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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IN CHRONOLOGICAL ORDER:

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MONDAY, SEPTEMBER 18, 2023 - - MORNING SESSION

THE COURT: Let's go on the record.

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

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

THE COURT: Welcome back, Mr. Brown.

MIKE BROWN,

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

THE COURT: Your witness.

DIRECT EXAMINATION

BY MR. ROSENBAUM:

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

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

A. Yes, it is.

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

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

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

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

BY MR. ROSENBAUM:

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

A. Yes, I am.

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

A. Yes.

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

THE COURT: So marked.

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

BY MR. ROSENBAUM:

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

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

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

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

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

A. Yes, it is.

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

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

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

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

Make Allowance decision.

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

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

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

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

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

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

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

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

"The cost of producing milk, in contrast, are in the aggregate reflected in the supply and demand conditions, that affect the NASS commodity prices of dairy products. See Federal Reg. 73 at 35.234 (sic). Plaintiffs' -- plaintiffs' insistence that the Make Allowance -- rather than the product -- the formula as a whole -- reflect producer costs misapprehends the underlying price mechanisms."

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

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

"The Secretary concluded it was necessary to

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

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

A. That is correct.

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

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

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

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

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

Tell us what the history has been on these subjects.

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

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

A. Yes, I was.

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

A. Yes, it does.

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

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

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

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

A. Yes, they were.

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

A. To the best of my memory, yes.

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

A. No, it was not.

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

A. That is correct.

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

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

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

A. It was not.

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

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

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

A. Yes, it was a mix.

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

basis for IDFA's milk allowance proposal.

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

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

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

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

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

Did that come from Dr. Stephenson's report?

A. Yes.

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

A. Yes.

Q. And how about the total survey annual production?
A. Simply the average production by the number of plant gives you the total of survey production.
Q. So the first column, participating plants, times the average annual production, gives you the total survey annual production, correct?
A. Yes.
Q. And then finally, your column survey production share of USDA NASS, just tell us how you calculated that.
A. I took the total annual survey production, divided it by the NASS 2022 annual production, to come up with the percentage.
Q. So that for cheddar cheese, for example, you took the total survey annual production of 2,203,279,668 and divided it by 3,963,741,000; is that correct?
A. That is correct.
Q. And that's where you get the 55.6% survey production share, correct?
A. Yes.
Q. And in your footnote do you indicate where specifically you got those USDA NASS 2022 annual production numbers?
A. Yes, I did. They are online and downloadable from the Cornell USDA website.
Q. Okay. So let's turn to the next page, which is page 12.
Did you make a comparison between -- well, let me start that question again.

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

A. Yes.

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

A. That is correct.

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

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

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

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

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

A. Yes, that is correct.

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

A. I did not. The only -- only time I heard anything was in the hearing record back during that hearing time. But, no, no direct discussion --

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

A. Oh, in 2019?

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

A. Yes, I was.

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

A. Yeah.

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

A. Right.

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

A. We --

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

A. It had not been the past practice.

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

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

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

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

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

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

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

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

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

A. Yes. Both, yes.

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

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

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

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

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

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

A. It was 91, excuse me.

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

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

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

A. Yes, I have.

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

And what have you set forth here?

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

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

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

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

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

A. That is correct.

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

A. Yes.

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

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

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

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

Q. Higher in what year?

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

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

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

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

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

A. Yes. Yes, I did.

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

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

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

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

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

A. Yes.

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

A. Yes.

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

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

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

A. That is correct.
Q. And do you have a reason why makes sense that a -- that a survey based solely upon California butter would -- might well be different than a national survey?
A. Well, I think, again, if you know the California industry, you have got probably ten or so butter makers, but you have two extremely large ones, extremely successful ones. And so when you weight average the cost, they are the bulk of the pounds, so -- and they are that large, we assume they are very efficient, and as a result you would expect theirs costs to be lower.
Q. All right. Let's turn to the next page, 16. And is this -- does this page set forth the ultimate Make Allowances that IDFA and Wisconsin Cheese Makers Association is seeking, although it's under a -- in a stair-step method, which we'll get to in a minute?
A. Yes. These are the numbers that the -- at the end step with the Make Allowances would be for cheese, dry whey, nonfat dry milk, and butter. And they are equal weighting, in other words, the simple average of the Schiek and the Stephenson studies.
Q. Let me just press on that to make sure the record is clear.
Within the Stephenson study and within the Schiek study, are the numbers they produced weighted average cost of production?
A. Yes. Schiek's is based on weighted average data, so his projections are weighted average. And Stephenson,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. That is also correct.

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

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

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

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

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

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

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

A. Yes.

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

A. Yes.

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

A. Yeah. Very similar to Mark's.

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

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

in the studies.

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

A. Yes.

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

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

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

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

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

A. That is correct.

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

A. '6 and '7, yes.

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

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

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

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

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

Q. Sorry, 8-0?

A. 8-0%.

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

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

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

A. 81.

Q. No, no, for AMPI?

A. 47.

Q. 47%?

A. Yes.

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

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

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

A. That is correct.

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

THE COURT: Wait. Just a quick break.

Off the record.

(Off-the-record.)

THE COURT: Back on the record.

BY MR. ROSENBAUM:

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

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

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

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

method uses a solids based allocation on that fixed cost.

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

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

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

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

A. Yes.

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

A. Yes.

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

weighted average cost of manufacture, correct?

A. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

A. Correct.

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

A. Right.

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

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

A. That is correct.

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

A. Yes, that's correct.

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

A. That is correct.

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

A. I -- I can't recollect.

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

A. Yes.

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

Okay. And assume with me --

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

Q. Do you remember the number?

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

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

A. Yeah.

Q. -- in 2008.

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

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

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

A. Yes.

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

A. Yes, that is correct.

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

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

A. Yes, it does.

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

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

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

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

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

continuing to suffer insufficient Make Allowances --

A. Yeah.

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

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

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

A. Yes.

Q. That's the Stephenson survey --

A. Yes.

Q. -- 2022 costs?

A. Yes.

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

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

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

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

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

deflation?

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

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

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

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

A. Yes.

Q. You are aware of that?

A. Yes.

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

A. No, they are not.

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

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

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

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

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

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

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

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

part of that.

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

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

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

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

Q. Okay.

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

Q. Keep going, please.

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

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

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

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

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

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

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

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

A. Is $0.24.

Q. Okay.

A. CDFA survey was $0.245 in '16.

Q. In 2016?

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

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

And what's your view about that?

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

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

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

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

Q. Okay.

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

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

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

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

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

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

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

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

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

Mr. Miltner.

CROSS-EXAMINATION

BY MR. MILTNER:

Q. Good morning, Mr. Brown.

A. Good morning.

Q. Ryan Miltner representing Select Milk Producers.

I wanted to start with your IDFA Exhibit 6, Exhibit 214, your full statement.

A. Okay.

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

A. Yes.

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

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

A. Yes.

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

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

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

A. No.

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

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

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

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

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

A. Yes.

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

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

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

Q. Within a few pennies you would say?

A. Yes. Yes, definitely.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. We don't have any data --

Q. Okay.

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

(Court Reporter clarification.)

BY MR. MILTNER:

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

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

A. That is correct.

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

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

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

A. No. Some of them just leave.

Q. Some do.

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

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

A. Yes, that's correct.

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

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

Q. Correct.

A. We have all experienced that.

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

What do you mean to convey with that sentence?

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

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

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

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

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

that a growing business tries to do.

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

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

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

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

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

that is lost if the formula prices are reduced?

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

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

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

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

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

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

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

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

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

Q. Okay.

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

Q. Thanks.

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

Q. And it's extraordinarily expensive, correct?

A. Oh, goodness, yes.

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

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

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

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

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

A. Yes.

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

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

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

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

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

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

Q. Asadero.

A. Yeah, thank you.

(Court Reporter clarification.)

BY MR. MILTNER:

Q. Asadero.

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

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

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

A. Yes. Although they are very similar.

Q. Similar but different, correct?

A. Yes, that is correct.

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

A. That is correct.

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

different?

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

Q. Thank you.

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

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

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

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

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

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

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

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

don't look so smart.

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

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

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

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

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

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

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

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

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

(Whereupon, a break was taken.)

THE COURT: Back on the record.

BY MR. MILTNER:

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

On slide 5.

A. Okay.

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

A. Yes.

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

A. Oh, boy. I don't.
Q. Do you know if this was -- I think it says here, this is the 2008 Make Allowance announcement --
A. Yes.
Q. -- not the 2007 Make Allowance announcement?
A. Yes, that is correct. From what I understand, yes.
Q. You are aware there were lawsuits in both -- following both changes?
A. There's always lawsuits.
Q. Always lawsuits.
A. Don't know the details, but I know there were, yes. Thankfully, I wasn't involved with those.
Q. Is it fair to characterize this statement here as the statements of counsel for USDA and not a statement of AMS itself?
A. It's a brief from USDA DOJ, isn't it?
Q. I don't know.
A. If you read, the attribution is it's a brief from USDA DOJ -- oh, excuse me. Yeah, I honestly -- I don't know. I just know the second -- the next slide kind of walks through what they did.
Q. Okay. So --
A. Again, having me read legal stuff is like having you read cheese recipes probably, so it's not my strength. I won't pretend it is.
Q. That's fair.
So on the next slide, which you just referred to,

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

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

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

A. Yes.

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

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

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

A. Okay.

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

A. Correct.

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

A. Yes.

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

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

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

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

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

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

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

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

A. The biggest difference would be packaging.

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

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

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

A. That is correct. I remember that.

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

A. That is also correct.

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

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

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

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

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

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

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

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

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

that's what we all think.

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

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

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

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

A. Okay.

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

Do you recall that?

A. Yes.

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

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

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

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

A. Not really.

Q. -- in this table?

A. That was an error on my part.

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

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

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

A. Yes.

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

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

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

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

A. Within the study, they are weighted averages.

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

A. I think I know where you are going.

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

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

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

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

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

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

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

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

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

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

Q. So just to draw a couple contrasts perhaps.

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

2006 or 2007 report?

A. I honestly don't.

Q. Do you at all recall any discussion?

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

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

A. Yes. Yes, he did say that.

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

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

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

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

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

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

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

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

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

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

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

A. I was listening in. It was colorful.

Q. Okay.

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

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

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

Q. It is.

A. That's the second one.

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

A. Yes.

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

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

THE COURT: Yes, I think we should.

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

MR. MILTNER: Thanks.

BY MR. MILTNER:

Q. Did you help draft the e-mail?

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

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

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

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

A. Oh, no, I'm --

Q. -- members --

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

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

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

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

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

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

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

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

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

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

A. Total plants?

Q. Yes.

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

that's roughly what it was.

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

A. I don't know.

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

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

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

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

"We" is IDFA?

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

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

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

Was that the Department asking IDFA to do that?

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

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

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

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

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

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

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

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

know last year we had it on audited surveys.

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

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

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

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

A. I believe it did not.

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

A. I believe it does.

Q. Do you believe --

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

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

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

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

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

A. No.

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

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

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

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

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

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

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

Q. Okay.

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

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

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

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

A. Proposal 7 and 8 are the same.

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

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

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

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

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

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

A. No, I don't.

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

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

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

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

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

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

So on a hundredweight basis or on an average cost

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

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

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

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

big change.

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

A. Overall, yes.

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

A. Yes.

Q. And despite --

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

Q. And --

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

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

A. Right.

Q. -- and I will honor that.

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

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

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

plant pay for itself.

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

A. Oh, no. Of course not.

Q. The --

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

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

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

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

A. No. No. Of course not.

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

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

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

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

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

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

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

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

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

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

they participate in the regulations.

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

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

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

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

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

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

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

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

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

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

MR. MILTNER: Thank you, Mr. Brown.

THE WITNESS: Thank you.

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

Ms. Hancock.

THE WITNESS: Good morning.

CROSS-EXAMINATION

BY MS. HANCOCK:

Q. Good morning.

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

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

(Court Reporter clarification.)

BY MS. HANCOCK:

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

A. Yes. That's all that was.

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

A. That is correct.
Q. And you would agree with me that to the extent that there is a historical precedent that's been set, that that's what the attorneys will cover in the briefing that will be submitted after the hearing to USDA; is that fair?
A. What we want to make sure is our -- our views were covered. So we include them in the testimony, yes.
Q. Yes.
A. Yes, they certainly have that -- I don't know that they have that opportunity. I'm not a lawyer. But if they do, then I expect that they will.
Q. Okay. And you would agree, though, that to the extent that any of that prior briefing in district court challenges that were made to prior hearings or recommended decisions or any of the recommended decisions or final decisions, that those should be taken into context based on the time period that those issues were being addressed?
A. Not always, because there have been long set precedents. I mean, I think the best example we saw that was with the California new order, because there was a lot of proposals that were outside of precedence, for example, on pooling is probably the best example. And USDA stayed consistent with their current rules on pooling in markets that are similar.
So I do think that they do look at that, and so I do think it -- we think that should be part of their decision-making. Again, they -- they have the right to do what the Secretary thinks is best. We do think that those

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

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

A. That is true. Yes.

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

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

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

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

Q. Okay.

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

chance to discuss them for six weeks in Indiana.

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

A. Right.

Q. -- what we're doing today?

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

Q. Okay. More -- more subjective?

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

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

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

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

A. Within the realm of the proposals, yes.

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

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

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

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

A. On?

Q. On updating or --

A. Oh, gosh --

Q. -- modernizing Make Allowances?

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

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

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

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

A. Director of dairy supply chain.

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

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

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

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

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

A. Last week of January.

Q. I'm sorry?

A. Last week of January.

Q. Of which year?

A. This year.

Q. Okay.

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

Q. Okay.

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

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

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

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

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

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

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

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

Q. Right. But you weren't --

A. But it didn't.

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

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

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

A. Right.

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

A. Yeah.

Q. -- is that fair?

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

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

A. Which one?

Q. National Milk's task force?

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

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

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

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

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

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

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

Q. And including the fact that they had --

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

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

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

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

A. October of last year, yes.

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

A. Oh, heavens, no.

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

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

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

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

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

A. On Mark's new survey?

Q. From 2021.

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

Q. Because --

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

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

the Make Allowance would actually go down for butter?

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

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

A. It did lower it, yes.

Q. Okay.

A. To the surprise of everyone, I think.

Q. Okay.

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

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

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

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

that.

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

A. That is true.

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

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

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

A. Yes --

Q. -- 2022?

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

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

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

Q. And --

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

way. That's not just this last one.

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

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

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

A. Yes.

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

A. Yes.

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

A. Is there a problem with that?

Q. I'm just asking --

A. If you have --

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

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

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

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

A. Very fair.

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

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

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

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

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

A. Two weeks.

Q. So --

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

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

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

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

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

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

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

A. You know --

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

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

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

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

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

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

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

A. I didn't quite get the question.

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

A. Generally that is true, yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Yes. 2008.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Do you recall that?

A. Oh, yes.

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

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

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

A. All right.

Q. -- I'm going with it.

In Exhibit --

A. I apologize.

Q. That's okay.

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

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

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

Q. Was that --

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

Q. Okay.

A. Yeah.

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

A. Yes.

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

those members departed?

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

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

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

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

A. I'm not going to tell you.

Q. Was it more than 50%?

A. No. But I'm not going to -- that's enough. Enough prying on that. That's private. I shouldn't even have told you that. No, it's not that. The whole staff is still there, so they are making it work.

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

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

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

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

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

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

A. Yes.

Q. -- that we are here for?

A. Yes.

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

THE WITNESS: Thank you very much.

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

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

(Whereupon, a break was taken.)

THE COURT: Back on the record.

Okay. Mr. English.

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Chip English, Milk Innovation Group.

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

What is your recollection of USDA's treatment of

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

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

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

THE COURT: Anything further from anyone besides AMS?

AMS.

CROSS-EXAMINATION

BY MS. TAYLOR:

Q. Good morning.

A. Good morning again.

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

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

A. That is correct.

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

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

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

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

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

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

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

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

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

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

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

Q. Okay. Can you turn to page 12 of your exhibit,

the PowerPoint slide, Exhibit 215?

A. Sure.

Q. So under the 2019 study, that first box, under participating plants. We found that the nonfat dry milk and butter plant numbers are different than what you have in this table. So I'm just wondering if they are -- if you were referring to a different study perhaps?

A. Let me --

Q. Or that might just be an oversight?

A. If I can, I'll check, and if it needs to be resubmitted, we will correct the table.

Q. Okay. So there was some talk about -- in one of your examples in your testimony, dumping milk, specifically in the Upper Midwest, because of lack of plant capacity. I'm just wondering if there might be additional reasons that could be why that milk was dumped or you attribute it all to willing -- I'll term it, willing plant capacity?

A. Yeah. And I think it is important that the dumped milk compared to what the supply management programs are doing on milk volume is small, but we're so tight. For example, when Hastings Creamery just closed down, and that caused some stress. We had some stress earlier in the year when we had a change in suppliers into a plant in South Dakota. And you can't live in Kenosha, Wisconsin, and not hear about the milk being dumped in the Milwaukee sewer, which amazes me because the BOD charge you are going to pay on that is going to kill them. Couldn't they

find someone else to do that.

But generally when milk is dumped, either it's -- it's -- has -- it's positive for antibiotics, and most of that is handled with lagoons. I think most companies have farmers that they work with to manage that.

The -- the other thing is -- you see, is sometimes if you, depending on where markets are, whether you have an outlet, because really the only Grade B milk anymore is when a BTU fails, and so you will have some milk that for a day or two will be B. Some plants will take that, not very many anymore because of their customers' requirements, so that can cause some.

But what you see in the Midwest isn't necessarily every day. There's 20 loads going to the Milwaukee sewer system. It's we're so tight on space, it just takes a very little thing to create some disruption. Hastings is a good example.

And it will generally resolve itself, but right now we're -- the spring in particular we were so tight in capacity, there was really no place for it to move. So it's -- it's -- it's more due to lack of space than normally. Normally I view dumped milk as being either antibiotics or someone failed a bulk tank unit with FDA.

Q. Okay. And lack of space would be lack of willing plant capacity to take on milk?

A. Yeah. What you find -- with that milk, if you look at the spot milk prices this year, I mean, if you wanted milk, you could buy it inexpensive. There's a

couple of things with that. One is labor is still tight. It's not as bad as it was a year ago, but labor is still tight in plants. Second is they literally don't have the room. They are running that full. Particularly the spring, I think we all know it got particularly crazy.

And what you will find when you dump milk, you are going to look, where can I send that to get rid of it, where can I sell it? If I get six bucks to sell it into some little dryer down in Kentucky, and it costs me four to get there, it's better than nothing. And so plants will do that. And there's some people that will pick up that milk. Same with cream, if you have cream that's got a high acidity, there's someone that can probably figure out a way to make something out of it, and they will buy it, and it will be at a heavy discount.

And so that's what they look for, any option they have that's better than dumping it. But unfortunately, this year there has been some of that.

My experience historically, particularly in Idaho, because you are so far from places, that processors, if they do get long, or you don't have anyone that can take B milk, then it does travel a long way, and so it is really math.

And this year, you know, sales started to get weaker. Cheese got weaker in June. No one is excited about building inventory, although thankfully we recovered nicely, and so there wasn't a place to send it. That's really what it amounts to. It's just -- this is just

math. It is not only how much can I make, it's how much -- how much will I lose versus dumping it. It just makes sense to haul it, so that's what they will do. That's been my experience.

Q. Could that -- that scenario which you just discussed and -- could that be leading to some of the decrease in the mailbox prices we see, because there's not other outlets for producers to sell their milk, and so they are being forced to take a lower price?

A. It certainly could. Well, if you -- I think we had one testimony from a cooperative talking about how premiums have lowered because of margins. It certainly -- it certainly could.

One thing -- the other thing is when you have inventories building. So, for example, cheddar got long in June. We all know that. And -- and do you really want to make -- even if the milk's cheap, do you want to devalue the inventory you already can't sell by putting more product on the market? And that's another consideration.

They're -- like everybody else in business, what's the best for my business, and it isn't always buying cheap milk. But generally, I mean, in -- I think the biggest indicator, Erin, is all the supply management programs we have with cooperatives, all over the country. They just simply -- they have -- they would have even more milk than they could manage if they didn't have those programs in place.

