

For public distribution

1 UNITED STATES DEPARTMENT OF AGRICULTURE

2

3

4	In the Matter of:	)	Docket Nos.
5	PROPOSED CHANGES TO	)	AO-368-A32
6	WESTERN AND PACIFIC NORTHWEST MILK	)	AO-271-A37
7	ORDERS	)	DA-03-04

---

7

8

9

10 TRANSCRIPT OF PROCEEDINGS

11

12 BEFORE: MARC R. HILLSON  
13 Administrative Law Judge

14 VOLUME IIIA

15 (Pages 649-792)

16 Tempe, Arizona  
17 September 25, 2003  
18 8:30 a.m.

19

20

21	Prepared for:	Prepared By:
22	USDA	ELAINE M. CROPPER
23		Registered Diplomate Reporter
24		Certified Realtime Reporter
25	(Copy)	Arizona CCR No. 50491
		CROPPER & ASSOCIATES, LTD.
		77 East Columbus, Suite 102
		Phoenix, AZ 85012-2351

Cropper & Associates, Ltd.  
602.277.8882

For public distribution

1	I N D E X			
2	EXAMINATION			
3	ERNEST YATES		Page	Line
4	BY MR. ENGLISH:	655	4	
	BY MR. YALE:	662	19	
5	BY MR. MARSHALL:	686	22	
	BY MR. RICCIARDI:	690	21	
6	BY MR. BESHORE:	717	2	
	BY MR. ENGLISH:	719	1	
7	BY MR. RITCHEY:	721	23	
	BY MR. RICCIARDI:	726	21	
8	ALAN RITCHEY			
9	BY MS. DESKINS:	738	5	
	BY MR. MARSHALL:	742	9	
10	BY MR. MILTNER:	748	12	
	BY MR. RICCIARDI:	754	10	
11	BY MR. ENGLISH:	757	6	
12	CARL D. HERBEIN, C. P. A.			
13	BY MR. BESHORE:	760	18	

14

15 EXHIBITS

16	Number		Mark	Admit
			Pg/Ln	Pg/Ln
17	24	Mr. Herbein's curriculum vitae	760 15	763 25
18	25	ten-page set of exhibits, the first	760 17	790 21
19		page entitled Cost Structure of Fluid		
20		Milk Plants of Various Sizes.		

21

22 RECESSES

23	(Recess at 10:16; resumed at 10:34.)	Page	Line
		729 14	

24

25



- 1 For Shamrock Foods Company, Shamrock Farms, and Dean Foods  
Company:  
2 Thelen, Reid & Priest, L. L. P.  
CHARLES M. ENGLISH, JR., ESQ.  
3 701 Pennsylvania Avenue, N.W.  
Suite 800  
4 Washington, D.C. 20004  
202.508.4000 202.508.4321 (Fax)  
5
- 6 For Northwest Dairy Association:  
DOUGLAS MARSHALL, SR., V. P., NDA  
635 Elliot Avenue West  
7 P.O. Box 79007  
Seattle, WA 98119  
8 206.286.6700 206.298.6892 (Fax)
- 9 For Maverick Milk Producers Association:  
Robbins & Green, P. A.  
10 BRIAN IMBORNONI, ESQ.  
3300 North Central Avenue  
11 Suite 1800  
Phoenix, AZ 85012  
12 602.248.7620 602.266.5369 (Fax)
- 13 For Sarah Farms:  
Hebert Schenk, P. C.  
14 ALFRED W. RICCIARDI, ESQ.  
1440 East Missouri Avenue  
15 Suite 125  
Phoenix, AZ 85014  
16 602.248.8203 602.248.8840 (Fax)
- 17 For Smith Brothers Farms, Edaleen Dairy, and Mallorie Dairy:  
Benjamin F. Yale & Assoc. Co., L. P. A.  
18 BENJAMIN F. YALE, ESQ.  
RYAN K. MILTNER, ESQ.  
19 KRISTINE H. REED, ESQ.  
102 West Wapakoneta Street, P.O. Box 100  
20 Waynesfield, OH 45896  
419.568.5751 419.568.6413 (Fax)  
21  
22  
23  
24  
25

Cropper & Associates, Ltd.  
602.277.8882

653

For public distribution

1

P R O C E E D I N G S

2 JUDGE HILLSON: Let's go on the record. It's  
3 about 8:30 in the morning. It's Thursday, September 25, and  
4 we're still in Phoenix and it's the third day of our  
5 hearing.

