

CERTIFIED  
TRANSCRIPT

NATIONAL FEDERAL MILK MARKETING ORDER  
PRICING FORMULA HEARING

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

Before the Honorable Channing D. Strother, Judge

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Carmel, Indiana

August 29, 2023

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16 John Vetne

17 FOR The National Milk Producers Federation:

18 Nicole Hancock  
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21 Ryan Miltner

22 ---o0o---

23 (Please note: Appearances for all parties are subject to  
24 change daily, and may not be reported or listed on  
25 subsequent days' transcripts.)  
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1 TUESDAY, AUGUST 29, 2023 - - MORNING SESSION

2 THE COURT: Let's come to order on the record.

3 At first, I understand we have some preliminary  
4 business today. One is, Mr. Rosenbaum, you have a  
5 corrected Exhibit 99?

6 MR. ROSENBAUM: Exactly, your Honor. We have  
7 submitted to USDA for posting on the website, and I have  
8 distributed copies to USDA, hard copies to USDA, and I  
9 have copies for everyone else as well, which I'm going to  
10 distribute as soon as I stop talking.

11 This is an updated Hearing Exhibit 99, which  
12 corresponds to updated IDFA Exhibit 5. And the changes  
13 are those that were discussed yesterday. On page 8, the  
14 words "MCP" were deleted and the words "fat/skim" were  
15 substituted in the last of the three bullet points.

16 On page 10, the word "from" was deleted.

17 And finally, on page 12, where it had said "2022  
18 DHI average protein in skim," it now says "2020-2022 DHI  
19 average protein in skim."

20 Otherwise, the exhibit -- updated Hearing  
21 Exhibit 99 is identical to the previous version, and we  
22 would ask that this new updated version be substituted for  
23 that which was distributed yesterday and that this be the  
24 version that would be the official exhibit.

25 THE COURT: Yes. Unless anyone has got any  
26 objections, I concur with Mr. Rosenbaum that this exhibit  
27 should simply be substituted for all purposes on the  
28 website, on the official copy of the exhibits.



1 I do note that in the upper right-hand corner on  
2 the colored section, page 1, it does say "updated." This  
3 is Exhibit 99.

4 I -- we haven't entered those into the record yet,  
5 have we, Mr. Rosenbaum?

6 MR. ROSENBAUM: No, your Honor. It's been marked  
7 is all at this point.

8 THE COURT: All right. Yes?

9 We are -- we still have cross of Mr. Brown; is  
10 that right --

11 MR. ROSENBAUM: Yes, your Honor.

12 THE COURT: -- ongoing? Okay. Thank you.

13 Yes, ma'am.

14 MS. VULIN: Good morning, your Honor. I just  
15 wanted to enter my appearance into the record.

16 THE COURT: Welcome.

17 MS. VULIN: Thank you. Ashley Vulin with Davis  
18 Wright Tremaine representing the Milk Innovation Group.  
19 Thank you.

20 THE COURT: Thank you.

21 Next? Yes, sir.

22 Mr. Brown has taken the stand again.

23 Mr. Brown, I remind you that you remain under  
24 oath.

25 THE WITNESS: Yes, sir.

26 THE COURT: Mr. Vetne, you may continue your  
27 cross-examination.

28 ///





## 1 CROSS-EXAMINATION (Cont'd)

2 BY MR. VETNE:

3 Q. John Vetne, National All-Jersey representative.

4 Good morning. I'd like to take you to your  
5 PowerPoint, page 8 and 9. Would it be Exhibit 99? At the  
6 bottom of the page on page 8, the corrected version says  
7 the "total impact on the four fat/skim orders is about  
8 \$33 million."9 And you make that same -- you refer to that  
10 \$33 million also on page 17 and 18 of your prepared  
11 testimony, Exhibit 98, and in table 12 of that exhibit.12 So first, is -- does this reflect a major  
13 objection of IDFA to the Proposal 1 as well as Proposal 2  
14 that it would uniquely affect use upset of four marketing  
15 orders in a way that it does not affect the other orders?16 A. Yes, that is correct. And the reasoning for that  
17 is because, quite honestly, we don't have accurate  
18 component data in those orders. History tells us Southern  
19 orders, because of temperature and also lack of  
20 incentives, tend to have lower components. And so it --  
21 we know at least in some specific instances it overvalues  
22 milk in class. That's our concern.

23 Q. Okay.

24 A. The value may be there, but we don't think that  
25 reflects what the real value is.26 Q. Okay. So Proposal 1 and 2 in your view results in  
27 a regional difference in the way it is applied in the  
28 Federal Order system?

1 A. Yes, that's correct.

2 Q. Okay. And the \$33 million, you refer to that in  
3 your testimony as well as on the PowerPoint, as a total  
4 impact on costs --

5 A. Yes.

6 Q. -- correct?

7 A. Yes. Again, regulated minimum cost. But, yes.

8 Q. Regulated minimum costs.

9 A. Right.

10 Q. I feel like I'm splitting a hair.

11 A. Well, I just -- I've bought lots of milk in my  
12 life, and the Federal Order prices in generally not the  
13 price you pay for milk. That's why I --

14 (Court Reporter clarification.)

15 THE WITNESS: Yes. What I said is that the  
16 regulated minimum cost, I use that term because of  
17 incentives, charges, other things that you pay for on milk  
18 on top of the minimum price, generally, are above that.  
19 So it isn't the true cost to a processor. It is --  
20 generally, it's the baseline cost. There's usually  
21 adjustments to it.

22 BY MR. VETNE:

23 Q. But is it your testimony that \$33 million is  
24 additional costs?

25 A. For -- for the four fat/skim orders, yes.

26 Q. Let's look at Arizona for a minute.

27 Do you know whether in that market that has a  
28 non-regulated multiple component system?



1 A. Correct.

2 Q. Do you know whether in that market, the buyers,  
3 Schreiber Cheese, are paying more for high component milk?

4 A. Yes, they are.

5 Q. Okay.

6 A. Of the fat/skim price.

7 Q. So it would not be an additional cost, it is  
8 already being paid for that segment of milk?

9 A. No, that is not correct. Because your baseline  
10 skim is assuming higher components than the current  
11 fat/skim price does, so unless their premiums are adjusted  
12 to reflect those higher component levels in that skim  
13 value, they will pay more for milk than they do now. Of  
14 course I have no idea how the contract reads, but that  
15 would be the case.

16 Q. But does -- all right. Because the Federal Order  
17 in Arizona does not base the Class III price on a product  
18 price formula, such as it does in the seven MCP orders,  
19 the regulated portion of what is paid would be higher?

20 A. Yes. And, of course, I don't know the details of  
21 that contract, so I don't know. But historically, I do  
22 know that contract was based off of the skim value plus  
23 adjustment for point protein. Again, I can't -- you know,  
24 I don't -- I don't work for Schreiber. I don't want to --  
25 I do know the contract still exists, and it's been  
26 updated. But it -- it assumes some kind of -- in the past  
27 it assumes some kind of base protein level, and it paid a  
28 premium on top of that. And historically, it was -- it



1 was much lower than 3.39.

2 Q. So are you aware whether Schreiber -- it would be  
3 listed in one of the USDA exhibits -- but whether  
4 Schreiber is a regulated pool plant or non-pool plant?

5 A. I believe it is non-pool.

6 Q. Okay.

7 A. But I -- again, I don't want to speak to that  
8 without looking at --

9 Q. So assuming the exhibit does not list Schreiber as  
10 a pool plant, we can conclude that it is a non-pool plant,  
11 correct?

12 A. Yes. If it is not on the list, it would be a  
13 non-pool plant.

14 Q. And the system does not regulate prices paid by  
15 non-pool plants, correct?

16 A. That is true.

17 Q. Okay. And if it's a non-pool plant, would it be  
18 fair to conclude that the milk it receives comes from a  
19 cooperative association?

20 A. In fact, the milk comes from a pool plant. If you  
21 were ever to visit the -- visit the location, United  
22 Dairymen of Arizona is build- -- they have a really clever  
23 plan. And they actually standardized the protein and fat  
24 ratio and levels in that milk, and then they basically  
25 pump through a wall into the -- into the Schreiber plant  
26 at that -- at that standard ratio. That is the part of  
27 the service that Schreiber pays for as part of their  
28 premium program.



1 Q. Okay. So then, UDA, United Dairymen of Arizona,  
2 would account to the Federal Order at the Class III price  
3 for that milk that is standardized and transferred to  
4 Schreiber?

5 A. Unless they depool, I would say, yes, that is  
6 correct.

7 Q. Okay. How do you depool milk that's transferred?

8 A. Others do it.

9 Q. I don't --

10 A. I don't know. I am no expert on that.

11 Q. Okay.

12 A. You got to remember, most of my experience is in  
13 the wild world of Idaho, so -- but it does -- it is very  
14 apparent that there is milk that is transferred into --  
15 again, it is separate plant even though they are adjacent.  
16 There's certainly milk in other orders that isn't pooled  
17 that is priced off of Class III pricing.

18 Q. Oh. Do you know whether UDA operates two  
19 receiving systems at its powder plant?

20 A. I believe they operate one.

21 Q. They operate one?

22 A. But, again, I'm no expert on their plant. I  
23 haven't seen it in 25 years.

24 Q. Would you agree with me that as long as the UDA  
25 powder plant is pooled, its transfers must be pooled?

26 A. Yes, that's true. It would have to be.

27 Q. Okay. In order to depool, you would have to  
28 depool the powder plant --



1 A. Yeah, you would have to have a separate way to get  
2 it into the plant that wouldn't be coming through the  
3 Class -- the Class IV plant. That would -- that would be  
4 correct. Thanks for --

5 Q. Okay.

6 A. Thanks for that correction.

7 Q. With respect to Exhibit 99, page 12, and 98,  
8 page 23, you have DHIA component information.

9 A. Yes.

10 Q. As I understand it, that component information  
11 that you report is DHI component information on milk  
12 produced within those -- the states?

13 A. Yeah. As -- as -- again, as reported through the  
14 DHIA system, which is a different system, although the  
15 testing is the same process. It's -- but they basically  
16 sample milk once a month -- one -- every one to three  
17 months, take samples, get component levels, and calculate  
18 individual lactation, production in both milk and  
19 components from that information. So, yes, that would be  
20 true.

21 Q. Okay. So it would not necessarily -- that  
22 information on Exhibit 99, page 12, and 98, page 23 --  
23 would not necessarily reflect the component level of milk  
24 pooled in those markets?

25 A. That would be true, because not all -- several  
26 reasons. First of all, there are different dates that  
27 samples are taken, and second of all, because it doesn't  
28 encompass the entire amount of milk in the order, part of



1 the milk in the order.

2 Q. Okay. So -- USDA produced some information which  
3 captured component levels of a large portion, 70, 80% of  
4 the Southeast markets.

5 To the extent that that shows higher component  
6 values, would it be fair to conclude that that is because  
7 it is milk pooled, which could include milk from outside  
8 of the Southeast coming from a region where there is more  
9 incentive to increase components?

10 A. A lot of that milk would -- the border orders that  
11 serve the Southeast markets are component orders. We'll  
12 have an example of it later how that milk often is  
13 segregated and doesn't hit the Southeast order to test  
14 milk, one of our members. But that is -- that is true.

15 And the other question I do have, I assume they're  
16 official labs because they were tested in the same place.  
17 I don't know how that 70%, how much of that is milk from  
18 Mideast and Northeast and other orders that supply the  
19 Southeast versus how much of it is local milk that happens  
20 to have a protein test. And I have no way to know that.  
21 I just know it's not all the milk.

22 Q. Okay. I'm still looking at page 12 of Exhibit 99,  
23 the PowerPoint.

24 At the bottom, you use the word "predicted" when  
25 you refer to DHI nonfat solids, 9.25. What does predicted  
26 mean --

27 A. Predicted --

28 Q. -- in that line?



1           A.     I did a multi -- I did a linear regression on all  
2 months of milk components for all plants that had data,  
3 including the retired Great Basin order, including the  
4 newer California orders. A simple -- simple linear  
5 regression. If you go to the full written testimony, if  
6 you go to Attachment B, it shows the regression results  
7 of -- of that.

8                     And the nonfat solids and protein is extremely  
9 higher. You have an R-squared of 93%. You have a  
10 multiple R of 96. And so it's -- it is highly  
11 predictable, and the correlation between the two is also  
12 very, very high. And that's simply because, you heard it  
13 yesterday from Dr. Van Amburgh, that the SNF portion of  
14 milk, which is mostly lactose -- I mean, the other solids  
15 portion, mostly lactose -- doesn't vary, so it's only  
16 logical that protein and total -- total nonfat solids  
17 would be very closely related, and they are.

18           Q.     So you took data from the national relationship  
19 between protein and solids nonfat --

20           A.     Right.

21           Q.     -- and applied it to the four fat/skim markets to  
22 come up with the prediction; is that --

23           A.     Yes.

24           Q.     Pardon?

25           A.     Yes, I did.

26           Q.     Okay. And is that prediction of 9.25% also a  
27 prediction based on three years --

28           A.     Yes.





1 Q. -- 2020, 2021, and 2022?

2 A. Yes, sir. That's correct.

3 Q. Okay. Would it be fair for me to conclude that  
4 using a three-year weighted average, your data understates  
5 the current component content of the Southeast or the  
6 fat/skim orders?

7 A. Well, if you look at the -- at the monthly data --  
8 I mean, the yearly data, those three years bounce around.  
9 That's one of the reasons we use the three-year average,  
10 because some are higher some years, some are lower some  
11 years. We tried to take some of that error out.

12 It could be, but I would also argue we don't have  
13 a good number for the Southeast what the solids levels are  
14 because we don't have a complete picture. And that's our  
15 challenge. That's why pricing on a set level of skim  
16 solid levels is so difficult and manufacturing in that  
17 market because we simply don't know. And when you raise  
18 those levels to an average, which I would argue is above  
19 what the actual average is, you are basically making that  
20 milk on a per unit of yield basis uncompetitive with milk  
21 in the Federal Orders that have component pricing, most of  
22 the time.

23 Q. When you say some -- some goes up and some goes  
24 down, what are you referring to, the DHI numbers?

25 A. I'm talking about seasonality of component tests.  
26 And the DHI numbers -- again, none of these -- these  
27 numbers are -- they are large volumes of herds, but those  
28 numbers are -- they are not the exact same milk dataset



1 that is the Federal Order dataset. And in the case of the  
2 Southeast, the dataset for Federal Orders is incomplete  
3 because there is a fair amount of milk that doesn't have  
4 solids levels tested.

5 Q. Okay.

6 A. Which they don't need to. Legally it is not  
7 required.

8 Q. Am I correct in believing from your testimony that  
9 the DHI numbers are annual, not seasonal?

10 A. They are annual.

11 Q. Okay. So the only information on seasonality  
12 comes from FMMO data?

13 A. It does, but it is -- it is well understood in the  
14 industry the significant seasonality of milk. I would  
15 be -- it would be, I think, really making a stretch to  
16 assume that DHI data isn't also seasonal. From personal  
17 experience, I can assure you that is the case.

18 Q. Okay. I'm looking at your PowerPoint, Exhibit 99,  
19 page 16.

20 You make two points on page 16 of your PowerPoint.  
21 One is that Proposals 1 and 2 would often require handlers  
22 to overpay for milk in the manufacturing classes.

23 A. Correct.

24 Q. I'm focusing on the word "often." I infer from  
25 that that sometimes it would not require overpayment.

26 A. We don't know.

27 Q. Okay.

28 A. That's why it says often; it doesn't say X



1 percent. We don't know because we don't have the data to  
2 determine that.

3 Q. Okay. Seasonality plays a role in how often there  
4 would be an overpayment, correct?

5 A. Yes. It would -- it would definitely have a role.

6 Q. And variations in components result in competing  
7 handlers receiving milk that is not identical in  
8 components, correct?

9 A. Yeah. You will -- you will hear some more while  
10 you're -- that, yes, you are exactly right. That is very  
11 true.

12 Q. So some handlers might overpay and some handlers  
13 might underpay?

14 A. Yes, they may. I personally have records of three  
15 that all underpaid in three different states but -- I  
16 mean, overpaid, excuse me. But, yes, that is true.

17 Q. So on a --

18 A. It will vary by wherever the milk they receive  
19 into that plant.

20 Q. So on a -- on a class price basis, the handlers'  
21 regulated costs for components would not be uniform?

22 A. That is correct.

23 Q. But they would be closer under Proposal 1 and 2  
24 than they are now, correct?

25 A. Well, it's kinda like saying on the Price is  
26 Right, we got to be closest to the price; if you go over,  
27 you don't win, so it is okay to overpay -- charge people  
28 more for milk than its economic value in a plant. You



1 haven't heard us argue that the averages haven't gone up.  
2 They have.

3 But to assume that they are the same as the seven  
4 MPC orders in Tempe, Arizona data, which is based on an  
5 assumption which we think is a big error, I think  
6 that's -- that's the big mistake. And even if they were  
7 identical, you still have those seasonal differences in  
8 yield, which they would cause problems.

9 One of the reasons for my long experience before  
10 we had component pricing, working in cheese plants on  
11 incentive programs, but even afterwards in fat/skim  
12 markets. One of the reasons that the minimums worked is  
13 because you had room for premiums, so you could reward  
14 high component -- particularly high protein producers for  
15 -- for milk, because they had added value above that  
16 minimum.

17 When you start to -- when you raise the base of  
18 that minimum to 3.39 protein, there's a lot less room for  
19 incentive, but yet, the folks at the low end of that  
20 protein scale are still going to -- they are going to get  
21 a higher value than it's worth. This comes back to the  
22 argument, Mr. Vetne, on why pricing on components is the  
23 way to keep it equitable, between -- between clients.

24 Q. Okay. The -- there are two conclusions on page 16  
25 of your PowerPoint. The second conclusion in two lines,  
26 if farmers want to be paid on components, they should  
27 adopt MCP.

28 Does the second conclusion have anything to do



1 with the first conclusion?

2 A. Yes.

3 Q. And what is the relationship?

4 A. It's -- it's equitable treatment of handlers on  
5 having the same costs per yield unit on manufacturing  
6 milk, no matter where they are in the country.

7 Q. And --

8 A. And then that baseline reference, regulated price  
9 is the same, and they are -- they are competing at the  
10 same level of minimum cost of milk.

11 Q. Okay. As I understand it, correct me if I'm  
12 wrong, Class II, III, and IV prices could provide  
13 regulated price uniformity between handlers without a  
14 component distribution to producers.

15 A. Absolutely they could.

16 Q. Okay.

17 A. Because you would, again, be yield based. And the  
18 handler is the one that has to work with that variation in  
19 margin on yield based on the price of milk.

20 Q. And the converse could also be true --

21 A. Yes, it could.

22 Q. -- handlers -- producers could say, pay us on  
23 multiple components, but keep charging handlers on a skim  
24 basis?

25 A. Well, I can't speak for what USDA would say. But  
26 if you -- again, if there's a hearing requested to  
27 consider that, it would probably be something that was  
28 certainly be up for discussion, yes.



1 Q. Okay. But simply having producers -- the second  
2 point you make, simply having producers pay on component  
3 levels by itself would not cure the inequity between  
4 handlers?

5 A. It would not.

6 Q. Thank you.

7 MR. VETNE: That's all I have. Thank you, your  
8 Honor. I might be back later after I hear everybody else.

9 THE COURT: Any further cross for this witness?

10 Yes, sir.

11 CROSS-EXAMINATION

12 BY MR. COVINGTON:

13 Q. Calvin Covington, representing Southeast Milk,  
14 Incorporated.

15 Good morning, Mr. Brown.

16 A. Good morning.

17 Q. Earlier yesterday, when you testified, you  
18 testified that you were involved in helping develop the  
19 Federal Order provisions that were included in 2000  
20 Federal Order Reform back in the 1990s.

21 Was -- did I hear that correct?

22 A. That is correct.

23 Q. Okay. And that took place in the late 1990s?

24 A. Yes. The actual process of moving through once  
25 it -- Congress basically authorized the ability to do that  
26 and to use reform orders. So most of it was 199- -- 1997  
27 through 1999 were most of the discussions before it went  
28 into rulemaking.



1 Q. Okay. And who was your employer back then?

2 A. You. National All-Jersey.

3 Q. All right. So you and I worked together during  
4 that period of time?

5 A. We sure did.

6 Q. Okay. All right. In that process that you were  
7 involved in, you know, it was no doubt you brought a lot  
8 of valuable input then.

9 Did you spend a lot of time in Washington DC there  
10 in the House, the Agricultural Committee chairman or staff  
11 office with the House Ag Committee putting all that --  
12 those things together?

13 A. Back when LDP chairman was Steve Gunderson, yes, I  
14 did.

15 Q. Uh-huh. And you were very much involved in the  
16 development of -- as we call back then -- the end product  
17 pricing formulas, or as some people refer to them today as  
18 the product pricing formulas?

19 A. Yes. Yes, I was. A lot of help from you I might  
20 add. But, yes, I was.

21 Q. Well, I appreciate that.

22 In those end product pricing formulas, and we  
23 don't need to go through all the details, everything you  
24 and I went through putting -- going through all that and  
25 so forth, but they ended up with developing a component  
26 price for protein, butterfat, other solids, and nonfat  
27 solids?

28 A. That is correct.



1 Q. Okay. Once those were developed, there needed to  
2 be a method also to take those product prices of protein,  
3 other solids, and so forth, and get them back to a  
4 Class III and Class IV skim milk value per hundredweight;  
5 was that correct?

6 A. Yes.

7 Q. Okay. And -- and what was the procedure, how --  
8 how -- do you remember how that process unfolded to get to  
9 where we are today on that, or get -- how it ended up in  
10 Federal Order Reform?

11 A. If I knew that, I would be very popular because,  
12 as you well know, that's been a big question for a lot of  
13 people. If you look historically -- if you go back to  
14 2000 and look at the component levels in those orders,  
15 they are certainly above -- for example, protein is above  
16 3.1, but not much. And certainly when you look at minimum  
17 months for that seasonality, it actually in those orders  
18 averaged below that.

19 So it was much closer to what the average tests  
20 were at that time, but I don't think there was a specific  
21 method that was used to -- to reach those. It was almost  
22 kind of the hip pocket kinda thing.

23 Q. And, again, what -- for the skim factors, just as  
24 we're talking here, what were those skim factors for  
25 protein? 3.1 for protein?

26 A. 3.1 protein, 5.9 other solids, and 9 for nonfat  
27 solids.

28 Q. Okay. And do you recall also during that period





1 of time -- and, again, I can't remember what year it  
2 started, but in the 1990s, the Minnesota-Wisconsin price  
3 series was still published?

4 A. Yes.

5 Q. And do you remember also during that period of  
6 time that that series was published with both protein but  
7 total protein and other solids, component information?

8 A. I honestly do not remember that.

9 Q. Okay. All right. If -- if I were to say that if  
10 we -- again, I don't have it with me. If we were to pull  
11 up those averages back in the 1990s under the  
12 Minnesota-Wisconsin, would you be surprised if those  
13 averages -- and you have come pretty close to saying --  
14 that those averages in the skim milk are pretty close to  
15 that 3.1, 5.9, and 9.0?

16 A. If you say they were, I would. I don't have the  
17 data, so I can't confirm that.

18 Q. Oh, okay. All right.

19 Those factors that were put in place in Federal  
20 Order Reform in 2000, what was the purpose of those  
21 factors?

22 A. To develop a reference price for skim milk for  
23 Class I and for manufacturing classes in non-MCP orders.

24 Q. So -- so it -- all right.

25 Were those factors also used to use in the  
26 published Class III and Class IV prices?

27 A. Yes. There -- the reference prices remain 3.5  
28 fat, and those were the component levels that they used to



1 determine the standard milk skim price.

2 Q. And they were also used to calculate the Advanced  
3 Class III and Class IV prices?

4 A. Yes, they are.

5 Q. Okay. Do you remember in your involvement when  
6 those factors were put out there, was there any  
7 consideration given that those factors needed to change  
8 seasonally?

9 A. No, there was not. But they also were set at  
10 levels that I -- at least from my estimation indirectly to  
11 that, but there's no hearing record that says that.

12 Q. Okay. And -- and those factors have been in place  
13 since January 2000?

14 A. That is correct.

15 Q. Okay. And can you recall, was any consideration  
16 given when those factors were set to what skim component  
17 levels were in Class I milk in other -- any other Federal  
18 Milk Marketing Orders?

19 A. I don't believe so. And I would expect there  
20 wasn't a lot of data on components in skim milk at that  
21 point, certainly, to even have any idea.

22 Q. And so we -- we don't know -- at that time, we  
23 don't know for sure whether those factors of 3.1 and 5.9,  
24 there could have been some Class I skim milk that could  
25 have been higher than that, and there could have been some  
26 Class I skim milk that could have been below that?

27 A. Yeah. And as an example -- you are right. An  
28 example, National All-Jersey -- I don't know the exhibit



1 number, but USDA produced some charts on spread in  
2 component levels in plants, and I'm sure that was true  
3 then just as it is now.

4 Q. Some above, and some below?

5 A. Yeah.

6 Q. Okay. I like to go to the page 3 of your written  
7 statement, if I could.

8 A. Uh-huh.

9 Q. And on page 3 of your written statement you state  
10 that the proposals -- and I'm assuming you are referring  
11 to Proposals 1 and 2; am I correct there?

12 A. Yes.

13 Q. Okay.

14 -- would require handlers to pay for components  
15 that often do not actually exist in the milk they receive  
16 and have no value even when they do exist.

17 When the current factors were implemented in 2000,  
18 again, as you just stated, there could have been some  
19 Class I skim above and some Class I skim below, when they  
20 were implemented, was it possible then that some Class I  
21 handlers could be paying -- they had lower -- skim  
22 component milk could be paying more than what that  
23 standard was?

24 A. Not on a regulated minimum price basis. They  
25 would be paying on that skim value of that milk, which  
26 would -- is independent of the actual component levels in  
27 the actual milk delivered.

28 Q. But they would -- but there -- they would be



1 paying on a skim price per hundredweight --

2 A. Yes.

3 Q. -- to Class I handlers?

4 A. That's -- that's correct.

5 Q. And regardless of the components of that milk,  
6 whether they were below that standard or above, it would  
7 be the same base price per hundredweight?

8 A. That is correct.

9 Q. Okay. And, again, the rest part of that statement  
10 you state, it says they have no value even when they do  
11 exist. Can you help clarify for -- what you mean by that  
12 statement? Are you saying that skim milk components have  
13 no value in fluid milk?

14 A. They have no added value because standards of  
15 identity doesn't allow you to adjust, so there's no  
16 economic value. Generally, the variations aren't enough  
17 to even be able to change the nutrition facts label. I  
18 mean, it is 8 grams of protein, 9 in California,  
19 generally.

20 And so as far as marketing or yield, it really  
21 doesn't have an impact. And that's -- and that's why it's  
22 been priced on skim, I assume, is because there is no  
23 yield factor.

24 Q. But, again, we go back to my question -- question.  
25 I want to make sure I'm understanding it. Do the skim  
26 milk components have any value in fluid milk?

27 A. They do as long as they meet Federal Order  
28 minimums -- I mean, standard of identity minimums. Above



1 that, the marginal value in fluid milk is -- is actually  
2 pretty minimal.

3 Q. Okay.

4 A. If any at all, because you can't standardize it.

5 Q. Okay.

6 A. Unlike the -- the products you can -- the yield  
7 products you can standardize.

8 Q. Okay. Now, when Federal Order Reform started, the  
9 Class I skim milk price, it was established based upon the  
10 higher of the Advanced Class III or Class IV; is that  
11 correct?

12 A. That is true.

13 Q. Okay. And also, in -- in 2000, the published  
14 Class III and Class IV skim milk values would have used  
15 the component standards that we have just talked about?

16 A. Yeah. The current ones, that is correct.

17 Q. Okay. And, again, can we make the assumption --  
18 again, I'll go back to where I refer to the average  
19 component levels in the Minnesota-Wisconsin. I'm just  
20 going to pick the state of Wisconsin, for example, if the  
21 Minnesota-Wisconsin was a good representative of the milk  
22 there in Wisconsin.

23 Would those published Class III and Class IV skim  
24 prices in the order been pretty close to the average  
25 actual Class III and Class IV skim milk prices?

26 A. I don't think you can know that because that was a  
27 Grade B milk series. That milk was from 100% into  
28 manufacturing plants. It was a relatively small, even by



1 that time, portion of the milk supply, which is why it was  
2 viewed as no longer a valid way to evaluate milk price.  
3 And, again, it went directly into manufacturing plants.

4 From my own personal experience, working with some  
5 of those plants, they did work to attract higher -- higher  
6 solids milk. So the MW probably has some incentives  
7 already built into it at that point. But I think because  
8 of that and because it was B, it wasn't even eligible for  
9 Class I, you can't assume that it had the same levels as  
10 other milk within the state.

11 Q. If -- if you go back to the exhibit that was --  
12 and I don't have -- I apologize, I don't have the number  
13 here, but it's been an exhibit that was included in my  
14 testimony, and also exhibits entered by USDA, that show  
15 the average skim milk component values from 2000 through  
16 2022.

17 Can you recall that?

18 A. Not -- not to the -- to the penny. But generally,  
19 yes.

20 Q. Okay. And, again, without us pulling that exhibit  
21 up, if we looked back about 2000, again, the data  
22 published by USDA as the exhibit, and also what was  
23 contained in -- and I used that -- that table in my  
24 exhibit as well, too, would you -- again, if we pull that  
25 up, that was pretty close to those standards, skim  
26 standards implemented in 2000 reform?

27 A. Back in 2000, I would expect they would be.  
28 Again, I don't want to -- certain because I don't have



1 them in front of me. But, yes, I would expect they were.

2 Q. Okay. And also a part of Federal Order Reform, do  
3 you recall, again, it talked about establishing the  
4 Class I price?

5 A. Yes.

6 Q. Okay. And I am just going to paraphrase from that  
7 reform. You've -- your memory is better than mine. I  
8 don't --

9 A. Oh, I bet not.

10 Q. -- remember the exact language in there. But from  
11 that -- in that reform it talked about a basic premise in  
12 establishing the Class I price would be the manufacturing  
13 milk price plus the Class I differential.

14 A. Yes. I expect it did say that. Again, I don't  
15 have it in front of me either, but I would expect it did.

16 Q. Yeah. And even if we went back -- back further  
17 than that, back when the AMW was started back in the early  
18 '60s, that's been a basic premise of how we established  
19 the Class I price in Federal Milk Marketing Orders.

20 A. It's always had a differential on top of the  
21 manufacturing price, that's correct.

22 Q. Okay.

23 A. To my knowledge.

24 Q. Okay. So I'm going to just use an example here,  
25 so bear with me. Make sure I keep -- I'm going to try to  
26 do my best to keep everything in order here.

27 If we compared -- again, I'm going to use the  
28 state of Wisconsin. All right? Again, you are familiar



1 with Wisconsin. I'm familiar with Wisconsin. Use the  
2 state of Wisconsin.

3 If we had the same product formulas today as back  
4 in 2000, there have been no changes in milk components.  
5 Milk components have stayed the same. There have been no  
6 change whatsoever in dairy product prices. All right?

7 A. Okay. Everything's equal.

8 Q. Every -- every -- everything is equal.

9 And if we assume today that there have been no  
10 change in -- no change in skim milk components today  
11 versus 2000, again, just rounded off numbers, would the  
12 Class III and Class IV skim values be the same?

13 A. To each other or relative over time?

14 Q. I'm leaving everything the same, yeah.

15 A. Well, if there's been no formula change. If all  
16 components were the same, yes, they would be the same.

17 Q. Be the same, okay.

18 And that would be the -- and, again, USDA  
19 published and -- publishes Class III and Class IV and  
20 Class III and IV Advanced at those skim milk component  
21 factors we're talking about?

22 A. That is correct.

23 Q. Okay. Again, leaving everything the same, but  
24 today, again, as you have -- you have testified and others  
25 have testified -- again, I'll use Wisconsin -- milk  
26 component levels have gone up.

27 A. They have.

28 Q. Okay. If everything else is the same, and we just





1 looked at pricing Class III and Class IV skim at test,  
2 where everything else is the same, in a hundredweight of  
3 skim milk, just because the components have gone up, the  
4 price of that hundredweight would have gone up?

5 A. If we did it at test?

6 Q. At test.

7 A. Yes, it would.

8 Q. Okay. All right. Now, I want to give you another  
9 example in -- as you well know, I spent a lot of time in  
10 Florida, and we had to -- because of seasonality, we had  
11 to buy supplemental milk.

12 A. Certainly.

13 Q. Okay. If I had gone to Wisconsin in the year 2000  
14 to buy supplemental milk, I am going to have to pay a  
15 competitive price just to get the milk away from the  
16 plants there.

17 A. Sure. Transportation charges.

18 Q. Right. Okay.

19 And, again, we'll assume, you know, milk component  
20 levels were what the table said back in 2000, so that  
21 would have been my beginning price I would have to pay for  
22 milk, then plus whatever give-up charge I'd have to pay in  
23 freight to get it there.

24 Do you agree?

25 A. Yes.

26 Q. Okay.

27 A. And whatever other market conditions they charge  
28 you. But, yes, basically that's right.



1 Q. Right. But I would start with that base  
2 competitive price?

3 A. Right.

4 Q. Okay. If I go to Wisconsin today to purchase  
5 supplemental milk, and I might have to, purchase  
6 supplemental milk, and with the component level gone up,  
7 would my beginning price, in order to pay a competitive  
8 price, be buying truckloads of milk, would that beginning  
9 price, the starting price increase?

10 A. Not necessarily. It's got a lot to do with the  
11 competition in the spring when they were dumping milk. My  
12 guess they would have been happy to sell it to you. Of  
13 course, you don't need it in the spring.

14 Q. Yeah.

15 A. So I don't think you can -- you can assume that.  
16 It's all -- it is really opportunity cost in that milk.

17 Q. So if I -- if I went in Labor Day or middle of  
18 September when school's open in 2023 when milk is tight  
19 everywhere, you don't think that the competitive price of  
20 milk would be higher because the components have increased  
21 compared to 2000?

22 A. I think -- I don't -- I don't know. And, again,  
23 it's all got to do with opportunity costs of that milk,  
24 and it also has to do with cost of delivery, which I know  
25 is going to be discussed later on in this hearing.

26 Q. Yeah, I'm talking -- yeah, I'm going to take care  
27 of the trucking, so I'm talking about just buying it  
28 there.



1           A.     I don't think you can assume that.  And even if  
2     you can, the yield's the same, and that's what over-market  
3     incentives are supposed to take care of, those  
4     differences.

5           The challenge you have with Class I milk, I don't  
6     care if it is 4% protein, you can't -- you can't add value  
7     for regulated minimum price.  There's no added value to  
8     that milk in yield.

9           Q.     Okay.  I --

10          A.     If you want the true yield --

11          Q.     Excuse --

12                 (Court Reporter clarification.)

13          MR. COVINGTON:  My apologies.

14          THE WITNESS:  What -- what I'm saying is that  
15     it's -- you have to -- you have to look at yield, and the  
16     yield isn't higher.  And so -- and you can't adjust the  
17     components in that milk.

18                 I also know from personal experience that, at  
19     least -- again, we'll have some data on that.  Trust me,  
20     the high protein milk doesn't necessarily stay -- head  
21     south.  There is -- there is -- which makes perfect  
22     business sense.  There is just -- there is differences in  
23     component levels in milk in different markets.

24          BY MR. COVINGTON:

25          Q.     When you just said that the high protein milk  
26     doesn't -- doesn't head south.  If -- if I am desperate  
27     for milk and got to get any kind of milk, are you saying  
28     that that milk might cost me more to attract it away and



1 move it south?

2 A. What I'm saying is that if someone -- for example,  
3 a cooperative is selling you milk and they look at the  
4 relative value of that milk in the cheese plant versus any  
5 other supply, they are -- if it is -- if it makes logistic  
6 sense, they should be segregating that milk and sending  
7 those solids milk south.

8 I know that from personal experience that it  
9 happens. I had the same supplier in a plant in  
10 Indianapolis and a plant in Tennessee when I worked for  
11 Kroger, and the components were consistently lower in  
12 Tennessee, which you would expect, quite honestly, because  
13 they can't pull the component value out of that milk back  
14 into the order. So they -- they will do that.

15 And, again, does that need to be regulated, or is  
16 that a negotiated point? Particularly, from the  
17 standpoint if I'm a buyer in Florida, I don't care whether  
18 the protein is high or not. I just need fluid skim milk  
19 to make my products. And if you have to negotiate that as  
20 far as the give-up -- and we had that back in 2000.  
21 Depends on supply relative to demand in some ways, again,  
22 depending on the time of year and where plants are at.  
23 It's easier in some places to get milk than it used to be;  
24 some places it's harder.

25 But for the most part there's never recent years  
26 been much issue finding milk. I've dealt with that  
27 personally. I have dealt with milk coming into the plant,  
28 and we really haven't seen -- seen issues. The only place



1 we have seen it was effective was organic because a pool  
2 can't provide it. Other than that, the 14 plants at  
3 Kroger, we never had difficulty finding that milk. And  
4 you pay a significant service charge, at least we did, on  
5 most of the milk we bought, and that's to cover those  
6 give-up costs. That's our view. Because the yield simply  
7 isn't there, we -- the protein doesn't help us.

8 Q. You -- you mentioned there at Kroger. When you  
9 were at Kroger and you were in charge of supplying those  
10 plants with fluid milk, did you have your own producer  
11 supply or did you contract with cooperatives to supply the  
12 milk or a combination of both?

13 A. We were 100% cooperative supply.

14 Q. Cooperative. Okay?

15 And, again, I'm not asking for -- for any details,  
16 but I assume if you are 100% supply with a cooperative,  
17 you have a contractual arrangement where that cooperative  
18 supplies your fluid needs or milk needs at a particular  
19 plant?

20 A. Yeah. It is one -- done one of two ways. You  
21 will be very familiar with this. It is either done  
22 directly with the supplier, or if there's a marketing  
23 agency, you work through the marketing agency on price.

24 Q. Okay. And, again, you have been familiar with a  
25 fluid milk plant. The milk needs are not constant seven  
26 days a week. There will be some fluctuation based upon  
27 day of week or sales, season of the year?

28 A. I would add, if you want your even-day receipt



1 credit, it will be even seven days a week. Kroger has  
2 actually put silos in plants in the past to receive milk  
3 on Sundays so they can keep it even because it's a  
4 significant benefit. Again, that's an over-market cost.

5 We think it's very fair that -- that our suppliers  
6 expect even -- even deliveries of milk because it costs  
7 them extra money to balance. If they are higher one day  
8 than others, just labor in a plant, it becomes a  
9 nightmare.

10 So that's -- we believe that's handled in  
11 over-order premiums, and then they build in most markets a  
12 strong incentive for us to -- to take milk evenly over a  
13 week. And we -- at least at Kroger, we track it every  
14 month. It's part of the monthly plant report, how much  
15 even-day receipt monies you give up because you didn't  
16 plan right. We work really hard to do that.

17 Q. And, again, from your background also on the farm,  
18 does the milk production coming off the farm, will it vary  
19 seasonally?

20 A. Yeah. Not as bad as it used to because we have  
21 done a lot with cow comfort. But, yes, there's still  
22 seasonal variation. And it really kind of varies by  
23 region, some places more than others.

24 Q. Okay. And as you referred to earlier, it could  
25 probably vary more in the Southern part of the United  
26 States?

27 A. Yeah. I think with heat and humidity, the  
28 Southern farmers have the biggest challenge in the summer



1 with cow comfort.

2 Q. Okay. So the cooperatives that were supplying  
3 your -- your milk plant, if they had to go a further  
4 distance to get -- to get milk or if they had to go to one  
5 of their manufacturing plants and divert milk from a  
6 manufacturing plant to meet your fluid needs, you probably  
7 wouldn't be aware of that, as long as they met the milk  
8 supply?

9 A. Well, we believe it is built into the service  
10 charge, which is significant. I mean, that's -- that's  
11 part of the negotiation, that cost of delivery into a  
12 plant. It is negotiated as part of the service charge.

13 Q. Okay.

14 A. And if anybody is buying fluid milk without  
15 service charges, they are a better negotiator than me.

16 Q. Okay.

17 A. Because we felt they were fair because there is  
18 cost --

19 Q. Okay.

20 A. -- to bring milk in.

21 Q. Last week in this hearing, Exhibit 53 and  
22 Exhibit 58 were presented, and those were USDA exhibits.  
23 And what they did, they showed for each particular Federal  
24 Milk Marketing Order the source by state of where the milk  
25 comes from.

26 A. Yes.

27 Q. Okay. You're roughly familiar with that?

28 A. I'm familiar with them. I certainly can't quote a



1 number on one.

2 Q. Okay.

3 A. So --

4 Q. If -- if we -- and, again, I'm not asking -- we  
5 can pull them out if we need to, but I think you have  
6 enough knowledge of the numbers to -- to know this. If we  
7 looked at the Appalachian order, Federal Order 5, and the  
8 Southeast order, Federal Order 7, if we could compare the  
9 source of milk in 2000 to -- again, it showed 2022, and,  
10 again, it had it listed by states, would it surprise you  
11 to see that the milk source producer milk for those two  
12 areas, it was coming from more states outside the  
13 geographical area?

14 A. Just based on production of clients in the  
15 Southeast, that does not surprise me.

16 Q. Okay. Because earlier yesterday -- well, in your  
17 written remarks, you made the statement, we were "awash in  
18 milk."

19 Could you de- -- I know there is probably  
20 different definitions of "awash." Could you give me your  
21 definition of "awash"?

22 A. I have absolutely no trouble finding milk anytime  
23 you needed it for a Class I plant.

24 Q. Okay. Okay. And, again -- but, again, if the  
25 cooperative is supplying your plants, and, again, they had  
26 to go further out or if they had to go to a manufacturing  
27 plant and bring milk in, as long -- as long as your plant  
28 stayed full of milk, you probably would not be aware of





1 that?

2 A. Other than our transportation surcharges have gone  
3 up, which we felt were fair because costs have increased.

4 Q. Okay. Would that be a sign that not only  
5 transportation costs have gone up, but milk might be  
6 travel -- travel more distances?