Q. Uh-huh. Okay.

On page -- well, page 22 of your PDF exhibit, you talk about you would like the effective implementation date to be January 1st, 2025, of the first increase.

And what's IDFA's position if, let's say, January 1st, 2025, in the calendar of events doesn't work, just for who knows what reason. What's your suggestion for how your proposal should be implemented?

A. Well, we believe strongly there's enough urgency that it doesn't need to wait. We don't think risk management on Make Allowances is -- is something we need to be careful with too much delay with that. We understand just the process alone and getting through all the steps, it looks like January 1st, 2025 was popular, Erin. I think we all recognize, again, that's -- that's Proposal 22. You make it work however it best fits to work. We would be open to a different timeline, but we would like annual adjustments like we proposed.

Q. Okay. So -- but starting at the first of the calendar year isn't --

A. It isn't crucial.

Q. -- isn't crucial? Okay.

A. Not if it doesn't make sense regulatory-wise to do that.

Q. Okay. And then on the -- give me a second. I thought I marked my page, but I apparently did not.

Page -- now I'm going to flip to your other exhibit, 214.

A. Okay.

Q. On page 26, so it's 25 going into 26, more in the implementation piece, you wrote, "If USDA were nonetheless to adopt such a delay in implementing, IDFA would no longer support staggered implementation of the proposed Make Allowance." And you would propose that we just jump to year four.

I'm just wondering if you could expand on that. I don't think anyone's asked you a question on that.

A. No. And that's an excellent question.

What -- what we're saying is if there's a significant delay due to, for example, risk management concerns. Let's just use an example. Say we're going to wait 18 months over when it could possibly be implemented because of that. We think at that point that that's too long to wait for just a partial, so we would ask that you move to the full thing. That would also give the risk management folks plenty of time to adapt to the change. That's what that's about. And that would be if there's a -- a plan significant delaying implementation. And, again, I know there hasn't been broad support for that, but we just -- our folks think it is pretty important that we don't stretch it out more than the four years we already have. So that's where that comes from.

Q. Okay. So I think as I have understood the testimony so far, that I -- I don't believe anyone's asked for a delay in the Make Allowance piece, for implementing that.

A. No. But there's -- there's been some conversation by one Upper Midwest bargaining cooperative that spent a lot of time talking about risk management and the need for delay that I don't think was specifically on Proposal 1.

Q. Okay.

A. Proposal 1, I can see some logic because you are changing those skim formulas.

Q. Okay. And then below that, you have, "A majority of cheese manufacturers have fewer than the 1250 employees, and then therefore qualifies as Small Businesses."

I know we have collected information on the plants that have been here or the -- represented here at this hearing. But how did you come up with "a majority"? Where does that --

A. The survey. IDFA, when you -- we do annual surveys, and they give us employee numbers.

Q. So these are IDFA members?

A. Yes. These are IDFA members. That is correct. I can't speak for cheese makers, but for IDFA members, the majority of them are smaller. The big ones are really big, but the majority are less than that.

Q. Okay.

MS. TAYLOR: I think that's all AMS has. Thank you.

THE WITNESS: Thank you.

THE COURT: Redirect?

MR. ROSENBAUM: Your Honor, at this point I would

simply move Hearing Exhibits 214 and 215 into evidence.

THE COURT: Any objections?

Hearing none, 214 and 215 are admitted into the record of this proceeding.

(Thereafter, Exhibit Numbers 214 and 215 were received into evidence.)

THE COURT: Mr. Miltner, do you want to move in Exhibit 179 at this point?

MR. MILTNER: I think we'll move it after Mr. Allen says what he has to say about it, if that's okay.

THE COURT: Very well.

You are dismissed. Thank you, sir.

THE WITNESS: Thank you.

MR. MILTNER: Your Honor, this is Ryan Miltner representing Select Milk Producers, and we would like to the stand Mr. Chris Allen.

THE COURT: Mr. Allen, welcome. Please raise your right hand.

CHRIS ALLEN,

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

MR. MILTNER: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. MILTNER:

Q. Mr. Allen, if you could state and spell your name for the record, please?

A. Chris Allen, C-H-R-I-S, A-L-L-E-N.

Q. And if you could also provide your business address for the record, please?

A. 5151 Belt Line Road, Suite 455, Dallas, Texas, 75254.

Q. And in front of you do you have a document that's labeled in the upper right as Exhibit Select-1?

A. Yes.

Q. And is that your testimony on what is known as Proposal 11 in this proceeding?

A. Yes.

Q. Okay. And I understand that you -- you intend to read an abbreviated version of that statement for your testimony today, correct?

A. That is correct.

Q. Okay. Now, as you were preparing to deliver your testimony, I believe there were three small edits to that exhibit from that which was submitted USDA in advance; is that correct?

A. That's correct.

Q. Okay. So I want to go through those. And they are reflected in the versions that have been handed out, and we will submit to AMS a PDF copy of the revised version.

On page 1, the third line from the bottom, where it reads, "0.68% of butterfat."

That did read 0.68% of milk solids, correct?

A. Yes.

Q. And then on page 2, under the section beginning

"Philosophy and Rationale," in the fourth line, the word "processing" appeared twice, correct?

A. Correct.

Q. And the first one of those should have read "production"; is that correct?

A. Right.

Q. And then on page 16, in your conclusion, in what is the fourth line from the bottom, there was no change to the wording, but the change to the punctuation in that sentence there, correct, where it read, 0.2% of all solids, period, butterfat losses, comma, there was a punctuation change there, correct?

A. Yes.

Q. But no change to the wording as I recall; is that right?

A. Yes.

Q. All right. So if you would give a little bit of your revised statement on your background. If you would then pause, I would like to ask you a few more questions, and we'll proceed from there.

THE COURT: Did we mark this?

MR. MILTNER: Oh, you know what, we did not. Could we mark that, your Honor, as the next sequential exhibit?

THE COURT: Select-1 is marked 216 for identification.

(Thereafter, Exhibit Number 216 was marked for identification.)

MR. MILTNER: Thank you very much.

THE WITNESS: I am the senior director for industry relations and analytics at Select Milk Producers, Inc. I hold a bachelor's and master's degree in economics from the University of Texas at Arlington. I have worked in the dairy industry since 2008. Among my responsibilities are market analysis and economic policy. In conjunction with Select staff, I have analyzed and developed the three proposals submitted by Select and noticed for consideration at this hearing.

BY MR. MILTNER:

Q. Thank you very much.

Mr. Allen, if you could give us a little more background on the work you currently perform for Select Milk Producers and what that involves on a day-to-day basis.

A. Sure. Currently, and really throughout the 15 years I have been in the industry, I have had various roles, but I have consistently and primarily focused on the economic analysis of the production, the supply/demand for milk, dairy products. Also focused on analysis of co-op businesses and businesses they run. And I have focused on the analysis of how changes in dairy policy impacts producer milk checks.

Q. When you are analyzing different scenarios for your employers, and currently for Select Milk, would you be looking at the producer side of that equation, at least in part?

A. Yes.
Q. Would you also be looking at the sale side of the equation where the cooperative is now selling producer milk to a customer?
A. Correct. Yes.
Q. On the policy, you mentioned you work in -- on policy analysis.
Does that include analysis of Federal Order regulations?
A. Yes.
Q. Would that include issues like this proposal or these proposals?
A. Exactly.
Q. Have you participated either as an attendee or a witness in any other Federal Order proceedings?
A. Yes.
Q. How long have you been working with Select Milk?
A. Just over one year.
Q. And prior to working with Select, did you work for another dairy cooperative?
A. Yes. Dairy Farmers of America.
Q. And how long did you work with DFA?
A. A little over 14 years.
Q. And the work you performed at DFA, was that similar in nature to that which you now do for Select?
A. Yes.
MR. MILTNER: Your Honor, we would like to qualify Mr. Allen as an expert in dairy economics and cooperative

economics.

THE COURT: No objections that I see. Yes, I so find.

MR. MILTNER: Thank you very much.

BY MR. MILTNER:

Q. Mr. Allen, if you want to read your abbreviated statement, keeping in mind the court reporter needs to take everything down. And -- and then when you are finished, we may have a few more questions. Thank you.

A. Yes, sir.

My testimony today addresses Proposal 11 related to product yields and farm-to-plant shrink. The current yield factors incorporate farm-to-plant loss of 0.25% of all milk solids and an additional 0.015 pounds of butterfat per hundredweight on all milk. These losses are incorporated through reductions in the yield factors for each surveyed commodity. In combination, the two assumptions presumed that 0.68% of butterfat solids are lost between the farm and the plant. Select’s data from its milk shipments and milk receipts at its processing plants establish that these factors are incorrect.

Select’s Proposal 11 removes the adjustment for farm-to-plant milk losses, resulting in changes to the yield factors for butter, the protein value in cheese, and the butterfat value in cheese. Adoption of Proposal 11 would not change the yields for nonfat dry milk or whey. If adopted, Proposal 11 would change the yield for butter to 1.22, the yield reflecting the protein value in cheese

to 1.386, and the yield reflecting the butterfat value in cheese to 1.582.

Select's Proposal 11, and, in fact, all of Select's proposals and its evaluation of the other proposals under consideration at this hearing are governed by one overriding principle: The formulas establishing the minimum prices paid to producers should reflect the current economic realities of producing, transporting, processing, and marketing milk and dairy products. All aspects of the formulas should be reviewed rather than limiting consideration to a small subset of factors. Achievable efficiencies should be promoted rather than discouraged.

We expect that the adoption of Proposal 11 will increase the Class III and Class IV prices, thereby increasing Class I and Class II prices. I want to point out that increased minimum prices are the result of, and not the impetus for, offering Proposal 11.

Proposal 11 aims to ensure that the formulas reflect market conditions and achievable efficiencies. As representatives of Dairy Programs have occasionally said, the role of Federal Orders is not to enhance producer income. Rather, the end product pricing system is intended to construct a series of formulas that allow USDA to ascertain the value of producer milk used to manufacture defined commodities, taking into account the costs to convert milk into finished products and the yields of the products produced.

I would add that while Select's proposals would increase producer income, the same proposals would increase the cost of milk to Select's processing facilities. Every proposed change to the product formulas will have an impact. Make Allowance increases will decrease minimum prices. But if make costs have increased, those factors should be adjusted.

USDA’s decision to hold a hearing on Make Allowances is prudent. Utilizing manufacturing cost factors set in 2008 based on even older data calls into question the validity and accuracy of those formula elements. In the same vein, the yield factors in the formulas incorporate assumptions regarding farm-to-plant shrink that are at least as stale as the underpinnings for manufacturing costs. It is time for them to be made current.

Precision and accuracy are paramount. Producers and handlers deserve to know that the calculation of the minimum class and component prices utilized the best available data and inherent assumptions for each of the three principal formula elements: Commodity prices, manufacturing allowances, and yields.

To accomplish that goal, it is incumbent on USDA to adopt those changes that most closely tie the price discovery mechanisms to the actual conditions of the market for commodities and the processes used to convert raw milk into those commodities.

USDA's 2002 decision to reduce yields came after

its recommended decision on the Class III and IV formulas, which reasoned that, "Inflating costs of production or reducing yield factors to reflect shrinkage would not properly reflect the value of producers' milk used in manufactured products."

The 2002 Final Decision reversed course, reducing the product yields and reasoning that, "The loss allowances in the Class III and IV formulas are intended to reflect actual losses that are beyond the processing handler's ability to control."

The 2002 Final Decision further stated that, "Comments received on the recommended decision indicated that milk solid losses between the farm and the receiving plant are real, unavoidable, and common."

In further explanation, USDA then wrote, and I quote: "It is necessary to include such an adjustment in using end-product pricing formulas for determining component prices. Since the handlers receiving milk from producers pay the producers on the basis of farm weights and tests, handlers do not receive all of the milk components due to farm-to-plant losses. An adjustment to the price formulas to account for the difference in milk components paid for versus components actually received is appropriate."

When USDA considered a proposal to eliminate farm-to-plant shrink in 2007, it found that, "Record evidence supports concluding that farm-to-plant shrinkage remains a reality for manufacturers. …While DPNM argued

that its members' farm-to-plant shrinkage is well below the 0.25% contained in the Class III and Class IV product-price formulas, no evidence was offered for examination as an alternative other than its elimination."

Our testimony at this hearing will provide evidence sufficient for USDA to establish that plant losses are within the ability of producers, cooperatives, and handlers to control and that the majority of milk shipments realize little to no losses. Accordingly, USDA's previous conclusions that farm-to-plant losses are unavoidable and common should be reconsidered and that an adjustment to yields for farm-to-plant losses is not "necessary."

My written testimony presents the USDA calculation of the product yield factors and the revisions to the formulas outlined in this proposal. In lieu of reading that portion of my testimony, I am willing to answer any questions on these calculations.

In the 2007 hearing on formula components, Select, in conjunction with Dairy Producers of New Mexico and others, proposed eliminating farm-to-plant shrink. That proposal was part of a suite of formula modifications that were "considered jointly as coordinated adjustments to the various yield factors."

To be clear, in the hearing today, Select proposes the adoption of each of Proposals 10, 11, and 12. But each proposal stands alone. Based on the record evidence, USDA could adopt one, two, or all three of Select's

proposals.

Also In the 2007 hearing, USDA concluded that the weight of evidence was insufficient to support the elimination of farm-to-plant shrink. In today's proceeding, Select will provide data and evidence from both its cooperative operations (which include shipments from member farms to milk buyers) and from its processing operations (which include shipments received by Select's plants from both Select's farms and other producers). This data and evidence will support the removal of the shrink yield adjustments. We also provide data from USDA sources and additional rationale to supplement the data submitted. Collectively, this body of evidence should amply support Proposal 11.

Select's membership consists of 115 dairy farms in Indiana, Michigan, Ohio, New Mexico, Oklahoma, and Texas. Collectively, our members produce approximately 9.6 billion pounds of milk each year. This translates to 192,000 loads of milk per year. That's based upon a standard 50,000 load. Because many loads of milk are shipped using supertankers which carry greater volumes, the actual number of loads of milk marketed by Select each year is closer to 170,000.

Select will present testimony from its Senior Accounting Manager, Harmoni Campbell, to provide greater detail on Select's management and accounting of milk shipments, including the use of farm weights and reconciliations against plant weights. Her testimony,

which analyzed hundreds of thousands of data points for milk shipped by Select over the last year, will demonstrate that, in the aggregate, farm weights and plant weights align nearly perfectly (a difference of less than 0.1%), and her testimony will demonstrate when discrepancies occur between farm weights and plant weights, the variance is not necessarily shrink, but a different issue that is able to be addressed between the cooperative and the handler.

In the 2007 hearing on price formulas, Select found itself in a position all too common to cooperatives and producers. It lacked data on plant operations to place in the evidentiary record. At the time, Select owned a small plant in Dexter, New Mexico, used for the filtration of milk. It owned no significant processing plants of its own. As a result, Select possessed limited data that it could provide to USDA regarding plant receipts.

In 2012, Continental Dairy Products, Inc., a cooperative that merged with Select in 2014, opened a state-of-the-art powder plant in Coopersville, Michigan. That plant, Continental Dairy Facilities, LLC ("CDF"), produces a full complement of dairy powders, as well as butter and cream.

In 2019, Select commissioned a sister plant in Littlefield, Texas, to serve our producers in the Southwest. That plant, Continental Dairy Facilities Southwest, LLC ("CDF Southwest"), produces a similar suite

of products as CDF.

Select will present testimony from the Director of Sales and Marketing for CDF and CDF Southwest, Cheslie Stehouwer, to provide detail and data on plant receipts. Her testimony will offer insight into the other side of the farm-to-plant shrink equation.

Because CDF and CDF Southwest receive milk from both Select members and other producers and cooperatives, this testimony will be important for demonstrating that controlling farm-to-plant shrink is not uniquely achievable by Select's members, large farms, or dairies in the Southwest. Her data will show that the shrink between farm and plant at Select's plants ranges from 0.10% to 0.15%.

A cornerstone of Select's philosophy with respect to Federal Milk Marketing Orders is that they should discourage inefficiency and encourage efficiency in the production, collection, transportation, and marketing of milk. This guiding principle informs our views on the use of end product pricing and the policy decisions that USDA must make when it considers changes to the price formulas. The issue of farm-to-plant shrink is no different.

The more farms included on a milk route, the greater the chance for discrepancies between farm weights and plant weights to differ. Each time a milk truck stops to pick up milk, there is potential for spillage, loss within piping, and even errors in measurement. All of Select's members are of sufficient size to ship a full

tanker load of milk at each pickup. As a result, Select is not subject to the risk of additional losses that can occur on routes with multiple stops.

I want to explain for the record the difference in operations for a full-load milk pickup and a multiple-stop pickup to highlight both efficiencies and areas where losses might occur.

Every milk pickup involves using a hose to transfer milk into the truck tank. Some milk is regularly left in the hose once the transfer is completed. With a multi-stop pickup, a hose is used at each farm, and the loss accumulates with each separate pickup. With a full-load pickup, only a single hose is used, and the residual milk is limited to what is left in this hose. Additionally, full-load pickups can range from about 40,000 pounds to over 100,000 pounds in total milk transported to a plant.

In the case of a 100,000-pound load of milk, this is the equivalent of shipping two 50,000-pound tankers with the hose transfer occurring only once, not twice. However, the vast majority of multi-stop pickups occur with 50,000-pound or less of total collected and delivered to a plant.

The vast majority of milk produced in the United States is produced on farms with sufficient cows to produce a full tanker load at each pickup. USDA's Milk Production Report suggests that the national average per cow production is approximately 67 pounds per day. Milk

must be picked up on-farm not less frequently than every 48 hours. Assuming every-other-day pickups, a farm milking 375 or more cows will fill a full 50,000-pound tanker.

The USDA Publication, Consolidation in U.S. Dairy Farming, analyzed U.S. dairy farms across multiple measures. It concluded that in 2016, seven years ago, dairy farms with more than 200 cows accounted for 80.3% of all U.S. milk production. Farms with more than 500 cows accounted for 68.4% of all milk production. It is reasonable to assume that half of the volume produced by farms milking between 200 and 499 cows comes from farms with more than 375 cows.

So in, 2016 three-quarters of all U.S. milk production was produced from farms that could fill a tanker. By comparison, in 2000, farms that could fill a full tanker accounted for less than half of U.S. production. While ERS has not yet released its findings from the most recent Census of Agriculture, given the continued consolidation of dairy farms, the percentage of farms able to fill a full tanker is undoubtedly higher in 2023.

Since 2016, the consolidation of dairy farms has only continued, if not accelerated. In 2016, the number of licensed U.S. dairy farms was 41,819. For 2022, that number was 27,932. It is, therefore, reasonable to assume that the volume of milk from these farms is now well above 80%.

And so, recognizing that shrinkage is most prevalent on shipments containing multiple farms but that such loads are a small and declining minority of milk shipments, USDA must ask itself whether its policy decision on yields will recognize the changes in the production and transportation of milk that have occurred since it concluded in 2002 that farm-to-plant losses were common, unavoidable, and uncontrollable.

Although farm-to-plant shrinkage is most easily controllable when producers ship full loads, that does not mean that farms with fewer than 375 cows necessarily have losses as high as assumed by the current yield factors. The data to be presented from CDF includes milk shipments from farms in multiple pickup routes. As that testimony will show, differences between the farm and plant weights from full-load shipments and multiple farm shipments are not significant. In addition, good practices and the use of available technologies can mitigate actual shrink.

It is consistent with Select's philosophy of promoting efficiencies within the entire milk marketing system, increases in minimum prices resulting from the elimination of farm-to-plant shrink should be used by producers and cooperatives, in part to improve their on-farm technologies and practices to achieve the lowest practicable shrink. Handlers, producers, and cooperatives should be working collaboratively to identify and mitigate areas of excessive shrink with the goal of achieving actual shrink that is negligible.

Even those farms without the ability to fill a full tanker can adopt the use of farm scales, flow measurement, and other technologies to eliminate much of the imprecision and inaccuracies that can result from the utilization of outmoded dipsticks and similar tools.

Could some of these improvements come with a cost to the producer? Certainly, but based on the anticipated price impacts of adopting Proposal 11, the incremental income to a farm with 170 cows (approximately half the size of an average licensed dairy herd) would exceed $3,000 per year, which based on the useful life of such improvements, still is a net improvement to the producers' bottom line.

