

**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  
September 18, 2023

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Reported by:

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

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FOR SELECT MILK PRODUCERS, INC.:

Ryan Miltner

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

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M A S T E R I N D E X

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1 MONDAY, SEPTEMBER 18, 2023 - - MORNING SESSION

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

3 Good morning, again on the record. What do we  
4 have up first?

5 MR. ROSENBAUM: Steve Rosenbaum for the  
6 International Dairy Foods Association, your Honor. We are  
7 recalling Mike Brown to testify about Make Allowances.

8 THE COURT: Welcome back, Mr. Brown.

9 MIKE BROWN,

10 Being first duly sworn, was examined and  
11 testified as follows:

12 THE COURT: Your witness.

13 DIRECT EXAMINATION

14 BY MR. ROSENBAUM:

15 Q. Good morning, Mr. Brown. I have placed before you  
16 two documents. The first one is called IDFA Exhibit 6.

17 Is this your written testimony regarding  
18 Make Allowance Proposals 7, 8, and 9?

19 A. Yes, it is.

20 MR. ROSENBAUM: Your Honor, I would ask that this  
21 be marked with the next Hearing Exhibit number.

22 THE COURT: I don't quite have my list up. Is it  
23 200? 214?

24 This will be -- IDFA Exhibit 6 is marked 214 for  
25 identification.

26 (Thereafter, Exhibit Number 214 was marked  
27 for identification.)

28 BY MR. ROSENBAUM:



1 Q. And have you also, Mr. Brown, prepared a  
2 PowerPoint presentation which you are going to use to  
3 present your testimony in a more summary fashion?

4 A. Yes, I am.

5 Q. And is that the document that's been marked as  
6 updated IDFA Exhibit 42?

7 A. Yes.

8 MR. ROSENBAUM: Your Honor, I ask that that be  
9 marked as Hearing Exhibit 215.

10 THE COURT: So marked.

11 (Thereafter, Exhibit Number 215 was marked  
12 for identification.)

13 BY MR. ROSENBAUM:

14 Q. Mr. Brown, why don't we go to page 2 of your  
15 PowerPoint presentation, and please describe to us what  
16 you are showing here.

17 A. Okay. How Make Allowances work. Make Allowances  
18 are used to determine a minimum milk price obligation to  
19 farmers. 100% of the price at which referenced  
20 commodities are sold minus the Make Allowances at minimum  
21 milk price.

22 To quote USDA from 2008, "The ability of a  
23 manufacturer to offset cost increases is limited by the  
24 level of Make Allowances in the Class III and Class IV  
25 price formulas. Manufacturing processors are charged the  
26 FMMO price for producer milk used to produce Class III and  
27 Class IV products. However, plant manufacturing cost  
28 increases may not be recovered because Class III and



1 Class IV product price formulas use Make Allowances that  
2 are fixed, regardless of marketing conditions, and change  
3 only by regulatory action."

4 Q. And is that why we're here today seeking  
5 regulatory action to change the Make Allowances to reflect  
6 plant manufacturing cost increases?

7 A. Yes, it is.

8 Q. Okay. If we turn to the next page, please,  
9 page 3.

10 A. According to USDA past records, it said, plant  
11 costs, not farmer costs, determine Make Allowance levels.  
12 "Opponents of increasing Make Allowances argue a number of  
13 points, that they are already set at too high a level,  
14 that dairy farmer production costs have also increased  
15 significantly due to higher energy and feed costs, that  
16 processors should look beyond asking dairy farmers to  
17 receive less for their milk by charging more for  
18 manufactured products, and that Make Allowance increases  
19 should be made only when all dairy farmer production costs  
20 are captured in their milk pay price."

21 These are not valid arguments for opposing how  
22 Make Allowances should be determined or what levels  
23 Make Allowances need to be in the Class III and Class IV  
24 product pricing formulas.

25 "When dairy farmer production costs exceed the  
26 value for which products are sold in the marketplace, no  
27 source of revenue from the marketplace is available to  
28 cover those costs." Again, quotes from 2008





1 Make Allowance decision.

2 Q. Okay. Take us to page 4, please.

3 A. Again, from that decision: "In the aggregate, the  
4 costs of producing milk are reflected in the supply and  
5 demand conditions for the dairy products. When the supply  
6 of milk is insufficient to meet the demand for Class III  
7 and Class IV products, prices for those products increase  
8 as do regulated minimum milk prices paid to dairy farmers,  
9 because the milk is more valuable, and this greater milk  
10 value is captured in the pricing formulas.

11 "It is reasonable to conclude that the  
12 Make Allowances used in the Class III and Class IV product  
13 price formulas should be updated to reflect changes in the  
14 costs manufacturers incur in producing cheese, butter, dry  
15 whey and nonfat dry milk. It is necessary to reflect  
16 changes in manufacturing costs, so that with the  
17 prevailing market prices for manufactured products,  
18 minimum Federal Order classified prices can be set."

19 Q. Okay. If you turn to the next page, is there  
20 another document where USDA set forth its position  
21 regarding how properly to set Make Allowances?

22 A. Yes. After that 2008 decision that the Department  
23 was sued on the cost of production issue, and they were  
24 successful in defending that attack.

25 This is a quote: "It is, therefore, neither  
26 inappropriate or surprising that while USDA considers  
27 producer costs in fixing prices, it declined to modify the  
28 Make Allowances to account for those costs. The



1 Make Allowance is the input in the product-pricing formula  
2 that accounts the costs manufacturers incur when  
3 transforming raw milk into other dairy products.

4 "In order to extrapolate the value that raw milk  
5 contributes to the commodity prices of dairy products, and  
6 thereby approximate raw milk's true value in the  
7 marketplace, these manufacturer costs must be included as  
8 part of the formula.

9 "The cost of producing milk, in contrast, are in  
10 the aggregate reflected in the supply and demand  
11 conditions, that affect the NASS commodity prices of dairy  
12 products. See Federal Reg. 73 at 35.234 (sic).

13 Plaintiffs' -- plaintiffs' insistence that the  
14 Make Allowance -- rather than the product -- the formula  
15 as a whole -- reflect producer costs misapprehends the  
16 underlying price mechanisms."

17 Q. And then if we turn to the next page, still  
18 focusing on this fight that broke out regarding the last  
19 update of Make Allowances, could you tell us what the  
20 ultimate resolution was?

21 A. "In sum, the Secretary considered the cost of  
22 producing milk to producers, but reasoned that those costs  
23 could be recouped through the market mechanisms. The  
24 Make Allowances, by contrast, represent the cost of  
25 handlers and are the only mechanism through which  
26 manufacturers' costs can be recouped under the pricing  
27 formulas.

28 "The Secretary concluded it was necessary to



1 increase Make Allowances to reflect handlers' increased  
2 costs. Although the Secretary increased Make Allowances  
3 and thereby decreased the amount received by producers for  
4 a given market price, his well-reasoned analysis in the  
5 rulemaking record constitutes 'consider[ing producers'  
6 feed and fuel] prices in determining whether or not to  
7 adjust Make Allowances."

8 Q. And you're quoting from the decision that affirmed  
9 USDA's 2008 Make Allowances; is that correct?

10 A. That is correct.

11 Q. Okay. And turn to page 7, please, and tell us  
12 about some additional guidance on -- that you think is  
13 relevant.

14 A. Okay. I certainly can. This goes back to '99.

15 USDA has also emphasized the need for those  
16 allowances that result in minimum milk prices that clear  
17 markets. And the quote is: "The importance of using  
18 minimum prices that are market-clearing for milk used to  
19 make cheese and butter, nonfat dry milk cannot be  
20 overstated. The prices for milk used in these products  
21 must reflect supply and demand and must not exceed a level  
22 that would require handlers to pay more for milk than  
23 needed to clear the market and make a profit."

24 Q. Okay. Let's turn to page 8, and now switch, if  
25 you will, from the philosophy of how to set  
26 Make Allowances to the question of how one determines what  
27 the cost of manufacturer actually is. Obviously, we have  
28 already heard from Dr. Stephenson and Dr. Schiek regarding



1 the survey information, and then for Dr. Schiek the  
2 econometric study that he then performed.

3 Tell us what the history has been on these  
4 subjects.

5 A. Since Order Reform, that's always been the case.  
6 The quote from the decision in April of '99: "The  
7 Make Allowances contained in the proposed rule were  
8 developed primarily from Make Allowance studies conducted  
9 at and published by Cornell University and an analysis of  
10 manufacturing plant size in relationship to the data  
11 contained in the Cornell studies. Audited cost of  
12 production data published by the California Department of  
13 Food and Agriculture was also used in determining a  
14 reasonable level of Make Allowances."

15 Q. Now, are you aware that Dr. Stephenson was at  
16 Cornell when he performed some of his Make Allowance  
17 analyses, or I should say cost of manufacture analyses?

18 A. Yes, I was.

19 Q. Okay. And does the IDFA proposal now -- that is  
20 now pending before USDA, does it depend upon a combination  
21 of study by Dr. Stephenson as well as information from the  
22 California Department of Food and Agriculture?

23 A. Yes, it does.

24 Q. Okay. If we turn to the next page, please.

25 A. December 7th, 2000 decision, increasing  
26 Make Allowances: "Manufacturing costs used to determine  
27 appropriate Make Allowances for cheddar cheese, butter and  
28 nonfat dry milk in this proceeding are calculated



1 primarily from a weighted average of the RBCS" -- which is  
2 the Rural Business Cooperative Service -- "and CDFA" --  
3 California Department of Food and Agriculture -- "surveys,  
4 with a check against the NCI, National Cheese Institute,  
5 survey cost of manufacturing cheddar cheese. The cost of  
6 manufacturing nonfat dry milk continues to be used as the  
7 cost of making whey powder due to the nature of the  
8 information in the hearing record about the actual cost of  
9 drying whey."

10 Q. So in this December 7, 2000, decision, was USDA  
11 continuing to rely upon survey data to determine a cost of  
12 manufacture?

13 A. Yes, they were.

14 Q. And at that particular juncture, I think there was  
15 not an updated Cornell study, so they relied here on the  
16 Rural Business Cooperative Service study; is that correct?

17 A. To the best of my memory, yes.

18 Q. That was not an audited or mandatory study; is  
19 that correct?

20 A. No, it was not.

21 Q. And the National Cheese Institute survey, to which  
22 reference is made, that also was not an audited or  
23 mandatory survey, correct?

24 A. That is correct.

25 Q. All right. If we turn to the next page, please,  
26 we're going forward chronologically. We're now up to the  
27 decisions in 2006 and 2008 by USDA regarding  
28 Make Allowances. So tell us what happened there.



1           A.     Okay.  In November 2006, USDA, in their decision,  
2     said:  "This tentative final decision finds that combining  
3     the weighted average manufacturing cost of the most recent  
4     CDFA survey and CPDMP, Cornell Program on Dairy Markets  
5     and Policy, study for cheese, nonfat dry milk, and butter,  
6     into a single weighted average is appropriate for updating  
7     Make Allowances for those three products.  The CPDMP study  
8     weighted average manufacturing cost of dry whey without  
9     California should be used for the dry whey  
10    Make Allowance."

11          Q.     And once again, the Cornell study upon which USDA  
12    relied, was that an audited mandatory study?

13          A.     It was not.

14          Q.     Okay.  And then finally, to bring us up to date,  
15    so to speak, since we're now under the 2008  
16    Make Allowances, tell us what happened in the June 2008  
17    USDA decision.

18          A.     That decision relies on the 2006 and '07 Cornell  
19    cost studies led by Mark Stephenson and the CDFAs study,  
20    both separately and in combination.

21          Q.     Is that -- is it the case that for some of the  
22    commodities USDA combined the two, and some of the  
23    commodities -- for some of the commodities USDA found one  
24    of the two numbers preferable and went with that?

25          A.     Yes, it was a mix.

26          Q.     Okay.  Okay.  So let's now go to page 11, and  
27    we're now up to this hearing.  Tell us about the 2023  
28    Stephenson study that, as we will see, forms part of the



1 basis for IDFA's milk allowance proposal.

2 A. Well, we were very pleased with that study because  
3 we got good participation. And if you read Mark's study,  
4 it was a combination of cooperatives and privately held  
5 companies, it was a mix. And what -- what pleased us is  
6 that we were over 50% of the NASS annual survey for those  
7 four products actually included in the cost survey. It's  
8 the highest average by far ever.

9 And so when you look at the -- this is a quick  
10 summary -- 55.6% of cheddar cheese production was included  
11 in the survey; 50.8% of human whey; 91.2% of human nonfat  
12 dry milk; and 80.1% of butter.

13 Q. Okay. And just so we're clear as to how you did  
14 the calculations to go through the columns, you have a  
15 column called USDA NASS 2002 annual production. Tell us  
16 where you got that information.

17 A. I got it from the dairy products annual summary.  
18 It's published every April, and I used the one published  
19 this April which had '22 numbers from this past April.

20 Q. Okay. And with respect to the columns -- the  
21 three columns that have the super heading, if you will,  
22 "2023 Stephenson Cost Survey," you show the number of  
23 participating plants.

24 Did that come from Dr. Stephenson's report?

25 A. Yes.

26 Q. And then the average annual production, did that  
27 come from Dr. Stephenson's report?

28 A. Yes.



1 Q. And how about the total survey annual production?

2 A. Simply the average production by the number of  
3 plant gives you the total of survey production.

4 Q. So the first column, participating plants, times  
5 the average annual production, gives you the total survey  
6 annual production, correct?

7 A. Yes.

8 Q. And then finally, your column survey production  
9 share of USDA NASS, just tell us how you calculated that.

10 A. I took the total annual survey production, divided  
11 it by the NASS 2022 annual production, to come up with the  
12 percentage.

13 Q. So that for cheddar cheese, for example, you took  
14 the total survey annual production of 2,203,279,668 and  
15 divided it by 3,963,741,000; is that correct?

16 A. That is correct.

17 Q. And that's where you get the 55.6% survey  
18 production share, correct?

19 A. Yes.

20 Q. And in your footnote do you indicate where  
21 specifically you got those USDA NASS 2022 annual  
22 production numbers?

23 A. Yes, I did. They are online and downloadable from  
24 the Cornell USDA website.

25 Q. Okay. So let's turn to the next page, which is  
26 page 12.

27 Did you make a comparison between -- well, let me  
28 start that question again.





1           On page 12, did you also examine what percentage  
2 of total production of these four commodities was included  
3 in some of the prior surveys that have been conducted?

4           A.    Yes.

5           Q.    And did you do that -- and this is on the top half  
6 of the page -- with respect to Dr. Stephenson's survey of  
7 2019 costs which ultimately resulted in a report that's  
8 sometimes been called the 2021 Stephenson report?

9           A.    That is correct.

10          Q.    And just tell us what the shares are of the survey  
11 production, share of the NASS production in that survey.

12          A.    A lot of variation on products. Cheddar cheese  
13 was 16.3%; dry whey was 29.7%; nonfat dry milk was 69.6%;  
14 and butter was 95.7%.

15          Q.    Is it fair to say that for cheddar cheese, whey,  
16 and nonfat dry milk, the 2023 survey was significantly  
17 more robust than the 2021 survey?

18          A.    Yes, with the exception of butter, but they were  
19 both very high.

20          Q.    Now, one issue, of course we don't want to  
21 necessarily go into this in detail, but was in the 2019  
22 survey, Dr. Stephenson engaged in some transformation  
23 adjustments with respect to butter and nonfat dry milk  
24 when he actually calculated cost of manufacture, correct?

25          A.    Yes, that is correct.

26          Q.    And tell me, did you personally have discussions  
27 with -- with manufacturers when they saw those reports --  
28 with that report I should say, regarding that?



1 A. I did not. The only -- only time I heard anything  
2 was in the hearing record back during that hearing time.

3 But, no, no direct discussion --

4 Q. No, I'm talking about in the 2000 -- when  
5 Dr. Stephenson --

6 A. Oh, in 2019?

7 Q. I'm still in the 2019, I'm sorry. Let me start  
8 again.

9 A. Yes, I was.

10 Q. Let me start again, because we may have confused  
11 things.

12 A. Yeah.

13 Q. When Dr. Stephenson published in 2021, his report  
14 on 2019 cost of manufacture, that's the report in which he  
15 used various transformation factors, correct?

16 A. Right.

17 Q. Which had not been the past practice, correct?

18 A. We --

19 Q. Is that right, that had not been the past  
20 practice?

21 A. It had not been the past practice.

22 Q. And so what was the reaction when industry saw --  
23 well, based upon your exposure to people in the industry,  
24 what was the reaction?

25 A. Two things. First of all, just confusion trying  
26 to understand how they worked.

27 But the other thing is, is that standard  
28 accounting practice has always been to spread fixed costs



1 over pounds of milk solids. That had been done in the  
2 earlier Cornell studies, and it had always been done in  
3 the California study. And they didn't understand why that  
4 changed because it made it difficult to compare.

5 Q. And those California studies went all the way back  
6 to, what, the year 2002, I think?

7 A. Actually earlier than that, but that's the  
8 earliest that we could find. As you know, we had copies  
9 from '02 through '16.

10 Q. Okay. And they had consistently used a  
11 methodology which spread costs based upon pounds of  
12 solids, correct?

13 A. That's generally accepted accounting practice in  
14 plants from my experience.

15 Q. Okay. And did you have conversations with both  
16 proprietary handlers and co-op handlers regarding the 2021  
17 Stephenson survey and these issues relating to the  
18 transformation factor?

19 A. Yes. Both, yes.

20 Q. Okay. And what was -- I mean, what was their --  
21 did they have a different -- was there a different point  
22 of view between the proprietaries and the co-ops?

23 A. It was remarkably consistent. Every single  
24 company I talked to had the same request: When this is  
25 updated, if we update it, because it wasn't certain at  
26 that point, we need to go back to allocation of fixed cost  
27 based on pounds of solids.

28 Q. All right. Let's go down, then, to the second



1 half of slide 12, where you discuss the 2006 data, which  
2 ultimately went into the 2008 Make Allowance decision.  
3 Tell us what the -- what the robustness is, if you will,  
4 of that survey as compared to the 2023 survey.

5 A. 2023 is -- is more robust, particularly with  
6 butter. Cheddar cheese was basically 42%; it's 56 in the  
7 new study. Whey was 38.6; it's 50% in the new study.  
8 Nonfat dry milk was 39.5%; it's roughly 80% in the new  
9 survey. Butter was only 15.9%, and as we all know, it  
10 also was in that -- it was much higher in the most recent  
11 survey.

12 Q. Could you go back and look at the nonfat dry milk  
13 number, I think, what percentage that was in 2023?

14 A. It was 91, excuse me.

15 Q. Okay. Is that -- that's the correct number?

16 A. Yes. Not 80, 91. Butter is the one that's a  
17 little over 80.

18 Q. Okay. And so, once again, have you provided the  
19 data sources you relied upon for both pieces, if you will,  
20 of the analysis that appears on page 12?

21 A. Yes, I have.

22 Q. All right. And then let's go on to page 13.

23 And what have you set forth here?

24 A. Okay. Updating comparable data has been submitted  
25 at this hearing.

26 Just a quick background, and that is that it was  
27 very evident that we needed to get the best updated  
28 research-based data as we possibly could to have an



1 effective proposal for the hearing so we could be  
2 comfortable with what we had. And so we did hire  
3 Dr. Stephenson to do that again, and we were delighted  
4 with the amount of participation, both again from co-ops  
5 and non-co-ops.

6 But those establish the following manufacturing  
7 costs: Cheese was .2643; dry whey was .3361; nonfat dry  
8 milk was .275; butter was .3176.

9 Q. All right. And these numbers reflect  
10 Dr. Stephenson's return to the traditional method of  
11 allocating costs based upon pounds of solids; is that  
12 correct?

13 A. That is correct.

14 Q. With respect to nonfat dry milk and butter,  
15 correct?

16 A. Yes.

17 Q. And then second, these numbers are more current in  
18 that they reflect 2022 costs, whereas Dr. Stephenson's  
19 2021 report reflected 2019 costs; is that correct?

20 A. That is correct. And as we all know, there are  
21 significant cost increases between '19 and '22.

22 Q. Just as the general inflation as well as specific?

23 A. Anything you looked at, bought, or borrowed or  
24 rented was higher, a lot higher --

25 Q. Higher in what year?

26 A. -- costs -- oh, '21, '22. Particularly '22 was  
27 the worst. It was very high.

28 Q. Okay. All right. Let's turn to page 14 now, and



1 just briefly summarize what Dr. Schiek did. He obviously  
2 has testified, so we're not going to go into this in great  
3 detail.

4 A. Well, Dr. Schiek, again, I think we -- we have all  
5 heard, employed econometric techniques to the CDFA audited  
6 dairy manufacturing cost data from '03 to '16 to estimate  
7 2022 manufacturing costs for cheese, dry whey, nonfat dry  
8 milk, and butter. His study establishes the following,  
9 2022 costs: Cheese .3006; dry whey .2953; nonfat dry milk  
10 .2653; and butter .2364.

11 Q. All right. Now, if we turn to the next page, have  
12 you done on this, page 15, some comparisons between the  
13 result of the Stephenson survey and the result of the  
14 Schiek survey/econometric study?

15 A. Yes. Yes, I did.

16 Q. And for cheese, dry whey, and nonfat dry milk, how  
17 similar are they?

18 A. Well, they are fairly similar when you consider  
19 the breadth of the studies. Minus cheese was -- in  
20 Stephenson, was 13.7% lower; dry whey was 12.1% higher,  
21 nonfat dry milk was 3.5% higher, and if you understand the  
22 California industry, those even make more sense.

23 Q. All right. Well, tell us what you mean by that.

24 A. What I mean is that in the case of cheese, in  
25 particular, the average size of the survey plants was very  
26 large, and so that would skew it versus perhaps what Mark  
27 would find when he has a -- more of a range in plant  
28 sizes, would be my speculation.



1 Q. Okay. And -- and just to be clear, that with  
2 respect to cheese, the Stephenson number is lower than  
3 Schiek. With respect to the other two, dry whey and  
4 nonfat dry milk, it's -- it's the other way around, right?  
5 Stephenson is higher than Schiek, correct?

6 A. Yes.

7 Q. Okay. Now, we then come to butter, but I think  
8 you discovered something sort of interesting, and I'll  
9 have you explain why in a minute, but the difference  
10 between the two numbers for 2000 -- with respect to the  
11 information we're presenting today, namely the Stephenson  
12 2023 report versus the Schiek 2022 report, there's about a  
13 25.6% difference between the two, correct?

14 A. Yes.

15 Q. Then did you go back and check what the  
16 relationship had been back in 2008 when the  
17 Make Allowances were last set?

18 A. We did because we knew it was wide. We were very  
19 surprised to find it was the exact same percent difference  
20 25.6 in '08 as it was in 2023.

21 Q. So to the tenth of a percent, the percentage  
22 difference between Stephenson and, if you will, CDFA,  
23 which is what Schiek relied upon of course, the difference  
24 between the two was that Stephenson was 25.6% higher, and  
25 that actually turns out to be the exact same percentage to  
26 the tenth of a percent as the difference had been back in  
27 2008 between the Cornell study and the CDFA number; is  
28 that correct?



1 A. That is correct.

2 Q. And do you have a reason why makes sense that a --  
3 that a survey based solely upon California butter would --  
4 might well be different than a national survey?

5 A. Well, I think, again, if you know the California  
6 industry, you have got probably ten or so butter makers,  
7 but you have two extremely large ones, extremely  
8 successful ones. And so when you weight average the cost,  
9 they are the bulk of the pounds, so -- and they are that  
10 large, we assume they are very efficient, and as a result  
11 you would expect theirs costs to be lower.

12 Q. All right. Let's turn to the next page, 16. And  
13 is this -- does this page set forth the ultimate  
14 Make Allowances that IDFA and Wisconsin Cheese Makers  
15 Association is seeking, although it's under a -- in a  
16 stair-step method, which we'll get to in a minute?

17 A. Yes. These are the numbers that the -- at the end  
18 step with the Make Allowances would be for cheese, dry  
19 whey, nonfat dry milk, and butter. And they are equal  
20 weighting, in other words, the simple average of the  
21 Schiek and the Stephenson studies.

22 Q. Let me just press on that to make sure the record  
23 is clear.

24 Within the Stephenson study and within the Schiek  
25 study, are the numbers they produced weighted average cost  
26 of production?

27 A. Yes. Schiek's is based on weighted average data,  
28 so his projections are weighted average. And Stephenson,





1 as well, used the weighted average, again, average cost on  
2 total pounds.

3 Q. Okay. And let's just be clear what that means.  
4 If it's -- if the Stephenson report is a weighted average  
5 cost of production, and Schiek also, does that mean that  
6 half of the commodity, for each commodity, is produced at  
7 a cost equal to or less than the Make Allowance and half  
8 is produced at a cost equal to or more than?

9 A. That's essentially, yes, that's correct.

10 Q. And that's what a weighted average means?

11 A. That's what a weighted average means, yes.

12 Q. Is there any sense that one could state the  
13 Make Allowances proposed by IDFA is a guarantee of  
14 profitability?

15 A. No, it's not. And if you use Mark's as an  
16 example, he breaks out high-cost and low-cost operations,  
17 and you can see with the weighted average there's  
18 certainly going to be a fair number that will be below  
19 average cost -- be above average cost. And below, both.

20 Q. Do either of the surveys take into account the  
21 fact that there are -- at least some at the time, perhaps  
22 a lot of the time -- over-order premiums paid by  
23 manufacturers to dairy farmers?

24 A. No. In my understanding, Federal Order pricing is  
25 minimum pricing, and -- and that is what's required for a  
26 regulated plant. They can pay over that any way that they  
27 wish. If they would like to pay over, they can.

28 Q. Okay. And if -- if the dairy farmers are able to



1 insist on that as a condition of supplying the milk, then  
2 the manufacturer -- you can't find somebody else to supply  
3 the milk more cheaply?

4 A. There's -- there's good old competition, yes, in  
5 that pricing.

6 Q. Okay. But that -- that would, if you will, drive  
7 down the actual money available to the manufacturer to pay  
8 its costs of manufacture, correct?

9 A. Yes, it would. I mean depending what that  
10 Make Allowance is, the higher it is, the less opportunity  
11 they are going to have to pay some kind of premium.

12 Q. Okay. And if they are paying a premium above the  
13 minimum price, then that is, if you will, a deduction from  
14 the assumed Make Allowance, leaving less money to actually  
15 pay the actual cost; is that fair?

16 A. That is also correct.

17 Q. Okay. Now, why is it you decided to propose equal  
18 weighting -- you -- I should say IDFA and Wisconsin Cheese  
19 Makers Association -- equal weighting?

20 A. We elected on equal weighting for a couple  
21 reasons. If you look at past history, both these studies  
22 were used. The advantage of Bill Schiek's study is the  
23 data is audited. So even though it ended in 2016, you  
24 have a lot of confidence that the data was done at the  
25 best way possible. I mean, they had accountants at CDFA  
26 that collected the data.

27 Mark's data is broader, includes more plants  
28 across more of the country. It is not audited. But we



1 thought that because of the prices -- and there's some  
2 difference between the two -- that a weighted average --  
3 or excuse me -- a simple average of the two weighted  
4 averages was the best way to propose for a Make Allowance  
5 to be.

6 Q. Okay. Now, if USDA determined that instead of a  
7 simple average they wanted it to be a weighted average  
8 between Stephenson and Schiek, is there information in the  
9 record that would allow that to be done?

10 A. There's current information on Mark's. You can  
11 take Bill's -- you can take the past weights in the CDFA  
12 survey and use those if you wanted to do that.

13 Q. Okay. So we -- Dr. Schiek admitted -- had  
14 admitted into the record during his testimony the actual  
15 California Department of Food and Agriculture annual  
16 studies from 2002 to 2016; is that correct?

17 A. Yes.

18 Q. And are there in those -- in many of those reports  
19 actual production data, that is to say a recitation of how  
20 many pounds of --

21 A. Yes.

22 Q. -- each commodity is included in the -- in the  
23 survey?

24 A. Yeah. Very similar to Mark's.

25 Q. Okay. And so one could look at that and figure  
26 out what the poundage is covered by the California  
27 surveys, correct?

28 A. Yes, they could. In fact, they give the percent



1 in the studies.

2 Q. Okay. And you have already, on page 11, set forth  
3 the poundage that's covered by -- by Dr. Stephenson's  
4 study, correct?

5 A. Yes.

6 Q. So is that enough information to -- to do a  
7 weighted average if you wanted to?

8 A. I think it's the most complete as far as volume  
9 covered that we have ever had.

10 Q. Okay. Let's turn to page 17, then.

11 Now, you previously told us what the IDFA/  
12 Wisconsin Cheese Makers Association proposed  
13 Make Allowances are in absolute dollars. That is what's  
14 on page 16.

15 Now, on page 17, have you translated, if you will,  
16 those increases so that they now are stated in terms of  
17 percentage increase over current Make Allowances?

18 A. That is correct.

19 Q. And the current Make Allowances, once again, are  
20 those that were put in place in 2008, mainly based on 2006  
21 data?

22 A. '6 and '7, yes.

23 Q. Okay. Why don't you just read those numbers if  
24 you would.

25 A. Okay. The cheese Make Allowance increases by  
26 41.79%; the dry whey Make Allowance increases by 59.32%;  
27 nonfat dry milk is 61.86%; and butter is 62.39%.

28 Q. All right. On the next page, 18, did you compare



1 those percentage increases to certain testimony in the  
2 record as to what the actual increases on a percentage  
3 basis are that various cooperatives have indicated they  
4 have themselves experienced during this timeframe?

5 A. Yes, we did. Where we had III and I cheese,  
6 Land O'Lakes was butter/powder and Darigold was all four  
7 products, Darigold and Land O'Lakes -- Darigold said they  
8 had an 80% increase, so --

9 Q. Sorry, 8-0?

10 A. 8-0%.

11 Land O'Lakes gave numbers. We took back and  
12 looked at those numbers and assigned them to butter/powder  
13 and then that fixed cost, which is again, fixed cost being  
14 used as solids, and that works out to 81%.

15 AMPI quoted the number of 40% on their commercial  
16 cheese --

17 Q. Now, what's the number? You said 40.

18 A. 81.

19 Q. No, no, for AMPI?

20 A. 47.

21 Q. 47%?

22 A. Yes.

23 Q. Okay. And then -- so how do IDFA's proposed  
24 Make Allowances increases, which you list here in the  
25 second column on page 18, compare to the testimony from  
26 these three cooperatives regarding the percentage  
27 increases that they have experienced over the same  
28 timeframe?



1 A. Yes. We were -- we -- we learned that they were  
2 actually higher in these three cases.

3 Q. Okay. The cost increases experienced by these  
4 cooperatives were in all cases higher than the proposed  
5 increase in IDFA's proposal as an -- on a percentage  
6 basis, correct?

7 A. That is correct.

8 Q. Okay. And let's turn to page 19.

9 THE COURT: Wait. Just a quick break.  
10 Off the record.

11 (Off-the-record.)

12 THE COURT: Back on the record.

13 BY MR. ROSENBAUM:

14 Q. Okay. On page 19 you mentioned a minute ago that  
15 Land O'Lakes had provided some data in their testimony,  
16 that you had determined reflected an 81% increase in the  
17 cost of making nonfat dry milk and butter.

18 Can you tell us on page 19 how you actually came  
19 up with that 81% figure?

20 A. Well, Land O'Lakes provided the 2007 cost survey  
21 numbers, and they provided the percent increases. So we  
22 simply multiplied the survey times the percent increase to  
23 come up with a set increase per pound. And that was for  
24 processing, labor, and utilities in both butter and nonfat  
25 dry milk.

26 Land O'Lakes put all the fixed costs together in  
27 one number for nonfat dry milk, and in butter, and that  
28 was up 112%, so it was \$0.113 increased. And, again, that



1 method uses a solids based allocation on that fixed cost.

2 So when you take those costs, and you look at what  
3 we call our standard yields in a hundred pounds of milk,  
4 so you have basically, roughly, 8.5 pounds of nonfat dry  
5 milk and about 4.2 pounds of butter, when you -- when you  
6 run those numbers, what you find, if you take those pounds  
7 of each of those by their costs, you add them all  
8 together, you get an increase in price per pound of  
9 14.24%, which is 80% of the current number, which is 17.5,  
10 which was also supplied by Land O'Lakes.

11 Q. All right. So basically you calculated based upon  
12 the information provided that Land O'Lakes costs had been  
13 \$0.175, correct?

14 A. Yes, that's what they -- that's what they showed  
15 when you add up the costs it come to.

16 Q. And when you -- when you add up Land O'Lakes' own  
17 information as to the percentage increases in those costs  
18 over time, that indicates that the total increase in  
19 costs, was \$0.1424; is that correct?

20 A. Yes.

21 Q. And then you simply then divided 14.24 by 17.50,  
22 to calculate that this reflected an 81% increase in the  
23 cost?

24 A. Yes.

25 Q. Okay. Now, let's go to the next page. You have  
26 testified -- to page 20. You have testified that under  
27 your approach, you were using a Schiek report and a  
28 Stephenson report, both of -- each of which calculated a



1 weighted average cost of manufacture, correct?

2 A. Yes.

3 Q. And how does that methodology compare to what USDA  
4 has done in the past?

5 And I think you can just summarize this. You  
6 don't have to read the whole thing.

7 A. Good. Because I can hardly see it on my screen.  
8 Apologize for that. We used to call these cooperative  
9 extension slides, where they have so much stuff on the  
10 slide you can't read them. Or I have had a few  
11 consultants that were good at that, too.

12 Basically, they used the weighted average cost in  
13 the 2008 decision. And basically -- so the precedent in  
14 that decision in 2008, although they took some numbers  
15 combined from both studies, what they used was those  
16 weighted average costs in -- within those studies to  
17 determine those Make Allowances.

18 Q. Okay. Let's turn to page 21, and tell us, you  
19 know, what your view is about the need for prompt action.

20 A. Well, I -- I think it is very critical. I'll be  
21 very honest, I took this job I have now, when I retired  
22 from Kroger, because I thought this was so urgently  
23 important to happen.

24 "Make Allowances below costs cause dairy  
25 processors to face financial losses, risk financial ruin,  
26 and/or lack appropriate financial incentive either to  
27 reinvest, expand, or build new plants, to meet both market  
28 demand and milk supply needs.





1 "If manufacturers attempt to raise their commodity  
2 product prices to cover higher costs, those higher prices  
3 automatically lead to higher milk prices, leaving no  
4 additional net income to apply to those higher costs."

5 Q. Okay. Let's now switch on page 22 to an issue I  
6 alluded to, which is the proposed staggered phase in.

7 A. Well, because -- because the increases, we have  
8 waited so long to make the changes, they are very  
9 significant. And an accommodation to farmers and to make  
10 the transition a little easier, IDFA's proposing that half  
11 of that change in Make Allowances apply at the initiation  
12 of the new Federal Order, and then for the next three  
13 years, a sixth of that total is added until you get at the  
14 beginning of the fourth year the full amount of the make.

15 And, again, 50% of that average the first year,  
16 and we're using January '25 in our example. That seems to  
17 be everybody's wish for an order. We'll see what really  
18 happens. And then January 1st the next three years, that  
19 difference, one-third of the difference or one-sixth of  
20 the total is added until you get to the full amount.

21 Q. Okay. So if we go back to page 17 just for a  
22 second, that's the percentage increase that would be  
23 experienced at the end of year four, correct --

24 A. Correct.

25 Q. -- when there's a full implementation of the  
26 proposal?

27 A. Right.

28 Q. So if we were to begin in, as we would hope, but



1 we'll see how things play out, that the first year  
2 increase would be effective on or about January 1, 2025,  
3 these percentage increases would not actually occur until  
4 January 1, 2028; is that correct?

5 A. That is correct.

6 Q. And the -- if you want to figure out what the  
7 percentage increase is in year one, IDFA is proposing that  
8 half of the increase be incurred in year one, correct?

9 A. Yes, that's correct.

10 Q. You could cut all those percentages in half, and  
11 that would tell you what -- on page 17, and that would  
12 tell what you the percentage increase is in year one,  
13 correct?

14 A. That is correct.

15 Q. Now, have you gone back and looked at how large a  
16 percentage increase for a particular commodity USDA has  
17 previously made?

18 A. I -- I can't recollect.

19 Q. Okay. Well, if -- all right. If one were to go  
20 back to the 2008 decision, one would be able there to  
21 find, readily, what the butter Make Allowance had been  
22 before that decision --

23 A. Yes.

24 Q. -- if it came as a result of that decision?

25 Okay. And assume with me --

26 A. Yeah, I'm -- this is coming back now. I remember  
27 that one in particular. So go ahead.

28 Q. Do you remember the number?



1 A. I don't remember the number. I just know it was  
2 very significant.

3 Q. Okay. So assume with me that the butter  
4 Make Allowance went up by 42% in one fell swoop --

5 A. Yeah.

6 Q. -- in 2008.

7 And do you recall that the Make Allowance  
8 increases in 2008 were -- were imposed on an emergency  
9 basis?

10 A. They were, and they were immediate. Full amount  
11 was -- when the orders -- the change orders were voted in,  
12 it was an immediate change.

13 Q. All right. And that's -- so the 42%, that was  
14 imposed immediately for butter with -- on an emergency  
15 basis is, you know, materially higher than the -- any of  
16 the year one Make Allowance increases that you are  
17 proposing; is that correct?

18 A. Yes.

19 Q. And of course, this is not -- and unlike then,  
20 this is not an emergency hearing. I mean, there's going  
21 to be a recommended decision and a final decision here,  
22 correct --

23 A. Yes, that is correct.

24 Q. -- what we're doing right now?

25 Okay. So let's go then to page 23. And does this  
26 document set forth your -- the actual phase-in amounts  
27 going from year one through year four?

28 A. Yes, it does.



1 Q. All right. Let's switch to -- on page 24 to a  
2 comparison of National Milk's Make Allowance proposal,  
3 which is Proposal 7, and tell us what your view is about  
4 that.

5 A. Well, what page 7 talks about is National Milk has  
6 a one-time change in makes that they are recommending and  
7 then no further adjustments, and they were negotiated by  
8 National Milk's members, and the numbers are published  
9 here.

10 Again, we used our two studies, averaged them,  
11 used the weighted averages from both studies, averaged  
12 them to come up with a full-year -- I mean, a full cost  
13 change -- and keep in mind, these are 2022 costs. These  
14 aren't 2028 costs. And then we are proposing that that  
15 full amount be put in again, half in the first year and  
16 then a third of that -- what's remaining the next three  
17 years. So it is gradual.

18 And what that -- what that does is basically,  
19 again, gives time for industry to adjust, when you are  
20 basically requiring makes to people making commodity  
21 cheese, which makes them lose money, they do need to be  
22 corrected and -- but we are trying to do it in a way that  
23 is reasoned. And I was very pleased our board strongly  
24 supported the gradual implementation. I thought that was  
25 a very good thing.

