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UNITED STATES DEPARTMENT OF AGRICULTURE

In the Matter of:)
)
PROPOSED CHANGES)
WESTERN AND PACIFIC NORTHWEST)
MILK ORDERS)
_____)

TRANSCRIPT OF PROCEEDINGS
BEFORE: MARC R. HILLSON
Administrative Law Judge

VOLUME IIA

(Pages 273 through 528)

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September 24, 2003
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1 TRANSCRIPT OF PROCEEDINGS

2

3 JUDGE HILLSON: Let's go on the record,
4 please.

5 Good morning. I'm Marc Hillson, your
6 administrative law judge for this case, and today is
7 Wednesday, September 24th, in Phoenix at 8:15 a.m., the
8 second day of the hearing.

9 I'm going to ask the court reporter to make
10 sure that the page numbers for today continue from
11 whatever the last page number was from yesterday.

12 Before the hearing started, I asked people to
13 give me -- for both the proponents and opponents of the
14 various proposals to give me a list of people who they
15 plan to have testify.

16 It's not finely apparent to me, but it's
17 relatively apparent to me that this hearing couldn't be
18 finished at the pace we've been going and the number of
19 witnesses I have who are scheduled to testify by -- even
20 if we went all day Friday.

21 As I asked when the hearing started, I wanted
22 us to get out of here early on Friday, so there's a very
23 good chance, especially if we keep our current pace,
24 that whatever -- at the end of the day Thursday, if I
25 see we have at least two or three more days of hearing

1 to go, that I might just call it -- just continue it and
2 we'll try to reschedule it.

3 And I'll try to get my -- I don't know if I
4 can do it, you know, if I can announce the new date at
5 the hearing because I didn't bring my schedule with me
6 and I know a lot of people have a lot of other things on
7 their plate as well. We'll figure that out as we go
8 along.

9 I just want to read, and this is tentative,
10 but I want to read a list of people that are scheduled
11 to speak today and tomorrow in order. And I know we had
12 Mr. March on the stand when we left yesterday, but
13 Mr. Depee has asked if he could come in and testify
14 because he needs to get out of here today.

15 I'm going to call him first and then we're
16 going to finish up with Mr. March and then we're going
17 to have Jim Tillison, William Gladden, Mike Krueger,
18 Norman McLelland, Ernest Yates, Daryl Vander Pol, and
19 Paul Arbuthnot -- and those two have to testify today,
20 so if we're running slow on the other ones, they may be
21 pushed up earlier -- Herbein, Hollon, Van Dam, McBride,
22 and maybe Mr. Paul Christ.

23 And for the opponents, the tentative list I
24 have is Highland, Koester, an independent distributor
25 whose name wasn't readily available, Brandsma -- two

1 Brandsmas, Heerspink -- I hope I pronounced the name
2 right, and if not, that's the way it goes -- Flannigan,
3 either Mr. Mallorie or Ms. Wilgus, Gardner, two
4 Hettingas, Bachelor and Swanson and Albright. And,
5 also, Mr. Ritchey said he needs to testify, but he wants
6 to do it tomorrow.

7 That's a long list, and at the pace we went
8 yesterday, it's -- even if we went like 14 hours a day
9 within the next three days, I don't think -- my
10 impression is this hearing couldn't be done, couldn't be
11 completed by that time. But we'll see how it goes.

12 So at this time, unless someone else has
13 anything they want to put forward, I'm going to call
14 Mr. Depee.

15 MS. DESKINS: Judge Hillson, I did have one
16 thing. I'm Sharlene Deskins. I'm general counsel at
17 USDA.

18 Judge Hillson, some people asked official
19 notice to be taken of the AMS Dairy's program Web-page
20 and also the Web page for the Pacific Northwest and
21 Arizona-Las Vegas area Marketing Orders.

22 And I copied those -- well, those pages from
23 the Web and was wondering if maybe we could have people
24 look at them to confirm that this is what they wanted
25 the court to take official notice of.

1 JUDGE HILLSON: Why don't you leave copies in
2 the back of the room so you can decide on that.

3 MS. DESKINS: And then we can put on the
4 record that that's what official notice was taken of
5 yesterday.

6 JUDGE HILLSON: Right. That'll be good
7 because we had a lot of relatively vague sites, I'm
8 afraid, of official notice.

9 MS. DESKINS: I'll put it in the back, and
10 then we can confirm it.

11 JUDGE HILLSON: So we know exactly what we're
12 noticing, that's a good idea.

13 MS. DESKINS: Thank you.

14 JUDGE HILLSON: I'll remind everyone,
15 especially since we have a different reporter, when you
16 get up for the eighth time of the day to cross-examine
17 someone, you still need to state your name. There's a
18 lot of names to try and keep track of around here, so
19 just if you could try to remember to keep on doing that.

20 And at this time, I'll ask Mr. Depee to come
21 up here.

22 Would you please raise your right hand,
23 Mr. Depee.

24

25

AL DEPEE,

1 a witness herein, having been first duly sworn to speak
2 the truth and nothing but the truth, was examined and
3 testified as follows:

4

5 JUDGE HILLSON: Please state and spell your
6 name for the reporter and make a brief statement.

7 MR. DEPEE: Good morning. My name is Al
8 Depee, D-e-p-e-e. I'm the manager of Braum's Dairy
9 facility in Tuttle, Oklahoma.

10 Although we have no marketings in the Pacific
11 Northwest or the Arizona-Las Vegas Orders, I have reason
12 to believe that proposals are being formulated to change
13 the producer-handler language in all Federal Orders.

14 Perhaps it would be helpful if I gave a brief
15 description of Braum's operation and marketing concepts.

16 We milk approximately 10,000 cows and process
17 the milk right on the dairy. We process the milk into
18 fluid milk, cultured products and ice cream. We balance
19 our needs within without purchasing outside milk.

20 The products we produce are all marketed
21 through our own retail outlets. All products are
22 marketed at retail and we have no wholesale business.
23 Between 50 and 60 percent of our milk utilization would
24 be considered Class I. In the 35 years since Mr. Braum
25 started this business, he has never accepted government

1 subsidies of any kind.

2 Braum's has not always been a
3 producer-handler. For many years, we were a regulated
4 handler. During many of those years, we had difficulty
5 getting a sufficient quantity of high-quality milk on a
6 timely basis.

7 We gradually increased the herd size to have
8 a solid base of high-quality milk. When unreasonably
9 liberal pooling rules for out-of-area milk began for the
10 benefit of producers in other areas of the United States
11 that we are not involved, we felt that we had no choice
12 but to become a producer-handler.

13 For example, in January 1999, Class I
14 utilization in our Order, 106, was 50.44 percent. And
15 in July 1999, Class I was 60.24 percent. In other
16 words, the market was very close to the way Braum's
17 utilized milk.

18 Contrast that to 2003 Class I utilization:
19 January, 26.07; February, 24.72; March, 27.48; April,
20 27.41; May, 27.12; June, 25.38; July, 49.23; and August,
21 59.75.

22 We can only assume that because of the much
23 lower producer price differential that the milk coming
24 in from other areas was not pooled in Order 32 in July
25 and August.

1 The Federal Order has been in existence along
2 with the producer-handler language for 66 years and it
3 has worked pretty well. We feel that there is no need
4 to change the language of the Order solely to eliminate
5 certain producer-handlers.

6 Thank you for the opportunity to express our
7 feelings on these proposals.

8 JUDGE HILLSON: Does anyone have any
9 questions?

10 MR. ENGLISH: For surplus milk disposal --

11 JUDGE HILLSON: You need to identify
12 yourself.

13 MR. ENGLISH: I'm sorry. Thank you, Your
14 Honor.

15 Charles English.

16

17 EXAMINATION

18 BY MR. ENGLISH:

19 Q. With respect to any surplus milk that you may
20 have, are you able, practically or otherwise, to dispose
21 of any of that in California?

22 A. No.

23 Q. Are you practically or otherwise able to
24 dispose of any of that in Mexico?

25 A. No.

1 Q. Are you practically or otherwise able to
2 dispose of that in Montana?

3 A. No.

4 Q. Are you practically or otherwise able to
5 dispose of that in Western New York or Pennsylvania?

6 A. No.

7 Q. Are you practically or otherwise able to
8 dispose of it in Canada?

9 A. No.

10 MR. ENGLISH: Thank you. That's all I have.

11 JUDGE HILLSON: Does anyone else have any
12 questions?

13 Okay. You need --

14 MR. YALE: I thought Marv was going.

15 Benjamin Yale.

16

17 EXAMINATION

18 BY MR. YALE:

19 Q. It's Depree?

20 A. Depee.

21 Q. Depee.

22 Okay. How long has Braum's been a PD?

23 A. I don't know exactly, but four or five years.
24 Three, four, five years.

25 Q. It's always been -- in the Order days when

1 the utilization was closely tied to Order pool, it
2 didn't really make much difference, did it?

3 A. No, sir.

4 Q. During that period, whether you were a PD or
5 not, you a lot of times were still using only your own
6 milk; right?

7 A. Depends on the time frame, I guess. Early
8 on, we bought more than we produced. But we had
9 difficulty getting the consistent high-quality milk on a
10 timely basis, so we gradually, over the years, built a
11 herd.

12 Q. That brings up my point. One of the things
13 as a PD is you want to identify the fact that your milk
14 has some characteristic that's not otherwise available
15 in the market and that there's some consistency with
16 that characteristic in the eyes of the consumer; is that
17 correct?

18 A. That's correct.

19 Q. So if they see the Braum's label, they know
20 that this is the same milk and the same taste that we
21 had today that I had when I bought it three weeks ago;
22 is that correct?

23 A. That's absolutely correct.

24 Q. All right. And is that possible when you're
25 buying that from -- as a regulated handler buying that

1 from other sources?

2 A. Depends on the source of the milk. It's
3 possible, but not always -- it doesn't always happen.

4 Q. Right. But it also puts you in a situation
5 where you're not as able to advertise that fact, maybe
6 not as truthfully, but as clearly as you would like if
7 it's your own; right?

8 A. That's correct.

9 Q. Does the fact that you have your own milk, do
10 you make any adjustments in your farm operation to
11 dovetail into your processing operation?

12 A. Absolutely.

13 Q. And what are some of those changes that you
14 make?

15 A. Could you be more specific? I'm not sure
16 where you're going.

17 Q. Well, for example, do you try to tie the
18 number of milkings and the timing of milkings to
19 correspond to the plant operations?

20 A. No, not the time of the milking. We milk
21 pretty much all the time, but we are able to -- in most
22 cases, we're able to get our milk from the cow to the
23 consumer in 36 hours.

24 Q. All right. And that's an important sales
25 point; right?

1 A. Yes.

2 Q. And that gives you a longer code date?

3 A. Yes, sir.

4 Q. As I understand it, you don't have any
5 wholesale outlets at all?

6 A. Not at all.

7 Q. Is this because you don't have the milk or
8 this is a business --

9 A. It's a business decision.

10 Q. Now, in your plant operation, I mean, do you
11 do any coordination between the plant and the farm in
12 terms of when you operate and the milk's available and
13 the like? I mean, is there any dovetailing that's going
14 on between those two operations?

15 A. To a certain amount. Delivery, probably.

16 Q. Do you use separate silage?

17 A. Yes. The manufacturing operation and the
18 farm are about two miles apart.

19 Q. Okay. I thought -- I got the indication they
20 were next to each other on the same site. I'm sorry.

21 Now, you indicated this concern to change PDs
22 in all Federal Orders, and you see this as a threat to
23 Braum's?

24 A. I see that as a very large threat.

25 Q. All right. Now, the impact of regulating

1 Braum's as a, quote, regulated handler, what would that
2 impact be?

3 A. It would be a tremendous -- the way the
4 current pooling rules are, it would be a financial
5 hardship.

6 Q. And why would that be?

7 A. Well, as I said in my statement,
8 historically, our Class I utilization was very close to
9 the Order pool.

10 Q. Right.

11 A. And those pooling rules were very liberally
12 and unreasonably changed to cut the Class I utilization
13 by 50, by half.

14 Q. So you would -- the question comes out, you
15 would have to pay in based on all your classes of use,
16 which would be Class I -- it looks like maybe all four
17 classes in one way or another?

18 A. Perhaps.

19 Q. Perhaps, huh?

20 A. If you consider inventory.

21 Q. Right. And you get back a blend price which
22 would be less than what you put into the pool; right?

23 A. The blend price is artificially lowered by
24 the liberal pooling arrangements.

25 Q. And do you have any control over those

1 pooling arrangements?

2 A. Not at all.

3 Q. And who are the people that are in control of
4 those pooling arrangements?

5 A. I wouldn't pretend to know.

6 Q. Well, are there co-operatives? I mean --

7 A. Yes.

8 Q. Okay. What co-operatives are --

9 A. DFA is dominant.

10 Q. Okay. And do you compete with DFA in any
11 way?

12 A. No.

13 Q. Do you compete with any of their handlers
14 that they --

15 A. We're in the same market, but in a
16 stand-alone business.

17 Q. In a stand-alone business.

18 Okay. But you would be in a situation
19 where -- being a regulated handler, would you feel like
20 you're somewhat at their mercy as to how much milk they
21 would put in that pool to determine how much money you
22 would get back?

23 A. I'm not sure that they would do it for our
24 benefit or variously used, but I think that that would
25 happen and it would be to our detriment.

1 Q. I mean, you already saw one instance where
2 the pooling jumped by double to their benefit?

3 A. Yes, sir. It's my understanding that the
4 Class III plants pulled out of the pool, which was
5 out-of-area milk.

6 Q. And that brings up my next question.
7 You're in the Central Order?

8 A. Order 32, that's correct.

9 Q. And do you know how broad an area that milk
10 comes from that gets onto that Order?

11 A. Oh, sure. It comes from quite a ways.

12 Q. Roughly, what's the geographic area of the
13 Central Order?

14 A. Central Order is primarily from --

15 JUDGE HILLSON: Yes?

16 MR. BESHORE: Marvin Beshore.

17 I'd like to interpose an objection to
18 extended examination about Order 32. It's not involved
19 in this hearing and, you know, we're going to be here a
20 long time to begin with. We don't want to litigate
21 Order 32 with Mr. Braum [sic] now, and Mr. Yale seems to
22 be leading us that way. I think it's irrelevant.

23 JUDGE HILLSON: What do you have to say,
24 Mr. Yale?

25 MR. YALE: Your Honor, it's not irrelevant at

1 all. We have a witness up here who has testified that
2 he sees that this PD regulation is intended to go to all
3 Orders and that this has an impact on his plant.

4 What I want to get at is the fact that, when
5 you become a regulated handler, you are not in control
6 of the price of your milk and the net income that you
7 derive.

8 And to get into that, it involves the amount
9 of milk that you pool on the Order and the broad area
10 which the Central Order has that you can pool milk on.
11 The Central Order gives, as he just said, a lot of
12 out-of-state milk. There is this potential that
13 co-operatives and others who control the amount of milk
14 of that pooling Order has a direct impact on PD lines.
15 And it goes to one of the issues we're going to be
16 talking about in our own argument about a regulated PD.

17 JUDGE HILLSON: Okay. Mr. Yale, I think it's
18 on the very edges of relevancy. I'll allow you a few
19 more questions on this issue and you can turn to
20 something else or let someone else do the questioning.

21 Q. BY MR. YALE: Do you have any idea how broad
22 an area they draw milk from?

23 MR. BERDE: Sydney Berde.

24 That's a question that is absolutely
25 unnecessary when Order 32 geographic limits are defined

1 in the federal regulations. To ask this man out of his
2 memory to describe the geographic limits is absolutely
3 absurd.

4 JUDGE HILLSON: Okay. I'm going to sustain
5 that objection.

6 MR. YALE: Your Honor, can I -- may I offer a
7 proffer, please, on this issue?

8 JUDGE HILLSON: Do you want to -- oral or in
9 writing?

10 MR. YALE: I would like to do it orally.

11 The geographic area of the Central Order is
12 defined as the marketing of the milk. It is not the
13 geographic area of the milk supply which will be pooled
14 to determine the price of milk that a PD would pay.

15 And it becomes very relevant to the issue at
16 heart. Taking a PD -- one of the issues they want to do
17 is regulate a PD and define the impact of a regulated
18 PD, which is at the core of this issue.

19 And this is getting to the heart of our
20 thing. If we're not going to be able to testify in
21 terms of this and develop this, then we're not going to
22 have an opportunity to defend ourselves, Your Honor.

23 MR. ENGLISH: Charles English.

24 This is not a national hearing. This is not
25 open for Orders 1 and 5 and 7 and 30 and 32 and 126.

1 The Secretary decided to open this hearing for
2 Orders 124 and 131, and the assumption that something
3 that may go in for specific market circumstances in the
4 Pacific Northwest and Arizona, that that will carry
5 forward for market circumstances elsewhere is erroneous
6 and ought to be taken up if and when a hearing is ever
7 held for Order 32.

8 If we're going to have testimony for
9 Order 32, we aren't going to get done this week; we're
10 not going to get done next week; we're not going to get
11 done this year, and literally, we are way outside, if we
12 are ever going to get this hearing ever done, for what
13 is relevant for this proceeding.

14 JUDGE HILLSON: Does the agency have a
15 position?

16 MS. DESKINS: Discussing the issue as
17 noticed, it would be beyond the scope of the hearing,
18 what we noticed would be a topic of this hearing.

19 JUDGE HILLSON: I think he made his general
20 point. I think if you go into too many specifics, it's
21 not an issue here. I think I'm going to allow the
22 objection.

23 MR. YALE: Can we move to strike any
24 witnesses who do not have pool plants in Order 131 or
25 124?

1 JUDGE HILLSON: You can move it, but I don't
2 think I'm going to grant it.

3 MR. YALE: Well, why? Because we have people
4 from California --

5 JUDGE HILLSON: We're trying to set a
6 reasonable limit on what's at issue in this hearing.
7 You know, I allowed Mr. Braum -- I mean, Mr. Depee's
8 testimony even though, technically, it doesn't have
9 anything specifically to do with these things, because
10 he talked about the generic impact on people in his
11 position, in his company's position. I allowed that
12 testimony, and I'm allowing you to ask him follow-up
13 questions on it, but I don't want to go on forever or
14 else --

15 MR. YALE: I really hadn't intended to, but
16 I'm very concerned that when we get to the issue of the
17 impact of a PD, where people are going to have their
18 businesses at risk, that we can't explore those, and
19 we're going to have to bring that from evidence of other
20 PDs in other areas, and he won't be the only one that
21 will be testifying.

22 JUDGE HILLSON: I'm going to allow it --
23 sustain the objection --

24 MR. YALE: All right.

25 JUDGE HILLSON: -- and ask you to move on.

1 Q. BY MR. YALE: Mr. Depee, do you advertise
2 that you are bST-free?

3 A. No, we do not.

4 Q. Do you make any other claims in terms of the
5 type of herd or other characteristics of your herd?

6 A. No.

7 Q. All right. Do you market -- you do your own
8 distribution to your own stores; is that right?

9 A. Yes.

10 Q. Everything's under your own label?

11 A. Yes.

12 Q. Now, I want to get back to a question before
13 we got into this other area, and that is, is that you
14 are subject to the difference -- a regulated DP is
15 subject to the difference between his blend price at the
16 plant and the blend price of the Order; is that correct?

17 A. If you're a regulated handler, that's
18 correct.

19 Q. Yes.

20 And is there -- in the integration and the
21 operation of a PD such as yourself, have you ever
22 considered what the possible economic ramifications
23 would be, roughly?

24 A. Depends on the pooling.

25 Q. Depends on the percentage of the pooling.

1 But at a 30 percent pool, you know, blend, you know --

2 A. It's significant.

3 Q. Pardon?

4 A. It's significant.

5 Q. Is it one in which you would have to make
6 significant changes in the operation of your operation
7 in order to absorb those costs?

8 A. I'm not sure what they'd be, but you'd
9 certainly hope we'd do something.

10 Q. To be able to survive?

11 A. That's right.

12 Q. Right. But this isn't -- if those changes
13 were made, would there be any savings that you would
14 incur being a regulated handler?

15 A. Yes.

16 Q. What would those be?

17 A. Balancing.

18 Q. Balancing. All right. Let's talk a minute
19 about balancing.

20 You indicated you utilize all your milk. Do
21 you put it all into your own products?

22 A. Yes.

23 Q. And what are those products, again? Cultured
24 products?

25 A. Fluid milk, cultured products, and ice cream.

1 Q. And how is the balancing a cost for you if
2 you're doing it all in your own operation?

3 A. Well, I'm not sure what you're after in the
4 question.

5 If you're going to balance your own milk, you
6 have to -- nobody uses milk at the same rate every day
7 of the year, so you have to make -- you have to make
8 sacrifices, many kinds, to make that come out even.
9 It's not an easy thing at all.

10 Q. Now, what do you mean by "sacrifices"?

11 A. Well, for instance, one of the ways of
12 controlling the amount of milk that you produce is by
13 having the cows you milk. How many cows you milk are
14 determined by how often you breed them.

15 For instance, we have a certain amount of our
16 milk and ice cream, so most people don't buy quite as
17 much ice cream in the winter as they do in the summer,
18 so we have to control our breeding rate to have less
19 milk in the winter.

20 Q. Okay. Does that then have a cost at your
21 farm site?

22 A. Absolutely.

23 Q. All right.

24 A. It increases the price.

25 Q. So if your producer -- if your milk from the

1 farm wasn't going into a PD but was going into the
2 regular pool, you would have a different operation at
3 the farm?

4 A. Yes.

5 Q. It would be more efficient than you are now?

6 A. Yes.

7 Q. And more cost effective as an independent
8 unit?

9 A. Yes.

10 Q. So let's go back, then, to the operation now
11 as the handler. You talk about, you know, these
12 sacrifices. Are there other sacrifices in order to
13 balance the product that you produce?

14 A. Sure there is. Again, we do some of that
15 with ice cream. We build inventory during the winter
16 months, which is costly.

17 Q. You do what?

18 A. Build inventory of ice cream.

19 Q. Build inventory. Okay.

20 A. So that we start the summer months, when
21 sales are higher, we have a large inventory, and we
22 finish the summer months with a very low inventory.

23 Q. And in those other operations that are
24 regulated, or at least not PDs that are in the ice cream
25 business, is it their practice to build inventories in

1 that way, to your knowledge?

2 A. Certainly not to the extent that we do.

3 Q. All right. Is there a cost associated with
4 building those inventories?

5 A. You tie up capital at a cost to you.

6 Q. All right. So that if you were a regulated
7 handler and not being dependent upon your own supply,
8 you'd be able to make changes that can make you more
9 efficient or the like; is that correct?

10 A. That's correct.

11 Q. All right. So although you may have -- let
12 me go to the next statement, and that is, is that in the
13 general financial scope, in terms of whether the company
14 makes a profit in the end, do you determine the cost of
15 your milk to be the blend price of the Federal Order or
16 do you determine it to be the cost of production at your
17 farm?

18 How do you determine whether you made money
19 by selling your finished product? I mean, how do you
20 determine the cost for the raw milk that goes into your
21 building product? Let me state it that way.

22 A. I'm not sure I want to get into that. This
23 is a family business and it's proprietary.

24 Q. All right. I don't want to get -- just in
25 general. I mean, the point is that, at the end of the

1 day, you've got to make money on the whole operation; is
2 that right?

3 A. That's right.

4 Q. And there's not a correlation between the
5 blend and necessarily whether you're making money on the
6 farm?

7 A. That's correct.

8 Q. All right.

9 A. We have to make money at the end of the day,
10 not necessarily on one unit or another.

11 Q. Not necessarily on one unit or another; is
12 that right?

13 A. That's right.

14 Q. So that comes up to my final range of
15 questions.

16 When you look at your business, do you look
17 at it as a farm and then as a plant and then a mix
18 together, or do you look at it as one enterprise that
19 you're looking for the total profitability of the whole
20 enterprise?

21 A. We have P & Ls on each unit.

22 Q. So you can monitor their cost centers; right?

23 A. Yes.

24 Q. But in the end, it's the whole company that
25 makes a difference; right?

1 A. That's right.

2 Q. When you determine -- I'm not trying to get
3 into confidential information, but the transfer cost for
4 the raw milk to the PD, that ends up being an internal
5 business decision that you make?

6 A. That's correct.

7 Q. Fair enough.

8 You don't purchase the milk from yourself?

9 A. No.

10 MR. YALE: All right. I have no other
11 questions. Thank you.

12 MR. BESHORE: Marvin Beshore representing
13 DFA.

14

15 EXAMINATION

16 BY MR. BESHORE:

17 Q. Mr. Depee, how many stores does Braum's have?

18 A. I guess I don't know exactly. Around 275 or
19 '80.

20 Q. 275 or '80 stores.

21 How many states are they located in?

22 A. In parts of five states.

23 Q. What's the geographic range? How far from
24 your farm?

25 A. We try to stay within 300 miles of Tuttle,

1 Oklahoma.

2 Q. Okay. Are the stores all part of the same
3 business enterprise?

4 A. Yes.

5 Q. And what do you sell at the stores besides
6 your dairy products?

7 A. We also have a bakery.

8 Q. Gasoline?

9 A. No.

10 Q. Are they convenience stores?

11 A. No. They're a dairy store. Dairy/bakery
12 store.

13 Q. Just strictly dairy products and bakery
14 products?

15 A. It has a grill and a fountain.

16 Q. What are the gross sales of your total
17 business? Do you care to --

18 A. What's your salary?

19 Q. I'm self-employed, sir.

20 A. So is the Braum family.

21 Q. How many employees does Braum's have?

22 A. On the dairy operation or the total?

23 Q. In total.

24 A. Somewhere around 9,000.

25 Q. The P & L units include -- is the farm one of

1 them?

2 A. Yes.

3 Q. And is the fluid milk plant a cost center?

4 A. Yes.

5 Q. Is the ice cream plant a separate one?

6 A. No. That's all part of the dairy, all part
7 of the plant.

8 Q. Do you draw any milk?

9 A. No.

10 Q. Do you sell any surplus cream or --

11 A. We do sell some surplus cream.

12 Q. Who do you sell it to?

13 A. We go through a broker in nonpool plants. I
14 think typically it either -- usually goes to a butter
15 plant.

16 Q. Now, your concern with the utilization of the
17 Order, I think, was clear, but I just want to make sure.

18 If the utilization -- your utilization is in
19 the 50 to 60 percent range; correct?

20 A. That's correct.

21 Q. If the utilization of the Order is in the
22 same range, you're essentially indifferent as to whether
23 you're pooled or not?

24 A. That's correct, if I thought that would
25 remain that way.

1 Q. Right. And if it's less, if the utilization
2 on the Order is less, of course, you don't want to be
3 pooled?

4 A. That's correct.

5 Q. Because to account to the pool for the class
6 values of your milk, you would pay more in than you take
7 out; correct?

8 A. That's correct.

9 Q. On the other hand, if the utilization in the
10 pool were higher than your utilization, you'd want to be
11 pooled, would you not?

12 A. That's correct.

13 Q. Okay. Thank you.

14 A. In fact, at one time -- let me add to that.

15 Q. Yes.

16 A. At one time, we slipped below 50 percent by a
17 fraction, and they threatened to kick us out of the
18 pool.

19 Q. When was that? Do you recall?

20 A. 10 or 15 years ago.

21 Q. Okay. And was that -- that was related to
22 the utilization at your fluid milk plant?

23 A. Yes.

24 Q. So that it would not have been -- because of
25 the percentage of Class II, it would not have qualified

1 as a distributing plant under the Order?

2 A. That's right.

3 MR. BESHORE: Thank you very much.

4

5 EXAMINATION

6 BY MR. RICCIARDI:

7 Q. Mr. Depee, good morning. I'm Al Ricciardi on
8 behalf of Sarah Farms, and I have some follow-up
9 questions, if you don't mind.

10 Mr. Beshore asked you a question which you
11 respectfully declined to answer regarding gross sales
12 figures for Braum's. Let me ask you a follow-up
13 question and see if you can't answer this.

14 Dairy Farmers of America, who Mr. Beshore,
15 represents, indicated in their books that in 2002 they
16 had sales of almost \$1.6 billion. My assumption is that
17 Braum's isn't anywhere close to \$1.6 billion.

18 A. Nowhere close.

19 Q. That we got. Okay. Good enough.

20 As a producer-handler -- and I think we
21 covered some of this, but I want to make sure that I got
22 your testimony correct -- Braum's is required to balance
23 its own milk needs; correct?

24 A. Yes.

25 Q. Now, balancing the milk production to market

1 demand, is that a difficult procedure?

2 A. Very difficult.

3 Q. Does it require careful planning?

4 A. Very much so.

5 Q. Does it require efficient management by
6 Braum's?

7 A. Well, we hope so.

8 Q. And you believe that, in fact, that that's
9 what you do, efficiently balance it for your own needs?

10 A. Yes.

11 Q. As a producer-handler, do you have the
12 ability to go out and buy milk from somewhere else to
13 balance your own needs?

14 A. We're allowed 150,000 a month, three loads.
15 We don't.

16 Q. But beyond that, you're not?

17 A. No.

18 Q. Okay. In terms of the production and
19 processing portion of your business, was there capital
20 that was expended by Braum's in putting that production
21 facility in place?

22 A. Certainly.

23 Q. Is there a cost associated with
24 transportation in your business?

25 A. What part of the business? Are you talking

1 about raw milk?

2 Q. Yeah.

3 A. It's minimum.

4 Q. With regard to the transportation to your
5 stores, however -- I think you indicated you had 275 to
6 280 in five states within 300 miles, approximately --

7 A. That's right.

8 Q. -- of any of your farms?

9 A. Yes.

10 Q. Is there a cost associated with transporting
11 product to those stores?

12 A. Big-time.

13 Q. How long have you been at Braum's?

14 A. A little over 25 years.

15 Q. How long have you been in the dairy business?

16 A. All my life. But since I got out of school.
17 42 years.

18 Q. Over that period of time, have you seen the
19 dairy business change?

20 A. Certainly.

21 Q. Let's talk about just the issue of
22 technological change.

23 In the last 10 years -- let's state that --
24 has technology improved to the extent that you're able
25 to produce more milk than you were before and at perhaps

1 a lower cost?

2 A. At the processing level or the farm level?

3 Q. Let's do it at the processing level right
4 now.

5 A. Technology improves every year.

6 Q. Okay. And, therefore, the efficiencies at
7 the production level would also improve every year?

8 A. Yes.

9 Q. How about dairy level? What about the farm?

10 A. The efficiency at the farm is -- the biggest
11 expense on any farm is the cost of cows and the cost of
12 feed, so cost of milk at the farm level is tied to those
13 two more than anything else.

14 However, over the last 25 years, a genetic --
15 the genetics of the animals has made it so that
16 typically you get more milk than you did 25 years ago
17 from a cow.

18 Q. Overall, in looking at both the dairy side
19 and also the production side, my assumption is that
20 Braum's bears the complete financial risk on this
21 business; is that correct?

22 A. That's correct.

23 Q. And if in fact there was a problem, for
24 example, with a load of milk that for whatever reason
25 was spoiled or wasn't acceptable, that would be Braum's

1 responsibility to replace it?

2 A. Yeah. It happened once. We poured it down
3 the drain.

4 Q. And there's capital costs that are associated
5 or financial costs associated with that; correct?

6 A. Yes.

7 Q. And the producer-handler has to bear every
8 one of those costs every day?

9 A. That's correct.

10 MR. RICCIARDI: Nothing further.

11 JUDGE HILLSON: Anyone else?

12 Okay. Thank you very much.

13 Wait a second.

14 Mr. Beshore.

15

16 EXAMINATION

17 BY MR. BESHORE:

18 Q. What's the average production per cow a year?

19 A. That's proprietary information.

20 Q. What's the approximate volume of your fluid
21 milk plant?

22 A. We milk 10,000 cows. You can probably come
23 close.

24 Q. Well, that's why I was going to do some
25 multiplication if I had some --

1 A. I'll loan you a calculator.

2 Q. Would you say your herd is above the national
3 average in production per cow?

4 A. No.

5 Q. It's not?

6 A. No.

7 Q. Are you certain of that?

8 A. Well, no, I'm not certain, because I don't
9 know what the national average is.

10 Q. Are you involved in the production side of
11 the dairy?

12 A. Yes.

13 Q. Are they -- are your cows -- do you
14 participate in DHIA testing programs or things of that
15 nature?

16 A. No.

17 Q. You do not.

18 Do you keep your own records with respect to
19 the individual production of your dairy cows?

20 A. No.

21 Q. Do you know how much milk you produce a day?

22 A. I know what's in the tank at the end of the
23 day.

24 Q. Okay. Do you know how many cows you've
25 milked that day?

1 A. I sure do.

2 Q. But you don't know your production average
3 per cow?

4 A. No.

5 Q. You raise your own replacement stock?

6 A. Yes.

7 MR. BESHORE: Thank you.

8 JUDGE HILLSON: Thank you, Mr. Depee.

9

10 EXAMINATION

11 BY MR. ROWER:

12 Q. Jack Rower, sir. Thank you for coming. I
13 just wanted to ask you a very quick question. I won't
14 hold you up.

15 Braum's business model seems very unique, and
16 in your experience, does Braum's business model differ
17 from other producer-handlers that you're aware of?

18 A. I think it differs from most dairy
19 businesses, yes, sir.

20 Q. And in your experience, are other
21 producer-handlers similar in their business models or
22 different? Do you have any knowledge of that?

23 A. Only what I hear and I read. It seems they
24 are similar through the production/processing of the
25 milk, but beyond that are different.

1 Q. But in marketing, they may be different?

2 A. In marketing, they're different.

3 MR. ROWER: Thank you very much.

4 MR. YALE: One follow-up to that.

5 JUDGE HILLSON: Sure. Don't forget to
6 identify yourself.

7 MR. YALE: Benjamin Yale.

8

9

EXAMINATION

10 BY MR. YALE:

11 Q. Mr. Depee, just following up with Mr. Rower's
12 question, you stated they're alike in the production/
13 processing; is that right?

14 A. That's my impression.

15 Q. And that is because of the balancing issue?

16 A. Yes.

17 Q. And that's the primary reason you make that
18 comment?

19 A. Yes.

20 Q. And that is one of the biggest burdens of
21 being a PD?

22 A. DP.

23 MR. YALE: DP.

24 All right. Thank you very much.

25

1 EXAMINATION

2 BY MR. RITCHEY:

3 Q. Mr. Depee, Al Ritchey with Alan Ritchey,
4 Incorporated.

5 The way you did your sales at your store is
6 by the quality of your milk and not what it buys. I
7 know in my hometown, I can go to Wal-Mart and buy milk
8 cheaper than a gallon of Braum's, but I've got people
9 that won't buy milk unless it's Braum's. Isn't that one
10 of the reasons you're a PD, to keep the quality of your
11 milk up?

12 A. Certainly a factor, yes, sir.

13 Q. And almost always, there's somebody in town
14 selling milk cheaper than you are?

15 A. Yes, sir.

16 Q. But people drive to your store just to buy
17 milk because they like the quality of your milk?

18 A. Yes, sir.

19 It's a real challenge to get a housewife to
20 bypass the dairy counter in the supermarket and make an
21 extra trip to our store.

22 MR. BESHORE: One follow-up to Mr. Ritchey's
23 question.

24 JUDGE HILLSON: Mr. Beshore, you've got to
25 identify yourself every time.

1 MR. BESHORE: I'm sorry.

2 Marvin Beshore.

3

4 EXAMINATION

5 BY MR. BESHORE:

6 Q. Mr. Depee, you could process solely milk from
7 your own farm, from your plant, regardless of your
8 regulatory status under the Federal Order; isn't that
9 correct?

10 A. That's correct.

11 Q. Do you acquire for your stores any dairy
12 products of any variety from any other processors?

13 A. Yes, we do. It's a very, very small amount,
14 but we buy some half-and-half and some low creamers.

15 Q. From pooled handlers?

16 A. Yes.

17 MR. BESHORE: Thank you.

18 JUDGE HILLSON: I think if you move quickly,
19 you can be excused.

20 (Witness excused.)

21 Do we want to finish up with Mr. Marsh,
22 please?

23 Mr. Marsh, you'll be called to the stand.

24 You've been sworn in. My recollection is
25 that Mr. Yale was in the middle of asking you some

1 questions yesterday.

2 Is that correct, Mr. Yale?

3 MR. YALE: That's right, Your Honor.

4 JUDGE HILLSON: So we're going to resume the
5 cross-examination of Mr. Marsh.

6

7 MICHAEL L.H. MARSH, CPA,
8 a witness herein, having been previously duly sworn to
9 speak the truth and nothing but the truth, was examined
10 and testified as follows:

11

12 EXAMINATION (continued)

13 BY MR. YALE:

14 Q. Good morning.

15 A. Good morning, Ben.

16 Q. I never thought I'd have two tries.

17 Ben Yale on behalf of the Smith Brothers
18 Farms, Edaleen Dairy, and Mallorie Dairy.

19 Mr. Marsh, I guess I was getting tired. I
20 may not have made myself clear. We talked about the
21 California system, and that is a marketwide pool system?

22 A. Uh-huh.

23 Q. And processors pay into the pool based on
24 approximately five classes of milk?

25 A. Yes. Class I, II, III, IV and IVA.

1 Q. And producers then receive out of that pool,
2 really, in a sense, two blend prices, a quota price and
3 an overbase price, is that right, depending on -- they
4 maybe get some quota and then what they don't get quota,
5 they get overbase?

6 A. Subject to regional quota adjusters.

7 Q. Subject to regional quota adjusters.

8 And that is an advantage to those California
9 producers, right, to have that minimum price and that
10 uniform price? Is that my understanding of your
11 testimony?

12 A. Relative to?

13 Q. Just, I mean, it's an advantage to have that
14 system to see that they have a minimum price; right?

15 A. Clearly it's a benefit to have a regulated
16 system.

17 Q. Now, as I understand it -- you know, you
18 heard Mr. Depee talk about some milk being depooled and
19 the percentages change. And that can't happen in
20 California, can it?

21 A. Yeah, it can.

22 Q. As readily as that?

23 A. No, not as readily as that.

24 Q. Right. And --

25 A. Which is, by the way, one of the real

1 concerns that we have in California. If there were a
2 petition, I'm sure that it would be filed in Federal
3 Orders to eliminate depooling on a month-to-month basis.
4 We would look at that situation very seriously and
5 consider taking a position in support of that.

6 Q. Because some people refer to California as a
7 universal pooling state, basically universal pooling?

8 A. Yes, I would think so.

9 Q. And then a producer who, in California -- the
10 California producer who ships to a California plant, by
11 and large, the plant is subject to pay to the pool
12 whatever the use is for that milk and the producer gets
13 to pay him whether he's got quota or not and overbase
14 price on that milk?

15 A. Let me correct something there. If you're a
16 Grade B shipper and shipping into a pool plant in
17 California, it doesn't matter. If you're shipping in,
18 then you're Grade B.

19 Q. Right. It's a Grade A pooling system?

20 A. Uh-huh.

21 Q. That's a good qualification, I mean, a
22 Grade A shipper. Grade B -- you can't make bottled milk
23 out of Grade B; right?

24 A. Correct.

25 Q. We're talking about a bottle of milk by a

1 quality producer and they ship to a pool plant, and then
2 that sale and that product is part of that marketwide
3 pooling? I mean, the plant pays to the pool based on
4 use and the producer gets his quota with the
5 adjusters --

6 A. Correct.

7 Q. -- and overbase as appropriate?

8 A. Right, unless you're an out-of-state
9 dairyman.

10 Q. I'm going to talk about that in a minute.

11 A. They receive a modified quota price, which is
12 higher than any California producer receives.

13 Q. We'll get to that in a second. But the
14 producer, though, that receives -- the California
15 producer from that plant does receive the benefit of
16 that minimum uniform price, whether it's the overbase or
17 the quota; right? He gets --

18 A. Yes.

19 Q. All right. And although sometimes that
20 overbase may be less than the class, than the plant he
21 goes into, he still gets this fairly steady overbase
22 price that's a benefit; correct?

23 A. Yes. Typically most of the plants have some
24 type of premium structure associated with that as well.

25 Q. And producers -- there are some producers and

1 some operations that have very little quota; right?

2 A. That's correct.

3 Q. And they subsist almost entirely on that
4 overbase price?

5 A. That's correct.

6 Q. Plus if they get any premiums or premium
7 checks --

8 A. Yes.

9 Q. -- that's a benefit?

10 Now, you mentioned that the non-California
11 shipper who's bottling milk and he ships it into a pool
12 plant in California is entitled to a higher price; is
13 that right?

14 A. Yes, that would be correct. It almost
15 inevitably ends up in the bottle.

16 Q. And that would be a benefit to that producer;
17 right?

18 A. It could be, depending upon what his blend
19 price is and what his situation is in his individual
20 Order.

21 Q. Now, I want to kind of move on here to
22 another issue here.

23 In California, the producer has a right to
24 choose the market that he wants to go to?

25 A. Well, actually, let me just touch -- just

1 clarify on that just a little bit.

2 Of course, we have had predatory entities
3 establish operations just outside the borders of
4 California in order to take advantage of California's
5 lucrative Class I market. And, of course, we're working
6 with Congress in an attempt to make sure that that
7 predatory behavior is halted.

8 Q. Right. But I'm not talking about the plant.
9 I'm talking about a producer who's located in Arizona,
10 Nevada, or Oregon, Northwest, and ships their milk into
11 California can negotiate potentially a higher price than
12 a California producer?

13 A. Sure.

14 Q. It's a benefit to that producer to do that if
15 it's greater than his blend would get --

16 A. Yes. We have no authority to regulate
17 interstate commerce. The handler ultimately pays the
18 producer.

19 Q. Let's move into another topic.

20 You would agree, under the California system,
21 the producer still has a right -- they get to choose
22 plants that they go into and co-ops that they're a
23 member of; right?

24 A. Yes.

25 Q. And that's an important right to a producer;

1 right?

2 A. Oh, yes, I would think so.

3 Q. Now let's talk a minute about the PD status.
4 WUD, I mean, they took the time to bring you here to
5 testify because it's very important to them; right?

6 A. Sure.

7 Q. And WUD is a producer organization and you've
8 got other people on your staff, economists and others,
9 to assist you in making your testimony, in addition to
10 the board telling you what to say?

11 A. Right.

12 Q. But you have economists, for example, that do
13 research and the like; right?

14 A. Yes. And we also gather information from
15 other sources as well.

16 Q. That's very important to know what you're
17 talking about?

18 A. Helps.

19 Q. It helps?

20 A. Certainly.

21 Q. Now, when you look at the producer-handler
22 situation, a producer-handler competes with a co-op;
23 right?

24 A. I would think so, but, of course, as a
25 co-operative member, he also has a significant

1 investment in his co-operative, and after doing balance
2 sheets for a number of different dairy operations, it's
3 clear that those investments do show up.

4 Actually, I think most co-operative members
5 stake all of their financial risk in their operations
6 with regard to both their processing side, as well as
7 their production side of their operation.

8 Q. I understand.

9 But the point is, a PD does compete with a
10 co-operative in terms of marketing milk to that fluid
11 handler; right?

12 A. I'm sorry?

13 Q. There is competition between a
14 producer-handler and a co-operative that supplies the
15 fluid market?

16 A. The producer-handlers supplying -- putting
17 the milk in the bottle?

18 Q. Right. The co-operative is selling it to a
19 bottler. Isn't there competition there?

20 A. There might be, Ben. But I would more see it
21 between bottler and bottler. You know, you have a
22 regulated price in one instance and then you have a tilt
23 to the advantage of the producer-handler on the other
24 with regard to an unregulated price.

25 Q. I just want to get -- you agree, then, that

1 there is a competition with the plant? I mean, it's a
2 plant-to-plant competition?

3 We'll just move on. I'm not going to --

4 A. Well, perhaps.

5 Q. Perhaps?

6 A. Yeah.

7 Q. Okay. Now, when you did the research to make
8 your statement, as you did yesterday, about the
9 producer-handlers, did you do any impact analysis on
10 producer-handlers as a result of this change in
11 regulations?

12 A. I have one software package which is an
13 econometric models software package, and we did not do
14 any models and substitute any additional variables with
15 regard to determining an impact on producer-handlers in
16 Federal Orders. If you've got some that are prepared,
17 I'd be anxious to look at it.

18 Q. Okay. Did you do any -- forget the real
19 fancy econometric models. Did you do any simple
20 analysis to see what the actual impact between a blend
21 and a class price would be to PDs?

22 A. My assumption, Ben, would be that it would
23 increase the acquisition cost to the producer-handler,
24 provided he exceeded the cap, and then would be
25 regulated under the system.

1 Now, of course, what that would mean would be
2 that that would put him on a level playing field with
3 his competition.

