

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

IN RE: X DOCKET NOS. AO-368-832,
X AO-271-837, DA-03-04
PACIFIC NORTHWEST AND X HELD JANUARY 20, 2004
ARIZONA-LAS VEGAS X 8:30 A.M.
MARKETING AREAS X Embassy Suites Hotel
X 1900 Diagonal Road
X Alexandria, Virginia

VOLUME IX OF XI

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P R O C E E D I N G S8:40 a.m.

1
2
3 THE COURT: Today is January 20th, 2004, we're in
4 Alexandria, Virginia, and this is the ninth day of our
5 hearing in these milk orders, and I'll give you the official
6 number as soon as I figure out what I did with them.

7 My name is -- I'm Marc Hillson, I'm the
8 Administrative Law Judge, and one of the things I wanted to
9 say was that -- and this is more for the typist, who's going
10 to be typing the transcript, that this is a continuation of
11 a hearing that -- I looked on the internet, and the last
12 page that I saw was Page 2437, so that would -- I'll be
13 asking the person who transcribes this to begin with Page
14 2438.

15 Once again, I believe that the Department intends
16 to post the transcript for this case on the internet, and I
17 don't know how much I need to say that I haven't said
18 before. Once again, as I've said, I'm just here to keep
19 order, to rule on motions, to administer the oaths,
20 et cetera, but I'm not going to be making any decision in
21 this case.

22 I will read the -- it's Docket No. AO-368-832,
23 AO-271-837, and DA-03-04.

24 A couple preliminary things, preliminary matters.
25 I know I said I'd start the hearing at 9 o'clock, but the

1 notice came out at 8:30 and we're all here, so I guess
2 that's not really an issue, and I'll go from -- depending on
3 how it's going, I would say, 8:30 to 5:30 or so, but I'm
4 willing to go later, if people are wanting to go later, it's
5 not a problem for me, unless people are getting really wiped
6 out [phonetic] before the end of the day, which has tended
7 to happen after eight or nine or ten really intensive hours.

8 I plan to have a morning break, about 15 minutes.
9 I plan to have a decent lunch break.

10 Let me ask, Ms. Deskins, do you have any
11 additional exhibits? I know there's been at least one new
12 notice of this hearing in particular, and -- I think the
13 last month -- we were doing these -- I think the last time
14 we did this, it was an A, B, or C or D exhibit, I forgot how
15 I numbered these, it's been so long.

16 MS. DESKINS: I think they were numbered 1, 2, 3,
17 as I recall.

18 THE COURT: Okay. And --

19 MS. DESKINS: I think that's how we did them.

20 UNIDENTIFIED MALE: That's correct.

21 THE COURT: Yeah, I think I did -- I think that I
22 marked the new-notice exhibits as like B, C, and D,
23 something like that.

24 MS. DESKINS: Okay.

25 THE COURT: [Indiscernible.] So do you have --

1 UNIDENTIFIED MALE: Just -- they were the
2 reconvene notice was Number 28 -- 28 and 29, so that they --

3 THE COURT: Okay. So I think you numbered
4 [indiscernible].

5 UNIDENTIFIED MALE: Sequential.

6 THE COURT: Okay, then let's keep them that way.
7 Thank you for that. 45 was the last number I noted.

8 UNIDENTIFIED MALE: Yes.

9 UNIDENTIFIED MALE: Yes.

10 THE COURT: Okay. So do you have any exhibits
11 you want to give me?

12 MS. DESKINS: Yes, Judge. We have the notice of
13 what was published in the Federal Register about the
14 reconvened hearing, it's dated December 29th, 2003. I have
15 the press release, and I'm going to be getting a copy within
16 the hour of the certificate of mailing, so if I could give
17 you these two now, if we could reserve the number for the
18 certificate of mailing.

19 THE COURT: Should we just call them 46, 47, and
20 48, then?

21 MS. DESKINS: Right.

22 THE COURT: So 46 is the notice. What's 47, the
23 press release?

24 MS. DESKINS: Yes.

1 UNIDENTIFIED MALE: Yes.

2 THE COURT: And 48, which we don't have right
3 now, is the certificate of mailing.

4 MS. DESKINS: Certificate of mailing.

5 THE COURT: But we'll get that shortly.

6 (Exhibits Nos. 46, 47, and 48 were marked for
7 identification.)

8 THE COURT: Ms. [indiscernible], there was some
9 other exhibit I think that --

10 UNIDENTIFIED MALE: 48.

11 THE COURT: 48, yes, okay.

12 UNIDENTIFIED MALE: I have copies of that.

13 THE COURT: Okay. And who was that -- just
14 refresh my recollection.

15 UNIDENTIFIED MALE: It was a change in the table
16 by the testimony of Dan Morrison, and since we had his
17 testimony with the exhibit submitted, I think it's the
18 exhibit -- we have the whole thing, with just the
19 modifications on the other, so --

20 THE COURT: Okay. So I'm going to just call it--

21 MR. YALE: We called it 48.

22 THE COURT: We'll call it Exhibit 48, that's
23 fine. Mr. Beshore?

24 MR. BESHORE: Just a small procedural thing. I

1 noted in reviewing the transcript of the Seattle sessions
2 that since the record is being tape-recorded, as opposed to
3 it being taken stenographically, that when the tapes were
4 changed we missed a sentence or so, on more than one
5 occasion. So I think for everyone's benefit when the person
6 taking the record needs to change the tapes we need to stop
7 and make sure we're not losing any of the --

8 THE COURT: Okay. I asked the reporter in
9 Seattle, and he told me he had two machines going and that
10 he would tell us if we had to stop, and I relied on that.

11 MR. BESHORE: He may have, but --

12 THE COURT: And I'm going to rely on this
13 reporter too. Do you have a single tape, do you have two
14 tapes going, or --

15 COURT REPORTER: I have a machine that -- one
16 ends, the other one automatically starts, so no problem.

17 THE COURT: Okay. You'll have to -- if you think
18 there's any problem at all, you just wave at us to stop.

19 COURT REPORTER: Okay.

20 THE COURT: The other thing I'll ask you to do,
21 is I try, I really do try, to get people to identify
22 themselves every time they speak, and there will be a number
23 of different people speaking here and doing questioning, so
24 if you don't get what it is, if you just wave to them, I
25 find that they're very good at responding to that and will

1 then identify themselves.

2 Are there any other preliminary matters before we
3 -- ask Mr. Yale to call his next witness, anything else to
4 talk about at this point? Mr. Beshore?

5 MR. BESHORE: Mr. Mykrantz has predistributed
6 some updates to his exhibits by email, we received them
7 anyway, I'm sure that everyone did, so that at some point I
8 think he should be added to the witness list too, to present
9 those additional --

10 THE COURT: Okay. Any suggestion as to when he
11 should be called? I assume you have no --

12 MS. DESKINS: It's up to you, Judge Hillson, I
13 mean --

14 THE COURT: I don't care, I'm not making the
15 decision. In terms of the development of the record I mean,
16 do you want Mr. Mykrantz to come in, get his exhibits in,
17 and then turn it back over to Mr. Yale to call a witness?
18 How do you feel about that, Mr. Yale?

19 MR. YALE: I'm fine with Mr. Mykrantz going
20 first, that's fine.

21 THE COURT: Why don't you come on up here,
22 Mr. Mykrantz.

23 MS. DESKINS: And also, Mr. Mykrantz has some
24 extra copies of the exhibits in the back.

25 (Pause.)

1 THE COURT: I'll just remind you, I don't have --
2 the [indiscernible] is still good, it hasn't expired yet, so
3 I'll just let -- Ms. Deskins, are you going to ask Mykrantz
4 --

5 MS. DESKINS: Yes.

6 THE COURT: -- some questions to get these
7 documents in?

8 MS. DESKINS: Yes.

9 THE COURT: Okay.

10 MIKE MYKRANTZ, DEPARTMENT'S WITNESS, SWORN

11 DIRECT EXAMINATION

12 BY MS. DESKINS:

13 Q. Mr. Mykrantz, for the record, just identify who
14 you are.

15 A. My name is John Mykrantz spelled M-y-k-r-a-n-t-z.
16 I am a marketing specialist with the Pacific Northwest/
17 Western Arizona-Las Vegas order, which office is located in
18 Seattle, Washington.

19 Q. Mr. Mykrantz, you prepared some additional
20 exhibits for this hearing; correct?

21 A. I did.

22 Q. Can you tell us what you prepared.

23 A. I prepared three documents, one which is entitled
24 "Statistical material prepared at the request of Sydney
25 Berde January 2004"; a document entitled "Statistical

1 material prepared at the request of Douglas Marshall, Senior
2 Vice President, Northwest Dairy Association, 2004"; and one
3 final document, "Statistical material prepared at the
4 request of N. Douglas Marshall, Senior Vice President,
5 Northwest Dairy Association, December 2003."

6 MS. DESKINS: Judge Hillson, could we have these
7 marked right now so that there won't be any further
8 [indiscernible] --

9 THE COURT: That's what I was just going to ask
10 you. Okay, I'll just mark them in the order you identified
11 them, so the document that says "Sydney Berde, January of
12 2004," I'm marking as Exhibit 49; the one that says "Douglas
13 Marshall, January of 2004," I'm marking as Exhibit Number
14 50; and then the one that says "Douglas Marshall, December
15 2003," I'm marking as Exhibit Number 51.
16 (Exhibits Nos. 49 through 51 were marked.)

17 BY MS. DESKINS:

18 Q. Mr. Mykrantz, just to clarify, looking at Exhibit
19 49, when it says "January 2004," what does that refer to?

20 A. It represents the month on which we finished
21 putting together the request for information.

22 Q. Okay. It also has "Prepared at the request of
23 Sydney Berde." Can you tell us what that means.

24 A. Sydney Berde contacted Bill Wise [phonetic], of
25 our Phoenix office, and requested that Table 11 of Exhibit 5

1 be -- and 6 -- be updated, and that's what this table
2 represents.

3 Q. Now, in regards to Exhibit 49, did you prepare it
4 yourself or was it prepared under your direction?

5 A. All of this information was prepared under my
6 supervision.

7 Q. Have you had a chance to review it?

8 A. I have.

9 Q. Is it correct, to the best of your knowledge?

10 A. Yes, it is.

11 MS. DESKINS: All right. I'd like to move for
12 the admission of Exhibit 49.

13 THE COURT: Any objection to Exhibit 49 as being
14 admitted?

15 (No response.)

16 THE COURT: Okay, it's admitted into evidence.
17 (Exhibit No. 49 was received.)

18 BY MS. DESKINS:

19 Q. Now, in regards to Exhibit 50, it has on it,
20 again, January 2004; is that the date that you prepared
21 this?

22 A. It is the month which we finished its
23 preparation.

24 Q. And it says on here it was prepared for -- at the
25 request of Douglas Marshall?

1 A. Correct.

2 Q. In general, when you prepare these at someone's
3 request, does this reflect the position of the Department on
4 the proposals being considered at this hearing?

5 A. No, it does not. We are not here in support of
6 or in opposition to any proposals.

7 Q. Now, Exhibit Number 50, was that prepared under
8 your supervision or did you prepare it yourself?

9 A. It was prepared under my supervision.

10 Q. Have you had a chance to review the document?

11 A. Yes, I have.

12 Q. Is it correct, to the best of your knowledge?

13 A. Yes, it is.

14 Q. Okay, now, this one is an update of what had
15 previously been entered into the record as Exhibit 7?

16 A. Correct.

17 MS. DESKINS: I would move for the admission of
18 Exhibit 50.

19 THE COURT: Any objection?

20 (No response.)

21 THE COURT: Exhibit 50 is admitted into evidence.

22 (Exhibit No. 50 was received.)

23 BY MS. DESKINS:

24 Q. Now, the next exhibit is Exhibit 51. Can you
25 tell us again what "December 2003" means.

1 A. "December 2003" represents the month in which we
2 were asked to put together some information, and I guess it
3 was completed in January 2004. It's a little bit different
4 than the other documents.

5 Q. And also, in regards to this one, it says,
6 "Prepared at the request of Douglas Marshall." Does this
7 document represent any position of the Department?

8 A. No, it does not.

9 Q. And also if we could look at the table on the
10 second page, can you just briefly tell us what this is a
11 table of.

12 A. This table represents accounts of producers'
13 plants, divided into two categories: total and small, for
14 the Pacific Northwest quarter and the Arizona-Las Vegas
15 quarter.

16 I'd like to note that in the column headed
17 "producer-handler plants," the definition used to determine
18 the number of small operations is based on the volume of
19 milk produced by the producer-handler's dairy farm being
20 less than 500,000 pounds in June 2003, the decision to
21 define producer-handlers in this table as "small" using the
22 500,000-pound threshold of milk production and not the 500-
23 employee threshold described in Footnote 2, was mine, and
24 does not represent a statement of policy by or on behalf of
25 the USDA.

1 Q. Did the reason you make that determination, was
2 that to comply with Mr. Marshall's request?

3 A. Mr. Marshall, through Bill -- William Van Damme,
4 requested a table of small producers, and so I used that, I
5 used the producer definition for the producer-handlers.

6 Q. Now, have you had a chance to review Exhibit 51?

7 A. Yes, I have.

8 Q. On the back page of 51 it says "Pacific Northwest
9 Federal Order Number 124." Do you see that page?

10 A. I do.

11 Q. Can you just tell us what this is -- well, it's
12 two tables -- what those two tables are about.

13 A. For December of selected years we looked at
14 producer-handlers and 7(a) pool plants under the Pacific
15 Northwest order. For the producer-handlers we established
16 counts of producer-handlers who had less than a million
17 pounds of production and more than a million pounds of
18 production and we broke them into those two categories, and
19 over towards the right, we calculated average pounds by size
20 range.

21 So, for example, in the second column, where it
22 says "greater than 1 million pounds" --

23 Q. Uh-huh.

24 A. -- in 1990 there was five producer-handlers who
25 had operations of greater than 1 million pounds.

1 Correspondingly, to the right, in that same year, those
2 producer-handlers that had greater than 1 million pounds'
3 production, the average production was 2.228 million pounds.

4 Q. Is it million pounds a month or million pounds a
5 year?

6 A. Per month.

7 Q. Per month, okay.

8 A. In December of that year. And the same would be
9 true in the description for 7(a) pool plants, we are able to
10 break it into three categories: greater than 10 million
11 pounds, 4 million to 10 million pounds, and then less than 4
12 million pounds.

13 Q. Now, have you had a chance to review the
14 information that's in Exhibit Number 51?

15 A. Yes, I have.

16 Q. Is it correct, to the best of your knowledge?

17 A. Yes, it is.

18 MS. DESKINS: I'd like to move for the admission
19 of Exhibit 51.

20 THE COURT: Any objection?

21 MR. YALE: Your Honor, we would object pending an
22 opportunity to do some cross-examination.

23 THE COURT: Okay. Well, I'll just hold off on --
24 but I'll let you -- we'll have examination. He did prepare
25 -- I mean I'm going to end up letting it in because he said

1 it was prepared under his supervision. In terms of what
2 it's worth and the value of it --

3 MR. YALE: Well, there's -- if you would wait
4 until [indiscernible] cross-exam --

5 THE COURT: But I will wait, okay, that will be
6 my pleasure.

7 Okay, do you have any more questions,
8 Ms. Deskins, any more questions?

9 MS. DESKINS: No more questions.

10 THE COURT: Okay. Cross-examination?

11 MR. YALE: Yes, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. YALE:

14 Q. Good morning, John.

15 A. Good morning.

16 THE COURT: Please identify yourself.

17 MR. YALE: I'm sorry. Ben Yale on behalf of
18 Edaleen Dairy, Mallorie's Dairy, Smith Brothers Farms,
19 Select Milk Producers, and Continental Dairy Products.

20 Q. (By Mr. Yale) Now, Mr. Mykrantz, during -- I
21 know this has been a long time ago, this hearing -- you
22 know, months, but I think back in September you put into
23 Exhibit -- Exhibit 5, there was extensive cross-examination
24 and examination over what those tables meant, and I'm not
25 asking you to remember all the questions, but you remember

1 those discussions; right?

2 A. Somewhat.

3 Q. All right. My question is, is that: is there
4 any difference in your methodology in what these tables in
5 Exhibit -- what is now Exhibit 49, say anything different
6 than what the tables that we had in September, other than
7 you've added a couple of months' worth of data?

8 A. A couple of months. That's all that has changed,
9 we've added months to those tables.

10 Q. No changes in methodology.

11 A. No changes in methodology.

12 Q. No changes in the decisions on what went into one
13 column or what went into another.

14 A. Correct.

15 Q. So we'd be looking at apples to apples.

16 A. Yes.

17 Q. And that would be the case for both Exhibit 49
18 and 50; right?

19 A. Correct.

20 Q. So that if I look over here on Page 2 of Exhibit
21 49, if I look at November of 2003 and compare that to
22 November of 2002 for Class I and -- by producer-handlers,
23 the volume that the producer-handlers had in November in
24 total was 3 million plus less than it was in November of
25 2002; is that right?

1 A. A little bit over 3 million pounds.

2 Q. And then looking again into Exhibit Number 50 --
3 and again, this is just an update of Exhibit 7 from the
4 exhibit that was submitted in I believe September in
5 Phoenix; right?

6 A. Correct.

7 Q. -- and all that's changed is you've added data
8 that you received for months that have occurred since that
9 hearing or that session.

10 A. Correct.

11 Q. But no changes in methodology or anything else.

12 A. No.

13 Q. All right. So, again, I can look over here at
14 Page 2 of Exhibit 50 and that would indicate that for
15 November the producer-handler share in the Pacific Northwest
16 was 8.37 percent.

17 A. Correct.

18 Q. And also, moving over to the last page of that
19 exhibit, this indicates that in the state of Oregon, between
20 October and November -- or first of all between August and
21 September there was a loss of a producer-handler in Oregon?

22 A. (No response.)

23 Q. In Oregon. Went from 6 to 5 from August to
24 September?

1 A. I think that's Washington.

2 Q. I'm looking at the -- Page 4, and then there's --
3 let's just go through it. You've got, as I understand it,
4 three main sections: you've got Oregon, and you've got
5 Washington --

6 A. Correct.

7 Q. -- and you've got Oregon and Washington.

8 A. Uh-huh.

9 Q. And -- combined, and looking under the Oregon
10 section, as I see it, in August there were six producer-
11 handlers.

12 THE COURT: I think you're looking in the wrong
13 column, Mr. Yale.

14 A. That counts as for Washington.

15 MR. YALE: Okay, that's for Washington. I'm
16 sorry.

17 THE COURT: Yes.

18 MR. YALE: Thank you. That's what I'm trying to
19 clarify.

20 Q. (By Mr. Yale) Okay, so that's Washington, went
21 from six to five, and then went from five to four in October
22 to November.

23 A. Correct.

24 Q. All right. Can you identify the names of the
25 companies that are no longer producer-handlers.

1 A. I believe between August and September is Norman
2 Brook that went out of business.

3 Q. Okay.

4 A. And then from October to November Country Morning
5 Farms in Othello, Washington, burned down, their plant did.

6 Q. So that -- and has there been any changes in
7 those numbers since we -- since this November table, there's
8 been no changes in December or January that you're aware of?

9 A. We have not tabulated data for December as of
10 yet.

11 Q. So that would show that there are now a total of
12 seven producer-handlers in the Pacific Northwest.

13 A. Correct.

14 Q. Okay. Let's turn and look to Exhibit 51. In the
15 footnote number 1 of this exhibit, you identify the
16 definition of a small business in terms of a producer and as
17 -- also in terms of a plant; is that right?

18 A. Correct.

19 Q. Now, is this footnote the language, more or less,
20 that appears as part of the notice to this hearing, the
21 initial -- the original notice of holding this hearing?

22 A. I don't believe I made a direct comparison
23 between this footnote and that. It is a common description
24 that we use in generating information for dairy programs
25 with respect to the -- I believe it is the Regulatory

1 Flexibility Act.

2 Q. Okay. So when we come over here and we look at
3 this column called "pool producers," and I guess there's
4 three columns underneath that --

5 A. Yes.

6 Q. -- and it says that -- for example, in the
7 Pacific Northwest, that there are 574 small, is what you
8 have; right?

9 A. Correct.

10 Q. Now, does that mean, then, that those are 574
11 producers that have less than 500,000 pounds per month?

12 A. Correct.

13 Q. And when you provide the percentage here, this is
14 of the number of producers but not the volume that they
15 contribute to the order; is that right?

16 A. That would be correct.

17 Q. Do you have or did you ever compute what the
18 percentage of the milk would be?

19 A. I don't recall offhand that we've done that, but
20 we certainly could do that.

21 Q. How hard is that to do?

22 A. It would take a phone call and some Excel work.

23 Q. Spreadsheets are wonderful.

24 A. Yes, they are.

25 MR. YALE: We would make that request if it could

1 be done timely through the rest of this hearing.

2 Q. (By Mr. Yale) Now, moving over, we have fully-
3 regulated pool plants, and you've got 24, and then you've
4 got 11 that are small.

5 A. Correct.

6 Q. Now, these do not include any of the producer-
7 handlers; right?

8 A. By definition, they are not fully-regulated pool
9 plants.

10 Q. These are 7A plants?

11 A. 7A, 7B, 7C, 7D.

12 Q. Okay. And again, it says that there are 11 that
13 are small. Now, in determining that they were 11 small, is
14 it your understanding they have less than 500 employees?

15 A. Their operations have fewer than 500 employees,
16 yes.

17 Q. Does the market administrator get that
18 information?

19 A. We use our judgment, and we also contact the
20 handlers to determine whether they have 500 employees or
21 not.

22 Q. So -- but it has nothing to do with how big their
23 producers are; right?

24 A. (No response.)

25 Q. I mean that supply that plant. It has no

1 correlation; right?

2 A. There is no correlation.

3 Q. I mean, for example, they could have however few
4 it would take of the large producers over there in that
5 first section, to supply all their needs, and they could
6 receive all their milk from large producers, or not small,
7 as you define them, and they'd still be a small plant;
8 right?

9 A. Correct.

10 Q. And is that the same situation for the partially-
11 regulated pool plants?

12 A. That would be true also.

13 Q. All right. Now -- and the exempt plants, same
14 situation?

15 A. That would be true also.

16 Q. And non-pool plants.

17 A. That would be true also.

18 Q. So let's now talk about the producer-handler
19 plants, and you indicate -- first of all, this is as of June
20 of last year and it's not as of November; right?

21 A. That is correct.

22 Q. So we're talking about nine and not seven.

23 A. Correct.

24 Q. Okay. And you indicate that there are two small
25 producer-handler plants; right?

1 A. Correct.

2 Q. And are you saying, in the same way that you did
3 for the fully-regulated, the partially-regulated, the
4 exempt, and the other non-pool plants, that when one sees
5 that there are two small producer-handler plants, there are
6 only two producer-handler plants that have fewer than 500
7 employees?

8 A. As I said in my previous testimony -- and I may
9 add: the notation of producer-handler plants, it may be
10 better to have that column "producer-handlers." And with
11 respect to producer-handlers, we determined -- we
12 categorized the small producer-handlers as those with less
13 than 500,000 pounds of milk production.

14 Q. Because you -- when you look at a producer-
15 handler, this is within your agency, within your department,
16 right, that that's how you categorize them routinely?

17 A. That's how I categorized them for this table.

18 Q. Were you requested to categorize them that way by
19 Mr. Van Damme or Mr. Marshall?

20 A. As I said earlier, Mr. Van Damme requested a
21 breakdown of small producers.

22 Q. Okay. So let's come back, though, that this is
23 -- that you have a label as producer-handler plants; right?

24 A. Right.

25 Q. And also over here you have this thing of "total

1 plants"; is that correct?

2 A. Correct.

3 Q. And one can take the eleven fully-regulated, the
4 three partially-regulated, the two producer-handler plants,
5 the one exempt, these are under the "small," and the 24, and
6 that equals the 41?

7 (Pause.)

8 A. Yes.

9 Q. Okay. So if -- as producers, because they
10 produce more than 500,000 pounds, you're saying that these
11 producer-handlers would qualify as a large producer under
12 the definition of the Department; is that right?

13 A. (No response.)

14 Q. At the farm level.

15 A. Could you repeat that?

16 Q. Yeah, I'd be happy to. Is the -- what you're
17 saying is that this number 2 -- one way of -- the real way
18 to speak to this is, is to say if you look at the size of
19 the farm operation of the producer-handlers and the volume
20 of milk that they produce -- right? -- that they have more
21 than 500,000 pounds of milk per month.

22 A. Correct.

23 Q. Or the two have less than 500,000.

24 A. Correct.

25 Q. All right. But you cannot say by looking at this

1 that these two plants have -- or that seven of these plants
2 have more than 500 employees at the plant; right?

3 A. No, you could not.

4 Q. Now, if you were to designate for producer-
5 handler plants the number of producer-handler plants that
6 have more than 500 employees, how many would remain -- how
7 many small plants would you then have?

8 A. I believe it would be zero, for the Pacific
9 Northwest order. I'm not as familiar with the Arizona-
10 Las Vegas order, but I believe that would be zero also.

11 Q. And therefore, then, the number of total plants
12 that were small would then be 39, right, for the Order 124?

13 A. Correct.

14 Q. Based upon your testimony, are you willing to
15 modify the exhibit to reflect both the fact that the
16 producer-handler plants as listed in here should be zero as
17 small and that the reflection of this testimony that you
18 have as printed really refers to the size of their farms?

19 (Pause.)

20 A. Yes.

21 Q. Now, I'd like to turn our attention to the second
22 page of this exhibit, a little simpler questions. When you
23 talk about average pounds by size range, are we talking
24 about Class I usage or total receipts of the plants?

25 A. We're speaking of -- the table contains

1 information on Class I route dispositions.

2 Q. And that's all it is.

3 A. Correct.

4 Q. And does that route -- that excludes plant-to-
5 plant transfers?

6 A. Yes, it does. I guess if product was transferred
7 from one plant to another and then went out on routes, the
8 second plant would have those routes in this data.

9 Q. What about transfers to an out-of-area, non-
10 federally-regulated route distribution plant: it would be a
11 non-pool plant under the order, but would that be included?

12 A. This is total route dispositions, not route
13 dispositions defined within an order area.

14 MR. YALE: I have no other questions. Thank you,
15 Your Honor.

16 THE COURT: Okay. Is your objection continuing
17 or can I admit Exhibit 51 at this point?

18 MR. YALE: Amended as -- I'm not going to -- I'll
19 withdraw it as long as the -- his testimony to his
20 amendments are part of that.

21 THE COURT: Obviously it is.

22 MR. YALE: Yes, right.

23 THE COURT: So I'm going to admit Exhibit 51.
24 (Exhibit No. 51 was received.)

25 THE COURT: Mr. Ricciardi, do you have questions

1 of the witness?

2 MR. RICCIARDI: A couple, Judge. Thanks.

3 Al Ricciardi, on behalf of Sarah Farms.

4 CROSS-EXAMINATION

5 BY MR. RICCIARDI:

6 Q. Good morning, Mr. Mykrantz.

7 A. Good morning.

8 Q. In the original notice, which is marked as
9 Exhibit 1, under the supplementary information, there's an
10 indication that the milk order program is subject to the
11 Regulatory Flexibility Act, and for purposes of that act,
12 there's a definition of a dairy farm as a small business if
13 it has an annual gross revenue of less than \$750,000;
14 correct?

15 A. If the --

16 Q. If that -- that's what it says.

17 A. -- it says.

18 Q. Yeah. And a dairy products manufacturer is a
19 small business if it has fewer than 500 employees; right?

20 A. I wouldn't argue with that, no.

21 Q. All right. Now, with regard to -- so I
22 understand it, with regard to Exhibit Number 51, the first
23 table, particularly footnote 1, what you actually did was,
24 in preparing this table, you changed the definitions that I
25 just talked about from Exhibit 1 under the Act, at the

1 request of Mr. Marshall or Mr. Van Damme; correct?

2 MR. BESHORE: I object to that, Your Honor. It
3 mischaracterizes his testimony.

4 THE COURT: Well, why don't you try to answer
5 that question and characterize your -- I don't mean to
6 characterize --

7 MS. DESKINS: Just for the record, that was
8 Mr. Beshore that testified.

9 THE COURT: Thank you for that.

10 THE WITNESS: Could you repeat the question?

11 THE COURT: He's asking you why don't you explain
12 why your definition is different than the supplemental
13 notice. Would it help if you had the supplemental notice in
14 front of you? Is it Page -- we're talking about forty six
15 five oh six, is that what it is? Does that sound right to
16 you?

17 MR. RICCIARDI: It sounds right, Judge. I just
18 handed it back. Forty six five oh six, right.

19 A. Mr. Van Damme requested that the information be
20 defined on a producer basis, not on a plant basis.

21 Q. (By Mr. Ricciardi) And if a request had been
22 made to you without that type of a definition from
23 Mr. Van Damme, would the table be different?

24 A. I really couldn't say, because we weren't asked
25 the other way.

1 Q. Essentially, this table is the way it is because
2 of the limitations provided to you by Mr. Van Damme;
3 correct?

4 A. He asked for it on a producer basis.

5 MR. RICCIARDI: Nothing further. Thanks.

6 THE COURT: Questions on the proponents' side?
7 You can go ahead, Mr. Beshore.

8 MR. BESHORE: Marvin Beshore, for Dairy Farmers
9 of America.

10 CROSS-EXAMINATION

11 BY MR. BESHORE:

12 Q. Mr. Mykrantz, with respect to Exhibit 51, the
13 second page, if you look at the -- or the second table I
14 guess I should say, the first step, information set, number
15 of plants by size range, calling your attention to 2002 --
16 well, looking down the "greater than 1 million" column,
17 which is the first column, there's a reduction from five to
18 four from 2000 to 2002. Do you see that?

19 A. Yes, I do.

20 Q. Is it possible and do you know whether one of the
21 producer-handlers that was greater than 1 million in 2000
22 had less than 1 million pounds in route disposition in
23 December of 2002 and appears in the "less than 1 million"
24 column?

25 A. Could you repeat that?

1 Q. Yes. There's a reduction in the number of
2 producer-handlers with route disposition greater than
3 1 million pounds between 2000 and 2002, and these are the
4 month of December in each year; correct?

5 A. Correct.

6 Q. Okay. There were five in the year 2000 and four
7 in the year 2002. I'm -- my question is, is it possible
8 that that is not -- that reflects the fact that one of those
9 same producer-handlers had less than 1 million pounds of
10 route disposition in December of 2002 as opposed to: just
11 went out of business?

12 (Pause.)

13 A. I don't recall offhand.

14 Q. Now, let's look at the bottom part of the same
15 page here, Pacific Northwest order 7A plants, and in 2002 -
16 - by the way, 7A plants are fully-regulated plants, full
17 plants, under the order.

18 A. They are fully-regulated plants.

19 Q. Okay. And by "fully-regulated," they pay the --
20 at least the minimum class prices for all of their
21 utilization of producer milk.

22 A. Correct.

23 Q. All their Class I dispositions which are
24 reflected on -- on this chart, Exhibit 51, they've paid at
25 least the Class I price for those poundages of Class I milk;

1 correct?

2 A. Correct.

3 Q. If you look at -- there were three fully-
4 regulated 7A plants with less than 4 million pounds of Class
5 I route dispositions in December of 2002; correct?

6 A. Correct.

7 Q. Now, if you assume with me for a moment that the
8 information you've previously placed in the record shows
9 that the three largest producer-handlers in the Pacific
10 Northwest averaged 4.7 million pounds of Class I route
11 disposition per month, would it be correct that those fully-
12 regulated handlers' accounting at Class I prices were
13 smaller, on average, than the three largest producer-
14 handlers?

15 A. I guess that would be true.

16 Q. And there are nine fully-regulated handlers in
17 the Pacific Northwest order and between 4 million and
18 10 million pounds of Class I per month; is that correct?

19 A. Nine 7A plants?

20 Q. Nine 7A plants, excuse me.

21 A. Yes.

22 Q. By the way, how many -- maybe it's on this table
23 or another table. The 7B, C, and D plants, how many of
24 those do you have?

25 A. Under the Pacific Northwest order -- it depends

1 on the year and the month. I believe we have no 7B plants
2 and at some time in the past there may have been 7C plants
3 also. Two examples would be Farmers Cooperative Creamery
4 and Tillamook County Creamery Association, and no -- we
5 didn't have 7D plants until January of 2003.

6 Q. Okay. 7A plants are basically your distributing
7 plants under the order.

8 A. Pool-distributing plants.

9 Q. Pool-distributing plants. So you had nine pool-
10 distributing plants in the 4 million to 10 million Class I
11 sales per month for December 2002; correct?

12 A. Correct.

13 Q. And if -- would it be fair to infer that it's
14 possible locally that some of those were below the 4.7
15 million figure and that that is the average producer-handler
16 size of the three largest producer-handlers?

17 A. Could you repeat that?

18 Q. Is it possible that some of those nine handlers
19 were less than -- were in the 4 million to 5 million range?

20 A. That's possible.

21 Q. And where the average of those 4 to 10 million
22 was -- of the nine plants was 6.8 million, as shown on
23 Exhibit 51; is that correct?

24 A. 6.857, yes.

25 Q. Now, if the largest producer-handler and the

1 owner is approximately at that level of Class I sales, they
2 would then be larger than the three producer-handler --
3 three fully-regulated plants that were less than 4 million
4 and at the average size for nine additional fully-regulated
5 plants; correct?

6 A. I guess if you're saying -- if what you're saying
7 about the producer-handler size is true, that would be true
8 also.

9 (Pause.)

10 MR. BESHORE: Thank you.

11 THE COURT: Any further questions of this
12 witness? Ms. Deskins.

13 MS. DESKINS: Charlene Deskins, United States
14 Department of Agriculture, Office of General Counsel.

15 REDIRECT EXAMINATION

16 BY MS. DESKINS:

17 Q. Mr. Mykrantz, I just want to clarify on Exhibit
18 51. The Department doesn't have a definition of what a
19 small producer-handler is or a large producer-handler;
20 correct?

21 A. We get asked by dairy programs to put together
22 information for purposes of the Regulatory Flexibility Act,
23 that has asked us to put producer-handlers into the small
24 versus large category based on the 500,000-pound limit.

25 Q. For the "small business" definitions; correct?

1 A. Correct.

2 Q. Okay. And with this chart, you're not trying to
3 say the Department has taken any position on what small
4 producer-handlers are or large producer-handlers are?

5 A. No, I am not.

6 Q. You were just responding to a request that you
7 produce this table based on a certain definition they gave
8 you.

9 A. Yes.

10 MS. DESKINS: I have no further questions.

11 THE COURT: Mr. Yale, you have a question?

12 MR. YALE: I have a follow-up.

13 Ben Yale.

14 RECROSS-EXAMINATION

15 BY MR. YALE:

16 Q. Mr. Mykrantz, I want to follow up with what
17 Ms. Deskins just asked and I want to make sure I understand
18 it. Are you saying that the Department determines the
19 producer-handlers who have more than 500,000 pounds of milk
20 production, that they view those as large businesses, under
21 the Regulatory Flexibility Act?

22 A. I don't know what dairy programs uses those
23 numbers for; we simply put them together based on the
24 instructions.

25 Q. So when you send information to dairy programs,

1 you are not informing them that, as plants, that they're
2 smaller than 500 employees; right?

3 A. We were not asked to put the numbers together in
4 that manner, no.

5 Q. By dairy programs?

6 A. Correct.

7 Q. So if I have a -- you had a line of questions
8 here by Mr. Beshore of plants that are less than 4 million
9 pounds and some 4 to 10 million; right?

10 A. Correct.

11 Q. All right. So if you have a plant in the state
12 of Washington that's -- a 7A plant that's 5 million pounds,
13 you would -- unless it's associated with some other larger
14 enterprise, it would probably be a small business; right?

15 A. Just based on their volume I couldn't determine
16 that.

17 Q. But I mean your experience. I mean, do you know
18 of any 5-million-pound plants that are -- by themselves,
19 individual single-plant enterprises, that are not small
20 businesses, that have about 5 million pounds' production?

21 A. I can't think of any offhand, no.

22 Q. So for the moment -- bear with me a second --
23 let's assume that that plant is a small business, you've
24 determined it has less than 500 employees, and you would
25 report that to dairy programs as a small business; right?

1 A. If it had fewer than 500 employees, that would
2 be.

3 Q. But a producer-handler with 5 million pounds of
4 route distribution, with less than 500 employees in the
5 plant -- by the way, do you have -- I think you've testified
6 that if you looked at the employees, all the producer-
7 handlers in the Pacific Northwest would be small businesses.
8 Right? Just based on size of producers -- or size of --
9 number of employees.

10 A. I don't recall us ever surveying producer-
11 handlers to determine if they have 500 employees. We are
12 asked to put small producer-handlers in the -- or put
13 producer-handlers in the small category based on their milk
14 production.

15 Q. Now, let's -- let me take it to another step,
16 then. Under two of the proposals submitted in this hearing
17 -- I mean, you're aware of the proposals before the
18 Secretary; right?

19 A. I'm aware of them, yes.

20 Q. And two of those are suggesting that if a
21 producer-handler has more than 3 million pounds of milk in
22 Class I during the month, that they would be treated as a 7A
23 plant and have to pay into the pool and receive the -- you
24 know, for their classified milk and receive back a blend;
25 right?

1 A. Correct.

2 Q. All right. Now, is that regulation on their
3 Class I sales -- been based upon their plant operations and
4 sales or is it based upon their farm production?

5 A. To my understanding, it's based on their plant
6 sales.

7 Q. So do you have any knowledge whether dairy
8 programs, in doing its Regulatory Flexibility Act analysis
9 of these proposals, is going to view the impact of those
10 proposals on those operations as producers or as plants?

11 A. I don't know.

12 MR. YALE: I don't have anything else.

13 MR. RICCIARDI: Al Ricciardi for Sarah Farms.

14 RECROSS-EXAMINATION

15 BY MR. RICCIARDI:

16 Q. Mr. Mykrantz, Exhibit 51 again, table number 1, I
17 guess, under Federal Order Number 131, the category of
18 producer-handlers, plants, you've got a total of two listed
19 there and one as small; correct?

20 A. Correct.

21 Q. And what did you do to define what producer-
22 handler was a small plant?

23 MR. ENGLISH: Asked and answered, this is Charles
24 English, for Shamrock; this is the fifth or sixth time he's
25 been asked to go through this analysis, and we're going to

1 hear the same answer for the sixth time.

2 THE COURT: I'm going to let him answer the
3 question.

4 MR. ENGLISH: We've been an hour on this exhibit.

5 THE COURT: You can answer the question.

6 A. As I said earlier, the column entitled "producer-
7 handler plants" might be better described just as "producer-
8 handlers," and to -- I guess we use the 500,000-pound
9 threshold as the dividing line between what we can -- what
10 we would count as small versus large.

11 Q. (By Mr. Ricciardi) And you did not use the
12 500-employee threshold to determine whether or not it was
13 small versus large; correct?

14 A. No.

15 Q. Do you know, if you had used that particular
16 threshold, whether both of the producer-handlers would be in
17 the "small" category, on this table?

18 A. I'd have to research that question.

19 Q. You never looked at that?

20 A. I guess we did not prepare that -- prepare this
21 table with that in mind, no.

22 Q. If you were to assume now for purposes of your
23 testimony at this moment that in fact the producer-handlers
24 in Order 131, both of them, had less than 500 employees,
25 then both of them would be categorized as "small" on this

1 table; correct?

2 A. If we use -- I'd have to do some research on --
3 determining that.

4 Q. I understand, and I ask you to make the
5 assumption, and I realize that you don't have that
6 information in front of you, but if you assume that both of
7 the producer-handlers had less than 500 employees
8 collectively, then in this table both would be categorized
9 as small; correct?

10 A. This table defines producer-handlers on their --
11 on the basis of their farm milk production.

12 Q. I understand, and I've asked you to change that
13 and instead look at the number of employees, and if you did
14 that, then they both would be defined as small. Correct?

15 A. If you're saying they're both small, then they
16 would be both small.

17 MR. RICCIARDI: Correct. I guess that's the way
18 we do things here. That's fine, Judge, thanks.

19 THE COURT: Go ahead, Mr. Beshore.

20 RECROSS-EXAMINATION

21 BY MR. BESHORE:

22 Q. Mr. Mykrantz, with -- on the first table of
23 Exhibit 51, did anyone instruct you how to classify exempt
24 plants? As large or small.