26 Q. I mean, the effect of that phase-in means that, on  
27 a weighted average basis, the industry -- the  
28 manufacturing industry is, essentially, going to be



1 continuing to suffer insufficient Make Allowances --

2 A. Yeah.

3 Q. -- for another four-plus years, right?

4 A. And it wouldn't be honest to say everybody thought  
5 that was a great idea, but the strong consensus was it was  
6 a more reasonable approach, so we adopted it.

7 Q. Okay. Now, there has -- and let me just -- the  
8 survey here is as of 2022, correct?

9 A. Yes.

10 Q. That's the Stephenson survey --

11 A. Yes.

12 Q. -- 2022 costs?

13 A. Yes.

14 Q. I mean, although inflation has come down somewhat  
15 in 2023, we still are suffering from inflation, correct?

16 A. Oh, heavens, yeah. I mean, energy has certainly  
17 come back a little bit, but a lot of the other costs are  
18 still actually going up.

19 Q. Okay. So I mean, you would have to actually enter  
20 into a deflationary period in order for there to be any  
21 risk that the 2022-based Make Allowances are too high,  
22 correct?

23 A. Yes. And historically that simply hasn't happened  
24 in modern times with manufacturing costs.

25 Q. And, indeed, the fact you are phasing it in over  
26 time and you won't hit your full proposed Make Allowances  
27 until January 1, 2028, which is, as I say, more than four  
28 years from now, I mean you would have to have real



1 deflation?

2 A. Yeah, you would. And as we look at what's  
3 happening, continuing with labor costs in particular,  
4 which are a huge part of this growth in costs, if you look  
5 at Mark's numbers, that would -- that's -- generally we  
6 don't go backwards on labor costs. They just continue to  
7 go up. It is just the rate of change moves around.

8 Q. Have you read that the automobile manufacturers  
9 are now -- their workforce has gone on strike asking for a  
10 30-plus percent increase in their labor rates over four  
11 years?

12 A. You can't listen to the morning radio and not know  
13 that. It is all over the place.

14 Q. Yeah. And -- and the manufacturers have countered  
15 at 20%, I think is their number.

16 A. Yes.

17 Q. You are aware of that?

18 A. Yes.

19 Q. And no one's asking for a material decrease in  
20 labor costs; is that fair?

21 A. No, they are not.

22 Q. All right. So page 25, please. Let's talk about  
23 the notion that, well, we should wait for mandatory  
24 audits.

25 A. Well, IDFA has put a clause in their proposal that  
26 basically says if that mandated audit is approved and  
27 completed ahead of the four years schedule, we would  
28 recommend support that those numbers be implemented when



1 they are ready so that we could move to that when it  
2 became -- became -- when it became available.

3 That -- that's ambitious. I don't want to say  
4 it's not possible. We'll talk about that in a minute, the  
5 steps.

6 But National Milk isn't near as specific. In  
7 fact, we have had testimony that basically says that, you  
8 know, over a certain percent we're not going to support,  
9 even if there are audited surveys, which is a little  
10 troubling.

11 And so basically, we would stay at their  
12 negotiated levels, if that was adopted by USDA, with no  
13 change possible until there was that mandated survey  
14 completed, which as we know with our current Congress, it  
15 seems logical, it has very broad support, both farm  
16 groups, co-ops, and IDFA are all supporting that, but that  
17 doesn't mean it's going to happen. And so there's a --  
18 there's a -- I think there's a real concern that -- that  
19 we won't get it done in time to -- to be effective.

20 Q. All right. And if we turn to page 26 and 27, do  
21 you list some of the steps that would have to be completed  
22 before one would actually be in a position -- USDA would  
23 be in a position to impose Make Allowances based upon  
24 mandatory audited surveys?

25 A. Yes. And thank you to USDA for a very good  
26 brochure on the steps for Federal Order changes because I  
27 think everybody's used those, and this takes care of some  
28 that too. Although the first few steps aren't actually



1 part of that.

2 First of all, you have Congress enacts  
3 legislation. There's still ambition of having a Farm Bill  
4 done by December, but there's always ambition for a Farm  
5 Bill to be done by December of the Farm Bill year, and it  
6 rarely happens. We'll just have to see.

7 And then once that -- the enabling legislation is  
8 in there and the funding, USDA has to promulgate or  
9 develop the regulations through which such a survey is  
10 carried out and the authority how they would use it. They  
11 have to devise the survey, conduct the survey, audit the  
12 results, and publish the results.

13 Q. Now, let me just pause you there. I mean, this  
14 survey would potentially cover companies that have never  
15 participated in such a cost of production survey; is that  
16 correct?

17 A. Yeah, I think that's likely. In fact, it's  
18 absolutely -- well, if you look at the percentage of the  
19 coverage particularly, some of the products, yeah, you  
20 will have a lot that aren't currently in the survey.

21 Q. Okay.

22 A. And there may be limits on how small they have to  
23 go, all those kind of things. They are part of the  
24 rulemaking. But, yes, it will be broader than what we  
25 have seen so far. It will be more similar to California  
26 where most of the products was caught in their surveys in  
27 the past.

28 Q. Keep going, please.





1           A.     And then -- so after we do all that and then, we  
2 have the result, and then we start the rulemaking Federal  
3 Order hearing process.

4           Once that's the result -- when those results are  
5 out -- and, again, industry can petition USDA at any time  
6 on anything, but if they were to petition -- wait until  
7 that survey to be done, then you would start the more  
8 classic hearing process where they would petition USDA,  
9 hold hearings to raise Make Allowances to reflect the new  
10 survey.

11           And this next page looks very familiar to  
12 everybody in this room. It is that you -- when you --  
13 there's a process that USDA follows for a survey -- I  
14 mean, for a Federal Order Reform at AMS, and these are  
15 kind of the Cliff Notes of what those -- what those  
16 summaries -- those decisions are.

17           And as we look at our timeclock for this hearing  
18 today, albeit this is not as complicated as the one we  
19 have on the many issues we're covering, it would be a  
20 significant amount of time.

21           So, for example, if you were to get the survey  
22 completed -- say -- say, they did complete the survey by  
23 2028, which would be admirable because it's a complex job.  
24 It would likely be a year and a half to years before  
25 anything would be implemented based on the time it  
26 normally takes, by the time people petition for a normal  
27 hearing. So we could be five, six, seven years -- I would  
28 say five out from where we are now.



1 Q. And even if things move faster, even if it could  
2 get done, let's say, by 2017, or some time in 2017, you  
3 still would, under the National Milk proposal, be living  
4 under, admittedly, lower than actual cost to manufacture  
5 Make Allowances for all of 2025, all of 2026, into 2027,  
6 correct?

7 A. Yeah. And if you think of the National Milk  
8 levels, let's take cheese for a simple example, their  
9 proposal is actually below the California number from the  
10 actual survey from 2016.

11 Q. Okay. Let's just make clear about that. National  
12 Milk's proposed --

13 A. Is \$0.24.

14 Q. Okay.

15 A. CDFA survey was \$0.245 in '16.

16 Q. In 2016?

17 A. Yes. And so those levels are -- are teens levels,  
18 someplace in the mid to late teens, that's our estimate  
19 what they would be. So you, again, could be ten years out  
20 before you got to contemporary numbers, if -- you know,  
21 assuming how quick things can get done and the hearing  
22 process can take place.

23 Q. Okay. If we turn to page 28, you have made  
24 reference a couple of times to the concern whether even if  
25 we had audited mandatory surveys that USDA would simply be  
26 able to implement those without a major disputed hearing.

27 And what's your view about that?

28 A. Well, the view is under current rules, they



1 probably can't, it would have to be enabled, probably  
2 through statute or through some other process. I don't  
3 pretend to be an expert on how you do rulemaking on  
4 rulemaking but --

5 Q. Right now the assumption is you have to go through  
6 an order --

7 A. Yeah, it would be -- it would be the classic  
8 formal hearing is -- maybe emergency, but it would be  
9 formal hearing. That would be our best estimate.

10 Q. Okay.

11 A. And what we -- what we heard, which is a little  
12 troubling, was "even if credible and reliable information  
13 regarding costs of manufacture existed, and it suggested a  
14 Make Allowance change of more than a few cents per pound,  
15 we would be restrained from advocating for the full  
16 implementation of the change due to the impact on milk  
17 prices and profitability of our farmer-owners." And that  
18 was Ed Gallagher from DFA's testimony earlier this last  
19 week actually.

20 Q. Okay. Now, if you turn to page 29. Is the notion  
21 that Make Allowances have gotten out of kilter with  
22 reality a brand new subject?

23 A. No, it's not. There's -- we all know -- 2020  
24 changed everything as far as progress, but we have known  
25 that. The CDFA surveys in general have shown increases in  
26 costs on all commodities. Certainly Mark's study in 2019  
27 did that as well, although the allocations and maybe some  
28 sampling caused some strange numbers. In 2022, of course,



1 he just did that one, showed it again. We also see it in  
2 that -- and the most empirical evidence is basically the  
3 gap between mailbox prices and announced prices,  
4 particularly when you adjust for component levels of milk,  
5 which we have through Federal Orders. We can estimate  
6 what those are.

7 We saw positives in some markets go to significant  
8 negatives, and even though we acknowledge hauling is part  
9 of those costs, the share of hauling of that increase,  
10 between 30% hauling, and you are seeing a dollar and some  
11 change in some cases, doesn't begin to cover it. And  
12 that' simply because there's less -- there's less dollars  
13 able to pay premiums for milk than there was in the past  
14 because the Make Allowances are out of line with real  
15 costs.

16 Q. Okay. And turn to the last page, please. Just  
17 read that one, if you would.

18 A. "The long-needed update to inadequate  
19 Make Allowances cannot be delayed any longer."

20 MR. ROSENBAUM: Your Honor, Mr. Brown is available  
21 for cross-examination.

22 THE COURT: Who has questions for this witness  
23 other than AMS?

24 Mr. Miltner.

25 CROSS-EXAMINATION

26 BY MR. MILTNER:

27 Q. Good morning, Mr. Brown.

28 A. Good morning.



1 Q. Ryan Miltner representing Select Milk Producers.  
2 I wanted to start with your IDFA Exhibit 6,  
3 Exhibit 214, your full statement.

4 A. Okay.

5 Q. And I'm looking at page 3. You give this example  
6 of a cheddar cheese sale at \$2 a pound, with manufacturing  
7 costs of \$0.28 per pound. And we have had these  
8 discussions with other witnesses on the stand. Similar  
9 examples were presented, right?

10 A. Yes.

11 Q. I don't know that you have been asked these  
12 questions, so I just want to make sure we have the same  
13 understanding.

14 If this manufacturing plant has actual  
15 manufacturing costs that are at all different from those  
16 that are incorporated in the Make Allowance formulas, your  
17 further analysis about the profitability of this plant  
18 would change, would it not?

19 A. Yes.

20 Q. Similarly, if this plant had different yields of  
21 products than were assumed in the Federal Formulas, this  
22 analysis would probably change as well, correct?

23 A. Yes. But not a lot, but it could change. You  
24 know, an average is an average. A milk plant is going to  
25 be the average. That's what we have to work with.

26 Q. Yeah. And really, there probably is no plant  
27 that's exactly average, correct?

28 A. No.



1 Q. So all of the statements that you make that say  
2 that, you know, plants are guaranteed to lose money or  
3 that they absolutely can't make a profit, we can't ascribe  
4 that to any particular plant, can we?

5 A. No. But on the average we can because we have  
6 average cost data, and we know what the NDPSR surveys  
7 show. And so if you are making a commodity products,  
8 that's -- that's what you are -- that's what your margin  
9 will be.

10 We heard some testimony last week of people who  
11 have done some value add to help counter that,  
12 particularly from Nasonville up in Wisconsin did an  
13 excellent job explaining how they try to work with that.

14 But on the average, it is true. And, again, that  
15 gets down to what's our idea of our pricing. I mean, USDA  
16 in 2008, took weighted average costs. We're recommending  
17 the same thing again. And we're recommending that because  
18 we recognize that we can't -- we don't expect that price  
19 to keep everyone in business because there would  
20 probably -- the make would have to be very high. And no  
21 one -- no one that I know thinks that's the right  
22 solution.

23 Q. Right. And so you said on the average, your  
24 statements about profit and loss are -- are -- you stand  
25 by those, correct?

26 A. Yes.

27 Q. But even if we're looking at the average, if a  
28 plant has average manufacturing costs, that doesn't



1 necessarily mean that same plant has average sales prices,  
2 right?

3 A. No. But NDPSR, of course, collects commodity  
4 cheddar. In my experience, buying commodity cheddar,  
5 there's not much difference if you are buying a short-hold  
6 fresh cheddar 40-pound block, or even a 640, from those  
7 averages. I mean, they all -- most of them use CME.  
8 There's some that use NDPSR to determine that price. But  
9 they are remarkably close. If you are a volume buyer,  
10 they are remarkably close. And I have some experience  
11 with that, buying and selling honestly.

12 Q. Within a few pennies you would say?

13 A. Yes. Yes, definitely.

14 Q. You mentioned Nasonville. I think, if I'm  
15 remembering correctly, they testified that they -- their  
16 diversification of products isn't exactly a new thing for  
17 them, correct?

18 A. Oh, no. And pretty typical for your Wisconsin  
19 family-owned cheese makers. I think that they have  
20 diversified their product.

21 Q. And I think for them, their diversification even  
22 predated USDA's adoption of end-product pricing, correct?

23 A. Yes. They have been in that business for a long  
24 time.

25 Q. So at least for them, their diversification of  
26 products really couldn't tie that to any Make Allowance at  
27 any point in time, could you?

28 A. You couldn't. But you also have to acknowledge



1 that those products are made on demand. They're made by  
2 order. You have that wall of milk, so you are going to  
3 make cheddar, commodity cheddar even. I mean, they make  
4 some retail cheddar as well. So that's always going to be  
5 part of their business, and so that does affect their  
6 profitability, because it's 42% of their cheese, I think  
7 they said, was commodity cheddar.

8 Q. Okay. And a lot of that ended up being  
9 cut-and-wrap, too, correct?

10 A. Part of it. But a lot of their cheddar -- like  
11 cheddar for aging, if you go to their website, they put  
12 every insertion you can think of in a pound of cheddar  
13 cheese. Some of it does. But what's your opportunity  
14 cost in that? That's the other question you have to ask,  
15 too. You can go buy that cheese, and a lot of those  
16 plants do -- will buy outside cheese to supplement if they  
17 have strong orders for their specialty products. That  
18 commodity cheddar market short hold for fresh cheddar is a  
19 buy/sell market. And everybody knows who makes a product  
20 like they like, and they will work -- and they will work  
21 with that.

22 The other thing is, is his cost of production. If  
23 you looked at what he put together on his cheddar relative  
24 to his specialty cheeses and how the costs are allocated,  
25 the cheddar takes a much lower share as a percentage of  
26 cheese made than his other products. Those other products  
27 are more expensive to make.

28 Q. And presumably -- well, not even presumably --





1 they actually have a very different cost structure and  
2 sales structure?

3 A. Yeah. They do their best to reflect that,  
4 obviously, out of the market. You are correct.

5 Q. On page 5 of your written statement there's a  
6 statement about "if the formulas overestimate how much  
7 finished product is being obtained from a quantity of raw  
8 milk," that section there.

9 You or IDFA, you are not offering any other  
10 statement in here about yields, right?

11 A. We don't have any data --

12 Q. Okay.

13 A. -- to support a change in yields at this time. I  
14 think we're hoping that USDA will get that job as well as  
15 the Make Allowance when they move forward with the audited  
16 hearing.

17 (Court Reporter clarification.)

18 BY MR. MILTNER:

19 Q. So, again, at the top of page 7 you have got a --  
20 in the first sentence, again, you refer to "forcing  
21 manufacturers to lose money on every pound."

22 Just, again, a question that's been asked of  
23 others, but you have repeated this statement. No  
24 Class III or Class IV manufacturer is forced to  
25 participate in the Federal Order system, correct?

26 A. That is correct.

27 Q. So I mean, there would be economic reasons why  
28 they might or might not participate, correct?



1 A. There is, but there's economic reasons why they  
2 need to if they are in a market with significant Class I  
3 to be competitive and buy milk.

4 Q. They are not forced to lose money on every pound  
5 of dairy product produced, are they?

6 A. No. Some of them just leave.

7 Q. Some do.

8 A. And then we have more milk than we can fit in the  
9 plants.

10 Q. It's similar to how farmers, some of them just  
11 have to leave, don't they?

12 A. Yes, that's correct.

13 Q. Economics work on both sides of the buy/sell --

14 A. They do. And there's lots of reasons for those  
15 exits, we know that, too.

16 Q. Correct.

17 A. We have all experienced that.

18 Q. At the bottom of page 7, and this is when I need  
19 some help understanding. The second sentence of the final  
20 paragraph: "Cooperative associations will pass on to  
21 their milk producer members, or put to other business  
22 uses, all of the wholesale sales value of dairy products  
23 in excess of that needed to cover the total cost of  
24 manufacturing."

25 What do you mean to convey with that sentence?

26 A. When I mean is that the real costs of your total  
27 product value, what you can sell, whatever it is, added  
28 value or commodity, less what it costs to make it, is the



1 pool of money you have left to pay producers, maintain  
2 plants, invest into -- invest into further improvements or  
3 changes, or to, you know, retire as -- as an equity  
4 payment at the end of the year. That's the real dollar  
5 amount. There isn't -- that's what they have got, except  
6 for, of course, for any pool draw they may have, but that  
7 would be what they have to pay producers.

8 Q. And so is the argument or the conclusion you would  
9 like people to draw from this section, that if the -- if a  
10 cooperative that manufactures products has a lower, say  
11 Class III price, that the lower revenue from the sale of  
12 milk will be made up with higher value in the product sold  
13 from the plant?

14 A. No. What I'm saying is regardless of that  
15 relationship, they have options. I mean, if you are a  
16 proprietary plant and your plant is pooled, you have to  
17 pay the regulated minimum price to your producers. Now,  
18 we all know with depooling, that number can be a little  
19 weird, but what's what you are required to pay.

20 If you're a cooperative, you have options. And  
21 certainly, cooperatives strive to pay the producers as  
22 much as they possibly can. But they do have flexibility  
23 if they need it. And with any plant, whether you are a  
24 co-op or not, those -- that revenue that you get back from  
25 your sales and that costs, there is maintenance -- we know  
26 all those things, growth, product development, whatever it  
27 may be. That's -- that's your capital that you have to  
28 pay producers, as well as all those other myriad of things



1 that a growing business tries to do.

2 Q. Does that analysis work equally for a cooperative  
3 like Prairie Farms that is predominantly Class I?

4 A. Not -- well, yes, actually it does. Because  
5 you -- same thing, you have got receipts from sales or  
6 whatever you make. You have a requirement both to the  
7 pool and to your producers and what they will be paid, and  
8 after you pay your pool, your pool requirement, what you  
9 have left is to reinvest, market, repairs, maintenance,  
10 and then also to -- to obviously pay your producers. So  
11 it is really not that different except the Class I's  
12 mandatory, you don't have an option not to be pooled.

13 Q. Does it also work for a cooperative that might be  
14 relatively smaller, that is a true milk marketing  
15 cooperative selling all of its producer milk to plants  
16 that are not cooperative owned?

17 A. They have the same -- they have the same -- it's a  
18 little different, because they don't have plants to  
19 reinvest in. But from the standpoint, you know, what you  
20 get, what it costs to deliver it, is what you have left is  
21 what you are going to pay your producers, whether you are  
22 a cooperative or not. That's the pool of money you have  
23 to work with or to grow your business or whatever else you  
24 feel that's the most important use of that money. And as  
25 we know, co-ops have different strategies in how to best  
26 allocate that and how to reinvest in their business.

27 Q. For that co-op that I just described, would you  
28 expect them to recover from the marketplace the income



1 that is lost if the formula prices are reduced?

2 A. Let's take the other side. How about the ones  
3 that have invested tens and hundreds of millions dollars  
4 in plants who can't cover their costs and they have that  
5 investment in a fixed asset that they are struggling to  
6 make a margin on? Some of those plants, as we know in the  
7 co-op world, are very large commodity plants.

8 So my question is -- look at reblends. There's  
9 all kinds of deals. Most manufacturing plants are not  
10 pooled. The milk may be pooled, but the plant isn't. So  
11 there's a lot of flexibility on how that milk is moved  
12 into that plant.

13 The second thing is, is we seem to have extra  
14 milk. We have supply management programs pretty much  
15 across the country. So we're basically telling our  
16 dairymen, well, you can't grow, and so hopefully you can  
17 get a margin that's going to work for you. We're not  
18 giving them an alternative right now because of lack of  
19 plant capacity to do that growth, which we know most of  
20 our dairymen want to do.

21 So it's not as simple as price. It simply is not  
22 as simple as price. And price will take care of it over  
23 time. If you look at farm exits, what you really see, if  
24 margins get tight on the farm, farm exits don't change  
25 near as much as growth slows down. That's been true for  
26 four years, and I think that will continue to be the case.

27 And so talking about a make when a make is a very  
28 small portion of the total value of that milk and the



1 products, we're giving it a little too much -- a little  
2 too much credit, I think.

3 Q. Usually someone doesn't preface the answer with  
4 I'm going to answer a different question or state a  
5 different question, they just divert it. So I appreciate  
6 all you said.

7 But for the co-op that doesn't own any  
8 manufacturing plants and is purely a milk marketing co-op,  
9 is it your testimony that you expect them to receive from  
10 the marketplace income to offset the reductions in the  
11 minimum prices?

12 A. No. Because the minimum prices are too high.

13 Q. Okay.

14 A. That's why we have gone to our challenge with  
15 negative -- negative prices relative to -- to blends in  
16 many markets.

17 Q. Thanks.

18 A. I admire co-ops that invest in plants and grow for  
19 their producers, and I know it's not easy, and we don't  
20 need to make it harder for those. And that's the future.

21 Q. And it's extraordinarily expensive, correct?

22 A. Oh, goodness, yes.

23 Q. And I think I have -- I mean, per load of daily  
24 milk coming into the plant, millions of dollars per load  
25 of capacity, right?

26 A. Yes, absolutely. Yes, it's a -- it's a -- it's a  
27 commitment for sure. Both of the cooperative's employees  
28 as well as its member-owners. It's a big commitment.



1 Q. Do you recall any witness who has testified as a  
2 processor, who only produces those commodities surveyed in  
3 the NDPSR?

4 A. No. It's completely that, no.

5 Q. And so to gauge the profitability of a plant, you  
6 would have to truly look at its entire operations,  
7 correct?

8 A. Yes.

9 Q. A plant that manufactures multiple products, you  
10 might be able to allocate costs and revenues and estimate  
11 the profitability of each individual product line,  
12 wouldn't you?

13 A. If you have got good accountants, you should be  
14 able to, yes.

15 Q. But the profitability of that enterprise is a  
16 function of each of those individual products produced,  
17 correct?

18 A. I'm going to give you a but. Yes. But those  
19 products are all paid off -- are sold, if you are talking  
20 American-style cheeses, off the same commodity market.  
21 And so the opportunity to add value on large bulk  
22 commodities of any type, whether it's cheddar or Monterey  
23 Jack, or whatever that product may be, is difficult,  
24 because everybody has that same -- all the suppliers are  
25 looking at it the same way.

26 And I'll use Jack as an example. Monterey Jack is  
27 a little higher moisture than cheddar, a little lower fat,  
28 so its ingredients cost are a little bit lower. So you



1 think of it as a specialty, it's not. Of course, there's  
2 so much of it sold these days. In fact, at Kroger, the  
3 Mexican blend, which is Jack, cheddar, and the Asiago --  
4 not Asiago --

5 Q. Asadero.

6 A. Yeah, thank you.

7 (Court Reporter clarification.)

8 BY MR. MILTNER:

9 Q. Asadero.

10 A. Asadero. I'm too German-Irish for that word.

11 They -- those costs are -- they are all  
12 calculated. And a good buyer knows that there's more  
13 moisture and less fat, and they are going to negotiate  
14 that price with the same commodity mentality as you do  
15 with a cheddar because there's someone willing to make it  
16 for you.

17 Q. And, again -- I mean, it sounds like I'm  
18 belaboring the point, but since you brought up those  
19 cheeses, those cheeses have different costs of  
20 manufacturing, correct?

21 A. Yes. Although they are very similar.

22 Q. Similar but different, correct?

23 A. Yes, that is correct.

24 Q. And the sales price pegged to a commodity, perhaps  
25 similar, but not identical, correct?

26 A. That is correct.

27 Q. And I don't know, but I presume Jack cheese has a  
28 somewhat different yield profile than cheddar, similar but





1 different?

2 A. Yes, because it's a little higher moisture.

3 Q. Thank you.

4 On page 10 now of your written statement, again,  
5 there's a statement here that I think is a little more  
6 absolute than maybe I would think it should be.

7 "No one thinks the current manufacturing  
8 allowances remotely reflect current manufacturing costs."

9 Now, I don't recall perhaps exactly who said it,  
10 but I think there has been some testimony from some  
11 processors that they might even be producing some products  
12 at costs lower than the current Make Allowances.

13 A. Proposed, yes. Current, I'm not so confident  
14 that's true.

15 Q. Okay. In your direct examination with  
16 Mr. Rosenbaum you stated that -- something along the lines  
17 of there would have to be deflation for there to be any  
18 risk of Make Allowances reaching the levels reported in  
19 2022.

20 Does that sound correct, or am I misstating what  
21 you were answering?

22 A. A little bit -- I meant a little different, so let  
23 me give my clarification.

24 What I'm saying is that when you look at plant  
25 input costs, the one cost that seems to vary the most is  
26 no surprise to anyone, is energy. And there's several  
27 reasons for that. One is some people use forward buys on  
28 energy, and sometimes those look smart, sometimes they



1 don't look so smart.

2 But if you look at core -- kind of like production  
3 per cow. You know, it always seems to go up. Your core  
4 costs outside of energy tend to be in a rising curve.  
5 They can bounce around a little bit, but they tend to be  
6 on a rising curve. And that's been my experience my  
7 entire career, that they just continue to creep up. You  
8 do what you can to avoid it. Sometimes you can counter  
9 that. That's one of the reasons that Bill Schiek used the  
10 productivity factor in his projections. But a lot of  
11 time, there's only -- only so much blood to squeeze out of  
12 that turnip, and you -- you accept your costs are going  
13 up. And that's I think what we saw particularly the last  
14 few years.

15 Q. So when you were referring to the 2022 costs, were  
16 you referring to those specifically contained in any of  
17 the economic reports here or just generally to 2022 costs?

18 A. You could almost make it general, but certainly  
19 both the Schiek and Stephenson studies, so significant  
20 cost increase. But if you look at trend, particularly  
21 with Schiek's study, because it's easier to do because it  
22 is a projection, energy is the one thing that bounces  
23 around, and the energy was the one factor that had the  
24 lowest correlation with -- with the trend. It's just  
25 because it does bounce.

26 Other things -- it's amazing how things do follow  
27 trends over time. Sometimes I wonder when I do a big  
28 analysis why I wasted my time because trend gave me almost



1 the same accuracy as the analysis did. Maybe I'm just a  
2 bad economist that doesn't know how to use Excel. That  
3 could be it, too.

4 Q. Let the record reflect he's just admitted he's a  
5 bad economist.

6 A. I have a degree in cow milking, Ryan.

7 MR. MILTNER: Your Honor, I have gone through the  
8 questions I have from his written statement. I have  
9 questions from his presentation. I'm happy to proceed,  
10 but it's 9:20, and if the court reporter would like a  
11 break, this would be a good spot for me.

12 THE COURT: Yes. We have been going about an hour  
13 and 25 minutes. Let's -- let's come back at 9:30 --  
14 actually, 9:35.

15 (Whereupon, a break was taken.)

16 THE COURT: Back on the record.

17 BY MR. MILTNER:

18 Q. Mr. Brown, I'm now looking at the printout of the  
19 PowerPoint slides you presented, Exhibit 215. And I just  
20 want to make sure this is clear.

21 On slide 5.

22 A. Okay.

23 Q. At the bottom of the quote you present, you note  
24 this is from a brief.

25 A. Yes.

26 Q. Do you know if this -- if this brief was the brief  
27 before the District Court or the Court of Appeals in that  
28 case?



1 A. Oh, boy. I don't.

2 Q. Do you know if this was -- I think it says here,  
3 this is the 2008 Make Allowance announcement --

4 A. Yes.

5 Q. -- not the 2007 Make Allowance announcement?

6 A. Yes, that is correct. From what I understand,  
7 yes.

8 Q. You are aware there were lawsuits in both --  
9 following both changes?

10 A. There's always lawsuits.

11 Q. Always lawsuits.

12 A. Don't know the details, but I know there were,  
13 yes. Thankfully, I wasn't involved with those.

14 Q. Is it fair to characterize this statement here as  
15 the statements of counsel for USDA and not a statement of  
16 AMS itself?

17 A. It's a brief from USDA DOJ, isn't it?

18 Q. I don't know.

19 A. If you read, the attribution is it's a brief from  
20 USDA DOJ -- oh, excuse me. Yeah, I honestly -- I don't  
21 know. I just know the second -- the next slide kind of  
22 walks through what they did.

23 Q. Okay. So --

24 A. Again, having me read legal stuff is like having  
25 you read cheese recipes probably, so it's not my strength.  
26 I won't pretend it is.

27 Q. That's fair.

28 So on the next slide, which you just referred to,



1 this is -- is this the statement of the Court then on  
2 this --

3 A. This is from the decision, I believe. Yes.

4 Q. Okay. So it's the Court's decision --

5 A. Yes.

6 Q. -- separate from USDA's regulatory decision?

7 A. Right. This is the response back, you might kind  
8 of say, I guess.

9 Q. I'm now looking at page, slide 11.

10 A. Okay.

11 Q. In the final column, I understand the numbers  
12 there represent a fraction where the numerator is the  
13 total survey annual production number.

14 A. Correct.

15 Q. And the denominator is USDA NASS annual production  
16 number.

17 A. Yes.

18 Q. We can look up the definition, so I don't want to  
19 belabor this too much, but what is your understanding of  
20 what is included in that category of cheddar cheese for  
21 NASS's data?

22 A. All cheddar. Basically, if it's a cheddar,  
23 barrel, block, cheddar for aging, it would all be part of  
24 that number.

25 Q. And do you believe that all cheddar has a similar  
26 manufacturing cost?

27 A. Except for if you're making like a cheddar for  
28 aging, because it's low in moisture, higher fat, so it



1 costs more, and it's usually a slower make process. But  
2 the bulk of cheddar is made in a very, very similar  
3 process. It may be different types of equipment, but the  
4 process is very similar.

5 Q. Okay. Well, the process might be similar, but is  
6 the manufacturing cost similar?

7 A. Depends on the plant. I mean, that's -- you know,  
8 Mark talked about that. But, yeah, it depends on the  
9 plant and their efficiency. And older plants generally  
10 are less labor efficient, for example; newer ones tend to  
11 have more debt. So I mean, it's just like with farming,  
12 there's those trade-offs. So there is variation, yes.

13 Q. If a reasonably efficient plant is manufacturing a  
14 500-pound barrel and a reasonably efficient plant is  
15 manufacturing a 40-pound block, would you expect their  
16 manufacturing costs to be similar?

17 A. The biggest difference would be packaging.

18 Q. What about between 640-pound blocks and 500-pound  
19 barrels?

20 A. Same thing. It's mostly packaging. A lot of  
21 plants can make either. You just run the curd to a  
22 different packaging line.

23 Q. Now, NASS used to survey the prices used in the  
24 formulas, correct?

25 A. That is correct. I remember that.

26 Q. And it's no longer NASS, correct?

27 A. That is also correct.

28 Q. So the percentage you have here is, to be clear,



1 not the percentage of cheese surveyed or -- yeah, not the  
2 percentage of cheese surveyed that's in the current NDPSR  
3 report, correct?

4 A. That is -- that is correct, yes. This is just  
5 total production of cheddar.

6 Q. Do you have an estimate as to what percentage of  
7 NDPSR production volume was surveyed by Dr. Stephenson?

8 A. I don't. But based on his average plant size,  
9 which is over double what it was last time, I expect he  
10 has a lot of those larger, more efficient plants. But I  
11 don't even know who sells -- who NDPSR -- I mean, I know  
12 who they survey because I know at Glanbia we participated  
13 in those surveys, and if the cheese met the spec, you  
14 surveyed.

15 In fact, when NDPSR took it over, it got much  
16 better because the -- the auditors knew what they were  
17 looking for, and so it was easier, when you called to ask  
18 do I report this or not, you actually got an answer. It  
19 really helped.

20 But it's -- it's fairly small. And that's, again,  
21 because of the spec, and a lot of it's the timing. It's  
22 the days that causes issues with the cheese is reported or  
23 not.

24 Q. Well, it's also the size of the particular  
25 commodity obviously --

26 A. Yeah. 640s and 40s are probably roughly the same  
27 in total pounds. That's kind of the rule of thumb  
28 everybody uses. We could all be lying to each other, but



1 that's what we all think.

2 There's a couple of people that have formally  
3 survey in the industry, so we know it's roughly a third, a  
4 third of those two.

5 Q. Similarly, I think you answered specifically for  
6 cheese, but do you have any information about the  
7 percentage of NDPSR volume that's encompassed in  
8 Dr. Stephenson's surveys for any other commodities?

9 A. I do not. And that information wasn't gathered,  
10 so I doubt he does, either.

11 Q. I'm going to look at slide 15, please.

12 A. Okay.

13 Q. You -- you were discussing the slide with  
14 Mr. Rosenbaum, and you made a reference to the data for  
15 cheese plants being skewed.

16 Do you recall that?

17 A. Yes.

18 Q. Can you -- can you elaborate a little bit on what  
19 you meant by that?

20 A. Well, I had it backwards, but the -- what you have  
21 in California is, again, one large plant and a bunch of  
22 smaller ones, so there's a lot of diversity in costs  
23 according to -- I don't know that because CDFA has four  
24 cheddar plants that they surveyed the last few years for  
25 costs. I just have worked with all of them, so I know  
26 kind of how big they are or they are not. And one is  
27 very, very large; the others aren't tiny, but they aren't  
28 large plants.





1           So there were two other larger plants in  
2 California, and they both closed, so they were no longer  
3 part of that cost survey.

4           Q.    So do you believe that there's anything skewed in  
5 this --

6           A.    Not really.

7           Q.    -- in this table?

8           A.    That was an error on my part.

9           Q.    May I characterize your previous testimony as  
10 supportive of and confident in the numbers reported by  
11 Dr. Stephenson and Dr. Schiek?

12          A.    Of anything that's available, yes.  That's the  
13 best data we have.

14          Q.    Yet, if I look at -- I'm, again, on slide 15, the  
15 second data box -- which this is just butter, correct?

16          A.    Yes.

17          Q.    To what do you attribute the difference between  
18 Dr. Schiek's numbers and Dr. Stephenson's numbers?

19          A.    California has always had -- again, we had the  
20 correction in the butter make in 2008.  California's had  
21 significantly lower butter costs because you probably  
22 have -- I don't want to give anybody a big head -- two of  
23 the very best butter makers in the country in California,  
24 and they are both very large.  I believe this is from 10  
25 or 11 plants that are in that data, but they truly did --  
26 they did -- those two plants were the -- by far the bulk  
27 of the butter.  So they are less expensive.  The  
28 methodology is the same, and the questions are the same.



1           So I -- I would expect that that is the reasoning  
2 behind it. I just know that if you want efficiently  
3 produced butter, California's got it, you just got to  
4 figure out a way to get it transported back east so you  
5 can still afford it, because the transportation is their  
6 biggest challenge.

7           Q. On slide 16 you referred to in discussion the idea  
8 of using the weighted average of Dr. Schiek's study and  
9 Dr. Stephenson's study for --

10          A. Within the study, they are weighted averages.

11          Q. So that was what I was kind of getting at.

12          A. I think I know where you are going.

13          Q. When IDFA melded those studies together, explain  
14 for us what the intention was and what you believe that  
15 that then represents.

16          A. We meld -- well, we didn't meld them together.  
17 And the -- the point -- and, again, when we were doing  
18 this, we looked back at what other decisions had been and  
19 USDA evaluated the information and picked what they  
20 thought was the best information. We expect that could  
21 well happen again. That's what Proposal 22 is all about,  
22 make it work.

23                 We felt for simplicity sake it was the easiest way  
24 to do it. We do have volumes on Schiek's historical data,  
25 and Mark's, so it could be weighted if someone decided  
26 they wanted to do that, and all of those numbers are in  
27 the hearing record. They are not in my testimony, but  
28 they are in the hearing record.



1 Q. Throughout your testimony, and I think it was  
2 probably more in your written statement than your  
3 presentation, is it fair that to say that you have argued  
4 that there's a consistency with IDFA's approach with the  
5 previous approaches employed by USDA?

6 A. Yes. And in not just decision, but the way it was  
7 presented, and then USDA, the way they made their decision  
8 weighing all the different opportunities or different  
9 methods that could be used. We think we are consistent.

10 What would be perfect, if we had California actual  
11 cost data. We don't, so we did the best that we could do  
12 to make use of that very robust set of information.

13 Q. And specifically with the California data, you're  
14 drawing an analogue between CDFA's audited cost studies  
15 and the work that Dr. Schiek has done to evaluate and  
16 model that data.

17 A. It's the best information we had. We wanted to  
18 have a check to Stephenson's survey. We thought it was  
19 important. And that was done earlier. That actually was  
20 started last fall, Schiek -- the Schiek study.

21 Q. And then with regard to Dr. Stephenson's study,  
22 you are drawing an analogue between his prior  
23 manufacturing cost reports and the reports he's since  
24 prepared, correct?

25 A. Yes, we do have some comparisons in this document.

26 Q. So just to draw a couple contrasts perhaps.

27 With respect to Dr. Stephenson's, do you recall  
28 him explaining the methodology for plant selection in his



1 2006 or 2007 report?

2 A. I honestly don't.

3 Q. Do you at all recall any discussion?

4 A. I know -- I know there was no California in it.  
5 But I don't -- I really -- I really don't. I read the  
6 results, but I -- I don't remember, quite honestly.

7 Q. Do you have any recollection of him doing a -- a  
8 random sample of plants to --

9 A. Yes. Yes, he did say that.

10 Q. Okay. And -- and the study that IDFA commissioned  
11 was not a random sample, correct?

12 A. No, but the average plant size is far above the  
13 average size of plants in each of the categories.

14 Q. It was not stratified to guarantee or attempt to  
15 get representation from plants across all sizes, was it?

16 A. No, it wasn't. It was voluntary.

17 Q. And so whereas USDA in prior decisions would have  
18 been relying on a report from Dr. Stephenson that was a  
19 random sample, this would be a difference if they were  
20 going to rely on this one, it wouldn't be exactly the same  
21 type of study, would it?