4 Q. You say "a level playing field." Why is it
5 unlevel as it is now?

6 A. We have a regulated price and an unregulated
7 price.

8 Q. And what does that mean?

9 A. Well, you have Class I prices -- let me use a
10 California example.

11 Q. Okay.

12 A. You have a Class I price established in
13 California based upon the formula I include within the
14 California Marketing Order, and that price is a
15 regulated price that handlers of milk are required to
16 pay into the pool or account to the pool, typically.

17 Sometimes there's some payment into the pool,
18 but it depends upon what the other classes of milk are
19 doing. But there is an accounting function that takes
20 place regardless for a Class I price. A
21 producer-distributor/producer-handler in California, of
22 course, has no accountability at all except to himself.

23 Q. Now, but he also has -- would you agree that
24 he has an obligation to be profitable on a long-term
25 basis?

1 A. I would hope so. Clearly with the caps we've
2 had in place in California, they have been profitable.

3 Q. But the point is that, if they're not
4 profitable, you don't have to regulate them? Then the
5 unprofitability will take care of itself in time; right?

6 A. I would agree with that.

7 Q. Well, you say, though, that they have to pay
8 that Class I price. If a handler in California pays a
9 Class I price, do they pay, in addition to that,
10 balancing costs?

11 A. Do they pay balancing costs?

12 Q. Yes.

13 A. Pay someone to take your excess milk?

14 Q. Right.

15 A. You know, I don't know.

16 Now, I would assume that a
17 producer-handler -- for example, if you were in a
18 Federal Order and you had the option of belonging to a
19 co-operative also in a state Order, that exists in a
20 state Order, or you had another state Order where you
21 could balance yourself, that might be an advantage
22 that no other producer-handlers that I'm aware of in
23 California would have, so I'm not certain exactly what
24 that transaction cost might be.

25 Q. In your analysis, when you say that it's not

1 a level playing field, you don't know, in fact, that a
2 producer-handler has all the advantages? He has other
3 costs associated with his transaction that a regular
4 handler doesn't have that would narrow, if not
5 eliminate, that advantage; is that correct?

6 A. I wouldn't surmise that at all.

7 Q. All right.

8 A. The price is unregulated, Ben.

9 Q. But he has the cost of production in his
10 farm; right?

11 A. Certainly.

12 Q. He has the cost of -- cost to transport it to
13 his dairy or processing plant?

14 A. By the way, I wanted to make a point.

15 Yesterday, my colleagues from California
16 indicated perhaps I hadn't been completely clear, but
17 production costs included in the California Dairy
18 Bulletin, that's based on an index -- that's that
19 publication that comes out -- rather than the actual
20 numbers with regard to production, so I was hoping to
21 make that clear.

22 Q. But the point is, whether it's an -- I mean,
23 that number, whatever it is -- but a farm has real costs
24 producing milk. It has real costs operating the plant.
25 And have you done any analysis to know what those costs

1 are at that plant?

2 A. That's available through CDFFA.

3 Q. No. Do you have any analysis of a PD to
4 know, for example, how much less they paid for their
5 acquisition of their milk than the bottlers that they
6 compete with?

7 A. No.

8 Q. Do you know how much they sell their milk to
9 their stores for, however they distribute it, as
10 compared to the bottlers?

11 A. No.

12 Q. All right. Isn't that the kind of
13 information that would tell the Secretary that there in
14 fact is a difference, that there's an advantage?

15 A. I wouldn't think so. I think clearly, just
16 by the prima facie, the fact that you have an
17 unregulated island in a sea of regulation should clearly
18 lay that out.

19 You know, as you're well aware, Ben, in the
20 not too distant past in California, we had some
21 experiments with regard to deregulation of the energy
22 industry, the Wilson administration. That did not end
23 up very positive for Californians.

24 Q. I know nothing about that. I'm not about to
25 ask any questions about that. But let's talk, though,

1 about the point.

2 When you talk about this advantage, if there
3 was an advantage, isn't it true that businessmen seeking
4 to profit are going to move to what's most profitable?
5 Isn't that almost a given in any industry?

6 A. Certainly. In many industries -- well, some
7 industries are actually regulated. When you have one
8 segment of the industry that's regulated and one segment
9 of the industry that's not, that's an unfair competitive
10 advantage.

11 Q. Well, let's talk --

12 A. Regulatory loophole.

13 Q. If one of them is unregulated, and you're
14 suggesting that, per se, because it's unregulated it has
15 an economic advantage, as I understand your testimony,
16 per se, being unregulated has an advantage over the
17 regulation; is that correct?

18 A. I would suggest that's the case.

19 Q. If that is the case and you talk about
20 empirical evidence, wouldn't you see more and more and
21 larger and larger PDs throughout the Federal Order
22 system?

23 A. And I think we are.

24 Q. And where are you seeing those?

25 A. Here in Arizona, you've had unabated growth

1 of the producer-distributors within this Order that has
2 grown phenomenally and taken advantage in a predatory
3 nature of markets here in the state of Arizona.

4 Q. Let's move on.

5 How about in the Northwest? How many new PDs
6 have started up in the last 10 years?

7 A. You know, I don't recall, Ben, but I think I
8 saw some information in one of the exhibits that
9 indicated that the percentage of the shared Class I
10 markets in the Pacific Northwest had grown -- held by
11 PDs had grown by about 20 percent or so within the past
12 five years. I could be mistaken, but I think I saw
13 something like that in the exhibit.

14 Q. I think if you were to look at the exhibit
15 that was put together, you'll see that the percentage of
16 route distributions PDs have and the total sales have
17 declined.

18 A. I may be mistaken. I seem to recall that.

19 Q. They've declined. But the differences are
20 a percent here or there; right? It went -- even in your
21 thinking, it went from 9 and a half to 10 percent or 8
22 and a half to 10 percent?

23 A. Yeah, but that's 20 percent.

24 Q. I don't know that -- I think that number,
25 we'll find that out later with some other witnesses.

1 A. Okay.

2 Q. But you don't see any new PDs; right?

3 A. I really don't know.

4 Q. What about -- you say that there's this
5 advantage and the Federal Order system is more than just
6 Arizona and the Pacific Northwest; right?

7 A. Yes.

8 Q. So are you aware, for example, in the
9 Southwest, New Mexico and Texas, how many PDs are there?

10 A. No. But I do recall you telling me at one
11 point, Ben, that you had a client that might be
12 interested in taking advantage of this and you were
13 keeping your options open for your client, and I believe
14 that was near the Chicago area.

15 Q. I never made any statement like that.

16 A. Something like that.

17 Q. I'm not even going to testify to that one.
18 But that's not --

19 A. I'm testifying.

20 Q. Huh?

21 Is there anybody making a PD up there? I
22 think that's your supposition.

23 A. Yeah.

24 Q. Because I don't even know what their
25 intention is in that regard.

1 What about in the Southwest and New Mexico?

2 Answer the question. In the Southwest, how
3 many PDs are there?

4 A. I really can't tell you.

5 Q. There's one, isn't there?

6 A. I have no idea.

7 Q. And the size of that PD has dropped; right?

8 A. I have no idea, Ben.

9 JUDGE HILLSON: Let's start talking -- you
10 guys are talking over each other.

11 MR. YALE: I apologize, Your Honor.

12 Q. BY MR. YALE: The point is that, if you make
13 this statement that this has this unfettered advantage
14 and PDs are breaking out like the measles all over the
15 body and face of the Federal Order map and you come up
16 with one PD in one state, right, and you haven't done
17 any analysis, there's 11 Orders here and you can't
18 identify any other Order where there's a single growth
19 of PDs in that area; right?

20 A. Well, you've mischaracterized my testimony.
21 I don't believe I said anything about measles breaking
22 out all over Federal Orders or anything like that.

23 Q. Right.

24 A. But what I have indicated in my testimony is
25 that the unabated growth of PDs clearly is a threat to

1 the entire system.

2 Q. All right. But you say they're unabated, and
3 yet, if they're unabated and there's a regulatory
4 advantage or an advantage to be unregulated in this
5 environment, then you would agree that there ought to be
6 more people taking advantage of it and growing it, and
7 you can only identify one particular instance where
8 that's occurring; right?

9 A. Ben, I haven't identified anyone. You
10 identified someone.

11 Q. You said it happened in Arizona. You say
12 that there's a situation in Arizona.

13 A. I'm sorry. I thought you were talking about
14 the fellow in New Mexico.

15 Q. Right. So you don't know of any others?

16 A. I'm not certain --

17 Q. Okay.

18 A. -- except in the Pacific Northwest, where
19 there has been some growth, actually a 20 percent
20 increase, I believe, from the data that was presented
21 earlier in the growth of those producers' share --
22 producer-handlers' share of Class I.

23 MR. YALE: One moment, please.

24 Your Honor, we have an exhibit we'd like to
25 have identified. I think it would be No. 20.

1 JUDGE HILLSON: Right. 19 was withdrawn.

2 (Exhibit No. 20 was marked for identification
3 by the reporter.)

4 JUDGE HILLSON: Mr. Yale, I'm going to call
5 for a short five-minute recess. A lot of people are
6 scurrying around.

7 MR. YALE: That's fair.

8 JUDGE HILLSON: I'm going to call a
9 five-minute break.

10 (Recess at 9:23; resumed at 9:33.)

11 JUDGE HILLSON: Let's go back on, Mr. Yale.

12 MR. YALE: Thank you, Your Honor.

13 Q. BY MR. YALE: Mr. Marsh, I have in front of
14 you an exhibit that we've marked as Exhibit No. 20.
15 It's entitled "Northwest Producer Handlers Table 3,
16 Pacific Northwest Marketing Area - Federal Order Number
17 124."

18 A. You gave me three pages.

19 Q. They're all the same.

20 A. Are they all the same one?

21 Q. Yeah. That's part of the four copies we
22 provided.

23 Now, also, you need to have -- I apologize.
24 I should have done this -- Exhibit 5, I think, and
25 Table 11.

1 Can we have the availability of that?

2 JUDGE HILLSON: I have one sitting here.

3 I'll give it to him.

4 Q. BY MR. YALE: Now, Mr. Marsh, if you'll
5 notice --

6 Let's look at Exhibit 5, Table 20.

7 A. Okay. Exhibit 5.

8 Q. Table 11. I'm sorry.

9 You will notice that it has --

10 A. Just a minute, Ben.

11 Q. I'm sorry.

12 A. Okay. Which page? 36 or 37?

13 Q. Wait a minute.

14 Page 36.

15 A. Okay.

16 Q. If you would look at Table 11 --

17 A. Uh-huh.

18 Q. -- and notice in January of 2000 that the
19 Class I in-area producer sales was 18,104,179.

20 Do you see that?

21 A. Yes, that's what the document says.

22 Q. Okay. And then if you look in January of
23 2003, and what is that number?

24 A. January 2003 says 18,486,595 on the copy I
25 have --

1 Q. Okay.

2 A. -- in the same column.

3 Q. In the same column.

4 You'll notice there's a slight increase, is
5 that correct, from 2000 to 2003?

6 A. Between those two numbers?

7 Q. Yes.

8 A. Yeah. It's 300,000 pounds between those two
9 numbers.

10 Q. Look in February --

11 A. 380 or so.

12 Q. Look in February of 2000 and February of
13 2003.

14 A. Okay.

15 Q. What do you see there?

16 A. There's a difference between those two
17 numbers of 1.- -- I don't have my calculator with me --
18 one point some million pounds.

19 Q. Which would indicate a reduction?

20 A. Between those two numbers, it appears that
21 that would be correct.

22 Q. Of course, in all fairness, 2000, February of
23 2000 was 29 days.

24 A. Yes, that is correct.

25 Q. I think my --

1 A. Yeah.

2 Q. And then you have 28, so that would have some
3 account for that; right?

4 A. Could, yes.

5 Q. It should?

6 A. Yeah.

7 Q. So look at March of 2000 and compare that
8 with March of 2003.

9 A. Okay. 19,987,828 versus 17,854,015.

10 Q. Okay. Now, to kind of help you, I just
11 wanted to show you kind of the methodology. If you
12 would look at my Exhibit 20 that we have --

13 A. This was prepared by you?

14 Q. Yeah, this was prepared by our clients.

15 A. I see.

16 Q. And if you will note in those columns under
17 2000, the column 2000, and compare that with under the
18 column Class I In-Area by Producer-Handlers on page 36
19 for the year 2000, those numbers should correspond.

20 A. Okay.

21 Q. I'm not trying to give you trick questions.

22 A. Yeah. No.

23 Q. And the methodology -- you'll see the same
24 thing in the next column of 2001 -- should match 2001.

25 A. Yes. And clearly this is not the exhibit I

1 was referring to when I testified earlier --

2 Q. I know it's not.

3 A. -- that it was a 21 percent increase. That
4 came from Exhibit No. 7, Ben --

5 Q. Right. That was --

6 A. -- this Table 1 where you had an increase in
7 the producer-handler share from 1999 to 2001 of
8 21.62 percent in the Pacific Northwest Order. You went
9 from 8.6 percent to 10.46 percent, which, you know, I
10 said about 20 percent. 21.62 is a little closer --

11 Q. All right. If --

12 A. -- which is pretty significant growth --

13 Q. What is significant?

14 A. -- for some period of time.

15 Q. That's a good point. Let's look at that
16 table. This is Table 1 on Exhibit 7; right?

17 A. Yes.

18 Q. Okay. Compare that with -- well, this also
19 jibes and uses the same total Class I sales as those
20 that are in Table 11?

21 A. Yes. What it clearly shows is that --

22 MR. MARSHALL: Your Honor, let me interpose
23 an objection at this point. Doug Marshall with
24 Northwest Dairy Association objecting.

25 Objection on the grounds that this is

1 argumentative, and it's also going to delay the hearing
2 if Mr. Yale insists on putting in his exhibits through
3 other witnesses who aren't familiar with them. He's
4 trying to impeach the witness. The witness has
5 explained the basis for his own statement that's being
6 impeached. At this point we're just arguing on the
7 record.

8 JUDGE HILLSON: Well, I'm going to allow the
9 question. He hasn't offered the exhibit into evidence
10 as it is at this point.

11 MR. MARSHALL: Thank you, Your Honor.

12 Q. BY MR. YALE: Mr. Marsh, let's look at this
13 Exhibit 20 and you can do the checking.

14 A. Is this one that's been entered into
15 evidence?

16 Q. No, for identification, and it's really to
17 help you with your math, okay?

18 A. Thank you, Ben.

19 Q. Because you don't have a calculator and
20 somebody out here's got a calculator and I'm sure
21 somebody's checking it, and if there's any errors, it's
22 going to be identified before the end of this hearing.

23 But you'll notice if you compare with
24 Table 11 the class area for 2000, 2001, we did the same
25 thing for 2002 and 2003, so that you can do that

1 month-to-month comparison I was talking about. We can
2 do it without shifting pages. This is the purpose of
3 this table, okay?

4 A. Okay.

5 Q. And if you look comparing month to month from
6 the year 2000 to the year 2003, there have, in all
7 fairness, been a couple months in which the amount of
8 milk in this producer-handler in the area has been about
9 2 percent higher than it was in 2000 -- do you see
10 that? -- but there's also been months where it's been as
11 much as 10 percent or less.

12 A. Yeah. You know, I didn't prepare this
13 document, so I can't --

14 Q. I know you didn't prepare that document.

15 A. I can't attest to the accuracy of your
16 calculations, Ben.

17 Q. And --

18 JUDGE HILLSON: Is the person who prepared
19 the document going to be testifying?

20 MR. YALE: We will have somebody to testify
21 to get this into the record. The numbers, Your Honor,
22 are straight out of the table that's already been
23 admitted. This is a recompilation of numbers already in
24 the exhibit.

25 THE WITNESS: Ben, I don't see the

1 percentages indicated on this Table 11.

2 Q. BY MR. YALE: What I want to point out to
3 you, and let's look at this and then we'll talk about
4 why your Table 1 and this Table 20 shows a difference,
5 is that what this Table 20, and if you look at
6 Table 11 -- forget Table 20 -- or Exhibit 20. Look at
7 Table 11.

8 If you do the comparison, you see, going from
9 one month of January of 2000 to January of 2003 and do
10 it month to month, and even going back into 2002, that
11 the percentage of producer-handler milk that's in-area
12 sales, the total of Class I milk in-area sales has
13 declined if you look at Table 11.

14 Now --

15 A. Would that also mean, then, that Class I
16 sales have declined in the Marketing Order? Because as
17 Table 1 on Exhibit 7 would indicate, you've got
18 21.62 percent increase in the market share for
19 producer-handlers over a period from 1999 to 2001 in the
20 Pacific Northwest Order.

21 Q. But you also, from 2000, went from
22 10.43 percent to 10.08 percent; right?

23 A. Yes, that's correct.

24 Q. So what?

25 A. Excuse me. That would be a 16.3 percent

1 increase.

2 Q. Right. But the trend since 2000 has been
3 down; right?

4 A. Yes. But I wish my mutual funds during that
5 period of time had done that well.

6 Q. The trend has been down.

7 The point is, when you look at the hard
8 numbers and, actually, on a month-to-month comparison,
9 the percentage in this Order 124 of Class I in-area
10 sales by producer-handlers has not grown unabated; is
11 that right?

12 A. I would disagree with you. It has grown
13 significantly over that period of time. Whether or not
14 some of the attrition that you're displaying here with
15 regard to this total sales is due to a decline in
16 Class I sales, I don't have that information. I've not
17 looked at that information.

18 Q. All right. Look at Table 11. What is the
19 June volume of Class I in-area sales by
20 producer-handlers?

21 A. Okay. I'm sorry. What were the dates again?

22 Q. Table 11, June 2000.

23 A. Table 11, June 2000, it says 18,783,027.

24 Q. Right.

25 What is it in June of 2003, Table 11?

1 A. 16,771,677.

2 Do you want to go through every one of these
3 numbers, Ben?

4 Q. No. I just want to look at those two.

5 A. Okay.

6 Q. Is that growth?

7 A. That does not appear to be growth.

8 Let me look at -- you also had a significant
9 decline between June of 2000 in Class I in-area by pool
10 plants from 152 to 147, I believe, so there's a pretty
11 significant decline there as well in total Class I
12 in-area by pool plants as well.

13 Q. All right. Look over in your Class I in-area
14 by other plants. What's going on there from 2000 to
15 2003?

16 A. It looks like you've had a choppy continued
17 growth.

18 Q. All right. Where is the bulk of those --
19 what are the sources of the bulk of that Class I milk
20 that was in-area sales?

21 A. I have no idea.

22 Q. I think, if you'll look, most of the plants
23 that supply, partially regulated or other plants, are
24 from California; right?

25 A. I have no idea.

1 Q. All right. And so that the reduction by
2 Class I processors by this table shows not by the
3 producer-handlers growing -- they're going down -- but
4 it's out-of-state milk coming in that's eroding into the
5 Class I market; right?

6 A. Actually, the total numbers are significantly
7 off, Ben. If you look at that period that you indicated
8 for in-plant usage for Class I, if we're going from 152
9 to 147 on the Class I side and a 2 million-pound
10 difference showing up in other plants and, actually,
11 that being -- you know, you'd have to look over the base
12 period again for other in-plant -- Class I in-area by
13 other plants. I think you would see an attrition in
14 Class I sales, perhaps, rather than what you seem to be
15 trying to testify to.

16 I'm sorry. You're not testifying.

17 Q. I'm going to ask you the question.

18 JUDGE HILLSON: Mr. Marsh, let's just try to
19 respond to questions.

20 Q. BY MR. YALE: And the question -- well, we've
21 asked it. I think the document shows that there's this
22 growth.

23 Now, you did indicate that there is a --
24 well, let me back up.

25 There was a question, I think, asked

1 yesterday, I think, by maybe Ms. Deskins, one of them
2 from the government, that says, "Isn't the regulatory
3 environment a cost that keeps PDs from growing? It
4 creates its own cap."

5 Do you recall anything like that?

6 A. I'm not sure. Regulation, in a number of
7 respects, can at times limit growth of business. We see
8 it in California with regard to worker's compensation
9 and higher taxes and those types of things, which by the
10 way, we have a bright line on with regard to tax rates,
11 as we do in many other areas of government. But I'm not
12 sure I recall clearly that question.

13 Q. All right. We've identified one market where
14 there's been a significant growth of a PD, and that's
15 Arizona?

16 A. And I would assert also in the Pacific
17 Northwest Order based upon the amount of the
18 producer-handler share growing significantly from 1998
19 to 2002 -- or from 1999 to 2001.

20 Q. But the drop from 2000 to 2003 is not growth?

21 A. I would have to look and actually do some
22 calculations.

23 (Brief interruption.)

24 Q. BY MR. YALE: All right. So let's take a
25 look.

1 In Arizona, you're making the comment that
2 there's an unabated growth of a PD in Arizona; is that
3 right?

4 A. Absolutely.

5 Q. All right. Now, there's been discussion by
6 Mr. Depee and some others about the cost of balancing an
7 operation, right, of a PD?

8 A. Yes.

9 Q. All right. And they have to unload their
10 milk and sometimes it may be cheaper prices. That
11 reduces the benefit of the PD; right?

12 A. I think that that was some of the testimony.
13 I'd have to look at the transcript.

14 Q. Now, in the situation -- what is your
15 understanding of the PD in Arizona, how it balances
16 itself?

17 A. My anecdotal information that I received is
18 that they're balancing themselves either against the new
19 plant they built in Yuma or against another co-operative
20 to which they're a member in California.

21 Whether or not -- I don't have any firsthand
22 knowledge of either, but that's my understanding.

23 Q. If they were a California producer --

24 They have a farm in California and they sell
25 some of that milk to a cheese plant in California?

1 A. Correct.

2 Q. -- they would be entitled to the minimum
3 overbase price under the California Order; right?

4 A. Well, modified by any quota they might have.

5 Q. That's right. But they'd be entitled --

6 A. Correct.

7 Q. So that would be a benefit to them; right?

8 A. It could be, yes.

9 Q. All right. And there's also evidence, you're
10 indicating, that maybe milk comes from Arizona through a
11 co-op and goes to Class I in California and they get
12 this modified quota price or whatever for out-of-state
13 milk; right?

14 A. Very well could, yes.

15 Q. And that's a benefit to them; right?

16 A. Certainly.

17 Q. All right. Isn't it true, Mr. Marsh, that
18 those circumstances provide that PD a balancing
19 opportunity in a situation that's not available anywhere
20 else in the country?

21 A. That's beyond the scope of my knowledge, Ben.

22 Q. You have no knowledge of that?

23 A. No, I don't. I think it is probably unique,
24 though, in the extraordinary nature, given the growth of
25 the PD.

1 Q. And it's unique in its location; right?

2 A. On the Mexican/California border with
3 Arizona --

4 Q. And to be able to take advantage --

5 A. -- as far as I know.

6 (Brief interruption.)

7 JUDGE HILLSON: Excuse me. You guys are
8 doing it again. I've got to ask you, you know, to just
9 try to talk one person at a time.

10 THE WITNESS: Yes.

11 JUDGE HILLSON: I'm talking to both of you.

12 MR. YALE: I understand, Your Honor. I get
13 excited.

14 JUDGE HILLSON: You're both doing it. One at
15 a time. Try to relax.

16 MR. YALE: Mike and I have conversations over
17 the phone all the time, and this is the way it goes, so
18 I guess we've got to stop that for today.

19 Q. BY MR. YALE: I guess it's a unique location
20 with the ability to use a state pool to be able to go
21 into Mexico as an allocation. Having the PD, that's a
22 unique location; right?

23 A. It could be. I don't know with regard to
24 Canada. If you have somebody in the Pacific Northwest,
25 you could probably also go into California or into an

1 unregulated area in Idaho.

2 Q. The only one we're aware of is this one;
3 right?

4 THE REPORTER: Is that a no?

5 THE WITNESS: No. I just shrugged my
6 shoulders. I'm not sure.

7 Q. BY MR. YALE: If the evidence were to show
8 that it's a fact that it can use the state system to its
9 advantage, is it your request that the Secretary do
10 what's necessary to see that that handler, that
11 producer-handler doesn't take advantage of the state
12 system vis-a-vis the Federal Order?

13 A. We would -- my board of directors gave me
14 direction to support both petitions/proposals by NDA and
15 UDA.

16 Q. If the Secretary finds that the presence of
17 the California pricing as regards this producer is
18 irreconcilable with its policies of the PD, should the
19 Secretary modify the California system to allow the
20 producer not to take advantage of that?

21 A. I'm not sure how the Secretary would modify
22 the California system. We're a California Marketing
23 Order.

24 Q. It could deny him the ability to be an
25 overbase, right, take that advantage?

1 A. Ms. Veneman or Mr. Lyons?

2 Q. Yeah. Yeah.

3 A. I'd have to think on that, Ben. Yeah, I
4 don't know the answer to that right off the top of my
5 head.

6 MR. YALE: All right. Your Honor, I really
7 have come to the end of the questions. Thank you.

8 JUDGE HILLSON: Thank you.

9 Who's next?

10

11

EXAMINATION

12 BY MR. RICCIARDI:

13 Q. I'm Al Ricciardi, Mr. Marsh, on behalf of
14 Sarah Farms.

15 Can I borrow the statement back from you
16 again?

17 Mr. Marsh, if at any time you think you need
18 this prepared testimony, you'll let me know and I'll
19 provide it to you. Is that okay?

20 A. Okay.

21 Q. As I understand it from your written
22 statement, you're not an expert on the Federal Order
23 system; correct?

24 A. That's correct.

25 Q. And you're not here to give any testimony,

1 and to the extent that there was any trying to elaborate
2 on specific data, you didn't mean to do that?

3 A. I think that's what my testimony says.

4 Q. Okay. Your board of directors has authorized
5 you to come in and testify; correct?

6 A. Yes.

7 Q. Is your board of directors paying the cost of
8 your transportation here?

9 A. Yes.

10 Q. Is your board of directors --

11 A. Excuse me. Our association is.

12 Q. Okay. Is the association being reimbursed by
13 any of the proponents here for anything?

14 A. No.

15 Q. You gave some testimony, and I wrote it down
16 to make sure I got it right. You said something about
17 making sure to stop predatory behavior, something like
18 that.

19 Did I misstate your testimony?

20 A. I think you're paraphrasing.

21 Q. I am.

22 A. Yeah, I don't think you're too far off.

23 Q. All right. If there was predatory behavior
24 on behalf of a large co-operative, you'd want to stop
25 that behavior too; correct?

1 A. It would depend whether or not it was
2 creating market instability and whether or not, of
3 course, that co-operative was in an unregulated
4 situation, growing unabated, and clearly disrupting the
5 balance of the marketplace.

6 Q. So is your testimony that predatory behavior
7 is okay as long as it doesn't disrupt the marketplace?

8 A. I think that folks looking for regulatory
9 loopholes in which to operate is the nature of the
10 business, and this is a regulatory loophole that clearly
11 needs to be closed with regard to producer-handlers'
12 intentions.

13 Q. Let me see if I can ask my question so that
14 you can answer it.

15 A. Yeah, go ahead.

16 Q. Is it your testimony that predatory behavior
17 is okay if it doesn't disrupt the marketplace?

18 Yes or no?

19 A. It depends. I don't have a yes-or-no answer
20 for you, Mr. Ricciardi.

21 Q. So predatory behavior can be okay in some
22 circumstances and not be okay in some circumstances;
23 correct?

24 A. Certainly.

25 Q. So predatory -- and it wouldn't depend on

1 whether it was a co-operative; correct?

2 A. You're just limiting this to dairy?

3 Q. Yeah.

4 A. Okay.

5 Q. It wouldn't depend on whether it was a
6 co-operative that was predatory?

7 A. No. My board is made up of proprietary
8 shippers as well as co-operative shippers.

9 Q. Do you -- strike that.

10 One of the proponents apparently supporting
11 the proposals is the Dairy Farmers of America?

12 A. Yes.

13 Q. Do you support Dairy Farmers of America?

14 A. With regard to --

15 Q. Anything.

16 A. I have two members on a 19-member board that
17 I believe ship to Dairy Farmers of America.

18 Q. Your board of directors would support DFA?

19 A. That's their co-op. They made a significant
20 investment in their co-op in order to be members of
21 their co-op.

22 Q. So the answer is yes?

23 A. I would assume so.

24 Q. Are you sure?

25 A. I'm not -- I don't speak for my individual

1 board of directors. I speak with regard to board
2 policy.

3 MR. RICCIARDI: I have someone on my right
4 shoulder.

5 MR. BESHORE: Marvin Beshore.

6 It's apparent Mr. Ricciardi is about to go
7 down a path of unknown direction or duration with
8 respect to DFA, which is not -- who is not a -- which is
9 not the subject of any proposals here or anything else.
10 I mean --

11 JUDGE HILLSON: That's not apparent to me at
12 the present time. It sounded to me like he was
13 inquiring on the use of the word "predatory," which was
14 used by Mr. Marsh a number of times in his testimony,
15 and I think he's entitled to follow up on some on that.

16 MR. RICCIARDI: If it's apparent to
17 Mr. Beshore, it's not apparent to me yet, and I will go
18 forward, Your Honor. Thank you.

19 Q. BY MR. RICCIARDI: Is it your opinion,
20 because I heard this a number of times, that
21 deregulation of an industry is bad?

22 A. It depends.

23 Q. Would you agree with me that, for example,
24 the deregulation of the airline industry has effectively
25 assisted consumers in that they're paying cheaper prices

1 for airfare?

2 A. I think my analogy was with regard to the
3 deregulation of the energy industry in California. And,
4 also, since we are talking about milk, having some folks
5 regulated with minimum price requirements and some folks
6 not --

7 Q. Let me stop you there. Let me stop you
8 there.

9 A. I thought you were asking me to answer your
10 question.

11 Q. No. I asked you a specific question. I
12 listened to you not answer Mr. Yale's questions and give
13 speeches, and I'm not going to allow that in my
14 cross-examination.

15 My question was, would you agree with me that
16 with regard to the deregulation of the airline industry,
17 that has assisted consumers in that they're paying a
18 cheaper price for fares?

19 A. It depends.

20 MR. BERDE: I'm going to object to this line
21 of questioning. It is off the wall. If we're going to
22 get into the question of whether or not economic
23 regulation is appropriate in an array of industries,
24 that has nothing to do with the issues presented at this
25 hearing.

1 This unduly prolix examination will take us
2 into next month and the month afterwards. It's totally
3 inappropriate to inquire of this witness concerning
4 economic regulation of industries that have nothing to
5 do with the issues here.

6 MR. RICCIARDI: Thank you very much for the
7 pause.

8 The fact is that this witness made an analogy
9 and specifically in his testimony indicated that he was
10 talking about the regulation -- or deregulation of the
11 energy market in California, and my cross-examination is
12 fair and appropriate under the circumstances.

13 JUDGE HILLSON: I think maybe his direct
14 testimony went a little bit beyond the bounds. I really
15 don't want to hear what Mr. Marsh thinks of each and
16 every individual program that is worthy of regulation or
17 not that you can name.

18 I'll let him answer this question only on
19 this issue; otherwise, let's focus on milk and milk
20 marketing, which is what we're here for today.

21 As you pointed out, Mr. Marsh has tended to
22 go a little bit beyond the questions that have been
23 asked of him, and I understand the point you're making.

24 So, Mr. Marsh, you might want to try to focus
25 on answering the questions that are asked of you.

1 And I'll let him answer this one question,
2 but I don't want you to go any further on this line
3 unless you're going to talk -- let's talk about the
4 issues we have here. He went beyond in his direct. I
5 don't think the administrator's going to care a whole
6 lot about Mr. Marsh's opinion on airline deregulation.

7 MR. RICCIARDI: I've got one question in
8 front of him, Judge. If I get an answer, I'm ready to
9 move on.

10 THE WITNESS: As I answered previously, it
11 depends.

12 Q. BY MR. RICCIARDI: Is the unabated growth of
13 Dean Foods a risk to any of the Federal Orders,
14 including 131 and 124?

15 A. I think clearly it appears, based upon
16 discussions we've had at our board of directors, that
17 concern has been expressed by a number of producers
18 about consolidation in the industry, whether it be at
19 the producer level or if it's at the processor level.

20 Again, as I discussed earlier, it's good to
21 have competition in the marketplace and, of course,
22 provided that that competition is playing on a level
23 playing field with everyone paying a price.

24 Q. Is the unabated growth of Dean Foods a risk
25 to Order 131 or Order 124? Yes or no.

1 MR. ENGLISH: My name is Charles English, and
2 I object to the question with no foundation with this
3 witness, and if the attorney wants to handle this with
4 other witnesses, he can, but I do think if we're going
5 to ask every single witness questions about every single
6 company -- again, there are witnesses.

7 These proceedings with cross-examination are
8 designed not to be repetitive and not to ask every
9 single witness who doesn't have information about every
10 company questions forever. And I think this question
11 has no foundation and is inappropriate at this time.

12 MR. RICCIARDI: May I be heard, Judge?

13 JUDGE HILLSON: You may.

14 MR. RICCIARDI: You heard this witness opine
15 on everything. He has opined on every issue that he
16 wants to when it's, of course, their side, and without
17 foundation, by the way. When it's toward their side,
18 it's okay.

19 I'm asking a particular question. I'm
20 entitled to probe his bias, quite frankly, and also I'm
21 entitled to probe his information. That's a fair
22 question and it needs to be answered.

23 JUDGE HILLSON: I'm going to allow the
24 question.

25 Once again, I'm going to ask you -- you know,

1 we're getting very verbose here today, it seems, on all
2 sides, and I'd like you to focus on answering the
3 questions. If he asks you a yes-or-no question or if
4 it's "I don't know," maybe you should just try to limit
5 it to that, and then we can maybe move a little faster.

6 Q. BY MR. RICCIARDI: Do you want the question
7 repeated or do you want me to do it again?

8 A. I believe that Dean Foods has grown very
9 large, and I think that my board of directors, as I've
10 indicated earlier, have expressed concern about
11 consolidation both at the producer level as well as at
12 the processor level. That consolidation would include
13 Dean Foods.

14 Does that answer your question,
15 Mr. Ricciardi?

16 Q. No, it doesn't, but I'll ask another one.

17 Is the board of directors concerned about the
18 unabated growth of Dairy Farmers of America?

19 A. They've never expressed that to me.

20 Q. Do you believe that the unabated growth of
21 DFA is a risk to Order 131 or 124?

22 A. I don't have any idea.

23 MR. RICCIARDI: No further questions, Your
24 Honor.

25 JUDGE HILLSON: Thank you, Mr. Ricciardi.

1 Anyone else?

2 MR. MARSHALL: Doug Marshall with Northwest
3 Dairy Association. Thank you, Your Honor.

4

5 EXAMINATION

6 BY MR. MARSHALL:

7 Q. Very quickly, with respect to the topic of
8 "predatory," Mike, when you're using that term, are you
9 intending to make any reference to court cases that may
10 have had specific findings about what may or may not
11 constitute predatory behavior, or was that an opinion of
12 a different nature of the term "predatory"?

13 A. It was a different nature, yes.

14 Q. You've been cut off a couple times. Is there
15 anything else that you'd like to say for purposes of
16 this hearing to clarify your testimony?

17 A. I think my board of directors indicated that
18 we are in support of these proposals, and that's the
19 extent of our testimony.

20 MR. MARSHALL: Thank you, Mr. Marsh.

21 THE WITNESS: Thank you, Doug.

22 JUDGE HILLSON: Anyone else?

23 You may step down, Mr. Marsh.

24

25

1 EXAMINATION

2 BY MS. DESKINS:

3 Q. Sharlene Deskins, Mr. Marsh. I just wanted
4 to clarify something that you said.

5 A. Sure.

6 Q. You said that PDs are a threat?

7 A. Yes.

8 Q. And by "PDs," that's producers-distributors?

9 A. Yes.

10 Q. When you made that statement, are you
11 referring to PDs within California or are you referring
12 to any of them covered by the Marketing Orders that are
13 the subject of this hearing?

14 A. Marketing Orders subject to this hearing,
15 producer-handlers.

16 Q. So it would be within the Arizona-Las Vegas
17 and Pacific Northwest Order?

18 A. Yes, that's correct.

19 Q. Can you tell us why you believe they're a
20 threat?

21 A. Well, the growth that they've experienced
22 clearly continues to displace other pool plants and
23 reduces producer income throughout the area Orders in
24 which they are, in which they exist.

25 And, of course, when that happens, you end up

1 shifting milk supply often into manufacturing products,
2 which ends up shifting product back into California. I
3 mean, clearly, we do have a vested interest here as
4 well, shifting milk back into California as well, which
5 lowers our blend price, our overbase price.

6 Q. Now, do you have any members that are located
7 within either of the two Marketing Orders, 124 and 131?

8 A. Yes, I do. I have members that have dairies
9 that are -- they have dairies in California and they
10 also have dairies that are outside of the state of
11 California in these Marketing Orders.

12 MS. DESKINS: I don't think I have any other
13 questions. Thank you.

14 THE WITNESS: Thank you.

15 JUDGE HILLSON: Mr. Marsh, you may step down.

16 (Witness excused.)

17 THE WITNESS: Okay. Thank you, Your Honor.

18 JUDGE HILLSON: Did we want -- I know there
19 were two people who haven't testified today. Could that
20 be after lunch?

21 Should I go with the order we have, which has
22 Mr. Tillison coming in? I'm speaking of Vander Pol and
23 Arbuthnot, which I have listed as "must testify today,"
24 if that's okay to do those later on today. I'm just
25 asking.

1 MR. MARSHALL: Your Honor, Doug Marshall from
2 Northwest Dairy Association.

3 We'd like to call Mr. Vander Pol as early in
4 the day as possible. I think there is time for
5 Mr. Tillison, and his testimony logically follows
6 Mr. Marsh.

7 JUDGE HILLSON: All right. Mr. Tillison,
8 come on up, please.

9 MR. TILLISON: Here is copies of my
10 testimony.

11 JUDGE HILLSON: Raise your right hand,
12 Mr. Tillison.

13

14 JAMES E. TILLISON,
15 a witness herein, having been first duly sworn to speak
16 the truth and nothing but the truth, was examined and
17 testified as follows:

18

19 JUDGE HILLSON: Please state your name and
20 spell it for the record, and you may testify.

21 MR. TILLISON: Thank you, Your Honor.

22 My name is James Tillison, T, as in Tom,
23 i-l-l-i-s-o-n. I'm executive vice president and CEO of
24 the Alliance of Western Milk Producers. The Alliance
25 represents three of California's four major

1 co-operatives. Those co-operatives market and process
2 approximately 60 percent of the milk in California
3 produced by about 1300 producer-owners.

4 I'm appearing here today at the direction of
5 the Alliance's board of directors in support of
6 proposals 1, 2, 3 and 4.

7 Being regulated by a state milk Marketing
8 Order, what happens in surrounding federal milk
9 marketing areas is of great interest to California dairy
10 farmers. That is because they can be, and in fact are,
11 directly impacted by what occurs in those areas.

12 It appears producer-handlers have a
13 tremendous competitive advantage in the marketplace
14 because they're subject to neither minimum pricing, nor
15 do they have a pool obligation.

16 The evolution of the dairy industry, fewer
17 but much larger dairies, has taken the actuality of
18 producer-handlers far beyond what we believe the
19 founding fathers of Federal Orders envisioned when they
20 provided an exemption from pooling for the mom-and-pop
21 dairies that bottled the little milk their cows produced
22 and sold it to their neighbors.

23 Producer-handlers are a major factor in both
24 Order 124 and Order 131 Class I markets. Unless some
25 limitation is put on their size, given the growing size

1 of dairies, new producer-handlers will further
2 negatively impact the competitive balance in Federal
3 Orders which, in turn, can negatively impact producers
4 and processors in areas regulated by state milk
5 Marketing Orders.

6 Specifically, California law says that
7 California Class I prices have to be, quote, in
8 reasonable relationship, end quote, to Class I prices in
9 surrounding markets. California Food and Agriculture --
10 California statute 62062.1 says specifically, "Any
11 designation of a Class I price by any method or formula
12 that is used to develop Class I prices paid to producers
13 in the various marketing areas shall provide on a
14 calendar basis a statewide weighted average minimum
15 price level for a hundredweight of milk testing 3.5 fat
16 and 8.7 solids not fat that is in reasonable
17 relationship with minimum Class I prices paid to
18 producers in contiguous states. If the statewide
19 weighted average Class I prices paid to producers are
20 not in a reasonable relationship with the Class I prices
21 paid to producers in contiguous states, the Secretary
22 shall immediately hold a hearing to consider adjustments
23 to the Class I prices." That's the end of the
24 regulation.

25 In any market, the competition for Class I

1 sales is a major factor in determining the producer
2 price for Class I milk. However, defining "reasonable
3 relationship" can and has gone beyond simply comparing
4 the Phoenix Class I Federal Order price for the Southern
5 California Class I price.

6 In past hearings, compensatory payments,
7 transportation costs, competitive pricing in a market
8 have all been entered into California Class I hearing
9 records.

10 Unless the producer-handler issue is
11 addressed as in proposals 1, 2 and 3, competitive
12 pressures will impact what producers in surrounding
13 markets receive for Class I milk. That will impact
14 California dairy farmer milk prices.

15 California stopped the potential negative
16 impact large producer-handlers could have when it put in
17 place pooling in 1969. Only those producer-handlers in
18 existence at that time were allowed to remain
19 producer-handlers, but their exemption was not allowed
20 to grow with the production of milk on their dairies.

21 No new producer-handlers have gone into
22 business in California since 1969. Producer-handler
23 exempt milk is equal to approximately 4 percent of
24 Class I milk sales in California. Even that amount of
25 exempt milk creates competitive problems for noncaptive

1 fluid processors since California producer-handlers are
2 not restricted in terms of the outside milk that they
3 are allowed to process.

4 In July, for example, the difference between
5 the Class I price and the overbase price in California
6 was 74 cents per hundredweight in Northern California.
7 That gave our producer-handlers a six cent a gallon
8 price advantage on its exempt milk processed and a one
9 cent a gallon advantage on all milk the
10 producer-handlers processed.

11 Regarding proposal number 4 by United
12 Dairymen of Arizona, the Alliance supports the revision
13 to 1131.13, which prevents what we call double-dipping,
14 producer milk being pooled in both a state and a Federal
15 Order. Such activity creates a competitive advantage in
16 both procuring milk and competing for markets for milk
17 for the handler utilizing this loophole. Only the
18 Federal Order can correct this situation since it
19 involves interstate commerce, and we urge USDA to do so.

20 In conclusion, the Alliance of Western Milk
21 Producers urges USDA to make the changes to Order 124 as
22 in proposals 1 and 2 and to Order 131 as in proposals 3
23 and 4. The maintenance of orderly marketing requires
24 that these actions be taken.

25 We appreciate the opportunity to participate

1 in this hearing, and I'll answer questions if I can.

2 JUDGE HILLSON: Mr. Yale.

3

4 EXAMINATION

5 BY MR. YALE:

6 Q. Good morning.

7 A. Good morning, Mr. Yale.

8 Q. On your statement, you make this comment that
9 "Producer-handlers have a tremendous competitive
10 advantage in the marketplace because they are subject to
11 neither minimum pricing nor do they have an obligation
12 to the pool"?

13 A. Yes, sir.

14 Q. All right. What is that -- expressed in a
15 per hundredweight, what is that advantage?

16 A. Well, in California, for example, the
17 advantage would be .74 per hundredweight. In the
18 Federal Order system, the implied advantage would be the
19 difference between the Class I price and the blend
20 price.

21 Q. And you would agree, however, that a
22 producer-handler doesn't get a blend price? Their cost
23 isn't the blend? It's the cost of producing their milk;
24 right?

25 A. I have no idea what a producer-handler's cost

1 of milk is. I assume producer-handlers will testify to
2 that.

3 Q. Isn't that an important number to know
4 whether they have an advantage or not?

5 A. As I said, Mr. Yale, the only information
6 that I have is to look at the difference between the
7 Class I price and the blend price. And since the
8 Class I processor -- the competing Class I processor has
9 to account to the pool for that difference and a
10 producer-handler does not, I assume that there's an
11 advantage there.

12 Q. You assume there's an advantage. You have no
13 numbers that can establish that the procurement costs of
14 a processor -- of a PD is below the Class I prices under
15 the Federal Order; is that right?

16 A. Well, what I assume is that a
17 producer-handler would not be a producer-handler if it
18 was to his advantage to be a regulated handler, which to
19 me is an indication that his cost of doing business is
20 probably less than what it would be if he was a
21 regulated handler.

22 Q. You indicate in here -- you said something
23 about that the founding fathers of Federal Orders
24 envisioned that PDs not be that big.

25 What evidence do you have they did not

1 envision a PD being this big?

2 A. Well, I guess the only evidence that I have
3 is the situation that occurred when the Federal Order
4 was first drafted in the early 1920s, and the average
5 dairy size was significantly less than the size of
6 dairies that we have today.

7 I didn't have a chance to ask Mr. Berde when
8 he helped draft those Federal Orders, so --

9 Q. Well, let's talk about that.

10 At the same time, processors weren't very big
11 then, were they? Dairy processors in the 1920s and '30s
12 weren't very big either, were they?