25 A. According to the footnote, if an exempt plant was

1 part of a larger entity, say a university or charity or some
2 other operation, that -- where the larger entity had more
3 than 500 employees, we would put that in -- we would not
4 consider that as small.

5 Q. Okay. And I understand that's how you have --
6 how you have presented the information, what your table
7 shows. My question was: Did Mr. Van Damme instruct you to
8 segregate or classify exempt plans in that way?

9 A. No, he did not.

10 Q. Okay. That was a matter of judgment that you
11 made or it was made by the Department --

12 A. It was a matter of judgment.

13 Q. Okay. And if you look at the Washington State
14 Creamery, for instance, they -- if they weren't an exempt
15 plant -- by the way, the definition of "exempt plant" is
16 what, less than 150,000 per month, of volume?

17 A. Correct.

18 Q. Okay. Now, if they -- so you have a large --
19 you've classified Washington State University Creamery as a
20 large exempt plant even though its volume is less than
21 150,000 pounds per month; correct?

22 A. Correct.

23 Q. And you did that because, as an employer, it has
24 more than 500 employees; correct?

25 A. Washington State University has more than 500

1 employees, yes.

2 Q. Okay. And that was done, as you've testified, on
3 the basis of your judgment; correct?

4 A. Correct.

5 Q. And if you were using that -- your own
6 independent judgment, applying that same principle that if
7 it's a large -- for either test, it's large, you're applying
8 the same principle to producer-handlers that were large at
9 the producer level, you'd classify them as large also, would
10 you not, applying the same principle?

11 One would, I would say, one would. If one
12 applied the same principle, that if you're large for either
13 test you're large, you'd classify producer-handlers that are
14 large at the producer level as large.

15 A. I don't think I would go that far. I would say
16 if we had instructions to define it that way, that's the way
17 we would label it.

18 Q. But I'm not instructing you; I'm just asking you
19 a question. If the test you were applying was: if you're
20 large on either end you would be considered large, or not
21 small, then, if a producer-handler is not small on the
22 producer side, even if it's small on the handler side, it
23 would be: not small, would it not?

24 A. I guess I don't feel comfortable going into the
25 specifics of what I would do. Maybe we'd leave it to the

1 secretary?

2 MR. BESHORE: Thank you.

3 THE COURT: Mr. Berde, you have questions, go
4 ahead.

5 MR. BERDE: Sydney Berde for United Dairymen.

6 REXCROSS-EXAMINATION

7 BY MR. BERDE:

8 Q. In the course of your testimony I think you
9 indicated that on Exhibit 51 the column "producer-handler
10 plants" would more properly be described as "producer-
11 handler," eliminating the word "plants." Is that correct?

12 A. Correct.

13 Q. In that case, then, any producer-handler whose
14 dollar volume, production, was over 750,000 per year, or who
15 marketed more than 500,000 pounds per month, would not be a
16 small business, would it?

17 A. No, it would not.

18 MR. BERDE: Thank you.

19 THE COURT: Anyone else? Mr. Ricciardi, go
20 ahead.

21 MR. RICCIARDI: A follow-up, Judge, based upon
22 the last question, I have a concern.

23 FURTHER REXCROSS-EXAMINATION

24 BY MR. RICCIARDI:

25 Q. On Exhibit 51, with regard to Federal Order

1 Number 131, during the period of time that is represented by
2 this table, how many producer-handlers were in Order 131?

3 A. In June 2003?

4 Q. Yes.

5 A. I believe it was two.

6 Q. And if there are less than three is the
7 information that is provided to the Department confidential?

8 A. Oftentimes when we break categories down into
9 indefinite ranges we will publish a number that represents
10 fewer than three handlers.

11 Q. So in reality part of Exhibit 51 doesn't
12 represent an indefinite range, it represents at least a
13 definite range, because it makes assumptions as to how much
14 milk production per month; correct?

15 A. Maybe I misspoke on the "indefinite." It does
16 provide a threshold below which you could determine the
17 volume or -- or have an -- you'd get an idea of the volume
18 of that producer-handler, for example.

19 Q. And therefore Exhibit 51, in reality, with regard
20 to Federal Order 131, would be in violation of the
21 Department's policy with regard to providing information
22 concerning producer-handlers; correct?

23 MS. DESKINS: Your Honor, I'm going to object to
24 that. This witness wouldn't be in a position to --

25 THE COURT: Well, I don't know that. He can

1 answer for himself, and if he can't answer it, then we'll
2 let you talk about it.

3 Answer that question, if you know the answer,
4 Mr. Mykrantz.

5 THE WITNESS: Could you repeat the question?

6 MR. RICCIARDI: Can you read it back to us?

7 THE COURT: We don't have -- we have a tape --

8 MR. RICCIARDI: I forgot, Judge. I apologize.

9 Q. (By Mr. Ricciardi) What I asked specifically
10 was: Then Exhibit 51, at least as it relates to 131, would
11 be in violation of the Department's policy because it would
12 provide specific information regarding volumes concerning
13 Exhibit -- Order 131; correct?

14 A. I do not believe so.

15 MR. RICCIARDI: Nothing further.

16 THE COURT: Anyone else?

17 (No response.)

18 THE COURT: You may step down, Mr. Mykrantz.

19 (Witness excused.)

20 THE COURT: We'll take a break now. Let's come
21 back at 10 o'clock.

22 (Off the record and reconvened.)

23 THE COURT: On the record. Mr. Yale, call your
24 witness, please.

25 MR. YALE: Yes. Call Mr. Joe Albright.

1 THE COURT: Mr. Albright, I hope you like our new
2 seating arrangement; it's a lot safer than the last one.

3 (Laughter.)

4 THE COURT: If you'd please raise your right hand
5 I'll swear you in.

6 W. JOE ALBRIGHT, OPPONENTS' WITNESS, SWORN

7 THE COURT: If you would please state and then
8 spell your name for the record.

9 THE WITNESS: My name is W. Joe Albright,
10 A-l-b-r-i-g-h-t.

11 THE COURT: Okay, your witness, Mr. Yale.

12 MR. YALE: Thank you, Your Honor.

13 DIRECT EXAMINATION

14 BY MR. YALE:

15 Q. Mr. Albright, where are you currently living?

16 A. I reside at 2000 Williams Drive, Sulphur,
17 Oklahoma, 73086.

18 Q. And what are you currently doing?

19 A. I'm raising horses and I'm raising hay. All the
20 cows -- I'm back to where the cows were, I was raised on a
21 dairy farm, and I'm back to the same farm; the cows are gone
22 and I've got horses.

23 Q. Now, prior to this hay and horses you were
24 involved in the dairy industry; is that right?

25 A. (Nods head) Since I was six years old.

1 Q. All right.

2 A. Milking cows by hand.

3 Q. And what -- can you kind of give us a brief
4 excursion through your life, particularly in the area of the
5 dairy interests and your employment --

6 A. Well, during World War II, the war took all my
7 older brothers and I basically ran the dairy farm through
8 high school; then I drafted into the Navy; and then out of
9 the Navy I went to -- got my degree in business, business --
10 B.A. degree. In '49 I began working with the Central
11 Oklahoma Milk Producers Association as a milk tester and
12 going to night school to finish my degree.

13 Then when the new federal milk order came into
14 Oklahoma City, I was hired there as a milk tester. Then I
15 was an auditor, and I had a two-year break for the Korean
16 conflict, I got drafted twice, and after that I was an
17 officer, and then I went to several places, I went to
18 Nebraska, I went to Utah, I went to Denver, assistant market
19 administrator.

20 Then I spent six years in Washington, D.C., in
21 the order enforcement branch of the dairy division, where I
22 worked hand in hand with the attorneys office to enforce
23 federal milk orders.

24 Then I went to Rochester, Minnesota, as an
25 assistant again, and to Denver as an assistant, and as an

1 acting in Denver. The last 22 years of my career was spent
2 in Phoenix, Arizona, as market administrator.

3 I retired January 1998, six years ago, and since
4 that time I've been inactive.

5 Q. Just raising horses and raising hay.

6 A. That's it.

7 Q. I want to ask you a couple background questions,
8 then I want to get into some of the meat of your position in
9 this hearing. First off, do you know what the primary
10 issues are as part of this hearing?

11 A. Well, as I understand it, the intent is to fully
12 regulate under the practicing [phonetic] provisions any
13 producer-handler for which any month it has route
14 dispositions in excess of 3 million pounds.

15 Q. And on those producer-handlers that would be so
16 regulated, what is the impact, as you understand it? I mean
17 what changes for them?

18 A. Well, they'd be subject to the practicing
19 provisions and their milk would be subject to pooling, under
20 the pool, with all the other regulated handlers, and then
21 they draw out of the pool, the blend, for their production,
22 pay into Class I for Class I use and draw out the difference
23 [phonetic] between blend and 1 -- I mean pay in the
24 difference between blend and 1 for the Class I utilization
25 and draw out between a blend and a class -- a lower-class

1 utilization.

2 And if their total Class I utilization exceeded
3 the market-wide, then their net would be a minus from the
4 pool.

5 Q. In other words, they would end up paying money
6 in, more than they got back.

7 A. Right. They wouldn't get anything back at all;
8 they'd just pay in.

9 Q. Okay. Now, based upon your experience and
10 knowledge within the market administrator's office, what do
11 you understand the policy or the goal of the Agricultural
12 Marketing Agreement Act to be?

13 A. Well, the Secretary was told by Congress to
14 establish orderly marketing and to set minimum prices and
15 protect the interests of the consumer, and basically that's
16 it, set a price to produce that will ensure a certain
17 percent of parity, where they make money.

18 Q. So how does the Secretary protect the interests
19 of the consumer?

20 A. Well, Congress told him to keep the prices
21 reasonable but have the prices to the dairy farmers at a
22 level that would ensure an adequate supply of pure wholesome
23 milk year-round but not let the price get excessive, where
24 the consumer could obtain milk at a reasonable price.

25 Q. And under the current situation, is that public

1 interest being served, to your knowledge, or belief?

2 A. Well, there's conflict in regards to an adequate
3 supply of milk.

4 Q. And what's that conflict?

5 A. Well, we're getting a little bit on base here.
6 The Dairy Production Stabilization Act of 1983, it reduced
7 the blend price to producers, they just took 15 cents off
8 the blend price for generic advertising of fluid milk and
9 cheese, and I have a table here that shows the money spent
10 for generic advertising, fluid milk, and for cheese for 20
11 years, 1983 through 2002. It was prepared by Todd M.
12 Schmit, S-c-h-m-i-t, or Cornell University on October 2,
13 2003.

14 Let me get down here, I've got some percentages
15 here.

16 (Pause.)

17 Well, I better go by memory. I think the first
18 year, 1983, the total money spent for generic advertising
19 was about 81 percent for class -- for cheese and 19 percent
20 for fluid.

21 The last two years, 2001 and 2002, two-thirds
22 each year of the money was spent for cheese promotion and
23 one-third for fluid milk promotion, but for the 40 -- for a
24 20-year period there was a 43 percent for cheese and 57
25 percent for fluid milk. So this encouraged production of

1 more milk for cheese.

2 When I was in California, at the dairy forum, I
3 was invited over there last month to discuss the industry
4 problems, and I asked the attendants why would a fluid milk
5 producer want to give up 15 cents per hundredweight each
6 month to advertise cheese.

7 MR. BESHORE: Your Honor, at this point I'd like
8 to interpose an objection. We're not litigating the 15-cent
9 assessment on producers for generic promotion in this forum.
10 I really -- Mr. Yale asked for this, you know, description
11 of the effect of the '83 Act in generic promotion. I don't
12 see what it has to do with this proceeding at all. I hate
13 to interrupt Mr. Albright, but -- he's certainly
14 knowledgeable about many things in the industry, but this
15 has nothing to do with the proceeding. Mr. Yale is
16 litigating the issue elsewhere --

17 MR. YALE: No, I'm not litigating it anywhere.

18 THE COURT: Okay, let me ask, Mr. Yale -- go
19 ahead, Mr. Yale, what's your response?

20 MR. YALE: First of all, I'm not litigating the
21 issue anywhere.

22 Secondly, the issue with Mr. Albright: A) --

23 If they would be patient, we're getting there.
24 This is an important part of his testimony, and this is
25 background.

1 We're not litigating the promotion, we're not
2 asking the Secretary to do that, but I will note that they
3 have in their proponents' testimony on numerous occasions
4 referenced provisions out of the milk fluid promotion and
5 the dairy promotion as support of their position of
6 3 million pounds and others.

7 So it's not, you know -- it's already been in the
8 record, but I -- you know, give us some point [sic.] and
9 you'll see how this ties up, but I mean --

10 THE COURT: And if it's background to --

11 MR. YALE: Yeah, it's background.

12 THE COURT: -- points that are part of the actual
13 litigation, then -- it's far easier to --

14 MR. YALE: It's not -- and there is no litigation
15 that I'm involved in, that's going on, so it has nothing to
16 do with that whatsoever.

17 THE COURT: Well, whatever you -- this
18 rulemaking, whatever you want to call it, this here thing
19 that we're going through, if it's --

20 MR. YALE: Oh, this.

21 THE COURT: Yeah.

22 MR. YALE: Yeah. This is --

23 THE COURT: We're talking about, you know --

24 MR. YALE: This hearing.

25 THE COURT: We have issues that are supposed to

1 be decided at this hearing --

2 MR. YALE: And that's exactly where we're going.

3 THE COURT: -- and if where he's going is going
4 to get us there sooner rather than later --

5 MR. YALE: Right.

6 THE COURT: -- then that would be good.

7 MR. YALE: It may not be the way Mr. Beshore
8 would like to see it --

9 THE COURT: Well, it's -- he's your witness --

10 MR. YALE: Right.

11 THE COURT: -- so you just go right ahead.

12 MR. YALE: Okay. Very well.

13 Q. (By Mr. Yale) We were talking about: that you
14 saw, as I recall, Mr. Albright -- there was -- you were
15 talking about the fact that the promotion was now starting
16 to spend more money towards the promotion of cheese as
17 opposed to fluid milk, and so the question comes down to:

18 Is it your understanding, under the AMAA, that
19 the Secretary is obligated to supply a sufficient supply of
20 cheese or is it to supply a sufficient supply of fluid milk?

21 A. He's to minimize application of manufactured
22 milk, that's in the Act, and he's told to set a price
23 that'll ensure an adequate supply but not a surplus supply,
24 just an adequate supply, on a year-round basis. That's what
25 the Agricultural Marketing Agreement Act says specifically.

1 Q. So you indicated earlier that there was a -- kind
2 of a conflict that was going on between the AMA and the way
3 things are. Could you explain what that conflict is.

4 A. Well, the Dairy Promotion Stabilization Act of
5 1983 provides that each producer have 15 cents per
6 hundredweight deducted from its check to pay for generic
7 advertising for fluid milk and for cheese. That's, to my
8 thinking, in conflict with the adequacy as asked for in the
9 Agricultural Marketing Agreement Act of 1935 and -7,
10 et cetera, et cetera.

11 Q. I'm not trying to put words -- I want to ask this
12 question so that I can make sure we're clear. What you're
13 saying is: it's your understanding under the AMAA that the
14 Secretary is obligated to supply an adequate supply of
15 beverage milk and drinkable milk but not manufactured milk.

16 A. Not manufactured milk because of -- milk to
17 babies and children is a vital product to the American
18 public, and that's what the whole Act was about: to be sure
19 of an adequate supply of fluid milk only.

20 Q. Okay. So let's move on, then, and let's -- let's
21 discuss --

22 A. No, I want to tell you about this story --

23 Q. Oh, I'm sorry; we were interrupted. Thank you.

24 A. -- in California. I was invited over there to
25 discuss -- I was a market administrator for Phoenix for

1 several years, so I guess that's why I got the invite, it
2 was last month.

3 So I asked the question of why would a fluid milk
4 producer want to give up fif- -- 25 -- 15 cents a month to
5 advertise cheese, and I was told -- and of course they were
6 unquard- -- weren't on guard, they were not in a hearing or
7 anything, they said, Well, the fluid milk was saturated and
8 the producers wanted to expand. I said, Well, is all this
9 milk going to cheese, is that being produced as a reserve
10 for fluid milk or is it being produced for cheese, and it
11 came back: "Cheese."

12 And then the question came up about termination
13 of the Western order and the discussion was, "Where is that
14 cheese milk going?" Well --

15 MS. DESKINS: Your Honor, at this point I think
16 we're going to have to object to it being beyond the scope
17 of the Notice. I mean, the Western order and that
18 relationship to fluid milk, I don't think that's relevant.

19 THE WITNESS: It's relevant in regard to what is
20 reserved for fluid use.

21 THE COURT: Go ahead. Mr. English has a
22 question.

23 MR. ENGLISH: Your Honor, Charles English, for
24 Shamrock and Dean Foods.

25 A little belatedly on the last two, I think I see

1 where we're going with the third one, which is: in each
2 question there is some unnamed source whose testimony is now
3 coming in as pure hearsay, and while hearsay can get in in
4 certain circumstances in these proceedings, we don't even
5 know the names of the people who said those, we don't know
6 the circumstances, it's unguarded --

7 THE WITNESS: I can tell you -- I can tell you
8 the names.

9 MR. ENGLISH: -- but it is -- it is hearsay being
10 put into this record for propositions that have nothing to
11 do with this hearing, and it's so far beyond the scope of
12 where we are and where we're going, and I just -- I think
13 that we are somewhat deliberately going far afield to deal
14 with issues that have nothing to do with this proceeding,
15 and I agree with Ms. Deskins' objection as well.

16 THE COURT: Mr. Yale, we do seem to be getting a
17 little bit off the issues that we have here, I mean I just -
18 - if you could focus your witness a little bit and get on
19 these issues --

20 MR. YALE: We'll try to --

21 THE COURT: I mean, in terms of the hearsay, you
22 know, the Secretary is capable of -- you know, I'm pretty
23 well -- I'm letting -- I've been letting in a lot of stuff
24 on both sides here, and at this point, you know, I'm not
25 going to knock something off because it's hearsay. I mean,

1 you know, the Secretary can give evidence the weight that
2 she thinks it's due. But if we can get a little more
3 focused here, we might move along --

4 MR. YALE: I'm trying to get there, and -- but
5 let me -- I want to speak to Ms. Deskins' objection.

6 We are not challenging the Secretary's decision
7 on the Western order, and if you give me -- and I -- give me
8 some patience, but I'm going to get this point across, and
9 it all ties together, trust me, and -- it all comes
10 together. So let me run a few questions and see where we
11 go.

12 Q. (By Mr. Yale) Mr. Albright, you talk about a
13 reserve supply. Okay? Now, in the federal orders we have -
14 - and what we're talking about here with these producer-
15 handlers is milk that's gone into beverage use; right?

16 A. That's right.

17 Q. All right. And you've testified that the purpose
18 of the Act is to supply a sufficient quantity of that to the
19 consuming price at a reasonable price; right?

20 A. At a reasonable price (nods head).

21 Q. All right. Now, you mentioned in your discussion
22 about the California and the Western order this issue of
23 reserve supply. What is a reserve supply?

24 A. It's milk that's produced in excess of Class I
25 needs, in case of an accident or in case of some other

1 mishap, just so there'll be some milk to back up any milk
2 that's needed for fluid consumption of the public, it's more
3 or less backup milk in case of -- you know, anything could
4 happen on a farm or somewhere where milk might be short, but
5 there'll be enough reserve to make up that temporary
6 shortage.

7 Q. So that there's always a supply of milk for Class
8 I use; right?

9 A. That's right.

10 Q. All right. Now, you mentioned cheese milk.
11 What's the difference between cheese milk and reserve
12 supply?

13 A. Well, I think the proponents contend that all
14 milk produced is either used for Class I or reserved for
15 fluid use. When I say "Class I" I mean fluid use.

16 Q. Right.

17 A. But when they spend money and when they want to
18 expand for cheese, that means that cheese milk is not being
19 produced as a reserve for Class I. So we don't know today,
20 have any idea, what the reserve supply is for fluid use.

21 Q. Based upon your experience with the market
22 administrator's office in the Central Arizona order, you
23 were familiar with the statistics and the numbers that were
24 there, right, in terms of production and class --

25 A. Well, it's been six years. I'll try what I can.

1 Q. I'm not asking: specific numbers.

2 And you've seen and heard testimony about some of
3 the numbers since then in those orders that have been
4 submitted at this hearing; right?

5 A. I've heard some of it.

6 Q. Yeah. You've been --

7 A. Not all of it. Some.

8 Q. But you've attended all seven sessions --

9 A. No, I've missed -- I've probably been in about
10 half or more of it.

11 Q. Okay. Now -- but I want to ask this question
12 based upon -- we'll do it with the Central Arizona when you
13 were there, but in your opinion -- well, first of all:

14 We have this milk, that's pooled milk; right?
15 This is milk that producers get a blended price for; right?

16 A. That's right.

17 Q. All right. So there's a size to that pool, how
18 much milk is qualified to receive that blend; right?

19 A. Right.

20 Q. All right. Now, based upon your testimony, that
21 you've talked about the reserve supply and the cheese milk
22 and the Class I usage, is there milk -- first of all:

23 In that pool, in that milk that is pool milk in
24 Arizona, there's milk that goes into Class I handlers;
25 right?

1 A. Yes.

2 Q. All right. And based upon your earlier
3 discussion of the reserve supply -- is there a reserve
4 supply of milk in Arizona, to meet that need?

5 A. Adequate and more.

6 Q. Okay. And is -- if you took all of the milk that
7 goes into Class I and what you believe to be adequate for
8 the reserve supply, is there additional milk that is being
9 used, that is being pooled, that is not going into the Class
10 I or as a necessary reserve for that Class I?

11 A. You know, that's -- in the minds of the dairy
12 farmer: did he expand based on Class I or did he expand
13 because the cheese market? -- and, you know, I think it's
14 pretty obvious but -- where the increased production was
15 increased for the purpose of.

16 Q. And it was not for the Class I; right?

17 A. I don't think it was for the reserve of Class I.

18 Q. All right. Now, let's bring this to the issue of
19 producer-handlers, and producer-handlers, do they have a
20 reserve supply for their milk?

21 A. If they're smart they do. It's hard to keep
22 their customer -- they'd have to have a reserve supply or
23 otherwise they couldn't serve the customers.

24 Q. And how does the maintenance of that reserve
25 supply enter into their status in not being subject to the

1 minimum pricing and pooling under the federal orders?

2 A. Well, that reserve supply cannot receive any
3 price under the federal order program, it cannot be pooled,
4 it's left completely out of the pool, and they're left to
5 get what price they're able to get for that reserve milk,
6 and it hasn't been a concern to us, what prices they get.

7 Q. Now, do you have an opinion as to whether or not
8 the producer-handlers are taking on an equal share of their
9 reserve supply as compared to other Class I plants that are
10 fully regulated?

11 A. I couldn't answer that question. It just depends
12 on how much cheese milk's out there and how much other
13 milk's being produced based on the support price and the
14 cheese price, so I -- I would presume -- the assumption was,
15 when producer-handlers were exempt, in '35, 1935, there's
16 testimony in the record that says that that market at the
17 time, of '35, the producer-handlers Class I was 50 percent
18 of the market. I guess I've lost the question, tell me the
19 question --

20 Q. Okay. What I want to come back to is the reserve
21 supply. You know, in the Arizona order, you know,
22 approximately 20 percent of the milk goes into Class I, does
23 that sound about right?

24 A. I don't know. It's way down there somewhere.

25 Q. Okay. Now, if -- when you talk about -- you just

1 mentioned that the producers in -- you know, there were 50
2 percent that were producer-handlers and they were -- they
3 represented 50 percent of the Class I and they were
4 balancing their milk. Right?

5 A. Uh-huh.

6 Q. So when you talk about balancing the milk, the
7 volume of milk that they had to balance, okay, do they -- do
8 you need to look at -- or are you suggesting to the
9 Secretary they need to look at all of the milk in the order,
10 including this milk that's going to the cheese milk, or do
11 they need to look at -- to whether they're just balancing
12 enough of their reserve supply so that they can meet their
13 customer needs?

14 A. Well, in '35 the assumption was that the other --
15 the market had the same reserve as the producer-handlers
16 had, and I'd have to presume that same assumption is on
17 today, that the real reserve for fluid needs for the other -
18 - for the whole market is equal to what the producer-
19 handlers' reserve is. That's the assumption since '35, and
20 I presume it's -- continues.

21 Q. And the rest of the milk that is being pooled is
22 being used for purposes other than meeting the adequate
23 supply of beverage milk; is that right?

24 A. Well, yes, and whatever -- it's advantageous --
25 cheese milk, quote unquote "cheese milk," is left out of the

1 pool, and when it's advantageous to put it back into the
2 pool -- and in both situations it lowers the blend price.

3 And also there's a give-up deal, there's riding
4 of the pool, all kinds of situations, you can ride the pool,
5 you bring the producers in and -- associated with a pool
6 plant, one day's delivery, they used to divert forever
7 [phonetic].

8 And then there's a give-up charge it's called,
9 when Florida and the southern part of the state need milk,
10 in shortage in the falls especially, they call on the
11 Midwest cheese plants for this milk to go down to where it's
12 needed for fluid use, and the cheese plant says -- I've
13 heard, and I don't think it's hearsay -- that that milk is
14 for our plant for our cheese and if we have to give it up
15 we're going to have a give-up charge and -- there's four of
16 them in California and one person set the give-up charge
17 amount at sometimes over 4 dollars a hundredweight.

18 Q. Now, let's take this discussion another step. I
19 think you indicated earlier on that the purpose of the
20 federal orders, the AMAA, was to promote orderly marketing.
21 Right?

22 A. Orderly marketing and ensure an adequate supply
23 of milk, being in the public interest.

24 Q. Okay. So how do you understand that the
25 Secretary is to maintain orderly marketing?

1 A. Well, obtain orderly marketing is simply to keep
2 an adequate supply of pure wholesome milk available on a
3 year-round basis. That would be orderly marketing.

4 Q. And again, this is dealing with the milk
5 available to the bottling -- or the beverage -- or the --
6 beverage milk; is that right, is your understanding?

7 A. Yeah, bottling fluid, fluids, yes.

8 Q. All right. Now, in this area -- you know, you
9 talk about maintaining "orderly" -- what do you see as a
10 disorderly marketing condition?

11 A. Well, go back before the federal milk orders,
12 there were strikes, there were rifle firing [phonetic] in
13 the milk tanks, there were price wars, or in the fall, being
14 short of milk and having to go out to a farmer and say,
15 "I'll give you free hauling if you'll switch from the
16 processor and come to me." Then at spring flush he'd cut
17 him off because of having too much milk. And then in the
18 spring some processors might have too much milk so they
19 would -- and in order to get rid of it and not have to cut a
20 farmer off, they would cut the price, to get more sales, and
21 pretty soon you got a price war going on among handlers, and
22 that was disorderly marketing.

23 And under the orderly marketing, of the
24 Secretary, one of the policies was that any milk order that
25 would come about, that would come out of the handlers'

1 pocket rather than out of the producers' pocket, so there's
2 no more price wars.

3 Q. Based upon what you understand is going on today
4 in these orders, do you see any sign of any disorderly
5 marketing?

6 A. I haven't seen any sign.

7 Q. Okay.

8 A. Now, go back to Kansas City in '35, when 50
9 percent of the milk, Class I use, was producer-handlers. If
10 that would have resulted in disorderly marketing, the
11 Secretary wouldn't have exempted those producer-handlers
12 from full regulation. So the criteria is: an adequate
13 supply. That's -- if you don't have an adequate -- there
14 have been hearings addressing situations where milk
15 supplying a local area has dried up because of drought, or
16 potential to dry up, and so there's been emergency hearings
17 to increase the Class I price, to encourage the producers to
18 produce more feed and get more milk, to offset the drought.

19 Q. Now, you mentioned this issue of these price wars
20 and competition between handlers for sales. What role does
21 the market administrator or the Secretary have regarding the
22 competition of handlers for milk sales?

23 A. Well, the Secretary has authority from Congress
24 to regulate unfair competition and unfair trade practice,
25 but I'm going to read you something here, okay, I'll get it

1 out of this --

2 (Pause.)

3 The Milk Industry Foundation in 1992 issued a
4 series of legal -- what's called Legal Series, and I'll read
5 the first paragraph:

6 "The Legal Reference Series" -- and this is the
7 first -- this is talking about the -- there's about six or
8 seven volumes. Other volumes critique the Agriculture
9 decisions and court cases.

10 But in -- this has a preface to that, and it
11 says: The Legal Reference Series is the first compilation
12 in the 30-year history of the federal milk marketing order
13 program whereby all of the important legal references are
14 available in a single source, document.

15 It represents a mammoth task, first authorized by
16 the Board of the Milk Industry Foundation over five years
17 ago. The document includes a complete annotated copy of the
18 Agricultural Marketing Agreement Act of 1937, as it is now
19 amended, and the Rules and Regulations governing the
20 administrative procedures applicable to amending federal
21 orders.

22 Now, on Part 4, entitled "Legislative History and
23 Comment," on Page 81, it states, and I'll just read from a
24 page here, it reads:

25 "Authority to prohibit unfair methods of

1 competition and unfair trade practices have been construed
2 by the Department as pertinent to the milk order only within
3 the context of producer pricing.

4 "Several proposals for the employment of this
5 particular provision have been submitted, but none have gone
6 to hearing. Refusal of hearing have been made on the ground
7 that the practice involved must be shown to be directly
8 pertinent to producer pricing and not one turning on the
9 pricing of milk at retail.

10 "This construction is believed to have been
11 influenced also by the earlier action of Congress in
12 withholding approval of resale price fixing."

13 Q. So to your knowledge, has the Secretary -- you've
14 read from that, but in your own knowledge, in your, what,
15 almost 40, 50 years with the federal orders, are you aware
16 of any time at which the Secretary has exercised any
17 authority on competition between handlers in their wholesale
18 or retail sales?

19 A. He has not chose to put that in the federal milk
20 order since '35.

21 Q. Now, in that same line, as a market
22 administrator, did -- you audited plants; right?

23 A. Oh, I was an auditor for a number of years.

24 Q. Right. And then as a market administrator and
25 assistant marketing -- you supervised and audited those

1 plants; right?

2 A. Yes.

3 Q. Okay. And you gathered a lot of information from
4 those audits; right?

5 A. Oh, yes.

6 Q. And then in fact some of the statistics that
7 Mr. Mykrantz and others have shown are the result of those
8 audits and that collection --

9 A. Reports and audits.

10 Q. Reports and audits. The purpose of the audits is
11 to make sure the reports are accurate; right?

12 A. Right. Right.

13 Q. Okay. Now, during this period of time in which
14 you have done this auditing of these reports, have you ever
15 audited the prices that plants sell the milk for, to
16 wholesale or retail?

17 A. No -- the short answer is no, but -- but -- we'd
18 want to know that the price somehow was reasonable with the
19 volume, because we're concerned that the volume's correct,
20 not that the price between a processor and a customer is
21 correct but that the volume that goes to the customer is
22 correct.

23 Q. You would look at the gross sales just to make
24 sure that they've accounted for all the -- classified and
25 accounted for all their milk sales?

1 A. Yes. We want to be sure the dispositions are
2 correct.

3 Q. And your concern was more in terms of the higher
4 prices that would be sold as opposed to the lower?

5 A. Say that again.

6 Q. Your concern would be in terms of seemingly
7 higher prices as opposed to lower, because it might suggest
8 milk that wasn't fully reported?

9 A. Well, if the price was, say, double what it
10 should be, I'd say, well, you must have sold more milk than
11 you reported and I'd look into that very carefully, I'd go
12 to interview employees and check some more detailed records,
13 maybe go question a customer, because the marketing
14 administrator had investigative power, so I'd be -- I want
15 to be dang sure that the volume and the price was equal --
16 was reasonable. But if it's high or low, I don't care.

17 Q. Right. And you didn't keep track of the prices
18 that the plant sold milk for.

19 A. No, no, no.

20 Q. All right. And as a market administrator, were
21 you concerned and check into situations in which there was a
22 shift in supply of milk between one competitor and another?

23 A. Was I concerned?

24 Q. Yes.

25 A. No, we don't have anything to do about who -- how

1 to buy milk, where, when, and wherever he wants to, we --
2 that's not our concern. This order [phonetic] reports where
3 he gets it and how he uses it.

4 Q. Did you have any concern whether or not a
5 regulated handler was selling milk at a price less than what
6 its raw milk cost and processing cost was?

7 A. That doesn't come into our regulatory program.

8 Q. Now -- so --

9 A. I guess I shouldn't say the -- not "ours"
10 anymore, I'm retired, but --

11 Q. Yeah.

12 A. -- you know what I mean.

13 Q. You're not aware of any changes since you
14 retired, on that issue, though, are you?

15 A. I'm sorry?

16 Q. You're not aware of any changes --

17 A. No.

18 Q. -- since --

19 A. No.

20 Q. Now, we were talking -- I asked you a question
21 about, you know, moving account to account. Is there an
22 interest -- no, withdraw that.

23 So the Secretary, in terms of this public
24 interest you talked about, does not have an interest in
25 terms of the competition at the retail or the wholesale

1 level for this milk; is that your understanding?

2 A. No, we have nothing to do with competition.

3 Q. Now, there are some provisions -- I think there's
4 been some discussion in terms of the Secretary
5 interpretation of the Act and exempting producer-handlers, I
6 think you're aware of those -- that testimony. Right?

7 A. Yes.

8 Q. All right. Are there any other provisions in the
9 Act that suggest that producer-handlers should not be
10 subject to the pricing regulations?

11 A. Well, you go to Section 7 under the Act, I can
12 quote from our agreement back, Section 7, U.S.C.
13 608(c)(5)(k) of the Act.

14 Q. Okay.

15 A. Now, here's what it provides. It provides that
16 milk produced by certain persons -- and they're talking
17 about the Georgia deal years ago when some foreign-owned
18 company wanted to come in and produce milk, this was put in
19 during that period of time.

20 It provides that milk produced by certain persons
21 shall -- and here's a quote, here's the quote: shall be
22 treated as other-source milk and shall be allocated as milk
23 received from producer-handlers for the purposes of
24 classifying producer milk.

25 Now, anybody that runs a federal order pool would

1 understand that the intent here that producer-handlers' milk
2 is not priced.

3 Q. And then if adopting -- let's take that another
4 step further, that if the Secretary were to adopt provisions
5 that would take producer-handlers and cause their milk to be
6 subject to minimum prices, that that could undermine the
7 effect of that provision?

8 A. I think that provision would have to be amended.

9 Q. Okay.

10 (Pause.)

11 MR. YALE: I've just got one more topic to
12 address and then I'll be done with this witness.

13 THE COURT: Okay.

14 (Pause.)

15 Q. (By Mr. Yale) Mr. Albright, you're aware, are
16 you not, that there is a provision in the Arizona order that
17 provides that if a producer-handler supplies a customer with
18 milk of the same product and the same size and a similar
19 label during the month that -- I mean that -- he in a sense
20 is prohibited from doing that. Are you aware of that
21 provision?

22 A. Well, they'll lose their exemption. There's no
23 prohibition about anything.

24 Q. Okay.

25 A. If they do certain things, they just lose their

1 exemption and become pool.

2 Q. But you're aware of that provision.

3 A. Yes. Yes --

4 Q. It was after you left, though; right?

5 A. Right.

6 Q. Okay. What's your understanding, though, of the
7 purpose of that provision? How would you --

8 A. It's to prevent a producer-handler to let some
9 other processor help him carry his reserve.

10 Q. So as long as --

11 A. Or "its reserve." You're not supposed to use
12 "his" or "hers" anymore (chuckling).

13 Q. Right. So if the producer-handler is not using
14 another handler to handle its reserve supply, then that's in
15 compliance with that provision; is that your understanding?

16 A. If he's not relying on -- that's right.

17 MR. YALE: Thank you, Your Honor. I have no
18 other questions.

19 THE COURT: Any other questions for this witness?
20 Mr. English, step on up.

21 CROSS-EXAMINATION

22 BY MR. ENGLISH:

23 Q. Good morning, Mr. Albright.

24 A. Good morning. Or afternoon, I guess, morning.

25 MR. ENGLISH: Charles English, for Shamrock

1 Foods.

2 Q. (By Mr. English) Let me sort of start where you
3 ended and work my way in different directions here.

4 It's not necessarily the case, with respect to
5 the same product and similar -- or same size, similar label,
6 that you're relying on another handler, or a handler is
7 relying on a producer-handler; isn't it the case, sir, that
8 it could be a retailer, purchasing, though, from a producer-
9 handler, until that producer-handler can no longer supply
10 the milk for that period, or how much they need, and then
11 that retailer goes and relies on the regulated handler to
12 get the remaining supply?

13 A. It'd be the same effect.

14 Q. Yeah.

15 A. I mean, it'd be getting reserve from another
16 processor.

17 Q. And in the end, as you say, the same effect is
18 that the burden has been now placed upon the regulated
19 market to provide the balancing for that product --

20 A. That's right.

21 Q. -- correct?

22 A. That's right.

23 Q. And talking -- speaking of 7 U.S.C. 608(c)(5)(k),
24 you would agree that that provision is put in, as you
25 yourself said, for a specific problem involving a foreign-

1 owned entity; correct?

2 A. Right.

3 Q. And that the effect, as opposed to what you said,
4 that this shows that there's no charge to the producer-
5 handler, the effect of that is that under those
6 circumstances, milk received, under the statutory provision,
7 from such an entity, because it's treated as other-source
8 milk, results in a charge to the regulated handler that
9 purchases that milk, because it's treated as other-source
10 milk and that pushes other milk out --

11 A. If it goes into Class I, if it's used for fluid
12 use it will get charged, otherwise there would be no charge.

13 Q. Well, but let's say it goes into a lower-class
14 use; does that not mean the remaining milk of the regulated
15 handler has been pushed up into, let's say, Class I, whereas
16 before, some of it was not Class I and it will pay more for
17 that milk to the pool as a result?

18 A. Try me again.

19 Q. Let's take a simple example of, you know, a
20 thousand hundredweight --

21 A. Okay.

22 Q. -- and 990 hundredweight are in Class I --

23 A. Okay.

24 Q. -- and 10 hundredweight are in class 4.

25 A. Okay. All right.

1 Q. It's a Class I operation. And let's say the
2 plant purchases from a producer-handler --

3 A. Uh-huh.

4 Q. -- 10 pounds.

5 A. Okay.

6 Q. That's going to be class 4; correct?

7 A. He --

8 Q. It's going to be allocated other-source milk and
9 it's going to be --

10 A. You mean it doesn't --

11 Q. -- subtracted --

12 A. It's not in 10, he just gets that --

13 Q. Yes.

14 A. -- 10 from a producer-handler, some other source?

15 Q. That's right.

16 A. So it's not -- producer milk and 10 producer-
17 handler milk.

18 Q. That's correct.

19 A. Okay, all right. Right, I'm with you.

20 Q. It's a slight change to my example but I'll take
21 the change. Now, the 10 pounds, that's other-source milk,
22 results in the 90 pounds of producer milk being all Class I;
23 correct?

24 A. Yes.

25 Q. And that results in a charge to the handler on

1 that 90 pounds of milk at all Class I; correct?

2 A. Well, he pays the Class I price for it, is
3 producing milk in Class I, but the fact that they can
4 produce 100, I don't see --

5 Q. You don't think it results in --

6 A. -- change in the obligations --

7 Q. Okay, but you agree that if any of it's allocated
8 to Class I it's going to result in a charge?

9 A. If producer-handler milk gets into Class I,
10 there's a charge, but it's not the Class I price.

11 Q. But you agree there can be a charge.

12 A. If it -- if producer-handler milk gets into Class
13 I, there'll be a charge to the procedure who brought the
14 milk and put it into Class I.

15 Q. So at least you agree that on some sort -- that
16 at least under one circumstance, that there are
17 circumstances in which milk from producer-handlers ends up
18 being charged.

19 A. As other-source milk.

20 Q. But does result in a charge to the handler who
21 purchased the milk; correct?

22 A. Yeah, because the assumption is that he bought
23 that milk at class 3 price or lower price and use it at a
24 higher price.

25 Q. Now, any --

1 A. But I don't -- I don't understand the
2 significance of it.

3 Q. Let me take you to your point that somehow this
4 provision would have to be amended. Is it your
5 understanding that if the proposals from proponents are
6 adopted, that there would no longer be producer-handlers?