The adoption of Proposal 11 would result in increases to the announced component prices for butterfat and protein. Based on my analysis of the changes, using five and ten-year averages of commodity prices through April 2023, I computed the component and Class price impacts presented in my written testimony.

The precise impacts on the statistical uniform or blend price will vary by order and could be further impacted by any adjustments USDA elects to make to the Class I mover. But because the Class III and Class IV impacts under the five-year and ten-year analyses are about $0.07, it is reasonable to project that the overall impact of the full adoption of Proposal 11 would be $0.07.

My written testimony includes the required amendments for the adoption of Proposal 11. Select

believes that the data and evidence it has and will present provide USDA with ample justification to eliminate shrink from the yield factors.

If however, USDA finds that it is appropriate to reduce the impact of shrink rather than fully adopt Proposal 11 as drafted, Select would defer to USDA's reasoned discretion based on the record evidence.

The current yield factors in Class III and Class IV formulas are lower than they would be otherwise due to USDA's policy decision to incorporate a reduction factor for farm-to-plant shrink. That policy decision was premised on the belief that such losses were beyond the handler's ability to control, unavoidable, and common.

Select believes otherwise. Producers, cooperatives, and handlers do have the ability to address and stem losses in the transportation of milk from the farm to the plant.

In addition to the measures I have discussed, actual data on farm shipments and plant receipts to be presented by Select's other witnesses will establish that the net differences in farm weights and plant weights are far less than assumed by the current formulas. In fact, Select's data will demonstrate that those differences are less than 0.2% of all solids and that butterfat losses, to the extent they occur, do not occur at a rate greater than overall solids losses assumed in the current formulas. It is time to remove this factor from the yield formulas and compensate producers for the full value of the milk they

ship to handlers.

Q. Thank you, Mr. Allen.

A couple of questions to provide a little more context to your testimony. And I'm looking at page 2 of what has been marked as Exhibit 216.

And you have testified that the role of Federal Orders is not to enhance producer income. Can you expand on that concept a little more for us?

A. Yeah. I think USDA has been asked to define the role of the Federal Orders over the years, and I think you can point to differences in what they have stated. But there are some core -- some core statements that I think still hold true today.

And the enhancement of producer income, or what's otherwise been interpreted as improving producer prices, I would say that just by the very creation of co-ops allowing to work on behalf of farms and negotiate on behalf of farms, that has resulted in increased prices to producers.

So USDA has already met some of that obligation, but I don't think the intent was for USDA to use the Federal Orders to continually increase producer prices. Select believes that the market should still dictate the price that goes to the producer.

Q. So you actually in preparing for this, you found I think it was a Congressional report, where USDA testified to the opposite of that, that the purpose of the orders was to increase producer income.

A. Right.
Q. And so do you have any thoughts on what you interpreted that concept as then versus what you're testifying to now?
A. Again, I think the concept of increasing producer income was in the absence of the co-op's ability to collective bargain on behalf of producers. And so I do think there has been -- there was an expectation of what the Federal Orders would do, and that has been achieved. Producer income has been increased. But I don't think it was expected to continue to increase.
Q. When you talk about cooperatives bargaining, would that include the changes in relative bargaining position that the Federal Orders create for producers and handlers?
A. Yes. I -- I believe that at the inception of Federal Orders it was believed that the processors, the plants had unequal bargaining power, that they had the upper hand when it came to negotiating milk prices. And the implementation of the Federal Orders allowed some equalization of that -- that negotiation power, bargaining power.
Q. And as an economist, if you -- if you stabilize the relative bargaining power of a product seller, what would you expect that to do to the income they receive?
A. To increase.
Q. So in that sense, the Federal Orders do increase producer income, right?
A. Absolutely.

Q. And even today, in the absence of Federal Orders, would you expect that the bargaining power -- relative bargaining power of producers to weaken if the orders were eliminated?

A. Absolutely. Yes. Without a doubt.

Q. So that function of stabilizing producers' bargaining power and bargaining position remains an important consideration?

A. Yes.

Q. But you also clarify that the purpose for Proposal 11 is not just to raise the price, is it?

A. Correct.

Q. Further on in your statement you talk a little bit about some of the milk losses that occurred with hoses, and you talk about multiple farm stops.

And I would ask you, perhaps, other than hose losses, can you think of an area where there is inherent, unavoidable, farm-to-plant loss that occurs?

A. I guess I'm drawing a blank on where in the process for picking up at the farm to the plant that that could occur. There's a known loss when you measure what's in the bulk tank at the farm and then you transfer that product to a truck and you know that not all of that product makes it to the truck. But once the product is on the truck, if you capture the weight at that point, then you know what's going to be delivered to the plant.

Q. And then, on page 16, of Exhibit 216, the first paragraph there that isn't a CFR citation, it says,

"Select believes that the data," do you see that paragraph there?

A. Yes.

Q. At the end of that paragraph, just to I guess cap -- encapsulate what you are saying is that Proposal 11 is not an all-or-nothing proposition for Select, is it?

A. Correct. It is not all or nothing.

Q. Okay. One last thing. We introduced an exhibit, Exhibit 179, into the hearing record.

And you were not here when that was introduced, correct?

A. I was not present. I was viewing online, but I was not here.

Q. So you are familiar with the Exhibit 179?

A. Yes.

Q. Have you seen it before?

A. Yes.

Q. Has your name on it, doesn't it?

A. Correct.

Q. Did you receive this e-mail from International Dairy Foods Association?

A. I did.

Q. And the version that is Exhibit 179, is that an accurate copy of the e-mail you received as the -- in the form that you received it?

A. Yes.

Q. Is Select Milk Producers a member of IDFA?

A. Yes.

Q. To this day, correct?
A. Correct.
MR. MILTNER: Your Honor, we would offer Mr. Allen for any additional questions.
THE COURT: Anyone have any questions for this witness, other than AMS?
CROSS-EXAMINATION
BY MR. ENGLISH:
Q. Good morning, Mr. Allen.
A. How are you doing?
Q. My name is Chip English, and I represent the Milk Innovation Group. Thank you for your testimony.
I have -- I'd like to start with some, like -- I think maybe some philosophical questions, as I read or perhaps misread your testimony, so I -- I'm really trying to understand.
So at some points in your testimony, you talk about the USDA should use actual conditions in the industry, correct?
A. Yes.
Q. And then at other times you talk about achievable efficiencies, correct?
A. Yes.
Q. In your mind are those things the same?
A. Not necessarily.
Q. Would it be fair to say that even in its terminology, achievable efficiencies doesn't necessarily mean achieved efficiencies?

A. Correct.
Q. So when you say, "Achievable efficiencies should be promoted rather than discouraged," is it your view that Federal Orders in some way do not en- -- presently, do not encourage achievable efficiencies?
A. Yes.
Q. And how -- how are Federal Orders doing that in your mind?
A. I think the underlying assumptions assume an allowable amount of shrink to just occur, that it just occurs, it is out there, and so the formulas just build that into the assumptions on the yield factors. And I think if the formulas were reflective of more of what actually occurs in the industry, again, as I described, I forgot what page it is on, but producers would benefit from the change in the formulas and be able to use that benefit to rationalize why they would make changes on their farm to better reflect the weights delivered to the plants.
Q. So -- but until they actually do that, they may be get more income, but the plants who bought the milk from them, assuming that those smaller farms have not yet adjusted, wouldn't fully realize the benefit at the plant, correct?
A. That's correct.
Q. Okay. And you talked about the income, I think you said $3,000 for the 175-cow farm, correct?
A. That was the example given.

Q. As an example.

Do you know how much it would cost that farm to achieve that?

A. There's many options that could be deployed, so I don't know exactly.

Q. But there is a cost to achieve that?

A. Yes.

Q. So what -- what should the Department -- I'm not here to ask the questions for the Department, but assuming -- you know, for a policy maker, I'm thinking about other issues that have been before the hearing or may come before this hearing. You understand that, for instance, with Make Allowances, USDA has used weighted averages of cost, correct?

A. Yes.

Q. Okay. And to the extent they used a weighted average of costs, that would arguably encourage efficiencies for those plants who are more costly than the average, correct?

A. Ask that again, please?

Q. So -- so to the extent Make Allowances are based on weighted average costs for plants --

A. Yes.

Q. -- those plants that are -- have higher costs than that weighted average, assuming they are currently up to date or something, those plants will obviously face a need to become more efficient and have less cost in order to meet those goals, correct?

A. Well, I think it depends on if the plant's being priced under the Federal Order and is being held to the Federal Order price. That's the assumption that you're --

Q. Yeah. Yeah. Thank you for that. The assumption here is that a plant is being held to the Federal Order price.

A. If they were buying milk at the Federal Order announced price, then they would be incentivized to reduce their costs, I would agree.

Q. Does Select have a position, thinking about achievable efficiencies, on whether the use of weighted averages, whether for Make Allowances or yields, is the right approach?

A. I don't believe we have gotten that far yet.

Q. Okay. And so when you testify about Select's experiences, for instance, I'm looking at page 9, you are not actually saying that everybody achieves that kind of results, correct?

A. On page 9, where did you want to direct me to look?

Q. Well, I'm sorry, actually's page 10.

A. Okay.

Q. In aggregate, farm weights and plant weights align nearly perfectly with a difference of less than 0.1%, and that, you know, the losses are, you know, very, very small.

You would agree that not everybody is presently achieving that, correct?

A. Don't know. That's the challenge. That's what we are -- that's what this section is about is we don't have data other than our own, so we are willing to submit our data for the record.

Q. And your data reflects -- you know, you have a hundred -- this is where I was on page 9, so I got ahead of myself.

A. Okay.

Q. Your data reflects that you have 115 dairy farms, you know, translated for standard loads at 192,000 loads.

My quick math suggested that's somewhere in the neighborhood on average of four and a half loads per day for those farms?

A. That's very fair.

Q. Okay. Are you aware of the size of farms, say, in the Northeast?

A. Yes.

Q. Is it fair to say that a lot of farms in the Northeast are very small?

A. Yes, they are.

Q. Have you ever been to Maine?

A. I have.

Q. You have? Have you ever seen tankers in Maine?

A. They are not the same as the ones that are in Texas or in Michigan. How about that?

Q. Okay. Do you know that they don't even hold 40,000, they are smaller than that, because the Maine roads won't take tankers that large?

A. I can't say personally I have experienced that, but I have heard that before.

Q. Okay. And that might very well be true in Vermont and New Hampshire, correct?

A. I think I have seen larger tankers in Vermont without a doubt.

Q. So you've focused some of your attention on page 12 on discussion about volumes of milk and how that has changed since 2000.

Volumes -- you focused on volumes rather than the actual number of farms, correct?

A. Yes.

Q. Okay. And it's axiomatic that it would take a larger number of small farms to achieve a volume than the large farms, correct?

A. Yes.

Q. Okay. So when you say that in your estimation, now, 75 or 80% of the volume is from farms that have a full tanker load, that necessarily means that more than 20% -- if 20% volume is smaller than that, that's got to be more than 20% of the farms, correct, by math?

A. You've got me in front of a crowd asking questions on math, so you are going to have to give me a second. Could you ask that again, please?

Q. You want me to start over?

A. Yeah. I don't know if you got --

Q. I had a question, but then the -- so given my question about axioms in terms of math, in terms of volume

versus numbers, if -- if -- if 80% of the volume in your view, including every-other-day tank pickups, would be full tankers, that additional -- that left-over 20% volume by necessity has to be more than 20% of the farms?

A. Yes. And that's where I got lost was the difference between volume and farms. That's why I was asking you to repeat it.

Q. Well, and I appreciate that because I got lost in your testimony between volume and farms, so --

A. Understood. Understood.

Q. So I understand what you are trying to get at. And I understand the idea that for -- you know, for farms there would be a financial incentive to make the changeover.

But part of what you are telling us is, hey, we have our evidence, but we don't know what's happening in the rest of the industry, correct?

A. That is correct.

Q. Okay. And so that is one reason why you, you know, would like at some point at least for there to be a study on yields, correct?

A. Yes.

Q. Has Select sought out to have a yield study done by industry sort of like what Dr. Stephenson did on Make Allowances?

A. I don't believe so.

Q. And you acknowledge that each time a milk truck stops to pick up milk, there's potential for spillage,

correct?

A. Yes.

Q. Is there some risk that if your proposal is adopted without having done a yield study, that plants purchasing milk from farms in the Upper Midwest or, say, the Northeast where there are smaller farms will stop buying milk from smaller farms?

A. I don't think so.

Q. Is there some risk that until that money actually gets through to the smaller farms and they can adjust, that they as small businesses may be more affected by the change in regulations than larger farms?

A. Small businesses may be more affected than larger farms? Did you mean both farms in that scenario?

Q. Yes.

A. Smaller farms would be more impacted than larger farms?

Q. Yes.

A. As a percentage of -- everything we're talking about is a percentage of milk, so I don't think so.

Q. Do you know for a fact that -- your statement on page 12 refers to assuming every-other-day pickups?

A. Correct.

Q. Do you know for a fact that that's actually how it occurs in the Northeast, that in order to avoid more pickups, that they actually do that, or that maybe because the routes the way they work, people actually pick up the milk from less than full loads every day?

A. Yes. There are plenty of instances where less-than-full loads are picked up.

Q. So is it fair to say that we are -- you know, obviously Select has its experience, which is terrific and it is well known for innovation and for its success.

But nonetheless, in an industry where not everyone has farms the size of Select, that your achievable efficiencies are theory and not necessarily reality?

A. There's -- there's a certain amount you can show as data. And there's a certain amount that's experience and a certain amount that's anecdotal. We felt like we did the best we could to bring data forward.

I can speak to experience where there's challenges with labor, and driver wages are becoming more and more of an issue in the industry, and where there's more of a push to cut back on how much driver time is spent at farms. And so there's technology being invested and implemented on tankers to better reflect or -- and the goal is to reduce driver time on the farms, but what actually ends up happening is you now measure weights at the tank -- the pickup truck instead of the bulk tank. So there's other things that are going on in the industry that aren't just specific to the dynamics and the economics of just the milk price.

And so I think there's a lot that's changed in 20 years in the industry that hasn't been captured, that better reflects that what is being delivered to plants is closer to what's -- what the farms say they are shipping.

So I know that was a long way to answer your question. But, again all I can say is we have the data we have, and that's the best we can do.

MR. ENGLISH: Thank you. That's all I have. Appreciate your time.

THE COURT: Other questions for this witness, other than AMS?

MS. HANCOCK: Your Honor, I have a few, but I don't know what we want to do for lunch time.

THE COURT: Either way.

(Off-the-record.)

THE COURT: Let's break for lunch and come back at 1:15.

(Whereupon, a luncheon break was taken.)

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MONDAY, SEPTEMBER 18, 2023 - - AFTERNOON SESSION

THE COURT: Welcome back. You are still under oath.

CROSS-EXAMINATION

BY MS. HANCOCK:

Q. Okay. Good afternoon, Mr. Allen. We have met off the record, but I'm Nicole Hancock. I represent National Milk. Thanks for being here today.

I just want to cover a few things in your testimony. If you could turn to page 5. This is the section you kind of fast forwarded over just because it looks like it is just the calculation of factors and saving us some time in reading testimony. Appreciate that.

Did you do -- this is -- these are your calculations that start on page 5?

A. This is the USDA calculation.

Q. Well, that you have included -- well, I guess you take USDA's numbers and then you have applied your own calculations to it as well?

A. Yes.

Q. Okay. So on page 5, for example, we're under the butterfat yield factor, the last sentence of the first -- or the last sentence of the last full paragraph on that page, you have done a calculation dividing 1.0 by the .82 divisor in the butterfat formula results in a yield of 1.2195, which rounded to two decimal places is 1.22.

I'm just curious why you chose the rounding that

you did to two decimal places as opposed to continuing with the four decimal places?

A. I thought that was consistent with how it had previously been calculated by USDA.

Q. Okay. And in this example it just results in a rounding up to 1.22; is that fair?

A. Yes.

Q. Okay. And then if we go to the next page, under the cheese protein yield factor, in that example, you have stayed with -- well, you went from 1.3864, and then you rounded that one to three decimal places.

Any reason why that one you took out to three?

A. Again, I thought we were being -- our approach here was being consistent with how USDA had presented in their testimony -- or in their final decision.

Q. Okay. Do you have a preference which way you think it should be done?

A. I guess for consistency sake, just do it the same way USDA had done it. Like the approach that I took, yes.

Q. Okay. And then just so that we're clear, the same would be true on -- if we look 7 going onto page 8, for nonfat dry milk, it looks like that one we took to just two decimal places, and you rounded up there again?

A. Yes. Same method.

Q. Okay. And then on dry whey yield factor, which goes over to page 9, that one you took out to two decimal places. And that one actually ended up rounding down.

A. Looks like.

Q. Same thing?
A. Yes, slightly. Yep.
Q. Okay. You had mentioned in your testimony that Select has recently constructed a state-of-the-art facility?
A. Yes.
Q. Where is that located?
A. The most recent one is in Littlefield, Texas.
Q. Okay. How -- how many plants have been constructed in the last ten years by Select?
A. I believe two if my math is right. Well, close to ten years on the one in Coopersville.
Q. Okay. So the two would be Littlefield, Texas, and Coopersville?
A. Yes.
Q. Okay. And what do you produce in Littlefield?
A. It is -- it's not listed here. Yeah, it just says dairy powder. So we would do -- and I can get better -- or you will have other witnesses from Select that will be able to better answer that question if I'm not correct, but it would be nonfat dry milk and I think skim milk powder, along with condensed and cream. And butter.
Q. Okay. Who would be the witness that you said is coming up that would be potentially better informed about it?
A. Definitely Steve Cooper and then Cheslie Stehouwer, either one could answer that question specifically. I think I got it mostly correct though.

Q. Okay. And then -- and when was that -- when did that plant open up?

A. The Littlefield, Texas, plant was 2014. No. Sorry. It's -- even I lose track of these time lines. 2019 was Littlefield.

Q. Okay. And then Coopersville, is that the one that was 2014?

A. 2000 -- 2012 is when that plant was built. That's why I was saying it was around ten years. I knew it wasn't exactly ten years or within that ten-year window.

Q. Okay. And what do you produce there?

A. Same thing, the nonfat dry milk, skim milk powder, condensed cream, and butter.

Q. Do you know what you spent in constructing those facilities?

A. I do not.

Q. Safe to say hundreds of millions of dollars as we have seen with other plants?

A. Feel safe, yes.

Q. And when we -- you have had some testimony, I don't want to rehash it, but you have already had some questions and provided some responses, which I think are very candid about, you know, you recognize that you're providing somewhat of a limited dataset when you provide Select's yield data; is that fair?

A. Yes.

Q. And in a perfect world, or even in a much more improved world, you would have a much larger sampling size

of actual data from others as well?
A. Yes.
Q. And so do you agree that having a mandatory audited cost survey that would also include yield data would be a better methodology for collecting and analyzing the numbers that are -- that you are proposing today?
A. It would be a good methodology. When you say better -- is that the word you used was better?
Q. Well, better than one sample size.
A. Yes. I agree with that.
Q. Okay. But do you believe that it would be a good methodology as well?
A. Yes.
Q. Okay. And so do you support the concept of having a mandatory audited cost survey that would also include yield data as well as the cost data that we have been talking about for Make Allowances?
A. Yes.
Q. And you have already covered some of this with Mr. English. But it's fair to say that the farms that produce milk or from whom Select purchases its milk tend to be on the larger size; is that fair?
A. Our member farms are larger, but I wouldn't say that all the farms we purchase from are larger size.
Q. Okay. Member farms that are larger tend to build in some additional efficiencies?
A. Again, what are we comparing against?
Q. Against smaller farms?

A. I would believe that.

Q. Okay. And that would include also the capability of implementing some of the -- of the measuring tools or technologies or the efficiencies that you think would be potentially encouraged by -- by your proposal?

A. I don't think those technologies are limited to just certain type -- certain size farms, no.

Q. But do you agree that the larger farms have a greater capacity because of those efficiencies, a greater financial capacity to be able to implement those -- those tools already?