13 A. There were more smaller dairy processors,
14 yes.

15 Q. What about co-ops?

16 A. Co-ops were smaller also.

17 Q. All right. Do you believe that in the 1930s
18 that the Federal Order, when they drafted this, they
19 envisioned a processing company that has 25 percent of
20 the Class I sales in the country?

21 A. No, sir.

22 Q. Do you think --

23 A. I don't think they envisioned that, no.

24 Q. Did they envision a co-operative that has
25 producers in practically every state of the union?

1 A. No, sir, I don't think they envisioned that
2 either. In fact, they didn't envision a California milk
3 industry because they left us out of the Federal Order
4 system.

5 Q. Right.

6 A. And the rest, as they say, is history.

7 Q. So how can you single out and say that they
8 didn't -- that we can allow a co-op to be this big, we
9 can allow processors to be this big, we can allow
10 retailers like Wal-Mart and Costco to be this big, but
11 the PDs can't be this big? I mean, how do you
12 distinguish that in your statement?

13 A. Well, the difference that I make is that the
14 Federal Orders specifically exempt a class from
15 participating in those Orders, and since that's the
16 nature of this hearing, that's what my testimony is
17 specifically addressed at.

18 I was not -- this hearing has nothing to do
19 with the size of co-operatives or processors.

20 MR. BERDE: Sydney Berde.

21 I suggest, Your Honor, that Mr. Yale, who's a
22 very competent attorney, search the legislative history
23 and the records of promulgations of Federal Orders going
24 back to 1940 or '45 to ascertain precisely what
25 Mr. Tillison has suggested, that in the origins of the

1 Order system, the only exemption from regulation was
2 limited, as provided and as described in those early
3 hearings, to small family-type operations which have no
4 competitive effect on the market.

5 JUDGE HILLSON: He can do that, Mr. Berde.

6 MR. BERDE: That can be done briefly.

7 JUDGE HILLSON: And that can be part of the
8 briefs as well. I think right now he's focusing pretty
9 specifically on just asking Mr. Tillison the basis for
10 some of the statements made in his statement, and I
11 think he's entitled to do that.

12 You can proceed, Mr. Yale.

13 MR. YALE: Thank you, Your Honor.

14 Q. BY MR. YALE: Coming back to this question,
15 you made the comment just before the comments by
16 Mr. Berde to the effect that the PDs would only want
17 exemptions so, therefore, they're subject to a size
18 consideration as opposed to the other ones.

19 Is that how you -- that's why they're
20 different than the co-ops, than the retailers, than the
21 processors and so on and so forth?

22 A. Exactly. I mean, this hearing is about the
23 PD, the producer-handler exemption. It's not about
24 whether or not co-ops can grow or whether or not the
25 processors can grow.

1 Q. But isn't part of a larger thing that, if PDs
2 are allowed -- the legislation would clearly indicate
3 that PDs existed and gave no indication that PDs not
4 exist; right? It never suggested that the Secretary
5 should eliminate PDs; right?

6 A. It was mute on that point. I really
7 personally don't have knowledge of that.

8 MR. BERDE: Your Honor, Sydney Berde.

9 Your Honor, that's a statement of counsel
10 which is contrary, in fact, to the legislative history
11 and to the statute itself.

12 I don't believe it's appropriate to probe
13 this witness about his understanding of the authority of
14 the Secretary or what is or what is not exempt. That's
15 strictly a legal question which we will brief
16 appropriately in our brief posthearing.

17 JUDGE HILLSON: Okay. I'm going to ask you,
18 Mr. Yale, to try to limit your questions to this --

19 MR. YALE: I am, Your Honor. The point of it
20 is -- we're getting this legal thing and an objection,
21 and the point is, is that the witness has made a
22 statement and I want to know the basis of it and I want
23 to be able to challenge why he's made that statement.

24 And that's the point that we're getting at.
25 And Mr. Berde can make his statement, and he will and

1 he'll do it very effectively.

2 Q. BY MR. YALE: But the point is, today, you
3 have producers in California that have 5,000, 10,000
4 cows; right?

5 A. Yes, sir.

6 Q. How many 5- and 10,000-cow farms were there
7 in 1940?

8 A. I assume there were none, but since I was
9 born in 1946, I have no knowledge prior to that time.

10 Q. But you yourself cannot identify specifically
11 an indication that Congress intended PDs to have a
12 different relative size in the marketplace than other
13 parts of the dairy industry?

14 A. Based on what I knew about what I've seen in
15 terms of the size of dairies back at that period of
16 time, I made the assumption, as I said in my oral
17 statement, I believe that they've gone beyond what their
18 founding fathers intended.

19 Q. And have you presented any evidence that
20 suggests that we have gone beyond that, what the size of
21 PDs to date is? We've gone beyond that?

22 A. I haven't presented any evidence. What I've
23 presented is a statement as to what I believe is true.
24 And I base that statement --

25 I guess I could have put it in my testimony,

1 and perhaps should have, that in my opinion -- in the
2 opinion of, rather, the Alliance, when a
3 producer-handler gets to be a significant part of the
4 market, there needs to be some limitation put on their
5 size.

6 Q. What about the side of producers? Should
7 there be a limit to what their benefits are in the
8 Federal Order based on size?

9 A. No.

10 Q. I want to follow up on this question so I
11 understand it -- well, no, there was another.

12 You know, the Act says that the purpose is to
13 provide a good and wholesome product to the consuming
14 public at a reasonable price.

15 Do you recall language something to that
16 effect?

17 A. That's one of the things that I think the Act
18 says.

19 Q. In your analysis, is there any markets in 124
20 that are not receiving a good and wholesome product at a
21 reasonable price?

22 A. Not to my knowledge.

23 Q. And again, to make sure -- withdraw that.

24 Have you done any analysis on the impact that
25 these regulations would have on Order 124 producers in

1 terms of whether they would be able to meet the
2 producer-handler definition or whether they'd become
3 fully regulated?

4 A. I haven't done any specific research.

5 In another project that we're involved in,
6 however, my understanding is that there are
7 producer-handlers in those Orders that would be above
8 the proposed threshold of 3 million pounds per month.

9 Q. And do you anticipate, then, that they would
10 have an added cost to be part of their operation, would
11 have an added cost because they have to pay into the
12 pool that they're not paying now?

13 A. That would be a reduction in their revenue,
14 yes.

15 Q. All right.

16 A. However, if the Braum's witness is correct,
17 he also indicated that by participating in Federal
18 Orders, there would be efficiencies gained at the dairy
19 that could offset, at least in part, that reduction in
20 revenue.

21 Q. But the choice of whether they want to offset
22 by either being in the pool or being a PD is their
23 choice right now under current regulations; right?

24 A. Yes, sir.

25 Q. And to make that change, would you not agree

1 that the Secretary needs to see specific numbers in
2 terms of the actual out-of-pocket difference/cost
3 advantage between being a PD and being a processor to
4 determine whether or not they have the tremendous
5 advantage that you suggest?

6 A. Repeat the question, please.

7 Q. All right. To make that change and to impose
8 that additional cost on these PDs, isn't it true that
9 the Secretary, to make that decision that there's an
10 impact and she needs to change that, you need to have
11 specific price comparisons and out-of-pocket expenses
12 between being a PD and being a processor to substantiate
13 making that policy change?

14 A. No, I don't agree with that. I think that
15 what the Secretary needs to determine is if the size of
16 the PD or PDs in an area is causing disorderly marketing
17 in the area.

18 And in terms of providing the cost data, I
19 assume that your clients, as well as the clients -- as
20 well as the producer-handlers in Arizona will provide
21 that information in posthearing briefs so the Secretary
22 can use that, in part, as making a determination.

23 But I think ultimately the determination has
24 to be, is disorderly marketing occurring because of the
25 producer-handler situation?

1 Q. All right. What disorderly marketing is
2 occurring in Washington or Oregon as a result of
3 producer-handlers?

4 A. I'm not specifically aware of any, but I
5 assume because Northwest Dairies, who is a major handler
6 up there, has a concern regarding it, there must be some
7 disorderly marketing occurring or they wouldn't have
8 petitioned for a hearing.

9 Q. If the Secretary finds no disorderly
10 marketing, they don't even have to look at these costs;
11 right?

12 A. I think that's part of the -- I think that's
13 probably the primary determination, is whether or not
14 disorderly marketing is occurring, not what someone's
15 profit margin is or isn't.

16 Q. But you indicate that the disorderly
17 marketing is created because of a price advantage;
18 right?

19 A. Yes, sir.

20 Q. So doesn't that go to the heart of knowing
21 whether it's disorderly marketing, to know what that
22 price advantage is?

23 A. No. Because one of the things a marketing
24 professor told me is, "Don't be afraid" -- "be afraid of
25 the crook because he's going to always make money. Be

1 afraid of the idiot who's giving his product away."
2 Just because someone chooses to undercut a price does
3 not necessarily mean that he is operating either below
4 or above his cost.

5 Q. Are you suggesting that the size of a
6 producer-handler be used as determination for exempting
7 a producer-handler from full regulation?

8 A. I think it's a combination of things. I
9 think what they're trying to look at in the proposals is
10 the impact within the particular Order of
11 producer-handlers.

12 Q. As I understand your testimony, you're
13 supporting 124 -- the proposed change to 124?

14 A. Right.

15 Q. And it suggests that the proposal is a
16 3 million cap?

17 A. Yes, sir.

18 Q. Why would you support a 3 million cap as
19 opposed to a 6 or a 2 or a 10?

20 A. Well, because as the witness from United
21 Dairymen -- there hasn't been a witness from the
22 Northwest yet, but as a witness from United Dairymen
23 tried to explain, was that the 3 million pound cap was
24 based on a cap that was developed as part of the
25 regulation of processors regarding Class I promotion.

1 And if you or your constituents have a
2 different number, I assume that'll be put in the record
3 later on.

4 Q. But that's your only basis for supporting the
5 3 million?

6 A. Yes, sir.

7 Q. And one final topic here.

8 You've indicated that the producer-handler,
9 "We expect them to come and put up costs of production
10 and all those things." I think that was your statement.

11 A. No. My answer was in response to a question
12 that you said: Shouldn't you take those costs into
13 consideration?

14 And the answer was: I assume that if there
15 are significant cost differences between a
16 producer-handler's operation and a regular handler that
17 that information will be entered by them into the
18 record.

19 Q. As so as I understand it, then, it is the
20 obligation not of the proponents to regulate handlers
21 who are longstanding to come up with the information,
22 but the assumption is that they're regulated unless
23 producer-handlers come up with information that suggests
24 that the Secretary should not?

25 A. I think that the handlers should make a case

1 for why they shouldn't be regulated. It's up to the
2 proponents to make a case for why they should be
3 regulated.

4 MR. YALE: Now I don't have any other
5 questions. Thank you.

6 THE WITNESS: Thank you, Mr. Yale.

7 JUDGE HILLSON: Who's next?

8 Mr. Ricciardi.

9 MR. RICCIARDI: Thank you, Your Honor.
10 I'm Al Ricciardi on behalf of Sarah Farms.

11

12

EXAMINATION

13 BY MR. RICCIARDI:

14 Q. Mr. Tillison, you told us during questioning
15 by Mr. Yale that you were born in '46; is that right?

16 A. Yes, sir, January 20th, 1946.

17 Q. I appreciate that.

18 So --

19 A. In Milwaukee, Wisconsin.

20 Q. And I appreciate that too.

21 Packer fan?

22 A. Oh, don't bring that up here. You've already
23 had to put up with stuff from Mr. Murfield on that. I'd
24 rather not go into that at this time.

25 Q. I was at the game. I'll talk to you about it

1 later.

2 So the fact of the matter is, when you give
3 any kind of statements with regard to the intention of
4 the, quote, founding fathers, whoever they may be,
5 that's your opinion and supposition as to what occurred
6 nine years or more before you were born?

7 A. Yes, sir, based on review of information --
8 USDA has to go back to that time in terms of the size of
9 dairies and that sort of thing -- plus talking with
10 Mr. Berde.

11 Q. We'll have to put in evidence his actual date
12 of birth at some point in here.

13 How long have you, since the date of your
14 birth, been involved in the dairy industry?

15 A. Since 1975.

16 Q. And in what capacity?

17 A. 1975, I began insuring cheese factories in
18 the state of Wisconsin, which had me traveling
19 throughout Wisconsin, getting involved in the dairy
20 issues, going to meetings and so forth.

21 In 1981, I became executive director of the
22 Wisconsin Cheese Makers Association, and I did that for
23 nine years prior to coming to California, and I've been
24 involved in the California dairy industry for 12 years.

25 Q. Okay. You indicated in testimony that you

1 actually were quoting from your marketing professor. I
2 assume that was in undergraduate school?

3 A. Yes, sir. I do not have a master's degree.

4 Q. And where did you get your degree?

5 A. University of Wisconsin - Madison.

6 Q. What was your degree in?

7 A. Business administration.

8 Q. Did your marketing professor define for you
9 "disorderly marketing"?

10 A. No.

11 Q. Okay. Has anybody defined for you
12 "disorderly marketing"?

13 A. Well, "disorderly marketing" is a term that's
14 used within the Federal Order system. It's also used
15 within the California system to try to define -- or not
16 define, but try to identify reasons for making
17 adjustments to either the State Order or the Federal
18 Order.

19 Q. You used that phrase in some questions that
20 Mr. Yale asked you. Tell me your definition of
21 "disorderly marketing," please.

22 A. Well, I think disorderly marketing could be a
23 situation where a handler or handlers have a price
24 advantage created by the system that allows them to
25 undercut pricing that others in the system don't have

1 the advantage of using.

2 Q. Let me use your definition, then. Let's
3 assume for a moment that there is a competitive
4 advantage based upon efficiencies of a particular
5 producer which allows that producer to sell perhaps
6 lower than another producer.

7 Is that an example of disorderly marketing?

8 A. Not necessarily.

9 Q. In that situation, that would simply be good
10 competition?

11 A. Well, in that situation, I doubt if you'd
12 have an advantage equal to the difference between the
13 Class I price and the blend price, for example.

14 Based on discussions with people, my members
15 who operate plants, there are variations in efficiencies
16 and sometimes they can be quite significant, but not to
17 the magnitude that that difference would be.

18 Q. You brought up your members. There are 1300
19 producer-owners within the Alliance; is that right?

20 A. Well, there are three co-operatives that are
21 the actual members of the Alliance, and those three
22 co-operatives are owned by the 1300 producers.

23 Q. Got it.

24 Do any of those producer-owners sell within
25 the 131 area, marketing area?

1 A. I would have no knowledge of that.

2 Q. Do you know?

3 A. I don't know if they have -- some of the
4 producers in California have multiple dairies that
5 they're involved in. Some of them may be in Arizona.
6 Some of them may be in the Order 124 area, but I have no
7 specific knowledge of that.

8 Q. For example, let me ask you a couple
9 questions. In Exhibit No. 6, we have a listing of
10 partially regulated distributing plants that I assume
11 distribute in the Order 131 area, and there are a number
12 of them that are based in California.

13 Do you know whether or not any of your
14 producer-owners sell to any of those plants?

15 A. Some of the co-operatives, the co-operatives
16 I represent, may be providing some of them with milk,
17 yes.

18 Q. Okay. Do you know which ones?

19 A. No, I don't.

20 Q. Have you done any analysis to determine the
21 average cost for production of Class I fluid milk by the
22 producer-owners in the co-operatives?

23 A. None of the co-operatives bottle Class I
24 milk.

25 Q. Okay. What do they bottle?

1 A. The co-operatives sell milk. They market
2 milk. It's in my statement. They market milk to
3 various -- everything from fluid handlers all the way
4 down to other butter/powder plants. They also
5 manufacture some dairy products themselves, primarily
6 butter and nonfat dry milk and some cheese.

7 Q. Have you done any analysis of the 1300
8 producer-owners within the co-operatives to determine
9 what their cost is for product?

10 A. No, I have not.

11 Q. Do you have any idea as to what their cost
12 is?

13 A. No, I don't.

14 Q. Do you have any idea, giving us even a
15 ballpark figure, as to what the cost of production for
16 raw milk would be?

17 A. I think based on the overbase prices we had
18 in California in the last 15 or 18 months, I would guess
19 that their cost of production is probably higher than
20 \$10 per hundredweight.

21 Q. Who is it -- and this goes back to an answer
22 you gave to Mr. Yale, again, that your marketing
23 professor apparently told you. Who is giving away his
24 product?

25 A. Who's what?

1 Well, in terms of giving away his product,
2 what he meant by that was somebody not knowing what
3 their costs were, or knowing what their costs were, but
4 in order to capture a market, essentially selling
5 product at a loss.

6 Q. Who is selling product at a loss?

7 A. I can't remember the specific example that he
8 gave.

9 Q. Is anyone in the Order 131 area selling
10 product at a loss that you know of?

11 A. I would have no knowledge of that.

12 Q. Is anybody in the 131 area selling -- giving
13 away product?

14 A. I would have no knowledge of that either.

15 Q. The testimony that you're providing today,
16 does the Alliance take into consideration, in providing
17 any information to this hearing, the importance of
18 providing milk or dairy products at a reasonable price
19 to the consumer?

20 A. Could you repeat that question?

21 Q. Sure. Let me try it again.

22 A. Yeah.

23 Q. Is that an important factor for the Alliance,
24 the provision of milk or dairy products to the consumer
25 at a reasonable price?

1 A. The most important factor to the Alliance is
2 the profitability of the co-operatives that I represent,
3 and in return, the profitability of the producer-owners
4 that operate -- that own those co-operatives.

5 Q. I understand you gave me two important
6 factors. I asked you whether or not providing good and
7 wholesome milk or dairy products to the consumer at a
8 reasonable price is a factor that's important to your
9 Alliance.

10 A. My board of directors has never really taken
11 a position on that, but I would assume that providing a
12 wholesome product is the concern of every dairy farmer
13 in California and every co-operative that I represent.

14 Q. I appreciate that. That took part of my
15 question. Let me ask you the other part.

16 What about providing it at a reasonable price
17 to the consumer? Is that an important factor to your
18 board of directors?

19 A. Because the producers and co-operatives are
20 not the final determinant of the retail price to the
21 consumer, they don't have any control over that, so,
22 therefore, they would like to see -- I'm sure they
23 support the idea of a reasonable price to consumers, but
24 again, as I said, that's not under their control.

25 Q. Do you believe that that's a factor that the

1 Secretary should take into consideration, the provision
2 of milk/dairy products, good and wholesome products at a
3 reasonable price?

4 A. No. Not in this case, no.

5 Q. Okay. In your statement -- well, first of
6 all -- and let me back up on this, and I apologize.

7 Do you indicate in your statement that new
8 producer-handlers will further negatively impact the
9 competitive balance in the Federal Orders? That's your
10 testimony; correct?

11 A. Yes, sir.

12 Q. What new producer-handlers are you aware of
13 in Order 131?

14 A. I'm not aware of any new producer-handlers.
15 That statement was in regards to what we're seeing in
16 other parts of the country and the potential that exists
17 for people to get into that business.

18 We've got dairies that are -- there have been
19 dairies built in Indiana, Michigan, I believe in
20 Illinois, that are of significant size, at least as
21 large as some of the dairies that run that farm or
22 whatever, in that journal article that had the
23 10,000-cow dairies and so forth.

24 So the concern that we have is, with the
25 change in the retailing of dairy products, with the size

1 of those dairies, and the opportunity that it presents,
2 that there is the possibility of more producer-handlers
3 going into business outside of California. In
4 California, that's not a possibility.

5 Q. So again, getting back to my question, there
6 are no new producer-handlers that you're aware of in
7 131; correct?

8 A. That's right.

9 Q. And same question with regard to marketing
10 area 124. No new producer-handlers you're aware of?

11 A. Not that I'm aware of.

12 Q. In your answer recently, what you started to
13 talk about is change in the dairy business in terms of
14 consolidation, among other things.

15 Would you agree that since you have been in
16 the dairy business, there has been a major
17 consolidation?

18 A. Yes, sir.

19 Q. Would you agree also that we are going
20 towards what amounts to a nationwide market?

21 A. No, sir.

22 Q. Would you agree that -- well, let me back up.
23 Let me ask this particular question.

24 Do you have any producer-owners that are part
25 of the co-operative that you represent that have 5,000

1 cows?

2 A. Yes.

3 Q. Do you have any producer-owners in the
4 co-operatives that you represent that have 10,000 cows?

5 A. Yes.

6 Q. 15,000?

7 A. That I wouldn't know. That's getting up
8 there.

9 Q. And I think that in answer to a question that
10 Mr. Yale asked, as long as they're regulated producers,
11 you don't care if they have a hundred thousand cows;
12 right?

13 A. Right.

14 Q. That's not going to have a negative impact on
15 any marketing; right?

16 A. It shouldn't under the present system.

17 Q. It wouldn't create any disorderly marketing?

18 A. No.

19 Q. In fact, we have entities on a nationwide
20 basis that sell 20 or 25 percent of the milk that is
21 sold in this country. That doesn't create a disorderly
22 market in your opinion?

23 A. No. In my opinion, no, because to my
24 knowledge, they're both operating within the regulated
25 system.

1 Q. Let's assume for whatever reason that the
2 large entity that has 25 percent of the market decides
3 that it is going to sell the product to a wholesale food
4 store for a price less than its cost for a loss leader.

5 Would that create disorderly marketing?

6 A. Depending on the length of time that it
7 carries out, yes.

8 Q. A week?

9 A. Probably not.

10 Q. Two weeks?

11 A. Probably not.

12 Q. Once a week for a month?

13 A. Oh, that wouldn't be a problem at all.

14 Q. Tell me, then -- I talked yesterday about
15 bright lines. Let's talk about one now.

16 What is, in my hypothetical, the time period
17 that would create a disorderly marketing for that type
18 of sale activity?

19 A. Well, I think that the -- in my opinion, the
20 time line would be -- or the bright line, whatever you
21 call it, wouldn't be reached simply because no one is
22 stupid enough to sell product below cost for the length
23 of time it would take to reach the level where it would
24 be disorderly.

25 When you talk about milk at retail being used

1 as a loss leader, there's a specific purpose for that.
2 The purpose is to get people to come into the store to
3 buy other things.

4 And normally, at least to my knowledge, the
5 relationship is one where the retailer says, "I want to
6 run a special on milk to get people in," and he works
7 out an arrangement with the fluid processor. It's not
8 up to the individual handler as to whether or not to
9 have a loss leader. It's up to the -- ultimately up to
10 the retailer to have a loss leader.

11 MR. RICCIARDI: Okay. Nothing else. Thanks.

12 THE WITNESS: Thank you.

13 JUDGE HILLSON: Does anyone else have
14 questions for Mr. Tillison?

15 Mr. Tosi.

16 MR. TOSI: Good morning, Mr. Tillison.

17 THE WITNESS: Good morning.

18 MR. TOSI: Thank you for coming.

19 MS. DESKINS: Just for the record, would you
20 say what your name is?

21 MR. TOSI: I'm Gino Tosi, T-o-s-i.

22

23 EXAMINATION

24 BY MR. TOSI:

25 Q. I want to talk a little bit more about some

1 of the specifics of what you're supporting about the
2 three proposals that we have before us for regulating
3 producer-handlers.

4 A. Okay.

5 Q. We have had a pretty good discussion here
6 about size.

7 To what extent is share of the market
8 important and, in your opinion, what level of share of
9 the market when a producer-handler becomes an important
10 factor?

11 A. Well, in California, the exempt milk in
12 California is about 4 percent of the Class I market. I
13 think that when you start approaching 10 percent of
14 Class I utilization within producer-handlers, there's
15 reason for concern.

16 Q. With respect to some of your knowledge of
17 what happens in the context of federal milk Marketing
18 Orders, what is it that you see with respect to how
19 producer-handlers market their milk that's different
20 today than it had been that should cause the Secretary
21 to consider changing the regulatory status of
22 producer-handlers?

23 A. Well, I think, as I said in my response to a
24 question, when you look at how retailing of food is
25 changing, Wal-Mart becoming a major factor, Costco

1 becoming a major factor in markets -- and, frankly,
2 those organizations set -- have a tendency to set at
3 least the bottom of the price.

4 In fact, in California, in order to determine
5 whether or not someone is selling below cost, a
6 handler -- not a handler -- a retailer is selling below
7 cost, they compare the milk price of that handler to
8 what Costco is selling milk for.

9 So I think that one of the big differences in
10 today's milk marketing world is the proliferation --
11 don't ask me to say that twice -- the proliferation of
12 these discount bulk milk outlets.

13 Q. But how is that different from the past
14 producer-handler that sold to someone who was not a
15 wholesale customer?

16 A. Well, I think that the difference is the
17 price that that product is being offered at.

18 The two-for packs -- for example, I got a
19 call from a producer in Southern California who went
20 into a Costco store in Southern California, and they
21 were selling two gallons of milk, two-gallon packs of
22 milk that I believe came from a plant in Yuma, Arizona,
23 at \$3.49 a gallon -- or for two gallons, which was lower
24 than the cost of one gallon in most of the other stores
25 in Southern California.

1 And a producer-handler obviously, of course,
2 depending on what his costs are, but assuming that a
3 producer-handler has an advantage, that advantage can be
4 used to sell product at a very low cost in order to
5 capture market.

6 Q. But haven't producer-handlers always had that
7 price differential?

8 A. I think it's a matter of size. It's a matter
9 of size. As I said, my belief is that when the
10 producer-handler exemption was created, it was created
11 for the producer who was physically bottling milk at
12 their ranch and selling it directly to consumers at or
13 near their local area. That's my assumption. Today,
14 the producer-handlers in some areas have gone way beyond
15 that.

16 Q. Okay. I understood your testimony to say
17 that producer-handlers have a pricing advantage over a
18 regulated handler --

19 A. Yes, sir.

20 Q. -- in their capacity as a handler --

21 A. Yes.

22 Q. -- in the producer-handler's capacity as
23 a producer-handler?

24 A. Yes, sir.

25 Q. Do regulated handlers have an advantage over

1 producer-handlers in the sense that they avoid the risk
2 of having to produce their own milk supply?

3 A. No, because they have an obligation that the
4 producer-handler doesn't have, and that's the obligation
5 to the pool for the difference between the blend price
6 and the Class I price.

7 In terms of the fact that they don't have the
8 risk of producing the milk, you know, I think that's
9 offset by the price advantage. And as I said in my
10 testimony, if it was to a producer-handler's advantage
11 to become a regulated handler from the standpoint of
12 cost, he would become a regulated handler.

13 Q. May I ask you a couple of specifics on
14 proposals?

15 A. Sure.

16 Q. Two of the proposals specifically would --
17 give me a moment here to find it -- would limit a
18 producer-handler's ability to sell to wholesale
19 customers that are already served by a fully regulated
20 or partially regulated distributing plant which supplies
21 the same size product and the same label product?

22 A. Uh-huh.

23 Q. Why is it that you think that's a critical
24 feature here on defining a producer-handler with that
25 sort of --

1 A. Well, I think the most important factor there
2 is because of the advantage that the producer-handler
3 has in competing with a regulated handler. In other
4 words, I think it's just a carryover over the size of a
5 producer-handler.

6 Q. I hear your answer, but it doesn't explain --
7 it does not seem to address -- what is it about limiting
8 a producer-handler to sell a similar product to a
9 customer that's already being served by a regulated
10 source?

11 A. Well, I think the purpose of it is to prevent
12 them from undercutting the regulated handler and,
13 therefore -- what I assume they're doing -- I didn't
14 draw up the proposal and all I can do is assume what
15 they intend.

16 What they intended to do was to say that a
17 producer-handler should not be able to undercut a
18 regulated handler in a market -- in an existing market.

19 Q. So if a producer-handler has a product that's
20 similar to a regulated handler, finds a customer that's
21 willing to buy his or her milk, how is it that the
22 producer-handler is somehow responsible for knowing what
23 his customer's other buying patterns are with other
24 regulated handlers?

25 A. The only assumption I can make is that since

1 the customer is being served by somebody else, that
2 that's the assumption that's made.

3 But I don't know how the producer-handler
4 would have any direct knowledge of someone else's
5 marketing decisions or patterns of another handler's
6 marketing decisions or patterns.

7 MR. TOSI: Thanks. I appreciate your answer.

8 JUDGE HILLSON: Any more questions from the
9 front row?

10 Anyone else?

11 Mr. Berde.

12 MR. BERDE: Sydney Berde.

13

14 EXAMINATION

15 BY MR. BERDE:

16 Q. Mr. Tillison, in response to the last
17 question from Mr. Tosi about the existing provision in
18 Order 131 that limits the right of a producer-handler to
19 distribute a package of similar size and similar label
20 as a regulated handler's package to the same wholesale
21 outlet, that provision was inserted into Order 131 based
22 upon the Secretary's wisdom that it was necessary to
23 overcome a flaw in the Order 131 regulatory structure
24 which permitted the producer-handler to, in effect, rely
25 on the pool when he was short milk; isn't that correct?

1 MR. RICCIARDI: Your Honor, with Mr. Berde,
2 can we at some point get a question, as opposed to a
3 statement?

4 JUDGE HILLSON: He said, "Is that correct?"
5 I know that it's considered cross-examination, but I
6 also know you both are proponents of this and it's more
7 leading than the average questions.

8 Q. BY MR. BERDE: Are you aware that it was a
9 provision that the Secretary, in his wisdom, inserted
10 into Order 131 to address a problem?

11 MR. RICCIARDI: Objection. Can I make an
12 objection?

13 JUDGE HILLSON: I'm going to allow him to
14 answer the question. I'm going to direct Mr. Berde to
15 try to ask questions that aren't quite so leading.

16 What else do you want to say?

17 MR. RICCIARDI: In addition, Your Honor, I
18 don't think this witness has foundation for that
19 testimony.

20 JUDGE HILLSON: Well, it was a follow-up to a
21 question that --

22 MR. BERDE: Counsel can suggest anyone else
23 who adopts regulatory provisions -- I allow him to do
24 so -- other than the Secretary.

25 MR. RICCIARDI: I wish you would ask a

1 question instead of making a statement.

2 Q. BY MR. BERDE: I'll ask you a simple
3 question.

4 Does the Secretary adopt the regulatory
5 provisions of Orders?

6 A. Yes, sir, the Secretary does that.

7 And just to fill in, my assumption,
8 incorrectly, was, because the section appeared in the
9 proposal, that in fact it was not in existence
10 currently, and you have corrected my misknowledge on
11 that. Thank you.

12 JUDGE HILLSON: Does anyone else have any
13 questions at this point of Mr. Tillison?

14 Go ahead, Mr. Beshore.

15

16 EXAMINATION

17 BY MR. BESHORE:

18 Q. Jim, you've been here throughout the hearing?

19 A. Uh-huh.

20 Q. Did you hear John Hitchell's testimony about
21 how a producer-handler could affect the balance of the
22 pool if all his supply went in to the customer and they
23 balanced with supplies from other sources?

24 A. Yes, I did hear his testimony.

25 Q. That may be the type of circumstance that the

1 provision, with respect to similar packaging, similar
2 labels, would be addressing, then?

3 A. I agree.

4 MR. BESHORE: Thank you.

5 JUDGE HILLSON: Mr. Tosi.

6

7

EXAMINATION

8 BY MR. TOSI:

9 Q. Mr. Tillison, I apologize. I know that when
10 I asked that question about similar size and all this,
11 that, and the other, I wasn't referring to the
12 Arizona-Las Vegas Order. It's a feature that's being
13 proposed for the Pacific Northwest?

14 A. Right.

15 MR. TOSI: It's not there. I apologize to
16 everyone in this room for not making that distinction
17 before.

18 That's all.

19 THE WITNESS: Okay.

20 Your apology is accepted.

21 MR. MARSHALL: Doug Marshall with Northwest
22 Dairy Association.

23

EXAMINATION

24 BY MR. MARSHALL:

25 Q. Jim, a couple of quick questions on a line of

1 questioning from both Mr. Yale and Mr. Ricciardi on what
2 constitutes disorderly marketing.

3 I think at one point you suggested that, if a
4 retail store might be using a loss leader for a week or
5 once a week for a month, it may not constitute
6 disorderly marketing conditions.

7 I would ask you to opine, since you were
8 opining earlier, about a situation where a series of low
9 prices might exist in a marketplace and attempts at both
10 the wholesaler level and the retailer level to maintain
11 market share against a competitive threat from a
12 lower-cost operation that might be using loss leaders.

13 Could that situation result in disorderly
14 marketing conditions as you know the term?

15 A. Yes.

16 MR. MARSHALL: Thank you.

17 JUDGE HILLSON: Do you have a question?

18 MR. YALE: Yes, a follow-up.

19

20 EXAMINATION

21 BY MR. YALE:

22 Q. You made the comment that somebody sold two
23 gallons for \$3.49 in a market?

24 A. Uh-huh.

25 Q. That month, do you know what the cost of

1 the -- the Class I price value of that milk would have
2 been?

3 A. I'm trying to remember and do the math in my
4 head.

5 No, I wouldn't know what the cost would have
6 been.

7 Q. You're also -- one of your jobs as an
8 official of National Milk Producers Federation -- you're
9 an officer of National Milk?

10 A. I'm not an officer. I am -- I work part-time
11 for National.

12 Q. Okay. Very well.

13 A. But they do not compensate me. Part of my
14 time is spent working for National.

15 Q. Then I won't go there with that.

16 A. Okay. And they did not pay my way here. The
17 Alliance paid my way here and is paying for the hotel.

18 Q. I frankly didn't care.

19 But isn't it -- as a representative of dairy
20 producers, one of the big concerns this spring and
21 summer had been this long trough of low prices; right?

22 A. Yes, sir.

23 Q. And that affected every producer in the
24 country; right?

25 A. Every producer, yes, sir.

1 Q. And kind of a concern the other way was that
2 the price -- the retail price didn't seem to reflect
3 that same kind of drop in value?

4 A. That certainly has been a concern of
5 producers, yes.

6 Q. Right. So I guess I'm kind of troubled from
7 the standpoint, are you saying that when a producer
8 calls up and says, "The price of milk was this in the
9 store," is that good news because that means cheaper
10 prices and higher demand; we're going to sell more milk?
11 Or are you saying that the price was less than what a
12 regulated handler could pay to supply that milk at that
13 price that the store sells at a profit?

14 A. In that specific instance, it was less than a
15 regulated handler in California, I believe, who put the
16 product in the store.

17 Q. Did you actually pencil that out?

18 A. No, I didn't.

19 Q. By the way, that did not come from an
20 Order 124 PD to your knowledge, did it?

21 A. No, it did not.

22 MR. YALE: Okay. Then I'm not going to ask
23 any more questions.

24 JUDGE HILLSON: Anyone else have questions?

25 Mr. Beshore.

1 EXAMINATION

2 BY MR. BESHORE:

3 Q. What month did you observe that Costco
4 California price?

5 A. I believe it was -- I believe I got the
6 phone call either at the -- it was at the end of August.

7 Q. So it was probably August milk?

8 A. Yeah.

9 Q. Okay. And your information was that was
10 coming from a plant in Yuma?

11 A. Yes.

12 MR. RICCIARDI: Now I do have a couple
13 questions.

14

15 EXAMINATION

16 BY MR. RICCIARDI:

17 Q. You don't know that, sir?

18 A. I don't have direct knowledge, but I have
19 been told by people with a lot more knowledge of that
20 specific case that that's what is -- that's what
21 occurred.

22 Q. Okay. So you don't have any personal
23 knowledge; correct?

24 A. Just hearsay.

25 Q. Okay. As we define it, that's what you've

1 got?

2 So the fact, Your Honor, is he's given us
3 hearsay that needs to be stricken, which I would move to
4 strike.

5 JUDGE HILLSON: It's not going to be
6 stricken.

7 MR. RICCIARDI: I understand that, but I'm
8 making my record anyway.

9 JUDGE HILLSON: Consider it made.

10 MR. RICCIARDI: I appreciate that.

11 MR. ENGLISH: Charles English.

12 Let me comment on that.

13 MR. RICCIARDI: Can I ask a question? Do you
14 have an objection?

15 MR. ENGLISH: I have an objection to hearsay
16 when the Rules of Evidence are very specific about
17 hearsay, and I'd like to at least -- you say you're
18 laying a record. Let's lay the right record for the
19 rules of hearsay.

20 JUDGE HILLSON: You can argue that. I've
21 already -- I'm not going to strike the testimony. The
22 testimony is in there and I overruled the objection.

23 Q. BY MR. RICCIARDI: Let's get back to some
24 questions now that we've had a little bit of jousting.

25 You don't know with regard to the example

1 that you gave what the cost was that Costco paid for
2 that milk; correct?

3 A. Correct.

4 Q. You don't know if it paid Class I price? You
5 don't know what it paid; correct?

6 A. I don't know that Costco didn't pay Class I
7 price. Costco paid the provider of the product a price.

8 Q. I understand.

9 A. I do not know what price that was.

10 Q. Correct.

11 And you don't know whether or not Costco made
12 a decision to market that milk at whatever price you
13 have given as an example for a variety of reasons,
14 including the loss leader example we used before;
15 correct?

16 A. Exactly. Correct.

17 MR. RICCIARDI: Thank you very much.

18 JUDGE HILLSON: Okay. You may step down.

19 (Witness excused.)

20 JUDGE HILLSON: And let's take another
21 10-minute break, okay? I have two minutes of. Let's
22 come back a quarter after and we'll break for an hour or
23 so for lunch.

24 (Recess at 10:58; resumed at 11:20.)

25 JUDGE HILLSON: Let's go back on the record.

1 And Mr. Arbuthnot is ready to be sworn in; is
2 that correct?

3 MR. MARSHALL: Yes.

4 Doug Marshall, Northwest Dairy Association.
5 We are proponents of proposal number 1, so we are
6 appreciative of the opportunity to bring Mr. Arbuthnot
7 in out of order here in order that he may catch an
8 afternoon flight. His testimony is confusing because of
9 coming out of order.

10 He's ready to be sworn.

11

12 PAUL ARBUTHNOT,
13 a witness herein, having been first duly sworn to speak
14 the truth and nothing but the truth, was examined and
15 testified as follows:

16

17 JUDGE HILLSON: Please state and spell your
18 name for the record.

19 THE WITNESS: My first name is Paul, P-a-u-l.
20 Last name is Arbuthnot, A-r-b-u-t-h-n-o-t.

21 JUDGE HILLSON: Mr. Arbuthnot, please proceed
22 to read your prepared statement, copies of which I
23 believe have been distributed to the crowd.

24 THE WITNESS: Good morning. My name is Paul
25 Arbuthnot, and I am the past president of Sunshine Dairy

1 Foods, Portland, Oregon. I continue my relationship as
2 an adviser to the company, and I'm a rapt observer of
3 the dairy scene in general. I spent 35 years with
4 Sunshine, but my expenses to appear at this hearing
5 today are being paid by Northwest Dairy Association of
6 Seattle.

7 My experience in the dairy industry is
8 lifelong, and I joined Sunshine in 1968 as a
9 salesperson, became sales manager in '75, general
10 manager and part owner in 1980, and president in 1998.
11 I retired from full-time employment earlier this year.

12 Sunshine Dairy Foods is a small dairy
13 processor with about 135 employees, 67 years old,
14 serving the majority of its customers in Oregon's
15 Willamette Valley and Southwest Washington. Customers
16 are typically restaurants, hospitals, private clubs,
17 convenience and grocery stores.

18 Over the years, we built survival ground
19 rules, describing involvement, accessibility and
20 unsurpassed quality. The company continues to live by
21 these ground rules which we found to be a crucial key to
22 its survival.

23 In 1968, when I joined the company, there
24 were at least 10 traditional, proprietary, regulated
25 handlers in the Portland market. Now there are three,

1 testimony to just how tough it is to survive in the
2 dairy business.

3 Today's topic, producer-handlers, is a topic
4 with which all of us in the regulated handler business
5 are all too familiar. My personal experience with them
6 starts many years ago with a then small producer-handler
7 in Oregon's Marion County, who from time to time sought
8 the same customers I did, seemed to have a significant
9 pricing advantage over my company's prices.

10 During those early years, this operator was
11 not a significant factor in our market, and we at
12 Sunshine survived in spite of his competition. Today,
13 that Willamette Valley producer-distributor is much
14 bigger and has increased its marketing area greatly,
15 presenting even tougher competition for Sunshine Dairy
16 Foods and other like-type handlers.

17 Now fast forward to the '90s, when a coffee
18 store opened in Portland's Pioneer Square. This company
19 called for dairy service, and I, showing my naivete
20 about the impending explosion in boutique coffee shops,
21 was reluctant to set them up as an account. I later
22 learned that these shops actually use more milk than
23 they do coffee, and we came to highly covet them as
24 customers.

25 Go forward a few more years to the late '90s,

1 when this little chain had added scores of stores, when
2 they used 25,000 gallons of milk collectively in a week,
3 more than 200,000 pounds, constituting more than
4 10 percent of our fluid milk volume.

5 Sunshine had been fortunate enough to become
6 the premier dairy supplier to these coffee stores in
7 Oregon until the phone call. A new buyer who previously
8 had worked as a buyer for a fast-food chain called to
9 set up a visit. He delivered the shattering news that
10 Sunshine would lose the account in about 60 days.
11 Another supplier was assuming the fresh milk business.

12 "It's all economics," he said. "You folks
13 have provided great service and products, but the
14 savings we will see as a result of this change will net
15 us hundreds of thousands a year."

16 Edaleen Dairy, he said, would take the
17 business. I knew that Edaleen was a
18 producer-distributor nearly 300 miles from Portland,
19 near the Canadian border.

20 I asked him a question that obviously was
21 hypothetical. "If we were able to lower our price by 15
22 to 20 cents a gallon, would we be able to keep the
23 business?"

24 "We wouldn't be having this meeting," he
25 said, implying that that number would have saved the

1 business. But, of course, the die was cast and we did
2 lose the business. The bitter irony is that that price
3 difference was very close to the Class I differential my
4 company had to pay and a producer-handler did not.

5 The above is a true story and important
6 because of the huge impact it had on our small business.
7 But it's a story that I've seen experienced by other
8 regulated handlers throughout my dairy business career
9 in the Northwest.

10 As I said earlier, Sunshine's survival tactic
11 is to provide personal service of an exceptional nature,
12 and just as a little example of that, all of our
13 managers and salespeople have their home phone numbers
14 printed on their business cards.

15 Quality maintenance has been a mantra for us
16 which has resulted in many national awards. But despite
17 all of our commitments to our customers, countless
18 opportunities do not come our way, and business is lost
19 because of the producers-handlers' advantage, as we see
20 it. To some folks, price is everything, and our being a
21 regulated handler places us in a distinct economic
22 disadvantage from those who are not regulated.

23 Other customers, maybe not as important as
24 the coffee shops I mentioned, have also been lost to
25 producer-handlers, and I am very familiar with more than

1 one handler whose customers cherry-pick the dairy
2 business, awarding the volume sales to the
3 producer-handler and the small stuff to the regulated
4 handler.

5 So I'd like to make some observations about
6 the dairy business that we're in.

7 Consolidation in retailing and manufacturing
8 provides fewer opportunities for regulated handlers to
9 find business. At the same time, consolidation on the
10 farm spells larger, better-capitalized corporate farms,
11 more able to vertically integrate the operations into
12 manufacturing functions. We see some trend in that
13 direction today in our own Willamette Valley.

14 The trends, when combined, pose a threat not
15 only to regulated processor-handlers but to traditional
16 farm producers as well who must function within the
17 framework of the Federal Order system.

18 As I understand it, one of the goals of the
19 Federal Order system is to maintain order in milk
20 marketing. It seems ludicrous to me that some handlers,
21 distinguished from others only by virtue of the fact
22 that they own cows, do not come under the regulation,
23 the Order, if you will, that other handlers do. It also
24 seems incredibly unfair to the vast majority of dairy
25 farmers who work to produce milk for the market, but

1 since they don't have processing plants, they get a
2 smaller paycheck for a like product.

3 Handlers like Sunshine Dairy and traditional
4 producers are threatened by this anomaly. Perhaps at
5 one time when producer-handlers might have been small
6 raw milk operations, they weren't worth a look.

7 They're worth looking at today. I've been
8 told that the Northwest Order -- and I think that the
9 reports -- the testimony earlier today testifies to the
10 fact that 10 percent of the Class I milk is coming from
11 producer-handlers in our Order.

12 Obviously, I think means must be provided to
13 regulate the unregulated and, to use again the term
14 that's been used frequently throughout today, even out
15 the playing field, and I urge the Secretary serious
16 consideration in implementation of such action.

17 Thank you.

18

19

EXAMINATION

20 BY MR. MARSHALL:

21 Q. Mr. Arbuthnot, you've sat through the hearing
22 so far, and a number of things have come up that you
23 indicated might be able to add to your testimony to
24 address some of the things that you heard to be of
25 interest to others, so I'd direct your attention to the

1 dialog there on your prepared testimony towards the
2 bottom two-thirds there regarding a small producer, then
3 small producer-handler in Marion County of Oregon.

