

**CERTIFIED  
TRANSCRIPT**

NATIONAL FEDERAL MILK MARKETING ORDER  
PRICING FORMULA HEARING

DOCKET NO.: 23-J-0067; AMS-DA-23-0031

Before the Honorable Jill Clifton, Judge

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Carmel, Indiana

January 30, 2024

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Reported by:

MYRA A. PISH, RPR, C.S.R.  
Certificate No. 11613

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A P P E A R A N C E S:

FOR THE USDA ORDER FORMULATION AND ENFORCEMENT DIVISION,  
USDA-AMS DAIRY PROGRAM:

Erin Taylor  
Todd Wilson  
Brian Hill  
Michelle McMurtray

FOR THE MILK INNOVATION GROUP:

Ashley Vulin

FOR THE NATIONAL MILK PRODUCERS FEDERATION:

Nicole Hancock  
Brad Prowant

FOR SELECT MILK PRODUCERS, INC.:

Ryan Miltner

FOR INTERNATIONAL DAIRY FOODS ASSOCIATION:

Steve Rosenbaum

FOR THE AMERICAN FARM BUREAU FEDERATION:

Danny Munch

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(Please note: Appearances for all parties are subject to  
change daily, and may not be reported or listed on  
subsequent days' transcripts.)

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M A S T E R I N D E X

SESSIONS

TUESDAY, JANUARY 30, 2024

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MORNING SESSION

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M A S T E R I N D E X

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M A S T E R I N D E X

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1 TUESDAY, JANUARY 30, 2024 -- MORNING SESSION

2 THE COURT: Let's go back on record.

3 We're back on the record. It's 2024, January 30,  
4 it's a Tuesday, approximately 8:01 a.m. This is the 49th  
5 day of this hearing.

6 Are there any preliminary matters before we  
7 proceed with evidence?

8 I see none.

9 I know we'll return later in the day to some of  
10 the discussion we had yesterday about the post-hearing  
11 responsibilities of parties who want to file proposed  
12 transcript corrections and proposed findings, conclusions,  
13 and briefs. I did want to follow up with one detail.

14 I mentioned yesterday that it is permissible to  
15 e-mail the Hearing Clerk with your documents. I forgot  
16 about the problems with the size of the documents that you  
17 are probably going to send, which can be blocked by  
18 internal firewalls or whatever.

19 So what I intend to do, I'm going to give the  
20 contact information for the Hearing Clerk now.

21 But I'm also, when I get back to the office, going  
22 to meet with the Hearing Clerk, whose name is Caroline  
23 Hill, no relationship to Brian Hill. Both are extremely  
24 competent and have a great deal of responsibility. I have  
25 never seen Caroline Hill dance, but I suspect she's good.

26 The reason I want to consult is so that I can send  
27 out a written document that you will all have that  
28 proposes the alternatives you can use to get your



1 documents filed with the Hearing Clerk by the deadlines.

2 So here is the contact information, it's just at  
3 stopgap for you to have before I get specific instructions  
4 from the Hearing Clerk and send them to you.

5 First of all, there's only one Hearing Clerk at  
6 USDA, and that Hearing Clerk is located in the USDA  
7 headquarters in Washington, D.C., and the zip code there  
8 is 20250-9203. Now, the 9203 is not a Post Office code,  
9 it's an internal code for our headquarters in Washington,  
10 D.C., to help the mail handling for the different agencies  
11 that are housed there.

12 So the mailing address for the Hearing Clerk is:  
13 Hearing Clerk, United States Department of Agriculture,  
14 Stop 9203, South Building, 1031-S, 1400 Independence  
15 Avenue Southwest, Washington, D.C., 20250-9203.

16 The e-mail address for filing with the Hearing  
17 Clerk is -- and e-mail addresses, you know, can be  
18 uppercase, lower case, a combination of the two, it's not  
19 fatal if you capitalize letters or even fail to -- but  
20 this is the e-mail address: SM.OHA.HearingClerk@USDA.gov.  
21 The phone number is 1-202-720-4443. The fax number -- and  
22 these faxes are received electronically in the inbox of  
23 the Hearing Clerk, you don't have to worry about whether  
24 someone's at the fax machine -- the fax number is  
25 1-844-325-6940.

26 So as I have indicated, you may choose to use none  
27 of that in filing depending on how the Hearing Clerk  
28 instructs you as to the best way to submit your materials



1 for filing, particularly if the documents are large. So I  
2 will get that information put in an order very soon after  
3 I get back to the office.

4 Are there any questions about what I have said so  
5 far?

6 There are none.

7 I have some exhibits here.

8 Who will be the next witness?

9 MR. ROSENBAUM: Steve Rosenbaum for the  
10 International Dairy Foods Association.

11 We'd call Mr. Kyle Powell to the stand.

12 THE COURT: Welcome, Mr. Powell.

13 You may be seated and make yourself comfortable.

14 In a moment we'll test to see how close you need to be to  
15 that microphone.

16 And for now, I'd like you to state and spell your  
17 name.

18 THE WITNESS: Kyle Powell, K-Y-L-E, P-O-W-E-L-L.

19 THE COURT: Have you previously testified in this  
20 proceeding?

21 THE WITNESS: I have not testified.

22 THE COURT: I'd like to swear you in.

23 KYLE POWELL,

24 Being first duly sworn, was examined and  
25 testified as follows:

26 THE COURT: Mr. Rosenbaum, I'm looking at  
27 exhibits.

28 MR. ROSENBAUM: Yes, Your Honor. I have placed





1 before you, and distributed, a document marked as IDFA  
2 Exhibit 68, which we would ask be marked with the next  
3 Hearing Exhibit number.

4 THE COURT: Is the next number 504? It is.  
5 Marking this Exhibit 504.

6 (Thereafter, Exhibit Number 504 was marked  
7 for identification.)

8 DIRECT EXAMINATION

9 BY MR. ROSENBAUM:

10 Q. Mr. Powell, you have before you the document that  
11 has now been marked as Hearing Exhibit 504, which is also  
12 IDFA Exhibit 68.

13 Is this document your written testimony today?

14 A. Yes, it is.

15 Q. Could you please read the statement into the  
16 record?

17 A. Yes. Good morning. My name is Kyle Powell, and  
18 I'm the vice president of procurement for Lakeview Farms,  
19 LLC. I have been in the food industry my entire  
20 professional career. I spent 17 years with the Kroger  
21 Company in Cincinnati, Ohio, and three years with Dairy  
22 Farmers of America in Kansas City, Kansas, prior to  
23 Lakeview Farms. I have a bachelor of science degree in  
24 food agribusiness from The Ohio State University and a  
25 master of business administration (finance) from Miami  
26 University of Ohio.

27 In my current role I oversee all procurement  
28 functions within Lakeview Farms. Lakeview Farms is a food



1 processor with headquarters in West Chester, Ohio,  
2 production facilities in Delphos, Ohio. Lakeview Farms  
3 produces Class II end use products such as refrigerated  
4 dips, pudding, and kefir.

5 The increase of \$0.86 a hundredweight to \$1.56 a  
6 hundredweight will affect how processors purchase Class II  
7 dairy milk-based products and, most importantly, how  
8 retailers pass on new costs to customers.

9 Dairy costs within Class II are typically passed  
10 through to the customer. With the increase in the  
11 Class II differential, these costs will move right to the  
12 customer. On-shelf retail pricing will reflect the change  
13 in the price of farm milk which could significantly impact  
14 the omnichannel strategy, specifically retail and online.

15 While producers may benefit from a greater pool  
16 draw, consumers will feel less inclined to buy multiples  
17 or become repeat consumers if prices become higher.  
18 Class II product sales generally benefit from consumer  
19 behavior where multiple purchases are made within a  
20 household visit, for example, yogurt, pudding, cottage  
21 cheese, sour cream. Increases in the Class II  
22 differential combined with the higher premiums due to  
23 elevated demand within Class II could limit households  
24 consuming these goods.

25 The increase in farm milk differential has the  
26 ability to negatively disrupt the entire dairy supply  
27 chain. The extra costs could affect two primary aspects  
28 of commercial Class II processor production: The



1 innovation and domestic dairy usage.

2 During COVID, innovation took a backseat as food  
3 and feedstock processors scrambled to keep material moving  
4 through the omnichannel. The logjam of innovation  
5 continues to lag as some inputs continue to be in short  
6 supply and higher costs. Should differential increase  
7 another \$0.86 a hundredweight, for example 200%,  
8 processors will accelerate ways to save on costs of goods.  
9 Processors are challenged by retail merchandisers every  
10 year to cut costs while typically passing on dairy costs.  
11 Other fat sources have been used to replace dairy fat in  
12 the past with successful commercialization, for example,  
13 palm, soy.

14 Retailers are asking for more oil-based  
15 formulations to offset the price volatility of dairy fat.  
16 Overall consumer tolerance of substitute dairy fats will  
17 cross when the price of non-standard identity dairy  
18 properties, for example, dairy dips, dairy desserts,  
19 exceeds the value to the customer. Should innovation ramp  
20 up without using Class II dairy, U.S. dairy should  
21 continue to expect to be left behind on cutting edge  
22 innovations, for example, coffee creamers, half and half.

23 Liquid inputs typically are more desirable in  
24 spoonable Class II retail product.

25 THE COURT: And just so the transcript is correct,  
26 would you spell "spoonable" for us?

27 THE WITNESS: Yes. S-P-O-O-N-A-B-L-E.

28 THE COURT: Thank you.



1 THE WITNESS: Mouth feel and solubility of dry  
2 ingredients are sensory traits picked up in the trials.  
3 Should dairy inputs be the strategic decision for  
4 processors, savvy buyers will arbitrage the market to the  
5 best of their availability.

6 Arbitrage opportunities could limit annualized  
7 agreements for Class II milk suppliers, leaving them to  
8 ship to balancing plants rather than a higher value  
9 Class II sale. Processors will look up to pile up -- pile  
10 on NFDM in times of surplus and purchase condensed skim  
11 milk at less than desired premium levels. The possible  
12 increase in formula non-fat solids would be a bigger  
13 option for processors. The opportunity to arbitrage could  
14 lessen the impact of the increased regulated pool value of  
15 Class II.

16 Given the possible paths processors can take, I  
17 challenge the increased pool value of 122 million. In  
18 AMFB's proposal it does not appear to address new pool  
19 benefit as a net value. The possible increased appetite  
20 for dairy substitutes should be quantified with an overall  
21 impact, both near- and long-term.

22 Further, Class II's -- Class II skim saw an  
23 increase of overages of over 30% during COVID-19 due to  
24 the incredible demand within the retail space. This is an  
25 example of a true premium allowing the economics of the  
26 environment to set the price as demand surged. Setting  
27 non-market differentials does not set up a healthy  
28 supply/demand price relationship.