22 A. No, but it skews large. So if anything, it's  
23 probably -- if you assume that larger plants have lower  
24 costs, it would -- it would skew toward large plants.

25 The average cheddar plant is 3.2 million pounds of  
26 milk a day in that -- in that survey. If you look at the  
27 total number of plants and the total number of production,  
28 that's multiples of what the average cheddar production



1 is, so -- and that was -- that was intentional. We wanted  
2 to make very sure and we encouraged our membership to  
3 participate. We don't force them. And we don't even know  
4 all who did unless they told us because it is private.  
5 But we felt it was important that we get the large ones as  
6 well because they are a big part of the industry, and they  
7 need to be part of the survey.

8 Q. That's a great point you bring up.

9 There was a document introduced and given an  
10 exhibit number. We haven't admitted it yet. It was an  
11 e-mail from IDFA.

12 Did you happen to be in the room the day that was  
13 introduced?

14 A. I was listening in. It was colorful.

15 Q. Okay.

16 A. Which date is that one? Because there was  
17 actually three different letters that went out.

18 Q. You want me to get you one? You can look at it?

19 A. I can pull it up on my computer if I need to, but  
20 is that the -- just -- is that the one that has the  
21 April 14th deadline in it?

22 Q. It is.

23 A. That's the second one.

24 Q. Okay. So for the record, I'm looking at my copy  
25 of Exhibit 179. And it -- it basically is an e-mail from  
26 Michael Dykes to IDFA's membership, and it's asking them  
27 to participate in the study. Correct?

28 A. Yes.



1 Q. And did you receive a copy of this e-mail?

2 MR. ROSENBAUM: Your Honor, if I could, could I  
3 just pull out a copy?

4 THE COURT: Yes, I think we should.

5 THE WITNESS: Yes, I was copied on that e-mail.

6 MR. MILTNER: Thanks.

7 BY MR. MILTNER:

8 Q. Did you help draft the e-mail?

9 A. Yes. I helped. I didn't write it, but I did  
10 help, yes. I was -- I was the person that worked with  
11 Dr. Stephenson. I was the direct liaison to IDFA. It was  
12 me.

13 Q. Okay. Was this e-mail sent to all of IDFA's  
14 membership?

15 A. It was sent to all membership at this point. All  
16 three letters were sent in the time we had not had any  
17 change in membership yet. So all co-ops and known co-ops  
18 that had manufacturing plants got all three letters.

19 Q. Okay. And I'm not trying to get into --

20 A. Oh, no, I'm --

21 Q. -- members --

22 A. I'm just trying to clarify for you.

23 Q. Yeah. But it went to -- IDFA sent this to all of  
24 its members that were members at the time, right?

25 A. It was sent to boards, board members, and it was  
26 sent to specific plant people that -- in IDFA's database,  
27 we also have plants. And so if people made the four  
28 commodities, we just made sure they were copied on the



1 letter to their CEO or whatever their representative was.  
2 So in some cases the letter may have -- may have went to  
3 two people. Sometimes it went to three. Sometimes it  
4 only went to one.

5 Q. Do you know if IDFA sent this e-mail to any other  
6 manufacturers that weren't IDFA members?

7 A. We did not. It was pulled out of our own  
8 database.

9 Q. And do you know what kind of response rate IDFA  
10 had to this letter as far as --

11 A. I have no idea other than a couple called me who  
12 were having trouble getting ahold of Mark, so I -- Mark  
13 said, call these people. Otherwise, I don't even know who  
14 the final participants were unless they told me, or in  
15 this hearing we have heard a couple of people say they  
16 were participants.

17 We worked very hard to keep that wall. It was  
18 important that we -- that IDFA let mark do his work  
19 completely independent. All we did was ask our members to  
20 participate. And I believe the cheese makers did the same  
21 thing.

22 Q. Do you know how many different plants are  
23 represented in IDFA's membership?

24 A. Total plants?

25 Q. Yes.

26 A. I can't share that. I can share you that there's  
27 around 45 companies that got this letter. I don't know  
28 how many plants that represents. That's -- give or take,



1 that's roughly what it was.

2 Q. And you can't share because you don't know or  
3 that's not something you are permitted to share?

4 A. I don't know.

5 Q. Okay. Now, you told your membership with this  
6 e-mail that this data was going to be used to create or  
7 form a report for the purpose of setting Make Allowances,  
8 correct?

9 A. Because we were requested to provide that data.  
10 And so we worked hard to get our members to make sure we  
11 had a system. When you look at the 2021 results,  
12 particularly cheese was very weak. We knew we needed to  
13 get larger plants. We needed to get more of them just so  
14 that it was more representative of the industry, so -- but  
15 the letter went out to everyone. There was no personal  
16 selling on calls. It was all by e-mails. People called  
17 us and could ask questions, or a lot of them called Mark  
18 directly because that's what we preferred that they do.

19 But it was not -- there was no intention to skew  
20 anything. If we had, we would have had a lot more small  
21 plants than we did. We didn't have a lot of small plants  
22 in the survey, just based on the size of the average  
23 respondent being 3.2 million pounds of milk a day roughly.

24 Q. I think you said, "we were asked to provide that  
25 information."

26 "We" is IDFA?

27 A. IDFA. We were recommended to IDFA, if we are  
28 going to hold -- if we are going to request a hearing, do





1 whatever we can to get the very best possible data. And  
2 so we -- that's why we worked with Dr. Schiek and why we  
3 worked with Dr. Stephenson, because they are the two  
4 people in the industry -- Schiek is familiar with  
5 California for years, and Stephenson -- because of his  
6 expertise in surveys, we went to those two people. Plus  
7 USDA was familiar with Mark's survey process, and so we  
8 thought it was most suitable to use something that they  
9 already had some familiarity with. Plus I'm not sure who  
10 else in the industry would do it honestly.

11 Q. Okay. I just want to know, like you said "we were  
12 asked."

13 Was that the Department asking IDFA to do that?

14 A. The Department recommended that we do whatever we  
15 can to get the best data we can get. And we told them we  
16 would likely try to get -- we might try to get another  
17 survey, and they didn't say yes or no, but they certainly  
18 didn't say, don't waste your time. So we did it.

19 Q. Okay. So you made the decision at IDFA, we need  
20 to get some data to support the request we're asking for,  
21 but you didn't have to say in this e-mail, this is what  
22 we're going to use this data for? You could have simply  
23 asked plants to -- we're doing a report with  
24 Dr. Stephenson, can you participate?

25 A. If you went to a board meeting, you would kind of  
26 know what it was all about. I mean, that topic was -- I  
27 mean, and IDFA's structure, you have an economic policy  
28 committee where all policy starts, and then it moves to



1 the different boards. And so there was lots of  
2 discussion.

3 In fact, the economic policy committee is the one  
4 that approved the original Schiek study. And then they  
5 also approved an elasticity of milk study. You will hear  
6 more about that later. And then the study came out of  
7 meetings with USDA wondering if we could get a more robust  
8 sample of data. We figure the more information we have to  
9 present in the hearing, the more opportunities there are  
10 for people to find something they think would be workable.

11 Q. Once it is very clear to a plant what this data is  
12 going to be used for, if they believe they have lower  
13 costs than the average, what incentive would they have to  
14 participate in your study?

15 A. Because they are honest. Because they  
16 understand -- a lot of the plants with the lowest costs  
17 aren't even regulated. It's not in their best interest to  
18 even support this, but they are, because they think it is  
19 good for the overall health of the industry.

20 We have very large plants in that study, and the  
21 doubling of the average plant size from the last study  
22 kind of indicates that. And we explained to them the  
23 importance. And we also explained to them that sooner or  
24 later this is probably going to be an audited survey, so  
25 there's no sense pretending that you can put your head in  
26 the sand. Sooner or later you're going to be doing a  
27 survey we think when the Farm Bill -- I mean, that  
28 discussion was already taking place early in the year. I



1 know last year we had it on audited surveys.

2 So I don't think -- I'm not going to -- I'm  
3 offended that you would think our members would cheat. I  
4 don't believe that. They all hand it to the accountants  
5 to do it, and then they would turn it in.

6 Q. And I -- if you interpreted my question, as  
7 accusing anyone of cheating, I think you badly misheard  
8 it.

9 A. Well, I think -- I think that you are trying to  
10 make that connection. Keep in mind there's seven co-ops  
11 in that survey, and it's a huge amount of value. Just  
12 because of the products that were surveyed, we know who  
13 make them. And they admit -- and they admitted -- they  
14 acknowledged that they participated in the survey. So we  
15 had a lot of participation, both with current members and  
16 quite honestly with some former members that participated  
17 in the survey.

18 Q. So changing gears. You mentioned in response to  
19 one of my previous questions that you don't believe  
20 Dr. Stephenson's 2007 report included California plants,  
21 correct?

22 A. I believe it did not.

23 Q. Okay. Did his survey this time around include  
24 California plants?

25 A. I believe it does.

26 Q. Do you believe --

27 A. Yes, I know because Hilmar says they participated.  
28 So, yes, it does.



1 Q. Do you believe that there's any risk of  
2 overweighting California production if you simply average  
3 those two surveys together?

4 A. You could. You could. You would probably also  
5 have lower costs, although I have no way to know that.  
6 That's speculative.

7 Q. Can I ask some questions about slide 18, please.

8 Now, do you know what AMPI's cost to produce  
9 cheese was at the time the Make Allowances were last  
10 changed?

11 A. No.

12 Q. Do you know if it was higher or lower than the  
13 Make Allowance in the current formulas?

14 A. I do not know that -- all I know is the percent  
15 change from that period of time to current.

16 Q. And the same is true for Land O'Lakes and  
17 Darigold?

18 A. That is also true. I don't know their numbers. I  
19 just know what they -- what they talked about. In the  
20 Land O'Lakes, we calculated it based on the data that they  
21 provided in their testimony.

22 Q. So within Dr. Stephenson's 2006 report, the  
23 average for a low cost cheddar plant was \$0.1459. That --  
24 if you increased that by 47%, you would still be only  
25 slightly higher than the current Make Allowance, correct?

26 A. Yes. But this is not based on Stephenson's  
27 survey. This is based on the Make Allowances that were  
28 put in place in 2008. And if it is not labeled that way,



1 that is my mistake. No, I'm saying, because I apologize  
2 because it isn't quite clear.

3 Q. Okay.

4 A. Yeah. And we use -- on most of our comparisons we  
5 use the adopted Make Allowances because we thought that  
6 was most appropriate because that's what they have been  
7 using for regulation since 2008.

8 Q. I guess the point is that you don't know if you  
9 take whatever the base cost of manufacturing for these  
10 three entities was in 2008 and increase them by the  
11 percentage of their overall increase, you don't know what  
12 their cost is today, yet, do you?

13 A. No. You just know it went up. It is all  
14 percents. As you know, people were very careful of not  
15 sharing actual cost data for the most part.

16 Q. And you don't know whether that increased number  
17 more closely aligns with Proposal 7 or Proposal 8,  
18 correct?

19 A. Proposal 7 and 8 are the same.

20 Q. I'm sorry, am I getting --

21 A. 8 and 9 -- yeah, I guess you are right, 7 and 8.

22 We -- we don't. But where's the data behind the  
23 National Milk proposal other than they got in a room and  
24 discussed it? That's about right. We haven't seen any  
25 documentation. We have tried to do that. So I'm -- I --  
26 I don't know that.

27 On the other hand, both -- both -- both -- all  
28 three of the plants listed on that form have publicly



1 acknowledged they participated in the surveys, all three  
2 of those cooperatives, so we know that they're in it. I  
3 don't know who they are or where they are, but I know that  
4 they're all in the survey.

5 Q. And you don't know where they fall within the  
6 stratification --

7 A. No, I don't.

8 Q. -- of Dr. Stephenson's results?

9 A. No. No. I'm not supposed to know that, so I  
10 don't know it.

11 Q. On slide 19, are these actually Land O'Lakes'  
12 costs you represent here?

13 A. They listed the Stephenson costs. They listed the  
14 percent over Stephenson. And with those two pieces of  
15 information, you -- since we have the Stephenson cost, you  
16 can calculate what that actual amount was. So that's what  
17 we did. And they put all other costs together in that --  
18 what is called all other costs. And they assigned that  
19 equally across all milk solids, both fat, protein, and  
20 other solids.

21 Q. And the -- but there are still some holes in  
22 getting to the precise figure because of that blending of  
23 both the products and all other costs, right?

24 A. Well, if you assume those all other costs -- keep  
25 in mind what Mark said about his survey, is he didn't have  
26 detail on certain costs. What he did is he would -- he  
27 would -- he would -- he would blend average them.

28 So on a hundredweight basis or on an average cost



1 for butter and powder, we're confident these numbers  
2 are -- are actually quite accurate. Because you take the  
3 two costs they have defined, and then you add the \$0.10 or  
4 I guess it was \$0.11 addition on all other costs. And on  
5 powder, you take those processing, labor, and utility  
6 costs, you add that same other cost, which they spread  
7 equally across all product, to come up with a number.

8 And the price at the bottom is an aggregate  
9 because we don't know -- I didn't want to assume either,  
10 you know -- I had to assume that the \$0.1009 was across  
11 all. So I really wanted to look at it on a hundredweight  
12 average cost basis change, and to do that I used Federal  
13 Order yields on butter and on powder and came up with a --  
14 came up with an aggregate change. That's how that was  
15 calculated.

16 And I'll be honest with you, it was bigger than I  
17 thought it was going to be, too, and I worked on it for  
18 about 45 minutes to make sure it was right because that  
19 seems high. But it is not inconsistent with, for example,  
20 what Darigold had offered, so we just -- we -- were pretty  
21 confident that it is in the range of being right.

22 And Land O'Lakes had two plants in the survey.  
23 They had Carlisle, Pennsylvania, and Tulare, California,  
24 which he -- which Christian acknowledged. So I just -- I  
25 just kept that in math. It's more about the overall cost  
26 change than it is the actual number of cost, and that's  
27 the whole idea of this exercise, that they are -- and if  
28 you are efficient, which I assume they are, it's still a



1 big change.

2 Q. Is it your testimony that there is currently a  
3 lack of an appropriate financial incentive to reinvest,  
4 expand or build new plants?

5 A. Overall, yes.

6 Q. And that's your testimony despite the evidence  
7 that Glanbia has recently entered into -- or opened a  
8 joint venture plant at a cost of \$450 million plus?  
9 That's still your conclusion?

10 A. Yes.

11 Q. And despite --

12 A. You don't -- you can't assume that plants are  
13 buying milk on Class III. James made that very clear in  
14 his testimony.

15 Q. And --

16 A. Because those plants aren't pooled, so there's  
17 lots of flexibility.

18 Q. And he also said we're not going to talk about  
19 specific business agreements --

20 A. Right.

21 Q. -- and I will honor that.

22 A. Yep. I just quoted him, by the way, on the plants  
23 aren't pooled, he said that.

24 Q. But as far as that you can't say that they are  
25 buying above or below Class III?

26 A. I don't know that. I just know that there's a lot  
27 of flexibility. He did say that, those contracts are  
28 flexible. They have to be, because you got to make a





1 plant pay for itself.

2 Q. You have not seen those contracts, have you?

3 A. Oh, no. Of course not.

4 Q. The --

5 A. I didn't see them when I worked there. They keep  
6 those pretty private.

7 Q. And that's still your testimony even though  
8 Hilmar's doing a \$600 million plant?

9 A. Yep. And what did they talk about pooling? What  
10 did they say? They said they had no plans at this time to  
11 pool, that they worked out contracts with producers in  
12 order to make the plant work, and if they'd had any idea  
13 what was going to happen with inflation in the last two  
14 years, they wouldn't have built it. That all came out of  
15 Wes's testimony.

16 Q. And you don't know their milk contract either, do  
17 you?

18 A. No. No. Of course not.

19 Q. And despite Saputo's testimony about installing  
20 two and a half million dollar water polishers across its  
21 facility, that is still your conclusion?

22 A. That's a sustainability, environmental, and maybe  
23 even a regulatory issue if they are dealing with a lot of  
24 BOD in water that made them have to do that. I mean, a  
25 lot of times water cleansing is more -- I had that  
26 experience with Kroger. Michigan -- Detroit has very high  
27 BOD costs in their waste treatment system, so you could do  
28 things that seem crazy, and in the end, it still saves you



1 money. And I can't speculate that's why they did that,  
2 but I know that's often the case when you put in  
3 clarifiers.

4 Q. And the testimony from Leprino about a \$1 billion  
5 new plant, you still conclude that there's not enough  
6 incentive, economic incentive, to expand or build new  
7 plants?

8 A. Again, I don't know the -- I don't know the  
9 details of that -- of that arrangement, so I can't -- I  
10 can't speak to that. But contracts have got very --  
11 again, when a plant is not pooled, and none of those  
12 plants are pooled, there's a lot more flexibility in how  
13 you negotiate the price of milk.

14 Q. Because, again, no Class III plant is required to  
15 pool, correct?

16 A. That is correct. So we give them a competitive  
17 advantage over those who need to for competitive reasons  
18 or there are supply contracts for fluid milk who have to,  
19 to some degree, pool plants.

20 You brought up what I think is a really important  
21 point, is that do we want to give manufacturing to  
22 unregulated areas, just let them have all of it because  
23 it's so difficult to compete when you're regulated?  
24 Because we're reaching that point.

25 Q. Are any of the plants I just asked you about in an  
26 unregulated area?

27 A. No, but are they regulated? Are they regulated?  
28 It is not just where they are located, it's whether or not



1 they participate in the regulations.

2 Q. That ability to participate or not participate in  
3 the regulations hasn't changed in how -- ever?

4 A. Right. We're seeing these massive plants built  
5 where they don't have to participate in regulation. You  
6 still see some growth in other markets. I won't argue  
7 with that. But the big growth is in these unregulated  
8 markets. And to me, as a buyer of a lot of cheese at  
9 Kroger, it disturbs me -- I -- I -- I like to buy from a  
10 broad -- we like to buy from a broad group of suppliers,  
11 and it is becoming more and more difficult for  
12 profitability, particularly in the Midwest and Northeast,  
13 with current regulations.

14 I mean to say that we have gone 15 years without a  
15 change in make, that there isn't a need for it, is just  
16 hard to believe. And it is evident. I mean, we have --  
17 almost every cooperative of any size has limits on milk  
18 production. And that is long-term very, very damaging.  
19 Some -- some are doing better than others; some have --  
20 some farmers can sell base to others, and that seems to  
21 work a little better. But in a lot of cases you are kind  
22 of trapped. If you want to compete with where there  
23 aren't those limitations, with larger herds that can grow  
24 and spread those fixed costs further, it's difficult to  
25 do. Very, very hard to do.

26 So this whole thing about economic harm to farmers  
27 isn't just price. And, again, most of the price of milk  
28 has nothing to do with the Make Allowance. It's got to do



1 with the price of the commodities. It's got to do with  
2 the access to market and the ability to grow. Terry  
3 Brockman from Saputo said that. The biggest question he  
4 gets isn't price, it's, "Can I sell you more milk?"

5 And so what do we do to make sure that that can  
6 happen for dairymen that want to sell more milk, that they  
7 have a place to send milk?

8 And there's dumping, but dumping is a small part  
9 of it. The supply, the quotas or whatever you want to  
10 call them, is -- base/excess programs are restricting  
11 ability to grow. And we all know in our incredibly world,  
12 at some point, you have to specialize or grow, because if  
13 you are -- if you are good at what you do, but you can't  
14 capitalize on that talent and grow your business, you'll  
15 have a hard time. I mean, you certainly work for a co-op  
16 that's probably the best at that of any. And you can't  
17 ignore that. That's a big part of the -- of the whole  
18 equation is availability of market, not just what's the  
19 Make Allowance.

20 Q. That was my last question. And when we get the  
21 transcript, I'm very interested to look and see how long  
22 the answer was to a yes/no question.

23 A. Well, if you ask a yes/no that can't be answered  
24 with a yes/no, you're not going to get a yes/no. You know  
25 me better than that.

26 Q. That is not a criticism. I'm just interested in  
27 seeing it.

28 MR. MILTNER: Thank you, Mr. Brown.



1 THE WITNESS: Thank you.

2 THE COURT: Further questions of this witness,  
3 other than AMS?

4 Ms. Hancock.

5 THE WITNESS: Good morning.

6 CROSS-EXAMINATION

7 BY MS. HANCOCK:

8 Q. Good morning.

9 Okay. I want to -- I'm just going to first touch  
10 on your written testimony in Exhibit 214. You start off  
11 by providing some calculations, I think a basic product  
12 price formula calculation and how Make Allowance works.  
13 That's just for the historical perspective; is that --

14 A. Yeah, it's just -- it's more demonstrative than  
15 anything. It's not --

16 (Court Reporter clarification.)

17 BY MS. HANCOCK:

18 Q. I think the last part of my question was, you were  
19 just providing that for the historical perspective, an  
20 explanation of how it worked?

21 A. Yes. That's all that was.

22 Q. Okay. And then similarly, in the presentation  
23 that you put together to summarize your testimony, the  
24 presentation as Exhibit 215, the first third or so of  
25 that, you were just providing some historical context of  
26 regulatory rulings, and what we heard with Mr. Miltner was  
27 some district court briefing and some other historical  
28 anecdotes?



1 A. That is correct.

2 Q. And you would agree with me that to the extent  
3 that there is a historical precedent that's been set, that  
4 that's what the attorneys will cover in the briefing that  
5 will be submitted after the hearing to USDA; is that fair?

6 A. What we want to make sure is our -- our views were  
7 covered. So we include them in the testimony, yes.

8 Q. Yes.

9 A. Yes, they certainly have that -- I don't know that  
10 they have that opportunity. I'm not a lawyer. But if  
11 they do, then I expect that they will.

12 Q. Okay. And you would agree, though, that to the  
13 extent that any of that prior briefing in district court  
14 challenges that were made to prior hearings or recommended  
15 decisions or any of the recommended decisions or final  
16 decisions, that those should be taken into context based  
17 on the time period that those issues were being addressed?

18 A. Not always, because there have been long set  
19 precedents. I mean, I think the best example we saw that  
20 was with the California new order, because there was a lot  
21 of proposals that were outside of precedence, for example,  
22 on pooling is probably the best example. And USDA stayed  
23 consistent with their current rules on pooling in markets  
24 that are similar.

25 So I do think that they do look at that, and so I  
26 do think it -- we think that should be part of their  
27 decision-making. Again, they -- they have the right to do  
28 what the Secretary thinks is best. We do think that those



1 precedents are an important reminder of what they -- how  
2 they have looked at things in the past. Yes, I know they  
3 know that, but I also know that we need to make sure  
4 everyone knows that. And you'll have a chance to comment  
5 on that, of course, when you brief.

6 Q. Right. And I was just -- I was just trying to say  
7 that those were opinions or decisions or arguments that  
8 were made based on the information that everybody had in  
9 the moment that they were made; is that fair?

10 A. That is true. Yes.

11 Q. And, for example, in the federal reform hearing  
12 and then recommended decision and final decision, that --  
13 you understand that the point of that was to update the  
14 system to best reflect the market conditions at the time?

15 A. I was very, very much involved with that. Yes,  
16 you are correct.

17 Q. Okay. And then similarly, where we are today,  
18 which is essentially a modernization hearing, what we're  
19 here to do is make sure that -- that any pricing formulas  
20 that are set are modernized to reflect the current market  
21 conditions; is that fair?

22 A. No. I will not use the word modernize. We can  
23 use the word update, adapt. I think there's a lot of  
24 argument that some of the proposals actually are the  
25 opposite of modernization, so I will not use that term.

26 Q. Okay.

27 A. Certainly we have lots of opportunities to make  
28 changes, and we're going to -- we're all getting a good



1 chance to discuss them for six weeks in Indiana.

2 Q. Okay. So you would rather use a word like update  
3 rather than modernize to accurately reflect --

4 A. Right.

5 Q. -- what we're doing today?

6 A. And I have been saying that from the beginning  
7 because modernization is very -- it's very -- that's an  
8 opinion.

9 Q. Okay. More -- more subjective?

10 A. Yes, it's more subjective. Updates, which can  
11 mean modernization, it can mean other things, I think is  
12 probably a better term for my personal comfort level.

13 Q. Okay. Do you think that we should be modernizing  
14 the proposal?

15 A. I think we are offering to modernize the proposal.  
16 I don't think all proposals actually modernize it.

17 Q. Okay. So you agree that, in your opinion, that --  
18 that this -- the outcome of this hearing would be best  
19 reflected to modernize what currently exists?

20 A. Within the realm of the proposals, yes.

21 Q. Okay. And then your presentation after you have  
22 gone through the historical information goes into your  
23 summarizing Dr. Stephenson and Dr. Schiek's analysis and  
24 why you believe that of all the data points that are in  
25 the record, that these are the best ones to use for  
26 setting Make Allowances?

27 A. Yes. We -- we, early on, made a commitment to use  
28 research-based information. We thought that it was





1 important that we use stuff that there's a research record  
2 or an explanation or, you know, an understanding of the  
3 process how it was done. And so we made that commitment.  
4 We made the commitment no matter what studies showed that  
5 we were going to do that. We just felt that that was --  
6 you lose credibility. We were concerned we would lose  
7 credibility if we didn't use data that was -- you know, we  
8 thought was well reasoned and every effort was made to  
9 make accurate.

10 Q. And you have been working on this for years,  
11 haven't you?

12 A. On?

13 Q. On updating or --

14 A. Oh, gosh --

15 Q. -- modernizing Make Allowances?

16 A. -- yes. Yes, since the '90s.

17 Q. Okay. But most recently, for this hearing in  
18 particular, you have been working on it for more than two  
19 years; is that accurate?

20 A. Yeah. But in different roles because I was with  
21 Kroger until January.

22 Q. Okay. And so what hat, what role were you wearing  
23 when you were with Kroger?

24 A. Director of dairy supply chain.

25 Q. And how did that differ than the hat or role that  
26 you are performing today?

27 A. I didn't have to spend 110% of my time on policy.  
28 I kind of like negotiating and working on risk management.



1 And I've got lost of friends I worked with in this room  
2 actually right now on different projects.

3 So this is a policy role. I was very, very  
4 involved with Federal Order Reform back in 2000,  
5 particularly some of the formulas, so I have a lot of  
6 familiarity with it. And I've worked with most -- every  
7 proponent or opponent on every proposal here in some way,  
8 shape, or form in my career. It was -- I was not planning  
9 to take this job when I left Kroger. I was planning to do  
10 a little consulting and not work quite so hard. That  
11 hasn't happened yet. But I thought it was a -- it was an  
12 opportunity to try to work to make the system more  
13 sustainable. In the long run that worked better. That  
14 was my view.

15 Q. And remind me again when you joined IDFA on a  
16 policy --

17 A. Last week of January.

18 Q. I'm sorry?

19 A. Last week of January.

20 Q. Of which year?

21 A. This year.

22 Q. Okay.

23 A. I took -- I took six hours off between jobs.

24 Q. Okay.

25 A. Not -- not smart. I don't recommend it, but  
26 that's what I did.

27 Q. The last week of January of 2022 or 2023?

28 A. 2023. I've been with Kroger for -- this makes



1 nine months. End of this month will be nine months. But  
2 I have worked with them for years as a member.

3 Q. So prior to you taking the new role and then  
4 throughout your current role, you had been working on the  
5 Make Allowance for the last two years?

6 A. Yeah, we -- I led the economic policy committee at  
7 IDFA, so we were basically in discovery mode. But, yes.  
8 We did -- no decisions were made, but we tried to --  
9 again, trying to assemble information so we could make  
10 what we thought would be the best decision based on the  
11 best available information. You know, nothing new was out  
12 there, so we decided we needed to try to figure out ways  
13 to find updated information. Particularly, with Mark's  
14 survey in 2021, cheese was very weak as far as -- and we  
15 needed to have more cheese plants participate, because it  
16 was only 16% of production, and we didn't feel that was  
17 enough to be a good sample.

18 Q. Okay. And so you said that you were committed  
19 to -- to making an adjustment no matter what the results  
20 revealed; is that --

21 A. No. We needed to -- if the results had said that  
22 what we have now is fine, we would have done nothing.

23 Q. Right. But you weren't --

24 A. But it didn't.

25 Q. You weren't selecting an end and trying to work  
26 backwards from there. You were saying whatever the  
27 results reveal is what we will -- what we will proceed  
28 with?



1 A. Yes. And we felt that that was the only honest  
2 way to approach it.

3 Q. And -- and along the way, you had Dr. Stephenson's  
4 2021 survey results that came out?

5 A. Right.

6 Q. And at that time, you were working, even  
7 collectively or collaboratively, with National Milk as  
8 well on looking at what -- what updates could be made to  
9 the Make Allowance --

10 A. Yeah.

11 Q. -- is that fair?

12 A. That was true. Yes, at that point it certainly  
13 was true.

14 Q. And in fact, you were -- did you serve on the  
15 National Milk task force as well or participate with the  
16 task force in the work that they were doing?

17 A. Which one?

18 Q. National Milk's task force?

19 A. No, not -- we had a -- you know, National Milk, it  
20 still does, more than, has a lot of members of IDFA, and  
21 so they were -- both co-ops were involved in those  
22 discussions. And there was an attempt made to work closer  
23 with National Milk in the spring of '22. Unfortunately  
24 that never really happened. It is unfortunate, but it  
25 didn't. And I understand, people have to do what they  
26 think is best. But we didn't do that.

27 Q. It did happen, right? You just didn't reach an  
28 agreement on a number; is that fair?



1           A.    No, we didn't really work trying to come up with  
2 what proposal should be. There was no direct work.  
3 National Milk did share with me personally some of the  
4 work they were doing, and were very generous with that,  
5 and, again -- but as far as knowing where they were going  
6 to go policy direction, we found that out in October like  
7 everybody else did.

8           Q.    Okay. When you said they were generous with  
9 sharing the work that they were doing, what kind of  
10 information did they share with you?

11          A.    Just some of the economic background and some of  
12 the different proposals before they were proposals.

13          Q.    Okay. Some of the economic analysis that National  
14 Milk was performing to -- to evaluate Make Allowances?

15          A.    Yes, before they made any decisions, that is  
16 correct.

17          Q.    And including the fact that they had --

18          A.    Well, not so much make. No, they didn't -- I  
19 didn't see any research on make. I saw it more on  
20 differentials, skim calculations. Not on make. I never  
21 saw any information from National Milk on makes.

22          Q.    Did you talk with them about their economic  
23 analysis on Make Allowances?

24          A.    No. Because we -- we thought we were all still  
25 working together when they came out with a proposal.  
26 Quite honestly, we were surprised.

27          Q.    When they came out with a proposal in October?

28          A.    October of last year, yes.



1 Q. Okay. And at the point had IDFA already submitted  
2 its request for a hearing?

3 A. Oh, heavens, no.

4 Q. Or submitted its position on its proposal with the  
5 Dr. Stephenson survey?

6 A. No, we hadn't even decided to do the Stephenson  
7 survey yet. We had some conversations with regulators,  
8 came to the conclusion we needed to have an updated,  
9 broader survey, so we decided to work to get that  
10 accomplished.

11 Q. And one of the reasons that IDFA decided that it  
12 wanted to have an updated Stephenson survey was because it  
13 had some concerns with the numbers that it saw out of the  
14 2021 Stephenson survey; is that right?

15 A. Yeah. We didn't think -- participation just  
16 simply wasn't even, and we needed to have a better  
17 representation, of particularly cheese and whey.

18 Q. Okay. And then did you have some concerns with  
19 the numbers that came in on butter?

20 A. On Mark's new survey?

21 Q. From 2021.

22 A. 2021, yes. And that's where a lot of our members,  
23 co-op and non-co-op, said we need to go back to allocating  
24 across on a solids basis for fixed costs.

25 Q. Because --

26 A. Which is why that was the request for the new  
27 survey.

28 Q. Because Dr. Stephenson's 2021 survey revealed that



1 the Make Allowance would actually go down for butter?

2 A. But it would take powder almost to \$0.30.

3 Q. You have to answer the first question that I  
4 asked, though.

5 A. It did lower it, yes.

6 Q. Okay.

7 A. To the surprise of everyone, I think.

8 Q. Okay.

9 A. Including butter/powder operators based on my  
10 conversations.

11 Q. So in that example, IDFA did not want to take  
12 Dr. Stephenson's number at face value but wanted to redo  
13 the survey to make sure that the survey results were  
14 updated in 2023?

15 A. Two reasons -- well, several. One is we needed to  
16 have stronger participation on the whey side, particularly  
17 on the cheese side. We were very pleased to see the  
18 average cheese plant survey size double, which we thought  
19 was an indication we got a broad spectrum of plants.

20 On the butter/powder, both co-ops and non-co-ops  
21 expressed concerns over the non-traditional way of  
22 allocating figured costs. So at their -- I won't say  
23 insistence, but their recommendation, if you're going to  
24 update it, let's go back to the old method so that we  
25 can -- it's a little more apples and apples than what we  
26 had with Mark's new allocations. And that's why we  
27 specifically asked he go back to that. And he had done it  
28 before, so it wasn't particularly difficult for him to do



1 that.

2 Q. And you were more comfortable with the second  
3 survey results than you were with the first; is that  
4 right?

5 A. That is true.

6 Q. And do you believe -- and those survey results  
7 were taken based on costs that were incurred in calendar  
8 year 2022?

9 A. Yeah. There's a couple plants that were fiscal  
10 2022, but most of them were calendar. They're all --  
11 whatever the business year was for the participants,  
12 that's what Mark said.

13 Q. Okay. So either calendar year 2022 or fiscal  
14 year --

15 A. Yes --

16 Q. -- 2022?

17 A. -- which is the plus or minus off of '22 average.

18 Q. And that was at the discretion of the plant?

19 A. Or the companies, yes, whatever they wanted to  
20 use. We asked them to be consistent across all plants  
21 within the organization. So, again, the allocation of  
22 costs, you can do it right. But as you can imagine, most  
23 companies have annual records on -- on that kind of  
24 information. It's much easier to access than to comprise  
25 a year that's part of the two fiscal years, so we gave  
26 people that option.

27 Q. And --

28 A. And that was true in his other studies too, by the





1 way. That's not just this last one.

2 Q. Okay. So that methodology didn't change?

3 A. No. No. Annual years -- if you are going to make  
4 your accountants dig up a lot of data, for heavens sakes,  
5 don't make it harder than it has to be for them, because  
6 they already had it -- most of them had it already  
7 compiled.

8 Q. And you understand that in Dr. Stephenson's cost  
9 allocation, that he's included a return on the investment  
10 for those processing products --

11 A. Yes.

12 Q. -- that's built into each one of his cost  
13 allocations?

14 A. Yes.

15 Q. So if -- if a processor were to sell their product  
16 of cheese, for example, at the cost -- or at the price  
17 that the USDA sets, and its costs came in exactly as  
18 Mr. Stephenson -- or whatever the final number was  
19 forecasted, and then they pay their dairy processors based  
20 on that, that would necessarily have embedded within that  
21 a profit margin?

22 A. Is there a problem with that?

23 Q. I'm just asking --

24 A. If you have --

25 Q. -- if that's your understanding of --

26 A. That is my understanding. Yes, that's pretty  
27 classic allocation. You have to basically put an  
28 alternate value or an opportunity cost on that investment



1 and that asset. That's my experience. Very common.

2 Q. And I'm just asking this based on your historical  
3 perspective and overview because you provided some  
4 calculations in here. So I just want to make sure that  
5 when you do your calculations in your testimony, that I'm  
6 understanding what that includes.

7 A. Very fair.

8 Q. Okay. And so if a processor, for example, were  
9 able to sell their cheese, in this example, at a price  
10 higher than what USDA had set, that would be an additional  
11 opportunity for an additional profit?

12 A. Assuming that the manufacturing costs were  
13 consummate to allow for a greater margin, yes.

14 Q. Everything else is still the same as my first  
15 example.

16 A. Then they would be as long as it isn't surveyed,  
17 because if it's surveyed, it will end up in that NDPSR  
18 price.

19 Q. Well, I mean, but that -- how long does it take  
20 for the survey to end up in the price?

21 A. Two weeks.

22 Q. So --

23 A. Most cheeses -- I'll use cheese since I'm most  
24 familiar with. Most cheese is sold on previous week CME.  
25 Some isn't. Some is priced off of Class III. Some is  
26 priced -- cream cheese is a really weird formula. But  
27 basically it is generally if you -- it's generally a two,  
28 two-and-a-half week lag. And if you look -- if you look



1 at, for example, you look at NDPSR prices compared to CME  
2 prices, particularly for butter and block and barrel  
3 cheese, that lag is very, very predictable because it's  
4 reporting. USDA bases its price on sale date, and sale  
5 date is generally based on a previous week average. And  
6 it can -- I think it's even delivery with USDA, so it  
7 probably adds another week. So there's usually a two- to  
8 three-week -- they follow each other very well, but  
9 there's definitely a lag with those products. And it's  
10 becoming more that way. We have nonfat dry milk too. But  
11 that is a newer market. It hasn't been as robust as  
12 butter and cheese because they have been around, I think  
13 longer than me. They have been around a long time, so --

14 Q. So at the strike price, at least, that lag hasn't  
15 yet caught up; is that right?

16 A. No, it's two to three weeks.

17 Q. Okay. So if they sell at higher than the cheese  
18 price, that's another opportunity for a profit?

19 A. Unless the market's going down, and then the other  
20 thing happens. It averages out over time, but it is  
21 painful. You say it is great when -- it's great when the  
22 market's going up; it is painful when the market is  
23 dropping, because of that lag, and you are paying off the  
24 lag price.

25 Q. And if a plant is able to process more  
26 efficiently, or deadily efficiently as I have really come  
27 to enjoy --

28 A. You know --



1 Q. -- that's another opportunity for a processor to  
2 build in a profit opportunity?

3 A. No different than a dairyman. Some dairymen have  
4 lower production costs than others. It's -- I see no  
5 difference. No -- no two plants are the same, no two  
6 farms are the same. Those who are the best at making  
7 quality products at the lowest cost, regardless of  
8 regulation, will be around over the long-term because they  
9 have the most ability to generate a margin that allows  
10 them to grow.

11 Q. Okay. So is the answer yes, that the -- if they  
12 can -- if a processor can beat the Make Allowance, then  
13 that's another opportunity to find or build profit into --  
14 into their calculations?

15 A. If they are the half that's lower, yes.

16 Q. Okay. And then you said that's no different than  
17 a producer, if they can build efficiencies into their  
18 process, they might be able to find some profit margins in  
19 there as well; is that fair?

20 A. As we all know, they work very, very hard to do  
21 that.

22 Q. Yeah. And we have heard some other testimony in  
23 this hearing that the larger the herd, the more  
24 efficiencies that a dairy producer can build in -- into  
25 their profit margin calculations. Would you agree that's  
26 your experience as well? In your observations of the  
27 industry?