7 A. Oh, yes. You'd have pool producer-handlers and
8 you'd have unrated producer-handlers.

9 Q. Well, no, is it --

10 A. They'd all be producer-handlers. You're not
11 going to change the spots on a leopard, he's going to be a
12 producer-handler --

13 Q. Isn't it the case --

14 A. He's going to be a producer-handler whether it's
15 pool or not.

16 Q. Well, but for purposes of regulation, they will
17 no longer be -- if the proposals are adopted, an entity that
18 is presently a producer-handler, that has, say, 8 million
19 pounds --

20 A. Uh-huh.

21 Q. -- would no longer meet the definition of being a
22 producer-handler; right?

23 A. He'd be called a pool handler.

24 Q. That's correct.

25 A. Right.

1 Q. But there would still be, according to the
2 exhibit we just saw, Exhibit 51, producer-handlers; correct?

3 A. I don't know about the exhibit, I can't talk to
4 that.

5 Q. Well, we know from the exhibit that there would
6 be entities that have less than 500,000 pounds, which by
7 definition is less than 3 million pounds, which by
8 definition means they're not affected by this provision;
9 correct?

10 A. That's right, if it's less than 3 million.

11 Q. And so those entities would still be producer-
12 handlers; correct?

13 A. They'd be exempt producer-handlers, yes.

14 Q. Correct. And so the provision 7, U.S.C.F
15 608(c)(5)(k), would make perfect sense with reference to
16 those entities; correct?

17 A. Well, I -- I don't know what the Department calls
18 a producer-handler if it's pool.

19 Q. Well, if you read the proposals, do they not --
20 and you've said you've been here for half the hearing, does
21 it mean that they're no longer called producer-handlers?

22 A. But the point of it is, Mr. English, that
23 Congress, in putting that provision in, probably intended
24 that producer-handlers not be regulated.

25 Q. And you conclude that simply from the language

1 you -- or if you go back and look at the provision --

2 A. I didn't go back and look at anything --

3 Q. So you didn't go back and look --

4 A. -- because my resources are limited, I don't have
5 access to anything anymore.

6 Q. So we'd have to rely on what Congress actually
7 said about that --

8 A. That's right.

9 Q. -- correct?

10 A. That's right.

11 Q. And the fact that producer-handlers over time
12 have, in some circumstances, become regulated; correct?

13 A. If they misstep.

14 Q. Well, but under your construction, they can't
15 misstep because Congress has said they can't be regulated;
16 correct?

17 A. Well, if they buy milk from unauthorized sources
18 and things of that nature, they'll lose their exemption.

19 Q. And they lose their exemption because they're no
20 longer defined as a producer-handler; correct?

21 A. Well, I presume you're right, I concede you that
22 point.

23 Q. Thank you. Now, you -- this next question I
24 think was more -- I either misheard or perhaps you misspoke.
25 You were referencing the milk industry document --

1 A. Uh-huh.

2 Q. -- and I thought I heard you say 1992.

3 A. '72.

4 Q. 1972. Thank you.

5 A. Copies of those are in each market
6 administrator's office.

7 Q. But it's not been updated since 1972, has it?

8 A. Not to my knowledge.

9 Q. It hasn't been updated factually, it hasn't been
10 updated legally, and it certainly hasn't been updated based
11 upon changes in the marketplace; correct?

12 A. That's right.

13 Q. You referenced the Kansas City producer-handlers
14 and that they were not a disruptive or disorderly marketing
15 condition and you reached some conclusions about that.
16 Based upon what you've read about the Kansas City history
17 back in the 1950s, isn't it true that not one, not one, of
18 the producer-handlers that was exempted in the 1950s in
19 Kansas City would fall under regulation based upon this
20 pound limit?

21 A. Oh, I'm pretty sure (chuckling) -- pretty sure
22 it's -- you're telling the truth. In fact, back in those
23 days, most of the farmers, back in those days, their mode of
24 transportation was horse and wagon, so they didn't have very
25 many cows.

1 Q. Precisely, sir. A couple questions about reserve
2 supply. Since you've traveled recently to California, and
3 since you've certainly in your time have studied some of
4 these issues: when milk from, say, Arizona or Nevada moves
5 into California, do you have an understanding as to how it
6 is effectively priced under the California system?

7 A. Let me think. I know it would be -- it wouldn't
8 be quota milk, it wouldn't be quota milk --

9 Q. It's not quota milk but does not effectively
10 receive a credit, and the fact of the matter is, the credit
11 to the handler is what the producer receives; correct? The
12 handler receiving that milk --

13 A. In California?

14 Q. -- in California receives a credit. We'll talk
15 about what that credit level is in a moment.

16 A. A credit? I don't understand -- you mean under
17 the California law?

18 Q. Under the California provisions. You've studied
19 them, you've talked about them with them. You were just out
20 there.

21 A. Well, I know that if a handler, A, gets his
22 receipts from an out-of-state producer, then original that
23 milk wasn't priced, as I recollect.

24 Q. Well, okay.

25 A. But --

1 Q. But that was before 1997; correct?

2 A. Yeah, it was before -- and then, you know, after
3 1997, I've lost -- I'm lost.

4 Q. All right. So you don't know what can happen to
5 Arizona milk and how it might be priced in California today;
6 correct?

7 A. No, I really don't. I really don't.

8 Q. Okay. I think I heard you saying -- and let me
9 see if I can recharacterize it and get it right, I'm not
10 trying to recharacterize it wrong --

11 A. Sure.

12 Q. -- that you're talking about the market reserve
13 and reserve milk, and I thought what you were saying is that
14 in your opinion, the federal order market reserves that have
15 resulted in recent years are too large for actual Class I
16 needs.

17 A. Oh, absolutely.

18 Q. Isn't that a criticism of general pooling rules,
19 as opposed to treatment of producer-handlers?

20 A. I think that's the fault of producers that want
21 to expand, and Congress, going along with the producers, put
22 in this advertising promotion that helped increase
23 production for cheese, and that increased more milk
24 production, and -- which obviously wasn't, in my opinion,
25 produced for reserve for fluid use.

1 Q. But sir, haven't we, since federal order reform
2 effective January 1, 2000, had no fewer than six
3 proceedings, not counting this one, that have to do with
4 pooling provisions?

5 A. Yeah, but I -- you're gonna lose me on this
6 reform, because I --

7 Q. All right.

8 A. -- I retired before that went into effect.

9 Q. But you understand enough to know that there has
10 been some criticism of federal order reform as to how the
11 pooling provisions actually work; correct?

12 A. I know what a local producer told me, he told me,
13 after this reform went in, he used to understand how milk
14 was priced but he does not understand it anymore, and I'm
15 kind of in his light, I don't understand, really, all this
16 stuff.

17 Q. Well, I mean you've -- you've talked about market
18 reserves --

19 A. It's more -- it's more -- rather than make it
20 more simple they made it more complicated, in my opinion.
21 And I have some understanding, but go ahead.

22 Q. All right. But if rather than making it more
23 simple they made it more complicated, that could be viewed
24 as a commentary on the pooling provisions; correct?

25 A. The pool provisions have always been complicated,

1 to some people.

2 Q. Now, we've had some discussion this morning and
3 you've already said that in your opinion, that you think
4 federal order market reserves are too large. Do you
5 understand the so-called double pooling issue?

6 A. Uh-huh.

7 Q. You understand what it is?

8 A. When you talk about pool, you mean like the pool
9 under two different orders?

10 Q. The milk being pooled on a federal order and
11 simultaneously being pooled on a state order, and let's be
12 candid about it, California.

13 A. Yeah, but that's -- that has no concerns to the
14 federal regulation, we have no concern as to where the other
15 milk goes.

16 Q. Well, but are you familiar, since 1998, that,
17 again, we've had a number of proceedings that have concerned
18 themselves with what happens there?

19 A. Maybe so. I don't know, I'm not --

20 Q. If milk can receive a form of a pool price in
21 California and simultaneously be pooled in Arizona but not
22 physically received in Arizona, is that not yet another
23 example, in your opinion, of the federal order market
24 reserve being too large for Class I needs?

25 A. Well, it may be a problem with state regulations

1 of California.

2 MR. ENGLISH: I have no further questions of this
3 witness.

4 THE COURT: Mr. Beshore?

5 MR. BESHORE: Marvin Beshore, for Dairy Farmers
6 of America.

7 CROSS-EXAMINATION

8 BY MR. BESHORE:

9 Q. Good morning, Mr. Albright.

10 A. Good morning.

11 Q. You're the first witness which Mr. Yale has
12 called since he entered his appearance for two additional
13 companies this morning, Select Milk Producers. Do you know
14 anything about Select Milk Producers?

15 A. I know about them, that's about all.

16 Q. Okay. Are they involved in Order 131, to your
17 knowledge?

18 A. Not while I was market administrator, no.

19 Q. Okay. What do you know about Select Milk
20 Producers?

21 A. Well, they started out in New Mexico, and I think
22 they're now in Indiana, and they got the filtration system
23 on the plant, on the farm, to filter the milk, then move it
24 to the Midwest for cheese, which indicates that if a -- when
25 they put those filtration systems in, they knew they weren't

1 producing milk as a reserve for fluid milk, I can tell you
2 that much.

3 Q. Okay. Do you know -- he also entered his
4 appearance for Continental Milk Products.

5 A. I don't know that name.

6 Q. So you wouldn't know -- were they involved in the
7 Arizona order when --

8 A. I don't recognize the name.

9 Q. Do you know what interests Select Milk Producers
10 would have in this proceeding?

11 A. What interest they would have?

12 Q. Yes. Since they're now represented by counsel in
13 the proceeding.

14 A. Well, they're primarily a cheese producer. They
15 can ride the pool when they can and they can get
16 [indiscernible] of fluid and market it as much as they can,
17 that'd be their interest.

18 Q. And do you know how that would relate to the
19 producer-handler provisions of Order 131?

20 A. I'm not following you.

21 Q. I'm not -- I'm asking for your help.

22 A. (Chuckling.)

23 Q. Do you know what interest Select Milk Producers,
24 as you've described their operations, would have in the
25 issues in this hearing, relating to the "producer-handler"

1 definition in Order 131?

2 A. Well, there'd be more money for him if a
3 producer-handler was regulated --

4 Q. So --

5 A. -- if a producer-handler's utilizations was
6 higher than the market average.

7 Q. So your -- it would be your indication that a
8 cooperative in the position of Select, which is primarily
9 supplying milk for cheese production, would have an interest
10 in seeing the utilization, the Class I utilization that
11 producer-handlers be part of the pool.

12 A. Well, in effect they wouldn't affect Select
13 because he's not part of the Arizona order. He doesn't --
14 as far as I know, he has no milk under that order, so it
15 wouldn't affect him at all.

16 Q. One way or the other.

17 A. Unless it was universal, all over the country,
18 this proposal, then he might get some to some other
19 marketing area.

20 Q. Okay. If they wanted to -- if Select wanted to
21 go into the producer-handler business in another part of the
22 country, might that be a reason for them being interested in
23 what happens here?

24 A. If they were interested in becoming a producer-
25 handler?

1 Q. Yes.

2 A. Oh, certainly. Certainly.

3 Q. They might want to see that door kept wide open.

4 A. (Chuckling) That's right. That's right.

5 Q. Same thing for Continental, if they were located
6 in Indiana, Michigan, Ohio, in that area?

7 A. That's right. And it may be -- the consumer
8 might have some interest in this proceeding, if they were
9 here, you know, keep competition.

10 Q. Now, one of the -- one of your primary
11 responsibilities as a person involved in the administration
12 of federal milk orders over the years was to assure price -
13 - minimum price uniformity among handlers; correct?

14 A. Pool handlers.

15 Q. Pool handlers. And there have been some -- some
16 previous discussion in the hearing about the deleterious
17 impact of unpriced milk in a federal order market. Do you
18 recall that?

19 A. Well, there would be, if you had unpriced milk,
20 it would, it would not --

21 Q. That would be harmful, if you had unpriced --

22 A. Well, it'd be competition, it'd be a matter of
23 competition, if you put unpriced milk into an order. I
24 don't know that that would be disorderly marketing but it'd
25 be --

1 Q. Well, it could be disorderly marketing, could it
2 not?

3 A. Only if there's a threat of drying up local -- or
4 national supply of -- adequate supply for fluid use.

5 Q. How would unpriced -- well, isn't it the case
6 that -- as in previous decisions by the Secretary which have
7 been quoted in this proceeding, isn't it the case that the
8 entry into federal order markets of unpriced milk has always
9 been viewed as potentially disorderly?

10 A. Well, I don't know how it would have been put,
11 but I don't know that they had an understanding when they
12 use the word "disorderly," in my opinion.

13 Q. Isn't -- hasn't it been the case, Mr. Albright,
14 during the years that you were with the Department, that the
15 Department consistently viewed the entry of unpriced milk
16 into the marketing area as a danger to disorderly -- to
17 orderly marketing?

18 A. If it was a threat to regulated producers which
19 might result in a shortage of milk, it would be disorderly
20 marketing, but I don't know how much unpriced milk can get
21 into the market. My mind's turning here. I think there's
22 compensatory payment on any milk that comes into the
23 marketing area from an unrelated source. I don't know -- I
24 can't think of how unpriced milk can get into the market
25 today.

1 Q. Well, how about producer-handler milk, isn't that
2 unpriced milk?

3 A. Well, the Secretary decided he doesn't want to
4 regulate the producer-handler and he's -- on the basis
5 that's his reserve, it probably equals the other handlers'
6 reserve, and you break even.

7 Q. On the --

8 A. Now, that's -- see, and that's the job of the
9 Secretary. He's chose not to regulate them.

10 Q. Within his definitions.

11 A. He's chose to exempt producer-handlers from
12 pricing provisions.

13 Q. As he defines them.

14 A. As he defines them. And I can't argue with what
15 he does, I have to accept that as infinite wisdom from
16 above.

17 MR. BESHORE: Thank you.

18 THE COURT: Any other questions on the
19 proponents' side?

20 (No response.)

21 THE COURT: Any redirect at all, Mr. Yale?

22 MR. YALE: No.

23 THE COURT: Ms. Deskins, you don't have any
24 questions?

25 MS. DESKINS: No.

1 THE COURT: Okay. You may -- very carefully --
2 step down.

3 THE WITNESS: Very good. I can't slip now.
4 (Witness excused.)

5 THE COURT: Why don't we take a five-minute break
6 and then I'll have Mr. Yale call -- who's your next witness
7 going to be?

8 MS. DESKINS: Duane Brandsma.

9 THE COURT: Okay. Let's take a five-minute break
10 and then we'll have Mr. Brandsma.
11 (Off the record and reconvened.)

12 THE COURT: On the record. Before I start, I do
13 want to say that Ms. Deskins has given me copies of Exhibit
14 48, so Exhibit 48 is available. That was the notification -
15 - was it the notification document?

16 MS. DESKINS: Yeah. The certification of
17 mailing.

18 THE COURT: The certification of mailing, okay,
19 and that's Exhibit 48, and we do have that, and a copy was
20 given to the Reporter, but it's admitted into evidence and -
21 =

22 MS. DESKINS: I've got some extras I'll put at
23 the back.

24 THE COURT: Okay.
25 (Exhibit No. 48 was received.)

1 THE COURT: At this point, Ms. Reed, call your
2 witness.

3 MS. REED: Thank you, Your Honor. Kristine Reed,
4 calling Duane Brandsma, and Mr. Brandsma has a statement
5 that we have circulated and would be offered as an exhibit,
6 which I believe is Number '52.

7 THE COURT: Okay, and I'm going to mark this as
8 Exhibit 52.

9 (Exhibit No. 52 was marked.)

10 THE COURT: Are you going to -- well, I should
11 swear him in first, probably.

12 MS. REED: Yes.

13 THE COURT: If you could raise your right hand.

14 DUANE BRANDSMA, OPPONENTS' WITNESS, SWORN

15 THE COURT: Could you please state your name and
16 spell it for the record.

17 THE WITNESS: My name is Duane Brandsma,
18 D-u-a-n-e, B-r-a-n-d-s-m-a.

19 MS. REED: And Mr. Brandsma will proceed to read
20 his prepared statement first.

21 THE COURT: And do you want me to -- I can admit
22 it now while we're thinking about it if you want. Since
23 he's going to be reading it I can't imagine there'd be an
24 objection. So I'm going to admit Exhibit 52 into evidence,
25 and you may proceed, Mr. Brandsma.

1 (Exhibit No. 52 was received.)

2 DIRECT TESTIMONY

3 BY THE WITNESS: My name is Duane Brandsma, and I
4 am an owner and plant manager of Edaleen Dairy, located in
5 Lynden, Washington. Our plant is located just south of the
6 Canadian border and east of Bellingham, Washington. We are
7 entirely a family-owned and -operated business. The
8 business was founded by my mother and father, Ed and Aileen
9 Brandsma, who remain owners. My wife and I, my sister and
10 her husband, Probably Heerspink, and my other sister and her
11 husband, Mitch Moorlag, are also owners. We are opposed to
12 all of the proposed amendments submitted at this hearing.

13 As I began to develop my testimony after hearing
14 eight days' worth of testimony in Phoenix and Seattle, I was
15 not sure whether I should stand up here and tell the
16 Secretary that we are an efficient plant, delivering product
17 at a reasonable price to the consuming public, or should I
18 try to explain to the Secretary that we have inefficiencies
19 and therefore we deserve some kind of regulatory break to
20 deal with those inefficiencies.

21 Frankly, the last is an absurd position. I do
22 not believe -- and, after hearing the testimony of Ron
23 Knutson, I am convinced -- that producer-handlers are no
24 more or less efficient than other handlers. The simple
25 point of a producer-handler is that he is not purchasing

1 milk from anyone; he is handling his own milk, produced on
2 his farm, and is taking the full risk of being both the
3 owner of the farm and the owner of the plant.

4 This risk cannot be overstated. If you're only a
5 producer and one milk plant can no longer process your milk,
6 you can deliver that milk to another handler and you have no
7 economic responsibility for the future success or viability
8 of that milk plant. If it fails, it fails, and you have a
9 lost customer, but no more.

10 Similarly, if you are operating a milk plant and
11 the producer cannot supply milk, you are not out anything;
12 you are able to acquire that milk from some other source,
13 and you have no legal or economic obligation to take care of
14 that producer or continue to provide at a market or
15 otherwise deal with its production.

16 Let me give you some examples. If I am operating
17 my plant as a producer-handler, which we are, and some
18 health or environmental issue arises that makes my milk --
19 that makes milk from our farms unavailable, I may be able to
20 purchase milk from other sources at a price. Nonetheless, I
21 have a continuing obligation to keep the plant operating and
22 profitable, but also available to the farm that we own.

23 Moreover, I have double cost, I have the cost of
24 the milk that I purchase from the outside supplier, but I
25 still have the cost of producing the milk that we have

1 rejected from our own farm.

2 Another example explains this. If I am operating
3 a farm, as a producer-handler, and I lose a sale at the
4 plant, I still have the milk production coming from the
5 farm, which I have to pay for even though I do not have a
6 market for that product.

7 A regulated handler does not have that risk but
8 can change its production as it wishes based upon its sales.
9 David Beene testified exactly what can happen when those
10 stars align. When it does happen, the producer-handler
11 faces the loss of its plant.

12 We were almost in that same situation when
13 Starbucks terminated our contract, but Starbucks gave us
14 enough time to replace that sale with numerous other sales,
15 and we worked hard to find new customers.

16 The reason that there is risk to both the farm
17 and the plant is because a producer-handler is a single
18 economic entity, a producer-handler does not "lose money" at
19 the plant or at the farm. At the end of the day, the entire
20 business either loses or makes money. Cost accounting does
21 not change that reality.

22 When the proponents talk about creating some
23 assessments that would have to pay into a pool, it is a cost
24 that is going to be borne by the whole enterprise, so when
25 the Secretary would require us to make payments into the

1 producer pool, based upon our own production that we are
2 marketing, it would be an imposition on the producer as much
3 as it would be on the handler.

4 Other discussions at this hearing have dealt
5 with the cost accounting and the fact that producer-handlers
6 get the difference between Class I and the blend price.
7 This argument only comes from those who do not operate
8 producer-handlers and have no understanding what producer-
9 handler is or how it operates.

10 For a producer-handler, the blend price is a
11 meaningless number. That figure has no being whatsoever in
12 terms of the cost of operating our farm or the price at
13 which we sell our milk. The only relevance in this hearing
14 is that we would pay into the pool the difference between
15 Class I and the blend price, which would necessarily be a
16 reduced price because we do not sell our milk on the basis
17 of a blend price.

18 In fact, our efforts are to sell milk at the
19 highest price the market will bear, and we do not
20 intentionally sell milk at less than class price. If it
21 happens it happens, but the Class I price is not a basis for
22 pricing our milk. Instead it is to our advantage that the
23 market price be as high as possible.

24 It is also to our advantage to have the market
25 price exceed our cost. That is what business is all about.

1 In the last several years, plants who are regulated have
2 only had to pay the Class I price for their milk. In some
3 cases that price has been lower than the cost of production.

4 When that happens, the producer-handler is placed
5 at a distinct disadvantage, but that situation has not been
6 mentioned by the proponents.

7 What really matters to Edaleen Dairy and all of
8 the producer-handlers is that the revenue we earn from the
9 sale of our milk exceeds the cost to produce the finished
10 product. We try to make an overall profit on the operation.
11 If our cost of producing milk and bottling the milk or the
12 cost of disposition outside of Class I is less than the
13 amount of money earned through the sale of such products,
14 then we are a profitable enterprise.

15 The blend price is irrelevant to the standard
16 financial equation for any enterprise. Sale minus cost of
17 goods sold equals gross profit. To illustrate the policy of
18 the relevancy of the blend price to a producer-handler, a
19 comparison of costs of milk production to the blend price
20 shows how different they are.

21 Where classified pricing clearly defines the cost
22 of raw product to a pool distributing plant, the producer-
23 handlers' costs of raw milk encompasses its cost of
24 production, including fee costs, land costs, livestock
25 costs, and other farm-related expenses and investments.

1 The idea that the producer-handler can make a
2 profit by receiving the blend price for its milk is false.
3 Regular reports are prepared by the California Department of
4 Food & Agriculture, documenting the costs to a producer --
5 the cost to produce a single hundredweight of milk in
6 California.

7 Likewise, the Economic Research Service of USDA
8 compiles similar information for other areas of the country.
9 I would ask that the Secretary take official notice of the
10 ERS data, which can be found at the internet at the
11 www.ers.usda.gov website. The ERS data for California and
12 Idaho, the two states closest to Order 124 and 131, has been
13 incorporated into the tables accompanying this statement.

14 The first two tables accompanying this statement
15 summarize the cost of production information. It compares
16 for various months, when cost data was available, the cost
17 of production as reported by the previously-identified
18 sources against the FMMO [phonetic] blend prices for Orders
19 124 and 131.

20 The final column in each table shows that not
21 infrequently the cost of producing milk exceeds the blend
22 price received by producers. In Idaho, which is the closest
23 state to Order 124 for which data was available, ERS reports
24 that the cost of production exceeded the blend price by over
25 \$4.50 per hundredweight for the first 11 months of 2003.

1 In markets such as these, producer-handlers have
2 been stressed to sell at competitive prices, which did not
3 meet their production costs. If producer-handlers were
4 required to pay additional funds into the pool, these
5 expenditures would be nothing but pure losses, assessments
6 that would drive them out of business.

7 Some accounting firms that specialize in dairy
8 accounting produce periodic composite statements for their
9 universe of clients, which includes the cost of production
10 on a per-hundredweight basis. These composite statements
11 are consistent with the data and conclusion on the attached
12 tables. The fact that the cost of production has exceeded
13 the blend price in recent years is well-known in the
14 industry.

15 I would seriously doubt that any of the
16 cooperative components would testify that their members have
17 been consistently profitable, receiving blend prices. In
18 fact, the cost-of-production squeeze has been so great in
19 recent years that we feel that handlers paying minimum
20 prices have had a cost advantage over producer-handlers.

21 Unmentioned so far in this hearing is the ability
22 of cooperatives to use their ability to reblend and pay
23 producers less than the blend price, to subsidize their
24 bottling operations, such as those plants -- such that those
25 plants are paying less than the minimum prices.

1 The proponents have offered testimony to prove
2 the alleged negative impact that producer-handlers are
3 having on those marketing areas. Their arguments have been
4 that the quantity of Class I market produced by producer-
5 handlers is growing unabated, and producer-handlers have
6 exerted such fierce pricing pressure on the marketplace that
7 others cannot compete.

8 Attached to my testimony is a chart which was
9 prepared by Charlie Flanagan, of Mallorie's Dairy, using the
10 information found on Exhibit 5. This shows the trend lines
11 of both the Class I usage in the market by pool plants and
12 the Class I by producer-handlers.

13 Based upon the change in the relationship in the
14 last two years, I estimate the producer-handler milk will
15 equal processor milk in the year 1950. Yes, I said 1950:
16 because the percentages are going down and not going up.

17 If this is the kind of unbridled growth that the
18 Secretary wishes to make determinations, then I hate to
19 think of what type of growth it would take to show
20 otherwise.

21 We would have to show a declining market share of
22 10 percent or 20 percent to show that we cease to be a
23 menace. There is some repeated assertion that there are
24 named and unnamed producers of such a size that they could
25 become producer-handlers and take over significant Class I

1 sales. This potential has existed in the Arizona for many
2 years, and the current situation is no different.

3 It would be premature to enact regulations
4 dealing with marketing conditions that do not currently
5 exist. If and when a large producer would decide to enter
6 the market as a producer-handler, the marketing conditions
7 may be such and that producer-handler's operation designed
8 so that the orderly marketing is not only maintained but
9 enhanced.

10 Speculating now puts the Secretary in the
11 position of potentially creating inefficiencies in the
12 system based on ignorance of future results. Mr. Ritchey
13 testified in Phoenix, and there was speculation that he was
14 examining the possibility of becoming a producer-handler.
15 However, I have been informed that he has since sold his
16 herd and is no longer dairying.

17 There's other testimony, about Vitamilk, and how
18 producer-handlers allegedly did Vitamilk in. There is
19 absolutely nothing to that claim whatsoever. I have
20 attached to my testimony two news releases that discuss the
21 downfall of Vitamilk. One article is from the November 23,
22 1998, edition of The Puget Sound Business Journal. The
23 second article is from the August 16, 2003, edition of The
24 Seattle-Times.

25 As was known in the industry and recognized in

1 each of the documents, Vitamilk lost a sale to QFC when QFC
2 merged with the Kroger Company through Fred Meyer, which is
3 owned by the Kroger Company. Since the Kroger Company has a
4 captive plant, Vitamilk sales were lost to the Kroger
5 Company. Similarly, Vitamilk lost sales to Carr Stores in
6 Alaska, when Carr Stores were purchased by Safeway. Safeway
7 also operates a captive plant.

8 The end of Vitamilk has nothing to do with the
9 price of the milk or producer-handlers. In an extremely
10 short period of time Vitamilk found itself with 50 percent
11 less sales. Before the loss of these sales, Vitamilk sold
12 20 million gallons of milk a year. Afterward it sold only
13 10 million gallons of milk per year.

14 Vitamilk needed to find customers remaining in
15 the market to pick up those sales. Well, all that would be
16 left in the marketplace would be sales that are not sold or
17 controlled by Safeway and the Kroger Company and not
18 otherwise being supplied by other dairies in the industry,
19 including Dean Foods, Wilcox, West Farms, and others.

20 During that period, after the loss of the QFC
21 account, Edaleen Dairy picked up a new account that had been
22 supplied by Vitamilk. The total sales to that account
23 amounted to one load of milk per week. A load of milk per
24 week represents 50,000 pounds of milk. In a month that is
25 200,000 pounds. As a percentage of Vitamilk's 14-million-

1 pounds-per-month operation before the loss of QFC and
2 Carr's, that represents less than 2 percent of their total
3 sales.

4 None of us own our customers. Account switching
5 of this nature and of this size or larger are regular
6 occurrences in the dairy industry. The loss of a single
7 small account by Vitamilk amounted to a fraction of the loss
8 occasioned by QFC and Carr's.

9 Given the real facts on the demise of Vitamilk,
10 perhaps the scope of this hearing should be changed to
11 eliminate captive plants instead of to eliminate producer-
12 handlers.

13 Another issue was raised dealing with school
14 pricing, and the facts that schools have contracted, with
15 flat pricing, as opposed to index pricing. Under flat
16 pricing, a distributor or a plant would give a bid to a
17 school, that would be fixed for the rest of the school year.

18 Under an index plan, the schools will purchase
19 the milk and the price will be adjusted in accordance with
20 the formulas and that use the Class I price in the
21 marketplace. Flat pricing is not a creation of producer-
22 handlers. Until a few years ago it was almost the absolute
23 rule in terms of how milk was sold to schools, regardless of
24 supplier.

1 In the late 1990s and early this decade, when
2 there was great volatility and high milk prices, some
3 handlers tried to get schools to purchase milk on an index
4 formula. Some schools agreed to consider that, but when
5 schools requested bids on milk, they would specify whether
6 they wanted a flat price or an index price.

7 As in any forward contracting, there are risks
8 for both buyer and seller. For us, an index price does not
9 shift the risk or protect us from any risk because our cost,
10 as I mentioned before, is not the class price or the blend
11 price but is the cost of production, which or may not move
12 in the same direction and to the same degree as classified
13 pricing.

14 At the same time, the use of flat price exposes
15 us to risks, and if our cost of production goes up, we will
16 be exposed to an unprofitable sale, as has happened from
17 time to time in our pricing.

18 But when it comes to bidding on that contract, we
19 are no better or worse positioned than any other handler in
20 the market, be it a fully priced and regulated handler or a
21 regulated producer-handler in the market.

22 Also, there has been some attempt to estimate the
23 price at which producer-handlers store their milk, based
24 upon the store price for a gallon of milk. My experience
25 has been: there is little correlation between the price at

1 which Edaleen sells its milk and the price on the store
2 shelf.

3 Another issue has come up, as to whether there is
4 a good number for a cap that can be used. The problem with
5 any cap or limitation -- and a 3-million-pound cap is
6 totally unacceptable -- is that it imposes a hard limitation
7 on any future growth of a producer-handler.

8 First let me explain what the impact of a cap
9 would be. A plant is at 10 million pounds of milk and is a
10 producer-handler and the cap is set at 11 million pounds.
11 To go over that 11 million is substantial. Once at
12 11,000,001 pounds, all the milk is now subject to the
13 difference between Class I at the plant and the blend price,
14 at an average of about a dollar twenty a hundredweight.
15 That one pound could be very, very expensive, to the tune of
16 hundreds of thousands of dollars.

17 The proposed limitation of 3 million pounds means
18 that if a producer-handler has 3,000,001 pounds of
19 production, he becomes fully priced under the order.

20 Assume a difference between the blend price and
21 the Class I of a dollar twenty. At 3 million or less pounds
22 per month, the producer-handler has no obligation to the
23 pool. Once he reaches one pound more, he is obligated at
24 \$1.20 on all of his milk. The total is \$36,000.01. On a
25 per-hundredweight basis, this pound represents \$3,600,001

1 per hundredweight.

2 All this assessment will be borne by milk owned
3 and produced by the producer-handler. If the Secretary were
4 to adopt a higher cap, the rate would only go up on this
5 marginal pound of milk.

6 The penalty associated with this assessment means
7 that producers will take substantial steps to avoid reaching
8 that level, including keeping their sales substantially
9 below 3 million pounds, to avoid an accidental occurrence.

10 I would estimate that the target would be about
11 10 percent less. This is because the scheduling of delivery
12 of orders and actual receipt at month end would be the most
13 likely cause of a producer-handler being trapped. One day
14 is approximately 3 percent of monthly production, and three
15 days represent a weekend with a holiday.

16 The current regulations limiting the ability of
17 producer-handlers to produce -- to purchase milk from other
18 producers, to a hundred fifty pounds of milk per month, have
19 the same effect.

20 For example, assume that a producer-handler has
21 monthly Class I sales of 5 million pounds a month and for a
22 given month purchases three loads of milk, as is allowed.
23 For simplicity, we assume that the cost of these three loads
24 of milk is \$15.00 per hundredweight. If one of those
25 trailers is overloaded by one hundredweight, that producer

1 is not in compliance with the qualification requirements and
2 will be assessed a pool obligation on the entirety of its
3 own farm production. Again, at the rate of \$1.20 per
4 hundredweight, that extra pound, in addition to the payment
5 required to the producer, result in an assessment of \$60,000
6 on all the producer-handler's milk. This is \$6 million per
7 hundredweight on that marginal pound of milk.

8 Another way of saying that this is the effective
9 cost of the 15 hundred and one hundredweight to purchase
10 milk would be \$54.97 per hundredweight. The money collected
11 from this assessment would be paid into the producer's
12 settlement fund and the producer-handler would receive
13 absolutely no benefit from the assessment.

14 Even if the AMAA permits the Secretary to require
15 settlement fund contributions on milk that is never
16 purchased from a producer, the new regulations would take
17 millions of dollars per year from producer-handler
18 operations, redistribute the money to other producers, and
19 return absolutely no benefit to the producer-handler
20 operations.

21 Edaleen's milk price to our customers cannot be
22 increased to make up the substantial cost we would have to
23 incur if the amendment were adopted. Our pool payments just
24 cannot be recouped. The assessment will be a direct
25 reduction from the bottom line. My father, mother, sister,

1 brothers-in-law, wife and I have invested the time, capital,
2 and effort to develop our business on the long-standing
3 policy and regulations of the Department.

4 We also bear the risk of having to maintain our
5 own supply of milk, largely independent of outside sources.
6 Edaleen Dairy would be destroyed if these unreasonable and
7 unnecessary changes were made to the order.

8 Another problem with caps is that what may be
9 reasonable today may not be reasonable tomorrow. The size
10 of customers that we are dealing with is rapidly changing,
11 and for the dairy to be in business in the future, they will
12 have to handle larger and larger units or go out of
13 business.

14 Again, assume the cap is at 10 million pounds and
15 a handler is at 8 million pounds; he would now be in a
16 position to have to turn down a sale of 2 and a half million
17 pounds because it would take him over the cap, but the
18 producer-handler will never know if tomorrow he could get a
19 call from an existing customer, canceling an order that
20 would put him in a position to accept that new large
21 customer.

22 Edaleen Dairy is very much a small business. It
23 is a small business because we have less than 500 employees
24 in the plant. The exhibit by the market administrator that
25 categorizes producer-handlers as large enterprises does not

1 acknowledge the fact that producers are on both sides. We
2 may be a large producer, but we are not a large producer-
3 handler.

4 There is a fear -- this fear of producer-handlers
5 is really unfounded. All that is really being done is that
6 some players in the market want to have a bigger share of
7 the market and they are trying to define some basis to put
8 others out of business.

9 On the part of West Farms Foods, the benefit to
10 them would be double. One, they would get the higher Class
11 I sales, they think, because they think they could pick up
12 some of our customers; second, they know that under current
13 situations we would have to join West Farms as a producer if
14 we continue to operate the farm, which would mean we would
15 have to pay for to cover the losses of their plants and
16 otherwise participate in their economic unit. Until now, we
17 have chosen not to do so.

18 There has also been talk about a large producer-
19 handler being created in western Oregon. Although we are
20 always unhappy with the possibility of a new competitor
21 coming into the marketplace and we worry about whose sales
22 it will take, we see no reason to fear a producer-handler
23 any more than we would any other entrant.

24 That is because we understand producer-handlers
25 and we understand their economics and do not believe that

1 they have any advantage that any other plant would not be
2 able to use. If we are going to fear producer-handlers, why
3 don't we fear the Krogers and Safeways, that are integrated?
4 Why don't we fear the Dean Foods, that have national sales,
5 they can use profit from one plant to reduce the sale price
6 at another to gain market share? Why aren't we worried
7 about West Farm Foods, that blends individual producers 5
8 and 10 cents on all of their milk, regardless of class, to
9 offset losses at their bottling plant?

10 Another often-repeated phrase in this hearing has
11 been that producer-handlers do not play by the same rules.
12 This is untrue. Every single producer-handler -- every
13 single producer and every single handler has a right to
14 become a producer-handler at any time. Their choice is not
15 to do so -- their choice not to do so is one that they have
16 made to their best economic advantage. Based on the decline
17 in the number of producer-handlers over the years, it is
18 obvious that few have taken the steps to be done, and even
19 fewer have succeeded.

20 Finally, I want to talk about selling milk to
21 Alaska. We sell milk to Alaska in 50,000-pound tankers. We
22 pasteurize it and sell it to Matanuska Maid Dairy. If we
23 bottled it in cartons and sent it up there, we could still
24 be a producer-handler, but if we sell it raw, we lose.

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The only basis for this is to take away a sale from us, but since Alaska is not in a marketing area, the Secretary should not exercise any authority for pricing that milk.

In conclusion, Edaleen Dairy has operated for decades in the Pacific Northwest without causing disorderly marketing conditions. We make good and wholesome products that are sold at fair prices.

The proposed amendments should not be adopted.

MS. REED: Thanks, Duane. Your Honor, the witness would be available for Cross at this point, and I'm sure there's going to be some questions; I didn't know if you wanted to proceed at this point or take a break.

THE COURT: Let's proceed. Who wants to start with Cross-Examination? Mr. Beshore, you want to go first?

MR. BESHORE: Sure.

THE COURT: Go ahead.

MR. BESHORE: Thank you. Marvin Beshore, for Dairy Farmers of America.

CROSS-EXAMINATION

BY MR. BESHORE:

Q. Good morning, Mr. Brandsma.

A. Good morning.

1 Q. You've stated early on in your testimony that
2 you're opposed to all of the proposals at this hearing. Did
3 you mean to include Proposal 4?

4 A. Which is --?

5 Q. Which is the proposal alluded to or referred to
6 by Ms. Deskins this morning, which would prohibit what's
7 been called double dipping in the Arizona order; that is,
8 prohibit producers from having milk pooled both on the
9 federal order and on the California state order at the same
10 time.

11 A. I don't have a position on that as -- because
12 we're not involved in that order.

13 Q. So you would -- your statement should then be
14 corrected to reflect you're not talking about Proposal
15 Number 4?

16 A. No, I'll take that back. I believe that we are
17 in this all together, and I'm going to have to be in favor
18 of that, so --

19 Q. So you do oppose Proposal 4.

20 A. Yes.

21 Q. Because you're in it with Mr. Hettinga, who
22 opposes Proposal 4; is that correct?

23 A. That would have to be correct at this time.

24 Q. Okay. Are you also together with Select Milk
25 Producers and Continental, Mr. Yale's other clients in this

1 proceeding?

2 A. Yes.

3 Q. Okay. And what -- could you tell us what their
4 interest is. By the way, is Select in your market --

5 A. No.

6 Q. -- Select Milk Producers?

7 A. No.

8 Q. Continental Milk Products, are they in your
9 market?

10 A. No.

11 Q. Okay. And what interest do they share with you
12 in opposing these proposals, to your knowledge?

13 A. As far as I know, they -- their interests are
14 that they do not feel that it's right for the Secretary to
15 make these changes and they feel it takes away rights from
16 farmers to be able to market their own milk, and I believe -
17 - yeah, that's as far as I know.

18 Q. Do you know what markets they operate in?

19 A. Just that was mentioned earlier and what I've
20 read about them.

21 Q. Is it your understanding that they want to
22 preserve the options to be large producer-handlers in the
23 markets in which they operate?

24 A. That I do not know.

25 Q. Let me ask you, then, to turn to Edaleen Dairy:

1 your position with Edaleen is plant manager, I take it.

2 A. (Nods head.)

3 Q. Can you tell us what your -- duties and
4 responsibilities are encompassed as plant manager at
5 Edaleen.

6 A. A lot of the stuff other people don't want to do.
7 (Laughter.)

8 Q. What's in that category?
9 (Laughter.)

10 A. I would say a lot of it has to do with -- some of
11 it has to do with sales, some of it has to do with
12 distributing the milk and looking over the plant crew and
13 writing the orders for everyday production and those kind of
14 things.

15 Q. How many employees does Edaleen Dairy have?

16 A. Like the -- the whole business?

17 A. About 70.

18 Q. And how many of those are at the farm level and
19 how many of them in the plant operation?

20 A. I think it's about 60 percent are farm and --
21 well, it's hard to -- I mean, we had a little store there
22 too, so I don't know --

23 Q. But can you just break it down for us, the 70
24 employees?

25 A. 70 people, I would say probably 10, 12 people in

1 the plant, and then we've got 10, 12 route people, office
2 staff of 3, and probably about 40 on the farm.