1           Class II is one of, if not the number one, most  
2 innovative spaces within the dairy complex. The  
3 opportunities for growth are endless if costs are under  
4 control and remain competitive with alternatives. We have  
5 seen the erosion of natural dairy in end use process [sic]  
6 erode over the years, for example, cheese dips, dairy  
7 dips, dairy desserts, due to costs. I urge the USDA to  
8 keep the current Class II differential with no changes in  
9 order to support the growth and innovation of U.S. dairy.

10 BY MR. ROSENBAUM:

11       Q. Thank you very much for your statement.

12           I just wanted to follow up on one particular  
13 statement you make on page 2, where you say that, and I'll  
14 quote it, "Retailers are asking for more oil-based  
15 formulations to offset the price volatility of dairy fat."

16           Is that a real-world phenomenon that you  
17 personally experience?

18       A. Yes, I have experienced that.

19           MR. ROSENBAUM: Your Honor, the witness is  
20 available for cross-examination.

21           THE COURT: Mr. Powell, do you want to leave a  
22 particular address for Lakeview Farms, like, a mailing  
23 address?

24           THE WITNESS: Yes, I can -- I can leave one before  
25 I leave. I don't have it right here.

26           THE COURT: All right. Would you please present  
27 that to the Agricultural Marketing Service table, any of  
28 these people that are on the first row directly across



1 from me --

2 THE WITNESS: Of course.

3 THE COURT: -- so that they will have that for  
4 their records in case some mailing needs to go out, hard  
5 copy.

6 THE WITNESS: Yes.

7 THE COURT: All right. Great.

8 Who would like to begin cross-examination of  
9 Mr. Powell?

10 CROSS-EXAMINATION

11 BY MR. MILTNER:

12 Q. Good morning, Mr. Powell.

13 A. Good morning.

14 Q. My name is Ryan Miltner. I represent Select Milk  
15 Producers, which is a cooperative with farms in Ohio,  
16 Michigan, and Indiana, as well as in the Southwest, and I  
17 believe we have a couple of farms within about 15 miles of  
18 Delphos, so they are almost neighbors.

19 A. Uh-huh.

20 Q. I noticed in your statement you said that you are  
21 in charge of procurement for Lakeview Farms.

22 Do you purchase fresh milk to bring into your  
23 plant to make your Class II products?

24 A. Yes, we do.

25 Q. Do you source your -- your milk from a cooperative  
26 supply, or from a broker, or direct from a farm? Where do  
27 you get your milk from?

28 A. Proprietary. As far as where we buy -- actually



1 source the milk from, I would rather not share.

2 Q. Okay. Do you know if the milk that you purchase  
3 is pooled on a Federal Order?

4 A. I cannot answer that.

5 Q. Do you know if Lakeview Farms pays the regulated  
6 Class II price for the milk that it uses in its products?

7 A. Could you ask the question again, please?

8 Q. Sure. I don't want to know specifically what you  
9 pay for your milk, but do you know if the price you pay is  
10 the regulated Class II price?

11 A. We pay Class II pricing for our milk.

12 Q. Do you always pay above the Class II price for  
13 your milk?

14 A. I can't answer that.

15 Q. Is that because you don't know or because that's  
16 proprietary?

17 A. Proprietary. Yes.

18 Q. You mentioned on page 2 of your statement, and  
19 Mr. Rosenbaum asked about customers' desires for oil-based  
20 formulations to offset the price volatility of dairy fat.  
21 Some processors have testified in this hearing that they  
22 use hedging or risk management tools to, you know, address  
23 that price risk or similar price risks.

24 Does Lakeview Farms use hedging tools to lock in a  
25 price for butterfat?

26 A. We use many risk management tools, yes, including  
27 hedging.

28 Q. Do you utilize tools through the CME or any other



1 exchanges similar?

2 A. We do.

3 MR. MILTNER: Thank you. Appreciate it.

4 CROSS-EXAMINATION

5 BY MS. HANCOCK:

6 Q. Good morning, Mr. Powell.

7 On page 2 of Exhibit 504 --

8 THE COURT: Ms. Hancock, identify yourself,  
9 please.

10 MS. HANCOCK: Nicole Hancock for National Milk.

11 BY MS. HANCOCK:

12 Q. On page 2 of Exhibit 504 you talk about what would  
13 happen if the price -- if the Class II differential is  
14 increased, and you said that processors will have to  
15 accelerate ways to save on costs of goods.

16 Can you describe the ways in which a processor can  
17 save on expenses?

18 A. Due to the increased cost of milk in general or  
19 just -- just in general, anything we purchase?

20 Q. Well, I took your statement to say that if your  
21 cost of goods went up, that as a processor you would have  
22 to find other ways to save on costs to offset that; is  
23 that fair?

24 A. That's fair.

25 Q. Okay. And I'm just wondering if you can give me  
26 some examples on the ways in which you would save on  
27 costs. What are some things that you can control as a  
28 processor that would allow you to save on some costs?





1           A.     So depending on the supply chain as a whole, there  
2     are ways to save from a formulation standpoint,  
3     potentially, operationally, logistically. I think when  
4     you are looking at savings, it's not binary, right? It's  
5     the entire supply chain.

6           Where buyers evaluate the risk and opportunity,  
7     they look for the increases of that particular piece of  
8     the supply chain that it's -- that sees costs increasing.  
9     If it's more the cost of goods bucket, there's more of a  
10    direct focus on cost of goods. If it's an operational  
11    opportunity, labor, et cetera, then there's more focus on  
12    operational side.

13           So in this particular statement, if there is an  
14    increase in cost of goods, especially on the cost of goods  
15    that's a very high percentage of the formulation, then  
16    there are evaluations on how you purchase that input more  
17    efficiently.

18           Q.     Okay. So is it fair to say that if the cost of  
19    milk, the cost of your procurement of the raw milk goes  
20    up, that you look to the totality of your business  
21    operations to see if there are ways in which you can build  
22    in efficiency to save or offset those expenses?

23           A.     I would say -- I would say if the cost of raw milk  
24    went up, we would evaluate options in the supply chain and  
25    understand if there is any value that would offset that  
26    within our supply chain or a supply chain. If the supply  
27    chain cannot absorb or cannot reduce costs, then the cost  
28    of goods or the input that is preceding the higher cost



1 would have to have more scrutiny, which would be supply,  
2 looking at different types of supply, looking at different  
3 types of innovation, up into -- and not including but  
4 considering substitutes.

5 Q. And if you weren't able to find those efficiencies  
6 within your own operational expenses, another way in which  
7 you could capture that increase in costs would be to  
8 increase your price to your consumer -- to your customers  
9 as well?

10 A. I would think that that would be -- so we would  
11 offset the increase by increasing price to customers. And  
12 as I said in the statement, that would be something that  
13 would be a detriment not only to a processor, but also the  
14 industry.

15 Q. Okay. Still an option for you as a handler,  
16 though; is that fair?

17 A. That's an option, yes.

18 MS. HANCOCK: Thank you so much for your time.

19 THE COURT: Are there any other cross-examination  
20 questions for Mr. Powell before I call on the Agricultural  
21 Marketing Service for questions?

22 I see no one. I invite the Agricultural Marketing  
23 Service to ask questions.

24 CROSS-EXAMINATION

25 BY MS. TAYLOR:

26 Q. Thank you. Good morning.

27 A. Good morning.

28 Q. Thank you so much for coming to testify today.



1 Just a few questions.

2 You discussed a little about with Mr. Miltner  
3 about whether milk was pooled or not, but I -- I wanted to  
4 ask about the plant.

5 Do you know if the plant is a pool plant or  
6 non-pool plant?

7 A. I believe it's a non-pool plant.

8 Q. Okay.

9 A. But I --

10 Q. Okay.

11 A. -- I would need to verify that.

12 Q. Okay. And so if that's the case, does your --  
13 your supply has the option to be pooled; is that correct?

14 A. I believe so, yes.

15 Q. Okay. You mentioned to Mr. Rosenbaum that you do  
16 have experience in the fact that retailers are asking for  
17 more oil-based formulations, and I was wondering if you  
18 could just expand on that for the record, what you have  
19 seen in your own experience.

20 A. So in my experience, oil-based or -- or oil -- oil  
21 products, such as soy and palm, have been introduced into  
22 dairy items, specifically dairy -- specific dairy items to  
23 offset costs and price. Also, from a price -- from a  
24 hedging perspective, just from a more predictable price,  
25 because there's liquidity in this market, especially the  
26 soy market.

27 So with -- with the increase, especially on the  
28 fat side, more introductions have -- more innovation



1 discussions, more commercialization opportunities have  
2 come down the pipeline for more of a soy-, palm-based  
3 product to offset more of a traditional dairy-based  
4 product.

5 Q. Okay. And in your experience, do those things  
6 switch back and forth, or once the formulation is made to  
7 switch to an oil-based product, it stays that way?

8 A. So I can think of -- I can think of both. I can  
9 think of both where product shifts back and forth, excuse  
10 me, more -- maybe more of a commoditized-type item.

11 Q. What would be a more commoditized-type item?

12 A. More like a powder-based product.

13 Q. Okay.

14 A. And then on the retail side, if -- if the products  
15 and the pricing sticks and the sensory meets the appetite  
16 of the customer, typically there isn't going back.

17 Q. Okay. On page 2 at the bottom paragraph, and I  
18 just want to make sure the record's clear what you mean by  
19 this. You say, "Arbitrage opportunities could limit  
20 annualized agreements for Class II milk suppliers."

21 What do you mean by limiting "annualized  
22 agreements"?

23 A. So if there are more opportunities, if there is  
24 more innovation to -- to subsidize formulations with  
25 non-fat, for example, then there would be -- there could  
26 be less opportunities for producers to have contracted  
27 agreements with their -- with their end users, with their  
28 customers.



1 Q. So they -- so as a buyer, you would buy less?

2 A. We would buy less raw milk, correct. Potentially.

3 Q. And then on the next page you talk about,  
4 "Class II skim saw an increase of overages of over 30%  
5 during COVID-19 due to the incredible demand."

6 What do you mean by increase in overages?

7 A. Premiums, excuse me. Premiums.

8 Q. So the products all -- premiums in the price at  
9 the retail level?

10 A. No, no, I'm sorry. At the purchasing level, at  
11 the input level from farm -- or from -- from B2B,  
12 processor to the plant, balancing plant to the processor.  
13 So the premiums --

14 Q. I'm not sure I'm getting that.

15 A. So the Class II premium, the Class II premium on  
16 condensed skim milk, for example --

17 Q. Okay.

18 A. -- or for farm milk, as an example, increases in  
19 those premiums were up in the range of 30% during --  
20 during COVID.

21 Q. And I just want to make sure because everyone  
22 talks about premiums differently, and overages in the  
23 Federal Order world means different than what you have  
24 stated there.