4 Could you describe for us the ways in which
5 that producer-handler has changed the way they market
6 their milk over the years as you've observed it from
7 your vantage point in Portland?

8 A. Thanks.

9 One of the ways is to become involved in
10 larger, higher-volume stores. Initially, when I was
11 aware of this Willamette Valley producer-handler, the
12 main thrust of his business seemed to be in front stores
13 and small convenience stores and that sort of thing.
14 Today I think you'll find his milk in a wider marketing
15 area but in much larger stores.

16 Q. Much larger types of retail establishments?

17 A. Yes.

18 Q. Would the term "box stores" or "pricing pack
19 stores" apply here?

20 A. Something like that.

21 Q. And do you know -- excuse me. Did you
22 finish?

23 A. The conventional grocery store we would call
24 a supermarket.

25 Q. Thank you.

1 Are you aware if this producer-handler also
2 utilizes a distributor who buys some of its products
3 from others?

4 A. I'm aware of a distributor who does buy
5 products from us and others and distributes them into a
6 fairly wide area, a wider area than when I first knew of
7 him, and he's in Portland and Eastern Oregon, Central
8 Oregon.

9 Q. Thank you.

10 Let me change subjects slightly.

11 There is an Andersen Dairy in Battle Ground,
12 Washington, is there not?

13 A. There is.

14 Q. As far as I know, it's spelled differently,
15 and no relationship to the Anderson Dairy in Nevada that
16 we've heard testimony about; is that right?

17 A. That's right.

18 Q. When you joined the dairy business, was
19 Andersen Dairy a producer-handler?

20 A. To the best of my recollection, yes, he was a
21 producer-handler in Bellevue.

22 Q. And at some point he chose to become a
23 regulated handler and buys additional milk from what
24 we'll call pool producers; is that correct?

25 A. From the pool producers, yes.

1 Q. Are you aware whether Ron Andersen retains
2 his own dairy farm?

3 A. He still has his own dairy farm.

4 Q. So he bottles some of his milk and some from
5 other sources?

6 A. That's right.

7 Q. Seems to be doing well as a regulated
8 handler?

9 A. To my knowledge, he's doing well.

10 Q. Are you familiar with the experience of
11 Wilcox Dairy as a producer-handler at one point?

12 A. They were a producer-handler. I don't know
13 exactly when they ceased to be one, but yes, they were a
14 producer-handler in Washington.

15 Q. And would it be fair today to say that
16 they're a regulated handler in all their locations?

17 A. They are a regulated handler in all
18 locations.

19 Q. And you observed them grow rapidly over the
20 last few years through acquisition and otherwise to
21 become one of the largest bottlers in the Northwest?

22 A. They may be the largest bottler in the
23 Northwest.

24 Q. And with respect to -- we had conversation
25 about Echo Spring Dairy. Who was Echo Spring Dairy?

1 A. Echo Spring Dairy was a regulated handler in
2 Eugene, Oregon, which is 110 miles south of our
3 operation. Because they were in a noncompetitive area
4 at the time, we didn't compete with them. We became
5 close personal friends, the owners and I.

6 They were successful due to some treatment
7 steps to acquire a large national grocery chain in their
8 area. They lost some of that market to a
9 producer-handler who had committed to this large company
10 to provide all the milk that they had, and it was the
11 obligation then of the folks in Eugene to balance out
12 that which the producer-handler couldn't.

13 Q. Are we talking about Mallorie's Dairy here?

14 A. We are talking about Mallorie's Dairy.

15 Q. How did that balancing relationship work as
16 you understood it from your acquaintances at Echo
17 Spring?

18 A. As I understood it, the stores -- there was a
19 coordination of some manner in which the
20 producer-handler would communicate or the store would
21 communicate that there would be this much additional
22 milk needed from the regulated handler, Echo Spring, to
23 fill the needs of the grocery stores.

24 MR. MARSHALL: Okay. No further questions at
25 this time. Mr. Arbuthnot is available for

1 cross-examination.

2 JUDGE HILLSON: Mr. Yale.

3

4 EXAMINATION

5 BY MR. YALE:

6 Q. Good morning. Ben Yale on behalf of
7 Mallorie's Dairy, Edaleen Dairy, and Smith Brothers
8 Farms.

9 You came down a list of several dairies,
10 Andersen Dairy and Wilcox Dairy, that started as PDs and
11 now are fully regulated; right?

12 A. Yes.

13 Q. And cows?

14 A. From all outward appearances.

15 Q. So do you make decisions to go from one
16 position to the other based upon profit and economics?
17 Is that the basis for making that kind of a decision?

18 A. I have never made it. I can't tell you.

19 Q. I mean, as a businessman, I mean, isn't that
20 the logical thing, is that they made a business decision
21 that it was better economically for them to make this
22 move from being a PD to being a regulated handler?

23 A. I would think that would be at least one
24 consideration.

25 Q. And the reason is that, when they balanced it

1 all out, it was more cost effective to be that way,
2 right, for their particular situation? Right?

3 A. I can't answer if that was the only
4 consideration they made.

5 Q. Doesn't that statement support the fact that
6 a PD and its costs aren't that wildly different from a
7 regulated handler?

8 A. I couldn't conclude that. There are so many
9 external factors in what goes into a business decision.
10 That wouldn't be one of the -- that wouldn't be the
11 exclusive component.

12 Q. You said there's a lot of external factors
13 that go into the cost of a product; right?

14 A. Yes.

15 Q. And in milk that is sold, whether it's a
16 processor or a producer-handler, there's a lot of cost
17 just besides the value of milk that goes into those
18 costs; right?

19 A. That would be right.

20 Q. And efficiency of the plant operation can
21 contribute to that cost either positively or negatively;
22 right?

23 A. That's right.

24 Q. All right. And location, transportation, all
25 those things go into it; right?

1 A. Go into?

2 Q. The cost?

3 A. Yes.

4 Q. The economics; right?

5 A. Yes.

6 Q. And you've been in the business -- you have a
7 blow-mold or did you have paper?

8 A. Both.

9 Q. And did you have your own blow-mold
10 operation, or do you buy those?

11 A. We were a joint venture in operation.

12 Q. With?

13 A. Other handlers.

14 Q. Okay. Because the volume is cheaper, right,
15 volume in blow-mold that you can make is cheaper than
16 trying to do it in a small operation?

17 A. I don't know that it was feasible, but we
18 certainly -- it became doable.

19 Q. Now, you indicated that there are fewer
20 regulated handlers today in the Portland market than
21 there were back in 1968; right?

22 Now, there's been an exhibit submitted by the
23 Market Administrator that suggested in the whole
24 marketing area -- Oregon, Washington -- that's part of
25 this new marketing area that there's also considerably

1 fewer PDs as well; right?

2 A. I didn't see that there were considerably
3 fewer PDs.

4 Q. There's a document that said 73 in 1975 and
5 there's 8 today.

6 A. That would verify what you're saying.

7 Q. Okay. So the economic factors that have made
8 it difficult for a regulated handler also apply to
9 producer-handlers as well; right? Can't you surmise the
10 same thing?

11 A. There were factors for both, I'm sure, right.

12 Q. And the factors that have caused a demise of
13 the businesses, competition's always one of them, but
14 there's always other things that contribute as well;
15 right?

16 A. That's right.

17 Q. Now, this coffee shop and this little chain,
18 is that a Starbucks?

19 A. It is.

20 Q. All right. And you had a contract with them
21 supplying a certain amount of volume of milk; right?

22 A. No contract.

23 Q. You didn't have a contract. They were
24 ordering it and you were delivering it; right?

25 A. That's right.

1 Q. According to your testimony, you lost it to
2 Edaleen Dairy?

3 A. That's true.

4 Q. All right. And what year was that?

5 A. 1999 to 2000. I'm no longer with the
6 company. I don't have access to those records.

7 Q. But approximately 1999?

8 A. That's right.

9 Q. All right. And do you know who's supplying
10 Starbucks today?

11 A. I don't know.

12 Q. Is it Edaleen?

13 A. I heard just yesterday that it was not. I
14 lost track of the company. We're not doing business
15 with it. But I heard that locally here, that it wasn't
16 Edaleen.

17 Q. Who did you hear that it was?

18 A. Can I ask the person who told me? I don't
19 remember what he said. He's sitting here.

20 Q. Was it Safeway?

21 A. It probably was. You know, I just can't
22 remember. It was a fleeting conversation.

23 Q. Is Safeway bigger than Sunshine?

24 A. Yes.

25 Q. Much bigger?

1 A. I would think so.

2 Q. All right. And wasn't one of the factors
3 that Safeway has processing and distribution throughout
4 the West Coast? Isn't that something that you didn't
5 even have at Sunshine?

6 A. We didn't have --

7 Q. You didn't have a West Coast distribution
8 system, ability to supply markets from Tiajuana all the
9 way up to Bellingham, did you?

10 A. I don't know that that was a consideration,
11 but no, we do not have.

12 Q. Okay. But Safeway as a total operation is
13 much larger than Sunshine; right?

14 A. It is.

15 Q. And much larger than Edaleen; right?

16 A. I would think so.

17 Q. And do you know of any of the circumstances
18 with Edaleen, in terms of what investment they had to
19 make to supply that contract?

20 A. I wouldn't know that.

21 Q. And let's go back to the point when you got
22 the phone call, the visit or whatever, the bad news.
23 That meant you weren't going to sell as much milk from
24 then on; right?

25 A. It did.

1 Q. All right. And what was one of the first
2 things you had to do as a businessman once you realized
3 you weren't going to process that milk, process in your
4 milk plant? What was one of the first things?

5 A. Right-size the business. I think I mentioned
6 it was 10 percent of the business. Right-size the
7 business.

8 Q. To right-size the business, what did that do
9 with your supply of milk?

10 A. We didn't need as much.

11 Q. All right. So how many cows did you get rid
12 of to supply 10 percent less of your market?

13 A. That's an obvious question. We don't have
14 any cows.

15 Q. You called up a co-op and told them, "I don't
16 need as many tankers," didn't you?

17 A. Yes, we did.

18 Q. What cost did that come to you for that
19 downsizing?

20 A. Specifically for that one --

21 Q. No. For reducing the volume, the purchase of
22 the milk, the supply of the milk, what extra cost did
23 you have in reducing your cost of milk?

24 A. Didn't have any cost.

25 Q. Didn't have any cost at all.

1 Now, you testified -- I mean, you agree --
2 you understand and accept the fact that Safeway at some
3 point since 1999 has taken over the contract of
4 Starbucks away from Edaleen?

5 A. I heard that yesterday.

6 Q. All right. Now, as a producer-handler, put
7 yourself in a situation that you own cows, all right,
8 your same scenario, and Starbucks comes and says, "Nice
9 job, but not nice enough. We're going to pull
10 35 percent of your market."

11 Now, what can a producer-handler do at that
12 point?

13 A. I don't think that the result for the
14 producer-handler is any different than it is for a
15 regulated handler in that scenario. You respond to it
16 in one form or another. We responded by labor layoffs.
17 Painful experience for me to do.

18 Q. I'm sure it is. But you didn't have to get
19 rid of cows?

20 A. Specifically, we didn't have to get rid of
21 cows. We had to get rid of people. People are more
22 important to me.

23 Q. Yeah, I know people are important to Edaleen
24 as well, and we don't know what that --

25 MR. MARSHALL: Objection, Your Honor.

1 JUDGE HILLSON: On what basis?

2 MR. MARSHALL: Lack of foundation, and it's
3 going way beyond the scope of direct testimony. It's
4 hypothetical, it's argumentative, and Mr. Yale,
5 representing Edaleen, can go into all of this with his
6 own witnesses. We are prolonging the hearing
7 unnecessarily.

8 JUDGE HILLSON: Mr. Yale, do you want to
9 address that?

10 MR. YALE: Your Honor, first of all, we're
11 not prolonging the hearing. It's to our advantage if
12 this is much shorter than it is.

13 But the point is, in this particular line of
14 questions, he's indicating that as a producer, a
15 regulated handler, he has an advantage over
16 producer-handlers. And I want to probe those
17 differences to indicate and show in the record that that
18 advantage wasn't there. And I think I have a right to
19 challenge him on that.

20 JUDGE HILLSON: I'm going to allow the
21 question. I think it's a legitimate follow-up to his
22 testimony.

23 MR. MARSHALL: Thank you, Your Honor.

24 Q. BY MR. YALE: Have you ever been involved in
25 operating a farm with dairy cows?

1 A. My dad was a dairy farmer.

2 Q. Okay. So you wouldn't know the impact there
3 to find yourself with a milking parlor and barns, with a
4 certain size farm, and have to either find sales or get
5 rid of cattle; right?

6 A. I haven't had to do that, no.

7 Q. But that's one of the risks of a
8 producer-handler, is that they have the capital thing
9 they have to get rid of when they lose -- right-size, as
10 opposed to a regulated handler that can use the market
11 power of the co-ops to balance them in those situations;
12 right?

13 A. One of the risk factors of any entrepreneur
14 is to make an investment, and they don't always work
15 out, whether it's the dairy business or the farm
16 business. Sunshine made a capital investment to get
17 this business in fleet and in people.

18 Q. Now, but also, though, the record would
19 reflect, though, that --

20 First of all, is there anything in this
21 system that guarantees you a customer for life?

22 A. Absolutely nothing.

23 Q. If you didn't lose it to Edaleen, there could
24 have been a risk you would have lost it to somebody
25 else, eventually lost it to Safeway, for example?

1 A. That's a hypothetical. I can't answer that.

2 Q. Did they come back to you after they --
3 whenever they decided to get rid of that?

4 A. Did they come back to us?

5 Q. Yes.

6 A. No.

7 Q. All right. So you don't know, I mean, you
8 know, where that would go, but it's a competitive
9 market. Customers come and go; right?

10 A. Yes, that's correct.

11 Q. All right. And if there was in fact a 15 to
12 20 cent per gallon advantage, as you've testified,
13 Safeway wouldn't be able to match that as a regulated
14 handler, would they?

15 A. I can't answer what Safeway would be able to
16 do.

17 Q. Now, let's talk a minute. You mentioned this
18 bit about -- I think you said Mallorie's Dairy was
19 delivering all of their milk to a grocery store and then
20 the grocery store was going -- chain was going to
21 balancings. Did I misunderstand that?

22 A. What I said was that my associate and my
23 colleague at another handler had lost a portion of his
24 business to Mallorie's. And the understanding that he
25 had was he would be able to maintain that which

1 Mallorie's would not be able to provide.

2 Is that the answer you understood?

3 Q. Now, was that at a store level? I mean, how
4 many stores were in this chain? I don't know. Do you
5 know?

6 A. The effective portion of the chain would be
7 10 to 15, I think.

8 Q. All right. Was this a situation where
9 Mallorie delivered to all 10 or 15 stores what it could,
10 and then what was left, all 10 or 15 stores would buy
11 the rest; or did he get six stores or five stores?

12 A. There were some selected stores.

13 Q. Selected stores; right?

14 A. Right.

15 Q. They were obligated to supply those stores?

16 A. With as much as they could.

17 Q. Right.

18 A. They weren't obligated to keep them fully
19 supplied because there was a regulated handler who was
20 required, as a condition of the relationship, to
21 maintain what Mallorie's couldn't.

22 Q. When did this occur?

23 A. This would be pre-1999. Could I say '97?
24 '95/'96.

25 Q. Does that circumstance still exist today?

1 A. It does not.

2 Q. All right. What was the name of the chain?

3 A. Albertson's.

4 Q. Albertson's.

5 Does Albertson's buy any milk from Mallorie's
6 at this date and time?

7 A. I don't know that.

8 Q. So you don't know whether Albertson's is now
9 buying it from a larger handler or what their
10 circumstances are?

11 A. I don't know.

12 Q. You don't know.

13 Okay. Doesn't the fact that -- well, let's
14 go back to this.

15 In your market, in that market of Oregon
16 today, or as you remember it most recently, 1999, 2000,
17 you indicated Albertson's. That's a fairly large chain;
18 right?

19 A. Right.

20 Q. All right. And what other retail outlets for
21 milk of the chain type exist in that market?

22 A. What other outlets, chain --

23 Q. Yeah.

24 A. Safeway, Albertson's. There's a Fred Meyer,
25 some smaller regional chains, and, of course, Wal-Mart

1 and Costco.

2 Q. Okay. Fred Meyer is Kroger; right?

3 A. That's right, Fred Meyer is Kroger.

4 Q. So we have all these large chains, and what
5 you indicate here is that, if Mallorie's were put in a
6 position to have to supply Albertson's, they're not big
7 enough to do it; right?

8 A. I don't know that.

9 Q. Well, obviously they didn't have enough to
10 supply all --

11 A. At that time, they didn't, apparently.

12 Q. And do you know whether the one that took
13 Albertson's was Wilcox, took all the Albertson's from
14 Mallorie's and others, was Wilcox Dairy?

15 A. I don't know what the sequence was. I really
16 don't know. Wilcox, I believe, is a supplier to many
17 Albertson's stores.

18 Q. Does your friend still supply Albertson's?

19 A. He's out of business.

20 Q. He's out of business.

21 How much of that -- do you know how much of
22 that was due to the PD?

23 A. I do not know.

24 Q. And is it possible that Albertson's sensed
25 that there was a problem with that business that might

1 be there and they were seeking an additional supplier in
2 a transition move to someone else?

3 A. I obviously couldn't know that.

4 Q. But there's a lot of things that go into why
5 milk moves from one supplier to another. It's not just
6 price; right?

7 A. There are more reasons than price.

8 Q. Because you've indicated some very important
9 ones, quality and service and the like; right?

10 A. Uh-huh.

11 Q. And it doesn't take long for a retailer to
12 find out that they can get a cheap price for a bad
13 quality, that they haven't gotten any bargain at all --

14 A. It doesn't take them long, I'm quite sure.

15 Q. -- when customers start coming back with
16 stale milk after two days or something like that; right?

17 Okay. Now, what you have, do you not, in the
18 retail side is just a continued consolidation of the
19 retail markets; right?

20 A. That's right.

21 Q. I mean, when you started in '68, would you
22 ever have thought you would have gone to Fayetteville,
23 Arkansas, to sell milk to a store down the street, you
24 know, like a Wal-Mart or something?

25 A. I beg your pardon?

1 No, I wouldn't have thought that.

2 Q. You wouldn't have thought that.

3 It was always a local business, right, and
4 people were looking for volume and they were looking for
5 large suppliers; right?

6 A. I'm not sure what you're asking.

7 Q. Well, I mean, the consolidation comes.
8 They're wanting to have fewer and fewer suppliers that
9 meet their needs. Is that part of their business model?

10 A. It is for some.

11 Q. And so as it stands for the producer-handler,
12 that they either get big enough to deal with them or
13 they have to scrap, like you say, to all the remaining
14 small and retail and convenience shops that are out
15 there; right?

16 A. That would be one strategy.

17 Q. Or home delivery?

18 A. The other.

19 Q. So is it the role of the Federal Market
20 Administrator or the Secretary to make a decision with a
21 handler in terms of what kind of retail market that they
22 can seek, I mean distribution system, or the weight of
23 the market for their finished product?

24 A. Try the question one more time.

25 Q. It wasn't a very good question, so I want to

1 try it again.

2 JUDGE HILLSON: I agree.

3 Q. BY MR. YALE: Is it the role -- do you see
4 the Secretary having to make a decision that says that
5 "For producer-handlers, here's this retail sector which
6 is the big box," I think it was called, "and the
7 discounters and the others, and you can't have those,
8 but you can have what's left of the convenience stores
9 and the mom-and-pops and the restaurants and the
10 churches"?

11 Is that your position?

12 A. Are you asking if that's -- if I think that's
13 the role of the Secretary?

14 Q. Yes.

15 A. No, I don't think so.

16 Q. Now, do you support the 3 million pound cap
17 that's proposed by NDA?

18 A. Yes.

19 Q. Okay. And how -- did you come up with that
20 number yourself, or is this just something you agree
21 with because that's what they propose?

22 A. This has been bandied about for two days now,
23 "What's the right number?" And at some number, it has
24 to be. If it's 3 million and there's been some
25 consideration put into that question that I haven't,

1 I'll accept it as the right number.

2 Q. But you don't have any information of what
3 that right number ought to be?

4 A. I do not.

5 Q. Have you lost business to any regulated
6 handlers over the years?

7 A. Yes.

8 Q. What are some of the regulated handlers you
9 lost business to?

10 A. I think it's sufficient for me to say we have
11 lost business to other handlers, and anything beyond
12 that is proprietary.

13 Q. But the point of it is, being regulated and
14 going head to head with regulation is not an assurance
15 that you're going to continue to be competitive; right?

16 A. I know of no assurance that is --

17 Q. Right. So is it fair to say that over the
18 years you've had as much business come and go between
19 regulated handlers and you as between you and PDs?

20 A. How would you quantify -- how would you
21 describe "as much"?

22 Q. Well, have you ever had a situation where in
23 one year you lost 10 percent of your sales volume to
24 another handler but gained it from someplace else to
25 offset it?

1 A. Nowhere close.

2 Q. Have you lost schools?

3 Did you ever have schools?

4 A. No, we don't.

5 Q. You don't sell to schools.

6 You sell to chains and stores and --

7 A. Restaurants, as I described. Restaurants,
8 hospitals, clubs, some small convenience stores.

9 Q. Starbucks, by percentage, was one of the
10 larger customers?

11 A. Yes, it was.

12 Q. The reason you wouldn't lose 10 percent
13 necessarily in others is because if you lost all the
14 business of a particular customer, it wasn't big enough
15 to get there. Is that fair to say?

16 A. That's accurate.

17 Q. But it is a dynamic in which customers come
18 and go; right?

19 A. It is a dynamic in which customers come and
20 go.

21 MR. YALE: Very well. I have no other
22 questions.

23 JUDGE HILLSON: Who would like to proceed
24 next, if anyone?

25

1 EXAMINATION

2 BY MR. RICCIARDI:

3 Q. Mr. Arbuthnot, good morning. I'm Al
4 Ricciardi here on behalf of Sarah Farms, and I have some
5 follow-up questions.

6 You're not here to present any testimony with
7 regard to the proposals for changing any regulations in
8 Order 131; correct?

9 A. That's correct.

10 Q. And you don't have any specific information
11 concerning any events that may have occurred within this
12 Marketing Order, that is, 131; correct?

13 A. That is correct.

14 Q. Let me ask you some general questions, then,
15 about your testimony.

16 You indicated that, I guess, things have
17 gotten tougher to survive in the dairy business since
18 1968; is that correct?

19 A. Tougher than? No. It's been tough.

20 Q. Okay. Fair enough.

21 You indicated that you are the past president
22 of Sunshine Dairies, but basically you have retired,
23 although you do have some continuing affiliation with
24 them; is that right?

25 A. That's right.

1 Q. Do you continue to be paid by them?

2 A. Terribly small stipend.

3 Q. Okay. Fair enough. Not enough, but at least
4 getting something.

5 During the time that you were acting as the
6 president, were there regulated handlers in the area
7 that you marketed that had their own stores?

8 A. Not to my knowledge.

9 Well, excuse me. I beg your pardon. Yes.
10 The two big ones: Safeway, Kroger.

11 Q. So Safeway and Kroger operated in your
12 marketing area?

13 A. Yes, that's right.

14 Q. Did you find that that type of integration
15 allowed those particular regulated handlers to have an
16 advantage over you?

17 A. I don't want to be -- what do you mean by
18 "advantage"?

19 Q. Well, you know, let's explore it, because
20 we've heard it for two days.

21 You know, unfair advantage?

22 A. I want to be careful with my answers.

23 Q. I appreciate that, and I'm not meaning to
24 take offense on it, but let me ask it this way.

25 I assume Sunshine Dairy did not have its own

1 stores?

2 A. That's true.

3 Q. So in terms of a market, who did you sell to?

4 A. We sold to convenience stores. We sold to
5 the -- what I would call smaller independent grocery
6 stores. We had a specialty area that we worked hard
7 with which we called food service: restaurants,
8 hospitals, that sort of thing. That was the majority of
9 our business.

10 Q. And Sunshine competed for that business with
11 others; correct?

12 A. Yes, that's right.

13 Q. All right. Now, with regard to Kroger and
14 Safeway, which we used as an example before, since
15 Kroger and Safeway had their own stores, they weren't
16 competing with anyone for that particular business;
17 correct?

18 A. For the particular business? They had their
19 own stores and they sold milk.

20 Q. That's right.

21 A. And that was the business that they had. We
22 weren't competing with them in that sense.

23 Q. They made a decision with regard to that
24 particular business model to make that investment --

25 A. They did.

1 Q. -- that Sunshine didn't make; correct?

2 A. Right.

3 Q. And, therefore, as entrepreneurs, as you
4 described it in your testimony, they put in capital in
5 those stores that Sunshine Dairies decided not to?

6 A. Right.

7 Q. Do you find that to be an advantage?

8 A. I can only find an advantage as it manifests
9 itself at the retail level. And, frankly, it was not a
10 disadvantage --

11 Q. Okay.

12 A. -- to us.

13 Q. Basically, it was another business decision
14 to operate in that integrated fashion versus the
15 operation of Sunshine Dairies; is that correct?

16 A. That's a decision.

17 Q. And Sunshine Dairies also made a decision not
18 to have cows?

19 A. We did.

20 Q. That was a business decision that Sunshine
21 Dairies made?

22 A. Before my time, but apparently that's it.
23 That's the result.

24 Q. And if Sunshine had decided that it wanted to
25 have a dairy, it would have to expend capital in order

1 to go out and start dairying, buy the cows and do the
2 things you would need to do; correct?

3 A. You would have to make a business decision
4 just like you do when you start another plant. You
5 factor in the risks, and you go for it or you don't. It
6 doesn't always work.

7 Q. And an individual who decides to be a handler
8 makes those decisions; correct?

9 A. They do.

10 MR. RICCIARDI: Nothing further.

11 JUDGE HILLSON: Mr. Beshore?

12

13

EXAMINATION

14 BY MR. BESHORE:

15 Q. Good morning, Mr. Arbuthnot.

16 A. Good morning.

17 Q. In your statement, you refer to customers
18 cherry-picking the dairy business, awarding volume sales
19 to the producer-handler and small stuff to the regulated
20 handler.

21 Can you give us some examples of you what you
22 mean by that?

23 A. Yeah, I can.

24 Typically -- and I'm generalizing here. I
25 don't want to be tripped up on that. But typically the

1 producer-handler produces a limited number of items in
2 his operation. It may not include the full gamut of
3 somebody who's -- somebody used the example of
4 half-and-half. It may not include the full gamut of the
5 product, so, therefore, the producer-handler might
6 typically produce mainstream quantity products and ask a
7 handler to provide those which are not in such quantity
8 and maybe takes a little more capital, more specialty,
9 maybe a little more skill to produce.

10 The person this morning from Braum's, I
11 think, used half-and-half. There could be others,
12 cultured products. It could be all sorts of things in
13 which the producer-handler has chosen for whatever
14 reason not to produce. So that's my description of
15 cherry-picking. That producer-handler could then go to
16 a regulated handler to buy those products.

17 Q. Or their customer could get them?

18 A. Or their customer --

19 Q. Could go to the regulated handler?

20 A. That's right.

21 Q. Did cherry-picking occur in Order 124, in
22 your observation, in sizes of milk containers
23 occasionally? For instance, producer-handlers only
24 offering gallons?

25 A. In the past, that has happened, yes, that's

1 right.

2 Q. And then the regulated handler would need to
3 supply the customer's needs for half-gallons, pints,
4 whatever it might be?

5 A. Whatever, right.

6 Q. Okay. Gallons are typically more profitable
7 than the smaller items in your product line?

8 A. They contribute an enormous amount to the
9 efficiency of the plant.

10 MR. BESHORE: Okay. Thank you.

11 MR. BERDE: Sydney Berde.

12

13

EXAMINATION

14 BY MR. BERDE:

15 Q. Mr. Yale already asked you about the
16 operations of Kroger and Safeway --

17 A. Yes.

18 Q. -- suggesting in his questions that they were
19 fully integrated, similar to a producer-handler.

20 A. He intimated that, right.

21 Q. Is there any analogy between the operations
22 of Kroger and Safeway in the operation of a bottling
23 plant that is in any way analogous to a
24 producer-handler's operation?

25 A. It's tenuous.

1 Q. It's what?

2 A. It's tenuous. It's not clear to me that
3 there is.

4 Q. Well, Kroger and Safeway, with respect to the
5 operations of a bottling plant, bought raw milk from
6 dairy farmers, didn't they?

7 A. As regulated handlers.

8 Q. And they paid the federally regulated Class I
9 price or whatever their utilization was for that milk?

10 A. That would be right.

11 Q. Yeah. And there was no such similar
12 operation with respect to a producer-handler who in
13 effect is integrated with his own raw milk production to
14 the distributive level; isn't that correct?

15 A. I would agree that that's correct.

16 MR. BERDE: Thank you.

17

18 EXAMINATION

19 BY MR. RICCIARDI:

20 Q. I have a follow-up question. This is Al
21 Ricciardi again.

22 The question was asked of you regarding
23 profit on certain sizes of milk. In actuality, the
24 profit margin on gallons is less in most cases than
25 smaller half-gallons, quarts, and smaller bottles than

1 that; correct?

2 A. You're making that statement. I can't -- I
3 won't state that. I won't comment on that.

4 Q. You're saying you won't say it because it is
5 confidential information?

6 A. It's information you don't want to talk
7 about. Where our profits lie, where they don't lie is
8 proprietary.

9 Q. So you can't tell us today whether the profit
10 margin on gallons is more or less than smaller milk,
11 correct, types of milk?

12 A. In my opinion, that's proprietary information
13 to our company.

14 MR. RICCIARDI: Nothing further. Thanks.

15

16 EXAMINATION

17 BY MR. RITCHEY:

18 Q. Al Ritchey with Alan Ritchey, Incorporated.

19 You made a statement that in 1968 there were
20 at least 10 bottlers up in the Portland area?

21 A. Yes.

22 Q. And as of today, there's possibly three?

23 A. That's correct.

24 MR. MARSHALL: Objection. Your Honor, the
25 question misstates the testimony, which is three

1 traditional-style dairy operations.

2 JUDGE HILLSON: He can take care of it in his
3 answer. He asked him if that's what he said.

4 THE WITNESS: Ask the question again, would
5 you, Mr. Ritchey?

6 Q. BY MR. RITCHEY: As of 1968, there was
7 approximately 10 traditional-style bottlers in the
8 Portland area?

9 A. Proprietary traditional handlers, yes.

10 Q. And today, that number has dropped to three?

11 A. Yes, sir.

12 Q. Of those seven, how many have sold out to
13 larger bottling companies and how many have closed the
14 doors and did something else?

15 A. Mr. Ritchey, to the best of my knowledge,
16 there were none that were sold to a larger company. I
17 think that's what you described.

18 Q. Right, or any company.

19 A. Okay. I would have to spend some time on
20 that, but I believe most of them closed the doors.

21 Q. And so being in the business, when somebody
22 closes the doors and doesn't sell, that means it's not
23 passable; is that right?

24 A. Yes, I think that's a good conclusion.

25 MR. RITCHEY: Okay. I don't have anything

1 else at this time.

2 JUDGE HILLSON: Thank you, Mr. Ritchey.

3 Anyone else have any questions of
4 Mr. Arbuthnot?

5 MS. DESKINS: Sharlene Deskins.

6

7 EXAMINATION

8 BY MS. DESKINS:

9 Q. I had a question about your testimony where
10 you characterize things as being small. Under the Small
11 Business Act, small business is described if it has
12 gross receipts of less than \$750,000, and a dairy
13 manufacturer is a small business if it has fewer than
14 500 employees.

15 A. We have fewer than 500 employees.

16 Q. So you would be a small business, then?

17 A. My understanding of the definition is yes,
18 we're a small business.

19 Q. Okay. And I'm just trying to remember. Did
20 you use the term "small" in describing any other entity
21 in your testimony?

22 A. I don't recall doing that.

23 MS. DESKINS: All right. Thank you. That's
24 all the questions I had.

25 JUDGE HILLSON: Do you have another question,

1 Mr. Ritchey?

2

3

EXAMINATION

4 BY MR. RITCHEY:

5 Q. One.

6 Now, you were talking about, excuse me, a
7 producer-handler supplying maybe only gallons to the
8 store, but a regulated handler had to supply the
9 half-gallon and half-and-half and that; is that right?

10 A. I wasn't specific as to what they were, but
11 yes, in general, your question is right.

12 Q. It's not under any kind of obligation to come
13 in and supply that? In other words, he's not going to
14 supply that unless he's making a profit on it.

15 Is that a false statement?

16 A. That would be one reason. Another reason
17 would be -- my innate sense of being a salesman, I think
18 if I have a foot in the door, I may be able to get back,
19 and that's exactly what we do. That's not always a good
20 business model, but it's one hoping for the future.

21 Q. But you were not selling at a loss?

22 A. We would hope not to. That's true.

23 JUDGE HILLSON: Ms. Deskins.

24

25

1 EXAMINATION

2 BY MS. DESKINS:

3 Q. Yes. I just looked at your statement. You
4 used the term "small producer-handler."

5 A. That was my description.

6 Q. Okay. Would that have been a
7 producer-handler that had -- well, gross revenues of
8 less than \$750,000?

9 A. I can't answer that. It may or may not.
10 "Small," as I applied it to Sunshine Dairy,
11 was fewer than 500 employees.

12 Q. When you use the term in describing the
13 producer-handler, you don't know what size they are?

14 A. I do not.

15 MS. DESKINS: Okay. Thank you.

16

17 EXAMINATION

18 BY MR. MILTNER:

19 Q. Ryan Miltner for the producer-handlers in the
20 Pacific Northwest.

21 Mr. Arbuthnot, you made a statement about
22 being outbid for business to Starbucks, and you stated
23 that you were told if you could lower your price by 15
24 to 20 cents a gallon, you could keep the business?

25 A. I did not say that. I said the die was cast.

1 I said, if we had had a price-lowering by that much, the
2 buyer had told me in person that we wouldn't be
3 having -- the clear implication was it wouldn't have
4 been the right price.

5 Q. Okay. Do you know for a fact that you were
6 outbid for this?

7 A. I know for a fact he told me 15 or 20 cents,
8 and that was the hypothetical. He said we wouldn't have
9 a meeting.

10 Q. Did you offer him a 5 cent a gallon --

11 A. I said 15 to 20 cents.

12 Q. Okay. Do you have any specific knowledge
13 about -- assuming that there was an advantage, price
14 advantage by Edaleen Dairy by, hypothetically assume 15
15 cents a gallon, do you have any knowledge as to how they
16 could achieve that price advantage?

17 A. I think that I referred to it in my
18 testimony. One very distinct possibility is that it
19 would be blend price to Class I price.

20 Q. But that's pure supposition on your part?

21 A. It is not supposition. The pure fact is,
22 there was much difference in the price.

23 Q. But they could also have chosen to have a
24 lower profit margin than Sunshine?

25 A. That would be outside the purview of my

1 knowledge, and I'm not testifying to that.

2 Q. They could have had lower bottling costs than
3 Sunshine and that would allow them to price their milk
4 less?

5 A. Anything is possible, I guess.

6 Q. Okay.

7 A. I specifically referred to one issue.

8 Q. But you don't know for a fact that's how?
9 You don't even know for a fact they did have a price
10 advantage, and you don't know, if they did have a price
11 advantage, that that advantage arose because they
12 have -- because they're an unregulated producer-handler;
13 is that correct? You don't know those for facts?

14 A. I think we're kind of bandying about the same
15 subject.

16 JUDGE HILLSON: He's testified to what he
17 knows and the basis of that, so you don't have to ask.

18 Anyone else?

19 Mr. Berde.

20 MR. BERDE: Sydney Berde.

21

22 EXAMINATION

23 BY MR. BERDE:

24 Q. Were you in the room when John Hitchell
25 testified as to the percentage of plant costs that are

1 attributable to raw milk costs?

2 A. I was.

3 Q. Do you remember the figure 70 percent of a
4 handler's costs?

5 A. I remember that number.

6 MR. BERDE: Thank you.

7 JUDGE HILLSON: Anything else?

8 MR. MARSHALL: Your Honor, I just want to
9 thank you --

10 JUDGE HILLSON: Would you identify yourself
11 one more time?

12 MR. MARSHALL: Doug Marshall for Northwest
13 Dairy Association.

14 I want to thank you, the witness, and the
15 current president of Sunshine Dairy for allowing him to
16 come down and testify and explain for the record his
17 experience competing against producer-handlers.

18

19 EXAMINATION

20 Q. BY MR. MARSHALL: I just ask, as a final
21 question, Mr. Arbuthnot, is there anything else that
22 you'd like to say to clarify anything that's come up
23 during these questions?

24 A. Something that occurred to me, and I hope
25 this is sort of relevant, that we've heard quite a bit

1 from the producer-handlers about the cost of balancing.

2 And in the middle of the night, it occurred
3 to me that we all experience some level of cost of
4 balancing. It is not a burden that is exclusive to the
5 producer-handler. It is a burden that goes with the
6 business.

7 I'm not going to -- I'm not an expert and I
8 can't tell you exactly what those differences are;
9 however, at our company, we need to balance with the
10 co-operative that supplies us milk, and if we don't, we
11 pay a premium amount over what we've agreed to.

12 If we buy milk on a certain date, if we buy
13 milk in excess of a certain predestined quantity, we pay
14 more for it. That's a cost associated with balancing.
15 And I think that somewhere along there -- maybe it'll
16 come up in later testimony -- that that is in fact not
17 exclusive to producer-handlers.

18 MR. MARSHALL: I think there will be later
19 testimony on that subject.

20 Thank you very much, Mr. Arbuthnot.

21 JUDGE HILLSON: Do you have another question?

22 MR. RITCHEY: Yeah, please.

23 JUDGE HILLSON: Proceed.

24

25

1 EXAMINATION

2 BY MR. RITCHEY:

3 Q. In relationship to the loss on the milk
4 supplied to Starbucks Coffee, isn't it maybe a
5 possibility that that loss wasn't based on price, but
6 maybe it was based on service?

7 JUDGE HILLSON: That question's been asked
8 and answered. I mean, he said he didn't know, and I
9 just told the last -- on the prior question, we're all
10 done with that issue.

11 You can go, Mr. Arbuthnot.

12 (Witness excused.)

13 JUDGE HILLSON: Right now it's 12:15. I
14 guess it's a logical time to break for lunch.

15 When we come back, unless someone tells me to
16 change the order again, we're going to hear from
17 Mr. Gladden, Mr. Krueger, and then Mr. Vander Pol, and
18 take it from there, so I'll see you in about an hour,
19 about 1:15.

20 (Recess at 12:15; resumed at 1:24.)

21 JUDGE HILLSON: We can go on the record now.

22 And this is the afternoon of the 24th.

23 Is that what it is? I'm losing track here.

24 The afternoon of the 24th?

25 MR. BERDE: Yeah.

1 JUDGE HILLSON: And the schedule I have right
2 now for the next three speakers will be Mr. Gladden,
3 Mr. Krueger, Mr. Vander Pol.

4 Is that something that needs to be changed?
5 Mr. Vander Pol, he's going to be after Mr. Gladden and
6 before Mr. Krueger?

7 MR. BESHORE: Yes.

8 JUDGE HILLSON: Gladden, Mr. Vander Pol, and
9 Mr. Krueger.

10 If Mr. Gladden is ready, he can head on up
11 here.

12 MR. IMBORNONI: Brian Imbornoni for Maverick
13 Milk Producers Association. We would like to produce
14 William T. Gladden, who will read a short statement.

15 And thank you for taking our witness out of
16 order.

17 JUDGE HILLSON: Mr. Gladden, please raise
18 your right hand.

19
20 WILLIAM T. GLADDEN,
21 a witness herein, having been first duly sworn to speak
22 the truth and nothing but the truth, was examined and
23 testified as follows:

24

25 JUDGE HILLSON: Could you state your name and

1 then spell it for record, please.

2 THE WITNESS: William T. Gladden. That's
3 G-l-a-d-d-e-n.

4 My name is William T. Gladden. My family and
5 I have a dairy farm in Buckeye, Arizona. We milk 1900
6 cows and market our milk through Maverick Milk Producers
7 Association.

8 Maverick is a small co-op formed in December
9 of '99. I was one of the founding co-op members and
10 currently serve as president of Maverick's board.

11 Maverick has 16 members at this time and it markets the
12 majority of its milk to Class I or fluid uses in
13 California and Arizona.

14 Since 1999, Maverick has pooled just over
15 1 billion pounds of production under Order 131. Using
16 the Market Administrator's calculation contained in
17 Exhibit 9, we estimate that Sarah Farms' status as a
18 producer-handler has cost our members in excess of
19 \$1.2 million. Now, this estimate is based on the
20 assumption that Sarah Farms is producing 18 million
21 pounds of milk that would otherwise be pooled as Class I
22 milk under Order 131.

23 Maverick agrees with UDA and DFA's proposal
24 to limit the scope of the producer-handler exemption and
25 supports the adoption of proposal number 3.

1 JUDGE HILLSON: Thank you, Mr. Gladden.

2 Are there questions of Mr. Gladden?

3 MS. DESKINS: Sharlene --

4 JUDGE HILLSON: I don't care who wants to go
5 first.

6 MR. RICCIARDI: Go ahead.

7 All right. I appreciate that.

8

9

EXAMINATION

10 BY MR. RICCIARDI:

11 Q. Good afternoon, Mr. Gladden.

12 A. Yes.

13 Q. I am Al Ricciardi on behalf of Sarah Farms,
14 which I'm sure you've heard a couple of times in the
15 last couple of days here.

16 A. Yes, sir.

17 Q. Give me a moment, because I'd like to take a
18 look at your statement.

19 You indicated in your statement that you
20 market your milk through Maverick Milk Producers; is
21 that correct?

22 A. Yes.

23 Q. Do you know if Maverick Milk Producers sells
24 any milk to Shamrock?

25 A. Yes.

1 Q. How much of the milk -- how much of your milk
2 sold through Maverick goes to Shamrock?

3 A. Since 1999, all of that production I
4 mentioned.

5 Q. So 100 percent of your milk goes --

6 A. No, I didn't say that.

7 Q. Then how much of your milk --

8 A. I said all of what I mentioned here, our
9 production since 1999 under Order 131, is Shamrock.

10 Q. How much of that amount of milk is actually
11 produced --

12 A. What percentage?

13 Q. Yes.

14 A. Well, over that time period, it was probably,
15 I would guess, 75 percent.

16 Q. So 75 percent of the milk through Maverick
17 goes to Shamrock; am I correct?

18 A. In that time period, yes. Not currently, but
19 at that time.

20 Q. Currently, where does it go?

21 A. It goes to Shamrock and into California.

22 Q. Okay. So currently your milk either goes to
23 Shamrock or California; am I correct?

24 A. No.

25 Q. Where does it go right now?

1 A. It goes both places.

2 Q. I thought that's what I said.

3 So it goes to both Shamrock and to
4 California?

5 A. Yes.

6 Q. Can you tell me percentagewise --

7 A. Oh, I would say maybe close to 50/50. Maybe
8 a little less to Shamrock.

9 Q. So from '99 till when did 75 percent of the
10 milk go to Shamrock?

11 A. Well, to date.

12 Q. And the 50/50 split you're talking about --

13 A. Is right today. We're shipping a little less
14 to Shamrock than we did prior to today.

15 Q. Okay. When you're selling over into
16 California, is there a particular customer that you have
17 in California that Maverick markets milk to?

18 A. Yes. Safeway.

19 Q. Does Safeway get the other 50 percent of your
20 milk currently, then?

21 A. They get, yes, the other milk.

22 Q. And do you know how much, in terms of
23 poundage per month, is sold to Shamrock and how much is
24 sold to Safeway?

25 A. No, I can't answer that. I don't know exact

1 number.

2 Q. Do you have an idea?

3 A. Per month? I'd have to have a calculator,
4 and I don't have that information right now.

5 Q. Do you have a yearly figure?

6 A. No.

7 Q. Does Maverick transport its milk into
8 California for sale to Safeway?

9 A. Maverick itself?

10 Q. Yes.

11 A. No.

12 Q. Does Safeway pick the milk up?

13 A. No. We hire truckers to haul it. We don't
14 transfer it.

15 Q. Is there a cost associated with transporting
16 the milk into California?

17 A. Well, yes. Transportation costs.

18 Q. And is that transportation cost added onto
19 the price that you sell the milk to at Safeway -- for
20 Safeway?

21 A. No.

22 Q. Do you bear that cost yourself?

23 A. Yes.

24 Q. Does Maverick have its own milk production
25 facility?

1 A. No.

2 Q. When you say that Maverick has pooled a
3 certain amount of production under 131, where is the
4 milk pooled?

5 A. In the State Order. It goes to Shamrock.

6 Q. You give some estimates in the third
7 paragraph of your statement regarding a certain amount
8 of money you said was lost, in excess of 1.2 million; is
9 that right?