3 Q. How many days a week do you run your plant?

4 A. 6 days a week.

5 Q. What products do you process at your plant? Do
6 you have just one plant or do you have more than one?

7 A. Just one plant. We process fluid milk and
8 buttermilk and ice cream, chocolate milk, some fruit juices,
9 things like that.

10 Q. Okay, let's take those products. Fluid milk.
11 What do you -- do you produce the full range of fluid milk
12 products, whole milk, 2 percent, 1 percent?

13 A. Yeah, whole milk, 2 percent, 1 percent, skim,
14 half-and-half, whip cream.

15 Q. What type of containers?

16 A. Anywhere from half-points to 200-gallon totes.

17 Q. And everything in between?

18 A. Yeah. I mean, pints, quarters, half-gallons,
19 gallons, dispenser bags, for restaurant use, that type of
20 thing.

21 Q. Do you use plastic containers or cardboard, or a
22 combination?

23 A. Plastic for the gallons and then cardboard for
24 half-gallons, quarts, pints, half-pints.

25 Q. Can you tell us anything about your product mix,

1 volume mix, in fluid milk, what portion is gallons versus
2 the smaller quantities?

3 A. I would say that's proprietary.

4 Q. When you're running -- what's the -- you run
5 6 days a week. Do you bottle 6 days a week?

6 A. Yes, we do.

7 Q. How many shifts?

8 A. Two, two and a half, right in there. We start at
9 -- probably -- we start at 2 o'clock in the morning, and the
10 last guy'll leave, depending on what day it is, sometimes as
11 late as midnight and sometimes 8 o'clock in the evening.

12 Q. Would you say your plant's essentially running at
13 nearly full capacity?

14 A. Pretty close, just -- when you throw the clean-up
15 in and everything, it's -- not much room.

16 Q. Is your ice cream production at the same plant?

17 A. Yes, it is.

18 Q. Do you produce ice cream 6 days a week also?

19 A. Not during the winter. 5 days a week. If we
20 were in Phoenix we would do it all the time. But 5 days a
21 week. And then during the summer, we, you know, of course
22 increase it to 6 days a week.

23 Q. What's the mix of fluid milk products versus
24 Class II products, such as ice cream, at the plant?

25 A. I'd have to say that's proprietary.

1 Q. How many days do you run your fruit juices?

2 A. During the summer -- they're pretty small
3 batches. During the summer we'll do it maybe 1 day a week,
4 and that's a couple thousand gallons; and during the winter,
5 once every 2 or 3 weeks.

6 Q. You say you have a store. You sell your milk
7 products, ice cream, at your store?

8 A. Uh-huh.

9 Q. Is that on -- at the farm, at the plant, or at
10 a --

11 A. The processing plant, yeah.

12 Q. Are the farm and processing plant in the same
13 location, or can you tell us a little bit about that.

14 A. They're separated.

15 Q. How far apart are they?

16 A. A couple miles.

17 Q. And you are -- you're located in, what, the
18 northern part of the state of Washington?

19 A. Yeah, quite northern.

20 Q. How far from the Canadian border?

21 A. A mile.

22 Q. Pardon?

23 A. A mile.

24 Q. A mile.

25 A. Yeah.

1 Q. What's your average monthly volume of fluid milk
2 products?

3 A. That's proprietary.

4 Q. How many cows do you have at the dairy?

5 A. Also.

6 Q. Also?

7 A. Confidential.

8 Q. Do you know your average production per cow?

9 A. Yeah, but it's also confidential.

10 Q. Do you sell -- besides your own -- your customers
11 for your processed fluid milk products and Matanuska Maid,
12 which you've referred to, do you have any other sales of
13 bulk milk?

14 A. Other than like to West Farm Foods or to anything
15 like that?

16 Q. I'm just asking --

17 A. I mean --

18 Q. -- are there any other sales?

19 A. There is --

20 Q. To anyone.

21 A. There is some sales, I mean to like West Farm or
22 something like that.

23 Q. Okay. Do you sell on a regular basis to West
24 Farm Foods?

25 A. No, we don't.

1 Q. You don't have sales to them every month, then.

2 A. No, we do not.

3 Q. Are they seasonal, mostly?

4 A. Yeah. It's hard to tell. I mean we're at -- I
5 mean, I'm at the mercy, I guess, of cows fluctuating up and
6 down, cows go up and then, you know, we probably would have
7 some, but when the cows are down I wish I could take the
8 milk back again, so I'm at the mercy of the cows going up
9 and down, you're at the mercy of accounts calling and
10 saying, you know, "all the grocery stores have specials on
11 right now so I don't need two trailers this week" and then
12 you're stuck with extra milk. So things like that, when
13 that kind of stuff happens.

14 Q. Okay. And if I understand your testimony
15 correctly, that happens, but it doesn't happen frequently,
16 on a regular basis.

17 A. It depends on market conditions, it's a lot
18 dependent on that.

19 Q. But you don't sell to West Farm regularly every
20 month; correct?

21 A. No, not currently.

22 Q. Is there any other bulk customer that you sell to
23 on a regular basis every month?

24 A. No.

25 Q. Do you sell surplus cream regularly?

1 A. No.

2 Q. Do you ever sell surplus cream?

3 A. Haven't for a few years.

4 Q. It's used in your own creamers or ice cream
5 production?

6 A. Yeah. Yeah.

7 Q. I take it, then, there are months that go by when
8 you sell no products, no bulk milk, to anyone as surplus
9 disposal from your operation.

10 A. That is true, yeah, when -- like during the fall
11 and wintertime, generally, when the cows -- cows don't give
12 as much and we -- we don't have -- we'll go months, yes.

13 Q. You referred to -- correct me if I get the
14 numbers wrong -- 10 or 11 or 12, maybe, route employees?

15 A. Yeah.

16 Q. Do you have your own -- do you do distribution of
17 your products through your own routes?

18 A. Mostly, yeah. What we -- we have routes within
19 our own county, which is Whatcom County, and then outside of
20 Whatcom County we more or less depend on distributors,
21 because it gets too expensive, trying to deliver to all the
22 stores outside of that.

23 Q. What portion of your sales are distributed within
24 Whatcom County, on your routes?

25 A. I'd have to say it's probably confidential.

1 Q. How many distributors do you sell to regularly?

2 A. That's confidential as well.

3 Q. Do any of your own employees deliver fluid milk
4 products outside Whatcom County?

5 A. Yes, they do.

6 Q. What's the furthest you go with products on your
7 own routes?

8 A. The furthest we go is Olympia.

9 Q. And how far is that from your plant?

10 A. Oh, 140 miles, maybe.

11 Q. What's the furthest distance, that you're aware
12 of, that your distributors go with your products?

13 A. I honestly don't know (chuckling).

14 Q. What's the furthest you know of?

15 A. Well, I can only, you know, guess what the
16 Olympia people do, and that would be to the -- southern
17 Washington, I guess.

18 Q. When you say "the Olympia people" --

19 A. The Olympia distributor.

20 Q. Okay, that's the name of a distributing company
21 that you sell to.

22 A. No. It's just the --

23 Q. A distributor who's from Olympia.

24 A. Yes. Yeah.

25 Q. Okay. Are any of -- what retail -- do you do any

1 home delivery?

2 A. No.

3 Q. What type of retail outlets are your products
4 sold in primarily?

5 A. Primarily, I would have to say c-stores --

6 Q. Convenience stores?

7 A. Yeah, convenience stores. And to restaurants.

8 I'm trying to think if we're in any grocery stores and I'm
9 not sure that we are. And then to some manufacturing
10 companies. So that's --

11 Q. What are your -- what type of sales do you have
12 to manufacturing companies, bulk, bulk sales?

13 A. The dispenser bags that maybe they use for mixes
14 for soups and stuff like that.

15 Q. Okay. In the convenience stores to which you
16 distribute fluid milk products, is Edaleen the sole supplier
17 of fluid milk products in those stores?

18 A. Sometimes we are, sometimes we aren't, I guess.
19 I guess it depends on the distributor, if he wants our full
20 line of product or not. So I guess -- yeah, it's up to the
21 distributor. Some of our distributors take our full line of
22 products and some of them don't, some of them just take
23 dispensers and gallons, and other ones take our full line,
24 so --

25 Q. Okay. Now, when you talk -- when you refer to

1 some of your distributors, do you mean your own employees or
2 third-party distributors --

3 A. Third-party.

4 Q. How about your own -- your own employees, I take
5 it, sell to convenience stores, distribute your milk to
6 convenience stores in Whatcom County.

7 A. Yeah. They're employed by us. They don't have
8 their own routes, they're --

9 Q. Right.

10 A. Yeah.

11 Q. Okay. Now, to your knowledge, those customers
12 that are direct customers of your dairy, those convenience
13 stores, do they purchase fluid milk products from other
14 dairies as well?

15 A. None that I can think of.

16 Q. Do your distributors -- now, I'm talking about
17 independent. Independent distributors to whom you sell
18 product, I think you've indicated that they may handle
19 product from other dairies as well.

20 A. Yes.

21 Q. What other dairies might they also handle
22 products from?

23 A. Any other dairies in our federal order. I mean,
24 I --

25 Q. Wilcox perhaps?

1 A. Wilcox, Smith, West Farm. I mean -- their
2 choice.

3 Q. Do the distributors, the independent distributors
4 to whom you sell product, do they purchase the product at
5 your dock, at your plant?

6 A. One small one does, and the rest of them we
7 deliver to.

8 Q. Okay, so you deliver, what, trailer-loads of milk
9 products from your plant to a distributor's distribution
10 center?

11 A. Uh-huh.

12 THE COURT: You've got to -- I know what you're
13 saying, but when you say -- "uh-huh" doesn't come across too
14 well.

15 THE WITNESS: All right.

16 A. Yes, we do.

17 Q. (By Mr. Beshore) Thank you. Do you have a fleet
18 of trucks of your own?

19 A. Yes, we do.

20 Q. How many delivery trucks do you have, of what
21 sizes?

22 A. Oh, we got anything from small cube vans, that
23 have a little ramp out of the back, to a 48-foot trailer.
24 We've got a 48-foot trailer and a 53-foot trailer, and the
25 rest of them mostly are like 45-foot normal delivery

1 trailers.

2 Q. Did I understand you to say previously that
3 Olympia -- you would deliver products from your plant to a
4 distributor in Olympia?

5 A. Yes, that's correct.

6 Q. What other points outside Whatcom County do you
7 deliver products to distributors?

8 A. Points in between us and Olympia, points in
9 between Mt. Vernon, which is an hour drive away, to Olympia,
10 which is 3 hours away, just -- anywhere in between there.

11 Q. Do you set the products at -- which you sell, the
12 wholesale price to distributors? That is, are you involved
13 in that price setting?

14 A. Yes, I am.

15 Q. Do you have a -- you know, a price schedule that
16 you circulate, publish to distributors if they're interested
17 in handling your product?

18 A. That -- no, I would say not, just -- it's about
19 impossible for us to solicit more business when you can't
20 really take on more business, so I don't -- you know, I'm
21 not out there being -- I'm not out there on the streets,
22 what you would say, with price lists and things like that.

23 Q. Okay. Well, you're running, basically, at full
24 capacity --

25 A. Yeah.

1 Q. -- so you're not really out to get new business;
2 right?

3 A. Yeah. And then -- I mean even new business is so
4 involved for us that -- I mean, by the time we build a barn,
5 add cows, and everything like that, we've just got to be so
6 sure of that business, and then -- I think we're a little
7 gun-shy, with what we did with Starbucks, and the ramping up
8 and then losing that business, that -- yeah, we make doubly
9 sure now, I guess, if you can.

10 Q. Okay. But setting aside soliciting new business,
11 do you have a published price list that your distributors
12 know in advance what their -- what the price for the
13 products is going to be?

14 A. They know what their price is going to be.

15 Q. Do you change it monthly?

16 A. That's confidential.

17 Q. Has it been the same for the last year?

18 A. No, it has not.

19 Q. How often have you changed it in the last year?

20 A. That's confidential as well.

21 Q. When you change prices -- what leads you to
22 change prices when you do?

23 A. Oh, anywhere from our costs that we are having at
24 the time, perhaps, whether it's feed costs or increased
25 costs in packaging, to the Class I price, to market

1 conditions out there, so --

2 Q. Now, when you say the Class I price, you're
3 talking about -- what are you referring to there?

4 A. The published Class I price for our marketing
5 order.

6 Q. That is the minimum Class I price that your
7 competitors must pay for fluid milk --

8 A. Uh-huh.

9 Q. -- for Class I use; correct?

10 A. Uh-huh.

11 Q. Okay. And when it --

12 A. I mean yes.

13 Q. So with reference to the Class I price, when your
14 competitor's minimum price goes up, you consider raising
15 your prices, then, as well, I assume.

16 A. Yeah, sometimes we do, sometimes it finally
17 brings it to where we are, if the price has been in the
18 gutter, like it has been for the last couple of years.

19 Q. And when the minimum price under the federal
20 orders comes down, then your prices come under pressure as
21 well, do they not?

22 A. Uh-huh. Yes, I mean yes, they do.

23 THE WITNESS: I'll stop doing that.

24 THE COURT: Do your best.

25 (Laughter.)

1 Q. (By Mr. Beshore) Let me draw your attention,
2 Mr. Brandsma, to the first table, the "Cost of Production"
3 information that you've attached to Exhibit 52. It's the
4 first page after your -- it would be page 13, although it's
5 not numbered, the first page after your written -- the
6 written statement you read. Do you have that?

7 A. Yes.

8 Q. Did you compile this?

9 A. No, I did not. I did make notice of it when I
10 saw it on the internet.

11 Q. What did you see on the internet, the ERS costs?

12 A. Yes, I did.

13 Q. Did you see the full series of ERS data on the
14 internet?

15 A. Yes, I did.

16 Q. So you noted that, as has been referred to in
17 some earlier testimony, ERS breaks out its cost-of-
18 production figures by the size of the farms.

19 A. Uh-huh. Yes.

20 Q. Okay. Now, did you show the applicable cost for
21 the size farm that Edaleen Dairy has on your exhibit?

22 A. No.

23 Q. You did not.

24 A. (Shakes head.)

25 Q. Was there any reason for that? Wouldn't that be

1 the right number to use?

2 A. I'm not aware of exactly what number this was,
3 but it -- the numbers that were used were the total costs
4 for producing hundredweight in California or in Idaho.

5 Q. If one was to use ERS data for -- to compare
6 blend price, for instance, for purposes of analyzing your -
7 - you know, the economics of your producer-handler
8 operation, wouldn't it be most accurate to use the ERS
9 information for facilities with dairy operations with over
10 500 cows?

11 A. Yes, and I'm not aware that these numbers were
12 used or not used with 500 cows.

13 Q. Okay, so you're not sure which numbers were
14 used --

15 A. Uh-huh.

16 Q. -- on your exhibit, then.

17 A. Yes.

18 Q. It would make a difference, though, wouldn't it?

19 A. Generally it does, just like it makes a
20 difference if produce -- milk plants can bottle 10 million,
21 20 million pounds of milk per month, or per weeks, and this
22 makes a difference as well.

23 Q. Okay. So you had knowledge that at the farm
24 level you've got some economies of scale with a herd that's
25 producing more than 3 million pounds of milk a month, you

1 agree you're producing more than 3 million pounds of milk a
2 month; correct?

3 A. Yes.

4 Q. So you've got some economies of scale, some
5 efficiencies of operation, at the production level, that
6 pool producers with less -- producing less than 3 million
7 pounds a month don't have; correct?

8 A. That's our choice. Yes.

9 Q. Okay. It's their choice to produce less than
10 3 million pounds per month; correct?

11 A. It is.

12 Q. And by you choosing to do that, your cost of milk
13 production per unit has gone down, compared to them;
14 correct?

15 A. It depends, I -- it depends. I can't say that
16 for sure. I mean, I've got friends that milk 2,000 cows
17 that are less efficient than friends that milk 500 cows, so
18 -- I mean, that's a hard statement for me to make.

19 Q. Okay. Are you -- you do agree, do you not, that
20 as a general matter, given the same management efficiency,
21 there are economics of scale in production of milk on a
22 dairy farm? If you apply the same management principles,
23 the same management practices, to a 3,000-cow herd as to a
24 300-cow herd, your cost of production per hundredweight's
25 going to be less on the 3,000-cow herd, would it not?

1 A. Sometimes it is, sometimes it isn't. I'm not
2 going to go there, because if a 300-cow herd has all --
3 everything paid for and has no debt, then you're talking
4 different -- you're talking a different story.

5 Q. Do you have -- what's your debt level at Edaleen
6 Dairy?

7 A. That's confidential (chuckling).

8 Q. Do you know your capital invested, whether it's
9 debt or equity, per cow at Edaleen Dairy? Just on the
10 production side, not the plant side.

11 A. I don't, off the top of my head, no.

12 Q. Now, let's talk about the plant side a little
13 bit. You're aware, as the market administrator has
14 testified this morning that -- well, first of all, I think
15 you just told me that there are economies of scale in plant
16 operations. Correct?

17 A. Yes.

18 Q. Okay. And basically that means that the larger
19 you are, all other things being equal, your cost-per-unit of
20 production may be less.

21 A. You surely hope so.

22 Q. Okay. Now, you're aware, then, of course, as
23 Mr. Mykrantz testified this morning, that Edaleen is larger
24 than a number of fully-regulated pool plants in Order 131?
25 124, I'm sorry.

1 A. I was not here during his testimony.

2 Q. You were not?

3 A. I was not.

4 Q. Okay. Well, let me -- just assume with me for a
5 moment that information in the record, provided by the
6 market administrator, shows that there are a number of
7 fully-regulated pool plants under Order 124 that are smaller
8 than the average size of Smith, Edaleen, and Mallorie, which
9 has also been provided, for the record.

10 A. Combined or separately?

11 Q. Average, the average of the three of them. Okay?
12 There are plants that are smaller than the average. Okay?

13 A. Okay.

14 Q. Now, you would have a competitive advantage
15 versus them, would you not, in economies of operation?

16 A. I wouldn't think so.

17 Q. No?

18 A. (Shakes head.)

19 Q. Didn't you just tell me that the larger the
20 plant, you've got economies of scale?

21 A. Well, when they're purchasing milk for 11 and a
22 half dollars a hundredweight at Class I, and I -- I can't
23 purchase milk at that price, I think the economies of scale
24 change there.

25 Q. How does that affect the economies of scaling the

1 plant operation?

2 A. You mean if -- go ahead.

3 Q. I was trying to just focus on the plant side.

4 A. Okay.

5 Q. Okay? Because you had made the contention, the
6 argument, in your testimony and in response to some
7 questions that, you know, bigger handlers are -- can be more
8 cost-efficient in their economies of scale.

9 A. Okay.

10 Q. Correct?

11 A. Yes.

12 Q. So if you're bigger than fully-regulated -- some
13 fully-regulated pool handlers, you would have a competitive
14 advantage in terms of cost of plant operation, would you
15 not?

16 A. If -- are all these pool handlers, are they
17 separate -- I -- separate plants, are they part of co-ops,
18 are they -- what are they? I mean are they -- are they a
19 separate stand-alone plant or are they --

20 Q. Does that make a difference in terms of what the
21 plant costs are?

22 A. Well, yeah. I mean, if you're part of --

23 Q. It does?

24 A. If you're part of a co-op and you've got a plant
25 here and a plant here and a plant here, your production --

1 or your buying power is great.

2 Q. How does that affect -- how does that make any
3 difference in terms of plant operation itself?

4 A. What you purchase product, what you purchase
5 ingredients.

6 Q. So you're assuming --

7 A. -- if you're able to blow-mold. I mean, there's
8 just -- there's a lot of things that play into that. I
9 mean, there is a plant and -- that's bigger than we are, and
10 we buy blow-molded jugs from them. I mean, that's --
11 there's advantages they can have.

12 Q. And a smaller fully-regulated plant has got the
13 same challenge that you have in purchasing blow-molded jugs
14 for its production, does it not?

15 A. Well, I guess -- tell me -- tell me who the
16 plants are, I mean -- I can tell you then.

17 Q. I don't know the names of the plants --

18 A. Well, then I -- I mean, I can't --

19 Q. Do you know the -- okay. Do you know the -- we
20 can go down the handler list, I guess. Do you know the
21 operations of all the fully-regulated pool plants in your
22 order?

23 A. Some of them I know about, some of them I don't.

24 Q. Okay. And do you know the -- the ones that are
25 -- the three that have less than 4 million pounds per month?

1 A. Wouldn't have a clue.

2 Q. Okay. Do you know the nine that have from 4 to
3 10 million pounds per month?

4 A. I don't keep track.

5 Q. You just told me that you know about the plants
6 in the order.

7 A. I said one plant that we buy milk from --

8 Q. That's the only one you know --

9 A. -- that we buy bottles from.

10 Q. Okay. Is that the only one you know anything
11 about?

12 A. A little bit about, yeah.

13 THE COURT: I'm wondering if it's getting to be
14 that time, for lunch that is. It's just about 12:15. I'm
15 not exactly sure what the lunch facilities are around here,
16 so I'll give us an hour and a quarter and say we'll come
17 back at 1:30. We'll be resuming Mr. Brandsma's
18 Cross-Examination, and then I guess we'll be hearing from
19 Mr. Hettinga after that. Off the record.

20 (Off the record at 12:15 p.m. and reconvened at 1:30 p.m.)

21 THE COURT: On the record. Mr. Brandsma is still
22 on the stand, and Mr. Beshore still has the floor for Cross-
23 Examination.

24 MR. BESHORE: Yes. Thank you, Your Honor.

25 Q. (By Mr. Beshore) Mr. Brandsma, I want to ask you

1 first a couple of questions about your sales to Matanuska
2 Maid Dairy.

3 Do you have -- do you sell them milk like every
4 week?

5 A. No, we don't.

6 Q. Okay. Do you have sales every month?

7 A. That, as I said before, tends to go up and down
8 with the cows and how their production is and if I lose
9 sales or gain sales.

10 Q. With your cows in your production.

11 A. Uh-huh.

12 Q. So basically do your sales to Matanuska Maid then
13 vary with the availability of milk from Edaleen Dairy to be
14 supplied to Matanuska Maid?

15 A. A number of things, I mean it even bases on if
16 they need milk, I mean they've turned me down many, many,
17 many, many times, so it's just a variety of things I mean
18 that can play into the picture there.

19 Q. Are your sales, sales to Matanuska Maid, of
20 pasteurized bulk milk greater than the Class I price in the
21 order?

22 A. That's confidential.

23 Q. Do you know how your sales prices compare to
24 Matanuska's other suppliers'?

25 A. No, I don't.

1 Q. Do you know how your volumes compare to
2 Matanuska's other suppliers'?

3 A. I don't know.

4 Q. Okay. You're aware that they're supplied by
5 Smith as well, you heard that testimony in the hearing?

6 A. If -- yeah. That they are supplied by Smith as
7 well?

8 Q. Yes.

9 A. Yes.

10 Q. Okay. And you're aware that they're also
11 supplied by West Farm Foods?

12 A. Yes.

13 Q. Do you know if -- how the relationship of your
14 sales to Smith are handled, Matanuska Maid?

15 A. Our sales to Smith?

16 Q. No. I'm sorry, I misspoke.

17 A. Okay.

18 Q. Do they buy from Smith first and then Edaleen, or
19 Edaleen first and then Smith, do you have any idea?

20 A. I don't know what he does, actually.

21 Q. Okay. Are your sales on the basis that when you
22 have sales [sic.] available you call him, or does he call
23 you with regular orders?

24 A. It's been both, in the past.

25 Q. Have you -- do you sell to them more during the

1 winter than you do in the spring?

2 A. Once again, it goes against what I said before, I
3 mean up and downs in production and sales, so it's really
4 hard for me -- I mean, if I look back over various years,
5 there's strong areas some months and then the next year it's
6 none those months but in different months it's more.

7 Q. Now, let me -- how long have you been selling
8 bulk milk up to Alaska?

9 A. Eight years?

10 Q. Have your sales gone up or down during that
11 period of time? Are they greater now than they were eight
12 years ago?

13 A. I can't really recall. I mean, it's hard for me
14 to keep track of the years and how much it goes up and down.

15 Q. Does anyone at Edaleen keep track of that other
16 than you?

17 A. No.

18 Q. That would be your main area? Are you the main
19 person that's responsible for that account?

20 A. Yeah.

21 Q. Now, you've made the statement in your testimony
22 that -- it's on the bottom of Page 8 of 12, "There's little
23 correlation between the price for which Edaleen sells its
24 milk and the price on the store shelf." Have you made a --
25 you know, done a study of that?

1 A. No.

2 Q. What's the basis for your statement?

3 A. The basis of the statement would probably be the
4 there's been some testimony here that we undercut the
5 market, and that would be the basis of that.

6 Q. What does whether you undercut the market or not
7 have to do with the correlation between your price and the
8 price on the store shelf?

9 A. That people would say our price is cheaper on the
10 store shelf.

11 Q. You don't price the milk on the store shelf, do
12 you, or do you?

13 A. No, I do not.

14 Q. If you don't set that price and you haven't made
15 any study, how can you say that there's little correlation
16 between your sales price and the price on the store shelf?

17 A. Because a lot of our accounts use milk as a loss
18 leader [phonetic].

19 Q. The convenience stores that you sell to?

20 A. Uh-huh.

21 Q. Do they sell it for less than you sell it to them
22 for?

23 A. I don't -- sometimes they might, sometimes they
24 don't. It's -- it's up to them.

25 Q. I understand it's up to them, but have you

1 observed occasions when they've sold it for less than you've
2 sold them for?

3 A. Yes, I have.

4 Q. Is that routine?

5 A. I think it depends on circumstances, what they're
6 -- what they're trying to do. For us, being along the
7 border, a lot of the -- a lot of the c-stores along the
8 border try to draw in Canadians, and if they do a really --
9 take a discount on their milk, then they get the Canadians
10 in to buy their gas.

11 Q. What's the current going price for a gallon of
12 milk out of convenience stores in Whatcom County?

13 A. Hmm.

14 Q. Let's talk 2 percent gallon.

15 A. I think most of the stores we deliver to in
16 Whatcom County are around 2.19, 2.29.

17 Q. For 2 percent whole milk?

18 A. For 2 percent. And then like a lot -- for a lot
19 of places, I mean -- and then they struggle with that
20 because they feel their competition is Wal-Mart and then
21 Wal-Mart's always got it at a dollar ninety-nine, so it's--
22 (Pause.)

23 Q. Do you -- what labels do you sell your fluid milk
24 products under?

25 A. That's confidential.

1 Q. The labels? Aren't they -- I mean they're made
2 available to the public; right?

3 A. Well, then look it up. I just said it was
4 confidential.

5 Q. Well, I'm wondering what you mean by confidential
6 when they're on the store shelves and anybody can read them.

7 A. Well, then read it. I mean --

8 Q. Well, we're not in the store.

9 THE WITNESS: If I say if it's confidential,
10 can't it be confidential?

11 THE COURT: I can't order you to answer
12 questions. I believe if you say something is proprietary, I
13 don't think I have the authority to order you, but, you
14 know, it's a close call. If something's obviously to the
15 public and you don't want to tell what it is, then there's
16 not much I can do about it, other than hope -- let the
17 Secretary decide what he wants to do with it -- she wants to
18 do with it.

19 Q. (By Mr. Beshore) You don't want to tell us what
20 your labels are. You're not saying that they're secret;
21 right?

22 A. No.

23 Q. Do you have more than one label?

24 A. Yes.

25 Q. Do you package milk products under labels of a

1 buyer?

2 A. Like a --

3 Q. A store --

4 A. No.

5 Q. -- that you're selling to.

6 A. No.

7 Q. Do any other fluid milk plants package fluid milk
8 products with the same label that you use on some of your
9 products?

10 A. Maybe one, and I don't even know if they do it
11 anymore. I mean, a few years ago they did, but I'm not sure
12 if they do anymore or not.

13 Q. Was that a store or a distributor --

14 A. That was a distributor.

15 Q. The distributor in Olympia, for instance, do you
16 supply them with products under their label?

17 A. Yes.

18 Q. Do they buy products with their label from other
19 plants also?

20 A. They used to, but that plant no longer wants to
21 give them a private label.

22 Q. And are there other distributors that you supply
23 them with products under their label?

24 A. Yes, there is.

25 Q. How many?

1 A. I'm just going to say it's confidential.

2 Q. Do you know if any of those distributors also
3 acquire fluid milk products under the same label from other
4 plants besides Edaleen?

5 A. No, they don't.

6 Q. They do not.

7 A. (Shakes head.)

8 Q. Okay. Do you have agreements with them that they
9 will supply only products purchased from Edaleen?

10 A. Can you repeat that?

11 Q. Yeah. The distributors that you know do not
12 acquire products -- that you've said did not acquire their
13 labeled products from other sources, is that by virtue of an
14 agreement that you have with them that they will only
15 purchase those products from you?

16 A. That they only purchase --

17 Q. -- fluid milk products under their label from
18 you.

19 A. No.

20 Q. You've indicated that you're presently operating
21 your plant at basically full capacity. How long has that
22 been the case?

23 A. Since 1999.

24 Q. Now, during that period of time, when you're
25 operating at full capacity, there's no -- you've not been -

1 - I think you testified to this. You're not out soliciting
2 business because you can't handle any; right?

3 A. Yeah, just for the expenses that it takes.

4 Q. Are you -- so there's really no cost to Edaleen
5 in foregone business by virtue of your producer-handler
6 status, it's just a matter of your plant capacity?

7 A. I wouldn't say that. If I -- I'm basically
8 saying no to sales for a number of reasons, and that would
9 be farm and plant capacity, and I think if we lose an
10 account, I'm not going to go get that account that has
11 fulfilled their needs elsewhere.

12 Q. You're not going to go get it back, try to get it
13 back.

14 A. No.

15 Q. Why wouldn't you try to get it back?

16 A. Well, you're going to try to get it back, but it
17 doesn't generally set well with people when they want milk -
18 - or if they want anything and you tell them no. It's a
19 hard sale to make again.

20 Q. You mean if you refuse to supply somebody because
21 you don't have the supply --

22 A. Uh-huh.

23 Q. -- if you turn down a sale because you can't
24 provide --

25 A. Uh-huh.

1 Q. And -- what are you saying, that you can't -- you
2 can't supply them in the future if you do have supply?

3 A. Oh, you tell them "maybe in the future," but they
4 -- they don't understand the process of a PD a lot of the
5 times, that we're not allowed to buy milk from other people
6 and everything, so -- I mean, it's just a hard one to go
7 back to.

8 Q. But if you were part of the pool you could;
9 right?

10 A. If we were part of the pool --

11 Q. Right.

12 A. -- yeah, then we could.

13 Q. Right. And that would be one of the benefits of
14 being a pool handler: you wouldn't have --

15 A. Well --

16 Q. -- the limit on -- the limit -- there'd be no
17 impact on your price, of purchasing supplemental supplies
18 from other sources than your own farm; correct?

19 A. Well, then we'd have to pay the cost of being in
20 the pool.

21 Q. Right.

22 A. Which -- you'd have pool costs, but you'd have
23 the countervailing -- one of the benefits would be that you
24 could service additional accounts by acquiring supplemental
25 supplies from other farms.

1 A. Yes and no, I guess. The hard part for me is,
2 you know, we're allowed to buy that 150,000 pounds of milk
3 but West Farms will never sell it to us, so then we have to
4 buy it out of eastern Oregon. So, you know, if they're not
5 willing to sell us milk, it's kind of hard for me to say I
6 can just get milk from another farm.

7 Q. If you were a producer-handler you could enter
8 into a contract with another farm in Whatcom County, to have
9 them supply you.

10 A. I have to go through the co-op.

11 Q. Well, they're not indentured to the co-operative,
12 are they?

13 A. Yes.

14 Q. They have contracts but they --

15 A. Yes, they do.

16 Q. They can terminate those contracts, can they not?

17 A. None of them seem too willing to do that.

18 Q. Well, they'd need to have another market before
19 they'd do that, wouldn't they?

20 A. They could, but their contracts are with Darigold
21 and -- I don't know a lot about the whole -- who buys milk
22 from who and how that goes, but I'm not aware of anybody
23 right now that is buying milk directly from producers
24 without going through the co-op.

25 Q. Really.

1 A. Yeah.

2 Q. Okay. Let me ask you this, you've raised -- made
3 some comments in your testimony about Darigold being -- or
4 West Farm Foods, I'm sorry -- being able to blend 5 or 10
5 cents off of their producers, for losses at the bottling
6 plant. You recall that?

7 A. Yes.

8 Q. Okay. So basically what you're talking about
9 there is that the cooperative, when it has losses at -- or
10 reduced earnings at its bottling plant, it pays its members
11 less for milk from their farm; correct?

12 A. Yes.

13 Q. And when you have reduced profitability, reduced
14 revenues, in your fluid milk plant, you have less to pass
15 back to the bottom line at your farm; isn't that correct?

16 A. Well, it's all considered one, so -- you know, I
17 mean --

18 Q. Well, isn't the cut-off the same -- same thing?

19 A. Well, we don't have the --

20 Q. It's multiple producers but --

21 A. Yes.

22 Q. -- they're either -- if the co-op's profitable,
23 they -- the farms receive more money, and if it's not
24 profitable, they receive less money. Isn't that correct?

25 A. Well, we're not -- I think -- if we purchase

1 milk, I don't think we're going to get 5, 10 cents off the
2 price of the milk we purchase.

3 Q. Well, what I was asking you was if -- isn't the
4 allocation of profits and losses from the plant to the farm
5 in the cooperative the same as from the plant to the farm in
6 the producer-handler?

7 A. I don't know how they work.

8 Q. In any event, the way you work is, if it's --
9 it's one entity, if you make money at the farm level it
10 comes to your bottom line, if you make money at the plant
11 level it comes to your bottom line, if you lose at either
12 place, that comes to your bottom line also.

13 A. Yeah.

14 MR. BESHORE: Thank you. I have no further
15 questions.

16 THE COURT: Mr. English, you have some questions?

17 MR. ENGLISH: Yes, Your Honor. Charles English,
18 for Dean Foods and Shamrock Foods.

19 CROSS-EXAMINATION

20 BY MR. ENGLISH:

21 Q. Afternoon, sir.

22 A. Good afternoon.

23 Q. I just have a few questions, I hope. On Page 3
24 of your prepared testimony, near the bottom, you have a
25 statement that says: "In the last several years, plants who

1 are regulated have only had to pay the Class I price for
2 their milk."

3 Are you aware -- and perhaps you're not, since
4 you are not a regulated handler -- that regulated handlers
5 routinely pay over-order premiums in your marketplace?

6 A. Not aware.

7 Q. So you don't know whether routinely over the last
8 number of years that federal order handlers have been paying
9 upwards of 60 cents a hundredweight for their Class I milk.

10 A. And that is because --

11 Q. -- as an over-order premium.

12 A. An "over-order premium," explain it to me.

13 Q. Well, I'm asking you. I'm not the one doing the
14 testifying. So I'm asking whether you know whether over --
15 whether processors who are regulated have to pay more for
16 their milk than the minimum price obligation from the
17 federal order.

18 A. I am not aware of that.

19 Q. And if that occurs, and if that is in the record,
20 then to the extent that occurs, your statement does not take
21 that in consideration; correct?

22 A. That is correct.

23 Q. Similarly, on Page 5, the short paragraph at
24 about the middle, maybe just below the middle, you have a
25 statement that "In fact the cost-of-production squeeze has

1 been so great in recent years that," quote, "'we feel that
2 handlers paying minimum prices have had a cost advantage
3 over producer-handlers.'" Now, that statement is true, sir,
4 in light of some of what I just said, only if the handlers'
5 raw milk costs are actually below your costs of production;
6 correct?

7 A. Say that again.

8 Q. The statement that you make there, that you feel
9 that handlers paying minimum prices have had a cost
10 advantage over producer-handlers, is only true if those
11 handlers' raw milk costs are actually below your raw -- your
12 costs of production.

13 (Pause.)

14 A. So that if -- I just want to get this straight,
15 okay?

16 Q. (Nods head.)

17 A. You're saying that when the Class I price is
18 11.50 and our cost of production is higher than that, then
19 handlers have an advantage.

20 Q. No, actually, it's what you're saying, but I'm
21 also trying to add --

22 A. No, no. I'm trying to -- I'm trying to get
23 straight in my mind what you are trying to say to me.

24 Q. Let's try to combine the two concepts. If the
25 Class I price is \$14.00 and there's a 60-cent over-order

1 premium --

2 A. If there is.

3 Q. -- and therefore the cost is 14.60, if your cost
4 of production is lower than that 14.60, the statement you
5 make here isn't true; correct?

6 A. Is not true?

7 Q. Is not true. If your cost of production is less
8 than that 14.60, then your statement is not correct.

9 A. This statement does not have to do with every
10 situation.

11 Q. Fine. So let's talk about costs of production
12 for a moment. The costs of production, the unnumbered page
13 following Page 12 of 12 of your statement, these are not
14 your costs of production; correct?

15 A. Are we on -- I'm sorry. Okay, I gotcha. I
16 flipped too many tables. Yes.

17 MR. ENGLISH: And, Your Honor, I'm not sure
18 whether these were included as part of the exhibit when you
19 admitted it.

20 THE COURT: Well, I didn't know they were there
21 when I admitted it. I thought it was the written statement.
22 I admitted Exhibit 52, and this was all stapled together,
23 and, you know, if there's --

24 MR. ENGLISH: I may have some questions about
25 that and --

1 THE COURT: If there's questions on the
2 attachments to the written testimony and whether they should
3 be admitted, we can hear them before the witness is done.

4 MR. YALE: We're going to move that these
5 exhibits -- if you wish to renumber them separate numbers,
6 that's fine.

7 THE COURT: I think that your co-counsel moved
8 the whole package that was stapled together into evidence,
9 but it was characterized as written testimony when she did
10 it, she said, Here's his written testimony, I'd move it into
11 evidence, so --

12 MR. ENGLISH: And that was what I'd understood,
13 and then I missed the boat and I --

14 THE COURT: So with these attachments, we can
15 discuss whether they should be admitted as well. At this
16 point I'd just as soon have him question him and then at the
17 end of his testimony I'll make a ruling.

18 MR. YALE: That's fine. Just as long as you know
19 that we're moving this to be admitted as well.

20 THE COURT: I truly understand that.

21 MR. ENGLISH: Just so you know that at the end of
22 it I'm going to object to at least a couple things, but be
23 that as it may.

24 Q. (By Mr. English) You now know what we're
25 referring to --

1 A. Yes.

2 Q. -- Mr. Brandsma, there's some pages after your
3 statement.

4 A. Yes.

5 Q. And the very first one after the statement, an
6 unnumbered page, has two tables, characterized as "Cost of
7 Production - Order 131" and a smaller chart, "Cost of
8 Production - Order 124." Do you see that document?

9 A. Yes.

10 Q. And my question is: These are not your costs of
11 production; correct?

12 A. No, they are not.

13 Q. Now, do you know how ERS compiles the data that
14 you have listed here?

15 A. Just from what I've seen on their website.

16 Q. And do you know, based upon what you've seen at
17 your website, that ERS does not include the value of cull
18 cows as part of its ERS cost-of-production table?

19 A. No, I did not know that.

20 Q. Do you know that ERS does not include the value
21 of the sale of veal calves as part of their cost-of-
22 production data?

23 A. No, I do not know that.

24 Q. Do you know that ERS does not include, in the
25 cost-of-production data listed on this page, any other

1 government payments received, such as, but not limited to,
2 MILC?

3 A. No, I did not know that.

4 MR. ENGLISH: I think, Your Honor, since they
5 haven't -- I guess they've been moved. I'm going to object
6 to the portions, at least for my part, the portions of this
7 document here.

8 At the end there's an article from something
9 called "The Puget Sound Business Journal," November 23rd,
10 1998, that purports to make statements from some investment
11 banker I have never heard of, about my client, Dean Foods,
12 and I would object to the extent that any of that is to the
13 truth of the assertion regarding Dean Foods, especially
14 given the fact that any of the statements made about Dean
15 Foods in this are about what we call Legacy Dean, a non-
16 existent company, and now what we call New Dean, and I will
17 make that my representation, that it be refers to a company
18 called Chicago-based Dean Foods. There is no Chicago-based
19 Dean Foods in 2004.