25 The premium is what you pay to your seller of  
26 milk?

27 A. That's right.

28 Q. Who you buy from?



1 A. Premium plus class.

2 Q. Yeah. So for us it would maybe be like an  
3 over-order premium?

4 A. Exactly.

5 Q. Okay.

6 A. Exactly right. Yes. Overage was the wrong term.

7 Q. Okay.

8 THE COURT: Do you want that changed in the record  
9 copy? Do you want --

10 THE WITNESS: Yes.

11 THE COURT: -- "overages" to be changed to  
12 "over-order premiums"?

13 THE WITNESS: Yes. That makes more sense in  
14 relation to this particular case, yes.

15 THE COURT: Understood.

16 So I would ask that the record copy be changed  
17 accordingly. We're in Exhibit 504, page 3. We're in the  
18 top paragraph. And when you find the "30%," then back up,  
19 and instead of the word "overages," the phrase will be  
20 "over-order premiums."

21 Thank you.

22 BY MS. TAYLOR:

23 Q. My last question. You talk about Class II being  
24 the most innovative space, showing the most opportunities  
25 for growth.

26 Could you just kind of expand on -- on, from your  
27 experience, that innovation and growth that you have seen  
28 in the Class II market?



1           A.     Yeah. I think specifically, and a little bit of  
2 conjecture here, but specifically, non-dairy creamers.  
3 The explosiveness across that fluid milk aisle, where, you  
4 know, you have items such as half and half that is a  
5 standalone item. Innovation hasn't been there on the  
6 dairy side. It's all been on, let's say, oil-based kind  
7 of coffee creamers I think is a huge example of the growth  
8 in a sector that dairy has kind of been left behind.  
9 And in retail outlets, creamers are in the dairy space,  
10 taking up dairy doors. If that's -- that's the biggest  
11 example that I have from an innovation standpoint.

12           Q.     So the Class II products that compete with other  
13 non-dairy-based, what would be considered Class II  
14 products?

15           A.     Yes.

16           Q.     Okay.

17           A.     Yes.

18           MS. TAYLOR: I think that's it from AMS. Thank  
19 you for your time.

20 BY MS. TAYLOR:

21           Q.     Actually, I got reminded about one quick question,  
22 I don't know why I didn't ask this.

23                   Lakeview Farms, would they be considered a small  
24 business? Do you know how many employees you employ?

25           A.     Over a thousand. So we have one plant. Of  
26 course, the Delphos, Ohio, plant is our major facility.  
27 We do have other plants that process salsas.

28           Q.     Okay.



1 MS. TAYLOR: Thank you.

2 MR. ROSENBAUM: Steve Rosenbaum.

3 I would ask that Hearing Exhibit 504 be admitted  
4 into evidence.

5 THE COURT: Is there any objection?

6 There is none. I admit into evidence IDFA  
7 Exhibit 68, marked Exhibit 504.

8 MR. ROSENBAUM: Thank you, Your Honor.

9 (Thereafter, Exhibit Number 504 was received  
10 into evidence.)

11 THE COURT: Mr. Powell, is there anything you  
12 would like to add before you step down?

13 THE WITNESS: No, thank you.

14 THE COURT: Thank you so much for being here and  
15 testifying.

16 Let's go off record while a document is being  
17 distributed.

18 We're off record at 8:33.

19 (An off-the-record discussion took place.)

20 THE COURT: Let's go back on record.

21 We're back on record at 8:34.

22 MR. MUNCH: Thank you. My name is Danny Munch.  
23 I'm with the American Farm Bureau Federation.

24 We would like to -- I would like to read a letter  
25 into the record. I'm not really sure the most appropriate  
26 way, but if I should go up to the stand. I'm here myself,  
27 so I'll be representing myself.

28 THE COURT: All right. I would like you to be





1 sworn in as a witness, and then we'll find out how we  
2 handle the exhibit.

3 So please take a seat in the witness stand and  
4 state and spell your name.

5 THE WITNESS: Daniel Munch, D-A-N-I-E-L,  
6 M-U-N-C-H.

7 MR. ROSENBAUM: Your Honor, could I be heard just  
8 a moment?

9 THE COURT: You may.

10 MR. ROSENBAUM: Because I have an objection to  
11 this. This is Steve Rosenbaum.

12 THE COURT: Would you wait just a minute for your  
13 objection.

14 MR. ROSENBAUM: Yes, Your Honor.

15 THE COURT: I'm going to swear him in.

16 MR. ROSENBAUM: Yes.

17 THE WITNESS: And I have testified before, so I  
18 don't know if --

19 THE COURT: Thank you. You remain sworn.

20 DANIEL MUNCH,  
21 Having been previously sworn, was examined  
22 and testified as follows:

23 THE COURT: Mr. Rosenbaum.

24 MR. ROSENBAUM: Your Honor, the document that  
25 Mr. Munch is about to read was distributed at 7:40 or so,  
26 a.m., this morning. I actually wasn't copied, but it was  
27 passed on to me.

28 As I understand this document, it is a request for



1 an omission of the issuance of a recommended decision with  
2 respect to a specific proposal and that the Secretary skip  
3 a recommended decision and go to a -- directly to a final  
4 decision.

5 The regulation about this issue is 900.12, which  
6 says in subpart (d) -- which discusses the issuance of a  
7 recommended decision, (d), which is called "omission of  
8 recommended decision," reads, and I quote: "The procedure  
9 provided in this section" -- referring to the issuance of  
10 recommended decision -- "may be omitted only if the  
11 Secretary finds on the basis of the record that due and  
12 timely execution of his functions imperatively and  
13 unavoidably requires such omission," period, end quote.

14 Your Honor, I -- I believe that if a party was  
15 going to seek that relief, then they should have requested  
16 it contemporaneously with the proposal itself so that  
17 other parties would be on notice that they should  
18 introduce into the record evidence as to why the due and  
19 timely execution of his function does not imperatively and  
20 unavoidably require the omission of a recommended  
21 decision.

22 But appearing now, on the last day, day 49 of the  
23 hearing, to make the request, when all of my witnesses  
24 have been heard, and I believe there are no other  
25 witnesses intending to testify in this hearing, I believe  
26 this is an inappropriate and untimely request. And  
27 therefore, I object to it being made at this time.

28 THE COURT: Thank you, Mr. Rosenbaum.





1 He leads the public policy department at American Farm  
2 Bureau, so that means he leads our lobbying team, as well  
3 as our economist team and a team of legislative affairs  
4 administrative group.

5 So in terms of hierarchy, it goes President, Zippy  
6 Duvall; Joby Young; and then Sam Kieffer would fall under  
7 the next tier.

8 THE COURT: Would you spell those names?

9 THE WITNESS: Zippy Duvall, Z-I-P-P-Y,  
10 D-U-V-A-L-L. And then Joby Young, J-O-B-Y, Y-O-U-N-G.  
11 BY MR. MILTNER:

12 Q. Would Mr. Kieffer have been involved in the  
13 development and the approval of the statements that you  
14 made prior to this today?

15 A. Yes.

16 Q. And what role, if any, did you have in developing  
17 this letter which Mr. Kieffer signed?

18 A. So yesterday I drafted the letter in this room,  
19 and then it went through a clearance process, which  
20 included Roger Cryan, my boss, and Sam Kieffer.

21 MR. MILTNER: I don't have any questions further  
22 on the voir dire of the witness, Your Honor.

23 THE COURT: Does anyone else want to voir dire the  
24 witness about his involvement and preparation of this  
25 proposed exhibit?

26 MS. VULIN: No, Your Honor. I just want to note  
27 for the record -- Ashley Vulin with the Milk Innovation  
28 Group -- that the Milk Innovation Group joins with IDFA's



1 objection to the admission of the letter in consideration  
2 of the emergency procedures.

3 THE COURT: On the same grounds?

4 MS. VULIN: Yes, Your Honor.

5 THE COURT: Before I get to further comments on  
6 the exhibit itself, does anyone else want to voir dire  
7 this witness about his involvement in the preparation of  
8 it?

9 I see no one.

10 I'll continue to hear comments on whether or not  
11 it should be considered.

12 MR. MILTNER: Your Honor, for the record, my -- my  
13 client, Select Milk Producers, does not have a position  
14 right now on whether omission of a recommended decision is  
15 appropriate or not.

16 However, the regulation cited by Mr. Rosenbaum is  
17 clear that it is the Secretary's decision as to whether a  
18 recommended decision may be omitted. It is also the  
19 Secretary's obligation to find on the basis of the record  
20 as to whether the omission of a recommended decision is  
21 proper.

22 The timing of Mr. Munch's statement, certainly, I  
23 think, bears on the Secretary's decision. However, it  
24 seems to me that an interested party, regardless of the  
25 time at which they make their request and present their  
26 arguments to USDA, should not matter in terms of their  
27 ability to make those arguments.

28 And I assume that when Mr. Munch is finished



1 presenting his statement, everyone here can ask questions  
2 about timing and impacts and evidence and all of those  
3 things, and ultimately it is the Secretary's obligation to  
4 weigh the evidence in the record and make a determination  
5 about whether it is proper to omit the decision. But to  
6 prevent a witness from offering an explanation as to why  
7 that might be proper, I think, is erroneous.

8 I would also suggest that as you look at the  
9 provisions of 900.12(d), it seems to me that the Secretary  
10 could, on his own volition, decide to omit a recommended  
11 decision based on the evidence in the record, even if no  
12 one here in this proceeding decided to explicitly ask for  
13 its omission.

14 And so the arguments that Mr. Rosenbaum raises on  
15 behalf of his client as to why a recommended decision  
16 might not be properly omitted are certainly arguments that  
17 can be made on brief, and my client may end up aligning  
18 with him on that point after consideration and direction  
19 from our board. But I think for purposes of the  
20 proceeding, it's appropriate to let Mr. Munch present his  
21 statement.

22 Thank you.

23 THE COURT: Who else would like to be heard on the  
24 issue of what I do with the proposed exhibit?

25 I'm going to start by giving it a number. I'm  
26 going to call this the next number, which is 505.

27 (Thereafter, Exhibit Number 505 was marked  
28 for identification.)



1 THE COURT: So I am marking the document as  
2 Exhibit 505. It is also known as AFBF-6.

3 Would anyone else like to be heard?

4 MR. HILL: Brian Hill, USDA. Dairy Division is  
5 not objecting to this document, and I'll just leave it at  
6 that.

7 THE COURT: All right. First of all, it's not my  
8 decision to make what to do with the document. I agree  
9 that this is going to be considered at a later stage of  
10 the proceeding, after the hearing is over. I have had  
11 just a glance to look at Title 7 of the Code of Federal  
12 Regulations 900.12, the "Administrator's recommended  
13 Decision," and so forth. All of that will happen long  
14 after I have certified the transcript.

15 Normally I would just reject the exhibit and say  
16 it's part of the record as a rejected exhibit and not  
17 require anyone to cross-examine with so little notice.

18 But I think at this stage of the proceeding, I'm  
19 going to allow the witness to read into the record his  
20 Exhibit 505, he has familiarity with it, he wrote it, and  
21 then got the approval of two levels of supervisory  
22 authority in his organization. So he's well-qualified as  
23 the witness to present it. So I'm going to allow him to  
24 read it into the record.