6 I just want to go over for starters what I think  
7 is the hearing schedule for today. I was corrected that I  
8 said we had had 14 witnesses testify. We actually had 15,  
9 not that it makes any difference in terms of how many more  
10 we still have to go. I was off by one in my count.

11 The schedule that I have this morning is as  
12 follows. Certainly it could be changed. I have Yates,  
13 Herbein, Cryan, Hollon and, if we get that far, Van Dam,  
14 McFry and Mr. Paul Christ.

15 I also have Mr. Ritchey, who has told me that he  
16 wants to testify later on this morning or early in the  
17 afternoon. So when there's a break at around 10:30 or so,  
18 I'll call Mr. Ritchey.

19 Does that order sound correct or do you want to do  
20 any switching?

21 MR. BESHORE: That order sounds fine. How about  
22 Mr. Mykrantz?

23 MS. DESKINS: It's up to Your Honor. We can  
24 recall him today or, if you want to, when we continue this  
25 in Seattle.

Cropper & Associates, Ltd.  
602.277.8882

654

For public distribution

1 JUDGE HILLSON: It is up to everybody.

2 MR. BESHORE: If he has the information that we

3 talked about before that he was going to bring back today, I  
4 think we should call him today to do that.

5 JUDGE HILLSON: Is there any particular time that  
6 you want him to testify?

7 MR. BESHORE: Before adjournment, before recess.

8 JUDGE HILLSON: How about if we make Mr. Mykrantz  
9 the first after-lunch witness, would that be okay? Would  
10 you rather him before? I certainly --

11 MS. DESKINS: Why doesn't he be the first one  
12 after lunch.

13 JUDGE HILLSON: The first one after lunch? Okay.

14 Mr. Yates is going to be our first witness this  
15 morning.

16 MR. ENGLISH: Yes. This is Charles English.

17 Mr. Yates will be our first witness.

18

19 ERNEST YATES,  
20 a witness herein, having been first duly sworn by the Judge  
21 to speak the truth and nothing but the truth, was examined  
22 and testified as follows:

23

24 JUDGE HILLSON: Could you please state your name  
25 and spell it for the record?

Cropper & Associates, Ltd.  
602. 277. 8882

655

For public distribution

1 THE WITNESS: My name is Ernest, E-R-N-E-S-T,  
2 Yates, Y-A-T-E-S.

3 EXAMINATION

4 BY MR. ENGLISH:

5 A. I'm the Director of Dairy Procurement for Dean  
6 Foods. I have worked in various capacities in dairy  
7 procurement since 1983.

8 I am testifying today on behalf of Dean Foods  
9 Company. Dean Foods owns and operates fluid milk processing  
10 plants and other dairy facilities throughout much of the  
11 United States. We do not, however, operate plants that are  
12 fully regulated by either of the two Federal Milk Orders  
13 involved in this hearing. However, we do operate fluid milk  
14 plants located in nonfederally regulated territories that  
15 have sales into the Arizona-Las Vegas marketing area.

16 Those sales result in partial regulation of those  
17 plants. In addition, we compete directly from our federally  
18 regulated plants in Idaho, Colorado, and Utah. When our  
19 competitors face competition from plants that do not pay  
20 regulated minimum prices or do not have obligations to the  
21 Producer Settlement Fund, we are most definitely affected.  
22 We are not here today to discuss the pros and cons of  
23 government milk regulation. That regulation is a fact.

24 However, government milk regulation depends  
25 absolutely on a central principle -- equal minimal raw milk

Cropper & Associates, Ltd.  
602.277.8882

656

For public distribution

1 costs -- which includes an obligation to the Producer  
2 Settlement Fund.