20 So therefore I would object to the paragraphs
21 respecting Dean Foods. Frankly, I think all the materials
22 in it, you know, tend to be hearsay. I understand what you
23 said earlier, but especially as to Dean Foods, the
24 references are simply incorrect, referencing a different
25 company.

1 THE COURT: And Mr. Beshore has an objection
2 also, and then I'll hear you, Mr. Yale.

3 MR. BESHORE: Yes, I want to join the objection
4 and move to strike, if it's already in, the two newspaper
5 articles at the back of 52, which were provided for the
6 specific purpose of -- by newspaper articles attempting to
7 impeach Mr. Vanderpol [phonetic], who testified earlier in
8 the hearing and could have been confronted with these if
9 they're used for that purpose, but he didn't, and he's not
10 here, and they're just newspaper articles, and if we're
11 going to have hearings by clippings, you know, I don't know
12 what the witness stand's about. I think they're really not
13 probative and should not be admitted for any purpose.

14 THE COURT: I'll hear from Mr. Yale.

15 MR. YALE: First of all, do we have a number for
16 these exhibits so that I can --

17 THE COURT: Well, right now the whole --

18 MR. YALE: The whole packet, all right.

19 THE COURT: I have a package called Exhibit 52.

20 MR. YALE: All right. The issue -- first of all,
21 we've made no reference, you know, in terms of Dean Foods in
22 this issue of his testimony. The essence of his testimony
23 was that there's been a change in Vitamilk and that he as in
24 the industry has, first of all -- firsthand this -- he talks
25 about the transaction between him and Vitamilk, but the rest

1 of the transactions that occurred, he wanted to point out
2 that here was some suggestion that it was not their fault,
3 there was something else that's going on.

4 Now, in terms of the weight of whether this is,
5 you know, a newspaper clipping or whatever else, I mean,
6 that's for the secretary to weigh, you know, how much they
7 want to use that, but I mean the purpose of the testimony -
8 - he's just supporting what the source of his information
9 was that Vitamilk sales had nothing to do with PDs, it had
10 to do with some larger transaction that went on.

11 And the other part of it is -- I mean it's --
12 it's reliable information that could be used to at least
13 give that support, and I think it's consistent -- I don't
14 know whether it's so much impeachment; I think it's somewhat
15 consistent with what Vanderpol said. They did acknowledge
16 that they'd lost QFC and some of these others in there.

17 So, you know, we're not -- it just comes down to
18 that issue --

19 THE COURT: I've got it, you can stop. I'm going
20 to let it in under the same theory that I've let a lot of
21 other documents in here that aren't worth a whole lot, and
22 this is -- you know, this has some very limited value, I
23 would think, to the Secretary, but the Secretary can give it
24 the weight that it's worth, to the extent that it's somewhat
25 corroborative of the main statement of the witness and it

1 may be of some value; at least it shows you where he got
2 some of his thoughts.

3 What I would like just to -- I'm going to call it
4 Exhibit 52(a), the attachments, just in case somebody -- the
5 administrator or the Secretary decides to -- that they want
6 to toss it, but I'm going to mark it as Exhibit 52(a).

7 MR. YALE: All three of them as 52(a)?

8 THE COURT: I'm going to call the attachments as
9 52(a), yeah.

10 MR. YALE: All right.

11 THE COURT: And if somebody wants to toss a few
12 pages out of that, that the Secretary doesn't want to look
13 at, or not, it's up to her.

14 Go ahead, Mr. Beshore.

15 MR. BESHORE: I just want to note briefly an
16 additional objection to the first page of 52(a). It's a
17 table that he didn't prepare. There's no explanation for
18 how it's been prepared. It's got, you know, monthly -- or,
19 you know, annual data, monthly data, some of the columns are
20 half full and half empty. I don't think it has any
21 probative value.

22 THE COURT: Well, I think you made clear what you
23 think it's worth, and, you know, if the Secretary agrees
24 with you on that issue, she just won't pay attention to it,
25 she'll rely on other information to -- but, you know --

1 MR. BESHORE: That was just a different part of
2 the exhibit.

3 THE COURT: I understand. Are there any other
4 questions for this witness?

5 MR. BERDE: Yes.

6 THE COURT: Mr. Berde, go right ahead.

7 MR. BERDE: Sydney Berde, for United Dairymen.

8 CROSS-EXAMINATION

9 BY MR. BERDE:

10 Q. I don't think the record reflects the regulated
11 handlers with whom you compete. Can you name them?

12 A. The regulated handlers?

13 Q. The regulated handlers with whom you compete.

14 A. Most of the competition is either West Farm Foods
15 or our distributors. I'm really not sure who they all would
16 compete with. They compete with a number of dairies.

17 Q. Well, I'm talking about -- when you refer to your
18 distributors, do those distributors distribute milk that
19 they purchase from other regulated handlers?

20 A. "Do they purchase milk from other regulated
21 handlers?"

22 Q. Yes, or deliver milk from a producer.

23 A. Some of them do, some of them don't.

24 Q. So they would -- those other sources of fluid
25 distribution would be the regulated handlers who supply

1 those distributors; isn't that correct?

2 A. Yes.

3 Q. And that would constitute part of your
4 competition; isn't that correct?

5 A. Yes.

6 Q. All of whom paid Class prices established under
7 the order; is that correct?

8 A. Yes.

9 Q. I want to ask you about a statement again, about
10 the reblending by West Farms, that Mr. Beshore inquired
11 about. You agreed, as I recall, that to the extent that
12 West Farms reblends in order to cover losses at its
13 distributing plant, in effect you do the same. Is that
14 right?

15 A. I don't recall that.

16 Q. Well, if you have losses in your operation at the
17 distributive level, there has to be some reflection of those
18 losses in your operation; isn't that correct?

19 A. I guess so, but, you know, what --

20 Q. Well, I think --

21 A. No, no, no, let me --

22 Q. Let me follow it up.

23 A. Well, can I finish?

24 Q. And you've indicated --

25 A. Can I finish?

1 Q. Yeah, go ahead. All right.

2 A. Okay. You know, there comes a point where in a
3 business, either you have to raise your price or you take it
4 out of the farmer's check, and I guess that's where I'm not
5 following why it's being taken out of the farmer's check.

6 Q. Well, if you can't raise your prices, you take it
7 out of your farmer's check, don't you, as a producer?

8 A. No.

9 Q. No?

10 A. I mean, I'm -- I'm one entity.

11 Q. Well, you take it out of the check of the
12 enterprise, don't you, the returns of the enterprise?

13 A. Wherever that might be. I mean --

14 Q. But the --

15 A. Or you try to cut cost.

16 Q. Well, the difference, however, between West
17 Farms' reblending and how you handle your losses is that
18 West Farms pays into the pool the Class value of their milk
19 but you do not.

20 A. That's why we have so many other risks involved
21 in being a PD.

22 Q. But that is a difference between your operation,
23 is it not, and West Farms?

24 A. One of many, many, many differences.

25 Q. West Farms' plant is owned by its producer

1 members, is it not?

2 A. It's supposed to be, yes.

3 Q. It is in fact -- or one description of it might
4 be: a producer-handler.

5 A. I think that's a stretch, but --

6 Q. You think it's a stretch? Is that what you said?

7 A. Yeah. I don't think Darigold owns all the farms.

8 Q. Well, the farmers own the plant, do they not?

9 A. Yeah, but they -- they don't all own each -- they
10 don't own the plant and the farms together.

11 Q. But they own the plant.

12 A. But they don't own the farms. It's not all --

13 Q. Who's the "they" we're talking about? Aren't the
14 producer members of West Farms the owners of the bottling
15 plant?

16 A. They have all got a small stake in it, yes.

17 Q. And they all suffer losses or gains of the
18 operation of the bottling plant.

19 A. Or the cheese plant or the powder plant or
20 whatever plant --

21 Q. Right.

22 A. -- of all the different plants they have, of
23 their \$1.1 billion worth of business.

24 Q. But the difference is that West Farms pays the
25 market administrator a cost for milk that you do not bear;

1 isn't that correct?

2 A. That is one of the things they do.

3 Q. Can you explain why that difference should occur?

4 A. Because that is what has been stated since 1937
5 and that is the rules we play by, and they -- and every
6 farmer has played by. They have a choice of whether they
7 want to be a PD or not a PD. I'm not sure why this is --
8 needs to be taken away.

9 Q. Let me ask you where it has been stated?

10 A. From what I've seen in 1937.

11 Q. What did you see, in 1937, that led you --

12 A. Well, not personally back then.

13 (Laughter.)

14 Q. What did whoever --

15 UNIDENTIFIED MALE: [Indiscernible.]

16 THE WITNESS: Yeah, I wasn't going to say so.

17 MR. BERDE: Unfortunately, I was around in 1937,
18 yes.

19 (Laughter.)

20 Q. (By Mr. Berde) Are you referring simply to the
21 fact that the Department has defined some kind of an entity
22 called "producer-handler" and exempted that entity from
23 pooling in pricing and application of uniform prices, as the
24 Act provides?

25 A. As far as I know, yes.

1 Q. Is that the source of what you call 1937 --

2 A. As far as I know.

3 Q. And isn't that the reason we're here now: to
4 reexamine that issues?

5 A. You guys are, I'm not really not (chuckling).

6 MR. BERDE: Thank you.

7 THE COURT: Anything else from the proponents?
8 (No response.)

9 THE COURT: Mr. Yale, do you have Redirect at
10 all?

11 MR. YALE: Yes, I do. Thank you.

12 THE COURT: Oh, and I also want to give the --
13 let me give Ms. Deskins and Mr. Rower a chance first, I
14 guess. I'm sorry. Go ahead, Mr. Rower.

15 MR. ROWER: Jack Rower.

16 CROSS-EXAMINATION

17 BY MR. ROWER:

18 Q. Mr. Brandsma, on Page 7 of your testimony, you
19 introduced a term, "captive plant."

20 A. Yes.

21 Q. Could you expand on what you mean by "captive
22 plant."

23 A. A captive plant would be someone like Safeway or
24 Fred Meyer, which Fred Meyer is -- I don't know if they're
25 nationwide or not, but they're by -- in our neck of the

1 woods, but they would be plants that have sales to their own
2 stores, they bottle the milk and are able to send it to
3 their own stores, thus eliminating a middleman, I guess you
4 would say. So they kind of have a captive source for their
5 milk.

6 Q. To your knowledge, do captive plants have other
7 customers beyond the retail customers at the groceries?

8 A. Yes. Safeway, for instance, has a large
9 distributor in the Seattle area, and they also have the
10 Starbucks accounts, which they distribute to a warehouse,
11 and for -- when we lost the Starbucks accounts, it was
12 probably, just in Seattle, nine trailers a week, so I'm sure
13 it's far and above that, so -- and the other account I know
14 takes -- well, I've been told -- takes six or seven trailers
15 a week, from Safeway, and -- and from being around and with
16 the competition and milk prices being fairly shared, there's
17 very few people that can compete with Safeway because of
18 what they have.

19 Q. Well, as you've said, only some portion of the
20 retail sales, what you call the captive sales --

21 A. Yes.

22 Q. -- are part of that operation, is that what
23 you're --

24 A. Yes. Yes.

25 MR. ROWER: Mr. Tosi has some questions for you.

CROSS-EXAMINATION

1
2 BY MR. TOSI:

3 Q. Thanks for appearing today, Mr. Brandsma. A few
4 questions, just to build a little bit off of what Jack here
5 was just asking.

6 MR. TOSI: I'm sorry. My name is Gino, G-i-n-o,
7 Tosi, T-o-s-i. I'm with USDA Dairy Programs in Washington,
8 D.C.

9 Q. (By Mr. Tosi) I heard some Cross-Examination a
10 little bit here on -- and I'm not sure that I understood
11 everything that you were saying, but I'd like to ask a
12 question or two about the relationship between the price to
13 a consumer, when a consumer comes to a store and buys milk,
14 and what you sell milk for to retail outlets. Could you
15 please go over a little bit about things that you observe or
16 what you think you know about that relationship.

17 A. For what we would sell to retail stores for and
18 what they would sell milk for and things like that, a lot of
19 the things I observe there is a lot of the c-stores -- and
20 there's a pretty fierce competition between c-stores, and
21 what I see a lot of them do is A-frame signs and so many of
22 them take milk and use milk as a draw to get people in the
23 store, and I think what I see a lot of is: at-cost, less-
24 than-cost, just-above-cost pricing in a lot of those c-
25 stores.

1 Q. Thinking in your capacity as a businessperson,
2 maybe this is asking you to think more in terms of -- in
3 your capacity acting as a handler -- no, I'll strike that
4 question.

5 In your testimony here you talk a little bit
6 about orderly marketing, you make reference to that.

7 A. Yes.

8 Q. Would you please start off by saying -- based on
9 how you understand milk orders to work and what some of
10 their objectives are.

11 A. Based on what I think?

12 Q. What you think orderly marketing is.

13 A. Well, I think orderly marketing means that you
14 have competition in the marketplace, and when you have
15 competition in the marketplace, you have basically consumers
16 that benefit by competition, and if we have orderliness in
17 the marketplace, I think you see good competition between
18 all members involved in that marketplace, and if -- yeah.

19 Q. Let me -- I'll ask it a little bit differently.

20 A. Okay.

21 Q. If you were a producer --

22 A. Yes.

23 Q. -- you're a dairy farmer --

24 A. Okay.

25 Q. -- and you're in an area where your milk can be

1 priced under an order, from a producer's point of view, what
2 would you think orderly marketing would mean to you?

3 A. From a producer's point of view, orderly market.

4 So if I was just a regular farmer, say shipping to the
5 co-op?

6 Q. Sure.

7 A. Orderly market, if I was a producer, would mean
8 that we see milk at the same price levels between all the
9 players in the marketplace.

10 Q. You mean that the price you're receiving would be
11 similar, like for example, to your neighbor's?

12 A. Uh-huh, yes.

13 Q. And then in your thinking as a handler, what
14 would that mean, what would orderly marketing mean to you?
15 How would you describe that?

16 A. As a handler. Orderly market as a handler would
17 mean that -- just a fair competition, I guess, in the
18 marketplace, between all the handlers in the marketplace.

19 Q. Would that mean that you're paying a similar
20 price with all other handlers? Similar price for milk,
21 excuse me.

22 A. Well, that's a hard one for me to answer. I'm
23 not familiar enough with just being a handler. I really
24 can't answer that, I'm just not familiar enough.

25 Q. If you were a producer, what would be an example

1 of something that would be disorderly from your point of
2 view as a producer?

3 A. As a producer?

4 Q. Yes.

5 A. Something that would be disorderly, as a
6 producer.

7 (Pause.)

8 I haven't thought about that before. Something
9 that would be disorderly as a producer.

10 (Pause.)

11 I guess, you know, disorderly would probably be:
12 your neighbor getting \$2.00 a hundredweight more or \$3.00 a
13 hundredweight more for their milk.

14 Q. What's disorderly about that, in your opinion?

15 A. What's disorderly about that?

16 Q. Yes.

17 A. Well --

18 Q. I mean that you wouldn't like it is obvious.

19 A. Well, you wouldn't like it, but I mean -- yeah.
20 I mean, that's nothing really disorderly about it, I mean -
21 - the neighbor got a good deal, you know.

22 (Pause.)

23 I haven't -- I have no answer, I'm sorry, on
24 that.

25 MR. TOSI: That's all I have.

1 THE WITNESS: Okay.

2 MR. TOSI: Thank you, I appreciate your
3 testimony.

4 THE WITNESS: Sorry.

5 THE COURT: Counsel, over here, Mr. Cherry,
6 Ms. Deskins, any other questions?

7 (No response.)

8 THE COURT: Go ahead, Mr. Beshore.

9 MR. BESHORE: One other question.

10 FURTHER CROSS-EXAMINATION

11 BY MR. BESHORE:

12 Q. You testified, I think, that the price of milk
13 out of convenience stores in Whatcom County is 2.19 or 2.29
14 a gallon. Is that at the present time?

15 A. From most of the accounts we deliver to.

16 Q. Okay. And are you delivering to them -- are
17 those profitable sales for you presently?

18 A. I would say so, yes.

19 Q. So are they selling your milk as a loss leader or
20 is there some margin between your price to the stores and
21 their out-of-store price?

22 A. I'm not going to comment on -- that's
23 confidential.

24 Q. In any event, your sales to them are profitable
25 at the present time.

1 A. Yes.

2 MR. BESHORE: Thank you.

3 THE COURT: Okay, Mr. Yale, you have questions?

4 MR. YALE: Sure. Ben Yale, on behalf of Smith
5 Brothers Farms, Edaleen Dairy, and Mallorie's Dairy.

6 CROSS-EXAMINATION

7 BY MR. YALE:

8 Q. You made a comment -- there was a question here
9 about the captive plants.

10 A. Yes.

11 Q. All right. Are you aware of whether Kroger is
12 selling milk to anybody other than to its own stores?

13 A. I'm not aware that they are.

14 Q. You testified that Safeway is selling to somebody
15 other than Safeway; right?

16 A. Yes; they are.

17 Q. And there's kind of an integration between the
18 Safeway plant and its stores?

19 A. Yes.

20 Q. Do Safeway Stores buy milk from any other plants,
21 to your knowledge?

22 A. I saw just a little bit of like Darigold in our
23 local store, at Safeway, but it's like a shelf or something,
24 not very much.

25 Q. But you made a comment that -- said that based on

1 the prices you saw with Safeway, that they're selling to
2 these other companies that aren't -- that their prices are,
3 what, better, worse? What's the situation that you're
4 seeing?

5 A. From what I'm seeing, they're definitely below
6 the pricing that we currently supply to our customers.

7 Q. And are you asking the Secretary to limit
8 Safeway's ability to be integrated as stores and also sell
9 to other customers?

10 A. No.

11 Q. Now, there was a question, I think by Mr. Berde,
12 that talked about the risk that West Farms was like a
13 producer-handler. I think you remember the gist of that.
14 Right?

15 A. Yes.

16 Q. If you have a loss of production at your farm,
17 tell me what the impact would be, I mean a significant loss
18 of production, maybe feed was bad or bad weather or, you
19 know, all these other variables that hit, tell me what the
20 ramifications --

21 A. A loss of production either is going to mean a
22 loss of sales, that you're going to lose a customer because
23 they can't -- you can no longer supply them, or it's going
24 to mean that you, in order to supply them, join the pool.

25 Q. But your whole enterprise takes the risk of that

1 loss; right?

2 A. Yes.

3 Q. Now, you've got neighbors, I understand, that are
4 members of like West Farms or DF -- NDA?

5 A. NDA.

6 Q. NDA. And do those members from time to time go
7 bankrupt and out of business?

8 A. Yes, they do.

9 Q. And do the other farmers have to pay for the
10 losses that occurred as a result of those farmers' -- I mean
11 do they have to pay for those other cows or the creditors or
12 anybody else that -- of that farm that went bankrupt?

13 A. No, they don't.

14 Q. But in your case, if something happens in your
15 production, you have that full risk; right?

16 A. Yes.

17 Q. Now, you mentioned, I think, on this issue of
18 this disorderly marketing that if a producer -- you thought
19 maybe if they got \$2.00 more than their neighbor or
20 something, that it could change things; right?

21 A. Yes.

22 Q. The point is, is that if there's an economic
23 value to make a business decision to join a cooperative or
24 to sell to a distributing plant or to be a PD, that
25 producers will make that if there's an economic advantage to

1 them; right?

2 A. Yes, they would.

3 Q. All right. And if there was an economic
4 advantage to them, as they saw it, to be a PD, they could
5 make the same decision their dad did and you did; right?

6 A. Yes, they could.

7 Q. And isn't the fact -- or first of all let me ask
8 you this. In Whatcom County, let's just limit it there,
9 have you seen any producers decide to become PDs?

10 A. No.

11 MR. YALE: I don't have any other questions.

12 (Pause.)

13 THE COURT: Okay, you may step down,
14 Mr. Brandsma.

15 (Witness excused.)

16 THE COURT: Who's the next witness, Mr. Yale? I
17 thought Mr. Ricciardi --

18 MR. YALE: We're done with ours. I think that
19 the next one they were going to bring, I think, was Mr. --

20 THE COURT: -- was Mr. Hettinga, brought by
21 Mr. Ricciardi. I don't see either one of them here.

22 MR. YALE: I mean, I can go get them, they may
23 not be aware -- they may have thought that we wouldn't be
24 done at this time. I'll go get them.

25 THE COURT: If they're right outside, bring them

1 in, otherwise we can take a short break. I wasn't planning
2 on breaking this early, though.

3 (Pause.)

4 THE COURT: Off the record.

5 (Off the record and reconvened.)

6 THE COURT: On the record. Okay, Mr. Ricciardi,
7 I'll let you call your next witness, please.

8 MR. RICCIARDI: Your Honor, Al Ricciardi, for
9 Sarah Farms. The next witness would be Hein Hettinga, and
10 Your Honor, I have provided to everyone in the room,
11 including you and the Court Reporter, four documents: a
12 statement of Mr. Hettinga; an article from Dairy Foods
13 entitled "'A Decade of Change' Dairy Foods 100"; there's
14 also a document from the Progressive Dairymen, Southwest
15 Division, for November of 2003; and then, finally, an
16 article regarding Shamrock Foods, with Mr. Kroger's picture
17 painted on it right there.

18 THE COURT: Do you want all four of these
19 documents marked at this time?

20 MR. RICCIARDI: I would, Your Honor, and I would
21 suggest that we mark them -- I believe that we're up to 53.

22 THE COURT: 53.

23 MR. RICCIARDI: The statement would be 53; the
24 "Dairy Top 100" article 54, the Progressive Dairymen 55; and
25 the Shamrock Article 56.

1 THE COURT: Okay, that's how I've marked them.
2 (Exhibits Nos. 53 through 56 were marked.)

3 MR. RICCIARDI: Appreciate it, Judge.

4 THE COURT: And I'm going to swear Mr. Hettinga.
5 Would you please raise your right hand.

6 HEIN HETTINGA, OPPONENTS' WITNESS, SWORN

7 THE COURT: Please state your name and then --

8 THE WITNESS: Hein Hettinga.

9 THE COURT: Spell it for me too, please.

10 THE WITNESS: Hein, H-e-i-n, Hettinga,
11 H-e-t-t-i-n-g-a.

12 THE COURT: Okay. Go ahead, Mr. Ricciardi.

13 MR. RICCIARDI: Your Honor, I'm going to make a
14 somewhat unusual request, but hopefully it will be
15 accommodated.

16 Mr. Hettinga, although never formally diagnosed
17 as dyslexic, has a reading difficulty in the nature of
18 dyslexia. He has a difficult time in reading. The
19 statement that he is to give today will be his statement,
20 but my request is that to the extent it needs to be read
21 into the record, that the Court allow me to red that
22 statement into the record and then Mr. Hettinga would be
23 available for cross-examination or examination by the
24 proponents' counsel. I would request, however, that to the
25 extent that anyone's going to ask him to look at a document

1 or review a document, that we be given sufficient time to do
2 that.

3 THE COURT: That sounds okay to me. I mean, I
4 assume that these folks are just getting the statement now,
5 they haven't had them overnight, so they can't -- we can't
6 like just go right to cross-examination, the statement
7 hasn't -- they haven't had a chance to read the statement;
8 is that correct?

9 MR. RICCIARDI: That is correct, Your Honor.

10 THE COURT: In that case I think the statement
11 might as well be read. It's going to take people 15 or 20
12 minutes to read it, and you speak at a reasonably good pace,
13 and unless someone objects, I'm going to let Mr. Ricciardi
14 read the statement of Mr. Hettinga. Anyone have a problem
15 with that?

16 UNIDENTIFIED FEMALE: Maybe at the end, once he
17 finishes, if he could confirm that that --

18 THE COURT: I would think we'd do something like
19 that, but --

20 MR. RICCIARDI: And I intend to do that, Judge.

21 THE COURT: Okay. Go ahead.

22 MR. RICCIARDI: As indicated, Judge, this is the
23 testimony of Hein Hettinga.

24 DIRECT TESTIMONY

25 BY THE WITNESS (as read by Mr. Ricciardi):

1 "My name is Hein Hettinga, and I am the founder
2 and co-owner with my wife of Sarah Farms. Sarah Farms is
3 named after my daughter and is a family company which was
4 founded about ten years ago. I have been dairying about 30
5 years. Along with my two sons, I run the operation, and my
6 daughter, Sara, serves as the comptroller.

7 "Sarah Farms believes that the real purpose of
8 this hearing is to eliminate Sarah Farms from the
9 marketplace. The imposition of a cap would restrict the
10 future growth of Sarah Farms, whatever that may be.
11 Meanwhile other farmers, other cooperatives, and other
12 handlers would retain the ability to expand, without any
13 such restriction.

14 "Furthermore, the imposition of any cap based on
15 what marketing conditions might be in the future is
16 unjustified and speculative. The imposition of the proposed
17 3-million-pound-per-month cap, which is lower than the
18 current monthly production of Sarah Farms, would force Sarah
19 Farms to examine whether to continue as a producer, whether
20 to continue as a handler, or whether it would be feasible to
21 continue operations at all.

22 "These proposals would dramatically injure or
23 terminate our business. This is true even though there is
24 no real evidence that Sarah Farms holds an unfair advantage
25 as a producer or a procedure. In fact, the evidence

1 establishes that in exchange for regulation as a producer-
2 handler, Sarah Farms bears costs that are not usually borne
3 by other market participants.

4 "I have been in a number of agricultural
5 businesses throughout my life. I owned a hoof-trimming
6 business and a cattle-trading operation before I began
7 dairying some 30 years ago.

8 "About 8 years ago a new state-of-the-art
9 processing plant was built in Yuma, Arizona. The original
10 intent of the plant was to process milk and the sell the
11 milk into New Mexico. In reality, the primary sales of
12 Sarah Farms occur within the borders of the state of Arizona
13 and the New Mexico market represents a small percentage of
14 the company's business.

15 "The customers of Sarah Farms include Bashas,
16 specifically its Food City stores, as well as Sam's Club,
17 Costco, and some smaller independent retailers. Within the
18 first year or so of the operation of the integrated dairy
19 and milk-processing operations Sarah Farms welcomed
20 Food City as the first major customer. When Bashas
21 purchased the Food City stores and began to expand its
22 operations, the sales of Sarah Farms began to grow.

23 "Sarah Farms currently produces in excess of
24 3 million pounds of milk per month, and the business would
25 suffer substantially if any of the current proposals or

1 revised proposals were to be adopted.

2 "Since 1995 Sarah Farms has operated as a
3 producer-handler in Order 131 without creating disruptive or
4 'disorderly' marketing conditions, and there is no evidence
5 that any disruptive marketing conditions, however defined,
6 are now occurring. Instead, Sarah Farms has consistently
7 operated its business under the guidelines that the
8 United States Department of Agriculture, the 'Department,'
9 has left virtually unchanged and that Congress has
10 consistently protected for decades.

11 "Sarah Farms has been able to successfully
12 operate by controlling the source of its milk and by
13 providing a quality product and good service to its
14 customers. For example, although more expensive to produce,
15 Sarah Farms uses a tamper-proof cap, with a foil seal, which
16 prevents leaks and air contamination, as well as increasing
17 consumer safety. Sarah Farms delivers milk from its cows to
18 the customer's store within 24 hours, which provides for a
19 17-day shelf life on delivery, as opposed to the 10-day
20 shelf life offered by others.

21 "In addition, as part of the services provided to
22 several of its major customers, Sarah Farms ships its gallon
23 milk containers in cardboard boxes. As far as I know, no
24 other distributors in the marketing area have been willing
25 to provide this service to their customers. The use of the

1 cardboard boxes insulates the milk from light and also keeps
2 the milk cooler. These examples of quality issues exemplify
3 the type of services provided by Sarah Farms to its
4 customers.

5 "As noted above, Sarah Farms operates as a
6 producer-handler within the current federal regulations, has
7 made a substantial and continuing financial investment, and
8 has also built its operations to ensure continued compliance
9 with the current rules and regulations.

10 "Over the years, Sarah Farms has been presented
11 with numerous challenges to its status as a producer-
12 handler. For example, the Department received comments from
13 the industry during the course of federal order reform that
14 suggested the curtailment or elimination of the producer-
15 handler exemption. The Secretary properly concluded that:

16 "It has been a long-standing policy to exempt
17 from full regulation many of those entities that operate as
18 both the producer and a handler. ... A primary basis for
19 exempting producer-handlers from the pricing and pooling
20 provisions of a milk order is that these entities are
21 customarily small businesses that operate in a self-
22 sufficient manner. Also, during the history of producer-
23 handler exemption from full regulation, there has been no
24 demonstration that such entities have an advantage as either
25 producers or handlers so long as they are responsible for

1 balancing their fluid milk needs and cannot transfer
2 balancing costs, including the costs of disposing of reserve
3 milk supplies to other market participants. 64 Fed.Reg.
4 16135 (April 2,1999).'

5 "The Secretary also discussed the small changes
6 that were made to producer-handler regulations for the sole
7 purpose of standardizing the consolidated orders.

8 Importantly, the Secretary noted that, quote, 'no changes
9 have been made that would intentionally regulate a producer-
10 handler that is currently exempt from regulation under
11 current operating procedures.' The Secretary also took note
12 of Congress's unwavering support of the producer-handler
13 exemption.

14 "From the inception of its operation as a
15 producer-handler, Sarah Farms has faced a number of
16 challenges from some of the proponents of the current
17 proposals, including the United Dairymen of Arizona, UDA,
18 and Shamrock Foods Company, Shamrock. From the time that
19 Sarah Farms was established as a producer-handler in the 131
20 market, both UDA and Shamrock have continuously attempted to
21 have the Department disqualify Sarah Farms as a producer-
22 handler. Both UDA and Shamrock filed litigation in the
23 United States District Court, for the District of Arizona,
24 in an attempt to contest a decision by the Department that
25 Sarah Farms qualified for the producer-handler exemption.

1 "As I understand it, the United States District
2 Court dismissed the action for lack of subject matter
3 jurisdiction and the 9th Circuit Court of Appeals held that
4 the dismissal for lack of subject matter jurisdiction was
5 correct, referencing United Dairymen of Arizona, Shamrock
6 Farms, v. Veneman matter, 279 F.3d 1160 (9th Circuit 2002).

7 "Sarah Farms is now faced with yet another
8 challenge to its continued existence from UDA, Shamrock, and
9 some of the major cooperatives and publicly-traded companies
10 in the dairy industries. Large grocery chains and dairy
11 retailers, including Dean Foods and Kroger, are supporting
12 the proposed changes to the Department milk marketing orders
13 that regulate Class I fluid milk and are seeking to impose
14 regulatory restrictions on independent producer dairy farms
15 to require those producer-handlers, including Sarah Farms,
16 to set minimum prices for fluid milk.

17 "Despite no significant change in marketing
18 conditions since order reform and without any substantial
19 substantive evidence of disorderly marketing, the proponents
20 seek to effectively shut our doors. The proposals, if
21 adopted, would force Sarah Farms to change the way it
22 operates, and Sarah Farms would incur increased costs.
23 Depending on market conditions, if the proposals were
24 adopted, the ability of Sarah Farms to continue its
25 operations will need to be examined.

1 "The impact of the various proposals would force
2 Sarah Farms to incur additional costs in the form of Class I
3 settlement fund contributions, from which it is now
4 exempted. However, the proponents' own testimony
5 establishes no basis for this dramatic change in policy.

6 "Instead, the reality is that being a producer-
7 handler involves a substantial amount of risk that the
8 typical dairy farmer does not bear, and the 'unfair
9 advantage' claimed by the proponents is a fallacy. If being
10 a producer-handler was the fast-track to wealth that the
11 proponents claim, then why aren't there more of them in this
12 market and in the other parts of the United States? The
13 number of producer-handlers in the Class 131 marketing area
14 has declined six in 1980 to just two in the year 2002.
15 Moreover, it appears that in the Class 131 marketing order
16 has the least number of producer-handlers in the entire
17 country.

18 "For the reasons cited by the Secretary in
19 support of the last decision on this topic, the Department
20 should not adopt these proposals. The regulation of
21 producer-handlers contradicts not only Congress's stated
22 intent that the producer-handler exemption be preserved but
23 would also constitute a change in the long-standing policy
24 of the Department.

25 "The proponents seek to close our business

1 despite the fact that Sarah Farms bears all of its balancing
2 costs, is entirely self-sufficient, and is a small business
3 under the provisions of the Regulatory Flexibility Act as a
4 dairy products manufacturer that employs less than 500
5 employees. Moreover, the growth of our production in recent
6 years has been due to increased efficiencies and the growth
7 of our customers.

8 "As noted above, the growth of Sarah Farms is
9 reflected in the growth of its main customers. In this
10 regard, over the last five years there has been a
11 significant shift in the retail industry from small
12 operations to larger warehouse stores and/or larger
13 supermarkets.

14 "As previously mentioned, some of the major
15 customers of Sarah Farms are Bashas/Food City, Costco, and
16 Sam's Club. Each of these customers has grown in the last
17 five years. With regard to Food City, Sarah Farms has gone
18 from serving a small number of stores to serving a
19 substantially larger number.

20 "Moreover, discount retail outlets such as Costco
21 are challenging traditional milk processors and grocery
22 chains. The large national cooperatives, dairy processors,
23 and food retailers are attempting through these proposals to
24 limit competition, which would ultimately impact the
25 consumer both in the quality of the milk that will be

1 available in the market and in the increased price of the
2 milk.

3 "Sarah Farms relies principally on the sale of
4 fluid milk in gallons, half-gallons, and quarters. Indeed
5 most of Sarah Farms' sales are from the sale of fluid milk
6 in these size containers. Sarah Farms also has a limited
7 number of sales in sour cream.

8 "Sarah Farms has chosen to integrate both its
9 dairy and milk-processing operation and to concentrate on
10 the sale of fluid milk. Sarah Farms expended significant
11 capital in reliance upon the exemption from regulation as a
12 producer-handler.

13 "Sarah Farms expended substantial capital and
14 took the risk of building a fresh modern processing plant
15 with the latest equipment and technology. Based upon the
16 technology and equipment that is available today, Sarah
17 Farms is able to utilize these efficiencies to process milk
18 in a more efficient manner and, I believe, less than
19 expensive than our competition.

20 "Moreover, since Sarah Farms focuses on just one
21 product, fluid milk, rather than having to run a plant
22 producing certain items at certain times and others at other
23 times, Sarah Farms can run its plant consistently and
24 without any significant down time. These savings in
25 processing costs can be passed on to Sarah Farms' customers

1 and ultimately to the consumer.

2 "The proponents suggest that our operation
3 threatens their ability to market milk in the 131 Order area
4 and that Sarah Farms is somehow a threat to their business.
5 These claims are made despite the fact that those testifying
6 in support of the regulations are all significantly larger
7 than our operation. Indeed, Sarah Farms does not have a
8 price advantage.

9 "As noted in the compilation of statistical
10 material for Federal Milk Marketing Order Number 131, the
11 Arizona-Las Vegas marketing area, prepared by the
12 United States Department of Agriculture, Agricultural
13 Marketing Service Dairy Program, there are four handlers
14 operating pool plants within the marketing area: Kroger
15 Company, Safeway Stores, Inc., and Shamrock Foods Company
16 operate distributing plants; United Dairymen of Arizona has
17 a co-op pool manufacturing plant.

18 "In addition, handlers operating partially-
19 regulated distributing plants in the area of this federal
20 order include Dean Foods of California, Inc., Morningstar
21 Foods, Inc., General Mills, and Alta Dena Certified Dairy.
22 I believe that Sarah Farms is smaller than each of the
23 non-exempt plans in the state of Arizona.

24 "The August 2003 edition of Dairy Foods, in an
25 article entitled, 'A Decade of Change...and a Year of

1 Challenges,' which has been marked as Exhibit '54, lists the
2 100 companies with the largest fiscal year sales in the
3 dairy industry, on a list entitled the 'Annual Dairy 100.'
4 The Kroger Company Dairy operation is listed as number 7 on
5 the Top 100, Safeway Dairy Division is number 23 on the
6 list, and Shamrock Farms is listed as number 58.

7 "While UDA is not listed in the Top 100, 18
8 cooperatives are among the top 100 companies with the
9 largest amount of fiscal year sales in the dairy industry.
10 There is not one producer-handler in the Top 100 list.

11 "What this list exemplifies is that the companies
12 that are challenging Sarah Farms and making these proposals
13 are in a much better financial position than Sarah Farms.
14 Therefore, this is really an effort by the larger companies
15 to eliminate competition in Order 131, which, in my opinion,
16 would have the effect of increasing the cost of milk for
17 consumers in the marketing area.

18 "There has been a seismic shift in the last
19 several years in the marketing of milk. Warehouse stores
20 have decided to market milk at a smaller mark-up or profit
21 margin. This is direct competition at both the retail and
22 wholesale level for companies such as Dean's, Safeway,
23 Kroger, and, locally, Shamrock. This is a war at the street
24 level to limit competition, which the proponents have now
25 brought into this hearing.

1 "Indeed, there has also been heightened concern
2 among consumer advocacy groups, federal lawmakers, and state
3 attorney general that large national cooperatives, dairy
4 processors, and food retailers are attempting to take
5 advantage of declines in raw milk prices but not passing
6 these cost savings on to the consumers. This is the reality
7 and the factual backdrop for the proposed changes in the
8 regulations made by these proponents.

9 "The proponents also testified that Sarah Farms
10 possesses an advantage as a producer-handler that gives us a
11 competitive edge not available to other market participants.
12 First, that advantage simply is not there. Second, even if
13 it were a reality, there are no barriers that prevent a
14 handler from buying a dairy herd or that prevent a dairy
15 farmer from opening a bottling facility.

16 "For example, as shown in a recent article from
17 the Progressive Dairyman in November of 2003, a copy of
18 which has been marked as Exhibit 55, Shamrock Farms Dairy
19 has recently built a 10,000-cow milking facility near
20 Stanfield, Arizona. Based upon my experience, the financial
21 investment in this dairy is in the millions of dollars.
22 This amount has increased because I believe that Shamrock
23 has recently purchased cows and began its operations at this
24 dairy.

25 "Given this investment in a dairy production

1 facility, Shamrock Farms could make a business decision to
2 construct a processing plant near that dairy and to then
3 operate as a producer-handler under the terms of the current
4 regulations, if it chose to do so. While I am not privy to
5 the financial information for Shamrock Farms, since it is
6 confidential and privileged, it is apparent that Shamrock
7 has decided that it is in its best economic interest to
8 operate as a regulated handler rather than a producer-
9 handler, even though it has now spent substantial amounts of
10 money to construct a state-of-the-art dairy.

11 "One of the proponents to the changes to the
12 regulations is Shamrock Foods Company. As noted in an
13 article titled 'Shamrock Foods: A Family Company with
14 Foresight, a copy of which has been marked as Exhibit 56,
15 Shamrock Foods has the largest dairy in the Southwest and
16 among the largest five privately-held Arizona companies.

17 "The article indicates that Shamrock has a herd
18 of approximately 7500 cows. However, that was before
19 Shamrock completed its new dairy near Stanfield and added at
20 least 3,000 additional cows. In total, Shamrock processes
21 70,000 gallons of milk annually.

22 "In June 2001, Shamrock opened an extended shelf
23 life (ESL) plant facility, which gives Shamrock the ability
24 to put 82 days of code life on its products, which in turn
25 allows it to serve a larger geographic area with its

1 products. Shamrock produces 12-, 20-, and 32-ounce plastic
2 bottles of white milk and flavored milk in its ESL facility.
3 Sarah Farms cannot compete with Shamrock on a head-to-head
4 basis given the competitive advantage that Shamrock has in
5 the sale of, among others, ESL products.

6 "Shamrock also has the size and financial
7 wherewithal to sell its products in Arizona, Colorado, New
8 Mexico, Utah, Nevada, and Texas. Sarah Farms is not here
9 complaining that Shamrock has an unfair competitive
10 advantage, although Shamrock may have a competitive
11 advantage in many areas, including in Arizona.

12 "Obviously Shamrock has a certain business plan
13 that it continues to follow. Sarah Farms cannot directly
14 compete in the ESL market and has chosen not to do so.
15 Based upon the arguments made by the proponents, Shamrock
16 has an obvious 'unfair advantage' over Sarah Farms because
17 of its ESL plant.

18 "Nevertheless, Sarah Farms attributes this
19 advantage to the time, effort, and substantial monetary
20 contribution made by Shamrock in order to grow its business
21 throughout the Western states. Likewise, Sarah Farms has
22 made a substantial monetary contribution and time
23 contribution to become a producer-handler. Sarah Farms and
24 the other producer-handlers should not be forced to bear the
25 risk of a change in the rules in the middle of the game.