28 A. I didn't quite get the question.



1 Q. Yeah. Just that the larger -- the larger the herd  
2 or the larger the dairy farm, the more opportunities they  
3 have to be efficient and have a higher profit margin?

4 A. Generally that is true, yes.

5 Q. So the smaller dairy farmers tend to be the ones  
6 that have the thinnest margins or the most difficult time  
7 building those efficiencies into their process?

8 A. It really varies. From my personal experience, it  
9 really does vary. One of the challenges you have with  
10 small dairies, even if your margin per unit of milk is  
11 high, based on your size and just the cost of living, do  
12 you generate enough margin to support that family, even  
13 though the herd itself may be fairly profitable. So it  
14 really varies.

15 But if you just look at herd size over time and  
16 how it has grown, that's telling us that the -- obviously  
17 the big herds seem to be the ones that are -- are doing  
18 better because they -- herd size continues to grow. Which  
19 makes perfect sense, just hopefully get better  
20 efficiencies out of the equipment and labor and everything  
21 else.

22 Q. And so you would agree with me, then, that those  
23 that are most susceptible to the pressures of  
24 Make Allowances being increased are those smaller dairy  
25 farmers who might have the thinner margins and not as big  
26 of efficiencies?

27 A. Well, if they are on a base/excess program like  
28 most of the country, they don't have a chance to grow if



1 they want to. So I don't think that's -- you can't look  
2 at half that question. You simply can't.

3 Q. Yeah. Is it -- I'm just asking you about that  
4 example.

5 A. I know you are, but you are trying to get me to  
6 say a certain answer, aren't you? I mean, the way I look  
7 at it is the -- a farmer or producer -- Federal Order  
8 term -- a producer has, I mean, they're -- if they are  
9 selling milk more proprietary, they are guaranteed a  
10 minimum price based on their component levels in the  
11 market they are in, and all those other things. And it is  
12 the same price whether you have 10,000 cows or you have a  
13 hundred cows. There's no discrimination on size or  
14 advantage to size as far as regulated minimum price.

15 And so they will have those struggles regardless.  
16 And as far as whether that Make Allowance hurts their  
17 price, it depends if they own their cooperative, if they  
18 are a cooperative member, owns their manufacturing assets.  
19 They only have so much money to pay. That's where we see  
20 these mailbox prices. It's very discouraging. They get  
21 harder. And if you are not a co-op -- I mean, if they are  
22 a co-op and they are selling to someone who sells on a  
23 regulated price, those plants sometimes grow, but not as  
24 consistently.

25 So it's -- it's unfortunately more complex than I  
26 wish it was. And, you know, I was raised on one of those  
27 little farms, and I wish they were all still there. But  
28 it's getting tougher and tougher.



1 I think -- and I'll go back to Idaho. There was a  
2 lot of small farms in Idaho at one time, and the order  
3 didn't matter then. It was just a function of efficiency.  
4 And you got bright kids, and they decide to be lawyers or  
5 I guess cheese makers or whatever they decide to be. It  
6 is just more difficult. And with or without regulations,  
7 unfortunately our small dairymen, unless they've got some  
8 kind of specialty market or they worked out some kind of  
9 arrangement, it is very hard. And it is unfortunate, but  
10 it is very hard.

11 Q. It's been a long time since we have had small  
12 dairy farms in Idaho.

13 A. Yeah, I know. When I went to Glanbia, there was a  
14 few. They are pretty much all gone now.

15 Q. Did you hear the testimony from some of the  
16 processors like Glanbia and Leprino that said that it --  
17 it's been the last four -- four -- four-ish years or at  
18 least since the pandemic since they haven't been able to  
19 beat those Make Allowances?

20 A. Yeah. And they are -- they are -- I would assume  
21 they are all probably low cost operators. The way they  
22 have grown, you would assume that they are. And so they  
23 are low cost operators and can't meet the make in the last  
24 three or four years. It doesn't surprise me. The smaller  
25 ones, it's probably been a little longer. The very  
26 biggest, that would be the time. But we've had, as we all  
27 know, remarkable inflation in the last two and a half  
28 years. So it had a big effect.



1 Q. Does that indicate that Make Allowances that were  
2 last updated -- what, was it 15 years ago?

3 A. Yes. 2008.

4 Q. Does that indicate then that if they were able to  
5 beat them for 11 of those 15 years, that 15 years ago  
6 Make Allowances were set too high?

7 A. No. Because you are talking about four of the  
8 most efficient dairy companies probably in the world.  
9 That's not your weighted average cost. It's the smaller  
10 ones that have really struggled. And a lot of them aren't  
11 tiny. They may be 3 or 4 million pounds of milk a day,  
12 but they have really struggled. And they kind of hobbled  
13 along.

14 And, again, I think the data that James DeJong  
15 did -- and I'm glad he did it so I didn't have to -- on  
16 the -- when you look at the -- the mailbox versus  
17 regulated minimum -- or announced price, and  
18 unfortunately, the negative, you can't explain those kind  
19 of differences away on hauling. They are much bigger than  
20 that. And that just means there's less money to go  
21 around.

22 And the system doesn't function if -- if it  
23 basically doesn't let competition have some room -- just  
24 like the farms -- some room and who -- who is in business  
25 in ten years and who is not.

26 So it isn't, sadly, that simple. And very  
27 large -- I would expect very large companies to have lower  
28 manufacturing costs. I would hope when I was at Kroger I





1 was a better negotiator because of the volume we had, and  
2 they never fired me, so we must have done okay.

3 But the point is, is that you are always going to  
4 have differences in business with or without regulation,  
5 and you have to expect that. And we have some extremely  
6 efficient private cheese companies. We have some  
7 extremely efficient block producers as well.

8 Q. You were talking with Mr. Miltner about the change  
9 from NASS to NDPSR. And I think you said that when NDPSR,  
10 they took -- took over, we got better data because the  
11 auditors knew what they were doing?

12 A. They got consistent direction. Under NASS --  
13 because I was at Glanbia when NDPSR started. Under NASS,  
14 it was run by the states, and every state kind of  
15 interpreted things a little differently, and so it  
16 resulted in not consistent reporting.

17 When USDA took that over, I mean, they have had --  
18 they know audits. They have been doing them for decades  
19 and decades and decades. And so it wasn't malicious  
20 perhaps -- I'll give you a real simple example. One  
21 cheese plant was reporting white block cheddar because  
22 they make yellow and while block. You are not supposed to  
23 report whites. So they said, oops, we're sorry, and they  
24 quit reporting the whites, just as -- a very simple  
25 example of a thing that USDA caught that they had been  
26 doing incorrectly for at least ten years.

27 So it's -- it -- maybe not -- yeah, close to ten,  
28 maybe eight.



1           Anyway, the -- they just made it far more  
2 consistent, which is something USDA's Dairy Division is  
3 very good at, trying to be consistent across their  
4 procedures, and it just made the data better.

5           I don't know how many audits there is as far as  
6 people not reporting, or it was more, a little fine things  
7 on the edge where, that no one had ever told them not to  
8 report that, and so they reported it, or they weren't  
9 reporting something they should.

10           Another thing I saw was on fresh cheese, very  
11 fresh cheese, some -- particularly barrels, some  
12 processors bought barrels that are two or three days old,  
13 and they were being reported rule five. So that was  
14 cheese that was no longer --

15           Q.    They were being reported -- I missed the last  
16 of --

17           A.    They were reporting cheese that was just two -- it  
18 was delivered very fresh. Barrels, fresh, have a  
19 different functionality than barrels that are two months  
20 old. And they both are important, but you kind of blend  
21 them. And they weren't -- they were less than the five  
22 days I believe it is on barrels. So it shouldn't have  
23 been reported, although it was, you know, being sold to  
24 the same customer that was buying stuff that was reported.

25           So, again, just trying to make sure everything is  
26 consistent because that's the only way you get comparable  
27 data is to have consistent rules on what you report.

28           Q.    And I think you started off by saying one of the



1 differences in the way that NASS collected and reported  
2 the data compared to NDPSR, that it wasn't maliciously  
3 motivated, but that it was just better methodology for  
4 collection.

5 A. Yes. I believe that is the case. And just you  
6 had -- the auditor staff had -- they had consistent  
7 training, because it's a federal program rather than a  
8 local program. So people were given the same -- basically  
9 the same tool kit to do their job, which I think made it  
10 work a whole lot better.

11 In my experience, the industry confidence went up  
12 a lot in NDPSR when it -- with AMS because they knew the  
13 rules were -- everybody was following the same rules.  
14 Even plants would say, well, they are not reporting.  
15 Well, you know, if they weren't or they were doing it  
16 wrong, it got corrected. So it just made the system work  
17 better. Put a lot more confidence in those numbers.

18 Q. Why did it matter if the industry had confidence  
19 in the numbers?

20 A. Well, why wouldn't it? If you feel that -- if you  
21 are going to be regulated, don't you want to make sure it  
22 is based on fair data? I mean -- and that was it. You  
23 want to make sure it was fair.

24 And, again, I don't think -- there were some  
25 issues, I think, with reporting, the states, that may have  
26 been more onerous than others. But a lot of them were  
27 just really simple like I just described, and they were  
28 generally not large volumes of product. But if you are



1 going to record it, do it right because, you know, there's  
2 a lots of dollars depending on those numbers being  
3 accurate.

4 Q. And do you agree that for Make Allowances, if you  
5 are going to record it and audit it -- or if you are going  
6 to record it and survey it, that we should do it right?

7 A. We need to use our best available data. I think  
8 Farm Bureau, National Milk, and IDFA are all working on  
9 legislative language to give USDA the opportunity to do  
10 that. But if we're going to be 2008 to 2010 before we  
11 have something we can use, that's way too long.

12 Q. How long did take Dr. Stephenson to do the survey  
13 the IDFA commissioned?

14 A. He started it in February; he finished it the end  
15 of May.

16 Q. Okay. And I think when you were talking with  
17 Mr. Miltner, it was Exhibit 179 about the e-mail that was  
18 sent out to the members.

19 Do you recall that?

20 A. Oh, yes.

21 Q. And you said at the time that it was sent out you  
22 didn't know if it was the membership that existed at the  
23 time or the membership --

24 A. No, I did know. It went to everyone that was a  
25 member, and we hadn't had any change yet, so everyone.

26 Q. Let me finish my question because it might clarify  
27 where --

28 A. All right.



1 Q. -- I'm going with it.

2 In Exhibit --

3 A. I apologize.

4 Q. That's okay.

5 In Exhibit -- this is just an awkward conversation  
6 when it's so compartmentalized.

7 But in Exhibit 179, when you were talking with  
8 Mr. Miltner about that, you were saying you don't know if  
9 it was the membership that existed at the time was what --  
10 is the same membership that you have now because there had  
11 been a change in membership.

12 A. No. It was whoever was a member, and so if people  
13 had joined since those letters were written or they have  
14 left since those letters were written, they -- they -- the  
15 ones that joined later didn't get a letter; those who left  
16 after the letters did get a letter. So -- so, basically,  
17 we did have some members leave in May. All of those  
18 people got the letters because they were sent in April.  
19 The final letter was actually sent in April.

20 Q. Was that --

21 A. The one that you saw was sent in March, the one  
22 that Ryan had.

23 Q. Okay.

24 A. Yeah.

25 Q. So when you talk about the members that had left  
26 in May, was that May of 2023?

27 A. Yes.

28 Q. Okay. What do you understand was the reason that



1 those members departed?

2 A. That's -- they can tell you.

3 Q. I'm just asking you what your understanding was.

4 A. I think that's private between members who have  
5 got different reasons and different letters. I don't  
6 think it is my ability -- I can't share that. I don't  
7 feel it appropriate.

8 Q. Do you know what percentage of IDFA's membership  
9 left in May of 2023?

10 A. I'm not going to tell you.

11 Q. Was it more than 50%?

12 A. No. But I'm not going to -- that's enough.

13 Enough prying on that. That's private. I shouldn't even  
14 have told you that. No, it's not that. The whole staff  
15 is still there, so they are making it work.

16 Q. Is it your understanding that you had a membership  
17 departure because of the concerns with the methodology and  
18 the approach that IDFA is taking with respect to its  
19 Make Allowance at this hearing?

20 A. I think the -- from what I understand the concern  
21 was that they were looking only at Make Allowance at IDFA.  
22 That's the only thing we had consensus on at that time, so  
23 we moved ahead with that.

24 Q. It was the approach that IDFA was taking, with the  
25 lack of consensus from its membership?

26 A. Well, you never have 100%. They weren't happy,  
27 otherwise they wouldn't have left. Some of them I think  
28 it was budget, but most of them I think it was probably



1 the policy, Federal Order policy was the reason. And  
2 we've also had a couple of join us since then because of  
3 Federal Order policy. I mean, it's just -- you know, we  
4 live in a very diverse industry, and there's lots of  
5 opinions, and getting them all to align is a challenge.

6 Q. When you say Federal Order policy, you understand  
7 that that's Federal Order policy that is being presented  
8 at this hearing --

9 A. Yes.

10 Q. -- that we are here for?

11 A. Yes.

12 MS. HANCOCK: That's all I have. Thank you so  
13 much for your time.

14 THE WITNESS: Thank you very much.

15 THE COURT: Further questions for this witness,  
16 other than AMS?

17 We have been going about an hour and 20 minutes  
18 again. We can take a break. Come back at 11:00.

19 (Whereupon, a break was taken.)

20 THE COURT: Back on the record.

21 Okay. Mr. English.

22 CROSS-EXAMINATION

23 BY MR. ENGLISH:

24 Q. Chip English, Milk Innovation Group.

25 Mr. Brown, you had a couple of questions or  
26 several questions from National Milk counsel about the  
27 issue of return on investment.

28 What is your recollection of USDA's treatment of



1 return on investment dating back to 1999 and the Federal  
2 Order Reform?

3 A. They have always included it when they are doing  
4 their analysis on what's an adequate cost because  
5 that's -- you have an opportunity cost for that asset.  
6 You have to put a value on it if you are going to have a  
7 true cost.

8 MR. ENGLISH: That's all I had, your Honor.

9 THE COURT: Anything further from anyone besides  
10 AMS?

11 AMS.

12 CROSS-EXAMINATION

13 BY MS. TAYLOR:

14 Q. Good morning.

15 A. Good morning again.

16 Q. You guys got very organized at the break and  
17 caught me off guard.

18 Okay. The IDFA proposal seeks to implement your  
19 Make Allowances over a four-year time period.

20 A. That is correct.

21 Q. But throughout the testimony of -- your testimony  
22 and other IDFA members that have testified previously, you  
23 know, obviously the emphasis is on how you all feel the  
24 current makes are very inadequate and plants are losing  
25 money, etcetera.

26 So I guess, how come given that reality that you  
27 all testified to, you still are okay with a four-year kind  
28 of staggered implementation? Why is that acceptable?





1           A.     Because of the large increase that is being asked  
2     for.   And we think that it would -- it may be too much at  
3     once to basically raise makes \$0.08 on cheese, whatever  
4     the other numbers are, and to do it in a more gradual  
5     basis as long as we have a schedule to get there or as,  
6     you know, until we have a USDA audited study, gives some  
7     time.

8                     It's -- it's been so long, and inflation the last  
9     two years has been so rough on everyone, that we just feel  
10    that it would make more sense to give it -- give it some  
11    room.   We have members that would like it all at once.   It  
12    was a consensus view that it just makes it a little easier  
13    on the farm side if we do it over four years.   It's never  
14    fun for anyone, but that's -- that's the view.

15           Q.     Okay.   And we have heard a lot about -- throughout  
16    the past few weeks, about plant investment, whether it's  
17    new plants being built or not being built or investments  
18    in current plants to help increase efficiencies.   And a  
19    lot of that discussion was, well, we had to be innovative  
20    if Make Allowances aren't reflective of our costs to  
21    figure out how to combat that.

22                     So given the current -- the Stephenson study and  
23    the Schiek study that you all are proposing be used, how  
24    are those efficiencies captured?   Or maybe another way to  
25    put that is, capturing efficiencies can also mean  
26    increasing yields, and we're not -- you all aren't seeking  
27    an increase in yields.   So how is that somehow being  
28    factored into the equation?



1           A.     You can only create so much yield.  I mean, if you  
2     have a product that's 3% water and 97% solids, for  
3     example, there's only so much you can do to increase the  
4     yield.  I'm -- one of the reasons I personally am very  
5     confident about a yield study with USDA as part of the  
6     make study is you are going to find that the yields are  
7     pretty much right.  It is whether you fortify or you  
8     condense milk in front of the vat, which of course you  
9     would take account for.

10           In my experience, the only -- only -- if you are a  
11    modern efficient plant, you are already doing what you can  
12    because the last thing you can afford is to lose the  
13    solids down the drain, quite frankly.

14           And I think one of the reasons we really  
15    encouraged broad participation in the last survey is we  
16    wanted to make sure there was large plants in it.

17           One of the -- one of the opportunities I saw with  
18    Mark's 2021 study is he didn't have enough cheese in it,  
19    and his average plant size was like 1.6 million pounds.  
20    Which isn't tiny, but for an average it is kind of low.  
21    That was doubled.  So I'm more confident that it reflects  
22    those -- those big efficient plants, whether they are  
23    powder dryers or cheese makers are now in the information.

24           And, again, we can't make anybody do anything, but  
25    we strongly encourage them to go in because we think it  
26    helps credibility.  And it is a more honest picture of the  
27    industry, quite honestly.

28           Q.     Okay.  Can you turn to page 12 of your exhibit,



1 the PowerPoint slide, Exhibit 215?

2 A. Sure.

3 Q. So under the 2019 study, that first box, under  
4 participating plants. We found that the nonfat dry milk  
5 and butter plant numbers are different than what you have  
6 in this table. So I'm just wondering if they are -- if  
7 you were referring to a different study perhaps?

8 A. Let me --

9 Q. Or that might just be an oversight?

10 A. If I can, I'll check, and if it needs to be  
11 resubmitted, we will correct the table.

12 Q. Okay. So there was some talk about -- in one of  
13 your examples in your testimony, dumping milk,  
14 specifically in the Upper Midwest, because of lack of  
15 plant capacity. I'm just wondering if there might be  
16 additional reasons that could be why that milk was dumped  
17 or you attribute it all to willing -- I'll term it,  
18 willing plant capacity?

19 A. Yeah. And I think it is important that the dumped  
20 milk compared to what the supply management programs are  
21 doing on milk volume is small, but we're so tight. For  
22 example, when Hastings Creamery just closed down, and that  
23 caused some stress. We had some stress earlier in the  
24 year when we had a change in suppliers into a plant in  
25 South Dakota. And you can't live in Kenosha, Wisconsin,  
26 and not hear about the milk being dumped in the Milwaukee  
27 sewer, which amazes me because the BOD charge you are  
28 going to pay on that is going to kill them. Couldn't they



1 find someone else to do that.

2 But generally when milk is dumped, either it's --  
3 it's -- has -- it's positive for antibiotics, and most of  
4 that is handled with lagoons. I think most companies have  
5 farmers that they work with to manage that.

6 The -- the other thing is -- you see, is sometimes  
7 if you, depending on where markets are, whether you have  
8 an outlet, because really the only Grade B milk anymore is  
9 when a BTU fails, and so you will have some milk that for  
10 a day or two will be B. Some plants will take that, not  
11 very many anymore because of their customers'  
12 requirements, so that can cause some.

13 But what you see in the Midwest isn't necessarily  
14 every day. There's 20 loads going to the Milwaukee sewer  
15 system. It's we're so tight on space, it just takes a  
16 very little thing to create some disruption. Hastings is  
17 a good example.

18 And it will generally resolve itself, but right  
19 now we're -- the spring in particular we were so tight in  
20 capacity, there was really no place for it to move. So  
21 it's -- it's -- it's more due to lack of space than  
22 normally. Normally I view dumped milk as being either  
23 antibiotics or someone failed a bulk tank unit with FDA.

24 Q. Okay. And lack of space would be lack of willing  
25 plant capacity to take on milk?

26 A. Yeah. What you find -- with that milk, if you  
27 look at the spot milk prices this year, I mean, if you  
28 wanted milk, you could buy it inexpensive. There's a



1 couple of things with that. One is labor is still tight.  
2 It's not as bad as it was a year ago, but labor is still  
3 tight in plants. Second is they literally don't have the  
4 room. They are running that full. Particularly the  
5 spring, I think we all know it got particularly crazy.

6 And what you will find when you dump milk, you are  
7 going to look, where can I send that to get rid of it,  
8 where can I sell it? If I get six bucks to sell it into  
9 some little dryer down in Kentucky, and it costs me four  
10 to get there, it's better than nothing. And so plants  
11 will do that. And there's some people that will pick up  
12 that milk. Same with cream, if you have cream that's got  
13 a high acidity, there's someone that can probably figure  
14 out a way to make something out of it, and they will buy  
15 it, and it will be at a heavy discount.

16 And so that's what they look for, any option they  
17 have that's better than dumping it. But unfortunately,  
18 this year there has been some of that.

19 My experience historically, particularly in Idaho,  
20 because you are so far from places, that processors, if  
21 they do get long, or you don't have anyone that can take B  
22 milk, then it does travel a long way, and so it is really  
23 math.

24 And this year, you know, sales started to get  
25 weaker. Cheese got weaker in June. No one is excited  
26 about building inventory, although thankfully we recovered  
27 nicely, and so there wasn't a place to send it. That's  
28 really what it amounts to. It's just -- this is just



1 math. It is not only how much can I make, it's how  
2 much -- how much will I lose versus dumping it. It just  
3 makes sense to haul it, so that's what they will do.  
4 That's been my experience.

5 Q. Could that -- that scenario which you just  
6 discussed and -- could that be leading to some of the  
7 decrease in the mailbox prices we see, because there's not  
8 other outlets for producers to sell their milk, and so  
9 they are being forced to take a lower price?

10 A. It certainly could. Well, if you -- I think we  
11 had one testimony from a cooperative talking about how  
12 premiums have lowered because of margins. It certainly --  
13 it certainly could.

14 One thing -- the other thing is when you have  
15 inventories building. So, for example, cheddar got long  
16 in June. We all know that. And -- and do you really want  
17 to make -- even if the milk's cheap, do you want to  
18 devalue the inventory you already can't sell by putting  
19 more product on the market? And that's another  
20 consideration.

21 They're -- like everybody else in business, what's  
22 the best for my business, and it isn't always buying cheap  
23 milk. But generally, I mean, in -- I think the biggest  
24 indicator, Erin, is all the supply management programs we  
25 have with cooperatives, all over the country. They just  
26 simply -- they have -- they would have even more milk than  
27 they could manage if they didn't have those programs in  
28 place.



1 Q. Uh-huh. Okay.

2 On page -- well, page 22 of your PDF exhibit, you  
3 talk about you would like the effective implementation  
4 date to be January 1st, 2025, of the first increase.

5 And what's IDFA's position if, let's say,  
6 January 1st, 2025, in the calendar of events doesn't work,  
7 just for who knows what reason. What's your suggestion  
8 for how your proposal should be implemented?

9 A. Well, we believe strongly there's enough urgency  
10 that it doesn't need to wait. We don't think risk  
11 management on Make Allowances is -- is something we need  
12 to be careful with too much delay with that. We  
13 understand just the process alone and getting through all  
14 the steps, it looks like January 1st, 2025 was popular,  
15 Erin. I think we all recognize, again, that's -- that's  
16 Proposal 22. You make it work however it best fits to  
17 work. We would be open to a different timeline, but we  
18 would like annual adjustments like we proposed.

19 Q. Okay. So -- but starting at the first of the  
20 calendar year isn't --

21 A. It isn't crucial.

22 Q. -- isn't crucial? Okay.

23 A. Not if it doesn't make sense regulatory-wise to do  
24 that.

25 Q. Okay. And then on the -- give me a second. I  
26 thought I marked my page, but I apparently did not.

27 Page -- now I'm going to flip to your other  
28 exhibit, 214.



1 A. Okay.

2 Q. On page 26, so it's 25 going into 26, more in the  
3 implementation piece, you wrote, "If USDA were nonetheless  
4 to adopt such a delay in implementing, IDFA would no  
5 longer support staggered implementation of the proposed  
6 Make Allowance." And you would propose that we just jump  
7 to year four.

8 I'm just wondering if you could expand on that. I  
9 don't think anyone's asked you a question on that.

10 A. No. And that's an excellent question.

11 What -- what we're saying is if there's a  
12 significant delay due to, for example, risk management  
13 concerns. Let's just use an example. Say we're going to  
14 wait 18 months over when it could possibly be implemented  
15 because of that. We think at that point that that's too  
16 long to wait for just a partial, so we would ask that you  
17 move to the full thing. That would also give the risk  
18 management folks plenty of time to adapt to the change.  
19 That's what that's about. And that would be if there's  
20 a -- a plan significant delaying implementation. And,  
21 again, I know there hasn't been broad support for that,  
22 but we just -- our folks think it is pretty important that  
23 we don't stretch it out more than the four years we  
24 already have. So that's where that comes from.

25 Q. Okay. So I think as I have understood the  
26 testimony so far, that I -- I don't believe anyone's asked  
27 for a delay in the Make Allowance piece, for implementing  
28 that.





1 A. No. But there's -- there's been some conversation  
2 by one Upper Midwest bargaining cooperative that spent a  
3 lot of time talking about risk management and the need for  
4 delay that I don't think was specifically on Proposal 1.

5 Q. Okay.

6 A. Proposal 1, I can see some logic because you are  
7 changing those skim formulas.

8 Q. Okay. And then below that, you have, "A majority  
9 of cheese manufacturers have fewer than the 1250  
10 employees, and then therefore qualifies as Small  
11 Businesses."

12 I know we have collected information on the plants  
13 that have been here or the -- represented here at this  
14 hearing. But how did you come up with "a majority"?  
15 Where does that --

16 A. The survey. IDFA, when you -- we do annual  
17 surveys, and they give us employee numbers.

18 Q. So these are IDFA members?

19 A. Yes. These are IDFA members. That is correct. I  
20 can't speak for cheese makers, but for IDFA members, the  
21 majority of them are smaller. The big ones are really  
22 big, but the majority are less than that.

23 Q. Okay.

24 MS. TAYLOR: I think that's all AMS has. Thank  
25 you.

26 THE WITNESS: Thank you.

27 THE COURT: Redirect?

28 MR. ROSENBAUM: Your Honor, at this point I would



1 simply move Hearing Exhibits 214 and 215 into evidence.

2 THE COURT: Any objections?

3 Hearing none, 214 and 215 are admitted into the  
4 record of this proceeding.

5 (Thereafter, Exhibit Numbers 214 and 215 were  
6 received into evidence.)

7 THE COURT: Mr. Miltner, do you want to move in  
8 Exhibit 179 at this point?

9 MR. MILTNER: I think we'll move it after  
10 Mr. Allen says what he has to say about it, if that's  
11 okay.

12 THE COURT: Very well.

13 You are dismissed. Thank you, sir.

14 THE WITNESS: Thank you.

15 MR. MILTNER: Your Honor, this is Ryan Miltner  
16 representing Select Milk Producers, and we would like to  
17 the stand Mr. Chris Allen.

18 THE COURT: Mr. Allen, welcome. Please raise your  
19 right hand.

20 CHRIS ALLEN,

21 Being first duly sworn, was examined and  
22 testified as follows:

23 MR. MILTNER: Thank you, your Honor.

24 DIRECT EXAMINATION

25 BY MR. MILTNER:

26 Q. Mr. Allen, if you could state and spell your name  
27 for the record, please?

28 A. Chris Allen, C-H-R-I-S, A-L-L-E-N.



1 Q. And if you could also provide your business  
2 address for the record, please?

3 A. 5151 Belt Line Road, Suite 455, Dallas, Texas,  
4 75254.

5 Q. And in front of you do you have a document that's  
6 labeled in the upper right as Exhibit Select-1?

7 A. Yes.

8 Q. And is that your testimony on what is known as  
9 Proposal 11 in this proceeding?

10 A. Yes.

11 Q. Okay. And I understand that you -- you intend to  
12 read an abbreviated version of that statement for your  
13 testimony today, correct?

14 A. That is correct.

15 Q. Okay. Now, as you were preparing to deliver your  
16 testimony, I believe there were three small edits to that  
17 exhibit from that which was submitted USDA in advance; is  
18 that correct?

19 A. That's correct.

20 Q. Okay. So I want to go through those. And they  
21 are reflected in the versions that have been handed out,  
22 and we will submit to AMS a PDF copy of the revised  
23 version.

24 On page 1, the third line from the bottom, where  
25 it reads, "0.68% of butterfat."

26 That did read 0.68% of milk solids, correct?

27 A. Yes.

28 Q. And then on page 2, under the section beginning



1 "Philosophy and Rationale," in the fourth line, the word  
2 "processing" appeared twice, correct?

3 A. Correct.

4 Q. And the first one of those should have read  
5 "production"; is that correct?

6 A. Right.

7 Q. And then on page 16, in your conclusion, in what  
8 is the fourth line from the bottom, there was no change to  
9 the wording, but the change to the punctuation in that  
10 sentence there, correct, where it read, 0.2% of all  
11 solids, period, butterfat losses, comma, there was a  
12 punctuation change there, correct?

13 A. Yes.

14 Q. But no change to the wording as I recall; is that  
15 right?

16 A. Yes.

17 Q. All right. So if you would give a little bit of  
18 your revised statement on your background. If you would  
19 then pause, I would like to ask you a few more questions,  
20 and we'll proceed from there.

21 THE COURT: Did we mark this?

22 MR. MILTNER: Oh, you know what, we did not.  
23 Could we mark that, your Honor, as the next sequential  
24 exhibit?

25 THE COURT: Select-1 is marked 216 for  
26 identification.

27 (Thereafter, Exhibit Number 216 was marked  
28 for identification.)



1 MR. MILTNER: Thank you very much.

2 THE WITNESS: I am the senior director for  
3 industry relations and analytics at Select Milk Producers,  
4 Inc. I hold a bachelor's and master's degree in economics  
5 from the University of Texas at Arlington. I have worked  
6 in the dairy industry since 2008. Among my  
7 responsibilities are market analysis and economic policy.  
8 In conjunction with Select staff, I have analyzed and  
9 developed the three proposals submitted by Select and  
10 noticed for consideration at this hearing.

11 BY MR. MILTNER:

12 Q. Thank you very much.

13 Mr. Allen, if you could give us a little more  
14 background on the work you currently perform for Select  
15 Milk Producers and what that involves on a day-to-day  
16 basis.

17 A. Sure. Currently, and really throughout the  
18 15 years I have been in the industry, I have had various  
19 roles, but I have consistently and primarily focused on  
20 the economic analysis of the production, the supply/demand  
21 for milk, dairy products. Also focused on analysis of  
22 co-op businesses and businesses they run. And I have  
23 focused on the analysis of how changes in dairy policy  
24 impacts producer milk checks.

25 Q. When you are analyzing different scenarios for  
26 your employers, and currently for Select Milk, would you  
27 be looking at the producer side of that equation, at least  
28 in part?



1 A. Yes.

2 Q. Would you also be looking at the sale side of the  
3 equation where the cooperative is now selling producer  
4 milk to a customer?

5 A. Correct. Yes.

6 Q. On the policy, you mentioned you work in -- on  
7 policy analysis.

8 Does that include analysis of Federal Order  
9 regulations?

10 A. Yes.

11 Q. Would that include issues like this proposal or  
12 these proposals?

13 A. Exactly.

14 Q. Have you participated either as an attendee or a  
15 witness in any other Federal Order proceedings?

16 A. Yes.

17 Q. How long have you been working with Select Milk?

18 A. Just over one year.

19 Q. And prior to working with Select, did you work for  
20 another dairy cooperative?

21 A. Yes. Dairy Farmers of America.

22 Q. And how long did you work with DFA?

23 A. A little over 14 years.

24 Q. And the work you performed at DFA, was that  
25 similar in nature to that which you now do for Select?

26 A. Yes.

27 MR. MILTNER: Your Honor, we would like to qualify  
28 Mr. Allen as an expert in dairy economics and cooperative



1 economics.

2 THE COURT: No objections that I see. Yes, I so  
3 find.

4 MR. MILTNER: Thank you very much.

5 BY MR. MILTNER:

6 Q. Mr. Allen, if you want to read your abbreviated  
7 statement, keeping in mind the court reporter needs to  
8 take everything down. And -- and then when you are  
9 finished, we may have a few more questions. Thank you.

10 A. Yes, sir.

11 My testimony today addresses Proposal 11 related  
12 to product yields and farm-to-plant shrink. The current  
13 yield factors incorporate farm-to-plant loss of 0.25% of  
14 all milk solids and an additional 0.015 pounds of  
15 butterfat per hundredweight on all milk. These losses are  
16 incorporated through reductions in the yield factors for  
17 each surveyed commodity. In combination, the two  
18 assumptions presumed that 0.68% of butterfat solids are  
19 lost between the farm and the plant. Select's data from  
20 its milk shipments and milk receipts at its processing  
21 plants establish that these factors are incorrect.

22 Select's Proposal 11 removes the adjustment for  
23 farm-to-plant milk losses, resulting in changes to the  
24 yield factors for butter, the protein value in cheese, and  
25 the butterfat value in cheese. Adoption of Proposal 11  
26 would not change the yields for nonfat dry milk or whey.  
27 If adopted, Proposal 11 would change the yield for butter  
28 to 1.22, the yield reflecting the protein value in cheese



1 to 1.386, and the yield reflecting the butterfat value in  
2 cheese to 1.582.

3 Select's Proposal 11, and, in fact, all of  
4 Select's proposals and its evaluation of the other  
5 proposals under consideration at this hearing are governed  
6 by one overriding principle: The formulas establishing  
7 the minimum prices paid to producers should reflect the  
8 current economic realities of producing, transporting,  
9 processing, and marketing milk and dairy products. All  
10 aspects of the formulas should be reviewed rather than  
11 limiting consideration to a small subset of factors.  
12 Achievable efficiencies should be promoted rather than  
13 discouraged.

14 We expect that the adoption of Proposal 11 will  
15 increase the Class III and Class IV prices, thereby  
16 increasing Class I and Class II prices. I want to point  
17 out that increased minimum prices are the result of, and  
18 not the impetus for, offering Proposal 11.

19 Proposal 11 aims to ensure that the formulas  
20 reflect market conditions and achievable efficiencies. As  
21 representatives of Dairy Programs have occasionally said,  
22 the role of Federal Orders is not to enhance producer  
23 income. Rather, the end product pricing system is  
24 intended to construct a series of formulas that allow USDA  
25 to ascertain the value of producer milk used to  
26 manufacture defined commodities, taking into account the  
27 costs to convert milk into finished products and the  
28 yields of the products produced.





1 I would add that while Select's proposals would  
2 increase producer income, the same proposals would  
3 increase the cost of milk to Select's processing  
4 facilities. Every proposed change to the product formulas  
5 will have an impact. Make Allowance increases will  
6 decrease minimum prices. But if make costs have  
7 increased, those factors should be adjusted.

8 USDA's decision to hold a hearing on  
9 Make Allowances is prudent. Utilizing manufacturing cost  
10 factors set in 2008 based on even older data calls into  
11 question the validity and accuracy of those formula  
12 elements. In the same vein, the yield factors in the  
13 formulas incorporate assumptions regarding farm-to-plant  
14 shrink that are at least as stale as the underpinnings for  
15 manufacturing costs. It is time for them to be made  
16 current.

17 Precision and accuracy are paramount. Producers  
18 and handlers deserve to know that the calculation of the  
19 minimum class and component prices utilized the best  
20 available data and inherent assumptions for each of the  
21 three principal formula elements: Commodity prices,  
22 manufacturing allowances, and yields.

23 To accomplish that goal, it is incumbent on USDA  
24 to adopt those changes that most closely tie the price  
25 discovery mechanisms to the actual conditions of the  
26 market for commodities and the processes used to convert  
27 raw milk into those commodities.

28 USDA's 2002 decision to reduce yields came after



1 its recommended decision on the Class III and IV formulas,  
2 which reasoned that, "Inflating costs of production or  
3 reducing yield factors to reflect shrinkage would not  
4 properly reflect the value of producers' milk used in  
5 manufactured products."

6 The 2002 Final Decision reversed course, reducing  
7 the product yields and reasoning that, "The loss  
8 allowances in the Class III and IV formulas are intended  
9 to reflect actual losses that are beyond the processing  
10 handler's ability to control."

11 The 2002 Final Decision further stated that,  
12 "Comments received on the recommended decision indicated  
13 that milk solid losses between the farm and the receiving  
14 plant are real, unavoidable, and common."

15 In further explanation, USDA then wrote, and I  
16 quote: "It is necessary to include such an adjustment in  
17 using end-product pricing formulas for determining  
18 component prices. Since the handlers receiving milk from  
19 producers pay the producers on the basis of farm weights  
20 and tests, handlers do not receive all of the milk  
21 components due to farm-to-plant losses. An adjustment to  
22 the price formulas to account for the difference in milk  
23 components paid for versus components actually received is  
24 appropriate."

25 When USDA considered a proposal to eliminate  
26 farm-to-plant shrink in 2007, it found that, "Record  
27 evidence supports concluding that farm-to-plant shrinkage  
28 remains a reality for manufacturers. ...While DPNM argued



1 that its members' farm-to-plant shrinkage is well below  
2 the 0.25% contained in the Class III and Class IV  
3 product-price formulas, no evidence was offered for  
4 examination as an alternative other than its elimination."

5 Our testimony at this hearing will provide  
6 evidence sufficient for USDA to establish that plant  
7 losses are within the ability of producers, cooperatives,  
8 and handlers to control and that the majority of milk  
9 shipments realize little to no losses. Accordingly,  
10 USDA's previous conclusions that farm-to-plant losses are  
11 unavoidable and common should be reconsidered and that an  
12 adjustment to yields for farm-to-plant losses is not  
13 "necessary."

14 My written testimony presents the USDA calculation  
15 of the product yield factors and the revisions to the  
16 formulas outlined in this proposal. In lieu of reading  
17 that portion of my testimony, I am willing to answer any  
18 questions on these calculations.

19 In the 2007 hearing on formula components, Select,  
20 in conjunction with Dairy Producers of New Mexico and  
21 others, proposed eliminating farm-to-plant shrink. That  
22 proposal was part of a suite of formula modifications that  
23 were "considered jointly as coordinated adjustments to the  
24 various yield factors."

25 To be clear, in the hearing today, Select proposes  
26 the adoption of each of Proposals 10, 11, and 12. But  
27 each proposal stands alone. Based on the record evidence,  
28 USDA could adopt one, two, or all three of Select's



1 proposals.

2 Also In the 2007 hearing, USDA concluded that the  
3 weight of evidence was insufficient to support the  
4 elimination of farm-to-plant shrink. In today's  
5 proceeding, Select will provide data and evidence from  
6 both its cooperative operations (which include shipments  
7 from member farms to milk buyers) and from its processing  
8 operations (which include shipments received by Select's  
9 plants from both Select's farms and other producers).  
10 This data and evidence will support the removal of the  
11 shrink yield adjustments. We also provide data from USDA  
12 sources and additional rationale to supplement the data  
13 submitted. Collectively, this body of evidence should  
14 amply support Proposal 11.