3 Absent equal minimum raw milk costs and a  
4 corresponding obligation to the Producer Settlement Fund,

5 government milk regulation simply cannot be sustained.  
6 Decades of Congressional action, USDA decision-making and  
7 judicial decisions make clear that uniform prices paid by  
8 all handlers to all producers is necessary to achieve the  
9 required goal of orderly marketing.

10           Dean Foods is presently building a fluid milk  
11 plant in Las Vegas. That plant is being built primarily to  
12 better serve our customers in the rapidly growing Las Vegas  
13 metropolitan market.

14           At various times over the last two years, we have  
15 served our Las Vegas customers from as many as six different  
16 plants. Obviously, that's not a very efficient system of  
17 servicing those customers.

18           Our new plant will permit us to better serve our  
19 Las Vegas customers. I also note that our plans submitted  
20 to the Nevada Dairy Commission for their consideration do  
21 not include the necessary equipment to standardize the milk  
22 with federal standards. We have no present intention and no  
23 one within Dean Foods has discussed the issue to add such  
24 equipment.

25           Therefore, that plant will not have the ability to

Cropper & Associates, Ltd.  
602.277.8882

657

For public distribution

1 serve the California market. However, our new Las Vegas  
2 plant can and may sell packaged fluid milk in Arizona. We  
3 certainly recognize, for the equal raw product cost reasons  
4 discussed during this hearing, that that also poses an issue  
5 of fairness in competition. It is for that very reason that



6 we wholeheartedly support a legislative change that would  
7 require plants located in Nevada with sales into federally  
8 regulated territories to be treated identically to any other  
9 federally regulated fluid milk plant.

10 In its emergency decision regarding the Western  
11 Order, USDA recognized that the central principle that the  
12 failure to assure uniform minimum prices paid by all  
13 handlers results in disorderly marketing.

14 The problems we faced there, and others that I  
15 will discuss, are crucial to an understanding of why the  
16 proposals being considered in this hearing regarding the  
17 scope and extent of any producer-handler exemption must be  
18 adopted. In Idaho, two relatively small, and I note  
19 significantly smaller than 3 million pounds, handlers are  
20 obtaining milk under the proprietary bulk tank handler  
21 provision unique to that order.

22 As acknowledged in that hearing record by the  
23 handler involved and as was clear from the competitive  
24 impact in the market, those Class I handlers, not  
25 producer-handlers, were receiving substantially all, if not

Cropper & Associates, Ltd.  
602.277.8882

658

For public distribution

1 all, of their milk at prices below Federal Order minimums.

2 Our local plant manager testified about the  
3 significant competitive impact, and USDA accepted,  
4 correctly, that this constituted disorderly marketing.

5 Our plants in Idaho are larger than the Class I  
6 operations receiving below minimum priced milk. However,

7 those operations running as jugger operations realized  
8 significant benefits that permitted them to take away our  
9 customers and our sales.

10 We know and understand that lost customers and  
11 lost sales happen every day, but those losses occurred at  
12 prices that simply could not be met by us since we were  
13 paying regulated minimum prices.

14 USDA concluded that the provision should be  
15 eliminated, although we testified that it should be modified  
16 to restrict abuse.

17 In 68 Federal Register 49375 at page 49383 on  
18 August 15, 2003, it states:

19 "The record evidence also provides strong evidence  
20 that the proprietary bulk tank handler provision gives rise  
21 to disorderly marketing conditions because the order is  
22 unable to establish minimum prices that are uniform among  
23 regulated handlers, a requirement of Section 608c(5)(A) of  
24 the AMAA. The record clearly reveals that this pooling  
25 feature of the Western order is being used to pool milk that

Cropper & Associates, Ltd.  
602.277.8882

659

For public distribution

1 could not otherwise be pooled and allows for the sale of  
2 milk for Class I milk below the order's minimum Class I  
3 price. While this provision served its function in the  
4 pre-reform Southwest Oregon-Eastern Idaho order, its purpose  
5 and usefulness for the larger consolidated Western Order can  
6 no longer be justified."