25 And then I will, again, invite any specific  
26 objections to be required to cross-examine under these  
27 circumstances.

28 And as I have said, I make no decision with regard



1 to what to do with it, except to decide whether to admit  
2 it or reject it. So I'll do that after I allow the  
3 witness to be heard and to be cross-examined.

4 So all of that means you may proceed with reading  
5 the record -- reading into the record the document. But I  
6 would like to you read all of it, beginning with the date,  
7 to whom it is addressed, every word of it, if you would  
8 please, and also, on what letterhead it is prepared.

9 MR. MUNCH: Yes. So the letterhead is American  
10 Farm Bureau Federation. Our address is listed, 600  
11 Maryland Avenue Southwest, Suite 1000W, Washington, D.C.,  
12 20024. The date, January 30th, 2024.

13 It is written out to The Honorable Thomas J.  
14 Vilsack, Secretary, U.S. Department of Agriculture, 200A  
15 Whitten Building, 1400 Independence Avenue Southwest,  
16 Washington, D.C., 20250; and Ms. Dana H. Coale, Deputy  
17 Administrator, Dairy Program, Agricultural Marketing  
18 Service, U.S. Department of Agriculture, 1400 Independence  
19 Avenue Southwest, Washington, D.C., 20250.

20 And the title line is: Request for emergency  
21 return to "Higher-of" Class I mover.

22 So I'll go ahead and read it now:

23 Dear Secretary Vilsack and Ms. Coale,

24 On behalf of Farm Bureau members across the  
25 country, I would like to express our appreciation for the  
26 U.S. Department of Agriculture's continuing efforts to  
27 help provide price stability and transparency to dairy  
28 farmers. We all understand the challenges that face U.S.





1 dairy farm families year in and year out and their  
2 critical role in the well-being of our nation.

3 While Farm Bureau appreciates the value of the  
4 full hearing process for amending Federal Milk Marketing  
5 Orders, ongoing milk price spreads have driven  
6 persistently negative impacts on dairy farmers from the  
7 current average-of Class I mover formula. Therefore, the  
8 American Farm Bureau Federation requests emergency  
9 implementation of the previous higher-of Class I mover  
10 formula to buffer dairy farmers from further losses during  
11 this comprehensive and extensive regulatory amendment  
12 process.

13 The 2018 Farm Bill included a provision that  
14 swapped the higher of the Advanced Class III or IV skim  
15 milk price formula for the simple average of Advanced  
16 Class III and IV skim milk formulas, plus \$0.74, intended  
17 to produce a roughly equal, long-term Class I milk price.  
18 This statutory change was made at the request of dairy  
19 processors and dairy cooperatives and was intended as a  
20 revenue-neutral way to improve risk management  
21 opportunities for beverage milk. It was not based on a  
22 hearing record of demonstrated need.

23 Disruptive market conditions during the recent  
24 pandemic exposed and exacerbated a temporary but serious  
25 shortage of block cheddar cheese production, very high  
26 Class III values, and a huge imbalance between Class III  
27 and Class IV prices, leading to over 700 million in  
28 Class I revenue losses to producers in the 11 Federal



1 Order pools in 2020 alone. This, along with the delay  
2 associated with advanced pricing, resulted in  
3 manufacturing milk prices higher than the market blends,  
4 leading to massive depooling of producer milk by  
5 manufacturing plants to capture those higher market  
6 prices.

7 These large negative producer price differentials  
8 created significant disparities among the milk checks of  
9 different groups of farmers. These losses in pool value  
10 have continued through 2023 as Class IV prices have become  
11 the driver of the dairy market and the gap between  
12 Class III and Class IV prices has flipped but remained  
13 large, with no end in sight.

14 As of December 2023, cumulative pool losses have  
15 surpassed 1 billion since the formula went into effect in  
16 May of 2019, including pool losses of 50 million in  
17 November of 2023 and 38 million in December of 2023.  
18 Dairy farmers with pooled milk face ongoing threats of  
19 decreased milk checks linked to the current Class I mover  
20 formula.

21 Last week, on Tuesday, January 23rd, AFBF's  
22 grassroots delegates from across the nation, representing  
23 all types of farmers, ranchers, and agricultural  
24 producers, gathered at American Farm Bureau's annual  
25 meeting in Salt Lake City to represent the interests of  
26 nearly 6 million member families. During this session,  
27 these selected community leaders are tasked with  
28 reviewing, revising, and reaffirming existing national



1 policy positions, and approving policy on new issues and  
2 topics.

3 In the dairy section, our delegates unanimously  
4 reaffirmed the following AFBF policy statement:

5 "We support: Revisions to the FMMO,  
6 including fluid milk pricing, progress  
7 through the normal channels at USDA that will  
8 provide thorough economic analysis and public  
9 hearings for producers to be engaged, rather  
10 than through legislative override. However,  
11 given the circumstances of the Class I mover  
12 changes in the 2018 Farm Bill, we support  
13 returning to the Class I milk mover formula  
14 to the higher-of Class III or IV in the most  
15 expedient manner possible."

16 AFBF respects the FMMO amendment process. Our  
17 delegates expressed clear support for revisions occurring  
18 through the normal regulatory process at USDA. In this  
19 special case, however, the higher-of Class I mover  
20 formula, which was a direct result of a previous thorough  
21 FMMO hearing process discussion, and approved by a  
22 referendum of dairy farmers, was replaced without a public  
23 hearing process due to an act of Congress. This approach  
24 resulted in an outcome that unintentionally harmed our  
25 dairy farmers' ability to break even during a time defined  
26 by volatile, unforgiving market conditions. Given that  
27 USDA previously had concluded that the higher-of was an  
28 appropriate formula for the Class I mover, we believe it



1 is reasonable to request a return to this previous vetted  
2 determination as soon as possible.

3 We note that the FMMO hearing process is only in  
4 step 5 of a 12-step process before changes would  
5 potentially go into effect for our dairy farmers. With  
6 nearly 90 million in pool-related losses in the previous  
7 two months alone, any additional month under the current  
8 formula regime poses a threat to dairy farmers'  
9 livelihoods. By our reckoning, an emergency decision  
10 could speed implementation by six months or more.

11 We are aware of the possible impact a formula  
12 change may have on current futures contracts and risk  
13 management practices. If USDA believes that there should  
14 be delay in implementing a change to the Class I mover,  
15 better to start the clock sooner than later.

16 The comprehensive process of amending Federal  
17 Orders, though important, means dairy farmers remain stuck  
18 with current pricing regulations until USDA publishes a  
19 final rule. Current marketing -- current market dynamics  
20 underscore the need for FMMO modernization. The current  
21 Class I mover was a well-intentioned policy misstep that  
22 has reduced dairy farmers' checks, with little relief in  
23 sight. Emergency implementation of the higher-of Class I  
24 mover formula will help buffer against persistent losses  
25 associated with mistaken and outdated policies that have  
26 left dairy farmers struggling to make ends meet.

27 Thank you all -- thank you for all you do for  
28 American agriculture.



1 Most respectfully signed, Samuel A. Kieffer, Vice  
2 President of Public Policy.

3 And I would also note, for pool data from all 11  
4 orders to be given official notice through December 2024.  
5 I know most of that data had already been recognized, but  
6 in case it was not.

7 THE COURT: Okay. Who would like to begin  
8 examination?

9 CROSS-EXAMINATION

10 BY MS. VULIN:

11 Q. Sorry. Can you just state again what you wanted  
12 official notice of?

13 A. Pool data from all 11 orders, just to make sure  
14 that November and December are included, since the  
15 hearing's been going on since September.

16 Q. Sorry. Can you just state with specificity the  
17 entirety of the request? I'm just having trouble tracking  
18 exactly what you are asking.

19 A. So in calculating the \$50 million pool loss in  
20 November, and \$38 million pool loss in December, you  
21 basically use the difference between the higher-of and the  
22 average-of plus \$0.74 formula, and apply it to the Class I  
23 utilization or pooled milk value.

24 So we just want that utilization, those pounds  
25 that were pooled in those two months, to be recognized.

26 Q. And that will be part of -- and I think I didn't  
27 identify myself, so Ashley Vulin with the Milk Innovation  
28 Group.



1           And that request is part of American Farm Bureau's  
2 official notice request? It will be?

3           A. If it was not -- if that data was not already  
4 officially -- given official notice previously, we wanted  
5 to make sure that it was. We think it was, but I haven't  
6 been here for a couple of weeks, so...

7           It is not on this document, though.

8           Q. And did you do the calculations to get to the  
9 50 million?

10          A. I did. Yes.

11          Q. And do you have those calculations and that data  
12 to submit here today?

13          A. I can if -- I have an Excel file if people would  
14 like that.

15          Q. But you haven't submitted it so far with your  
16 letter?

17          A. No. It -- we have submitted in previous -- in  
18 some of our previous exhibits, basically the previous  
19 months. It's just since then we have the November and  
20 December data. So in a previous testimony we put forth,  
21 we had the same calculations, just not yet for November  
22 and December.

23          Q. And I think you may have said December 2024, so  
24 just to clarify.

25          A. Oh, 2023.

26          Q. And did AFBF file at the outset of the hearing any  
27 request that the hearing be conducted on the -- on an  
28 emergency basis?



1 A. Not to my knowledge, no.

2 Q. Why not?

3 A. So our policy has been, since January 2023, our  
4 convention last year, to switch back to the higher-of in  
5 as expedient a manner as possible. At that time, we  
6 had -- and in this particular case we have support to  
7 switch back through a legislative change as well.

8 So we were pursuing efforts in the Farm Bill, as  
9 well as separate legislative efforts, which as many in the  
10 room know have stalled. There may be new Farm Bill  
11 discussions starting in a couple of months, but the  
12 timeline has shifted given what we saw in November with  
13 what happened with the Speaker's House race and just  
14 delays in Congress.

15 So the pathway that we, our members, once thought  
16 was going to be the fastest, may not have been the  
17 fastest.

18 So we are also pursuing it through this hearing,  
19 and our members reaffirmed last week that they think we  
20 should attempt another -- the most expedient approach,  
21 which is now asking for emergency.

22 So basically, because of the change in timeline  
23 for the legislative approaches, our members have found it  
24 that this is now the appropriate time to ask for emergency  
25 request.

26 Q. Okay. So let me -- I'm going to summarize just to  
27 make sure I'm tracking.

28 So AFBF had believed they could successfully



1 bypass this change through legislative means, correct?  
2 And when that became no longer likely, or if AFBF saw that  
3 it was not as likely to be successful as they had  
4 originally thought, now you are returning to the hearing  
5 process to expedite this process because you don't believe  
6 you could be successful on the legislative side as quickly  
7 as you had hoped?

8 A. I would not use the word "bypass." Our members  
9 were very supportive and active in the previous hearing  
10 process, and they participated in the referendum that USDA  
11 put out that approved the higher-of. They believe that  
12 that was bypassed in the 2018 Farm Bill, so switching back  
13 legislatively could -- in their mind, is not considered a  
14 bypass, it's just going back to what they previously  
15 affirmed through a comprehensive regulatory process.