7 A. I think it's a sign that the system outside of  
8 minimum prices works to attract milk, personally. I mean,  
9 basically, that those Federal Order prices are minimum  
10 prices, and charges, what you mentioned earlier balancing,  
11 which is a lot of plants I know is an opportunity --  
12 sorry, opportunities at Kroger work for a problem, I have  
13 to get that out of my -- it can be a problem. But that's  
14 part of -- that's part of that negotiation. And if you  
15 are buying milk in an area that doesn't have enough local  
16 milk, you expect you are going to pay those, at least we  
17 did, because we knew those costs were there.

18 Q. Okay.

19 A. But it doesn't need to be part of the regulated  
20 price. That can be achieved through negotiation, or it  
21 should be.

22 Q. Let's go back to the National Milk Producers  
23 Proposal Federal Order 1. Okay. You testified there  
24 earlier that the current method used in Federal Milk  
25 Marketing Orders in which Class I handlers paid for skim  
26 milk is a price per hundredweight.

27 A. Yes. Skim is per hundredweight under the order.

28 Q. Okay. And is your understanding of National Milk



1 Producers Proposal Federal Number 1, if it was accepted,  
2 would that methodology of paying for Class I skim milk per  
3 hundredweight change?

4 A. It would still be on a hundredweight, but the  
5 price would be higher --

6 Q. It would still --

7 A. -- relative to the component -- to the  
8 manufacturing market.

9 Q. It would still be on a per hundredweight basis?

10 A. In fact, on all -- yeah, on Class I and in all  
11 classes in the skim markets, yes.

12 Q. Same way Class II, III, and IV --

13 A. In the skim --

14 Q. -- in the skim/butterfat markets?

15 A. Yeah.

16 Q. Okay. I want to change here a little bit and talk  
17 about DHIA. You used DHIA as a source of component tests  
18 in your data or your testimony; is that correct?

19 A. Yes, we did.

20 Q. Okay. And had you testified also that you're  
21 familiar with -- with DHIA?

22 A. Since I was a kid, yes.

23 Q. Okay. About like -- probably about like -- about  
24 like me?

25 A. Even a little more because my dad was a DHIA  
26 tester for 25 years.

27 Q. Well -- yeah. Okay.

28 A. Yeah.



1 Q. And do you remember that I also was a DHIA tester,  
2 too?

3 A. That's right.

4 Q. Yeah, that's --

5 A. You had in common.

6 Q. That's what we have in common.

7 A. Yeah, that's right. Yeah. No, he -- I think you  
8 both found better things to do. But, yes, you both were  
9 at one time.

10 Q. Okay. Does DHIA -- I know it's changed a lot  
11 since your father's time and my time.

12 A. Oh, my goodness, yes.

13 Q. Do they have a very -- a variety of plans?

14 A. They do. They have a wide variety, everything  
15 from length of time between samples, to what is sampled.  
16 Of course, now with automated equipment, a lot of the  
17 samples are in line, just like your in-line samples,  
18 moving milk from a bulk tank into a -- into a plant. And  
19 so they have lots of ways, lots of flexibility of doing  
20 that. And they weight them as accuracy depending on the  
21 method, how often, all those kinds of things.

22 But, yes, they -- they -- they have -- they have  
23 had -- they have had to keep up with the technology on the  
24 farm.

25 Q. Okay. And so I -- I or you could participate in  
26 DHIA, and we might have our milk sample pulled every month  
27 at all milkings, or we could elect a plan that only pulls  
28 one milking, or every other month, or there are even some



1 plans that are milk only with no samples pulled; is that  
2 correct?

3 A. That is correct.

4 Q. Okay. And the data that you used and where you  
5 looked at the compar- -- calculated the volume of -- or  
6 estimated the volume of milk in the skim/butterfat  
7 orders -- volume of producer milk that you had DHIA test  
8 on, approximately 40%. Is that --

9 A. Yes. That's correct.

10 Q. -- in one of your tables.

11 When you calculated that, did you include all --  
12 and I -- and I assume in your calculations DHIA is  
13 reported by cows?

14 A. Cows and herd numbers.

15 Q. Cows and herd numbers.

16 And I assume to arrive at a volume, you took the  
17 cows and multiplied times the average production?

18 A. Yes, that's the best -- that was the advice I got  
19 is the best way to do it.

20 Q. Okay. And when you did that, did you include the  
21 entire DHIA enrollment in each area or just those that  
22 were having components pulled and -- or components pulled  
23 every day? Did you make any distinction?

24 A. We did not. But the data -- if you go on the  
25 website, and we have the URL -- lists percent milk tested  
26 for components, and in every single market it is in the  
27 high 90s. So we -- we accepted that as -- as high enough.  
28 And I was surprised how consistent that particular measure



1 was across orders. If you go back to 2000, less so, as  
2 you might imagine. More current times, particularly I  
3 think with butterfat becoming more valuable, pretty much  
4 everyone is pulling some kind of component sample.

5 Q. When you say it was 90% of all DHIA --

6 A. Almost 99 in most markets, in the very high 90s.

7 Q. That was tested for components?

8 A. Right.

9 Q. Did that include whether they were tested one  
10 milking a month or every other month?

11 A. No. It is just based on the herd records in that  
12 farm whether they were pulling samples or not.

13 Q. But it --

14 A. How often they pulled them, we don't know.

15 Q. You don't know.

16 So it could have been one milking a month, and  
17 some could have been two milkings a month?

18 A. That's true.

19 Q. Or some could have been a milking every other  
20 month?

21 A. Yes. That's very true.

22 Q. Okay. Would seasonality have impacted that any in  
23 your results?

24 A. It could, but the sample size is so large, I think  
25 it actually rounds itself out. That would be  
26 statistically looking at the -- just the mass, the  
27 millions and millions and millions of records, our -- my  
28 view putting on my statistics -- statistician's hat, that



1 that's going to measure that out.

2 I think one thing we have to recognize in our --  
3 when you get into the markets outside of the Northeast, we  
4 don't have perfect data anywhere. We picked that because  
5 it was the largest value of data available. It is  
6 supervised, for the most part. It is used for genetic  
7 evaluations. It is used -- it's viewed the most valuable  
8 source of information for herd management genetic  
9 selection. And so we felt it was the best proxy we had.  
10 If we had component data in the Southeast markets, we  
11 wouldn't have to have these discussions, but  
12 unfortunately, that's incomplete.

13 Q. Okay. In order I can understand the source of  
14 data that you used in there --

15 MR. COVINGTON: Your Honor, I have two exhibits I  
16 would like to bring forth, and we have copies of those.  
17 And Mr. Brown, he used data from the Council on Dairy  
18 Cattle Breeding --

19 THE WITNESS: Yes.

20 MR. COVINGTON: -- for his -- his information.  
21 And what I want to present, I went to that same source,  
22 and I went -- pulled data for two states, Arizona and  
23 Florida, two states that basically have their own Federal  
24 Milk Marketing Orders.

25 THE WITNESS: Yes. They're the easiest ones to  
26 use.

27 MR. COVINGTON: Okay. And what this does, it  
28 shows for 2022 the various DHIA programs and the percent



1 of cows or herds under each of those.

2 THE COURT: Okay. We will distribute them and  
3 mark them for identification.

4 MR. COVINGTON: Is it okay if I can give these to  
5 Mr. Brown?

6 THE COURT: Yes. Yes, you may approach the  
7 witness.

8 No objection, I take it?

9 Seeing no objections, you --

10 MR. ROSENBAUM: Your Honor, this is Steve  
11 Rosenbaum. I don't object to his asking questions, but I  
12 don't -- I mean, unless Mr. Brown can independently verify  
13 the numbers, I don't believe that it is appropriate to  
14 have the exhibits entered into evidence without  
15 independent testimony.

16 THE COURT: Well, let's see.

17 Ms. Hancock rises.

18 MS. HANCOCK: I mean, your Honor, this is the  
19 source of his data for his testimony and his Exhibits 98  
20 and 99. If he can't verify it, then we would move to  
21 strike the testimony in those exhibits.

22 MR. ROSENBAUM: Your Honor, Mr. Brown went to the  
23 DHI data source to create the exhibits and information  
24 that he's used in his testimony, and that provides the  
25 necessary verification of its accuracy that he did it  
26 himself. But the distinction here is -- is that hasn't  
27 been done here. I'm not saying there isn't somebody in  
28 this room, maybe it is Mr. Covington, who could verify the



1 information, but I don't think it's Mr. Brown.

2 THE COURT: Well, let's see where we go with this.

3 And I'd ask the witness whether he can verify the  
4 information I suppose.

5 THE WITNESS: If you were to go -- I'm sure Calvin  
6 did this, Calvin worked in genetics a long time before he  
7 worked with milk -- if you go to this website and do a  
8 query, my guess is that, yes, you could pull this data  
9 from the same website reference that we have. It might be  
10 good to have that reference on here, the URL. But I --  
11 again, I haven't checked it, but I'm -- I believe that you  
12 could find this information there.

13 MR. COVINGTON: Well, your Honor, actually,  
14 Mr. Brown through his testimony, if I remember, you've got  
15 reference to those web -- that website in your  
16 testimony --

17 THE WITNESS: Yes.

18 MR. COVINGTON: -- and that helped -- helped me  
19 find it.

20 THE WITNESS: Yes. Well, I'm glad it was -- I'm  
21 glad somebody already used it.

22 MR. COVINGTON: You have helped me over the years  
23 find a lot of things, so I appreciate it.

24 THE WITNESS: Well, it's been very mutual, Calvin.

25 MR. COVINGTON: Okay. Your Honor, is it okay if I  
26 keep going?

27 THE COURT: Yes. I think we should -- unless  
28 you're just using this -- so the witness can look at it,





1 and you don't want us to look at it, I think we should  
2 identify the exhibit. I think we're up to Exhibit 100.  
3 You have got two exhibits, so --

4 MR. COVINGTON: I have got Arizona and one for  
5 Florida.

6 THE COURT: Okay. Has this document been  
7 distributed? I don't have a copy, I don't think.

8 MR. COVINGTON: The Judge needs a copy.

9 THE COURT: Okay. Do you have -- all right.  
10 Let's mark -- I see. Okay. Exhibit NMPF-97, top  
11 right-hand corner, let's mark that Exhibit 100 for  
12 identification. And top right-hand corner, NMPF-98, let's  
13 mark that as Exhibit 101 for identification.

14 (Thereafter, Exhibit Numbers 100 and 101  
15 were marked for identification.)

16 THE COURT: Okay. You may continue.

17 MR. COVINGTON: Okay. Thank you, your Honor.

18 BY MR. COVINGTON:

19 Q. Mr. Brown, I'm just going to -- both these are  
20 similar, just two different states. I'm just going to go  
21 to Florida.

22 A. Okay.

23 Q. And if we go over to the -- one, two, three, four,  
24 five -- at the far right, again, this is 2022, come off  
25 the Council of Dairy Cattle Breeding, down at the bottom  
26 it shows 27,843 cows. Do you understand that would be the  
27 cows enrolled in DHIA?

28 A. That would be my understanding, yes.



1 Q. Okay. And, again, you would know these numbers  
2 pretty close. If I told you that in 2022 there was about  
3 90,000 dairy cows in Florida, would you feel pretty  
4 comfortable with that number?

5 A. I would because I could go check it, so -- I don't  
6 know how many cows, but I would say that could be the  
7 case, yes.

8 Q. Okay. So if we do the division there, a little  
9 less than a third of the cows in 2022 in Florida were  
10 under some type of DHIA program?

11 A. That would be true, yes.

12 Q. Okay. All right. And down at the far left-hand  
13 side under where it says plan tag, those are the different  
14 types of DHIA programs?

15 A. Right.

16 Q. Okay. And, again, you well know, like DHIA, I  
17 sort of consider that the full blown program where all  
18 milk is weighed and all samples are taken?

19 A. It's got the highest reliability rating of their  
20 plans.

21 Q. Okay. Yeah. Supervised and so forth?

22 A. Right.

23 Q. And could you read on there of the cows or percent  
24 in Florida that had the full program, supervised  
25 components taken every day, up at the top, under  
26 percentage?

27 A. It's 1664.

28 Q. Okay. Out of the 27,000 cows?



1 A. Yes. But that doesn't mean there isn't other  
2 accurate data on this sheet. That's the one that uses the  
3 full program that tends to be a lot of times herds that  
4 marketing genetics use that program.

5 Q. Yes. Well, I'm getting there?

6 So if we come down to DHIA-APSC, do you recall --  
7 again, if you go -- you -- again, you can look that up.  
8 That includes for all milk is weighed less than all milk  
9 is sampled? That would be the highest number on there?

10 A. Yeah, that's AM/PM component sampling, which means  
11 you take a sample once a day.

12 Q. So you would have a sample?

13 A. Twice a day --

14 Q. You would have --

15 A. -- one sample per day, per cow --

16 Q. And so you actually get --

17 A. -- number of milkings.

18 Q. Excuse me. You actually get one sample a.m. one  
19 milk in one month, p.m. sample the next month?

20 A. Yeah. That's been around a long time. That's  
21 correct.

22 Q. Okay. And then if we come on down there to the  
23 bottom, DHIA-SS-APSC, that is where all milk is weighed,  
24 they test for somatic cell counts, but no milk components?

25 A. Right.

26 Q. You see that one?

27 A. Yeah. MO means milk only.

28 Q. Yeah. And in your calculations, I won't go



1 through every state, you got the same thing for Arizona.  
2 Again, I picked two states where the orders were within  
3 the states. Of the 27,000 cows in Florida, what -- what  
4 number -- what numbers did you use in your calculations?

5 A. I used the full number.

6 Q. 27,000?

7 A. Yes.

8 Q. So it could include some cows that were -- did not  
9 have milk components?

10 A. Yes. They had lactation information. And, in  
11 fact, I just added them up. It's around 2900 and some  
12 that don't have MO's.

13 Q. Okay. All right. And, again, I just wanted to  
14 clarify what you used in your -- in your number. And  
15 this -- let's go to Arizona.

16 And we look on Arizona, in 2022, we see a total of  
17 42,973 cows in the program. Do you see that cow count?

18 A. 42,973.

19 Q. Yes.

20 A. Yes.

21 Q. Okay. And if I told you there was about 195,000  
22 cows in Arizona, would you think that's fairly close, that  
23 number?

24 A. If that's what -- if that's what NASS says, that  
25 would be the number.

26 Q. Okay. So you can do the division, and we can see  
27 what percent is there.

28 A. Yeah. It's a lower percentage.



1 Q. Okay. And in your number for Arizona and did your  
2 calculations, did you include that 42,000, the total  
3 number there?

4 A. Yes.

5 Q. So it could include some samples that were not  
6 tested both milkings every month?

7 A. Oh, yeah. That's actually the most common testing  
8 in every state I think now.

9 Q. Okay. All right. One more thing on the DHIA and  
10 on the data. Can you explain the DHIA process of how they  
11 collect the milk sample, then how it ends up becoming an  
12 average?

13 A. They collect -- again, they -- let's start with  
14 full regular DHIA testing. They take however many times  
15 those cows are milked. They take a sample each milking,  
16 and they weigh it each milking, and they combine the  
17 samples. That is -- and that's once a month.

18 And then the other ones, depending if it's one  
19 milking again, again, a.m. or p.m., they use that to  
20 estimate the daily production. And, again, use it  
21 to estimate daily component production. And they go a.m.,  
22 p.m., to try to take out any balance -- imbalances there  
23 may be there.

24 And then they use those numbers to estimate a  
25 production for lactation, that one data point per month or  
26 every two months or whatever it might be. And to do  
27 that -- and you are going to correct me on this because  
28 I'm probably wrong -- but they look at the previous month,



1 current month and take a median to figure out what they  
2 estimate that average production's going to be. It's not  
3 as simple as just, she gave 50 pounds, and so for the next  
4 30 days we give her 50 pounds. It is a little more  
5 sophis- -- particularly with the genetic evaluations, it's  
6 more sophisticated than that. That's my understanding.

7 Q. Okay.

8 A. And it actually has changed a little bit over the  
9 years. Back from -- my dad used to do the records by hand  
10 in a lab in the back of the house. It is a little more  
11 sophisticated than that now.

12 Q. Yeah, I'm familiar with that.

13 But we compare that, arriving at a component  
14 sample, when it comes to producer milk, Federal Milk  
15 Marketing Orders, we're dealing with truck driver getting  
16 a load of milk, pulling a bulk sample, and testing the  
17 total bulk, the components in the total bulk sample,  
18 versus individual cow samples?

19 A. Yes, we are.

20 But if you are in a component order, there's no  
21 reason to look at this data. The average -- the average  
22 component test in -- under DHI in the component orders is  
23 about 3.39. It is accurate. It is very much in alignment  
24 with this.

25 In these -- in these markets, we do not have full  
26 data, and we're making some estimates in what we believe  
27 were probably not the best assumptions. And so I think  
28 it's an unknown. I think -- which, again, makes the



1 argument why if you want to value milk, and particularly  
2 for Classes II, III, and IV, we have to look at the actual  
3 component values in the milk to keep it competitively  
4 fair. But regardless how producers are paid, you have to  
5 keep that cost of milk -- minimum cost of milk the same  
6 across all operations.

7 Q. In 2000, when the current standards were  
8 established, did we have data from all over to set those  
9 standards?

10 A. Not all over, no, we wouldn't have that -- well,  
11 we had some orders with component pricing but nowhere near  
12 the number we do now.

13 Q. But, again, as you testified earlier, there could  
14 have been some milk below that standard, and some milk  
15 could have been above that standard set in 2000?

16 A. Yes.

17 And just so you all know for a proxy, Calvin, I  
18 did not include 2000 data in the DHI because they were  
19 still using total protein. That didn't change officially  
20 until 2001. So that's why 2000 is not in any of the  
21 comparisons.

22 But, again, if you even take USDA's own component  
23 data for -- for 2000, the numbers aren't as far off as you  
24 think that they are. They are closer to the estimates  
25 than maybe we give them credit for being. I'm not saying  
26 they are lower, but I am saying that sometimes -- some  
27 orders, the minimums are actually below 3% on protein. So  
28 they certainly can be lower.



1 Q. I'd like to go back to your written testimony on  
2 page 37, the last sentence on that page -- or last two  
3 sentences.

4 A. I'm there.

5 Q. Okay. And I'm just going to read that: "The  
6 federal order system has never embraced NMPF's and NAJ's  
7 position that Class I prices should reflect increases in  
8 nonfat milk components. Had the order system done so, the  
9 regulations would have provided that Class I prices would  
10 automatically increase with increased nonfat milk  
11 component levels."

12 Did I read that correctly there?

13 A. Yes.

14 Q. Okay. To the best of your knowledge, does the  
15 Federal Order have provisions that calls for automatic  
16 adjustments in anything?

17 A. No. That's why we have a hearing.

18 Q. Okay.

19 A. Other than -- other than calls, they can do that  
20 on their own. But anything pricing-wise, I believe, all  
21 has to be done through a hearing.

22 Q. Okay. And if I'm understanding this, since it was  
23 not automatic in 2000, that is one of your arguments why  
24 Proposal 1 or 2 should not be accepted, that if -- if the  
25 Department embraced it, they would have made it automatic?

26 A. Yes. And if you look at every component order  
27 decision before order reform, the same view was taken. So  
28 even though that was different because we had -- we had MW





1 with those days. But there's never been discussion of  
2 adjusting components on Class I.

3 Q. Okay.

4 A. To my knowledge, at least, not in decisions.

5 Q. Does your position on automatic adjustments apply  
6 to all Federal Order provisions, that we should not make  
7 changes in Federal Order provisions unless they were  
8 automatic?

9 A. No. We have a hearing like this to do that. This  
10 is the -- if that was -- if that needed to be adjusted,  
11 this is our opportunity to decide that. It doesn't --  
12 it -- I think -- I'm perfectly fine with that. We do  
13 adjust some things automatically, like the prices, because  
14 they are based on cost surveys. And, you know, again,  
15 we're looking at should those be changed. We're looking  
16 at should those -- some of the calculations be changed,  
17 should the makes be changed. That's all done, from my  
18 understanding, through the formal hearing process, unless  
19 Congress gets in the middle of it.

20 So what we -- what we have is what we have. And  
21 USDA -- I think the California hearing is a good  
22 example -- does tend to look at precedent when making  
23 decisions, which it keeps things consistent. I think  
24 that's a good way to look at things. If there's enough  
25 reason to change, it can change.

26 I get back to, on this case, if a Class I plant  
27 can't make money with those extra components because they  
28 aren't even allowed to adjust them and they can't even



1 change their nutrition labels, then it is kinda hard to --  
2 to justify why it has added value, other than to say that  
3 it does -- because it adds more value to a cheese plant or  
4 a powder plant doesn't necessarily mean it adds more value  
5 than a fluid plant.

6 Q. Going back to your support of automatic  
7 adjustments. If the Department would approve and  
8 implement Proposal 1 and 2 -- and I'm sure you are  
9 familiar, it does have an automatic adjustment --

10 A. Three years kind of a conditional adjustment, yes.

11 Q. Okay. If the Department did implement Proposal 1  
12 and 2, would you support future automatic adjustments?

13 A. I would support -- consider supporting anything  
14 once you get the standard of identity changed so a Class I  
15 processor can actually get value out of those components.  
16 Until they -- they -- until they can, I can't support it  
17 in any way, shape, or form personally.

18 Q. But you do support automatic adjustments in other  
19 Federal Order provisions?

20 A. I -- I support them in price calculations because  
21 they are all -- they are formula based, and they are all  
22 yield based. But this is a change in formula. So if I  
23 don't support the premise to change it at all, I can't  
24 very well support the automatic adjustment, and I don't.

25 Q. Okay. I would like to go to your PowerPoint,  
26 which is Exhibit 99. And if you will bear with me as I  
27 turn through here. I just have some questions on a few  
28 pages as we go through here.



1 On page 8, and you let me know when you get there.

2 A. I'm there.

3 Q. Okay. The middle sentence, and help me here,  
4 five-year increase per hundredweight ranges from 40 to  
5 \$0.80 per pound. Could you help explain that? We talked  
6 about the five-year increase per hundredweight. But rate,  
7 is that 40 to \$0.80 per pound of --

8 A. It should be -- boy, found another correction --  
9 hundredweight. That should be --

10 Q. That should be hundredweight?

11 A. Yes. The Class II, the Class III, and IV prices  
12 variations for five years is \$0.40 on II and IV, and it is  
13 \$0.80 on III.

14 Q. Okay. Thank you for clarifying that.

15 A. Thank you for --

16 Q. Okay.

17 A. There are several people in here I should have had  
18 read this ahead of time. They are finding our mistakes.  
19 So thank you, Calvin.

20 Q. Let's go to the next page, page number 9. And  
21 these are questions for clarification.

22 On your first table there, Proposals 1 and 2, skim  
23 adjustments for Class II, III, and IV, and you've got  
24 dollar values there for each class in every year. There's  
25 no unit there. Is that dollars per hundredweight?

26 A. Yes, sir. Yes, it is.

27 Q. That's dollars per hundredweight. Okay.

28 And then on that second set of Proposals 1 and 2,



1 Class II, III, and IV impacts, the second set there, I'm  
2 going to come on down to the four skim/butterfat orders,  
3 and where you calculated the total Class II, III, and IV  
4 difference.

5 A. Okay.

6 Q. When you made that calculation, did you assume  
7 that all Class II, III, and IV milk market -- producer  
8 milk marketed in those orders would receive the minimum  
9 Class II, III, or IV skim price?

10 A. I did. I assumed all milk that would be pooled  
11 under that order would be -- minimum price would be based  
12 on the order provisions which are skim. So these are  
13 based on deliveries of skim milk into the four fat/skim  
14 orders. That's where these numbers come from. That's the  
15 number I used to calculate this value.

16 Q. Okay. Again, I'm just going to use an example of  
17 Florida. Almost all the milk in Florida is marketed by a  
18 cooperative. And as you referenced earlier, there is  
19 seasonal production in Florida. There's times of years we  
20 have more milk than is needed, times of year we have not  
21 enough milk. And no manufacturing plants down there, and  
22 the manufacturing plants that there are, they are not  
23 pooled. And many times we have to -- we would pool that  
24 milk and divert it, but we would not receive Class II or  
25 III/IV price for it.

26 Are you aware of situations like that that take  
27 place?

28 A. Happens across the country. All types of orders



1 can have that happen, yes.

2 Q. But in your numbers here, in my example, if we had  
3 diverted milk to a non-plant -- non-pool plant, but it  
4 pooled it and got well below the Class II or III or IV  
5 price, would that still have been included?

6 A. This is based not on the market price, this is  
7 based on the regular minimum price. So the assumption I  
8 think is correct is if there was reported X pounds of milk  
9 pooled in Class II skim within a market, that's where the  
10 values come from. This is not the market value. This is  
11 the regulated minimum value based on reported poolings.  
12 So there could be a lot more milk sold to Class II plants  
13 that wasn't pooled. We don't have that data. And, again,  
14 we're talking about the regulated part of the market here,  
15 so this is using the data that we have that is from  
16 regulated sales.

17 Q. But, again, if we had pooled that milk and  
18 diverted it, yes, we would report it to the order at the  
19 regulated price, but our actual dollars that we'd receive  
20 for it could have been less?

21 A. Yeah, but that's true anyway. That's -- part of  
22 that's balancing. Part of it -- another good example is  
23 what's cream -- on the fat side, what's cream worth versus  
24 the regulated minimum price. If you are in a cream  
25 surplus market, it's usually worth -- you don't make money  
26 on cream. If you are in Wisconsin, you probably make  
27 money on cream. It really depends where you are located.  
28 And I assume skim's probably the same way.



1 Q. I would like to go to slide number 12.

2 A. Okay.

3 Q. And this is the one you corrected from 2020  
4 through 2202, DHIA average protein in the skim?

5 A. Yes.

6 Q. Okay. And then we come down toward the bottom,  
7 proposed formula nonfat solids, 9.41. I'm assuming you  
8 used the number from Federal Order 1 and -- Proposals 1  
9 and 2 to get the 9.41?

10 A. Yes.

11 Q. And can you recall from Proposals 1 and 2, that  
12 9.41 is based on what year?

13 A. 2022.

14 Q. Okay. So that's 2022 number, but you're comparing  
15 it to the three-year average?

16 A. Yes. Because there's variation both up and down  
17 with those three years. That's why we did that. I could  
18 have picked one year. Florida particularly -- was  
19 different. Florida had a lot less milk on test than DHI  
20 actually in the last year for whatever reason.

21 Q. Okay. Table number 19.

22 A. Yes, sir.

23 Q. Okay. On the first table there, NMPF skim  
24 proposal adjustments, again, for clarification, are those  
25 numbers per hundredweight?

26 A. Yes, sir.

27 Q. Okay.

28 MR. COVINGTON: Okay. Well, Mr. Brown, I



1 appreciate your answering my -- my questions.

2 And, your Honor, this is all I have for now,  
3 unless under further questions if something came up  
4 related. Okay.

5 And could we ask that, again, Exhibits 100 and 101  
6 be admitted?

7 THE COURT: Well, normally, I would wait until  
8 redirect, you can get some challenge on redirect on that,  
9 or further cross.

10 MR. COVINGTON: Okay.

11 THE COURT: No exhibits for the witness have been  
12 admitted yet.

13 MR. COVINGTON: Okay. That's all I have.

14 CROSS-EXAMINATION

15 BY DR. VITALIANO:

16 Q. Peter Vitaliano from National Milk Producers  
17 Federation.

18 Good morning, Mr. Brown.

19 A. Good morning.

20 Q. You have -- you know that the U.S. dairy industry  
21 is a bit of a small world --

22 THE COURT: Sir, Mr. Rosenbaum rises.

23 DR. VITALIANO: Oh, sorry.

24 MR. ROSENBAUM: We have been going for about an  
25 hour and a half. How much cross do you have? Is now a  
26 good time to break?

27 THE COURT: Good point.

28 How much cross do you have? Is now a good time



1 to --

2 MS. HANCOCK: It will be short, your Honor.

3 DR. VITALIANO: Maybe 15 minutes.

4 THE COURT: I'm sorry, Ms. Hancock, what did you  
5 say?

6 MS. HANCOCK: I just said I think it will be  
7 short.

8 THE COURT: Let's do this and then take a break.

9 DR. VITALIANO: I'm fine with that.

10 BY DR. VITALIANO:

11 Q. You know the U.S. dairy industry has got to be a  
12 bit of a small world when you get to be cross-examined on  
13 the same morning by two former bosses and a former  
14 teacher?

15 A. Well, you have to wonder. And a former roommate  
16 who is now a top line animal nutritionist at Cornell.  
17 Yes, it is a small world. Definitely is. But it is kind  
18 of intimidating being interviewed by your old bosses.

19 Q. You have mentioned several times -- and,  
20 therefore, apparently think it is a key issue -- that  
21 National Milk's Proposal 1, and by extension Proposal 2,  
22 would require some processors, particularly in the  
23 fat/skim order, to pay for components in milk at rates  
24 above the actual average component levels in milk in their  
25 area; is that correct?

26 A. Yeah. And that's because they used a divisor on  
27 skim, it's a higher number than it would be in a MPC  
28 order.





1 Q. And the way you have done -- the way you have done  
2 that is illustrated, for example, in your PowerPoint,  
3 Exhibit 99, page 12, where for protein you show the -- as  
4 Mr. Covington pointed out -- the 3.39%, which is based on  
5 2022 numbers. And --

6 A. Right.

7 Q. -- I'm aware of your concern about the estimates  
8 and the fat/skim orders --

9 A. Yes.

10 Q. -- given the volume of milk, that's probably not  
11 going to have a huge impact. And you compare that to the  
12 2022 averages in those fat/skim orders.

13 Are you aware that National Milk's Proposal  
14 Number 1 contains in its implementation mechanism  
15 substantial lags in -- in -- when these, you know,  
16 component changes would occur?

17 For example, the initial one, which we are  
18 proposing based on 2022 averages, would probably not  
19 be imp- -- you know, the order would probably not come  
20 into effect until maybe 2025, and then we have a proposed  
21 12-month implementation lag. So by the time those 2022  
22 averages would come into effect would be maybe 2026.

23 And the subsequent adjustments that we propose  
24 would occur only every three years and would be based upon  
25 a trigger level that would -- they would not come into  
26 effect unless the increase was fairly significant. So,  
27 for example, the next one, the 2022 numbers would likely  
28 start coming into effect 2026, 2027, 2028, and then



1 possibly another increase would be triggered and come into  
2 effect 12 months after that.

3 Let me direct your attention to your Table 3,  
4 page 23 of your written testimony, Hearing Exhibit 98,  
5 particularly the column second from the right, on the  
6 average protein tests from -- in the fat/skim orders,  
7 showing a fairly significant increase from 2020 to 2029.

8 Do you think it's possible that given those  
9 implementation lags, the fact that the increased component  
10 test levels in milk would probably be something like four  
11 years old by the time they would be implemented and -- you  
12 know, initially, and then in subsequent --

13 A. Well --

14 Q. -- increases, that given the continued -- the  
15 likely continued increase in component levels, by the time  
16 those lagged actual component tests -- you know, verified  
17 component levels would come into effect, that problem that  
18 you indicated of processors having to pay for milk at  
19 component levels that are less than what they have to pay  
20 for, would either be ameliorated, if not -- or minimized,  
21 if not even eliminated, given just that dynamic of how the  
22 implementation would take place?

23 A. On II, III, and IV, if you priced on components,  
24 it is a non-issue --

25 Q. Right.

26 A. -- because it's accurate. This is still  
27 estimates, you're still assuming every processor, II, III,  
28 and IV in those four orders, is getting milk that averages



1 those numbers. There's no seasonality, which we all know  
2 that there is. And it's simply not accurate. You can  
3 solve the accuracy problem by pricing on components  
4 regardless of how you reblended producers, having  
5 manufacturers pay on yield. On Class I it's irrelevant  
6 because I don't care what those tests are, until we change  
7 the way you can manage Class I milk, there's no yield  
8 value. So it is -- it is what it is.

9 So that's -- that's our take. I think if -- it's  
10 always good to update things, as long as they are  
11 relevant. But my concern is the basic premise that we use  
12 averages to price skim milk that are based on, primarily,  
13 if you weight average, on northern component orders that  
14 don't take into account variability, and as a result of  
15 that, and certainly seasonality, don't reflect minimum  
16 values. And they are not competitive with the values that  
17 the folks at MCP orders pay because they are based on --  
18 they are the same. Protein is the same in California as  
19 it is in Maine.

20 Q. I just wanted to point out and see if you would  
21 acknowledge that your comparison, contemporary comparison,  
22 so to speak, on page 12, is a little bit -- a little bit  
23 misleading given the fact that the components are  
24 increasing significantly and Proposal 1 contains a lag  
25 adjustment mechanism in all cases?

26 A. We did it because they bounce back and forth. We  
27 did not intend it to be misleading. And if you may  
28 recall, your original proposal was three years. So we did



1 a lot of analysis early on three years and then have it  
2 become a year. So you can look at 2022, and you can look  
3 at that, and if you want to use those comparisons, you  
4 certainly can. But --

5 Q. My final --

6 A. -- that's the way it was done.

7 Q. Okay. Thank you.

8 My final question is a little bit of a subtle one.  
9 Going back to page 9 in Exhibit 99, the PowerPoint. The  
10 right-hand -- the left-hand table where you calculate for  
11 the ten years, 2013 to 2022, you show increases in the  
12 Class II, Class III, and Class IV prices per  
13 hundredweight, as is pointed out, and you summarize them  
14 in an average five-year average and ten-year average.

15 Could you explain -- just pick any one of those  
16 cells and explain how you calculated it.

17 A. I calculated it by using your new formula,  
18 subtracting from the current values, and that's -- is --  
19 is the difference. And I used the Advanced Class III and  
20 IV component values to determine hundredweight.

21 Q. Similarly.

22 A. Yeah. I think kind of the way we read your  
23 proposed language is how we tried to do it.

24 Q. Right. In other words, it was what I tend to  
25 refer to as a simple arithmetic calculation.

26 A. Hopefully.

27 Q. Okay. Now, you have told me about several  
28 occasions, perhaps even proudly, that you are not trained



1 as an economist, but I know your capabilities and your  
2 skills. And I assume that you are familiar with how  
3 economic policy analysis is conducted, and you carry the  
4 title of chief economist. And in my opinion, you have --  
5 definitely have the skills to be considered an economist,  
6 and a very good one.

7 A. Oh, you started it all, Peter. It is your call.

8 Q. Even though you don't claim that specifically, is  
9 it possible that one could look at your table on, for  
10 example, page 9, and a similar one on page 19, and look at  
11 all of those increases over the years and look at the  
12 five-year average, and then go back to page 8, look at  
13 that phrase five-year increase per hundredweight ranges  
14 from 40 to \$0.80 per hundredweight now, and infer that if  
15 Proposal 1 was in place during all those ten years, that  
16 increase, \$0.40 per hundredweight in Class II, 40 in --  
17 well, in this case, \$0.42 for Class II and Class IV, and  
18 \$0.80 in Class III, that those would be sustained  
19 increases over a ten-year period if, in a thought  
20 experiment, Proposal 1 was in place for all ten years?

21 A. Yes. I mean you could -- one way you could look  
22 at this is go back and say, what if they had done it every  
23 three years, and those numbers would be different because  
24 your base would be different --

25 Q. Yeah.

26 A. -- proposal. It could.

27 We used your proposal. Again, this is not even  
28 saying the milk is worth more or less than this. This is



1 what the difference in regulated minimum cost would have  
2 been if we had that proposal. We coulda also projected  
3 tests based on trend ahead, what those would look like.  
4 We did not do that. We didn't think that was relevant for  
5 this analysis.

6 And I ran out of time, Peter, or I could get it  
7 done.

8 Q. Well, for the sake of my -- my question, let's  
9 assume that you -- that you are just looking at a thought  
10 experiment where the 2022 -- that the increases from  
11 current to the 2022 numbers were in place in all of those  
12 ten years. So I'm not worrying about technically what  
13 would have happened.

14 A. Right.

15 Q. But that isn't it the case that sort of a standard  
16 method for economic policy analysis is not to just do  
17 simple arithmetic calculations, particularly when you are  
18 looking at impacts over time, you are trying to project  
19 them into the future, where you take into account  
20 adjustments in supply and demand.

21 For example, a price increase of the magnitude you  
22 have here would stimulate an increase in production,  
23 perhaps a very slight reduction in demand, although that's  
24 another issue that will be addressed by an expert witness  
25 later on, and that that would result in a reduction in  
26 price, and that things might tend to approach equilibrium.

27 So that claiming that if those higher component  
28 levels were in place for all those ten years claiming that



1 the price increase would -- or implying that the prices  
2 would actually increase and not adjust through economic  
3 forces throughout that whole period. And, again, by  
4 saying the five-year increase per hundredweight ranges  
5 from \$0.40 to \$0.80 per pound -- excuse me -- per  
6 hundredweight, that kind of would imply to a casual reader  
7 that that would be a sustained economic effect if --

8 A. This isn't a table of economics, this is a table  
9 of algebra.

10 Q. Good. That's --

11 A. That's what it is.

12 Q. That's what I wanted to know.

13 A. We are not saying whether those new prices are  
14 right or wrong specifically in this table, we're just  
15 saying that's what the minimum pool would look like if you  
16 used the five-year averages over those years.

17 Q. Algebraically?

18 A. Yes, that's what it is. I didn't get fancy Excel  
19 on this one. This is just simple algebra.

20 Q. Yeah. I think it could be challenged if that's --  
21 that would be what the pool might look like one year at a  
22 time.

23 A. Yes. And that's exactly what it is.

24 Q. Okay. Just wanted to get you to clarify that  
25 there's no economic impact in that table.

26 A. Oh, but there's plenty of economic impact, but  
27 maybe not in that table.

28 Q. Okay. Thank you.



1 DR. VITALIANO: No more questions.

2 THE WITNESS: Thank you. Hopefully my two bosses  
3 are not going to fire me now that I have talked to them.

4 THE COURT: It's been suggested we take a  
5 ten-minute break, I guess. Let's do that. Let's come  
6 back at come back at 10:00, 10 o'clock.

7 (Whereupon, a break was taken.)

8 THE COURT: Back on the record.

9 Is there further cross for Witness Brown?

10 Mr. Miltner.

11 MR. MILTNER: Thank you, your Honor.

12 CROSS-EXAMINATION

13 BY MR. MILTNER:

14 Q. Ryan Miltner representing Select Milk Producers.

15 Good morning, Mr. Brown.

16 A. Good morning.

17 Q. I want to start with Table 3 of your written  
18 statement, Exhibit 98. It's page 23. I had a lot of  
19 questions about this that Mr. Covington addressed, so I  
20 won't try to go over those again.

21 I did have a question about footnote 1, though.  
22 Can you explain what -- what you intended by that  
23 footnote?

24 A. The footnote is, is that we didn't try to divide  
25 up the states. We just assigned states based on wherever  
26 they provided the most milk into any specific order.

27 Q. So -- so all of the state of Florida is in --

28 A. Florida.





1 Q. -- is in number six -- the column for Federal  
2 Order 6?

3 A. That is correct.

4 Q. And I assume, likewise, all of the milk for  
5 Georgia would be in Federal Order 7; you did not attempt  
6 to break out a portion of the Georgia milk that might be  
7 pooled in Florida?

8 A. No, I did not. If I had another month before the  
9 hearing, I might have, but I didn't get the chance to get  
10 that done.

11 Q. I would suggest expanding the hobbies and the  
12 spare time, but that would be a criticism of myself too.  
13 If I had more time, I would be doing similar things.

14 Okay. So let's look at the Federal Order 6 column  
15 on that table. The -- if I look at years 2005 through  
16 2010, 2013, 2015, 2017 through 2020, skim protein is below  
17 3.1%, right?

18 A. Yes. That would be true.

19 Q. And these are averages, correct?

20 A. Yes.

21 Q. And so it is not a median, but half the milk is  
22 above that and half the milk is below that?

23 A. That is correct. They are simple averages.

24 Q. And so base Class I skim assumes that that protein  
25 is 3.1% today, correct?

26 A. That is true.

27 Q. And so take 2020, for instance, there at 2.99.  
28 Class I handlers in your estimation are paying for 11



1 points of protein that's not in their milk actually,  
2 correct?

3 A. Based on DHI data, that is correct.

4 Q. And because it's an average, in some cases it  
5 could be significantly lower, or at least lower?

6 A. Yes. Certainly seasonally it would be.

7 Q. And because they are averages, these numbers on  
8 Table 3, you would expect that at least in some months the  
9 same thing is occurring in the other fat/skim orders, 7  
10 and 5 and 131?

11 A. I would be -- I would be picking that market. Be  
12 very surprised if there weren't significant seasonal  
13 differences.

14 (Court Reporter clarification.)

15 THE WITNESS: Yeah, what I -- yeah, what we would  
16 expect, that you'd see the same seasonal variations in any  
17 of those markets because the data we had was simple annual  
18 averages. So, yes, they would -- they would move up and  
19 down.

20 BY MR. MILTNER:

21 Q. And you said this in your testimony. I hope I got  
22 it right because I loved it. You are a purist on yield;  
23 did I get that correct?

24 A. That's made me a good living, yes.

25 Q. And when it comes to Class I, the yield is simply  
26 a volumetric number, right?

27 A. Yes. It is just skim pounds.

28 Q. So except for perhaps a really unique case like



1 Fairlife, which we could spend days talking about that, it  
2 really is just simply a gallon, regardless of the content?

3 A. Except for the unique highly protein fortified  
4 milks, which are popular but of a small share of total  
5 sales, it would make no difference, that is correct.

6 Q. Small but growing?

7 A. Well, hey, I'm doing my best to help you.

8 Q. Okay. So whether the milk received by the Class I  
9 handlers is 2.98 or 3.1 or, if you look at Order 126,  
10 3.57, the yield by volume is the same?

11 A. That is correct.

12 Q. And the yield is the same whether the base price  
13 would assume 3.1% or 3.39%?

14 A. Yes.

15 Q. And if we're talking about Class IV, the same,  
16 whether nonfat solids are 9 or 9.25 or 9.41, it doesn't  
17 matter, correct?