7 We applaud this decision. Now is the time to take

8 that decision's conclusion and logic, substitute the term  
9 "producer-handler" for "proprietary bulk tank handler," and  
10 provide realistic limitations to producer-handlers who have  
11 or will in the future substantially disrupt the market order  
12 system even as the relatively small juggers in Idaho have  
13 disrupted and continue to disrupt the Western Order. The  
14 decision has not yet been implemented.

15 As in the Western Order proceedings, we are not  
16 calling for the elimination of the producer-handler  
17 provision.

18 Another large unregulated fluid milk plant is now  
19 operating in Western Arizona and selling all or nearly all  
20 of its packaged fluid milk direct to a customer in  
21 California. This hearing will not resolve that issue, but I  
22 raise it to point out the impact on California's regulated  
23 industry from a large unregulated milk plant. Since it  
24 began selling milk in Southern California in early June, it  
25 has expanded its sales from the San Diego market northward.

Cropper & Associates, Ltd.  
602.277.8882

660

#### For public distribution

1 Dean Foods' Swiss Dairy lost the business solely  
2 on the basis of price, a price that could only be based upon  
3 the fact that while Swiss Dairy pays regulated prices in  
4 California, the Arizona operation does not.

5 This serious disruption has substantially  
6 undermined both the minimum uniform prices paid to dairy  
7 farmers in California and the competitive market for fluid  
8 milk processors. To our knowledge, this operation remains

9 smaller than the existing producer-handler in Arizona, so it  
10 is not at all surprising to us to hear the significant  
11 testimony here about the disruption caused by the large  
12 producer-handler in this market.

13 Finally, let me discuss how relatively small fluid  
14 milk plants can be and are highly efficient and able to sell  
15 milk, as regulated handlers, in competition with large  
16 operations. There is a relatively small, less than 3  
17 million pounds per month, fluid milk operation in Bryan,  
18 Texas, which is owned and operated by a family. This Bryan  
19 operation processes, packages, and distributes gallons,  
20 half-gallons, quarts, pints and half-pints to grocery  
21 stores, C-stores, institutional accounts, schools and state  
22 institutions in the Bryan, College Station, and Brenham,  
23 Texas, area.

24 Most recently this plant successfully bid on the  
25 Texas State Prison business in Waco, Texas; Sugarland,

Cropper & Associates, Ltd.  
602.277.8882

661

#### For public distribution

1 Texas; and Brazoria, Texas. Our Oak Farms plant previously  
2 had this business. The Bryan plant submitted a bid for the  
3 prison business of 11.75 cents per half-pint of one percent  
4 milk. Their bid was significantly lower than our half-pint  
5 bid price. As a result, our Oak Farms lost over one-half  
6 million dollars in sales to this dairy for the 2003-2004 bid  
7 year.

8 Again, we are not here to complain about this or  
9 other competitors, especially when this Bryan, Texas,

10 operation is fully regulated by the Federal Order system.  
11 However, we bring this example up to establish that large  
12 plants do not necessarily have net efficiency advantages  
13 over smaller competitors. Competitiveness and efficiency is  
14 not necessarily a function of size.

15 From what we know of the producer-handler,  
16 especially in Arizona, we believe that it, too, is extremely  
17 efficient both as a handler and as a producer.

18 As to the language proposed, we agree that  
19 stricter limits must be established. An efficient plant at  
20 3 million pounds can certainly compete very effectively. A  
21 producer of that size is in the top one-half of one percent  
22 of the producer size in this country. We certainly believe  
23 that such an operation is likely to be extremely efficient.  
24 Indeed in this market area, such an operation has  
25 significant opportunities to dispose of its surplus milk in

Cropper & Associates, Ltd.  
602.277.8882

662

#### For public distribution

1 packaged form in Mexico or as bulk milk to California where  
2 it will receive a form of the blend price.

3 Therefore, the costs of surplus disposal in this  
4 market are minimal. Indeed, surplus milk, we believe,  
5 results in the opposite of a disposal cost in the West.

6 We are also concerned about the present usefulness  
7 of the wholesale account provisions. We think this should  
8 be stricter to prevent future abuses. The provision needs  
9 to be changed by using the words "similar product sizes and  
10 labels" instead of "same product sizes and labels."