16 Our -- again, our policy as listed there says,  
17 "the most expedient manner possible," so that's what we  
18 are pursuing.

19 Q. So I'm fine to avoid the word "bypass." But the  
20 intent was regardless of how this hearing proceeded or the  
21 outcome of the hearing, it was AFBF's goal to obtain  
22 legislative authority to return to the higher-of as  
23 opposed to through the hearing process?

24 A. Yes. If that was the most expedient process, that  
25 was our goal to switch back, mainly because this process  
26 could take up to two years, and that means two years where  
27 farmers are still under that regimen. So even if USDA  
28 comes up with -- depending on what the final rule is, and





1 we do have policy that allows us some flexibility, and  
2 if -- you know, what other formula we may support, but  
3 it's mainly to protect farmers during this lull period  
4 where we have a hearing and -- and no change has been  
5 implemented yet.

6 Q. It was always possible the legislative route was  
7 not going to be successful, correct?

8 A. Correct.

9 Q. But despite that, AFBF didn't seek that the  
10 hearing proceed on an emergency basis?

11 A. Not at that time, no.

12 Q. And these same issues existed at the time the  
13 hearing began, correct?

14 A. Correct. It was uncertain whether or not they  
15 would have continued at the magnitude that they have.

16 And I would also note, just the interactions we  
17 have had at our convention from our dairy farmers, very  
18 emotional, lots of communications to us about how this is  
19 still impacting them. So the priority has increased with  
20 time as well.

21 Q. And I know Mr. Rosenbaum issued an objection. But  
22 I was not clear from your letter what it is you are asking  
23 USDA to do, because it does not explicitly state that USDA  
24 should omit a recommended decision, or that USDA should  
25 designate the hearing to proceed on an emergency basis,  
26 which given that that applies to the notice period has  
27 long passed.

28 So can you clarify for me what is it specifically



1 you are asking USDA to do with this letter?

2 A. To my knowledge, we are not asking for an  
3 omittance of a final decision through this current  
4 process, but we are just asking for emergency  
5 implementation in the meantime of the -- of the higher-of  
6 so that farmers can be protected in the meantime.

7 Q. Sorry, you said "final decision," so -- and I just  
8 want to be clear for the record.

9 AFBF is not asking USDA to omit a recommended  
10 decision in this letter?

11 A. Correct.

12 Q. And AFBF is not asking that the hearing as an --  
13 as an entire proceeding proceed on an emergency basis,  
14 correct?

15 A. No. This is exclusively asking for emergency  
16 implementation of higher-of. I'm not familiar with how  
17 that would fit in legally, in my background or knowledge,  
18 but it -- for that specific one, we don't want to override  
19 or -- or interrupt any of the other proceeding at all.  
20 It's for this point in time, as quickly as possible, on  
21 emergency basis, implement the higher-of.

22 Q. Are you asking USDA to implement the higher-of  
23 before it reaches a recommended decision?

24 A. That is the emergency request, yes.

25 Q. On what basis? Legal basis?

26 A. I am -- I -- I have no expertise in commenting on  
27 that.

28 Q. And you are not sure if legally USDA is permitted



1 to make a change prior to any recommended decision or  
2 final decision?

3 A. My superiors with experience in dairy have said  
4 that this has occurred in the past, that emergency  
5 requests within the Federal Order hearing process have  
6 been made.

7 And I would also note that the Secretary has acted  
8 on this exact issue and provided funding through a  
9 different program, the Pandemic Market Volatility  
10 Assistance Program, to basically protect farmers through  
11 this process.

12 So the Secretary has acted on an emergency basis,  
13 perhaps not only through a formula change, but in a way to  
14 buffer farmers from these disruptions.

15 MS. VULIN: So, Your Honor, then, I would, given  
16 that clarification, amend MIG's objection to any request  
17 or granting of any request to bypass both the recommended  
18 and the final decision, as absolutely in contravention of  
19 7 CFR Section 900 and the due process rights of all  
20 participants in this hearing.

21 Nothing further. Thank you.

22 MR. ROSENBAUM: Steve Rosenbaum for the  
23 International Dairy Foods Association.

24 CROSS-EXAMINATION

25 BY MR. ROSENBAUM:

26 Q. So -- so that the record is clear, witnesses for  
27 the Farm Bureau have included Dr. Cryan and yourself,  
28 correct?



1 A. Correct.

2 Q. And as I'm looking at it --

3 THE COURT: I'm not knowing why your voice keeps  
4 getting softer.

5 MR. ROSENBAUM: All right.

6 THE WITNESS: And several dairy farmers as well.

7 BY MR. ROSENBAUM:

8 Q. And I'm looking at the -- at the schedule of  
9 testimony. It appears to me that Mr. -- Dr. Cryan  
10 testified first on August 28; testified again on  
11 September 5th; testified again on October 3rd; and then  
12 you also testified somewhere in there, correct?

13 A. Correct.

14 Q. And did you or he at any of those occasions  
15 indicate a request for an emergency implementation of this  
16 proposal?

17 A. We did not, in previous testimony, request  
18 emergency implementation.

19 I believe, however, Roger did mention at one point  
20 that our policy is a return to the higher-of in -- as  
21 expedient as possible. But, no, not in an emergency  
22 basis.

23 Q. And, in fact, when you -- you're aware that this  
24 hearing began, procedurally, as a result of a submission  
25 by National -- by NMPF, as well as by IDFA and Wisconsin  
26 Cheese Makers Association for a hearing? Are you aware of  
27 that?

28 A. Yes.



1 Q. And are you aware that USDA issued a public notice  
2 inviting others to submit proposals of their own?

3 A. Yes.

4 Q. And are you aware at that time American Farm  
5 Bureau indicated in response their support for the  
6 National Milk's proposal to return to the higher-of?

7 A. Yes.

8 Q. And are you aware that in that submission,  
9 American Farm Bureau made no reference to that being  
10 implemented on an emergency basis?

11 A. No, but we were both also pursuing the change  
12 legislatively.

13 MR. ROSENBAUM: That's all I have, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. MILTNER:

16 Q. This is Ryan Miltner again, representing Select  
17 Milk Producers.

18 Mr. Munch, I think you said you're not a lawyer,  
19 correct?

20 A. That is correct.

21 Q. And despite your background, have you done a lot  
22 with the procedural regulations regarding the Federal  
23 Orders?

24 A. Not the procedural, no. I was not around in  
25 previous amendment processes.

26 Q. Well --

27 THE COURT: How old are you, young man?

28 THE WITNESS: 26.



1 THE COURT: Thank you.

2 BY MR. MILTNER:

3 Q. I think I was 26 in my first Federal Order.

4 So despite your presence or not your presence in  
5 those -- developing those regulations, do you have a lot  
6 of familiarity with what we call Part 900 of the  
7 regulations?

8 A. I personally do not. Roger would have much more  
9 familiarity than I would.

10 Q. Okay. So when I hear someone say, "We want a  
11 hearing or a proposal handled on an emergency basis," I  
12 understand that to mean that the Secretary will omit a  
13 recommended decision and issue a tentative final decision  
14 on that issue, and if there are other issues in the  
15 hearing, they will continue to have a recommended decision  
16 and proceed down a regular process.

17 When you say you want something handled on an  
18 emergency basis, is that -- do you have that same  
19 understanding I do or is yours different?

20 A. I would say my personal understanding was  
21 different in that our members thought there was a way that  
22 they could temporarily, or on emergency basis, implement a  
23 change, or the Secretary can authorize that under  
24 emergency situation. From that legal perspective, I -- I  
25 don't know.

26 Q. Is it your members' desire to move back to the  
27 higher-of as quickly as possible without regard to the  
28 mechanism that they get there?



1 A. Correct.

2 Q. And so from the Secretary's perspective, if the  
3 only way he and his staff were able to do that, that would  
4 be to omit a recommended decision; is that what your  
5 members want?

6 A. Yes.

7 Q. And if there's another way that could include a  
8 recommended decision, your members would be okay with  
9 that, too?

10 A. Yes.

11 Q. Now, when you testified about -- and maybe it was  
12 Roger, I forget -- but when American Farm Bureau testified  
13 about returning to the higher-of, do you recall what  
14 the -- what the spread between Class III and IV was at  
15 that time?

16 A. Not off the top of my head. I do know in the past  
17 two years the spread has been higher than \$1.48 for the  
18 majority of the time. Which, when the spread is more than  
19 \$1.48, or double that \$0.74 mover, it results in pool  
20 losses for those that remain pooled in the order.

21 Q. Okay. So when you say "the spread," you are  
22 talking about the spread between Class III and Class IV?

23 A. Correct.

24 Q. And there are advanced issues there, but generally  
25 if Class III and Class IV deviate by more than \$1.48, that  
26 harms your members?

27 A. Correct.

28 Q. It harms all dairy farmers that are pooled,



1 correct?

2 A. Correct.

3 Q. Now, if in August the Class III and IV spread was  
4 \$1 -- I'm sorry -- about \$1.80, does that sound about  
5 right?

6 A. I'll take your word for it.

7 Q. Okay. And if in September it was about \$0.70,  
8 does that sound correct?

9 A. I'll take your word for -- I know there -- there  
10 were several months in the period that we analyzed where  
11 the spread was smaller than \$1.48, but accumulated across  
12 months, it still ended up negative for producers.

13 Q. Now, have you looked at what that spread is  
14 recently in recent months?

15 A. I believe when I checked it yesterday, there was  
16 still a negative value over -- I'll have to look at my  
17 numbers again, but I believe the spread was still fairly  
18 high.

19 Q. Maybe to the tune of 3 or \$4?

20 A. That sounds about right.

21 Q. And for October, November, December, the numbers  
22 were about that range, 3 to \$4 or more than \$4?

23 A. Yes.

24 Q. Okay. Now, from your statement, and from the  
25 letter, I understand that even though American Farm  
26 Bureau's policy hasn't changed, the specific call of your  
27 members from your annual meeting to ask for emergency  
28 consideration just happened in the last week or two?





1 A. Yes. The reaffirmation of that policy, yes.

2 Q. You mentioned that you had talked with several  
3 Farm Bureau dairy farmers about how this is impacting  
4 them. I wonder if you could share a little bit more about  
5 that.

6 A. Yeah. So we have quite a few workshops at our  
7 convention, and one of them is a dairy market policy  
8 session, so there was a number of our dairy farmers in  
9 that room.

10 And I went through, gave basically an update on  
11 this process, so -- and some of the Dairy Market Coverage  
12 and other issues. And afterwards, you know, you can tell  
13 the room was sort of somber when you provide the changes  
14 in the licensed dairy herds across the country, and -- and  
15 there was a lot of emotion in the room afterwards. Folks  
16 basically came up and said their neighbors are closing and  
17 they continue to see the decline in dairy farms in their  
18 areas, and are really just wondering what Farm Bureau can  
19 do to help buffer against those closures.