1 "Moreover, the claims of unfair competition ring
2 hollow because producer-handler status places limits on the
3 types of customers that Sarah Farms can effectively serve.
4 First, Sarah Farms can only serve those customers who
5 require less milk than it can produce. Unlike a pool
6 handler, Sarah Farms cannot purchase more milk to fill the
7 large or growing needs of a customer. Sarah Farms cannot
8 serve customers whose demand for milk is irregular. Indeed,
9 the profitability of Sarah Farms depends on our ability to
10 effectively control our surpluses and its disposition. When
11 a customer has needs that exceed our farm capacity or would
12 upset our ability to balance, we are faced with the choice
13 of losing our producer-handler status or our customer.

14 "The proponents have suggested that payments from
15 producer-handlers into the producer settlement fund are
16 necessary because Sarah Farms, and other like-situated
17 producer-handlers, enjoy an unfair advantage because we can
18 acquire our Class I milk for the blend price. This is not
19 accurate. Sarah Farms does not, as is suggested, enjoy an
20 advantage equal to the difference between the Class I price
21 and the blend price. This simplistic calculation does not
22 take into account our cost of production, for instance,
23 which exceeds the blend price.

24 "Repeated allegations have been made about the
25 pricing of our products, which the proponents 'determined'

1 by analyzing retail prices of our products at the store.
2 The specifics of our pricing scheme is proprietary
3 information, but I will state that Sarah Farms does not sell
4 its milk for less than the Class I price, plus the cost of
5 processing, packaging, and transportation. We do not
6 undercut the market by selling our product for less than the
7 Class I price.

8 "In fact, I was recently asked to price milk for
9 Costco, to be delivered to a market outside of Order 131.
10 The estimate I gave was based on the same formula Sarah
11 Farms uses to supply other customers. Sarah Farms did not
12 get the new order. I was told that our price was not
13 competitive -- not even close.

14 "At the hearing, the testimony of Carl Herbien,
15 that was used to suggest that our prices were unattainable
16 by a regulated handler, were based on plants whose product
17 mixes were not disclosed but were almost certainly more
18 diverse than that of Sarah Farms'. My experience has shown
19 that the cost of processing, packaging, and labeling is
20 about the same regardless of the size package that is run.

21 "A plant running straight white milk gallons will
22 have a lower overall cost per gallon than will have a plant
23 running a product mix of multiple sizes and SKUs. The
24 composite cost information provided to the Secretary is
25 meaningless as a basis for comparison. Sarah Farms' cost

1 per white gallon should be no more than the cost of
2 Shamrock. In fact, it should be less.

3 "Mr. Herbien's study looks only at 2 percent
4 white gallons. Without knowing what the same store was
5 charging for whole milk or skim milk, it is possible to know
6 whether or not the stated price for 2 percent represented a
7 markup over the actual cost from the plant or a markup over
8 some blended milk cost to the plant.

9 "Also, the stated period of time is stated to
10 represent January through June 2003, there is nothing stated
11 to indicate the days of the month or the dates of the month
12 these costs were surveyed. This is relevant because the
13 store may be pricing milk based on prior months' costs or
14 anticipation of the following month.

15 "As a dairy processor, butterfat costs me money.
16 A gallon of whole milk costs more than a gallon of reduced-
17 fat milk, which costs more than a gallon of skim milk.
18 Sarah Farms prices its products based on the butterfat
19 content. I have noticed that the stores price milk rather
20 uniformly.

21 "To the consumer, there isn't much difference
22 between the cost of a gallon of skim milk and a gallon of
23 whole milk, even though the whole milk costs the store more.
24 Also, the figures cited by Mr. Herbien for transportation
25 are highly overstated, based on my experience. Finally,

1 pallet costs do not correlate to those for Sarah Farms
2 because we offer a pallet exchange program. The whole
3 purpose is to keep the cost of my product low -- and it
4 works.

5 "The balancing costs incurred by producer-
6 handlers are also significant. In addition to the cost of
7 balancing, producer-handlers have expenses in transportation
8 that other producers do not bear. Producer-handlers bear
9 huge amounts of risk in the event that there are problems at
10 their processing facility. A stoppage in production can
11 mean the loss of raw milk that cannot be replaced by a
12 purchase from another farm. Likewise, problems on the farm,
13 such as illness, are not only a loss to the producer but can
14 mean the loss of milk to the plant, that cannot be replaced.
15 The result can be lost customers. Managing the timing of
16 deliveries to the plant is also critical, or we must incur
17 additional cleaning costs and difficult scheduling.

18 "These demands, in addition to increasing our
19 operating costs, effectively regulate the size of producer-
20 handlers. At the farm level, we are required to carefully
21 maintain the level of our herd. Herd fluctuations pose the
22 risk of causing large pool plant purchases, which would
23 require us to lose our status or, alternatively, large
24 surpluses, which must be disposed of, often at a substantial
25 loss.

1 "With regard to the other portions of the
2 proposals, Sarah Farms firmly believes that limiting milk
3 distribution to cooperatives and milk processors only works
4 to deny wholesale customers meaningful choice. Due to the
5 state of the dairy industry today, there needs to be a third
6 participant in the market in order to foster competition and
7 prevent monopolistic tendencies.

8 "Sarah Farms believes the Department should
9 consider the following:

10 "Dairy Farmers of America is being investigated
11 by the Justice Department for numerous antitrust violations.

12 "Dean Foods controls more than 20 percent of the
13 national market and has driven up the prices of milk for
14 consumers in Southern California by buying up competition.

15 "Most processors began as producer-handlers and
16 grew out of their role as a milk producer.

17 "Cooperative associations, formerly a method of
18 protecting dairy farmers in the marketplace, are now less
19 focused.

20 "The exemption of Clark County, Nevada, from the
21 federal order system has enabled Dean Foods to establish a
22 plant which will be far more disruptive to the federal order
23 system than any single producer-handler or producer-handlers
24 in the aggregate.

25 "Furthermore, the Dean Foods plant is not limited

1 by the requirement placed on producer-handlers to produce
2 and market all of their own milk. Under the UDA/Shamrock
3 proposal, a smaller independent dairyman will be regulated
4 and competing with a large, national company that is not
5 required to be regulated. How is that fair?

6 "Moreover, as stated before, every producer can,
7 under the law, become a producer-handler. Also, ever
8 handler can integrate with a producer. The fact that Sarah
9 Farms is the only producer who has chosen to do so in the
10 131 Order does not mean that our practices are unfair or
11 that the playing field is not the same for all participants.
12 Instead, it reflects that operating as a producer-handler
13 includes inherent risk that others have been unwilling to
14 accept.

15 "In short, the proponents expect Sarah Farms to
16 pay millions of dollars to other producers who have not
17 incurred our investment costs nor have borne any of our
18 risk. By definition, Sarah Farms must be able to produce
19 all the milk it utilizes.

20 "The upper floor on the size of any producer-
21 handler's operation is the point at which it can no longer
22 produce enough milk internally to meet the demand for its
23 products. When that point is reached, only then should
24 there be a forced decision as to whether to maintain current
25 levels of sales or abandon the status of a producer-handler.

1 "As technologies are developed and economies
2 change, such that producers are able to increase the number
3 of cows that can be milked, producer-handlers are permitted
4 to take advantage of these advancements, as all other
5 producers might. The proposals advanced by UDA, Shamrock,
6 and other large cooperatives and national companies deny
7 producer-handlers the benefits of those advancements.

8 "It is my understanding from Mr. Albright's
9 testimony that the AMAA was intended to protect dairy
10 farmers from brutal competition that resulted when milk
11 plants could play farm against farm to drive down prices
12 below a sustainable level. Because a producer-handler
13 cannot compete with other producers for the sale of raw
14 milk, it made little sense to regulate producer-handlers.
15 Indeed, if the proposals were to be accepted, this would
16 work to insulate the entire market area from any further
17 competition and require producer settlement fund payments
18 for any milk produced by a handler on his own farm.

19 "Finally, UDA/Shamrock and the other proponents
20 have argued that Sarah Farms has somehow caused disorderly
21 marketing conditions in the Arizona-Las Vegas Order. As
22 stated above, this is not true in fact, nor do any of the
23 statistics cited by any of the proponents hold water when
24 viewed in the context of the producer-handler's historical
25 market presence.

1 "In sum, there was no disruption in the
2 marketplace found during order reform. There have been no
3 changes in the marketing conditions in the marketing area
4 since order reform. There are no facts supporting a finding
5 of disruptive marketing now. Therefore, the proposals
6 should be denied."

7 DIRECT EXAMINATION

8 BY MR. RICCIARDI:

9 Q. Mr. Hettinga, I have read your testimony. Is
10 that your testimony that you adopt at this hearing?

11 A. Yes, it is.

12 MR. RICCIARDI: Your Honor, I would move then
13 into admission the statement and the three exhibits, which
14 I believe are 53, 54, 55, and 56, respectively.

15 THE COURT: Any objection? Mr. Beshore?

16 MR. BESHORE: I object to the newspaper articles
17 on the same basis.

18 THE COURT: Okay. I'm going to allow it in on
19 the same basis, I'm going to admit Exhibits 53 through 56.
20 (Exhibit Nos. 53 through 56 were received.)

21 THE COURT: Do you have any further questions of
22 the witness, Mr. Ricciardi, at this time or is he ready for
23 cross-examination?

24 MR. RICCIARDI: Your Honor, at this time I don't
25 have any further questions for Mr. Hettinga. Obviously I

1 reserve the right to ask questions on redirect and
2 otherwise.

3 THE COURT: Okay. Any cross-examination? Go
4 ahead, Mr. Berde.

5 CROSS-EXAMINATION

6 BY MR. BERDE:

7 Q. Mr. Hettinga, good afternoon.

8 A. Good afternoon.

9 Q. My name is Sydney Berde. I represent United
10 Dairymen of Arizona. I'd like to ask you a few questions
11 about your testimony.

12 First, I'd like to know something about your
13 background, how you got into the dairy business, how long
14 you've been in the dairy business, and where it started.

15 A. I milked cows for two years as -- when I got out
16 of high school; and then I hoof-trimmed cows, which is
17 physical work, for about seven --

18 Q. Uh-huh.

19 A. -- and then I traded cows for two or three, and
20 when I was trading cows I spent a day buying, a day selling,
21 a week collecting the money; so when I got a dairy, I didn't
22 have to spend that time, I just bought my own cows and
23 milked them.

24 Q. Where did you go to high school?

25 A. I went to Artesia High School.

1 Q. In California?

2 A. Yes.

3 Q. And any education after high school?

4 A. No.

5 Q. And the first dairy that you established was
6 where?

7 A. In Artes- -- Chino. Chino.

8 Q. How long ago was that?

9 A. I'm going to say thirty-four, -five years ago.

10 Q. I see.

11 A. Time goes by.

12 Q. Would you agree, Mr. Hettinga, that the words
13 which appear in Exhibit 53 are not in fact your words?

14 A. I did not write the article, yeah.

15 Q. Who wrote it?

16 A. My attorney.

17 Q. I want to ask you something about how you
18 established your original dairy and the additional dairies
19 that you established afterwards, starting, I think you
20 indicated, about 35 years ago?

21 A. Uh-huh.

22 Q. The first one was Artesia?

23 A. No. Chino.

24 Q. Where?

25 A. Chino.

1 Q. And then you bought or established additional
2 dairies, did you not?

3 A. After several years.

4 Q. And now you operate a number of dairies in
5 California, do you not?

6 A. Yes.

7 Q. And in Arizona.

8 A. Yes.

9 Q. One of your dairies is AH Dairy?

10 A. Andy Hettinga, my son, runs it.

11 Q. Andy Hettinga --

12 A. Yeah.

13 Q. -- your son?

14 A. It's not -- they call it El Mirage Road Dairy
15 [phonetic].

16 Q. Yeah. But the legal name is AH Dairy?

17 A. No. It's Hein and Ellen [phonetic] Hettinga. It
18 has to have a name because otherwise they'd all be running
19 the wrong place.

20 Q. Is that the dairy that's owned by -- well, first
21 of all, where does that milk go?

22 A. To Sarah Farms.

23 Q. To Sarah Farms?

24 A. Uh-huh.

25 Q. The AH Dairy -- milk produced on AH Dairy goes to

1 Sarah Farms.

2 A. Correct.

3 Q. That, AH Dairy, is in fact a general partnership,
4 isn't it?

5 A. No, it is not.

6 Q. It consists --

7 A. It's a sole proprietor by my wife and I.

8 Q. Isn't that the one that's owned by Andrew, Ellen,
9 Jill Gerben [phonetic]?

10 A. It is not. It is owned by my wife and me.

11 Q. I see. You're familiar with the Farm Credit
12 Services of Southern California?

13 A. Correct.

14 Q. And you have filed a financing statement, did you
15 not, a UCC statement?

16 A. I don't know. I don't take care of the
17 paperwork.

18 Q. Well, the -- one of the -- the entity named as
19 the borrower, 3H Dairy, a California partnership?

20 A. Yes. That's not A & H.

21 Q. That's not A & H.

22 A. That's not A & H.

23 Q. Okay. And you have an A & H there, don't you?

24 A. Not -- it's called that. It's called that. It's
25 called that and El Mirage, one of the two.

1 Q. Bear with me for a minute.

2 A. Surely.

3 Q. I'm looking at a document, "Capital Services,
4 Inc., UCC Search Report" --

5 A. Okay.

6 Q. -- which lists AH Dairy, a California general
7 partnership, debtor; second debtor is Andrew Hettinga.

8 You're familiar with that?

9 A. Andrew's my son.

10 Q. And another debtor --

11 MR. RICCIARDI: Let me object to the entire line
12 of questioning.

13 UNIDENTIFIED FEMALE: Say who you are.

14 MR. RICCIARDI: I apologize. Al Ricciardi, on
15 behalf of Sarah Farms.

16 Your Honor, the specific business issues or
17 business interests, whether Mr. Hettinga owns them, whether
18 a general partnership, or whatever they may be, are not at
19 issue in this case. What --

20 MR. BERDE: Oh, yes, they are.

21 MR. RICCIARDI: Can I finish?

22 MR. BERDE: Yeah.

23 MR. RICCIARDI: Whether or not they're entitled
24 to the exemption or not entitled to the exemption is not at
25 issue. The only issue here is whether or not the

1 proponents' change in regulations should be made.

2 Therefore, to the extent that this goes to the
3 question of audits that may have been done by the Department
4 and confirmed by the Department and issues concerning
5 whether or not this particular dairy is owned or not owned,
6 if it isn't an issue in this case we shouldn't spend time on
7 it, Judge, and I'm going to tell my client that to the
8 extent it gets into proprietary information like this, not
9 to answer the question.

10 MR. BERDE: Well --

11 THE COURT: Go ahead, Mr. Berde. Tell him where
12 you are going with this, please.

13 MR. BERDE: I beg your pardon?

14 THE COURT: Where are you going with this?

15 MR. BERDE: I'm going with it as to the source of
16 milk for the Sarah Farms Dairy and the ownership of that
17 milk, the ownership of the source of that milk, which is
18 relevant, critically relevant, to these proceedings.

19 THE COURT: Mr. English, you have something to
20 say?

21 MR. ENGLISH: Yes. Charles English, for
22 Shamrock.

23 Just as an example, just leafing through the
24 document very quickly, prepared by Mr. Ricciardi, and read
25 by Mr. Ricciardi, on Page 12, there were two statements made

1 that I think are tested by this kind of information.

2 One is "A stoppage in production can mean the
3 loss of raw milk, that cannot be replaced by a purchase from
4 another farm." That can only be tested by knowing how many
5 farms, where they are, and whether or not the milk is
6 available for this producer-handler. In this case, we
7 believe that this statement, that has been made repeatedly
8 in this proceeding, simply isn't true.

9 The second statement on Page 12, "Producer-
10 handlers have expenses in transportation that other
11 producers do not bear." Well, we need to test that out, and
12 one way to test it out is to find out where the farms are
13 and who owns them and whether or not they can ship the milk
14 to this processing plant.

15 And finally, Your Honor, as to the instruction
16 not to answer: if these documents and materials are in the
17 public record, I believe that instruction is inappropriate.

18 MR. BERDE: They are public record documents
19 obtained from the Secretary of State of Arizona and
20 California.

21 THE COURT: I guess they could be submitted if
22 they need be, but go ahead, Mr. Ricciardi.

23 MR. RICCIARDI: They can be submitted, Judge. My
24 argument is still the same. What they're really trying to
25 do is they're going to try to go behind the Department audit

1 that was done and determined that they met producer-handler
2 status a long time ago. That's not an issue in this case,
3 and I'm just going to tell my client not to answer any
4 questions in this area --

5 THE COURT: I can't tell, as well as you say you
6 can in terms of where they're going with it, in terms of
7 that point, so given that there's been a few statements,
8 they're entitled to challenge, and I'm going to allow this
9 line of questioning and hope it doesn't go on past the point
10 of relevance.

11 MR. RICCIARDI: And I will tell my client not to
12 answer at some points where I think appropriate, Judge.

13 MR. ENGLISH: And for the record, we will then
14 take that instruction as evidence that we are unable to test
15 those statements on Page 12 and we will ask to strike them,
16 Your Honor.

17 MR. RICCIARDI: And, Your Honor, then I'll do the
18 same, that we've had throughout the course --

19 THE COURT: Okay, okay --

20 MR. RICCIARDI: -- with Shamrock Farms. I mean,
21 you want to go back, we'll go back.

22 MR. ENGLISH: The difference, Your Honor, is this
23 is material on the public record, that is available for
24 examination, not confidential.

25 THE COURT: Okay. Well, let's --

1 MR. ENGLISH: It is not confidential.

2 THE COURT: -- see how far we go with this before
3 we --

4 MR. RICCIARDI: It is, and I'll take the position
5 I need to take.

6 THE COURT: Okay. Mr. Berde, you can pursue this
7 questioning for a while.

8 THE WITNESS: Could you please repeat the
9 question or the location so I know what we're talking about.

10 Q. (By Mr. Berde) I'm asking you about whether the
11 debtor, listed on the UCC document identified as AH Dairy,
12 is in fact a California partnership, the partners of which
13 listed as debtors --

14 A. Could you --

15 Q. -- are --

16 A. Could you list the partners to me and I could
17 tell you.

18 Q. Yes. Andrew Hettinga, Ellen Hettinga, Hein
19 Hettinga, Jill Hettinga. Those are the partners of AH
20 Dairy, as indicated on the UCC filing that you made.

21 A. I believe -- and I'm not sure, okay?

22 Q. Yeah.

23 A. I have a partnership with a dairy in Modesto area
24 with my son Andrew, but not El Mirage. El Mirage is owned
25 by my wife and I.

1 Q. I'm not -- I didn't indicate El Mirage or
2 describe El Mirage.

3 A. But --

4 Q. I'm talking about AH Dairy, which you indicated
5 is a milk source of Sarah Farms.

6 A. It also -- I'm not sure which location -- have
7 you got an address?

8 Q. The P. O. box is Chino for debtor AH Dairy;
9 Andrew at Corona, California; Ellen at Corona, California;
10 Hein at Yuma, Arizona; Hein at Corona, California; and Jill
11 in Corona, California. That's the address listed by the UCC
12 filling.

13 A. I believe that's 3H Dairy.

14 Q. Well --

15 A. That is the only partnership I have with my son,
16 Andrew, that has -- El Mirage Dairy is totally owned by my
17 wife and I.

18 Q. I didn't ask you about El Mirage; I asked you
19 about --

20 A. El Mirage or AH.

21 Q. -- AH Dairy, which is a partnership in -- a
22 general partnership in California.

23 A. No.

24 Q. Yeah. No what?

25 A. A & H is not a partnership.

1 MR. BERDE: Your Honor, I think I'm going to have
2 to mark this document as an exhibit and I'll provide
3 additional copies at the appropriate time.

4 THE COURT: Okay. Well, we'll mark this as
5 Exhibit 57.

6 (Exhibit No. 57 was marked.)

7 UNIDENTIFIED MALE: What's the title?

8 MR. BERDE: The title is "Capital Services, Inc.,
9 UCC Search Report."

10 Q. (By Mr. Berde) Now I want to ask you about
11 3H Dairy.

12 A. Okay.

13 Q. The milk from 3H Dairy, where is that marketed?

14 A. Northern California, I don't know who.

15 Q. Does that milk also go to Sham- -- to Sarah
16 Farms?

17 A. No, it does not.

18 Q. And that is a California partnership, is it not?

19 MR. RICCIARDI: Objection now, Your Honor, he
20 said to the extent that there's any relevancy, and there
21 still isn't any. And this is Al Ricciardi, I apologize, on
22 behalf of Sarah Farms. He'd already said it doesn't go to
23 Sarah Farms, it has nothing to do with it, it's a separate
24 business, why is it anything to do with this particular
25 hearing, why are we talking about?

1 THE COURT: Well, he was only like one-half -- he
2 was only a half a question beyond that answer. I usually
3 give people a little more -- I've been giving everyone a
4 little more leeway, including you and Mr. Yale. So I mean -
5 - if another question indicates that that -- that with
6 respect to that property it's going nowhere, then we'll move
7 -- I'm sure Mr. Berde will move on.

8 Q. (By Mr. Berde) Would you agree that 3H Dairy, a
9 California partnership, is a partnership consisting of Hein
10 Hettinga, Ellen Hettinga, Jill Hettinga, Pete Hettinga, and
11 Melody Hettinga?

12 A. I think that's incorrect. It's Ellen Hettinga;
13 Andrew Hettinga; Pete Hettinga, my brother; and myself.
14 It's a four-way cut.

15 MR. BERDE: Your Honor, may I refresh the
16 recollection of the witness by showing him the document?

17 THE COURT: Okay, I think -- did you need to
18 assist on this?

19 MR. RICCIARDI: I don't, Judge. I think it's --
20 again, it's irrelevant to any issue in this case and --

21 THE COURT: You may be right, but I'm just giving
22 him a little leeway to develop it. You know, it's been
23 three weeks in this hearing, we'll -- if there's a couple of
24 wrong turns, then the Secretary will sort things out.

25 MR. RICCIARDI: Well, let me assist with regard

1 to that.

2 Q. (By Mr. Berde) Would you agree now --

3 A. Jill is not --

4 Q. Can you understand the document that --

5 A. I can see the four signatures on the bottom.
6 Somewhere -- but Jill is not an owner.

7 MR. BERDE: I think I'm going to have to have
8 this marked also, Your Honor.

9 THE COURT: That would be Exhibit 58. I hope
10 you're keeping track of which document is which because I
11 don't have copies of them to mark, so you can mark that as
12 58.

13 (Exhibit No. 58 was marked.)

14 UNIDENTIFIED VOICE: Could we have the title of
15 that, please.

16 . BERDE: This is a financing statement, the
17 lender is Farm Credit Services of Southern California. It
18 bears the numbers 0035460528, filed in Sacramento,
19 California, December 11, 2000, with the California Secretary
20 of State.

21 MR. RICCIARDI: And Judge -- again, Al Ricciardi,
22 I apologize again, now we get to this issue of: first, it's
23 not relevant to anything; and secondly, this witness has
24 said the information in there is wrong. Now, by the way,
25 what a shock, the UCC filed is incorrect. He can give the

1 testimony that it is -- and now are we going to go down into
2 this area where I have to call another witness to say the
3 UCC is incorrect and the information provided by
4 Mr. Hettinga is correct? This is why, Judge, it's a waste
5 of time.

6 THE COURT: Well, at this point, you know, I
7 don't know if we're going to get useful information out of
8 this line of inquiry or not, but -- go ahead, Mr. Beshore.

9 MR. BESHORE: Just another point in terms of the
10 relevancy. The proposals do speak to the ownership of
11 production facilities, anywhere by the producer-
12 handler/owner. It's part of the -- you know, it's one of
13 the provisions in the proposals; it's certainly pertinent to
14 that.

15 THE COURT: I'm frankly having some trouble
16 seeing how it's pertinent to the issue that's before the
17 Secretary, in terms of whether to do away with the
18 exemption, but I'm willing to allow this line of inquiry to
19 a reasonable degree, but --

20 MR. ENGLISH: Charles English. Your Honor, I
21 understand that maybe we get lost in the forest and trees
22 here very easily, but I think what Mr. Beshore was saying is
23 that proposals are much more than what has been talked about
24 mostly, which is a volume limitation.

25 The proposals look at ownership more

1 specifically, as to both plant and farms, and it is highly
2 relevant for USDA AMS to understand why that proposal was
3 submitted in that fashion, and the only way to get at that
4 is to discuss an entity that has multiple farms, and this is
5 highly relevant to that proposal.

6 THE COURT: Okay. I'm still not -- I'm allowing
7 it at this point, but I'm not convinced of how highly
8 relevant it is, and I've got --

9 MR. BERDE: Judge, do I need to speak again on
10 the issue?

11 THE COURT: I get the point. Maybe if we can get
12 some questions and answers we can get through this so fast
13 that we won't even have to wonder why we're spending all
14 this time arguing about it.

15 MR. BERDE: I'm sure, Judge. Thanks.

16 Q. (By Mr. Berde) You're familiar with GH Dairy?

17 A. Yes.

18 Q. That's a partnership of Hein, Ellen, and Gerben,
19 is it not?

20 A. Correct.

21 Q. And that milk goes to Sarah Farms.

22 A. No, it does not.

23 Q. Where does it go?

24 A. It goes --

25 MR. RICCIARDI: Objection, Your Honor, at this

1 point. It doesn't go to Sarah Farms, it has to do with
2 proprietary information. It's a business answer. He's not
3 going to give that --

4 THE COURT: Well, let him answer or let him say
5 it's proprietary, I mean --

6 MR. RICCIARDI: It's proprietary, Judge.

7 MR. BERDE: Well, wait a minute. Proprietary?
8 It's highly relevant to this proceeding to know how many
9 farms he owns, whether in fact --

10 THE COURT: No, he just said -- we're talking
11 about the milk that -- he said the milk from this farm does
12 not go to Sarah Farms.

13 MR. BERDE: All right, that's an answer.

14 THE COURT: Yeah, but he already --

15 MR. BERDE: He answered. But that doesn't mean
16 that the rest of the information with respect to that farm
17 is irrelevant to this proceeding.

18 THE COURT: I don't know what the question was
19 going to be because -- I don't know what the answer was
20 going to be.

21 Q. (By Mr. Berde) Where does that milk go?

22 MR. RICCIARDI: Proprietary, Judge.

23 THE COURT: I can't make him answer. I mean, he
24 says proprietary --

25 MR. BERDE: He didn't say that.

1 THE COURT: Well, his lawyer said -- I mean --

2 MR. BERDE: Well, he read the statement, but he's
3 not testifying --

4 THE COURT: Okay, do you want to answer the
5 question, what do you want to --

6 THE WITNESS: I'd rather keep that to myself.
7 (Laughter.)

8 MR. BERDE: The question, Your Honor, is --

9 THE COURT: I can't make him answer it. I mean,
10 no one has shown me any authority in the rules and
11 regulations that say I can order someone to answer a
12 question or put them in the big house [phonetic], I mean
13 this is -- my authority is -- you know, I rule; if he elects
14 not to answer, for whatever reason, I can't force an answer.
15 The Secretary can take whatever inference she wants to take
16 from his not answering that question. Do you know of any
17 authority I have to order someone other than that?

18 UNIDENTIFIED MALE: It doesn't go to Sarah Farms,
19 it doesn't go to my PD plant.

20 MS. DESKINS: Well, there's no authority to make
21 him answer, but I would point out, I don't know that
22 ownership would be that relevant for the question here about
23 the proposals, so --

24 THE COURT: Well, I still have a little trouble
25 with that myself, although Mr. English tried to convince me

1 that it was highly relevant, but I'm still working on that.

2 Q. (By Mr. Berde) Can you tell me where the GH Farm
3 is located.

4 A. One is in -- on Chino Avenue --

5 Q. Where?

6 A. On Chino Avenue, in Chino. -- and the other is
7 in Doane Valley, Arizona.

8 Q. And it produces raw milk, grade A raw milk?

9 A. It makes grade A milk.

10 Q. Is that milk marketed in Arizona?

11 A. I'd rather not say.

12 Q. Is it marketed to fluid handlers in California?

13 A. I would rather not say.

14 Q. Does it have a market?

15 A. It has a market.

16 Q. And you have another dairy, called Aztec Dairy?

17 A. Correct.

18 Q. And where is that located?

19 A. On Aztec Road, in Hoffay [phonetic].

20 Q. In Arizona?

21 A. In Arizona.

22 Q. And where is that milk marketed?

23 A. Sarah Farms.

24 Q. And who owns that dairy?

25 A. My wife and I.

1 Q. I see. And Painted Rock Dairy.

2 A. Also on Painted Rock Road, in Arizona, and it's
3 owned by my wife and I.

4 Q. And where does that milk go?

5 A. Sarah Farms.

6 Q. And you have a dairy in Kingman, Arizona?

7 A. Correct.

8 Q. And who owns that farm?

9 A. Ellen and I.

10 Q. And where does that milk go?

11 A. Sarah Farms.

12 Q. And you have another dairy, called Doane Valley?

13 A. No, I do not.

14 Q. In Welton?

15 A. I do not.

16 Q. Have you had one there?

17 A. No, I do not. GH has one, GH.

18 Q. GH has one.

19 A. I gave that to you earlier.

20 Q. I see. And where is that milk marketed?

21 A. Same place -- no, not -- pardon me. The same
22 answer, it does -- not to Sarah Farms.

23 Q. I see. Is there an entity called GH Processing?

24 A. There is.

25 Q. And what is GH Processing?

1 A. It has nothing to do with Sarah Farms.

2 Q. Is it a plant?

3 A. Yes.

4 Q. Is that the new plant located in Yuma?

5 MR. RICCIARDI: Objection, Your Honor, it has
6 nothing to do with Sarah Farms, it has no relevance to this
7 case --

8 THE COURT: Well, that's what his answer is.
9 Just ask him where it's located. I mean, how could that --
10 how objectionable can that be? I mean --

11 MR. RICCIARDI: Well, Your Honor, it's
12 objectionable because it has nothing to do with the
13 producer-handler in this case and it has nothing to do with
14 any issues that we're talking about. I want to put -- then
15 what I want to do is let's have UDA and let's have Shamrock
16 up here so I can ask them proprietary questions about where
17 their milk goes, what they do with it, how much they
18 produce, et cetera.

19 MR. BERDE: We're willing to answer every
20 question relating to what you just posed, yes.

21 MR. RICCIARDI: You weren't when they were up
22 there.

23 THE COURT: They said proprietary a lot, and your
24 client can do the same thing.

25 MR. RICCIARDI: And that's exactly what I'm

1 saying, Judge.

2 THE COURT: Okay. So if he wants to say it's
3 proprietary, rather -- you know, it's less objectionable
4 than it is possibly proprietary.

5 MR. RICCIARDI: I understand.

6 THE COURT: And he's objecting to it. If he
7 wants to say it's proprietary, that's fine.

8 MR. RICCIARDI: Fair enough.

9 UNIDENTIFIED MALE: Proprietary.

10 Q. (By Mr. Berde) Is GH Processing the owner of
11 your new plant in Yuma?

12 A. Yes.

13 Q. And does milk move from GH Dairy to your new
14 plant?

15 A. It's not my plant.

16 Q. To GH Dairy plant.

17 A. I'm sorry, you'll have to -- could you please
18 repeat the question.

19 Q. Does the milk produced at GH Dairy move to the
20 new GH Dairy plant in Yuma?

21 A. It has -- it has nothing to do with my PD status.

22 Q. I understand that.

23 A. So it's proprietary.

24 Q. Okay. Does milk move from your PD, producer-
25 handler, operation to your new plant?

1 A. My PD milk, wherever I can get the most money is
2 where I bring it.

3 Q. Including the new plant?

4 A. Wherever I can get the most money for it.

5 Q. Well, would that be including that --

6 A. Wherever I can get the most money for it.

7 Q. I see. You also own a plant, or a dairy rather,
8 in Hopeville, California.

9 A. Hopeville. No. No.

10 Q. How about Mountain Dairy Number 1, is that a
11 dairy farm of yours?

12 A. I think it's gone.

13 Q. You think it's gone?

14 A. I think it's gone.

15 Q. How about Mountain Dairy Number 2?

16 A. My boy says yes. It's gone, he says it's gone.

17 Q. Okay. And you own a dairy called Citrus Dairy?

18 A. Citrus Valley, yes.

19 Q. And where is that located?

20 A. Citrus Street, or Avenue, in Arizona.

21 Q. And where is that milk marketed?

22 A. Sarah Farms.

23 Q. And Paloma Ranch Dairy.

24 A. There is no Paloma Ranch Dairy.

25 Q. Is there a Paloma Dairy?

1 A. These locations, the Citrus and the Painted Rock
2 Dairies, are on Paloma Ranch, so you're double-counting.

3 Q. I see.

4 A. They're -- they're in those areas.

5 Q. Okay. Now, have I exhausted the dairies that you
6 or your wife or you and your family own?

7 A. No.

8 Q. You own other dairies?

9 A. Yes.

10 Q. And could you list those.

11 A. That --

12 (Pause.)

13 MR. RICCIARDI: Again, Judge, I raise my question
14 about proprietary and also relevancy.

15 MR. BERDE: It has to do with the size of this --

16 THE COURT: We don't know until we know what the
17 answer is, so, you know --

18 Q. (By Mr. Berde) Are you stating the dairies that
19 ship to Sarah Farms? All the dairies that you own,
20 anywhere, and wherever they ship? Additional?

21 MR. RICCIARDI: Proprietary, Judge.

22 A. Proprietary.

23 Q. (By Mr. Berde) You want to explain for the
24 record what's proprietary about your ownership of a dairy?

25 A. Well, I can tell you a little story. The last

1 meeting we were in, when I was shipping milk back into
2 California, Kroger got with my co-op, Security, and
3 basically said if they buy any milk from me, meaning me,
4 excess milk, that Kroger was going to cut my co-op off, and
5 since then my co-op has disinherited me and will not work
6 with me. So everything that comes here comes back and bites
7 me. And today my co-op will -- the co-op that I was dealing
8 with will not take milk from me because Kroger said if he
9 buys milk from me they will not do business with them.

10 Q. I take it that your milk that you own, or milk of
11 a dairy farm that you own, was marketed through a co-op.
12 Was that Security?

13 A. Yes.

14 Q. And that milk had a market to a fluid outlet in
15 California --

16 A. Correct.

17 Q. -- is that it?

18 A. Correct.

19 Q. And you have other dairy farms in California,
20 that you fear if they have -- a market and a fluid outlet
21 might be cut off, is that it?

22 A. The co-op cut me off, cut me off. It cost me --
23 the co-ops have the right to do things that other businesses
24 would be sued for.

25 Q. We'll get to the co-op relationship with you in a

1 moment.

2 A. Okay.

3 Q. Bear with me a little bit.

4 A. Okay.

5 Q. I take it that your fear is that the milk
6 production from all of the farms we've talked about, that
7 are not marketed to Sarah Farms, might lose a fluid outlet
8 in California, is that it?

9 MR. RICCIARDI: Objection, Your Honor. It's the
10 backdoor way of trying to get to the proprietary information
11 that he declined to give.

12 THE COURT: I think he's just asking why he
13 doesn't want to answer those questions --

14 THE WITNESS: You're correct.

15 Q. (By Mr. Berde) Is that correct?

16 A. You're correct. Anything I give you can hurt me.

17 Q. Okay. So --

18 A. It already has.

19 Q. Now, some of the milk had been marketed through
20 Security; isn't that correct?

21 A. Correct.

22 Q. And you were a member of Security.

23 A. Correct.

24 Q. And I take it you're now indicating that you are
25 no longer a member?

1 A. I was an associated member is what they called
2 me.

3 Q. Which of your arms were members of Security?

4 A. That's proprietary. You'll be able to read a
5 court case on it pretty soon.

6 Q. Well, it's going to be published; you may as well
7 let us know now.

8 A. We'll wait.

9 Q. Those were California farms that were members of
10 Security?

11 A. That's proprietary.

12 Q. I see. You also are involved in the operation of
13 a dairy with Amos Decrute [phonetic], are you not?

14 A. Correct.

15 Q. I see. You also are involved in the operation of
16 a dairy with Amos Decrute?

17 A. Correct.

18 Q. Is that Parumph, at Parumph, Nevada?

19 A. Correct.

20 MR. BERDE: That's P-a-r-u-m-p-h, in case the
21 recording machine didn't get it.

22 Q. (By Mr. Berde) Where does that milk go?

23 MR. RICCIARDI: Objection, Your Honor.

24 Q. (By Mr. Berde) Isn't that part of public
25 information in a lawsuit?

1 A. It hasn't got there yet.

2 THE COURT: The objection -- well --

3 MR. RICCIARDI: Two --

4 THE COURT: It's outside the market, it's not
5 material to --

6 MR. RICCIARDI: Exactly, Judge. It's outside the
7 marketing area, it's not relevant to anything, it has
8 nothing to do with the producer-handler --

9 THE COURT: How is something outside the
10 marketing area relevant to this case? You tell me.

11 MR. BERDE: Your Honor, it has to do with the
12 ability of Sarah Farms milk or the milk that is controlled
13 by this witness to be marketed in a variety of outlets,
14 which totally eliminates any claim of carrying the burden of
15 a surplus. If we don't that by this part of the hearing, we
16 never will.

17 MR. RICCIARDI: And Your Honor, it's outside the
18 marketing area, he just said it's a general partnership,
19 therefore he doesn't control the milk, the milk itself is
20 not part of the disposition, therefore it has nothing to do
21 with this case, it has nothing to do with the producer-
22 handler, it also contains proprietary information.

23 THE COURT: Well, I'll let him answer the
24 question. If it's proprietary he can just say so.

25 O. (By Mr. Berde) Parumph is in Clark County,

1 Nevada, isn't it?

2 A. I'm not sure which county it's in.

3 Q. Clark County, Nevada --

4 A. I'm not --

5 Q. -- is in the marketing area.

6 A. I'm not sure. I don't believe it's in that
7 county, though.

8 Q. It was part of the litigation involving the
9 controversy between the state of California and Parumph
10 Dairy, was it not?

11 A. Correct.

12 Q. That's all public information, isn't it?

13 A. I don't know.

14 Q. It went up to the United States Supreme Court, as
15 a matter of fact.

16 MR. ENGLISH: I'm not your lawyer

17 [indiscernible].

18 (Laughter.)

19 UNIDENTIFIED MALE: I think Mr. Berde should ask
20 Mr. English about that.

21 THE WITNESS: I don't know what county it's in.

22 Q. (By Mr. Berde) Okay. Now, on some -- you were
23 -- you were at the hearing when Jim Boyle testified, were
24 you not, and he referred to an article in "Successful
25 Farming," a 1995 article, in which you were ranked as the

1 second largest dairyman in the United States. Do you recall
2 that?

3 A. I know the article.

4 Q. And the number then given, in 1995, was thirteen
5 thousand -- herd, combined herds of 13,000 cows.

6 A. That's what the article said.

7 Q. And you would not disagree with that article,
8 would you?

9 A. Yes, I would.

10 Q. It was less than what you actually --

11 A. No, it was incorrect.

12 Q. Incorrect?

13 A. Incorrect. The numbers were incorrect at that
14 time. They estimated. Nice estimate, but it was --

15 Q. But the second rank was correct, was it not?

16 A. It'd probably've been third.

17 Q. All right. Now, you indicated that you are a
18 member of Security Milk Producers.

19 A. No, I was an associated member and they threw me
20 out.

21 Q. What do you mean by "an associated member"?

22 A. We did business together.

23 Q. Well, in order to be a member of a co-op, you
24 have to commit your milk for marketing to the co-op, don't
25 you?

1 A. Only if you're a captive in UDA.

2 (Laughter.)

3 Q. Do you know what a cooperative is?

4 A. It's a marketing association.

5 Q. You had a marketing agreement, did you not, with
6 Security, which your son, as a matter of fact, incorporated
7 back in 1983?

8 A. Could be, at that time it was put together, yes.

9 Q. Yeah. And he was secretary at the time of the
10 incorporation.

11 A. I believe that's correct.

12 Q. And to be a secretary of a cooperative, you're
13 aware that you must be a member of the board of directors.

14 MR. YALE: Your Honor, I'm going to object. That
15 is an -- he's making a statement, and that is legally
16 incorrect.