A. Again, it depends on the tool that's being implemented. A scale is one thing. That's a large fixed cost. So that's a different approach than I -- I butchered it, but I was trying to elaborate on the scenario in the Northeast where because of hauling cost challenges, there's actually work by the co-ops to implement technology on the tankers that reduce the hauling costs associated with picking up milk, but it also creates a benefit to the farms that they have better measure of the weight of the milk collected on the tanker.

So, again, that's not necessarily a cost borne directly by those farms for that technology. It may be shared across the members of that co-op. But it is not the same as putting a scale at a single farm. There's different approaches or different solutions, different costs.

Q. Okay. And in that example, it would be a

measuring tool that was put on the tanker, and it would save the farm from having to put that into the -- become a farm expense?

A. You assume that they have already had some sort of measuring device on their tanker -- I mean, on their farm tank, and so this just adds another tool that now captures the milk on the tank instead of the farm, bulk pickup -- or farm bulk tank.

Q. Okay. Did Select participate in Dr. Stephenson's survey for 2021?

A. I don't believe so, but I don't know specifically. I was not a part of Select in 2021.

Q. And I think it -- did -- did Select participate in Dr. Stephenson's study for 2023?

A. I don't believe so.

Q. Okay. And I think you had already talked about with Mr. Miltner that you had been a recipient of IDFA's letter that was encouraging all of its members to participate in that survey; is that right?

A. Yes.

Q. Why did Select choose not to participate?

A. I couldn't answer that question. Just timing of when that survey came out, I was new to Select. I don't think I was fully involved to really appreciate what was going on.

Q. And since you have been there and since you have been preparing for this hearing, have you heard any information that would help you have a better

understanding about why Select did not participate?
A. I have been engaged with the board on these topics and some of the other proposals, but I haven't gotten to that level of detail, no.
Q. And then the same is true, you are not sure whether Select participated in the 2021 survey?
A. I believe I answered that, no, I don't know why Select did not participate.
Q. Okay.
MS. HANCOCK: That's all I have. Thank you.
THE WITNESS: Sure.
THE COURT: Are we ready for AMS?
Seeing no hands raised or other volunteers, this witness is in your hands, Ms. Taylor.

CROSS-EXAMINATION

BY MS. TAYLOR:
Q. Good afternoon.
A. Hey there.
Q. Thanks for coming to testify this week.
A. Absolutely.
Q. Just a few questions that might not have been covered by others.
I think on -- late in your testimony you say there's 115 members of Select?
A. Correct.
Q. Okay. And that you also buy milk from other non-members?
A. Yes.

Q. About how many non-members do you all buy milk from?

A. Currently about a dozen.

Q. And when it comes to Select's members, I'm not sure if you have listened in, I think you have been here earlier in the hearing, on the Small Business definition of $3.75 million?

A. Yes.

Q. Do you know how many of Select members would meet that definition?

A. In the Southeast Federal Order hearing, we had to answer that question, and I should have looked it up before I got up here. I believe it was only a handful of that dozen, but I don't recall specifically what that number was. It was not all 12 to be clear.

Q. That's of the non-members?

A. Of the non-members, yes.

Q. And would any of the Select members meet the definition --

A. Oh, no, no. Sorry.

Q. Okay. And I'm not sure it's covered in your testimony, but where does Select market milk?

A. The same places our farms are located: Texas, New Mexico, Indiana, Ohio, Michigan are the primary locations, and then we do have supplies into the Southeast on a year-round basis as well.

Q. I'm going to turn to your testimony first.

On the first page, when you are doing the overview

of your proposal, and you say, "In combination, these two assumptions presume that .68% of butterfat is lost between the farm and the plant."

Can you just tell me the math to get to this .68?

A. Yeah. It's on -- just assume 3.5 pounds of butterfat, you have lost .25% of that, you do the assumption in the formula, and then another 0.015 pounds. So then you take your new result, divide it over the original 3.25, and that should be the .68% difference.

Q. Okay. He got that.

A. Good.

Q. You can go back and read later to make sure we got that.

Turning to page 10, and you list -- you are talking about a little bit summarizing the upcoming testimony of Ms. Campbell. And then you say the testimony will demonstrate in the aggregate farm weights and plant weights align nearly perfectly with a difference of less than .1%.

And then I turn to the next page, in the last sentence of that first paragraph, says, Her data will show the shrink between farm to plant in Select's plans -- I think that should be plants -- ranges from .1 to .15%. When I read those two sentences, they seem different, but trying to tell me the same thing, if that makes sense.

Is one like just on Select farms specifically and one's on all the milk Select receives?

A. And that typo was plants, to be clear. So thank

you for catching that.

So Harmoni will speak to Select sales of milk, so that would include our member milk and then other milk we market. So that will be sales primarily to customers. And then Cheslie will speak to the milk purchased at our plants, again, mostly from Select farms but also from other parties.

Q. Okay. So sales and purchases are different?

A. Yes.

Q. And just to be clear, the purchases are just for your two plants?

A. Yes. Yes. Milk processed at those -- received and processed at those two plants, yes.

Q. Okay. On page 12, this is where you are talking about, "The vast majority of milk produced in the U.S. is produced on farms with sufficient cows to produce a full tanker load at each pickup." And you cite some statistics that kind of leads you to that conclusion on milk production.

But have you looked up the numbers and how that stacks up against farm numbers?

A. I guess I'm not tracking your question.

Q. Sure. So I mean you are talking about how a majority of the milk produced, there's a difference of looking about where most of the milk is produced, and that's different than looking at the numbers of farms impacted. So I'm going to use not real numbers.

A. Okay.

Q. But let's say, 75 -- 70% of the milk is produced on 15% of the U.S. farms. That is different locations than looking at the fact that 85 -- now I'm going to confuse myself -- but -- well, now these numbers aren't going to add up. But, you know, 20% of the milk is produced on, I don't know, 80% of the farms. I know my numbers don't add up. But you get the point I'm trying to make?

A. I get your concept, yes.

Q. Yeah. So I guess what I'm asking is here you are talking about where the -- the milk production numbers, now I'm asking about the farm numbers, the impact of how this would impact farms.

A. I think it would impact all farms, not just specific farms. I think --

Q. Can you talk into the mic?

A. Yeah. It would impact all farms, not just specific farms. And when you are saying the impact, I don't -- you are talking about the proposal and the changes that would occur within the pricing formulas?

Q. Yeah. Well, I think your testimony talks about how there's a capability for -- at farms that produce a lot of milk, they can ship full tanker loads, and therefore they are not experiencing these farm-to-plant losses.

A. Right.

Q. So my question is, on the farms that don't produce full tanker loads of milk, so it takes three farms to fill

up a tanker or whatever --

A. Right.

Q. -- you know, they don't have -- do they have the abilities to reduce those farm-to-plant losses, or put a different way, is you talk later on the technologies available to those farms that invest in to -- to eliminate or lessen those losses. And how frequently is that done, how prevalent is that amongst those farms, not amongst the big farms that can ship a full tanker, but amongst the smaller farms who don't have that capability?

A. I don't know. And I guess I would say I'm not sure if this goes along with the concept, but I think it does. It's just as important as not just where the milk is produced but where it's purchased. And, again, 75% of the milk in your example was purchased from farms that were larger than a certain size. So, again, it goes back to the impacts are felt at the plant and at the farm and the milk purchased is still 75% of the milk. So there are a lot of small farms, but that is a much smaller share of the total milk supply that's being purchased.

Q. Okay. On the next page, in that first full paragraph, you are talking about consolidation in the farm side, and in 2022 we had 27,932 farms.

The next sentence reads, "It is therefore reasonable to assume that the volume of milk produced from these farms is now well above 80%."

Who is "these farms" in this sentence?

A. Well, we had detailed statistics for the 2016 set

of farms, which was 41,819. So we had a breakdown of that 41,819. We don't have a breakdown of the 27,932. But if you apply some of the same assumptions of percentage of farms in the different size categories, "these farms" would be that 27,932.

Q. But if I assume the same breakdown of -- of 2016 --

A. Of that same dataset in 2016 --

Q. Okay.

A. -- you apply that to -- yeah, sorry.

Q. Okay. I got you now.

A. I lost you there, but thank you for keeping up with me somehow.

Q. Yeah. Okay.

On page 14 -- okay, I'm using part of this hearing to learn new things.

So on page 14, I think you added a word on that second -- the first full paragraph, talking about they can "adopt, you know, farm scales, flow measurement, and other technologies to eliminate much of the imprecision and inaccuracies that can result from the utilization of" -- I think you added the word outmoded dipsticks when you read your sentence.

A. Uh-huh.

Q. And similar tools.

And I guess, I'm not sure if you added that word, but if you did, could you explain what that means?

A. Yeah, I probably misspoke on that one. I was

reading from a bad version of my draft.

Q. Okay.

A. Yep.

Q. Okay. Thank you.

On the analysis of impacts, you use a five- and a ten-year average.

What time period is that for?

A. So it was the period ending April of 2023. So if you just go back 60 months and 120 months before that, you would -- you would get your time period.

Q. Okay. And then what prices did you look at when you did this analysis, if we wanted to go back and do it ourselves?

A. It was the --

Q. Announced?

A. Yeah. The monthly announced commodity prices in the pricing formulas.

Q. Okay. And on page 16 in your conclusion, at the very bottom, you write, "Butterfat losses to the extent they occur do not occur at a rate greater than overall solids losses."

And I was wondering if you could just expand on that because I don't think much of your testimony covered that particular piece.

A. Yeah. My testimony just outlined what will be discussed in more detail by the other witnesses. So I can try to elaborate, or maybe they could -- just when they give their testimony, they could address that.

Q. Okay. That's fine.

MS. TAYLOR: I think that's it from AMS. Thank you.

REDIRECT EXAMINATION

BY MR. MILTNER:

Q. Ryan Miltner representing Select Milk Producers.

Good afternoon, Mr. Allen. I have a couple of follow-ups based on the questions you have already gotten.

So do you have a calculating device near you?

A. I do.

Q. Okay. You had a question from Ms. Hancock about the butterfat yield factor, and I want to just clarify for the record what I think we have here.

Can you just divide 1 divided by .82 and tell me what you get out to about, I don't know, four or five decimal places?

A. 1.2195.

Q. Okay. So if you wanted to round that to the three decimal places that are in the current regulation, what would you round to?

A. 1.22.

Q. So it would have rounded to 1.220 if you went to three spots, right?

A. Yes.

Q. Okay. Thanks.

AMS asked you some questions about the breakdown of the volume of milk shipped on full tankers and the number of farms and how those broke down across size

categories. Now, you answered a little bit about the -- on the plant receipts side, and I wanted to just ask a few more questions about that.

So, for a receiving plant, would it be correct if -- if they were -- if they were -- if that plant were receiving milk from a milk shed whose composition kind of matched the national average, you would expect that about 80% of those truckloads would come from a full single farm pickup, right?

A. Based on the assumption we've applied using the 2016 data, yes.

Q. And that the remaining 20% of loads or so would come from routes with multiple stops, correct?

A. Yes.

Q. And so it would -- to the farm -- or to the plant that's making those purchases, in terms of the loss, if there's a -- if there's a difference in -- in the amount of loss on a single pickup tanker and a multi pickup tanker, would they really care how many farms are impacted or would they be more focused on what the tanker profile looks like?

A. How are you defining the tanker profile?

Q. Whether it is a single farm pickup or a multi-farm pickup.

A. The tanker profile would have more weight.

Q. Okay.

A. And when I say "weight," I mean weight in that decision, not weight of milk. I just realized we're

talking about shrink and I'm throwing out the word weight -- the term weight. I meant more weight toward the decision that was being made.

Q. I understood it that way, but thank you for clarifying.

MR. MILTNER: Your Honor, I don't have any additional questions for Mr. Allen on this piece of testimony. We would move the admission of Exhibit 216.

THE COURT: Seeing no objections, Exhibit 216 is admitted into the record.

(Thereafter, Exhibit Number 216 was received into evidence.)

THE COURT: You may step down from the stand. Thank you.

MR. MILTNER: We did admit Exhibit 179 previously, did we?

THE COURT: Yeah, I had a -- I was going to ask the same question.

MR. MILTNER: I thought we did, but if we did not, I would like to move the admission of Exhibit 179.

THE COURT: Any objections.

Exhibit 179 is admitted into the record.

(Thereafter, Exhibit Number 179 was received into evidence.)

MR. MILTNER: Thank you.

Your Honor, we would call Ms. Harmoni Campbell to testify.

THE COURT: Welcome to the stand, Ms. Campbell.

Please raise your right hand.

HARMONI CAMPBELL,

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

THE COURT: Your witness.

MR. MILTNER: Thank you, your Honor. We're distributing her testimony here.

THE COURT: Let's go off the record while we do that.

(Off-the-record.)

DIRECT EXAMINATION

BY MR. MILTNER:

Q. Good afternoon, Ms. Campbell.

A. Hello.

Q. You are going to need to speak close to that mic just to make sure it picks up everything.

A. Yes, sir.

Q. Would you be kind enough to state and spell your name for the record?

A. Yes. I am Harmoni Campbell, H-A-R-M-O-N-I, C-A-M-P-B-E-L-L.

Q. And, Ms. Campbell, could you give your business address for the record as well, please?

A. 320 West Hermosa Drive, Artesia, New Mexico.

Q. 88 --

A. 88210.

Q. 210. Almost said 201. That's Roswell.

A. It is.

Q. In front of you, you have a document that's labeled Exhibit Select-2; is that correct?
A. Yes, sir.
Q. And are you familiar with that document?
A. Yes, sir.
Q. And that's the testimony that you have prepared in support of Select's Proposal 11, correct?
A. That is correct.
Q. Okay. Now, Mr. Allen gave a kind of an abbreviated statement different from what was printed.
Are you going to provide -- are you going to read the entire statement that you have got there?
A. Yes, I am.
Q. Okay. Then if you want to go ahead and do that, and when you are done, we may have a few additional questions of you. Okay?
A. Okay.
Q. Thank you.
THE COURT: Should we mark it?
MR. MILTNER: Yes. Let's mark the exhibit.
THE COURT: This exhibit, Select-2, is marked 217, for identification.
(Thereafter, Exhibit Number 217 was marked for identification.)
MR. MILTNER: Thank you. I hope to not be reminded again.
THE COURT: No worries.
THE WITNESS: Hi. Thank you all for having me

here. My name is Harmoni Campbell. I am the senior accounting manager for Select Milk Producers. I hold a Bachelor's degree in accounting from Eastern New Mexico University, and I have been employed as the accounting manager at Select Milk for ten years. Before joining Select, I worked as an accounting manager for an exploration and production oil and gas company.

I oversee a seven-person department responsible for balancing the milk receipts across plants, farms, and haulers. Our department is responsible for accounting for every single load of milk produced by our members or sold by Select to any customer.

For every milk shipment, our accounting department will invoice the receiving plant, pay the hauler, and ultimately pay our producers. Within two to four days of milk leaving the farm, Select's accounting department will have received all necessary records from the supply chain, processed that data, analyzed it, and cleared any errors or discrepancies.

Receipt balances are confirmed with every plant for the first 15 days of the month, referred to as the advance, and, again, at month end, the settlement, to confirm all shipments received at the plant for the entire month. Plants are also invoiced on these balance totals for both the advanced and settlement periods.

I was asked by Chris Allen, Select's director of industry relations and analytics, to analyze Select's available data on milk shipments, including farm weights

and plant weights. I was asked to analyze this data to provide relevant information about the differences between farm and plant weights. This data and analysis was performed by me in conjunction with Chris Allen and additional Select staff. These analysis were prepared to support Select's proposal to change the yield factors used in minimum price formulas. All of the underlying data is regularly collected and maintained by Select's logistics department and accounting department as part of our regular operations.

I am aware of the purpose of Select's proposal, and that if adopted, it will impact the minimum prices paid to our members, but I am not an expert on Federal Order language and price formulas. The scope of my testimony is limited to describing the data and analysis performed by me or under my supervision to support Proposal 11.

I want to describe the data that Select collects and maintains. Select markets the milk of our member producers to multiple customers, primarily in the Southwest Marketing Area Order 126 and the Mideast Marketing Area Order 33.

In addition, some of our members' milk is marketed to customers in adjacent Federal Milk Marketing areas. Select's customers include manufacturers of all classes of milk.

In a typical month, Select member milk is delivered to approximately 20 customer plants, with spot

milk being sold to several other plants. In a typical month, significant deliveries are made to plants manufacturing products in all four classes.

For a typical load of milk produced by a Select member, a farm pickup is scheduled by Select through the contracted hauler. Select's logistic team is responsible for coordinating the pickup with the hauler and the farm. At pickup, the milk hauler scales in at the member farm, loads milk directly from the bulk tank, draws the required milk samples for analysis, tags the load, and then scales out. This farm scale weight provides the basis for Select's farm weights.

Amongst Select's customers, the procedures vary upon delivery. About half of Select's customers do not report any plant weights, except when a significant discrepancy is observed. In a typical year, our accounting staff fields less than a dozen such inquiries. For the remainder of Select's customers, the receiving plant reports back to Select plant weights which are input and confirmed and any errors cleared.

Select uses -- Select utilizes software and procedures to collect, process, and analyze producer milk production and shipments, milk composition, logistics data, quality information, and other related data points. This integrated data management tool, Mobile Manifest, allows Select to track individual milk shipments from farm to plant. It also allows Select to analyze all the shipments from a particular farm, all of the shipments to

a particular customer, all shipments through a specific hauler, all shipments within a given date range or range of dates, and additional data points.

I utilized the Mobile Manifest data to perform several analysis related to the issue of farm-to-plant losses. These analysis are discussed further below, and two tables at the end of my statement summarize this information.

I pulled from Mobile Manifest a report of all Select Milk shipments for a one-year period of August 1st, 2022, through July 31st, 2023. This report encompassed 171,240 distinction milk shipments, with an aggregate manifest weight of approximately 9.8 billion pounds. Over that period, Select shipped to -- I'm sorry, let me try that again -- over that period, Select shipped milk to 88 distinct plants and utilized 27 different haulers.

From that report, I was able to determine the percentage of shipments that had a corresponding plant weight. I found that a plant weight was reported back to Select on 89,899 loads. That's 52.5%. And 81,341 loads, 47.5%, had no reported plant weight. Of all the loads with a reported plant weight, 39,337, or 23%, reported no variance.

Realistically, it is unlikely that the scale would report the exact weight as the farm, but this demonstrates that for most loads, the plant either accepts Select's farm weights outright without reporting back or that the weights are so close to farm weights as to not merit a

more precise measurement.

I then identified those loads of milk where the hauler or plant reported back a clearly erroneous weight. These clear errors included missing digits in the reported weight, decimal point errors, or where the plant weight was off by an even 1,000 or 10,000 pounds, or reported weights so different that there's a clear error or other problem. These accounted for 1,121 loads, .7%.

After removing these loads, I was left with a total of 49,442 loads of milk, 28.9% of the annual load total, with an actual reported plant weight reflecting a variance from farm weights.

I analyzed the loads for positive and negative variances. Of those loads, 21,822 which represents 44.1% of loads with variances, showed a positive variance, where the plant weight exceeded the farm weight. And 27,619 loads, or 55.9% of those with variances, showed a negative variance, where the plant weight was less than the farm weight.

I then summed the negative and positive variances for these loads. The total was a net negative variance of 1,331,434 pounds, representing a farm-to-plant shrink of .04% on the total volume of those 49,442 loads.

On the whole, the weights of the loads with reliable farm and plant weights were essentially equal. I then reviewed the remaining shipments and removed another subset of shipments where there were known issues that affected the accuracy of the farm weight and plant weight

comparison. My decision on which loads to place in this category was based on my judgment as well as the experience of my team. We identified one hauler and customer who has had issues with the consistency of plant weight reports due to the use of a drop yard. All of those loads were excluded. Similar judgments were made with respect to other customers.

After removing these loads I was left with 20,964 loads of milk, 42.4% of loads with an actual reported plant variance reflecting a variance from farm weights. I analyzed the loads for positive and negative variances. Of those, 41% showed a positive variance where the plant weight exceeded the farm weight, and 59% showed a negative variance where the plant weight was less than the farm weight. I then summed the positive and negative variances for these loads. The total was 1,191,125 pounds, representing losses of .07% on the total volume of those 20,964 loads.