18 A. That is correct. In skim, it doesn't matter.

19 Q. I want to -- I want to take up a slightly  
20 different topic, and that is the base price. So before  
21 the USDA adopted multiple component pricing, we used a  
22 basic formula price, correct?

23 A. Yes.

24 Q. Okay. That still predates me, so I could tell you  
25 what I think it is and ask if you agree or not. But I  
26 would rather just ask, what did the basic formula price  
27 represent?

28 A. Basic formula -- oh, boy. You know, that's



1 23 years ago, 24. Basic formula price -- my memory is not  
2 that good, especially lately. The basic formula price was  
3 based on the survey. It had adjustments to try to keep it  
4 contemporary. But it was a survey Grade B price that was  
5 adjusted to try to reflect -- reflect market. There's  
6 others here that are more expert on that than me. I mean,  
7 my job in the '90s was to try to get rid of it because we  
8 didn't think it was accurate.

9 So that is -- so it was a -- it was a non- -- it  
10 was basically survey price. So it wasn't standardized --  
11 or maybe it was. I mean, it wasn't -- it was simply a  
12 price -- for example, it was -- fat was adjusted to 3.5  
13 regardless of how much fat actually went into Grade B  
14 plants that bought milk. But that was the primary  
15 adjustment was fat, and that was based off the butter  
16 market.

17 Q. And using the BFP, the Class I price was simply  
18 that -- that BFP plus your differential, correct?

19 A. My understanding -- from my memory, yes, Ryan,  
20 that is correct.

21 Q. And when USDA moved to multiple component pricing,  
22 we replaced the BFP-based price with the base prices that  
23 we have now, correct?

24 A. Yes.

25 Q. And I don't know whether this happened during  
26 order reform before, but that base price, as I understand  
27 it, is supposed to represent the value of producer milk to  
28 a manufacturing market. Would you agree with that?



1 A. Crudely that's what it attempted to do, yes.

2 Q. And so the Class I price, comprised of the base  
3 plus the differential, is supposed to represent the value  
4 to the bottler as a comparative price to the manufacturer,  
5 correct?

6 A. Well, yes and no. When we went to -- when we went  
7 to component pricing in 2000, everything became priced on  
8 yields. And I view skim the same way. And so skim yield  
9 is independent of tests, kind of like your Florida example  
10 you just gave.

11 And so I would say that that changed the -- there  
12 was no more marginal value on that, and again, some of  
13 USDA's comments particularly we pulled up from their Great  
14 Basin decision really refer to that. So in my mind,  
15 actually, with component pricing, that changes what  
16 that -- what that true skim value is. And we have always  
17 struggled with Class I because we were setting an  
18 artificial value for it. It isn't a market-based price  
19 like everything else is.

20 And so should that reflect yield? I believe it  
21 should, and in that case, it's independent of what those  
22 component levels are.

23 Q. Thanks. I appreciate that.

24 If you -- if you look at what Proposals 1 and 2  
25 are looking to do, they are looking essentially to change  
26 that underlying base price, correct?

27 A. Yes.

28 Q. And what won't change regardless of that base



1 price, as you alluded to, is the yield to the Class I  
2 handler, correct?

3 A. Yes.

4 Q. And the increase of the components themselves  
5 doesn't change the yield, correct?

6 A. No. There's no added value to those higher  
7 components in Class I.

8 Q. And so it's the same product with the same yield,  
9 it's just the Class I handler would pay more, correct?

10 A. Essentially, yes. Which they already do as  
11 commodity markets move up and down. With the current  
12 formula, of course, that Class I price changes month to  
13 month.

14 Q. And even today as we have gone through Table 3,  
15 sometimes they are paying more than what the component  
16 value would suggest that milk is worth?

17 A. Yes.

18 Which is the reason why minimum component values  
19 in that calculation make good sense.

20 Q. So the Class I handlers will pay more for the same  
21 milk. So in one month they pay X, and the next month it  
22 is X plus, for the same milk, same yield, the same  
23 product?

24 A. Simply changing factors, that's correct, in my  
25 understanding.

26 Q. How is that different from a producer who will be  
27 producing the same milk and delivering that same milk to  
28 the same plant in one month and then Make Allowances



1 change based on circumstances and they receive less?

2 A. The big difference is that Make Allowances haven't  
3 been updated since 2008. We all recognize, I think,  
4 National Milk recognizes, we certainly do, that costs have  
5 increased. And you can't -- Federal Order pricing should  
6 be minimum pricing. If you are -- particularly in the  
7 case of -- this clearly gets into the next argument -- but  
8 you are creating a competitive disadvantage, particularly  
9 for milk inside and outside the order on manufacturing  
10 with makes where they are, because reality in milk is less  
11 expensive outside of orders.

12 Kind of the same thing here, but -- but the --  
13 yes, you could say it's the same for everyone, but on  
14 Class I, what's the real value? You can't even most times  
15 put it on your label. There isn't an added value to that.  
16 And in Class II, III, and IV, it simply is going to  
17 overvalue milk. I recognize II, III, and IV in those four  
18 markets isn't a very large matter, but it still has an  
19 impact to give them competitive cost disadvantage per unit  
20 of components most months of the year would be our  
21 speculation.

22 Q. Just as Make Allowances have not been updated in  
23 15 years, the base price assumptions haven't been  
24 revisited in 23 years, correct?

25 A. Yes, that's true. But just because something  
26 hasn't been revisited doesn't mean it needs to be changed.

27 Q. That I would agree with.

28 All right. Because I can't resist --



1 A. This is always scary.

2 Q. No. I hope this is amusing.

3 -- on page 6 you cite Dire Straits.

4 A. I still have -- I still have the LP, by the way,  
5 Brothers in Arms.

6 Q. Do you have Dark Side of the Moon?

7 A. Oh, of course.

8 Q. "But if you ask for a rise, it's no surprise that  
9 they're giving none away"?

10 A. Yeah. Absolutely.

11 Q. All right.

12 A. I had that pretty much memorized about '72.

13 Q. It came out in '73, that's amazing.

14 A. Well, I do forecasts for a living, Ryan.

15 Q. Thank you, Mr. Brown. I appreciate it.

16 MR. MILTNER: I have no more questions.

17 THE COURT: Any further cross?

18 CROSS-EXAMINATION

19 BY DR. CRYAN:

20 Q. Good morning. I am Roger Cryan for the American  
21 Farm Bureau Federation.

22 Good morning, Mike.

23 A. Good morning, Roger.

24 Q. It's nice to see you.

25 A. Always good to see you.

26 Q. Okay. So you talked about fluid handlers get no  
27 yield value from -- from additional components, which of  
28 course is true because a hundred pounds of milk is a





1 hundred pounds of milk in terms of yield. But that  
2 doesn't necessarily mean there's no benefit at all.

3 I mean, what I have -- would you say there's no  
4 benefit to a fluid handler of having a higher --

5 A. There's no economic benefit.

6 Q. But there are a range of fortified fluid milk  
7 products?

8 A. Yes, but they are significantly higher in  
9 component level. That's a very different thing. And,  
10 quite honestly, with this proposal, you would make those  
11 even more expensive because you would be assuming a base  
12 level of protein even in those products, which often would  
13 likely not be what the assumptions are.

14 Q. So less of their fortification would be priced at  
15 Class III?

16 A. What I'm saying is that your -- your skim still  
17 is. The other issue is California where you convert  
18 skim -- SNF back into skim for fortification.

19 Q. Uh-huh.

20 A. And that's a hundredweight calculation. And the  
21 same thing would happen there, you would increase the cost  
22 of that fortification, even though -- because it's  
23 Class I. Even with Federal Order rules on pricing milk  
24 for high protein, if you are a skim market, it's still  
25 going to raise that cost.

26 But if you are -- so it doesn't necessarily create  
27 a lot of benefit. More so perhaps? Yes. Because it's  
28 higher in the base. But the other side of that is, is



1 what share of the market is that? It's tiny. It's  
2 growing, I will agree, but it's very small.

3 Q. If a processor of a high protein product is --  
4 receives higher protein milk, they actually have to do  
5 less fortification?

6 A. That is true.

7 Q. And they are paying the same price for the skim  
8 milk?

9 A. Yes. But how do you guarantee they are getting  
10 higher components in that milk? Because they are still  
11 paying for it on skim. You have no assurance of what that  
12 level is, so there is no marginal value to them on skim  
13 pricing that can be assured.

14 Q. But that's not the -- the argument has been about  
15 more protein isn't worth anything to fluid handlers.  
16 That's a different issue.

17 A. It is and it isn't. It gets back to pricing  
18 Class II, III, and IV on the skim and not on components.  
19 But, again, that's rare to have that. Unfortunately -- I  
20 hope it grows because high protein milks are certainly a  
21 good product.

22 Q. And --

23 A. But at this point they are a small part of the  
24 market.

25 Q. And even traditionally before the development of  
26 these products, there has been fortification in them, in  
27 fluid products --

28 A. SN -- generally -- generally with SNF, which a lot



1 of that stopped because it raised carbohydrates, and  
2 there's no -- no -- high carbs aren't attractive to folks.

3 Q. I -- I have sent an e-mail this morning requesting  
4 data on fortification. I don't know if it will become  
5 available or not but --

6 A. It could be good for all of us to see that, Roger.  
7 Thanks for asking.

8 Q. I agree. I agree.

9 So do fluid handlers get the component value from  
10 the current formulas? Do they -- do they obtain component  
11 value for the components under the current values?

12 A. No, but the values are much closer -- they're  
13 still significantly above the federal standard of  
14 identities, but they are much closer. So they are  
15 probably closer -- more closely reflect that -- the value  
16 of that milk as far as what its value is to a plant.

17 Q. Your numbers showed that there is -- even at the  
18 short months in -- in the low component markets, that  
19 there's -- the component test -- the protein tests are  
20 still higher than the standard on the -- in the current  
21 formula. Would you -- would you -- does that -- does that  
22 offer an argument for a small --- for some increase in the  
23 standard?

24 A. It makes for an argument of having component  
25 pricing in Classes II, III, and IV in all markets in my  
26 mind. So, again, that per unit cost would be the same for  
27 a handler in any market that pools II, III, or IV  
28 processing. That's how I view it. I think assuming a



1 change, when we have a way that's worked, you know, for  
2 23 years that addresses that difference in value, why  
3 doesn't the -- it needs to be considered as a national  
4 standard in my view of the way to do it, because that way  
5 if I'm making -- if I'm Kroger and I'm making Greek yogurt  
6 in Tennessee, which they do, I know my -- my cost is SNF  
7 in that market, but my cost of SNF will be the same  
8 because, again, that's even -- that's a three times  
9 concentration of protein, so it -- it does -- it does make  
10 a difference, and that's a fat/skim order.

11 Q. Right.

12 A. And it would -- and I can tell you from personal  
13 experience, there's no incentive to send high component  
14 milk into that market because most of the milk in that  
15 market is split. A lot of it comes from the Mideast, and  
16 if you aren't in that maximized value to your producers,  
17 any good cooperative, and they are a very good  
18 cooperative, would keep the higher solids milk in Kroger's  
19 Indianapolis plant, which producer prices on components,  
20 and send the lower solids milk to Tennessee. It just  
21 makes good business sense for them. And Kroger recognized  
22 that. That's just the way it is.

23 Q. That is not on the table. The multiple component  
24 pricing in the other markets is not on the table under the  
25 current proposal. Would it be --

26 A. That's why --

27 Q. -- logical --

28 A. -- that's why the proposal is -- that's why it's



1 flawed.

2 Q. Would it be logical to have some increase in  
3 the -- in the standard?

4 A. No.

5 Q. None at all?

6 A. Fix it right or don't fix it.

7 Q. Okay.

8 A. Don't change it.

9 Q. So the form -- the component standards in the  
10 current formula are based on roughly the average levels in  
11 the years leading up to order form.

12 A. Yes. That's my understanding.

13 Q. And -- but your -- your argument suggests that  
14 that was -- those were too high.

15 A. No -- the ones that were originally assumed?

16 Q. Uh-huh.

17 A. Not necessarily.

18 Q. How is it -- how is it different?

19 A. Well, first of all, there wasn't good raw data to  
20 even look at. You had a few orders that obviously  
21 component pricing effects, and you go back to the  
22 Northeast, and it was actually below the 2.99 and 3.1.  
23 And so it was -- in that -- of course they didn't have  
24 component pricing until Federal Order Reform, we didn't  
25 even know that. But they were -- they were much closer.  
26 And, again, they are much closer to standard of identity  
27 for fluid milk. So even if you were paying under those,  
28 you were still paying more than the minimum order required



1 for that product, but much, much closer than the current  
2 values that are being proposed. So it was more reflective  
3 of the real value to meet standard as well as -- again,  
4 the yields are identical.

5 Q. Is there a -- is there a protein standard in  
6 standard of identity for fluid milk?

7 A. No, but it is 8.25 SNF, and with the 97%  
8 relationship between protein and SNF prediction, you can  
9 pretty much back into what the protein would be. So --  
10 and, again, keep in mind, Class I is priced -- the  
11 adjustments aren't just for protein, they are also for  
12 nonfat solids.

13 Q. So -- so by your logic, the -- the components test  
14 in the class price formula should be -- should be set at  
15 the -- at least in the -- should be set at the 8-point --  
16 at the minimum standard?

17 A. 8.25?

18 Q. Yeah.

19 A. We're not suggesting that. We are -- what we --  
20 we think where they are now is appropriate. We don't  
21 think they -- we are not proposing they go lower, although  
22 from the standpoint of value of yield, they could be. But  
23 I don't think anyone's -- no one that I'm aware of is  
24 asking for that.

25 Q. Okay. I mean, I do think it follows your -- from  
26 your logic it follows that the levels were too high in  
27 2000, and that -- and is there any evidence that there  
28 were problems in 2000 with those levels set?



1 A. No.

2 Q. No?

3 A. I will say this. Some Southern markets certain  
4 times of the year, fluid plants do monitor solids, just to  
5 make sure that the milk doesn't lose mouth feel and taste.

6 Q. Right.

7 A. But we're talking at -- at those kinds of -- we're  
8 talking the 2/7 milk used to get protein in the summer.

9 Q. Right.

10 A. That just is -- it's called thin milk.

11 Q. There was some -- some competitive pressure in  
12 some markets to fortify to maintain the quality standard?

13 A. There was. And there was some redirecting milk,  
14 and that was part of, you know -- I can't speak for Kroger  
15 back then, but certainly some folks, there was -- there  
16 was expectation, I don't think it was ever necessarily  
17 written in a contract, but that the milk would meet needs.  
18 And, again, that's part of that service charge that you  
19 pay. And, again, most -- in my experience most  
20 cooperatives work hard to meet the needs of their  
21 processors, very hard.

22 Q. I think I understood from your -- your back and  
23 forth with Mr. Miltner that you agreed that the price  
24 formulas have something to do with the relationship  
25 between the manufacturing prices and the Class I value.

26 Is that -- is that right?

27 A. They do. They are derived from the manufacturing  
28 values in milk.



1 Q. And that the -- that the Class I values -- the  
2 Class I prices aren't necessarily designed to capture a  
3 return to fluid processors from the milk, but to establish  
4 a relationship between Class III and Class -- between the  
5 manufacturing milk prices and the bottling milk prices?

6 A. It's been like that forever. Could there be a  
7 different model? I suppose you could, but it's always  
8 been basically for manufacturing built up to a fluid  
9 price.

10 Q. So with respect to -- so between markets -- one of  
11 the issues I think that a previous witness, myself, raised  
12 is that there is a misalignment between markets,  
13 skim/butterfat markets and component markets on the  
14 borders, and it leads -- it can lead to a plant choosing  
15 to pool milk on -- on the deficit markets that doesn't  
16 necessarily need to be pooled on that, that there's a --  
17 that the low protein standard, basically makes milk on  
18 those markets, which are short -- typically shorter  
19 markets, but more of a bargain than paying the component  
20 value in the local market.

21 In fact, would that not lead a cheese plant, for  
22 example, to pool high component milk on the skim  
23 markets -- the skim/fat markets, and low component milk on  
24 the -- on the component markets even if it is delivered at  
25 the same plant?

26 A. That's the argument for having it base on  
27 components for II, III, and IV in all markets. That's  
28 another reason why it should happen.





1 Q. Multiple component pricing?

2 A. It takes care of that. Playing that game.

3 Q. And raising the components in the standard formula  
4 doesn't -- doesn't help address --

5 A. That doesn't accurately reflect what's in the  
6 milk. I mean, why, when we have a method to get an  
7 accurate measure of yield and component values for  
8 manufacturing, why wouldn't that be everywhere? That's  
9 our argument.

10 Q. Would it make sense to set a higher bar for  
11 incentivizing milk to be pooled on those -- those deficit  
12 markets by -- by raising the -- sort of the cost of  
13 admission for pooling Class III and IV milk on those  
14 markets?

15 A. Based on the lack of difficulty in getting milk  
16 into three of the -- two of the Southeast orders or  
17 Kroger-ran plants, I would say no, because there isn't a  
18 problem getting milk. You -- you may see service charge  
19 adjustments. You'll see adjustments based on energy  
20 costs, which I think most people would agree are fair.  
21 But I -- again, getting an adequate supply hasn't been a  
22 problem in my personal experience. And with fluid milk,  
23 that's really the last seven years, but I haven't ever  
24 seen that that was an issue.

25 Q. Okay. Well, I appreciate your giving us your  
26 expertise based on your experience. And have a -- thank  
27 you very much.

28 DR. CRYAN: I'm done.



1 THE WITNESS: All right. Thank you, Roger.

2 THE COURT: Further cross?

3 Redirect?

4 I'm sorry, AMS. I am forever going to get this  
5 wrong, so you'll have to forgive me or fire me.

6 MS. TAYLOR: No problem, your Honor.

7 CROSS-EXAMINATION

8 BY MS. TAYLOR:

9 Q. Good morning. It is still morning. How are you?

10 A. I'm doing well. And so far so good.

11 Q. Okay. I think Mr. Wilson and I will go through  
12 your statement and try to go back and forth, if we need  
13 to, to keep it logical instead of jumping all around.

14 I am going to concentrate on your written  
15 statement, which is Exhibit 4, so I will reference those.

16 Okay. Let's see. On page 3, you talk about the  
17 impact on Proposals 1 and 2 on Class II, III, and IV milk,  
18 increased between \$0.37 and \$0.72.

19 And I know you had a lot of tables back in your  
20 testimony, but here it doesn't say where those numbers  
21 came from.

22 A. Those numbers, once again, were based on our  
23 earlier analysis using the three-year rolling protein  
24 average. So they should be -- \$0.37 should be 40 and 72  
25 should be 80.

26 Q. Okay.

27 Okay. On page 5, at the bottom you quote from the  
28 USDA decision from 1988, the Great Basin and Lake Mead



1 Marketing Areas, on -- that handlers have no difference --  
2 no economic benefit from different levels of protein in  
3 fluid milk.

4 And that decision is now 35 years old. So I'm  
5 just wondering if could you speak do you think the market  
6 has changed somewhat since that time, that --

7 A. Not in a big way because standards of identity  
8 haven't modernized to allow for higher standards or in the  
9 case of just being able to standardize milk, I mean, to  
10 me, that's -- that's -- that's the real challenge there.  
11 There's no way to really derive that extra value, and  
12 that's -- that's that the concern. So because standards  
13 haven't changed, I don't think it has really changed.

14 MS. TAYLOR: Okay.

15 CROSS-EXAMINATION

16 BY MR. WILSON:

17 Q. Good morning, Mr. Brown.

18 A. Good morning.

19 Q. Continuing with your testimony, page 17, the  
20 footnote 8, there's quite a bit of numbers and  
21 calculations and math in that footnote.

22 Could you go through or -- or try to give us a  
23 source of those -- of those numbers, for instance, "The  
24 math is as follows: 2.492 billion pounds"?

25 A. Okay. And I think we're going to have to  
26 double-check those numbers. Those numbers are from the --  
27 I can't remember which table it is. What's the one where  
28 you show producer pounds per class of components fat and



1 skim? Those are the producer numbers by class, or they  
2 are supposed to be. The calculations were actually made  
3 on those. We need to make sure those references are  
4 correct.

5 Q. Okay. Yeah, I looked on several tables, and I  
6 couldn't quite come back to those values?

7 A. We'll -- we'll make sure they are right.

8 Q. Thank you.

9 On the next page, 18, Table 2, there appears to be  
10 some addition missing on the very last row, all orders  
11 combined, for the third column and the sixth column.

12 A. Yes, we omitted the change in Class II on  
13 component orders. Those need to be updated. It would be  
14 in column 2, it would be -- excuse me -- the third column  
15 of data, it would be minus 2.3. And the final column  
16 would be 33 minus 2.3, so I guess that's 30.7.

17 Q. Thank you.

18 A. Just as an added, we hadn't figured out yet the  
19 Class II --

20 Q. I understand.

21 A. -- SNF change, that's our mistake.

22 Q. I understand. I'm just trying to make sure the  
23 record is clear.

24 A. Much appreciated.

25 Q. So continuing on that same page, the paragraph in  
26 the written testimony, the first paragraph there, you  
27 indicate that the skim and fat orders, producing  
28 products -- plants that are producing those products of



1 Greek yogurt, cottage cheese, etcetera, would -- would  
2 those -- would those plants benefit from receiving higher  
3 component milk for those products?

4 A. They would, relative to their yield.

5 MR. WILSON: Okay. Thank you.

6 CROSS-EXAMINATION

7 BY MS. TAYLOR:

8 Q. Excuse me. I want to talk -- have a few questions  
9 on the DHI data that you put in the record. You talk  
10 about -- you mention that the data is accurate, credible,  
11 and uniform. And you talk a little bit about the testing.

12 Do you know what oversight those labs have for  
13 testing?

14 A. It depends. Some of them are actually using  
15 certified Federal Order labs, although they aren't  
16 necessarily -- it's the same lab, isn't necessarily  
17 indicated that. Most of them are labs that are -- if they  
18 are not used for that, they are used for multiple  
19 purposes, for example, plant tests, for maybe non-pool  
20 milk or for evaluation of products within a plant.  
21 Those -- as you can imagine, because of the investment in  
22 a testing facility, they tend to service both the  
23 commercial market as well as herd farm records. So some  
24 would be and some wouldn't, and it really depends from lab  
25 to lab.

26 MS. TAYLOR: Okay.

27 CROSS-EXAMINATION

28 BY MR. WILSON:



1 Q. Following up on that, Table 3, you have -- I think  
2 you have indicated in your testimony that the DHIA  
3 laboratories data, the dataset itself, is a test of  
4 protein on the volume of milk that is being sampled for  
5 that day?

6 A. That is correct.

7 Q. So you have converted that dataset back to a skim  
8 portion percent?

9 A. Yes. Using the fat test data we also have from  
10 that same dataset.

11 Q. Thank you. That was my question.

12 A. Yes. It's divided just like proposed by. The  
13 rationale behind the National Milk proposal, we used the  
14 same methodology.

15 CROSS-EXAMINATION

16 BY MS. TAYLOR:

17 Q. A little bit more on how this data is aggregated  
18 and displayed under the orders, just so we're clear.  
19 That -- and I think the exhibit that Mr. Covington put on  
20 might have helped clarify that some -- but the data when  
21 this shows up in a state for DHIA, that is where the farm  
22 is located, that's not where the lab is located  
23 necessarily?

24 A. Generally, yes. Sometimes you have a little  
25 overlap, but generally, yes, it is where the farm is  
26 located, probably 99 and a half percent of the time at  
27 least, yes. It is where the farm is. So the lab may be  
28 some place very different, and the records may be



1 processed across the country, but the farms are where the  
2 farms are.

3 Q. Okay. And that milk is then -- it's milk that's  
4 produced in the state, it's not necessarily where it's  
5 pooled?

6 A. That's right. It -- and that's why we had to make  
7 an assumption on where -- where to assign the states is  
8 because, as we know, the states have multiple markets that  
9 they serve.

10 Q. Okay. In -- earlier in your testimony, you talked  
11 about how farms in MCP orders, there is a financial  
12 incentive for them to increase their components, so they  
13 have done so, since reform.

14 A. Yes.

15 Q. And that, logically, farms in the Southeast would  
16 have no incentive to increase their components on --  
17 because there's no financial incentive to do so?

18 A. Only indirectly because the fat markets have  
19 gotten stronger, there's more incentive to breed and  
20 manage for higher butterfat, and since there's a high  
21 correlation between fat, protein, and SNF, they probably  
22 got some of those components at the same time. But the  
23 total financial reward would be -- would be significantly  
24 less.

25 Q. So that would explain in the data, even the DHI  
26 data that you put on, it does show an increase in  
27 components in 5, 6, and 7 over time?

28 A. Yes. Yes.



1           And we're not denying components have an increase,  
2           it's the degree.

3           Q.     And I'm -- I don't want to assume, but I'll ask.  
4           Because you have DHI totals, pound totals on here, but  
5           that wasn't -- and I know you didn't put this exhibit on,  
6           but Exhibit 101 lists cows and lists percentages and --  
7           etcetera. But there's no pound totals in there. I'm  
8           assuming that those pound totals exist somewhere in the  
9           database --

10          A.     Yes.

11          Q.     -- and that's where you --

12          A.     We --

13          Q.     -- pulled this from?

14          A.     What we do is we take the total number of cows,  
15          times the production per cow, which is listed on the site,  
16          to come up with the total pounds.

17          Q.     Okay. And I think you talked about how some of  
18          that's even estimated in DHIA because they don't -- you  
19          know, they might sample once a month, or they sample --  
20          they have different sampling methods depending on how they  
21          have enrolled?

22          A.     Yeah. Once a month is kind of the way it's always  
23          been accomplished. So it is daily data, and we recognize  
24          that. It is still a very, very large dataset, which  
25          statistically I think warrants -- warrants considering,  
26          quite honestly.

27          Q.     Okay. And the DHI data is just protein, and they  
28          don't collect data on nonfat solids?





1 A. That's correct.

2 Q. So you did this regression analysis, which you  
3 have explained on -- starting on page 25 to look at the  
4 relationship between protein and nonfat solids. Would  
5 that be accurate?

6 A. Yes.

7 Q. So because it's been a long time since I have sat  
8 in an economics class, although these hearings sometimes  
9 seem to be that same type of class, I just want to make  
10 sure, for the record, we're straight on or clear on.

11 What you are showing there, as I read that, is  
12 that the 97% correlation that you talk about, does that  
13 mean that 97% of the change you may see in nonfat solids  
14 is explained by the change you see in protein?

15 A. Yes. And if you go to attachment 3 on this  
16 document, I actually printed out the regression analysis  
17 for the different relationships between components. And  
18 the data is -- is your producer component test data per  
19 market for every month that -- through April, that you  
20 have -- that the USDA has collected, including the  
21 discontinued order and the newly started one in  
22 California. It is just very simple math data, lots of  
23 data points.

24 Q. Did you say including the discontinued order?

25 A. Yes, the Great Basin data, until 2004, was  
26 continued as far as the monthly information, and that  
27 regression.

28 Q. Okay.



1           A.     I made that decision partly because we have  
2 California coming in later, and I just wanted to make it  
3 as complete as possible, because we're not looking for  
4 averages, we're looking for relationships.

5           Q.     Right.  And when you say "Great Basin," you might  
6 mean the Western order?

7           A.     I'm old.  Yes, I mean the Western order.

8           Q.     Okay.

9                     Then you go on on page 27 to talk about the USDA  
10 data for the Southeast, which was estimated, is not -- is  
11 not complete.  You say it is partial.  And there's no  
12 indication as to whether the test labs are certified or  
13 the results verified.

14                    But I would ask that are you aware that all the  
15 payment testing labs that provide data to Federal Order  
16 offices are overseen by the Federal Order lab system?

17           A.     They do, but I was not aware that when you  
18 collected data for those markets, that that was the entire  
19 source of that data.  If that's the case, then it is -- it  
20 is verified.

21           Q.     Okay.  On the bottom of 28 -- and I know this has  
22 been discussed some about how manufacturing handlers --  
23 well, I'll say this a different way -- how you contend  
24 that component levels in the fat/skim orders are lower  
25 than the national average, so that if we had -- if USDA  
26 chooses to adopt the National Milk and National All-Jersey  
27 levels reflecting 2022 levels, that would put those  
28 handlers of the manufacturing classes in the Southeast



1 markets at a competitive disadvantage.

2 Am I correct in that understanding?

3 A. That's -- that's what we believe, yes.

4 Q. Okay. So -- but on the flip side, would you say  
5 that currently then, if the current levels are below the  
6 averages in the fat/skim markets, that those handlers have  
7 a competitive advantage in the milk that they purchase?

8 A. They do. It's not a function of the problem. The  
9 function means the function of what's the best solution.

10 Q. Can you restate that?

11 A. I said, to me, I think, yeah, even our DHI data  
12 shows that the component levels are higher for skim solids  
13 than -- than the current Federal Order calculations.  
14 However, they are -- the National Milk proposal we think  
15 is weighted very much to the Northern climates, cheese  
16 markets, where there's a been a lot of incentive. And the  
17 best way to make sure it is fair is to just move to  
18 component values in all II, III, and IV, so that cost per  
19 unit -- regulated minimum cost would be the same for  
20 components, which impacts yields.

21 Q. Okay. And we just wanted to ask you some just  
22 general questions. Would you agree that through the long  
23 history of the Federal Order program, the Class I value  
24 has always been tied to manufacturing classes regardless  
25 of methodology? There's kind of been that tie.

26 A. I can't speak to that. Certainly, during my  
27 career, from the late '80s, that has been true.

28 Q. Okay. And as I understand your testimony today,



1 IDFA isn't proposing or supporting decoupling that link at  
2 all, between the one in manufacturing and any of the 11  
3 orders?

4 A. That is correct.

5 Q. Okay. But your issue is that the numbers proposed  
6 in Proposals 1 and 2 don't reflect the actual components  
7 in fat/skim?

8 A. For Class II, III, and IV, that is correct. For  
9 Class I, they don't impact yield. That's our argument on  
10 Class I.

11 Q. Okay. And so I think we have talked a lot about  
12 the lack of data in the fat/skim orders, and there's our  
13 estimate -- USDA estimated data, there's DHI data, which  
14 is estimated. And I know your one solution, as you have  
15 stated, is to adopt multiple component pricing in the  
16 Southeast, but that's not a proposal within the scope of  
17 this hearing, in the -- contained in the hearing notice.

18 So what solution, given that, might you offer to  
19 remedy this lack of data?

20 A. I think the solution is to not change those  
21 factors until we -- and then let's come back with other  
22 solutions. I know there was proposals to include  
23 component pricing in the market. I understand it was  
24 viewed not in context, that maybe that needs to come back  
25 again and maybe view it as a national hearing issue rather  
26 than just a component market issue.

27 I just don't think we have a solve within the  
28 proposals we have to work with here that don't -- won't



1 result in overvaluation of regulated minimum price for --  
2 between manufacturers. Because if you are lower -- and,  
3 again, we all recognize that II, III, and IV is fairly  
4 small. II is -- there is a fair amount of Class II in the  
5 Southeast. In Arizona, there is quite a lot of both III  
6 and IV.

7 But you can't -- I think you have to err on the  
8 side of not overpricing product. I think we're -- we  
9 haven't got to the Make Allowance structure yet. We'll  
10 talk about that when we get to it. But I think the  
11 orders, they work best when they are minimum prices. They  
12 leave room for the market to work.

13 And our biggest concern with the National Milk and  
14 All-Jersey proposals, that they simply don't do that. In  
15 a lot of cases they will create competitive disadvantages,  
16 and you're rewarding pricing for components that don't  
17 simply exist in those markets in manufacturing milk.

18 Q. I want to talk a little bit on the Class I side.  
19 We focused a lot on the fat/skim side in the Southeast.  
20 But on the Class I side and the competitive relationship  
21 between plants competing for Class I sales, how would the  
22 adoption of National Milk's proposal and National  
23 All-Jersey's proposal impact the competitive relationship  
24 between fluid handlers, and in a way, particularly the  
25 fluid handlers in the Southeast versus those located in  
26 MCP orders that are competing for sales in the same  
27 markets?

28 A. I would expect it wouldn't change those



1 relationships. It would be the same between -- because  
2 it's still skim pricing. It would be the same between  
3 plants.

4 Q. So if I may clarify then -- excuse me -- wouldn't  
5 change the relationships. And so that's not something  
6 that's of concern. The concern for IDFA is just you would  
7 be required to pay on higher components of which you see  
8 there's no additional value to those Class I handlers?

9 A. That is correct. If you are going to look at  
10 yield value of milk, including Class I, those components,  
11 unfortunately, with our current regulations, you can't  
12 attribute -- you can't derive yield value from those skim  
13 components.

14 Q. Okay. And so then going back to your experience  
15 at Kroger, for example, where you bought a lot of fluid  
16 milk then, you wouldn't see this change as proposed having  
17 any -- it wouldn't alter necessarily your procurement or  
18 distribution strategy when you were buying milk for fluid?

19 A. I would not expect it would, no.

20 MS. TAYLOR: Okay. I think that's it for AMS this  
21 morning. Thank you.

22 THE WITNESS: Thank you.

23 THE COURT: Redirect?

24 REDIRECT EXAMINATION

25 BY MR. ROSENBAUM:

26 Q. Steve Rosenbaum for the International Dairy Foods  
27 Association.

28 I would like to begin with an issue that got some



1 questions from AMS as well as other cross-examiners, which  
2 is the reliability of the DHI data. Okay. You know what  
3 I'm talking about?

4 A. Oh, I sure do. I compiled it.

5 Q. You need to get your microphone much closer to  
6 your mouth, Mike.

7 A. Most people would prefer I move it farther away,  
8 but I appreciate the --

9 Q. No, I'm on the other side of that, so --

10 A. Okay.

11 Q. -- bear with me.

12 Now, so USDA requires in MCP orders that there be  
13 testing of the component levels in milk, correct?

14 A. Yes, that is correct.

15 Q. And where does that testing actually take place?

16 A. It takes place in certified Federal Order approved  
17 labs.

18 Q. Okay. But where -- and what milk is being sampled  
19 to do that test?

20 A. Producer milk.

21 Q. Okay. And literally, where are they getting that  
22 milk from, physically?

23 A. They are getting it from samples taken at the farm  
24 at time of pickup for milk.

25 Q. Okay. And so for the MCP orders, USDA has  
26 information as to what protein levels are based upon those  
27 tests, correct?

28 A. That is correct.



1 Q. And that is the derivation of the 3.39% protein  
2 level that --

3 A. That is also correct, yes.

4 Q. -- that's used in the order -- in the Proposal 1  
5 and 2, correct? Is that right?

6 A. Yes.

7 Q. Now, does that -- so we have that number.

8 Now, let's turn now to DHI, correct?

9 A. Yes.

10 Q. Now, the focal point of your testimony has been  
11 what the DHI data shows as to protein levels in the four  
12 fat/skim orders, correct?

13 A. Yes.

14 Q. But did you also use that same DHI data, but for  
15 the seven MCP orders?

16 A. Yes, we did.

17 Q. And did you use the exact same methodology for  
18 determining what DHI data you would allocate to each  
19 order?

20 A. Yes, it was based on majority of milk from each  
21 state. That's the order it was assigned.

22 Q. Okay. And so if you -- and that -- and so  
23 what's -- what was the bottom line number that came out  
24 from the DHI data as to average protein levels?

25 A. Slightly over 3.39.

26 Q. Okay. And so what does that tell you as to the  
27 reliability of DHI data?

28 A. It's an affirmation that it's a big enough sample





1 that the data is actually quite accurate.

2 Q. Okay. And so there was questioning made as to how  
3 often the cows get tested, correct?

4 A. Yes.

5 Q. And there was questioning as to how many cows per  
6 state are tested, correct?

7 A. Yes.

8 Q. Okay. And there was -- in Hearing Exhibits 100  
9 and 101 used by Mr. Covington, there were a listing of the  
10 wide variety of services DHI provides and how they vary,  
11 correct?

12 A. Yes.

13 Q. Are those same wide variety of services available  
14 in the seven MCP orders?

15 A. Yes. They are available nationally.

16 Q. Okay. And regardless of the variability and  
17 methodologies used, etcetera, we know for an absolute  
18 certainty that DHI data will give you the exact same  
19 number as the USDA data with respect to protein levels in  
20 the seven MCP orders, correct?

21 A. As far as methodology of testing, yes.

22 Q. As far as the ultimate result I'm saying.

23 A. Well, they are both samples in those fat/skim  
24 orders, and so I think --

25 Q. No, let -- I'm sorry. Let me --

26 A. I guess I'm confused.

27 Q. I didn't ask the question correctly. Let me try  
28 again.



1           The -- the -- with all these various differences  
2 in the testing methodologies used, etcetera, by DHI, the  
3 end result is that for the seven MCP orders, the DHI data  
4 gives you the exact same ultimate result as --

5           A.    It's very accurate.

6           Q.    -- as -- as the USDA data, correct?

7           A.    That is correct.

8           Q.    And what -- what conclusion do you draw from that  
9 as to the accuracy of the DHI data that you have used to  
10 calculate protein levels in the four fat/skim orders?

11          A.    I would believe it would have the same accuracy.

12          Q.    Now let me switch topics to the question of  
13 automatic updating. You were asked questions about  
14 whether the orders provided for automatic updating, and  
15 you gave us one example of that, that in fact that orders  
16 automatically update the minimum prices based upon the  
17 finished product prices, correct?

18          A.    Yes, that's correct.

19          Q.    Okay. So that every month there is a  
20 determination of what the cheese price is, what the dry  
21 whey price is, etcetera, etcetera, and that automatically  
22 changes the resulting minimum prices, correct?

23          A.    Yes.

24          Q.    Okay. So I want to give you another thing the  
25 Federal Orders do and ask you if that's also automatic,  
26 that there is a testing in the seven MCP orders, which  
27 represent 89% of all milk, as to milk component levels,  
28 and the price obligations change every month based upon



1 those component levels; is that right?

2 A. That is correct.

3 Q. Is that an automatic updating?

4 A. It is, yes, because the components change monthly,  
5 and so the price -- the values of particularly individual  
6 producer's milk will change monthly based on those levels.

7 Q. And do the obligation of handlers to pay change as  
8 a result --

9 A. Absolutely, yes.

10 Q. -- every month?

11 A. That's what -- that's -- and that takes care of  
12 that seasonal concern. That's one of the things it does.

13 Q. Okay. But is there such automatic updating for  
14 changes in component levels with respect to the pricing of  
15 Class I milk?

16 A. There is not.

17 Q. And was that a -- based upon your review of the  
18 record, was that a considered decision by USDA that they  
19 were going to make that change for components with respect  
20 to Class II, III, and IV milk but not for Class I milk?

21 A. Based on our understanding of reading decisions,  
22 yes, that's correct, that they -- it was for II, III, and  
23 IV, Class I would not -- components would not adjust.

24 Q. And so is it -- and -- but Proposal 1, in fact,  
25 would update the Class I price based upon component  
26 levels, correct?

27 A. Yes.

28 Q. And, in fact, both Proposals 1 and 2 would not



1 only do that to the levels they specify in the proposal,  
2 but would subsequently do it thereafter, every three --

3 A. Yes.

4 Q. -- every three years in the National Milk Producer  
5 Federation proposal and every year in the -- in the  
6 National All-Jersey proposal, correct?

7 A. Yes.

8 Q. So who -- who is it who is proposing to change the  
9 methodology by which Class I milk is priced? Is it -- is  
10 it you or is it -- is it National All-Jersey, and is it --  
11 and National Milk?

12 A. Yeah. Proposals 1 and 2, which is National  
13 All-Jersey and National Milk Producers Federation, would  
14 change that.

15 Q. Okay. And if you look at -- can you just put up  
16 on the screen, do you -- are you still -- are you hooked  
17 up?

18 A. I don't know.

19 Q. Can you -- if you could turn to page 21.

20 Now, this is the quotation from the USDA decision  
21 when it first adopted component pricing, correct?

22 A. Yes.

23 Q. And there is a discussion, which you read into the  
24 record yesterday. I'm not going to ask you to repeat the  
25 whole thing. But at the very end, the last sentence,  
26 quote: "Handlers obtain no discernible difference in  
27 economic benefit from the various levels of protein  
28 contained in milk used in fluid milk products, and there



1 is no justification for requiring them to pay for such  
2 milk according to its protein content," end quote.

3 Do you see that?

4 A. Yes.

5 Q. Isn't that exactly what Proposals 1 and 2 are  
6 doing?

7 A. Yes. They are changing that protein level.

8 Q. Sorry?

9 A. They are changing the protein level.

10 Q. They are changing the price based upon --

11 A. Yes. They are raising it by the factor, yes.  
12 That's correct.

13 Q. Just so we get the question and answer out,  
14 plainly: They are changing the price of Class I milk,  
15 based upon protein levels in the farmer milk, correct?

16 A. Yes. Protein affect all three skim components.  
17 But, yes, that's correct.

18 Q. And is there anything that would distinguish  
19 protein versus other solids versus total nonfat solids  
20 that would you think cause a different conclusion to be  
21 reached with respect to any of those?

22 A. No, because yields haven't changed.

23 Q. And has anything changed since 1988 that would  
24 cause the conclusion USDA reached then to be --

25 A. No. Regulatory and standard of identity for fluid  
26 milk have not changed, and if they aren't changed, there's  
27 no way to get added value out of those components in fluid  
28 milk.



1 Q. Now, let's assume that, as we know, that nonfat  
2 solids levels are a little higher in the four fat/skim  
3 orders than are currently in the assumption, correct?

4 A. Yes.

5 Q. And you described a solution to that to be to go  
6 to multiple component pricing, correct?

7 A. That is correct.

8 Q. That is how you get farmers to get -- strike that.

9 That's how you get processors to pay for Class II,  
10 III, and IV milk based upon the component levels in that  
11 milk that are of value to Class II, III, and IV, correct?

12 A. Yes. It equalizes minimum regulated price for all  
13 markets, all handlers that are pooled.

14 Q. And -- and if you instead do it by changing the  
15 assumption in the formula that now exists, A, you are  
16 assuming solid levels that may or may not actually be  
17 there and, therefore, may -- or the milk may not, in fact,  
18 be of more value for Class II, III, and IV, correct?