15 Select's membership consists of 115 dairy farms in  
16 Indiana, Michigan, Ohio, New Mexico, Oklahoma, and Texas.  
17 Collectively, our members produce approximately  
18 9.6 billion pounds of milk each year. This translates to  
19 192,000 loads of milk per year. That's based upon a  
20 standard 50,000 load. Because many loads of milk are  
21 shipped using supertankers which carry greater volumes,  
22 the actual number of loads of milk marketed by Select each  
23 year is closer to 170,000.

24 Select will present testimony from its Senior  
25 Accounting Manager, Harmoni Campbell, to provide greater  
26 detail on Select's management and accounting of milk  
27 shipments, including the use of farm weights and  
28 reconciliations against plant weights. Her testimony,



1 which analyzed hundreds of thousands of data points for  
2 milk shipped by Select over the last year, will  
3 demonstrate that, in the aggregate, farm weights and plant  
4 weights align nearly perfectly (a difference of less than  
5 0.1%), and her testimony will demonstrate when  
6 discrepancies occur between farm weights and plant  
7 weights, the variance is not necessarily shrink, but a  
8 different issue that is able to be addressed between the  
9 cooperative and the handler.

10 In the 2007 hearing on price formulas, Select  
11 found itself in a position all too common to cooperatives  
12 and producers. It lacked data on plant operations to  
13 place in the evidentiary record. At the time, Select  
14 owned a small plant in Dexter, New Mexico, used for the  
15 filtration of milk. It owned no significant processing  
16 plants of its own. As a result, Select possessed limited  
17 data that it could provide to USDA regarding plant  
18 receipts.

19 In 2012, Continental Dairy Products, Inc., a  
20 cooperative that merged with Select in 2014, opened a  
21 state-of-the-art powder plant in Coopersville, Michigan.  
22 That plant, Continental Dairy Facilities, LLC ("CDF"),  
23 produces a full complement of dairy powders, as well as  
24 butter and cream.

25 In 2019, Select commissioned a sister plant in  
26 Littlefield, Texas, to serve our producers in the  
27 Southwest. That plant, Continental Dairy Facilities  
28 Southwest, LLC ("CDF Southwest"), produces a similar suite



1 of products as CDF.

2 Select will present testimony from the Director of  
3 Sales and Marketing for CDF and CDF Southwest, Cheslie  
4 Stehouwer, to provide detail and data on plant receipts.  
5 Her testimony will offer insight into the other side of  
6 the farm-to-plant shrink equation.

7 Because CDF and CDF Southwest receive milk from  
8 both Select members and other producers and cooperatives,  
9 this testimony will be important for demonstrating that  
10 controlling farm-to-plant shrink is not uniquely  
11 achievable by Select's members, large farms, or dairies in  
12 the Southwest. Her data will show that the shrink between  
13 farm and plant at Select's plants ranges from 0.10% to  
14 0.15%.

15 A cornerstone of Select's philosophy with respect  
16 to Federal Milk Marketing Orders is that they should  
17 discourage inefficiency and encourage efficiency in the  
18 production, collection, transportation, and marketing of  
19 milk. This guiding principle informs our views on the use  
20 of end product pricing and the policy decisions that USDA  
21 must make when it considers changes to the price formulas.  
22 The issue of farm-to-plant shrink is no different.

23 The more farms included on a milk route, the  
24 greater the chance for discrepancies between farm weights  
25 and plant weights to differ. Each time a milk truck stops  
26 to pick up milk, there is potential for spillage, loss  
27 within piping, and even errors in measurement. All of  
28 Select's members are of sufficient size to ship a full



1 tanker load of milk at each pickup. As a result, Select  
2 is not subject to the risk of additional losses that can  
3 occur on routes with multiple stops.

4 I want to explain for the record the difference in  
5 operations for a full-load milk pickup and a multiple-stop  
6 pickup to highlight both efficiencies and areas where  
7 losses might occur.

8 Every milk pickup involves using a hose to  
9 transfer milk into the truck tank. Some milk is regularly  
10 left in the hose once the transfer is completed. With a  
11 multi-stop pickup, a hose is used at each farm, and the  
12 loss accumulates with each separate pickup. With a  
13 full-load pickup, only a single hose is used, and the  
14 residual milk is limited to what is left in this hose.  
15 Additionally, full-load pickups can range from about  
16 40,000 pounds to over 100,000 pounds in total milk  
17 transported to a plant.

18 In the case of a 100,000-pound load of milk, this  
19 is the equivalent of shipping two 50,000-pound tankers  
20 with the hose transfer occurring only once, not twice.  
21 However, the vast majority of multi-stop pickups occur  
22 with 50,000-pound or less of total collected and delivered  
23 to a plant.

24 The vast majority of milk produced in the United  
25 States is produced on farms with sufficient cows to  
26 produce a full tanker load at each pickup. USDA's Milk  
27 Production Report suggests that the national average per  
28 cow production is approximately 67 pounds per day. Milk



1 must be picked up on-farm not less frequently than every  
2 48 hours. Assuming every-other-day pickups, a farm  
3 milking 375 or more cows will fill a full 50,000-pound  
4 tanker.

5 The USDA Publication, Consolidation in U.S. Dairy  
6 Farming, analyzed U.S. dairy farms across multiple  
7 measures. It concluded that in 2016, seven years ago,  
8 dairy farms with more than 200 cows accounted for 80.3% of  
9 all U.S. milk production. Farms with more than 500 cows  
10 accounted for 68.4% of all milk production. It is  
11 reasonable to assume that half of the volume produced by  
12 farms milking between 200 and 499 cows comes from farms  
13 with more than 375 cows.

14 So in, 2016 three-quarters of all U.S. milk  
15 production was produced from farms that could fill a  
16 tanker. By comparison, in 2000, farms that could fill a  
17 full tanker accounted for less than half of U.S.  
18 production. While ERS has not yet released its findings  
19 from the most recent Census of Agriculture, given the  
20 continued consolidation of dairy farms, the percentage of  
21 farms able to fill a full tanker is undoubtedly higher in  
22 2023.

23 Since 2016, the consolidation of dairy farms has  
24 only continued, if not accelerated. In 2016, the number  
25 of licensed U.S. dairy farms was 41,819. For 2022, that  
26 number was 27,932. It is, therefore, reasonable to assume  
27 that the volume of milk from these farms is now well above  
28 80%.





1           And so, recognizing that shrinkage is most  
2 prevalent on shipments containing multiple farms but that  
3 such loads are a small and declining minority of milk  
4 shipments, USDA must ask itself whether its policy  
5 decision on yields will recognize the changes in the  
6 production and transportation of milk that have occurred  
7 since it concluded in 2002 that farm-to-plant losses were  
8 common, unavoidable, and uncontrollable.

9           Although farm-to-plant shrinkage is most easily  
10 controllable when producers ship full loads, that does not  
11 mean that farms with fewer than 375 cows necessarily have  
12 losses as high as assumed by the current yield factors.  
13 The data to be presented from CDF includes milk shipments  
14 from farms in multiple pickup routes. As that testimony  
15 will show, differences between the farm and plant weights  
16 from full-load shipments and multiple farm shipments are  
17 not significant. In addition, good practices and the use  
18 of available technologies can mitigate actual shrink.

19           It is consistent with Select's philosophy of  
20 promoting efficiencies within the entire milk marketing  
21 system, increases in minimum prices resulting from the  
22 elimination of farm-to-plant shrink should be used by  
23 producers and cooperatives, in part to improve their  
24 on-farm technologies and practices to achieve the lowest  
25 practicable shrink. Handlers, producers, and cooperatives  
26 should be working collaboratively to identify and mitigate  
27 areas of excessive shrink with the goal of achieving  
28 actual shrink that is negligible.



1 Even those farms without the ability to fill a  
2 full tanker can adopt the use of farm scales, flow  
3 measurement, and other technologies to eliminate much of  
4 the imprecision and inaccuracies that can result from the  
5 utilization of outmoded dipsticks and similar tools.

6 Could some of these improvements come with a cost  
7 to the producer? Certainly, but based on the anticipated  
8 price impacts of adopting Proposal 11, the incremental  
9 income to a farm with 170 cows (approximately half the  
10 size of an average licensed dairy herd) would exceed  
11 \$3,000 per year, which based on the useful life of such  
12 improvements, still is a net improvement to the producers'  
13 bottom line.

14 The adoption of Proposal 11 would result in  
15 increases to the announced component prices for butterfat  
16 and protein. Based on my analysis of the changes, using  
17 five and ten-year averages of commodity prices through  
18 April 2023, I computed the component and Class price  
19 impacts presented in my written testimony.

20 The precise impacts on the statistical uniform or  
21 blend price will vary by order and could be further  
22 impacted by any adjustments USDA elects to make to the  
23 Class I mover. But because the Class III and Class IV  
24 impacts under the five-year and ten-year analyses are  
25 about \$0.07, it is reasonable to project that the overall  
26 impact of the full adoption of Proposal 11 would be \$0.07.

27 My written testimony includes the required  
28 amendments for the adoption of Proposal 11. Select



1 believes that the data and evidence it has and will  
2 present provide USDA with ample justification to eliminate  
3 shrink from the yield factors.

4 If however, USDA finds that it is appropriate to  
5 reduce the impact of shrink rather than fully adopt  
6 Proposal 11 as drafted, Select would defer to USDA's  
7 reasoned discretion based on the record evidence.

8 The current yield factors in Class III and  
9 Class IV formulas are lower than they would be otherwise  
10 due to USDA's policy decision to incorporate a reduction  
11 factor for farm-to-plant shrink. That policy decision was  
12 premised on the belief that such losses were beyond the  
13 handler's ability to control, unavoidable, and common.

14 Select believes otherwise. Producers,  
15 cooperatives, and handlers do have the ability to address  
16 and stem losses in the transportation of milk from the  
17 farm to the plant.

18 In addition to the measures I have discussed,  
19 actual data on farm shipments and plant receipts to be  
20 presented by Select's other witnesses will establish that  
21 the net differences in farm weights and plant weights are  
22 far less than assumed by the current formulas. In fact,  
23 Select's data will demonstrate that those differences are  
24 less than 0.2% of all solids and that butterfat losses, to  
25 the extent they occur, do not occur at a rate greater than  
26 overall solids losses assumed in the current formulas. It  
27 is time to remove this factor from the yield formulas and  
28 compensate producers for the full value of the milk they



1 ship to handlers.

2 Q. Thank you, Mr. Allen.

3 A couple of questions to provide a little more  
4 context to your testimony. And I'm looking at page 2 of  
5 what has been marked as Exhibit 216.

6 And you have testified that the role of Federal  
7 Orders is not to enhance producer income. Can you expand  
8 on that concept a little more for us?

9 A. Yeah. I think USDA has been asked to define the  
10 role of the Federal Orders over the years, and I think you  
11 can point to differences in what they have stated. But  
12 there are some core -- some core statements that I think  
13 still hold true today.

14 And the enhancement of producer income, or what's  
15 otherwise been interpreted as improving producer prices, I  
16 would say that just by the very creation of co-ops  
17 allowing to work on behalf of farms and negotiate on  
18 behalf of farms, that has resulted in increased prices to  
19 producers.

20 So USDA has already met some of that obligation,  
21 but I don't think the intent was for USDA to use the  
22 Federal Orders to continually increase producer prices.  
23 Select believes that the market should still dictate the  
24 price that goes to the producer.

25 Q. So you actually in preparing for this, you found I  
26 think it was a Congressional report, where USDA testified  
27 to the opposite of that, that the purpose of the orders  
28 was to increase producer income.



1 A. Right.

2 Q. And so do you have any thoughts on what you  
3 interpreted that concept as then versus what you're  
4 testifying to now?

5 A. Again, I think the concept of increasing producer  
6 income was in the absence of the co-op's ability to  
7 collective bargain on behalf of producers. And so I do  
8 think there has been -- there was an expectation of what  
9 the Federal Orders would do, and that has been achieved.  
10 Producer income has been increased. But I don't think it  
11 was expected to continue to increase.

12 Q. When you talk about cooperatives bargaining, would  
13 that include the changes in relative bargaining position  
14 that the Federal Orders create for producers and handlers?

15 A. Yes. I -- I believe that at the inception of  
16 Federal Orders it was believed that the processors, the  
17 plants had unequal bargaining power, that they had the  
18 upper hand when it came to negotiating milk prices. And  
19 the implementation of the Federal Orders allowed some  
20 equalization of that -- that negotiation power, bargaining  
21 power.

22 Q. And as an economist, if you -- if you stabilize  
23 the relative bargaining power of a product seller, what  
24 would you expect that to do to the income they receive?

25 A. To increase.

26 Q. So in that sense, the Federal Orders do increase  
27 producer income, right?

28 A. Absolutely.



1 Q. And even today, in the absence of Federal Orders,  
2 would you expect that the bargaining power -- relative  
3 bargaining power of producers to weaken if the orders were  
4 eliminated?

5 A. Absolutely. Yes. Without a doubt.

6 Q. So that function of stabilizing producers'  
7 bargaining power and bargaining position remains an  
8 important consideration?

9 A. Yes.

10 Q. But you also clarify that the purpose for  
11 Proposal 11 is not just to raise the price, is it?

12 A. Correct.

13 Q. Further on in your statement you talk a little bit  
14 about some of the milk losses that occurred with hoses,  
15 and you talk about multiple farm stops.

16 And I would ask you, perhaps, other than hose  
17 losses, can you think of an area where there is inherent,  
18 unavoidable, farm-to-plant loss that occurs?

19 A. I guess I'm drawing a blank on where in the  
20 process for picking up at the farm to the plant that that  
21 could occur. There's a known loss when you measure what's  
22 in the bulk tank at the farm and then you transfer that  
23 product to a truck and you know that not all of that  
24 product makes it to the truck. But once the product is on  
25 the truck, if you capture the weight at that point, then  
26 you know what's going to be delivered to the plant.

27 Q. And then, on page 16, of Exhibit 216, the first  
28 paragraph there that isn't a CFR citation, it says,



1 "Select believes that the data," do you see that paragraph  
2 there?

3 A. Yes.

4 Q. At the end of that paragraph, just to I guess  
5 cap -- encapsulate what you are saying is that Proposal 11  
6 is not an all-or-nothing proposition for Select, is it?

7 A. Correct. It is not all or nothing.

8 Q. Okay. One last thing. We introduced an exhibit,  
9 Exhibit 179, into the hearing record.

10 And you were not here when that was introduced,  
11 correct?

12 A. I was not present. I was viewing online, but I  
13 was not here.

14 Q. So you are familiar with the Exhibit 179?

15 A. Yes.

16 Q. Have you seen it before?

17 A. Yes.

18 Q. Has your name on it, doesn't it?

19 A. Correct.

20 Q. Did you receive this e-mail from International  
21 Dairy Foods Association?

22 A. I did.

23 Q. And the version that is Exhibit 179, is that an  
24 accurate copy of the e-mail you received as the -- in the  
25 form that you received it?

26 A. Yes.

27 Q. Is Select Milk Producers a member of IDFA?

28 A. Yes.



1 Q. To this day, correct?

2 A. Correct.

3 MR. MILTNER: Your Honor, we would offer Mr. Allen  
4 for any additional questions.

5 THE COURT: Anyone have any questions for this  
6 witness, other than AMS?

7 CROSS-EXAMINATION

8 BY MR. ENGLISH:

9 Q. Good morning, Mr. Allen.

10 A. How are you doing?

11 Q. My name is Chip English, and I represent the Milk  
12 Innovation Group. Thank you for your testimony.

13 I have -- I'd like to start with some, like -- I  
14 think maybe some philosophical questions, as I read or  
15 perhaps misread your testimony, so I -- I'm really trying  
16 to understand.

17 So at some points in your testimony, you talk  
18 about the USDA should use actual conditions in the  
19 industry, correct?

20 A. Yes.

21 Q. And then at other times you talk about achievable  
22 efficiencies, correct?

23 A. Yes.

24 Q. In your mind are those things the same?

25 A. Not necessarily.

26 Q. Would it be fair to say that even in its  
27 terminology, achievable efficiencies doesn't necessarily  
28 mean achieved efficiencies?





1 A. Correct.

2 Q. So when you say, "Achievable efficiencies should  
3 be promoted rather than discouraged," is it your view that  
4 Federal Orders in some way do not en- -- presently, do not  
5 encourage achievable efficiencies?

6 A. Yes.

7 Q. And how -- how are Federal Orders doing that in  
8 your mind?

9 A. I think the underlying assumptions assume an  
10 allowable amount of shrink to just occur, that it just  
11 occurs, it is out there, and so the formulas just build  
12 that into the assumptions on the yield factors. And I  
13 think if the formulas were reflective of more of what  
14 actually occurs in the industry, again, as I described, I  
15 forgot what page it is on, but producers would benefit  
16 from the change in the formulas and be able to use that  
17 benefit to rationalize why they would make changes on  
18 their farm to better reflect the weights delivered to the  
19 plants.

20 Q. So -- but until they actually do that, they may be  
21 get more income, but the plants who bought the milk from  
22 them, assuming that those smaller farms have not yet  
23 adjusted, wouldn't fully realize the benefit at the plant,  
24 correct?

25 A. That's correct.

26 Q. Okay. And you talked about the income, I think  
27 you said \$3,000 for the 175-cow farm, correct?

28 A. That was the example given.



1 Q. As an example.

2 Do you know how much it would cost that farm to  
3 achieve that?

4 A. There's many options that could be deployed, so I  
5 don't know exactly.

6 Q. But there is a cost to achieve that?

7 A. Yes.

8 Q. So what -- what should the Department -- I'm not  
9 here to ask the questions for the Department, but  
10 assuming -- you know, for a policy maker, I'm thinking  
11 about other issues that have been before the hearing or  
12 may come before this hearing. You understand that, for  
13 instance, with Make Allowances, USDA has used weighted  
14 averages of cost, correct?

15 A. Yes.

16 Q. Okay. And to the extent they used a weighted  
17 average of costs, that would arguably encourage  
18 efficiencies for those plants who are more costly than the  
19 average, correct?

20 A. Ask that again, please?

21 Q. So -- so to the extent Make Allowances are based  
22 on weighted average costs for plants --

23 A. Yes.

24 Q. -- those plants that are -- have higher costs than  
25 that weighted average, assuming they are currently up to  
26 date or something, those plants will obviously face a need  
27 to become more efficient and have less cost in order to  
28 meet those goals, correct?



1           A.     Well, I think it depends on if the plant's being  
2     priced under the Federal Order and is being held to the  
3     Federal Order price. That's the assumption that you're --

4           Q.     Yeah. Yeah. Thank you for that. The assumption  
5     here is that a plant is being held to the Federal Order  
6     price.

7           A.     If they were buying milk at the Federal Order  
8     announced price, then they would be incentivized to reduce  
9     their costs, I would agree.

10          Q.     Does Select have a position, thinking about  
11     achievable efficiencies, on whether the use of weighted  
12     averages, whether for Make Allowances or yields, is the  
13     right approach?

14          A.     I don't believe we have gotten that far yet.

15          Q.     Okay. And so when you testify about Select's  
16     experiences, for instance, I'm looking at page 9, you are  
17     not actually saying that everybody achieves that kind of  
18     results, correct?

19          A.     On page 9, where did you want to direct me to  
20     look?

21          Q.     Well, I'm sorry, actually's page 10.

22          A.     Okay.

23          Q.     In aggregate, farm weights and plant weights align  
24     nearly perfectly with a difference of less than 0.1%, and  
25     that, you know, the losses are, you know, very, very  
26     small.

27                     You would agree that not everybody is presently  
28     achieving that, correct?



1           A.    Don't know.  That's the challenge.  That's what we  
2   are -- that's what this section is about is we don't have  
3   data other than our own, so we are willing to submit our  
4   data for the record.

5           Q.    And your data reflects -- you know, you have a  
6   hundred -- this is where I was on page 9, so I got ahead  
7   of myself.

8           A.    Okay.

9           Q.    Your data reflects that you have 115 dairy farms,  
10   you know, translated for standard loads at 192,000 loads.

11                   My quick math suggested that's somewhere in the  
12   neighborhood on average of four and a half loads per day  
13   for those farms?

14          A.    That's very fair.

15          Q.    Okay.  Are you aware of the size of farms, say, in  
16   the Northeast?

17          A.    Yes.

18          Q.    Is it fair to say that a lot of farms in the  
19   Northeast are very small?

20          A.    Yes, they are.

21          Q.    Have you ever been to Maine?

22          A.    I have.

23          Q.    You have?  Have you ever seen tankers in Maine?

24          A.    They are not the same as the ones that are in  
25   Texas or in Michigan.  How about that?

26          Q.    Okay.  Do you know that they don't even hold  
27   40,000, they are smaller than that, because the Maine  
28   roads won't take tankers that large?



1 A. I can't say personally I have experienced that,  
2 but I have heard that before.

3 Q. Okay. And that might very well be true in Vermont  
4 and New Hampshire, correct?

5 A. I think I have seen larger tankers in Vermont  
6 without a doubt.

7 Q. So you've focused some of your attention on  
8 page 12 on discussion about volumes of milk and how that  
9 has changed since 2000.

10 Volumes -- you focused on volumes rather than the  
11 actual number of farms, correct?

12 A. Yes.

13 Q. Okay. And it's axiomatic that it would take a  
14 larger number of small farms to achieve a volume than the  
15 large farms, correct?

16 A. Yes.

17 Q. Okay. So when you say that in your estimation,  
18 now, 75 or 80% of the volume is from farms that have a  
19 full tanker load, that necessarily means that more than  
20 20% -- if 20% volume is smaller than that, that's got to  
21 be more than 20% of the farms, correct, by math?

22 A. You've got me in front of a crowd asking questions  
23 on math, so you are going to have to give me a second.  
24 Could you ask that again, please?

25 Q. You want me to start over?

26 A. Yeah. I don't know if you got --

27 Q. I had a question, but then the -- so given my  
28 question about axioms in terms of math, in terms of volume



1 versus numbers, if -- if -- if 80% of the volume in your  
2 view, including every-other-day tank pickups, would be  
3 full tankers, that additional -- that left-over 20% volume  
4 by necessity has to be more than 20% of the farms?

5 A. Yes. And that's where I got lost was the  
6 difference between volume and farms. That's why I was  
7 asking you to repeat it.

8 Q. Well, and I appreciate that because I got lost in  
9 your testimony between volume and farms, so --

10 A. Understood. Understood.

11 Q. So I understand what you are trying to get at.  
12 And I understand the idea that for -- you know, for farms  
13 there would be a financial incentive to make the  
14 changeover.

15 But part of what you are telling us is, hey, we  
16 have our evidence, but we don't know what's happening in  
17 the rest of the industry, correct?

18 A. That is correct.

19 Q. Okay. And so that is one reason why you, you  
20 know, would like at some point at least for there to be a  
21 study on yields, correct?

22 A. Yes.

23 Q. Has Select sought out to have a yield study done  
24 by industry sort of like what Dr. Stephenson did on  
25 Make Allowances?

26 A. I don't believe so.

27 Q. And you acknowledge that each time a milk truck  
28 stops to pick up milk, there's potential for spillage,



1 correct?

2 A. Yes.

3 Q. Is there some risk that if your proposal is  
4 adopted without having done a yield study, that plants  
5 purchasing milk from farms in the Upper Midwest or, say,  
6 the Northeast where there are smaller farms will stop  
7 buying milk from smaller farms?

8 A. I don't think so.

9 Q. Is there some risk that until that money actually  
10 gets through to the smaller farms and they can adjust,  
11 that they as small businesses may be more affected by the  
12 change in regulations than larger farms?

13 A. Small businesses may be more affected than larger  
14 farms? Did you mean both farms in that scenario?

15 Q. Yes.

16 A. Smaller farms would be more impacted than larger  
17 farms?

18 Q. Yes.

19 A. As a percentage of -- everything we're talking  
20 about is a percentage of milk, so I don't think so.

21 Q. Do you know for a fact that -- your statement on  
22 page 12 refers to assuming every-other-day pickups?

23 A. Correct.

24 Q. Do you know for a fact that that's actually how it  
25 occurs in the Northeast, that in order to avoid more  
26 pickups, that they actually do that, or that maybe because  
27 the routes the way they work, people actually pick up the  
28 milk from less than full loads every day?



1           A.     Yes.  There are plenty of instances where  
2     less-than-full loads are picked up.

3           Q.     So is it fair to say that we are -- you know,  
4     obviously Select has its experience, which is terrific and  
5     it is well known for innovation and for its success.

6                     But nonetheless, in an industry where not everyone  
7     has farms the size of Select, that your achievable  
8     efficiencies are theory and not necessarily reality?

9           A.     There's -- there's a certain amount you can show  
10    as data.  And there's a certain amount that's experience  
11    and a certain amount that's anecdotal.  We felt like we  
12    did the best we could to bring data forward.

13                    I can speak to experience where there's challenges  
14    with labor, and driver wages are becoming more and more of  
15    an issue in the industry, and where there's more of a push  
16    to cut back on how much driver time is spent at farms.  
17    And so there's technology being invested and implemented  
18    on tankers to better reflect or -- and the goal is to  
19    reduce driver time on the farms, but what actually ends up  
20    happening is you now measure weights at the tank -- the  
21    pickup truck instead of the bulk tank.  So there's other  
22    things that are going on in the industry that aren't just  
23    specific to the dynamics and the economics of just the  
24    milk price.

25                    And so I think there's a lot that's changed in  
26    20 years in the industry that hasn't been captured, that  
27    better reflects that what is being delivered to plants is  
28    closer to what's -- what the farms say they are shipping.





1           So I know that was a long way to answer your  
2 question. But, again all I can say is we have the data we  
3 have, and that's the best we can do.

4           MR. ENGLISH: Thank you. That's all I have.  
5 Appreciate your time.

6           THE COURT: Other questions for this witness,  
7 other than AMS?

8           MS. HANCOCK: Your Honor, I have a few, but I  
9 don't know what we want to do for lunch time.

10          THE COURT: Either way.

11                               (Off-the-record.)

12          THE COURT: Let's break for lunch and come back at  
13 1:15.

14                               (Whereupon, a luncheon break was taken.)

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1 MONDAY, SEPTEMBER 18, 2023 - - AFTERNOON SESSION

2 THE COURT: Welcome back. You are still under  
3 oath.

4 CROSS-EXAMINATION

5 BY MS. HANCOCK:

6 Q. Okay. Good afternoon, Mr. Allen. We have met off  
7 the record, but I'm Nicole Hancock. I represent National  
8 Milk. Thanks for being here today.

9 I just want to cover a few things in your  
10 testimony. If you could turn to page 5. This is the  
11 section you kind of fast forwarded over just because it  
12 looks like it is just the calculation of factors and  
13 saving us some time in reading testimony. Appreciate  
14 that.

15 Did you do -- this is -- these are your  
16 calculations that start on page 5?

17 A. This is the USDA calculation.

18 Q. Well, that you have included -- well, I guess you  
19 take USDA's numbers and then you have applied your own  
20 calculations to it as well?

21 A. Yes.

22 Q. Okay. So on page 5, for example, we're under the  
23 butterfat yield factor, the last sentence of the first --  
24 or the last sentence of the last full paragraph on that  
25 page, you have done a calculation dividing 1.0 by the .82  
26 divisor in the butterfat formula results in a yield of  
27 1.2195, which rounded to two decimal places is 1.22.

28 I'm just curious why you chose the rounding that



1 you did to two decimal places as opposed to continuing  
2 with the four decimal places?

3 A. I thought that was consistent with how it had  
4 previously been calculated by USDA.

5 Q. Okay. And in this example it just results in a  
6 rounding up to 1.22; is that fair?

7 A. Yes.

8 Q. Okay. And then if we go to the next page, under  
9 the cheese protein yield factor, in that example, you have  
10 stayed with -- well, you went from 1.3864, and then you  
11 rounded that one to three decimal places.

12 Any reason why that one you took out to three?

13 A. Again, I thought we were being -- our approach  
14 here was being consistent with how USDA had presented in  
15 their testimony -- or in their final decision.

16 Q. Okay. Do you have a preference which way you  
17 think it should be done?

18 A. I guess for consistency sake, just do it the same  
19 way USDA had done it. Like the approach that I took, yes.

20 Q. Okay. And then just so that we're clear, the same  
21 would be true on -- if we look 7 going onto page 8, for  
22 nonfat dry milk, it looks like that one we took to just  
23 two decimal places, and you rounded up there again?

24 A. Yes. Same method.

25 Q. Okay. And then on dry whey yield factor, which  
26 goes over to page 9, that one you took out to two decimal  
27 places. And that one actually ended up rounding down.

28 A. Looks like.



1 Q. Same thing?

2 A. Yes, slightly. Yep.

3 Q. Okay. You had mentioned in your testimony that  
4 Select has recently constructed a state-of-the-art  
5 facility?

6 A. Yes.

7 Q. Where is that located?

8 A. The most recent one is in Littlefield, Texas.

9 Q. Okay. How -- how many plants have been  
10 constructed in the last ten years by Select?

11 A. I believe two if my math is right. Well, close to  
12 ten years on the one in Coopersville.

13 Q. Okay. So the two would be Littlefield, Texas, and  
14 Coopersville?

15 A. Yes.

16 Q. Okay. And what do you produce in Littlefield?

17 A. It is -- it's not listed here. Yeah, it just says  
18 dairy powder. So we would do -- and I can get better --  
19 or you will have other witnesses from Select that will be  
20 able to better answer that question if I'm not correct,  
21 but it would be nonfat dry milk and I think skim milk  
22 powder, along with condensed and cream. And butter.

23 Q. Okay. Who would be the witness that you said is  
24 coming up that would be potentially better informed about  
25 it?

26 A. Definitely Steve Cooper and then Cheslie  
27 Stehouwer, either one could answer that question  
28 specifically. I think I got it mostly correct though.



1 Q. Okay. And then -- and when was that -- when did  
2 that plant open up?

3 A. The Littlefield, Texas, plant was 2014. No.  
4 Sorry. It's -- even I lose track of these time lines.  
5 2019 was Littlefield.

6 Q. Okay. And then Coopersville, is that the one that  
7 was 2014?

8 A. 2000 -- 2012 is when that plant was built. That's  
9 why I was saying it was around ten years. I knew it  
10 wasn't exactly ten years or within that ten-year window.

11 Q. Okay. And what do you produce there?

12 A. Same thing, the nonfat dry milk, skim milk powder,  
13 condensed cream, and butter.

14 Q. Do you know what you spent in constructing those  
15 facilities?

16 A. I do not.

17 Q. Safe to say hundreds of millions of dollars as we  
18 have seen with other plants?

19 A. Feel safe, yes.

20 Q. And when we -- you have had some testimony, I  
21 don't want to rehash it, but you have already had some  
22 questions and provided some responses, which I think are  
23 very candid about, you know, you recognize that you're  
24 providing somewhat of a limited dataset when you provide  
25 Select's yield data; is that fair?

26 A. Yes.

27 Q. And in a perfect world, or even in a much more  
28 improved world, you would have a much larger sampling size



1 of actual data from others as well?

2 A. Yes.

3 Q. And so do you agree that having a mandatory  
4 audited cost survey that would also include yield data  
5 would be a better methodology for collecting and analyzing  
6 the numbers that are -- that you are proposing today?

7 A. It would be a good methodology. When you say  
8 better -- is that the word you used was better?

9 Q. Well, better than one sample size.

10 A. Yes. I agree with that.

11 Q. Okay. But do you believe that it would be a good  
12 methodology as well?

13 A. Yes.

14 Q. Okay. And so do you support the concept of having  
15 a mandatory audited cost survey that would also include  
16 yield data as well as the cost data that we have been  
17 talking about for Make Allowances?

18 A. Yes.

19 Q. And you have already covered some of this with  
20 Mr. English. But it's fair to say that the farms that  
21 produce milk or from whom Select purchases its milk tend  
22 to be on the larger size; is that fair?

23 A. Our member farms are larger, but I wouldn't say  
24 that all the farms we purchase from are larger size.

25 Q. Okay. Member farms that are larger tend to build  
26 in some additional efficiencies?

27 A. Again, what are we comparing against?

28 Q. Against smaller farms?



1 A. I would believe that.

2 Q. Okay. And that would include also the capability  
3 of implementing some of the -- of the measuring tools or  
4 technologies or the efficiencies that you think would be  
5 potentially encouraged by -- by your proposal?

6 A. I don't think those technologies are limited to  
7 just certain type -- certain size farms, no.

8 Q. But do you agree that the larger farms have a  
9 greater capacity because of those efficiencies, a greater  
10 financial capacity to be able to implement those -- those  
11 tools already?

12 A. Again, it depends on the tool that's being  
13 implemented. A scale is one thing. That's a large fixed  
14 cost. So that's a different approach than I -- I  
15 butchered it, but I was trying to elaborate on the  
16 scenario in the Northeast where because of hauling cost  
17 challenges, there's actually work by the co-ops to  
18 implement technology on the tankers that reduce the  
19 hauling costs associated with picking up milk, but it also  
20 creates a benefit to the farms that they have better  
21 measure of the weight of the milk collected on the tanker.

22 So, again, that's not necessarily a cost borne  
23 directly by those farms for that technology. It may be  
24 shared across the members of that co-op. But it is not  
25 the same as putting a scale at a single farm. There's  
26 different approaches or different solutions, different  
27 costs.

28 Q. Okay. And in that example, it would be a



1 measuring tool that was put on the tanker, and it would  
2 save the farm from having to put that into the -- become a  
3 farm expense?

4 A. You assume that they have already had some sort of  
5 measuring device on their tanker -- I mean, on their farm  
6 tank, and so this just adds another tool that now captures  
7 the milk on the tank instead of the farm, bulk pickup --  
8 or farm bulk tank.

9 Q. Okay. Did Select participate in Dr. Stephenson's  
10 survey for 2021?

11 A. I don't believe so, but I don't know specifically.  
12 I was not a part of Select in 2021.

13 Q. And I think it -- did -- did Select participate in  
14 Dr. Stephenson's study for 2023?

15 A. I don't believe so.

16 Q. Okay. And I think you had already talked about  
17 with Mr. Miltner that you had been a recipient of IDFA's  
18 letter that was encouraging all of its members to  
19 participate in that survey; is that right?

20 A. Yes.

21 Q. Why did Select choose not to participate?

22 A. I couldn't answer that question. Just timing of  
23 when that survey came out, I was new to Select. I don't  
24 think I was fully involved to really appreciate what was  
25 going on.

26 Q. And since you have been there and since you have  
27 been preparing for this hearing, have you heard any  
28 information that would help you have a better





1 understanding about why Select did not participate?

2 A. I have been engaged with the board on these topics  
3 and some of the other proposals, but I haven't gotten to  
4 that level of detail, no.

5 Q. And then the same is true, you are not sure  
6 whether Select participated in the 2021 survey?

7 A. I believe I answered that, no, I don't know why  
8 Select did not participate.

9 Q. Okay.

10 MS. HANCOCK: That's all I have. Thank you.

11 THE WITNESS: Sure.

12 THE COURT: Are we ready for AMS?

13 Seeing no hands raised or other volunteers, this  
14 witness is in your hands, Ms. Taylor.

15 CROSS-EXAMINATION

16 BY MS. TAYLOR:

17 Q. Good afternoon.

18 A. Hey there.

19 Q. Thanks for coming to testify this week.

20 A. Absolutely.

21 Q. Just a few questions that might not have been  
22 covered by others.

23 I think on -- late in your testimony you say  
24 there's 115 members of Select?

25 A. Correct.

26 Q. Okay. And that you also buy milk from other  
27 non-members?

28 A. Yes.



1 Q. About how many non-members do you all buy milk  
2 from?

3 A. Currently about a dozen.

4 Q. And when it comes to Select's members, I'm not  
5 sure if you have listened in, I think you have been here  
6 earlier in the hearing, on the Small Business definition  
7 of \$3.75 million?

8 A. Yes.

9 Q. Do you know how many of Select members would meet  
10 that definition?

11 A. In the Southeast Federal Order hearing, we had to  
12 answer that question, and I should have looked it up  
13 before I got up here. I believe it was only a handful of  
14 that dozen, but I don't recall specifically what that  
15 number was. It was not all 12 to be clear.

16 Q. That's of the non-members?

17 A. Of the non-members, yes.

18 Q. And would any of the Select members meet the  
19 definition --

20 A. Oh, no, no. Sorry.

21 Q. Okay. And I'm not sure it's covered in your  
22 testimony, but where does Select market milk?

23 A. The same places our farms are located: Texas, New  
24 Mexico, Indiana, Ohio, Michigan are the primary locations,  
25 and then we do have supplies into the Southeast on a  
26 year-round basis as well.

27 Q. I'm going to turn to your testimony first.

28 On the first page, when you are doing the overview



1 of your proposal, and you say, "In combination, these two  
2 assumptions presume that .68% of butterfat is lost between  
3 the farm and the plant."

4 Can you just tell me the math to get to this .68?

5 A. Yeah. It's on -- just assume 3.5 pounds of  
6 butterfat, you have lost .25% of that, you do the  
7 assumption in the formula, and then another 0.015 pounds.  
8 So then you take your new result, divide it over the  
9 original 3.25, and that should be the .68% difference.

10 Q. Okay. He got that.

11 A. Good.

12 Q. You can go back and read later to make sure we got  
13 that.

14 Turning to page 10, and you list -- you are  
15 talking about a little bit summarizing the upcoming  
16 testimony of Ms. Campbell. And then you say the testimony  
17 will demonstrate in the aggregate farm weights and plant  
18 weights align nearly perfectly with a difference of less  
19 than .1%.

20 And then I turn to the next page, in the last  
21 sentence of that first paragraph, says, Her data will show  
22 the shrink between farm to plant in Select's plans -- I  
23 think that should be plants -- ranges from .1 to .15%.  
24 When I read those two sentences, they seem different, but  
25 trying to tell me the same thing, if that makes sense.

26 Is one like just on Select farms specifically and  
27 one's on all the milk Select receives?

28 A. And that typo was plants, to be clear. So thank



1 you for catching that.

2 So Harmoni will speak to Select sales of milk, so  
3 that would include our member milk and then other milk we  
4 market. So that will be sales primarily to customers.  
5 And then Cheslie will speak to the milk purchased at our  
6 plants, again, mostly from Select farms but also from  
7 other parties.

8 Q. Okay. So sales and purchases are different?

9 A. Yes.

10 Q. And just to be clear, the purchases are just for  
11 your two plants?

12 A. Yes. Yes. Milk processed at those -- received  
13 and processed at those two plants, yes.

14 Q. Okay. On page 12, this is where you are talking  
15 about, "The vast majority of milk produced in the U.S. is  
16 produced on farms with sufficient cows to produce a full  
17 tanker load at each pickup." And you cite some statistics  
18 that kind of leads you to that conclusion on milk  
19 production.