10 A. It was an assumption, yes.

11 Q. That's what I wanted to get to. You don't
12 have any idea about what the amount of pounds of milk
13 Sarah Farms has sold?

14 A. No. I know how many pounds of milk we had,
15 but I don't know -- I used the assumption that the
16 Market Administrator put in Exhibit 9.

17 Q. Okay. The Market Administrator put
18 assumptions in Exhibit 9. Let me ask you a question.

19 You don't know the amount, by pounds or
20 otherwise, of milk that Sarah Farms sold during any
21 given period of time, do you?

22 A. I know it's a lot.

23 Q. Other than that, a lot, you don't know?

24 A. You know, I'm neighbors there, so I know it's
25 a lot.

1 Q. "A lot" doesn't translate itself -- directly
2 translate into 18 million. You don't know the specific
3 amount. That's why you say in your statement it's an
4 assumption?

5 A. No. That's why I use "assumption."

6 Q. You indicate that Maverick supports the
7 adoption of proposal number 3. Do you support the
8 adoption of any other proposal that's made before the
9 Department today?

10 A. Number 4 also.

11 Q. Okay. So when you say 3 in here, you also
12 meant number 4?

13 A. Yes.

14 Q. And can you tell me why you support number 4?

15 A. We're just -- no, I can't tell you exactly
16 why.

17 Q. Can you tell me why you support number 3?

18 A. We just feel it's fair because we're pooled
19 on this Order at a blend price, and we just feel it's
20 fair to have this milk in to raise the blend.

21 Q. Has Shamrock asked you to come here to
22 support that?

23 A. Shamrock is our customer and we -- yes, they
24 have asked us, but we were going to anyway.

25 Q. You're here to support your customer

1 Shamrock?

2 A. That's correct.

3 MR. RICCIARDI: Okay. I don't have any
4 further questions.

5 JUDGE HILLSON: Questions?

6 MS. DESKINS: Yes. Sharlene Deskins.

7

8 EXAMINATION

9 BY MS. DESKINS:

10 Q. I wanted to clarify some things in your
11 statement. You put, "Since 1999, Maverick has pooled
12 just over 1 billion pounds of production under
13 Order 131."

14 A. That's correct.

15 Q. Do you know, on a yearly basis, what are they
16 pooling?

17 A. I can't tell you that. We just took the --
18 we went back in our accounting and took the whole amount
19 for that period of time.

20 Q. For five years?

21 A. Yes. So I can't tell you exactly how much on
22 each year.

23 MS. DESKINS: Okay. That's all the
24 questions.

25

1 EXAMINATION

2 BY MR. ROWER:

3 Q. Jack Rower, Mr. Gladden. I'm sorry. The
4 period for the estimated \$1.2 million loss you remember,
5 is that over the four-year period?

6 A. Yes, that's correct.

7 Q. Thank you.

8 And your interest in supporting the proposal
9 is specific to Order 131?

10 A. That's correct.

11 Q. It doesn't address 124?

12 A. No.

13 MR. ROWER: Thank you very much.

14 MS. DESKINS: I have no further questions.

15 JUDGE HILLSON: Anyone else have any
16 questions of Mr. Gladden?

17 You may step down, Mr. Gladden. Thank you
18 very much.

19 (Witness excused.)

20 Mr. Vander Pol is going to be called next.

21 Mr. Vander Pol.

22 Mr. Vander Pol, if you'd raise your right
23 hand, I'll swear you in.

24

25 DARYL VANDER POL,

1 a witness herein, having been first duly sworn to speak
2 the truth and nothing but the truth, was examined and
3 testified as follows:

4

5 JUDGE HILLSON: Could you please state and
6 spell your name, please.

7 THE WITNESS: My name is Daryl Vander Pol.
8 Daryl, D-a-r-y-l, Vander Pol, V as in Victor a-n-d-e-r
9 capital P-o-l. I'm from Seattle, Washington, and I am
10 testifying at the request of Dairy Farmers of America.

11 I have served during the last 25 years as the
12 executive vice president and chief financial officer of
13 Vitamilk Dairy, Inc. In that capacity, I was exposed to
14 and had responsibility for a wide range of financial and
15 operational issues.

16 Vitamilk Dairy, based in Seattle, has been a
17 family-owned and -operated company. We have served
18 markets principally in the state of Washington, but also
19 in Alaska and some in Oregon and Idaho.

20 Vitamilk was started by my father-in-law, Ed
21 Teel, in the 1950s. He started the company as a single
22 delivery route while he was a college student at Seattle
23 Pacific University.

24 Vitamilk grew gradually over the years to the
25 point where we realized approximately 200 million pounds

1 of Class I and II dispositions in the year 1997, with
2 sales for the fiscal year ending September 30, 1998, of
3 over \$50 million.

4 Our sales have declined subsequent to that
5 time. As a family-owned independent processor, we have
6 had four generations of family members working for the
7 company.

8 On August 16, 2003, Vitamilk Dairy found it
9 necessary to discontinue operations. Although we served
10 a wide range of accounts, our primary traditional
11 customer base has been the independent grocer. As the
12 grocery industry has consolidated and as the number of
13 independents have been reduced, we found it increasingly
14 difficult to maintain our volume.

15 Our two largest customers during the 1980s
16 and into the mid and late 1990s were gobbled up by
17 consolidation, both by national grocery chains that
18 maintain their own processing plants. These two
19 customers represented approximately 50 percent of our
20 volume.

21 As we sought to retain what volume was left
22 and to replace some of the lost volume by retaining
23 segments of the Puget Sound, Washington state, and
24 Northwest regional market, we continually ran into
25 roadblocks formed by competitive inequities.

1 Among those inequities have been prices
2 offered by producer-handlers that are below our costs
3 and the marketing appeal presented by area
4 producer-handlers that they can offer a fixed price,
5 which removes budget uncertainty, a fixed-price program
6 that we could not afford to offer as a regulated
7 handler.

8 As I go on with my tale, please excuse those
9 portions of my prepared statement that are in the
10 present tense when they should more properly be in the
11 past tense. It's a challenge to consistently shift my
12 thinking from our former operation, so with that caveat,
13 please let me go on.

14 Following the loss of our major grocery chain
15 customers to consolidation, our independent
16 distributors, jobbers, filled an increasingly important
17 role for volume retention, yet at the same time, we were
18 looking to our distributors for increased sales. The
19 most beneficial part of that business, the high-volume
20 gallon sales, was being targeted by competition from
21 producer-handlers.

22 Particularly during early 2002, a time when
23 we urgently needed to increase sales, we found our
24 volume to distributors being eroded by gallon prices
25 from producer-handlers against which we could not

1 compete.

2 One of our good distributors with whom this
3 occurred was Dairy Distributing based in the city of
4 Bellingham near the Canadian border. Out of the blue,
5 we were informed by this distributor that he was
6 switching his gallon product purchases to a local
7 producer-handler, Edaleen. The price being offered by
8 the producer-handler was 11 to 12 cents per gallon below
9 our best net price to distributors, according to
10 information from our sales staff.

11 As we tried to save this account, discussions
12 with the customer revealed that he loved our products,
13 loved our quality, our service. He loved most
14 everything about us. He felt compelled, however, to
15 switch his gallon volume to this producer-handler lest
16 the lower cost advantage of the producer-handler caused
17 his accounts to be taken from him one by one by
18 competing distributors carrying producer-handler
19 product.

20 Our net price to our major distributors at
21 that time, in January 2002, for 2 percent milk was \$1.75
22 per gallon. We offered this price in an effort to
23 retain and gain volume even though that price
24 represented no contribution to our indirect costs.

25 At that time, our ingredient cost was 1.22

1 per gallon; our packaging, 13 cents per gallon; our
2 direct production cost 40 cents per gallon, giving a
3 total of \$1.75 for those categories, with no
4 consideration for delivery, marketing, office, or other
5 administrative expenses.

6 Against that, our sales staff informed us the
7 producer-handler was offering a price understood to be
8 1.64 per gallon. In trying to salvage this account and
9 the volume it represented, we offered to match the price
10 presented by the producer-handler. We did so knowing
11 that the margin to us, even on an incremental basis,
12 made no economic sense. We were desperate to retain and
13 build volume.

14 Our offer to match prices, even with our
15 excellent track record, was not enough. This
16 distributor also wanted a fixed-price proposal,
17 something we as a regulated handler could not offer.
18 This distributor was fearful of losing his accounts to
19 other producer-handler competition.

20 At about this same time period, early in year
21 2002, one of our smaller distributors on the Olympic
22 Peninsula was merging with a neighbor distributor. We
23 worked hard at offering a proposal to be the supplier to
24 the surviving entity.

25 We were successful in part, but try as we

1 may, we could not get this distributor to carry our
2 gallons. We presented a gallon program we thought
3 competed. In fact, the gallon price we offered, as
4 before, was below the price needed to cover our
5 ingredient, packaging, and direct operating costs, the
6 cost of approximately 1.75, as I earlier mentioned.

7 We offered a below-cost price because we
8 needed the volume badly. Still, we could not convince
9 the distributor to take our gallons because of the
10 extremely low price offered by the producer-handler,
11 again, estimated at 1.64 per gallon, and because the
12 producer-handler could offer a fixed-price program.

13 Producer-handlers do have the advantage of
14 being able to offer fixed-price contracts to schools and
15 other customers for which we have been in direct
16 competition.

17 I can offer a couple further examples of this
18 that we happen to have on file, but these examples are
19 not isolated.

20 My remaining skeletal staff provided me
21 copies of the 2002 and 2003 school year bid proposals
22 for the Sumner and Bellevue School Districts. These are
23 in the Puget Sound area.

24 The Bellevue bid uses the very specific
25 wording, quote, "This contract is of the fixed-price

1 type," end quote, with "fixed-price type" being
2 underlined.

3 The Sumner bid is not so direct in its
4 wording. That bid refers to a unit bid price, that no
5 alternative bids will be considered, and there is no
6 provision on that proposal for an escalating price or
7 price that can move with the market.

8 These are two examples of school bids against
9 which we cannot compete. In fact, we can't even afford
10 to submit a proposal. If milk prices are low and when
11 the proposals are due, we can't offer a currently
12 competitive number because any increase in market cost
13 will have to be fully absorbed by us, the regulated
14 handler.

15 If prices are too high, the proposal we
16 submit will not begin to compete with what the
17 producer-handler can offer. For those reasons, we have
18 not been able to compete for fixed bid school milk
19 contracts, nor even realistically offer a proposal for
20 them.

21 One slight variation to that theme occurred
22 in the last school year, year 2002/2003. The Issaquah
23 School District in a suburb of Seattle has traditionally
24 been served with producer-handler product on a fixed bid
25 basis. It is my understanding that because no regulated

1 handlers could afford to offer bids in that environment,
2 the price offered by the distributor of producer-handler
3 product had crept up and become noncompetitive.

4 Vitamilk Dairy decided to make a run for it,
5 and we chose to study the district invitation to bid
6 more closely. The Issaquah School District bid
7 condition stated that the district is, quote,
8 "requesting firm prices," end quote. Again, "firm
9 prices" is underlined and in bold.

10 Vitamilk chose to submit a variable or
11 escalated proposal anyway, one which would move with
12 change in the Federal Market Order. Normally, our bid
13 would have been rejected out of hand. It was only
14 because regulated handlers had not been bidding and the
15 resulting noncompetitive environment allowed the price
16 to get so high that our proposal caught the district's
17 attention.

18 In discussions with the school district that
19 followed, we argued that the use of the word, quote,
20 "requesting," end quote, in the invitation to bid was
21 noncompelling and opened the door for other options.

22 The district concurred, and on July 15, 2002,
23 awarded us the bid on an escalator basis. On July 22nd,
24 we were informed that the award was challenged on the
25 escalator versus fixed-price issue. The challenge was

1 denied. But had the situation not become so egregious,
2 our variable bid approach would not have made it to
3 first base.

4 Let me offer one more example of a
5 producer-handler cost and fixed-price advantage that has
6 cost us lost sales.

7 In early 2002, we noticed that the volume of
8 half-pint purchases by our largest distributor had
9 suddenly dropped. Our chocolate and 1 percent school
10 half-pint sales to this distributor had been averaging
11 over 1,615,000 units per month during the last quarter
12 of 2001. In February 2002, that number was just over
13 618,000 units, a decline of almost 1 million units per
14 month to this one distributor.

15 Upon entering discussions with our customer,
16 we were told he had received a price that was 1 cent per
17 unit lower than ours and on a fixed basis. We sought to
18 match the price to retain the volume, but the
19 distributor-customer also wanted us to match the fixed
20 provision, which we could not do.

21 The price we attempted to match would have
22 generated a gross profit of 24 percent on the one
23 product, 27.8 percent on the other. This is a gross
24 profit, the way we calculate it, that only includes
25 ingredient and packaging costs. Adding in direct and

1 indirect operating costs would have produced a loss of
2 between 9.7 percent to 13.5 percent on every unit sold.

3 No matter how good we were, no matter how
4 hard we worked, we could not compete in those
5 disadvantageous conditions. In our opinion, the
6 producer-handlers in our marketplace have held an unfair
7 competitive advantage, a competitive advantage that has
8 cost us sales. Producer-handler competition that we
9 could not meet was a significant factor in our continued
10 decline following the initial loss of our two major
11 chain customers.

12 If it was not for this inequitable
13 competition, there is a good chance we would still be
14 operating today.

15 Thank you.

16

17

EXAMINATION

18 BY MR. BESHORE:

19 Q. Just a couple of additional questions,
20 Mr. Vander Pol.

21 How long ago did you say Vitamilk was
22 founded? When was it initially founded by your father?

23 A. The date's uncertain, but it's somewhere in
24 the 1930s. We often say 1937.

25 Q. I think you may have misspoken and said 1950s

1 in your testimony.

2 A. I did mean the '30s. Thank you.

3 Q. And until the business closed in August,
4 there had been four generations of the family involved
5 in the business; is that correct?

6 A. That's correct.

7 Q. How many employees did Vitamilk have at its
8 peak? You talked about the higher volume period in the
9 '90s.

10 A. Right. During that period, we had as many as
11 approximately 115 employees.

12 Q. And when you closed your doors in August, how
13 many employees did you have at that time?

14 A. When we closed last month, we were down to
15 about 70 employees.

16 Q. And those employees were terminated?

17 A. Those employees were terminated.

18 Q. Okay. Those were good union jobs up --

19 A. Those were all good-paying union jobs indeed.

20 Q. Now, you've spoken of the difficulty -- of
21 the inability of competing with fixed-price contracts.
22 As a regulated handler, you're required to pay the
23 minimum price -- the minimum Class I price for all your
24 Class I usage; correct?

25 A. That's correct.

1 Q. It varies from month to month?

2 A. Correct.

3 Q. In recent months, some of the variations have
4 been quite substantial with fluctuation in the dairy
5 commodity markets; correct?

6 A. Quite substantial. We're not economists and
7 we understand the economists couldn't predict where the
8 market was going, so we certainly had no way of
9 predicting it.

10 Q. But a producer-handler doesn't have to
11 account to the Market Administrator for the minimum
12 Class I price; correct?

13 A. That's my understanding.

14 Q. And they must only account to themselves for
15 whatever they choose to account to themselves for on a
16 monthly basis; is that correct?

17 A. That is also my understanding.

18 Q. That enabled them to have the ability to
19 offer fixed-price programs that you could not compete
20 with; correct?

21 A. That would be my understanding as well.
22 There may have been other reasons why they could, but
23 that would be certainly an ingredient as to why they
24 could and we could not.

25 Q. Now, you came here, as you testified, on the

1 request of Dairy Farmers of America?

2 A. Correct.

3 Q. DFA agreed to reimburse your expenses in
4 being here?

5 A. Yes, they did.

6 MR. BESHORE: Thank you. That's all I have
7 on direct.

8 JUDGE HILLSON: Mr. Yale.

9

10 EXAMINATION

11 BY MR. YALE:

12 Q. Good afternoon.

13 A. Good afternoon.

14 Q. Ben Yale on behalf of Edaleen Dairy, Smith
15 Brothers Farms, and Mallorie Dairy.

16 Let's take off with this fixed-price
17 contract.

18 Isn't it true, Mr. Vander Pol, that WestFarms
19 routinely offers fixed-price contracts to school
20 districts?

21 A. I am not familiar with their procedures.

22 Q. Have you ever run in any competition with
23 them for school bids?

24 A. We have competed with their distributors for
25 school bids more than we would have with them directly.

1 Q. Okay. And you have not seen that they also
2 offer fixed-price contracts?

3 A. I have not reviewed their procedures in that
4 regard. I am not familiar with that.

5 Q. So the question comes back, is that they're a
6 regulated handler; right?

7 A. They are.

8 Q. And they're still in business; right?

9 A. I have to ask that question. Are they? I
10 understand they are.

11 Q. That wasn't a trick question, I didn't think.
12 I certainly hope that they are.

13 And they're much larger than Vitamilk was?

14 A. They are.

15 Q. And so you had distributors that you sold
16 milk to that also sold WestFarms milk, or you didn't --
17 you didn't share distributors with anyone else?

18 A. We didn't share distributors with WestFarms
19 that I'm aware of.

20 Q. What you're saying is your distributors may
21 have sold -- you didn't know what the distributors'
22 competition was like. You just know you either got the
23 bid or you didn't and that they may have had to go head
24 to head against a fixed price with WestFarms, and you
25 would not know that?

1 A. That would be possible and I would not be
2 aware.

3 Q. Doesn't that change things, that fixed bids
4 are coming from a larger regulated handler in the
5 market, that it's not necessarily being regulated or
6 unregulated which determines whether you're going to
7 offer a fixed bid?

8 A. I can't speak to WestFarms's situation. I
9 can only speak to our situation. And our situation,
10 there was a difference.

11 Q. There's a risk for anyone that agrees to sell
12 milk at a fixed price for an extended period of time;
13 right? I mean, you've been in the business for a number
14 of years. That's just plain a risk, isn't it?

15 A. There is a risk, I would guess, but certainly
16 not the risk that we would face, having the market
17 conditions, the Federal Order market conditions to deal
18 with as well.

19 Q. The producer-handler has other market
20 conditions they have to deal with?

21 A. Which are also market conditions we have to
22 deal with. Those are market and economic conditions we
23 have to deal with.

24 Q. Cost of feed?

25 A. It's a factor.

1 Q. Cost of other farm services? Labor and stuff
2 on their farm might change during that period of time,
3 availability of feed, availability or production
4 capacity of cows due to weather and the like that they
5 couldn't control, that they'd have to give up other
6 customers? They have their own economic conditions that
7 they're taking a risk on with a fixed price; right?

8 A. You're making a statement, and I'm not
9 familiar --

10 Q. I'm just asking you.

11 You can't say that they didn't have the same
12 economic risks that you had, but they had economic risks
13 by fixing prices for a school year?

14 MR. BESHORE: Your Honor, that's
15 argumentative. He answered the question before, and I
16 object.

17 JUDGE HILLSON: Did he answer the question?

18 MR. YALE: I wasn't sure I got the answer.

19 JUDGE HILLSON: I'm not quite sure that you
20 answered it. I don't want you to repeat it again.

21 THE WITNESS: Well, I'm not an expert in the
22 producer-handler farming operation for me to speak to
23 the risks.

24 JUDGE HILLSON: You're saying you don't
25 know --

1 THE WITNESS: I don't know.

2 JUDGE HILLSON: -- is that right?

3 If you don't know, you can say you don't
4 know.

5 THE WITNESS: Okay.

6 Q. BY MR. YALE: One of your big chains that you
7 sold to was Quality Foods, or QFC; right?

8 A. That's correct.

9 Q. What's the status of QFC today?

10 A. QFC was acquired by Fred Meyer, which was
11 subsequently acquired by Kroger.

12 Q. All right. When was that -- when did that
13 acquisition by Kroger take place?

14 A. Oh, the Kroger acquisition? I'm thinking it
15 was around '98, but I'm not good at those dates.

16 Q. When did you lose the sales to QFC?

17 A. It didn't happen overnight. It happened
18 incrementally, so it wouldn't be a point in time that I
19 could put my finger on.

20 In fact, we were still selling a very small
21 amount of product to them, but not enough to be what you
22 would consider significant.

23 Q. What was it -- the time that that acquisition
24 began and this trickling or this incremental change,
25 what percentage was QFC of Vitamilk's business?

1 A. That certainly changed over time as well. I
2 think at the highest point they were a little more than
3 30 percent of our sales.

4 Q. Would that have been in 1998?

5 A. Approximately.

6 Q. All right. And then it went down?

7 A. It went down.

8 Q. All right. And so you lost 30 percent of
9 your sales to a regulated handler; right?

10 A. That's correct.

11 Q. Now, you testified that you -- is it Issaquah
12 or Issaq?

13 A. Issaquah School District.

14 Q. Issaquah School District?

15 A. Yes.

16 Q. Okay. You obtained a bid in 2000?

17 A. Right, for the school year 2002/2003.

18 Q. As I understand your testimony, it was
19 because you had a lower price?

20 A. Not compared to the market, we didn't have a
21 lower price. Compared to that particular school
22 district we went in, yes.

23 But that's all the sales. I mean, the school
24 district isn't going to say, "This isn't higher or lower
25 than the market." They're going to look at competitive

1 bids. They're going to make a decision on what they
2 consider is low.

3 Q. This PD had a higher price for their milk
4 than what you did?

5 A. The PD didn't have the higher price. The
6 distributor had the higher price.

7 Q. All right. So do we know what the
8 distributor was paying to the PD?

9 A. No, we don't.

10 Q. So the distributor, as I understand it -- I
11 mean, I've had to deal with marketing raw milk in my
12 earlier years. I never had to deal with the retail, but
13 from everybody I've talked to, they say it's a
14 dog-eat-dog world.

15 Is that a fair statement?

16 A. For the most part, it is.

17 Issaquah was an exception where someone had
18 an advantage they felt they could take and -- because of
19 the "fixed," and they knew they were the only one
20 bidding on it, or they thought they were.

21 Q. But those kinds of games of bids, I mean,
22 those are legion not just in the dairy business, but
23 anything, school bids or anything else, I mean, games
24 people play to get specifications and the like; right?

25 A. They may be legion, but we certainly haven't

1 had the benefit of any of those.

2 Q. Let's talk about that for a moment, okay?

3 Wasn't there a period of time that you had
4 some milk called fresh or farm range or farm --

5 A. You want to keep guessing, or do you want me
6 to help you out?

7 Q. What's the name?

8 A. That's my point.

9 Free farmed.

10 Q. Free farmed; right?

11 A. Yes.

12 Q. And wasn't it -- did you offer free farmed
13 milk?

14 A. We offered free farmed milk.

15 Q. What's free farmed milk? It's not free. I
16 mean, it had to be a price. What's the "free" part
17 about it?

18 A. The free farmed was an American -- or it's a
19 Humane Association certified label that's not available
20 anymore, for your information, but the point of that
21 product was that our farmers agreed that they were using
22 certain humane standards for the treatment of their
23 cows, and more importantly to us, in the marketing was
24 the fact that they agreed not to use rbST with their
25 cattle in the production of milk.

1 Q. And a school district happened to make a
2 requirement that there be free farmed milk as part of
3 the bid process; right?

4 A. There was one small school district in the
5 state of Washington that did that, yes.

6 Q. And what handlers were able to bid by meeting
7 that specification of free farmed milk?

8 A. For that one small school district which,
9 again, is the only one in the state of Washington, they
10 happened to be friends of my cousin and he was able to
11 coerce them to put that in there. There was a
12 limitation.

13 Q. I'm not going to get into the loss of family
14 relationships in this business.

15 A. It does make it more interesting, though.

16 Q. It does make it more interesting. But if we
17 start getting into first and second degree, we may be
18 here for a long time. I'm not going to go down that
19 route.

20 The point is, in this competitive business,
21 you were able to come up with some distinction, at least
22 with your cousin or somebody in that district, and
23 prevail, and I got to believe -- is this not true, the
24 case -- that you had sought other schools to make the
25 same requirement/specification?

1 A. Our sales staff may have done that. I'm not
2 aware of any.

3 Q. So how -- I'm not going to go that way.

4 Now, I get the impression that basically all
5 you're doing during this period of time and your
6 testimony seems to suggest that all you did was lose
7 business to PDs.

8 Did you ever gain any business from PDs, that
9 the PDs were supplying during this period of time?

10 A. None that I can recall.

11 Q. Let's take a look at -- what about Franklin
12 Pierce School?

13 A. I'm not familiar with that school district,
14 and it is not one that we would directly have bid on.
15 If I recall correctly, to the extent we even bid on that
16 district, it would have been by one of our distributors
17 who could have used our milk or anyone else's milk.

18 Q. But if testimony were to show that a PD lost
19 sales to Franklin Pierce School through a distributor
20 using your milk and your prices, you wouldn't have any
21 reason not to believe that; right?

22 A. If that's what the record shows, that's what
23 the record shows. But as I pointed out earlier, we had
24 a situation in which we were supplying school milk to a
25 PD, and then midyear, he switched -- excuse me, we were

1 supplying school milk to a distributor, and midyear, he
2 switched to a PD because of a penny advantage.

3 Q. Isn't it also true that some distributors
4 left Smith Brothers Farms and started to market only
5 your milk?

6 A. I'm aware of one smaller distributor that did
7 that.

8 Q. And do you remember the name?

9 A. I do not.

10 Q. But that occurred during that period of time;
11 right?

12 A. That occurred within the last couple years,
13 as I recall.

14 Q. So the point is, is that during this period
15 of time, there's the competitive market that's going
16 back and forth? You're getting some; they're getting
17 some?

18 A. That wouldn't be a fair characterization. We
19 picked up a couple small accounts and lost substantially
20 larger accounts.

21 Q. But do you know whether the producer-handlers
22 may not have been in the same situation that you were
23 in? You know, they were facing the same idea that the
24 larger the stores got, the larger the customers got, the
25 more they were able to meet with those and supply those

1 sales, such as QFC, which are no longer available, or
2 Albertson's or the like; right? They're smaller than
3 you, first of all, in size of sales; right?

4 A. You know, again, I can't speak to their
5 situation. All I can speak to is our experience, and
6 that anytime we had head-to-head competition, we could
7 not meet the same prices they were offering.

8 Q. All right. And do you know -- the point I'm
9 getting at, first of all, some of those prices you had
10 to have were through distributors; right?

11 A. That's right.

12 Q. So you don't know what the distributors' real
13 cost was for that milk? They may be playing some
14 loss leaders as well to maintain market share?

15 A. "They" being the distributor?

16 Q. The distributor.

17 A. That could be possible.

18 My experience with the distributors is they
19 weren't typically doing the loss leader-type thing.
20 That's something that happened at the retail level, not
21 the distributor level.

22 Q. I understand. But to get sales, you had to
23 reduce your price to meet competition. Is it possible
24 the PDs had to reduce their price to meet competition as
25 well?

1 A. Certainly they're going to adjust price to
2 meet competition.

3 Q. Do you know if the sales at that price were
4 more profitable to them than what you were offering? Do
5 you know that?

6 A. Could you restate the question? I'm not sure
7 of the "thems" in this case.

8 Q. The antecedents are unclear. Let me withdraw
9 and restate the question.

10 You're stating, as I understand your
11 testimony, that you went up head to head or through a
12 distributor with the PD, and the PD came in with a lower
13 price, and you tried to match it by trying to just carry
14 your variable costs and not any of your overhead or any
15 of your other costs and you couldn't match their price.
16 Is that --

17 A. That's correct.

18 Q. Okay. Now, how do you know that in those
19 same markets the PDs weren't doing the same thing,
20 trying to reduce down to just their variable costs in
21 order to maintain or gain some market share themselves?

22 A. There's no way I would know what their
23 costing structure is.

24 Q. Okay. So when you make the statement that
25 they were in this cost advantage, it's kind of taking

1 this view that "They have to have an advantage because
2 they're not regulated and I lost to them, so therefore
3 the reason I lost to them was because of this perceived
4 disadvantage."

5 Is that a fair statement?

6 A. That's a possible characterization. Again
7 and again, in facing head-to-head competition, we could
8 not come close to their prices, only covering the basic
9 minimum of direct costs.

10 Q. So when you -- you went to this bST-free
11 milk; right?

12 A. Correct.

13 Q. You had to get some kind of statement from
14 your producers or affidavits or something that they
15 didn't --

16 A. We had a process that we went through with
17 them.

18 Q. Did you -- as I understand, they're all
19 independent producers?

20 A. Yes.

21 Q. All right. And did you have to pay them
22 anything extra for this bST-free milk?

23 A. We did. Not as much as they wanted or
24 thought they deserved, but we did pay a bit of a premium
25 for them to have to go through the hassle of having the

1 certification process and so on.

2 Q. Their representation to you was, "If I can't
3 use bST, I have a cost on the farm and I'm not going to
4 make as much, and I need a lot of money to cover that
5 loss."

6 Is that a fair statement?

7 A. I don't think I heard that statement --

8 Q. You didn't hear that statement?

9 A. -- made with them.

10 Q. Okay. Now, these 10 independent producers,
11 where are they shipping their milk now?

12 A. I don't think I ever said 10, did I?

13 Q. Whatever the number is.

14 How many independents did you have?

15 A. Well, I think when we closed down, we were
16 down to 16.

17 Q. All right.

18 A. Okay.

19 Q. 16.

20 Do you know where they're going?

21 A. Well, I don't, not on a case-by-case basis.
22 They have had two options presented to them.

23 Q. What are those options?

24 A. And Dairy Farmers of America's one option and
25 WestFarms Northwest Dairy Association is another option.

1 Q. So they were not members of a co-operative?

2 A. They were not members of a co-operative.

3 Q. Now their choice is to be members of one or
4 another co-operative?

5 A. That's correct. There may be other options,
6 but I'm not aware of what those other options are.

7 Q. Where do your distributions go to, your sales
8 that were left over? Do you know?

9 A. Oh, at the time of our closure?

10 Q. Yeah.

11 A. We made an arrangement with Wilcox Family
12 Farms to acquire selected assets, and included with that
13 acquisition was a commitment to work with them and
14 having them continue to serve our accounts.

15 Q. And Wilcox is owned in part by DFA?

16 A. I understand there's -- I'm not privy to
17 that, but I understand through the rumor mills that they
18 are partly owned by DFA.

19 Q. Now, there was an exhibit submitted that
20 showed the various sizes of dairy processing plants in
21 the Northwest Order, you know, the lower one-third and
22 medium one-third and the upper one-third.

23 Were you here during the testimony and hear
24 anything about that?

25 A. I did, but I would probably decline to answer

1 any questions because I was not engrossed in that part
2 of the presentations.

3 Q. At least you weren't enraged.

4 Okay. There was an exhibit. It's Exhibit
5 No. 8, and I'm going to just ask you a question off of
6 it, but it says that the average size of the regulated
7 plant in the Pacific Northwest was 9.7 million pounds
8 per month. That's the middle ground.

9 I mean, were you in the range?

10 A. What time period was that referring to?

11 Q. This would have been May of 2003.

12 A. We would have been just under that.

13 Q. Okay. Would you have been larger than
14 4.7 million?

15 A. Yes.

16 Q. Now, you mentioned one of your distributors,
17 I think, left you and went to Safeway or went -- left
18 you to go to a PD in part. I think that was the term.
19 You lost some of the sales. The distributor tried to
20 take sales from another --

21 A. Yes. That was referring -- if I remember the
22 specifics of my testimony correctly, I was referring to
23 a PD in the Olympic Peninsula in which there was a
24 merger of two distributors there and we were seeking to
25 serve the succeeding entity.

1 Q. Now, during this last couple of months,
2 you're not the only handler in the Pacific Northwest
3 that's going out of business, are you?

4 A. I'm not sure what other reference you'd be
5 making.

6 Q. Are you aware of a producer-handler going out
7 of business or terminating this summer?

8 A. Yes, I believe there is one, Norman Brook
9 Farm, if that's the one to which you're referring.

10 Q. One moment, please.

11 You indicated, I think, in your testimony --
12 make sure I understand it right -- that you had a
13 processing cost of 40 cents?

14 A. That's correct. That was our direct -- what
15 we call direct, our -- the way we account may be
16 different than the way someone else accounts, but --

17 Q. The pasteurization, the homogenization, the
18 separation, all of that stuff; right?

19 A. Yeah, over half of that would be labor.

20 Q. Right.

21 And were you a union shop or not?

22 A. We're a union shop.

23 Q. So you indicated 1.75, 1.64. I mean, if you
24 were competing against a handler and everything else was
25 equal and their processing cost was 30 cents, that gave

1 them a 10 cent advantage; right?

2 A. State that again.

3 Q. If you're competing with them and everything
4 else being equal and their process cost is 30 cents and
5 yours is 40, that's a 10 cent advantage?

6 A. For them?

7 Q. For them.

8 A. That would be.

9 Q. And if that's a PD and it has nothing to do
10 with the cost of milk, it just happens to be they have a
11 process advantage over you?

12 A. You could view it that way.

13 Q. So is it your view that the Secretary should
14 be regulating in this competitive market between various
15 handlers and take into consideration their labor costs
16 and other costs besides the cost of raw milk?

17 A. I don't have a view on that. I'm here to
18 testify as to our experience.

19 Q. But one in which -- we really don't know for
20 sure if the price reflected an advantage because of the
21 cost of milk or other economic conditions that entered
22 into that equation; right?

23 A. Please state that again.

24 Q. I said, we don't know for a fact that the
25 differences in these prices are totally dependent upon

1 being a PD, as opposed to a regulated handler, but could
2 be responsive to other economic and competitive
3 circumstances besides the raw cost of milk; right?

4 A. I would guess that all of those factors,
5 including the regulated/nonregulated issue, are all
6 factors that go into the formulation.

7 Q. Now, how familiar are you with the school bid
8 process in the state of Washington?

9 A. Not intimately. I was never involved in it
10 directly myself.

11 Q. Is that why you still maintain some sanity?

12 A. That would probably help.

13 Q. But kind of getting back, I guess it really
14 goes with any bid situation. Do you know -- when you go
15 into such a bid situation, do you know who or if anybody
16 else is going to bid against you?

17 A. In our case, we did not know.

18 Q. Okay. And is that generally the case, that
19 you might make some assumptions? But assumptions can be
20 wrong whether you're going to have competition or not;
21 right?

22 A. We always assumed we would have competition.

23 Q. That's right.

24 A. We didn't know what it would be.

25 Q. So going back to this PD -- this distributor

1 that put in a bid for a PD, they had to assume that they
2 had competition?

3 A. No. They assumed they did not have
4 competition, is what we had heard from our sales staff
5 in overhearing discussions. That's why the bid was the
6 way it was.

7 Q. Which indicates they were trying to recover
8 their costs; right?

9 A. Which indicated they were trying to take
10 advantage of the system.

11 Q. Which brings me up to the next question, and
12 that is, is that, in this rolling consolidation of the
13 dairy industry, PDs do provide for the consumer a
14 situation to ensure that the price of the milk that they
15 get in the store or the convenience store, the school or
16 the hospital or the restaurant is a competitive price;
17 right?

18 A. I think they play a role in that.
19 Unfortunately, they do it with an advantage that is
20 beyond our control.

21 Q. Now, who is Jerry Teel?

22 A. I can give you two answers. He's my
23 brother-in-law, but he was our CEO.

24 MR. YALE: Okay. I want to supply or have
25 numbered as an exhibit --

1 JUDGE HILLSON: 21.

2 MR. YALE: Isn't anybody putting exhibits in?

3 JUDGE HILLSON: They're putting them in.

4 They haven't marked them.

5 MR. YALE: I understand. We'll get to this.

6 (Exhibit No. 21 was marked for identification
7 by the reporter.)

8 Q. BY MR. YALE: I want to show you what's been
9 marked as 21.

10 JUDGE HILLSON: Yes.

11 Q. BY MR. YALE: Mr. Vander Pol, first of all,
12 do you recognize the letterhead?

13 A. I recognize the letterhead.

14 Q. And turn to the second page.

15 Do you recognize the signature?

16 A. Yes. That appears to be Jerry's signature.

17 Q. Are you aware of the fact that, during that
18 period of time, that the letter was written to Rich
19 McKee of AMS talking about Order reform?

20 A. I'm not familiar with this letter.

21 Q. You're not familiar with that letter at all?

22 A. No, I'm not.

23 Q. Let me ask you just a question on here,
24 though, that maybe you can answer.

25 It says, "Vitamilk is in competition with

1 major coops, other independent dairies and producer
2 handlers."

3 Do you see that in the second sentence?

4 A. Yes.

5 Q. Would you say that that reflected the
6 competitive situation of Vitamilk even in 2000, 2001,
7 2002?

8 A. I'm trying to think about what may have been
9 left out of that statement, and I offhand can't think of
10 anything, so I would have to agree with your statement.

11 Q. Now, there's another discussion in here. I
12 want to ask that question to deal with -- are you
13 familiar with the issue of depooling?

14 A. Not like Jerry was. He took the lead in
15 those types of issues.

16 Q. Now, you paid -- your producers received a
17 blend price as a regulated handler?

18 A. Yes.

19 Q. And maybe a premium --

20 A. And a premium.

21 Q. -- on top of that?

22 And when the blend went down, the amount of
23 money you had available to pay your producers went down;
24 right?

25 A. Yes.

1 Q. All right. So if a major co-op made
2 decisions to add or subtract Class III or IV milk to the
3 pool to change that blend price, that impacted the price
4 that your farmers received; right?

5 MR. BESHORE: The pooling is not an issue in
6 the hearing. We're talking about equal depooling in
7 1996. Honestly.

8 MR. YALE: Your Honor, it's a critical issue
9 in this hearing and it's because, to make a handler
10 regulated, their price that they can pay their producers
11 is dependent upon the blend price, and their ability to
12 track milk is restricted by the blend price.

13 And to the extent that a major co-op has
14 proposed to regulate these handlers, it gives them the
15 ability to regulate the handler in another way, and it
16 is a critical issue in this case.

17 JUDGE HILLSON: I'll ask you to answer the
18 question.

19 THE WITNESS: A little bit went on there, so
20 maybe the statement -- or the question could be
21 restated.

22 Q. BY MR. YALE: That's a great request.

23 The question is, is that you pay -- start
24 back.

25 You pay your producers a blend price; right?

1 A. Correct.

2 Q. That blend price depends upon the amount of
3 Class III and Class IV milk that is pooled or not pooled
4 on that Order; right?

5 A. Right.

6 Q. Do you have any control in the amount of III
7 or IV milk that is pooled in the Order?

8 A. No, I do not.

9 Q. So you don't have any control over the amount
10 of money that's available through the blend to pay your
11 producers?

12 A. No. I mean, we have a little bit based on
13 our own activity, but a small part to play.

14 MR. YALE: Fair enough.

15 I have no other questions.

16 MR. MARSHALL: Thank you, Your Honor.

17 Doug Marshall, Northwest Dairy Association.

18

19 EXAMINATION

20 BY MR. MARSHALL:

21 Q. I found that an intriguing exchange, Daryl,
22 regarding depooling. And I realize that you weren't
23 particularly familiar with that issue, but would it be
24 fair to say that your situation as a regulated handler
25 with respect to the depooling issue was no different

1 than that of other small regulated handlers in the
2 market?

3 A. Oh, I would guess we would be in the same
4 class, same category, same treatment as others in that
5 same description.

6 Q. And so currently what you have in the
7 Pacific-Northwest market is a situation where the
8 various producer-handlers are exempt from any of those
9 impacts, unlike Vitamilk Dairy and others?

10 A. That's my understanding.

11 Q. I was also interested in the discussion about
12 the size of Vitamilk Dairy, and I do not want you to
13 reveal any information that is or might have been
14 proprietary, but there were some volume numbers used.
15 I'd ask you to think for a moment just about the portion
16 used in bottling, as opposed to other products.

17 Are you aware whether any of the other --
18 whether any of the producer-handler operations that you
19 competed against would be larger than your volume of
20 bottled milk?

21 A. I'm not well enough aware of their volumes to
22 be able to respond to that, Doug.

23 Q. Fair enough.

24 I also found interesting the discussion about
25 the competitive efforts that you made to try to retain

1 volume in the face of the competitive environment that
2 you described.

3 And I think Mr. Yale asked you if you were in
4 effect dropping your price below average cost down
5 towards your variable costs, and I believe that you said
6 that that was the case?

7 A. That is the case.

8 Q. Okay. Thank you for clarifying that.

9 My question is that it sounds a lot like
10 cut-throat competition. Would you agree with that
11 characterization of the competitive environment that you
12 were describing?

13 A. That could be a word to describe it. We
14 certainly felt that way from our position. There was
15 nothing we could do to be able to fairly compete with
16 the prices that our distributors were being faced with.

17 Q. Are you familiar with the Federal Order term
18 "disorderly market conditions," and if so, would you
19 describe that cut-throat competition as a disorderly
20 market condition?

21 A. Based on earlier testimony and the questions
22 about what that term really means, I would suggest that
23 other witnesses, Doug, may be able to handle that better
24 than I can, because I'm not sure -- I've heard the term,
25 but I'm sure I never studied the regulations well enough

1 to know what was intended by the use of that term.

2 Q. Well, you know, it's a shame that the
3 aggressive cross-examination of earlier witnesses leads
4 you to not express an opinion on that.

5 A. Well, all I know is that we could not compete
6 in the situations with which we were faced.

7 Q. Let's talk about the free farmed label or the
8 various concepts that you were marketing under.

9 My understanding is that, as a result of that
10 approach to marketing, you needed to be able to rely on
11 your own supply of producer milk and not to buy from
12 organizations whose supply could not be certified in the
13 manner that you wished it certified.

14 Was I correct in that understanding?

15 A. That's correct. We always had had a
16 principle of being independent and maintaining over
17 80 percent of our own milk supply even before the free
18 farmed program.

19 But obviously, when we went to the free
20 farmed program, we needed to have 100 percent of our
21 supplies so that we could be honest to our statement on
22 the package and the certification process.

23 Q. Well, that gave you a balancing problem, did
24 it not?

25 A. It did.

1 Q. And you entered into -- at some point you
2 entered -- you and Jerry Teel particularly entered into
3 an agreement with me, did you not, to provide for the
4 balancing of your milk?

5 A. Yes.

6 Q. Your surplus milk?

7 A. Yes, we did, for the surplus.

8 Q. From your own knowledge, could you describe
9 what that cost of balancing was that was part of our
10 arrangement?

11 A. Well, let me offer what I can from recall.

12 Again, Jerry was the one that negotiated the
13 agreement, but it amounted to us paying 5 cents a
14 hundredweight on all milk so that we could have a buyer
15 of excess milk when those needs came up.

16 We had other balancing costs as well. We had
17 an ice cream plant which, in part, was instituted years
18 ago for the whole process of balancing the cream and
19 excess that would come, you know, from our fluid milk
20 operations.

21 So we had a lot of other balancing costs.
22 But most obviously would be that one of the 5 cents per
23 hundredweight. And in addition, we had to cover the
24 cost of transporting it to a plant that could accept the
25 milk.

1 Q. In a sense, then, would it be fair to say
2 that your milk supply, even though it was from multiple
3 herds rather than one, in many respects was like having
4 your own producer-handler operation with multiple
5 producers in the sense that you were dependent on that
6 supply and responsible for managing that entire supply
7 produced by the cows on those farms?

8 A. In some sense.

9 Q. You had to do all of the balancing yourself?

10 A. That's right. And that is correct. To some
11 sense, those independent producers that supplied to us
12 really viewed themselves as part of our operation. Many
13 of them were third generation to us, and they considered
14 the bond that close.

15 And we, quite frankly, when we found we could
16 not compete, toyed with some ideas. Is there a way we
17 can become a producer-handler being we already had our
18 own supply? Is there a way we can put this pool of milk
19 into a joint venture operation or so on, but it became a
20 little complicated so we didn't continue to pursue that
21 route.

22 Q. So other than the fact that you were
23 regulated, your operation would have been much the same
24 as the producer-handler operation, would it not?

25 A. In many respects, yes.

1 MR. MARSHALL: Thank you very much.

2 MR. BERDE: Sydney Berde.

3

4 EXAMINATION

5 BY MR. BERDE:

6 Q. Mr. Vander Pol, were you in the room when
7 John Hitchell testified to the handlers' total cost of
8 putting the package of milk on the dock, about
9 70 percent is attributed to raw milk costs?

10 A. I was present in body.

11 Q. Does that experience approximate the
12 Vitamilk --

13 A. It does. It approximates our experience.

14 Q. And I want to direct my questions about the
15 firm price proposals that Vitamilk was unable to accept.
16 Operating under a Federal Order, your Class I
17 cost, 70 percent of it is attributable to the raw milk
18 cost under the Federal Order; is that correct?

19 A. That's correct.

20 Now, let me just clarify. I was checking
21 some notes here real quickly. Our costs of operation
22 were actually a little higher than that, so the
23 percentage would have been somewhat lower than 70.