11 For the Federal Milk Order system to survive,  
12 plants need to be on a level playing field from a raw milk  
13 cost perspective. Historical understanding of  
14 producer-handlers no longer applies. Today's  
15 producer-handlers are causing disorderly marketing.

16 MR. ENGLISH: Thank you, Mr. Yates.

17 The witness is available for cross-examination.

18 EXAMINATION

19 BY MR. YALE:

20 Q. This is Benjamin Yale.

21 Prior to your employment at Dean Foods, what other  
22 jobs have you held in the dairy industry?

23 A. Well, I was with a predecessor company or the  
24 company that was purchased -- I was with Sui za Foods,  
25 Director of Dairy Procurement for Sui za Foods, same thing

Cropper & Associates, Ltd.  
602.277.8882

663

For public distribution

1 for Fleming Dairy located in Nashville, Tennessee, and then  
2 prior to that, I was working for a co-operative in the  
3 mid-Atlantic area.

4 Q. When you were with Fleming Dairy, did you deal  
5 with cooperatives or did you deal with producers? What was  
6 the role?

7 A. It had an independent supply.

8 Q. Okay. Those were producers located in what  
9 states?

10 A. Kentucky and Tennessee mostly.

11 Q. Does that plant still exist there in Nashville?

12 A. Yes, it does.  
13 Q. And who owns that plant?  
14 A. Dean Foods.  
15 Q. All right. And does it supply independent  
16 producers?  
17 A. It has a supply agreement with Dairy Farmers of  
18 America.  
19 Q. Do any of the Dean plants now receive independent  
20 milk?  
21 A. Yes.  
22 Q. Do you readily accept new producers as  
23 independents into your plants?  
24 A. What do you mean? Usually, you know, we try not  
25 to have an oversupply or too much of an oversupply. So if

Cropper & Associates, Ltd.  
602.277.8882

664

For public distribution

1 we have a full supply and some new producer wanted to ship  
2 to us, we may or may not take it.  
3 Q. Have you taken on any new independent producers in  
4 the Dean system in the last year?  
5 A. Yes.  
6 Q. And in any markets in the West?  
7 A. I don't know.  
8 Q. And do you have a full supply agreement with DFA  
9 for all of your Dean plants nationwide?  
10 A. We have a supply agreement with DFA and with  
11 others.  
12 Q. And do the terms of those agreements allow them

13 first opportunity to supply the milk before any new entry  
14 can get into your plant?  
15 A. There's multiple interpretation of what the supply  
16 agreements really say.  
17 Q. But the market, the situation in the Southeast in  
18 terms of milk supply, has changed dramatically in terms of  
19 the last five years, hasn't it, in terms of whether it's  
20 co-op or independent; right?  
21 A. I don't know.  
22 Q. Wasn't there a large number of independent  
23 producers that supplied what are now Dean plants and some  
24 other plants in Alabama and Tennessee?  
25 A. They continue to supply those plants.

Cropper & Associates, Ltd.  
602.277.8882

665

For public distribution

1 Q. But aren't they through a co-operative structure  
2 of DFA or DMS?  
3 A. I wouldn't agree to that.  
4 Q. They are still independent producers?  
5 A. Yes.  
6 Q. Have you done an analysis to determine exactly  
7 what the cost of milk that a PD has that you compete  
8 against? You say there's a competitive disadvantage. What  
9 is that disadvantage in dollars and cents?  
10 A. Okay. It's my opinion that that advantage that  
11 they have is a difference between the regulated Class I  
12 price and the blend price in that market.  
13 Q. But that's an artificial number. That's not --



14 A. That's a real number.

15 Q. No. What does a producer-handler have to pay for  
16 its milk? What does it actually have to pay for its milk?  
17 Do you know?

18 A. Well, of course, you know, the price of milk  
19 changes every month. So when you ask me exactly what that  
20 number is, I don't think that's a fair question. But if you  
21 compare what a producer-handler has to pay for milk versus  
22 what a regulated handler has to pay for milk, I would say  
23 the difference is at least the difference between a Class I  
24 price and the blend price.