I separated those loads into two categories. In the first category I placed those whose plant weights were within .5% of the farm weight. This accounted for 15,579 loads. In the second category I placed those loads with a variance that exceeded .5%. Those loads accounted for 5,385 loads. Variances over .5% could occur for multiple reasons, of which Cheslie Stehouwer from Continental Dairy Facilities will provide more context.

In most instances, these discrepancies represent identifiable fixable issues, many of which are wholly

outside the producers' control or can be corrected by the producer.

Tables 1 and 2, that follow, summarize everything I just read.

So to conclude the testimony, most Select customers accept farm weights and tests and report no plant weight at all or log the farm weight as their plant weight. Of the minority of loads where a plant weight is reported, it is about as likely that the plant weight will exceed the farm weight as it is that the farm weight will exceed the plant weight.

Where the discrepancy between farm and plant weight is particularly larger, non-shrink factors are the cause in virtually every instance. Analysis of the subset of loads where variances remain, the net variance across all of these loads is less than .1%.

Thank you.

BY MR. MILTNER:

Q. Thank you, Ms. Campbell. I wanted to follow up to get some additional detail on what you just testified to, if I could.

The first question I would have, is you said you have worked with Select for ten years now?

A. That's correct.

Q. What year were you hired?

A. 2013.

Q. So you were not part of Select during the last time there was a hearing on formula factors in the Federal

Order backs in 2007 then, were you?

A. I was not.

Q. Were you working with that oil and gas company then?

A. Yes.

Q. Okay. So I want you to think back to the systems and the software and the tools that you had available when you started working at Select.

And what were you hired to do, by the way, when you first were hired at Select?

A. When I was first hired, I was hired to reconcile all of the work that I do now, described in the beginning of my testimony, which is balance all of the milk and pay producers, haulers, and invoice plants. So I was the person reconciling that when I first started.

Q. So thinking back to that time when you were hired, was there -- were there the tools and information available to you to do the type of analysis that you did in preparing your testimony here?

A. No, there was not.

Q. And so if you -- if you think about the systems and the processes in place that existed then, how have they changed in the ten years that you have been doing this?

A. We have converted to electronic manifests, and that pretty drastically changed all of the systems in place where we capture significant ly more data on pickups than we did historically.

Q. And so before it was computerized and digitized, was there any repository that would allow you to easily analyze or sort 170,000 milk shipments?

A. No, there was not.

Q. So I'd also -- now I'd like to walk through really the tables you have on the last page of your testimony.

A. Okay.

Q. And so I'm looking at Table 1 and the row which reads "no reported plant weight." Just for clarity that means that 47.5% of the shipments that are made by Select, the plant does not report any information back to Select on the weight at receipt; is that correct?

A. That is correct.

Q. And as a result, we certainly can't, or Select certainly can't, analyze any shrink on those loads at all, could they?

A. That is a correct statement.

Q. So now the next row reads, "plant weight identical to farm weight." And you testified that in those instances you do get a weight reported at point of receipt, but it's exactly the same as the farm weight, correct?

A. That is correct.

Q. Okay. And you made an assumption that in almost every case that's not an actual plant scale weight, correct?

A. Correct.

Q. Hypothetically, if you were going to include those

39,337 loads in the analysis that you performed, would that have materially skewed your average variance per load?

A. Yes, it would have. It would have understated what the shrink is.

Q. It would have understated the shrink?

A. Yes, sir.

Q. So you made the decision to exclude those loads?

A. That is correct.

Q. Okay. The next one you have "clearly erroneous weights," and it's a relatively small fraction of those loads. But what would you see, for instance, that would make you say, this is clearly erroneous, and you excluded it then from your analysis?

A. In -- in this particular set of data, a great example is one of the loads came in with 14 million pounds. Now, with the adoption of Mobile Manifest, the data flows straight into our system, so whatever the driver or receiver has put in, flows in, and we see that, which is why I was able to perform the analysis. So we all know there's not a tanker on the planet that can hold 14 million pounds of milk.

Q. And that's an example --

A. Clearly erroneous.

Q. An extreme one. But that was not the only instance of that type of data you were working from, correct?

A. That's correct. We would have some come in with

one pound. We would have some come in that would be just clearly 10,000 pounds off from, you know, what the actual scale was. All typo errors.

Q. And you had -- did you have some that would come in with, say, an even 50,000 pounds or something like that?

A. Several, yes.

Q. Okay. And so you excluded those from your analysis; is that correct?

A. That is correct.

Q. So that left you with 49,441 loads to look at. And then you -- you separated those out, and you said there were some with identifiable issues. And you noted that at least for a chunk of those it was a particular hauling company and a particular drop yard that created some anomalies that you felt uncomfortable with; is that right?

A. That is correct.

Q. And so I just want to go through here. Where, in Table 2, the column of "all analyzed loads," that includes those -- those -- those loads that you said had identifiable issues, right?

A. That's correct.

Q. And so that includes that hauler, that drop yard, and similar issues that you felt shouldn't be analyzed, correct?

A. Yes, sir.

Q. When you included those, you had an average

farm-to-plant shrink of 0.04% though, right?

A. Yes.

Q. Now, when you excluded those loads, if I'm reading your table correctly, your farm-to-plant shrink is higher. It's 0.07%; is that correct?

A. That's correct.

Q. So just so the record's clear, when you remove those that you had issues, it ended up with a result that somewhat less favorable than to Select's argument here, isn't it?

A. Yes, sir.

Q. But you felt that was important to show the most accurate dataset that you had available; is that right?

A. Yes. If we know that there's an issue, I did not want to include that in the analysis. It would skew the number in my opinion, regardless of what the outcome is.

Q. Okay. So one more thing that I noticed, and it's -- it is very minor. But I want you to look at page 5 of your testimony. And in the first full paragraph, the line at the very end, the total was, 1,191,125 pounds.

Do you see that?

A. Yes.

Q. And if you look at Table 2, in the final column, it is 1,191,225 pounds?

A. Oh, that is correct.

Q. So there's a -- there's an extra hundred pounds there.

Now, I'm sure we could go back to your work and find out which one of those two is right. But a hundred pounds of milk over 21,000 loads of milk, is that going to make a material difference --

A. No, it is not.

Q. -- on the conclusion?

A. No.

Q. Okay. Is there anything else that you want -- you think needs to be explained about your statement before other folks have a chance to ask you questions?

A. No.

Q. Okay.

MR. MILTNER: Your Honor, we'd make the witness available for additional questioning.

THE COURT: Who else has questions?

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. My name is Chip English, and I represent something called the Milk Innovation Group. And I want to thank you for your testimony, and I really have some, in my mind, clarifying questions.

Some of it is like, what's a drop yard?

A. A drop yard is when the hauler is going to go drop the tanker in the yard and leave it up to the plant to shuttle it into receiving bays as needed.

Q. And what kind of problem would that create with the consistency of plant weights?

A. We discovered that set different driver -- so we

can't ensure that the same tanker -- that the same truck that pulls the tanker in across the scale is the same truck that pulls it back out across the scale, or driver. Weight could vary. Cheslie is actually going to speak a little bit more to the drop yard issue in her testimony, but things like that would definitely skew the scale weight.

Q. And not saying you should throw her under the bus or anything, but --

A. Right.

Q. -- when I'm asking questions if -- if -- I don't want to spend time twice doing it, so if that's the answer, I'm perfectly happy to reserve questions like that for her.

So would that also be something to ask her about if similar judgments were made with respect to other customers, which is on page 5, right after the drop yard?

A. No, that -- no, those were my judgments.

Q. Okay. What -- just what categories of judgments that you were making, if you can?

A. Identifiable known issues at the plant outside of the drop yards. There are instances over the past 12 months where a plant would inform us that they were having scale issues. So if I knew what that set of data was, I would also eliminate it, just so that we're looking at variances that we do not know there was an issue, that identifiably like actual variances between farm and plant.

Q. So would that go to your conclusions under 4(c) on

page 6 where you say, "Where the discrepancy between farm weight and plant weight is particularly larger, non-shrink factors are the cause in virtually every instance"? Is that what you are talking about there?

A. Yes.

Q. So help me out on something else. On page 4, and a couple other times, you talk about where the plant weight exceeded the farm weight.

That's not normally what I think about happening here. So what can explain that?

A. I don't know that I have an explanation for that. I -- because I don't work at the plants. I -- all I know is the data showed clearly that over 40% were coming in with a higher plant weight than farm weight.

Q. So would I be right when I was -- and thank you, Mr. Miltner for some of your questions -- when I look at page 4 and over to page 5, what I think you did, and correct me if I'm wrong, you first did this analysis on that paragraph I was just referring to where you have 44.1% of the variances showing positive, 55.9 showing negative, and you sort of sum those up and you gave sort of an average result for all of those, correct?

A. Correct.

Q. And then you didn't stop there. You went with those -- using that analysis going further, as I understand it, you then looked at those shipments and excluded the ones that were inconsistent, correct?

A. Correct.

Q. And then once you were left with the loads that are described in sort of on Tables -- Table 2, the last paragraph appears to provide a bit of a range, am I right, that -- in that last paragraph you are providing sort of --

A. The last paragraph on page 5.

Q. Yes.

A. Yes.

Q. Okay.

A. The range -- the range referencing the variance. The 5.5%, is that what you are referring to.

Q. Yes?

A. Yes.

Q. So there were loads where variances -- and I understand that maybe someone else is going to explain it -- but there are loads, like 5,385, where a variance exceeded 0.5%, correct?

A. That's correct.

Q. Do you know how high that variance would have gone?

A. I do not.

Q. That's fine.

And do you know how common the use of electronic manifests is now outside of Select, in the industry?

A. It's becoming more common. That's all I know.

Q. Okay.

A. Yes.

MR. ENGLISH: I have no further questions. I

thank you very much.

THE COURT: Any other questions other than AMS of this witness?

Seeing none, AMS.

CROSS-EXAMINATION

BY MR. WILSON:

Q. Good afternoon. Todd Wilson, AMS.

Got a question on the bottom of page 5.

A. Okay.

Q. So after you separated loads out, results out, and got kind of a good set, right, you came down to 20,000 -- 20,000-plus loads of milk.

Then in that last paragraph, as Mr. English was asking about, that .5%, is that a -- is that a plus and a minus .5%?

A. Yes.

Q. Okay. And so then the second one, is anything greater than a plus .5 or minus .5?

A. Yes.

MR. WILSON: Okay.

CROSS-EXAMINATION

BY MS. TAYLOR:

Q. Good afternoon.

A. Hi.

Q. Thanks for coming up and testifying today.

A. Thank you.

Q. Just a couple questions.

So for your Select Producers, do all of your

producers scale at the farm?

A. I don't believe all of them do. I'm not an expert on the farm operations, though. I am an accountant.

Q. That's fair. Okay.

On page 3, you state that 47.5 of Select's loads have no reported plant weight. Can you elaborate on why that is? Do they -- there's not -- just elaborate on the reasons why they don't provide you a plant weight.

A. I would assume that it's because it's not out of variance from the farm weight enough for them to question it. And we pay our producers on farm tests and weights, and that's what's accepted --

Q. Okay.

A. -- for the majority of our loads.

Q. Okay. And for your analysis in these numbers, this includes both Select members and non-members who you market -- or who you purchase milk from?

A. Correct.

Q. Okay. Also on page 3 -- and I should have said this before, I'm going out of order, I apologize -- at the top of that page, about half of Select's customers don't report any plant weights except when there's a significant discrepancy.

Can you just define what that would -- a significant discrepancy would be?

A. Most plants would be outside of that .5% there -- they have some sort of percentage in their system that will flag it. Typically, that's going to be issues that

we already are aware of with, you know, some -- a farm scale being down or a driver has put in a very bad number on the manifest and the plant scale shows a more accurate picture of the weight.

MS. TAYLOR: Okay.

CROSS-EXAMINATION

BY MR. WILSON:

Q. Sorry. Todd Wilson, again.

A. Okay.

Q. I was trying to explain the question to --

A. I saw.

Q. -- my counterpart.

A. She was like, nope, take the mic.

Q. So of the -- of the 170,000 occurrences that you have, I know we have another witness coming on later, how many of those are represented in the two plants of Littlefield and Coopersville? Do you have an idea?

A. I do not.

Q. Let me ask you another question.

A. Okay.

Q. Is -- does Coopersville and Littlefield have plant weights in your analysis?

A. Yes.

MS. TAYLOR: I think that's it from AMS.

THE COURT: You got to introduce her exhibit.

MR. MILTNER: A couple quick -- couple quick redirect questions.

///

REDIRECT EXAMINATION

BY MR. MILTNER:

Q. Ryan Miltner, representing Select Milk.

Ms. Campbell, there was a question about that positive plant variance where the farm weight is lower than the plant weight. And I think you correctly stated that Ms. Stehouwer can comment on that a little bit.

But do you ever have issues where the calibration at a farm plant -- I'm sorry -- at a -- at a plant scale, would be -- would be off or incorrect?

A. Yes.

Q. And would that lead to a discrepancy between the farm weight and the plant weight?

A. Absolutely.

Q. And do you know if -- if a -- if a truck added fuel on its journey, if that would affect the weights between the farm and the plant?

A. Yes.

Q. And there could be other reasons that would --

A. He could have picked up lunch, too.

Q. Could have picked up lunch.

Could have picked up somebody to ride along, who knows, right?

A. Yes. Yes.

Q. And then there were some questions, I think, from Mr. Wilson about what -- whether the CDF plant deliveries were included in your dataset. And you answered that they were; is that correct?

A. Yes.
Q. And this included -- am I correct you included all deliveries from any Select farm to any collect customer for an entire 12-month period, correct?
A. That is correct.
Q. And so it would include those Select member loads delivered to Continental Dairy Facilities and Continental Dairy Facilities Southwest; is that correct?
A. Yes.
Q. Now, would your dataset include deliveries from other cooperatives that sold milk to Continental Dairy Facilities?
A. No.
MR. MILTNER: That's all I have.
And we would move the admission of her testimony, please, Exhibit 216 (sic).
THE COURT: Any objection?
Exhibit 217 is made a part of the record.
(Thereafter, Exhibit Number 217 was received into evidence.)
THE COURT: Thank you. You may step down.
MR. MILTNER: Thank you, your Honor.
We would next call Cheslie Stehouwer.
THE COURT: Raise your right hand.

CHESLIE STEHOUWER,

Being first duly sworn, was examined and testified as follows:
THE COURT: Your witness.

MR. MILTNER: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. MILTNER:

Q. Good afternoon, Ms. Stehouwer. How are you?

A. Good.

Q. Have you had a chance to testify at a Federal Order hearing before?

A. I have not.

Q. All right. You have had a chance to watch today at least, though, and listen in a little bit beforehand, correct?

A. Yes.

Q. Could we have you just state and spell your name for the record, please?

A. Cheslie Stehouwer, C-H-E-S-L-I-E, S-T-E-H-O-U-W-E-R.

Q. And could you also provide your business address for the record?

A. 999 West Randall Street, Coopersville, Michigan, 49404.

Q. Thank you.

MR. MILTNER: Your Honor, we have given Ms. Stehouwer Exhibit Select-3. Could we have that marked, please, for identification?

THE COURT: That exhibit is marked 218 for identification.

(Thereafter, Exhibit Number 218 was marked for identification.)

MR. MILTNER: Thank you.

BY MR. MILTNER:

Q. And, Ms. Stehouwer, you have that exhibit in front of you?

A. I do.

Q. And you are familiar with that exhibit?

A. Yes.

Q. And is that your testimony in support of Select's Proposal 11?

A. Yes, it is.

Q. And are you intending to read it for the record today?

A. Yes.

Q. Could you go ahead and do that, and then when you are done, we'll have some more questions for you. Thanks.

A. Okay.

My name is Cheslie Stehouwer. I'm the director of sales and marketing for Continental Dairy Facilities, LLC, and Continental Dairy Facilities Southwest LLC.

CDF operates a butter/powder plant in Coopersville, Michigan. CDF Southwest operates a similarly constructed butter/powder plant in Littlefield, Texas. Both CDF and CDF Southwest are wholly-owned subsidiaries of Select Milk Producers, Inc.

I was hired by CDF in 2011 as an administrative assistant. My duties then include working on projects related to the construction of the CDF plant, information technology, and company policies and procedures.

As the plant was commissioned, my role expanded into monitoring and coordinating milk receiving, overseeing milk balancing, and product sales.

When the design and construction of CDF Southwest began in 2015, I was added to that team to plan for its commissioning and to manage product sales. In my current role with CDF and CDF Southwest, I'm responsible for sales contracts of all bulk commodities, retail manufacturing agreements, and hedging. My oversight includes information technology and milk balancing.

In addition, I work closely with our president and general manager, Steve Cooper, on all aspects of product manufacturing. My job responsibilities also require me to work with our accounting, finance, and receiving teams to coordinate operations and analyze related performance and financial data.

In overseeing milk balancing, I receive daily reconciliation reports from my direct reports at CDF and CDF Southwest. Those reconciliation reports provide information on milk received from all suppliers, their weights and tests, and highlight any particular area of attention. I then provide guidance and feedback to our receiving teams, where appropriate, to adjust problem areas.

I was asked by Chris Allen, Select's director of industry relations and analytics, to analyze the farm weights and plant weights for all-milk received at our Michigan plant and our Texas plant, CDF Southwest, and

assess the extent of farm-to-plant losses. I was asked to analyze this data to provide relevant information about the differences between farm weights and plant weights.

This data and analysis was performed by me in conjunction with Chris Allen and additional CDF staff. These analysis were prepared for the purpose of supporting Select's proposal to change the yield factors used in the minimum price formulas. All the underlying -- underlying data is regularly collected and maintained by CDF and CDF Southwest as part of our regular operations.

I'm aware of the purpose of Select's proposal, and that if adopted, it will impact the minimum prices paid to our members. But I'm not an expert on Federal Order language and price formulas. The scope of my testimony is limited to describing the data and analysis performed by me or under my supervision to support Proposal 11.

For my analysis, I generated reports from our existing systems that produced the following data: The originating supplier, the date and time of delivery, the hauler, the ticket number, the slip weight, or farm weight, and the scale weight or plant weight. The report -- these reports were generated for both plants for the period of August 1, 2022, through July 31st, 2023.

For the observed period, this encompassed deliveries from the 15 different suppliers. For the Michigan plant, there was a total of 16,396 distinct deliveries. Of this total, 8,907, or 58.3%, were from Select. The remainder were from other cooperatives and

plants.

For each supplier, I then examined the difference -- differences between farm and plant weights. As would be expected, for any individual load, the farm weight might be higher or lower than the plant weight. But data on an individual basis is of little meaning when determining the overall loss of milk for the plant.

To determine the aggregate farm plant losses, I aggregated the total differences of each load for each supplier, arriving at a net difference between the farm and plant weights. Those results are reported in the table on the next page. Negative net discrepancies reflect a lower plant weight than farm weight. Positive net discrepancies represent a higher plant weight than farm weight.

The table shows the suppliers, the percent of deliveries they are to the CDF plant, and the net discrepancy for each supplier.

You will see that the overall net discrepancy was negative 0.15%. Looking at only the loads from Select Milk Producers, the net discrepancy was negative 0.2%, slightly greater than the overall discrepancy. All of the cooperatives listed, other than Select, include shipments from milk from multiple farms -- multiple pickup routes.

I performed the same analysis for Texas plant over the same time period. There was a total of 27,792 deliveries. The deliveries to this account came from a much smaller set of suppliers. Accordingly, I'm not

reporting the data by supplier. In total, the aggregate net discrepancies across all deliveries was negative 0.1%.

The discrepancies of negative 0.15% for Michigan and negative 0.1% for Texas were weight discrepancies only. Neither CDF, nor CDF Southwest, regularly analyzed farm-to-plant losses on a solids basis. We do, however, measure the components of our silos and compare them with aggregate component levels of our farm tests. Those two measures are consistently aligned with one another.

Accordingly, it appears, from our internal data that losses of milk solids occur across all components equally. We do not realize losses of butterfat at a greater weight than the overall loss of milk solids.

In addition to reviewing our actual plant data for the volume of milk lost in farm-to-plant transit, I was asked to offer my opinion as why discrepancies between farm weights and plant weights occur, other than the actual loss of milk. All plant weights are scaled weights. Assuming that the farm weight is also a scale weight, there are four principal reasons why weights would be different.

