I think policy makers would get input and testimony and

13 make that decision based on the testimony that they get.

14   Q. Right. In a regulated system?

15   A. In a regulated system.

16   Q. Okay. So in the Federal system, the policy maker,

17 which is the Secretary of the United States Department of

18 Agriculture, Secretary of the United States Department of

19 Agriculture, talking about the Federal Milk Marketing Order

20 system, with respect to manufactured milk prices policy,

21 decision has been that there be one national price, correct?

22   A. There is one Class III price under the Orders, there is

23 one Class IV price, and there's one Class II price under the

24 Orders currently.

25   Q. Which apply in each case, nationally?

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1   A. It applies in all the Orders for milk pooled under the

2   Orders that participates in the system.

3   Q. Okay. In making, and that's been the case since 2000,

4   correct?

5   A. I was trying to think back. It certainly has been the

6   case from 2000, it may have been the case somewhat earlier.

7   And you know, we can talk about this. I was thinking maybe

8   more when the Class pricing section is up it would be better,

9   but if you want to talk about it now, we can talk about it now.

10   Q. You talked about it, right?

11   A. Yep. So I think if you look at the M-W price that was

12   the basis for setting Class III prices on the Federal Order,

13   that was of a region of production where there was the greatest

14   level of Grade B milk and the largest reserve supply of milk in

15   the country. And that was, you know, an argument could be made

16   that that was the lowest value use in the country. And that

17   was the basis for setting one price for the whole country. And

18   I think there's some logic in that.

19   Q. Okay. But my, point of departure in your answer there,

20   my question was, hasn't there been one price established,

21   Class II, III, and IV, since 2000?

22   A. Since 2000 there has been one price.

23   Q. Okay. And you are aware, of course, that in setting

24   that price, the Secretary of Agriculture had before him, the

25   Department had before them, all sorts of recommendations and

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1   data, including data from the Cornell model that was, that was

2   part of their study at that time. You are aware of that?

3   A. Yes, I'm aware of that.

4   Q. Okay. And you are aware that that study, that the

5   Cornell, USDSS simulator that's been subject of some questions

6   here, showed that you could have multiple prices for

7   manufactured products, or of, that showed that in some

8   simulations of a, that by dairy sector economy, there could be

9   multiple manufactured product prices rather than just one

10   national price, correct?

11   A. Yes, I'm aware of that.

12   Q. Okay. But the policy choice was that there should be

13   one and there's been one since 2000, correct?

14   A. Well, that was what was adopted, yes.

15   Q. Now, your testimony on page 27 suggests that, and in

16   your view, that's an erroneous policy choice, correct?

17   A. I think what I'm saying is that it ought to be

18   recognized and, you know, here we're talking about introducing

19   fairly large milk production state into a Federal system where

20   it hasn't been. And we're also talking about, in my view, a

21   state that has had, at various times, trouble marketing all of

22   its milk locally within the state. And I just think that the

23   spatial value and the fact that people sell their products,

24   their products are worth less down here, makes economic sense

25   that regulated minimums should not assign product value higher

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1 than what they are able to achieve.

2   Q. Do you agree that cheddar cheese prices are the right

3 product prices to use to set Class III prices for the Federal

4 system, including California?

5   A. I think there are probably the best choice we have

6 available because of the commodity nature of the product and

7 the ability to observe those prices. Yeah.

8   Q. Okay. Is it your view, Dr. Schiek, that if there is

9 ever any milk that must travel beyond the local area to find a

10 market, that the, in a regulated minimum price marketplace,

11 that, that the minimum price in that area is therefore, minimum

12 regulated price in that area, is therefore, too high?

13   A. So if I rephrase your question, you are saying that if

14 one truckload of milk has to leave the region I'm saying the

15 regulated price is too high?

16   Q. I asked the question.

17   A. No, well, okay. That's how I interpreted your

18 question, so I'm saying, I'm not saying that.

19   Q. How much has to leave the area before, in your

20 judgment, the regulated price is too high?

21   A. Well, more than one load.

22   Q. Could you do any better than that?

23   A. I think you have to look at pattern. You know, if you,

24 Mr. Beshore, if you have got a one week of the year where, you

25 know, things are tight and milk has to leave, that's one issue.

1 But if you have got a month, that becomes another issue. If

2 you have got several months, then I think you for sure have a

3 problem. I mean, it's a little bit of a, you have to look at

4 kind of the market and what's going on.

5   Q. So isn't it likely that milk movements of that, well,

6 not likely. Isn't it the case that when milk movement of that

7 kind occurs, it relates to plant capacity as much as it does

8 price?

9   A. Well, it relates to the price because the capacity of

10 the plants and what they are willing to buy is a reflection of

11 the local demand for milk. And if there is more milk being

12 produced than there is demand locally to satisfy it, then it's

13 probably not a market clearing price.