19 A. Yes.

20 Q. And as you have demonstrated, you are  
21 increasing -- strike that.

22 And if you do the change there, the -- you are  
23 increasing the minimum Class I prices by \$240 million,  
24 correct?

25 A. That's the number. But, yes, whatever is in the  
26 chart.

27 Q. And when you -- when you quoted Dire Straits,  
28 "money for nothing," is that what you had in mind?





1 will move milk to its highest and best use. And so there  
2 is no yield value from their protein in Class I, just like  
3 there's a much lower yield value of that Class -- high  
4 protein milk in Class IV, so its value based on its  
5 contribution to yield.

6 And that's one of the things component pricing  
7 also does, it incentivizes, particularly cooperatives,  
8 to the extent it makes transportation sense, to move those  
9 high protein milks to where they get the highest and best  
10 use. And that would also be true in any market, not just  
11 the MCP orders, because there is no -- there is no  
12 value -- no marginal value of that protein in Class I. If  
13 we could figure out a way to do that, frankly, I think it  
14 would be great, but at this point it is not possible.

15 Q. If a bottler is receiving milk with 3.7% protein,  
16 in a multiple component market, they are not paying for  
17 that -- that protein?

18 A. That's true.

19 Q. But the pool is?

20 A. Yes.

21 Q. And that drains money from the pool. You -- you  
22 are setting a standard if -- if -- if they are receiving  
23 milk with the -- when the skim milk has a 3.41% protein  
24 right now, they -- they are draining the pool to pay the  
25 protein at the -- on the producer paychecks, and the  
26 Class I handler is not matching that average value.

27 A. How is he draining the pool if he's paying for the  
28 product what it contributes to yield? If -- if a





1 cooperative or even a farmer elects to ship milk directly  
2 to a fluid plant and their milk's very high protein,  
3 that's -- that's a decision that is made. From my  
4 experience, that doesn't happen very often. And the  
5 reason it doesn't, because you add the pool value by  
6 moving that milk into its highest and best use of  
7 manufacturing. And you -- you reserve the lower solids  
8 milk to go into Class I, which, frankly, works just fine.  
9 And that's a -- that's a business decision that is made  
10 every day in -- in -- certainly now in component markets.  
11 You move milk to what's the net best -- the best net  
12 benefit to the cooperative's members, and that means in  
13 general, if transportation makes sense, it is going to  
14 move into -- it is going to move into cheese plants if it  
15 is high protein milk.

16 Q. If -- if the transportation is paid for by that  
17 extra value?

18 A. Well, there's generally market premiums on all  
19 milk. So, yes. But also just from the standpoint of,  
20 again, where the milk is located and how many farms are  
21 together, you are going to -- I mean, you are going to  
22 maximize pool value for your members if you are a  
23 cooperative. So that milk's going to move to its higher  
24 use.

25 Q. If you instituted multiple component pricing in  
26 the Southeastern markets, just as a hypothetical, and it's  
27 a -- it will be affected that -- the impact of that will  
28 be affected by the decisions made on the formulas in this



1 hearing. You would have a lot of milk potentially with  
2 high protein tests, incentivized by multiple component  
3 pricing, that are so far away from any cheese plants that  
4 they would simply be delivered to bottling plants.

5 A. Well, in that market, they probably are now. And,  
6 again, we believe tests are lower in those markets. And,  
7 again, it comes to the solution. We will have examples  
8 later where milk is being -- low sales milk is being  
9 diverted to Class II processing in the Southeast, and it  
10 makes perfect business sense, because that milk has more  
11 value than the components in it in a higher market. In  
12 one plant's case, they are very, very close to the current  
13 standards for solids in SNF, it's remarkable. So you  
14 can't just -- you just can't assume that.

15 Anytime you have a regulated system, there is  
16 going to be decisions made based on that economic benefit.  
17 And I'm amazed how sophisticated a lot of my suppliers at  
18 Kroger were at doing that, which they should be. They are  
19 just serving their membership.

20 And so you generally are going to allocate  
21 because, yes, you can send that high protein milk into a  
22 fluid plant and -- and pay producers in protein. But when  
23 you are trying to get the maximum value out of the pool,  
24 you are going to send that milk into manufacturing if you  
25 possibly can, if it makes sense. So it will never be  
26 perfect.

27 And the other thing to remember, again, is we are  
28 talking minimum pricing, and we are talking value to that



1 the processor. He should be paying for milk based on its  
2 true yield value, and that doesn't change, sadly, when the  
3 components go up because regulation doesn't allow it to  
4 change it.

5 Q. You testified, though, in multiple component  
6 pricing markets, producers are incentivized to increase  
7 their protein tests?

8 A. They are.

9 Q. Okay.

10 A. And they are rewarded for it.

11 Q. So if we implemented multiple component pricing in  
12 the Southeastern markets, they would presumably increase  
13 their component tests?

14 A. If the decision was to change producer payments to  
15 multiple component pricing. That has been the precedent.  
16 Made that -- will that always be the precedent, I don't  
17 know. I can't speak to that. That you would pay  
18 producers on the same components as Class III like you do  
19 in the other orders. Certainly that has been the  
20 precedent.

21 Q. Thank you. Thank you.

22 DR. CRYAN: I'm done.

23 THE COURT: Further cross, AMS?

24 MR. WILSON: Yes. Thank you.

25 RE-CROSS-EXAMINATION

26 BY MR. WILSON:

27 Q. Mr. Rosenbaum asked you a couple of follow-up  
28 questions on Table 3, and I would like to ask you about



1 the mechanics, the math on footnote 1.

2 When you -- when you were estimating the impact --  
3 the -- I'm sorry. When you were estimating the percent on  
4 states that had multiple orders that they were delivering  
5 to -- for instance, we're sitting here in Carmel, Indiana.  
6 Indiana borders two or three different orders.

7 A. Yes.

8 Q. How did you -- how did you apply Indiana's percent  
9 that was calculated from DHIA records?

10 A. Again, I picked the state where the bulk of the  
11 milk is delivered. I didn't try to divide it up. It's,  
12 frankly, a function of time. So it went to Mideast.

13 Q. And you used the -- one of the exhibits that has  
14 already been presented on the majority of milk from that  
15 state --

16 A. Yes.

17 Q. -- coming into different markets?

18 A. Yes.

19 Q. Okay.

20 MR. WILSON: Thank you.

21 THE COURT: Is that it?

22 Mr. Rosenbaum, re-redirect?

23 MR. ROSENBAUM: No, your Honor --

24 THE COURT: I'm sorry?

25 MR. ROSENBAUM: Your Honor, I just would like to  
26 move the exhibits -- the admission of Exhibits 98 and 99.

27 THE COURT: Any objection?

28 Exhibits marked for identification 98 and 99 are



1 admitted into the record.

2 (Thereafter, Exhibit Numbers 98 and 99 were  
3 received into evidence.)

4 MR. ROSENBAUM: And I just -- I would have a  
5 proposal about Exhibits 100 and 101. Those are the  
6 documents that Mr. Covington used during examination.  
7 And, you know, normally, frankly, something like that  
8 would come in through a witness, since Mr. Covington went  
9 and took some information off the data source. And we  
10 would just like, if we could, to have the opportunity to  
11 wait and -- to just double-check that same data source  
12 during lunchtime today, and so we would ask that a ruling  
13 on 100 and 101 just be deferred until that point if --

14 THE COURT: I think that's a -- that's a good --  
15 Ms. Hancock rises.

16 MS. HANCOCK: Your Honor, I have no objection to  
17 that as long as the witness would be -- remain available  
18 today so that we could voir dire him on it if they do have  
19 any objections.

20 THE COURT: Sure.

21 MR. ROSENBAUM: That is perfectly reasonable.

22 THE COURT: I don't know what the procedures in  
23 these milk hearings have been in the past. There probably  
24 is a better procedure to present a witness to -- with your  
25 own numbers. These numbers are extracted from a  
26 government source, and the witness basically agreed -- in  
27 general. I understand you go through number by number.  
28 That seems certainly appropriate to me to give you the



1 opportunity to compare that source to the numbers  
2 presented in these two exhibits to see if they are right.

3 MR. ROSENBAUM: Thank you, your Honor.

4 THE COURT: Yes, sir.

5 Okay. With that, what's next?

6 MR. HILL: I do have a housekeeping matter, your  
7 Honor.

8 THE COURT: Yes.

9 MR. HILL: Yesterday there was a witness named  
10 Lynne McBride --

11 THE COURT: Yes.

12 MR. HILL: -- who had Exhibits 86 through 95.  
13 They did not come in yesterday because she did not have  
14 hard copies of 87 through 95. And we apparently have  
15 those hard copies now.

16 THE COURT: Have they been distributed?

17 MR. HILL: There were only four copies of each.

18 THE COURT: Okay. So Ms. -- and the exhibits are  
19 on the website?

20 MR. HILL: Yes.

21 THE COURT: I --

22 MR. HILL: I just note that you were going to  
23 admit them yesterday, so I wanted to make you aware that  
24 they are here.

25 THE COURT: Yes, they -- we have four copies. Do  
26 I get a copy of the four -- one of the four or -- I don't  
27 know how many we need. I'm not saying that they wouldn't  
28 be admitted. And the hearing -- I guess the hearing



1 reporter doesn't need them, so -- thanks.

2 Are these mine to keep?

3 MR. HILL: Yes, sir.

4 THE COURT: Okay. I don't have these labels, but  
5 I'll figure it out.

6 Any objection to the admission of Ms. McBride's  
7 exhibits previously identified as 86 through 95?

8 Seeing none, those exhibits as previously  
9 identified are admitted into the record.

10 (Thereafter, Exhibit Numbers 86 through 95  
11 were received into evidence.)

12 THE COURT: If it is okay with everyone, I don't  
13 think it's ex parte, I'm going to walk over at lunch and  
14 see if I can match up what I was just given with what was  
15 identified previously. Or I guess I could do it on the  
16 website, couldn't I?

17 Yes, Mr. Miltner.

18 MR. MILTNER: Your Honor, I have a question about  
19 Exhibit 86, and it is not about its admission. At the  
20 very end of it, Ms. McBride had a request at the end, and  
21 I don't recall it was really addressed yesterday. She  
22 said, "I would like to request the ability to submit  
23 additional written testimony on a range of subjects  
24 important to dairy farmers for consideration during this  
25 hearing."

26 And I -- to the extent she's referring to  
27 post-hearing briefs or appearing again to comment on other  
28 proposals, we would not have an objection. But we would



1 object to anybody filing written testimony that didn't  
2 comply with the procedures that have already been outlined  
3 by AMS, and I just wanted to make that statement for the  
4 record. And I don't know if there needs to be a ruling or  
5 anything like that, but I did want to make that statement.  
6 So thank you.

7 THE COURT: Thank you. If a request comes -- I  
8 don't take that to be a specific enough request to rule  
9 upon. I would think that in general you would be correct,  
10 that we need to follow the procedures here. But there are  
11 instances when additional testimony or other materials  
12 could be put in. So when we actually get a specific  
13 request, we'll rule upon it then, and parties and  
14 witnesses are forewarned that you will oppose, if  
15 appropriate.

16 MS. VULIN: Your Honor, I believe that upon  
17 conferring with the other parties here, we're ready to  
18 proceed to a MIG witness next.

19 THE COURT: Yes, please.

20 MS. VULIN: And did we want to take another  
21 morning break, or are we set to push to lunch? I'm fine  
22 either way, but I wanted to check with the court reporter.

23 THE COURT: Ms. Pish is the nodding yes. So let's  
24 take ten minutes. Let's come back at 11:30.

25 MS. VULIN: Thank you.

26 (Whereupon, a break was taken.)

27 THE COURT: Let's reconvene at 11:31 a.m. On the  
28 record.





1 MS. HANCOCK: Your Honor, we would just move to  
2 introduce Exhibits 100 and 101 as verified by IDFA.

3 MR. ROSENBAUM: Steve Rosenbaum for IDFA. We have  
4 verified those numbers, and we have no objection to the  
5 admission of the exhibits.

6 THE COURT: Yes. Thank you, Counsel, for working  
7 together on that. That solves problems in a good way.

8 (Thereafter, Exhibit Numbers 100 and 101  
9 was received into evidence.)

10 THE COURT: And we'll remain on the record.  
11 You have the floor, Ms. Vulin.

12 MS. VULIN: Thank you.

13 MIG calls to the stand Wendy Landry with HP Hood.

14 THE COURT: Raise your right hand.

15 WENDY LANDRY,

16 Being first duly sworn, was examined and  
17 testified as follows:

18 THE COURT: Your witness.

19 MS. VULIN: Thank you, your Honor.

20 DIRECT EXAMINATION

21 BY MS. VULIN:

22 Q. Ms. Landry, will you please state and spell your  
23 name for the record?

24 A. Wendy Landry, W-E-N-D-Y, L-A-N-D-R-Y.

25 Q. And, Ms. Landry, you have before you -- oh, excuse  
26 me -- our housekeeping, what is your business address?

27 A. Business address is 6 Kimball Lane, Lynnfield,  
28 Massachusetts, 01940.



1 Q. And, Ms. Landry, you have before you a document  
2 entitled MIG-3.

3 Do you see that?

4 A. Yes.

5 Q. And is this document your written testimony for  
6 the hearing?

7 A. Yes, it is.

8 MS. VULIN: And may I ask, your Honor, that this  
9 document be marked as Exhibit 102 upon completion of  
10 Mrs. Landry's testimony and any cross-examination?

11 THE COURT: Well, we'll mark it for identification  
12 now, and we'll consider admitting it after the -- this  
13 witness's testimony.

14 (Thereafter, Exhibit Number 102 was marked  
15 for identification.)

16 MS. VULIN: Thank you, your Honor. And we would  
17 also request that the court reporter enter this testimony  
18 into the record as read.

19 THE COURT: Yes, this testimony will be -- well,  
20 when you say -- you want her to type out what's in the  
21 statement?

22 MS. VULIN: Correct.

23 THE COURT: Okay.

24 MS. VULIN: Just to save us the time of having  
25 to --

26 THE COURT: No, I understand that. The other  
27 possibility would be -- it's an exhibit. It is going to  
28 be in the record at the end anyway. But, yeah, that -- I



1 know others have done that.

2 MS. VULIN: I --

3 THE COURT: Ms. Hancock rises.

4 MS. VULIN: I believe Mr. Vetne had.

5 THE COURT: Yes, I think so.

6 MS. HANCOCK: Your Honor, I think that we did that  
7 in California, and that was one of the kind of time syncs  
8 that we got into. And if we admitted it as an exhibit  
9 into the record, I think the substance of it is in there,  
10 and then other witnesses have just summarized it as they  
11 see fit. But I don't think that we need to waste the  
12 court reporter's time of having her just retype what is  
13 admitted as an exhibit.

14 THE COURT: AMS, what do you guys think? I mean,  
15 I understand the tradition here has been to read  
16 statements and then -- and type things out, and I'm not --

17 MR. HILL: We certainly feel the same way, that if  
18 it's -- if it is an exhibit, there's no reason to retype  
19 it. It will be an exhibit as 102 most likely, and we  
20 don't really see the need to retype it into the record.

21 THE COURT: What do you think.

22 MS. VULIN: We're of course happy to proceed  
23 however AMS would prefer. So that sounds fine by us.

24 THE COURT: I don't think you will stick with that  
25 throughout the whole hearing, but we'll find out.

26 MS. VULIN: As long as they proceed how I want  
27 them to, then we'll remain aligned.

28 THE COURT: I hear you there. I will say, I do



1 know that it's -- like I said, I do know it is tradition  
2 here to read statements into the record and -- or to --  
3 and we now have a limit on direct of 60 minutes, and  
4 summary and all that. But not every agency does it that  
5 way, and I don't see a benefit to it. I do think the  
6 folks writing the decision are going to read it. They  
7 don't have to hear it here. And I -- I read much faster  
8 than I listen, so --

9 MS. VULIN: That's fine.

10 THE COURT: Thank you. Thank you, everybody, for  
11 that. I'm not -- you know, if somebody wants to read it  
12 into the record, another set of testimony, I realize that  
13 that's the tradition, and I won't -- I probably won't  
14 limit that. But those are my views. I think it serves  
15 every purpose to have it as a written document as an  
16 exhibit. Thank you.

17 MS. VULIN: Thank you. Happy to proceed that way.

18 And then I would also ask that MIG Exhibit 3A be  
19 recognized and identified as Exhibit 103 for purposes of  
20 testimony, and that's a copy of the PowerPoint  
21 presentation that Ms. Landry's going to present.

22 THE COURT: So marked, Exhibit -- Exhibit  
23 MIG/Hood-3A is marked for identification as 103.

24 (Thereafter, Exhibit Number 103 was marked  
25 for identification.)

26 MS. VULIN: And for those attending in person,  
27 that's stapled together with MIG Exhibit 3 as one  
28 document. So you should have everything.



1           Now that our housekeeping is hopefully taken care  
2 of --

3           THE COURT: I have an Exhibit MIG/Hood -- wait a  
4 minute. I have got two copies of the same thing. Never  
5 mind. Strike that. I've got my own housekeeping to take  
6 care of.

7           You may proceed, Counsel.

8           MS. VULIN: Thank you, your Honor.

9 BY MS. VULIN:

10          Q. Ms. Landry, I would like to start with your  
11 background, if we could, please. How did you get into the  
12 dairy industry?

13          A. Both of my parents were cooperative extension  
14 agents when I was little, and so I was involved in 4H.  
15 When I was nine, my parents went and bought me a dairy  
16 heifer, so that became the beginning of a ten-year career  
17 in 4H showing dairy heifers. So after high school I  
18 decided I wanted to go to college, and -- and that -- one  
19 thing led to another, so here we are.

20          Q. Can you give us a brief summary of your  
21 professional background, please?

22          A. Yes. I started in the industry in '97, working  
23 for an independent family-owned company in Maine. We had  
24 one plant and 110 producers. So I did the plant quality  
25 side as well as the farmers. And then in 2007, I moved  
26 to -- joining Hood, which was actually a half a mile  
27 difference in my commute. So they were both in Portland,  
28 Maine.



1 Q. What was your role when you joined Hood in 2007?

2 A. I was the quality assurance manager for the  
3 Portland, Maine, facility.

4 Q. And how long did you stay in that role?

5 A. Nine and a half years.

6 Q. What did you do after that?

7 A. I went and spent a year and a half as the supply  
8 chain quality manager, auditing our suppliers. And then I  
9 took a role as the quality assurance director for the  
10 fluid and ice cream plants for Hood, and they are all  
11 located in New England. So there are four fluid plants  
12 and an ice cream plant.

13 Q. And how long did you have that role?

14 A. Until 2019 when -- sorry -- I became the senior --  
15 sorry, excuse me -- the director of supply chain quality.  
16 Now I have two staff under me.

17 Q. And where -- we have been talking this morning  
18 about -- about skim milk components, correct?

19 A. Correct.

20 Q. And the last few days. Have you worked with  
21 components as part of your job experience before?

22 A. I have, when I was at both of those as a quality  
23 assurance person.

24 Q. And can you just give us a little summary of  
25 how -- how did components play into your day-to-day work  
26 when you were in quality assurance?

27 A. Yeah. When I was in the independent dairy, which  
28 has now -- has been sold to DFA, we had the 110 farms, and



1 I would be in charge of testing all of those farms for  
2 payment. We paid them ourselves. And then at Hood, I was  
3 responsible for testing the milk that came into the  
4 facilities for payment.

5 Q. So you're fairly familiar with how component  
6 factors play into milk?

7 A. Yes.

8 Q. And I understand that you have a PowerPoint to  
9 share?

10 A. I do.

11 Q. Could you pull that up for us, please?

12 A. Yes.

13 Q. Great. I think we see it now.

14 A. Uh-huh.

15 Q. So, Ms. Landry, can you tell us a little bit about  
16 the corporate history of HP Hood?

17 A. Yes. HP Hood is a family-owned company. It  
18 started in New Hampshire in 1846. It is not currently  
19 owned by the original family, but it is a family-owned.  
20 We're based out of -- the corporate offices are in  
21 Massachusetts, but it covers all of the Northeast as well  
22 as a plant in Sacramento. We have 3 billion in sales for  
23 2022.

24 Q. And how many fluid milk plants does Hood have?

25 A. We have nine. We have the four fluid milk plants  
26 in New England, those are HTST plants; and then we have  
27 five other ESL, or UHT, plants throughout the country.

28 Q. You said four fluid plants in the Northeast; is



1 that right?

2 A. Yes. In New England.

3 Q. In New England. Are those regulated on Federal  
4 Order 1?

5 A. They are, yes.

6 Q. And then the other plants you mentioned, where --  
7 what order are those regulated under --

8 A. They're --

9 Q. -- if any?

10 A. Yep. So four of those are in the Northeast, so  
11 they are in Federal Order 1. And then there is one in  
12 Sacramento, California, which is Federal Order 51.

13 Q. And what types of products does Hood manufacture?

14 A. We make everything from fluid milk, creams, half  
15 and half, culture products, and ice cream, as well as  
16 plant-based items.

17 Q. And what is Hood's Class I utilization rate for  
18 its ESL and HTST plants?

19 A. In 2022, it was over 87% utilization.

20 Q. In your testimony you mention Lactaid.

21 Can you tell us a little bit about that, please?

22 A. Yep. Lactaid is the largest brand Hood uses --  
23 sorry -- we produce, and we have a license with McNeil  
24 Nutritionals, which used to be J&J. And that is --  
25 sorry -- in the last 52 weeks, as of July 30th, was  
26 108 million gallons of production.

27 Q. What kind of product is Lactaid?

28 A. Lactaid is a lactose-free milk.





1 Q. And is that a -- you said that's -- is that a  
2 successful product for Hood?

3 A. It is a very successful product. We don't have  
4 the capacity in all of our plants. We have several  
5 co-manufacturers making it for us because the volume is so  
6 large.

7 Q. And in addition to lactose-free, you said Hood  
8 makes everything from skim, 1%, 2%, chocolate milk,  
9 etcetera?

10 A. You got it. The gamut.

11 Q. Wonderful.

12 If you could go to the next slide, please.

13 And can you walk us through the manufacturing  
14 process for Hood's fluid milk products, please?

15 A. Sure. This is a very crude chart, but it is our  
16 flow for a white milk at our Class I plants.

17 So the milk comes into the raw milk receiving bay,  
18 and it is tested for all of the standard tests that we do,  
19 including temperature, antibiotic testing, total solids,  
20 freezing points.

21 After it's passed those standards, it is allowed  
22 to go into the raw milk silo. It is stored there and used  
23 when needed depending on the production.

24 I have added the liquefier into this flow, and we  
25 can go back to that later, but that's where we add any  
26 ingredients if needed.

27 The milk out of the storage silo goes to the  
28 separator where it is separated into skim milk and cream.



1 We also have a cream storage silo if we need to bring  
2 cream back into a blend.

3 Then vitamins are added for fluid milk. It goes  
4 through the homogenizer, on to the pasteurizer --  
5 pasteurized storage milk -- sorry -- pasteurized milk  
6 storage, then filling, cold storage, and distribution.

7 Q. And you mentioned kind of adding and subtracting  
8 ingredients, so I want to focus on that for a moment.

9 Can you point out where, if any, points in the  
10 manufacturing process Hood adds ingredients?

11 A. So we would add, obviously, the vitamins, but we  
12 would also, if we were making a flavored milk, we would  
13 add the chocolate powder or the sugar or solids, if  
14 needed, we would add it in the liquefier.

15 Q. Okay. And can Hood add water to its milk at any  
16 stage?

17 A. We cannot.

18 Q. And when we talk about kind of standardizing  
19 products, it -- is it your understanding that that  
20 includes adding water to create a larger volume or yield  
21 of those products?

22 A. We are not allowed to do that based on the  
23 standard of identity.

24 Q. And when you say "we," that's all Class I  
25 manufacturing plants?

26 A. Correct.

27 Q. And then I would like to focus then on the stages  
28 of manufacturing where you can remove an ingredient.



1 Can you point that out to us, please?

2 A. Yes. The only place we can remove is at the  
3 separator. We're removing the fat.

4 Q. And so Hood can't remove, for example, protein  
5 from its milk?

6 A. No, we cannot.

7 Q. Or other solids?

8 A. No, we cannot.

9 Q. Or nonfat solids?

10 A. Correct.

11 Q. The only component or ingredient that Hood can  
12 remove is the fat?

13 A. Is the fat, yes.

14 Q. And, again, is that your understanding based on  
15 federal regulations of what Hood can do to fluid milk it  
16 processes?

17 A. Yes.

18 Q. And at what stage in this manufacturing process,  
19 or before is -- does Hood have its components levels  
20 tested in its raw milks?

21 A. So we have tried in the past to do the raw milk --  
22 the loads as they come in. However, because a lot of the  
23 milks can be holdover, so they were loaded on one day,  
24 stood still overnight, the butterfats vary too much. So  
25 we now test based on the storage silo at the end of it  
26 being filled, and it's a weighted average for butterfat.

27 Q. And when you say the butterfat was -- because  
28 literally the cream would rise up?



1 A. The cream really does rise to the top, yes.

2 MS. VULIN: And is the volume okay for everyone?

3 (Court Reporter clarification.)

4 BY MS. VULIN:

5 Q. And so you said after Hood transitioned away from  
6 doing its own component testing, at what point is Hood's  
7 raw milk tested for components today?

8 A. So we test the incoming for everything. But we're  
9 using the butterfat. As far as the components coming in  
10 from the producer samples, those samples are sent to a  
11 third-party co-op lab. So it depends on what -- who we're  
12 buying the milk from and what lab it will go to for  
13 testing.

14 Q. And you said Hood does internal component  
15 testing --

16 A. Correct.

17 Q. -- correct?

18 A. Yes. All of our equipment that we have in the lab  
19 is capable of testing for all of these components;  
20 however, we only use the butterfat.

21 Q. Sorry, you said that Hood is capable of testing  
22 for all components, but the only component Hood actually  
23 tracks is butterfat?

24 A. Correct. Yes.

25 Q. And then you mentioned that your supplier  
26 cooperatives or whomever is your supplier does the  
27 testing. Is that the component testing upon which your  
28 pay prices are set?



1 A. That is correct, yes.

2 Q. And that testing is done by the supplier?

3 A. It is, at various labs throughout the Northeast.

4 Q. And is it your understanding if that supplier  
5 testing is what is reported to the MA?

6 A. Yes, that is what we -- they also base our bills  
7 on that.

8 Q. Now, if we could go to the next slide, please.

9 I believe this is also found on page 4 of your  
10 written testimony.

11 A. Yes, it is.

12 Q. Can you tell us what this table is?

13 A. This is a table that we have compiled of the  
14 Hood -- the nine Hood plants that produce Class I milk  
15 with the Federal Milk Marketing Order current standards,  
16 Proposal Numbers for 1 and -- Proposals 1 and 2, and the  
17 Hood maximum and minimum results for those three  
18 components. And this was based on the calendar years of  
19 2021 and 2022.

20 Q. So this table here has two years of data, correct?

21 A. Yes, it does.

22 Q. And this data is specific to Hood's nine fluid  
23 milk plants?

24 A. That is correct.

25 Q. And what is the source of the component data  
26 that's in this table?

27 A. These are -- the components were from the MA  
28 reports that we received at the plants.



1 Q. Uh-huh. And who created this table?

2 A. Sally Keefe did it for us. We provided the data  
3 for her.

4 Q. And you said there were a number of different  
5 metrics in the rows.

6 A. Yes.

7 Q. The first one being the current FMMO skim milk  
8 component factors?

9 A. Correct.

10 Q. The second being Proposals 1 and 2?

11 A. Yes, that is correct.

12 Q. And then we get to the Hood specific data?

13 A. Uh-huh.

14 Q. So HP Hood minimum, can you please tell us what  
15 that is?

16 A. Sure. So those three numbers, the 3.09, 5.83, and  
17 8.92, are the minimum we received in 24-month -- that  
18 24-month time period from any of our nine plants that do  
19 Class I.

20 Q. Okay. So that's a single data point?

21 A. It is, yes. Not an average. It is an actual  
22 result we received.

23 Q. Okay. And looking at the protein, you said -- so  
24 there was some plant in that 24 months that received 3.09%  
25 protein?

26 A. Correct. Yes.

27 Q. And for other solids it was 5.83%?

28 A. Yes.



1 Q. And nonfat solids as a percent of skim is 8.92%?

2 A. That is correct.

3 Q. And comparing those to the current levels, it  
4 appears that all three of those component tests are below  
5 the current levels?

6 A. They are, correct.

7 Q. So if USDA were to apply a market minimum for the  
8 skim formula component factors based on Hood's data, what  
9 should that minimum be?

10 A. What it is currently set for for all three  
11 components.

12 Q. Now let's look at the maximum.

13 What does that number show?

14 A. So for the -- these are also the nine fluid milk  
15 plants, and these were the highest results we got in the  
16 two-year period, January 2021 to December of 2022.

17 So we had a protein, the highest we received was  
18 3.5%, other solids was 6.08, and nonfat solids was 9.49%.

19 Q. So there were a few months when Hood received  
20 components at levels above Proposals 1 and 2?

21 A. That is correct. Yes.

22 Q. But when I look at the next line, it looks like  
23 that was not consistent across the months; is that right?

24 A. It was not consistent, you are correct. There are  
25 several occasions where some of our locations have farms  
26 that are high Jersey percentages or colored breeds, and  
27 that would cause those numbers to go up.

28 Q. So then let's go to this last row, percent of



1 months with plants below proposals.

2 Do you see that?

3 A. Yes, I do.

4 Q. Can you tell us what that row reflects?

5 A. Yes. So out of that 24-month period, 83% of our  
6 plants tests were below the proposal for skim at 3.39.  
7 72% of our plants were below other skims at 6.02. And 86%  
8 of our plants were below the 9.4 proposal of nonfat  
9 solids.

10 Q. So looking at this, there is quite a range in the  
11 component levels; is that right?

12 A. There is, yes.

13 Q. But the overwhelming amount of time, those are  
14 falling below the Proposal 1 and 2 levels for Hood's  
15 actual testing data?

16 A. That is correct.

17 Q. And can you explain to us a little bit why there's  
18 such a range in components over plants and over years?

19 A. So there's obviously the seasonal differences,  
20 that 3.09 minimum was received in July for one location,  
21 as well as I mentioned before the different breeds of cows  
22 that we have in each area.

23 Q. And there's been talk of Class I plants receiving  
24 benefits based on current protein levels that are being  
25 delivered that aren't being paid for.

26 Looking at Hood's actual data, what -- if  
27 Proposals 1 and 2 are adopted, what percent of the time  
28 would Hood have to pay for components it is not actually





1 receiving based on protein?

2 A. Basically most of it.

3 Q. Nearly all of it?

4 A. Yep, nearly all.

5 Q. And the same for other solids?

6 A. That is correct.

7 Q. And the same for nonfat solids?

8 A. That is correct.

9 Q. Now, if we could go to the next slide, please.

10 A. Sure.

11 Q. I believe this slide is found on page 5 of your  
12 testimony.

13 A. Yes, it is.

14 Q. Can you tell us what this table shows, please?

15 A. This is a table of the nine plants we have, and  
16 they are results based on above or below the Proposals 1  
17 and 2 for the timeframe of December of 2021 to -- sorry --  
18 January of 2021 to December of 2022. The blue coloring is  
19 items -- months that every plant was below Proposals 1 and  
20 2 for protein levels, and the yellow indicates where it  
21 actually was above the protein levels.

22 Q. So this chart doesn't tell us the specific protein  
23 level any plant was at, correct?

24 A. That's correct.

25 Q. It just says whether or not it hit the benchmark  
26 of being above or below Proposals 1 and 2?

27 A. That is correct.

28 Q. And can you tell us what this table shows us about



1 the amount of time Hood's plants were reaching the protein  
2 levels in Proposals 1 and 2?

3 A. It -- there's a very few months at certain plants  
4 that it even hits those numbers. I believe there is at  
5 least ten or 11 months where we didn't hit it at all.

6 Q. And when you say ten or 11 months you didn't hit  
7 it at all, you mean there are ten or 11 months that not  
8 one of Hood's nine plants received protein tests at the  
9 Proposal 1 levels?

10 A. That is correct.

11 Q. And if I look at this, there's some seasonality,  
12 as you explained --

13 A. Yes.

14 Q. -- in the component levels?

15 A. That is correct. In January -- usually November,  
16 December, and January, we see the solids increase.

17 Q. But even in those high component months, the  
18 protein tests are not reaching Proposal 1 levels in all of  
19 Hood's plants, correct?

20 A. That is correct. Yep.

21 Q. So if Hood receives a load of milk with lower  
22 proteins than it desires, what are Hood's options to  
23 modify or alter those protein levels?

24 A. Well, as long as it meets the standards of  
25 identity, we will not change it at all. If it does not,  
26 we will have to add solids to it, which is very time  
27 consuming, and we would have to add -- it would be another  
28 processing step for us.



1 Q. And is it expensive to add solids?

2 A. It is expensive, as well as having it on hand,  
3 because we never know what the milk is going to come in  
4 as, so it could change. So we need to have it on hand.

5 Q. And why wouldn't Hood add protein if the milks  
6 meet the standard of identity?

7 A. We wouldn't add it because there's no advantage to  
8 having a higher protein level, and it's not listed on the  
9 label.

10 Q. And does Hood have any protein -- any products  
11 that are advertised based on -- or promoting higher  
12 protein content?

13 A. We do have two, and those are in the Lactaid  
14 family. There's a 2% and the whole milk.

15 Q. And do you consider those to be specialty  
16 products? Are they a large part of Hood's book? How  
17 would you describe those?

18 A. They are -- they are I would consider specialty  
19 products, but they are not a large portion of the volume  
20 at all.

21 Q. So even though Hood can and has advertised certain  
22 products as having higher protein, that's not a  
23 modification it's made across all of its fluid milk  
24 offerings?

25 A. Correct. Yes. That's only at the ESL plants if  
26 they run that Lactaid product, and a lot of the customers  
27 that we deal with on the Class I side don't ask for higher  
28 protein levels.



1 Q. My next question was going to be, why don't you  
2 add protein to all the other milk --

3 A. Yes.

4 Q. -- but you got there.

5 So is there anything else you would add other than  
6 your customers aren't asking for it?

7 A. No. I -- I think it is the standard. Customers,  
8 as Mike Brown testified yesterday, are looking for price  
9 and butterfat. So adding things would just increase the  
10 cost for all of us.

11 Q. And if you receive milk that has particularly high  
12 protein levels, is there any way for you to extract that  
13 protein out to utilize it in other ways, sell it, or  
14 generate any value?

15 A. There is no way for us to extract it.

16 Q. If you could go to the next slide, please.

17 And it appears this is the same metric as the  
18 prior slide, but for other solids; is that right?

19 A. That's correct, yes.

20 Q. I believe the earlier data reflected that a  
21 majority of the time Hood did not receive other solids  
22 levels at the Proposal 1 levels; is that right?

23 A. Yes, that is correct.

24 Q. Okay. And similarly, it looks like here there is  
25 no month where all of Hood's plants receive other solids  
26 at the levels in Proposal 1; is that right?

27 A. Yes, that is correct.

28 Q. Does Hood advertise any of its products as



1 containing high levels of other solids?

2 A. No, they do not.

3 Q. Based on your experience, what demand, if any, do  
4 retailers or ultimate consumers have for other solids?

5 A. They do not that I'm aware of.

6 Q. In your experience have you ever talked about  
7 other solids with a customer of Hood's?

8 A. I have not. I have talked to some 4H kids about  
9 it, but I have never talked to a customer about it.

10 Q. No -- no customer has ever asked Hood if it could  
11 have milk with higher levels of other solids?

12 A. No, it has not.

13 Q. If you could go to the next slide, please.

14 It looks like, to round out our components, this  
15 is the same table but for nonfat --

16 A. Yes.

17 Q. -- solids nonfat?

18 A. That is correct.

19 Q. And does Hood advertise any of its products as  
20 containing a high level of nonfat solids?

21 A. No, we do not.

22 Q. And similarly, have you ever had a retail or  
23 ultimate consumer inquire about wanting higher levels of  
24 solids nonfat?

25 A. No, we have not.

26 Q. And in your experience have you ever had a  
27 retailer or consumer ask for milk with better mouth feel?

28 A. No, we have not.



1 Q. What do your customers or the retail customers,  
2 buyers of your milk, what do they look for when purchasing  
3 products from Hood?

4 A. They are looking for price, and they are looking  
5 for, as Mike mentioned, butterfat and the expiration date.  
6 They do not consider anything else other than butterfat  
7 when they are buying and reaching for those gallons or  
8 half gallons in the store.

9 Q. And we've heard some testimony earlier about how  
10 Proposals 1 and 2 could raise the prices for Class I  
11 processors.

12 Do you recall that?

13 A. I do.

14 Q. And so based on your experience, what do you think  
15 the adoption of Proposal 1 would -- what impact would it  
16 have on Class I processors like Hood?

17 A. I think it would be a huge detriment to us. We're  
18 not set up to use any of the extra components. And it  
19 would just increase the price. And as I stated before,  
20 customers are very price conscious, so the more the price  
21 goes up, most likely the sales will fall.

22 Q. Thank you.

23 MS. VULIN: Nothing further on direct, your Honor.

24 THE COURT: Cross-examination other than AMS?

25 Ms. Hancock.

26 MS. HANCOCK: Thank you, your Honor.

27 CROSS-EXAMINATION

28 BY MS. HANCOCK:



1 Q. By one minute, good afternoon.

2 A. Good afternoon.

3 Q. It is -- I'm Nicole Hancock. I represent National  
4 Milk.

5 A. Nice to meet you.

6 Q. I just have a few questions to clarify some  
7 things. I just -- we'll start with your proposal -- or  
8 with your PowerPoint proposal.

9 A. Uh-huh.

10 Q. I think that -- let's -- if -- do you mind pulling  
11 that back up. We'll just take a look at it together.

12 A. Sure.

13 Which slide would you like?

14 Q. We'll just start at the beginning. We'll just go  
15 in order.

16 This is just a picture -- sorry, the first page --  
17 that's the picture of the branded products that Hood  
18 offers, branded dairy products, I should say?

19 A. Yes, that is correct.

20 Q. Well, dairy and nondairy?

21 A. Those are all dairy.

22 Q. Okay. Are any of those the Lactaid product that  
23 you were talking about?

24 A. They are not.

25 Q. Okay. Is that branded under a different brand  
26 name?

27 A. It is. It's branded under Lactaid, specifically.

28 Q. Okay. And I think you said that was a



1 lactose-free product?

2 A. Yes, it is.

3 Q. And so how does that arrangement work with Hood?  
4 Is that just a contract that you have to produce it?

5 A. It is a licensing agreement we have.

6 Q. Is it a license to produce it, or do you have the  
7 right to brand it and sell it as well?

8 A. I'm not positive on that one.

9 Q. Okay. But nonetheless, I think you said that it  
10 was a very successful part of the business endeavor for  
11 Hood?

12 A. Yes, it is.

13 Q. Do you know what percentage of Hood's revenues are  
14 made up by the Lactaid product?

15 A. I do not --

16 MS. VULIN: Your Honor, I object. If we're going  
17 to get into confidential business information I --

18 (Court Reporter clarification.)

19 THE COURT: Approach the mic. Thank you.

20 MS. VULIN: Ashley Vulin for MIG. I'm sorry.

21 If we're going to get into confidential business  
22 information, I would like the chance to confer with my  
23 client before she answers the questions.

24 THE COURT: I think that's reasonable.

25 Ms. Hancock, the witness will stay here, and you  
26 can confer with Ms. Vulin, too, if we have to. Does that  
27 make sense?

28 MS. HANCOCK: Yes. I'm not asking her to quantify





1 it. I was just asking her for a percentage. I don't need  
2 dollars amount. I think she answered it already, so --

3 THE WITNESS: I'm not aware anyway, so I couldn't  
4 answer it.

5 MS. HANCOCK: Yeah. I could move on. I was  
6 just -- they stated "very successful." I was just looking  
7 for them to quantify it.

8 THE COURT: Understood.

9 MS. HANCOCK: Okay.

10 THE COURT: I mean, I understand. Whether -- if  
11 there's further problems, talk it out amongst yourselves  
12 off the record. Thanks.

13 MS. HANCOCK: Yeah.

14 And no problem. Let me know if I step on it  
15 again.

16 BY MS. HANCOCK:

17 Q. So I guess it is fair to say just "very  
18 successful" means profitable?

19 A. Yes, that is correct.

20 Q. And so do you generate a higher margin for the  
21 Lactaid product because of that premium product  
22 qualification?

23 A. I do not have that information. I don't know.

24 Q. Okay. And I think that you said that Hood  
25 originated in 1846.

26 A. Yes, that is correct.

27 Q. It is fair to say it's gone through a lot of  
28 changes since that time?



1 A. Yes, it has.

2 Q. Including things like Lactaid and the premium  
3 valuation that can be obtained from selling that product  
4 into the marketplace?

5 A. Correct.

6 Q. You would agree that back in 1846 they didn't have  
7 the same kind of premium product offerings --

8 A. No.

9 Q. -- that we see today?

10 A. No, that's true.

11 Q. Okay. And, in fact, that Lactaid product, do you  
12 know when that entered the marketplace?

13 A. I do not. I wasn't involved in that with my job.

14 Q. Okay. And of those -- of those Hood products,  
15 those are all lactose-based products; is that right?

16 A. These currently that you are seeing in front of  
17 you, yes.

18 Q. Okay. And does Hood manufacture and market any of  
19 those Hood-branded products advertising protein?

20 A. No, we do not.

21 MS. HANCOCK: Your Honor, I would like to mark as  
22 an exhibit -- your Honor, could I hand the witness the  
23 exhibit?

24 THE COURT: Yes, you may approach the witness.  
25 Shall we mark this for identification?

26 MS. HANCOCK: Yes, please, your Honor.

27 THE COURT: Oh, yes, I see. Top right-hand  
28 corner, document labeled Exhibit NMPF-99 is marked Hearing



1 Exhibit for identification 104.

2 (Thereafter, Exhibit Number 104 was marked  
3 for identification.)