24 Q. And you're aware that under the Federal --
25 under the structure of the Federal Order mechanism for

1 establishing your Class I price, that price could vary
2 from month to month?

3 A. Yes.

4 Q. And the amplitude of that variation could,
5 during the course of a year, be as much as \$4 a
6 hundredweight, couldn't it?

7 A. Yes.

8 Q. Would there be any conceivable way in the
9 exercise of business judgment that a handler subject to
10 Federal Order pricing would commit himself to a firm
11 price without knowing in advance that his cost of milk
12 going into the package could vary by as much as \$4
13 during the period of a year?

14 MR. RICCIARDI: Object to the extent it calls
15 for speculation as to what other handlers might do. He
16 can ask him what he might do, but he can't ask him what
17 other handlers might do.

18 JUDGE HILLSON: I'll let him answer the
19 question.

20 THE WITNESS: I'll respond as to what we
21 would do because that would be consistent with what I
22 have been trying to do in my testimony.

23 In our case, in our judgment, we would not
24 enter into a fixed-price arrangement such as you
25 suggested because of those unknown factors, and in our

1 business judgment, it would be putting too much at risk.

2 MR. BERDE: Thank you.

3 JUDGE HILLSON: Mr. Ricciardi?

4 MR. BESHORE: Your Honor, Mr. Ricciardi has
5 approached the witness for the handwritten notes from
6 which he testified, and unlike other witnesses, he
7 hasn't --

8 JUDGE HILLSON: I don't think Mr. Ricciardi
9 realized that it wasn't a formal printed statement.
10 That's my guess, anyway.

11 MR. RICCIARDI: And you know what, Judge?
12 Your guess would be correct. I didn't realize that he
13 didn't have a typewritten statement, as with the other
14 witnesses, and I apologize for that and I'll move on.

15

16

EXAMINATION

17 BY MR. RICCIARDI:

18 Q. Again, I'm Al Ricciardi. I represent Sarah
19 Farms, and I have some follow-up questions.

20 The first one is simple. My assumption is
21 that you are not here today to testify in support of the
22 proposal regarding Marketing Order 131; is that correct?

23 A. I can't say that. I'm here at the request of
24 Dairy Farmers of America to testify to our experience,
25 and to the extent they feel it applies to that Market

1 Order, then that would be their call. But I'm certainly
2 not here to provide expert testimony on the details of
3 131.

4 Q. Okay. You're here simply to provide
5 information or testimony based upon your own personal
6 experience. Is that fair?

7 A. That's fair.

8 Q. And at the request of DFA --

9 A. Correct.

10 Q. -- to come down here?

11 And they're taking care of you, the cost of
12 your travel and things like that?

13 A. They've told me they would.

14 Q. Well, I'd get a check before you leave.

15 MR. BERDE: I don't know who you've been
16 dealing with.

17 Q. BY MR. RICCIARDI: I just want to make sure
18 that you get paid. That's all.

19 You decided -- at some point, I think your
20 testimony was that you were toying with the idea of
21 becoming a producer-handler; correct?

22 A. Correct.

23 Q. And you decided that it was, and I think your
24 testimony was, too complicated?

25 A. With all of our independent producers, to try

1 to figure out how to integrate them into one common
2 entity and so on.

3 If we had had just one or two producers, we
4 probably would have continued to pursue that idea, but
5 when we started the discussion, it was 18, and that got
6 a little bit complex.

7 Q. Okay. And did you, in toying with the idea,
8 look at the costs that would have been involved in
9 becoming a producer-handler?

10 A. We did not look at the costs. We were
11 more -- what we looked at was more just the legalities
12 of the structure and those types of things.

13 Q. We talked a little bit, I think, both on
14 direct and a little bit on cross-examination about your
15 costs, and you used the term "direct costs" and I think
16 you also used the term "variable costs."

17 Are you familiar with those?

18 A. I'm familiar with those terms.

19 Q. Okay. Can you tell me what you would define
20 as direct costs?

21 A. In my case for what I was doing, it was just
22 the form of financial presentation that we have. And
23 what I was using as direct cost is what under our
24 financial statement is processing costs. It does
25 include labor. It includes lab. It includes some

1 utilities. And again, our structure's going to be
2 different than any other processor's.

3 Q. You used the phrase, I think, "ingredient
4 costs" in your testimony.

5 A. I did.

6 Q. What does that mean?

7 A. Ingredient cost is the product itself,
8 excluding packaging. That would be milk, sugars,
9 powders, if they're a part of that product.

10 Q. And I think it was Mr. Berde who asked you
11 this question, and you came up with a follow-up
12 response.

13 You indicated, in response to his question as
14 to whether 70 percent of the cost was the milk itself,
15 that your percentage was actually less than that; is
16 that right?

17 A. That's correct.

18 Q. What was your percentage?

19 A. I haven't computed it out, and so I don't
20 have that number available.

21 Q. Did you tell us during the course of your
22 testimony -- if you did, I apologize if I'm asking it
23 again -- who were the larger national grocery chains
24 that gobbled the independents up in your area?

25 A. The two that we experienced were -- Kroger

1 was the eventual successor to what was originally our
2 QFC customer; and a large Alaska customer we had, Carrs
3 Quality Centers, was acquired by Safeway.

4 Q. Did Safeway have any production facility in
5 your area?

6 A. They do.

7 Depends on what you want to call "our area,"
8 but they do supply our area from a plant in Portland.

9 Q. Did that become difficult -- more difficult
10 for you in terms of the competitive environment when
11 that occurred?

12 A. That became more difficult, yes.

13 Q. Okay. And I guess I didn't understand.
14 There was a whole discussion about a bunch of school
15 contracts, and maybe my mind was wandering a bit, but
16 you gave one example about there being what you called
17 a, quote, noncompetitive environment, closed quote,
18 because no producer-handler was bidding on that
19 particular contract.

20 Do you recall that discussion?

21 A. I do. That would have been with the Issaquah
22 School District. But it wasn't because no
23 producer-handler was bidding on it. It was because no
24 regulated handler was bidding on it.

25 Q. Was there a producer-handler that bid on that

1 particular contract?

2 A. Yes. They had received that contract for
3 years. Again, it was a distributor -- as I understand
4 it, it was a distributor for producer-handler product.

5 Q. Over the period of time that you were in
6 business, were your efficiencies, in terms of being able
7 to sell product, did they get better or did they get
8 worse?

9 A. Well, our efficiencies as far as our plant
10 capability were better. Even with declining sales, we
11 reinvested as a family into the plant, and we continued
12 to do that to the last minute, even though the ownership
13 knew we were looking at an exit strategy when,
14 unfortunately, the rest our employees did not.

15 We continued to invest in the plant because
16 we felt that was the right thing to do, so we always had
17 an efficient operation. Obviously, our cost per unit
18 went up a bit as our volume dropped substantially.

19 Q. However, in terms of the cost itself, leaving
20 aside the volume drop, assuming that the volume would
21 have stayed the same or increased, the decrease in your
22 cost or your efficiencies would have allowed you to
23 market the milk at a cheaper price?

24 A. Correct.

25 Q. And your ability to go out and market at a

1 cheaper price would have had nothing to do with the cost
2 of the milk? It would have had to do with your
3 efficiencies at the plant; correct?

4 A. Well, except for those situations in which we
5 faced producer-handlers. Then regardless of what our
6 costs were, we had to try to meet at least that
7 competition.

8 Q. You gave some factors, and again, I
9 apologize. I might have missed some of them. You said
10 one of the important factors that you had in trying to
11 market product was the quality, correct, quality of your
12 product?

13 A. It was an important factor to us, yes.

14 Q. And to your customers?

15 A. Oh, by all means.

16 Q. And services?

17 A. And services.

18 Q. And the type of products themselves?

19 A. Not as much as we would have liked.

20 Q. Okay. Price, obviously, in any business is
21 always a factor?

22 A. By far the largest. Even with our unique
23 free farmed, we found that price was still the
24 overriding factor in the market.

25 Q. In terms of a producer-handler being able to

1 sell his milk at a profit, would you agree that since
2 the producer-handler has to operate the dairy that
3 there's certain costs that he has to assume as part of
4 that dairy operation in terms of marketing his milk?

5 A. Forgive me. My mind wandered. Can you ask
6 that question again?

7 Q. Probably not, but I'll try anyway.

8 A producer-handler, in terms of being able to
9 go ahead and market or sell his milk, has a certain
10 amount of costs in the dairy operation; correct?

11 A. Okay.

12 Q. Do you agree with that?

13 A. I would agree with that.

14 Q. And one of the things, for example, that a
15 producer-handler might have to do is purchase corn or
16 feed or other commodities well in advance of the time
17 period that he's going to sell his milk?

18 A. You know, some choose to do that; some do
19 not. But that can be a factor.

20 Q. And in the circumstances that I described,
21 if, for example, in this year, the producer-handler is
22 deciding that he's going to purchase corn and feed at
23 whatever the price is currently, he has to make
24 assumptions as to whether or not he's going to be able
25 to sell his milk into the future; correct?

1 A. Okay.

2 Q. Is that a yes?

3 A. But I'd rather not answer questions as to how
4 they run their business. I came here to testify as to
5 my experience, and I am not a producer-handler. I have
6 not run a producer-handler operation, so I'm not
7 qualified to really respond to those with any authority.

8 Q. That's fair. But let me ask you a question
9 to follow up on what you did say regarding looking at
10 being a producer-handler.

11 Did your looking into potentially being a
12 producer-handler ever get to the point where you took a
13 look at what it would cost to operate a dairy?

14 A. That question was already asked, and as I
15 mentioned, we did not look at the costing. We more
16 looked just at the legal, structural issues.

17 Q. Okay. And if you could have gone beyond the
18 legal, structural issue, you would have gone to the next
19 step?

20 A. There would have been a next step, obviously.

21 MR. RICCIARDI: Okay. I don't have any
22 further questions. Thank you.

23 JUDGE HILLSON: Any further questions?

24 MR. YALE: I have a follow-up one.

25 JUDGE HILLSON: Mr. Yale.

1 EXAMINATION

2 BY MR. YALE:

3 Q. One was to qualify just as a question that I
4 probably should have covered before.

5 You indicated you lost milk to a distributor,
6 that they took it to a PD who supplied it. Isn't it
7 true that that amounted to about one load of milk a
8 week?

9 A. I cannot respond to the volume. I don't know
10 the details of that.

11 Q. But would you agree that one load of milk --
12 I mean, every sale counts, but one load of milk a week
13 wasn't going to make or break the volume in your
14 business; right?

15 A. One load of milk a week would not make or
16 break the business, but I don't know if that's the right
17 volume in this case. I'm not knowledgeable about that.

18 Q. Now, Mr. Berde followed up on this question.
19 He's asked some others about this 70 percent. And you
20 said that your percentage was higher -- the cost of the
21 fluid milk was higher or lower?

22 A. No. Lower.

23 Q. Lower.

24 A. That's because our other costs are a little
25 higher.

1 Q. Right. Your processing costs?

2 A. Yes.

3 Q. Now, do you have either a rule of thumb or do
4 you have a real close number that you would divide a
5 hundred pounds by to come up with a gallon of skim milk?

6 A. Not me. My staff would have done that, but I
7 was not knowledgeable about those details in that area.
8 I didn't do the pricing for our company, so I don't have
9 those figures in my head.

10 Q. All right. But the Market Administrator
11 publishes prices that indicate what the skim price would
12 have been at your plant in Washington; right?

13 A. He may have. I never -- I could never figure
14 out how to read those documents.

15 Q. We just act like we do.

16 But one way to look at that cost was to find
17 out the cost per hundredweight that you had to pay and
18 divide that by however many gallons you get per
19 hundredweight, and you'd come up with a per-gallon cost
20 that would be the Federal Order price per gallon; right?
21 Does that sound reasonable to you?

22 A. Again --

23 Q. You can't go there?

24 A. I never went there.

25 Q. And you couldn't -- as I recall, you didn't

1 know what the percentage was, that your fluid milk was,
2 the total?

3 A. No. Again, I know it's lower because the
4 operating costs were lower than the standard. We were
5 supplying a full line of products and our gallons had
6 been eroded, so our cost per unit was quite a bit higher
7 than the average.

8 Q. I want to go back to that school situation,
9 the fixed versus the escalators.

10 How long have you been involved and have
11 knowledge of school bids in Washington, in terms of
12 pricing at the schools?

13 A. Well, intimate knowledge? Never. As I
14 mentioned, I wasn't involved with that.

15 An awareness of the issue, the competitive
16 challenges we faced, the macronature of that, you know,
17 probably for 20 years.

18 Q. Do you know when the process of using an
19 escalator clause in school bids began?

20 A. No, I don't.

21 I know that in recent years we've been trying
22 to convince some school districts that still had fixed
23 provisions in there to change. We've been successful
24 with some and not successful with many others.

25 Q. Obviously, if you're a buyer, you want to fix

1 those costs; right?

2 A. Certainly.

3 Q. Right. And depending. I mean, if they're
4 smart enough to know what the market is and they came in
5 at a high opening price, the likelihood of the market
6 decreasing, the school districts aren't always very
7 informed in nuances of the federal market, just as I'm
8 not?

9 A. The escalator is more recent phenomena, when
10 we started having more volatile Class I prices. I would
11 agree with you generally. I can't put the time frames
12 on that. But that's a general characterization that I
13 could agree to.

14 MR. YALE: That's all I have.

15 JUDGE HILLSON: Thank you.

16 Does anyone else have any questions of
17 Mr. Vander Pol?

18 Go ahead.

19

20 EXAMINATION

21 BY MR. RITCHEY:

22 Q. Yes. I'm Al Ritchey.

23 You spoke that Class I products in the past
24 year or two were as much as \$4 a hundredweight in one
25 year; isn't that right?

1 A. I didn't say that. I think that was one of
2 the attorneys questioning me that made that statement.

3 Q. But you agreed with it; isn't that right?

4 A. I agreed that that type of a fluctuation may
5 or could occur.

6 Q. A producer as large as Sarah Farms -- I'll
7 just take 19 million pounds used. I don't know whether
8 that's exactly right -- but producing 18,000 pounds of
9 milk per month at \$4, that would be \$720,000 variation
10 in a month, which you don't really know what size bids.
11 That's quite a bit of change.

12 Wouldn't that be a reason to become a
13 producer-handler, where you would have a more
14 fixed-price contract with some and take that 720,000
15 part of that out of the equation?

16 A. Well, if I understand your question
17 correctly, those are the very reasons why we considered
18 at one point the possibility -- or at least were looking
19 at the prospect of switching to a producer-handler
20 structure, yes.

21 MR. RITCHEY: Okay. Thank you.

22 JUDGE HILLSON: Anyone else have any
23 questions of Mr. Vander Pol?

24 Mr. Beshore.

25

1 EXAMINATION

2 BY MR. BESHORE:

3 Q. Mr. Vander Pol, just one or two questions on
4 redirect.

5 I think, in response to perhaps Mr. Marshall
6 or one of the other questioners, there was a reference
7 or allusion to premiums paid to your independent dairy
8 farmers.

9 Did you regularly pay them over-Order prices,
10 premiums in order to keep them competitive in the
11 country, as we say?

12 A. Yes, we did. There's uncertainty with them
13 supplying to a smaller proprietary handler, and we had
14 to pay a premium to keep them loyal and happy.

15 Q. So that in addition to the minimum regulated
16 cost of milk, you had additional charges required to
17 assure your milk supply?

18 A. Indeed we did.

19 Q. Okay. What was the range of producer
20 premiums in recent years in the market there?

21 A. Aside from the fact that we had a small
22 premium for the free farmed program, we were typically
23 in the 15 to 20 cents per hundred premium range, and
24 there were some qualifying parts of that, but most
25 qualified.

1 Q. Okay. Now, Mr. Yale asked you, couldn't
2 there be all sorts of different factors that may account
3 for differences in the producer-handler's price, costs
4 of feed or other variable -- other possible costs in
5 their enterprise. Couldn't that account for the
6 difference in their price versus your price?

7 Do you recall that line of questioning? I
8 think you said you don't know what their costs are.

9 Isn't it a fact, however, Mr. Vander Pol,
10 that there's one thing we all know with absolute
11 certainty in this proceeding, that you have -- the
12 regulated handlers have a cost of the minimum regulated
13 price every month and the producer-handlers do not have
14 that cost at all, period?

15 A. Yes, I agree with that.

16 MR. BESHORE: Thank you.

17 JUDGE HILLSON: Anything further?

18 Okay. Mr. Vander Pol, you can step down and
19 catch that plane.

20 (Witness excused.)

21 THE WITNESS: Thank you.

22 JUDGE HILLSON: It's 10 minutes to 3:00.

23 This might be a pretty logical time to take a break of
24 about, let's say -- let's make this a 15-minute break,
25 and then we'll come back and I guess we'll be taking

1 Mr. Krueger's testimony next.

2 Does that sound right?

3 Okay.

4 (The proceedings recessed at 2:50 p.m.)

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1 STATE OF ARIZONA)
) ss.
 2 COUNTY OF MARICOPA)

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I, LORENA MARIN-GARCIA, hereby certify that the foregoing pages numbered from 273 to 528, inclusive, constitute a full, true, and accurate record of the proceedings had in the above matter, all done to the best of my skill and ability.

DATED this 26th day of October, 2003.

Lorena Marin-Garcia
 Certificate No. 50541

Pursuant to Rule 39(f)(2) of the Arizona Rules of Civil Procedure, which states, "Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent," the "Prepared for" attorney has received a copy of this proceeding.

I, the officer, will provide a certified copy to each ordering party at the same copy rate, thus complying with Section 7-206, Appendix A Standard 3(a) of the Arizona Code of Judicial Administration (ACJA) Court Reporter Standard Certification (Effective January 1, 2003)

Each purchased copy of this transcript will be signed and certified by myself, thus complying with ACJA Section 7-206F(3).

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UNITED STATES DEPARTMENT OF AGRICULTURE

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In the Matter of:)
) Docket Nos.
 PROPOSED CHANGES TO) AO-368-A32
 WESTERN AND PACIFIC NORTHWEST MILK) AO-271-A37
 ORDERS) DA-03-04
 _____)

TRANSCRIPT OF PROCEEDINGS

BEFORE: MARC R. HILLSON
Administrative Law Judge

VOLUME IIB
(Pages 529-648)

Tempe, Arizona
September 24, 2003
3:12 p.m.

Prepared for:
USDA

Prepared By:
 ELAINE M. CROPPER
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 77 East Columbus, Suite 102
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(Original)

1 I N D E X
2 EXAMINATION

3	MICHAEL KRUEGER	Page	Line
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9
10 NORMAN McCLELLAND

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12
13 E X H I B I T S

14	Number		Mark		Admit
			Pg/Ln		Pg/Ln
15	22	Sarah Farms Gallon Volume Estimated by	540	2	548 9
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19
20 R E C E S S E S

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TRANSCRIPT OF PROCEEDINGS,

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2
3 taken on September 24, 2003, commencing at 3:12 p.m., at the
4 Sheraton Airport Hotel, 1600 South 52nd Street, Tempe,
5 Arizona, before Elaine M. Cropper, a Certified Court
6 Reporter, Certificate No. 50491, in and for the State of
7 Arizona.

8
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P R O C E E D I N G S

MICHAEL KRUEGER,

a witness herein, having been first duly sworn by the Judge to speak the truth and nothing but the truth, was examined and testified as follows:

JUDGE HILLSON: Please state and spell your name for the record.

THE WITNESS: Michael Krueger, K-R-U-E-G-E-R.

EXAMINATION

BY MR. ENGLISH:

Q. I'm Charles English.

Mr. Krueger, what's your business address?

A. 2228 North Black Canyon Highway, Phoenix, 85009.

Q. And could you please provide a brief professional background?

A. Yes. I was born and raised in Toledo, Ohio, attended the University of Toledo. After getting out of school, I got involved in the food service distribution business, relocated to Arizona in 1978 and joined Shamrock at that time. From 1978 through 1990, I was involved with Shamrock in a variety of management positions on the food service distribution side of their business.

I moved to the dairy processing business in late

1 '90 and worked in a variety of sales management positions
2 and became General Manager of that business in 1994.

3 Q. And what are your duties as the General Manager of
4 Shamrock Foods?

5 A. Full responsibility for that business which
6 includes processing the fluid milk, cultured products and so
7 on.

8 Q. Could you give me also, then, a brief background
9 of Shamrock Foods?

10 A. Shamrock Foods Company was started in 1982 in
11 Tucson, Arizona, as a dairy and continued as a dairy
12 business I believe exclusively until the latter part of the
13 1960s; at that point got into the food service distribution
14 business in both Arizona and Colorado and has continued to
15 grow in all three key core businesses, that being dairy
16 processing and distribution, food service distribution in
17 Arizona and food service distribution in Colorado.

18 Q. And when you use the term "dairy," you mean dairy
19 processing facility; correct?

20 A. That is correct.

21 Q. And at some point, did Shamrock build a plant in
22 Phoenix?

23 A. I believe the processing plant in Phoenix, which
24 is our current processing plant, was actually built around
25 1953 or '54.

1 Q. Now, is Shamrock Farms a separate corporation?

2 A. It is.

3 Q. And will there be a different witness to testify
4 on behalf of Shamrock Farms?

5 A. Yes.

6 Q. And do you have any responsibility with respect to
7 Shamrock Farms?

8 A. I do not.

9 Q. Turning to the primary issue in this hearing,
10 producer-handler issue, what are you not trying to
11 accomplish with support for any of the proposals?

12 A. We are certainly not attempting to put any
13 competitor out of business, which I've heard. But what we
14 are trying to do is to have a level playing field in which
15 we can successfully compete. And the current space does not
16 provide that. There's a gross inequity. In the current
17 situation, that does not allow for regulated handlers,
18 paying order price, to effectively compete against a
19 producer-handler that's exempt from order pricing.

20 Q. And to be clear, in no circumstances, what is
21 threatened within the Federal Order?

22 A. The Order itself. I believe that we're really at
23 a critical juncture in terms of identifying how this will go
24 forward. I think the reality of the major customers --
25 Safeway, Kroger, Wal-Mart, Albertson's -- in this market, a

1 strong independent like Bashas', Costco, Sam's Club, those
2 customers require -- in order to be able to succeed at their
3 end of the business, they require that they are buying on a
4 competitive basis.

5 If some of those customers are able to have an
6 advantage, which some of them have, through inequities in
7 what processors can offer, then the requirement and the
8 demand on the part of those customers will be such that
9 there will be additional players, whether it's further
10 expansion by Sarah Farms or whether it's a company like
11 ourselves that reorganize to become a producer-handler or
12 other parties that will enter the market. In some way there
13 has to be a level playing field in order to meet the
14 requirements of those customers.

15 Q. And level playing field, you mean a level
16 regulatory playing field?

17 A. Not necessarily. The playing field could
18 certainly be leveled by correcting the current inequity that
19 causes a single entity at this point in our market to be
20 exempt while everyone else is participating in a system that
21 is failing them. So there would be one way of correcting
22 the situation there within the system. But there's an
23 opportunity, if there's nothing done with the system, for a
24 level playing field among those that are structured to be
25 exempt outside of the system.

1 Q. So within the system, the problem is, for you, a
2 lack of uniformity in prices of paid producers by
3 processors?

4 A. I'm sorry. Ask the question again.

5 Q. Within the system, talking about within the
6 system, what is the problem?

7 A. The problem is that regularly, the cost that's
8 being presented to customers by the entity that's exempt is
9 lower than what we're able to offer as a regulated handler
10 within the system.

11 Q. And if you concluded that, that is because while
12 you're required to pay minimum prices, the exempt
13 producer-handler is not?

14 A. We are required to pay minimum class prices and
15 the producer-handler is not.

16 Q. How is this problem affecting your business
17 directly?

18 A. We're losing business.

19 Q. In this market, how many processors are there that
20 are the principal players?

21 A. I think the Order documents show that there are
22 four pool plants but, in reality, there are three fluid milk
23 plants -- Safeway, Kroger and ourselves -- and then there is
24 Sunrise Dairy up in Taylor, Arizona, and Sarah Farms as
25 producer-handlers.

1 Q. And with respect to Safeway and Kroger, we've
2 heard a little bit about them as integrated operations or
3 captive operations. Do you agree with what you've heard
4 today in discussing about Safeway and Kroger as being
5 integrated?

6 A. Yes.

7 Q. And the two others, Shamrock and Sarah Farms, you
8 will describe as independents?

9 A. Yes.

10 Q. And what does the term "independent" mean?

11 A. I think the distinction here specifically would be
12 that neither Sarah Farms nor Shamrock have retail stores
13 that they own as compared to Kroger or Safeway.

14 Q. And what does that mean for your business and for
15 your competitive situation vis-a-vis Sarah Farms?

16 A. From a business philosophy or business structure
17 standpoint, both Kroger and Safeway have determined that
18 dairy manufacturing is one of the things that they do in
19 their business. So the stores are a customer in a sense for
20 those processing plants, but it's certainly not a customer
21 at arm's length. Sarah Farms and Shamrock compete for
22 customers that don't have their own dairy processing plants.
23 So I think we're in a more direct head-to-head competitive
24 situation as a result.

25 Q. In that head-to-head competitive situation, is a

1 significant quantity of the milk sold at private label?

2 A. Yes, it is.

3 Q. And what does the term "private label" mean?

4 A. Private label would be a label that would either
5 be specific to the particular customer, and that could be
6 their store brand or another label that's unique to them
7 that they had developed, or it could be a generic label
8 that's developed that would typically be sold as an
9 aggressively priced gallon jug for fluid milk.

10 Q. And in that competitive market, is Sarah Farms a
11 significant competitor of yours?

12 A. Very much so.

13 Q. And have you estimated their volume?

14 A. We have.

15 Q. And what is your estimate of their volume?

16 MR. RICCIARDI: Let me object at this point, Your
17 Honor. There's no foundation as to this witness's
18 information as to an estimate of volume.

19 JUDGE HILLSON: I assume he was going to build on
20 that.

21 MR. ENGLISH: I think we'll be building on that.

22 JUDGE HILLSON: Maybe you want to ask the
23 questions in a different order then.

24 MR. ENGLISH: I'll hand the witness what I would
25 like to have marked, Your Honor.

1 JUDGE HILLSON: Okay. This will be Exhibit 22.

2 (Exhibit No. 22 marked for identification.)

3 BY MR. ENGLISH:

4 Q. Mr. Krueger, looking at Exhibit 22, have you
5 prepared a document reflecting the market of Sarah Farms?

6 A. Yes.

7 Q. Was this document prepared under your direction
8 and control?

9 A. Yes.

10 Q. Was it prepared in consultation with your sales
11 staff?

12 A. Yes.

13 Q. Was it prepared from records and information that
14 you normally gather as a part of your business?

15 A. Yes.

16 Q. Would you please read the label for Exhibit 22?

17 A. I'm sorry?

18 Q. Would you please read the label into the record
19 for Exhibit 22?

20 A. Sarah Farms Gallon Volume Estimated By Account,
21 Monthly Estimates.

22 Q. Now, is this exhibit a slice or snapshot for any
23 given month?

24 A. No, it would not be.

25 Q. What does this exhibit reflect?

1 A. What this exhibit reflects is the -- on a
2 by-account basis, the number of stores that that account had
3 in a given year, the estimated volume on a by-store basis
4 that we believe Sarah Farms was doing with each respective
5 account for a given month that they had that account's
6 business.

7 Q. And, again, you collect information such as this
8 with respect to your market on a regular basis with respect
9 to your competitors?

10 A. Yeah, on a semiregular basis. I mean, we're
11 involved in all of these accounts on a daily basis anyway.
12 We have relationships with all of these customers. We know
13 these customers. We know our market price. We know the
14 business that we're involved in and the business that our
15 competition is involved in.

16 So we deal with some of the same stores. We've
17 dealt with some of the same stores. We deal with other
18 customers that are virtually identical. Is this an exact
19 quantity as supplied by these stores for each location that
20 they have? No. Is this an accurate representation of the
21 kind of business that Sarah Farms is doing? Yes.

22 Q. But it's a reasonable estimate based upon your
23 best available information; correct?

24 A. That is correct.

25 Q. Now, is there an exception to the concept of a

1 representative month with respect to 2001?

2 A. Sam's Club -- I'm sorry, Costco and Sam's Club
3 actually converted to Sarah Farms late in 2001. We did not
4 show them as being customers of Sarah Farms in 2001; but for
5 the last couple of months in 2001, those accounts have
6 transferred to Sarah Farms.

7 Q. And because it was so late in the year, you
8 decided not to include it for representative purposes?

9 A. Correct.

10 Q. When you say you have relationships with all of
11 these customers, is that because while Sarah Farms may be in
12 one or more of these customers at a given time, they are not
13 servicing the whole line of dairy products that those
14 customers have?

15 A. That's correct.

16 Q. Let's start with the first line then --

17 MR. RICCIARDI: I'm going to object at this point,
18 Your Honor. We're getting into the substance of an exhibit
19 that hasn't been, in fact, admitted and I'm going to object
20 to it.

21 MR. ENGLISH: Your Honor, I think I'm entitled to
22 go through the entire time for my own voir dire first.
23 Beyond that, I've laid a foundation for the fact that this
24 document was prepared under the direction and control of
25 this witness. It is way beyond what the liberal Rules of

1 Evidence require for administrative ruling.

2 JUDGE HILLSON: Are you moving to admit?

3 MR. ENGLISH: I will be moving it for admission.
4 If you want me to try to move it now, I'll move admission
5 and then see what you say.

6 JUDGE HILLSON: Mr. Ricciardi, do you want to --
7 are there questions you want to ask concerning this?

8 MR. RICCIARDI: Well, there will be, Judge, but I
9 will tell you, based upon what I heard, the words "believe,"
10 "conjecture" and "speculation" come to mind very quickly.
11 The fact is, they created this, essentially, for litigation.
12 I don't care how liberal the rules are. The fact is, you
13 have to have some kind of foundation to admit this kind of
14 an exhibit, and there's nothing here other than speculation
15 and conjecture.

16 JUDGE HILLSON: Well, why don't you ask a few more
17 questions with regard to these numbers. They are very
18 general terms. Maybe you ought to be a little more
19 specific.

20 BY MR. ENGLISH:

21 Q. Well, let's start at Sam's for a moment and just
22 by way of example.

23 You had that business prior to 11-1-01; correct?

24 A. We had a couple of stores that we served.

25 Q. And you know from those stores the size volume

1 that those stores carry; correct?

2 A. Correct.

3 Q. And you know from servicing that customer what
4 their average size is for all of their stores; correct?

5 A. Correct.

6 Q. And you are in those stores on a regular basis;
7 correct?

8 A. Correct.

9 Q. And your salespersons make surveys of what those
10 stores are selling and what those stores are carrying;
11 correct?

12 A. Correct.

13 Q. And as a result, you have made an estimate of what
14 the Sam's Club volume is?

15 A. Correct.

16 Q. Based upon all of that information?

17 A. That's correct.

18 Q. And, similarly, for each of these items, based
19 upon the fact that your salespersons are in these stores on
20 a regular basis, you have made reasonable estimates of what
21 those lines are; correct?

22 A. That's correct.

23 JUDGE HILLSON: Excuse me. Do your salespersons
24 ask the people who run these stores how big an account they
25 had, what volume they were getting from Sarah Farms, or --

1 do they specifically ask that or did they generate it some
2 other way?

3 THE WITNESS: In some cases, they may. And if you
4 want me to be specific, I could tell you on which ones. In
5 other cases, it was because we had the business and so we
6 had firsthand experience as to what kind of volume.

7 JUDGE HILLSON: So when you lost the business --
8 when you lost the account to Sarah Farms, you just assumed
9 that they had the same amount of business that you had
10 beforehand?

11 THE WITNESS: Yes.

12 JUDGE HILLSON: Okay.

13 BY MR. ENGLISH:

14 Q. Let's talk about Wal-Mart. Wal-Mart is an account
15 that Sarah Farms had that it initially lost to another
16 entity but which you ultimately picked up; correct?

17 A. That is correct.

18 Q. And based upon the volume you picked up and your
19 customer relationship, you have determined what the volume
20 was being carried at Wal-Mart's in this market during 1999
21 and the 2000 time period; correct?

22 A. That is correct.

23 Q. Let's go back to the first line, Southwest.
24 You've indicated a number of these with footnotes with
25 information. Is it correct that this information came from

1 your sales staff from information collected in the ordinary
2 course of business?

3 A. That is correct.

4 Q. And you concluded from that information -- again,
5 do you have sales in the Southwest stores? Did you have
6 sales in the Southwest stores before they went bankrupt in
7 late 2001?

8 A. Yes, we did.

9 Q. And based on the fact that you had sales of
10 product in those stores, did you or your staff make regular
11 visits to the Southwest stores?

12 A. Yes.

13 Q. And is it a fact that in order to conduct your
14 business, you make it your business to know what is going on
15 in your marketplace?

16 A. Yes, we do.

17 Q. And you surveyed, as a regular part of your
18 business, what kind of volume was being sold in which stores
19 by all of your competitors?

20 A. Yes, we do.

21 Q. So this information, while generated for the
22 schedule, was not prepared for litigation, but was prepared
23 as part of your general business practices?

24 A. Yes.

25 MR. ENGLISH: Your Honor, I think there's more

1 than enough foundation, and I can go through the numbers.
2 The fact of the matter is this has not been prepared for
3 litigation. The fact of the matter is that this man since
4 1990 conducts his business in Arizona by knowing what is
5 going on in the marketplace and to simultaneously say, oh,
6 we're not going to tell you or we're not going to know what
7 the size is -- but when a witness shows up to provide a good
8 faith estimate, if there is contrary evidence, the way to
9 deal with that is through a future witness to come in and
10 testify that that information is wrong and not by objecting
11 to the good-faith estimate prepared by this witness.

12 MR. RICCIARDI: Your Honor, I bear the burden of
13 proof. You have to come in and show that I'm wrong. Come
14 on. The fact is, there's information in here that is
15 conjecture and speculation. You pointed out when you asked
16 the question. There's an estimate in here, a number of them
17 that basically says this, that, in fact, we assume that
18 because we had the business at a particular time, that Sarah
19 Farms had continued volume at that particular store.

20 There is nothing in here other than the footnotes
21 that show you that this is simply estimates, that this was
22 prepared for litigation, that it's conjecture. It is not
23 any information or evidence that the Secretary should be
24 basing anything on.

25 JUDGE HILLSON: Well, Mr. Ricciardi, I'm going to

1 allow this testimony in. I mean, you can, on
2 cross-examination, shred it to the extent that you can.
3 He's saying how he did it and you are free to ask him
4 questions on it. Assuming he's going to move it in
5 eventually, I will allow the questions. And I will allow it
6 to be admitted subject to anything that you can do to
7 influence the weight of this document under the
8 Administrative Secretary, you are free to do.

9 MR. RICCIARDI: I understand, Your Honor.

10 JUDGE HILLSON: Go ahead, Mr. English.

11 MR. ENGLISH: Thank you, Your Honor.

12 BY MR. ENGLISH:

13 Q. Let's go back to the first line, Southwest
14 Superdairy --

15 A. Southwest Supermarkets.

16 Q. Southwest Supermarkets.

17 In late 2001 or late 2002 your footnote indicates
18 that they filed for bankruptcy --

19 A. Yes.

20 Q. -- and that Food City purchased 19 locations.
21 Does that mean for 2002, the volume of those 19 locations --
22 based upon the information you had for the 33 stores in
23 2001, that the volume of the 19 locations, in your best
24 estimates, were moved down to the line for Food City, which
25 is line 2?

1 A. That is correct.

2 Q. But for the stores that were closed entirely, that
3 volume was not reflected certainly on line 2. It may have
4 gone to some other line based upon the volumes; correct?

5 A. That's correct.

6 Q. And for the two Safeway locations, you took the
7 volume for those two stores and you did not put it into Food
8 City; correct?

9 A. That is correct.

10 Q. Because Safeway picked up that volume; correct?

11 A. Correct.

12 Q. So for line item four -- and that makes sense to
13 explain the second -- Mercado, you similarly had an estimate
14 of volume based upon the stores but those stores converted
15 to Food City in 2001; correct?

16 A. Correct.

17 Q. So that volume was moved from 2000 from the
18 Mercado line up to the 2001 line for Food City; correct?

19 A. Correct.

20 Q. And in addition, for Food City there were other
21 changes as noted in footnote 2; correct?

22 A. Correct.

23 Q. And, again, you have -- just like with Southwest,
24 you sell other products to Food City?

25 A. Yes.

1 Q. And so your personnel are in the Food City stores
2 on a regular basis?

3 A. Yes.

4 Q. And as a result of being in those stores on a
5 regular basis, they make good-faith estimates of whose other
6 products are in the case; correct?

7 A. Yes.

8 Q. Let's talk about that for a second because there's
9 been this myth that's somehow all confidential information.
10 Milk sold in the store has a plant code on it;
11 correct?

12 A. Correct.

13 Q. Even if it's private label milk, the fact of the
14 matter is, any customer, any person in the public can pick
15 up that gallon of milk and look at that plant code?

16 A. Correct.

17 Q. And if they know enough to go on the Internet and
18 check for the codes, they can find out whose milk that is;
19 correct?

20 A. That is correct.

21 Q. So when it's private label milk and your employees
22 are in the store looking at the milk, they are not guessing
23 whose milk it is; correct?

24 A. That is correct.

25 Q. Then you've got a third item called independents.

1 What does that mean? You have a footnote but could you
2 describe what independents are?

3 A. The independents are some retail stores that are
4 located in Nogales and San Luis that have some sales in the
5 U.S. and also buy milk for export into Mexico.

6 Q. And, again, do you have sales in the independent
7 stores?

8 A. We do.

9 Q. And, again, your personnel go into those stores?

10 A. They did.

11 Q. And they check the plant codes?

12 A. Yes.

13 Q. And they know whose milk is in there?

14 A. Yes.

15 Q. And they do a survey of quantity?

16 A. They do.

17 Q. The next line item doesn't actually have a
18 footnote. It's also one of the smaller items. Nonetheless,
19 why don't you describe the Del Sol and King's?

20 A. That's just a small group of stores in the Yuma
21 area.

22 Q. And did you survey their information as well?

23 A. Yes.

24 Q. Do you have sales in those stores?

25 A. We do.

1 Q. And so the same answers would apply, that your
2 personnel go into the stores and look at the plant codes?

3 A. Correct.

4 Q. We've discussed Mercado. Do you want to add
5 anything about Mercado?

6 A. No.

7 Q. But would the same hold true, that you have
8 product in those stores prior to the changes that were made
9 in 2001?

10 A. Correct. Mercado is a part of Bashas' and we had
11 product in there in addition to Sarah Farms during this
12 entire period.

13 Q. And so all of the same answers would apply, that
14 your personnel went in the store, checked the plant codes,
15 did a survey and know what volume of milk was in those
16 stores?

17 A. Yes.

18 Q. Wal-Mart we have already discussed as well. Was
19 Wal-Mart new to the market in the late '90s?

20 A. They were with the supercenter concept. Prior to
21 that they had their division one stores, which is the
22 traditional Wal-Mart department store, and there were some
23 milk sales in those stores. It was comparatively
24 insignificant so we didn't list it.

25 Q. But later they did grow, but then in 2001 --

1 A. Excuse me. Once they came into the market with a
2 supercenter concept, then for each of those stores, they
3 represented significant volume, and Sarah Farms initially
4 had the bulk of the milk business in the Wal-Mart
5 supercenter stores when they entered the Arizona market.

6 Q. But the line item would indicate that they lost
7 that sale originally to an entity called Adhor Farms but
8 ultimately Shamrock picked it up. Do you know what happened
9 to cause the milk volume to move from Sarah Farms to Adhor?

10 A. I know what the director of the dairy program for
11 Wal-Mart told me was the reason.

12 Q. And what was that?

13 A. That they had grown in this market to the point
14 where they required their Great Value label, which is their
15 private label, to be produced, and Sarah Farms' plant, in
16 their opinion, was not capable of passing Wal-Mart quality
17 inspection to be approved to produce that label, so the
18 business needed to be moved.

19 Q. Eventually you picked up that milk off of Adhor?

20 A. Yes.

21 Q. Adhor is located in California?

22 A. Yes.

23 Q. Fair to say that you were a closer market for
24 delivering that milk?

25 A. Yes.

1 Q. The next line, Ross and Swiss and Stern Produce,
2 what does that line indicate?

3 A. They are a distributor to a variety of customers,
4 food service customers, Targets, the Big K accounts.

5 Q. And do you have product in those operations as
6 well?

7 A. No. That one would be an exception.

8 Q. And how did you estimate those numbers?

9 A. Just on understanding the accounts that they were
10 serving and making comparisons to similar-sized accounts
11 that we were serving and making a good-faith estimate in
12 terms of how much milk business those cows were likely to
13 represent.

14 Q. And is part of that in making those reviews that
15 you might be looking to try to pick up those accounts?

16 A. Yes.

17 Q. And in wanting to pick up those accounts, you'd
18 like to know what kind of volume you have to run; correct?

19 A. Yes. I mean, there's a whole qualifying approach
20 that we take to understanding what the needs of a customer
21 are and what the scope and size of their business is and the
22 products that they carry and so on and so forth. Those are
23 all routine kinds of information to gather and maintain as
24 you pursue business.

25 Q. Now, it looks like the volume in 2001 had gotten

1 as high as 150,000 gallons but dropped back in 2002. What
2 change occurred between 2001 and 2002 for the representative
3 month concept?

4 A. The biggest changes were the number of K-Mart
5 stores that closed, and the Target business, we were
6 successful in getting that business.

7 Q. And how were you able to get that business?

8 A. The primary reason for it was they were having
9 service problems with Sarah Farms. Actually, more
10 specifically in this case because it wasn't Sarah Farms
11 direct into those Target stores. They were having service
12 problems with Stern Produce/Ross Swiss in terms of service
13 at the store level.

14 Sarah Farms in this case was not a distributor to
15 the customers. They were a supplier of their packaged milk.
16 And this was the distributor entity, and the distributor
17 entity did not perform to the customer's satisfaction.

18 Q. And the customer told you when they switched the
19 business to you?

20 A. Yes.

21 Q. Line item 7, Super K.

22 A. We have product in those stores. We have our
23 people in those stores. The decrease in volume was due to a
24 closure of some of the stores. They are down to I think two
25 stores now in the State of Arizona.

1 Q. And, again, based upon being in those stores
2 yourself with your products, you're able to estimate what
3 the products are?

4 A. That's correct.

5 Q. Deco Foods, what is that?

6 A. They are a distributor to food service and
7 independent C-store type grocers primarily along the
8 Colorado River.

9 Q. And who was their previous supplier?

10 A. Their previous supplier was Cream of Weber.

11 Q. That's an organization out of Utah?

12 A. Yes.

13 Q. For instance, in the market statistics we
14 discussed yesterday, that would have shown up in the other
15 order plant numbers; correct?

16 A. That's correct.

17 Q. And, again, do you have products in those stores?

18 A. That's a distributor and, no, that one is an
19 estimate as well.

20 Q. Same kind of estimate based upon earlier
21 discussions?

22 A. Yes.

23 Q. Food for Less in 1999 is the only year. Can you
24 describe Food for Less?

25 A. We had that business and lost it to Sarah Farms

1 and then were able to recapture that business.

2 Q. At the time of lost business, were you told why?

3 A. Yes.

4 Q. What were you told?

5 A. Price.

6 Q. And when you picked it up again, why did you pick
7 it up?

8 A. Quality issues.

9 Q. And given that you had the volume before you lost
10 it and picked it back up, then did that provide the basis
11 for your reasonable estimate about the volume of that in
12 addition to going into the stores and observing?

13 A. Yes.

14 Q. Costco.

15 A. Costco is based on our estimate of what those
16 stores do based on the experience that we've had with Sam's
17 and making -- comparing and contrasting kind of evaluations
18 of Costco.

19 Q. And do your people survey that store and see
20 what's in there?

21 A. They do.

22 Q. And, again, both for Sam's and Costco, the reality
23 is that those numbers could have shown up in 2001 for the
24 last two months but you left them out; correct?

25 A. That's correct.

1 Q. And Sam's Club I think we've already discussed.

2 Do you have anything to add about Sam's Club?

3 A. No.

4 Q. The last item, Bashas', could you describe what
5 that item is and how you know that number?

6 A. We had served the Bashas' stores as the exclusive
7 private label supplier for several years. And in June of
8 this year, they switched to Sarah Farms for eight of the
9 stores in the Tucson area. This is the volume of those SKUs
10 that were switched.

11 Q. Your footnote indicates that that switched on
12 June 1. Did it actually switch on June 1?

13 A. It did not. I think it switched on June 10.

14 Q. And so would this be the item that I was
15 discussing with Mr. Wise yesterday?

16 A. It would be.

17 Q. And you know what volume you were selling into
18 that store on June 9 -- for instance, you knew what you were
19 selling in May?