20 So it's really a last cry for help that I saw in  
21 the room, of they don't really know what to do anymore.  
22 And they have -- you know, they see this process, it's  
23 very complicated. They don't necessarily understand what  
24 their place is in the process a lot of the time. They  
25 respect a lot of us that are working hard to get there,  
26 but sometimes not having an immediate answer or fix really  
27 hits home.

28 But it -- it continues from -- from the technical



1 aspect to impacting their milk checks, the ones that  
2 remain pooled. They are facing the highest interest  
3 expenses they have ever faced. Production expenses in  
4 many cases, yes, have declined, but not to the extent to  
5 cover some of these other increases, interest expenses.

6 So they are still working with very small margins  
7 and -- and are facing closure. A lot of our members are  
8 facing the hard decision of whether to sell their cattle  
9 or not.

10 So kind of a longwinded answer, but a little  
11 window into what our members mentioned last week.

12 Q. Did any of them offer you any thoughts on whether  
13 their decision to sell their cattle or not would be  
14 affected by whether some change to the Class I mover takes  
15 six months from now to get a decision, or a year from now  
16 to get a decision, or 18 months from now to get a  
17 decision?

18 A. I would say more of a sense or a perception that  
19 there is a positive outcome coming soon. A lot of our  
20 members are just concerned that that might not happen  
21 soon. So if there is a whisper of hope, I guess you can  
22 say, or sort of an optimistic change that they can see  
23 coming, it sort of fuels to say, hey, you know, maybe --  
24 maybe we can hang on a bit longer and -- and -- and work  
25 this out.

26 So I think it's more of, in the short run, do they  
27 see things getting better or are things going to kind of  
28 stay the way they are. So a tentative information that



1 said, hey, they will implement this on an emergency basis  
2 helps -- helps the confidence and the perception piece of  
3 it, which is a very big part of it as well.

4 Q. I want to -- I'd like you to help me with an  
5 example and make sure my understanding is the same as  
6 yours.

7 You said that if the difference between Class III  
8 and Class IV exceeds \$1.48, then that means producers  
9 receive less money under the current Class I mover formula  
10 than under the higher-of, correct?

11 A. For producers that have pooled milk, yes.

12 Q. Thank you.

13 And so let's just say that that spread was \$3.48.  
14 That means that there's a \$2 difference, but you average  
15 it, so that means the Class I price would be \$1 lower  
16 under the current formulas than under the higher-of.

17 Is that your understanding?

18 A. Yes.

19 Q. So if that's just the Class I price, and you are  
20 in an order with 75% Class I utilization, somewhere in  
21 Florida or the Southeast, that \$0.75 on all of your milk,  
22 that producer is probably not receiving, correct?

23 A. Correct.

24 Q. And even in orders where there might be 25%  
25 Class I utilization, that would be \$0.25 on all of their  
26 milk for that month that they are not receiving, correct?

27 A. Correct.

28 Q. As part of your job as an economist, do you look



1 at the Class III and IV futures at all?

2 A. I do occasionally. Dairy is one of many issues  
3 that I cover, so it's generally more looking into the  
4 policy aspects. But I do occasionally look at those, yes.

5 Q. Have you or anyone at Farm Bureau done anything to  
6 try to forecast whether that spread between Class III and  
7 Class IV will persist over the next several months or what  
8 it looks like for the year?

9 A. Roger and I have both kind of agreed that this  
10 sort of switch to the Class IV price driving the market is  
11 going to persist, which is basically how we have briefed  
12 our members and part of the reason why they continue to  
13 push for this so hard is because we don't think this is  
14 going to change soon.

15 Q. So you don't think that Class IV being higher than  
16 Class III will change?

17 A. Not in the short run, no.

18 Q. Okay. Now, what about the spread between  
19 Class III and Class IV, do you expect that that spread  
20 will be more than \$1.48?

21 A. So in the short run, we still expect there to be a  
22 large spread between those two prices.

23 Q. There was some testimony about this issue earlier  
24 in the hearing that perhaps a lot of this issue was  
25 specifically related to the COVID disruptions and the Food  
26 Box Program and large commercial purchases of cheese.

27 As you have seen the dairy markets post-COVID and  
28 post-Food Box Program, do you think that those really are



1 the drivers or is there something else going on?

2 A. Well, and that kind of goes back to some of my  
3 testimony. In 2020, we saw the 700 million in pool  
4 losses, and now in December, we have crossed 1.05 billion  
5 in pool losses. So those market dynamics have continued  
6 to negatively impact farmers because of that formula  
7 change.

8 Is that what you are asking?

9 Q. Well, that's your answer, and I'll take it.

10 So it seems to me that what your analysis and what  
11 your statement says is that the financial detriment to  
12 farmers as a result of the current Class I formula isn't  
13 solely the result of a black swan market shock event?

14 A. Correct. And that's part of the reason we have  
15 actually -- you know, this has picked up steam again,  
16 because some of our farmers were waiting to see, you know,  
17 how the market shifts, and they just -- basically, years  
18 later, it's still an issue. So that's another one of the  
19 driving forces for why we're asking for this now and why  
20 it came up again last week at our annual meeting.

21 MR. MILTNER: Thank you for that additional  
22 context.

23 CROSS-EXAMINATION

24 BY MS. HANCOCK:

25 Q. Nicole Hancock with National Milk.

26 Good morning. I just want to say thanks for being  
27 here and taking what is obviously the brunt of a lot of  
28 tough questions.



1 I just want to clarify. You know, of all of the  
2 things that -- that you were talking about with your  
3 members, is it fair to say that the higher-of is of  
4 paramount importance to them and the most immediate relief  
5 that they are seeking?

6 A. Yes.

7 And just to add a little bit of extra context. We  
8 had our Federal Milk Marketing Order forum in October of  
9 2022. Many in the room were involved in that. And part  
10 of that was to achieve consensus across the industry:  
11 Processors, co-ops, farmers. And the number one item that  
12 came out of that conference was switching back to the  
13 higher-of. There was unanimous consent from all the  
14 tables that were participating in that event.

15 So for that reason and for the reasons we have  
16 mentioned, that remains the number one priority of our  
17 dairy farmers.

18 Q. And back when we were talking about higher-of, and  
19 that seems like a very long time ago now, we got some  
20 historical context about how the higher-of changed over  
21 legislatively to the average-of. And I think it was  
22 pretty clear then that it was -- the intent that it was  
23 revenue neutral, as you mention in your letter in  
24 Exhibit 505.

25 Is that your members' -- is that part of the  
26 impetus that your members have come to you to ask for this  
27 relief?

28 A. Whether or not that it would have been revenue



1 neutral?

2 Q. Yeah. Because it was intended to be revenue  
3 neutral and it's turned out not to be?

4 A. And it's not, yes.

5 Q. And in -- in the -- in the process of getting that  
6 historical context, what we know is that the producers  
7 actually went to the processors and asked for a  
8 collaborative or a unified approach to bring to the USDA  
9 to return to the higher-of.

10 And do you -- in your -- do you recall what it was  
11 that was the response of the processors when the producers  
12 went to them?

13 A. I do not.

14 Q. Okay. Well, I think that what we heard is that  
15 the processors refused to provide that kind of unified  
16 position with the producers to return to that neutral  
17 position. And since then we have heard that, in the  
18 differentials, that the producers should be trusting the  
19 processors to just negotiate through an over-order premium  
20 that increased in price.

21 Did you hear that testimony?

22 A. I did.

23 Q. Is there anything in -- in the experience that the  
24 producers have had with respect to the higher-of that  
25 would inform them as to whether they could trust the  
26 processors to negotiate those over-order premiums?

27 A. I would just -- you know, our members have  
28 continuously sort of -- and part of the reason that I



1 guess American Farm Bureau's gotten so involved in this is  
2 just because the perception of a lack of trust between  
3 them and the processors going on, and them not really  
4 knowing where their price comes from. There's been a lot  
5 of concern about, you know, how their milk check is  
6 calculated. You know, that's one of the proposals that  
7 American Farm Bureau put in place, is more uniform, clear  
8 milk checks.

9 So there's -- there's a perception that things in  
10 the milk check have been manipulated. Perception.  
11 Doesn't necessarily mean in all cases that it's happening,  
12 but there's perception of mistrust.

13 So if there are ways that we can build back the  
14 trust, and one of those ways that our farmers are talking  
15 about is switching back to the higher-of, it's easier for  
16 our farmers to understand that calculation and -- and has  
17 shown to be, in the most current of times, more  
18 advantageous.

19 I don't know if that answered your question,  
20 but --

21 Q. And -- and you understand that the producers have  
22 asked you to make this request of the Secretary because  
23 they feel like it's critical to their survival?

24 A. Absolutely.

25 Q. Okay.

26 MS. HANCOCK: Thank you so much for your time  
27 today.

28 THE WITNESS: Thank you.





1 THE COURT: Does anyone else wish to ask questions  
2 before I call on the Agricultural Marketing Service for  
3 their questions?

4 I see no one. I do invite the Agricultural  
5 Marketing Service.

6 CROSS-EXAMINATION

7 BY MS. TAYLOR:

8 Q. Good morning.

9 A. Hi, Erin.

10 Q. Thank you for coming back to testify today.

11 A. No problem.

12 Q. Just a quick question. How often are your  
13 policy -- is your policy book updated?

14 A. So it's updated every year in January. We have a  
15 national convention, and our members -- the whole book  
16 gets reapproved. So they might not edit every single  
17 policy, but they -- everything has to be reapproved. And  
18 if they do, they will vote on new policy, things of that  
19 nature.

20 Q. Okay. So you weren't able to come here earlier in  
21 the hearing to testify on this particular issue?

22 A. No. Not that it was reaffirmed and made a  
23 priority, no.

24 MS. TAYLOR: Okay. That's my only question. I do  
25 want to thank you for testifying and for Farm Bureau's  
26 participation in the proceeding. So thank you.

27 THE WITNESS: Thank you.

28 And if I may, as the last witness, I would like to



1 thank our judge and our court reporter for their time. We  
2 know they have been out here a long time, so if we could  
3 give them a hand.

4 And also just to AMS and everybody in the room, I  
5 know myself and a few of the young folks that have been  
6 involved have really appreciated the expertise of the  
7 people in the room. We might be doing this in 20 years  
8 again, so it's good to have some of the folks in the room  
9 to learn from.

10 And thanks to Mike Brown for getting us printouts.  
11 He, at the last minute, got us some printouts, so we  
12 appreciate his time as well.

13 MR. BROWN: May I say that I did it because you  
14 were going to testify anyway, and it just made it  
15 expedient, so we can all get out of here.

16 THE WITNESS: Thank you.

17 MR. BROWN: Thank you for your support and  
18 testimony.

19 THE COURT: All right. Thank you so much. You  
20 may step down.

21 Over objection, I do admit into evidence  
22 Exhibit 505, also marked AFBF-6.

23 (Thereafter, Exhibit Number 505 was received  
24 into evidence.)