4 THE COURT: You may continue.

5 MS. HANCOCK: Thank you.

6 BY MS. HANCOCK:

7 Q. Ms. Landry, what's been marked for identification  
8 as Exhibit 104, I will represent to you I just pulled this  
9 off the Hood website.

10 Do you recognize this as Hood's branding for its  
11 1% milk?

12 A. Yes.

13 Q. And that's the bottling there that Hood brands and  
14 packages?

15 A. Yes. Lightblock bottles.

16 Q. And do you know where the 1% milk is produced,  
17 which one of the plants?

18 A. It would be one of the fluid milk plants in New  
19 England.

20 Q. And do you see there's a 1% lowfat milk in the  
21 lightblock bottle title there in the middle of the page?

22 A. Yes, I do.

23 Q. And under that, there's some description of the  
24 product there.

25 Do you see that?

26 A. Yes.

27 Q. And I'm going to read from it. It says, "And  
28 every serving of Hood 1% lowfat milk provides nine



1 essential nutrients and 8 grams of protein per serving."

2 Do you see that?

3 A. Yes, I do.

4 Q. Okay. Is that an accurate statement?

5 A. Yes.

6 Q. And so Hood is branding its 1% milk as offering  
7 that 8 grams of protein; is that fair?

8 A. Yes.

9 Q. And, in fact, if you look below that, there's some  
10 imagery there.

11 Do you see that?

12 A. Yes, I do.

13 Q. And there's some -- there's a barbell picture  
14 there?

15 A. Yes.

16 Q. Okay. And it says below that, "8 grams of protein  
17 per serving"?

18 A. Yes, I see that.

19 Q. Okay. And that's Hood further branding its  
20 product as containing protein in its -- in its milk; is  
21 that right?

22 A. Yes. But it's not an elevated level of protein.

23 Q. Okay. It is something that it is marketing to its  
24 consumers?

25 A. Uh-huh.

26 Q. Is that a "yes"?

27 A. Yes. Sorry.

28 Q. That's okay. I just need to make sure the court



1 reporter can grab that.

2 And then if you look to the right, Hood has also  
3 contained its nutritional label there?

4 A. Yes.

5 Q. And that nutritional label has a protein that's  
6 highlighted there in bold; is that right?

7 A. That's not actually bolded. It's how it is  
8 written on the nutritional label.

9 Q. Yeah, it's bolded compared to the 8 grams; is that  
10 right?

11 A. Yes. But that's how all nutritional labels are  
12 stated.

13 Q. Yeah, that's what's required --

14 A. Yes.

15 Q. -- by the labeling laws?

16 A. That is correct.

17 Q. Okay. And you know you are required to report the  
18 amount of protein?

19 A. Yes.

20 Q. And you would agree that the way in which Hood is  
21 marketing at least this 1%, it is highlighting the fact  
22 that it has that 8 grams of protein?

23 A. Yes.

24 Q. And this is designed to be marketing and  
25 promotional material for Hood's customers?

26 A. I believe this is for customers and sales.

27 Q. Okay. And back in 1846 when Hood started,  
28 highlighting protein was not part of a promotional



1 representation, would it have been?

2 A. I don't even know if there was a standard of  
3 identity in 1846.

4 Q. Okay. So an example of something that's changed  
5 over time?

6 A. Yes.

7 Q. Okay. Let's go to the second page of your  
8 PowerPoint. Oh, there we go.

9 And I think that you -- you talked about the  
10 process for your plants and said that you can't move --  
11 remove anything except for fat at the separator phase; is  
12 that right?

13 A. That is correct.

14 Q. Is that also true for the True Life products?

15 A. I'm not familiar with those.

16 Q. And what about an operation that uses heat or a  
17 vacuum system, do you know if you would be able to remove  
18 anything?

19 A. I'm not aware of those systems.

20 Q. It is not something that Hood uses?

21 A. It is not something that I'm familiar with. There  
22 may be some at some of the plants, but I am not familiar  
23 with it.

24 Q. Okay. Let's go ahead and move on to the next page  
25 of your PowerPoint.

26 Do you have your phone up there by chance?

27 A. No.

28 Q. Okay. Do you have a calculator on your -- on your



1 computer?

2 A. Somewhere.

3 Q. All right. Let's take your minimum and maximum  
4 for protein and add them together, 3.09, and add that to  
5 your maximum at \$3.50. And then let's divide by two.

6 A. That didn't work. Sorry. I don't usually use  
7 this calculator.

8 Q. Okay. So if we take your protein example of your  
9 minimum and your maximum, and we take the average between  
10 those two, it would be, if we round off to the hundredth,  
11 it would be 3.3; is that right?

12 A. That is correct.

13 Q. Okay. And you would agree with me that that's  
14 higher than the current Federal Milk Marketing Order  
15 standards?

16 A. It is, but we do not receive that consistently  
17 throughout the year.

18 Q. Okay. And because you have just taken your high  
19 point and your low point in this spreadsheet; is that  
20 right?

21 A. That is correct.

22 Q. And we -- oops, sorry.

23 A. Sorry. Out of the nine plants, fluid -- Class I  
24 fluid plants, we have taken our highest and lowest.

25 Q. And we didn't get a weighted average to know what  
26 the -- what the volumes of milk would actually -- averages  
27 would actually equate to?

28 A. That's correct.



1 Q. Did you do that calculation to look at the  
2 averages of -- based on the volumes of milk that you had  
3 received?

4 A. I did not do these calculations. Sally Keefe did  
5 them. So I'm not sure if she did the weighted averages.

6 Q. Did you ask her to do the weighted averages?

7 A. This was provided for me for my testimony.

8 Q. Okay. My question was, though, do you know if --  
9 if anybody asked her to do the weighted average?

10 A. I do not know.

11 Q. Okay. I just know sometimes I use the math that I  
12 like the best, so I'm just wondering if there's -- if  
13 there's other calculations that you did that might have  
14 shown something that better reflects what the volumes that  
15 were actually produced.

16 THE COURT: Ms. Vulin has risen to help with this,  
17 I hope.

18 MS. VULIN: And I will say, to the extent that  
19 this inquires into any attorney-client privilege as the  
20 testimony was prepared or discussions of the same, I would  
21 want the opportunity to talk to the witness first. I  
22 don't think -- I think the answer is no, but to the extent  
23 that it ventures there, then I would like to assert that  
24 objection.

25 MS. HANCOCK: Just to be clear, I don't think I  
26 asked anything that invoked any attorney-client privilege.  
27 I think the witness testified that she had been working  
28 with Ms. Keefe on this, and I don't think that that would





1 qualify for an attorney-client privilege.

2 THE COURT: Did this witness testify that these  
3 exhibits were prepared by her or under her supervision?

4 We don't have to resolve this now. You can -- you  
5 can do that.

6 MS. VULIN: To the extent that there were  
7 discussions about what to include in the testimony or not,  
8 if those were with counsel, or under the supervision or  
9 direction of counsel, then that could be privileged. But,  
10 again, I don't think it happened here. I just wanted to  
11 lay the marker down if the line of questioning was going  
12 to continue in that direction.

13 THE COURT: So noted.

14 MS. HANCOCK: I can't remember now if I got an  
15 answer to the last question or if it was interrupted.

16 THE COURT: I -- I can't either. Try it again.

17 MS. HANCOCK: Okay. Well, I don't actually  
18 remember what the last question was now.

19 BY MS. HANCOCK:

20 Q. But I think it was --

21 THE COURT: That's two of us.

22 BY MS. HANCOCK:

23 Q. I think I had asked you whether you had asked  
24 anybody or whether you were aware of asking for a weighted  
25 average based on volume?

26 And just to clarify, I don't want any  
27 communications with your counsel.

28 A. I was given this information to testify. I was



1 not privy to the averages or the calculations.

2 Q. And in your role at Hood, is this something that  
3 you ever look at?

4 A. I do not.

5 Q. Okay. All right. Let's do another calculation  
6 based on the other solids. If you can add those two  
7 numbers together and divide by two.

8 And it looks like the calculation is 5.96?

9 A. Yes.

10 Q. Okay. So, again, something that exceeds what's in  
11 the current order?

12 A. That is correct.

13 Q. Okay. And then, if we look at the last column  
14 there, 8.29 and 9.49, let's calculate the average of your  
15 maximum and minimum for that as well.

16 A. Oh, sorry.

17 Q. Okay. It looks like your --

18 A. I'm not quite there yet.

19 Q. Oh, sorry.

20 A. That's okay.

21 Q. Okay. So this one is 9.21?

22 A. That is correct.

23 Q. For nonfat solids skim, if we take the average  
24 between your minimum and maximum?

25 A. Yes.

26 Q. And you would agree with me that this is during  
27 a -- if I look -- you have some footnotes that are  
28 mentioned there on this page. Those footnotes refer back



1 to your testimony that's in Exhibit -- I didn't write your  
2 exhibit number down for some reason.

3 102 is your testimony number?

4 THE COURT: Yes.

5 BY MS. HANCOCK:

6 Q. And so those -- in your PowerPoint presentation,  
7 those footnotes that are on your HP Hood milk receipts  
8 skim components calculation, those footnotes refer back to  
9 Exhibit 102 footnotes?

10 A. Yes. Sorry.

11 Q. And if I -- I think those footnotes are on page 4  
12 of your testimony?

13 A. They are.

14 Q. And if I look at footnote 4, it looks like the  
15 calculations that you provided here are for January of  
16 2021 through December of 2022?

17 A. That is correct.

18 Q. And that's at a time period that's under the  
19 current Federal Milk Marketing Order; is that right?

20 A. Yes, it is.

21 Q. Okay. So then if we look at these numbers that  
22 are on your chart, those are all for a time period in  
23 which the new proposal numbers are not even in effect?

24 A. That is correct.

25 Q. And yet, even with that, your high watermark line  
26 exceeds the minimum price guarantees now -- or the minimum  
27 component numbers now that are -- that are reflected  
28 there?



1 A. Yes. But as the other charts show, most months we  
2 don't hit those numbers at all.

3 Q. Okay. And do you know which direction your  
4 components are trending?

5 A. I do not.

6 Q. Did you look at that data for --

7 A. I did.

8 Q. Let me just finish my sentence.

9 Did you look at that data for purposes of bringing  
10 your testimony forth today?

11 A. I did not.

12 Q. Okay. So then let's go ahead and look at the next  
13 pages.

14 And these next bar charts that you have there are  
15 designed to show and compare the amount of time within a  
16 month that is either below -- on page 5 -- below the  
17 protein percentages or above; is that right?

18 A. That is correct.

19 Q. And so, again, this is not a weighted average that  
20 would show us based on volumes, is it?

21 A. No. It is just based on the nine fluid Class I  
22 plants we have.

23 Q. And so the yellow is when the -- is when you were  
24 above the proposed percentage; is that right?

25 A. That is correct.

26 Q. And if I count the number of months, at least on  
27 page 5, it looks like there's 12 months in which you  
28 exceeded for protein the proposed levels; is that right?



1 A. That some of the plants exceeded, not all of them.

2 Q. Right. But you would agree with me that there's  
3 12 months in which it was exceeded?

4 A. Yes.

5 Q. And so that's half the months that are reported  
6 here; is that right?

7 A. Yes.

8 Q. And these are just, again, assuming the standards  
9 that are in effect in 2021 and 2022, which is the ones  
10 that have been in effect since 2000?

11 A. That is correct.

12 Q. Okay. And if we look at the next page for solids,  
13 it looks like every month all -- or excuse me, I'm sorry,  
14 not every month -- it looks like 21 of the 24 months, at  
15 least some of the plants exceeded for the -- for the  
16 percentage of skim.

17 A. Yes.

18 Q. And if we look at the nonfat tests, nine of the  
19 months exceeded for nonfat tests?

20 A. Yes.

21 Q. And, again, consistent with what we talked about  
22 previously, neither the solids nor the nonfat tests show  
23 us any kind of weighted average based on any kind of  
24 volumes?

25 A. That is correct.

26 Q. And you have not provided us with any data that  
27 would allow us to calculate the weighted average; is that  
28 accurate?



1 A. No.

2 Q. I think I asked you a double negative.

3 Is it accurate to say that you have not provided  
4 us with the data that would allow us to calculate the  
5 weighted average?

6 A. That is correct.

7 Q. Okay. Thanks.

8 And is it true that with the higher the protein,  
9 the less fortification that would be required?

10 A. If we were garnering fortification, yes.

11 Q. Okay. And then I just have a couple of questions  
12 about your testimony in Exhibit 102.

13 If we look at page 7, the last sentence, two  
14 sentences under "standard of identity."

15 Do you see that?

16 A. Yes, I do.

17 Q. It says, "The only way that we can modify milk is  
18 by removing something if removing" -- or I'm sorry, strike  
19 that.

20 "The only way that we can modify milk by removing  
21 something is by" -- "is removing milk fat; otherwise, we  
22 can only add to milk, and we can only add by fortifying  
23 using cream, NFDM, or like products."

24 Do you see that?

25 A. I do see that.

26 Q. Okay. But that's where I was -- I should have  
27 asked you, that's where the higher the protein, the less  
28 fortification should be required?



1           A.    If we were doing a product that declared extra  
2 protein.

3           Q.    If you look at the next page.

4                   Well, in the top of page 9, you state there at the  
5 top of the page that you understand that "manufacturers,  
6 for example, cheese, could use higher components mixed  
7 with ingredients and manufactured accordingly that could  
8 allow the manufacturer to make more cheese."

9                   And you are talking about what justifies the --  
10 using components for the pricing of that product; is that  
11 right?

12          A.    Yes.

13          Q.    And you understand that Class I milk is priced  
14 based on its best alternative use of milk?

15          A.    Yes.

16          Q.    And that would be based on, for example, Class III  
17 or Class IV?

18          A.    Yes.

19          Q.    Okay. And so indirectly it allows Class I to be  
20 priced on the value of what could alternatively be made  
21 with that milk if it went into manufacturing?

22          A.    Yes.

23          Q.    Okay.

24                MS. HANCOCK: That's all the questions I have.

25                Your Honor, I would move to admit Exhibit 104.

26                THE COURT: If we want to wait until we're all  
27 done, even on that exhibit, if someone's got redirect or  
28 wanted to challenge that exhibit somehow?



1 Yes, let's just wait until the end for all  
2 exhibits like that.

3 Would now be a good time to take a lunch break or  
4 how are we doing?

5 MS. VULIN: That was what I was going to suggest.

6 THE COURT: Let's take an hour. Let's come back  
7 at 1:30.

8 (Whereupon, a luncheon break was taken.)

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1 TUESDAY, AUGUST 29, 2023 - - AFTERNOON SESSION

2 THE COURT: Let's come to order.

3 Okay. We have the continuing examination of  
4 Witness Landry.

5 Is that right?

6 THE WITNESS: That is correct.

7 THE COURT: Welcome back.

8 THE WITNESS: I did come back after lunch.

9 THE COURT: I said welcome back.

10 THE WITNESS: Oh, thank you.

11 THE COURT: You are still under oath.

12 THE WITNESS: I know that.

13 THE COURT: All right. Who is up?

14 Yes, sir.

15 CROSS-EXAMINATION

16 BY MR. COVINGTON:

17 Q. Calvin Covington, Southeast Milk.

18 Ms. Landry, I have a few questions I would like to  
19 ask you on page 4 of your PowerPoint, which is  
20 Exhibit 103.

21 A. Is this the correct slide.

22 Q. Yes -- yes, ma'am. That's -- that's the one I  
23 like to ask you a couple of questions about.

24 A. Sure.

25 Q. Okay. You mentioned that you were involved in  
26 doing milk testing, testing components of producer milk?

27 A. That is correct.

28 Q. Okay. And would you agree that if you add the



1 protein and other solids up together, you get nonfat  
2 solids?

3 A. That is correct.

4 Q. Okay. If you'll go to the line where it says "HP  
5 Hood maximum"?

6 A. Uh-huh.

7 Q. Could you help me here just a little bit. You  
8 have got the 3.5 skim, the 6.08 under the other solids,  
9 and if we add those up, I don't come up to the 9.49.

10 A. So these are actual monthly results from specific  
11 plants in specific months. So out of the nine fluid  
12 plants we have, those were actual test results. That was  
13 the highest we got. The 3.5 was the highest --

14 Q. From one plant?

15 A. -- from one plant in one month. So they do not  
16 add up if you go across.

17 Q. Well, is it just a coincidence that the minimum  
18 adds up?

19 A. Yes, I believe it is.

20 Q. Okay. All right. So is this data from one month?

21 A. No. That is from 24 months.

22 Q. That's for 24 months.

23 A. Correct.

24 Q. Okay. And -- okay. I think I see it. 2021 and  
25 2022?

26 A. That is correct.

27 Q. Okay. Let's take for assumption that -- just go  
28 to the minimum at 3.09. Okay. Is it your understanding



1 that the minimum ob- -- if you are a Class I plant, that  
2 your minimum obligation for skim milk under the order is  
3 to pay the skim milk price per hundredweight as  
4 established by the order?

5 A. Yes, that is my understanding.

6 Q. Okay. And, again, using the two numbers 3.09 and  
7 3.50, if you had a load of milk come into the same plant,  
8 the same location, one testing 3.09 and one 3.50, you  
9 would -- under the order, the minimum order price, you  
10 would pay the same price per hundredweight of skim milk?

11 A. That is correct. However, those two numbers were  
12 not in the same month --

13 Q. Okay. Well --

14 A. -- necessarily.

15 Q. Well, I'll make the assumption that they are in  
16 the same month.

17 A. But I believe they are not.

18 Q. Okay. All right.

19 A. I believe one of them is in the -- the high  
20 maximum is in the winter months, and the 3.09, I remember  
21 very clearly, was in the July month.

22 Q. Okay. I'll rephrase my question.

23 A. Okay.

24 Q. Take the same month, say here the month of August.  
25 If you have a load of milk that comes into your plant that  
26 skim content is 3.09, and right after that you have a load  
27 of milk that comes in, the skim content is 3.50, your  
28 obligation for the skim portion of that milk would be the



1 same per hundredweight?

2 A. So we are paying the co-ops based on their results  
3 for the month. So it is not based on an actual load. It  
4 is based on what they are billing us for the month.

5 Q. Okay. All right. So you get -- you get billed  
6 the -- but, again, for a -- if we look at it as individual  
7 loads of milk --

8 A. Correct.

9 Q. -- am I correct that even though it's different  
10 skim component levels, the minimum obligation in the order  
11 for a hundredweight of skim would be the same?

12 A. Yes.

13 Q. Okay. Under -- and we all agree, under  
14 Proposal 1, it increases the skim milk price per  
15 hundredweight.

16 But does Proposal 1 change the methodology under  
17 Proposal 1? Would the skim milk price in the order, you  
18 would still meet your obligations on a per hundredweight  
19 basis of skim milk?

20 A. I don't know that without looking at the data.

21 Q. Okay. Let me -- let me rephrase that.

22 A. Okay.

23 Q. Okay. The current method under the order now that  
24 you pay for Class I skim milk is the minimum order price  
25 per hundred pounds of skim milk.

26 Do you agree to that?

27 A. Yes.

28 Q. And, again, your table talks about, and in your



1 testimony you talk about Proposal 1.

2 So I'm assuming that you understand Proposal 1?

3 A. To the best of my ability I do.

4 Q. Okay. But what my question is, if -- if the Dairy  
5 Division were to implement Proposal 1, does it change the  
6 methodology -- and what I mean by methodology, does it  
7 change the -- is skim milk for Class I milk priced on a  
8 per hundredweight basis?

9 A. It would be.

10 Q. Okay.

11 A. But it would not be any benefit to the Class I  
12 fluid milk plants.

13 Q. But it still would be priced per hundredweight  
14 of -- skim milk would still be priced on per hundredweight  
15 basis?

16 A. Yes. There just would be no advantage to the  
17 fluid milk plants.

18 Q. And earlier you testified when you were going  
19 through the description of the flow chart of your plant --

20 A. Yep.

21 Q. -- about that if you were required to add solids  
22 to milk, it would be an additional cost?

23 A. Yes, it would.

24 Q. Okay. Under Proposal 1, does Proposal 1 require  
25 you to add milk solids?

26 A. Not that I'm aware of.

27 Q. Okay. Thank you.

28 MR. COVINGTON: That's all, your Honor.



1 THE COURT: Yes.

2 CROSS-EXAMINATION

3 BY MR. VETNE:

4 Q. John Vetne representing National All-Jersey.

5 Good afternoon.

6 A. Good afternoon.

7 Q. Full disclosure, Ms. Landry. A few years ago I  
8 represented HP Hood involving a project called Carb  
9 Countdown.

10 Are you familiar with that product?

11 A. I'm aware it existed. Never drank it nor made it.

12 Q. Pardon?

13 A. I said I never drank it nor did I make it at any  
14 of the plants.

15 Q. Okay. Does Hood still make Carb Countdown?

16 A. I don't believe they do. I'm not sure.

17 Q. Okay. Are you familiar with the product at all?

18 Are you familiar enough to know that it was an  
19 ultra-filtered milk in which some solids were removed and,  
20 therefore, was called dairy beverage rather than milk?

21 A. I was aware it was called a dairy beverage. I  
22 wasn't sure how it was processed because it wasn't made at  
23 the plants that I was involved in.

24 Q. Okay. Was it -- but it was made in New England?

25 A. I don't believe so. I think it was made in our  
26 New York plants.

27 Q. Okay. Does HP Hood make any other products that  
28 are labeled dairy beverage rather than milk?



1 A. I can't say for sure. I'm not aware of any, but  
2 I'm not positive.

3 Q. You don't know. Okay.

4 I note that Lactaid, under the Lactaid brand --

5 A. Uh-huh.

6 Q. -- has a product line called Lactaid Protein.

7 A. Yes, we do.

8 Q. Whole milk, 2% milk, chocolate milk, with big  
9 letters, "protein."

10 You are familiar with that product?

11 A. Yes.

12 Q. How new is that product?

13 A. I am not sure exactly how new it is.

14 Q. Is that a Lactaid product that HP Hood both  
15 produces and licenses?

16 A. Unfortunately, I do not know who produces or what  
17 location produces that. But we do have the license for  
18 it.

19 Q. Okay. Are you familiar enough to know that  
20 Lactacid Protein is represented in the promotional  
21 material online as having 15 grams of protein versus  
22 8 grams in regular milk?

23 A. I don't know that it's 15, but I do know that it  
24 says whatever protein grams on the label.

25 Q. Okay. With respect to the blue and yellow bar  
26 graphs --

27 A. Okay.

28 Q. -- Exhibit 103, page 5, 6, and 7, there are nine



1 plants involved.

2 A. There are.

3 Q. Is there any region in which Hood operates plants  
4 in which the yellow part of the bar is more frequently  
5 represented, i.e., California versus New England?

6 A. I'm not sure without looking at the data. I don't  
7 have it in front of me.

8 Q. You don't know if there is a regional difference?

9 A. Right, I don't know if it's Federal Order 1 versus  
10 51. I don't know if one of those spans out more than the  
11 other.

12 Q. Okay. And -- but you operate outside of Federal  
13 Order 1 and 51 in other places which --

14 A. Those are our two orders that we have plants in.

15 Q. And within Federal Order 1, large geography, you  
16 don't know whether that's regional within Federal Order 1?

17 A. I am not sure. Not without having the data.

18 Q. Okay. The test data provided, does that include  
19 milk received by Hood plants used to produce Class II  
20 products?

21 A. No, it does not. It is just the nine fluid  
22 plants.

23 Q. Okay. And the fluid plants do not -- within their  
24 plant parameters, they don't produce Class II products?

25 A. They -- some of them do, and some of them do not.

26 Q. Pardon?

27 A. Some do and some don't.

28 Q. Okay. For those that do, does the test data





1 reflect what's received by those plants, including what  
2 goes into Class II?

3 A. This is -- as far as I'm aware this is just  
4 Class I milk.

5 Q. So it's not plant data, it is milk going into  
6 Class I data?

7 A. I'm not sure.

8 Q. Okay. How many Class II plants does Hood operate?

9 A. I am not sure off the top of my head.

10 Q. Okay. Does Hood operate any Class III or IV  
11 plants?

12 A. Not that I'm aware of.

13 Q. Okay. Do you know enough to be able to tell us  
14 whether any of the Hood Class II plants receive milk from  
15 basically the same milk shed as Class I plants?

16 A. They may be from the same cooperative, but I don't  
17 know if it is the same milk shed.

18 Q. Okay. Do you know whether as between the Hood  
19 Class I plants and Class II plants, whether either Hood or  
20 its supplier directs lower component milk to the fluid  
21 plants versus the Class II plants?

22 A. All I know is that we contract with our co-op to  
23 get milk delivered to us, and I don't know how they decide  
24 what goes where.

25 Q. Okay. Do you know -- do you have any knowledge  
26 of whether the Class II plants contract with the  
27 cooperatives for higher component milk?

28 A. I'm not aware of that.



1 MR. VETNE: That's all I have. Thank you.

2 THE WITNESS: Thank you.

3 CROSS-EXAMINATION

4 BY MR. MILTNER:

5 Q. Ryan Miltner representing Select Milk Producers.

6 Good afternoon, Ms. Landry.

7 A. Good afternoon.

8 Q. I'm looking at your statement -- which is that

9 103?

10 A. 102.

11 Q. 102. Okay, thank you.

12 On the first page you make a reference to a DSD  
13 plant, direct store delivery. I'm not familiar with that  
14 term. Can you explain to me what you mean by that?

15 A. Sure. Our direct store delivery plants are plants  
16 where we're making the product there and loading out of  
17 the warehouse directly onto trucks that will deliver to  
18 stores in the area. They will also have other products  
19 from our other plants will come in. You know, for  
20 instance, ultra -- if it is an HTST plant, if we're  
21 distributing a UHT cream out of that, it will come into  
22 that warehouse and be shipped to service those customers.

23 Q. Thank you.

24 On page 2 of your statement in the second line you  
25 reference a Portland, Maine, plant?

26 A. That is correct.

27 Q. You have "n/a" listed there as far as a Federal  
28 Order. But am I correct that that plant is a regulated



1 plant under Order 1?

2 A. Maine is not part of Federal Order 1. We have the  
3 Maine Milk Commission. But the milk is pooled from that  
4 plant -- or from the state.

5 Q. Okay. So I understand that Maine is not part of  
6 the geographic area of the order. But is that plant a  
7 regulated plant on Order 1?

8 A. Yes.

9 Q. Okay. I just wanted to make sure.

10 So then if -- if -- if that, in fact, is an  
11 Order 1 plant, all the plants you list on page 1 and  
12 page 2, they are all Order 1 plants with the exception of  
13 your plant in Sacramento, correct?

14 A. That is correct.

15 Q. Okay. Turn to the next page of your statement,  
16 page 4.

17 That's the same chart that appears in your  
18 PowerPoint, correct?

19 A. Yes, it is.

20 Q. Okay. Under the column protein percent skim where  
21 you list the HP Hood maximum?

22 A. Yes.

23 Q. Is the 3.5% maximum your California plant?

24 A. I will not -- I don't know that without looking at  
25 the data, but I can't say for sure. And that would have  
26 been just one month in the 24-month period -- the  
27 twenty- -- yeah, 24-month period.

28 Q. There were some questions asked a little bit ago,



1 I believe it was -- I think it was Mr. Covington.

2 Do your plants in Order 1 do any fortification of  
3 milk at all?

4 A. Beside vitamin fortification that's required, no.

5 Q. So you made a -- I think in your testimony, there  
6 was a statement that if the components are lower than  
7 desired, you have to add solids.

8 A. We would do that for a flavored milk.

9 Q. You do that for flavored milk?

10 A. Uh-huh. But that's to meet the formula, not  
11 necessarily the solids requirement.

12 Q. Okay. When you say "formula," is that a customer  
13 formula or a Hood formula?

14 A. That's a Hood formula.

15 Q. Okay. So does Hood ever have to add solids to its  
16 milk to meet a Federal Order requirement?

17 A. No.

18 Q. Does it ever have to add the solids to meet a  
19 California standard?

20 A. Yes.

21 Q. Do you still have Exhibit 104 handy, the website  
22 print I think is what it is?

23 A. Yes, I do.

24 Q. Okay. If Hood were to ever find that the  
25 component levels of protein in the milk they were  
26 receiving were such that they could report, for instance,  
27 nine grams of protein in their -- in your milk, are you  
28 aware of anything that would restrict you from putting



1 that information either on the nutrition facts or on the  
2 label?

3 A. No. As long as it was actually there.

4 MR. MILTNER: Your Honor, if I could approach the  
5 witness to give her a copy of Exhibit 18.

6 THE COURT: Yes.

7 THE WITNESS: Thank you.

8 BY MR. MILTNER:

9 Q. Ms. Landry, I think you were here yesterday, but  
10 were you here last week at all to have seen Exhibit 18  
11 before?

12 A. I was listening on Zoom, but I -- I wasn't here to  
13 see these.

14 Q. Okay. There are two things on -- two numbers on  
15 here that I wanted to look at.

16 The first is on the very first page there. And so  
17 what this data is, it was prepared by USDA, and it reports  
18 the yearly average component tests in producer milk by  
19 order, and then by all orders combined. It covers the  
20 period of 2000 to 2022.

21 A. Okay.

22 Q. So I'm looking at the very first row where the  
23 report year is 2000, and it's Federal Order 1, and the  
24 protein test for that year, the average in producer milk  
25 in Order 1 was 2.99.

26 A. I see it.

27 Q. You see that. Okay.

28 Based on your experience does that seem about



1 reasonable?

2 A. Yes.

3 Q. Okay. Now, if you turn to the very last page, and  
4 right in the middle, it starts with 2022.

5 And you see Order 1 there?

6 A. I do.

7 Q. Okay. And then in the protein test column you see  
8 3.16?

9 A. Yes, I see that.

10 Q. Does that sound reasonable to you as well?

11 A. Yes, it does.

12 Q. Okay. So in that 22-year period the average  
13 protein test in Order 1 went up by 17 points, correct?

14 A. Correct.

15 Q. I want to now turn back to your statement on  
16 page 4, the chart.

17 And this covered 2021 through 2022, right?

18 A. Yes, it did.

19 Q. Okay. Now, you did some math with Ms. Hancock,  
20 and you came to an average protein of 3.3, which would be  
21 somewhat higher than Order 1 but -- do you recall that,  
22 that math?

23 A. Yes.

24 Q. And let's look at your minimum of 3.09.

25 So even today, after protein tests have gone up by  
26 that 17 points since the base was established, in that  
27 minimum you are still getting less than the order  
28 presumes, correct?



1 A. That 3.09 is for one plant on one specific month.

2 Q. Correct.

3 A. So it's not the average.

4 Q. I'm sorry. I did not mean to suggest that it was.

5 But --

6 A. Okay.

7 Q. -- but at least for that month, you are still

8 getting less than the order presumes --

9 A. Well, that's one --

10 Q. -- correct?

11 A. Well, that's one plant on one month.

12 Q. Okay.

13 A. That's not the average of all nine plants in a  
14 specific month.

15 Q. Understood. Thank you.

16 I want to think back to -- look at 2000 now.

17 A. Okay.

18 Q. Okay. If the average protein test then was 2.99,  
19 what would you have expected Hood's average -- or Hood's  
20 minimum to be then?

21 A. I have no idea what that would be. I would guess  
22 it was less, but I cannot speculate on that without the  
23 data.

24 Q. Does Hood have any objection to the base price as  
25 it's calculated right now?

26 A. I do not believe so.

27 MR. MILTNER: Thank you, your Honor. I don't have  
28 anything else.



1 THE WITNESS: Would you like the exhibit back?

2 MR. MILTNER: I don't need it back, but USDA does.

3 THE COURT: Thank you.

4 Further cross? AMS?

5 I'm sorry, sir.

6 CROSS-EXAMINATION

7 BY DR. CRYAN:

8 Q. Good afternoon. My name is Roger Cryan. I'm with  
9 the American Farm Bureau Federation.

10 Good afternoon, Ms. Landry.

11 A. Good afternoon.

12 Q. I guess I'd make note again, because Ryan asked  
13 that you fortify at times. And that's -- part of that's  
14 due to the natural variation in milk content, right?

15 A. Yes.

16 Q. Okay. And you talked about the inability to  
17 change the composition.

18 Would -- would Hood be happier if they could  
19 dilute -- dilute milk?

20 A. No, we're not allowed to, and we wouldn't.

21 Q. Would you be happier if you were allowed to?

22 A. No, we would like it just the way it is.

23 Q. Okay. I mean, you have made products in the past  
24 that -- that didn't meet the milk standard. You called  
25 them something else. I mean that's --

26 A. Yes.

27 Q. -- more of a labeling issue than  
28 what-you-are-allowed-to-do issue, right?







1 Q. On the second page of your statement, let's see,  
2 you talk about how when it comes to pricing in your  
3 consuming products, I guess my first question is, when you  
4 talk about consumers -- or excuse me -- customers for  
5 Hood --

6 A. Yes.

7 Q. -- is that a customer as in another -- as a  
8 grocery store being the customer and not necessarily a  
9 consumer being a customer?

10 A. Correct.

11 Q. Okay. And so you all basically have annual  
12 contracts, as I read your statement, with your customers?

13 A. Most of them, yes. The larger ones, we do.

14 Q. Okay. And you make pricing changes infrequently,  
15 usually less than annually it says; is that correct?

16 A. That is correct.

17 Q. And what factors go into how you determine how you  
18 are going to price milk for the upcoming year?

19 A. I am not personally involved with that, but I  
20 believe it's involved with the Class I price and the  
21 manufacturing cost.

22 Q. Okay. So that's -- it's not a set fixed price  
23 necessarily?

24 A. It is not, no.

25 Q. Okay.

26 A. And sometimes it -- it goes longer than a year  
27 before we have a change.

28 Q. Okay. And then do you know if Hood utilizes the



1 CME to hedge any of their price risk?

2 A. I'm -- I'm not sure.

3 Q. Okay.

4 A. It is not my department.

5 Q. And I know your testimony generally is talking  
6 about how in the Class I bottle, components to the  
7 customer don't necessarily make a difference to them?

8 A. Yes.

9 Q. And so paying for components -- if Proposal 1 or 2  
10 were adopted, you would be paying on components that  
11 really don't matter to the end user?

12 A. That is correct.

13 Q. My question is, in regards to the competitive  
14 relationship that Hood would have in -- or has between  
15 itself and its, you know, other fluid handlers who it  
16 competes against, and I'm curious on -- if you knew -- or  
17 your opinion on if, you know, all fluid milk bottlers  
18 right now pay the same, you know, Class I price using that  
19 formula, would adoption of Proposal 1 or 2 change the  
20 current competitive relationship between fluid plants at  
21 all?

22 A. I think we would all be in the same boat and have  
23 to pay more for Class I milk. And that I think would be  
24 very detrimental because we don't know how we'd absorb  
25 that cost over the long haul, and you may see fluid one  
26 plants close.

27 Q. So you -- so it's your testimony you don't think  
28 you could pass that cost on? You would have to absorb it?



1           A.     Well, we would -- at some point we probably would  
2     be passing it on and -- and as it was testified earlier,  
3     the consumer, the person that finally buys the gallon of  
4     milk, is based on cost. So it would definitely detriment  
5     the Class I fluid milk sales.

6           Q.     Okay. On your chart which has been discussed at  
7     length --

8           A.     That's a famous chart now.

9           Q.     It really is.

10           So I did simple math, and if you have nine plants  
11     in 24 months, there's 216 observations.

12           A.     That is correct.

13           Q.     So if I wanted to convert those percentages, I  
14     could figure out how many months we're talking about. So  
15     83% of the observations would be 179 months you have  
16     received milk that had -- that was below the proposed  
17     component levels.

18           A.     And that -- that's in the other chart, the blue  
19     chart.

20           Q.     Yes.

21           A.     Yes.

22           Q.     And I know you used a two-year average on these,  
23     and I know the range of 2021, 2022.

24           Proposal 1 and 2 seek to just use 2022 numbers.  
25     So I was curious if you had compared '21 to '22 data to  
26     see if there was any difference there.

27           A.     I am not sure if they did or not. I know they  
28     have it available, but I don't know that they compared it.



1 Q. Okay. And on these charts in the -- page 6 of  
2 your testimony, you say the variation the charts  
3 demonstrate is not just seasonal but also geographic.

4 But I don't take from this chart -- can you  
5 explain how I can see the geographic distinctions in the  
6 charts and --

7 A. You -- you can't.

8 Q. Okay.

9 A. And the reason is, is that we only have one plant  
10 in California, on Federal Milk Market 51. So if we  
11 separate that out, you would know exactly what those  
12 numbers were for that location.

13 Q. Okay. So you have a -- you see a difference  
14 between -- and I don't want you to say what that  
15 difference is. I understand that's confidential. But you  
16 do see a difference between your Northeast milk and the  
17 California milk?

18 A. I would have to look at the data, but generally  
19 there's a little bit of difference. And it also depends  
20 on the time of year and the types of cows that are  
21 producing milk there.

22 Q. Okay. And also in these charts, you talk about,  
23 "For example, for protein, three of our nine plants never  
24 once met the proposed protein levels in the two years  
25 surveyed."

26 But there is no way for us to know, looking at the  
27 chart, that the three plants you are talking about are  
28 consistently one of the three plants -- the same three



1 plants; is that correct?

2 A. That is correct. Yep.

3 Q. Okay. I think -- well, Mr. Wilson has the same  
4 note as I do, but I think we're all clear.

5 But to make it clear for the record, on your  
6 charts on page 5 and 6 of your testimony, the Y axis  
7 doesn't have a unit, but I am assuming that should be the  
8 number of plants?

9 A. That is correct, the number of plants.

10 Q. Okay.

11 MS. TAYLOR: I think that's it. Thank you so  
12 much.

13 THE WITNESS: Thank you.

14 THE COURT: Any -- okay. Ready for redirect?  
15 Nobody got a claim for re-cross?

16 Okay, your witness on redirect.

17 REDIRECT EXAMINATION

18 BY MS. VULIN:

19 Q. I would like to pick up where Ms. Taylor left off,  
20 if we could, please.

21 A. Absolutely.

22 Q. So just to make sure we're clear on the famous  
23 yellow and blue charts.

24 The Y axis goes up to nine, correct?

25 A. That is correct.

26 Q. And that's because Hood has nine plants, right?

27 A. We have nine fluid plants.

28 Q. So each unit in the bar chart corresponds to one



1 plant?

2 A. That is correct.

3 Q. And you had testified earlier that the data from  
4 this came from MA reports, correct?

5 A. Yes, it did.

6 Q. How many MA reports does Hood receive per plant  
7 per month?

8 A. One, I believe.

9 Q. So --

10 A. Sorry.

11 Q. -- each unit corresponds to one MA report  
12 detailing the component levels?

13 A. Yes.

14 Q. Okay. And those MA reports are weighted averages,  
15 correct?

16 A. Yes, they are.

17 Q. So you were asked earlier about providing weighted  
18 average data. That would be reflected in these charts,  
19 correct?

20 A. Yes, it would.

21 Q. And so each step is -- or I should say each notch,  
22 right, in blue, indicates a month that the MA report  
23 detailed a weighted average that Hood received the  
24 component levels at below the proposal level, correct?

25 A. That is correct.

26 Q. So just to kind of put a fine point on it, can you  
27 look at June 2021?

28 A. Which chart.



1 Q. Let's do the protein on page 3 of your testimony,  
2 please. That would be slide 5 if -- if that's helpful.

3 A. Yep. I have it open.

4 Q. So looking at that month, July 2021, every single  
5 one of Hood's nine plants had an MA report that reported a  
6 weighted average of component levels for protein below the  
7 proposal level?

8 A. That is correct.

9 Q. That's true for looks like May, June, July,  
10 August, September of 2021?

11 A. That is correct.

12 Q. And then we see that again through the spring and  
13 summer of 2022?

14 A. That is also correct.

15 Q. And you were asked earlier about how to compare  
16 2021 and 2022, and you could do that using this chart,  
17 correct?

18 A. Yes, you could.

19 Q. And that would be just adding up the individual  
20 units of above or below the proposal level for each year?

21 A. Correct.

22 Q. And the data in these charts, it looks like in the  
23 bottom entry, the blue says "Below Proposal PR Percent  
24 Skim."

25 Do you see that?

26 A. I do.

27 Q. So this data is on a skim basis?

28 A. Yes, it is.





1 Q. And those MA reports, you said they're per plant,  
2 correct?

3 A. Correct.

4 Q. So they are not broken down for utilization within  
5 plants, correct?

6 A. No.

7 Q. And what was -- you said earlier I believe Hood's  
8 plant one utilization was -- or excuse me -- that Hood's  
9 fluid plant utilization was 87% Class I 'is that right?

10 A. It's over that. But, yes.

11 Q. Quite high?

12 A. Quite high.

13 Q. And then looking at Exhibit 104 that Ms. Hancock  
14 provided you the label --

15 A. Yes.

16 Q. -- of Hood's 1% fluid milk product.

17 Are you familiar with federal labeling  
18 requirements?

19 A. I am.

20 Q. How about federal nutrition panel requirements?

21 A. I am.

22 Q. And Ms. Hancock had asked you about the bold word  
23 "protein" in the nutrition facts panel, right?

24 A. Correct.

25 Q. Is there any requirement under federal law as to  
26 whether or not the word protein has to be bolded in a  
27 nutrition panel for this type of product?

28 A. It is. And there's also a specific font size that



1 needs to be used.

2 Q. So this bolding of the word "protein" was not an  
3 advertising choice by Hood?

4 A. It is not.

5 Q. It is a federal requirement?

6 A. Correct.

7 Q. Okay.

8 MS. VULIN: No further questions. Thank you.

9 I would like to move to admit the exhibit.

10 THE COURT: I want to see if there's anyone that  
11 thinks they have further cross based on that.

12 Do you have something further?

13 MS. VULIN: I do actually. Sorry.

14 THE COURT: Okay.

15 BY MS. VULIN:

16 Q. You were asked earlier about providing all --  
17 either weighted plant information data or underlying data  
18 for these charts, correct?

19 A. Correct.

20 Q. And it was -- it's Hood's position not to produce  
21 that information?

22 A. That is correct.

23 Q. Why is that?

24 A. It is confidential, and we don't want it -- if you  
25 take the group overall, and you take out those nine  
26 plants, it is a competitive reporting.