The first would be scale calibration. The scales at CDF and CDF Southwest are regularly calibrated and certified. The same is true for most milk manufacturing plants. While most farm scales are also properly calibrated, some are not. Even with those that are well calibrated, problems will occur. Where there is a substantial discrepancy, there is a strong likelihood that

an investigation will uncover a scale calibration issue.

The second would be hauler errors. Most of the logistics process, including weighing and testing, is being digitized. Within Select, new software has resulted in most farm shipments being manifested electronically, with data shared in realtime among farms, cooperatives, haulers, and plants.

Other cooperatives and plants use similar software and hardware systems to some extent. This movement to electronic records and data has improved timeliness and accuracy. However, the adoption of this technology is still ongoing. A significant portion of the milk received at CDF and CDF Southwest remains tracked on paper logs or manually entered by haulers. Investigations into weight discrepancies often find that numbers have been transposed, entries were simply mistyped, or weights are off by an even 1,000 or 10,000 pounds due to manual entry or errors. Hauler errors of this type are the second most common issue.

The third is drop yard and equipment changes. CDF Southwest utilizes a drop yard and yard dogs to help optimize milk deliveries and minimize demurrage costs. When we notice an unusually high number of loads with high weight variances, an investigation revealed that some tankers were scaling and using a semi tractor and scaling out using either a different semi tractor or a yard dog.

In addition, where a drop yard is used, different drivers in the equipment at scale in and scale out will

also affect weights. Even in the same equipment, it is not difficult to imagine two different drivers having a weight difference of a hundred pounds or more. Importantly, we have taken corrective action to minimize these occurrences.

And lastly, snow. While the drop yard discrepancies were isolated to CDF Southwest, the CDF plant in Michigan has its own unique discrepancy triggers, snow and ice. In cold months, tankers, trucks, and scales covered in snow and ice can add hundreds of pounds to a scale weight. A cubic foot of snow weighs up to 20 pounds, and a standard milk tanker has a footprint of over 3,000 square feet. So a single inch of snow on a tanker could weigh as much as 500 pounds.

When you consider that many of the deliveries in Michigan are made with 100,000-pound super tankers, the potential for snow and ice weight increases as well. We have observed higher than usual negative weight discrepancies during the winter months, which we have determined are attributable to frozen precipitation.

In conclusion, first is as usually measured and observed by CDF and CDF Southwest, the difference between farm weights and plant weights is less than 0.2% of total solids. Despite their different geographies, CDF and CDF Southwest show similar farm-to-plant shrink numbers.

Within the universe of deliveries to CDF, the net discrepancies for single farm shipments of Select Farms of negative .2% is very close and slightly higher than the

plant average of negative 0.15%. Given that many of the non-Select shipments received by CDF come from multiple farm loads, the necessary conclusion is that management for farm-to-plant shrink is not unique to Select specifically or larger farms generally.

CDF and CDF Southwest have identified areas that are likely to contribute to farm-to-plant weight variances. Those variances are neither inherent nor unaddressable. Instead, significant farm-to-plant losses often are the result of practices and circumstances that can be addressed and do not represent actual milk losses at all.

Thank you for the opportunity to testify today.

Q. Thank you, Ms. Stehouwer. I wanted to follow up with a few questions that I have done with the other witnesses.

So the first really doesn't deal with farm-to-plant shrink at all. It's on the first page of your testimony. You mention that you are responsible for a number of things with CDF and CDF Southwest, and among those is hedging.

What do you do for -- for the hedging -- or what do you do in the area of hedging for the companies?

A. So myself and our business analyst are responsible for our risk management program, which includes hedging of commodities, butter, nonfat.

Q. So would you be analyzing potential hedge positions for the sale of products out of the plant?

A. Yes.
Q. Okay. Do you do -- you don't do any hedging on the milk purchase side at the plant, do you?
A. No, I do not.
Q. And there have been some discussions throughout the hearing about the impacts of all of the proposals that we're talking about, on risk management and hedging.
Have you done any analysis on -- on that issue on whether any proposals would affect the hedging activities of Continental Dairy Facilities, or CDF Southwest?
A. I have not.
Q. Mr. Allen was asked about the products that were produced at CDF and CDF Southwest.
Did you hear his answer?
A. I did.
Q. Did he miss anything?
A. He did not.
Q. All right. He did well. Great.
I wanted to call out and ask you, you analyzed shipments for the exact same period that Ms. Campbell did.
Was that intentional?
A. Yes.
Q. You wanted the data to line up for comparative purposes?
A. I think so. Yes.
Q. Okay. I'd like to ask you about your table on page 4.
Now, you have not listed names of cooperatives or

plants, just for confidentiality reasons. But am I correct that each cooperative is a distinct single cooperative and you have aggregated all the shipments from that cooperative together in each individual row?

A. That's correct.

Q. And so you also have some plants that represent a very small portion of the total.

So why would you be receiving milk from plants?

A. Sometimes we -- we buy from non-cooperative suppliers.

Q. Okay. Would it happen like if a plant just had too much milk that they weren't processing and they would sell it to you for processing?

A. Yeah. Yes. Exactly.

Q. So when you and I were going over this testimony, we looked at Cooperative A's numbers and noticed that the net discrepancy was the lowest among the group.

A. That is correct.

Q. And you had -- you had stated that with respect to that particular cooperative, that as part of your reconciliations you made, in conjunction with that cooperative, adjustments to their weights; is that correct?

A. That is correct.

Q. Can you explain a little bit more about how that works?

A. Yeah. So when we -- we do a daily balance of receipts, we will flag anything that's over .8% and send

it back to the cooperative or supplier. And in that instance, the ones who I would say don't have reliable scale weights or noticeable that something's off, then they will either agree to take the plant weight due to the fact that they know that their weights are not reliable, or they will agree to split with us to become a little more in line with where we should be.

Q. You were here for Ms. Campbell's testimony?

A. Yes.

Q. Would you say that what you're describing are similar to what she said were, kind of known issues with loads?

A. Correct. Yes.

Q. Nevertheless, are those situations a distinct minority of instances with respect to the loads received by CDF?

A. Yes.

Q. Would you expect that if there were no adjustments to those loads, that the bottom line figure, I guess literally the bottom line figure in your table, would be affected much by that?

A. I think it would be affected but not significantly. I think it would not be higher than the highest one we have stated.

Q. Okay. On page 5 you're describing -- you make a description of the components of milk in the silo, and the components of the milk coming in based on farm tests. And you testified that those two measurements are consistently

in line with one another.

A. Correct.

Q. Is -- is that based on information provided to you by others in the company?

A. That is correct.

Q. It's not something you personally measure and track, is it?

A. That's correct. It's not in our department.

Q. Okay. When you say those measurements are in line with one another, I assume that means that whatever the protein is in the milk coming in, is the protein in your silo, and butterfat is the same; is that your understanding?

A. Yes, that's my understanding.

Q. Now, the farm-to-plant shrink figures that are in the price formulas now, they assume that you lose a certain amount of all the solids, which includes butterfat, and then additional butterfat on top of that.

Is that consistent with the tests in your silos?

A. Not my area, but based on what I've talked to individuals in our -- in our facility, that they align.

Q. Yeah. The farm plants and the silo tests align?

A. Yes, they align.

Q. Okay. You also go through a number of reasons why there would be plant discrepancies, and I just wanted to ask a few additional questions on those areas.

Scale calibration, is that something that you frequently are advised about, that a farm has an issue

with their scale?

A. I would say not from the farm level that we're hearing it frequently, but we do very rarely. It's more within our plant.

Q. I'm -- I don't know the answer to this because I haven't asked you before. But do you know how closely the scales are calibrated, to within how many pounds?

A. Of the farm or with our --

Q. Within your plant scale. Like, is it calibrated to within a range or --

A. Yeah, it's calibrated quarterly, I know that, and it is with a range. But I wouldn't be able to tell you the exact range.

Q. Okay. So I want you to assume for a second that a farm scale is calibrated within a range, and your plant scale is calibrated within a range. Within any given load of milk, you could be within the range at both places but still show some kind of variance, wouldn't you?

A. I would agree.

Q. Okay. As far as hauler errors, when I first heard Ms. Campbell's testimony, or first saw her put it together, I was -- I was surprised, actually, at the frequency of hauler errors in reporting.

How frequently are hauler errors, do you see hauler errors in your analysis and your reconciliations?

A. I would say every day.

Q. Every day?

A. Yeah, that we're receiving, you know, quite a few

tankers a day.

Q. Yeah. But it's not a rare occurrence?

A. No.

Q. You mentioned the use of drop yards and that CDF Southwest uses a drop yard.

Is there a drop yard used at the Michigan plant?

A. No, there's not.

Q. And you describe use of different equipment. I had to learn this in preparing for this testimony, too.

A yard dog, can you describe for us what that is?

A. Why he. So it's a -- it's a smaller tractor. Doesn't have a cab, so smaller than what you would see typically on the road. And they pull in the tankers and pull them out.

Q. And it weighs, therefore, less than a regular semi tractor?

A. That's correct.

Q. And then you also -- this is one that, when we were reviewing your testimony, you know, folks weren't clear on this. Where you talk about different drivers and the equipment at scale in and scale out. Can you actually explain for us like really simply what that is?

A. Yeah. So I mean your driver, for example, could be someone who weighs 120 pulling it in, and then you could have a truck driver that weighs 300 pulling it out. So you could have an easily difference of 100 and 200 pounds just by the person that's in the cab.

Q. And this snow you note, again, something I had

never thought about before you had clued me into it. In the winter months in Grand Rapids or Coopersville, how frequently does that issue arise?

A. A lot. January through March is pretty significant on that problem. And we'll be able to notice it by all the trucks being out of variance.

Q. You will notice a snowstorm and then a significant number of variances occurring in that same period?

A. That's correct.

Q. How many years of analysis, like, before you all realized it was the snow and ice that was doing that?

A. I think we figured it out the first year.

Q. First year? Okay. Great.

MR. MILTNER: The witness is available for additional questioning.

THE COURT: We have been going a little bit over an hour and a half. I think it's time for a break.

All right. Let's come back 2:05. I'm sorry, 3:05.

(Whereupon, a break was taken.)

THE COURT: Back on the record.

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Good afternoon. My name is Chip English from the Milk Innovation Group.

A. Nice to meet you.

Q. Thank you very much for being here today.

Let me actually start off, you were here, I know,

in the room when Ms. Campbell was testifying, correct?
A. Yes.
Q. And when I asked her some questions, and she deferred to you, correct?
A. Yes.
Q. And then you gave your testimony and provided some additional answers to Mr. Miltner.
Given the questions I had for her, which were about discrepancies and how things were resolved, is there anything you haven't covered in your testimony now in addition to what Mr. Miltner, going back to the questions I asked her?
A. Going off memory, I think we covered it.
Q. I think so, too. I just --
So let me turn primarily, maybe not exclusively, but primarily to page 4 of your testimony, which is the chart.
And let me start by asking on the accounts which are listed as Plant 1, Plant 2, Plant 3, Plant 4, I didn't hear Mr. Miltner go into this exactly, is that milk that is being reloaded at a plant and delivered to you?
A. I'd have to go back and look at specifics, but it could also be milk that the plant is selling to us that didn't go to the facility.
Q. So diverted milk?
A. Yes.
Q. Do you understand what that phrase is, diverted?
A. Yes.

Q. Okay. So it could be diverted milk, it could be reloaded milk, correct?
A. Correct.
Q. And you don't know what --
A. No. I'd have to go back specifically and look. The data is over a year, so...
Q. And with respect to the materials that you and Ms. Campbell have put together, I think -- if I'm wrong correct me -- I think what you put together is between the two of you, the information about the Michigan plant, correct?
And the Texas plant -- I want to break it down if I can. I'm right that this information on page 4 is about the Michigan plant, correct?
A. That's correct.
Q. And then you performed the same analysis, but because of different supply issues, you didn't provide the same detail, but between you and Ms. Campbell you provided information about the Texas plant, correct?
A. Correct. So on page 7 is the Texas plant. There's no chart because it is a smaller pool of data.
Q. Right. Okay. So -- and when we talk about the Michigan plant, that's your plant, correct, Select's plant?
A. That is, yes.
Q. And when we talk about the Texas plant, that's Select's plant, correct?
A. Correct.

Q. Is there another universe of milk that is delivered to others, so purchasers of your milk, that Ms. Campbell talked about, or is that not part of the study?

A. That is not part of this. This is just deliveries to the plants in Michigan and the plants in Texas.

Q. Okay. And that's what I was trying to get at.

A. Okay.

Q. So that this is not -- well, was Ms. Campbell's testimony about milk being delivered to other plants?

A. Yes, that is correct.

Q. But there isn't any information for confidentiality or competitive reasons about other plants themselves in terms of their overall receipts, correct? From others, other than Select, correct?

A. Can you repeat that? Sorry.

Q. So to the extent Ms. Campbell's testimony spoke to milk delivered by Select to -- on what's purchased milk, you don't go beyond that, so you don't know what the plant -- that plant's other receipts are, correct?

A. I do not. My testimony is not over other plants.

Q. And then also on page 4, the sentence that says, "All of the cooperatives listed, other than Select, include shipments of milk from multiple pickup routes."

Does that mean that they aren't all full tanker loads?

A. They are all full tankers, but they have multiple -- some of the deliveries from the other co-ops

have multiple farm pickups in one tanker.

Q. Okay. Do you know what percentage of their deliveries are multiple pickups?

A. I do not.

Q. When your column on page 4, the right-hand column, is labeled "net discrepancy," so for instance, Select Milk Producers, a net discrepancy of minus 0.20%, just to be clear for the record, what a net discrepancy means is when you add up all the deliveries from Select and netted out whatever variances, it was negative 0.2%, correct?

A. That is correct.

Q. Do you know what the range was of from, say, a load that was the most negative to the most positive?

A. I do not.

Q. Would there be a range?

A. There would -- I mean, yes, there would be a range.

MR. ENGLISH: I thank you very much. I have no further questions.

THE COURT: Other questions other than AMS for this witness?

Seeing none, Ms. Taylor.

CROSS-EXAMINATION

BY MS. TAYLOR:

Q. Good afternoon.

A. Hi.

Q. Thanks for coming to testify today. I don't have too many questions.

I did on the page 4 of the table, I just want to clarify for the record first that that negative .15% is a weighted average of all of the ones above; is that correct?

A. That's correct.

Q. Okay. Weighted by the percent of deliveries?

A. Yes. By the total volume. Yes.

Q. Okay. And then I was wondering if you had any insight why all the net discrepancies for the plants seem to be positive, but yet all the ones for the cooperatives seem to be negative?

A. That is a good question. I do not.

Q. Okay. That's fair.

For the cooperatives that have -- are on the higher end the net discrepancy -- and you did mention that all of these co-ops had multiple stops on their -- on their routes, did you -- have you been able to go and look at the data to see if there's a relationship between the farm size of the co-ops on the routes and the percent discrepancy?

A. I have not gone and looked at that. What I'll say is, not all of the smaller deliveries are just based on farm size, it's just based on how much we received from that supplier throughout the year.

Q. Okay. So you are talking about the percent of delivery. So it might be high like, negative .32, but you only got 1% of your milk from them?

A. Right.

Q. When you are talking about scale calibration on page 5 as one the reasons for plant discrepancies, I asked this same question of your co-worker where there is a substantial discrepancy. And I was just wondering if you could illuminate what you deem a substantial discrepancy or what your suppliers deem as a substantial discrepancy enough that they would discuss with you?

A. So depending on the weight of the load, you could see substantial discrepancies be 10,000, 20,000 pounds for each load. So it -- it's pretty -- I would -- I would say it's pretty clear to see when looking at a table of what would be substantial. It really sticks out and you know that there's no way that -- you know, it's not just 100 or 200, or even 1,000, it's going to be a quite large variance.

Q. Okay. Significant outliers?

A. Yes.

CROSS-EXAMINATION

BY MR. WILSON:

Q. Todd Wilson, USDA AMS.

Again, my question didn't pass mustard, I don't think, with Erin.

On page 6 of your testimony, under the hauler error paragraph, the last sentence, "Hauler errors of this type are the second most common issue."

Is the second referring to within this paragraph, that these types that you are identifying of the second most hauler issues, or is hauler errors the second of the

A, B, C, D groupings?

A. I would say we're saying it's the second most common issue we see, so it kind of listed them in order. The last two are outliers between each plant; the first two is what we see at both locations.

Q. Okay.

MS. TAYLOR: That's it from AMS. Thank you.

THE COURT: Anyone else?

REDIRECT EXAMINATION

BY MR. MILTNER:

Q. Ms. Stehouwer, I just want to finish up with a couple of clarifying questions on your testimony, and it's going to touch on Ms. Campbell's as well.

So when you were asked to prepare your testimony and your analysis, the purpose was to show, for the plant, the variance between all of the receipts regardless of source to your plant.

Was that your understanding of what your task was?

A. Yes, that's correct.

Q. And so you personally in your role at CDF and CDF Southwest, you don't have visibility to any other plants even really within Select's world, do you?

A. No, I do not.

Q. And then, you know, I think Ms. Campbell testified to this, but as you were working with her and the Select team on this whole project, was your understanding that she was presenting the other side of the same coin, the cooperative milk sales side deliveries from Select to its

plants regardless of who owned the plant?

A. Yes.

Q. And that so in conjunction, your testimony and her testimony would show what it looks like for the sale of milk and what it looks like for the purchase of milk, correct?

A. That's correct.

MR. MILTNER: Okay. I don't think that I have any other questions.

And so, your Honor, we would ask the admission of Exhibit 218.

THE COURT: Any objection?

Exhibit 218 is entered into the record of this proceeding.

(Thereafter, Exhibit Number 218 was received into evidence.)

THE COURT: Thank you. You are dismissed.

MR. MILTNER: We would call to the stand to talk about Proposal 12, Chris Allen again, and we will distribute his statement.

THE COURT: Let's say you are still under oath.

THE WITNESS: Yes, sir.

THE COURT: You were just here.

CHRIS ALLEN,

Having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MILTNER:

Q. Good afternoon, Mr. Allen. Welcome back.
A. Thank you.
Q. We have already had your name and address entered into the record, and the judge has noted you are still under oath.
In front of you is a document. Marked in the upper right as Exhibit Select-4.
Do you have that in front of you?
A. Yes.
Q. Are you familiar with that document?
A. Yes.
Q. Does it represent your written testimony submitted to USDA in support of Proposal 12 in this hearing?
A. Yes.
MR. MILTNER: And, your Honor, could we have Exhibit Select-4 numbered for identification, please?
THE COURT: Yes. It is marked as identification 219.
(Thereafter, Exhibit Number 219 was marked for identification.)
MR. MILTNER: Thank you.
BY MR. MILTNER:
Q. And, Mr. Allen, as you did previously with your prior testimony, are you going to read a somewhat abbreviated version --
A. That is correct.
Q. -- of this?
A. Okay.

MR. MILTNER: Your Honor, we previously qualified Mr. Allen as an expert in the field of dairy economics and cooperative analysis, so I just recognize his prior designation.

BY MR. MILTNER:

Q. And, Mr. Allen, if you could go ahead and read your statement, that would be great.

A. Will do.

I am here to testify on behalf of Select Milk Producers, Inc. My testimony today addresses Proposal 12 related to the yield of nonfat dry milk, which I will also refer to as NFDM, and the inclusion of the nonfat solids in dry buttermilk powder, which I will also refer to as BMP.

Select's Proposal 12 changes the yield factor for NFDM to properly account for the value of milk solids utilized in the manufacturing of BMP. If adopted, Proposal 12 would change the yield for NFDM from 0.99 to 1.03.

The current yield factor for nonfat solids of 0.99 was set as part of the Department's 2002 Final Decision on the Class III and IV price formulas. The 2002 Final Decision "eliminates the consideration of nonfat solids that end up in buttermilk powder from the Class IV nonfat solids pricing formula."