14   Q. Has milk at distressed prices, in your knowledge, ever

15 moved out of California when there was plant capacity in the

16 state to process it, in any volume of any significance?

17   A. Sometimes that will happen in a plant has a breakdown.

18   Q. Other than that situation.

19   A. Okay. And sometimes it will happen when, well, it will

20 happen -- again, it gets back to the issue of willing capacity.

21 I may be, I may have physical capacity at my plant, but the

22 price at which a product is being offered may not be attractive

23 to sufficient, and sufficient for me to buy it.

24   Q. But my question was, had milk in any substantial

25 volumes moved out of California, in your experience, because of

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 1   price when there was plant capacity available?
 2      A.  My understanding is, there have been times where, if
 3   the price, if the milk had been essentially offered at a
 4   discount, if a discount could have been paid, there could have
 5   been accommodations made to take more milk in some of these
 6   plants.
 7      Q.  When was that and what volumes are you talking about?
 8      A.  I don't have volumes, but 2007 and '08, 2012.
 9      Q.  It is your testimony --
10      A.  It is my understanding, it's my understanding that that
11   was available.
12      Q.  What's the basis of that understanding?
13      A.  Just discussions with people in industry.
14      Q.  People that had the capacity available?
15      A.  People who have told me they would have been willing to
16   take some extra milk if they could get it cheap.
17      Q.  And they refused to?
18      A.  They couldn't, yeah.  They decided not to buy
19   additional milk at the going price.
20      Q.  Members of Dairy Institute?
21      A.  Yeah.
22      Q.  Since, what last year, you said there 2008?
23      A.  I think I said 2007, 2008, 2012.
24      Q.  Same thing?
25      A.  Uh-huh.
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1   JUDGE CLIFTON: I heard you say same thing, I didn't hear

2 your response.

3   MR. BESHORE: I think there was a nod.

4   JUDGE CLIFTON: Was that a yes or a no?

5   DR. SCHIEK: I believe it was a yes.

6   JUDGE CLIFTON: I'm a little concerned, I know we never

7 took that break. I know it is 4:45. I think we have to talk

8 about the fact that we have to vacate this room.

9   May I, I know you are on a tear, Mr. Beshore, I love to

10 see you this this animated, but I need to hear from Ms. May.

11 If you could come to the microphone as to whether we have right

12 up until 5:00?

13   MS. MAY: So, yes, Laurel May. We can go right up until

14 5:00. There's not a big hurry to get out of here tonight, but

15 the group that is going to be using the room is coming in here

16 tonight to set up their event, so we do need to leave as soon

17 as we can after 5:00. And when we do so, we need to take

18 everything that we have in here out, so that they can move in.

19   Can I just go ahead and tell everything else? Okay.

20 Tomorrow and Friday we will be at the Piccadilly Inn at the

21 airport, which is at the Northwest corner of Peach and McKinley

22 Avenues. And we'll start at 9:00 as usual. And so we'll see

23 you tomorrow morning at the Piccadilly.

24   JUDGE CLIFTON: Thank you. Now, I think we ought to take a

25 five-minute stretch break even though we're going to, we're

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1 still going to have a few minutes of testimony, so real quick,

2 take five minutes. Please be back and ready to go at 4:51.

3 That's only five minutes.

4   (Whereupon, a break was taken.)

5   JUDGE CLIFTON: We're back on record at 4:52, sorry, 4:53.

6 Mr. Beshore, you may proceed.

7 BY MR. BESHORE:

8   Q. Yes, thank you, your Honor. Marvin Beshore.

9   Dr. Schiek, when did you work at Order 2?

10   A. 1982 to '85 in the office, then my duty station was

11 changed when I was in graduate school at the University of

12 Florida, to University of Gainesville, Florida.

13   Q. Okay. So in terms of the function of Federal Orders

14 and their relationship to Class I, so do you recall the Order 2

15 was an Order that had grandfathered manufactured plants pooled

16 under the Order, do you remember that?

17   A. I do. I'm a little hazy on that history.

18   Q. Maybe I can help you out. Refresh your recollection a

19 little bit.

20   Grandfathered manufacturing plants in order to, such as

21 Hershey Chocolate Company for instance down in Hershey,

22 Pennsylvania, had pool status from late '40's or early '50's.

23 Does that ring a bell?

24   A. I have to say, you know, my job was to administer the

25 Cooperative payments provision sections when I first got there,

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1 and then I worked on some economic research papers. And so my

2 knowledge of those provisions is pretty minimal.

3   Q. Okay.

4   A. Other than having heard the term before.

5   Q. So you wouldn't know then, that under Order 2, the

6 manufacturing plants that were grandfathered didn't have to

7 ship any milk to the Order anytime in order to be pooled?

8   A. I was not aware of that.

9   Q. Okay. And are you aware today that Order 2, Order 1,

10 that Order 1 today, which is the successor to Order 2, you

11 agree with that?