27 Q. Okay.

28 MS. VULIN: Now I have no further questions.



1 Sorry about that, your Honor.

2 THE COURT: Okay. Any re-cross?

3 Seeing none, yes, let's get these exhibits offered  
4 into evidence. You can start with yours, which is 102 and  
5 103, I think.

6 MS. VULIN: Yeah, 102 and 103, which were the  
7 testimony and the PowerPoint presentation, MIG moves to  
8 admit.

9 THE COURT: Any objections?

10 Exhibit 102 and 103 are admitted into the record.

11 (Thereafter, Exhibit Numbers 102 and 103  
12 were received into evidence.)

13 MS. VULIN: Thank you, your Honor.

14 THE COURT: Ms. Hancock, you had Exhibit 104?

15 MS. HANCOCK: Yes, your Honor. We would move to  
16 admit Exhibit 104.

17 THE COURT: Any objections?

18 Exhibit 104 is admitted into the record.

19 (Thereafter, Exhibit Number 104 was  
20 received into evidence.)

21 THE COURT: Okay. Thank you. You are dismissed.  
22 What's up next?

23 MS. VULIN: Your Honor, MIG would call Jed Ellis  
24 from Shehadey Family Foods, please.

25 THE COURT: Okay.

26 MS. VULIN: Oh, and I will pass out his testimony  
27 and the exhibits in just a moment.

28 THE COURT: Please raise your right hand, when you



1 get situated anyway.

2 JED ELLIS,

3 Being first duly sworn, was examined and  
4 testified as follows:

5 THE COURT: Okay. Witness is sworn in.

6 MS. VULIN: Thank you, your Honor.

7 THE COURT: And I think we're ready for direct  
8 examination.

9 MS. VULIN: Thank you.

10 DIRECT EXAMINATION

11 BY MS. VULIN:

12 Q. Good afternoon, Mr. Ellis.

13 A. Good afternoon.

14 Q. Can you please state and spell your name for the  
15 record?

16 A. My name is Jed Ellis, J-E-D, E-L-L-I-S.

17 Q. And can you tell us your business address, please?

18 A. It's 250 East Belmont Avenue, Fresno, California,  
19 93701.

20 Q. And you have before you a document entitled MIG --  
21 Exhibit MIG/Shehadey-4.

22 Do you see that?

23 A. I do.

24 Q. And what is that document?

25 A. That is my testimony.

26 MS. VULIN: Okay. We ask that the testimony be  
27 marked as Exhibit 105.

28 THE COURT: Yes.



1 (Thereafter, Exhibit Number 105 was marked  
2 for identification.)

3 MS. VULIN: And we have also included a copy of  
4 the PowerPoint presentation that Mr. Ellis is going to  
5 give. We asked that that be marked as Exhibit 106.

6 THE COURT: So marked.

7 MS. VULIN: Thank you, your Honor.

8 (Thereafter, Exhibit Number 106 was marked  
9 for identification.)

10 BY MS. VULIN:

11 Q. So I'd like to start with your background, if we  
12 could, please, Mr. Ellis.

13 How did you get into the dairy industry?

14 A. I was born into the industry, I guess. My  
15 great-grandfather was a dairy farmer. My grandpa began  
16 dairy farming as well. Began working for a processor  
17 running a buttermilk line. He became an executive with  
18 Beecher's Foods, KKR, Borden Dairy, Southern Foods Group,  
19 and eventually Dean Foods.

20 When my father married into the family, he got a  
21 job as a truck driver. Eventually became a key account  
22 salesman for many large retailers. I grew up going around  
23 with him doing store sets, ice cream resets. Eventually  
24 got hired as a merchandiser, and then became a  
25 merchandising manager was what essentially got me my first  
26 real job in the dairy industry.

27 Q. And what is your education post high school?

28 A. I have a Bachelor's of Science in accounting from



1 Weber State University in Ogden, Utah, as well as an MBA.

2 Q. You said as well as a what?

3 A. MBA.

4 Q. MBA.

5 And what was your first -- where was your first,  
6 as you call it, real job in the dairy industry?

7 A. I worked for Meadow Gold Dairy in Salt Lake City,  
8 Utah, as a merchandising manager while I was going to  
9 school. After I graduated, I moved to the -- they called  
10 it DFAAC, the Dean Foods Area Accounting Center, where I  
11 was hired as a cost accountant, and I was there for about  
12 five years. After that, I relocated to St. George, Utah,  
13 to be a plant foreman at the Dean Foods ice cream  
14 facility. I was there for a year and a half, and then  
15 decided to move on from Dean Foods, and I was hired at  
16 Producers Dairy.

17 Q. And what's your current title at Producers Dairy?

18 A. My current title at Producers Dairy is director of  
19 procurement. I've also held positions of costing manager,  
20 assistant controller, controller, and now director of  
21 procurement.

22 Q. And how is -- how is Producers Dairy related to  
23 Shehadey Family Foods?

24 A. So Shehadey Family Foods is essentially the  
25 corporate entity that oversees our operating facilities.  
26 So we have four production facilities: One in Fresno,  
27 California, that's a Producers Dairy; a Producers Dairy in  
28 Fairfield, California, that we acquired in 2018; and also,



1 Model Dairy in Reno, Nevada, that we acquired through the  
2 Dean Foods bankruptcy in 2020; and then also, in 2021, we  
3 acquired Umpqua Dairy in Roseburg, Oregon.

4 Q. And what's your current title did you say?

5 A. Director of procurement.

6 Q. Director of procurement.

7 And what are your day-to-day responsibilities as  
8 director of procurement?

9 A. So as director of procurement I am responsible for  
10 the acquisition and tracking of goods through disposition.  
11 I am also still responsible for the bill of materials, the  
12 cost of milk. I oversee the pricing department. I  
13 oversee the accounts payable department. So pretty much  
14 anything with our costs, I -- I oversee.

15 Q. And you have been here as we have been talking  
16 about components, correct?

17 A. Uh-huh.

18 Q. And are components a part of your day-to-day job  
19 responsibilities?

20 A. Yes. So we -- we -- we track -- so we track the  
21 incoming components into our facilities, although, much  
22 like Hood, we primarily only track butterfat through  
23 utilization. But we do track solids because we're part of  
24 California, so we do track solids for the California  
25 fortification, and also on flavored products and ice cream  
26 mixes.

27 Q. And have you ever done any work that involves  
28 state or Federal Orders?



1           A.     Yes.  So I have been responsible for the -- I  
2     guess the preparing and filing market reports for two  
3     state orders and five Federal Orders.

4           Q.     Which state orders?

5           A.     Montana and California.

6           Q.     And which Federal Orders?

7           A.     Federal Orders California, Arizona, Pacific  
8     Northwest, Southwest, and Central.

9           Q.     And you told us a little bit about kind of the  
10    general corporate structure for Shehadey Family Foods.  
11    But can you tell us something about the company history?

12          A.     Yeah.  So Producers Dairy began in 1932.  It was a  
13    one-plant entity until the acquisition of Fairfield in  
14    2018.  And we have primarily been a fluid Class I  
15    processor.  And our acquisition of Model Dairy in 2020,  
16    that brand began in 1906, in Nevada, the oldest brand in  
17    Nevada.  And then in Umpqua, that label was 1931.  And  
18    also through the Dean Foods acquisition, we acquired the  
19    rights to Berkeley Farms, which was established in 1910,  
20    giving us the oldest remaining brands in California,  
21    Oregon, and Nevada.

22          Q.     Wow.  And it's Shehadey Family Foods.  Can you  
23    tell us about the family a bit?

24          A.     Yes.  So we are third generation Shehadey family.  
25    They are -- the current I guess CEO is Scott Shehadey.  
26    His -- his grandpa was -- was the one that helped start  
27    the company.  All divisions we have bought outside of  
28    Fairfield were once a family company that -- that was





1 acquired. Umpqua Dairy was acquired from a third  
2 generation family as well.

3 Q. And is Shehadey a small business as defined by the  
4 SBA?

5 A. Yes, it is. We have under 1100 employees.

6 Q. About how many employees do you have? Less than  
7 1100?

8 A. Less than 1100.

9 Q. And can you tell us a little bit about Shehadey's  
10 milk sources, please?

11 A. Yeah. So we procure milk through three main  
12 cooperatives, and also through a family farm.

13 Q. Where is the Shehadey Family Foods family farm?

14 A. It is in Kerman, California.

15 Q. How close is that to any of the plants that  
16 Shehadey Family Foods has in that state?

17 A. So it's about 13 miles from our primary facility  
18 in Fresno. And also, on top of that, all milk that is  
19 received into our primary facility in Fresno comes from an  
20 average of 26 miles from our facility.

21 Q. And you said there that Shehadey Family Foods owns  
22 four fluid milk plants; is that right?

23 A. Yes.

24 Q. And can you remind us on what orders those plants  
25 are regulated?

26 A. 51 and 124.

27 Q. And what is Shehadey Family Foods Class I  
28 utilization for its fluid plants?



1 A. Over 84%.

2 Q. And I know you have a PowerPoint to share. If you  
3 could get that back up, please.

4 Can you tell us a little bit, please, about the  
5 types of products that Shehadey Family Foods sells?

6 A. So primarily we manufacture and sell fluid Class I  
7 product. We make both California standard and federal  
8 standard milk. In addition, we have Class II production,  
9 so we manufacture ice cream mixes and cottage cheese and  
10 sour cream out of one facility. We also resell many  
11 products that cooperatives produce, that Hood produces,  
12 for example. We buy and resell those as well.

13 Q. And you shared with me a nice fact earlier about  
14 the average time from cow to shelf for a product that  
15 comes from the Shehadey Family Foods farm.

16 Can you share that with us?

17 A. Yes. We pride ourselves on the fact that we can  
18 get milk from the cow to the customer within 24 hours.

19 Q. 24 hours?

20 A. Yes.

21 Q. That is quite impressive.

22 Can you walk us through just kind of the high  
23 level manufacturing process for Shehadey's fluid milk  
24 products?

25 A. Yes. So similar to Hood, we receive the product,  
26 and as we are receiving the product, we have a drip sample  
27 that we're collecting that pulls a little bit from each  
28 kind of level of the tanker. We'll take that into our



1 lab. We test for components. We test for bacteria  
2 counts, for antibiotics, I guess all your general testing,  
3 to determine if the product meets our standards to receive  
4 into our facility. Once -- once it is, we receive the  
5 product, we separate the product, and we batch the  
6 product, hold it over into finished product tanks, before  
7 bottling the product.

8 Q. And were you here when we talked a little bit with  
9 the HP Hood representative about how they are able to  
10 remove and add different components to their products?

11 A. Yes.

12 Q. And is there anything different about what  
13 Shehadey can do other than the limitations that HP Hood is  
14 also under?

15 A. No, I'd say nothing different other than we -- you  
16 know, our primary operation, we -- we are fortifying  
17 pretty much everything that goes through our facility.

18 Q. And we have heard a little bit about this  
19 fortification in California.

20 Can you just tell us a little bit about what that  
21 standard is and what Shehadey has to do to comply with it?

22 A. Yeah. So the difference in California milk versus  
23 everywhere else is whole milk has to be 3.5% butterfat or  
24 12.2% total solids; 2% and 1% have to be 12% total solids.  
25 And so 2% and 1%, in order to get to that standard of  
26 identity, we have to fortify with either powdered milk or  
27 condensed skim.

28 Q. And what is the expense that is added, not



1 necessarily in dollars or cents, but is it minimum,  
2 significant in having to fortify that milk?

3 A. It is significant. We have to have special  
4 equipment. We have to buy it. We have to store it. We  
5 have to test it. In fact, in terms of powder, we have to  
6 buy entire trailers of it, store entire trailers of it.  
7 We have to utilize employee -- employees to rip open bags,  
8 dump 55-pound bags into liquefiers. It is an expensive  
9 process.

10 Q. And you said that fortification is a State -- a  
11 California State requirement?

12 A. Yes. It is required for all milk sold in  
13 California, not just manu- -- not just manufactured, but  
14 sold.

15 Q. In your experience in the dairy industry, are you  
16 aware of any other state that has a similar fortification  
17 requirement?

18 A. I am not. I am aware that there's been trials in  
19 places, but in -- but for my knowledge, I do not know of  
20 anywhere that requires it.

21 Q. And the fortification requirement is for all milk  
22 manufactured for sold in California?

23 A. Sold in California.

24 Q. Sold in California.

25 A. So our facility in Reno, Nevada, makes both  
26 federal and California standard product, so anything sold  
27 into California has to be fortified, anything sold in  
28 Nevada does not have to be, it can be, but we have not had



1 a customer request California standard milk in Nevada.

2 Q. And so the California fortified milk has higher  
3 protein levels than milk standardized at the federal --  
4 not standardized -- but milk that meets the federal  
5 standard?

6 A. Correct. So on our labels in our federal milk, we  
7 have 8 grams of protein. Some may say nine, but 8 grams  
8 of protein. In California, we have 10 or 11 grams of  
9 protein.

10 Q. But you said that in your experience no customer  
11 of Shehadey Family Foods outside of California has ever  
12 requested the California fortified milk with higher  
13 protein?

14 A. They have not.

15 Q. And do you have any idea as to why?

16 A. Price. It is -- it is much more expensive.

17 Q. You say it is much more expensive to fortify the  
18 milk?

19 A. Yes, it is.

20 Q. And customers outside of California don't want to  
21 pay for that?

22 A. They do not.

23 Q. And how are the components in Shehadey Family  
24 Foods' milk reported to the MA?

25 A. So it is based upon the test results from the  
26 cooperatives. When we receive the product, we test it,  
27 and we are then given the result days later from the  
28 cooperatives of what was in those test results. And if



1 there's anything egregious, we can challenge it within a  
2 24-hour period. But 99% of the time it's what the  
3 cooperatives are reporting to us of what we got.

4 Q. And then that's reported to the MA?

5 A. Yes. Through the market report.

6 Q. Are you aware if MA reports are audited?

7 A. They are.

8 Q. Now, if you want to go to the next slide, please.  
9 You can just share a little bit about your various  
10 locations that we have here.

11 A. Yeah. So we just have, I guess, three -- three of  
12 our facilities. This is Fairfield, California. This was  
13 the facility we purchased at the beginning of 2018.

14 This is our main operation in Fresno, California,  
15 that began in 1932.

16 This is our latest acquisition up in Roseburg,  
17 Oregon, Umpqua Dairy. This is the facility that produces  
18 cottage cheese, sour cream, and ice cream.

19 Q. Thank you.

20 And if you could go to the next slide, please.

21 This is a similar chart that we looked with --  
22 looked at with Ms. Landry. But this one is for the  
23 Shehadey Family Foods Milk Receipts Skim Components; is  
24 that right?

25 A. Correct. So this is 24 months of data, all four  
26 facilities. So essentially it is 96 data points.

27 Q. So the same metrics that we saw earlier with  
28 Ms. Landry's?



1 A. Yes.

2 Q. Thank you.

3 And can you look, please, at the Shehadey minimum  
4 there.

5 A. Okay.

6 Q. Can you just walk us through those numbers,  
7 please, for the three components?

8 A. Yes. So the minimum amount that we received in  
9 this 24-month period, which is 2021, 2022, is 3.14%  
10 protein on a skim basis, 5.94% other solids on a skim  
11 basis, and 9.12% nonfat solids on a skim basis.

12 Q. And when you compare those to the current  
13 component factors in the Federal Milk Marketing Orders,  
14 what observations do you have?

15 A. The observations are that the current calculations  
16 are -- I guess they are -- they are slightly below what  
17 milk we are receiving as a minimum, but they are very  
18 close to what we are receiving.

19 Q. So even now, as Shehadey is receiving milk with  
20 components right around or slightly above the current  
21 component factors, have you seen any difference in how you  
22 are able to market this milk to your customers?

23 A. We have not.

24 Q. Now, if you could look at the maximum, please.  
25 Walk us through those numbers.

26 A. Yeah. The maximum in this 24-month period, four  
27 plants, 96 data points, 3.63% protein, 6.1% other solids,  
28 and 9.65% nonfat solids.



1 Q. And so like the numbers we looked at before, these  
2 also present quite a range, correct?

3 A. Yes. Correct.

4 Q. And at times, above the proposal levels?

5 A. Yes.

6 Q. And the reasons for this, can you explain those to  
7 us?

8 A. Yes. So I mean, we have got kind of two reasons  
9 for this. The first is locations. The Pacific Northwest,  
10 we get higher component tests than we do in California.  
11 If anyone would like to come to Fresno in July, they'll  
12 understand why.

13 But also, on top of that, is seasonality. In the  
14 summer months, the solids are much lower. We have even  
15 had periods of time where at our facilities in June and  
16 July of summer 2022, we had to -- we had to add cream to  
17 make whole milk for California because the results coming  
18 from the farms were below 3.5. So there is great  
19 seasonality due to weather.

20 Q. And this seasonality, does that impact what  
21 ability Shehadey would have to make representations on its  
22 labels about protein levels?

23 A. Yes, it would -- it would greatly -- it would  
24 greatly change how we made milk throughout the year.

25 Q. So essentially you have to make sure your label is  
26 compliant for the entire year, including the lowest  
27 component month?

28 A. Yes.





1 Q. And looking at the bottom row, percentage of  
2 months with plants below proposal, can you please walk us  
3 through those numbers?

4 A. Yes. So 71% of the months in this dataset, we did  
5 not receive the proposed levels of protein. And in the  
6 24-month period, we received milk components on other  
7 solids 65% of the time lower than the proposal, and 86% of  
8 the time we received nonfat solids lower than the  
9 Proposal 1 or 2.

10 Q. So even though Shehadey's minimum is slightly  
11 above current component levels and its maximum is above  
12 the proposal, the majority of the time Shehadey Family  
13 Foods was receiving components at levels lower than the  
14 proposals?

15 A. Correct.

16 Q. And if you could go to the next slide, please.

17 So can you tell us -- it says at the top,  
18 "Shehadey 2-year Protein Tests, Four Plant Weighted  
19 Average." Can you just explain to us what data makes up  
20 this pie chart, please?

21 A. Yes. So this is from the Market Administrator  
22 reports for 2021, 2022, accumulated. This is in totality  
23 of all milk received by all four of our facilities. So  
24 this is not location based. This is all four plants added  
25 together for a weighted average.

26 So in this regard in protein, we had six months  
27 out of 24 where the total protein tests were higher than  
28 the proposal. We had 18 months that were lower than the



1 proposal.

2 Q. And this is a weighted average across the four  
3 plants?

4 A. All milk received into our four facilities.

5 Q. And it's --

6 A. All producer milk.

7 Q. I'm sorry, I interrupted. Why don't you say that  
8 again.

9 A. All producer milk. That doesn't include cream we  
10 had to purchase from the outside or any of those things.

11 Q. And we talked about the fortification  
12 requirements.

13 Are the protein -- are the component tests before  
14 fortification?

15 A. Yes.

16 Q. Thank you.

17 And if we could go to the next slide, please.

18 Can you tell us what this pie chart reflects?

19 A. Yes. So in the 24-month period, we had one month  
20 where across Shehadey Family Foods' network of facilities  
21 that the other solids percentage met or exceeded the  
22 proposed limit -- level.

23 Q. And you had described that this is a four-plant  
24 weighted average. Across all four plants, correct?

25 A. Correct.

26 Q. So it's a somewhat different lens to look at this  
27 issue through than the table that you presented --

28 A. Yes.



1 Q. -- at the beginning?

2 A. Yes.

3 Q. And is there size disparity between Shehadey's  
4 four plants?

5 A. Very much so. Our -- our -- I don't know the  
6 specific numbers, but our facility in Fresno, I would dare  
7 say is probably -- probably double our next biggest  
8 facility. So it is -- there is definite size differences.

9 Q. So when we look at the variability, the component  
10 levels that a plant -- that your plant in Oregon may be  
11 achieving may be quite different than what your California  
12 plants can achieve, correct?

13 A. Correct.

14 Q. And because of their size disparity, that can have  
15 a disproportionate impact on Shehadey?

16 A. Correct.

17 Q. And if you could go to the next slide, please.

18 Can you tell us what this slide reflects?

19 A. Yeah. So this is the same -- same data, 24 months  
20 accumulated data for Shehadey Family Foods. We had four  
21 months that were at or above the proposal for Proposal 1  
22 and 2, and 20 months where it failed to meet those  
23 proposal limits.

24 Q. So for all three components, the -- again, the  
25 overwhelming majority of the time Shehadey Family Foods on  
26 a four-plant, two-year weighted average is not receiving  
27 components at the proposal level?

28 A. Correct.



1 Q. And if you could go back one slide just to  
2 confirm.

3 For other solids tests, this is true for every  
4 single month out of a two-year period except for one?

5 A. Yes.

6 Q. And this other solids we have heard talked about,  
7 have you ever had a customer bring up other solids to you?

8 A. Just wondering what it is and is it bad.

9 Q. How about nonfat solids?

10 A. Nonfat solids, the only questions we receive is,  
11 do we meet the California standards.

12 Q. Have you ever had a customer in California or  
13 elsewhere request higher nonfat solids?

14 A. Not higher than the California standard, no.

15 Q. And I know protein is probably the most familiar  
16 to all of us who are maybe not as steeped in components as  
17 you. And we have talked a little bit about advertising or  
18 touting on labels protein content.

19 Does Shehadey Family Foods ever put anything on  
20 its labels about protein content in its products?

21 A. The only -- the only one I can speak to is we --  
22 we do have certain chocolate milks that say it is a good  
23 source of protein. Milk is a good source of protein  
24 regardless of fortification, regardless of anything it is  
25 a good source. But we do not advertise increased levels  
26 of protein /we -- we label the minimums.

27 Q. And we have also seen evidence of protein levels  
28 rising from 2000, 2001 to present, correct?



1 A. Correct.

2 Q. And in that course of time, has Shehadey Family  
3 Foods been able to command higher prices from its  
4 customers based on these increasing protein levels?

5 A. We have not.

6 Q. And you mentioned that you were involved in the  
7 pricing process for customers; is that right?

8 A. Correct.

9 Q. Can you tell us what are the factors that Shehadey  
10 Family Foods' customers care about when you're negotiating  
11 prices with them?

12 A. Price. Price and quality. As an H -- you know,  
13 we are all HTST for Class I, so all of our products are  
14 manufactured with 20-ish days on the bottle. So they want  
15 to make sure that it is to their stores quickly and that  
16 it is the cheapest they could possibly buy it. And that  
17 it's good quality milk.

18 Q. And do you believe -- what do you believe would  
19 happen, if Proposals 1 and 2 were adopted, what would the  
20 impact be on Shehadey Family Foods?

21 A. I think an increase to Class I fluid milk will  
22 continue its decline, accelerate its decline even. We  
23 have numerous customers that, you know, continually hint  
24 to us that branded product is going to continue to get  
25 taken off the shelf for alternatives, which benefits  
26 nobody in this room.

27 Q. Thank you.

28 MS. VULIN: No further questions.



1 THE COURT: All right. Cross-examination, except  
2 for AMS? Anyone?

3 Ms. Hancock.

4 MS. HANCOCK: Thank you, your Honor.

5 CROSS-EXAMINATION

6 BY MS. HANCOCK:

7 Q. Good afternoon, Mr. Ellis.

8 A. Good afternoon.

9 Q. I'm Nicole Hancock. I represent National Milk.

10 As I understand it, you oversee all of the cost of  
11 the milk procurement for the Shehadey family businesses --

12 A. Correct.

13 Q. -- is that right?

14 A. Yes.

15 Q. Have you ever served in a sales role for the  
16 Shehadey family businesses?

17 A. Not Shehadey Family Foods, no, but I did for Dean  
18 Foods.

19 Q. Okay. And I think you said that you -- when the  
20 raw milk is brought in, that you are able to provide your  
21 own testing.

22 Do you have your own laboratories where you do the  
23 testing?

24 A. Yes, we do. We receive all milk. We test it  
25 through an FT120, which has a baseline product to test  
26 against.

27 Q. And you had mentioned -- I think that you said  
28 something to the effect of you test it to make sure it is



1 within your own parameters or requirements?

2 A. The quality. For somatic cell counts, bacteria  
3 levels. We make sure that it is not going to cause a  
4 recall.

5 Q. Okay. Do you have any protein requirements? Do  
6 you test for protein?

7 A. We do.

8 Q. And so nothing -- nothing specific to -- to your  
9 own requirements?

10 A. No, our requirements are we look at butterfat and  
11 we look at solid levels.

12 Q. And do you -- do you use -- I think you said that  
13 for any milk that's sold in California, it requires 10 or  
14 11 grams of protein?

15 A. On -- on 2% and 1%, yes.

16 Q. Okay. And -- and so do you use that as your  
17 standard baseline for all of the areas for which you  
18 deliver milk, even if it's outside of California?

19 A. Just California.

20 Q. And do you --

21 A. So --

22 Q. Sorry.

23 A. No, sorry. So in Nevada, for example, it will say  
24 either 8 or 9 grams on the label.

25 Q. Okay.

26 A. I'm not a -- I'm not a nutritionist. I don't -- I  
27 don't know what we have on everywhere.

28 Q. Okay. And I think that you said that the reason



1 is because it's more expensive to produce it at the higher  
2 protein levels?

3 A. Correct.

4 Q. And do you have any premium products where you are  
5 able to obtain premium pricing?

6 A. Nothing that we manufacture, no. That's fluid  
7 milk. Grade A fluid milk, no.

8 Q. Okay. Do you have other protein products that you  
9 manufacture that's not fluid milk?

10 A. Class II cottage cheese.

11 Q. And what about a product called Protein 22 to Go,  
12 what is that?

13 A. I'm unfamiliar.

14 Q. Okay. You are not aware of --

15 A. Oh, that's cottage cheese.

16 Q. Okay.

17 A. Yes.

18 Q. And is that a premium product that you are able to  
19 market based on the protein levels in that product?

20 A. Yes. Just as long -- as well as every cottage  
21 cheese in the nation.

22 Q. I'm sorry, just as long as the what?

23 A. Just as well as all cottage cheese. That's just  
24 standard cottage cheese. There's no protein added. It is  
25 just -- it is just cottage cheese.

26 Q. Yeah. But it's actually called --

27 A. Yes. We're advertising the protein on the  
28 Class II product, yes.





1 Q. Sorry, just so my record is clear. It's actually  
2 called Protein 22 to Go; is that right?

3 A. It's eight-ounce cottage cheese.

4 Q. I just want to make sure that it is clear that  
5 that's the -- that's the name of the product is that it's  
6 called Protein 22 to Go?

7 A. I'm -- I'm not sure.

8 Q. Okay. But you know that it's just a standard  
9 cottage cheese product?

10 A. Yes.

11 Q. Okay.

12 A. I think it is marketed as an eight-ounce product  
13 somebody can buy and have for lunch.

14 Q. Okay. And is the 22 the 22 grams of protein?

15 A. Yes.

16 Q. Okay. And so you know that there are markets out  
17 there where consumers are selectively picking dairy  
18 products for the protein choice?

19 A. Yes. On value-added products, they are.

20 Q. Okay. And for those value-added products, they  
21 oftentimes correspond with a premium pricing as well?

22 A. Correct.

23 Q. And I think you mentioned with your counsel  
24 that -- that there is a chocolate product that Producers  
25 Dairy brands and sells and markets it based on the protein  
26 value that it brings to rebuilding muscle support; is that  
27 right?

28 A. Correct, yes. And that comes through the research



1 done by MilkPEP.

2 Q. Okay. And that's just a standard protein in that  
3 product, isn't it?

4 A. Yes.

5 Q. There's nothing added to it, is there?

6 A. No. That's why -- was my comment earlier. I said  
7 all milk is a good source of protein.

8 Q. Yeah.

9 A. It says "good source of protein, great source of  
10 calcium" on it.

11 Q. So even if -- oh, I'm sorry.

12 A. No, you're good.

13 Q. Did I cut you off, sir?

14 A. No. Go ahead.

15 Q. So even at the base level protein level, you still  
16 market it, advertise it as a value-add because there is a  
17 benefit to that even baseline protein level; is that fair?

18 A. That's fair.

19 Q. Okay. And you understand that the price that you  
20 pay for your Class I milk is priced, at least on the  
21 Federal Orders, based on the best alternative use for that  
22 milk?

23 A. Correct.

24 Q. And that's Class III or Class IV for manufactured  
25 products?

26 A. Yes.

27 Q. And at least with respect to some of your milk --  
28 well, how much of your milk is produced from your own



1 farms, do you know?

2 A. As -- in terms of Shehadey Family Foods total, I  
3 don't -- I'm not sure.

4 Q. Do you know if it is more than half?

5 A. It is less than half.

6 Q. Okay. And for those contracts, you are able to  
7 enter into an arm's length transaction with your own  
8 farms; is that right?

9 A. Can you repeat the question?

10 Q. Yeah. Just you are able to -- you have your own  
11 contracts with your own farms, just like you would for any  
12 other farms?

13 A. Yes. Yeah, we have our own agreements within  
14 the -- within the -- our operating companies, yes.

15 Q. And once the Federal Order was implemented in  
16 California, then you had to pay the minimum price based on  
17 the Federal Order --

18 A. That's correct.

19 Q. -- 51 in that case?

20 (Court Reporter clarification.)

21 THE WITNESS: Yes. Sorry. I need a drink.

22 BY MS. HANCOCK:

23 Q. Okay. If I look at your testimony, I'm on -- what  
24 is this, Exhibit 105, I'm on page 3.

25 You have a statement in here that says, "I also  
26 note that raising component levels for Class I also  
27 unfairly pressures farmers to invest money and resources  
28 into raising components when the Class I fluid market does



1 not require them to do so."

2 Do you see that?

3 A. I do.

4 Q. Could you tell me what you mean by that?

5 A. Well, as Class I processors, we don't require a  
6 certain level of protein. So telling farmers they have to  
7 raise protein is putting pressure on them that we do not  
8 require. The requirements for that are -- are other milk  
9 classes.

10 Q. If the -- if the component pricing was increased,  
11 would that require them to increase their protein levels?

12 A. Likely.

13 Q. Is it because if you are going to pay for it, you  
14 at least want to get it?

15 A. Would be nice, yeah.

16 Q. Okay. And so if you did -- I mean, it wouldn't  
17 make sense for you to pay for something that you weren't  
18 receiving; is that right? For --

19 A. It doesn't make sense for us to pay for something  
20 we don't need nor pay for something we aren't getting.

21 Q. Well, that's kind of what I'm trying to get at is  
22 I'm curious if -- if you don't need it, and you are going  
23 to pay for it anyway, why would they have to ever increase  
24 the component?

25 A. Yeah.

26 Q. It's because if you are going to pay for it, you  
27 at least want the component to match what you are paying  
28 for; is that right?



1 A. Correct.

2 Q. And then you could use it however you want to use  
3 it; is that fair?

4 A. That's fair. And that's why we're saying I think  
5 it puts a burden on it, because we do not value -- the  
6 market does not value the additional components for  
7 Class I fluid milk.

8 Q. Okay. I want to go to page 6 of your statement,  
9 which is again Exhibit 105.

10 This is the same chart that's on page 6 of your  
11 testimony, that was in your PowerPoint on Exhibit 106; is  
12 that right?

13 A. Yeah. The nonfat solids with the chart below it?

14 Q. Yeah. And I'm looking at the -- at the  
15 spreadsheet chart on the bottom third of the page.

16 A. Yeah.

17 Q. Is that the same chart that's in Exhibit 106 in  
18 your PowerPoint presentation?

19 A. Yes, it is.

20 Q. Would you agree with me that the minimum, that  
21 water line as I'll call it, that you have reported here  
22 for protein percent of skim exceeds the current minimum  
23 under the Federal Milk Marketing Order?

24 A. Yeah. I agree with that.

25 Q. So 100% of the time the minimum components that  
26 you have received have exceeded the current Federal Milk  
27 Marketing Order?

28 A. Yes.



1 Q. And then the same would be true for other solids  
2 in the percentage of skim, it exceeds the current Federal  
3 Milk Marketing Order?

4 A. Yes.

5 Q. And so that would be 100% of the time you were  
6 able to exceed -- in this two-year lookback that you  
7 had -- exceeded that current Federal Milk Marketing Order?

8 A. Yes.

9 Q. And then the same for nonfat solids percent of  
10 skim, I guess that math would make sense there, that if  
11 you exceeded the prior two 100% of the time, you would for  
12 the nonfat solids as well?

13 A. Yes.

14 Q. And I -- I took the Hood representative through  
15 some averages. But we don't need to average it, right,  
16 because 100% of the time, at least for the milk that is  
17 coming into your plant, you are exceeding the minimum?

18 A. And in my testimony I gave current weighted  
19 averages for each of the three components.

20 Q. Okay. And -- and I want to -- you said weighted  
21 average.

22 Is it weighted based on the volume of milk that's  
23 received?

24 A. It is just total pounds by all four facilities. I  
25 did not weight it by region or geographically. It is by  
26 total.

27 Q. Okay. So it is weighted based on the volumes of  
28 milk, but you have added all four of the facilities



1 together?

2 A. Correct.

3 Q. And I think you said the -- I think Umpqua you  
4 said you didn't even acquire until sometime in 2021?

5 A. Yes.

6 Q. And is this reporting period that we're looking at  
7 is for the entirety of calendar year 2021 and 2022?

8 A. Correct. It includes the periods -- any period  
9 that we would have not owned them yet.

10 Q. I missed the tail end of that. What did you  
11 say --

12 A. Any period that we did not yet own them -- it's  
13 all 2021 regardless of ownership.

14 Q. Okay. That was my question: Did you capture the  
15 period prior to you acquiring the Umpqua facility?

16 A. Yes.

17 Q. And did you change any of the standards once you  
18 acquired the Umpqua facility?

19 A. No formulation changes. Yeah, no standard of  
20 identity changes on our side.

21 Q. And so where you have on the bottom of this chart,  
22 where it says percent of months with plants below the  
23 proposal, that's for the proposal that wasn't in effect in  
24 2021 and 2022; is that right?

25 A. Correct.

26 Q. Have you looked at the trend lines to see which  
27 way it is going over the years?

28 A. I have. You know, there's periods where it's --



1 it is up against prior years. There's periods where it is  
2 even down. Like I said, summer of 2022 was very rough for  
3 solids in the Central Valley of California and in the Reno  
4 market. Solids were low, and would argue that they were  
5 lower than prior years. So it is -- they have -- you have  
6 trends up and down.

7 Q. Okay. And if you look at it overall, is the  
8 overall trend increasing with respect to the solids?

9 A. They are increasing. I feel personally that they  
10 are not increasing at the levels that are being discussed.  
11 I think that's partly because the cooperatives are doing  
12 their job in determining which milk goes to which  
13 supplier -- goes to which manufacturer. I think that our  
14 milk is much more standard, and they are making sure the  
15 higher solids milk goes to cheese and butter processors.

16 Q. And I think you said that you acquire all of your  
17 milk from cooperatives?

18 A. All except what's acquired on -- bought from our  
19 family farm.

20 Q. Okay. And --

21 MS. HANCOCK: Okay. That's all I have. Thank you  
22 so much for your time.

23 THE COURT: Next for cross of this witness? You  
24 guys -- Mr. Miltner.

25 CROSS-EXAMINATION

26 BY MR. MILTNER:

27 Q. Good afternoon, Mr. Ellis.

28 A. Good afternoon.





1 Q. My name is Ryan Miltner. I represent Select Milk  
2 Producers.

3 The first question I have, actually it's -- deals  
4 with the title page of your statement. I see that it says  
5 "Testimony of Shehadey Family Foods, LLC, Part 1."

6 Are you going to be offering any other testimony  
7 on Proposals 1 and 2?

8 A. I believe not on 1 and 2. I believe that we will  
9 maybe be back for a different proposal.

10 Q. Okay. Recap for me when you acquired the  
11 facilities other than the main Producers Dairy facility.

12 A. Fairfield we acquired in the beginning of 2018  
13 from Super Store Industries. Reno, Nevada, we acquired  
14 through the Dean Foods bankruptcy in 2020. And then in  
15 2021, we acquired Umpqua Dairy Products from the Feldkamp  
16 family.

17 Q. So despite the challenges of the Class I market,  
18 at least for Shehadey Family Foods, it is doing well  
19 enough to expand quite a bit?

20 A. I mean, I guess you can make the argument that it  
21 is also doing poor enough that people want to sell. I  
22 mean, it is -- there's been advantageous purchases through  
23 out -- through our company due to the challenges in  
24 Class I.

25 Q. But you wouldn't have bought them if you were  
26 going to lose money, though, right?

27 A. No. But we -- there's also a lack of processors,  
28 so --



1 Q. On page 3 of your written statement, you say in  
2 the first paragraph, "I can tell you that Shehadey Family  
3 Foods would not be able to pass along to the market this  
4 increased cost from Proposals 1 and 2."

5 How do you know that?

6 A. Because we're not able to pass along all of our  
7 costs today. We have got retailers that just tell us no  
8 when we try to pass along costs, especially on a branded  
9 product. They tell us that we're too level, that they  
10 don't want to carry it if it keeps going up.

11 Q. What's the reason for those cost increases?

12 A. It's the monthly price change.

13 Q. I mean, is it resin, fuel, milk? What is it?

14 A. Milk. I mean, for example, milk has gone up  
15 almost \$0.20 a gallon in September. That's -- that's a --  
16 kind of a sticker shock to a lot of people.

17 Q. All four of your plants are regulated plants,  
18 correct?

19 A. Correct.

20 Q. And they are all in -- well, the orders in which  
21 they are located, are they -- are they multiple component  
22 orders or butterfat skim orders?

23 A. They are -- they are all regulated under multiple  
24 component orders. Reno, Nevada, happens to be in an  
25 unregulated area, but because of the component -- their  
26 customer base, they are fully regulated under California.

27 Q. You sell more than 25% --

28 A. Yes.



1 Q. -- of the receipts? Okay.

2 Who are your competitors?

3 A. I guess, anymore, anybody. Right? Anyone with an  
4 ESL plant is our competitor. Anything that takes volume  
5 away from us are competitors. So everyone here. We've  
6 got competitors such as Crystal Creamery, Dairy Farms of  
7 America with Alta Dena. We've got Dairy Gold. On top of  
8 that, most of our competitors are who we're buying raw  
9 milk from, so --

10 Q. I'm sorry, what was the last thing --

11 A. Our competitors are people we are buying raw milk  
12 from today.

13 Q. They are cooperatives, you mean?

14 A. Correct. And they -- they have processing  
15 facilities now.

16 Q. Crystal, Alta Dena, and Dairy Gold, are those all  
17 regulated handlers under the Federal Order?

18 A. They are Class I plants, correct.

19 Q. And if Proposals 1 and 2 increase your cost of  
20 milk, all your competitors have the same cost increases,  
21 don't they?

22 A. Correct.

23 Q. So if your customers are going to not accept your  
24 price increase and you insist upon it, they are going to  
25 turn to a competitor that has the same cost increase,  
26 won't they?

27 A. I mean, yeah.

28 Q. So if you are all in the same boat, somebody is



1 going to pass it through, won't they?

2 A. I guess so. But I guess that gets back to the  
3 question of we're not receiving those components today.  
4 And what is a minimum price? Is the minimum price based  
5 upon numbers that are not happening, or is the minimum  
6 price based upon the minimums that we should expect to pay  
7 at our facility.

8 Q. Ms. Hancock talked to you about one of your  
9 statements on page 3, and I want to ask about it because  
10 I'm not sure that the answer came through.

11 And that's the statement which says you "note that  
12 raising component levels for Class I unfairly pressures  
13 farmer" -- "farmers to invest money and resources into  
14 raising components when the Class I fluid market does not  
15 require them to do so."

16 Do you understand that Proposals 1 and 2 will  
17 require producers to increase their component levels?

18 A. I don't believe that it will require them to. But  
19 I believe what is happening is that they are -- it is  
20 so -- because of Class III, Class IV is becoming such a  
21 bigger share of the market, it is pushing farmers to  
22 increase their components to meet those demands. Class I  
23 is such a small portion now that the farmers are raising  
24 their components because of the other classes.

25 Q. However, the Class III and IV plants that are  
26 demanding more components, that happens -- that's already  
27 happening now, isn't it?

28 A. Yes.



1 Q. Proposals 1 and 2 don't change that at all, do  
2 they?

3 A. No.

4 Q. And you are in multiple component orders, so the  
5 incentive to increase those components already exists,  
6 doesn't it?

7 A. It does. But I mean, is that -- we buy from  
8 pretty much the same farms every day, and those farmers  
9 don't have to meet those standards.

10 Q. But contracts that Shehadey Family Foods has with  
11 its cooperative suppliers, does it require a certain  
12 minimum level of protein or total solids?

13 A. It does not.

14 Q. On page 4 of your statement, the pie chart, does  
15 that include the milk from the Shehadey family farm?

16 A. It does, which I'd note is actually higher on  
17 protein solids and other solids than the cooperative milk  
18 we are receiving.

19 Q. Thanks. That was my next question.

20 At the top of that page, the sentence reads,  
21 "Proposals 1 and 2 would unnecessarily burden those  
22 farmers by creating a policy that Class I milk will and  
23 should have certain high levels of components."

24 Can you explain that, please?

25 A. I believe that if we are going to change the  
26 formula, Class I processors are going to start demanding  
27 that there is a -- that these component levels are being  
28 met. Today, if it's low on protein, we bottle it. But if



1 we're going to increase and say, well, this is what you  
2 are getting, there's going to be a lot of Class I  
3 processors that say, this is not what I'm getting.

4 Q. Are those the same farmers that are already  
5 pressured to increase their components for Class III and  
6 IV plants?

7 A. I can't speak to that.

8 Q. Okay.

9 MR. MILTNER: I don't have anything else. Thank  
10 you.

11 THE COURT: Mr. Cryan, go ahead.

12 CROSS-EXAMINATION

13 BY DR. CRYAN:

14 Q. Good afternoon. We met earlier.

15 A. Yes, sir.

16 Q. I'm Roger Cryan from the American Farm Bureau  
17 Federation. Nice to see you.

18 So just to clarify, I know you have been asked  
19 this already, and I apologize for being repetitive.

20 You fortify milk in your plants to meet the  
21 California standards?

22 A. Correct. Three of our facilities, yes.

23 Q. Very good.

24 And if I understood your testimony, I think you  
25 said that your -- your milk is -- all comes from within --  
26 did you say within 26 miles from the fluid plants?