20 But have you looked up the numbers and how that  
21 stacks up against farm numbers?

22 A. I guess I'm not tracking your question.

23 Q. Sure. So I mean you are talking about how a  
24 majority of the milk produced, there's a difference of  
25 looking about where most of the milk is produced, and  
26 that's different than looking at the numbers of farms  
27 impacted. So I'm going to use not real numbers.

28 A. Okay.



1 Q. But let's say, 75 -- 70% of the milk is produced  
2 on 15% of the U.S. farms. That is different locations  
3 than looking at the fact that 85 -- now I'm going to  
4 confuse myself -- but -- well, now these numbers aren't  
5 going to add up. But, you know, 20% of the milk is  
6 produced on, I don't know, 80% of the farms. I know my  
7 numbers don't add up. But you get the point I'm trying to  
8 make?

9 A. I get your concept, yes.

10 Q. Yeah. So I guess what I'm asking is here you are  
11 talking about where the -- the milk production numbers,  
12 now I'm asking about the farm numbers, the impact of how  
13 this would impact farms.

14 A. I think it would impact all farms, not just  
15 specific farms. I think --

16 Q. Can you talk into the mic?

17 A. Yeah. It would impact all farms, not just  
18 specific farms. And when you are saying the impact, I  
19 don't -- you are talking about the proposal and the  
20 changes that would occur within the pricing formulas?

21 Q. Yeah. Well, I think your testimony talks about  
22 how there's a capability for -- at farms that produce a  
23 lot of milk, they can ship full tanker loads, and  
24 therefore they are not experiencing these farm-to-plant  
25 losses.

26 A. Right.

27 Q. So my question is, on the farms that don't produce  
28 full tanker loads of milk, so it takes three farms to fill



1 up a tanker or whatever --

2 A. Right.

3 Q. -- you know, they don't have -- do they have the  
4 abilities to reduce those farm-to-plant losses, or put a  
5 different way, is you talk later on the technologies  
6 available to those farms that invest in to -- to eliminate  
7 or lessen those losses. And how frequently is that done,  
8 how prevalent is that amongst those farms, not amongst the  
9 big farms that can ship a full tanker, but amongst the  
10 smaller farms who don't have that capability?

11 A. I don't know. And I guess I would say I'm not  
12 sure if this goes along with the concept, but I think it  
13 does. It's just as important as not just where the milk  
14 is produced but where it's purchased. And, again, 75% of  
15 the milk in your example was purchased from farms that  
16 were larger than a certain size. So, again, it goes back  
17 to the impacts are felt at the plant and at the farm and  
18 the milk purchased is still 75% of the milk. So there are  
19 a lot of small farms, but that is a much smaller share of  
20 the total milk supply that's being purchased.

21 Q. Okay. On the next page, in that first full  
22 paragraph, you are talking about consolidation in the farm  
23 side, and in 2022 we had 27,932 farms.

24 The next sentence reads, "It is therefore  
25 reasonable to assume that the volume of milk produced from  
26 these farms is now well above 80%."

27 Who is "these farms" in this sentence?

28 A. Well, we had detailed statistics for the 2016 set



1 of farms, which was 41,819. So we had a breakdown of that  
2 41,819. We don't have a breakdown of the 27,932. But if  
3 you apply some of the same assumptions of percentage of  
4 farms in the different size categories, "these farms"  
5 would be that 27,932.

6 Q. But if I assume the same breakdown of -- of  
7 2016 --

8 A. Of that same dataset in 2016 --

9 Q. Okay.

10 A. -- you apply that to -- yeah, sorry.

11 Q. Okay. I got you now.

12 A. I lost you there, but thank you for keeping up  
13 with me somehow.

14 Q. Yeah. Okay.

15 On page 14 -- okay, I'm using part of this hearing  
16 to learn new things.

17 So on page 14, I think you added a word on that  
18 second -- the first full paragraph, talking about they can  
19 "adopt, you know, farm scales, flow measurement, and other  
20 technologies to eliminate much of the imprecision and  
21 inaccuracies that can result from the utilization of" -- I  
22 think you added the word outmoded dipsticks when you read  
23 your sentence.

24 A. Uh-huh.

25 Q. And similar tools.

26 And I guess, I'm not sure if you added that word,  
27 but if you did, could you explain what that means?

28 A. Yeah, I probably misspoke on that one. I was



1 reading from a bad version of my draft.

2 Q. Okay.

3 A. Yep.

4 Q. Okay. Thank you.

5 On the analysis of impacts, you use a five- and a  
6 ten-year average.

7 What time period is that for?

8 A. So it was the period ending April of 2023. So if  
9 you just go back 60 months and 120 months before that, you  
10 would -- you would get your time period.

11 Q. Okay. And then what prices did you look at when  
12 you did this analysis, if we wanted to go back and do it  
13 ourselves?

14 A. It was the --

15 Q. Announced?

16 A. Yeah. The monthly announced commodity prices in  
17 the pricing formulas.

18 Q. Okay. And on page 16 in your conclusion, at the  
19 very bottom, you write, "Butterfat losses to the extent  
20 they occur do not occur at a rate greater than overall  
21 solids losses."

22 And I was wondering if you could just expand on  
23 that because I don't think much of your testimony covered  
24 that particular piece.

25 A. Yeah. My testimony just outlined what will be  
26 discussed in more detail by the other witnesses. So I can  
27 try to elaborate, or maybe they could -- just when they  
28 give their testimony, they could address that.





1 Q. Okay. That's fine.

2 MS. TAYLOR: I think that's it from AMS. Thank  
3 you.

4 REDIRECT EXAMINATION

5 BY MR. MILTNER:

6 Q. Ryan Miltner representing Select Milk Producers.

7 Good afternoon, Mr. Allen. I have a couple of  
8 follow-ups based on the questions you have already gotten.

9 So do you have a calculating device near you?

10 A. I do.

11 Q. Okay. You had a question from Ms. Hancock about  
12 the butterfat yield factor, and I want to just clarify for  
13 the record what I think we have here.

14 Can you just divide 1 divided by .82 and tell me  
15 what you get out to about, I don't know, four or five  
16 decimal places?

17 A. 1.2195.

18 Q. Okay. So if you wanted to round that to the three  
19 decimal places that are in the current regulation, what  
20 would you round to?

21 A. 1.22.

22 Q. So it would have rounded to 1.220 if you went to  
23 three spots, right?

24 A. Yes.

25 Q. Okay. Thanks.

26 AMS asked you some questions about the breakdown  
27 of the volume of milk shipped on full tankers and the  
28 number of farms and how those broke down across size



1 categories. Now, you answered a little bit about the --  
2 on the plant receipts side, and I wanted to just ask a few  
3 more questions about that.

4 So, for a receiving plant, would it be correct  
5 if -- if they were -- if they were -- if that plant were  
6 receiving milk from a milk shed whose composition kind of  
7 matched the national average, you would expect that about  
8 80% of those truckloads would come from a full single farm  
9 pickup, right?

10 A. Based on the assumption we've applied using the  
11 2016 data, yes.

12 Q. And that the remaining 20% of loads or so would  
13 come from routes with multiple stops, correct?

14 A. Yes.

15 Q. And so it would -- to the farm -- or to the plant  
16 that's making those purchases, in terms of the loss, if  
17 there's a -- if there's a difference in -- in the amount  
18 of loss on a single pickup tanker and a multi pickup  
19 tanker, would they really care how many farms are impacted  
20 or would they be more focused on what the tanker profile  
21 looks like?

22 A. How are you defining the tanker profile?

23 Q. Whether it is a single farm pickup or a multi-farm  
24 pickup.

25 A. The tanker profile would have more weight.

26 Q. Okay.

27 A. And when I say "weight," I mean weight in that  
28 decision, not weight of milk. I just realized we're



1 talking about shrink and I'm throwing out the word  
2 weight -- the term weight. I meant more weight toward the  
3 decision that was being made.

4 Q. I understood it that way, but thank you for  
5 clarifying.

6 MR. MILTNER: Your Honor, I don't have any  
7 additional questions for Mr. Allen on this piece of  
8 testimony. We would move the admission of Exhibit 216.

9 THE COURT: Seeing no objections, Exhibit 216 is  
10 admitted into the record.

11 (Thereafter, Exhibit Number 216 was received  
12 into evidence.)

13 THE COURT: You may step down from the stand.  
14 Thank you.

15 MR. MILTNER: We did admit Exhibit 179 previously,  
16 did we?

17 THE COURT: Yeah, I had a -- I was going to ask  
18 the same question.

19 MR. MILTNER: I thought we did, but if we did not,  
20 I would like to move the admission of Exhibit 179.

21 THE COURT: Any objections.

22 Exhibit 179 is admitted into the record.

23 (Thereafter, Exhibit Number 179 was received  
24 into evidence.)

25 MR. MILTNER: Thank you.

26 Your Honor, we would call Ms. Harmoni Campbell to  
27 testify.

28 THE COURT: Welcome to the stand, Ms. Campbell.



1 Please raise your right hand.

2 HARMONI CAMPBELL,

3 Being first duly sworn, was examined and  
4 testified as follows:

5 THE COURT: Your witness.

6 MR. MILTNER: Thank you, your Honor. We're  
7 distributing her testimony here.

8 THE COURT: Let's go off the record while we do  
9 that.

10 (Off-the-record.)

11 DIRECT EXAMINATION

12 BY MR. MILTNER:

13 Q. Good afternoon, Ms. Campbell.

14 A. Hello.

15 Q. You are going to need to speak close to that mic  
16 just to make sure it picks up everything.

17 A. Yes, sir.

18 Q. Would you be kind enough to state and spell your  
19 name for the record?

20 A. Yes. I am Harmoni Campbell, H-A-R-M-O-N-I,  
21 C-A-M-P-B-E-L-L.

22 Q. And, Ms. Campbell, could you give your business  
23 address for the record as well, please?

24 A. 320 West Hermosa Drive, Artesia, New Mexico.

25 Q. 88 --

26 A. 88210.

27 Q. 210. Almost said 201. That's Roswell.

28 A. It is.



1 Q. In front of you, you have a document that's  
2 labeled Exhibit Select-2; is that correct?

3 A. Yes, sir.

4 Q. And are you familiar with that document?

5 A. Yes, sir.

6 Q. And that's the testimony that you have prepared in  
7 support of Select's Proposal 11, correct?

8 A. That is correct.

9 Q. Okay. Now, Mr. Allen gave a kind of an  
10 abbreviated statement different from what was printed.

11 Are you going to provide -- are you going to read  
12 the entire statement that you have got there?

13 A. Yes, I am.

14 Q. Okay. Then if you want to go ahead and do that,  
15 and when you are done, we may have a few additional  
16 questions of you. Okay?

17 A. Okay.

18 Q. Thank you.

19 THE COURT: Should we mark it?

20 MR. MILTNER: Yes. Let's mark the exhibit.

21 THE COURT: This exhibit, Select-2, is marked 217,  
22 for identification.

23 (Thereafter, Exhibit Number 217 was marked  
24 for identification.)

25 MR. MILTNER: Thank you. I hope to not be  
26 reminded again.

27 THE COURT: No worries.

28 THE WITNESS: Hi. Thank you all for having me



1 here. My name is Harmoni Campbell. I am the senior  
2 accounting manager for Select Milk Producers. I hold a  
3 Bachelor's degree in accounting from Eastern New Mexico  
4 University, and I have been employed as the accounting  
5 manager at Select Milk for ten years. Before joining  
6 Select, I worked as an accounting manager for an  
7 exploration and production oil and gas company.

8 I oversee a seven-person department responsible  
9 for balancing the milk receipts across plants, farms, and  
10 haulers. Our department is responsible for accounting for  
11 every single load of milk produced by our members or sold  
12 by Select to any customer.

13 For every milk shipment, our accounting department  
14 will invoice the receiving plant, pay the hauler, and  
15 ultimately pay our producers. Within two to four days of  
16 milk leaving the farm, Select's accounting department will  
17 have received all necessary records from the supply chain,  
18 processed that data, analyzed it, and cleared any errors  
19 or discrepancies.

20 Receipt balances are confirmed with every plant  
21 for the first 15 days of the month, referred to as the  
22 advance, and, again, at month end, the settlement, to  
23 confirm all shipments received at the plant for the entire  
24 month. Plants are also invoiced on these balance totals  
25 for both the advanced and settlement periods.

26 I was asked by Chris Allen, Select's director of  
27 industry relations and analytics, to analyze Select's  
28 available data on milk shipments, including farm weights



1 and plant weights. I was asked to analyze this data to  
2 provide relevant information about the differences between  
3 farm and plant weights. This data and analysis was  
4 performed by me in conjunction with Chris Allen and  
5 additional Select staff. These analysis were prepared to  
6 support Select's proposal to change the yield factors used  
7 in minimum price formulas. All of the underlying data is  
8 regularly collected and maintained by Select's logistics  
9 department and accounting department as part of our  
10 regular operations.

11 I am aware of the purpose of Select's proposal,  
12 and that if adopted, it will impact the minimum prices  
13 paid to our members, but I am not an expert on Federal  
14 Order language and price formulas. The scope of my  
15 testimony is limited to describing the data and analysis  
16 performed by me or under my supervision to support  
17 Proposal 11.

18 I want to describe the data that Select collects  
19 and maintains. Select markets the milk of our member  
20 producers to multiple customers, primarily in the  
21 Southwest Marketing Area Order 126 and the Mideast  
22 Marketing Area Order 33.

23 In addition, some of our members' milk is marketed  
24 to customers in adjacent Federal Milk Marketing areas.  
25 Select's customers include manufacturers of all classes of  
26 milk.

27 In a typical month, Select member milk is  
28 delivered to approximately 20 customer plants, with spot



1 milk being sold to several other plants. In a typical  
2 month, significant deliveries are made to plants  
3 manufacturing products in all four classes.

4 For a typical load of milk produced by a Select  
5 member, a farm pickup is scheduled by Select through the  
6 contracted hauler. Select's logistic team is responsible  
7 for coordinating the pickup with the hauler and the farm.  
8 At pickup, the milk hauler scales in at the member farm,  
9 loads milk directly from the bulk tank, draws the required  
10 milk samples for analysis, tags the load, and then scales  
11 out. This farm scale weight provides the basis for  
12 Select's farm weights.

13 Amongst Select's customers, the procedures vary  
14 upon delivery. About half of Select's customers do not  
15 report any plant weights, except when a significant  
16 discrepancy is observed. In a typical year, our  
17 accounting staff fields less than a dozen such inquiries.  
18 For the remainder of Select's customers, the receiving  
19 plant reports back to Select plant weights which are input  
20 and confirmed and any errors cleared.

21 Select uses -- Select utilizes software and  
22 procedures to collect, process, and analyze producer milk  
23 production and shipments, milk composition, logistics  
24 data, quality information, and other related data points.  
25 This integrated data management tool, Mobile Manifest,  
26 allows Select to track individual milk shipments from farm  
27 to plant. It also allows Select to analyze all the  
28 shipments from a particular farm, all of the shipments to





1 a particular customer, all shipments through a specific  
2 hauler, all shipments within a given date range or range  
3 of dates, and additional data points.

4 I utilized the Mobile Manifest data to perform  
5 several analysis related to the issue of farm-to-plant  
6 losses. These analysis are discussed further below, and  
7 two tables at the end of my statement summarize this  
8 information.

9 I pulled from Mobile Manifest a report of all  
10 Select Milk shipments for a one-year period of August 1st,  
11 2022, through July 31st, 2023. This report encompassed  
12 171,240 distinction milk shipments, with an aggregate  
13 manifest weight of approximately 9.8 billion pounds. Over  
14 that period, Select shipped to -- I'm sorry, let me try  
15 that again -- over that period, Select shipped milk to 88  
16 distinct plants and utilized 27 different haulers.

17 From that report, I was able to determine the  
18 percentage of shipments that had a corresponding plant  
19 weight. I found that a plant weight was reported back to  
20 Select on 89,899 loads. That's 52.5%. And 81,341 loads,  
21 47.5%, had no reported plant weight. Of all the loads  
22 with a reported plant weight, 39,337, or 23%, reported no  
23 variance.

24 Realistically, it is unlikely that the scale would  
25 report the exact weight as the farm, but this demonstrates  
26 that for most loads, the plant either accepts Select's  
27 farm weights outright without reporting back or that the  
28 weights are so close to farm weights as to not merit a



1 more precise measurement.

2 I then identified those loads of milk where the  
3 hauler or plant reported back a clearly erroneous weight.  
4 These clear errors included missing digits in the reported  
5 weight, decimal point errors, or where the plant weight  
6 was off by an even 1,000 or 10,000 pounds, or reported  
7 weights so different that there's a clear error or other  
8 problem. These accounted for 1,121 loads, .7%.

9 After removing these loads, I was left with a  
10 total of 49,442 loads of milk, 28.9% of the annual load  
11 total, with an actual reported plant weight reflecting a  
12 variance from farm weights.

13 I analyzed the loads for positive and negative  
14 variances. Of those loads, 21,822 which represents  
15 44.1% of loads with variances, showed a positive variance,  
16 where the plant weight exceeded the farm weight. And  
17 27,619 loads, or 55.9% of those with variances, showed a  
18 negative variance, where the plant weight was less than  
19 the farm weight.

20 I then summed the negative and positive variances  
21 for these loads. The total was a net negative variance of  
22 1,331,434 pounds, representing a farm-to-plant shrink of  
23 .04% on the total volume of those 49,442 loads.

24 On the whole, the weights of the loads with  
25 reliable farm and plant weights were essentially equal. I  
26 then reviewed the remaining shipments and removed another  
27 subset of shipments where there were known issues that  
28 affected the accuracy of the farm weight and plant weight



1 comparison. My decision on which loads to place in this  
2 category was based on my judgment as well as the  
3 experience of my team. We identified one hauler and  
4 customer who has had issues with the consistency of plant  
5 weight reports due to the use of a drop yard. All of  
6 those loads were excluded. Similar judgments were made  
7 with respect to other customers.

8 After removing these loads I was left with 20,964  
9 loads of milk, 42.4% of loads with an actual reported  
10 plant variance reflecting a variance from farm weights. I  
11 analyzed the loads for positive and negative variances.  
12 Of those, 41% showed a positive variance where the plant  
13 weight exceeded the farm weight, and 59% showed a negative  
14 variance where the plant weight was less than the farm  
15 weight. I then summed the positive and negative variances  
16 for these loads. The total was 1,191,125 pounds,  
17 representing losses of .07% on the total volume of those  
18 20,964 loads.

19 I separated those loads into two categories. In  
20 the first category I placed those whose plant weights were  
21 within .5% of the farm weight. This accounted for 15,579  
22 loads. In the second category I placed those loads with a  
23 variance that exceeded .5%. Those loads accounted for  
24 5,385 loads. Variances over .5% could occur for multiple  
25 reasons, of which Cheslie Stehouwer from Continental Dairy  
26 Facilities will provide more context.

27 In most instances, these discrepancies represent  
28 identifiable fixable issues, many of which are wholly



1 outside the producers' control or can be corrected by the  
2 producer.

3 Tables 1 and 2, that follow, summarize everything  
4 I just read.

5 So to conclude the testimony, most Select  
6 customers accept farm weights and tests and report no  
7 plant weight at all or log the farm weight as their plant  
8 weight. Of the minority of loads where a plant weight is  
9 reported, it is about as likely that the plant weight will  
10 exceed the farm weight as it is that the farm weight will  
11 exceed the plant weight.

12 Where the discrepancy between farm and plant  
13 weight is particularly larger, non-shrink factors are the  
14 cause in virtually every instance. Analysis of the subset  
15 of loads where variances remain, the net variance across  
16 all of these loads is less than .1%.

17 Thank you.

18 BY MR. MILTNER:

19 Q. Thank you, Ms. Campbell. I wanted to follow up to  
20 get some additional detail on what you just testified to,  
21 if I could.

22 The first question I would have, is you said you  
23 have worked with Select for ten years now?

24 A. That's correct.

25 Q. What year were you hired?

26 A. 2013.

27 Q. So you were not part of Select during the last  
28 time there was a hearing on formula factors in the Federal



1 Order backs in 2007 then, were you?

2 A. I was not.

3 Q. Were you working with that oil and gas company  
4 then?

5 A. Yes.

6 Q. Okay. So I want you to think back to the systems  
7 and the software and the tools that you had available when  
8 you started working at Select.

9 And what were you hired to do, by the way, when  
10 you first were hired at Select?

11 A. When I was first hired, I was hired to reconcile  
12 all of the work that I do now, described in the beginning  
13 of my testimony, which is balance all of the milk and pay  
14 producers, haulers, and invoice plants. So I was the  
15 person reconciling that when I first started.

16 Q. So thinking back to that time when you were hired,  
17 was there -- were there the tools and information  
18 available to you to do the type of analysis that you did  
19 in preparing your testimony here?

20 A. No, there was not.

21 Q. And so if you -- if you think about the systems  
22 and the processes in place that existed then, how have  
23 they changed in the ten years that you have been doing  
24 this?

25 A. We have converted to electronic manifests, and  
26 that pretty drastically changed all of the systems in  
27 place where we capture significant ly more data on pickups  
28 than we did historically.



1 Q. And so before it was computerized and digitized,  
2 was there any repository that would allow you to easily  
3 analyze or sort 170,000 milk shipments?

4 A. No, there was not.

5 Q. So I'd also -- now I'd like to walk through really  
6 the tables you have on the last page of your testimony.

7 A. Okay.

8 Q. And so I'm looking at Table 1 and the row which  
9 reads "no reported plant weight." Just for clarity that  
10 means that 47.5% of the shipments that are made by Select,  
11 the plant does not report any information back to Select  
12 on the weight at receipt; is that correct?

13 A. That is correct.

14 Q. And as a result, we certainly can't, or Select  
15 certainly can't, analyze any shrink on those loads at all,  
16 could they?

17 A. That is a correct statement.

18 Q. So now the next row reads, "plant weight identical  
19 to farm weight." And you testified that in those  
20 instances you do get a weight reported at point of  
21 receipt, but it's exactly the same as the farm weight,  
22 correct?

23 A. That is correct.

24 Q. Okay. And you made an assumption that in almost  
25 every case that's not an actual plant scale weight,  
26 correct?

27 A. Correct.

28 Q. Hypothetically, if you were going to include those



1 39,337 loads in the analysis that you performed, would  
2 that have materially skewed your average variance per  
3 load?

4 A. Yes, it would have. It would have understated  
5 what the shrink is.

6 Q. It would have understated the shrink?

7 A. Yes, sir.

8 Q. So you made the decision to exclude those loads?

9 A. That is correct.

10 Q. Okay. The next one you have "clearly erroneous  
11 weights," and it's a relatively small fraction of those  
12 loads. But what would you see, for instance, that would  
13 make you say, this is clearly erroneous, and you excluded  
14 it then from your analysis?

15 A. In -- in this particular set of data, a great  
16 example is one of the loads came in with 14 million  
17 pounds. Now, with the adoption of Mobile Manifest, the  
18 data flows straight into our system, so whatever the  
19 driver or receiver has put in, flows in, and we see that,  
20 which is why I was able to perform the analysis. So we  
21 all know there's not a tanker on the planet that can hold  
22 14 million pounds of milk.

23 Q. And that's an example --

24 A. Clearly erroneous.

25 Q. An extreme one. But that was not the only  
26 instance of that type of data you were working from,  
27 correct?

28 A. That's correct. We would have some come in with



1 one pound. We would have some come in that would be just  
2 clearly 10,000 pounds off from, you know, what the actual  
3 scale was. All typo errors.

4 Q. And you had -- did you have some that would come  
5 in with, say, an even 50,000 pounds or something like  
6 that?

7 A. Several, yes.

8 Q. Okay. And so you excluded those from your  
9 analysis; is that correct?

10 A. That is correct.

11 Q. So that left you with 49,441 loads to look at.  
12 And then you -- you separated those out, and you said  
13 there were some with identifiable issues. And you noted  
14 that at least for a chunk of those it was a particular  
15 hauling company and a particular drop yard that created  
16 some anomalies that you felt uncomfortable with; is that  
17 right?

18 A. That is correct.

19 Q. And so I just want to go through here. Where, in  
20 Table 2, the column of "all analyzed loads," that includes  
21 those -- those -- those loads that you said had  
22 identifiable issues, right?

23 A. That's correct.

24 Q. And so that includes that hauler, that drop yard,  
25 and similar issues that you felt shouldn't be analyzed,  
26 correct?

27 A. Yes, sir.

28 Q. When you included those, you had an average





1 farm-to-plant shrink of 0.04% though, right?

2 A. Yes.

3 Q. Now, when you excluded those loads, if I'm reading  
4 your table correctly, your farm-to-plant shrink is higher.  
5 It's 0.07%; is that correct?

6 A. That's correct.

7 Q. So just so the record's clear, when you remove  
8 those that you had issues, it ended up with a result that  
9 somewhat less favorable than to Select's argument here,  
10 isn't it?

11 A. Yes, sir.

12 Q. But you felt that was important to show the most  
13 accurate dataset that you had available; is that right?

14 A. Yes. If we know that there's an issue, I did not  
15 want to include that in the analysis. It would skew the  
16 number in my opinion, regardless of what the outcome is.

17 Q. Okay. So one more thing that I noticed, and  
18 it's -- it is very minor. But I want you to look at  
19 page 5 of your testimony. And in the first full  
20 paragraph, the line at the very end, the total was,  
21 1,191,125 pounds.

22 Do you see that?

23 A. Yes.

24 Q. And if you look at Table 2, in the final column,  
25 it is 1,191,225 pounds?

26 A. Oh, that is correct.

27 Q. So there's a -- there's an extra hundred pounds  
28 there.



1           Now, I'm sure we could go back to your work and  
2 find out which one of those two is right. But a hundred  
3 pounds of milk over 21,000 loads of milk, is that going to  
4 make a material difference --

5           A. No, it is not.

6           Q. -- on the conclusion?

7           A. No.

8           Q. Okay. Is there anything else that you want -- you  
9 think needs to be explained about your statement before  
10 other folks have a chance to ask you questions?

11          A. No.

12          Q. Okay.

13                 MR. MILTNER: Your Honor, we'd make the witness  
14 available for additional questioning.

15                 THE COURT: Who else has questions?

16                                 CROSS-EXAMINATION

17 BY MR. ENGLISH:

18           Q. My name is Chip English, and I represent something  
19 called the Milk Innovation Group. And I want to thank you  
20 for your testimony, and I really have some, in my mind,  
21 clarifying questions.

22                         Some of it is like, what's a drop yard?

23           A. A drop yard is when the hauler is going to go drop  
24 the tanker in the yard and leave it up to the plant to  
25 shuttle it into receiving bays as needed.

26           Q. And what kind of problem would that create with  
27 the consistency of plant weights?

28           A. We discovered that set different driver -- so we



1 can't ensure that the same tanker -- that the same truck  
2 that pulls the tanker in across the scale is the same  
3 truck that pulls it back out across the scale, or driver.  
4 Weight could vary. Cheslie is actually going to speak a  
5 little bit more to the drop yard issue in her testimony,  
6 but things like that would definitely skew the scale  
7 weight.

8 Q. And not saying you should throw her under the bus  
9 or anything, but --

10 A. Right.

11 Q. -- when I'm asking questions if -- if -- I don't  
12 want to spend time twice doing it, so if that's the  
13 answer, I'm perfectly happy to reserve questions like that  
14 for her.

15 So would that also be something to ask her about  
16 if similar judgments were made with respect to other  
17 customers, which is on page 5, right after the drop yard?

18 A. No, that -- no, those were my judgments.

19 Q. Okay. What -- just what categories of judgments  
20 that you were making, if you can?

21 A. Identifiable known issues at the plant outside of  
22 the drop yards. There are instances over the past  
23 12 months where a plant would inform us that they were  
24 having scale issues. So if I knew what that set of data  
25 was, I would also eliminate it, just so that we're looking  
26 at variances that we do not know there was an issue, that  
27 identifiably like actual variances between farm and plant.

28 Q. So would that go to your conclusions under 4(c) on



1 page 6 where you say, "Where the discrepancy between farm  
2 weight and plant weight is particularly larger, non-shrink  
3 factors are the cause in virtually every instance"? Is  
4 that what you are talking about there?

5 A. Yes.

6 Q. So help me out on something else. On page 4, and  
7 a couple other times, you talk about where the plant  
8 weight exceeded the farm weight.

9 That's not normally what I think about happening  
10 here. So what can explain that?

11 A. I don't know that I have an explanation for that.  
12 I -- because I don't work at the plants. I -- all I know  
13 is the data showed clearly that over 40% were coming in  
14 with a higher plant weight than farm weight.

15 Q. So would I be right when I was -- and thank you,  
16 Mr. Miltner for some of your questions -- when I look at  
17 page 4 and over to page 5, what I think you did, and  
18 correct me if I'm wrong, you first did this analysis on  
19 that paragraph I was just referring to where you have  
20 44.1% of the variances showing positive, 55.9 showing  
21 negative, and you sort of sum those up and you gave sort  
22 of an average result for all of those, correct?

23 A. Correct.

24 Q. And then you didn't stop there. You went with  
25 those -- using that analysis going further, as I  
26 understand it, you then looked at those shipments and  
27 excluded the ones that were inconsistent, correct?

28 A. Correct.



1 Q. And then once you were left with the loads that  
2 are described in sort of on Tables -- Table 2, the last  
3 paragraph appears to provide a bit of a range, am I right,  
4 that -- in that last paragraph you are providing sort  
5 of --

6 A. The last paragraph on page 5.

7 Q. Yes.

8 A. Yes.

9 Q. Okay.

10 A. The range -- the range referencing the variance.  
11 The 5.5%, is that what you are referring to.

12 Q. Yes?

13 A. Yes.

14 Q. So there were loads where variances -- and I  
15 understand that maybe someone else is going to explain  
16 it -- but there are loads, like 5,385, where a variance  
17 exceeded 0.5%, correct?

18 A. That's correct.

19 Q. Do you know how high that variance would have  
20 gone?

21 A. I do not.

22 Q. That's fine.

23 And do you know how common the use of electronic  
24 manifests is now outside of Select, in the industry?

25 A. It's becoming more common. That's all I know.

26 Q. Okay.

27 A. Yes.

28 MR. ENGLISH: I have no further questions. I



1 thank you very much.

2 THE COURT: Any other questions other than AMS of  
3 this witness?

4 Seeing none, AMS.

5 CROSS-EXAMINATION

6 BY MR. WILSON:

7 Q. Good afternoon. Todd Wilson, AMS.

8 Got a question on the bottom of page 5.

9 A. Okay.

10 Q. So after you separated loads out, results out, and  
11 got kind of a good set, right, you came down to 20,000 --  
12 20,000-plus loads of milk.

13 Then in that last paragraph, as Mr. English was  
14 asking about, that .5%, is that a -- is that a plus and a  
15 minus .5%?

16 A. Yes.

17 Q. Okay. And so then the second one, is anything  
18 greater than a plus .5 or minus .5?

19 A. Yes.

20 MR. WILSON: Okay.

21 CROSS-EXAMINATION

22 BY MS. TAYLOR:

23 Q. Good afternoon.

24 A. Hi.

25 Q. Thanks for coming up and testifying today.

26 A. Thank you.

27 Q. Just a couple questions.

28 So for your Select Producers, do all of your



1 producers scale at the farm?

2 A. I don't believe all of them do. I'm not an expert  
3 on the farm operations, though. I am an accountant.

4 Q. That's fair. Okay.

5 On page 3, you state that 47.5 of Select's loads  
6 have no reported plant weight. Can you elaborate on why  
7 that is? Do they -- there's not -- just elaborate on the  
8 reasons why they don't provide you a plant weight.

9 A. I would assume that it's because it's not out of  
10 variance from the farm weight enough for them to question  
11 it. And we pay our producers on farm tests and weights,  
12 and that's what's accepted --

13 Q. Okay.

14 A. -- for the majority of our loads.

15 Q. Okay. And for your analysis in these numbers,  
16 this includes both Select members and non-members who you  
17 market -- or who you purchase milk from?

18 A. Correct.

19 Q. Okay. Also on page 3 -- and I should have said  
20 this before, I'm going out of order, I apologize -- at the  
21 top of that page, about half of Select's customers don't  
22 report any plant weights except when there's a significant  
23 discrepancy.

24 Can you just define what that would -- a  
25 significant discrepancy would be?

26 A. Most plants would be outside of that .5% there --  
27 they have some sort of percentage in their system that  
28 will flag it. Typically, that's going to be issues that



1 we already are aware of with, you know, some -- a farm  
2 scale being down or a driver has put in a very bad number  
3 on the manifest and the plant scale shows a more accurate  
4 picture of the weight.

5 MS. TAYLOR: Okay.

6 CROSS-EXAMINATION

7 BY MR. WILSON:

8 Q. Sorry. Todd Wilson, again.

9 A. Okay.

10 Q. I was trying to explain the question to --

11 A. I saw.

12 Q. -- my counterpart.

13 A. She was like, nope, take the mic.

14 Q. So of the -- of the 170,000 occurrences that you  
15 have, I know we have another witness coming on later, how  
16 many of those are represented in the two plants of  
17 Littlefield and Coopersville? Do you have an idea?

18 A. I do not.

19 Q. Let me ask you another question.

20 A. Okay.

21 Q. Is -- does Coopersville and Littlefield have plant  
22 weights in your analysis?

23 A. Yes.

24 MS. TAYLOR: I think that's it from AMS.

25 THE COURT: You got to introduce her exhibit.

26 MR. MILTNER: A couple quick -- couple quick  
27 redirect questions.

28 ///





## 1 REDIRECT EXAMINATION

2 BY MR. MILTNER:

3 Q. Ryan Miltner, representing Select Milk.

4 Ms. Campbell, there was a question about that  
5 positive plant variance where the farm weight is lower  
6 than the plant weight. And I think you correctly stated  
7 that Ms. Stehouwer can comment on that a little bit.8 But do you ever have issues where the calibration  
9 at a farm plant -- I'm sorry -- at a -- at a plant scale,  
10 would be -- would be off or incorrect?

11 A. Yes.

12 Q. And would that lead to a discrepancy between the  
13 farm weight and the plant weight?

14 A. Absolutely.

15 Q. And do you know if -- if a -- if a truck added  
16 fuel on its journey, if that would affect the weights  
17 between the farm and the plant?

18 A. Yes.

19 Q. And there could be other reasons that would --

20 A. He could have picked up lunch, too.

21 Q. Could have picked up lunch.

22 Could have picked up somebody to ride along, who  
23 knows, right?

24 A. Yes. Yes.

25 Q. And then there were some questions, I think, from  
26 Mr. Wilson about what -- whether the CDF plant deliveries  
27 were included in your dataset. And you answered that they  
28 were; is that correct?

1 A. Yes.

2 Q. And this included -- am I correct you included all  
3 deliveries from any Select farm to any collect customer  
4 for an entire 12-month period, correct?

5 A. That is correct.

6 Q. And so it would include those Select member loads  
7 delivered to Continental Dairy Facilities and Continental  
8 Dairy Facilities Southwest; is that correct?

9 A. Yes.

10 Q. Now, would your dataset include deliveries from  
11 other cooperatives that sold milk to Continental Dairy  
12 Facilities?

13 A. No.

14 MR. MILTNER: That's all I have.

15 And we would move the admission of her testimony,  
16 please, Exhibit 216 (sic).

17 THE COURT: Any objection?

18 Exhibit 217 is made a part of the record.

19 (Thereafter, Exhibit Number 217 was received  
20 into evidence.)

21 THE COURT: Thank you. You may step down.

22 MR. MILTNER: Thank you, your Honor.

23 We would next call Cheslie Stehouwer.

24 THE COURT: Raise your right hand.

25 CHESLIE STEHOUWER,

26 Being first duly sworn, was examined and  
27 testified as follows:

28 THE COURT: Your witness.



1 MR. MILTNER: Thank you, your Honor.

2 DIRECT EXAMINATION

3 BY MR. MILTNER:

4 Q. Good afternoon, Ms. Stehouwer. How are you?

5 A. Good.

6 Q. Have you had a chance to testify at a Federal  
7 Order hearing before?

8 A. I have not.

9 Q. All right. You have had a chance to watch today  
10 at least, though, and listen in a little bit beforehand,  
11 correct?

12 A. Yes.

13 Q. Could we have you just state and spell your name  
14 for the record, please?

15 A. Cheslie Stehouwer, C-H-E-S-L-I-E,  
16 S-T-E-H-O-U-W-E-R.

17 Q. And could you also provide your business address  
18 for the record?

19 A. 999 West Randall Street, Coopersville, Michigan,  
20 49404.

21 Q. Thank you.

22 MR. MILTNER: Your Honor, we have given  
23 Ms. Stehouwer Exhibit Select-3. Could we have that  
24 marked, please, for identification?

25 THE COURT: That exhibit is marked 218 for  
26 identification.

27 (Thereafter, Exhibit Number 218 was marked  
28 for identification.)



1 MR. MILTNER: Thank you.

2 BY MR. MILTNER:

3 Q. And, Ms. Stehouwer, you have that exhibit in front  
4 of you?

5 A. I do.

6 Q. And you are familiar with that exhibit?

7 A. Yes.

8 Q. And is that your testimony in support of Select's  
9 Proposal 11?

10 A. Yes, it is.

11 Q. And are you intending to read it for the record  
12 today?

13 A. Yes.

14 Q. Could you go ahead and do that, and then when you  
15 are done, we'll have some more questions for you. Thanks.

16 A. Okay.

17 My name is Cheslie Stehouwer. I'm the director of  
18 sales and marketing for Continental Dairy Facilities, LLC,  
19 and Continental Dairy Facilities Southwest LLC.

20 CDF operates a butter/powder plant in  
21 Coopersville, Michigan. CDF Southwest operates a  
22 similarly constructed butter/powder plant in Littlefield,  
23 Texas. Both CDF and CDF Southwest are wholly-owned  
24 subsidiaries of Select Milk Producers, Inc.

25 I was hired by CDF in 2011 as an administrative  
26 assistant. My duties then include working on projects  
27 related to the construction of the CDF plant, information  
28 technology, and company policies and procedures.



1           As the plant was commissioned, my role expanded  
2 into monitoring and coordinating milk receiving,  
3 overseeing milk balancing, and product sales.

4           When the design and construction of CDF Southwest  
5 began in 2015, I was added to that team to plan for its  
6 commissioning and to manage product sales. In my current  
7 role with CDF and CDF Southwest, I'm responsible for sales  
8 contracts of all bulk commodities, retail manufacturing  
9 agreements, and hedging. My oversight includes  
10 information technology and milk balancing.

11           In addition, I work closely with our president and  
12 general manager, Steve Cooper, on all aspects of product  
13 manufacturing. My job responsibilities also require me to  
14 work with our accounting, finance, and receiving teams to  
15 coordinate operations and analyze related performance and  
16 financial data.