The Department concluded then that the elimination of these nonfat solids from the Class IV formulas was appropriate because, and I quote: "[R]ecognizing a

minimum value for buttermilk powder does not materially affect the Class IV skim milk price. Record evidence indicates that the price of buttermilk powder can be a low of 70% of the nonfat dry milk price for the same period. In addition, according to the record, the Make Allowance of buttermilk powder is an additional 2 cents per pound higher than the nonfat dry milk Make Allowance. Official notice of weekly Dairy Product Prices published by the National Agricultural Statistics Service for January 2000 through May 2002 is hereby taken.

"Using the 2-cent higher Make Allowance for buttermilk and prices for nonfat dry milk and buttermilk powder for the period of January 2000 through May 2002, it was determined that the effect of including buttermilk powder in the nonfat solids price and the Class IV skim milk price was negligible. Therefore, this decision eliminates the consideration of nonfat solids that end up in buttermilk powder from the Class IV nonfat solids pricing formula."

However, the effect of buttermilk powder on the formulas was not then, nor is it now "negligible." The 2002 Final Decision did not set forth the mathematics to support its conclusion then. As further explained in this testimony, had the 2002 Final Decision properly analyzed the impacts of removing buttermilk powder, it should have arrived at a yield of 1.02.

The situation 20 years later is even more pronounced. Current data demonstrate that the spread

between the prices of nonfat dry milk and buttermilk powder is minimal and not uniformly negative. USDA reported dry buttermilk prices and nonfat dry milk low/medium heat prices established a much tighter price alignment than assumed by the 2002 Final Decision. Accordingly, the proper yield for NFDM should be increased to 1.03 to reflect the current state of the industry.

Select's Proposal 12 recognizes that the current yield factor wholly fails to compensate producers for the value of milk solids used in the manufacturing of buttermilk powder.

The 2002 Final Decision Improperly Accounted for the Value of Buttermilk Powder.

In developing Select's Proposal 12, we partially accepted the Department's reasoning in setting the NFDM yield described in the 2002 Final Decision. Specifically, we accepted that the portion of milk solids in Class IV milk used to manufacture buttermilk powder should reflect the proper value of the end product and the cost to manufacture it.

We did not accept, however, the Department's conclusion "that the effect of including buttermilk powder in the nonfat solids price and the Class IV skim milk price was negligible." Our starting point was to determine what the proper yield of NFDM would be, assuming that the yield was adjusted for the value of buttermilk powder rather than its wholesale removal from the yield formula.

My written testimony provides a relevant analysis and calculation of the NFDM yield factor from USDA's 2002 Finals Decision.

Select sought to restore the proper value of the buttermilk solids in dry buttermilk. To do so we took the calculated quantity of buttermilk solids and multiplied it by 70%, reflecting the Department's conclusion regarding the value of dry buttermilk. Next, we multiplied that result by 87.5% to account for the higher make costs for buttermilk powder recited by the Department.

Next, we took the 0.9975 pounds of nonfat solids and subtracted the 0.0479 pounds of solids in dry buttermilk and restored 0.0293 pounds of those solids based on the calculation above.

Finally, we adjusted the pounds of nonfat solids to the presumed moisture content of 3.8%. That calculation results in a yield of 1.02, not 0.99. This establishes that the Department’s conclusion that the value of buttermilk powder in the nonfat solids price is not "negligible." It has a real impact on the stated yield.

The price relationship between NFDM and Buttermilk Powder is closely aligned. Consistent with Select's approach and philosophy that all the elements of the minimum price formulas should reflect current realities, we next revisited the price relationship of NFDM and buttermilk powder.

For this analysis, we compared the reported prices

for NFDM and BMP reported by the Dairy Market News ("DMN"). We utilized the DMN monthly averages of the mostly price series for West and East/Central dry buttermilk and for Western and East/Central NFDM. We utilized prices from January 2021 through June 2023. We selected January 2021 to provide the longest continuous representative window possible while attempting to avoid the pricing impacts triggered by the COVID-19 pandemic.

The table provided in my written testimony provides the full scope of these comparisons and analyses. This data demonstrates two important truths: First, there is little difference between the Western and Central/Eastern prices of either NFDM or BMP; second, and more relevant to Proposal 12, BMP prices are aligned very closely to NFDM. BMP as a percentage of NFDM prices was 97.0% in the west and 98.0% in the Central/East. Steve Cooper from Continental Dairy Facilities will offer additional testimony confirming that its sales of buttermilk powder align with this analysis.

Once this analysis was complete, I looked further back over the period of January 2017 through July 2023 to confirm this price alignment. The additional charts in my written testimony demonstrate the longer-term price alignment of NFDM and BMP. The Department's finding that BMP is sold at 70% of NFDM is not borne out by current realities.

Recognizing this close price alignment, I performed the same calculation of the NFDM yield performed

by USDA in the 2002 Final Decision using the current price alignment. I maintained the same relationship between the cost of manufacturing BMP and NFDM (in other words, NFDM make costs are 87.5% of BMP make costs).

The arithmetic works out as follows. I took the calculated quantity of buttermilk solids and multiplied it by 97.5%, reflecting the proper price alignment. Next, I multiplied that result by 87.5% to account for the higher make costs for buttermilk powder.

Next, I took the 0.9975 pounds of nonfat solids and subtracted the 0.0479 pounds of solids in dry buttermilk. I then restored the 0.0409 pounds of those solids based on the calculation above.

Finally, I adjusted the pounds of nonfat solids to the presumed moisture content of 3.8%.

Changing the NFDM yield impacts the nonfat solids price and the Class IV prices. Based on my analysis of the changes, using five- and ten-year averages of commodity prices through April 2023, I computed the following component and Class price impacts: For the five-year average, the nonfat solids price under the current formula is 1.0219. Using Proposal 12, the nonfat solids price would be 1.0632. For that same five-year average the Class IV price under the current formula would be $17.26; under Proposal 12, it would be $17.62.

The ten-year average same commodities, nonfat solids price, under the current formula, the price would be 1.0021; Proposal 12 adjustments, the nonfat solids

price would be 1.0426. The Class IV price for the ten-year average would have been 16.92; using Proposal 12, the Class IV price would have been 17.27.

Because the Class II price is based on the Class IV price, the Class II price would change likewise. The precise impacts on the statistical uniform price or blend price would vary by order and could be further impacted by any adjustments the Department elects to make to the Class I mover.

The adoption of Proposal 12 in full would require the following amendment to 7 CFR Part 1000 as outlined in my written testimony.

The current yield factor for nonfat dry milk in the Class IV formula is lower than it would be otherwise due to USDA's policy decision to disregard the value of milk solids that are used to manufacture buttermilk powder. That policy decision was erroneous in its conclusion that the value of those solids was negligible. Even under the assumptions regarding the relationship of NFDM and BMP prices from the 2002 Final Decision, the conclusion was incorrect.

When taking into consideration the current price relationship, the error is even more impactful. If it remains USDA's goal to utilize price discovery mechanisms that establish the true value of producer milk used in the four classes, the value of Class IV milk must be corrected and updated to reflect the values of buttermilk solids.

Q. Thank you, Mr. Allen. A few additional questions

before we open you up to other questions.

I'm looking at page 4 of Exhibit 219, and it's the first two lines. I think you read a yield of 1.03, but it is 1.02 in your statement, which is consistent with the analysis on page 6. So I just want to confirm that that should be 1.02.

A. Yes. Like the prior testimony, I think I grabbed the wrong version of the draft, and so I think you are correct, that should have been 1.02.

Q. Great.

So as far as the approach of your analysis here, would it be fair to state that you took the rationale that USDA outlined in its prior decisions on the Class IV formulas and tried to apply current data to it?

A. Yes.

Q. And so there's really no change -- are you trying to change USDA's policy on this or are you just trying to update their analysis?

A. Just update the analysis.

Q. Now, on page 8 of your testimony, just a thing that I noticed as we were going through this. In the column -- really the fourth column, "DMN BMP East-Central Mostly Average." Dairy Market News publishes a mostly range for nonfat dry milk and for buttermilk powder in the West, but in the East/Central, it's just a pure average, right, they don't separate out a mostly?

A. That is correct. That was a typo. Yes.

Q. Yeah.

And so your numbers there are the average of the range reported, correct?

A. Yes. Yes, that is correct.

Q. Let me ask this: In all your work as a dairy economist, what -- what is your opinion of Dairy Market News and the reliability of the data they report?

A. It's the best source we have, but it is reliable.

Q. Now, on the top of page 11, you say you took the calculated quantity of buttermilk solids and multiplied it by 97.5.

And I think this was implied but not expressly stated, that that 97.5 is just the simple average of the relationships between the Western and the -- I'm sorry -- of -- yeah, of the Western and the East/Central relationships you described in your tables, correct?

A. That is correct. Yes.

Q. And then finally -- maybe not finally, but next, on page 12, where you show your five- and ten-year averages, was the methodology, the lookback methodology the same as what you answered with respect to your testimony on Proposal 11 that it goes back from April of 2023?

A. The prior -- 60 consecutive months and the prior 120 consecutive months using the announced prices in the monthly price formulas.

MR. MILTNER: I would make Mr. Allen available for additional questioning.

THE COURT: Anyone have questions other than AMS?

Can we take a minute?

THE WITNESS: Yeah. Okay.

MS. HANCOCK: Yes, if you want to.

THE COURT: I wasn't thinking of a break so much because --

MS. HANCOCK: We kind of went into a different topic area that I wasn't ready for yet, so I just want to make sure -- if we want to take a break, we can, or if Chip wants to go, that's fine, too.

MR. ENGLISH: All right. I'll go ahead and just proceed, if we can muddle through a little bit here.

THE COURT: Okay. Your witness.

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Chip English again for the Milk Innovation Group. Good afternoon, Mr. Allen.

Let me start on page 8, or more particularly, with questions that -- that you were asked by your counsel. And your response -- really your response is you were agreeing with Mr. Miltner that Dairy Market News is the best source we have, and it's very reliable, correct?

A. Yes.

Q. It's not audited, correct?

A. It's a good question. I don't believe so.

Q. Thank you.

So let me start with a question about technology and what the results are. When the skim and fat are separated, would you agree that it's inevitable that cream

includes an addition of the water and fat, small amount of SNF?

A. I would agree, yes, sir.

Q. So where -- where in the existing formula does that small amount of SNF that goes with the cream show up?

A. I assume when the cream is churned to butter, and then you have the resulting product is then dried into BMP, buttermilk powder.

Q. Do you know that for a fact?

A. I don't. That's my assumption.

Q. But it's certainly not in the nonfat dry milk, correct?

A. Yes. I would agree with that.

Q. You would agree that there's no such thing as a loss-less plant, correct?

A. Yes.

Q. That, somewhere in the process, whatever -- whatever your views are about from the farm-to-plant, that once the milk gets to the plant, there's going to be losses in solids and butterfat, correct?

A. Yes.

MR. ENGLISH: Okay. I have no further questions.

MS. HANCOCK: We don't have any questions.

THE COURT: Oh, no questions.

AMS? Or anyone else, I guess.

Seeing none, AMS, are you ready?

MS. TAYLOR: I guess we're going to be ready.

///

CROSS-EXAMINATION

BY MS. TAYLOR:

Q. Well, there's a lot of math to work through here, so I'm not going to focus on that now.

A. Thank you.

Q. We'll just have to figure it out later.

A. Great.

Q. So the assumption, in Select's mind, if I'm correct, is that whatever doesn't go into the churn, they put it into buttermilk powder, whatever left over that goes -- it gets dried as buttermilk powder, and they sell it; is that correct?

A. Yes, that is correct. Sorry. I was just nodding. Yes, that is correct.

Q. And, therefore, that should be accounted for in the price formulas because that is a saleable product?

A. Yes.

Q. Okay. We can go -- I'm not going through the math, but one can go through the math you provide. But do you know for a fact that that is actually what happens at butter plants?

A. I will have a better source speak for Select following me. I don't think he's here presently, but he's -- he may have landed here, but he's not here in -- he may have landed in town, but he's not here in the facility yet. We'll have somebody who can very much answer that question.

Q. Okay.

A. It will be a better resource than me.

Q. Okay. And so if I'm looking over on page 3 when you review our past decision, and you quote from it, and say -- the one line reads: "Record evidence indicates that the price of buttermilk can be as low as 70% of the nonfat dry milk price."

So the data that you provided, and it looks like that came from some NASS information. I have to go back and read the decision we wrote, but I'm guessing that we took official notice of something that was published by NASS to draw that conclusion, the 70% number.

So is the information you provided on 7 and 8 looking at Dairy Market News numbers, to conclude from that that the lowest -- if I was to compare the 70% then to a number now, it would be the 80.92% number as the lowest observed relationship during the two years that you looked at. Is that a fair comparison?

A. Are you referencing that number from the chart?

Q. Yeah -- well, if I'm looking on page 7, the min number at the very bottom is 80.92%. So if I wanted to look at the comparable number between the 70% that was quoted from in the decision, which says "can be as low," so it's not the average there, it's the min. So the min on the data you provided would be 80.92%. I just want to make sure I'm correctly comparing those numbers.

A. Yes.

Q. Okay. And then you go on to talk -- you -- you quote this decision where the buttermilk powder is an

additional $0.02 per pound in manufacturing costs. And then you -- you use that in your calculations to come up with the yield that you are proposing.

But what -- do you have any data that substantiates that it's still a $0.02 difference?

A. I believe Steve's testimony speaks to that. I could be incorrect, but I was thinking that he specifically addressed that.

Q. Okay.

A. If not, I think we can ask him. Again, he would be a better person to speak to that than me.

Q. Okay. So I don't think I have more questions on this exhibit, but we might think of them later since you get to come back up here.

A. Excited to do that.

Q. I'm excited as well.

I do have one question since you're up here. I want to recap the last proposal because you spoke, and then we kind of got the data to substantiate your position. So now that you are back up here, I want to make sure we understand the position.

And so amongst all that testimony, I think what we heard was, in Select's view, farm-to-plant shrink should be eliminated from the formulas, because even though your data shows that it still exists, there -- that's the control of either the producer or the plant to eliminate that.

A. I think we go on to specifically state that we

recognize that USDA has discretion in making a decision based on the data presented on record in this hearing. And if USDA were to find that complete elimination is not reasonable, we would be okay with that as long as the decision was based on the evidence provided in this hearing.

Q. Okay. That's helpful.

MS. TAYLOR: Thank you.

THE WITNESS: Yep.

MR. MILTNER: Mr. Allen, can I ask a few more questions?

THE WITNESS: Absolutely.

REDIRECT EXAMINATION

BY MR. MILTNER:

Q. So in the Class III formula, there's a -- it's primarily for pricing cheese, correct?

A. Yes.

Q. It also prices dry whey, doesn't it?

A. Well, you mean uses dry whey to establish the price?

Q. That's a better way to state it.

A. Correct. Yes.

Q. Now, do all cheese plants fully utilize their whey stream?

A. I mean, well, do they all sell it; is that the question you are asking about utilizing?

Q. Yes. Again, better phrased.

A. I don't believe so.

Q. Nevertheless, those plants pay a Class III price that presumes the sale of at least dry whey, correct?
A. Yes.
Q. And so when you were listening in to the testimony remotely, did you hear any of the butter plants, some of them say, yes, we make buttermilk powder, and others say no? Did you hear any of that?
A. I don't recall specifics, no.
Q. If a plant manufactured and sold buttermilk powder today, what's the raw input cost for that buttermilk powder?
A. I believe it's Class IV.
Q. And since the formula assumes no buttermilk powder value, what are they paying for the solids that are used in that buttermilk?
A. I don't think it's captured in what they pay for the producers for the milk.
Q. So it's other than the cost of manufacturing, would it be pure profit?
A. I assume so.
Q. Thank you.
MR. MILTNER: I don't have anything else for Mr. Allen on this topic.
We're prepared to offer his testimony on Proposal 10. Can we take a -- we can go right into it. We can take ten minutes before we do so. I'll defer to everyone else.
THE COURT: Can we put this exhibit into evidence?

MR. MILTNER: Yes. We would move that into evidence.

THE COURT: Yes. Exhibit 219 is offered into evidence.

Any objections?

It is admitted.

(Thereafter, Exhibit Number 219 was received into evidence.)

THE COURT: I guess, yeah, let's take a break. Come back at -- come back at 4:05.

(Whereupon, a break was taken.)

THE COURT: I consider you still under oath.

MR. MILTNER: Hello, Mr. Allen.

THE WITNESS: Hey there.

CHRIS ALLEN,

Having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MILTNER:

Q. You are under oath. We know your name. We know your address. And in front of you is a document in the upper right. It says Exhibit Select-6.

Do you have that?

A. Yes.

Q. And have you seen it before?

A. Yes.

Q. I believe it represents your testimony in support of Select's Proposal Number 10; is that correct?

A. That is correct.

MR. MILTNER: Your Honor, could we have an exhibit number assigned to Select-6, please?

THE COURT: Yes. This exhibit is marked 220 for identification.

(Thereafter, Exhibit Number 220 was marked for identification.)

MR. MILTNER: Very good.

BY MR. MILTNER:

Q. Mr. Allen, you have done this twice already today. Both times you gave us a somewhat abbreviated version of the testimony.

Is that your intent again?

A. Yes, I would like to do that again.

Q. Okay. Why don't you go ahead and do that, and then I'll come ask you some questions.

A. Will do.

Okay. My testimony today addresses Proposal 10 related to butterfat recovery. Select's Proposal 10 would update the factors for butterfat recovery in the formulas for protein and cheese to reflect the currently achievable and actually achieved factor of 93%. The change necessitates a corresponding increase in the butterfat yield in cheese to 1.624. This change to the butterfat yield in cheese does not consider the correction of farm-to-plant shrink.

The current butterfat recovery factor of 90% originated with the adoption of the 2002 Final Rule,

which reasoned, and I quote: "The recommended decision stated that even though many cheese makers may be able to achieve a higher fat retention in cheese, the use of the 1.582 factor representing 90% of fat recovery in cheese continued to be appropriate. The recommended decision also stated that as a result of the 90% level, butterfat in cheese was not overvalued, and those cheese makers who failed to recover more than 90% of the fat would not suffer a competitive disadvantage. The preponderance of the record indicates that most cheese manufacturers should be able to obtain a 90% butterfat recovery," end of quote.

In the hearing preceding the 2002 Final Rule, Select and others argued that the factor should be higher, relying on hearing testimony that butterfat recovery in cheddar cheese generally ranges between 90 and 93%. Although Kraft testified that their butterfat recovery is lower, the commenters favored a use of a factor that reflected 91 or 92% fat recovery because that level of recovery is common.

This argument was again presented in the 2007 formula hearing. Again, the Department declined to increase the recovery factor. In its reasoning then, the Department concluded, and I quote, "While the record contains evidence of what butterfat recovery in cheese production is possible by the use of more modern manufacturing methods in technology, the preponderance of evidence reflects that many cheese manufacturers generally achieve butterfat recovery near 90%. It is important that

the product price formulas reflect current market conditions, not market conditions that may be possible but not widely achieved or not reflective of general industry wide conditions. Accordingly, this decision rejects the adoption of a 94% butterfat recovery factor," end of quote.

The adoption of Proposal 10 as measured by an analysis of five- and ten-year averages are reflected in the table provided in my written testimony. Based on this analysis, we would expect modest increases in the value of protein and in the Class III price overall.

I note also that the survey prices for butter and cheddar cheese could result in higher or lower Class III prices as a result of adopting Proposal 10.

I provided a table in my written testimony that demonstrates the impacts of changing the butterfat recovery factor at various cheese and butter prices. Depending on the relationship between cheddar and butter, adopting Proposal 10 will reduce prices in certain circumstances.

Despite this fact, Select believes this change is warranted, in fact, it is compelled by our desire to have formulas that accurately reflect current realities. As noted in my prior statements, ensuring the accuracy of the formulas is more important than the result.

It is imperative that we introduce into this record the fact that Select and the majority of producer entities do not possess, or have not been authorized to

introduce evidence they do possess, regarding the actual butterfat recoveries in the manufacturing of commodity cheddar cheese.

The nature of Federal Milk Marketing Order hearings are such that the protection of proprietary or otherwise confidential business information precludes the Department from compelling manufacturers to offer evidence about their actual butterfat recoveries and other relevant data regarding costs and yields.

We fully support efforts to implement mandatory audited reporting of make costs, yields, and other relevant data for those firms subject to reporting sales through the NDPSR.