27 A. That's just in regards to our primary facility in  
28 Fresno, California.



1 Q. Okay.

2 A. An average of 26 miles.

3 Q. Okay. So your focus is on local sources rather  
4 than worrying about what the component tests are?

5 A. Correct.

6 Q. So the milk you are getting is more or less  
7 typical for the region?

8 A. Yes.

9 Q. Okay.

10 DR. CRYAN: Thanks very much.

11 THE COURT: How much do you have, Mr. Vetne?

12 He's already walking up to the lectern. Let him  
13 ask the questions, and then we can take a break.

14 CROSS-EXAMINATION

15 BY MR. VETNE:

16 Q. John Vetne representing National All-Jersey.

17 I just want to follow up on a question that  
18 Mr. Miltner asked you. You had a dialogue about farmers  
19 being pressured to increase their component to protein  
20 content to supply Class III and IV plants.

21 Do you recall that line of questioning?

22 A. I do.

23 Q. Isn't it true that farmers receive the benefit of  
24 higher component pricing whether their milk goes to  
25 Class I, II, III, or IV under the Federal Order? There's  
26 uniform prices regardless of use?

27 A. Correct. I mean, we pay Class III plus or minus  
28 the -- PPD, yes.



1 Q. Pardon?

2 A. Yes, we pay based on components, and then it gets  
3 pooled together --

4 Q. It is based on component whether it goes to your  
5 plant, whether it goes to a cheese plant, or a powder  
6 plant, the producer gets the same uniform price?

7 A. Uh-huh.

8 Q. Correct?

9 A. Correct.

10 MR. VETNE: That's it. Thank you.

11 THE COURT: Okay. Let's take a ten-minute break.  
12 Let's come back at 3:15.

13 (Whereupon, a break was taken.)

14 THE COURT: On the record. We have -- did we have  
15 redirect? Is that where we were? Remind me.

16 Okay. Who is up?

17 MS. TAYLOR: I think AMS is next on the list.

18 THE COURT: Very good.

19 MS. TAYLOR: Thank you, your Honor.

20 THE COURT: Ms. Taylor and Mr. Wilson.

21 CROSS-EXAMINATION

22 BY MS. TAYLOR:

23 Q. Good afternoon. Thanks for coming to testify  
24 today.

25 A. Yeah.

26 Q. You talked about Shehadey farms as in regards to  
27 your fluid plant business.

28 I'm curious on the farm side if it meets the small





1 business definition, and that is \$3.75 million in gross  
2 revenue a year. Is it under that? You can say you don't  
3 know.

4 A. I honestly -- I -- they are separate legal  
5 entities.

6 Q. Okay.

7 A. I do not have much to do with the farm other than  
8 recording their milk.

9 Q. Got you. Okay.

10 And I think this was asked, but I missed the  
11 answer, so I apologize for being duplicative. But I know  
12 you have your own farm production, and it is also co-op  
13 supplied.

14 Do you have the -- do you know the breakdown of  
15 that, percentage-wise?

16 A. As a total, no. I'd say that in Fresno it's  
17 probably 25% of our farm, 75% co-op. And the other two  
18 facilities are 100% cooperative.

19 Q. Are 100% what?

20 A. Cooperative.

21 Q. Cooperative.

22 A. Co-op milk.

23 Q. Oh, so your farm milk only goes to your Fresno  
24 plant?

25 A. Correct.

26 Q. Got you.

27 On the third page of your statement, you talk  
28 about Class I manufacturers -- let me -- "retailers do not



1 pay Class I manufacturers based on component tests, but  
2 only which items" -- what -- "what they are purchasing on  
3 a fixed price."

4 Can you expand on what you mean by "fixed price"?

5 A. Meaning that the price is the price. If component  
6 levels go up, they don't pay for that. So if it is \$4 for  
7 a gallon of whole milk, it is \$4 for a gallon of whole  
8 milk regardless of the protein level in there.

9 Q. But is the price -- and I'm -- I'm -- I'm talking  
10 about the -- your sale to your customer, which would be  
11 the retail grocery store.

12 A. Okay.

13 Q. That's not done, like, on a fixed number. That's  
14 a fixed formula -- or a min- -- Federal Order minimum?

15 A. Yes. Yeah. Changes monthly. Sometimes there's  
16 contracts we have that we only change the price quarterly,  
17 semi annually. So there are different contracts out  
18 there.

19 Q. Okay. And are they based on Federal Order prices?

20 A. Yes.

21 Q. Okay. And so later on when you talk about the  
22 "costing and pricing models that our largest retailers use  
23 to price Class I milk they buy from us are only based on  
24 skim and butterfat," are you talking about the Federal  
25 Order skim and butterfat prices for Class I?

26 A. Correct.

27 Q. Okay.

28 A. We have -- for example, we have some retailers



1 that it's -- you can tell they are not even going to  
2 factor in fortification, like solids price. They're just  
3 skim and butterfat. That's all they are looking at. Even  
4 though we have to fortify, they only let us move based on  
5 skim and butterfat.

6 Q. Okay. So that extra cost to you you're unable to  
7 pass on?

8 A. Correct.

9 Q. Got you.

10 You said at the end of some other  
11 cross-examination, you mentioned that the Class I price  
12 went up \$0.20 a gallon in September, and that was a  
13 surprise to everyone. And I am just curious, is that --  
14 were you able to pass along that increase to your buyers?

15 A. We're able to pass along -- I guess in different  
16 portions of it, right. So there's some we can pass along  
17 the majority of it to. There's some we can't pass along  
18 near that much. There's some that we can't pass any along  
19 to.

20 Q. Just depends on your contract with them?

21 A. Contract and labels, yes.

22 Q. And later on you say Shehadey Foods in 2021 and  
23 '22 purchased 2.5 billion pounds of producer milk.

24 I just want to make sure I'm clear. I think  
25 you -- I might have missed when you made this distinction.  
26 That's both co-op and owned farm supply; is that right, so  
27 in total?

28 A. Correct.



1 (Court Reporter clarification.)

2 BY MS. TAYLOR:

3 Q. And then this is on your -- on page 4 of your  
4 statement, the last sentence on that, this is on your  
5 protein graph, Shehadey would only be over the proposal  
6 "only six out of the 18 months." I think that might need  
7 to be 24 months if you look at that. For the two years  
8 there's a total of 24 months. So in six of those  
9 24 months --

10 A. Yes. Correct.

11 Q. Okay. I just wanted -- so that should be  
12 24 months?

13 A. 18 months of not being over the Proposal 1 and 2,  
14 and six months where it would have.

15 Q. Great.

16 And then I think that same -- I just want to make  
17 sure the record's clear -- the same type of fix might need  
18 to be on the top of page 6 where it says, "Shehadey would  
19 have met the proposal level only four out of the  
20 20 months." And I think that should also be 24.

21 A. Yes, correct.

22 Q. Okay. And then you mentioned in the preceding  
23 pages, but I wanted to just summarize it for the -- on the  
24 record. You gave us the weighted averages for your 2023  
25 milk on a skim basis, and if I jotted these down correctly  
26 on the page, that protein was 3.35%, other solids 6%, and  
27 nonfat solids 9.35%?

28 A. Yeah. 3.35 on a skim basis. 6% on a skim for



1 other solids. So, yeah, I believe you are correct.

2 Q. Yes.

3 You mentioned that three of your facilities  
4 fortify to meet the California standards. Do you know off  
5 the top of your head what those standards are?

6 A. Yes. So whole milk has to be 12.2% total solids  
7 and 3.5% butterfat. 2% and 1% both have to be 12.2% total  
8 solids.

9 Q. Total solids, okay.

10 And so if you looked at -- I know you have  
11 discussed how additional components, there's no added  
12 value to you. There is a cost, as you have mentioned, to  
13 fortify.

14 So have you done the comparison to see if getting  
15 higher solids milk from the farm would be a cost benefit  
16 to you when it came -- compared to the cost it costs you  
17 to fortify that milk later?

18 A. I mean I guess, yes, there would be some cost  
19 benefit to that. But in reality, unless -- unless the  
20 cows are at 10% or 11%, we still have to have the  
21 equipment. We still have to have the cost of processing  
22 the condensed skim. We still have to buy the powder. So  
23 I mean, it is still going to be a cost. It just may not  
24 be as much milk going through or as much -- you know, as  
25 much purchasing of condensed skim. We still have to have  
26 all the costs -- the fixed costs of having the equipment.

27 Q. But your ingredient cost is --

28 A. Yeah, unless --



1 Q. -- a smaller portion of your fixed cost anyways.

2 A. Yes.

3 Q. Okay. I understand.

4 I know the previous witness from Hood indicated,  
5 kind of, of all of their fluid plants how much Class I  
6 utilization they had.

7 Do you know how much Class I utilization that your  
8 fluid plants at Shehadey has?

9 A. 84%.

10 Q. And I hate to circle around, but my sticky notes  
11 got messed up out of order, so my -- I do try to keep  
12 things logical.

13 Back in the beginning, kind of back to how you  
14 worked -- how Shehadey does their price contracting with  
15 your purchasers. What factors are considered when you  
16 guys -- when you are making those decisions or having  
17 those negotiations with your buyers?

18 A. Supply, first off. I mean, do they have -- do  
19 they have the supply for us? Location to our facility.  
20 And price.

21 Q. Well, what I'm talking about, when you sell your  
22 milk, so the retail chain that buys it from you.

23 A. Oh, the retail chain.

24 Q. Uh-huh.

25 A. What factors do we look for?

26 Q. Or what factors -- maybe not what you look for,  
27 but what factors go into that negotiation to determine  
28 what the price is you all agree on?



1 A. So price is first and foremost.

2 Q. Would that be Federal Order price?

3 A. Just finished good price.

4 Q. Okay.

5 A. You know, typically, when we bid on a customer, we  
6 will have to notate what -- you know, what fat and  
7 butterfat -- or fat and skim price we used. But they are  
8 looking for a -- typically an FOB price and also a  
9 delivered price, and that is what they make their decision  
10 on.

11 There's qualifications you have to have. Certain  
12 customers require you to be, you know, SQF Level 3. Some  
13 don't require. So those are different factors. Some  
14 require you to be within a certain radius of all the  
15 stores; you can't bid on anything past 250 miles. Others  
16 are looking, just give me a price, and we don't care where  
17 you are at.

18 Q. Okay. And then some of the questions we have  
19 asked previously of other witnesses in regards to the  
20 competitive relationship you have between your plants and  
21 other Class I plants selling competitors of yours.

22 Can you speak to how that relationship may or may  
23 not change if Proposals 1 or 2 were adopted?

24 A. I mean, at face level the competition would change  
25 in direct correlation of each other. I can't speak to,  
26 you know, specific contracts, if they have got, you know,  
27 the ability to go and lower their price, lower their  
28 service price or anything like that. I can't speak to



1 that. This is just the minimum price. We pay delivery,  
2 we pay premiums, we pay fuel surcharges and -- on top  
3 of -- on top of the Federal Order price.

4 Q. Okay. So the minimum order price would -- would  
5 be the same for all, I guess. But that doesn't mean that  
6 other factors that you bid on might not change for you  
7 differently than your competitors?

8 A. Yes.

9 Q. Okay.

10 MS. TAYLOR: That's it for AMS. Thank you so  
11 much.

12 THE WITNESS: Thank you.

13 THE COURT: Redirect?

14 MS. VULIN: Thank you, your Honor. Just a couple  
15 quick points.

16 REDIRECT EXAMINATION

17 BY MS. VULIN:

18 Q. You were asked earlier about a cottage cheese  
19 product called Protein 22 to Go.

20 Do you recall that?

21 A. Correct.

22 Q. And about or approximately what percent of your  
23 overall company sales did that product make up?

24 A. .1%.

25 Q. .1 or .01?

26 A. Point -- I think it was .1, and then less than 2%  
27 of all cottage cheese sales.

28 Q. Less -- okay. Got it. Thank you. Less than 2%





1 of all cottage cheese sales.

2 And does Shehadey Family Foods have any cottage  
3 cheese products that have won an award?

4 A. They have. They have won numerous QCS awards for  
5 best tasting product.

6 Q. Was that this product?

7 A. It was the -- I guess the main product but not  
8 that specific size.

9 Q. And the question from Mr. Miltner about  
10 competitors, similarly covered by Ms. Taylor as to what  
11 happens to competitors or the competitive relationship  
12 with -- because of these price changes.

13 And you mentioned that some of your competitors  
14 are also your supplier; is that right?

15 A. Correct.

16 Q. And are there -- would you consider retail  
17 bottlers your competitors?

18 A. Yes, they are.

19 Q. And what would the impact be on the competitive  
20 relationship between you and retail bottlers if these  
21 proposals were adopted?

22 A. I mean, it would be -- it would be similar to  
23 where -- the correlation would go up the same. But  
24 retailers also have the advantage sometimes where they can  
25 determine, do we make money at the plant or the store, and  
26 so their pricing may not change. Also, I can't speak to  
27 their specific contracts with their -- their suppliers.

28 Q. And what about nondairy kind of milk alternative



1 products?

2 A. Correct. I guess, you know, a competitor I guess  
3 is not just milk -- milk processors. We're losing space  
4 to tea. We're losing space to water. We're losing space  
5 to almond, to cashew, to whatever -- to whatever product  
6 is out there anymore. So our competition is no longer  
7 just fluid dairy.

8 Q. And in your experience, what do you think would be  
9 a potential outcome or response from a retailer if all of  
10 its fluid milk suppliers said they needed to raise their  
11 prices?

12 A. Honestly I think that it will continue to decline  
13 the amount of doors in the store. I mean, when I was --  
14 you know, I mean, we have gotten to where in certain parts  
15 there is a door and a half of dairy in some large  
16 retailers, and that is it. And so the products that we  
17 like to go to market, where we can actually make a little  
18 bit of money, they don't carry anymore because there's no  
19 space for it.

20 Q. Thank you.

21 MS. VULIN: No further questions.

22 MS. TAYLOR: Your Honor?

23 THE COURT: Yes, AMS.

24 MS. TAYLOR: I apologize. I need a better method  
25 than sticky notes for my questions, but I just had one  
26 last question.

27 THE COURT: Not sure there is one.

28 No objection, I take it?



## 1 RECCROSS-EXAMINATION

2 BY MS. TAYLOR:

3 Q. I was -- we were just curious if you were able to  
4 speak to whether Shehadey uses any form of risk management  
5 tools to hedge your risk on the pricing side.

6 A. We -- we are not.

7 Q. Okay.

8 MS. TAYLOR: Thank you.

9 THE COURT: Okay. You want to move these exhibits  
10 into the record?11 MS. VULIN: Yes, please, your Honor. I believe we  
12 are on Exhibits 105, the testimony, and 106, the PDF of  
13 the PowerPoint presentation.

14 THE COURT: We are.

15 Any objections?

16 Exhibits 105 and 106 are admitted into the record  
17 at this proceeding.18 (Thereafter, Exhibit Numbers 105 and 106 were  
19 received into evidence.)

20 MS. VULIN: Thank you, your Honor.

21 THE COURT: You're welcome.

22 And thank you, Mr. Ellis, and you're dismissed.  
23 You may step down from the stand.

24 THE WITNESS: Thank you.

25 THE COURT: Okay. What's next?

26 MR. HILL: Brian Hill, USDA. And I'm rising in  
27 opposition to the objections lodged by the Milk Innovation  
28 Group and National All-Jersey, which both argue that the

1 exclusion of some of their proposals is arbitrary and  
2 capricious. I will be speaking mostly about the Milk  
3 Innovation Group; my co-counsel will be talking about  
4 National All-Jersey.

5 So I'll start by -- I'll start where the Milk  
6 Innovation Group started, because it appears they tie  
7 their arguments to the words of the Action Plan and their  
8 request for additional submissions, both which were  
9 released on June 1st, 2023.

10 So on page 2 of Exhibit 60, which is Milk  
11 Innovation Group's objection, they point out language in  
12 both of the documents I mentioned that refer to pricing  
13 provisions.

14 On page 3 of that same document, they contrast it  
15 with the language used in the Hearing Notice and the  
16 July 24th letter, which refers to pricing formula.  
17 Apparently, that difference appears to be scandalous, and  
18 I assure you that it's not.

19 Any reading that asserts the difference is  
20 untoward is a fundamental misunderstanding of the purpose  
21 of the Action Plan.

22 So I'll start with the 2008 Farm Bill because that  
23 amended the Agricultural Marketing Agreement Act, and as a  
24 result of that, 7 U.S.C. 608c(17)(C) now mandates hearing  
25 timeframes for the conduct of mandatory FMMO hearings, and  
26 only those.

27 The Action Plan that results is required, most  
28 notably, it requires expected timeframes for the



1 completion of the hearing, within 120 days of the issuance  
2 of the notice, which is important.

3 Now, what the Action Plan doesn't do is determine  
4 the scope of the potential hearing.

5 If we look at Exhibit 61, which is NAJ's --  
6 National All-Jersey's -- Objection, Attachment A1, we can  
7 see what the Action Plan actually says. In the second  
8 paragraph of that document, the Action Plan says, and I  
9 quote: "Based on the information submitted, USDA is  
10 considering initiation of a rulemaking proceeding that  
11 would include a public hearing to collect evidence  
12 regarding proposed changes to pricing provisions effective  
13 in all 11 FMMOs."

14 The very next paragraph starts off: "The  
15 following table outlines the initial timeframe of the  
16 formal rulemaking process, should the Secretary of  
17 Agriculture choose to proceed, to ensure the hearing  
18 concludes within 120 days of the publication of this  
19 Action Plan."

20 The following paragraph states: "If issued, a  
21 notice of hearing detailing the date, time, and location  
22 of the hearing, and the proposals under consideration,  
23 would be published in the Federal Register."

24 And since they also mentioned the invitation for  
25 new submissions, Attachment A2 speaks to that issue as  
26 well.

27 And if you look at it in page 1 of Attachment  
28 A2 -- this is still Exhibit 61, your Honor -- the second



1 paragraph says, "The proposal has not yet been approved  
2 for inclusion in a hearing note" -- "in a notice of  
3 hearing," excuse me. "Before deciding whether a hearing  
4 will be held, USDA is providing the opportunity for  
5 interested parties to submit additional proposals  
6 regarding potential amendments to the current pricing  
7 provisions applicable to all FMMOs."

8 If we move to the second page of that document,  
9 the penultimate paragraph reads: "If USDA determines a  
10 hearing will be held, all known, interested parties will  
11 be provided a copy of the notice of hearing."

12 So you can see from this language, again and  
13 again, that there's not even a commitment from the USDA to  
14 hold a hearing at all at that point, much less commit  
15 itself to accepting, as part of a potential hearing, every  
16 proposal having anything to do with pricing provisions.

17 What the Action Plan and request for additional  
18 proposals did was to establish the largest universe or the  
19 largest pool -- no pun intended -- of topics or  
20 submissions from which the Secretary would consider  
21 holding a hearing. It certainly was not a guarantee.

22 So an interested party can hardly claim an  
23 excep- -- an expectation, excuse me, was provided by the  
24 Action Plan or the request for additional proposals, when,  
25 in fact, there was no guarantee that a hearing on any  
26 proposal was going to be heard.

27 So to the second topic. I think it's instructive  
28 to look at the National Farmers Organization case, because



1 it is heavily relied upon by the Milk Innovation Group,  
2 and I think it's very distinguishable from the present  
3 circumstances.

4 First, there were four findings by the Court, but  
5 I have condensed them down to two.

6 The first is that the Court found that the denied  
7 proposal was essentially identical to those that have been  
8 previously noticed before in similar circumstances.

9 The second was that the Secretary -- the Court,  
10 excuse me, found that the Secretary using handler  
11 opposition to the proposal to exclude it was  
12 inappropriate. In fact, the Court called it "disturbing"  
13 that the Secretary "took the action solely or in part  
14 because of the opposition to the National Farmers  
15 Organization of milk handlers, the antagonist of the  
16 producers on issues of this kind."

17 The Court also said, "The sentiments of the  
18 handlers are not relevant when engaging support for a  
19 proposal to change a milk order since they have no say in  
20 the order's approval."

21 Your Honor, these don't apply to the Milk  
22 Innovation Group.

23 Secondly, I have already mentioned the hearing  
24 timelines and how they turned out to be important, so this  
25 is how so.

26 The National Farmers Organization case is from  
27 1988. That is a full 20 years before the  
28 Congressionally-mandated deadlines were imposed on the



1 USDA through the 2008 Farm Bill.

2 So at the time of the National Farmers  
3 Organization case, the USDA had no set deadline for which  
4 to concern itself with.

5 Now the Secretary or the Administrator are  
6 acquired to plan for a hearing that takes place within  
7 120 days of a notice -- of a notice providing an Action  
8 Plan, along with several other deadlines post-hearing.

9 There is simply no way that in a hearing of this  
10 type, of this magnitude, the USDA could have successfully  
11 navigated all of the topics raised in the 40 submissions  
12 that they received, done so within the  
13 Congressionally-mandated timeline, while also giving  
14 appropriate consideration to each proposal.

15 So the Secretary made the decision to limit the  
16 hearing to comply with Congress's mandate and clear intent  
17 to have a speedier and, hopefully, more efficient process.

18 And that's all that the USDA has done here,  
19 condensed the hearing to a manageable concept in order to  
20 comply with the statutory deadlines. And that concept was  
21 to limit the hearing to pricing formula, which was the  
22 largest unifying concept that could be heard in the time  
23 allotted.

24 And even with the 19 excluded proposals, we are  
25 still here, very uncertain about whether the USDA is going  
26 to be able to completely comply with those deadlines.

27 Now, the Milk Innovation Group was encouraged in  
28 the July 24th letter to submit their proposals for





1 consideration for a separate procedure. It still has that  
2 option.

3 But in the meantime, we ask that your Honor,  
4 pursuant to 7 CFR 900.7, find the objections meritless and  
5 deny them in full. Thank you.

6 THE COURT: Someone else want to speak?

7 Yes.

8 MS. McMURTRAY: Good afternoon, your Honor.  
9 Michelle McMurray with the Office of the General Counsel,  
10 Department of Agriculture. So I'll be handling the  
11 objection for National All-Jersey.

12 On October 23rd -- on August 23rd, 2023, National  
13 All-Jersey filed an objection to the Secretary of  
14 Agriculture's decision to exclude two proposals it  
15 submitted for consideration at this hearing. It is the  
16 position of the USDA that this objection is without merit.

17 On June 1st, 2023, USDA released an Action Plan  
18 and request for additional proposals. The request for  
19 additional proposals, signed by AMS Deputy Administrator  
20 Dana Coale, noted that proposals must be received by  
21 Wednesday, June 14th, 2023, at 5:00 p.m. Eastern Time.

22 In this document, USDA specifically asked for  
23 proposals that would amend the current pricing provisions  
24 applicable to all Federal Orders and that all proposals  
25 must be received by that date.

26 An Action Plan was issued on the same day as the  
27 request for those proposals and indicated that USDA was  
28 merely considering initiating a rulemaking proceeding,



1 and, again, reinforced the timeline outlined in the  
2 request for proposals. Again, that timeline is that  
3 proposals would be due June 14th, 2023; there would be a  
4 pre-hearing information session on June 16th, 2023; and  
5 the petitioners would be able to submit modified proposals  
6 by Tuesday, June 20th.

7 National All-Jersey submitted its three proposals  
8 and modifications thereto on each of those respective  
9 dates.

10 On July 24th, 2023, the hearing notice was  
11 published in the Federal Register, and that same day, USDA  
12 sent a letter to National All-Jersey, which indicated that  
13 USDA would hear evidence and testimony on Proposal 1,  
14 which to recap is the -- would amend the milk component  
15 factors for --

16 (Court Reporter clarification.)

17 MS. McMURTRAY: -- for Class III and IV skim milk  
18 price formulas across all orders. But USDA did indicate  
19 to NAJ that they would be excluding Proposals 2 and 3  
20 because those proposals asked for changes to specific  
21 marketing orders.

22 USDA's letter, very similar to Mr. Hill's point  
23 earlier, encouraged NAJ to participate in the hearings,  
24 and notified NAJ that they could offer Proposals 2 and 3  
25 for consideration in a separate rulemaking proceeding.

26 Per that June 20th submission, NAJ's Proposal 2  
27 sought to establish Class III, II, and IV payment  
28 requirements in Federal Milk Marketing Orders 5, 6, 7, and



1 131, based on multiple component pricing.

2 Throughout NAJ's explanation and justification for  
3 their proposal, it was clear that Proposal 2 only sought  
4 to amend the four orders without multiple component  
5 pricing.

6 NAJ's Proposal 3 works in tandem with Proposal 2,  
7 and operates on the premise that you would look to the  
8 price components on manufacturing milk in the four  
9 fat/skim orders --

10 (Court Reporter clarification.)

11 MS. McMURTRAY: So NAJ's Proposal 3 works in  
12 tandem with Proposal 2 and operates on the premise that  
13 you would look to the price components in manufacturing  
14 milk in the four fat/skim orders, and then that would also  
15 price Class I milk nationally, likewise based on  
16 components.

17 But since those fat/skim orders would need to make  
18 that decision on their own, in their own hearing, it's not  
19 appropriate at this time to consider Class I component  
20 pricing.

21 So the first thing I'll note after that summary is  
22 that USDA did not consider responses or proposals received  
23 after the June 20th deadline.

24 In a letter dated July 13th, 2023, which was  
25 23 days after the June 20th deadline for petitioners to  
26 submit modified proposals, NAJ responded to a letter from  
27 another proponent, and that indicated that their plan all  
28 along was to present multiple component pricing language



1 that would amend 7 CFR, Part 1000, which is applicable to  
2 all orders, rather than just the four specific orders.

3 However, NAJ did not submit proposed language or  
4 reference amending all orders in Part 1000. The Secretary  
5 did not consider or respond to NAJ's or any other  
6 petitioner's letter that was received after that deadline.

7 Our second point is that the Secretary of  
8 Agriculture has the authority to determine the scope of  
9 this hearing.

10 I think all parties have noted in various  
11 arguments that the Secretary does have that authority to  
12 set the scope of a rulemaking hearing, and that courts  
13 will generally not intervene unless that determination has  
14 been shown to be arbitrary and capricious.

15 The decision to exclude NAJ's Proposal 2 was not  
16 arbitrary and capricious because NAJ's Proposal 2 called  
17 for amendments to Orders 5, 6, 7, and 131, and not for the  
18 amendment of Part 1000, which, again, is applicable to all  
19 orders. Page 13 of NAJ's June 20th proposal explicitly  
20 states that they only seek to amend those four orders.

21 Again, Proposal 3 works in tandem with Proposal 2,  
22 which is why it is not being considered at this hearing,  
23 because it would require that those four orders be updated  
24 prior to being able to update Part 1000.

25 Additionally, the regulations do not require that  
26 the Secretary accept all proposals to amend Marketing  
27 Orders, and that is 7 CFR 900.3, Subsection A. And that  
28 allows the Secretary to deny applications to amend



1 Marketing Orders if the proposal does not effectuate the  
2 declared policy of the Act, or for other proper reasons  
3 that a hearing should not be held.

4 As Mr. Hill noted, in the instant case, the  
5 Secretary determined that the scope of the hearing would  
6 be limited to amendments to the pricing formulas in  
7 Part 1000. Both of NAJ's proposals sought to first amend  
8 four additional individual orders, which, again, is  
9 outside the scope of this hearing.

10 And then, again, as Mr. Hill noted, that due to  
11 the tight deadlines dictated by the Act and regulations,  
12 the Secretary was well within his authority to limit the  
13 scope of a national hearing to petitions that amended the  
14 uniform pricing formulas only and were national in scope.

15 Our last point is that USDA did inform NAJ of the  
16 reasons that Proposals 2 and 3 would not be heard.

17 In the July 24th, 2023, letter to NAJ, USDA  
18 explicitly informed NAJ that the Secretary has determined  
19 the hearing will be limited in scope to amendments  
20 directly impacting the uniform pricing formulas of all  
21 FMMOs. Those regulations do not require that the USDA  
22 provide the petitioner with anything more than a brief  
23 statement of the grounds for the denial, which the USDA  
24 did.

25 And so for these reasons, we request that NAJ's  
26 objection be overruled.

27 THE COURT: Okay.

28 Counsel?



1 MR. PROWANT: Good afternoon, your Honor. Bradley  
2 Prowant on behalf of National Milk Producers Federation.  
3 We submitted a brief in advance of today, and hopefully  
4 your Honor has a copy of that. I did set it up there.

5 THE COURT: I did. Do we want to mark that as an  
6 exhibit for identification or anything? I mean, it is not  
7 an evidentiary document, and neither was MIG's exhibit.

8 MR. PROWANT: Right. I think it's appropriate,  
9 just based on how we handled the objections.

10 THE COURT: Yeah, I think so.

11 We'll mark Exhibit NMPF 96, Exhibit 107 for  
12 identification.

13 (Thereafter, Exhibit Number 107 was marked  
14 for identification.)

15 THE COURT: You may proceed.

16 MR. PROWANT: Your Honor, National Milk joins in  
17 the comments of the USDA just made a moment ago on both of  
18 the objections, and what we have to say here and what we  
19 said in our brief sort of ties the two together.

20 What objectors seek in this hearing amendment --  
21 excuse me -- what's important to focus on is what the  
22 objectors seek -- and I'll refer to MIG and National  
23 All-Jersey as the objectors, collectively -- is to amend  
24 the notice of hearing in hearing.

25 And there are two problems with that.

26 First of all, USDA has the exclusive authority to  
27 set the scope of the hearing, and they do that in the  
28 notice of hearing; and two, there is neither precedent nor



1 authority for amending a notice of hearing to add  
2 proposals in a hearing.

3 Now, at the start of this hearing, your Honor  
4 noted that the scope of this hearing is confined to the  
5 notice of hearing as issued by AMS on July 24th, 2023.  
6 Quite so. The statutory framework of both the AMAA and  
7 the Associated Regulations promulgated by the Secretary  
8 establishing the procedure for amending Federal Milk  
9 Marketing Orders does not operate as the objectors would  
10 presuppose.

11 Under the AMAA, the Secretary has exclusive  
12 authority to initiate rulemaking and has delegated a  
13 procedure, as required by Congress, to the Administrator  
14 of AMS to accept proposals for amendments to the Federal  
15 Milk Marketing Orders.

16 However, in either case, how ever rulemaking is  
17 initiated, the scope of the hearing is set with the notice  
18 of hearing.

19 Now, Mr. Hill went through in detail, and our  
20 brief does as well, the problems that the objectors  
21 have -- have to overcome by presupposing that some other  
22 document, other than the notice of hearing, set the scope.

23 In this case, MIG intimates that it was somehow  
24 the Action Plan or the invitation for additional proposals  
25 that somehow set the scope of hearing. But MIG has cited  
26 no authority to that effect, and it is unclear how they  
27 overcome the plain language of 7 CFR 900.4.

28 Now, National All-Jersey's argument is a little



1 different, but it essentially says that because AMS did  
2 not respond to a letter they sent, that somehow the  
3 decision to set the scope of the hearing is arbitrary and  
4 capricious.

5 But in either case, objectors cite no authority  
6 outside of the National Farmers case that Mr. Hill  
7 discussed, and their proposals that they seek to add at  
8 this late juncture should not be included.

9 The reasons articulated by the objectors do not  
10 demonstrate that the USDA acted in an arbitrary and  
11 capricious manner.

12 And to take it one step further from what Mr. Hill  
13 said, with regard to the National Farmers case that  
14 objectors almost exclusively rely upon, in that case the  
15 Court said that there was an identical proposal that was  
16 included, and then the proposal of plaintiff was excluded,  
17 in addition to the other reasons that Mr. Hill noted, such  
18 as overrelying on one particular sector of the industry.

19 Now, in this case, the USDA considered 40  
20 proposals from industry stakeholders, and 21 were included  
21 in this hearing, plus an additional one from AMS. In  
22 excluding half of the proposals submitted, AMS defined a  
23 clear scope that was consistent and not arbitrary: The  
24 proposals to amend the pricing formulas in the 11 federal  
25 Federal Milk Marketing Orders.

26 In order for a decision to be found arbitrary and  
27 capricious, a reviewing court will merely consider whether  
28 the agency decision was based on a consideration of





1 relevant factors and whether there has been a clear error  
2 in judgment.

3 Now, the consideration of relevant factors were  
4 articulated by Mr. Hill, but clearly there was a need to  
5 find a uniform way to review the proposals that were  
6 submitted. And the ones that were selected were those  
7 that affected the uniform pricing formulas as found at  
8 7 CFR, Sections 1000.50 through 52.

9 And thus, the objectors' proposals, as found in  
10 their objections, fall clearly outside of the scope of  
11 this notice of hearing.

12 But there's a bigger problem afoot, and it's the  
13 one I alluded to as the second problem. While we  
14 understand there may be some anecdotal precedent to modify  
15 proposals in hearing, the objectors have cited no  
16 authority that proposals can be added -- that is, a notice  
17 of hearing can be amended -- in hearing. And  
18 unfortunately, and respectfully, 7 CFR, Section 906B, does  
19 not grant your Honor the authority to add proposals and  
20 amend the notice hearing.

21 Thus, the scope of the hearing is the Department's  
22 to make, and the Department's alone, and the objectors  
23 cite no authority that your Honor can, in effect, amend  
24 the hearing notice at this time. And there's no  
25 precedent, including the National Farmers case, to suggest  
26 otherwise.

27 Thus, the only thing to do at this point is what  
28 the regulations promulgated by the Secretary dictate, and



1 that's at 7 CFR 900.8. Evidence shall then be received  
2 with respect to the matters specified in the notice of  
3 hearing in such an order as the Judge shall announce.

4 And so it's with that, your Honor, as well as  
5 arguments in our brief, and those provided by USDA, that  
6 we ask that you overrule the objections of MIG and  
7 National All-Jersey. Thank you.

8 THE COURT: Counsel for MIG like to speak?  
9 All-Jersey, whatever.

10 Yes. I'm sorry if I'm getting this wrong.  
11 Welcome to the lectern.

12 I guess I'm honored that y'all think I could  
13 handle this without any written papers.

14 Well, let me ask, at this juncture, is it possible  
15 that AMS could get me, you know, their arguments in  
16 writing? I mean, obviously, they were reading from  
17 something.

18 And it -- maybe we can wait just to the end, but  
19 I'm interested to know what you would have in mind, my --  
20 what form you would want my ruling to take, like a written  
21 order or something read into the record, or just, "Hey,  
22 you win, you lose, take it to the Court."

23 You know, I want to -- you know, I want to do  
24 some -- I'm joking a little bit -- but I want whatever we  
25 do to be, you know, defensible on the next level. So that  
26 was a poor examination because it's a multipart question.

27 So any -- any -- well, we can let others talk,  
28 too. But at the end of this I'm going to want to have



1 some parties to tell me what they think I -- what form it  
2 should be, and we'll see whether we need something more in  
3 writing for me to deal with.

4 The floor is yours, Counsel.

5 MR. MILTNER: Thank you for welcoming me back to  
6 the lectern, your Honor.

7 If you don't mind, I would be happy to give you my  
8 thoughts on your last set of questions based on previous  
9 Federal Order hearings that I have participated in. And  
10 that is, that a ruling on an issue like this is most often  
11 not accompanied by a written ruling, but by a ruling from  
12 the presiding ALJ, on the record, during the course of the  
13 hearing, or at the conclusion of the hearing, depending on  
14 what that ruling might be, and usually that has been  
15 sufficient, for at least the participants in the hearing.  
16 And of course, others may have different views on that,  
17 but that has been my experience dealing with Federal Order  
18 hearings.

19 THE COURT: Citing cases and CFR sections and all  
20 or just --

21 MR. MILTNER: I'm sorry.

22 THE COURT: Please. Go ahead.

23 MR. MILTNER: I'll have some citations here, and  
24 I'd be happy to provide a written summary for your Honor.  
25 Unfortunately, my scrawlings probably are not enough right  
26 now to hand to you.

27 But Select Milk supports the request from MIG to  
28 consider its proposals regarding ESL shrink and a partial



1 exemption for certified organic milk.

2 By endorsing their request for consideration, I  
3 want to be clear that Select is not endorsing the adoption  
4 of those proposals, but we do believe that they merit the  
5 consideration of the Secretary as they are important  
6 issues and they fit within the scope of this hearing.

7 And, quite frankly, absent their consideration here, we're  
8 going to have duplicated efforts should they be presented  
9 to the Secretary again for consideration in a separate  
10 hearing.

11 As you will hear from Select's witnesses on our  
12 proposals, our philosophy is that all of the elements of  
13 the pricing formulas in the attendant regulations need to  
14 be considered in order to ensure the accuracy of the  
15 formulas and their fit with the industry as it exists  
16 today.

17 We also agree with MIG that your Honor has the  
18 ability to decide this issue as to the scope of the  
19 hearing.

20 And there are two proceedings in particular that I  
21 would call your Honor's attention to. The first is from  
22 2000, the hearing on these very Class III and IV formulas.  
23 And in that hearing, Dr. Barbano -- who, I don't know,  
24 he's been referenced six times in five days in the hearing  
25 from that proceeding, and he's not here -- but in that  
26 hearing, Dr. Barbano tried to introduce testimony about  
27 establishing a separate Class III butterfat price, an  
28 issue which was not noticed by the Secretary, and there



1 were objections to his presentation of that evidence.

2 The presiding ALJ at that time asked for opinions  
3 of the participants, as well as the representatives and  
4 the Secretary from AMS, and concluded that that was  
5 outside of the scope of the hearing notice and that they  
6 would not entertain it.

7 But the very fact that that issue was presented to  
8 the Administrative Law Judge indicates that it is within  
9 your Honor's powers to determine the appropriateness of  
10 testimony and the issues to be considered at this hearing.

11 The citation -- well, let me go a little bit  
12 further.

13 After his testimony was more or less excluded, the  
14 Secretary issued a final decision that, in fact, included  
15 a separate Class III butterfat price. And in a rare show  
16 of unity, everybody in this room, organizationally-wise,  
17 went to seek an injunction from the District Court in D.C.

18 And so because the issue was excluded from the  
19 hearing by the presiding ALJ, and then the Department then  
20 implemented a decision on that very issue, that resulted  
21 in injunction against that rule. And the citation there  
22 is 304 F.Supp. 2d 45, District of Columbia District 2004.

23 THE COURT: Well, it's a little different here,  
24 isn't it? Where the Secretary, the Administrative said,  
25 "No, this isn't an issue in the case." It's one thing to  
26 say something that's presented to the Administrative Law  
27 Judge that says, "We think this ought to be considered."  
28 I assume the argument is made, this is within the scope,



1 this is okay. I don't know what the regs were at the time  
2 or whatever. This is within the scope of the hearing, and  
3 we want to present it or whatever. And it's sort of a  
4 case of first impression as far as that case goes.

5 And rather than here where we've got someone  
6 saying, "No, that's not a part of the case." And then I'm  
7 supposed to overturn the entity that established the  
8 proceeding.

9 Am I getting something wrong?

10 MR. MILTNER: Well, I think there is -- there is a  
11 bit of a distinction there. And there's another case that  
12 followed that that I would -- I would point out, and that  
13 resulted in an appeal to the Seventh Circuit. The case is  
14 Alto Dairy vs. Veneman. The citation is 336 F.3d 560,  
15 2003, Seventh Circuit. And Mr. Vetne and I were both  
16 involved in that case.

17 In that case, the hearing notice involved milk  
18 orders that involved a separate issue about pool  
19 qualification and -- and issues that really aren't at  
20 issue in our proceeding here.

21 One particular entity, having read the hearing  
22 notice, decided that they were not going to participate in  
23 the hearing. And during the course of that hearing, there  
24 were modifications to the proposals made.

25 In particular, one of the solutions to the issue  
26 involved something called paper pooling. And it's not  
27 worth getting into, although I do have to cite this,  
28 because Judge Posner wrote the decision, and he describes



1 what the hearing notice says, and then he says, "Though  
2 this is gobbledygook to an outsider, insiders such as the  
3 plaintiffs would realize the focus of the proceeding would  
4 be on their eligibility to be pooled." I think it is  
5 great that we got gobbledygook in an opinion about that.

6 But the issue is that pooling was placed on the  
7 table. Proposals on how to address pooling were noticed.  
8 During the hearing, another solution, another aspect of it  
9 was considered, and ended up being adopted by the  
10 Department as a modification, and implemented. And under  
11 the logical outgrowth doctrine, it was upheld. So held by  
12 the Seventh Circuit.

13 And modifications to proposals, although it was  
14 referred to I think as anecdotally, and, you know, Alto  
15 may be the closest thing I have as far as a decision that  
16 describes a proposal modification.

17 But I would say it is the exception rather than  
18 the rule that a hearing not have a modification, that  
19 during the course of a hearing people realize that perhaps  
20 what they had proposed is not exactly the perfect answer,  
21 or there's another option to be considered, so they will  
22 offer a modification to a proposal. And most often those  
23 are -- those are accepted without an objection.

24 Again, I will acknowledge that that is not the  
25 case exactly on point here where the Secretary has already  
26 received -- has already received a request and -- and it  
27 was not noticed.

28 I do want to touch on a couple other things here



1 because timeliness --

2 THE COURT: Let me just ask. I mean, is it your  
3 contention that MIG and National All-Jersey proposals are  
4 alternative approaches to solve the same problem, I guess  
5 was a way of saying that this was a substitute for some --  
6 or it would be a modification of a proposal that is before  
7 us under the notice of hearing?

8 MR. MILTNER: Well, if you look at the notice of  
9 hearing here at the end, where it -- it puts the world on  
10 notice as to what's at issue here, after describing all of  
11 the proposals it says, "the list of subjects that are  
12 under consideration," and it cites the entirety of  
13 Part 1000.

14 Now, maybe that's a little bit broad. However, in  
15 the summary of the hearing notice, it says, "A national  
16 public hearing" -- a national public hearing -- "is being  
17 held to consider and take evidence on proposals to amend  
18 the pricing formulas in the 11 Federal Milk Marketing  
19 Orders." So that's a very broad area. And so -- and so,  
20 yes, I would say that those two proposals, in particular,  
21 are relevant to the topics that have been noticed.