25 THE COURT: And now let's take a 15-minute break.  
26 Please be back and ready to go at 9:45.

27 (Whereupon, a break was taken.)

28 THE COURT: Let's go back on record.



1 We're back on record at 9:46.

2 Who will be the next witness?

3 MS. TAYLOR: We're out of witnesses.

4 THE COURT: I know we have one because I have  
5 exhibits.

6 MS. TAYLOR: Your Honor, I don't think we have  
7 witnesses left to testify. I think what you have are  
8 everyone's -- or some of the official notice lists that we  
9 need to discuss.

10 THE COURT: Excellent.

11 Would you like to begin the topic? Or should I  
12 call on one of the attorneys that submitted them?

13 MS. TAYLOR: Yeah. These are not USDA exhibits,  
14 but I think next on our list was to discuss what everyone  
15 wanted to have officially noticed, and for you to rule on  
16 that.

17 THE COURT: All right. Who would like to begin?

18 MR. PROWANT: Your Honor, Bradley Prowant for  
19 National Milk.

20 We submitted -- since we're submitting these  
21 exhibits --

22 THE COURT: You're not talking to the mic.  
23 Swallow it.

24 MR. PROWANT: Swallow it?

25 THE COURT: Pretend like you're -- it's a musical  
26 term. Right? It's a musical term.

27 MR. PROWANT: Got it. I will get up in this mic.

28 (Court Reporter clarification.)



1 MR. PROWANT: How's this? We need more Brad in  
2 this hearing.

3 We have submitted Exhibit NMPF-114. I don't know  
4 if we needed to title it that, but we would just ask that  
5 it be marked as an exhibit. I think for expediency, to  
6 avoid reading all of the titles and URLs into the record,  
7 we're submitting these exhibits.

8 THE COURT: Good. I'm going to give it number  
9 506.

10 (Thereafter, Exhibit Number 506 was marked  
11 for identification.)

12 MR. PROWANT: Okay.

13 THE COURT: 506.

14 Is there any objection to my taking official  
15 notice of the items that are contained in  
16 Exhibit NMPF-114, also marked as Exhibit 506?

17 MR. HILL: I -- oh, I do have one question, and  
18 it's with Number 7, which is the CASS, C-A-S-S, linehaul  
19 index data. And I'm not sure that this is appropriate for  
20 official notice. It's not a matter of technical,  
21 scientific [sic], commercial fact of established  
22 character. It appears to be a private company's  
23 aggregated data from maybe a survey or something or the  
24 other.

25 So I think I would object to that portion,  
26 Number 7, CASS Line Haul Index Data, 2005 to 2023.

27 THE COURT: All right. What I'll do, when I am  
28 reviewing the record and looking at transcript corrections



1 and so forth, I will look at that and others. And I'm  
2 glad we have the place where the data can be found. It  
3 may have been referenced in testimony. And it may not be  
4 worthy of official notice, but it still might be useful  
5 that we have your cite. So thank you for that.

6 Is there any other comment by anyone about what's  
7 in Exhibit 506?

8 MS. VULIN: Your Honor, Number 6, which is the  
9 Original May and Final June Proposed Class I Differentials  
10 by NMPF, are already admitted as exhibits in the hearing,  
11 Exhibits 300 and 301.

12 So to the extent they are documents posted on the  
13 USDA website, I don't per se have an objection to their  
14 being officially noticed, but they are already admitted as  
15 exhibits, and so I don't think appropriate or necessary to  
16 also have them be officially noticed.

17 THE COURT: Thank you.

18 I'll probably take official notice regardless, but  
19 I appreciate the additional information, and I might well  
20 include that in my certification of transcript.

21 MR. PROWANT: Your Honor, if I could just briefly  
22 respond to both those points, going in reverse order.

23 The reason for requesting for official notice of  
24 the differentials as submitted by NMPF is because  
25 Exhibits 300 and 301 are MIG exhibits, they aren't  
26 exhibits of NMPF.

27 And Your Honor may recall -- trying to swallow  
28 it -- that is a bad record -- talking about the mic,



1 Myra -- Your Honor may recall that MIG was submitting  
2 exhibits with NMPF data, and we were very clear that we  
3 wanted those clearly marked as MIG exhibits. So this is  
4 an attempt to encompass what NMPF actually submitted to  
5 AMS as part of requesting this hearing.

6 Your Honor, with regard to the CASS Line Haul  
7 Index, Your Honor can certainly review that and determine  
8 whether or not you think it is reliable. I would note  
9 that under 900.8(5) [sic]: "Official notice may be taken  
10 of such matters as are judicially noticed by courts," or  
11 as Mr. Hill mentioned, "of other matter of technical,  
12 scientific, or commercial fact."

13 The types of facts that are usually taken notice  
14 of by courts are adjudicative facts, which are simply  
15 facts as opposed to legislative facts, which are facts  
16 that get into policymaking and rulemaking and lawmaking.

17 The Line Haul Index is just raw data about  
18 trucking costs. It's not anything suggesting how the  
19 Secretary should or should not act in this case. So -- so  
20 we would say that that's a -- an acceptable thing of which  
21 to take official notice.

22 But obviously we'll leave the final determination  
23 to Your Honor.

24 THE COURT: Thank you.

25 MR. PROWANT: Your Honor, the source of that  
26 request -- bear with me for a moment, I'll get the exhibit  
27 number -- was Exhibit 310 at page 14 in the testimony of  
28 Jeff Sims.



1 THE COURT: Good. Thank you. I think it's very  
2 helpful to have it. Often when people were talking about  
3 transportation costs, they were asking on what information  
4 they were relying, and I think it's a useful item.

5 All right. Who would like to speak next?

6 MR. ROSENBAUM: Steve Rosenbaum for the  
7 International Dairy Foods Association.

8 I just do have a procedural question. Is -- is  
9 the notion that for those -- just using the National Milk  
10 as an example -- for the various items as to which no one  
11 has raised a question, are those deemed to have been  
12 officially noticed or is there a -- just trying to  
13 understand the process a bit.

14 THE COURT: It's really helpful when we have this  
15 opportunity to acquaint me with where I might look. I'm  
16 going to deal with the request for official notice in the  
17 transcript corrections, and I'll take official notice  
18 there. So I'm going to check all these out. So presume  
19 nothing at this point.

20 MR. ROSENBAUM: Thank you, Your Honor, for that  
21 clarification.

22 Your Honor, we have provided a document which  
23 appears on the letterhead of my law firm, which I believe  
24 you have a copy of.

25 (Court Reporter clarification.)

26 MR. ROSENBAUM: That's it, Your Honor. Thank you.

27 And I guess I should give that maybe an IDFA  
28 exhibit number to begin with. So that would be IDFA



1 Exhibit 69.

2 THE COURT: IDFA-69, and it will be 507.

3 (Thereafter, Exhibit Number 507 was marked  
4 for identification.)

5 MR. ROSENBAUM: And, Your Honor, this document  
6 sets forth the materials for which IDFA is requesting that  
7 official notice be taken.

8 THE COURT: Does anyone have any comments or  
9 questions about the items in Exhibit 507?

10 MR. HILL: Brian Hill, USDA, OGC.

11 I would like Mr. Rosenbaum, if you could, if you  
12 look at Number 13, could you kind of give us a little  
13 background on that? It looks like a chart. I'm not sure  
14 where the information comes from. Is it aggregated  
15 information of the government? I'm not sure, and I want  
16 to have that clarified.

17 MR. ROSENBAUM: Yes, that's exactly what it is.  
18 It's an aggregation of the federal fund rate, which is a  
19 rate set by the United States Government.

20 MR. HILL: So these are basically government --  
21 it's government data just put together in a --

22 MR. ROSENBAUM: Precisely right.

23 MR. HILL: Okay.

24 THE COURT: Are there any comments or questions  
25 about Exhibit 507?

26 All right. Who would next like to speak?

27 MS. VULIN: Ashley Vulin with the Milk Innovation  
28 Group.





1           We submitted a document -- a document entitled  
2 "Milk Innovation Group Request for Official Notice." We  
3 also omitted the MIG specific exhibit number, but for  
4 clarity would ask that it be marked as MIG Exhibit 68.

5           THE COURT: Good. And I am calling it 508.  
6           (Thereafter, Exhibit Number 508 was marked  
7 for identification.)

8           MS. VULIN: And, Your Honor, just for clarity. To  
9 the extent that we'll receive a ruling on documents that  
10 receive official notice, will that come before the  
11 briefing deadline? Is that expected, so we know which of  
12 these we can incorporate into our briefs?

13          THE COURT: You know, I'm hoping to beat that  
14 briefing deadline. I'll be working very hard.

15          MS. VULIN: Thank you.

16          THE COURT: I realize you need it. But just  
17 assume for the purpose of briefing, just assume, if I have  
18 not finished the certification of the transcript, that  
19 everything you want in, is in.

20          MS. VULIN: Thank you, Your Honor, that's helpful.

21          THE COURT: All right. Mr. Miltner.

22          MR. MILTNER: Thank you, Your Honor.

23           I circulated by e-mail two documents. I do have  
24 them here, and I will give them to Your Honor and USDA and  
25 participants.

26          THE COURT: Let's go off record while these are  
27 distributed.

28           (An off-the-record discussion took place.)



1 THE COURT: Let's go back on record.

2 We're back on record at 10:00.

3 Mr. Miltner, I'm looking at the first document  
4 entitled "Select Milk Producers, Inc."

5 How would you like that marked.

6 MR. MILTNER: Your Honor, I think that would be  
7 Select-10.

8 THE COURT: All right. And it will also be  
9 Exhibit 509.

10 (Thereafter, Exhibit Number 509 was marked  
11 for identification.)

12 MR. MILTNER: Thank you very much.

13 That document includes references to several  
14 publications, all from the United States Department of  
15 Agriculture, most of which were referenced in testimony  
16 from Select's witnesses or in their statements. There  
17 were a few that were referenced in the course of the  
18 hearing, and I think a couple others that are new. But  
19 they are all United States Department of Agriculture  
20 documents, with the relevant websites provided.

21 THE COURT: Excellent. I'll start with this one.

22 Is there any question for Mr. Miltner or any  
23 objection with regard to Select-10, also marked  
24 Exhibit 509?

25 MR. ROSENBAUM: Steve Rosenbaum for the  
26 International Dairy Foods Association.

27 I have a comment about Hearing Exhibit 509, and  
28 this also actually applies to Hearing Exhibit 508, which



1 is the MIG document.

2 In both cases they have cited Federal Register  
3 publications of decisions made by USDA in the past. I  
4 don't -- it's certainly not -- it is my clear  
5 understanding that a decision by USDA published in the  
6 Federal Register does not have to be officially noticed in  
7 order for it to be cited in a brief. It's functionally  
8 the equivalent of, if you will, citing a court decision in  
9 a brief to a court.