We cannot, however, defer action on updating the formulas while we optimistically wait for Congress to act. While we respect the protection of such information and the confidentiality constraints upon Select which precludes us from submitting more probative evidence, such prohibitions illustrate the disadvantage facing the dairy farmer community. The fact is that producers are left to shadowbox opponents who are not obligated to engage. Select absolutely knows that not only is butterfat recovery at or above 93% achievable, we know that it is actually achieved.

Select has modeled its own cheese plants for the production of commodity cheddar and other cheeses. Select is part of multiple joint ventures that manufacture commodity cheddar. Select has conducted diligence

regarding the acquisition of or partnerships with multiple cheese plants in various locations throughout the country. Select employees and employees of Select's subsidiary companies have experience in manufacturing cheese in various styles. Our claims here are neither speculative nor theoretical; they are based on actual observations and experience.

We fully expect that opponents of increasing the butterfat recovery factors will offer testimony arguing that 90% remains a rational benchmark. And as testimony offered under oath, we do not doubt its veracity. But we must note that where there is no ability to compel testimony, there is little incentive for those market participants who achieve greater butterfat recoveries than those currently utilized in the minimum price formulas to testify.

The Van Slyke formula, upon which the entire Class III pricing formula is premised, was first developed in 1894. Van Slyke observed actual butterfat retention achieved by New York cheese manufacturers. This fact was testified to by Dr. David Barbano in a hearing preceding the 2002 Final Decision, and I quote: "The values selected for percent fat recovery in the cheese for calculation can be debated. However, a 93% fat recovery in the cheese is achievable with modern cheese-making equipment and was achievable in the mid-1890s when Van Slyke developed his cheese yield formula based on observations of cheddar cheese making practice in many

factories in Central New York over a two-year period."

A well-recognized academic text on cheese manufacturing teaches a "basic" Van Slyke formula incorporating the 93% butterfat recovery observed by Van Slyke. Additionally, journal articles, research, and other publications utilize the same 93% recovery factor for analysis or reference.

Without the ability to introduce data establishing that commodity cheddar manufacturers can and do achieve butterfat recoveries of 93% or greater, Select will provide expert testimony to establish these facts. Dr. Farkye of California Polytechnic State University in San Luis Obispo will testify about his research and observations on butterfat recoveries, as well as available equipment and technologies for optimizing butterfat recovery.

The amendment to 7 CFR Part 1000 necessary to implement Proposal 10 -- the amendments, sorry, to 7 CFR Part 1000 necessary to implement Proposal 10 are provided in my written testimony.

In conclusion, recovery of 93% of butterfat used in the manufacturing of cheddar cheese was documented in the late 19th Century and incorporated in the formula, which provides the basis for the Class III pricing formula.

The 2008 Final Decision recognized that butterfat recoveries higher than 90% were achievable. In the intervening 15 years there must be a recognition that what

USDA recognizes as achievable by some is now achievable by most.

While the industry consensus seems to be that mandatory survey of manufacturing costs and yields is desirable, USDA should not delay adjusting the price formulas based on the possibility of obtaining legislative authority that might never come to pass.

Q. Thank you, Mr. Allen. Let's start with a couple clarifying questions, if we could.

On page 4 of Exhibit 220 you present information on the five-year average and ten-year average.

And is it correct that those were calculated using the same periods as the calculations you provided in support of Select's other two proposals?

A. Yes, same periods, same methods.

Q. Further down that page you show a chart showing the calculated impact on the Class III price of a 93% butterfat recovery at various prices, and you testified that in some instances this proposal would actually have a negative effect on producer income.

And is that what this table reflects here?

A. This reflects that the proposal could have a negative impact on the milk prices paid to producers, yes.

Q. And it is a function of the relationship between the butter price and the price of cheese, correct?

A. Yes. The value of butter and the value of cheese, yep.

Q. I did some -- I don't know, I wouldn't call it

analysis, let's call it arithmetic. And it appears to me that when the butter price is about 137% or higher than the cheese price, that relationship seems to flip.

Does that seem about right to you?

A. I'm going to trust your arithmetic. That does seem about right.

Q. Now, on page 5 you talk about supporting evidence, and I think it's fair to say that Select respects the right of participants in these hearings to protect what they believe to be confidential information.

Would that be correct?

A. Yes.

Q. And obviously, Select wants to protect the confidential information of its partners and to some extent its own operations, correct?

A. Yes.

Q. When you were listening to parts of the hearing, did you happen to hear the testimony from Mr. DeJong from Glanbia?

A. Portions.

Q. Did you hear him discuss the butterfat recoveries of the Glanbia's plants?

A. If I did, I'm failing to recollect what he said.

Q. Okay. I believe he stated that all of Glanbia's plants achieved higher than 93%. I hope I'm not misstating my recollection. But if that were stated, would that surprise you?

A. No, not based on some of the information we have

available.

Q. Okay. And you also go through and you describe, beginning at the bottom of page 5, several points of data that Select, through one person or one area or another, might have some information on butterfat recovery or butterfat retention.

Your -- each of those data points informs your testimony and Select's proposal, correct?

A. Yes.

Q. And I don't -- I hope you are not suggesting that any or all joint ventures Select is in achieves 93% across the board, are you?

A. No.

Q. And I don't think you are suggesting either that every model that Select has done for a cheese plant achieves 93% or more or less, correct?

A. Correct. No, I'm not assuming that.

Q. In fact, I imagine that some of these observations and data points that Select has probably fall on the other side of the line of that 93% line, correct?

A. That would be correct.

Q. But out of respect for other confidentiality agreements, Select does not feel comfortable putting all of this data into the record?

A. That is correct.

Q. I imagine Dr. Farkye can answer this question for me too when he testifies, but I literally found this book after we submitted all of the testimony here. It's a book

called the Science and Practice of Cheese Making, and it was written by Lucius L. Van Slyke in 1916.

And in his book he has the formula, which we now call the Van Slyke formula, and it says the yield of cheese is equal to -- and the formula looks familiar to most of us here -- fat minus .007%. And you make reference to that -- the age of that formula.

Do you think it's a bit anomalous that our formulas recognize a butterfat retention that is lower than what is in this 110-year old book?

A. I do find that hard to believe.

Q. And more -- more to the point, not only hard to believe, is that consistent with your observations and understanding about what the industry is doing today?

A. No.

MR. MILTNER: We would offer Mr. Allen for any additional questions, your Honor.

THE COURT: Anyone have questions for Mr. Allen?

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Getting familiar, aren't we?

A. Yes, sir.

Q. Chip English, Milk Innovation Group. Good afternoon, again.

So I do want to -- you know, Mr. Miltner just discussed the formula. The formula, of course, the depends on what's in the vat, correct?

A. Yes.

Q. So if, for instance -- well, are you aware that inevitably in the plant milk solids are lost in wastewater?
A. Yes.
Q. So that doesn't end up in the vat, right?
A. Correct.
Q. And as I asked you earlier, and you agreed, there's no such thing as loss-less plant, correct?
A. Correct.
Q. So where in the formula are those kinds of losses accounted for?
A. That's where I would be speaking beyond my expertise.
Q. But if there are losses, why would you think that a cheese plant would be able to recover 100% of the fat?
A. 100% of the fat?
Q. In terms of its ability to even achieve something -- there's going to be loss fat, correct?
A. Yes.
Q. And you focus on the butterfat recovery. But do you make Grade AA butter of the type that can be reported to NDPSR?
A. I believe so.
Q. Do you use whey cream in your AA butter?
A. I don't know.
Q. Isn't it true that whey cream can't be priced as Grade AA butter -- can't be graded as AA butter?
A. I believe that is correct.

Just so we're clear, we'll have another person that can testify to that. Yeah.

Q. Are you aware that dry whey typically has a fat test of 1.25%?

A. I couldn't say specifically that I would know that off the top of my head. I could go look it up, but I don't know that.

Q. So just one last series of questions. I already asked this question once, but it seems to have come up again.

IDFA commissioned a study on Make Allowances. And you could have commissioned a survey on yields, correct?

A. Select could have.

Q. Select could have commissioned or sought the industry to commission a study on yields, correct?

A. That's correct.

Q. And you didn't do that, correct?

A. Correct.

Q. And one of the purposes of a study like that would be to allow people to provide, like they did Dr. Stephenson, confidential information, correct?

A. Yes.

Q. And then, as I think -- I wasn't going to bring it up yet because it really was in Mr. Cooper's testimony, but since National Milk Producers counsel brought it up, Select did not participate in the Stephenson study, correct?

A. As far as I know we didn't.

Q. Okay. Is that a little incongruous that -- I mean, as I hear it, you are implicitly criticizing cheese companies for not coming forward and talking about their butterfat recovery, and yet, you didn't commission a study and you didn't participate in Stephenson's study?

A. Again, as I explained earlier, I can't explain why we didn't participate.

MR. ENGLISH: I have no further questions.

THE COURT: Other questions?

I guess you are up, AMS.

CROSS-EXAMINATION

BY MS. TAYLOR:

Q. We're moving right through today. All right.

I want to turn to page 5 -- and I think you talked about this a little with Mr. Miltner, and I apologize if I missed some of those answers -- about at the bottom you talk about Select has modeled its own cheese plants. And I guess you are using this as the basis to say that you know that butterfat recovery of 93% is achievable; is that right?

A. It's one of the means, yes.

Q. And so how many plants are you talking about there?

A. I wouldn't be able to say. Proprietary.

Q. Okay. So we're not sure how many cheese plants that incorporates but --

A. Well, to be clear, this includes cheese plants that we have looked at acquisitions. I mean, this

includes not just plants owned and operated today by Select.

Q. Oh, but plants maybe Select looked at purchasing at some point in time?

A. Yes. That's why I don't want to start throwing out numbers.

Q. Okay. How do those plants compare to maybe other areas that I don't know where those plants are located, but to other plants in the country, cheddar plants? Older, newer, certain locations versus other parts of the country, I mean?

A. A mix, yes. Both newer and both on the older side of I guess of average, whatever you want to call average in this industry. I don't know that I would have a good number to pinpoint for average, but some more -- relatively newer and some older.

Q. We have had some discussion at the hearing about using UF to take out some water or condensing before it goes in the vat.

Do those impact butterfat recovery at all?

A. Wouldn't be able to speak to that. I just don't know.

Q. Your testimony talks about that these 93% -- this 93% butterfat recovery is achievable at modern plants.

Do you know what a guess on what percent of the cheddar production is from these types of plants?

A. I don't. I'm trying to recall if Dr. Farkye's testimony will reference that or not, but I do not know.

Q. Okay. And so that -- Dr. Farkye is going to get a little more into the technical side of things?

A. Absolutely more technical than I can possibly be. Yeah.

Q. Okay. We'll save some questions for him.

So on a very technical note, we do try to run everyone's numbers again to make sure we see them, and on your five- and ten-year averages that you use, and I think you said you started in April of I guess '21 through April of '23 to do that -- oh, five years, so '19?

A. Yeah, you're throwing me off. Right.

Q. I haven't had enough coffee today.

A. Start with May, end in April. So I think May of '18 through April of 2023, I believe that's right. Am I off a year? Oh, sorry, to be clear I will -- for the record, it ends April of 2023, and it includes the five consecutive years before that.

Q. So it would have started in May of --

A. I believe that is correct, May, yes.

MS. TAYLOR: I think we'll save the rest of the questions for later. Thank you.

THE COURT: Anything else?

MR. MILTNER: I don't have any addition al questions, your Honor. We would ask the admission of Exhibit 220.

THE COURT: Seeing no objections, Exhibit 220 is admitted into the record.

(Thereafter, Exhibit Number 220 was received

into evidence.)

MR. MILTNER: So, your Honor, we -- we have two additional statements to present. I am astonished at how quickly we have gone through what we did today.

Mr. Cooper, I think his flight landed in the last 45 minutes or so. We would be prepared to present him in the morning.

Dr. Farkye is actually here, just in full disclosure. He took a red eye in. Otherwise, he would not have arrived until much later tonight, which was his original plan, which is why I had told everyone that we would be prepared to put him on Tuesday.

So my preference would be to start with both of those witnesses first thing in the morning and proceed from there, but we will, of course, defer to your Honor's direction.

THE COURT: Okay. I will defer to the will of the parties, if I can.

Mr. Rosenbaum has stood up.

MR. ROSENBAUM: Your Honor, I have no objection to what was just stated.

I am standing on a different issue, which is when Mr. Brown was testifying this morning, USDA pointed out they thought there was an error in the calculations on page 12 of his PowerPoint presentation, which has been marked as Hearing Exhibit 215, and they were correct.

And so we would like to have Mr. Brown retake the stand. I think this is a five-minute undertaking, just to

put in the corrected numbers.

THE COURT: Okay. That seems like a good use of time unless someone's got -- got a concern about -- let's -- I mean, we can come back -- do we want to handle whether we take up Mr. Cooper and Mr. Farkye first thing in the morning after this, or do we --

MS. TAYLOR: I think AMS thinks that's a good idea, to start that in the morning.

THE COURT: I don't see an objections from anyone else.

So let's do -- let's do as you proposed, Mr. Miltner, you're betting general support from the audience.

Welcome back. Mr. Brown, you are still under oath.

MIKE BROWN,

Having been previously sworn, was examined and testified as follows:

REDIRECT EXAMINATION

BY MR. ROSENBAUM:

Q. Mr. Brown, I have put before you a one-page document that is entitled in the upper right-hand corner Updated IDFA Exhibit 42, corrected page 12.

Do you see that?

A. Yes.

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

THE COURT: This page is marked Exhibit 221.

(Thereafter, Exhibit Number 221 was marked for identification.)

MR. ROSENBAUM: Could I have that again, please, your Honor?

THE COURT: 221.

MR. ROSENBAUM: Thank you very much.

BY MR. ROSENBAUM:

Q. Now, is Hearing Exhibit 221 a corrected page 12 of your PowerPoint presentation that was marked as Hearing Exhibit 215?

A. Yes.

Q. All right. And so if we just -- if you get before you Hearing Exhibit 215, page 12, turn it to page 12, and then just side by side have new Hearing Exhibit 221. Could you just indicate what corrections you have made in your calculations of the percentage of various commodities in terms of total production that were addressed by the 2019 Stephenson survey that resulted in the 2021 Stephenson report? What changes have you made?

A. Okay. The error was in participating plants. The original had 29 nonfat dry milk plants and 14 butter; the correct numbers are 27 and 12.

I also double checked the rest of the numbers to make sure that they were in alignment, and they are.

And so those survey production shares dropped for both nonfat dry milk and butter. Nonfat dry milk dropped from 59.6 to 64.8; butter dropped from 95.7 to 82.1.

I also had an error in one of the reference

documents, dairy products, and those have also been corrected, and the pages are listed where the data came from.

Q. Okay. And so just to make sure we're actually all looking at the exact same information.

Under the heading 2019 USDA NASS and Stephenson cost survey dairy products volumes, the information with respect to cheddar cheese and whey are unchanged, correct?

A. That is correct.

Q. And for nonfat dry milk, the corrected version, which is Exhibit 221, has 27 plants rather than 29, correct?

A. Correct.

Q. The average annual production remains the same, correct?

A. Yes.

Q. But the total survey annual production has gone down because there are two fewer -- T-W-O, fewer plants, correct?

A. Correct.

Q. And so that number is now the -- that number is now 1,199,496,654, correct?

A. Correct.

Q. And as -- and as a share of total NASS production of nonfat dry milk, the percentage has now gone down in terms of what percentage was surveyed from 69.6 to 64.8, correct?

A. Yes.

Q. And similarly for butter, there now are only 12 participating plants, correct?
A. Correct.
Q. The average annual production per plant is unchanged, correct?
A. Correct.
Q. Because that's from the Stephenson survey itself, correct?
A. Yes.
Q. But the total survey annual production has fallen because now you are multiplying the average annual production by 12 plants rather than 14 plants, correct?
A. Correct.
Q. And that actually drops the percentage of total production covered rather materially, instead of 95.7% it's now 82.1%, correct?
A. Correct.
Q. And so if we go back to page 11 of Hearing Exhibit 215, that's where you had the percentage covered by the 2023 Stephenson survey of 2022 costs that actually is the source of information used by IDFA and calculated its proposed Make Allowance, correct?
A. Correct.
Q. All right. So just one by one, let's go through each of the commodities so we know the correct numbers.
In the 2023 Stephenson study, what percentage of the total cheddar cheese production in the United States was covered by the Stephenson survey?

A. 55.6%.
Q. And that compares as to what percentage in the Stephenson 2021 report?
A. 16.3%.
Q. So --
A. It's -- it's actually more than three times.
Q. More than three times as much coverage.
And for whey, the -- and by that I mean the 2023 report has more than three times as much coverage --
A. Yes.
Q. -- as the 2001 report -- 2021 report; is that correct?
A. Yes.
Q. Okay. And then for whey, what's the 2023 number?
A. It's 50.8%. The 2019 number is 29.7%. So it's about 21% higher.
Q. Okay. Well, 21 percentage points higher. But, I mean, in terms of -- well, you can look at it different ways. But 21 percentage points higher, correct?
A. Right.
Q. And then for nonfat dry milk in the 2023 report, what percentage of total nonfat dry milk production was covered by the survey?
A. 91.2%.
Q. And what percentage had been covered back in 2019?
A. 64.8%.
Q. Okay. So once again, a materially higher coverage in the 2023 report, correct?

A. Correct.
Q. And now, lastly, in terms of butter, what percentage was covered in the 2023 report?
A. 80.1%.
Q. And what percentage in the 2019 report?
A. 82.1%.
Q. So the 2021 study continues to cover more butter than the 2023 report, but at this point now it's only slightly more as opposed to the rather substantially more that had been shown in your original version --
A. Yes, that's correct.
Q. -- version of Hearing Exhibit 12; is that right?
A. Yes.
Q. Okay. Now I think going to Hearing Exhibit 221, and going back to page 12 of Hearing Exhibit 215, did you also -- there's a second part of that page that talks about the 2006 USDA NASS and Stephenson cost survey dairy product volumes, correct?
A. Yes.
Q. And the numbers in that part of this page are unchanged, correct?
A. That is correct.
Q. Did you, though, change one of the citations in the data sources?
A. Yes, I did.
Q. Okay. Is that -- is the -- does Hearing Exhibit 221 reflect the corrected --
A. Yes, it does. And it was -- it was -- essentially

it was the page references that need to be updated.

MR. ROSENBAUM: Okay. That's all I have, your Honor.

THE COURT: Questions for this witness?

AMS? No? No?

Seeing no cross, I guess we can move Exhibit 221 into the record, and it's accepted into the record as evidence.

(Thereafter, Exhibit Number 221 was received into evidence.)

MR. ROSENBAUM: Thank you, your Honor.

THE COURT: Thank you, Mr. Rosenbaum.

I guess, immediately prior to this witness retaking the stand, we talked about having those two witnesses, Cooper and Farkye, come up first thing tomorrow morning, so we'll do that.

Is there anything we can do to make productive use of the last 15 minutes?

MS. TAYLOR: For tomorrow as well, we have a witness from American Farm Bureau Federation that would like to testify in the morning, so we would like -- they were here -- he was here last week. He's coming back to testify tomorrow, so we do need to squeeze him in.

THE COURT: Okay. Do we need to figure out an order?

MS. TAYLOR: I mean, I would think he could go first, if possible. I don't -- is that okay?

MR. MILTNER: I think that's fine, yes.

MS. TAYLOR: Okay. We would like him to go first, and then we can proceed with the rest of Select's witnesses.

THE COURT: Okay. Very good.

MR. ROSENBAUM: Just to round out the order, we have two witnesses, then, Ms. Krebs and Mr. Brown, addressing these yield issues that are raised by Select Milk.

THE COURT: Very good.

And they can come after the three witnesses we were just talking about.

MR. ROSENBAUM: Yes, your Honor.

THE COURT: Thank you.

Off the record.

(Off-the-record.)

THE COURT: On record.

In off-the-record discussion we talked about the next witnesses who we will take up tomorrow morning and afternoon. And with that, we're seeing no other business. We're adjourned until tomorrow at 8:00.

(Whereupon, the proceedings concluded.)

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STATE OF CALIFORNIA)
) ss
COUNTY OF FRESNO)

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