17 THE COURT: Well, he can say that.

18 MR. YALE: Yeah. I mean --

19 THE COURT: Of course, he probably -- I think you
20 sort of fed him the answer, but, you know, he can answer the
21 question or say he doesn't know or whatever.

22 A. Could you repeat the question, please.

23 Q. (By Mr. Berde) Which question?

24 A. I don't know. I lost it.

25 (Laughter.)

1 Q. Well, you agreed that your son was one of the
2 incorporators of Security Milk Producers.

3 A. He was one of the Board members at Security.

4 Q. Okay. And so he was a member of Security in
5 terms of the marketing of milk for Security Milk Producers,
6 was he not?

7 MR. RICCIARDI: Al Ricciardi, for Sarah Farms.
8 First of all, Judge, what does it have to do with anything;
9 second of all, how does he know.

10 THE COURT: Well, I guess we'll --

11 MR. BERDE: I find it odd --

12 THE COURT: I'll let him answer the question.

13 MR. BERDE: -- coming from this witness -- or
14 this interrogator, to object to what is clearly relevant
15 evidence.

16 MR. RICCIARDI: Well, you know, you and I can
17 debate about it, Mr. Berde. Ask your question, I'll object
18 if I think it's necessary.

19 MR. BERDE: All right.

20 Q. (By Mr. Berde) What milk was committed for
21 marketing through Security?

22 A. I don't remember at that time.

23 Q. I see. Is Irvin [phonetic] still a member of
24 security?

25 A. No, he is not.

1 Q. Did you have a -- did you sign a membership
2 agreement with Security?

3 A. Some.

4 Q. You balanced some of your production, ordinarily
5 going to Sarah Farms, through Security, did you not?

6 A. I started out in California and I had contracts
7 in California, and as time went by we -- some of the
8 contracts were deleted.

9 Q. Were what?

10 A. Deleted, you know, were run out. We're not a
11 lifetime member, I mean we have the right to leave.

12 Q. As a member of Security -- I'm talking now about
13 you, not Irvin.

14 A. Okay.

15 Q. As a member of Security.

16 A. I am not a member of Security at this time.

17 Q. When you were a member of Security, my question
18 is, what milk production was marketed through Security?

19 A. I don't remember.

20 Q. Or from what dairy farms were marketed through
21 Security?

22 (Pause.)

23 A. I don't -- you know, what dairies, I don't know.

24 Q. You're familiar with Rockview Dairy?

25 A. Yes.

1 Q. And did you market milk from your dairy farms to
2 Rockview Dairy?

3 A. Not directly.

4 Q. Through Security?

5 A. Correct.

6 Q. And what dairy farms?

7 A. Not all of them, but some of them. I don't know.

8 Q. A number of them?

9 A. Yes.

10 Q. Did you seek out any other fluid outlets in
11 California on your own, other than through Security?

12 A. Yes.

13 Q. And about how many?

14 A. That's proprietary.

15 Q. That's proprietary?

16 A. Yeah.

17 MR. YALE: Your Honor --

18 Q. (By Mr. Berde) But the fact is that you did seek
19 out other fluid milk outlets in California.

20 MR. YALE: Your Honor --

21 A. I do not work through a co-op, if I possibly can.
22 I would go -- like to go direct, if I possibly can.

23 Q. (By Mr. Berde) And you were successful in
24 finding those outlets --

25 MR. YALE: Your Honor, can I enter -- I just have

1 -- it's more of an inquiry. Benjamin F. Yale, on behalf of
2 Mallorie, Smith Farms, and Edaleen.

3 My question is: What's the time frame here? One
4 time we were talking 1983. Are we still talking 1983?

5 THE COURT: If he doesn't know he can ask for
6 clarification.

7 MR. YALE: Well, I'm just --

8 THE COURT: I mean, I understand that --

9 MR. YALE: For the record purposes. If I can use
10 it, I'm just trying to figure out whether it's going on now
11 or whether it was --

12 THE COURT: That's a legitimate point.

13 MR. YALE: That's all I'm asking. I'm not
14 objecting to the question.

15 THE COURT: Okay. You know, it's five minutes of
16 four right now. Here's what I'd like to do. I'd like to
17 take what I would hope would be our final break of the day,
18 about a 10- or 15-minute break, then I would like to go till
19 either 6 o'clock or until we're done with this witness,
20 whichever comes first.

21 Does that sound like an unreasonable approach?
22 Or 6 o'clock -- should we say 7 o'clock -- I mean 6 o'clock
23 or till he's done. Okay?

24 MR. YALE: Is that an incentive?

25 THE COURT: What?

1 MR. YALE: That's an incentive.

2 THE COURT: It's an incentive that -- yeah, good
3 luck on that one, Mr. Yale.

4 (Laughter.)

5 THE COURT: So let's take a 10-minute break, and
6 then we're going to do that. Off the record.

7 (Off the record and reconvened.)

8 THE COURT: On the record. Mr. Berde, you can
9 resume your questioning.

10 MR. BERDE: Yes.

11 Q. (By Mr. Berde) Now, Mr. Hettinga, at some time
12 while you were a member of Security did milk marketed by
13 Security get delivered to Sarah Farms?

14 A. If it went to Sarah Farms, it would not have went
15 through Security.

16 Q. If it went to -- say that again.

17 A. If it went to Sarah Farms, it went directly from
18 my dairy to my to my deal [phonetic].

19 Q. Well, I think I'm going to have marked as the
20 next exhibit --

21 THE COURT: 59.

22 Q. (By Mr. Berde) -- 59 a single-page document,
23 which looks like it's a copy of two documents put together,
24 "Hettinga Dairy" at the top, and "Select Milk Producers
25 Association, Farm PU ticket."

1 (Exhibit No. 59 was marked.)

2 That's a pickup ticket; isn't it?

3 A. Correct.

4 Q. Bulk grade A raw milk, showing this on a farm
5 pickup ticket of Select Milk Producers, "Producer 130," name
6 "Hettinga," "delivered to Sarah Farms, Yuma, Arizona." You
7 see that?

8 A. Correct.

9 Q. Can you explain what that -- how that happened.

10 A. Yes. The truck driver had Security tickets and
11 used it.

12 Q. He what?

13 A. The truck driver had a Security milk ticket and
14 used it.

15 Q. And used it?

16 A. Yes. Because the truck driver also hauled to
17 Security, and that was the only paperwork he had.

18 Q. I see. And who is Producer 130?

19 A. I believe I am.

20 Q. And was 130 also a dairy farm that was a member
21 of Security?

22 A. An associate member.

23 Q. An associate member of Security.

24 A. We did business with them.

25 Q. And that's your explanation of how that so-called

1 Security milk got moved into Sarah Farms, is that it?

2 A. It's not Security's milk; it's my milk.

3 Q. Well, it's your milk, which, however, was
4 committed for marketing through Security.

5 A. No, it was not.

6 Q. Isn't that what you just testified to?

7 A. No.

8 Q. No?

9 THE COURT: He's doing a fine job of answering
10 the question, Mr. Ricciardi.

11 (Laughter.)

12 MR. RICCIARDI: He is doing a fine job, Judge.
13 We're now talking about this document, he's explained, from
14 1997.

15 THE COURT: And obviously Mr. Berde didn't quite
16 understand his explanation and he's going to explain it
17 again.

18 Please explain it again.

19 THE WITNESS: You want me to explain it again?

20 THE COURT: Yes.

21 THE WITNESS: I believe the paperwork was a truck
22 driver using a Security ticket to pick it up.

23 Q. (By Mr. Berde) How do you know that?

24 A. Because it would go directly from my dairy to my
25 plant.

1 Q. And the same truck driver, you say, also hauled
2 Security's?

3 A. Yes.

4 Q. How many dairies supplied milk to Sarah Farms?

5 A. Give me the day and the time.

6 Q. Well, let's take today.

7 A. All the three dairies that you spoke of in Nevada
8 -- in Arizona: Aztec, Painted Rock, and Citrus Valley. And
9 in California, I think 131 is Corona. And then we have two
10 or three more, and I don't know what their numbers are.

11 Q. What's 139?

12 A. I don't know.

13 Q. 124.

14 A. I don't know.

15 Q. One -- how many in total, delivered milk, let us
16 say in the last two, three years to Sarah Farms?

17 A. We're closing some of our dairies down in
18 California and moving them to Arizona, so it's -- it's kind
19 of a musical chair thing.

20 Q. Well, let me show you a production sheet for '97,
21 and I'd like to have it marked the next number.

22 THE COURT: This would be 60.

23 MR. BERDE: 60.

24 (Exhibit No. 60 was marked.)

25 MR. YALE: Your Honor, I really promised myself I

1 wasn't going to object, but I am a little concerned. We're
2 talking about 1997, and there's got to be some relevancy
3 here. I mean, this is --

4 THE COURT: Well, perhaps the connection will be
5 made, but I'm going to let him go with it for a while.

6 MR. YALE: I mean, the order's been reformed
7 since then.

8 (Pause.)

9 THE COURT: If you want to ask your question on
10 Exhibit 60.

11 MR. BERDE: Okay.

12 Q. (By Mr. Berde) Which one of those dairies is AH?

13 A. I have no idea. I know them by name, I don't
14 know them by number. I don't know them by number.

15 Q. How about -- can you -- which one is 3H?

16 A. 3H would not be on here.

17 Q. Do you know which one is 124, for example?

18 A. No, I do not.

19 Q. But you'll agree that a number of dairies
20 controlled by Hein Hettinga delivered milk to Sarah Farms.

21 A. It has to be controlled by Hein Hettinga, to be
22 shipped to Sarah Farms.

23 Q. Irrespective of who the actual owners of the
24 farms are, is that --

25 A. They have to be owned by me and my wife and we

1 have to have the same entity, and they are.

2 Q. Yeah, uh-huh. Irrespective of what the UCC
3 documents show.

4 A. I believe, and I'm not sure, but -- my boy's
5 going through a divorce, so I don't know how her name got on
6 there, and I don't even know how his name got on there.

7 MR. RICCIARDI: Your Honor, Al Ricciardi again.
8 We've got documents from '97, the Department has gone
9 through and done a formal audit and a more extensive audit
10 than with anybody else and made that determination.

11 They're trying to relitigate those issues, Judge.
12 It has nothing to do with what we're here for.

13 THE COURT: At this point, I mean, I've heard the
14 testimony is that -- you know, that only what I wrote down
15 as HH milk was going to Sarah Farms, and you're arguing with
16 him about what certain pieces mean and he doesn't know what
17 these numbers are exactly, and I'm not sure what point we
18 can -- what can be accomplished by going any further,
19 especially looking at things that are getting to be seven
20 years old.

21 Q. (By Mr. Berde) When you first started, or later
22 on, after 1994, were you bringing loads of California milk
23 to Yuma and then turning them around and shipping them back
24 to California?

25 A. I have done that.

1 Q. And what was the purpose of that?

2 A. To standardize it.

3 Q. To standardize the milk?

4 A. Uh-huh.

5 Q. Was that as much as nine, ten loads a day?

6 MR. RICCIARDI: What time frame, Judge, and
7 what's the relevance?

8 THE COURT: I think he had a time frame in the
9 question. Didn't you?

10 THE WITNESS: Yes, he did. What year was it,
11 though, again?

12 Q. (By Mr. Berde) At the time you started and
13 shortly after 1984, continuing over a period of time, I
14 asked you whether you brought loads in and you said you did,
15 and you indicated you did it to standardize. Did you also
16 do it for the purpose of subjecting that milk to interstate
17 commerce?

18 A. Correct.

19 Q. Correct?

20 A. Correct.

21 Q. So the milk then could go back into California
22 and you would -- it would be unpriced milk and you would get
23 the utilization of that milk from a fluid plant?

24 A. I could sell it to a customer that I couldn't
25 sell it to if I didn't do it.

1 Q. Over how many years did you continue to do that?

2 A. It was a short time.

3 Q. Do you recall at the time of the last hearing, in
4 Arizona, involving producer-handler, the Heartland
5 [phonetic] Dairy hearing --

6 A. Correct.

7 Q. -- you had someone working for you named Clyde
8 Edgar?

9 A. Yes.

10 Q. And who is Clyde Edgar?

11 A. Clyde Edgar.

12 Q. I mean -- describe him.

13 (Laughter.)

14 Simple answer to a complicated question, of
15 course, you know. Clyde Edgar was your manager?

16 A. He was Clyde Edgar.

17 THE COURT: Did he work for you?

18 THE WITNESS: He did work for me, yes.

19 Q. (By Mr. Berde) He worked for you.

20 A. Yes.

21 Q. Was he your manager? was my question.

22 A. Manager for what?

23 Q. Well, did he have authority to write letters to
24 the administrator concerning your objections to the proposed
25 amendment of the order?

1 MR. RICCIARDI: Could we have a time frame,
2 Judge.

3 THE COURT: He said at the -- he was talking
4 about the time of the previous rule-making hearing that was
5 in Phoenix, not ours but the -- not this. What year was
6 that?

7 MR. 1994.

8 THE COURT: 1994.

9 MR. BERDE: Yes.

10 Q. (By Mr. Berde) He wrote a letter to the hearing
11 clerk, did he not, over -- under Sarah Farms letterhead?

12 A. He may have. I don't know.

13 Q. Did he have your authority to do so?

14 A. I don't remember.

15 Q. Do you remember at the time he represented that
16 there were three producer-handlers, with a total Class I
17 utilization of 2.1 -- 2,140,000 Class I in the order?

18 A. I don't know.

19 MR. BERDE: I'd like to mark next, as --

20 THE COURT: This will be Exhibit 61.

21 (Exhibit No. 61 was marked.)

22 THE COURT: Now, you're going to ask questions
23 that's going to somehow make a nine-year-old document
24 relevant to today's hearing, Mr. Berde?

25 MR. BERDE: Absolutely, because it will establish

1 the rate of growth from that period.

2 MR. RICCIARDI: Your Honor, if you don't mind, I
3 am standing next to Mr. Hettinga, since he's got the
4 document, and --

5 THE COURT: I understand. You said that before.
6 It's no --

7 MR. RICCIARDI: It's fairly lengthy.

8 MR. YALE: While we're -- this, Your Honor --
9 maybe the Department, they can make their decision, but the
10 Order 131, as we stand today and are amending [phonetic],
11 took effect on January 1st, 2000.

12 THE COURT: And we have this 1994 letter here.

13 MR. YALE: We have a 1994 letter, and the
14 marketing conditions that existed in 1994, even if today is
15 different than 1994, aren't relevant. If they're different
16 than 2000 --

17 THE COURT: I'll let him ask it, but I'm getting
18 to the edge of the amount of leeway that I was giving him.
19 I was trying to be the same to both sides, but I do believe
20 you're pushing the envelope here in terms of --

21 Q. (By Mr. Berde) You'll agree that at that time,
22 in 1984, there was about --

23 THE COURT: '94.

24 Q. (By Mr. Berde) -- 1994, there was about 2 point
25 -- 2,140,000 of total Class I sales from producer-handlers?

1 A. I have no idea.

2 Q. Isn't that --

3 A. I don't know. I didn't --

4 Q. Well, the document's here.

5 A. Yeah.

6 MR. RICCIARDI: Well, the document's here. The
7 document's here, and what he's said is he doesn't know.

8 THE COURT: He doesn't remember what was in a
9 document nine years ago that he didn't write, basically, the
10 testimony.

11 Q. (By Mr. Berde) Will you look at Page 2.

12 A. I have Page 2 there.

13 THE COURT: Do you have a specific part of Page 2
14 you want him to look at?

15 Q. (By Mr. Berde) Well, look at about the fifth
16 line, it says, It evidences the remaining -- it's speaking
17 of the federal order data for October 1994, shows the three
18 producer-handlers produced 2,140,140 pounds of Class I route
19 disposition while total Class I route disposition:
20 95,978,000 pounds. Did I read that correctly?

21 A. I believe so, if you said so.

22 THE COURT: Yes, he read it correctly.

23 A. You read it correctly, okay.

24 Q. (By Mr. Berde) And can you tell us what your
25 rate of expansion was since then.

1 A. I grew because --

2 (Pause.)

3 MR. RICCIARDI: And I just want to know, are you
4 finished with this document, because I want to sit down
5 and --

6 MR. BERDE: Yeah.

7 MR. RICCIARDI: Okay.

8 THE WITNESS: Am I not supposed to grow, is that
9 something illegal?

10 Q. (By Mr. Berde) And you've grown, have you not?

11 A. Yes.

12 Q. Substantially.

13 A. Only 'cause UDA and Shamrock are the only two
14 guys on the block and they're the people that like to trade
15 with me.

16 Q. And then already in evidence is Exhibit 17, of a
17 letter by Clyde Edgar, dated July 15, 1994, which indicated
18 that over a 90-day period 15 million average production by -
19 - served by Hein Hettinga, or Sarah Farms --

20 MR. RICCIARDI: I'm sorry, could you please -- I
21 couldn't quite --

22 THE COURT: What's the source on that? You said
23 it's one of the exhibits that's already in evidence?

24 MR. BERDE: 17.

25 MR. RICCIARDI: And what does it say?

1 MR. BERDE: Well, let me read it, a short
2 document.

3 Q. (By Mr. Berde) He said, "Sarah Farms' raw milk
4 production for the last 90 days was 15,835,086 pounds.
5 Sarah Farms' milk plant bottled and sold 4,290,627 pounds of
6 Class I for the same 90-day period." That would indicate
7 that your average for the month of production was 5 and a
8 quarter million, would it not?

9 A. That sounds like a correct figure.

10 Q. And that your average was 1.4 million of Class I
11 sales. Is that correct?

12 A. I don't know.

13 Q. Isn't that what it says --

14 A. I -- yeah --

15 Q. -- if you take an average of the -- if you take a
16 3-month -- a single-month average of the 4.290627 pounds,
17 would come out to about 1.43 million for that period of
18 time. You agree?

19 A. For that period of time.

20 Q. Yeah.

21 A. If that's what the paperwork says, it's probably
22 correct.

23 Q. And that would also indicate a rather dramatic
24 growth in your operations since that time?

25 MR. RICCIARDI: Objection, Your Honor.

1 THE COURT: Well, I mean -- I mean, is anyone --
2 no one's denied that his -- his company has grown fairly
3 significantly over the years. It may not be relevant to the
4 issues the Secretary has to decide, but --

5 MR. RICCIARDI: And it may or may not be
6 proprietary since it's obviously something that's
7 confidential based on the fact that there are less than
8 three producer-handlers in the market [inaudible].

9 Q. (By Mr. Berde) Do you own California quota?

10 A. No, I do not.

11 Q. Did you?

12 A. Yes, I have.

13 Q. And you shipped for how long a period under
14 California quota?

15 A. I don't recall.

16 Q. Could you explain what the significance of the
17 fact is that you had California quota and were able to ship
18 under that quota.

19 MR. YALE: Clarification, when, Your Honor.

20 THE COURT: Yes, when. When are you asking him,
21 do you have a time period?

22 MR. BERDE: Well, he -- I don't know, and he --

23 THE WITNESS: I don't either.

24 THE COURT: This could be a tough one to get a
25 good answer, I think, if you don't know and he doesn't know,

1 then the question --

2 Q. (By Mr. Berde) Do you sell packaged products to
3 Southwest stores, or did you?

4 A. I have.

5 Q. And stores in Tucson?

6 A. I have.

7 Q. And El Paso?

8 A. I believe so.

9 Q. And 52 Food City stores?

10 A. I believe that figure's incorrect.

11 Q. 53?

12 A. 54.

13 Q. 54.

14 (Laughter.)

15 And also to Costco and Sam's Club in Arizona?

16 A. Correct.

17 Q. You receive from the market administrator of
18 Order 131 each month a breakdown showing the costs per
19 gallon, under the federal order, do you not?

20 A. I don't know. My plant might get it, but I
21 wouldn't get it.

22 Q. What's that?

23 A. My plant might get it, but I wouldn't look at it.

24 Q. You wouldn't look at it. Do you understand the
25 document I'm referring to?

1 A. I think I've seen it from time to time, yes.

2 Q. Do you know why proponent receives it?

3 THE COURT: Are you wanting this marked, is that
4 why you're walking over here with it?

5 MR. BERDE: Yes.

6 THE COURT: Okay, we'll call it Exhibit 62,
7 marked.

8 (Exhibit No. 62 was marked.)

9 A. No, I don't know why.

10 Q. (By Mr. Berde) Well, is it used in the pricing
11 of your gallons of fluid milk to your customers?

12 A. What's the number?

13 Q. 62.

14 A. I wouldn't want to sell any milk cheaper than
15 anybody else, so I guess I would probably look at it.

16 Q. Well, in fact don't you send out price
17 announcements to your customers when the federal market
18 order Class I price changes?

19 A. I don't.

20 Q. Does your -- does Sarah Farms?

21 A. Someone does, but I don't.

22 Q. Well, does Sarah Farms do it --

23 A. Yes. Yes.

24 Q. And why do you do that?

25 A. The customer needs to know what he's going to

1 have to pay for milk next month.

2 Q. Is that how you establish the selling price of
3 your milk, based on the Class I price?

4 A. It is part of the formula, yes.

5 MR. BERDE: I'm going to ask the next be marked,
6 a single-page document dated December 24th.

7 THE COURT: Okay, you want this marked, I'm going
8 to have it marked as Exhibit 63.

9 (Exhibit No. 63 was marked.)

10 Q. (By Mr. Berde) Can you recognize that document,
11 that's been marked --

12 A. I recognize the name, Diadley [phonetic]. Isn't
13 that right?

14 Q. What's that?

15 A. It looks like a pricing letter.

16 Q. A pricing letter?

17 A. Yeah, it looks like it.

18 Q. Jim Gardner is your general manager, isn't he?

19 A. He's my general manager today.

20 Q. And this letter is addressed to Veterans Market;
21 right?

22 A. Yes.

23 Q. And it advises Veterans Market that because of
24 the increase in the Class I price you're changing your
25 selling price; is that correct?

1 A. I believe so.

2 Q. And is that your practice, to follow the ups and
3 downs of the Class I price?

4 A. It is basically the market.

5 Q. It is what?

6 A. It's basically the market.

7 Q. The market.

8 A. Yeah.

9 Q. What kind of a margin do you apply to the
10 announced federal order Class I price to establish a selling
11 price per gallon?

12 A. I basically take the Class I price, put all my
13 costs in, and try to put a dime profit, and go on.

14 Q. Do you use the -- have you used the term "10, 10,
15 10, and 10"?

16 A. Yes.

17 Q. "Four 10s"?

18 A. Yes.

19 Q. What do the Four 10s relate to?

20 A. I'd like to be able -- now, these are goals, they
21 aren't figures.

22 Q. Uh-huh.

23 A. I'd like to be able to run it through the plant
24 for a dime, I'd like to buy the products for a dime, and I'd
25 like to deliver for a dime and I'd like to make a dime.

1 Q. And you're aware that your competitors in the
2 market actually pay that Class I price to the market
3 administrator on their own milk.

4 A. I believe they do.

5 Q. Which you do not.

6 A. I don't account for it. I mean, I price to my
7 customers --

8 Q. Uh-huh.

9 A. -- but it's all one big pot as far as the money
10 goes.

11 Q. And has that been a part of your phenomenal
12 success in increasing your distribution?

13 A. No, I don't think so. I think I was very lucky
14 when Shamrock -- when -- pardon me -- Carnation or
15 Sun Street, or what have you, went out of business. Gosh, I
16 don't remember the year, but about four years after I
17 started, there was -- there was more business on the street
18 than Shamrock could take care of and there was nobody else
19 to do it, and there was a tremendous -- I mean people --
20 Albertson's called us and said, "We got 180,000 gallons a
21 week, can you handle it," and we said no, we cannot handle
22 it, we don't have the ability. We picked up the crumbs
23 because we could digest them, and that is how we got big, is
24 because Shamrock and Sun Street, or whatever their --
25 Carnation, fought, and one of them went broke, and there was

1 -- there was too much business on the street and I picked up
2 all I could. I wish it would happen again, somebody else.

3 (Laughter.)

4 Q. In view of the fact that you have access to all
5 these outlets, California, down to Nogales, into Mexico,
6 El Paso, you really do not have a problem with what has been
7 described in this hearing as surplus disposal, do you?

8 A. At Christmas we went to Idaho with some milk, and
9 that is not cheap.

10 Q. That happens at Christmas, huh?

11 A. Yeah. Christmas only comes once a year, doesn't
12 it. The holidays stay around, it's a very difficult time to
13 get rid of milk.

14 Q. In terms of the rest of the year, you really do
15 not have a problem because you have this number of outlets
16 to which you can dispose of your surplus.

17 A. Are you saying customers?

18 Q. Outlets. Customers, yes. Sales.

19 A. Customers dictate to me, I don't dictate to them.

20 Q. Well, that wasn't really my question. My
21 question is: You do not have a problem disposing of what
22 has previously been described in this hearing as surplus
23 because you have all of these other outlets, including Class
24 I outlets, including sales into Mexico, including sales
25 wherever, and including all of the customers in the Arizona

1 market. You're running at capacity, are you not?

2 MR. YALE: Which question, Judge? -- because
3 there was a series of them.

4 THE COURT: I think one was just a slight
5 expansion of the other. He can answer.

6 A. I have to work at balancing, I have to work at
7 it, myself and a couple of other people, have to work very
8 diligent at it. It is not an automatic. I cannot call you
9 up, UDA, meaning -- and "bring me five loads today, eight
10 loads tomorrow," we have a very difficult time on Thursday,
11 stores take their milk -- they want to take most of their
12 inventory on Thursday and Friday for the weekend, Monday and
13 Sunday we have to "get a glass and try to drink it."

14 Q. (By Mr. Berde) And when the plants do not take
15 milk, at Sarah Farms, where do you dispose of that milk?

16 A. At the best price I can get.

17 Q. And those best-price outlets, do they also
18 include fluid outlets?

19 A. I'm sorry?

20 Q. The best-price outlets that you keep referring
21 to, do they include fluid outlets?

22 A. Wherever I can get the best money for my product,
23 however I can do it.

24 Q. And are you successful in doing it?

25 A. I'm here, going against billion-dollar companies.

1 MR. BERDE: Thank you.

2 THE COURT: Thank you, Mr. Berde. Is there any
3 other cross-examination of this witness? Mr. English.

4 THE WITNESS: Can I take a break? I'm just
5 kidding.

6 (Laughter.)

7 THE WITNESS: I might do it a little later.

8 THE COURT: If you need a break, you just let me
9 know.

10 THE WITNESS: Okay. I keep drinking water
11 because I'm nervous.

12 THE COURT: If you need a break, let me know,
13 sir.

14 THE WITNESS: Thank you.

15 MR. ENGLISH: It's dry air.

16 CROSS-EXAMINATION

17 BY MR. ENGLISH:

18 Q. Charles English, for Shamrock Foods. Let me just
19 start off, a couple questions, where you left off. Are you
20 aware that from time to time your customers go to Shamrock
21 Foods to purchase product that you're unable to provide
22 them?

23 A. No, I'm not.

24 Q. The Exhibit 63, in which you stated that the
25 federal market Class I price for January 2004 will be 14.40,

1 that's the Phoenix price, correct, that you listed at 14.40?

2 A. I don't know.

3 Q. Do you know that if a price were applicable at
4 Yuma it would be less than the price of Phoenix?

5 A. I -- I don't know.

6 Q. And you don't disclose to the customers that the
7 price, if it is less at Yuma, would be less at Yuma by, say,
8 10 cents?

9 A. Are you accusing me of selling milk too cheap,
10 now you're accusing me of selling it too high?

11 Q. No, I'm just asking you what you tell your
12 customers.

13 A. "This is the price."

14 Q. Now, in your testimony -- and I'll try as much as
15 possible simply to state it, but if necessary we can look at
16 it and look at pages, but you've referenced sales of milk to
17 Mexico --

18 A. Pardon?

19 Q. You've referenced sales of milk to Mexico?

20 A. Yes.

21 Q. In package form?

22 A. Yes.

23 Q. And those sales from Sarah Farms are fluid milk?

24 A. No.

25 Q. They are not fluid milk.

1 A. No.

2 Q. You did not say that -- you didn't answer
3 questions from Mr. Berde that you're selling milk to Mexico
4 in package form?

5 A. I'm selling to Mexico, package form.

6 Q. Are those gallons?

7 A. I would say so.

8 Q. Do they include half-gallons?

9 A. I don't know.

10 Q. But at least they include gallons.

11 A. Yes.

12 Q. And you've referenced issues regarding butterfat.
13 Would it be fair to say that the milk you sell to Mexico on
14 average is of higher butterfat content than the milk you
15 sell in other markets?

16 A. The milk that I sell to Mexico is the same as the
17 federal standards.

18 Q. I understand that. But is it true that the mix
19 of products that you would sell to Mexico would on average
20 contain higher butterfat?

21 A. As far as the mix? What are you saying?

22 Q. Whole milk, skim milk, 1 percent, 2 percent.

23 A. Mexican people do not drink skim milk or
24 2 percent, because in Mexico they have a unique way of
25 making it, they add water, so they don't want to buy nothing

1 but whole milk.

2 Q. So that's another way of answering the question
3 that I asked, which is that: yes, your mix of milk that you
4 sell to Mexico is different from the mix that you would sell
5 in the United States in that on average you'd have higher-
6 butterfat-content sales?

7 A. No. It would be depending on the customer, it
8 would be depending on -- if you're dealing in a Costco or a
9 -- a Costco or a Sam's Club would be 50 2 percent and 25 on
10 the other two sides; an Hispanic store will be 80 to 90
11 percent whole milk.

12 Q. That's what I'm asking, sir.

13 A. If it's Mexico, it will be 80 or 90 percent whole
14 milk.

15 Q. And also you mentioned Hispanic. Would that
16 include the Bashas stores, would those also be sales of say
17 80 percent whole milk?

18 A. Which Bashas stores?

19 Q. Food city.

20 A. No.

21 MR. RICCIARDI: Let me object to that,
22 Your Honor. He's asking for proprietary information. I
23 asked that same kind of information regarding Shamrock; they
24 refused to disclose that.

25 THE COURT: He can do the same or answer it. I

1 allowed them to ask the questions and if -- you know, if he
2 pleads proprietary and wants to so answer, that's his
3 privilege.

4 MR. RICCIARDI: It is, and he's not going to
5 answer that.

6 Q. (By Mr. English) So you're not going to answer
7 any further questions about butterfat-content --

8 A. I think it -- it makes a tremendous difference on
9 what store, what location, what general people are around
10 the area. When you talk in general, it is incorrect. I
11 mean, it --

12 Q. But at stores --

13 A. Every store, depending on the people that are
14 around that store, has a different mix.

15 Q. Would you agree that the stores closer -- this is
16 as general question -- that stores closer to the Mexican
17 border, in southern Arizona, would on -- would be more
18 Hispanic and would on average take higher butterfat?

19 A. I believe that's so.

20 Q. Thank you, sir. Now, you referenced the sale of
21 products with tamper-proof caps with a foil seal, that
22 prevent leaks and air contamination. I take it that you
23 view that as an advantage in your sales.

24 A. An advantage?

25 Q. Advantage to you, in order to be able to offer

1 that to your customers.

2 A. I'm sorry, I don't understand what you're saying.

3 Q. You offer that -- you've said that it's a more
4 expensive product to produce; correct?

5 A. Correct.

6 Q. But you nonetheless produce it; correct?

7 A. Correct.

8 Q. So you have made a determination in your mind
9 that that is a -- to your marketing advantage, to be able to
10 offer that opportunity to your customers; correct?

11 A. The advantage part I don't understand, I'm sorry.

12 Q. Do you believe that your customers want that
13 feature?

14 A. Some do.

15 Q. And for those customers who want that feature,
16 that is therefore something you are offering them, that you
17 believe provides you with an edge over your competition;
18 correct?

19 A. All they have to do is buy the -- there is no
20 advantage, anybody who wants to do it can buy the cap and -
21 - it's not a secret.

22 Q. Given the fact that it costs more money to
23 produce, you're doing it with an expectation that you're
24 going to sell more product, aren't you?

25 A. I believe it's a better product.

1 Q. I just want to ask literally one question about
2 GH Processing, the plant, and it is, I believe, public
3 information: that that plant, located, as I believe you
4 stated in answer to a question from Mr. Berde, in Yuma, is
5 not subject to either federal or state regulation of milk
6 pricing; is that correct?

7 A. I believe that's privileged.

8 Q. Okay. Thank you. You also stated, and I'm
9 certainly happy to show it to you, but I'm going to read it
10 verbatim: "Sarah" --

11 MR. ENGLISH: This is on Page 6, counsel.

12 Q. (By Mr. English) -- "Sarah Farms is able to
13 utilize these efficiencies to process milk in a more
14 efficient manner and, I believe, less expensive than our
15 competition."

16 A. I believe so.

17 Q. Is that an advantage for you competitively?

18 A. I believe I don't "put up all the," an expression
19 in the industry is, "dogs and cats" that Shamrock does, and
20 I don't make the profits, but by not changing products, it's
21 cheaper to make a gallon.

22 Q. And you find that "cheaper to making a gallon" is
23 an advantage for you in your --

24 A. No more advantage than let's say Shamrock making
25 12 ounces of -- they've got that -- those small sizes and

1 ultra-pasteurs, they make about 25 cents a unit, they do
2 about 200 units a minute, which relates back to about \$3,000
3 an hour, and they run 20 hours a day, which is \$60,000 a day
4 profit on their smaller, ultra-pasteurized products, that I
5 can't compete against, so I have to go to gallons because I
6 can't compete on that market. But I'd like to make the
7 \$60,000 a day, don't misunderstand me.

8 Q. And you've seen Shamrock's books and therefore
9 you know what Shamrock makes on that product.

10 A. I've taken the product apart. In other words, I
11 know how much milk's in it, I know how much -- how much the
12 plastic cost, I've got the pricing; I can take it apart.
13 They do a very, very nice job. I'm envious.

14 Q. And you're saying you do market research and in
15 that market research you determine what Shamrock has charged
16 for that product?

17 A. I -- just like you've got billing here, we get
18 billing too, we break it backwards. It's not a big trick.

19 Q. So that's not unusual, is it, sir.

20 A. No.

21 Q. But going back to the question I asked, since you
22 said that that was an advantage for Shamrock, do you agree
23 that your specializing in gallons in such a way as to make
24 yourselves less expensive than the competition is an
25 advantage?

1 A. No more than a football player going against a
2 basketball player'd have an advantage if he's playing
3 football.

4 Q. Yes or no, sir: it is an advantage.

5 A. I don't think I have any advantages. I just
6 decided to do it differently.

7 Q. Now, when you stated -- and I'm not going to get
8 in specifics, but when you stated in your testimony -- and
9 this was at the bottom of Page 10 -- the following:
10 "Simplistic calculation does not take into account our cost
11 of production, for instance, which exceeds the blend price."

12 A. I'm sorry, you -- I heard it but I didn't. Could
13 you please repeat it, please.

14 Q. Sure. "The simplistic calculation does not take
15 into account our cost of production, for instance, which
16 exceeds the blend price." That's at the bottom --

17 MR. ENGLISH: For everybody else: it's at the
18 bottom of Page 10.

19 Q. (By Mr. English) Do you recall that statement,
20 that you have affirmed being your statement?

21 A. It's my statement, I remember it. Could you
22 repeat it again, though, because I'm having a hard time
23 understanding it or what you're asking for.

24 Q. Well, I understand you didn't write it, but:
25 "This simplistic calculation does not take into account our

1 cost of production, for instance, which exceeds the blend
2 price." So far I'm just asking, you know -- that's the
3 statement I'm asking you to recall, that your counselor read
4 that statement.

5 A. Yes, he did.

6 Q. Now, in making that calculation, that your costs
7 of production exceeds the blend price, do you calculate your
8 costs of production in the way that the Economic Research
9 does for USDA?

10 A. I don't know. I don't know how they calculate
11 their prices. I basically do all my calculations. If it's
12 feeding a cow, I know how much she eats and what it costs to
13 feed her, per cow, per day, and when I make a bottle of
14 milk, I take the Class I price, bottle, cap, label, my
15 labor, and I try to put 10 cents on top. That's how I
16 calculate my price.

17 Q. I apologize, sir, but -- and maybe if you want to
18 have the document in front of you and counsel, that's fine,
19 but when I -- this is a reference to your farm side. That's
20 why the reference to the blend price, your costs of
21 production. I had understood the statement to be that your
22 costs of production on the farm side exceeded the blend
23 price.

24 And so I'm speaking to the question of
25 calculation of your cost of production as stated in this

1 statement, regarding the farm side.

2 Q. Are you saying everybody knows -- the milk
3 pricing that has gone by, the dairies have actually been a
4 disadvantage to have. I'd have been better off to have a
5 processing plant and no dairies for a certain part of the
6 last two years because the milk price was too cheap.

7 Q. Now, I -- and I haven't actually gotten there
8 yet --

9 (Laughter.)

10 (Pause.)

11 MR. YALE: Your Honor, I object to the fun next
12 door.

13 (Laughter.)

14 MR. ENGLISH: I'm afraid they're not cheering us.

15 (Laughter.)

16 Q. (By Mr. English) All right, I'm going to try
17 this a different way. I mean you did adopt it, it
18 ultimately is your statement, but --

19 You have a statement that your counselor wrote,
20 your counselor read, and you've adopted, that says, in
21 essence: our cost of production exceeds the blend price.
22 And that's a frame of reference.

23 A. Okay.

24 Q. I'm merely trying to get at: When you make that
25 statement, your calculation of cost of production, and for

1 that purpose, do you include in cost of production the value
2 of the sale of cull cows?

3 A. Let me state it differently. I don't know
4 exactly how all the numbers are put together, but I'd have
5 been better off last year not to have dairies, just a
6 processing plant. So how they came with the figures and how
7 they accounted for it, I really don't know, but it was not
8 positive to have a dairy. It was a positive to have a
9 processing plant but not a dairy.

10 Q. Let me try to get to the bottom line, then. You
11 don't know how your costs of production were calculated for
12 the purposes of this statement; correct?

13 A. I know what it costs to produce a gallon of milk.

14 Q. Do you know whether in the cost of production on
15 the farm side you include the value of cull cows?

16 A. I think it's offset with heifer replacements, and
17 I'm not sure about that, but I think heifer replacements are
18 at cost, and then I believe the beef cows are going into the
19 cost of the -- but basically the dairy business didn't work
20 last year.

21 Q. But you can't tell us that you know for --

22 A. The year before, really bad.

23 Q. Other than the fact you come to the conclusion,
24 you can't tell us how you know that that is calculated.

25 A. How?

1 Q. The methodology that you use to reach the
2 conclusion that cost of production exceeds the blend price.

3 A. You take your cost and you take your milk --
4 through the -- if it's a negative it's a negative.

5 THE COURT: Well, he's asking you specifically
6 whether you included certain factors in making that
7 calculation, and I guess he's not getting the exact answer
8 that he was hoping for.

9 MR. ENGLISH: I'm not getting any answer.

10 Q. (By Mr. English) Do you wish to add or clarify
11 in any way to that?

12 A. I know they added and subtracted, come up with
13 the bottom number, and it was read.

14 Q. You made the following statement, bottom of Page
15 12, top of 13, again, I'll read it in its entirety: "At the
16 farm level, we are required to carefully maintain the level
17 of our herd. Herd fluctuations pose the risk of causing
18 large pool plant purchases, which would require us to lose
19 our status or, alternatively, large surpluses which must be
20 disposed of, often at a substantial loss."

21 A. Correct.

22 Q. For the purposes of calculating "a substantial
23 loss": compared to what, the sales of Class I?

24 A. I try to milk -- price my milk -- or -- pardon
25 me. I try to market my milk to get the most money, and if

1 it -- the most money is: putting it in a bottle.

2 Q. Whether that's in sales to Mexico or sales to
3 California or sales in your Arizona operations; correct?

4 A. Sarah Farms does not sell any milk in California,
5 bottled --

6 Q. But GH Processing does; correct?

7 A. Privileged.

8 Q. You're going to say it's privileged when we've
9 all been trooping up to Capitol Hill for a year, talking
10 about the sales of GH Processing to stores in southern
11 California, you're going to say that's privileged?