20 A. Correct.

21 Q. And based upon that -- you were selling into that
22 store the year before, into those stores?

23 A. We were.

24 Q. And you knew what your volumes had been in the
25 year before?

1 A. The year before.

2 Q. So you used those estimates as part of your
3 calculation for this?

4 A. Correct.

5 MR. ENGLISH: Your Honor, I do move the admission
6 of Exhibit 22.

7 MR. RICCIARDI: Your Honor, I have the same
8 objection. Now, based upon his testimony where he even says
9 there are certain examples in here where they don't even
10 have their product in the store, it is clear that he has no
11 basis to produce and put this exhibit into evidence.

12 JUDGE HILLSON: I'm not going to be the fact
13 finder in this case. But in the -- the Administrator can
14 decide how much weight to give it, largely which may be
15 based entirely on your examination of Mr. Krueger, but I am
16 going to admit it into evidence as Exhibit No. 22.

17 BY MR. ENGLISH:

18 Q. Again, your staff didn't think in terms of
19 gallons?

20 A. Yes, we don't think in terms of gallons. I can do
21 the conversion.

22 Q. That's why you prepared this document from your
23 own internal material as to using gallons; correct?

24 A. We're a processor. We think in terms of gallons.

25 Q. But if you do the conversion, do you now have an

1 estimate for 2003 of the volume of Sarah Farms?

2 A. Yes, I do.

3 Q. And what is that estimate in pounds?

4 A. It would be a little over 17 million pounds based
5 on 8.6 pounds per gallon. That's on a per-month basis.

6 Q. Let me turn for a moment to the costs that
7 Shamrock incurs. Let's start with raw milk. First, you're
8 a fully regulated Class I distributing plant on Order 131;
9 correct?

10 A. That is correct.

11 Q. So to start with, you pay minimum class prices;
12 correct?

13 A. Correct.

14 Q. Now, in addition to Class I prices, do you pay any
15 premiums?

16 A. Yes, we do.

17 Q. And can you calculate a blended premium or, for
18 want of a better word, handling charge on your raw milk?

19 A. Yes, I could calculate that.

20 Q. And what have you calculated that to be?

21 A. It would vary between three and five cents a
22 hundredweight.

23 Q. You purchase some milk from United Dairymen of
24 Arizona?

25 A. Yes.

1 Q. And we heard United Dairymen of Arizona indicate
2 that that premium was 15 cents.

3 A. Yes.

4 Q. Approximately what volume of your milk do you
5 purchase from United Dairymen of Arizona?

6 A. It would vary, and that's the reason for the
7 blended premium rate to vary. The percentage of milk from
8 UDA would be 20 to 30 percent of the raw milk.

9 Q. And so when you say a blended premium is less than
10 the 15 cents and is around 3 to 5 cents depending on the
11 month, that is because you don't pay your own Shamrock
12 Farms' premium?

13 A. That is correct. We do not.

14 Q. Now, beyond raw milk costs, how do you view your
15 cost structure as a plant operator?

16 A. We have three national customers, two of which
17 have well over a dozen processing plants across the country
18 that are serving that. In the instance of all three of
19 these customers, they require component-by-component
20 justification of cost. That's the basis for our pricing
21 agreement with the customer on a monthly basis.

22 They benchmark every one of those components with
23 every one of the other processors that handle their business
24 nationally. And the feedback that we've gotten is that we
25 are at or lower, as a processor, to those customers than any

1 other processor that serves them in the United States.

2 Q. Have you lost business to Sarah Farms?

3 A. We have.

4 Q. And do you know what was the cause of that lost
5 business?

6 A. In every instance it's been price. Again, in
7 virtually every one of the customers that I can think of
8 that we've lost business to them, we've continued to do
9 business with the customer and we've continued to have a
10 relationship with the customer. We've not lost one gallon
11 of business due to product quality issues. We've not lost
12 one gallon of business due to service issues. We've not
13 lost one gallon of business due to issues of representation
14 or service at store level or promotional programs or
15 marketing or merchandising or anything else.

16 The only reason that we've ever lost business to
17 Sarah Farms is price.

18 Q. And for those customers which you continue to have
19 business with, do you know what the price difference is?

20 A. I know what, based on the information that we've
21 been provided, what we believe it to be.

22 Q. And what is that?

23 MR. RICCIARDI: Objection, Your Honor. No
24 foundation.

25 JUDGE HILLSON: You can respond to that.

1 MR. ENGLISH: Your Honor, he's already talked
2 about the fact that the customer has told him that it is a
3 normal practice for them to go into these stores to
4 understand -- to talk about continuing relationships with
5 the customers. I guess I could ask.

6 BY MR. ENGLISH:

7 Q. The customer told you?

8 A. Yes.

9 JUDGE HILLSON: I'll allow the question then.

10 BY MR. ENGLISH:

11 Q. Based upon what both of the customers told you and
12 your own investigation, what have you concluded about the
13 price difference?

14 A. The pricing offered by Sarah Farms is typically
15 six to eight cents a gallon below us.

16 Q. Now, that would work out to be something in the
17 neighborhood of 48 to 64 cents a hundredweight?

18 A. That sounds about right.

19 Q. Well, was your price too high?

20 A. Based on the information that has been fed back to
21 us by these national customers with regards to our cost
22 structure and based on a price philosophy that we have for
23 major customers with regards to their private label gallon
24 milk needs of passing through only the direct costs -- and
25 by that, the direct costs of raw milk, of packaging of plant

1 processing and of distribution. It's not burdened with any
2 sales and marketing expense. It's not burdened with any G
3 and A. It's not burdened with any debt service.

4 I believe that we could not have sold any product
5 for less than what we sold it for.

6 Q. The raw product costs you know and your customer
7 knows. It's basically published by the Federal Market
8 Administrator; correct?

9 A. More than basically. It is published.

10 Q. And your customers have gotten to the point where
11 they got the information the same time you got it; correct?

12 A. Correct.

13 Q. And the rest of those costs are the costs you just
14 told us are the ones that you've benchmarked with those
15 national customers and you are at or below those costs for
16 every other service provider; correct?

17 A. That is correct. I might add on that, the reason
18 that we do that, as an independent in this market, is that
19 we have customers that are dependent on us just as we are on
20 them and we need to keep them competitive with those
21 competitors that they have that have their own processing
22 plants, specifically, Kroger and Safeway.

23 So we have taken that philosophy and that's why I
24 don't have an issue in sharing that philosophy in this
25 forum, of pricing or major customers for their gallon milk

1 based on pass-through of our direct costs in producing that
2 product.

3 Q. Does the premium explain the price difference?

4 A. It would explain three to five cents a
5 hundredweight of it. What did you say the hundredweight
6 difference was?

7 Q. 48 to 64.

8 A. That would get it down to 45 to 61, I guess.

9 Q. In addition to you, who loses when you lose volume
10 to Sarah Farms?

11 A. The roughly hundred dairy farmers that make up
12 this pool.

13 Q. Turning back to Exhibit 22, what conclusions would
14 you draw from Exhibit 22?

15 MR. RICCIARDI: Objection, Your Honor. What the
16 heck does that mean?

17 MR. ENGLISH: Well, why don't we find out.

18 JUDGE HILLSON: I'm going to let him answer it.
19 You're going to have a full opportunity to answer it.

20 MR. RICCIARDI: I understand. Judge. I would at
21 least like to have a reasonable question so I can figure out
22 whether I should object or not.

23 MR. ENGLISH: Maybe the witness understands and
24 he'll explain it for us.

25 THE WITNESS: I would draw a couple of

1 conclusions. One is that they have nearly doubled their
2 business in the last four years, and this is in the reality
3 of a market that is relatively flat. In fact, we're
4 fortunate for it to be relatively flat augmented by
5 population gain. Per capita consumption of milk continues
6 to decline.

7 And so there is no growth in the market and yet
8 here's an entity that has grown. Because of the direct
9 competitive activity and the involvement with common
10 customers, I have a direct frame of reference that the
11 reason that they have been able to grow is simply because
12 they are able to sell product at a lower price than we can
13 afford to, even though we're not putting anything additive
14 into the pricing that we're offering.

15 It's a situation that I can't compete with a
16 regulated minimum cost. I can compete with it if we
17 restructure our organization to be exempt. But under the
18 current system, I can't compete.

19 BY MR. ENGLISH:

20 Q. Based upon your years of experience in the dairy
21 industry, for a producer-handler, in addition to the volume,
22 is the number of customers unusual, the number of retail
23 customers?

24 A. I don't know whether it's unusual on a comparative
25 basis to anything else. But in terms of the depth of their

1 customer list here, it's quite broad. I know that they have
2 continued to broaden the product offering that they made
3 available to their customers as well.

4 Q. Do you have an exhibit that shows that?

5 A. I believe we do.

6 MR. ENGLISH: I would like to have this marked.

7 JUDGE HILLSON: Exhibit No. 23.

8 (Exhibit No. 23 marked for identification.)

9 BY MR. ENGLISH:

10 Q. Could you first just describe the document for the
11 record, sir, what has been marked as Exhibit 23?

12 A. This is simply a listing of the products that we
13 were able to factually identify as having originated from
14 Sarah Farms that were available in the market in 1997 and
15 then a listing of the same products being made available by
16 Sarah Farms in 2003.

17 Q. And, again, is this the kind of information that
18 if you go into a store is readily available?

19 A. Yes.

20 Q. Especially if you have customer relationships?

21 A. Yes.

22 Q. So this is what you meant by --

23 A. In fact, on a store-by-store basis, we track every
24 one of these SKUs.

25 Q. And that's, again, something you do in the regular

1 course of business as part of maintaining your market in
2 Arizona?

3 A. Yes.

4 Q. Is it your opinion that was something that a
5 reasonably prudent businessman would do in your line of
6 work?

7 A. I would expect that. I don't think that we're
8 doing anything that would be abnormal.

9 Q. And, again, was this information collected just in
10 the normal course of business?

11 A. Yes.

12 MR. ENGLISH: Your Honor, I would move the
13 admission of Exhibit No. 23.

14 MR. RICCIARDI: I'll object again, Your Honor.
15 There's no foundation. What was the basis for it? Did they
16 ever see any of these products? How does he know that, in
17 fact, the products exist?

18 JUDGE HILLSON: I think he just said that this is
19 what they saw.

20 Didn't you just say that your people saw these in
21 stores?

22 THE WITNESS: Yes.

23 JUDGE HILLSON: I thought he said that. You can
24 cross-examine him on it.

25 MR. RICCIARDI: I will, Judge. Thanks.

1 JUDGE HILLSON: Okay. This is admitted into
2 evidence, Exhibit No. 23.

3 BY MR. ENGLISH:

4 Q. So with a business that has grown from over 8
5 million pounds to 17 million pounds from '97 to 2003 and, in
6 your view, that they have this raw cost advantage, what
7 happens as this process moves forward?

8 A. I guess I could describe a couple of scenarios.
9 One would be if left unchecked and no one responds, they
10 will continue to grow the business. I believe that the
11 advantage that they have here has led to the kind of growth
12 that we see in the estimates that we made in Exhibit 22.
13 It's provided for a second plant which Sarah Farms has which
14 they are using for an exempt opportunity to ship Class I
15 sales into California.

16 MR. RICCIARDI: Beyond the scope of the question
17 and I move to strike, that there's no basis for the
18 testimony. I'll put it on my note.

19 JUDGE HILLSON: I'm asking Mr. English what he can
20 say.

21 MR. ENGLISH: I guess we can break it down and
22 spend another 20 minutes getting there. The witness has
23 already described knowing this marketplace. If I need to
24 break it down --

25 JUDGE HILLSON: I don't think you need to break it

1 down. I'm going to let the answer stand.

2 MR. ENGLISH: Thank you, Your Honor.

3 BY MR. ENGLISH:

4 Q. Since it was interrupted, has it come to pass this
5 year that a new processing plant has opened in Arizona,
6 physically located in Arizona?

7 A. There is a new and, to my understanding, very
8 large volume capacity bottling plant which Sarah Farms has
9 built in Yuma that is intended to be operated as an exempt
10 plant shipping bottled milk into California.

11 Q. And this would be the same operation that
12 Mr. Tillison described earlier?

13 A. Yes.

14 Q. And, again, you're in the business of milk
15 processing. Do you make it your business to know when a
16 competitor is building a new plant?

17 A. Yes, I do.

18 Q. And in the normal course of business, have you
19 then discovered that there's this new plant that's been
20 built in Yuma, Arizona?

21 A. Yes; amazingly, yes.

22 Q. And in the normal course of business, have you
23 determined that that plant is now shipping product into
24 California?

25 A. Yes.

1 Q. And is it your understanding that that plant is
2 owned in some fashion by the Hettinga family?

3 A. Yes.

4 Q. And based upon your knowledge of Federal Milk
5 Marketing Orders and -- let me back up for a second.

6 First, you have some experience in selling milk to
7 California?

8 A. Yes.

9 Q. And based upon that experience in California,
10 would it be fair to say that you have gained an
11 understanding of how the California pooling and pricing and
12 Fluid Milk Standards Program works?

13 A. I have some understanding, yes.

14 Q. And based upon that, is it your understanding that
15 fluid milk sales from a plant located outside of California
16 into California are not regulated by California?

17 A. I understand that to be the fact.

18 Q. And just looking at the Market Administrator
19 statistics, one can tell that that plant is not listed as a
20 plant in the Federal Order; correct?

21 A. That's correct.

22 Q. And that's because that plant has no route
23 position in the Federal Order; correct?

24 A. Correct.

25 Q. And that's what you mean by that plant is exempt

1 from the pricing regulation; correct?

2 A. Correct.

3 Q. And you're saying that as part of your conduct of
4 business, recognizing that there's a plant nearby that is
5 owned and operated by the same family, that an opportunity
6 exists for milk to be moved into that second facility and
7 distributed in California fully unregulated?

8 A. Correct. Very attractive opportunity.

9 Q. Is it fair to say that within the market, looking
10 at the growth from 8 million pounds to 17.2 million pounds
11 by 2003, that this process becomes self-fulfilling?

12 A. Definitely.

13 Q. And as it grows, it feeds on your operations and
14 on the dairy farms in Arizona?

15 A. The cost advantage that we've experienced that
16 they have is an incredibly powerful tool. They have not
17 completely, but to a great extent they have harvested most
18 of the low-hanging fruit in Arizona. There are still a
19 couple of very attractive customers that are left; but given
20 the kind of cost advantage that they have, there's no
21 question in my mind if something is not changed -- and by
22 that, either change the regulation to eliminate the
23 disparity in raw milk cost or change in terms of ourselves
24 or others becoming competitive entities in an unregulated
25 marketplace -- they will end up with all of the business

1 that they want to have.

2 If I had a six to eight cent a gallon advantage, I
3 would have every piece of business available. Anybody in
4 this industry would. This isn't a particular skill of mine.
5 Six to eight cents a gallon is an enormous, enormous price
6 advantage.

7 Q. In your time working in the dairy industry on
8 these wonderfully productive and enjoyable milk hearings, has
9 it been your experience that people fight over tenths of a
10 penny a hundredweight in terms of what they have to pay?

11 A. Correct.

12 Q. And even at that tenth of a penny a hundredweight,
13 that price disparity is significant in your opinion?

14 A. Yes. It's amazing how many debates and
15 discussions you get into about the way that you round the
16 per-hundredweight change of the Market Order, at the tenth
17 of a cent level.

18 Q. Do you have Exhibit 6 with you, the Market
19 Administrator's statistics?

20 A. Is that --

21 Q. The red.

22 A. I do.

23 Q. Could you turn to Exhibit 11?

24 A. Yes.

25 Q. There were a number of questions asked yesterday

1 with respect to Table 11. And if you recall the testimony
2 concerning the change in how the calculation was presented
3 between the months of February 2001 for the third column
4 Class I in area by other plants and the March statistics for
5 in area by other plants --

6 A. Yes.

7 Q. -- and your understanding is that the difference
8 was -- in March at least the difference was the
9 producer-handlers were now included?

10 A. Yes.

11 Q. Other than the fact that February contained 28
12 days and March 31 days, based upon your experience and your
13 knowledge in the marketplace, is there anything -- strike
14 that.

15 Does anything, other than the addition of the
16 producer-handler statistics, figure into that change?

17 A. Not --

18 MR. RICCIARDI: Your Honor, let me object to the
19 question. We've got a document that was testified to by the
20 government and they weren't able to make that type of a
21 conclusion. This witness didn't prepare the document. He
22 doesn't have the information. He can't guess or speculate
23 as to it. He shouldn't be able to.

24 MR. ENGLISH: Your Honor, he refused to answer the
25 question. He didn't say what he knew. Beyond that, I think

1 what we know is that in February of 2001, it's other order
2 plants. In March of 2001, it's other order plants plus
3 producer-handlers. The question I asked is based upon his
4 knowledge. He's talked about -- repeatedly about how much
5 he goes into these stores. Is there any other explanation,
6 in his opinion, and I've already adjusted for the 28 days in
7 February and the 31 days in March. And so I'm asking, based
8 upon all of that and based upon the fact he makes --

9 JUDGE HILLSON: Okay. I'm going to allow him to
10 answer the question. As phrased, I think the question is
11 appropriate based on what -- I mean, I think it's an
12 appropriate question.

13 THE WITNESS: Will you restate the question,
14 please.

15 BY MR. ENGLISH:

16 Q. Based upon your experience and your knowledge and
17 taking into account the 28 days in February and the 31 days
18 in March, is there anything else, other than the addition of
19 the producer-handler information, that, in your opinion,
20 explains that change from February to March of 2001?

21 A. No.

22 Q. So let's talk about the proposed solution.

23 Why do you think a volume cap is appropriate?

24 A. Well, there's a couple of reasons in addition to
25 that which has been testified that that's the threshold the

1 National Milk Promotion Board has identified. One is in our
2 particular market, 3 million pounds a month is a significant
3 factor in the market. We're not talking about someone that
4 has an insignificant amount of business. We're talking
5 about someone that's got, you know, 3 plus percent share of
6 the market. That's significant.

7 Secondly is from an operating standpoint, 3
8 million pounds a month is a threshold by which there's a
9 pretty efficient plant operation that can result from that
10 in converting 3 million pounds of producer milk into bottled
11 milk. So that a hurdle of being less than that and that
12 being efficient, from a plant standpoint, has now been met.
13 Everything that's incremental from that point on is being
14 able to fully exploit the difference between being regulated
15 as far as class price and being unregulated.

16 Q. And does Arizona present unique opportunities?
17 There's been a fair amount of discussion about the cost of
18 disposal of surplus milk. You've already addressed the
19 issue of the opportunity to dispose of milk through another
20 Class I facility located in Arizona and selling into
21 California; correct?

22 A. I don't know what more attractive opportunity than
23 that anyone would need. But there are a variety of
24 opportunities to dispose of milk. I mean, I understand the
25 producer-handler system as compared to a regulated handler.

1 I understand that there is an additional challenge that's
2 involved in terms of managing milk supplies and surplus
3 disposal and that there can be some cost to that. But I
4 also understand the advantage of not being regulated by
5 minimum pricing. And when you put the two together, the
6 benefit of not being regulated hugely offsets the cost of
7 surplus disposal, particularly if you have a fluid plant
8 next door to dispose of in the form of Class I products
9 shipped into California.

10 Q. In fact, based upon your knowledge of the
11 industry, if that advantage of not being regulated didn't
12 offset the cost of disposing of the surplus, do you reach a
13 conclusion about what the logical conclusion would be for a
14 producer-handler?

15 A. It wouldn't make sense to exist.

16 Q. As a producer-handler?

17 A. As a producer-handler.

18 Q. It would make sense at that point to be regulated?

19 A. Right.

20 Q. Sir, what happens --

21 A. I mean, I don't understand the business reason for
22 being a producer-handler and going through whatever the
23 hardship is of surplus disposition if there's not a
24 sufficient cost advantage to absorb that and still make it
25 attractive. And the reality of what I've seen in the

1 marketplace suggests clearly and consistently that it is
2 attractive.

3 Q. Sir, what's going to happen if USDA does not take
4 action as you've recommended?

5 A. Again, the requirements of the customers are going
6 to demand that they have an opportunity to buy milk at costs
7 similar to what Sarah Farms has been able to make available
8 to their competitors and there will have to be an expansion
9 of unregulated suppliers to satisfy those customer needs.

10 So whether that expansion comes from further
11 expansion by Sarah Farms, which would be the most likely
12 scenario that you could describe today, or whether it's
13 another entity, ourselves or someone else, that would
14 determine that the system has failed, you can't survive in
15 the system, you can't compete effectively in the system. So
16 we have to become exempt from the system ourselves in order
17 to continue to survive.

18 Q. And as that happens, what happens to this
19 marketplace?

20 A. Every gallon -- I'm sorry, pound of Class I that
21 we take out of the pool further reduces the blend that the
22 remaining producers share.

23 In other words -- I mean, milk is structured to
24 where Class I, even without an overorder premium, is at a
25 premium. And it's balancing in the blend that gets paid to

1 the farmers against the manufactured uses that are lower
2 value.

3 And if Sarah Farms and another entity, ourselves
4 and maybe one other -- there's two or three entities that
5 are taking the bulk of the Class I out of that -- then
6 you've got all of the dairy producers that are not
7 participating in that. I don't think that they will
8 survive.

9 Q. Just one second, Your Honor.

10 One final question, sir. If the opportunity as a
11 producer-handler is so lucrative, why hasn't Shamrock done
12 it?

13 A. I think the more appropriate question would be why
14 hasn't Shamrock done it yet. The fact of the matter is that
15 we recognized as far back as I think it was 1996 the threat
16 that a producer-handler had on the system, the competitive
17 advantage that they have, joined with UDA because we believe
18 that the system is ultimately the best solution. But if the
19 system won't be changed to allow the participants in the
20 system to be able to compete, then we'll have no choice.
21 This hearing is really the first opportunity that we've had
22 to present the inequities that exist in the current system
23 and the need to have this system corrected.

24 MR. ENGLISH: Your Honor, that completes my
25 examination, and the witness is available for

1 cross-examination.

2 JUDGE HILLSON: Okay. Mr. Ricciardi, I take it
3 you have a question or two?

4 MR. RICCIARDI: I have a couple, Judge.

5 My first question is, is it okay, before we start
6 that process, that we take a couple-minute break?

7 JUDGE HILLSON: Okay. Let's go off the record.

8 (Recess at 4:22; resumed at 4:32.)

9 JUDGE HILLSON: Okay. I'm ready to go back on the
10 record.

11 And you may proceed.

12

13

EXAMINATION

14 BY MR. RICCIARDI:

15 Q. Al Ricciardi on behalf of Sarah Farms.

16 Mr. Krueger, could you take Exhibit No. 22 and
17 have that in front of you if you don't mind? Do you have
18 the document?

19 A. I do.

20 Q. Tell me the name of the individual who was
21 employed by Shamrock who provided you with the information
22 for Southwest for 1997?

23 A. It actually would have been two individuals that
24 provided that information.

25 Q. And were there actual product surveys that were

1 done?

2 A. I'm not sure what you mean by product survey.

3 Q. They heard about it. Did they go into any of the
4 stores at Southwest at that time, back in 1997, to see what
5 type of product was on the shelf?

6 A. Yes.

7 Q. And are those available for us?

8 A. I'm not sure if they go back as far as 1997.

9 Q. Do you rely upon any documents to make these
10 estimates for Southwest for 1997?

11 A. I'm not sure what you mean by "any documents."

12 Q. Excuse me?

13 A. I'm not sure what "any documents" means.

14 Q. Any documents, as broadly defined as you want to.

15 A. I don't know.

16 Q. Tell me the names of the individuals at Shamrock
17 Farms that had the information for 1997 for Southwest, and
18 then I'll ask you whether they are going to be available at
19 this hearing for cross-examination.

20 A. The individuals -- and it's Shamrock Foods
21 Company. Shamrock Farms is a brand name. Shamrock Foods
22 Company.

23 Q. I'll see if I can get it right from now on.

24 A. Dick Bender and Mark Stroh.

25 Q. Are they still employed?

1 A. They are.

2 Q. You personally didn't go into the Southwest stores
3 in 1997 to determine volume; correct?

4 A. No.

5 Q. And the employees of Shamrock Foods, hopefully I
6 got it right, didn't actually go in and count the number of
7 gallons that were on the shelves at Shamrock -- excuse me,
8 at Southwest in 1997, did they?

9 A. Do you mean take an inventory of what was in the
10 store?

11 Q. Yes, sir.

12 A. No.

13 Q. Nor did anybody at Shamrock Foods go and do any
14 type of count of the number of loads of milk that were
15 received by Southwest Food Stores in 1997; correct?

16 A. No.

17 Q. And so the estimate for Southwest for 1997 is
18 based upon information, you said, from two -- excuse me,
19 from two Shamrock Foods employees; correct?

20 A. That is correct.

21 Q. And did they give you any documents that you used
22 to prepare this particular exhibit from 1997 for Southwest?

23 A. Other than this particular exhibit, no.

24 Q. Again, there are no survey forms, no counts of
25 product, no counts of loads or shipments of milk or anything

1 like that that you base the determination as to the amount
2 you have for 1997 for Southwest; correct?

3 A. Correct.

4 Q. And the same would be true for Southwest all the
5 way through 1998, 1999, 2000, and 2001; am I correct?

6 A. Correct.

7 Q. Would the same be true with regard to the
8 remainder of any of the estimates on Exhibit No. 22?

9 A. Would the same be true?

10 Q. Yes.

11 Let me see if I can go through it again.

12 What I ask you specifically is this: Are there
13 documents that were generated or utilized by you in the
14 preparation of Exhibit 22, such as product surveys, counts
15 or things like that?

16 A. There are some documents, yes, that exist.

17 Q. And what documents exist?

18 A. I can't identify all of the specific documents
19 that exist, but we do have some documents that exist with
20 regards to information on various customers.

21 Q. What customers?

22 A. These customers and other customers that we serve.

23 Q. All of the customers on here?

24 A. Yes.

25 Q. Are all of the accounts listed, 1 through 12,

1 customers currently of Shamrock?

2 A. No.

3 Q. Have all of the accounts listed on 1 through 12
4 been customers at any given time of Shamrock?

5 A. Not all of them.

6 Q. So tell me the ones that have never been
7 customers.

8 A. Ross Swiss/Stern Produce and Deco Foods.

9 Q. So we know with regard to Ross Swiss and Stern
10 Produce and Deco Foods, you have no documents whatsoever;
11 correct?

12 A. Correct.

13 Q. And other than a guess as to volume with regard to
14 those, you have no basis for the information contained on
15 Exhibit 22; correct?

16 MR. ENGLISH: Object to the characterization.
17 That has never been his testimony.

18 MR. RICCIARDI: It's my cross-examination.

19 MR. ENGLISH: You don't get to mischaracterize the
20 testimony.

21 This is Charles English.

22 MR. RICCIARDI: What I do get to do is try to ask
23 the proper question and get the information from the
24 witness, and I'll ask it again.

25

1 BY MR. RICCIARDI:

2 Q. The fact is, with regard to those two entities,
3 Ross Swiss/Stern Produce and Deco Foods, you have no basis
4 for the information contained on Exhibit 22; correct?

5 A. No, I don't agree with that. Again, we are in
6 direct competition. We are in direct contact. We know
7 what's going on in the marketplace. We know what stores are
8 being served by competitors. We know what kind of volumes
9 that they do.

10 These are much more qualified estimates than to be
11 characterized as a guess.

12 Q. Let me, then, because I don't want to fence with
13 you, get specific.

14 Do you consider Ross Swiss/Stern Produce stores
15 that you are in competition with?

16 A. They are a distributor that serves stores that is
17 a competitive entity to us, yes.

18 Q. And with regard to the information for Ross
19 Swiss/Stern Produce, since it's not a customer of yours and
20 they are a competitor of yours, then the information
21 contained on this document, Exhibit No. 22, is based upon a
22 certain set of assumptions as opposed to facts; correct?

23 A. If you mean by "assumptions" that we estimated
24 volumes based on our knowledge and awareness of various
25 customers being served by these competitive entities and the

1 kinds of volumes that would typically be associated with
2 those stores, as an assumption, I'll agree with that. As
3 opposed to having copies of weekly or monthly usage reports
4 that we had obtained from those accounts as being facts,
5 I'll agree with you.

6 Q. Okay. And with regard to that -- and I'll take
7 your words. You don't have any weekly or monthly usage
8 reports for any of the estimates set forth on Exhibit 22;
9 correct?

10 A. No, that's not correct.

11 Q. Okay. Then tell me the weekly or monthly usage
12 reports you do have and for what customers.

13 A. Well, we have Food for Less before and after the
14 period that Sarah Farms served them.

15 Q. Okay.

16 A. So do we have weekly or monthly usage reports for
17 the period that Sarah Farms served them? No. We have
18 immediately prior and immediately after.

19 Q. The Food for Less, there's an indication on
20 footnote 99 that Shamrock had the business from '97 to '98,
21 Shamrock had it, Sarah Farms in '99, and then Shamrock got
22 it back in 2000; correct?

23 A. Yes.

24 Q. And Shamrock still has that business today?

25 A. That's correct.

1 Q. What's the current volume that Shamrock is selling
2 to Food for Less?

3 A. I'm sorry. Let me correct that. Food for Less
4 just recently ceased to operate as a result of the Fleming
5 bankruptcy.

6 Q. Prior to the time that it ceased operations, what
7 was the volume that Shamrock was selling at Food for Less?

8 A. I don't have that available.

9 Q. Can you tell me approximately?

10 A. No.

11 Q. Is it more or less than 70,000?

12 A. I can't tell you.

13 Q. Is there a reason you didn't look at that when you
14 prepared Exhibit 22?

15 A. Yeah, it wasn't about our volume.

16 Q. Yeah, I think it is about your volume to a certain
17 extent. That's why I wanted to ask some questions about it,
18 since you said one of the bases for determining, quite
19 frankly, the Food for Less volume was your volume beforehand
20 and your volume afterwards, sir, and that's how you
21 calculated the estimate in 1999. It is about your volume.
22 So tell me, if you can, if you know, what your volume was
23 before Food for Less ceased operations. More or less than
24 70,000?

25 A. For what period following?

1 Q. When did it cease operations?

2 A. Three or four months ago.

3 Q. Okay. And tell me for 2002, if you know.

4 A. I don't.

5 Q. Okay. I'm still staying with Exhibit 22. Just
6 keep it in front of you, but I have a couple of questions
7 that revolve around it.

8 Is quality an important issue for Shamrock's
9 customers?

10 A. To my knowledge, quality is an important issue for
11 any customers.

12 Q. That would include Shamrock?

13 A. That would include Shamrock.

14 Q. Is service an important issue for Shamrock's
15 customers?

16 A. For any customer.

17 Q. Including Shamrock's?

18 A. Correct.

19 Q. Do you know -- since you have this background in
20 the dairy business that you've had for a number of years,
21 have you ever heard the term "leaker"?

22 A. Yes, I've heard that term.

23 Q. What is it?

24 A. It's a package that leaks.

25 Q. Has Shamrock ever had a problem with regard to

1 leakers concerning any customers?

2 A. Not that I recall.

3 Q. Had Shamrock ever gotten any complaints from any
4 customers regarding leakers?

5 A. There have been isolated incidents where we've had
6 a package that leaked that the customers brought to our
7 attention. There's a line that I would draw between an
8 isolated incident and a problem with a customer.

9 Q. And that line would be where?

10 A. Where the customer is threatening to make a change
11 with the business unless the situation has been corrected.
12 We have not experienced that.

13 Q. So your testimony under oath here is that Bashas'
14 in Tucson did not make any complaints to Shamrock regarding
15 the number of leakers that were sold to eight of its stores
16 back in May and June or so of this year?

17 A. My testimony under oath would be to my knowledge,
18 we did not have a problem with Bashas' with regards to
19 leakers.

20 Q. Who at Shamrock would be the individual in charge
21 of dealing with customer complaints, service issues, quality
22 issues, such as leakers?

23 A. Typically, the first line of contact on Bashas',
24 if you want to talk specifically about that, would be Mark
25 Stroh or Elliott Begoun.

1 Q. Did Shamrock recently change caps on any of its
2 fluid milk products?

3 A. We did.

4 Q. When was that?

5 A. Probably in the last couple, three, four months.

6 Q. Was one of the reasons for the change in the caps
7 because of concerns expressed by customers over leaking
8 product?

9 A. No. The reason for the change was our own desire
10 to improve quality of our packaging and to reduce any
11 incidents of leakers that we had.

12 Q. Now, I have in front of me, if I can open it, a
13 Shamrock product. I'm sure you're happy that I have it
14 here.

15 A. Thank you. I hope you bought it.

16 Q. I'll tell you where I -- somebody bought it.
17 You'll ultimately get some of this money, I hope.

18 This is a 12-fluid-ounce container of milk that I
19 have in front of me; correct?

20 A. Yes.

21 Q. And I noticed when I took the plastic cap off that
22 it's also got an inner foil cap. Am I correct?

23 A. Yes.

24 Q. How long has Shamrock had that design for the
25 12-fluid-ounce milk container?

1 A. Since May of 2001.

2 Q. What was the reason why it went to that design,
3 that additional safety feature?

4 A. We changed the plant that we processed that in to
5 our extended-shelf-life plant.

6 Q. You're jumping ahead to some other things I was
7 going to ask you. Let me ask you this question. Hopefully
8 I'll help to keep that ball in the area.

9 With regard to your gallon packages, whether it be
10 private label or otherwise, do you have the same type of
11 inner foil under the cap?

12 A. We do not.

13 Q. Why not?

14 A. Because it hasn't been something that we perceived
15 to be a benefit.

16 Q. If customers requested that type of a change,
17 would you go ahead and do that?

18 A. It would certainly be something that we would
19 consider if a customer required it. We would try to better
20 understand what the customer's objectives and needs were.

21 Q. Would there be a cost associated with adding the
22 additional internal foil?

23 A. As compared to not having?

24 Q. Not having it, yes.

25 A. Yes, there is some cost difference.

1 Q. There would be a cost in changing some kind of --
2 part of the production facility to do that plus the ongoing
3 cost of the foil; correct?

4 A. The changeover is not of any significance.

5 Q. There would be some cost?

6 A. I would say it's insignificant.

7 Q. Do you know whether or not Sarah Farms, since you
8 apparently have at least expressed some knowledge about
9 Sarah Farms, sells its product, gallon milk, with an inner
10 foil?

11 A. I don't.

12 Q. If they did, would that be an added service or
13 quality for its customer?

14 A. Not from my perspective, no.

15 Q. Then why did you add it to your 12-fluid-ounce
16 container?

17 A. Because of the process that that product is
18 packaged under. We package that product with 82 days of
19 code life. And the seal is essential to keep any airborne
20 bacteria from permeating that package.

21 Q. Would you agree with me that adding an inner foil
22 to a gallon container of milk would also increase the shelf
23 life?

24 A. No, I would not.

25 Q. So it would be irrelevant to product quality or

1 service to the customer, in your opinion?

2 A. I don't see that there's, in and of itself, a
3 direct benefit.

4 Q. Now, as I understand it from Exhibit No. 22, that
5 Wal-Mart was served by Sarah Farms, at least it's your
6 assumption it was, '99 through 2000; correct?

7 A. Yes, that's our assumption.

8 Q. Adhor Farms?

9 A. Adhor Farms, we assumed that they served them.

10 Q. You assumed that they served them in 2001 and
11 Shamrock has served them from 2002 to the present; correct?

12 A. Yes.

13 Q. As I understand your testimony during the course
14 of this proceeding, it's your opinion that there is some
15 type of inequity in the 131 area based upon price that a
16 producer-handler pays or doesn't pay actually into the pool;
17 correct?

18 A. Based on the experience that I have with the
19 customers, yes.

20 Q. And your testimony also is that price is something
21 that you can't compete on against Sarah Farms; correct?

22 A. That is correct.

23 Q. And it is also your testimony that price is
24 critical to all of the customers that you're attempting to
25 serve. In fact, you're losing customers as a result of the

1 fact that you can't keep up on the price?

2 A. That is correct.

3 Q. If price was critical, then why in the world would
4 Wal-Mart have gone away from Sarah Farms to Adhor Farms and
5 then to Shamrock and not gone back to Sarah Farms to get
6 that great price?

7 A. Did you miss that on my testimony?

8 Q. I didn't miss a thing.

9 A. Sarah Farms was not able to convince Wal-Mart that
10 they could pass Wal-Mart's quality standards in their plant.

11 Q. So quality and service is as critical as price is,
12 obviously?

13 A. No. I wouldn't go there. I don't think that I
14 said anything that would allow you to make an equation.

15 Q. Is price and quality important to a customer?

16 A. They both are, yes. And in some situations, price
17 may be more important, and in some situations, quality may
18 be more important.

19 Q. If your testimony as to your perceived function as
20 to the price differential is true, then why wouldn't every
21 potential customer stay with the producer-handler such as
22 Sarah Farms?

23 A. I believe that it's a matter of time.

24 Q. Not for Wal-Mart?

25 A. I believe that it's a matter of time for Wal-Mart.

1 Q. Not for -- what are the other ones we have here?

2 Not for Food for Less?

3 A. Well, Food for Less is gone. That opportunity no
4 longer exists.

5 Q. They may have been gone. But the fact is that
6 price wasn't so significant that Food for Less was willing
7 to stay with Sarah Farms; correct?

8 A. At that time, that is correct.

9 Q. Well, "at that time," that was in 1999; correct?

10 A. Correct.

11 Q. And you served them in 2000; correct?

12 A. Yes.

13 Q. And Sarah Farms marketed them in 2000; correct?

14 A. Correct.

15 Q. Sarah Farms had that assumed price disparity in
16 2000?

17 A. Correct.

18 Q. Food for Less didn't go back to them?

19 A. But they eventually would, in my opinion.

20 Q. In your opinion.

21 They didn't actually do anything, because you told
22 me they are out of business.

23 A. For that specific customer, that's correct.

24 Q. That's what we're talking about.

25 So 2000, you were available to provide supply,

1 Shamrock was, so was Sarah Farms. We had this price
2 disparity. Food for Less stayed with you; correct?

3 A. Correct.

4 Q. Same is true in 2001?

5 A. Correct.

6 Q. Same is true in 2002?

7 A. Correct.

8 Q. And the same is true in 2003 until they went out
9 of business?

10 A. Correct.

11 Q. Shamrock currently sells gallon milk to Food City
12 stores; correct?

13 A. We do.

14 Q. How many gallons a month?

15 A. I don't know.

16 Q. Is it more or less than 60,000?

17 A. I already said I don't know.

18 Q. Is it more or less than a million one oh eight?

19 A. (Witness shrugs.)

20 JUDGE HILLSON: I think you need to use words
21 rather than gestures.

22 THE WITNESS: I already said I don't know.

23 BY MR. RICCIARDI:

24 Q. You're familiar with the marketplace. You make
25 assumptions with regard to how much in gallons that is sold

1 by Sarah Farms to Food City in 2002 and 2003, and your
2 testimony at this hearing is you don't know what you sell to
3 them?

4 A. I don't commit to recall, or memory, specific
5 volume levels for every customer, no.

6 Q. So your testimony is you don't know what it is?

7 A. No. My testimony would be that I haven't
8 successfully memorized our sales history to every account
9 that we serve.

10 Q. And your sales history would actually have
11 invoices as part of the backup to show that --

12 A. I haven't memorized those invoices either.

13 Q. Let's see if we can answer my question and we'll
14 stay with it and we'll do fine.

15 Your sales history would actually have invoices;
16 correct? You would be able to track -- and you get a
17 monthly report or weekly report as to volume anyway, don't
18 you?

19 A. Right.

20 Q. Did you look at a recent either monthly or weekly
21 report for Food City?

22 A. I look at monthly reports, yes. I looked at Food
23 City, yes. Do I remember what the numbers were? No.

24 Q. Have you been in a Food City store recently?

25 A. Within the last three months.

1 Q. When you were there within the last three months,
2 did you see that your gallon product was also sitting on the
3 shelf near the gallon product that was sold to Food City by
4 Sarah Farms?

5 A. Yes.

6 Q. Did you see that they were selling for about the
7 same price?

8 A. No.

9 Q. Did you look at the price one way or the other?

10 A. Yes.

11 Q. And what did you determine with regard to the
12 price?

13 A. I understand the different positions that Food
14 City has for various labels of milk that they carry and I
15 understand the position that we fulfill for them.

16 Q. And what position is that?

17 A. That would be the high-priced one.

18 Q. Do you also provide a private label gallon milk
19 for Food City?

20 A. We do not.

21 Q. When you say the higher-priced milk in a gallon
22 for Food City, what was Food City selling that gallon for
23 three months -- or within the last three months?

24 A. I don't remember.

25 Q. Did Shamrock ever sell any milk to Costco?

1 A. Not that I recall.

2 Q. So Costco has never been a customer of Shamrock;
3 correct?

4 A. Well, I'll correct that. We do sell Costco milk
5 now. We sell them chocolate milk.

6 Q. Gallon?

7 A. No.

8 Q. Has Shamrock ever sold gallon milk to Costco of
9 any variety, of any type?

10 A. Not that I recall.

11 Q. So, again, the information on here with regard to
12 Costco, that's information that you are assuming in terms of
13 gallons. It's not information that you have specific
14 documentation as to; correct?

15 A. I would respond the same way I did before. If
16 "assuming" means using our knowledge of the marketplace and
17 our experience with stores similar to Costco and the kind of
18 volumes that they represent, yes. If by "fact" you mean did
19 we get monthly sales reports that Costco provided us so that
20 we could prepare this, no.

21 Q. You indicate in footnote 6 that Targets and other
22 small accounts moved their business to Shamrock because of
23 service and quality issues. That's what it says there.

24 A. That's correct.

25 Q. When did they move the business?

1 A. During 2002. I think the most significant account
2 in there was Target, which I believe we started to serve in
3 May of 2002.

4 Q. And what is the price that you are selling to
5 them?

6 A. I don't know.

7 Q. Can you tell me whether or not that price is, at
8 this point, based upon your own personal knowledge, more or
9 less than was offered to them by Sarah Farms?

10 A. I don't recall.

11 Q. Is it your testimony that prior to the time that
12 the business was moved, that Sarah Farms had this, in your
13 opinion, pricing equality in terms of what it sells milk
14 for?

15 A. The situation with regards to Target specifically
16 is different in that Sarah Farms did not sell directly to
17 Target. Sarah Farms sold to -- either to Ross Swiss or to
18 Stern. And that entity is who sold to Target. So there was
19 a distributor that was involved in between Sarah Farms and
20 the customer.

21 What the pass-through of whatever benefit Sarah
22 Farms had in that particular instance or not by that
23 distributor was, I can't tell you.

24 Q. So the potential exists that that distributor
25 added on a cost in terms of that before it was sold to

1 Target; correct?

2 A. The distributor may have been efficient even
3 though they were buying very effectively. I don't know.

4 Q. Let's talk about that.

5 Efficiency in terms of plant operation is
6 important in terms of what you can sell a product for;
7 correct?

8 A. Yes.

9 Q. In fact, that's one of the reasons why Shamrock
10 spent a substantial amount of money and I think you
11 mentioned before when we were talking about this 12-ounce
12 fluid milk, to build a plant to ensure that you have a
13 longer shelf life for certain products; correct?

14 A. Yes.

15 Q. When a company like Shamrock is able, through
16 efficiencies, to lower its cost, it can also, then, if it
17 wanted to, pass on those lower costs to its customers;
18 correct?

19 A. Correct.

20 Q. So product is not everything. Production and
21 efficiencies of production is important to any particular
22 business; correct?

23 A. Correct.

24 Q. And it's important to Shamrock Farms?

25 A. Correct.

1 Q. Shamrock Foods. Yes, I hear you. I was looking
2 at the milk again and it threw me off.

3 A. The brand is pretty captivating.

4 Q. Yes, it is, especially when you pay as much money
5 for it in terms of advertising as you do in this market,
6 since I have to watch those Diamondback games and there it
7 is.

8 Now, speaking of markets, Shamrock distributes
9 product in Arizona; correct?

10 A. Correct.

11 Q. In New Mexico?

12 A. Yes.

13 Q. In El Paso, Texas?

14 A. Yes.

15 Q. In Nevada?

16 A. Yes.

17 Q. In Utah?

18 A. Yes.

19 Q. And in Colorado?

20 A. Yes.

21 Q. Does it have any processing plants in any of those
22 states?

23 A. No. Arizona.

24 Q. Other than Arizona. I apologize. Yeah.

25 Did you say in your direct testimony that you

1 don't intend to provide any information with regard to
2 Shamrock Farms or do you have information on Shamrock Farms?

3 A. I testified that there was another witness that
4 would testify for Shamrock Farms, that I have no direct
5 responsibility for Shamrock Farms. It's a separate
6 corporate entity.

7 Q. I'll ask that particular witness, then.

8 Take a look at the -- because you were asked this
9 question -- Exhibit No. 6, Table 11, page 26, the red
10 document. Do you have it in front of you?