10 And so I don't have any objection, per se, to  
11 their being on these lists, but I do think we should have  
12 clarity that it's not required to have submitted such  
13 decisions for official notice in order for them to be  
14 cited.

15 THE COURT: Let me tell you how helpful it is to  
16 have an URL with your computer to have the electronic  
17 version and push that button to have it called up. It's  
18 very, very helpful. So if someone has done it for the  
19 convenience of those utilizing all these materials, I'm  
20 all for it. And I agree that it's not necessary, but it's  
21 very helpful.

22 MR. ROSENBAUM: I think Your Honor is suggesting  
23 it behooves us to put that in the brief as well, and I  
24 will take that to heart.

25 THE COURT: Yes.

26 MR. ROSENBAUM: Thank you.

27 THE COURT: Very good.

28 Ms. Vulin.



1 MS. VULIN: Thank you, Your Honor. Ashley Vulin  
2 with the Milk Innovation Group.

3 I agree with Mr. Rosenbaum, it is the functional  
4 equivalent of citing to a statute, right? Or some other  
5 legal document that -- that we can readily cite without  
6 official notice.

7 For MIG, we wanted to ensure that we included in  
8 this list specific Federal Register cites that were  
9 incorporated in testimony or otherwise relied upon in  
10 exhibits introduced so that they were, as Your Honor said,  
11 readily available.

12 But similar to the California regulation cited on  
13 the second page, included for clarity of record, but agree  
14 that had it not been included, it would not prohibit MIG  
15 or any other entity from citing to a -- to a similar type  
16 legal source absent official notice already being granted.

17 THE COURT: Mr. Miltner, is there anything else  
18 you would like to say about Select Exhibit 10, also marked  
19 Exhibit 509?

20 MR. MILTNER: Other than to note that Ms. Vulin's  
21 statements about citing those Federal Register postings  
22 that were referenced in testimony, that was the intent,  
23 not to be all encompassing, but to provide references to  
24 those that were utilized in testimony.

25 THE COURT: Very good.

26 And, Mr. Miltner, the other document?

27 MR. MILTNER: Yes. The other document, Your  
28 Honor, is on the letterhead of Dan Smith who's appeared in



1 the hearing representing the Maine Dairy Industry  
2 Association. He is not here this week. He doesn't have  
3 any witnesses this week. And he asked if I would do the  
4 courtesy of providing the record the documents that the  
5 Maine Dairy Industry Association would like Your Honor to  
6 take official notice of, so those are reflected. They are  
7 two documents, publications of the USDA, and the citations  
8 to where they can be found online are included. And I  
9 believe this would be document MDIA-3.

10 MR. HILL: That's correct.

11 THE COURT: And I'm marking it also as  
12 Exhibit 510.

13 (Thereafter, Exhibit Number 510 was marked  
14 for identification.)

15 THE COURT: 510.

16 Is there any objection or any questions for  
17 Mr. Miltner with regard to MDIA-3, also marked  
18 Exhibit 510?

19 And I appreciate the courtesy of both Mr. Smith  
20 and Mr. Miltner in getting this to me. It's very helpful.  
21 Mr. Rosenbaum.

22 Let's go off record briefly while this document is  
23 being distributed. It is 10:06.

24 (An off-the-record discussion took place.)

25 THE COURT: Let's go back on record.

26 We're back on record at 10:07.

27 Mr. Rosenbaum.

28 MR. ROSENBAUM: Yes, Your Honor. I'm now -- Steve



1 Rosenbaum for the International Dairy Foods Association.

2 I'm now basically performing the same service that  
3 Mr. Miltner provided. And as they say, I -- as a matter  
4 of courtesy, I have provided a copy of National  
5 All-Jersey's request for official notice. Their  
6 representative, Mr. Vetne, is not here, and he circulated  
7 this copy and asked that it be provided to the Court.  
8 This would be, I think, NAJ-10.

9 THE COURT: NAJ-10.

10 MR. ROSENBAUM: NA, as in apple, NAJ-10.

11 THE COURT: All right. NAJ, for National  
12 All-Jersey, 10, and I have marked it also as Exhibit 511.

13 (Thereafter, Exhibit Number 511 was marked  
14 for identification.)

15 MR. ROSENBAUM: Obviously I'm not sponsoring this,  
16 I'm simply providing it to Your Honor.

17 THE COURT: Thank you.

18 Does anyone have any comments about it?

19 All right. I see none.

20 I also appreciate this courtesy. I realize what  
21 we're doing now, taking lists of requests for official  
22 notice, is not similar function to taking in witness  
23 testimony.

24 Ms. Vulin.

25 MS. VULIN: One typo. I believe Footnote 1, which  
26 says "old copies of the Federal Register since the 1040s  
27 are available by year." I believe it should say 1940s.  
28 Probably not critical, but wanted to note.



1 THE COURT: Where are you, Ms. Vulin?

2 MS. VULIN: Footnote 1, Your Honor.

3 And Mr. Miltner notes it could be 1840s. I  
4 haven't checked.

5 THE COURT: Oh, I see.

6 MS. VULIN: But I'm pretty sure it's not the  
7 1040s.

8 THE COURT: Thank you. That's Footnote 1 on  
9 page 1 of Exhibit 511.

10 For now I'm putting a question mark by 1040s. I'm  
11 sure Mr. Vetne will chuckle.

12 All right. Are there any other documents listing,  
13 but not in an exclusive way or an exhaustive way, items  
14 for which official notice is requested and we have the  
15 courtesy of an easy way to find the website?

16 All right. I see no comments.

17 I do admit into evidence for this special purpose,  
18 Exhibits 506, 507, 508, 509, 510, and 511.

19 (Thereafter, Exhibit Numbers 506, 507, 508,  
20 509, 510, and 511 were received into  
21 evidence.)

22 THE COURT: And I note that the record also  
23 probably includes other items for which official notice  
24 was taken. And when I compile the list, I will use a  
25 shorthand method. For example, I would refer to  
26 Exhibit 511, and all the items in that except for, and the  
27 "except for" would be things for which I do not take  
28 official notice. So I won't be trying to type these



1 things into my transcript certification, but they will be  
2 referenced. And in addition, I will reference those items  
3 that were officially noticed in the transcript that are  
4 not included in these.

5 All right. Is there anything further on this  
6 particular topic?

7 I see nothing further.

8 So now do we go to the topic of how counsel would  
9 like to submit their proposed findings and conclusions and  
10 briefs? All at once on the last -- or all at once before  
11 the deadline, the last day being April 1, 2024, a Monday,  
12 because the 60 days landed on a weekend.

13 So do you want to do it in stages where there's an  
14 earlier deadline for your initial brief so that every  
15 party would have an opportunity to file a response brief,  
16 or are you content with one brief coming in, and it  
17 doesn't have to be as late as April 1st, but that's the  
18 last date, it needs to be by 4:30 Eastern Time, received  
19 by the Hearing Clerk? Not sent, received.

20 MS. HANCOCK: Your Honor, Nicole Hancock with  
21 National Milk.

22 It's our preference to just have one brief due  
23 April 1st.

24 MR. ROSENBAUM: Steve Rosenbaum, International  
25 Dairy Foods Association.

26 That is also our preference.

27 MS. VULIN: Likewise for the Milk Innovation  
28 Group. Thank you.





1 MR. MILTNER: Select concurs.

2 THE COURT: Does anyone else want to be heard?

3 There is no one.

4 In accordance with Title 7 of the Code of Federal  
5 Regulations Section 900.27, all parties must file by this  
6 deadline in order to have their proposed findings and  
7 conclusions and briefs considered. That deadline is  
8 April 1, 2024. No late -- received by the Hearing Clerk  
9 no later than 4:30 p.m. I recommend being early. But  
10 when you get your items sent in whatever way fits what the  
11 Hearing Clerk has requested, please verify with the  
12 Hearing Clerk that it was received.

13 And I recommend that you also file, as you would  
14 anything else in this proceeding, in the normal way with  
15 the Agricultural Marketing Service, so that they will have  
16 it simultaneously with your -- or simultaneously or  
17 earlier than your Hearing Clerk copy.

18 We talked yesterday about the other deadline  
19 that's contained in Title 7 of the Code of Federal  
20 Regulations Section 900.27, and that's the request for  
21 transcript corrections. And as we noted, that deadline  
22 does not begin to run today, that deadline begins to run  
23 when all of the transcript is available. And the date  
24 when that occurs will be posted on the AMS website,  
25 together with the calculation of the 30th day so that  
26 people know their deadline for filing, again, with the  
27 Hearing Clerk, again by 4:30 p.m. Eastern Time.

28 What other legal items or any other issues need to



1 come before us with regard to this milk hearing?

2 MS. TAYLOR: I don't have any issues to bring up.

3 Just for courtesy for those listening, as well as  
4 here, AMS will make sure that the hearing web page  
5 reflects the proper deadlines for the briefing schedule  
6 and when the transcripts go up, and will provide  
7 information on the Hearing Clerk's address and e-mail,  
8 et cetera, so that can be accessible to all who would like  
9 to file corrections and briefs.

10 THE COURT: Excellent.

11 Mr. Miltner.

12 MR. MILTNER: When we adjourned the hearing back  
13 in October, AMS was kind enough to update a spreadsheet of  
14 the exhibits to cross-reference the designated number,  
15 Select-8, with the Hearing Exhibit number.

16 If they have the opportunity to do so as we  
17 adjourn today, that would be appreciated, so we ensure  
18 that we are citing to the correct documents.

19 MS. TAYLOR: We will do that. And it will have  
20 all the exhibits on it.

21 And we will not be -- just so everyone knows,  
22 renumbering the links of the exhibits with the official  
23 exhibit numbers on the website, but you will have a  
24 spreadsheet you can look at so you can find the right  
25 exhibits.

26 THE COURT: Excellent.

27 MR. HILL: Brian Hill, USDA, OGC.

28 I do want to just read on to the record Proposal



1 Number 22 submitted by Dairy Program, Agricultural  
2 Marketing Service: To make such changes as may be  
3 necessary to make the respective Marketing Orders conform  
4 with any amendments thereto that may result from this  
5 hearing for the obvious purposes.

6 Thank you, Your Honor.

7 THE COURT: Is there anything further that anyone  
8 wants to bring before the Secretary in this milk hearing?

9 I see no response.

10 So it is my pleasure, at 10:18 a.m. on 2024,  
11 January 30, to determine that this hearing has ended.

12 (Whereupon, the proceedings were concluded.)

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1 STATE OF CALIFORNIA )  
 ) SS  
 2 COUNTY OF FRESNO )

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4 I, MYRA A. PISH, Certified Shorthand Reporter, do  
 5 hereby certify that the foregoing pages comprise a full,  
 6 true and correct transcript of my shorthand notes, and a  
 7 full, true and correct statement of the proceedings held  
 8 at the time and place heretofore stated.

9

10 DATED: February 20, 2024

11 FRESNO, CALIFORNIA

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16 MYRA A. PISH, RPR CSR  
 17 Certificate No. 11613

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