12 A. I believe that that's none of this hearing's
13 business, if we're talking about PD status.

14 Q. It is none of this hearing's business, sir, how
15 you actually dispose of your surplus from your --

16 A. No, because you'll plug the hole.

17 Q. It's our hole, sir.

18 A. This isn't the communist party yet.

19 Q. You referenced -- you told us about it, so we'll
20 see what you'll tell us about it, that you were recently
21 asked to price milk for Costco, to be delivered to a market
22 outside of Order 131.

23 A. Yes.

24 Q. Can you just tell us which market?

25 (Pause.)

1 A. I don't think I should. Costco might be mad.

2 (Pause.)

3 Q. When Parumph Dairy sells milk to California,
4 isn't it true that the money paid for that milk is equal to
5 the credit provided under CDFA rules, which is "the lower of
6 end plant" [phonetic] "usage or modified quota not less than
7 modified overbase" [phonetic].

8 MR. RICCIARDI: Your Honor, it's Al Ricciardi.
9 Let me object, for a variety of reasons. One, I don't think
10 it's relevant to anything in this hearing; two, I'm
11 concerned that Mr. English may be using confidential
12 information that he may have obtained during the course of
13 representation.

14 Now, whether he represents Mr. Hettinga or
15 represents someone else or is simply part of a joint
16 representation, I just think that's -- I don't it's fair to
17 bring it into this hearing.

18 MR. ENGLISH: Your Honor, maybe a little
19 classification. I am indeed counsel in the case styled
20 Hillside Dairy versus whoever it's against now, because they
21 switched, Caracura [phonetic], and I do not represent
22 Parumph Dairy, another counsel represents Parumph Dairy.

23 In the course of that, in public documents filed
24 in the United States District Court in 1997, filed in the
25 9th Circuit Court of Appeals in 1999, and, yes indeed,

1 before the United States Supreme Court in 2000, 2001, 2002,
2 and 2003.

3 It has been stated that all the plaintiffs in
4 that case, including Parumph Dairy -- it has been stated,
5 exactly what price they receive for their milk. It is
6 public information. It is now back in the District Court in
7 Sacramento, it has now been filed yet again in summary
8 judgment documents. It is not confidential information in
9 the slightest.

10 THE COURT: Okay. I'll let him answer the
11 question, if he can answer the question, if he wants to
12 answer the question.

13 MR. RICCIARDI: Judge, let me finish. I mean,
14 it's not just a question of confidential and proprietary,
15 what we've got is Mr. English saying that he in fact
16 represents as co-counsel in the same litigation -- and he
17 says he doesn't represent Parumph but he represents someone
18 else, joint representation, this case. Now, I'm concerned,
19 I will tell you, that we have some potential conflict here,
20 and say there was a direct conflict, but there may be one
21 regarding confidential information, I'm not saying this is
22 particularly confidential --

23 THE COURT: He can claim -- he's already asked
24 what he's asked. I mean, if the answer -- if he feels the
25 answer's privileged --

1 MR. ENGLISH: Your Honor, I do need to speak to
2 that, because that's challenging my ethics.

3 MR. RICCIARDI: (Inaudible) challenge your
4 ethics.

5 MR. ENGLISH: The fact of the matter is that
6 issue was raised by Mr. Ricciardi to me in November in
7 Seattle and it was fully and faithfully resolved, and I
8 said, "If you have any further questions, you can get back
9 to me." It is not even a close call, and I resent the fact
10 that it's being brought up on this public record when I have
11 actually addressed it.

12 MR. RICCIARDI: Well --

13 MR. ENGLISH: I am not counsel for this witness.
14 The fact of the matter is it's public information.

15 THE COURT: Okay, let's not repeat the other --
16 Seattle -- problem we had.

17 MR. RICCIARDI: We're not going to do that,
18 Judge. And I'm not trying to challenge his ethics at all,
19 and we did have a discussion about it, but I didn't realize
20 that he was going to be bringing up these issues on cross-
21 examination of the witness, and so I raise it simply because
22 I want to protect this witness in the record, that's all,
23 and, you know, Chip [phonetic] can address it, but I'm
24 concerned.

25 THE COURT: Okay, you can answer the question and

1 say it's privileged or you don't know or whatever, whatever
2 you want to do.

3 A. "Privileged" is nice.

4 Q. (By Mr. English) So information in the
5 United States Supreme Court is privileged.

6 MR. RICCIARDI: Now it's argumentative, Judge.

7 THE COURT: You don't need to do that, it's okay,
8 he's --

9 Q. (By Mr. English) In addition to the products
10 you've listed, does Sarah Farms also sell heavy cream?

11 A. Yes.

12 Q. Near the end of your testimony you state that "In
13 short" --

14 MR. ENGLISH: This is the top of Page 14,
15 counselor.

16 Q. (By Mr. English) -- "In short, the proponents
17 expect Sarah Farms to pay millions to other producers, who
18 have not incurred our investment costs nor have borne any of
19 our risk."

20 A. That's absolutely correct.

21 Q. That's the same millions of dollars that are
22 presently not being paid to the pool, that you have as an
23 advantage vis-a-vis regulated handlers; correct, sir?

24 A. I have no advantage.

25 Q. And it's the same millions of dollars that are

1 not being paid to pool producers; correct?

2 A. They didn't build a plant. Any of them can build
3 a plant.

4 MR. ENGLISH: I have no further questions.

5 THE COURT: Mr. Beshore, you have some questions?

6 MR. BESHORE: Marvin Beshore, for Dairy Farmers
7 of America.

8 CROSS-EXAMINATION

9 BY MR. BESHORE:

10 Q. Good afternoon, Mr. Hettinga. You made some
11 comments that last year you'd have been better off owning a
12 plant and not being in the dairy business. Is that --

13 A. That's correct.

14 Q. -- correctly stating it?

15 A. (Nods head.)

16 Q. Okay. So I take it, then, that what you're
17 saying is that for all the other producers that are under
18 131, who did not have plant profits to offset losses at
19 their farm, they had the losses.

20 A. It was probably pretty bloody.

21 Q. Now, if you took the difference between the blend
22 price and the Class I price in Order 131 last year out of
23 your operating statement at the plant level --

24 A. I'm sorry, I got distracted. Could you start all
25 over again, please.

1 Q. Sure. Last year: are you talking about 2002 or
2 2003?

3 A. I think this -- this is 2004. 2002 was bad, and
4 the first 60 days of Two Thousand -- or the first six months
5 of 2003 were bad, and, you know, I don't know where I'm
6 going to end up the end of this year, but we're hoping to
7 not do too bad, but I haven't finished.

8 Q. Well, let's talk about the period of 2002, and
9 the first half of 2003, when we can agree it was bad at the
10 farm level. Right?

11 A. Absolutely.

12 Q. Okay. Now -- and it was bloody, to use your own
13 words, for the rest of the dairy farmers in Order 131 who
14 are -- just had their dairy farm enterprise as their
15 business; correct?

16 A. The dairies -- and I am a dairyman first, I mean,
17 I was a dairyman before I ever became a procedure --

18 Q. Okay.

19 A. -- and I relate to dairymen. I don't relate to
20 co-ops very well, but I do relate to dairymen.

21 Q. Now, my question is -- but you said during that
22 period of time your plant was profitable but the dairy was
23 not; correct?

24 A. Yes.

25 Q. Okay. Now, if you took the profit & loss

1 statement of your plant and you took out of it, you removed
2 from it, the difference -- the pool equalization payments
3 that you don't have to pay because you're producer-handlers
4 -- -handler, the difference between the blend price and the
5 Class I price, \$1.70, \$1.50 per hundredweight. Okay?

6 A. You also have additional costs --

7 Q. Well, let's just --

8 A. Okay. Go ahead.

9 Q. -- take it a step at a time.

10 A. Go ahead. All right.

11 Q. If you took that value out of your plant, profit
12 & loss, would your plant still have been profitable?

13 MR. RICCIARDI: Your Honor, I believe that's
14 proprietary information.

15 MR. BESHORE: Your Honor, he's been instructing
16 the witness persistently that way, and, you know,
17 Mr. Hettinga offered up --

18 THE COURT: It's inescap- -- I mean it's -- you
19 know, I mean, if he objects on that basis or makes a
20 statement -- I mean yes, he is in effect doing that, I
21 agree, but he's entitled to it I think is what I'm --

22 MR. RICCIARDI: Your Honor, and let me clarify
23 the record here.

24 THE COURT: There you are. Go ahead, talk.

25 MR. RICCIARDI: Al Ricciardi. I'm here

1 representing Mr. Hettinga. I am going to represent his
2 interests. To the extent they're asking information that
3 I believe is confidential or proprietary I'm going to make
4 the objection and I continue to make it.

5 MR. BESHORE: It's selective, you know,
6 revelation. He -- you know, of proprietary information. I
7 mean, whether he had a profit or a loss could be considered
8 proprietary. He offered that he'd had a profit at the
9 plant. Okay? I'm just asking him further about that. Now
10 Mr. Ricciardi wants to draw the line.

11 THE COURT: Okay. But I still can't -- I agree
12 with you that, you know, the door would have been opened,
13 but I -- by his own statements, but on the other hand, I
14 can't make him answer a question. You can ask him --

15 MR. BESHORE: I understand that. My objection is
16 to Mr. Ricciardi instructing him when he should and should
17 not --

18 THE COURT: He's not instructing him; he's
19 objecting -- I mean it's a close question, but he's
20 instructing him, as his attorney, that he believes that it's
21 proprietary or confidential information he's being asked
22 for. He's entitled to do that, I think, you know, and, you
23 know, I think my authority is limited.

24 MR. BESHORE: I think that the witness is
25 entitled to refuse to answer a question that asks for

1 proprietary information.

2 THE COURT: Right.

3 MR. BESHORE: I am not aware that counsel in
4 these proceedings is entitled to tell the witness with
5 respect to each question whether or not he should choose to
6 reveal the proprietary information or not.

7 THE COURT: I don't think a witness knows, you
8 know, whether something's legally proprietary or not and
9 that's what you hire lawyers for. I mean, you know, that's
10 -- but in any event --

11 MR. BESHORE: Do I understand Mr. Ricciardi to be
12 contending that that's legally proprietary?

13 THE COURT: He appears to be doing that, yes.
14 That's what he stated. Basically, he objected to the
15 question because it was asking for proprietary information,
16 is the way I interpreted it. Did I interpret something
17 wrong, Mr. Ricciardi, or is that what you're doing?

18 MR. RICCIARDI: You did not, Judge. What they're
19 asking him to do is to lay bare his profit & loss statement
20 for everybody in this hearing. If the proponents included
21 want to give all of their confidential proprietary
22 information, that's fine, but every time I've asked that on
23 cross-examination I've been blunted by that whole issue. So
24 if it's proprietary on one side, it's proprietary on the
25 other.

1 MR. BESHORE: I think Mr. Holland's testimony
2 stands, you know, on the record in terms of information that
3 he was quite open about with respect to their operations.

4 THE COURT: If he was, it wasn't uniform, I heard
5 the word "proprietary" uttered many times in Phoenix and in
6 the first few days in Seattle as well, so I wasn't keeping
7 score. I guess maybe I should have.

8 We can probably -- you know, because it's on the
9 internet, we can probably see how many times the word
10 "proprietary" was used, but it was a lot on both sides.

11 MR. BESHORE: May I ask the witness if he's
12 prepared to respond to the question?

13 THE COURT: You can ask the witness, and, you
14 know, he doesn't have to listen to his attorney's -- if it's
15 advice like that, I mean, but he made his objection, it's
16 not for me to sustain on, I can't order him to answer a
17 question.

18 Q. (By Mr. Beshore) Do you remember where we left
19 off?

20 A. Yes. It's proprietary.

21 Q. You've made a statement -- you made some
22 contentions in your testimony about Exhibit 54, the article
23 from Dairy Foods. Do you recall that?

24 A. Which one's that about? I'm sorry.

25 Q. This is the "A Decade of Change and a Year of

1 Challenges, the 10th Annual Dairy 100."

2 A. Okay, that's the one where they rate the dairies
3 for size?

4 Q. Right.

5 A. Okay.

6 Q. Okay?

7 A. (Nods head.)

8 Q. Did you read the article?

9 A. No.

10 Q. Do you know anything about the article?

11 A. I had somebody read part of it to me, yes, and
12 basically the sizing of the dairies.

13 Q. You made a statement, "There is not one producer
14 in the Top 100 list." Did you verify that in any way before
15 you made that statement?

16 A. It's what I was led to believe or that's what
17 I've heard.

18 Q. And how were you led to believe that?

19 A. I think we went down the list a little bit and
20 they said there isn't any PDs, any -- is there a PD in
21 there?

22 Q. Well, you made the statement under oath,
23 Mr. Hettinga, not me.

24 A. I believe there was no PDs.

25 Q. Okay. Do you recall Brauns testifying in this

1 hearing?

2 A. Yes, I do.

3 Q. They're a PD; right?

4 A. Yes.

5 Q. Would you go to Exhibit 54, please.

6 A. Tell me they're in there if I'm wrong.

7 Q. Check number 85.

8 A. Need glasses too.

9 (Pause.)

10 Is that F & A Dairy --

11 Q. 85.

12 A. 85, I'm sorry. Okay, I missed it.

13 Q. So 85 is Braun's Ice Cream Company?

14 A. I guess. They're bigger than I thought.

15 Q. They're bigger than you thought?

16 A. Uh-huh. I didn't know they were here.

17 Q. Did you listen to their representatives'
18 testimony in this hearing? You were there when he testified
19 --

20 A. Yes.

21 Q. -- in Phoenix; right?

22 A. Yes.

23 Q. Did you pay attention to it?

24 A. I thought they did a nice job.

25 Q. Do you remember how big he said they were?

1 A. No, I didn't recall that.

2 Q. You don't remember how many cows he said they
3 had?

4 A. Yes.

5 Q. You do.

6 A. Yes.

7 Q. How many was that?

8 A. I think 12,000.

9 Q. Less than you; right?

10 MR. RICCIARDI: Objection, Your Honor,
11 proprietary information.

12 A. I don't see how they're there, let's put it that
13 way, they must buy cream or something.

14 Q. (By Mr. Beshore) Well -- okay. How about my
15 question? Less than you, right, number of cows?

16 A. Proprietary.

17 Q. Did you compare where -- did you look at the
18 reported sales totals on the exhibit and compare where you
19 would stand? I'm talking now I guess -- let's just limit it
20 to Sarah Farms.

21 A. I thought they were all billion-dollar companies.
22 I don't get nowhere near a billion.

23 Q. You read the article and thought they were all
24 billion-dollar companies?

25 A. Uh-huh.

1 Q. Well --

2 A. At least Shamrock and what have you was --

3 Q. Oh, you were --

4 A. I probably went down to Shamrock and -- I don't
5 know, don't remember, but I --

6 Q. Well, you really didn't read the list at all, did
7 you?

8 A. We went over them, yeah, I think my boy and I.

9 Q. In part?

10 A. Probably.

11 Q. Do you have the exhibit in front of you?

12 A. No.

13 Q. The copy that I have, the photocopy that's passed
14 out, it's difficult to read, but I take it that the two
15 right columns are sales figures of some magnitude, perhaps.
16 Can you see the numbers in the two right columns?

17 A. It looks like a hundred. I don't know if it's a
18 hundred -- no, I cannot, I mean -- I'm sorry, but my eyes
19 aren't too good either.

20 Q. Can you tell what those numbers represent,
21 hundreds of dollars?

22 A. Oh, okay, okay, plus or minus a hundred percent
23 of prior years I think is what that meant -- means, I mean,
24 growth. Isn't it? On the right?

25 Q. I can't tell.

1 A. Okay. Neither can I. I think it's a growth
2 factor. They were the percentage of the sales. I know
3 Shamrock had an increase. Must have an unfair advantage.

4 Q. Well, assume that the second column from the
5 right is a gross sales figure. Can you tell us what it was
6 for Braun's there.

7 A. I'm sorry, I changed the page. I was going back
8 to Shamrock.

9 Q. Well, I know you want to talk about Shamrock; I'd
10 rather talk about Braun's for a minute.

11 A. Okay. Braun's Ice Cream Company. Okay, what,
12 what do you want to know?

13 Q. What sales figure were they estimated to have? I
14 think it's the second column from the right.

15 A. A hundred is what I got, what I see.

16 Q. A hundred million?

17 A. I don't know.

18 Q. Okay. What's the sales figure for the bottom
19 dairy there, Southwest Dairy? By the way, are --

20 A. I can't see it on this copy at all.

21 Q. Are you familiar with Southwest Dairy in Tyler,
22 Texas?

23 A. No, I am not. I think 75 or 72.

24 Q. Now --

25 A. 75 what?

1 Q. Million dollars perhaps?

2 A. Okay

3 Q. What did you understand it to be when you
4 compared it to yourself?

5 A. I didn't compare it to myself.

6 Q. Let's consider another statement you made in your
7 sworn testimony, Mr. Hettinga. Page 13 --

8 A. Page 13 of this article?

9 Q. No. I'm sorry. Page 13 of your statement,
10 Exhibit 53.

11 A. Okay. Would you read it to me?

12 Q. Yeah, I'll be glad to.

13 A. Thank you.

14 Q. The statement that you've made is that -- that I
15 want to call your attention to: "Dairy Farmers of America
16 is being investigated by the Justice Department for numerous
17 antitrust violations." And my question is: What basis do
18 you have for that assertion?

19 A. I have heard, in articles that have been given to
20 me since I'm in this legislation, that you guys are being
21 scrutinized very, very hard for trying to -- not trying to:
22 I personally think -- personally think, and I guess it's
23 "personally think," I don't know if I'll get in legal deals
24 -- personally think that DFA is basically trying to control
25 the milk market and I think DFA and Dean's are working

1 together to kill all competition.

2 This hearing should never ever be here. We
3 represent three-quarters of one percent of the milk, and the
4 other side represents, I'm going to say, 80 percent, I'm
5 just throwing figures on that, I don't know, I don't have it
6 right -- but I honestly feel that we are just a pebble in
7 the shoe, and myself, I probably deserve it, these other
8 good family people are -- are like salt of the earth, good
9 family people, and there shouldn't be hearing on this,
10 they're doing good business, they're doing the business the
11 American people should, should be, free enterprise, do your
12 own thing, and I think that this milk legislation is
13 protecting the big guys and protecting the big co-ops.

14 Q. Okay.

15 A. That's what I think.

16 Q. Three-quarters of one percent. What --

17 A. Someone -- somewhere in a hearing I heard that
18 figure, that three-quarters of one percent represents all of
19 the Class I milk that all the PDs represent. Now, there
20 might be a little more in Arizona, but somewhere in this
21 room, three-quarters of one percent today is all -- and
22 we've got enough paper pushers here, somebody can give me --
23 correct me, it's fine --

24 Q. Who made that statement --

25 A. I don't remember. I can remember the statement,

1 I thought, "What are they talking about." Three-quarters of
2 one percent is all the PD milk in the United States.

3 Q. You don't remember who made that statement?

4 A. No. You know, I'm not good -- sometimes things
5 stick in my head and they're there, and that's what I heard,
6 like I heard today, I think Joe Albright said that when he
7 first started, 50 percent of all the milk belonged to PDs.

8 Q. Is it of interest to you what market he was
9 talking about?

10 A. Sure.

11 Q. That would be pertinent?

12 A. It would be -- I mean it's just a figure that I
13 heard today, I said.

14 Q. Well, you took it to be significant, I take it.

15 A. Yeah.

16 Q. Okay. Would it be significant what the terms of
17 the PD regulations were at that time?

18 A. I'm sorry?

19 Q. Would it be significant to you if that 50 percent
20 -- it's an important figure -- what the rules were for the
21 PDs at that time?

22 A. That was the figure I heard from Joel Albright.

23 Q. Do you think it's an important figure?

24 A. I think there's less and less PDs continuously.
25 I mean, basically we've got -- the co-ops have gotten

1 bigger, they have the right -- you know. One of the reasons
2 -- we're very, very, very crucial about what we say here,
3 because whatever leaves this room, you'll go to it and
4 basically tell us, "Hey, if you're going to trade with Hein
5 or you're going to trade with a PD, you are not going to
6 trade with us" --

7 Q. Well --

8 A. -- and the reason them guys all went to Alaska to
9 sell their milk: because the local guys won't sell it. You
10 wouldn't help me out if I needed a load of milk or wanted to
11 get rid of a load of milk.

12 Q. You being me?

13 A. Sarah Farms. Well, DFA. DFA would -- I would
14 have to feed it to my calves before you guys would ever help
15 us, ever.

16 Q. Do you -- are you testifying, Mr. Hettinga, that
17 in this record -- for instance, the Pacific Northwest, that
18 -- are you aware that the record shows that Wilcox, for
19 instance -- well, Mr. Holland testified that the 50 percent-
20 owned [phonetic] dairy up there purchases milk from PDs for
21 the lower of Class III or IV. Are you aware of that?

22 A. I believe I heard some of that. But I also --

23 Q. Better deal than they get from West Farms up
24 there, isn't it, Mr. Hettinga?

25 A. I don't know who West Farms is.

1 Q. Do you know who Dariqold is?

2 A. That's another co-op, isn't it?

3 Q. How about Northwest Dairymen, does that ring a
4 bell?

5 A. Is that another co-op?

6 Q. I'm asking you.

7 A. I don't know. I don't know.

8 Q. You're the one who's making the accusations about
9 these co-ops trying to put people out of business.

10 THE COURT: We're getting a little bit
11 argumentative. Let's just calm down a little bit and ask
12 your questions.

13 Q. (By Mr. Beshore) You're making the contentions,
14 are you not, Mr. Hettinga, that the co-ops are attempting to
15 put people such as yourselves and producer-distributors in
16 the Pacific Northwest out of business?

17 A. Absolutely.

18 Q. By buying their surplus milk at Class prices?

19 MR. YALE: Now we're getting argumentative,
20 Judge.

21 THE COURT: I know, but he's --

22 MR. YALE: Let him make the argument in a brief,
23 Judge.

24 MR. BESHORE: No, no. He can make those
25 assertions and I can ask -- if he's going to make them, I

1 can ask him a couple of questions about them.

2 THE COURT: I think you asked him and I think you
3 got your answer. I mean --

4 MR. BESHORE: No, that question was not asked.

5 Q. (By Mr. Beshore) Is buying surplus milk at Class
6 prices a tactic to put people out of business?

7 A. No, that is not.

8 Q. Now, I think you said you were careful about what
9 you say in these hearings because it's on the public record.
10 You may have said "crucial." I think you meant "careful,"
11 didn't you?

12 A. I don't want to tell you exactly what I'm doing,
13 as far as with Sarah Farms, which is my business, which --

14 Q. I'm not -- this question is not directed to Sarah
15 Farms; it's directed to your statements and your veracity,
16 Mr. Hettinga.

17 A. "Veracity."

18 Q. Yes.

19 A. What's the word "veracity" --

20 Q. Truthfulness.

21 A. Truthfulness. Okay.

22 Q. Okay. Credibility.

23 A. Okay.

24 Q. Does that mean anything to you?

25 A. Yes.

1 Q. Okay. Now, what antitrust violations are you
2 referring to when you say "Dairy Farmers of America is being
3 investigated by the Justice Department for numerous
4 antitrust violations," can you cite me one?

5 A. I can't -- there's been documents --

6 Q. Is the answer no, you can't cite me one?

7 A. I've seen paperwork where you were -- DFA was --
8 and I can't remember what the name was or what have you, I'm
9 not good at that.

10 Q. Are you opposed, Mr. Hettinga, to proposal 4 in
11 this proceeding?

12 A. Which is --?

13 Q. The proposed ban on double dipping. You know
14 what double dipping is, don't you?

15 A. Yes, I know what double dipping is. I also know
16 what -- by not being able to cross state lines and deal in
17 both states, the co-ops will have me under their thumbs, so
18 yes, I'm opposed.

19 Q. So could I ask: Since, as a producer-handler,
20 you're not part of the pool, you don't claim or want any
21 part of the pool, or the blend price, why you would be
22 opposed to there being a prohibition on a producer being
23 pooled with the same milk in two pools at the same time?

24 A. As -- as I understand it, it would -- you know,
25 if they ever regulate me, I would not be able to buy milk

1 out of California and blend it in the total picture and draw
2 from the pool instead of putting into the pool, is how I
3 understand it. Now, I may have misunderstood it. But yes,
4 I'm opposed. It's more trade restrictions, more -- and we
5 don't need more trade restrictions, we need more free trade.

6 Q. Is it your position, Mr. Hettinga, that if you
7 were to become pooled, under Order 131, that you should be
8 able to draw the blend price from the Order 31 pool and from
9 the California state order pool on the same milk?

10 A. Not on the same milk.

11 Q. If proposal 4 prohibits that, why are you against
12 it, against the proposal to prohibit that?

13 A. Because I know you're putting it in there to hurt
14 me. I haven't figured out exactly how, but --

15 (Pause.)

16 Q. Your price list, which is Exhibit 63, that
17 Mr. Berde introduced, does --

18 THE COURT: Hasn't been introduced, just for the
19 record, they've only been marked. Exhibits 57 through 63
20 have only been marked and have never been introduced.

21 MR. BESHORE: I'm sorry.

22 Q. (By Mr. Beshore) -- which have been identified,
23 do those represent -- does that represent the full variety
24 of the fluid milk products you offer at Sarah Farms?

25 MR. RICCIARDI: Objection, Your Honor --

1 THE WITNESS: I don't know. What's there?

2 MR. RICCIARDI: Objection, Your Honor. That
3 would be proprietary to the extent that there are other
4 products, not on that particular document, which I don't
5 know how these people got it, but they did, obviously.

6 THE COURT: It happens. It's happened a lot in
7 this hearing.

8 UNIDENTIFIED MALE: Yes, it does.

9 (Laughter.)

10 THE COURT: Do you want to look at it and see if
11 you want to answer his question or not? I think it was the
12 last one --

13 (Pause.)

14 A. I think that's another product. I think. I'm
15 not sure.

16 Q. (By Mr. Beshore) I'm sorry: you think it does?

17 A. No, I think there's one missing.

18 Q. And what's that?

19 A. I think schoalies [phonetic] and heavy whipping
20 cream, I don't see that on here, but these people don't buy
21 it.

22 Q. Okay. What was -- besides heavy whipping cream,
23 the other product was --?

24 A. They call it schoalie. It's a bag of milk, for
25 restaurants and so forth.

1 Q. Okay. On Page 10 of Exhibit 53, I want to read a
2 statement made there and see if you can answer some
3 questions about it. You say -- this is the second sentence
4 in the first full paragraph, first, Sarah Farms can only
5 serve those customers who require less milk than it can
6 produce.

7 A. That means I can't go after like Wal-Mart because
8 they use -- they use 200,000 gallons a week. That means I
9 can't go after Albertson's because I don't have that volume
10 of excess milk. It means I can't price it, because if they
11 said yes, I wouldn't be able to serve them. That is how I
12 meant that.

13 Q. So you could only serve customers that you can
14 serve.

15 A. Yes.

16 Q. Do you mean the entirety of their requirements
17 there?

18 A. Oh, I'd hate to go into Wal-Mart and say, "I'd
19 like to have two stores," they'd just kind of say, "Well,
20 when you can serve them all, why don't you come back."

21 Q. You also -- in the same paragraph you say you
22 "cannot serve customers whose demand" -- "Sarah Farms cannot
23 serve customers whose demand for milk is irregular." What
24 do you mean by irregular?

25 A. A one-shot deal, you know, somebody calls up,

1 says -- irregular is irregular, pretty simple. We try to
2 deal with people for a long, ongoing, steady business, and
3 irregular would be -- I would say school business would be
4 irregular.

5 Q. Because it's not level year-round.

6 A. Correct. It's very, very profitable, very, very
7 profitable, but it's not what I want to do.

8 Q. Because you want level year-round sales.

9 A. I like working seven days a week. The cows do.

10 Q. So the pool's got to take those sales that are
11 irregular and balance them, correct, the other producers in
12 the market?

13 A. If there was a young man here that wanted to
14 become a processor, I would tell him to go buy a half-pint
15 machine and put them up, because there's a hole there,
16 there's a vacuum there, no one's serving it, it can be very,
17 very profitable. They haul half-pints out of New Mexico, I
18 think, to serve Arizona because the price was too high.

19 Q. Well, you've got a lot of capital, and obviously
20 the interest and ability in using it. Why aren't you doing
21 that?

22 A. You know, I work seven days a week, half a day,
23 12 hours, that's enough.

24 Q. That's for next year?

25 A. No, it's -- no. No. If I was going to do

1 something I'd -- never mind.

2 MR. BESHORE: Okay. Thank you.

3 THE COURT: Thanks.

4 MR. BERDE: I want to inquire, was 62 and 63
5 received?

6 THE COURT: No. Right now I have Exhibits 57
7 through 63 have been marked for identification, none of them
8 have been offered for admission. I'm willing to listen if
9 somebody wants to offer them --

10 MR. BERDE: Then we offer them.

11 THE COURT: You do offer them?

12 MR. BERDE: Yes.

13 THE COURT: Okay. Any objection?

14 (No response.)

15 THE COURT: They're admitted into evidence,
16 Exhibits 57 through 63 are admitted into evidence.

17 (Exhibits Nos. 57 through 63 were received.)

18 THE COURT: You have more questions, Mr. English?

19 MR. ENGLISH: Yes. Not very many, I hope.

20 FURTHER CROSS-EXAMINATION

21 BY MR. ENGLISH:

22 Q. Sir, when you -- I'm going to try this a
23 different way and see if I can get to it without being
24 proprietary.

25 When the statement about the Costco opportunity

1 on a market order outside of Order 131, you said, "I was
2 recently asked to price milk for Costco, to be delivered to
3 a market outside of Order 131," was that "I" Sarah Farms?

4 A. Yes.

5 Q. And since you said that Sarah Farms doesn't sell
6 into California, may we assume that wasn't a California
7 opportunity?

8 A. Correct.

9 MR. RICCIARDI: Objection, Your Honor.

10 THE COURT: He answered it before you could --

11 MR. RICCIARDI: I understand he answered it,
12 Judge, but, you know, to try and trap the witness, it's a
13 proprietary question --

14 THE COURT: Okay, fine. It's already asked --

15 MR. ENGLISH: I think I could have made the
16 argument on brief about it, so I don't think it's unfair.
17 He said it.

18 THE COURT: It's asked and answered and let's
19 move on.

20 MR. RICCIARDI: I understand.

21 THE COURT: I'm not going to strike it.
22 Mr. English, are you --

23 MR. ENGLISH: No. I'm sorry.

24 Q. (By Mr. English) With reference to --

25 MR. ENGLISH: For counsel's purposes and the

1 parties' purposes, Page 3.

2 A. (By Mr. English) -- two other statements you
3 made, one was that you --

4 THE COURT: You're talking Exhibit 53 now again?

5 MR. ENGLISH: Yes, Exhibit 53. This is the
6 statement read by Mr. Ricciardi.

7 Q. (By Mr. English) -- you reference that you're
8 able to put a 17-day shelf life on delivery, as opposed to
9 the 10-shelf life offered by others. You remember that
10 statement?

11 A. Yeah. That was -- yes.

12 Q. Are you aware that Shamrock puts 16 to 18 days on
13 their non-ESL products?

14 A. I think it was 21.

15 Q. You agree it's longer than 10 days --

16 A. Oh, yes.

17 Q. -- that Shamrock puts on --

18 A. Oh, yes.

19 THE COURT: He said "non-ESL products." I don't
20 know if you heard the question.

21 THE WITNESS: Yes.

22 THE COURT: Oh, you did hear it, okay.

23 THE WITNESS: Yes.

24 THE COURT: Sorry.

25 Q. (By Mr. English) So your reference to 10-day

1 shelf life offered by others was not a reference to
2 Shamrock.

3 A. Correct.

4 Q. Then you -- two sentences down, in the statement
5 that you've adopted, it says "Sarah Farms ships its gallon
6 milk containers in cardboard boxes. As far as I know, no
7 other distributors in the marketing area have been willing
8 to provide this service to their customers." Are you aware
9 that Shamrock provides milk in cardboard boxes?

10 A. I have not seen -- I say -- are you talking
11 gallons?

12 Q. Yes, gallons.

13 A. I was not aware of it.

14 MR. ENGLISH: I have no further questions.

15 THE COURT: Anyone else?

16 (No response.)

17 THE COURT: Are you going to have redirect,
18 Mr. -- I was going to say, it's 20 minutes of 6, and
19 Ms. Deskins has some questions, and I don't know if you
20 questions, I'm just trying to decide whether --

21 MR. RICCIARDI: Depending on how much is asked by
22 the front row, Your Honor, I likely don't have any redirect.

23 THE COURT: Go for it, Ms. Deskins, you're on.

24 CROSS-EXAMINATION

25 BY MS. DESKINS:

1 Q. Sir, I think you might have answered this, but
2 let me just make sure. For proposal 4, have you had a
3 chance to look at that proposal?

4 A. What they're trying to do?

5 Q. Well, it's referred to as the double-dipping one.
6 Have you had a chance to look at that proposal?

7 A. Yes.

8 Q. Have you considered what impact it would have on
9 your business?

10 A. It couldn't help me.

11 Q. Okay, could you explain to us how it couldn't
12 help you.

13 A. I'm -- I don't know how it could help me, I don't
14 -- anytime we -- the more restrictions we have in the milk
15 industry, and everybody, I would personally -- what is the
16 purpose of it, what -- they're putting it in, I think it's
17 just to hurt me.

18 Q. Okay, so your understanding is the more
19 regulations there are, the more it would restrict your
20 business?

21 A. Yes.

22 Q. Okay. And then also in your testimony there was
23 a sentence that read, "Indeed Sarah Farms does not have a
24 price advantage over regulated handlers and these proposals,
25 if adopted, will place it at a distinct price disadvantage."

1 Can you explain to us how the adoption of the proposals
2 would put you at a price disadvantage.

3 A. Basically, I will receive -- I will have to take
4 my milk from my cows, go to UDA, UDA -- and I'm just using
5 UDA as a deal, as a -- and then when it comes back, it will
6 charge my plant a price and keep money, and it's my milk
7 from my cows, going to my plant, to my producers, and they
8 want to put a tax on it.

9 That's basically -- UDA wants to share in what I
10 put together, and it's my milk, all my milk, I produced it
11 and made it, and they want to be in the middle and pull the
12 cream off the milk and give me back, I don't need them in
13 the middle of it. Basically it's a socialistic system.

14 And everybody -- and I say that, everybody has an
15 advantage, the -- I have an advantage - and I say that,
16 advantage, I made it, I put my plant together, I put my
17 plant together, and they want to share in some of the
18 profits.

19 Now, I'd love to share in some of Shamrock's
20 problem -- profits, I would love to share in some of
21 Kroger's profits, but here they're picking on my profits,
22 and I don't want to share with them. I mean, I put it
23 together, I -- the first four years of that plant I sweated
24 blood trying to make it go, and I finally got over the hump,
25 and I'm doing well, and now they want me to share my money,

1 and I -- someone -- an economist said it was a tax, and
2 that's just exactly what it is, it's an unfair tax on my
3 earnings and my sweat and my putting it together.

4 Q. Let me ask you a follow-up on that. So you're
5 saying, under the proposal, if there's a limit on how many
6 pounds per month you can produce, you would have to join a
7 co-op to stay in business?

8 A. It would be advantage -- then it would become an
9 advantage to me, I would have to join a co-op, then I
10 wouldn't have to balance, I wouldn't have to worry about my
11 milk, I would just tell them.

12 That's why -- Shamrock has a plant -- 10,000-cow
13 dairy, and they -- when they built a brand-new dairy, they
14 could have went right next to it and built a brand-new
15 jugger [phonetic] for another 5 million, they spent probably
16 30, so another 5 million wouldn't have been nothing, and
17 they could have put a bottling plant in, and they said, No,
18 we're not going to put a bottling plant there, we're going
19 to run it through our plant, we're not going to double our
20 overhead, have two plants. Because they had the choice.
21 It's not an advantage. It's only an advantage if you do it
22 and win, and I won, and now they want to take it away.

23 Q. Also, just to clarify your testimony, you
24 referred to the type of customers that Sarah Farms has been
25 able to develop over the years.

1 A. Okay.

2 Q. Can you explain to me how the --

3 MS. DESKINS: Let me strike that question. I
4 don't have any further questions.

5 THE COURT: Mr. Berde?

6 CROSS-EXAMINATION

7 BY MR. BERDE:

8 Q. I'd like to follow up on Ms. Deskins' question
9 and your testimony that if you became regulated you would
10 have to become a member of UDA? Is that your understanding?

11 A. Not a member or -- I'd have to form a co-op to
12 get the advantages and to be able to milk the system like
13 UDA does.

14 Q. What makes you -- would you explain that to me.
15 What would change if you were to become regulated, except
16 for the fact --

17 A. -- that I would give you money.

18 Q. -- that you would --

19 THE COURT: Let him answer the question.

20 Q. (By Mr. Berde) -- that you would share your
21 Class I utilization or your utilization with the market as a
22 whole, such as Shamrock does right now?

23 A. What would change?

24 Q. Uh-huh.

25 A. All the money that I spent on building this dairy

1 and putting it together, UDA would get some of the money,
2 and I -- they did not do any of the work.

3 Q. You are a producer in the market, are you not?

4 A. Correct.

5 Q. You are also a handler in the market, are you
6 not?

7 A. Correct.

8 Q. And have you ever regard the Agricultural
9 Marketing Agreement Act?

10 A. No.

11 Q. Are you unaware that the purpose -- operation of
12 the Act contemplates, intends, that in fact all producers in
13 the market share the utilization of the market?

14 A. All they gotta do is build a --

15 MR. RICCIARDI: Let me object, Your Honor.
16 That's an argument for the brief. It's asking for a legal
17 conclusion of this witness that he doesn't understand.

18 THE COURT: I don't know if he had a -- did you
19 answer that? I'm sorry, there were too many voices at the
20 same time.

21 THE WITNESS: I don't know if I did either but --

22 A. Basically, UDA did not share when I was sweating
23 bullets, trying to make the thing work, so I don't think
24 they should share in the money now.

25 Q. (By Mr. Berde) What kind of sharing did you ask

1 for and got refused from UDA, if any?

2 A. Sharing. UDA wants to share my money, I don't
3 want -- I don't want none of UDA's business.

4 Q. That's the reason for my previous question. Are
5 you unaware that sharing is the essence of a federal market
6 order?

7 A. Or a social party.

8 Q. Well, what you're really saying is you don't like
9 the whole regulatory system, isn't that what you're --

10 A. I'm sorry?

11 Q. What you're really saying is you are opposed to
12 the whole regulatory system.

13 A. No, I'm not. I'm opposed to the changes. I've
14 learned how to live with the system, when I put the rules in
15 and spent the money and sat down with people and said,
16 "These are the rules," and I spent my money and spent my
17 sweat and now you want to change the rules; that's what I'm
18 upset about.

19 Am I correct, are you wanting to change the
20 rules?

21 Q. Absolutely; that's why we're here.

22 A. Okay. Well, absolutely, I don't want to.

23 Q. And my question is -- since the question started
24 with respect to your statement about sharing and your
25 objection, are you unaware that that is the purpose of the

1 regulatory system?

2 MR. RICCIARDI: Your Honor, it's been asked about
3 15 different times --

4 THE COURT: I don't think he's going to agree
5 with you on that, you know, I just have a hunch, but --

6 THE WITNESS: They didn't share in the work or
7 the money when I had to hock my cows to build a plant. They
8 didn't share. They're not entitled to any of the money,
9 none.

10 THE COURT: Okay, the witness may step down.

11 THE WITNESS: Thank you.

12 (Witness excused.)

13 THE COURT: Before I -- well, what I'm going to
14 do is in about one minute I'm going to adjourn for today,
15 but then I want you all to sit tight for two minutes so we
16 can talk about tomorrow, okay? Right now I'm going to
17 adjourn until 8:30 tomorrow morning. Off the record.

18 (Whereupon, at 5:50 p.m., the hearing was recessed, to
19 reconvene at 8:30 a.m. on January 21, 2004, in the same
20 place.)

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CERTIFICATE

In Re: PACIFIC NORTHWEST AND ARIZONA-LAS VEGAS
MARKETING AREAS
Docket Nos.: AO-368-832, AO-271-837, DA-03-04
Place: ALEXANDRIA, VIRGINIA
Date Held: JANUARY 20, 2004
Time Held: 8:30 A.M.

We, the undersigneds, do hereby certify that the
foregoing pages, number 2438 through 2746, inclusive, is the
true, accurate and complete transcript prepared from the
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identified hearings, in accordance with applicable
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