11 A. Yes.

12 Q. This was not a document that was prepared by
13 Shamrock Foods; correct?

14 A. No.

15 Q. This is not a document that's based on any
16 information that is provided to the Market Administrator's
17 office by Shamrock Foods; correct?

18 A. I'm sorry?

19 Q. This is not based on any information that Shamrock
20 Foods has provided to the Market Administrator's office;
21 correct?

22 A. I'm not sure about that.

23 Q. Okay.

24 A. I suspect that Shamrock Foods is the source of
25 information that went into the preparation of this report.

1 Q. Okay. Fair enough.

2 With regard to the question that was asked as to
3 the difference between buying from February through March of
4 2001, again, that is based upon your conjecture and
5 supposition regarding what those figures mean; correct?

6 MR. ENGLISH: Object to the characterization.
7 Charles English.

8 MR. RICCIARDI: I'll give you a continuing
9 objection.

10 BY MR. RICCIARDI:

11 Q. Go ahead.

12 A. Would you restate the question?

13 MR. RICCIARDI: Can you read it back, please.

14 (Requested portion of record read.)

15 THE WITNESS: What I testified is that I don't
16 know of any reason for the change in the figures other than
17 the inclusion of Sarah Farms' volume in March.

18 BY MR. RICCIARDI:

19 Q. You also don't know of other reasons that may have
20 been factors that would have changed the volume; correct?

21 A. I think I testified that I did not know of any
22 other factors or reasons.

23 Q. I think you also indicated this was your first
24 opportunity, essentially, to challenge the issue of
25 producer-handler and, in particular, with regard to Sarah

1 Farms and Order 131.

2 In fact, wasn't Shamrock involved in an issue
3 concerning Heartland back in '93 or '94?

4 A. Yes.

5 Q. And didn't Shamrock, at that point, try to get the
6 Secretary to change with regard to Sarah Farms also?

7 A. I really don't recall that.

8 Q. Okay. Were you involved, along with the UDA, in a
9 lawsuit that was filed against the Secretary thereafter?

10 A. Yes.

11 Q. At the time that you filed that lawsuit, what was
12 the volume that was being sold by Sarah Farms in the
13 marketplace?

14 A. In 1996, I don't have that here.

15 Q. Are you looking at Exhibit 22?

16 A. Yes.

17 Q. Can you convert your estimate for 1997 from
18 gallons into pounds?

19 A. Yes.

20 Q. Can you tell me what your estimate is for pounds
21 in 1997?

22 A. This would represent about 9 million pounds a
23 month. So 100 to 110 million pounds per year.

24 Q. Can you tell me when the lawsuit was filed?

25 A. No, not specifically.

1 Q. Assuming it was filed in '95 or '96, can you tell
2 me specifically what the poundage was at the time it was
3 filed?

4 A. No. I don't have that available.

5 MR. BERDE: That's an assumption contrary to the
6 record, that question.

7 THE WITNESS: I don't have the information to
8 answer the question.

9 BY MR. RICCIARDI:

10 Q. Fair enough.

11 And then there was Order Reform that occurred in
12 '99-2000. Are you aware of that?

13 A. Yes.

14 Q. And at that point, Shamrock, along with UDA, was
15 attempting to get the Secretary to, again, change the
16 regulation with regard to producer-handlers?

17 A. Yes.

18 Q. That change did not occur; correct?

19 A. Has not yet.

20 Q. It still hasn't, has it?

21 A. We're here.

22 Q. Exactly.

23 And let me ask you the question. Tell me the
24 market conditions that have changed since the end of '99 to
25 2000 in the 131 Order area.

1 A. The market conditions that have changed is that
2 there's a flat, at best, Class I market that is increasingly
3 served by captive plants and, to a greater extent, a
4 producer-handler.

5 Q. But if your suppositions in Exhibit No. 22 are to
6 be believed, that same type of market condition would have
7 occurred from '97 to '98; correct?

8 A. I think '97 to '98 shows some increase, yes.

9 Q. And then there was an increase, if your
10 suppositions again are correct, from '98 to '99; correct?

11 A. That's what it shows.

12 Q. And if your suppositions are correct on
13 Exhibit No. 22, there was a change in '99 to 2000; correct?

14 A. Yes.

15 Q. So all of the marketing conditions that you're
16 complaining of now would have occurred also back then at the
17 time of reform; correct?

18 A. I think we were complaining then. We've been
19 complaining.

20 Q. Did you testify that Kroger and Safeway, who have
21 plants in this marketing area, are integrated in some
22 fashion?

23 A. Yes.

24 Q. What do you mean by that?

25 A. That they have -- in the context of being

1 integrated, that they have retail stores, which is their
2 primary business, and dairy processing is a manufacturing
3 function that they perform primarily for the supply of their
4 own stores, although in the case of Safeway, they have
5 external customers as well.

6 Q. Well, when Shamrock sells to a Bashas', for
7 example, that's an arm's length transaction; correct?

8 A. That's correct.

9 Q. When Kroger or Safeway, quote, sell, close quote,
10 to their own stores, is that an arm's length transaction?

11 A. No.

12 Q. And, in fact, having stores' built-in markets for
13 milk or dairy products is a competitive advantage that those
14 producers, Kroger and Safeway, would have over Shamrock;
15 correct?

16 A. Not necessarily. I mean, within any business
17 enterprise that's as broad as a Kroger or a Safeway, they
18 certainly have the ability to shift the P around as far as
19 what they would reflect of the cost of one aspect of the
20 business to another aspect of the business as they hand it
21 off.

22 But in the overall scheme of things, I don't see
23 that they have any advantage over us. They are limited to
24 their own stores primarily. They have the ability to
25 compete but it's more difficult for them to compete against

1 an independent like a Sarah Farms or ourselves because they
2 are identified by the customers that they would go after,
3 for the most part, as a competitive entity.

4 Rather than a supplier entity, they have no cost
5 advantage whatsoever with regards to the cost of raw milk,
6 which is the most important cost component in the specific
7 business that we're in. And we have the same competitive
8 challenge and opportunity to make sure that all of the other
9 costs of getting that raw milk into a package and,
10 ultimately, into a refrigerated display case, that we have a
11 chance to do a better job or a worse job than they do. So I
12 don't see that they have an advantage.

13 Q. You don't have to employ -- excuse me. They don't
14 have to go out and employ salesmen to try to find arm's
15 length contracts with outside customers; correct?

16 A. For that aspect, yeah.

17 Q. They wouldn't have to pay any of the marketing
18 costs that, for example, Shamrock might have to end up
19 paying in trying to attract and keep customers because they
20 have captive customers of their own; correct?

21 A. And I think that's apples and oranges. What they
22 do as far as merchandising their milk in the stores and
23 where the cost for the display ads they do and whatever
24 price discounts they do and so on goes -- again, is one of
25 those things that -- that's their internal accounting. But

1 I don't really see that it's an advantage or a disadvantage.

2 Q. You testified that there were three national
3 customers who gave you some information with regard to cost.
4 Who are those?

5 A. I don't care to answer that.

6 Q. You want to present that testimony but you don't
7 want to tell me who it is so I can probe it?

8 A. I don't think it would be appropriate to divulge
9 confidential customer information.

10 Q. I would like to find out --

11 A. I'm sure you would.

12 Q. I'm sure I would. I would like to find out the
13 basis for your testimony. What you're telling me is you are
14 not going to tell me that?

15 A. I took an oath when I sat down in this chair to
16 tell the truth. I've told the truth but I'm not going to
17 tell you the specifics of the customer.

18 Q. You're going to tell me there were three national
19 ones but you're not going to tell me who they are. Okay.

20 Is there a cost that Shamrock has by having a
21 fairly broad product line in the dairy industry?

22 A. I'm not sure -- I think I understand what it is
23 you're trying to get to. I will tell you that we have an
24 extensive activity based cost-in structure, so we identify
25 what it costs us to process milk into various forms to be

1 packaged and we understand the relative and comparative
2 costs of putting milk in large volumes and high-volume
3 filler run rates into gallon jugs versus putting them into
4 eight-ounce half-pints or half-gallons or that package there
5 or so on.

6 So different costs -- I'm sorry, different
7 products carry different cost burdens as a result.

8 Q. I understand. And that's almost an accounting
9 response to what I hope was a more basic question. Let me
10 see if I can get at it this way: If instead of selling
11 milk, for example, in the 12-fluid-ounce container that I
12 I've now got in front of me and in other smaller packaging,
13 what Shamrock decided to do was to sell milk, fluid milk,
14 only in gallon or half-gallons, there would be less of a
15 cost to Shamrock than in doing what it currently does in
16 terms of marketing in all of the various sizes; correct?

17 A. No.

18 Q. So there's no cost saving? Your testimony is
19 there's no cost saving in offering the product at all of
20 these various levels, various sizes?

21 A. There's no -- is your question that there's no
22 cost savings or no increased cost?

23 Q. Well, let's talk about -- let me talk about it
24 from the perspective of Shamrock.

25 Is there a cost savings to Shamrock -- strike

1 that. I apologize. Is there an increased cost to Shamrock
2 in trying to market along that larger product line?

3 A. Different products carry different costs and they
4 are structured to all stand alone. So the particular
5 product that you have on the podium has a different cost
6 structure than a gallon jug. The gallon jug, we've
7 identified what the cost is to produce the gallon jug.

8 It's not burdened by the fact that's a more
9 expensive product to produce. That product carries the full
10 burden of the additional expense.

11 Q. If instead of producing the products that you do
12 produce -- again, I'll try to get at it this way -- you
13 decided to limit yourself only to the sale of one-gallon
14 fluid milk and that is the only thing that you sold, is it
15 your testimony that there would be no cost savings in that
16 circumstance?

17 MR. BERDE: Your Honor, that question has been
18 asked and answered and it's been answered extensively by
19 this witness. It's the same question asked again.

20 JUDGE HILLSON: Do you have a response to that,
21 Mr. Ricciardi?

22 MR. RICCIARDI: Your Honor, we've gone back and
23 forth on this. I'm trying to probe a little bit more
24 information from this witness as to this issue and the cost
25 factors associated with the sale of milk. To the extent you

1 want me to move on, I'll move on.

2 THE WITNESS: I'll answer the question. I'm not
3 uncomfortable answering the question.

4 It's a hypothetical question because for us to go
5 from where we're at to a single SKU is strictly a
6 hypothetical. I would believe that our cost on that single
7 SKU would actually be greater than what it is today because
8 we have -- as we added incrementally to the product line and
9 caused those products to carry their own incremental burden,
10 we've also had benefits on an overall basis of more volume
11 than we would have if we reduced our operation to a single
12 product SKU. Therefore, I think the breadth of the product
13 line has actually driven down costs on an overall basis, not
14 added to it.

15 BY MR. RICCIARDI:

16 Q. So based upon that testimony, then, what you're
17 saying is that a producer-handler that only has a limited
18 amount of product line has a limited amount of rope;
19 correct?

20 A. No, I would not say that.

21 Q. That's what you just testified to.

22 A. I would say that the opportunities for the
23 producer-handler are the same as they are for us, to
24 proliferate the product line, to cap fewer -- more and more
25 of our customers' needs as Sarah Farms has done in what

1 we've reflected in Exhibit 23.

2 Q. And I'm glad you got there because I want to talk
3 about Exhibit 23.

4 First of all, let's talk about the creation of
5 this document. Did you actually go out to the stores in
6 1997 to see what Sarah Farms was selling?

7 A. Yes.

8 Q. You physically did?

9 A. Yes.

10 Q. What stores did you go to?

11 A. A variety of stores.

12 Q. Tell me the location of one of them.

13 A. Southwest Supermarkets at 19th Avenue and Osborn,
14 which is now closed, but it existed in 1997.

15 Q. It did before it went into bankruptcy, I believe.

16 And when you went there, did you -- tell me the
17 day you went, by the way.

18 A. The date I went?

19 MR. ENGLISH: Objection.

20 MR. RICCIARDI: Objection for what reason?

21 MR. ENGLISH: So far afield from what could
22 possibly be relevant as to what day it was in 1997 that he
23 went to a store.

24 JUDGE HILLSON: He can say that --

25 THE WITNESS: I don't recall.

1 JUDGE HILLSON: There's no reason he can't answer
2 the question if he knows the answer.

3 MR. RICCIARDI: You presented an exhibit you want
4 to get introduced and he has no basis for it. I'm trying to
5 probe his information. That's all.

6 MR. ENGLISH: I object to that characterization,
7 Your Honor, especially since the document has already been
8 introduced.

9 JUDGE HILLSON: The characterization isn't the
10 witness's testimony. Let's move on.

11 You can move on.

12 MR. RICCIARDI: I will, Judge. Thanks.

13 BY MR. RICCIARDI:

14 Q. So did you buy some Sarah Farms milk at that time?

15 A. Not that I recall.

16 Q. Would you agree with me that Exhibit 23, the
17 products produced in 1997, that there are actually two
18 products, gallon and half-gallon whole milk?

19 A. There are actually 16 SKUs as I look at it.

20 Q. Well, with regard to, for example, the Sarah Farms
21 gallons and private label gallons, it's the same milk with a
22 different label on it; right?

23 A. Different UPC. In the industry it's considered a
24 separate SKU.

25 Q. So that's a different product line is what you're

1 telling me?

2 A. It's a different product. They had a 16-product
3 line offering in 1997.

4 Q. Based upon the fact there was whole, 2 percent, 1
5 percent and fat-free in gallons, private label half-gallons,
6 private label?

7 A. Correct.

8 Q. Okay. With regard to the products produced in
9 2003, did you personally go out to any stores to find these
10 products?

11 A. I did not personally go out to stores for the
12 intention of preparing this summary of Sarah Farms' product.

13 Q. Who did?

14 A. My Sales Department.

15 Q. Who?

16 A. Who specifically? Dick Bender, Mark Stroh, and
17 Elliott Begoun.

18 Q. And are they going to be here to provide
19 testimony?

20 A. I don't think they have been called as witnesses.

21 Q. Okay. Who told you that there was a five-gallon
22 bag of heavy whipping cream that was produced by Sarah
23 Farms?

24 A. Elliott Begoun.

25 Q. And he told you he was able to find that

1 somewhere?

2 A. Yes.

3 Q. Did he tell you where?

4 A. Yes. Deco Foods.

5 Q. Did he tell you when he was able to locate that?

6 A. It's been very recently.

7 Q. You also on Exhibit 23 have other products that
8 Sarah Farms carries and it looks like that was corrected by
9 some other sources. What sources?

10 A. To my knowledge -- is that what you're asking,
11 whether or not I know who the supplier is of the Sarah Farms
12 label?

13 Q. That would be a good --

14 A. Foster Farms.

15 Q. And is it Foster Farms that sells Sarah Farms
16 cottage cheese in 16 ounces?

17 A. Yes.

18 Q. And who told you that?

19 A. Elliott Begoun.

20 Q. Does Shamrock currently sell any milk in the
21 California market?

22 A. Yes.

23 Q. You gave a wistful reply during the course of your
24 testimony --

25 A. Wistful?

1 Q. Yes. Maybe chagrined -- with regard to your
2 experience in the California market. The reason for that is
3 that, in fact, Shamrock was fined in California for certain
4 issues with regard to the sale of milk; is that correct?

5 A. Ultimately, yes.

6 Q. For failing to meet California standards?

7 A. Ultimately, yes.

8 Q. Did Shamrock change to meet the standards so that
9 it could sell milk in California?

10 A. Yes.

11 Q. And how much milk is Shamrock selling in
12 California now?

13 A. I don't know.

14 Q. Can you tell me who it's being sold to?

15 A. It's not an enormous amount and it's entirely in
16 the extended shelf life product line.

17 Q. Can you tell me what customers that Shamrock is
18 selling to in California?

19 A. Circle K, Mobil On the Run, Texaco.

20 Q. How many pounds of milk are currently being
21 produced by Shamrock?

22 A. I'm not authorized to divulge that.

23 Q. Is it less than 3 million or more than 3 million?

24 A. I'm not allowed to divulge that.

25 Q. So it's not information you can apply to?

1 A. No.

2 Q. And you won't tell us whether it's more than 3
3 million or less than 3 million?

4 A. No.

5 Q. Because it's confidential?

6 A. Correct.

7 Q. Because it's proprietary?

8 A. Correct.

9 Q. And you understand that if somebody is running a
10 business, they should be able to keep confidential
11 information confidential; correct?

12 A. Correct.

13 Q. And they should be able to keep proprietary
14 information proprietary; correct?

15 A. Correct.

16 Q. And that would include Sarah Farms; correct?

17 A. Correct. That wouldn't stop Sarah Farms from
18 making estimates as to what they thought we were doing,
19 though.

20 Q. Then give me an estimate of what you are doing per
21 month.

22 A. Ask Sarah Farms what they estimate.

23 Q. Can you give me -- you are under oath now. Can
24 you give me an estimate of what Shamrock is doing per month?

25 A. No.

1 Q. You won't do that?

2 A. No.

3 Q. When did Carnation close its processing plant?

4 A. I believe it was May or June of 1996.

5 Q. At the time that it closed, how much milk was it
6 processing?

7 A. I don't recall.

8 Q. Can you tell me if it was 3 million pounds or
9 less?

10 A. Let's see. I think it was in gallons.

11 Q. Give it to me in gallons. We'll convert it later.

12 A. I don't know. Give me a range.

13 Q. I'm asking you. You're under oath.

14 A. I don't recall.

15 Q. What happens --

16 A. I'm trying to help you here.

17 Q. And I appreciate that.

18 Does a million, million five per month sound about
19 correct?

20 A. No. I mean, I really don't recall.

21 Q. All right. Fair enough.

22 With regard to that milk, that amount of milk,
23 whatever it was, was Shamrock able to pick up any of the
24 milk that was being processed previously by Carnation when
25 it closed?

1 A. Do you mean in your question was Shamrock able to
2 begin to serve customers that had been previously served by
3 Carnation?

4 Q. That's a better question. Go ahead and answer it.

5 A. Yes.

6 Q. And how many of the customers of Carnation did
7 Shamrock begin to service after it was closed?

8 A. I can't remember specifically. A fair number.

9 Q. Would you say 75 percent of the customers?

10 A. I mean, it would be a guess.

11 Q. How much would it cost Shamrock at this point to
12 convert over to become a producer-handler?

13 A. Now, that's really proprietary.

14 Q. Have you looked at that issue?

15 A. Yes.

16 Q. Have you done estimates as to what the cost would
17 be?

18 A. Yes.

19 Q. Would you agree with me that there is a cost
20 associated with being a producer-handler?

21 A. Yes.

22 Q. Would you agree with me that there's capital that
23 has to be expended in order to be a producer-handler?

24 A. Yes.

25 Q. Would you also agree with me that there are costs

1 associated with having to balance your own milk if you're a
2 producer-handler?

3 A. Potentially, there are some costs. Potentially,
4 it's not onerous to balance.

5 Q. So you've looked at that issue. You've got
6 information as to that issue but, again, that's confidential
7 and proprietary and you are not going to provide it to us
8 for purposes of this hearing?

9 A. That's correct. Maybe Sarah Farms would like to
10 testify to that and then we can benchmark what their costs
11 are.

12 Q. As long as you start.

13 A. We're waiting. They have taken the lead.

14 Q. Can you tell me -- and I think you probably are
15 going to tell me it's proprietary but I'll ask it anyway --
16 isn't it true that the profit margin on something like this
17 12-fluid-ounce milk container for Shamrock is higher than
18 gallon milk?

19 A. It depends.

20 Q. You mean sometimes it is, sometimes it's not?

21 A. Yes.

22 Q. Does that depend on what kind of contract you're
23 able to negotiate with the ultimate customer?

24 A. Yes.

25 Q. Does it depend on volume that you are selling to a

1 customer?

2 A. Yes.

3 Q. Does it also depend upon the costs of production?

4 A. I don't know how that would be relevant. You're
5 talking about the profit comparison.

6 Q. I'm talking about the profit comparison. I assume
7 that you have some kind of a factor that you attribute
8 burden overhead to any particular product; is that right?

9 A. Yes. I'm still not sure that I understand the
10 comparison, though. It also depends on what brand -- I'll
11 help you on this -- whether it's private label, which I
12 indicated our pricing practice before, or whether it's
13 Shamrock Farms' brand. It also depends whether you are
14 measuring that profit comparison in penny profit or in
15 percentage of profit.

16 Q. Okay.

17 MR. RICCIARDI: Could I have a minute, Your Honor?

18 JUDGE HILLSON: Okay.

19 MR. RICCIARDI: Thanks.

20 Thank you very much.

21 THE WITNESS: Thank you.

22 JUDGE HILLSON: Does anyone else have questions
23 for Mr. Krueger?

24

25

EXAMINATION

1 BY MR. BERDE:

2 Q. Sydney Berde.

3 When you visited some of the retail outlets
4 serviced by Sarah Farms, were you able to observe changes in
5 the shelf price of Sarah Farms' product that reflected
6 changes in the Federal Order Class I price?

7 A. To an extent. Understanding that the retail
8 prices are set by the respective retailers and may or may
9 not reflect changes in price that we or Sarah Farms have
10 passed through as a result of market order change. I will
11 tell you that I know for a fact and do have documentation
12 that Sarah Farms has communicated price changes directly as
13 a result of changes in the Federal Order price to the milk.

14 Q. A marketing strategy of that kind, then, would
15 permit Sarah Farms to play the Federal Order price changes,
16 whether up or down, to retain the same raw milk cost
17 advantage between the market in the regulated market's
18 placement for Class I and the blended price, assuming that's
19 their imputed price?

20 MR. RICCIARDI: Objection, Your Honor. There's
21 been no testimony and no testimony from this witness and,
22 therefore, no foundation that there was any, quote,
23 marketing strategy. And the speeches, as opposed to
24 questions, are not what we're here for.

25 JUDGE HILLSON: You do seem to be doing a little

1 more testifying rather than questioning, Mr. Berde.

2 Rephrase it more to sound like a question.

3 MR. BERDE: The witness testified that he has
4 documentary evidence or direct evidence --

5 THE WITNESS: I'll testify that our experience
6 from dealing with the same customers and specifically the
7 same individuals in accounts that are served by both
8 Shamrock and Sarah Farms is that Sarah Farms follows the
9 Federal Market Order on a month-to-month basis in their
10 pricing and the changes in pricing on their milk items to
11 the customer, the same as a federally regulated handler
12 typically would.

13 MR. BERDE: Thank you.

14

15 FURTHER EXAMINATION

16 BY MR. RICCIARDI:

17 Q. You haven't talked to anybody at Sarah Farms to
18 find out that that's their strategy; correct?

19 A. I have not.

20 Q. You have not spoken with any representatives of
21 Sarah Farms to say that that's their strategy; correct?

22 A. I have not.

23 Q. Then the information that you are providing is
24 based upon your supposition as to what the marketing
25 strategy may be; correct?

1 A. No. The information that I'm providing is based
2 on information from people, people that we've known for
3 years and people who we have had the ability to identify as
4 being truthful and honest people and to be reliable in the
5 information that they give us.

6 And that's the basis for the information that I'm
7 testifying to.

8 Q. And who are those individuals?

9 A. Again, I don't want to divulge their names because
10 I think it's a breach of the confidentiality that's inherent
11 in the relationship.

12 Q. It's amazing that you come in here, sir, give
13 testimony, and not tell us the names so that we can try to
14 test the accuracy of that. Do you think that's fair?

15 A. I took an oath when I sat down in this chair to
16 tell the truth, and I am telling the truth.

17 Q. I asked you whether you thought it was fair for
18 you to give information and not give us the names of the
19 individuals. Do you think that's information that the
20 Secretary should be able to rely upon?

21 A. I don't think it's relevant.

22 JUDGE HILLSON: He asked you if you thought it was
23 fair. I guess we're all done.

24 MR. RICCIARDI: That's fine.

25 JUDGE HILLSON: Do you have a question,

1 Mr. Beshore?

2 MR. BESHORE: Yes.

3

4 EXAMINATION

5 BY MR. BESHORE:

6 Q. Just a few questions. Marvin Beshore.

7 You used the phrase "to the mil" with respect to
8 your observations -- with respect to the information you
9 received concerning Sarah Farms, the price. What do you
10 mean "to the mil"?

11 A. Well, the sad reality of the price challenge or
12 situation that we have in our business is that we're not
13 even able to get whole cents for the products that we sell.
14 So all pricing is out at least to the tenth of a cent. And
15 when the Order changes, then the exact change to the tenth
16 of a cent is what is reflected on an up-or-down basis.

17 Q. So a mil is a tenth of a cent?

18 A. Yes.

19 Q. And prices are frequently quoted, regularly
20 quoted, to your customers in a tenth of a cent per unit?

21 A. At least to that point, if not out to a fourth
22 decimal point.

23 Q. And it's your information that Sarah Farms moves
24 with the Federal Order prices to the mil?

25 A. That is correct.

1 MR. RICCIARDI: Objection, Your Honor, based upon
2 the same reason.

3 JUDGE HILLSON: I'm going to let him answer it. I
4 understand where you're coming from.

5 BY MR. BESHORE:

6 Q. By the way, if the information that you have
7 provided for the record with respect to Sarah Farms' pricing
8 has any inaccuracies, Sarah Farms could certainly provide
9 direct firsthand information for this record with respect to
10 their prices to their customers, could they not?

11 MR. RICCIARDI: Is that a question?

12 MR. BESHORE: Yes, that was a question.

13 THE WITNESS: I would presume so.

14 BY MR. BESHORE:

15 Q. You also used some terminology in your testimony,
16 SKU. Can you explain what that is?

17 A. It's a stock-keeping unit.

18 Q. And what -- how do you use that in your business?

19 A. An S-K-U would be an item, a separate and unique
20 item.

21 So when you talk about Sarah Farms' whole gallons
22 or a private label whole gallon that Sarah Farms is
23 producing in their plant, those are two separate SKUs even
24 though the only difference is a label and the UPC bar code?

25 A. They are two separate stock-keeping units.

1 Q. Okay. Thank you.

2 Now, does your sales and marketing staff regularly
3 track the out-of-store -- the retail prices of customers and
4 potential customers to the marketplace?

5 A. We do.

6 Q. And provide that information to your -- compile it
7 for your internal usage?

8 A. We do.

9 Q. Did you make information available to Mr. Herbein
10 for his study with respect to his study of those prices that
11 are publicly available prices available in the marketplace
12 of retail prices in the Phoenix area?

13 A. If we did, it would only be through Mr. English.
14 So I'm not sure -- I did not directly to Mr. Herbein.

15 Q. One final question. Mr. Krueger, are you aware --
16 you've testified that Shamrock Foods has considered and made
17 financial calculations with respect to the possibility of
18 becoming an exempt producer-handler itself?

19 A. That is correct.

20 Q. Are you aware of whether other persons in the
21 industry throughout the country may be considering that
22 option because of the exemption that is available to
23 producer-handlers?

24 A. This would be categorized as assumed rather than
25 fact. But on the basis of my understanding, I think there's

1 a tremendous amount of interest in the outcome of this
2 hearing and there are people poised to make moves depending
3 on the outcome of this hearing. That's my opinion.

4 MR. RICCIARDI: How come you are going to let that
5 in, Judge?

6 JUDGE HILLSON: It's already in.

7 MR. RICCIARDI: I understand.

8 JUDGE HILLSON: Mr. English?

9

10 FURTHER EXAMINATION

11 BY MR. ENGLISH:

12 Q. You were asked some questions about sales in
13 California and maybe perhaps a lingering implication of some
14 gross impropriety for getting fined for sales in California.

15 Isn't it a fact that when first notified by the
16 State of California that your milk was not meeting
17 California standards that you ceased selling milk
18 immediately into California --

19 A. Yes.

20 Q. -- that did not meet the standards; correct?

21 A. Yes.

22 Q. And then protracted litigation followed with
23 respect to the legality or not of California's program with
24 respect to fluid milk standards as applied to out-of-state
25 milk?

1 A. There was actually another round in there. There
2 was the passage of the NLEA which gave us a second
3 opportunity. We initially prevailed in terms of the
4 interpretation of NLEA. And then in the -- this goes back
5 quite a while. I believe in the farm bill that passed in
6 '96, there was a provision in there that gave California --
7 they contended that authority to reinforce their standards.
8 We did continue to sell our milk in there for a period of
9 time and finally did cease. And then the protracted round
10 of lawsuits where we lost the first round, won the second
11 round and, unfortunately, lost the rubber match.

12 Q. In fact, that was all following litigation that
13 you won prior to the enactment of the 1996 farm bill that
14 provided you an opportunity to sell the milk in California;
15 correct?

16 A. Well, based on the upholding of NLEA, yes.

17 Q. With respect to what may have changed since
18 Federal Order Reform and the announcement by USDA on April 1
19 of 1999 which means that no data was taken into
20 consideration after April 1 of 1999 by USDA, would you look
21 at Exhibit 22 and would you tell me whether there is any
22 change in 2002 with respect to Sarah Farms that was not
23 known to the Secretary at the time of any decision in 1999?

24 A. I'm sorry. Ask the question again, please.

25 Q. Is there anything on Exhibit 22 reflecting a

1 change in the marketplace since April 1 of 1999 that the
2 Secretary could not have been aware of prior to April 1,
3 1999, in making any decision about producer-handlers?

4 A. With reference to Exhibit 22?

5 Q. With reference to Exhibit 22 and the marketing by
6 a producer-handler, what significant, if any, change has
7 occurred since April 1 of 1999?

8 A. The significance is there was a producer-handler
9 in '99 that was doing 1,200,000 gallons, or somewhere around
10 14 million pounds a month, that, by 2002, was doing
11 1,900,000 gallons, or somewhere around 17 million pounds a
12 month.

13 I'm not sure that I'm picking up anything else out
14 of this.

15 Q. You've testified also, though, that another change
16 has occurred, which is, during this year, Sarah Farms has
17 opened a new processing facility in Arizona selling milk
18 into California; correct?

19 A. That is correct.

20 Q. And that provides a new and unknown to the
21 Secretary on April 1, 1999, opportunity to dispose of
22 surplus milk by this producer-handler; correct?

23 A. Correct. That plant was not operational in 2002,
24 though. I guess that was -- if there's some link between
25 2002 and that plant, it doesn't exist.

1 Q. I'm sorry. I'm going to a new issue. I
2 apologize.

3 A. Thank you.

4 Q. Just one -- two more questions.

5 Back on litigation. Again, so there's no question
6 about it, the litigation revolved around California's
7 compositional standards and not Shamrock's quality of milk;
8 correct?

9 A. Strictly, yes. It was strictly a battle over our
10 desire and our perceived right under a section of
11 California's code to sell milk meeting federal standards and
12 California's insistence that their standards prevailed and
13 that products related to federal standards were not legal
14 for sale in California. That was the gist of the issue.
15 There were no issues with regards to quality marketing
16 practices or anything else. It was strictly over
17 compositional standards.

18 Q. And, finally, you discussed the difference between
19 branded milk and private label milk and earlier you talked
20 about higher-priced milk.

21 Would it be fair to say that when you were
22 referencing the higher-priced milk in a package that you
23 meant branded product?

24 A. That's correct.

25 Q. Thank you.

1 MR. ENGLISH: I have no further questions.

2

3 FURTHER EXAMINATION

4 BY MR. RICCIARDI:

5 Q. Mr. Krueger, do you have enough information to
6 tell me the number of employees at Shamrock Foods?

7 A. I believe it's somewhere in the vicinity of 2000.

8 Q. 2000, 2200. Sound about right?

9 A. Somewhere in that range.

10 Q. With regard to your 12-, 20-, and 32-ounce plastic
11 bottles containing white milk and flavored milks, they are
12 all produced at the ESL plant; correct?

13 A. That's correct.

14 Q. But you don't use the process for plastic gallons
15 of milk because it's more expensive; correct?

16 A. That's correct.

17 Q. And with regard to Exhibit 22, again, the only
18 thing that has changed, if your assumptions are to be
19 believed, is that there's been an increase in the volume by
20 month; correct?

21 A. I'm sorry?

22 Q. The only thing that has changed from, let's say,
23 2000 to 2001 is an increase in volume; correct?

24 A. By Sarah Farms?

25 Q. Yes.

1 A. Correct.

2 Q. And the only thing that has changed from 2001,
3 again, if your assumptions are to be believed, to 2002 is
4 simply an increase in volume; correct?

5 A. I'm not sure of how you're defining the only thing
6 that's changed. There's a change in the customer base as
7 well as a change in the volume.

8 Q. So the increase in volume by a producer-handler,
9 in your opinion, creates a disorderly market; correct?

10 A. I haven't testified at all to a disorderly market.
11 Truthfully, I'm not interested in trying to define what a
12 disorderly market is. I can tell you from a practical
13 standpoint that I recognize that the current situation does
14 not allow us to compete.

15 So we seek to either get the current situation
16 corrected so that we can compete on an even basis or we need
17 to explore how we also can be exempt so that we can compete
18 on an equal basis exempt from this system.

19 Q. You're competing with Sarah Farms at the Food City
20 stores; correct?

21 A. I would say no.

22 Q. You're selling milk there; they are selling milk
23 there?

24 A. We're selling some milk there. We have a brand
25 there because of the strength that we have with it. It's

1 not a direct competitive situation. It's a different
2 product for a different buyer.

3 Q. You sell milk to Food City; correct?

4 A. We sell some milk to Food City.

5 Q. And Sarah Farms sells milk to Food City?

6 A. Different milk items to Food City, yes.

7 Q. And that would be direct competition, milk to
8 milk; right?

9 A. No.

10 Q. So are you saying, then, that because yours is a
11 higher-branded milk, it's not a competition for Sarah Farms
12 within the Food City chain?

13 A. What I'm saying is that I do compete on a regular
14 basis for the private label gallons in Food City, which are
15 a volume item, and I can't compete pricewise for that
16 business. So Sarah Farms has that business. I have other
17 products that Food City believes that they either have
18 customers that demand or that Sarah Farms happens to not
19 have in their product line that we sell to Food City.

20 Q. So, again, you sell product to Food City. Sarah
21 Farms sells product to Food City. And that's true at this
22 time; correct?

23 A. Yes.

24 Q. Okay. Thanks.

25

1 FURTHER EXAMINATION

2 BY MR. BERDE:

3 Q. Sidney Berde.

4 Mike, isn't there another significant change in
5 the market resulting from the increase of Sarah Farms'
6 distribution from about 8.2 million in 1997 to an assumed 17
7 plus million on sales in 2003? For example, isn't there an
8 erosion of the blend price by reason of the failure of those
9 Class I pounds to be computed in the Market Administrator's
10 determination of the blend price?

11 A. Correct.

12 Q. Isn't that a direct reduction in the price
13 received by dairy farmers in this Order?

14 A. Yeah. I mean, that's the -- the essence of the
15 situation is that at the handler level, the additional
16 factors for them of having to balance their milk supply and
17 being exempt from minimum order pricing have netted them a
18 cost advantage that we and the other regulated handlers
19 can't compete against. So they have grown their business.
20 And the effect of that is a continued reduction in the
21 Class I premium values in the blend computation that is
22 shared by the pool producers.

23 JUDGE HILLSON: Are there any further questions of
24 Mr. Krueger?

25

1 EXAMINATION

2 BY MS. DESKINS:

3 Q. Mr. Krueger, I just wanted to clarify some things.
4 Now, the customer list of Shamrock Farms would be
5 confidential?

6 A. Yes.

7 Q. And also the customer list of Sarah Farms would be
8 confidential?

9 A. I would presume it's confidential to them as a
10 competitor. We try to gain information about our
11 competitors and I would presume Sarah Farms has probably
12 tried to gain a little bit of information about us somewhere
13 along the way.

14 Q. Okay. And also in terms of the Milk Market
15 Administrator's Office, they can't reveal who Shamrock --
16 Shamrock Foods' customers are; correct?

17 A. That is correct.

18 Q. And they also can't reveal who Sarah Farms'
19 customers are; correct?

20 A. That is correct.

21 Q. If the only information the Milk Market
22 Administrator's Office can reveal is information in the
23 aggregate, that doesn't identify any particular handler or
24 producer?

25 A. I believe that's correct.

1 Q. Okay. I have another question for you. You said
2 in regards to Target Food, that you didn't sell directly to
3 them but a distributor sold to Target?

4 A. No. I'm sorry. Sarah Farms did not sell directly
5 to Target. They sold to a distributor who, in turn, sold
6 and distributed the product into the Target stores. We do
7 sell and deliver directly to the Target stores.

8 Q. Do you sell -- I don't want to reveal any
9 confidential information. Do you sell to any distributors?

10 A. We do.

11 Q. And once you sell to a distributor, do you
12 necessarily know where your product will end up?

13 A. Not always.

14 Q. And also you testified about a product number. I
15 just want to clarify that. A product number would appear on
16 each individual dairy product?

17 A. A plant code?

18 Q. Okay. Now, do they appear on each individual
19 dairy product?

20 A. Each package, yes. It has to carry a plant code
21 by statute --

22 Q. Where --

23 A. -- to identify the plant of origin.

24 Q. Is it just a number or --

25 A. Yes. It's, typically, a four-digit identifying

1 number. There's probably an example.

2 Q. And is there a list someplace that says what the
3 number -- the number --

4 A. Yes. All of the plant codes are registered
5 with -- I think it's FDA. Isn't that who registers plant
6 codes?

7 Q. All the plant code would tell you is where the
8 product was manufactured?

9 A. That's correct.

10 Q. It wouldn't necessarily tell you how it got to
11 that particular store?

12 A. In terms of through what distribution channel?

13 Q. Right.

14 A. You are correct.

15 MS. DESKINS: I have no further questions.

16 THE WITNESS: Thank you.

17 JUDGE HILLSON: Go ahead.

18

19 FURTHER EXAMINATION

20 BY MR. ENGLISH:

21 Q. I'm holding a gallon of Shamrock Farms milk and on
22 that gallon at the very bottom right-hand label -- let me
23 hand it to you.

24 JUDGE HILLSON: I'm hoping you don't want that
25 marked into evidence.

1 MR. ENGLISH: I might.

2 BY MR. ENGLISH:

3 Q. Do you want to examine that gallon?

4 A. It's plant number 04-05. That's our identifying
5 plant number. If you looked in the FDA Web site, you would
6 identify our plant name and address as the manufacturing
7 plant that's assigned 04-05.

8 BY MR. ENGLISH:

9 Q. Let's just be clear. The 04 portion of the code
10 is a state code; correct?

11 A. Yes.

12 Q. And the reason it's 4 is Arizona is fourth in the
13 alphabet; correct?

14 A. I didn't know that but thank you.

15 Q. And then the 05 portion is the individual plant
16 within Arizona and each plant gets numbered over time and
17 plants probably come and go. But the plant code is
18 individual to that plant; correct?

19 A. Correct.

20 MR. ENGLISH: No, I'm not going to have it marked,
21 Your Honor.

22 JUDGE HILLSON: Are there any further questions?

23 MS. DESKINS: No further questions.

24 JUDGE HILLSON: Does anyone else have any further
25 questions?

1 You may step down.

2 THE WITNESS: Thank you.

3 (Witness excused.)

4 JUDGE HILLSON: I'd like to do a five-minute or
5 less off-the-record discussion to talk about some scheduling
6 issues that we have; okay? So let's go off the record.

7 (Discussion off the record.)

8 JUDGE HILLSON: Let's go back on the record.

9 6:05.

10 We're back on the record. We're going to take the
11 testimony of Mr. McClelland.

12 NORMAN McCLELLAND,
13 a witness herein, having been first duly sworn by the Judge
14 to speak the truth and nothing but the truth, was examined
15 and testified as follows:

16 JUDGE HILLSON: If you could state and spell your
17 name for the record, please.

18 THE WITNESS: Norman McClelland, N-O-R-M-A-N,
19 M-C-C-L-E-L-L-A-N-D.

20 EXAMINATION

21 BY MR. ENGLISH:

22 Q. Mr. McClelland, a very brief background for
23 yourself?

24 A. Yes. I was born in Tucson where Shamrock began.
25 The company started in 1922. We came to Phoenix in the

1 middle '60s and -- in the early '50s. I moved here in the
2 '60s and brought the company headquarters here. I've been
3 the CEO of Shamrock Foods and the president of Shamrock
4 Farms for some time.

5 Q. Your testimony today is solely on behalf of
6 Shamrock Farms; correct?

7 A. That's correct.

8 Q. Where is your farm?

9 A. The farm recently moved to Maricopa, Arizona.
10 It's just north of Highway 84. It faces on White Parker
11 Road.

12 Q. And what volume of milk, on an annual basis, would
13 you have?

14 A. The most recent 12 months, 140 million pounds.

15 Q. And so applying the Market Administrator's
16 statistics and the assumption of 18 million pounds at a
17 resulting 12 cents, what does that work out to be as the
18 impact on Shamrock Farms?

19 A. Shamrock Farms, this last 12-month period is
20 approximately \$170,000.

21 Q. And is there a farm known as Parker Farms?

22 A. Parker Farms is owned by a relative, a cousin of
23 mine, Jim Parker, and his sister Jeanie. And their volume
24 would be in the approximate 85 million pounds. And the
25 impact on them would be approximately \$100,000. That's for

1 that 12-month period.

2 Q. Thank you, sir.

3 MR. ENGLISH: That's all the questions I have.

4

5 EXAMINATION

6 BY MR. RICCIARDI:

7 Q. Mr. McClelland, it has been a long day. We'll see
8 if we can be brief.

9 I think you told Mr. English that Shamrock Farms
10 produced about 140 million pounds of milk last year; is that
11 right?

12 A. That's correct.

13 Q. In terms of sales for Shamrock Farms, would that
14 place it 58th in the Dairy Foods Annual Dairy 100 List?

15 A. I don't know that.

16 Q. Can you tell me, based upon your knowledge of the
17 company, what the total sales figures were for Shamrock
18 Farms back in 2002?

19 A. No, I can't.

20 Q. You can't?

21 A. I cannot.

22 Q. Or -- do you know it?

23 A. I do not.

24 Q. 211 million sound right?

25 A. 211 million what?

1 Q. In terms of gross sales.

2 MR. ENGLISH: Are you confusing --

3 JUDGE HILLSON: Are you talking about dollars?

4 MR. RICCIARDI: Yes.

5 BY MR. RICCIARDI:

6 Q. Can you tell me, by dollar figure, what the sales
7 of milk and other dairy products by Shamrock Farms was in
8 2002?

9 A. I cannot. You could take the 140 million pounds
10 and multiply it out times the Federal Order pricing. That's
11 what we receive.

12 Q. Okay. Since Shamrock Farms started, has it ever
13 at any time been a producer-handler?

14 A. No.

15 Q. How many cows does Shamrock Farms currently have?

16 A. How many do we have -- how many do we milk?

17 Q. Let's start with milk. That's fine.

18 A. Approximately between 6,000 and 6,500.

19 Q. And how many total cows does Shamrock Farms have?

20 A. Well, you would have an appropriate amount of dry
21 cows.

22 Q. What's your involvement on a day-to-day basis with
23 Shamrock Farms?

24 A. I'm the president.

25 MR. RICCIARDI: I don't have anything further.

1 Thank you.

2 JUDGE HILLSON: Does anyone else have any
3 questions of Mr. McClelland?

4

5 EXAMINATION

6 BY MR. BESHORE:

7 Q. How many cows does Parker Farms have?

8 A. I would say somewhere in the range of 5,000, 5500,
9 somewhere in that range.

10 Q. Okay. Thank you.

11 JUDGE HILLSON: Is that it?

12 Okay. You may step down, Mr. McClelland.

13 Do you have another question?

14 (Witness excused.)

15 MR. BESHORE: No. I have an announcement before
16 we get adjourned. I just wanted to let everybody know
17 before we leave and on the record that one of Mr. Hollon's
18 exhibits, which is the language of the -- of Proposals 1 and
19 3 that he will be presenting when he testifies with some
20 modifications to what was in the hearing notice, is
21 available in the back of the room. There are copies
22 available --

23 JUDGE HILLSON: Thank you very much.

24 MR. BESHORE: -- so everybody can have it before
25 he testifies.

1 JUDGE HILLSON: At this point, we'll adjourn the
2 hearing until 8:30 tomorrow morning. Thank you very much.

3 (Whereupon, these proceedings were recessed at
4 6:10 p.m.)

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1 STATE OF ARIZONA)
2) SS.
3 COUNTY OF MARICOPA)
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5

6 I, Elaine M. Cropper, hereby certify that I was
7 present at the captioned proceedings; that I made a
8 shorthand record of all oral matters had and adduced at said
9 proceedings; that thereafter, the transcript of said
10 proceedings, pages 529-648, inclusive, were reduced to
11 typewriting under my direction, and that the material
12 contained herein is a true and accurate accounting of said
13 matters, all to the best of my skill and ability.

14 DATED at Phoenix, Arizona, this 27th day
15 of October 2003.
16
17

18 _____
Elaine M. Cropper
Certified Court Reporter
19 Certificate No. 50491
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