12   A. I agree with that, expanded.

13   Q. Right. That it has the most inclusive mandatory

14 pooling in the Federal Order system. Are you aware of that?

15   A. Okay. I know it has the dairy farmers for other

16 markets provision. I realize that that is a provision that

17 will limit the depooling. I do not believe that if you are a

18 manufacturing plant receiving Grade A milk in, somewhere within

19 the marketing area, if you have never tried to pool your milk,

20 I don't think it requires that you be pooled.

21   Q. All right. I dont' --

22   A. That's my understanding.

23   Q. Right. Okay. But have you ever analyzed the pooling

24 of milk in the Northeastern United States?

25   A. I have not. I have looked at those provisions and I

1 have read those provisions, but I have not analyzed the pooling

2 of milk.

3   Q. So when you have made comments right now about

4 depooling and you know, whether milk has to be pooled and

5 whatever, you haven't analyzed whether the Northeastern United

6 States under Order 1, a very high percentage of the eligible

7 milk is pooled all the time, year-round, whether it ends up at

8 a nonpool plant or at a pool plant?

9   A. What you are describing in terms of high percentage of

10 the milk is pooled, sounds accurate, sounds like my

11 understanding, but I have not done an analysis of that. I have

12 looked at the provisions.

13   Q. Okay. But when it is pooled, it is the pooling handler

14 is accountable for the minimum class price on that pooled milk,

15 correct?

16   A. That would be my belief based on looking at those

17 provisions. But there, if they are pooled, they are

18 accountable at pool places.

19   Q. That's the way --

20   A. That's the way the Orders work.

21   Q. That's the way the Orders work?

22   A. Exactly.

23   Q. Okay. Thank you. Let me just switch gears a bit and

24 talk about your Table 2.

25   A. Yeah.

1   Q. Which is a table of bulk milk imported.

2   A. Yes, Table 2 in Exhibit 80, right?

3   Q. Yes, exhibit 80. Okay. Now, Table 2, if my math is

4 roughly correct, shows there's around 45 million or so pounds

5 of milk a month currently?

6   A. Coming into the state.

7   Q. Coming into the state, correct?

8   A. Correct.

9   Q. That is on priced milk, correct?

10   A. It is milk not subject to California pricing, that's

11 correct.

12   Q. Milk not subject to any regulatory minimum price,

13 correct?

14   A. As far as I know.

15   MR. ENGLISH: That may not be correct.

16   DR. SCHIEK: I don't really know. I don't really know. I

17 know that if it's coming in from outside the state, it is not

18 priced by California. That's what I know.

19 BY MR. BESHORE:

20   Q. Do you know anything more about this milk movement?

21   A. I do know that there are a couple of, and I think

22 Mr. Hollon testified to this, there's some established

23 relationships from Northern Nevada coming into California from

24 dairy farmers shipping from Northern Nevada into California. I

25 also know that there is an entity, I believe the farm in

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1 Southern Nevada, a fairly large dairy that ships to a plant

 2 that I believe is owned by the same entity that owns the

 3 farmer, that owns the farm in the Southern California.

 4   Q. Have you, did you look at CDFA with respect to the data

 5 it provides concerning where the milk has come from over the

 6 years and where it comes from currently?

 7   A. I did. I don't have that table in front of me right

 8 now, but did I look at that.

 9   Q. Did you --

10   A. Arizona and Nevada.

11   Q. Right.

12   A. Had the bulk of it.

13   Q. Right. And the major changes have been in the, in the

14 volumes from Arizona over the years? Did you observe that?

15   A. Yes, I think I did. Yes.

16   Q. Okay. And are you aware of changes in plant capacity

17 in Arizona over the years that may have some influence on that?

18   A. Changes in plant capacity?

19   Q. Additions to plant capacity in Arizona?

20   A. I'm not sure exactly what you are referring to. Are

21 you talking about a Class I plant capacity additions or --

22   Q. I'm talking about any, any plant capacity additions in

23 Arizona that may have affected this milk movements?

24   A. Yeah, I do know there was a plant built in Arizona in

25 the early 2000's, a fluid milk plant.

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1   Q. A fluid milk plant?

2   A. The one I'm thinking of was primarily a fluid milk

3 plant, my understanding.

4   Q. Are you aware of any manufacturing plant expansions or

5 constructions in Arizona?

6   A. No, not specifically.

7   Q. Okay. Now --

8   JUDGE CLIFTON: I really do not like interrupting this, I'd

9 really like you to be able to finish, but it is 5:01 and we

10 have got to stop.

11   MR. BESHORE: I'm not going to get done today.

12   JUDGE CLIFTON: All right. Well, then, Mr. Beshore, after

13 our announcements tomorrow morning, you may resume.

14   I'll see you all at the Piccadilly. We'll go on record

15 at 9:00. We're off record now at 5:01.

16   (Whereupon, the evening recess was taken.)

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