22 USDA has said that at least one of the reasons why  
23 those proposals weren't included is because of the 120-day  
24 restriction on concluding this hearing.

25 And I would like to give another citation to a  
26 treatise, Professor Jeff Lubbers' Guide to Federal Agency  
27 Rulemaking, at page 357. And in there Professor Lubbers  
28 is talking specifically about statutory deadlines on





1 rulemaking. And he writes: "An agency should therefore  
2 be keenly aware of the importance of prompt completion of  
3 rulemaking, both for good management and in view of legal  
4 constraints imposed on agencies."

5 And he continues to describe some delays, and then  
6 says, "Where the enabling statute imposes a time limit on  
7 agency action" -- as we have here -- "the agency should  
8 obviously strive to meet the Congressional deadline."

9 And in his footnote, citing Newton County Wildlife  
10 Association versus U.S. Forest Service, 113 F.3d 110,  
11 Eighth Circuit, 1997, the footnote reads: "However, if  
12 the agency misses the statutory deadline, it does not void  
13 a subsequent rule unless the statute so provides."

14 And so while the deadlines imposed on the rules of  
15 practice in Federal Order hearings should be adhered to,  
16 and the agency should strive to achieve them, building a  
17 complete record and addressing all of the issues that need  
18 to be addressed are of paramount importance, and this  
19 proceeding is not at risk of being voided if we happen to  
20 miss that deadline.

21 And finally, I realize I have taken some time  
22 here, and it's not my motion, but it is important to my  
23 client.

24 We do depart with MIG on their emphatic and  
25 zealous advocacy over their positions. I do not believe  
26 that the denial of those petitions rises to the level of  
27 being arbitrary and capricious. And Mr. English and I and  
28 his clients, we will disagree on that point. I also



1 disagree about whether 7 CFR 900.3 reaches quite as far as  
2 their brief suggests.

3 And finally, as with respect to the NAJ  
4 objections, while my client has an interest in those  
5 proposals, we do agree that that particular issue is best  
6 reserved for regional hearings rather than a national  
7 hearing.

8 And with that, unless your Honor has questions, I  
9 will step away from the lectern.

10 THE COURT: That's fine for now. Thank you.

11 MR. MILTNER: Thank you.

12 MR. ENGLISH: Your Honor, my name is Chip English  
13 from the Milk Innovation Group.

14 I want to thank everybody for their thoughtful  
15 discussion about what I think are very important issues.  
16 And I do want to note that what we asked for is for the  
17 Secretary to amend the notice of hearing and for your  
18 Honor, I think, under Section 3, but most importantly  
19 under Section 6, to rule that he should do so.

20 I think a written ruling would be preferable, but  
21 I also think that for everybody speed is important, and  
22 therefore a written ruling may be an issue. Because if  
23 your Honor were to decide that one or more of these  
24 proposals should be considered, obviously everybody has to  
25 prepare.

26 I also want to agree with Mr. Miltner that the  
27 statutory deadline, you know, is what it is. Anybody who  
28 might have been involved theoretically back at that time



1 in that statute being drafted may regret so, but the  
2 reality is, as Mr. Miltner says in the footnote he cited,  
3 there isn't what we in Washington DC parlance call a  
4 hammer. There's no loss of funding. There's no  
5 invalidity of the rule. Nothing happens. Okay, maybe, a  
6 Congressional hearing, and somebody will say, "Why didn't  
7 you do it faster?" But there's nothing that happens.

8 So I really beg to differ with Mr. Hill on any  
9 argument that, you know, being done by September 29th --  
10 other than, of course, whether we're still operating as a  
11 government -- has any relevance to whether or not any  
12 proposals should be considered.

13 I also want to point out -- and Mr. Hill, you  
14 know, brought this up -- that we do have another  
15 similarity with the NFO case. Mr. Hill mentioned that in  
16 that case, handlers who opposed the very proposals that  
17 NFO wanted to have had discussed the Department not  
18 considering them.

19 So, interestingly, in this case, for whatever  
20 reason, you know, USDA says it wasn't going to consider a  
21 letter from National All-Jersey that they said was late,  
22 but on June 30th of 2023, National Milk Producers  
23 Federation submitted a letter to USDA and identified a  
24 number of proposals that it said were outside the scope of  
25 the Department's request, meaning really National Milk  
26 Producers' agenda.

27 And so the question is, who gets to set the  
28 agenda? National Milk Producers Federation or USDA and



1 industry. I note that every single one of -- and by the  
2 way, this is on the website -- for additional proposals, I  
3 know it was an additional submission dated June 30th,  
4 2023, from National Milk -- that every single one of the  
5 proposals National Milk opposed, conveniently was not  
6 included in the notice of hearing.

7 And as I mentioned the risk of any 15A or 15B,  
8 that will certainly be, if we got that far, part of any  
9 litigation.

10 Your Honor, we do think you have the authority  
11 under Part 9006(b), power to rule on motions and requests,  
12 to admit or exclude evidence and to hear oral arguments on  
13 facts or law.

14 And on 7(a) says, "The ALJ shall rule on any  
15 motions, except he can certify to the Secretary any  
16 decision on a motion."

17 And, today, what's -- you know, we don't have all  
18 the testimony yet on composition, but we have had, you  
19 know, five days of testimony or four days of testimony  
20 composition. And I want to note that Issue 1 highlights  
21 why this issue of an inclusive hearing notice is so  
22 critical.

23 While we as Class I representatives dispute that  
24 Class I handlers generally achieve any, quote, value, end  
25 quote, from protein, other solids, and solids nonfat, once  
26 an 8.25 total is achieved pursuant to the FDA standard of  
27 identity, extended shelf life plants, in particular, based  
28 upon our shrink proposal -- which, by the way, again,



1 Select Milk Producers has opened the door to shrink. So  
2 that's like the NFO, we have a proposal about shrink on  
3 one side; we don't get to talk about shrink on another  
4 side.

5 ESL plants, in particular, are not able to bottle  
6 those alleged components, whatever they turn out to be.  
7 Similarly, the so-called extra value to organic milk,  
8 which pays a non-classified price above Federal Order  
9 Class I, will simply be paying for that so-called value  
10 into the pool with no corresponding benefit to organic  
11 dairy farmers. And that is just with Issue 1.

12 We haven't gotten to issues -- the rest of the  
13 issues. That problem is just going to grow as this  
14 hearing continues.

15 And we even heard yesterday from the accounting  
16 firm, Frazer accounting firm, when asked about organic and  
17 A2 and pasture-fed milk, he specifically testified that  
18 they are different business models, with a different cost  
19 structure. And yet, we hear about cost production, and we  
20 hear about all of this -- the fact of the matter is that  
21 testimony, too, supports the need to hear and consider  
22 what was known as MIG-6.

23 Your Honor, it is simply past time that this  
24 program and industry rethought its relationship to Class I  
25 as being the set of handlers that could be continually and  
26 ever more charged more for milk as the category continues  
27 to fail.

28 We can test the idea before we hear from an



1 expert, that we have told is coming, about elasticity, or  
2 inelasticity. Because even if remotely true, so what?  
3 That is not the statutory standard, which is to bring  
4 forth an adequate supply of milk for fluid use and avoid  
5 disorderly marketing.

6 Overcharging consumers for milk just because old  
7 studies suggests that it's possible is not in the public  
8 interest, which by the way, is part of the statutory  
9 requirement.

10 Denying our objection only makes things worse, not  
11 better, and more disorder, not less, as pool draws  
12 increasingly shrink because of lost Class I utilization,  
13 more milk going into Class IV and exported, which we have  
14 already heard about, all of which happens far faster than  
15 dairy farmers can demand increases in the Class I price.

16 Our objection is well taken, you have the power to  
17 rule on it, and we ask that you do so. And if you are to  
18 turn us down, tell us, those issues are out. As Mr. Hill  
19 said, does that really mean that what we need to do is go  
20 submit another petition? Because we have one ready.

21 THE COURT: Yes, I mean, what is the -- there's a  
22 lot in this, obviously. You do allege -- you do a fair or  
23 other, that these are connected issues. But what's the  
24 big downside other than delay of bringing it up at a  
25 separate hearing?

26 MR. ENGLISH: Well, your Honor, I guess the first  
27 downside is that in 2015 we, for the Dairy Institute of  
28 California, right, in the California proceeding, raised



1 the issue of ESL shrink.

2 THE COURT: Uh-huh.

3 MR. ENGLISH: And USDA said, oh, this is an  
4 interesting idea, but it needs to be considered at  
5 national hearing.

6 All right. Here we are in 2023 at a national  
7 hearing, and USDA, eight years later, says, no, we're not  
8 going to hear it.

9 I -- you know, I don't bet that there's going to  
10 be another national hearing anytime soon because of the  
11 way the system works. And so the idea that, "Okay, just  
12 wait for another day, Mr. English," is basically denying  
13 our clients that day. That's what it is. It is telling  
14 us, never mind, congratulations, you are the third-class  
15 citizens, and you don't get to get heard.

16 And that is also the case because in 2015 the  
17 organic industry submitted a proposal that eventually got  
18 withdrawn because it never got past USDA sending us a  
19 letter every 30 days saying, we're thinking about it.

20 So the answer is, we may never get that hearing.  
21 And the past is prologue. We didn't get that hearing.  
22 We're here today. We have the chance. It is time. Thank  
23 you.

24 THE COURT: Well, unless you tell me that USDA  
25 said that now's not the time to bring this up, we should  
26 bring it up at a national hearing, you arrive at a  
27 national hearing, and they say, you can't bring it up  
28 here. So that's -- I mean, the test is arbitrary and



1 capricious, and I'm not sure it is.

2 Is that the test of -- by the way, let me ask you,  
3 what test should I apply to whether the Secretary is -- is  
4 it Secretary or Administrator that makes the -- that's --

5 MR. ENGLISH: It's technically the Secretary, your  
6 Honor. I mean, the Administrator will make a  
7 recommendation, but I think it's -- it is you that is  
8 being the Secretary. There is a complicated set of  
9 statutory provisions about delegation, but the bottom line  
10 is, the Secretary is making this decision.

11 THE COURT: Yeah.

12 MR. ENGLISH: And -- okay. Yes, the tests --

13 THE COURT: So what's the standard? The Secretary  
14 said, "Hey, you are out," under -- or someone under  
15 delegated authority. And I don't think you expect me  
16 to determine whether there's been an unconstitutional  
17 delegation of authority.

18 MR. ENGLISH: And I'm not going there, your Honor.  
19 We have actually argued that in a case. I mean, I have  
20 been on the other side. I have been perfectly fine with  
21 the delegation. I have zero problem with that.

22 THE COURT: So if the Secretary says we're not  
23 going to take this up in the hearing, it's not -- well --  
24 and are you arguing -- you are arguing that these  
25 proposals fit within the pricing formula description, that  
26 this is part of the pricing formula?

27 MR. ENGLISH: Well, I think our arguments are  
28 twofold. And first let me answer the question: Yes, I





1 agree the standard is arbitrary and capricious.

2 THE COURT: Okay.

3 MR. ENGLISH: I -- I am not going to undercut one  
4 of my arguments by highlighting the other, but  
5 nonetheless, the problem is that the Secretary calls it  
6 pricing provisions, but in so doing, the Secretary  
7 adopt -- not adopt, I'm sorry, that's not at all -- in the  
8 hearing notice the Secretary said, we're going to consider  
9 the question of farm-to-plant shrink when it comes to  
10 yield factors in the Class III and IV formulas.

11 We asked the Secretary to consider the question of  
12 farm-to-plant shrink and, ultimately in the plant, for  
13 extended shelf life products. Shrink is shrink. Just  
14 because it's not in Section 50, it applies to the pricing  
15 provisions, because it tells the clients, the processors  
16 of ESL, how much of their milk is priced as Class I versus  
17 the lowest class. I think that is the clear example  
18 without undercutting my organic milk argument.

19 But the fact of the matter is that to open the  
20 door on one piece of shrink and say, but your shrink can't  
21 be heard, is more than incongruous. I do think that's  
22 arbitrary and capricious.

23 THE COURT: Thank you, Mr. English.

24 MR. ENGLISH: Thank you, your Honor.

25 THE COURT: I guess one thing I would ask, is  
26 there a way of getting the transcript of this? That is  
27 another thing, that I can work with that. I don't know if  
28 it is \$100 a page or what. I mean, this is a lot for me



1 to take in orally.

2 And I am still not sure about when I have to --  
3 when you all really need a ruling on this. Or what  
4 happens if I rule against the admission of the evidence.

5 I guess I would raise that now, too, and somebody  
6 can talk to me about it or not. I mean, I assume that  
7 there's sort of a -- an offer of proof here of papers  
8 that these parties have submitted that were rejected.

9 MR. VETNE: May I address your Honor's question?

10 THE COURT: Yes, you may. I have an advocate  
11 standing at the lectern. I don't think we should keep you  
12 waiting.

13 MR. VETNE: John Vetne representing National  
14 All-Jersey.

15 As to the last comment concerning offer of proof,  
16 National All-Jersey, as well as the Milk Innovation Group,  
17 presented proposals, detailed the basis for the proposals  
18 and the request for hearing, detailed the problems and  
19 identified the solution.

20 The proposals submitted with supporting data is,  
21 in a nutshell, for each proposal an offer of proof of what  
22 would be presented at the hearing. It certainly was that  
23 way for National All-Jersey.

24 But let me speak in particular to the National  
25 All-Jersey proposal and its relationship to this hearing.

26 Your Honor asked a question earlier on about  
27 whether any of the proposal would present an alternative  
28 proposal to address the problem identified. And that is



1 precisely what NAJ Proposal 2 would do.

2 The problem would be -- we have been here a few  
3 days, and so we can pretty much identify the problem.  
4 There are two problems, primary problems. One problem  
5 identified is that the current skim formula results in  
6 handlers in the fat/skim market not to pay enough for  
7 Class II, III, and IV milk.

8 There's been repeated reference to underpayment  
9 for the value of such milk by reference to its  
10 composition. The formula assumes there's less component  
11 in that milk.

12 So Proposal 1 and Proposal 2 would change the  
13 formula so that those handlers would pay more. Who are  
14 those handlers? Those are handlers in the three Southeast  
15 orders and Arizona. That's the only place that this would  
16 affect Class II, III, and IV payments. All of the  
17 witnesses said, it's immaterial in the MCP markets; it is  
18 a regional problem, for which Proposal 1 and 2 provide a  
19 regional solution.

20 NAJ Proposal 2 in its request for hearing provided  
21 an alternative and less burdensome solution to the  
22 identified problem.

23 Now, there were two aspects of the NAJ proposal.  
24 One is to require all handlers that receive milk used to  
25 produce Class II, III, and IV products to pay a price  
26 based on the value of the components they receive.

27 The other aspect of the NAJ proposal, which has  
28 been used, I think, by many to mislead and confuse, is to



1 have producers paid in the redistribution of revenue on  
2 the basis of their proposal. As Mr. Brown explained and  
3 other witnesses have explained, those are two separate  
4 issues.

5 I think -- I think what Mr. Miltner was talking  
6 about when he said he preferred to have it done regionally  
7 is that he preferred to have producers decide in  
8 individual markets whether they want to receive a  
9 redistribution of revenue.

10 And that may be, but it doesn't address what I  
11 believe is arbitrary in excluding a proposal for the  
12 payment of -- for Class II, III, and IV in the way -- in  
13 the way National All-Jersey proposal would have it paid on  
14 the basis of component value, product price value.

15 What the letter from the Department to -- to NAJ  
16 said is Proposal 2 seeks a regional, not a national,  
17 pricing change. "For purposes of this hearing, Proposal 1  
18 and 2 seek a regional, not a national, pricing change for  
19 how Class II, III, and IV is priced. They have no impact  
20 on the MCP markets. As this change does not seek to amend  
21 uniform FMMO pricing formulas, the proposal is not within  
22 the scope of this hearing and will be not heard at this  
23 time." That is what the letter to NAJ said.

24 Now, what that says is this hearing is more -- is  
25 not really interested in addressing the marketing problem  
26 or the pricing problem, but that that this hearing is  
27 limited to solutions that can be found in Part 1000.

28 And that response suggests a gross lack of



1 imagination, because the solution can be found by amending  
2 the four individual orders as to their class prices, or  
3 simply as the -- as the hearing notice would do for  
4 certain Class I prices, eliminate -- eliminate individual  
5 order provisions for how milk is priced in Class II, III,  
6 and IV, and amend Part 1000 to make it uniform to  
7 everybody.

8 There is another regional issue that is accepted  
9 for hearing, and that is the surcharge in the Southeast on  
10 Class I milk. That is in separate order provisions. That  
11 was accepted in the notice of hearing.

12 And the solution is, make it uniform in Part 1000.  
13 That can be done for Class II, III, and IV. That is what  
14 NAJ proposed.

15 Mr. Miltner stole some of my thunder here because  
16 he and I were both involved in Alto, and I was counsel  
17 representing the plaintiff in that case. And, in fact,  
18 that case did apply -- did apply the notion of logical  
19 outgrowth. And there's another case, Clean Air Council  
20 versus Pruitt, 862 F.3d 1.

21 Basically, had we come to this hearing and  
22 identified the problem in the four fat/skim markets, the  
23 Southeast markets, and Arizona, had that just been clear  
24 in the hearing notice, we're going to do something to fix  
25 that problem, I believe there would be no question about  
26 whether a lesser included solution is part of the notice,  
27 such as proposed by amendments to the Class II, III, and  
28 IV price proposed by National All-Jersey.



1           The problem is by virtue of the letter sent by  
2           USDA, USDA has prejudged the propriety of a logical  
3           outgrowth. It has tied its own hands in the solution of  
4           the marketing problem that brings us all here and has been  
5           identified in three days of testimony.

6           The rules of practice, your Honor, in 7 CFR,  
7           Part 900.7, which I thought would have been mentioned by  
8           government counsel, provides your Honor with two options:  
9           Rule on the objection and the motion, which might require  
10          reopening the hearing or reissuing the notice by virtue of  
11          the self-imposed hand-tying that Dairy Programs has  
12          effected; the Judge may also under 900.7 certify the  
13          question to the Secretary.

14          Based on prior hearing experience, a ruling on  
15          these motions could be made today; it could be made at the  
16          end of the hearing. In all likelihood, it would -- it may  
17          require a reopening of the hearing or an amended notice of  
18          hearing, which has been done before by USDA. I think  
19          that's probably the solution.

20          But I would suggest whether it's a ruling on the  
21          motion or a certification of the motion, that a copy of  
22          the transcript of today's argument and the motions be  
23          available to the judge and it be ruled upon later in the  
24          hearing. Thank you very much.

25                 THE COURT: You are suggesting that I wait to --  
26                 until I can get a copy of the transcript --

27                 MR. VETNE: I'm suggesting this is too important  
28                 and too complex to do today.



1 THE COURT: Bless you, sir.

2 Mr. Rosenbaum, can you tie this up in a pretty  
3 knot for me?

4 MR. ROSENBAUM: I will do my best. Steve  
5 Rosenbaum for the International Dairy Foods Association.

6 Your Honor's already had cited to you I think  
7 relevant case law on these issues, and I would just focus  
8 on this notion of logical outgrowth and alternative  
9 proposal to address the problem identified with respect to  
10 what are going to be my primary remarks.

11 And I'm -- what I'm -- I think Mr. English  
12 articulated his reasons why the MIG proposals should be  
13 considered, and I don't have anything to add to the things  
14 that he said.

15 When it comes to the National All-Jersey motion,  
16 the comments I'm going to make are addressed to National  
17 All-Jersey Proposal 2. They had three proposals, 1, 2,  
18 and 3, and I'm talking about National All-Jersey  
19 Proposal 2, which is the proposal that would extend  
20 multiple component pricing to the four fat/skim orders.

21 Now, I should make clear that IDFA is not at this  
22 point endorsing any proposal, but we are endorsing the  
23 proposition that that proposal be included for  
24 consideration at this hearing as a logical outgrowth.

25 And let me explain. There really -- this  
26 proposal -- Proposals 1 and 2 -- this gets complicated  
27 because National All-Jersey Proposal 2 is not --

28 THE COURT: USDA's Proposal Number 2 that AMS



1 noticed.

2 MR. ROSENBAUM: -- USDA's Proposal Number 2. So  
3 just to be clear, when I'm talking about National  
4 All-Jersey Proposal 2 in this context, I'm talking about  
5 as submitted to the Secretary, which is different than --

6 THE COURT: Yes.

7 MR. ROSENBAUM: -- Proposal 2 which actually was  
8 National All-Jersey Proposal 1.

9 THE COURT: Which the Secretary has decided not to  
10 take up under --

11 MR. ROSENBAUM: It took up Proposal -- National  
12 All-Jersey Proposal 1 but not National All-Jersey  
13 Proposal 2 or National All-Jersey Proposal 3. And I'm not  
14 addressing National All-Jersey Proposal 3.

15 THE COURT: Okay.

16 MR. ROSENBAUM: I'm only addressing National  
17 All-Jersey Proposal 2.

18 So Proposals 1 and 2 -- I'm not talking about the  
19 ones accepted for hearing that are before us, your  
20 Honor -- purport to address a concern that dairy farmers  
21 in the four fat/skim orders are under the pricing formulas  
22 now in effect being paid less on a -- being paid under an  
23 assumed level of non-skim -- excuse me -- nonfat skim  
24 solids that is low -- the assumption is lower than actual.  
25 That's their complaint. And so Proposals 1 and 2 would  
26 address that in a certain way, and I'll get to that in a  
27 minute.

28 Our view is really twofold. First of all, we





1 don't -- the Proposals 1 and 2 would raise those  
2 assumptions, and our view is the -- it would increase  
3 those assumptions far in excess of the actual nonfat  
4 solids levels in milk in those four nonfat -- in those  
5 four -- excuse me -- fat/skim orders.

6 So we were against Proposals 1 and 2 because they  
7 go too far in solving the alleged problem of underpayment  
8 of farmers in the fat/skim orders for milk going to  
9 Class II, III, and IV purposes. That's what the alleged  
10 underpayment is for.

11 So there is an alternative, a logical outgrowth to  
12 that proposal, which is the approach taken in the rest of  
13 the Federal Order system, which is to go ahead and pay  
14 farmers for their milk used for Class III -- II, III, and  
15 IV purposes, based upon the actual levels of nonfat solids  
16 in their milk.

17 So basically, on that limited level, it's simply a  
18 question of do you go with an estimate, which is what the  
19 government -- which is what Proposals 1 and 2 would do,  
20 and an estimate which we believe our evidence has already  
21 proven is too high, but I'm not asking that to be resolved  
22 obviously here.

23 Or do you switch to a system that has been in  
24 place at least since 1998 in part of the country and --  
25 1988, excuse me, not 1998 -- 1988 in part of the country  
26 and in place in -- for 89% of farmers for the last 20-plus  
27 years, which is, to heck with estimates, just measure how  
28 much of these nonfat solids components are in the milk,



1 and make my clients pay for that based upon actual levels.

2 So that's the alternative solution, and that's  
3 what National All-Jersey Proposal 2 would do. I'm not  
4 saying, as I say, you know, that maybe they have -- the  
5 language is not precisely what we would think was right,  
6 whatever. But in any event -- I'm not saying that one way  
7 or the other. But conceptually, that's what National  
8 All-Jersey Proposal 2 would do.

9 So you would solve the problem to our -- you know,  
10 my clients are not adverse to paying the right price for  
11 milk. We are absolutely adverse to paying more for milk  
12 than it is worth.

13 So we have said many times already in our  
14 testimony, if this is a problem, go to multiple component  
15 pricing.

16 But it's not just that, your Honor, is why this is  
17 a logical outgrowth. The problem is that if you fix the  
18 formulas, so to speak, in the way that Proposals 1 and 2  
19 do, you don't only affect how much my clients have to pay  
20 for Class II, III, and IV milk in the four fat/skim  
21 orders, you are increasing material, how much my clients  
22 have to pay for milk going to Class I fluid drinking milk  
23 in the whole Federal Order system.

24 And indeed, the problem of farmers in the  
25 Southeast or in Arizona, which is that's where the four  
26 fat/skim orders are, the problem with them allegedly being  
27 underpaid is the tail wagging the dog here as our  
28 calculations show. I mean, the proposal, if accepted,



1 would increase the payments to them, that is to say  
2 farmers in the non- -- in the fat/skim orders supplying  
3 milk for Class II, III, and IV purposes. It would pay  
4 them \$33 million more a year, which to our view is much  
5 more than they are entitled to because their milk isn't as  
6 good as the national averages, so why use the national  
7 averages.

8 But then it would, in turn, raise prices to  
9 Class -- on Class I milk by \$320 million -- sorry,  
10 \$230 million. I said that backwards, \$230 million. I  
11 mean, that's the dog; the tail is the amount of money --  
12 just in terms of dollars, I'm talking about. I'm not  
13 saying in terms of the importance of Class I versus II,  
14 III, and IV. Lord knows, they are all my clients. But in  
15 terms of financial impact, you know, that's where the  
16 rubber crashes through the road, so to speak.

17 And so, you know, mind you, I'm not asking the  
18 Court to resolve -- your Honor to resolve the merits. I  
19 understand -- I have heard from -- we have heard National  
20 Milk testify, yeah, the Class I price ought to go up, and  
21 there's reasons A, B, and C for that. That's obviously  
22 something on the table, and we have presented all the  
23 reasons we think they are wrong. That's not for this --  
24 to be resolved in the context of this motion.

25 What is to be resolved in this motion is it's  
26 National All-Jersey Proposal 2 that provides the logical  
27 outgrowth, the alternative proposal, one that would fix  
28 the purported problem of the payment going to the farmers



1 in the four fat/skim orders on Class II, III, and IV milk,  
2 and an alternative that does not carry with it the  
3 severely adverse consequences to the price of Class I in  
4 the entire Federal Order system.

5 So that's why, you know, we think it is  
6 appropriate that that -- you know, that that be considered  
7 to be, you know, part of the logical outgrowth.

8 In terms of timing, and I --

9 THE COURT: Let me just ask you there. But aren't  
10 I -- the Secretary has charged me, an Administrative Law  
11 Judge, with conducting a hearing under particular  
12 guidelines and a particular scope and all that. And, you  
13 know, is it really up to me to say, "No, you are wrong.  
14 We'll need a different scope here. I can't do it. It is  
15 not fair. You're arbitrary and capricious."

16 You know, I'm dealing with the Supreme Court  
17 coming after me because I'm not under -- I'm not in  
18 control of the principal officers, you know, enough.

19 So how is it that I as an inferior officer who is  
20 supposed to conduct the hearing has to go back and tell  
21 the Secretary, "No, when you set -- when you set the  
22 hearing, you are wrong about that." And what, "I'm not  
23 going to do it"?

24 MR. ROSENBAUM: Well, your Honor, I mean,  
25 Mr. Vetne has already pointed out the regulations  
26 explicitly allow you to certify the question to the  
27 Secretary.

28 THE COURT: Well, that's --



1 MR. ROSENBAUM: So I'm not -- I'm not -- I'm  
2 not --

3 THE COURT: I feel like y'all are sort of tempting  
4 me with that one. You don't want to decide this one?

5 MR. ROSENBAUM: I mean -- I mean, part of my --  
6 the basis for my advancing this particularized  
7 discussion --

8 THE COURT: Yes.

9 MR. ROSENBAUM: -- is that you have sat here for  
10 the last week and heard the implications and -- and -- of  
11 the proposals that are before us. And so I do think,  
12 actually -- I -- so I don't think you are limited to  
13 certifying the issue, but I also think that you are armed,  
14 frankly, by having sat through the discussion, in a way  
15 that didn't exist prior to this week of testimony. So  
16 that's, you know, I think --

17 THE COURT: Well, you got my attention there.

18 MR. ROSENBAUM: So I think that's why there's  
19 something here.

20 And, you know, we are scheduled to be here for  
21 another month. I recognize we're all working -- Lord  
22 knows that we're all working hard to meet that, and I  
23 certainly will do my best to meet it.

24 I do not, personally -- I think the testimony that  
25 has come so far has been a pretty -- it's really been  
26 about this issue to a significant extent, and so I don't  
27 think we're lacking information already on that.

28 But, you know, if -- if this -- if it were



1 formal -- you know, formally made clear that this issue is  
2 up for grabs, I think we have plenty of time to make that  
3 clear and still have evidence received before  
4 September 28th.

5 THE COURT: I guess I asked this on the first day.  
6 I mean, if we -- well, let me ask -- ask this. If I make  
7 a ruling that Mr. Administrator, Mr. Secretary has, it  
8 seems arbitrary and capricious to me. If I rule now,  
9 seems like it ought be broader scope here. Do we go ahead  
10 on my say-so, or does the Administrator or Secretary have  
11 to issue something in order to -- they change they mind or  
12 issue a new notice, I guess, as someone suggested?

13 MR. ROSENBAUM: Well, your Honor, I -- I mean, I  
14 think it's -- I think it would be within your power to --  
15 to -- I mean, given the Alto Dairy case -- it is Alto  
16 Dairy?

17 THE COURT: Alto, I guess.

18 MR. ROSENBAUM: You know, I think it would be  
19 within --

20 THE COURT: A logical extension.

21 MR. ROSENBAUM: I would be -- I think it would be  
22 in your power to announce that based upon what you have  
23 heard and the connection between, it seems to you that,  
24 you know, this has become an alternate -- and I would say,  
25 and there's one point I haven't made yet, but I will just  
26 make it. I mean, you know, National Milk has advanced its  
27 proposals through testimony that, among other things, does  
28 focus upon the competitive imbalance -- I think I'm going



1 to use that term, I'm not sure that's the exact phrase  
2 they have used, but I think that's the concept -- the  
3 competitive imbalance between farmers in the Southeast  
4 orders and farmers in the adjoining border -- in the  
5 adjoining orders. I think they have made it more of a  
6 national hearing on -- national issue, if you will, in  
7 that sense. And I think your Honor would be in a position  
8 to say, I think this is a logical outgrowth.

9 And so from my -- from my view, I just want, you  
10 know, the parties to be aware that --

11 (Court Reporter clarification.)

12 MR. ROSENBAUM: I think from -- your Honor would  
13 be able to announce that, from my view, is that this, from  
14 my perspective, qualifies as a logical outgrowth.

15 THE COURT: Well, I asked this the first day. How  
16 long would it take to hear these issues, do you think?

17 MR. ROSENBAUM: To hear that issue, your Honor?

18 THE COURT: Well, you know, we've got a number of  
19 issues here.

20 MR. ROSENBAUM: Frankly, I think the testimony  
21 that we've provided already goes directly to this issue.

22 THE COURT: Wow. Okay. What keeps you from  
23 briefing the issue --

24 MR. ROSENBAUM: I mean, in the sense that -- I  
25 mean, in the sense that we -- I mean, my -- my --  
26 Mr. Brown took the stand yesterday and today and said that  
27 if there's a -- that the solution in Proposal 1 and 2 is a  
28 bad idea, here are the reasons it is a bad idea: A, it



1 overpays for Class II, III, and IV milk; and B, it raises  
2 the class price without justification, and if there's a  
3 problem, it's -- we already have the solution because it's  
4 been in place for 35 years. So I don't know how much more  
5 we would add, as I say, at this point -- well, I'll just  
6 leave it at that.

7 THE COURT: Well, can't hold you to that. We  
8 don't know how much more you would have. Okay.

9 MR. ROSENBAUM: I wouldn't hold myself to that,  
10 but all I'm saying is that I think -- I think one of the  
11 reasons I feel that we could meet the deadline is because  
12 I think we are -- you know, we have said our piece. And I  
13 think National Milk is going to have some more witnesses  
14 to go still, but I think they have already explained why  
15 they believe that raising the Class I place is warranted.  
16 I defended that position.

17 THE COURT: Okay.

18 Mr. Hill rises. We're at 4:54. I'm not --

19 MR. HILL: I'll make this quick.

20 THE COURT: Well, you know, I don't want to cut  
21 off the discussion, right? I do think this is sort of a  
22 complex area, at least it is for me, which --

23 MR. HILL: So, first of all, I'm hearing a lot  
24 about the substantive effect of the proposals that have  
25 been excluded, and I don't think that that is the test  
26 here. The test is whether or not we can have people  
27 substitute their judgment and their discretion for that of  
28 the Secretary. Because once we start doing that, we are





1 going down a slippery slope where the Secretary cannot --  
2 can no longer define the terms of the scope of a hearing.

3 We talked earlier, I think Mr. Miltner talked  
4 about a treatise, which said that if there's a deadline, a  
5 statutory deadline, as long as the government is trying to  
6 meet that deadline, it doesn't affect the outcome if we  
7 don't meet the deadline, it wouldn't void the proceeding.

8 But that's -- again, that's not the question here.  
9 The question here is whether the USDA, at the time that  
10 they made this decision, was -- was it a reasonable -- a  
11 well-reasoned decision, because at the time, the Secretary  
12 had to plan for a hearing to conclude within 120 days. He  
13 couldn't plan for a hearing that ends in six months. The  
14 statute said in 120 days. That's the plan he made, and he  
15 did so because of the statutory language. And it was a  
16 well-reasoned decision. And that's the reason that this  
17 hearing was limited in the way that it was.

18 Now, I wholly reject the logical outgrowth issue,  
19 because in this situation, the Secretary specifically saw  
20 these proposals and rejected them. We can't then say  
21 later that they are logical outgrowths when the Secretary  
22 determined at the time that they were not going to be  
23 heard. That's a totally different concept.

24 Also, I would say for the shrink issue, we have  
25 heard shrink is shrink. Again, in limiting the hearing,  
26 the shrink issue that is being considered here, is that in  
27 50, which is class prices. That's the one with the  
28 pricing formula.



1           The shrinkage that Mr. English is talking about is  
2 in, I believe, Section 40, and it's in classification of  
3 milk. Again, if the Secretary cannot determine the bounds  
4 and the scope of the hearing in some rational way, we're  
5 going to have a situation where every hearing we come to,  
6 someone's going to make a complaint, and we're going to be  
7 running to pull out another hearing notice and determine a  
8 new scope of a hearing.

9           And finally, I do want to say one thing that it  
10 did bother me a little bit. It was stated earlier that  
11 NMPF wrote a letter on June 30th, and it was hinted  
12 without saying that the USDA took that letter and  
13 basically adopted the positions of that letter.

14           I would take umbrage to that. The letter was not  
15 considered. I think that everyone in the USDA would agree  
16 that -- I'm not even sure what to say about that, your  
17 Honor. We're -- that is not true. It's kind of  
18 scurrilous, to be honest with you, and we reject that  
19 argument. Thank you.

20           MR. ENGLISH: I object to that accusation. I  
21 merely pointed out -- Chip English for Milk Innovation  
22 Group.

23           Mr. Hill brought the comparison and said it's  
24 different from NFO. And I said, well, like NFO, there was  
25 a complaint. Nobody said even in NFO that the Secretary  
26 was acting on that. So I reject that, and that was  
27 certainly not my intent. And if that was how it was  
28 taken, I apologize to the Department. That's not how I



1 intended it.

2 And my only final comment is, I think what we just  
3 heard suggests that the timeline, which isn't a hammer,  
4 was a justification for narrowing the scope. I think that  
5 is arbitrary and capricious.

6 MS. MCMURTRAY: We would just like to make one  
7 additional point about opening up the hearing more. The  
8 hearing notice did indicate that the proposals would be  
9 amending Section 1000, 50, and then 51. So if we start  
10 opening up the hearing to other sections, we run into not  
11 giving other parties who would want to participate in the  
12 hearing notice.

13 So, yeah, we would -- parties who maybe want to be  
14 heard on the shrinkage issue or on the issues related to  
15 the Southeastern orders have not had the notice and the  
16 opportunity to be a part of this hearing.

17 I think -- yeah, and I think that the only other  
18 thing that we would like to say to that is that we know  
19 that producers in the Southeast, again, that's a huge  
20 marketing area, and just, again, that that whole area has  
21 not been properly noticed.

22 THE COURT: Okay.

23 Yes, sir.

24 MR. PROWANT: Again, Bradley Prowant for National  
25 Milk.

26 Your Honor, I would just like to move my exhibit  
27 into the record.

28 THE COURT: Yes.



1 MR. PROWANT: You know, to the extent your Honor  
2 is entertaining any rebuttal here, you know, I would just  
3 point to two things, and one is just your intuitions about  
4 what your scope of authority is here is right. And if you  
5 take a look at the regulations, in particular, 7 CFR  
6 900.6, 900.7, which most people have referred to, I think  
7 you can get a good handle on what you can and cannot do.  
8 And I think your intuitions are right here about  
9 second-guessing the Secretary.

10 The other thing I would say is to look into the  
11 logical outgrowth doctrine. My understanding of that  
12 doctrine is it pertains to a proposed rule versus a final  
13 rule, where the final rule must be a logical outgrowth of  
14 the proposed rule when an agency makes -- does rulemaking.  
15 The way it was applied in the Alto case, in my brief  
16 review, suggested dissimilarity to here. So I would  
17 encourage your Honor to -- to review sort of all the  
18 sources that have been cited to you.

19 And in terms of, you know, National Milk's  
20 position on the standard and the timeline, you know, the  
21 standard if a court were reviewing this would be arbitrary  
22 and capricious. You know, I think we have serious  
23 reservations about whether your Honor should even be  
24 considering these objections, to the extent you are  
25 considering sustaining them. I think the only thing you  
26 can really do within your authority is overrule them, and  
27 then they are preserved for an appeal to district court.

28 In terms of timing, we would take no position on



1 that, just as long as you take sufficient time to, you  
2 know, satisfy whatever due diligence it is you need to do,  
3 including, you know, requesting additional briefing from  
4 the parties.

5 THE COURT: Thank you.

6 Let me ask, are you saying that -- I mean, I could  
7 overrule the objection saying, hey, I really don't have  
8 authority to expand the scope of this proceeding?

9 MR. PROWANT: Absolutely, yes. And, in fact, that  
10 is more or less the position that we are taking is that  
11 you have to do that, because there is no precedent and no  
12 authority to expand the scope of this hearing by telling  
13 the Secretary to amend the notice of hearing to include  
14 additional proposals, for all the reasons USDA has stated,  
15 all the reasons we have stated. That's just nothing  
16 anyone has cited authority for, including the logical  
17 outgrowth doctrine, as I understand it. I was not part of  
18 those litigation, so -- but to sum up what I came up here  
19 for is to have NMPF -- I forget the exhibit number --  
20 admitted into the record.

21 THE COURT: Yes. Let's admit it, yes. That's the  
22 procedure we followed before.

23 Exhibit 107 is National Milk Producers' response  
24 to the objections of Milk Innovation Group and National  
25 All-Jersey. But we'll put it into the record, and we're  
26 going to refer to it as we would an answer to a motion,  
27 basically. It doesn't come in for the truth of the  
28 assertions. There's no witness sponsoring it. But, yeah,



1 that's the way we're doing it. It works to put things in  
2 one place. That's good. Thank you, Counsel.

3 (Thereafter, Exhibit Number 107 was received  
4 into evidence.)

5 THE COURT: Yes. What do we -- what do we want to  
6 do about getting me something in -- more in writing or the  
7 transcript or something here? Do you know how that works?  
8 I'm not paying for the transcript. I don't have a client,  
9 so I don't know.

10 MS. TAYLOR: Can we go off the record for a  
11 second?

12 THE COURT: Yeah, let's go off the record.  
13 (Off-the-record.)

14 THE COURT: Back on the record.

15 MS. TAYLOR: The court reporter has indicated that  
16 she could get you the last hour of our discussion, which  
17 would cover all the discussion on the objections, by the  
18 end of the week, considering she's here, you know, nine  
19 hours a day, so she has to get this done in the evenings,  
20 and we need her to be fresh the next morning, so being  
21 cognizant of that.

22 THE COURT: Yes. I think that's a good faith  
23 effort. From what I heard, we don't need to decide this  
24 right away. And if you want me to be less punchy than I  
25 could be, maybe already, I think that type of thing works,  
26 for sure.

27 And if somebody else wants to send in something in  
28 writing, I won't discourage that either. I will say the



1 quality of advocacy here has been quite good. I tip my  
2 hat to you all.

3 MR. HILL: So I would like to make one more  
4 statement, and this kind of goes to the National Milk  
5 Producers Federation last argument.

6 The Alabama Dairy Products Association,  
7 Incorporated, versus Clayton Yeutter; that's 980 F.2d  
8 1421. And I don't have the cite for the second one; it is  
9 Superior Dairy, Incorporated, versus Thomas Vilsack.

10 I think both of those cases stand for the  
11 proposition that in the type of complaint that we have  
12 here, that the scope has been limited too far. The  
13 Courts, especially, Superior Dairy, I believe, required  
14 that the complainant exhaust all their requirements in --  
15 through the administrative procedure, all the  
16 administrative requirements, before moving forward, which  
17 they said included filing of 15A as Mr. English has said.

18 So that would be my last word for today.

19 THE COURT: What's that look like to --

20 MR. PROWANT: Sorry. Bradley Prowant. The cite  
21 on Superior Dairy is 2012 Westlaw 275199 --

22 THE COURT: I'm sorry. 2012 Westlaw.

23 MR. PROWANT: 275199, case number 5:11CV1979,  
24 Northern District of Ohio, January 31st, 2012.

25 THE COURT: Is that an unreported case?

26 MR. PROWANT: Correct, yes.

27 MR. HILL: Thank you.

28 THE COURT: Okay. That should be some persuasive



1 value.

2 Do we know -- I mean, is that binding on us -- is  
3 that precedential law for our purposes, or is it just  
4 persuasive? Don't know?

5 MR. PROWANT: Off the record, my experience, in  
6 federal court, it doesn't really matter.

7 THE COURT: I'm sorry, say that again?

8 MR. PROWANT: I said my experience in federal  
9 court is it really doesn't seem to matter.

10 THE COURT: I think I know what you mean. Never  
11 stopped me from citing something like that, you know,  
12 that -- if that's what you mean but -- well, that's enough  
13 for now.

14 Let's reconvene in the morning, 8 o'clock. Thank  
15 you so much, Ms. Pish, for the part of the hearing  
16 transcript. I do think that will be helpful.

17 (Whereupon, the proceedings concluded.)

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