17           In overseeing milk balancing, I receive daily  
18 reconciliation reports from my direct reports at CDF and  
19 CDF Southwest. Those reconciliation reports provide  
20 information on milk received from all suppliers, their  
21 weights and tests, and highlight any particular area of  
22 attention. I then provide guidance and feedback to our  
23 receiving teams, where appropriate, to adjust problem  
24 areas.

25           I was asked by Chris Allen, Select's director of  
26 industry relations and analytics, to analyze the farm  
27 weights and plant weights for all-milk received at our  
28 Michigan plant and our Texas plant, CDF Southwest, and



1 assess the extent of farm-to-plant losses. I was asked to  
2 analyze this data to provide relevant information about  
3 the differences between farm weights and plant weights.

4 This data and analysis was performed by me in  
5 conjunction with Chris Allen and additional CDF staff.  
6 These analysis were prepared for the purpose of supporting  
7 Select's proposal to change the yield factors used in the  
8 minimum price formulas. All the underlying -- underlying  
9 data is regularly collected and maintained by CDF and CDF  
10 Southwest as part of our regular operations.

11 I'm aware of the purpose of Select's proposal, and  
12 that if adopted, it will impact the minimum prices paid to  
13 our members. But I'm not an expert on Federal Order  
14 language and price formulas. The scope of my testimony is  
15 limited to describing the data and analysis performed by  
16 me or under my supervision to support Proposal 11.

17 For my analysis, I generated reports from our  
18 existing systems that produced the following data: The  
19 originating supplier, the date and time of delivery, the  
20 hauler, the ticket number, the slip weight, or farm  
21 weight, and the scale weight or plant weight. The  
22 report -- these reports were generated for both plants for  
23 the period of August 1, 2022, through July 31st, 2023.

24 For the observed period, this encompassed  
25 deliveries from the 15 different suppliers. For the  
26 Michigan plant, there was a total of 16,396 distinct  
27 deliveries. Of this total, 8,907, or 58.3%, were from  
28 Select. The remainder were from other cooperatives and



1 plants.

2 For each supplier, I then examined the  
3 difference -- differences between farm and plant weights.  
4 As would be expected, for any individual load, the farm  
5 weight might be higher or lower than the plant weight.  
6 But data on an individual basis is of little meaning when  
7 determining the overall loss of milk for the plant.

8 To determine the aggregate farm plant losses, I  
9 aggregated the total differences of each load for each  
10 supplier, arriving at a net difference between the farm  
11 and plant weights. Those results are reported in the  
12 table on the next page. Negative net discrepancies  
13 reflect a lower plant weight than farm weight. Positive  
14 net discrepancies represent a higher plant weight than  
15 farm weight.

16 The table shows the suppliers, the percent of  
17 deliveries they are to the CDF plant, and the net  
18 discrepancy for each supplier.

19 You will see that the overall net discrepancy was  
20 negative 0.15%. Looking at only the loads from Select  
21 Milk Producers, the net discrepancy was negative 0.2%,  
22 slightly greater than the overall discrepancy. All of the  
23 cooperatives listed, other than Select, include shipments  
24 from milk from multiple farms -- multiple pickup routes.

25 I performed the same analysis for Texas plant over  
26 the same time period. There was a total of 27,792  
27 deliveries. The deliveries to this account came from a  
28 much smaller set of suppliers. Accordingly, I'm not



1 reporting the data by supplier. In total, the aggregate  
2 net discrepancies across all deliveries was negative 0.1%.

3 The discrepancies of negative 0.15% for Michigan  
4 and negative 0.1% for Texas were weight discrepancies  
5 only. Neither CDF, nor CDF Southwest, regularly analyzed  
6 farm-to-plant losses on a solids basis. We do, however,  
7 measure the components of our silos and compare them with  
8 aggregate component levels of our farm tests. Those two  
9 measures are consistently aligned with one another.

10 Accordingly, it appears, from our internal data  
11 that losses of milk solids occur across all components  
12 equally. We do not realize losses of butterfat at a  
13 greater weight than the overall loss of milk solids.

14 In addition to reviewing our actual plant data for  
15 the volume of milk lost in farm-to-plant transit, I was  
16 asked to offer my opinion as why discrepancies between  
17 farm weights and plant weights occur, other than the  
18 actual loss of milk. All plant weights are scaled  
19 weights. Assuming that the farm weight is also a scale  
20 weight, there are four principal reasons why weights would  
21 be different.

22 The first would be scale calibration. The scales  
23 at CDF and CDF Southwest are regularly calibrated and  
24 certified. The same is true for most milk manufacturing  
25 plants. While most farm scales are also properly  
26 calibrated, some are not. Even with those that are well  
27 calibrated, problems will occur. Where there is a  
28 substantial discrepancy, there is a strong likelihood that





1 an investigation will uncover a scale calibration issue.

2 The second would be hauler errors. Most of the  
3 logistics process, including weighing and testing, is  
4 being digitized. Within Select, new software has resulted  
5 in most farm shipments being manifested electronically,  
6 with data shared in realtime among farms, cooperatives,  
7 haulers, and plants.

8 Other cooperatives and plants use similar software  
9 and hardware systems to some extent. This movement to  
10 electronic records and data has improved timeliness and  
11 accuracy. However, the adoption of this technology is  
12 still ongoing. A significant portion of the milk received  
13 at CDF and CDF Southwest remains tracked on paper logs or  
14 manually entered by haulers. Investigations into weight  
15 discrepancies often find that numbers have been  
16 transposed, entries were simply mistyped, or weights are  
17 off by an even 1,000 or 10,000 pounds due to manual entry  
18 or errors. Hauler errors of this type are the second most  
19 common issue.

20 The third is drop yard and equipment changes. CDF  
21 Southwest utilizes a drop yard and yard dogs to help  
22 optimize milk deliveries and minimize demurrage costs.  
23 When we notice an unusually high number of loads with high  
24 weight variances, an investigation revealed that some  
25 tankers were scaling and using a semi tractor and scaling  
26 out using either a different semi tractor or a yard dog.

27 In addition, where a drop yard is used, different  
28 drivers in the equipment at scale in and scale out will



1 also affect weights. Even in the same equipment, it is  
2 not difficult to imagine two different drivers having a  
3 weight difference of a hundred pounds or more.

4 Importantly, we have taken corrective action to minimize  
5 these occurrences.

6 And lastly, snow. While the drop yard  
7 discrepancies were isolated to CDF Southwest, the CDF  
8 plant in Michigan has its own unique discrepancy triggers,  
9 snow and ice. In cold months, tankers, trucks, and scales  
10 covered in snow and ice can add hundreds of pounds to a  
11 scale weight. A cubic foot of snow weighs up to 20  
12 pounds, and a standard milk tanker has a footprint of over  
13 3,000 square feet. So a single inch of snow on a tanker  
14 could weigh as much as 500 pounds.

15 When you consider that many of the deliveries in  
16 Michigan are made with 100,000-pound super tankers, the  
17 potential for snow and ice weight increases as well. We  
18 have observed higher than usual negative weight  
19 discrepancies during the winter months, which we have  
20 determined are attributable to frozen precipitation.

21 In conclusion, first is as usually measured and  
22 observed by CDF and CDF Southwest, the difference between  
23 farm weights and plant weights is less than 0.2% of total  
24 solids. Despite their different geographies, CDF and CDF  
25 Southwest show similar farm-to-plant shrink numbers.

26 Within the universe of deliveries to CDF, the net  
27 discrepancies for single farm shipments of Select Farms of  
28 negative .2% is very close and slightly higher than the



1 plant average of negative 0.15%. Given that many of the  
2 non-Select shipments received by CDF come from multiple  
3 farm loads, the necessary conclusion is that management  
4 for farm-to-plant shrink is not unique to Select  
5 specifically or larger farms generally.

6 CDF and CDF Southwest have identified areas that  
7 are likely to contribute to farm-to-plant weight  
8 variances. Those variances are neither inherent nor  
9 unaddressable. Instead, significant farm-to-plant losses  
10 often are the result of practices and circumstances that  
11 can be addressed and do not represent actual milk losses  
12 at all.

13 Thank you for the opportunity to testify today.

14 Q. Thank you, Ms. Stehouwer. I wanted to follow up  
15 with a few questions that I have done with the other  
16 witnesses.

17 So the first really doesn't deal with  
18 farm-to-plant shrink at all. It's on the first page of  
19 your testimony. You mention that you are responsible for  
20 a number of things with CDF and CDF Southwest, and among  
21 those is hedging.

22 What do you do for -- for the hedging -- or what  
23 do you do in the area of hedging for the companies?

24 A. So myself and our business analyst are responsible  
25 for our risk management program, which includes hedging of  
26 commodities, butter, nonfat.

27 Q. So would you be analyzing potential hedge  
28 positions for the sale of products out of the plant?



1 A. Yes.

2 Q. Okay. Do you do -- you don't do any hedging on  
3 the milk purchase side at the plant, do you?

4 A. No, I do not.

5 Q. And there have been some discussions throughout  
6 the hearing about the impacts of all of the proposals that  
7 we're talking about, on risk management and hedging.

8 Have you done any analysis on -- on that issue on  
9 whether any proposals would affect the hedging activities  
10 of Continental Dairy Facilities, or CDF Southwest?

11 A. I have not.

12 Q. Mr. Allen was asked about the products that were  
13 produced at CDF and CDF Southwest.

14 Did you hear his answer?

15 A. I did.

16 Q. Did he miss anything?

17 A. He did not.

18 Q. All right. He did well. Great.

19 I wanted to call out and ask you, you analyzed  
20 shipments for the exact same period that Ms. Campbell did.

21 Was that intentional?

22 A. Yes.

23 Q. You wanted the data to line up for comparative  
24 purposes?

25 A. I think so. Yes.

26 Q. Okay. I'd like to ask you about your table on  
27 page 4.

28 Now, you have not listed names of cooperatives or



1 plants, just for confidentiality reasons. But am I  
2 correct that each cooperative is a distinct single  
3 cooperative and you have aggregated all the shipments from  
4 that cooperative together in each individual row?

5 A. That's correct.

6 Q. And so you also have some plants that represent a  
7 very small portion of the total.

8 So why would you be receiving milk from plants?

9 A. Sometimes we -- we buy from non-cooperative  
10 suppliers.

11 Q. Okay. Would it happen like if a plant just had  
12 too much milk that they weren't processing and they would  
13 sell it to you for processing?

14 A. Yeah. Yes. Exactly.

15 Q. So when you and I were going over this testimony,  
16 we looked at Cooperative A's numbers and noticed that the  
17 net discrepancy was the lowest among the group.

18 A. That is correct.

19 Q. And you had -- you had stated that with respect to  
20 that particular cooperative, that as part of your  
21 reconciliations you made, in conjunction with that  
22 cooperative, adjustments to their weights; is that  
23 correct?

24 A. That is correct.

25 Q. Can you explain a little bit more about how that  
26 works?

27 A. Yeah. So when we -- we do a daily balance of  
28 receipts, we will flag anything that's over .8% and send



1 it back to the cooperative or supplier. And in that  
2 instance, the ones who I would say don't have reliable  
3 scale weights or noticeable that something's off, then  
4 they will either agree to take the plant weight due to the  
5 fact that they know that their weights are not reliable,  
6 or they will agree to split with us to become a little  
7 more in line with where we should be.

8 Q. You were here for Ms. Campbell's testimony?

9 A. Yes.

10 Q. Would you say that what you're describing are  
11 similar to what she said were, kind of known issues with  
12 loads?

13 A. Correct. Yes.

14 Q. Nevertheless, are those situations a distinct  
15 minority of instances with respect to the loads received  
16 by CDF?

17 A. Yes.

18 Q. Would you expect that if there were no adjustments  
19 to those loads, that the bottom line figure, I guess  
20 literally the bottom line figure in your table, would be  
21 affected much by that?

22 A. I think it would be affected but not  
23 significantly. I think it would not be higher than the  
24 highest one we have stated.

25 Q. Okay. On page 5 you're describing -- you make a  
26 description of the components of milk in the silo, and the  
27 components of the milk coming in based on farm tests. And  
28 you testified that those two measurements are consistently



1 in line with one another.

2 A. Correct.

3 Q. Is -- is that based on information provided to you  
4 by others in the company?

5 A. That is correct.

6 Q. It's not something you personally measure and  
7 track, is it?

8 A. That's correct. It's not in our department.

9 Q. Okay. When you say those measurements are in line  
10 with one another, I assume that means that whatever the  
11 protein is in the milk coming in, is the protein in your  
12 silo, and butterfat is the same; is that your  
13 understanding?

14 A. Yes, that's my understanding.

15 Q. Now, the farm-to-plant shrink figures that are in  
16 the price formulas now, they assume that you lose a  
17 certain amount of all the solids, which includes  
18 butterfat, and then additional butterfat on top of that.

19 Is that consistent with the tests in your silos?

20 A. Not my area, but based on what I've talked to  
21 individuals in our -- in our facility, that they align.

22 Q. Yeah. The farm plants and the silo tests align?

23 A. Yes, they align.

24 Q. Okay. You also go through a number of reasons why  
25 there would be plant discrepancies, and I just wanted to  
26 ask a few additional questions on those areas.

27 Scale calibration, is that something that you  
28 frequently are advised about, that a farm has an issue



1 with their scale?

2 A. I would say not from the farm level that we're  
3 hearing it frequently, but we do very rarely. It's more  
4 within our plant.

5 Q. I'm -- I don't know the answer to this because I  
6 haven't asked you before. But do you know how closely the  
7 scales are calibrated, to within how many pounds?

8 A. Of the farm or with our --

9 Q. Within your plant scale. Like, is it calibrated  
10 to within a range or --

11 A. Yeah, it's calibrated quarterly, I know that, and  
12 it is with a range. But I wouldn't be able to tell you  
13 the exact range.

14 Q. Okay. So I want you to assume for a second that a  
15 farm scale is calibrated within a range, and your plant  
16 scale is calibrated within a range. Within any given load  
17 of milk, you could be within the range at both places but  
18 still show some kind of variance, wouldn't you?

19 A. I would agree.

20 Q. Okay. As far as hauler errors, when I first heard  
21 Ms. Campbell's testimony, or first saw her put it  
22 together, I was -- I was surprised, actually, at the  
23 frequency of hauler errors in reporting.

24 How frequently are hauler errors, do you see  
25 hauler errors in your analysis and your reconciliations?

26 A. I would say every day.

27 Q. Every day?

28 A. Yeah, that we're receiving, you know, quite a few





1 tankers a day.

2 Q. Yeah. But it's not a rare occurrence?

3 A. No.

4 Q. You mentioned the use of drop yards and that CDF  
5 Southwest uses a drop yard.

6 Is there a drop yard used at the Michigan plant?

7 A. No, there's not.

8 Q. And you describe use of different equipment. I  
9 had to learn this in preparing for this testimony, too.

10 A yard dog, can you describe for us what that is?

11 A. Why he. So it's a -- it's a smaller tractor.  
12 Doesn't have a cab, so smaller than what you would see  
13 typically on the road. And they pull in the tankers and  
14 pull them out.

15 Q. And it weighs, therefore, less than a regular semi  
16 tractor?

17 A. That's correct.

18 Q. And then you also -- this is one that, when we  
19 were reviewing your testimony, you know, folks weren't  
20 clear on this. Where you talk about different drivers and  
21 the equipment at scale in and scale out. Can you actually  
22 explain for us like really simply what that is?

23 A. Yeah. So I mean your driver, for example, could  
24 be someone who weighs 120 pulling it in, and then you  
25 could have a truck driver that weighs 300 pulling it out.  
26 So you could have an easily difference of 100 and 200  
27 pounds just by the person that's in the cab.

28 Q. And this snow you note, again, something I had



1 never thought about before you had clued me into it. In  
2 the winter months in Grand Rapids or Coopersville, how  
3 frequently does that issue arise?

4 A. A lot. January through March is pretty  
5 significant on that problem. And we'll be able to notice  
6 it by all the trucks being out of variance.

7 Q. You will notice a snowstorm and then a significant  
8 number of variances occurring in that same period?

9 A. That's correct.

10 Q. How many years of analysis, like, before you all  
11 realized it was the snow and ice that was doing that?

12 A. I think we figured it out the first year.

13 Q. First year? Okay. Great.

14 MR. MILTNER: The witness is available for  
15 additional questioning.

16 THE COURT: We have been going a little bit over  
17 an hour and a half. I think it's time for a break.

18 All right. Let's come back 2:05. I'm sorry,  
19 3:05.

20 (Whereupon, a break was taken.)

21 THE COURT: Back on the record.

22 CROSS-EXAMINATION

23 BY MR. ENGLISH:

24 Q. Good afternoon. My name is Chip English from the  
25 Milk Innovation Group.

26 A. Nice to meet you.

27 Q. Thank you very much for being here today.

28 Let me actually start off, you were here, I know,



1 in the room when Ms. Campbell was testifying, correct?

2 A. Yes.

3 Q. And when I asked her some questions, and she  
4 deferred to you, correct?

5 A. Yes.

6 Q. And then you gave your testimony and provided some  
7 additional answers to Mr. Miltner.

8 Given the questions I had for her, which were  
9 about discrepancies and how things were resolved, is there  
10 anything you haven't covered in your testimony now in  
11 addition to what Mr. Miltner, going back to the questions  
12 I asked her?

13 A. Going off memory, I think we covered it.

14 Q. I think so, too. I just --

15 So let me turn primarily, maybe not exclusively,  
16 but primarily to page 4 of your testimony, which is the  
17 chart.

18 And let me start by asking on the accounts which  
19 are listed as Plant 1, Plant 2, Plant 3, Plant 4, I didn't  
20 hear Mr. Miltner go into this exactly, is that milk that  
21 is being reloaded at a plant and delivered to you?

22 A. I'd have to go back and look at specifics, but it  
23 could also be milk that the plant is selling to us that  
24 didn't go to the facility.

25 Q. So diverted milk?

26 A. Yes.

27 Q. Do you understand what that phrase is, diverted?

28 A. Yes.



1 Q. Okay. So it could be diverted milk, it could be  
2 reloaded milk, correct?

3 A. Correct.

4 Q. And you don't know what --

5 A. No. I'd have to go back specifically and look.  
6 The data is over a year, so...

7 Q. And with respect to the materials that you and  
8 Ms. Campbell have put together, I think -- if I'm wrong  
9 correct me -- I think what you put together is between the  
10 two of you, the information about the Michigan plant,  
11 correct?

12 A. And the Texas plant -- I want to break it down if  
13 I can. I'm right that this information on page 4 is about  
14 the Michigan plant, correct?

15 A. That's correct.

16 Q. And then you performed the same analysis, but  
17 because of different supply issues, you didn't provide the  
18 same detail, but between you and Ms. Campbell you provided  
19 information about the Texas plant, correct?

20 A. Correct. So on page 7 is the Texas plant.  
21 There's no chart because it is a smaller pool of data.

22 Q. Right. Okay. So -- and when we talk about the  
23 Michigan plant, that's your plant, correct, Select's  
24 plant?

25 A. That is, yes.

26 Q. And when we talk about the Texas plant, that's  
27 Select's plant, correct?

28 A. Correct.



1 Q. Is there another universe of milk that is  
2 delivered to others, so purchasers of your milk, that  
3 Ms. Campbell talked about, or is that not part of the  
4 study?

5 A. That is not part of this. This is just deliveries  
6 to the plants in Michigan and the plants in Texas.

7 Q. Okay. And that's what I was trying to get at.

8 A. Okay.

9 Q. So that this is not -- well, was Ms. Campbell's  
10 testimony about milk being delivered to other plants?

11 A. Yes, that is correct.

12 Q. But there isn't any information for  
13 confidentiality or competitive reasons about other plants  
14 themselves in terms of their overall receipts, correct?  
15 From others, other than Select, correct?

16 A. Can you repeat that? Sorry.

17 Q. So to the extent Ms. Campbell's testimony spoke to  
18 milk delivered by Select to -- on what's purchased milk,  
19 you don't go beyond that, so you don't know what the  
20 plant -- that plant's other receipts are, correct?

21 A. I do not. My testimony is not over other plants.

22 Q. And then also on page 4, the sentence that says,  
23 "All of the cooperatives listed, other than Select,  
24 include shipments of milk from multiple pickup routes."

25 Does that mean that they aren't all full tanker  
26 loads?

27 A. They are all full tankers, but they have  
28 multiple -- some of the deliveries from the other co-ops



1 have multiple farm pickups in one tanker.

2 Q. Okay. Do you know what percentage of their  
3 deliveries are multiple pickups?

4 A. I do not.

5 Q. When your column on page 4, the right-hand column,  
6 is labeled "net discrepancy," so for instance, Select Milk  
7 Producers, a net discrepancy of minus 0.20%, just to be  
8 clear for the record, what a net discrepancy means is when  
9 you add up all the deliveries from Select and netted out  
10 whatever variances, it was negative 0.2%, correct?

11 A. That is correct.

12 Q. Do you know what the range was of from, say, a  
13 load that was the most negative to the most positive?

14 A. I do not.

15 Q. Would there be a range?

16 A. There would -- I mean, yes, there would be a  
17 range.

18 MR. ENGLISH: I thank you very much. I have no  
19 further questions.

20 THE COURT: Other questions other than AMS for  
21 this witness?

22 Seeing none, Ms. Taylor.

23 CROSS-EXAMINATION

24 BY MS. TAYLOR:

25 Q. Good afternoon.

26 A. Hi.

27 Q. Thanks for coming to testify today. I don't have  
28 too many questions.



1 I did on the page 4 of the table, I just want to  
2 clarify for the record first that that negative .15% is a  
3 weighted average of all of the ones above; is that  
4 correct?

5 A. That's correct.

6 Q. Okay. Weighted by the percent of deliveries?

7 A. Yes. By the total volume. Yes.

8 Q. Okay. And then I was wondering if you had any  
9 insight why all the net discrepancies for the plants seem  
10 to be positive, but yet all the ones for the cooperatives  
11 seem to be negative?

12 A. That is a good question. I do not.

13 Q. Okay. That's fair.

14 For the cooperatives that have -- are on the  
15 higher end the net discrepancy -- and you did mention that  
16 all of these co-ops had multiple stops on their -- on  
17 their routes, did you -- have you been able to go and look  
18 at the data to see if there's a relationship between the  
19 farm size of the co-ops on the routes and the percent  
20 discrepancy?

21 A. I have not gone and looked at that. What I'll say  
22 is, not all of the smaller deliveries are just based on  
23 farm size, it's just based on how much we received from  
24 that supplier throughout the year.

25 Q. Okay. So you are talking about the percent of  
26 delivery. So it might be high like, negative .32, but you  
27 only got 1% of your milk from them?

28 A. Right.



1 Q. When you are talking about scale calibration on  
2 page 5 as one the reasons for plant discrepancies, I asked  
3 this same question of your co-worker where there is a  
4 substantial discrepancy. And I was just wondering if you  
5 could illuminate what you deem a substantial discrepancy  
6 or what your suppliers deem as a substantial discrepancy  
7 enough that they would discuss with you?

8 A. So depending on the weight of the load, you could  
9 see substantial discrepancies be 10,000, 20,000 pounds for  
10 each load. So it -- it's pretty -- I would -- I would say  
11 it's pretty clear to see when looking at a table of what  
12 would be substantial. It really sticks out and you know  
13 that there's no way that -- you know, it's not just 100 or  
14 200, or even 1,000, it's going to be a quite large  
15 variance.

16 Q. Okay. Significant outliers?

17 A. Yes.

18 CROSS-EXAMINATION

19 BY MR. WILSON:

20 Q. Todd Wilson, USDA AMS.

21 Again, my question didn't pass mustard, I don't  
22 think, with Erin.

23 On page 6 of your testimony, under the hauler  
24 error paragraph, the last sentence, "Hauler errors of this  
25 type are the second most common issue."

26 Is the second referring to within this paragraph,  
27 that these types that you are identifying of the second  
28 most hauler issues, or is hauler errors the second of the





1 A, B, C, D groupings?

2 A. I would say we're saying it's the second most  
3 common issue we see, so it kind of listed them in order.  
4 The last two are outliers between each plant; the first  
5 two is what we see at both locations.

6 Q. Okay.

7 MS. TAYLOR: That's it from AMS. Thank you.

8 THE COURT: Anyone else?

9 REDIRECT EXAMINATION

10 BY MR. MILTNER:

11 Q. Ms. Stehouwer, I just want to finish up with a  
12 couple of clarifying questions on your testimony, and it's  
13 going to touch on Ms. Campbell's as well.

14 So when you were asked to prepare your testimony  
15 and your analysis, the purpose was to show, for the plant,  
16 the variance between all of the receipts regardless of  
17 source to your plant.

18 Was that your understanding of what your task was?

19 A. Yes, that's correct.

20 Q. And so you personally in your role at CDF and CDF  
21 Southwest, you don't have visibility to any other plants  
22 even really within Select's world, do you?

23 A. No, I do not.

24 Q. And then, you know, I think Ms. Campbell testified  
25 to this, but as you were working with her and the Select  
26 team on this whole project, was your understanding that  
27 she was presenting the other side of the same coin, the  
28 cooperative milk sales side deliveries from Select to its



1 plants regardless of who owned the plant?

2 A. Yes.

3 Q. And that so in conjunction, your testimony and her  
4 testimony would show what it looks like for the sale of  
5 milk and what it looks like for the purchase of milk,  
6 correct?

7 A. That's correct.

8 MR. MILTNER: Okay. I don't think that I have any  
9 other questions.

10 And so, your Honor, we would ask the admission of  
11 Exhibit 218.

12 THE COURT: Any objection?

13 Exhibit 218 is entered into the record of this  
14 proceeding.

15 (Thereafter, Exhibit Number 218 was received  
16 into evidence.)

17 THE COURT: Thank you. You are dismissed.

18 MR. MILTNER: We would call to the stand to talk  
19 about Proposal 12, Chris Allen again, and we will  
20 distribute his statement.

21 THE COURT: Let's say you are still under oath.

22 THE WITNESS: Yes, sir.

23 THE COURT: You were just here.

24 CHRIS ALLEN,

25 Having been previously sworn, was examined  
26 and testified as follows:

27 DIRECT EXAMINATION

28 BY MR. MILTNER:



1 Q. Good afternoon, Mr. Allen. Welcome back.

2 A. Thank you.

3 Q. We have already had your name and address entered  
4 into the record, and the judge has noted you are still  
5 under oath.

6 In front of you is a document. Marked in the  
7 upper right as Exhibit Select-4.

8 Do you have that in front of you?

9 A. Yes.

10 Q. Are you familiar with that document?

11 A. Yes.

12 Q. Does it represent your written testimony submitted  
13 to USDA in support of Proposal 12 in this hearing?

14 A. Yes.

15 MR. MILTNER: And, your Honor, could we have  
16 Exhibit Select-4 numbered for identification, please?

17 THE COURT: Yes. It is marked as identification  
18 219.

19 (Thereafter, Exhibit Number 219 was marked  
20 for identification.)

21 MR. MILTNER: Thank you.

22 BY MR. MILTNER:

23 Q. And, Mr. Allen, as you did previously with your  
24 prior testimony, are you going to read a somewhat  
25 abbreviated version --

26 A. That is correct.

27 Q. -- of this?

28 A. Okay.



1 MR. MILTNER: Your Honor, we previously qualified  
2 Mr. Allen as an expert in the field of dairy economics and  
3 cooperative analysis, so I just recognize his prior  
4 designation.

5 BY MR. MILTNER:

6 Q. And, Mr. Allen, if you could go ahead and read  
7 your statement, that would be great.

8 A. Will do.

9 I am here to testify on behalf of Select Milk  
10 Producers, Inc. My testimony today addresses Proposal 12  
11 related to the yield of nonfat dry milk, which I will also  
12 refer to as NFDM, and the inclusion of the nonfat solids  
13 in dry buttermilk powder, which I will also refer to as  
14 BMP.

15 Select's Proposal 12 changes the yield factor for  
16 NFDM to properly account for the value of milk solids  
17 utilized in the manufacturing of BMP. If adopted,  
18 Proposal 12 would change the yield for NFDM from 0.99 to  
19 1.03.

20 The current yield factor for nonfat solids of 0.99  
21 was set as part of the Department's 2002 Final Decision on  
22 the Class III and IV price formulas. The 2002 Final  
23 Decision "eliminates the consideration of nonfat solids  
24 that end up in buttermilk powder from the Class IV nonfat  
25 solids pricing formula."

26 The Department concluded then that the elimination  
27 of these nonfat solids from the Class IV formulas was  
28 appropriate because, and I quote: "[R]ecognizing a



1 minimum value for buttermilk powder does not materially  
2 affect the Class IV skim milk price. Record evidence  
3 indicates that the price of buttermilk powder can be a low  
4 of 70% of the nonfat dry milk price for the same period.  
5 In addition, according to the record, the Make Allowance  
6 of buttermilk powder is an additional 2 cents per pound  
7 higher than the nonfat dry milk Make Allowance. Official  
8 notice of weekly Dairy Product Prices published by the  
9 National Agricultural Statistics Service for January 2000  
10 through May 2002 is hereby taken.

11 "Using the 2-cent higher Make Allowance for  
12 buttermilk and prices for nonfat dry milk and buttermilk  
13 powder for the period of January 2000 through May 2002, it  
14 was determined that the effect of including buttermilk  
15 powder in the nonfat solids price and the Class IV skim  
16 milk price was negligible. Therefore, this decision  
17 eliminates the consideration of nonfat solids that end up  
18 in buttermilk powder from the Class IV nonfat solids  
19 pricing formula."

20 However, the effect of buttermilk powder on the  
21 formulas was not then, nor is it now "negligible." The  
22 2002 Final Decision did not set forth the mathematics to  
23 support its conclusion then. As further explained in this  
24 testimony, had the 2002 Final Decision properly analyzed  
25 the impacts of removing buttermilk powder, it should have  
26 arrived at a yield of 1.02.

27 The situation 20 years later is even more  
28 pronounced. Current data demonstrate that the spread



1 between the prices of nonfat dry milk and buttermilk  
2 powder is minimal and not uniformly negative. USDA  
3 reported dry buttermilk prices and nonfat dry milk  
4 low/medium heat prices established a much tighter price  
5 alignment than assumed by the 2002 Final Decision.  
6 Accordingly, the proper yield for NFDM should be increased  
7 to 1.03 to reflect the current state of the industry.

8 Select's Proposal 12 recognizes that the current  
9 yield factor wholly fails to compensate producers for the  
10 value of milk solids used in the manufacturing of  
11 buttermilk powder.

12 The 2002 Final Decision Improperly Accounted for  
13 the Value of Buttermilk Powder.

14 In developing Select's Proposal 12, we partially  
15 accepted the Department's reasoning in setting the NFDM  
16 yield described in the 2002 Final Decision. Specifically,  
17 we accepted that the portion of milk solids in Class IV  
18 milk used to manufacture buttermilk powder should reflect  
19 the proper value of the end product and the cost to  
20 manufacture it.

21 We did not accept, however, the Department's  
22 conclusion "that the effect of including buttermilk powder  
23 in the nonfat solids price and the Class IV skim milk  
24 price was negligible." Our starting point was to  
25 determine what the proper yield of NFDM would be, assuming  
26 that the yield was adjusted for the value of buttermilk  
27 powder rather than its wholesale removal from the yield  
28 formula.



1 My written testimony provides a relevant analysis  
2 and calculation of the NFDM yield factor from USDA's 2002  
3 Finals Decision.

4 Select sought to restore the proper value of the  
5 buttermilk solids in dry buttermilk. To do so we took the  
6 calculated quantity of buttermilk solids and multiplied it  
7 by 70%, reflecting the Department's conclusion regarding  
8 the value of dry buttermilk. Next, we multiplied that  
9 result by 87.5% to account for the higher make costs for  
10 buttermilk powder recited by the Department.

11 Next, we took the 0.9975 pounds of nonfat solids  
12 and subtracted the 0.0479 pounds of solids in dry  
13 buttermilk and restored 0.0293 pounds of those solids  
14 based on the calculation above.

15 Finally, we adjusted the pounds of nonfat solids  
16 to the presumed moisture content of 3.8%. That  
17 calculation results in a yield of 1.02, not 0.99. This  
18 establishes that the Department's conclusion that the  
19 value of buttermilk powder in the nonfat solids price is  
20 not "negligible." It has a real impact on the stated  
21 yield.

22 The price relationship between NFDM and Buttermilk  
23 Powder is closely aligned. Consistent with Select's  
24 approach and philosophy that all the elements of the  
25 minimum price formulas should reflect current realities,  
26 we next revisited the price relationship of NFDM and  
27 buttermilk powder.

28 For this analysis, we compared the reported prices



1 for NFDM and BMP reported by the Dairy Market News  
2 ("DMN"). We utilized the DMN monthly averages of the  
3 mostly price series for West and East/Central dry  
4 buttermilk and for Western and East/Central NFDM. We  
5 utilized prices from January 2021 through June 2023. We  
6 selected January 2021 to provide the longest continuous  
7 representative window possible while attempting to avoid  
8 the pricing impacts triggered by the COVID-19 pandemic.

9 The table provided in my written testimony  
10 provides the full scope of these comparisons and analyses.  
11 This data demonstrates two important truths: First, there  
12 is little difference between the Western and  
13 Central/Eastern prices of either NFDM or BMP; second, and  
14 more relevant to Proposal 12, BMP prices are aligned very  
15 closely to NFDM. BMP as a percentage of NFDM prices was  
16 97.0% in the west and 98.0% in the Central/East. Steve  
17 Cooper from Continental Dairy Facilities will offer  
18 additional testimony confirming that its sales of  
19 buttermilk powder align with this analysis.

20 Once this analysis was complete, I looked further  
21 back over the period of January 2017 through July 2023 to  
22 confirm this price alignment. The additional charts in my  
23 written testimony demonstrate the longer-term price  
24 alignment of NFDM and BMP. The Department's finding that  
25 BMP is sold at 70% of NFDM is not borne out by current  
26 realities.

27 Recognizing this close price alignment, I  
28 performed the same calculation of the NFDM yield performed





1 by USDA in the 2002 Final Decision using the current price  
2 alignment. I maintained the same relationship between the  
3 cost of manufacturing BMP and NFDM (in other words, NFDM  
4 make costs are 87.5% of BMP make costs).

5 The arithmetic works out as follows. I took the  
6 calculated quantity of buttermilk solids and multiplied it  
7 by 97.5%, reflecting the proper price alignment. Next, I  
8 multiplied that result by 87.5% to account for the higher  
9 make costs for buttermilk powder.

10 Next, I took the 0.9975 pounds of nonfat solids  
11 and subtracted the 0.0479 pounds of solids in dry  
12 buttermilk. I then restored the 0.0409 pounds of those  
13 solids based on the calculation above.

14 Finally, I adjusted the pounds of nonfat solids to  
15 the presumed moisture content of 3.8%.

16 Changing the NFDM yield impacts the nonfat solids  
17 price and the Class IV prices. Based on my analysis of  
18 the changes, using five- and ten-year averages of  
19 commodity prices through April 2023, I computed the  
20 following component and Class price impacts: For the  
21 five-year average, the nonfat solids price under the  
22 current formula is 1.0219. Using Proposal 12, the nonfat  
23 solids price would be 1.0632. For that same five-year  
24 average the Class IV price under the current formula would  
25 be \$17.26; under Proposal 12, it would be \$17.62.

26 The ten-year average same commodities, nonfat  
27 solids price, under the current formula, the price would  
28 be 1.0021; Proposal 12 adjustments, the nonfat solids



1 price would be 1.0426. The Class IV price for the  
2 ten-year average would have been 16.92; using Proposal 12,  
3 the Class IV price would have been 17.27.

4 Because the Class II price is based on the  
5 Class IV price, the Class II price would change likewise.  
6 The precise impacts on the statistical uniform price or  
7 blend price would vary by order and could be further  
8 impacted by any adjustments the Department elects to make  
9 to the Class I mover.

10 The adoption of Proposal 12 in full would require  
11 the following amendment to 7 CFR Part 1000 as outlined in  
12 my written testimony.

13 The current yield factor for nonfat dry milk in  
14 the Class IV formula is lower than it would be otherwise  
15 due to USDA's policy decision to disregard the value of  
16 milk solids that are used to manufacture buttermilk  
17 powder. That policy decision was erroneous in its  
18 conclusion that the value of those solids was negligible.  
19 Even under the assumptions regarding the relationship of  
20 NFDM and BMP prices from the 2002 Final Decision, the  
21 conclusion was incorrect.

22 When taking into consideration the current price  
23 relationship, the error is even more impactful. If it  
24 remains USDA's goal to utilize price discovery mechanisms  
25 that establish the true value of producer milk used in the  
26 four classes, the value of Class IV milk must be corrected  
27 and updated to reflect the values of buttermilk solids.

28 Q. Thank you, Mr. Allen. A few additional questions



1 before we open you up to other questions.

2 I'm looking at page 4 of Exhibit 219, and it's the  
3 first two lines. I think you read a yield of 1.03, but it  
4 is 1.02 in your statement, which is consistent with the  
5 analysis on page 6. So I just want to confirm that that  
6 should be 1.02.

7 A. Yes. Like the prior testimony, I think I grabbed  
8 the wrong version of the draft, and so I think you are  
9 correct, that should have been 1.02.

10 Q. Great.

11 So as far as the approach of your analysis here,  
12 would it be fair to state that you took the rationale that  
13 USDA outlined in its prior decisions on the Class IV  
14 formulas and tried to apply current data to it?

15 A. Yes.

16 Q. And so there's really no change -- are you trying  
17 to change USDA's policy on this or are you just trying to  
18 update their analysis?

19 A. Just update the analysis.

20 Q. Now, on page 8 of your testimony, just a thing  
21 that I noticed as we were going through this. In the  
22 column -- really the fourth column, "DMN BMP East-Central  
23 Mostly Average." Dairy Market News publishes a mostly  
24 range for nonfat dry milk and for buttermilk powder in the  
25 West, but in the East/Central, it's just a pure average,  
26 right, they don't separate out a mostly?

27 A. That is correct. That was a typo. Yes.

28 Q. Yeah.



1           And so your numbers there are the average of the  
2 range reported, correct?

3           A.    Yes.  Yes, that is correct.

4           Q.    Let me ask this:  In all your work as a dairy  
5 economist, what -- what is your opinion of Dairy Market  
6 News and the reliability of the data they report?

7           A.    It's the best source we have, but it is reliable.

8           Q.    Now, on the top of page 11, you say you took the  
9 calculated quantity of buttermilk solids and multiplied it  
10 by 97.5.

11           And I think this was implied but not expressly  
12 stated, that that 97.5 is just the simple average of the  
13 relationships between the Western and the -- I'm sorry --  
14 of -- yeah, of the Western and the East/Central  
15 relationships you described in your tables, correct?

16           A.    That is correct.  Yes.

17           Q.    And then finally -- maybe not finally, but next,  
18 on page 12, where you show your five- and ten-year  
19 averages, was the methodology, the lookback methodology  
20 the same as what you answered with respect to your  
21 testimony on Proposal 11 that it goes back from April of  
22 2023?

23           A.    The prior -- 60 consecutive months and the prior  
24 120 consecutive months using the announced prices in the  
25 monthly price formulas.

26           MR. MILTNER:  I would make Mr. Allen available for  
27 additional questioning.

28           THE COURT:  Anyone have questions other than AMS?



1 Can we take a minute?

2 THE WITNESS: Yeah. Okay.

3 MS. HANCOCK: Yes, if you want to.

4 THE COURT: I wasn't thinking of a break so much  
5 because --

6 MS. HANCOCK: We kind of went into a different  
7 topic area that I wasn't ready for yet, so I just want to  
8 make sure -- if we want to take a break, we can, or if  
9 Chip wants to go, that's fine, too.

10 MR. ENGLISH: All right. I'll go ahead and just  
11 proceed, if we can muddle through a little bit here.

12 THE COURT: Okay. Your witness.

13 CROSS-EXAMINATION

14 BY MR. ENGLISH:

15 Q. Chip English again for the Milk Innovation Group.  
16 Good afternoon, Mr. Allen.

17 Let me start on page 8, or more particularly, with  
18 questions that -- that you were asked by your counsel.  
19 And your response -- really your response is you were  
20 agreeing with Mr. Miltner that Dairy Market News is the  
21 best source we have, and it's very reliable, correct?

22 A. Yes.

23 Q. It's not audited, correct?

24 A. It's a good question. I don't believe so.

25 Q. Thank you.

26 So let me start with a question about technology  
27 and what the results are. When the skim and fat are  
28 separated, would you agree that it's inevitable that cream



1 includes an addition of the water and fat, small amount of  
2 SNF?

3 A. I would agree, yes, sir.

4 Q. So where -- where in the existing formula does  
5 that small amount of SNF that goes with the cream show up?

6 A. I assume when the cream is churned to butter, and  
7 then you have the resulting product is then dried into  
8 BMP, buttermilk powder.

9 Q. Do you know that for a fact?

10 A. I don't. That's my assumption.

11 Q. But it's certainly not in the nonfat dry milk,  
12 correct?

13 A. Yes. I would agree with that.

14 Q. You would agree that there's no such thing as a  
15 loss-less plant, correct?

16 A. Yes.

17 Q. That, somewhere in the process, whatever --  
18 whatever your views are about from the farm-to-plant, that  
19 once the milk gets to the plant, there's going to be  
20 losses in solids and butterfat, correct?

21 A. Yes.

22 MR. ENGLISH: Okay. I have no further questions.

23 MS. HANCOCK: We don't have any questions.

24 THE COURT: Oh, no questions.

25 AMS? Or anyone else, I guess.

26 Seeing none, AMS, are you ready?

27 MS. TAYLOR: I guess we're going to be ready.

28 ///



## 1 CROSS-EXAMINATION

2 BY MS. TAYLOR:

3 Q. Well, there's a lot of math to work through here,  
4 so I'm not going to focus on that now.

5 A. Thank you.

6 Q. We'll just have to figure it out later.

7 A. Great.

8 Q. So the assumption, in Select's mind, if I'm  
9 correct, is that whatever doesn't go into the churn, they  
10 put it into buttermilk powder, whatever left over that  
11 goes -- it gets dried as buttermilk powder, and they sell  
12 it; is that correct?13 A. Yes, that is correct. Sorry. I was just nodding.  
14 Yes, that is correct.15 Q. And, therefore, that should be accounted for in  
16 the price formulas because that is a saleable product?

17 A. Yes.

18 Q. Okay. We can go -- I'm not going through the  
19 math, but one can go through the math you provide. But do  
20 you know for a fact that that is actually what happens at  
21 butter plants?22 A. I will have a better source speak for Select  
23 following me. I don't think he's here presently, but  
24 he's -- he may have landed here, but he's not here in --  
25 he may have landed in town, but he's not here in the  
26 facility yet. We'll have somebody who can very much  
27 answer that question.

28 Q. Okay.



1 A. It will be a better resource than me.

2 Q. Okay. And so if I'm looking over on page 3 when  
3 you review our past decision, and you quote from it, and  
4 say -- the one line reads: "Record evidence indicates  
5 that the price of buttermilk can be as low as 70% of the  
6 nonfat dry milk price."

7 So the data that you provided, and it looks like  
8 that came from some NASS information. I have to go back  
9 and read the decision we wrote, but I'm guessing that we  
10 took official notice of something that was published by  
11 NASS to draw that conclusion, the 70% number.

12 So is the information you provided on 7 and 8  
13 looking at Dairy Market News numbers, to conclude from  
14 that that the lowest -- if I was to compare the 70% then  
15 to a number now, it would be the 80.92% number as the  
16 lowest observed relationship during the two years that you  
17 looked at. Is that a fair comparison?

18 A. Are you referencing that number from the chart?

19 Q. Yeah -- well, if I'm looking on page 7, the min  
20 number at the very bottom is 80.92%. So if I wanted to  
21 look at the comparable number between the 70% that was  
22 quoted from in the decision, which says "can be as low,"  
23 so it's not the average there, it's the min. So the min  
24 on the data you provided would be 80.92%. I just want to  
25 make sure I'm correctly comparing those numbers.

26 A. Yes.

27 Q. Okay. And then you go on to talk -- you -- you  
28 quote this decision where the buttermilk powder is an





1 additional \$0.02 per pound in manufacturing costs. And  
2 then you -- you use that in your calculations to come up  
3 with the yield that you are proposing.

4 But what -- do you have any data that  
5 substantiates that it's still a \$0.02 difference?

6 A. I believe Steve's testimony speaks to that. I  
7 could be incorrect, but I was thinking that he  
8 specifically addressed that.

9 Q. Okay.

10 A. If not, I think we can ask him. Again, he would  
11 be a better person to speak to that than me.

12 Q. Okay. So I don't think I have more questions on  
13 this exhibit, but we might think of them later since you  
14 get to come back up here.

15 A. Excited to do that.

16 Q. I'm excited as well.

17 I do have one question since you're up here. I  
18 want to recap the last proposal because you spoke, and  
19 then we kind of got the data to substantiate your  
20 position. So now that you are back up here, I want to  
21 make sure we understand the position.

22 And so amongst all that testimony, I think what we  
23 heard was, in Select's view, farm-to-plant shrink should  
24 be eliminated from the formulas, because even though your  
25 data shows that it still exists, there -- that's the  
26 control of either the producer or the plant to eliminate  
27 that.

28 A. I think we go on to specifically state that we



1 recognize that USDA has discretion in making a decision  
2 based on the data presented on record in this hearing.  
3 And if USDA were to find that complete elimination is not  
4 reasonable, we would be okay with that as long as the  
5 decision was based on the evidence provided in this  
6 hearing.

7 Q. Okay. That's helpful.

8 MS. TAYLOR: Thank you.

9 THE WITNESS: Yep.

10 MR. MILTNER: Mr. Allen, can I ask a few more  
11 questions?

12 THE WITNESS: Absolutely.

13 REDIRECT EXAMINATION

14 BY MR. MILTNER:

15 Q. So in the Class III formula, there's a -- it's  
16 primarily for pricing cheese, correct?

17 A. Yes.

18 Q. It also prices dry whey, doesn't it?

19 A. Well, you mean uses dry whey to establish the  
20 price?

21 Q. That's a better way to state it.

22 A. Correct. Yes.

23 Q. Now, do all cheese plants fully utilize their whey  
24 stream?

25 A. I mean, well, do they all sell it; is that the  
26 question you are asking about utilizing?

27 Q. Yes. Again, better phrased.

28 A. I don't believe so.



1 Q. Nevertheless, those plants pay a Class III price  
2 that presumes the sale of at least dry whey, correct?

3 A. Yes.

4 Q. And so when you were listening in to the testimony  
5 remotely, did you hear any of the butter plants, some of  
6 them say, yes, we make buttermilk powder, and others say  
7 no? Did you hear any of that?

8 A. I don't recall specifics, no.

9 Q. If a plant manufactured and sold buttermilk powder  
10 today, what's the raw input cost for that buttermilk  
11 powder?

12 A. I believe it's Class IV.

13 Q. And since the formula assumes no buttermilk powder  
14 value, what are they paying for the solids that are used  
15 in that buttermilk?

16 A. I don't think it's captured in what they pay for  
17 the producers for the milk.

18 Q. So it's other than the cost of manufacturing,  
19 would it be pure profit?

20 A. I assume so.

21 Q. Thank you.

22 MR. MILTNER: I don't have anything else for  
23 Mr. Allen on this topic.

24 We're prepared to offer his testimony on  
25 Proposal 10. Can we take a -- we can go right into it.  
26 We can take ten minutes before we do so. I'll defer to  
27 everyone else.

28 THE COURT: Can we put this exhibit into evidence?



1 MR. MILTNER: Yes. We would move that into  
2 evidence.

3 THE COURT: Yes. Exhibit 219 is offered into  
4 evidence.

5 Any objections?

6 It is admitted.

7 (Thereafter, Exhibit Number 219 was received  
8 into evidence.)

9 THE COURT: I guess, yeah, let's take a break.  
10 Come back at -- come back at 4:05.

11 (Whereupon, a break was taken.)

12 THE COURT: I consider you still under oath.

13 MR. MILTNER: Hello, Mr. Allen.

14 THE WITNESS: Hey there.

15 CHRIS ALLEN,

16 Having been previously sworn, was examined  
17 and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. MILTNER:

20 Q. You are under oath. We know your name. We know  
21 your address. And in front of you is a document in the  
22 upper right. It says Exhibit Select-6.

23 Do you have that?

24 A. Yes.

25 Q. And have you seen it before?

26 A. Yes.

27 Q. I believe it represents your testimony in support  
28 of Select's Proposal Number 10; is that correct?



1 A. That is correct.

2 MR. MILTNER: Your Honor, could we have an exhibit  
3 number assigned to Select-6, please?

4 THE COURT: Yes. This exhibit is marked 220 for  
5 identification.

6 (Thereafter, Exhibit Number 220 was marked  
7 for identification.)

8 MR. MILTNER: Very good.

9 BY MR. MILTNER:

10 Q. Mr. Allen, you have done this twice already today.  
11 Both times you gave us a somewhat abbreviated version of  
12 the testimony.

13 Is that your intent again?

14 A. Yes, I would like to do that again.

15 Q. Okay. Why don't you go ahead and do that, and  
16 then I'll come ask you some questions.

17 A. Will do.

18 Okay. My testimony today addresses Proposal 10  
19 related to butterfat recovery. Select's Proposal 10 would  
20 update the factors for butterfat recovery in the formulas  
21 for protein and cheese to reflect the currently achievable  
22 and actually achieved factor of 93%. The change  
23 necessitates a corresponding increase in the butterfat  
24 yield in cheese to 1.624. This change to the butterfat  
25 yield in cheese does not consider the correction of  
26 farm-to-plant shrink.

27 The current butterfat recovery factor of  
28 90% originated with the adoption of the 2002 Final Rule,



1 which reasoned, and I quote: "The recommended decision  
2 stated that even though many cheese makers may be able to  
3 achieve a higher fat retention in cheese, the use of the  
4 1.582 factor representing 90% of fat recovery in cheese  
5 continued to be appropriate. The recommended decision  
6 also stated that as a result of the 90% level, butterfat  
7 in cheese was not overvalued, and those cheese makers who  
8 failed to recover more than 90% of the fat would not  
9 suffer a competitive disadvantage. The preponderance of  
10 the record indicates that most cheese manufacturers should  
11 be able to obtain a 90% butterfat recovery," end of quote.

12 In the hearing preceding the 2002 Final Rule,  
13 Select and others argued that the factor should be higher,  
14 relying on hearing testimony that butterfat recovery in  
15 cheddar cheese generally ranges between 90 and 93%.  
16 Although Kraft testified that their butterfat recovery is  
17 lower, the commenters favored a use of a factor that  
18 reflected 91 or 92% fat recovery because that level of  
19 recovery is common.

20 This argument was again presented in the 2007  
21 formula hearing. Again, the Department declined to  
22 increase the recovery factor. In its reasoning then, the  
23 Department concluded, and I quote, "While the record  
24 contains evidence of what butterfat recovery in cheese  
25 production is possible by the use of more modern  
26 manufacturing methods in technology, the preponderance of  
27 evidence reflects that many cheese manufacturers generally  
28 achieve butterfat recovery near 90%. It is important that



1 the product price formulas reflect current market  
2 conditions, not market conditions that may be possible but  
3 not widely achieved or not reflective of general industry  
4 wide conditions. Accordingly, this decision rejects the  
5 adoption of a 94% butterfat recovery factor," end of  
6 quote.

7 The adoption of Proposal 10 as measured by an  
8 analysis of five- and ten-year averages are reflected in  
9 the table provided in my written testimony. Based on this  
10 analysis, we would expect modest increases in the value of  
11 protein and in the Class III price overall.

12 I note also that the survey prices for butter and  
13 cheddar cheese could result in higher or lower Class III  
14 prices as a result of adopting Proposal 10.

15 I provided a table in my written testimony that  
16 demonstrates the impacts of changing the butterfat  
17 recovery factor at various cheese and butter prices.  
18 Depending on the relationship between cheddar and butter,  
19 adopting Proposal 10 will reduce prices in certain  
20 circumstances.

21 Despite this fact, Select believes this change is  
22 warranted, in fact, it is compelled by our desire to have  
23 formulas that accurately reflect current realities. As  
24 noted in my prior statements, ensuring the accuracy of the  
25 formulas is more important than the result.

26 It is imperative that we introduce into this  
27 record the fact that Select and the majority of producer  
28 entities do not possess, or have not been authorized to



1 introduce evidence they do possess, regarding the actual  
2 butterfat recoveries in the manufacturing of commodity  
3 cheddar cheese.

4 The nature of Federal Milk Marketing Order  
5 hearings are such that the protection of proprietary or  
6 otherwise confidential business information precludes the  
7 Department from compelling manufacturers to offer evidence  
8 about their actual butterfat recoveries and other relevant  
9 data regarding costs and yields.

10 We fully support efforts to implement mandatory  
11 audited reporting of make costs, yields, and other  
12 relevant data for those firms subject to reporting sales  
13 through the NDPSR.

14 We cannot, however, defer action on updating the  
15 formulas while we optimistically wait for Congress to act.  
16 While we respect the protection of such information and  
17 the confidentiality constraints upon Select which  
18 precludes us from submitting more probative evidence, such  
19 prohibitions illustrate the disadvantage facing the dairy  
20 farmer community. The fact is that producers are left to  
21 shadowbox opponents who are not obligated to engage.  
22 Select absolutely knows that not only is butterfat  
23 recovery at or above 93% achievable, we know that it is  
24 actually achieved.

25 Select has modeled its own cheese plants for the  
26 production of commodity cheddar and other cheeses. Select  
27 is part of multiple joint ventures that manufacture  
28 commodity cheddar. Select has conducted diligence





1 regarding the acquisition of or partnerships with multiple  
2 cheese plants in various locations throughout the country.  
3 Select employees and employees of Select's subsidiary  
4 companies have experience in manufacturing cheese in  
5 various styles. Our claims here are neither speculative  
6 nor theoretical; they are based on actual observations and  
7 experience.

8 We fully expect that opponents of increasing the  
9 butterfat recovery factors will offer testimony arguing  
10 that 90% remains a rational benchmark. And as testimony  
11 offered under oath, we do not doubt its veracity. But we  
12 must note that where there is no ability to compel  
13 testimony, there is little incentive for those market  
14 participants who achieve greater butterfat recoveries than  
15 those currently utilized in the minimum price formulas to  
16 testify.

17 The Van Slyke formula, upon which the entire  
18 Class III pricing formula is premised, was first developed  
19 in 1894. Van Slyke observed actual butterfat retention  
20 achieved by New York cheese manufacturers. This fact was  
21 testified to by Dr. David Barbano in a hearing preceding  
22 the 2002 Final Decision, and I quote: "The values  
23 selected for percent fat recovery in the cheese for  
24 calculation can be debated. However, a 93% fat recovery  
25 in the cheese is achievable with modern cheese-making  
26 equipment and was achievable in the mid-1890s when  
27 Van Slyke developed his cheese yield formula based on  
28 observations of cheddar cheese making practice in many



1 factories in Central New York over a two-year period."

2 A well-recognized academic text on cheese  
3 manufacturing teaches a "basic" Van Slyke formula  
4 incorporating the 93% butterfat recovery observed by Van  
5 Slyke. Additionally, journal articles, research, and  
6 other publications utilize the same 93% recovery factor  
7 for analysis or reference.

8 Without the ability to introduce data establishing  
9 that commodity cheddar manufacturers can and do achieve  
10 butterfat recoveries of 93% or greater, Select will  
11 provide expert testimony to establish these facts.  
12 Dr. Farkye of California Polytechnic State University in  
13 San Luis Obispo will testify about his research and  
14 observations on butterfat recoveries, as well as available  
15 equipment and technologies for optimizing butterfat  
16 recovery.

17 The amendment to 7 CFR Part 1000 necessary to  
18 implement Proposal 10 -- the amendments, sorry, to 7 CFR  
19 Part 1000 necessary to implement Proposal 10 are provided  
20 in my written testimony.

21 In conclusion, recovery of 93% of butterfat used  
22 in the manufacturing of cheddar cheese was documented in  
23 the late 19th Century and incorporated in the formula,  
24 which provides the basis for the Class III pricing  
25 formula.

26 The 2008 Final Decision recognized that butterfat  
27 recoveries higher than 90% were achievable. In the  
28 intervening 15 years there must be a recognition that what



1 USDA recognizes as achievable by some is now achievable by  
2 most.

3 While the industry consensus seems to be that  
4 mandatory survey of manufacturing costs and yields is  
5 desirable, USDA should not delay adjusting the price  
6 formulas based on the possibility of obtaining legislative  
7 authority that might never come to pass.

8 Q. Thank you, Mr. Allen. Let's start with a couple  
9 clarifying questions, if we could.

10 On page 4 of Exhibit 220 you present information  
11 on the five-year average and ten-year average.

12 And is it correct that those were calculated using  
13 the same periods as the calculations you provided in  
14 support of Select's other two proposals?

15 A. Yes, same periods, same methods.

16 Q. Further down that page you show a chart showing  
17 the calculated impact on the Class III price of a  
18 93% butterfat recovery at various prices, and you  
19 testified that in some instances this proposal would  
20 actually have a negative effect on producer income.

21 And is that what this table reflects here?

22 A. This reflects that the proposal could have a  
23 negative impact on the milk prices paid to producers, yes.

24 Q. And it is a function of the relationship between  
25 the butter price and the price of cheese, correct?

26 A. Yes. The value of butter and the value of cheese,  
27 yep.

28 Q. I did some -- I don't know, I wouldn't call it



1 analysis, let's call it arithmetic. And it appears to me  
2 that when the butter price is about 137% or higher than  
3 the cheese price, that relationship seems to flip.

4 Does that seem about right to you?

5 A. I'm going to trust your arithmetic. That does  
6 seem about right.

7 Q. Now, on page 5 you talk about supporting evidence,  
8 and I think it's fair to say that Select respects the  
9 right of participants in these hearings to protect what  
10 they believe to be confidential information.

11 Would that be correct?

12 A. Yes.

13 Q. And obviously, Select wants to protect the  
14 confidential information of its partners and to some  
15 extent its own operations, correct?

16 A. Yes.

17 Q. When you were listening to parts of the hearing,  
18 did you happen to hear the testimony from Mr. DeJong from  
19 Glanbia?

20 A. Portions.

21 Q. Did you hear him discuss the butterfat recoveries  
22 of the Glanbia's plants?

23 A. If I did, I'm failing to recollect what he said.

24 Q. Okay. I believe he stated that all of Glanbia's  
25 plants achieved higher than 93%. I hope I'm not  
26 misstating my recollection. But if that were stated,  
27 would that surprise you?

28 A. No, not based on some of the information we have



1 available.

2 Q. Okay. And you also go through and you describe,  
3 beginning at the bottom of page 5, several points of data  
4 that Select, through one person or one area or another,  
5 might have some information on butterfat recovery or  
6 butterfat retention.

7 Your -- each of those data points informs your  
8 testimony and Select's proposal, correct?

9 A. Yes.

10 Q. And I don't -- I hope you are not suggesting that  
11 any or all joint ventures Select is in achieves 93% across  
12 the board, are you?

13 A. No.

14 Q. And I don't think you are suggesting either that  
15 every model that Select has done for a cheese plant  
16 achieves 93% or more or less, correct?

17 A. Correct. No, I'm not assuming that.

18 Q. In fact, I imagine that some of these observations  
19 and data points that Select has probably fall on the other  
20 side of the line of that 93% line, correct?

21 A. That would be correct.

22 Q. But out of respect for other confidentiality  
23 agreements, Select does not feel comfortable putting all  
24 of this data into the record?

25 A. That is correct.

26 Q. I imagine Dr. Farkye can answer this question for  
27 me too when he testifies, but I literally found this book  
28 after we submitted all of the testimony here. It's a book



1 called the Science and Practice of Cheese Making, and it  
2 was written by Lucius L. Van Slyke in 1916.

3 And in his book he has the formula, which we now  
4 call the Van Slyke formula, and it says the yield of  
5 cheese is equal to -- and the formula looks familiar to  
6 most of us here -- fat minus .007%. And you make  
7 reference to that -- the age of that formula.

8 Do you think it's a bit anomalous that our  
9 formulas recognize a butterfat retention that is lower  
10 than what is in this 110-year old book?

11 A. I do find that hard to believe.

12 Q. And more -- more to the point, not only hard to  
13 believe, is that consistent with your observations and  
14 understanding about what the industry is doing today?

15 A. No.

16 MR. MILTNER: We would offer Mr. Allen for any  
17 additional questions, your Honor.

18 THE COURT: Anyone have questions for Mr. Allen?

19 CROSS-EXAMINATION

20 BY MR. ENGLISH:

21 Q. Getting familiar, aren't we?

22 A. Yes, sir.

23 Q. Chip English, Milk Innovation Group. Good  
24 afternoon, again.

25 So I do want to -- you know, Mr. Miltner just  
26 discussed the formula. The formula, of course, the  
27 depends on what's in the vat, correct?

28 A. Yes.



1 Q. So if, for instance -- well, are you aware that  
2 inevitably in the plant milk solids are lost in  
3 wastewater?

4 A. Yes.

5 Q. So that doesn't end up in the vat, right?

6 A. Correct.

7 Q. And as I asked you earlier, and you agreed,  
8 there's no such thing as loss-less plant, correct?

9 A. Correct.

10 Q. So where in the formula are those kinds of losses  
11 accounted for?

12 A. That's where I would be speaking beyond my  
13 expertise.

14 Q. But if there are losses, why would you think that  
15 a cheese plant would be able to recover 100% of the fat?

16 A. 100% of the fat?

17 Q. In terms of its ability to even achieve  
18 something -- there's going to be loss fat, correct?

19 A. Yes.

20 Q. And you focus on the butterfat recovery. But do  
21 you make Grade AA butter of the type that can be reported  
22 to NDPSR?

23 A. I believe so.

24 Q. Do you use whey cream in your AA butter?

25 A. I don't know.

26 Q. Isn't it true that whey cream can't be priced as  
27 Grade AA butter -- can't be graded as AA butter?

28 A. I believe that is correct.



1           Just so we're clear, we'll have another person  
2 that can testify to that. Yeah.

3           Q. Are you aware that dry whey typically has a fat  
4 test of 1.25%?

5           A. I couldn't say specifically that I would know that  
6 off the top of my head. I could go look it up, but I  
7 don't know that.

8           Q. So just one last series of questions. I already  
9 asked this question once, but it seems to have come up  
10 again.

11           IDFA commissioned a study on Make Allowances. And  
12 you could have commissioned a survey on yields, correct?

13           A. Select could have.

14           Q. Select could have commissioned or sought the  
15 industry to commission a study on yields, correct?

16           A. That's correct.

17           Q. And you didn't do that, correct?

18           A. Correct.

19           Q. And one of the purposes of a study like that would  
20 be to allow people to provide, like they did  
21 Dr. Stephenson, confidential information, correct?

22           A. Yes.

23           Q. And then, as I think -- I wasn't going to bring it  
24 up yet because it really was in Mr. Cooper's testimony,  
25 but since National Milk Producers counsel brought it up,  
26 Select did not participate in the Stephenson study,  
27 correct?

28           A. As far as I know we didn't.





1 Q. Okay. Is that a little incongruous that -- I  
2 mean, as I hear it, you are implicitly criticizing cheese  
3 companies for not coming forward and talking about their  
4 butterfat recovery, and yet, you didn't commission a study  
5 and you didn't participate in Stephenson's study?

6 A. Again, as I explained earlier, I can't explain why  
7 we didn't participate.

8 MR. ENGLISH: I have no further questions.

9 THE COURT: Other questions?

10 I guess you are up, AMS.

11 CROSS-EXAMINATION

12 BY MS. TAYLOR:

13 Q. We're moving right through today. All right.

14 I want to turn to page 5 -- and I think you talked  
15 about this a little with Mr. Miltner, and I apologize if I  
16 missed some of those answers -- about at the bottom you  
17 talk about Select has modeled its own cheese plants. And  
18 I guess you are using this as the basis to say that you  
19 know that butterfat recovery of 93% is achievable; is that  
20 right?

21 A. It's one of the means, yes.

22 Q. And so how many plants are you talking about  
23 there?

24 A. I wouldn't be able to say. Proprietary.

25 Q. Okay. So we're not sure how many cheese plants  
26 that incorporates but --

27 A. Well, to be clear, this includes cheese plants  
28 that we have looked at acquisitions. I mean, this



1 includes not just plants owned and operated today by  
2 Select.

3 Q. Oh, but plants maybe Select looked at purchasing  
4 at some point in time?

5 A. Yes. That's why I don't want to start throwing  
6 out numbers.

7 Q. Okay. How do those plants compare to maybe other  
8 areas that I don't know where those plants are located,  
9 but to other plants in the country, cheddar plants?  
10 Older, newer, certain locations versus other parts of the  
11 country, I mean?

12 A. A mix, yes. Both newer and both on the older side  
13 of I guess of average, whatever you want to call average  
14 in this industry. I don't know that I would have a good  
15 number to pinpoint for average, but some more --  
16 relatively newer and some older.

17 Q. We have had some discussion at the hearing about  
18 using UF to take out some water or condensing before it  
19 goes in the vat.

20 Do those impact butterfat recovery at all?

21 A. Wouldn't be able to speak to that. I just don't  
22 know.

23 Q. Your testimony talks about that these 93% -- this  
24 93% butterfat recovery is achievable at modern plants.

25 Do you know what a guess on what percent of the  
26 cheddar production is from these types of plants?

27 A. I don't. I'm trying to recall if Dr. Farkye's  
28 testimony will reference that or not, but I do not know.



1 Q. Okay. And so that -- Dr. Farkye is going to get a  
2 little more into the technical side of things?

3 A. Absolutely more technical than I can possibly be.  
4 Yeah.

5 Q. Okay. We'll save some questions for him.

6 So on a very technical note, we do try to run  
7 everyone's numbers again to make sure we see them, and on  
8 your five- and ten-year averages that you use, and I think  
9 you said you started in April of I guess '21 through April  
10 of '23 to do that -- oh, five years, so '19?

11 A. Yeah, you're throwing me off. Right.

12 Q. I haven't had enough coffee today.

13 A. Start with May, end in April. So I think May of  
14 '18 through April of 2023, I believe that's right. Am I  
15 off a year? Oh, sorry, to be clear I will -- for the  
16 record, it ends April of 2023, and it includes the five  
17 consecutive years before that.

18 Q. So it would have started in May of --

19 A. I believe that is correct, May, yes.

20 MS. TAYLOR: I think we'll save the rest of the  
21 questions for later. Thank you.

22 THE COURT: Anything else?

23 MR. MILTNER: I don't have any addition al  
24 questions, your Honor. We would ask the admission of  
25 Exhibit 220.

26 THE COURT: Seeing no objections, Exhibit 220 is  
27 admitted into the record.

28 (Thereafter, Exhibit Number 220 was received



1           into evidence.)

2           MR. MILTNER: So, your Honor, we -- we have two  
3 additional statements to present. I am astonished at how  
4 quickly we have gone through what we did today.

5           Mr. Cooper, I think his flight landed in the last  
6 45 minutes or so. We would be prepared to present him in  
7 the morning.

8           Dr. Farkye is actually here, just in full  
9 disclosure. He took a red eye in. Otherwise, he would  
10 not have arrived until much later tonight, which was his  
11 original plan, which is why I had told everyone that we  
12 would be prepared to put him on Tuesday.

13           So my preference would be to start with both of  
14 those witnesses first thing in the morning and proceed  
15 from there, but we will, of course, defer to your Honor's  
16 direction.

17           THE COURT: Okay. I will defer to the will of the  
18 parties, if I can.

19           Mr. Rosenbaum has stood up.

20           MR. ROSENBAUM: Your Honor, I have no objection to  
21 what was just stated.

22           I am standing on a different issue, which is when  
23 Mr. Brown was testifying this morning, USDA pointed out  
24 they thought there was an error in the calculations on  
25 page 12 of his PowerPoint presentation, which has been  
26 marked as Hearing Exhibit 215, and they were correct.

27           And so we would like to have Mr. Brown retake the  
28 stand. I think this is a five-minute undertaking, just to



1 put in the corrected numbers.

2 THE COURT: Okay. That seems like a good use of  
3 time unless someone's got -- got a concern about --  
4 let's -- I mean, we can come back -- do we want to handle  
5 whether we take up Mr. Cooper and Mr. Farkye first thing  
6 in the morning after this, or do we --

7 MS. TAYLOR: I think AMS thinks that's a good  
8 idea, to start that in the morning.

9 THE COURT: I don't see an objections from anyone  
10 else.

11 So let's do -- let's do as you proposed,  
12 Mr. Miltner, you're betting general support from the  
13 audience.

14 Welcome back. Mr. Brown, you are still under  
15 oath.

16 MIKE BROWN,  
17 Having been previously sworn, was examined  
18 and testified as follows:

19 REDIRECT EXAMINATION

20 BY MR. ROSENBAUM:

21 Q. Mr. Brown, I have put before you a one-page  
22 document that is entitled in the upper right-hand corner  
23 Updated IDFA Exhibit 42, corrected page 12.

24 Do you see that?

25 A. Yes.

26 MR. ROSENBAUM: Your Honor, I would ask that this  
27 document be marked with the next Hearing Exhibit number.

28 THE COURT: This page is marked Exhibit 221.



1 (Thereafter, Exhibit Number 221 was marked  
2 for identification.)

3 MR. ROSENBAUM: Could I have that again, please,  
4 your Honor?

5 THE COURT: 221.

6 MR. ROSENBAUM: Thank you very much.

7 BY MR. ROSENBAUM:

8 Q. Now, is Hearing Exhibit 221 a corrected page 12 of  
9 your PowerPoint presentation that was marked as Hearing  
10 Exhibit 215?

11 A. Yes.

12 Q. All right. And so if we just -- if you get before  
13 you Hearing Exhibit 215, page 12, turn it to page 12, and  
14 then just side by side have new Hearing Exhibit 221.  
15 Could you just indicate what corrections you have made in  
16 your calculations of the percentage of various commodities  
17 in terms of total production that were addressed by the  
18 2019 Stephenson survey that resulted in the 2021  
19 Stephenson report? What changes have you made?

20 A. Okay. The error was in participating plants. The  
21 original had 29 nonfat dry milk plants and 14 butter; the  
22 correct numbers are 27 and 12.

23 I also double checked the rest of the numbers to  
24 make sure that they were in alignment, and they are.

25 And so those survey production shares dropped for  
26 both nonfat dry milk and butter. Nonfat dry milk dropped  
27 from 59.6 to 64.8; butter dropped from 95.7 to 82.1.

28 I also had an error in one of the reference



1 documents, dairy products, and those have also been  
2 corrected, and the pages are listed where the data came  
3 from.

4 Q. Okay. And so just to make sure we're actually all  
5 looking at the exact same information.

6 Under the heading 2019 USDA NASS and Stephenson  
7 cost survey dairy products volumes, the information with  
8 respect to cheddar cheese and whey are unchanged, correct?

9 A. That is correct.

10 Q. And for nonfat dry milk, the corrected version,  
11 which is Exhibit 221, has 27 plants rather than 29,  
12 correct?

13 A. Correct.

14 Q. The average annual production remains the same,  
15 correct?

16 A. Yes.

17 Q. But the total survey annual production has gone  
18 down because there are two fewer -- T-W-O, fewer plants,  
19 correct?

20 A. Correct.

21 Q. And so that number is now the -- that number is  
22 now 1,199,496,654, correct?

23 A. Correct.

24 Q. And as -- and as a share of total NASS production  
25 of nonfat dry milk, the percentage has now gone down in  
26 terms of what percentage was surveyed from 69.6 to 64.8,  
27 correct?

28 A. Yes.



1 Q. And similarly for butter, there now are only 12  
2 participating plants, correct?

3 A. Correct.

4 Q. The average annual production per plant is  
5 unchanged, correct?

6 A. Correct.

7 Q. Because that's from the Stephenson survey itself,  
8 correct?

9 A. Yes.

10 Q. But the total survey annual production has fallen  
11 because now you are multiplying the average annual  
12 production by 12 plants rather than 14 plants, correct?

13 A. Correct.

14 Q. And that actually drops the percentage of total  
15 production covered rather materially, instead of  
16 95.7% it's now 82.1%, correct?

17 A. Correct.

18 Q. And so if we go back to page 11 of Hearing  
19 Exhibit 215, that's where you had the percentage covered  
20 by the 2023 Stephenson survey of 2022 costs that actually  
21 is the source of information used by IDFA and calculated  
22 its proposed Make Allowance, correct?

23 A. Correct.

24 Q. All right. So just one by one, let's go through  
25 each of the commodities so we know the correct numbers.

26 In the 2023 Stephenson study, what percentage of  
27 the total cheddar cheese production in the United States  
28 was covered by the Stephenson survey?





1 A. 55.6%.

2 Q. And that compares as to what percentage in the  
3 Stephenson 2021 report?

4 A. 16.3%.

5 Q. So --

6 A. It's -- it's actually more than three times.

7 Q. More than three times as much coverage.

8 And for whey, the -- and by that I mean the 2023  
9 report has more than three times as much coverage --

10 A. Yes.

11 Q. -- as the 2001 report -- 2021 report; is that  
12 correct?

13 A. Yes.

14 Q. Okay. And then for whey, what's the 2023 number?

15 A. It's 50.8%. The 2019 number is 29.7%. So it's  
16 about 21% higher.

17 Q. Okay. Well, 21 percentage points higher. But, I  
18 mean, in terms of -- well, you can look at it different  
19 ways. But 21 percentage points higher, correct?

20 A. Right.

21 Q. And then for nonfat dry milk in the 2023 report,  
22 what percentage of total nonfat dry milk production was  
23 covered by the survey?

24 A. 91.2%.

25 Q. And what percentage had been covered back in 2019?

26 A. 64.8%.

27 Q. Okay. So once again, a materially higher coverage  
28 in the 2023 report, correct?



1 A. Correct.

2 Q. And now, lastly, in terms of butter, what  
3 percentage was covered in the 2023 report?

4 A. 80.1%.

5 Q. And what percentage in the 2019 report?

6 A. 82.1%.

7 Q. So the 2021 study continues to cover more butter  
8 than the 2023 report, but at this point now it's only  
9 slightly more as opposed to the rather substantially more  
10 that had been shown in your original version --

11 A. Yes, that's correct.

12 Q. -- version of Hearing Exhibit 12; is that right?

13 A. Yes.

14 Q. Okay. Now I think going to Hearing Exhibit 221,  
15 and going back to page 12 of Hearing Exhibit 215, did you  
16 also -- there's a second part of that page that talks  
17 about the 2006 USDA NASS and Stephenson cost survey dairy  
18 product volumes, correct?

19 A. Yes.

20 Q. And the numbers in that part of this page are  
21 unchanged, correct?

22 A. That is correct.

23 Q. Did you, though, change one of the citations in  
24 the data sources?

25 A. Yes, I did.

26 Q. Okay. Is that -- is the -- does Hearing  
27 Exhibit 221 reflect the corrected --

28 A. Yes, it does. And it was -- it was -- essentially



1 it was the page references that need to be updated.

2 MR. ROSENBAUM: Okay. That's all I have, your  
3 Honor.

4 THE COURT: Questions for this witness?

5 AMS? No? No?

6 Seeing no cross, I guess we can move Exhibit 221  
7 into the record, and it's accepted into the record as  
8 evidence.

9 (Thereafter, Exhibit Number 221 was received  
10 into evidence.)

11 MR. ROSENBAUM: Thank you, your Honor.

12 THE COURT: Thank you, Mr. Rosenbaum.

13 I guess, immediately prior to this witness  
14 retaking the stand, we talked about having those two  
15 witnesses, Cooper and Farkye, come up first thing tomorrow  
16 morning, so we'll do that.

17 Is there anything we can do to make productive use  
18 of the last 15 minutes?

19 MS. TAYLOR: For tomorrow as well, we have a  
20 witness from American Farm Bureau Federation that would  
21 like to testify in the morning, so we would like -- they  
22 were here -- he was here last week. He's coming back to  
23 testify tomorrow, so we do need to squeeze him in.

24 THE COURT: Okay. Do we need to figure out an  
25 order?

26 MS. TAYLOR: I mean, I would think he could go  
27 first, if possible. I don't -- is that okay?

28 MR. MILTNER: I think that's fine, yes.



1 MS. TAYLOR: Okay. We would like him to go first,  
2 and then we can proceed with the rest of Select's  
3 witnesses.

4 THE COURT: Okay. Very good.

5 MR. ROSENBAUM: Just to round out the order, we  
6 have two witnesses, then, Ms. Krebs and Mr. Brown,  
7 addressing these yield issues that are raised by Select  
8 Milk.

9 THE COURT: Very good.

10 And they can come after the three witnesses we  
11 were just talking about.

12 MR. ROSENBAUM: Yes, your Honor.

13 THE COURT: Thank you.

14 Off the record.

15 (Off-the-record.)

16 THE COURT: On record.

17 In off-the-record discussion we talked about the  
18 next witnesses who we will take up tomorrow morning and  
19 afternoon. And with that, we're seeing no other business.  
20 We're adjourned until tomorrow at 8:00.

21 (Whereupon, the proceedings concluded.)

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

DATED: November 2, 2023

FRESNO, CALIFORNIA

MYRA A. PISH, RPR CSR  
 Certificate No. 11613



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