25 Q. Have you done any analysis or had any economist

Cropper & Associates, Ltd.  
602.277.8882

666

For public distribution

1 report to you with an analysis that has looked at the  
2 operations of a producer-handler and seen what its cost for  
3 its milk is to be able to make --

4 A. Again, I don't have to hire an economist to tell  
5 me that we're paying Class I price and they are -- that they  
6 are not held accountable to that. They don't have an  
7 obligation to the pool.

8 Q. There's a difference between being held  
9 accountable and being able to report what that price is as  
10 opposed to what that actual price is; right?

11 A. Well, we send money to the Producer Settlement  
12 Fund every month. I understand that producer-handlers do  
13 not.

14 Q. Right. But they have bills to pay; right?

15           A.    I assume that they have bills to pay.  They run  
16 the plant.  We run the plant.

17           Q.    I'm talking about at the producer level.  They  
18 have bills to pay --

19           A.    I guess I'm focusing more on the plant level and  
20 the cost.

21           Q.    Well, the producer-handler, you agree, it's all  
22 one thing.  It's a single enterprise; right?  So the  
23 profitability is on the plant and the producer-handler and  
24 producer together, not just as a producer as the plant?

25           A.    I guess I would agree with -- one of the previous

Cropper & Associates, Ltd.  
602.277.8882

667

For public distribution

1 witnesses that said the producer-handler wouldn't choose to  
2 continue to be a producer-handler unless there was some  
3 advantage to being a producer-handler, and I would say they  
4 look at it from the farm side and from the plant side.

5           Q.    But does that mean that they have an advantage on  
6 both sides at the same time?

7           A.    In my opinion, they do.

8           Q.    That's an opinion, Mr. Yates.

9                    Do you have any specific knowledge -- I want  
10 specific knowledge that says that when you go up head to  
11 head -- let me use an example.  You have a plant in  
12 Albuquerque, New Mexico, right, Dean Foods?

13           A.    Yes.

14           Q.    And you also have one in El Paso; right?

15           A.    Yes.

16 Q. And there's a producer-handler in Roswell, New  
17 Mexico?  
18 A. Okay.  
19 Q. Nature's Dairy?  
20 A. Okay.  
21 Q. And you compete with them in the New Mexico  
22 market; right?  
23 A. I'm not as familiar with that area as I should be.  
24 Q. Well, name me an area that you're familiar that  
25 you deal with. Let's use that as an example.

Cropper & Associates, Ltd.  
602.277.8882

668

For public distribution

1 A. I guess when you ask me for specific differences,  
2 we have a payment to the Producer Settlement Fund and that  
3 can be measured and the payment that the producer-handler  
4 has can be measured. I would say the difference between  
5 those two numbers is the advantage that they have from a  
6 plant perspective.  
7 Q. The difficulty is that producer-handlers don't  
8 play a blend price. They pay out-of-pocket expenses. I  
9 agree that they don't pay to the Producer Settlement Fund.  
10 But to say just because they are not accountable doesn't  
11 mean that they don't have the same costs.  
12 A. So the dairy farmers that we buy milk from, they  
13 have costs also.  
14 Q. That's right. I agree with that. The point that  
15 comes up that I want to ask is, we hear all of this  
16 testimony, and you've made it very clear today that you have

17 a competitive disadvantage, but nobody is able to measure  
18 what that competitive disadvantage is.

19 A. And I would suggest it's the difference in payment  
20 to the Producer-Handler Fund.

21 Q. In the last two years, is it your understanding  
22 the producers have been profitable at the blend price, for  
23 example?

24 A. Well, I've heard testimony that some have and some  
25 haven't.

Cropper & Associates, Ltd.  
602.277.8882

669

For public distribution

1 Q. All right. But some haven't; right? So the cost  
2 of production at a farm of a producer-handler; right? If  
3 he's equal, as you're suggesting, with all other producers  
4 in the market and there are producers in that market that  
5 aren't making it at the blend price, at the farm level, then  
6 his cost of production is low as the blend price; right? Is  
7 that true?

8 A. I sort of missed one of those.

9 Q. Well, I apologize. Let's take it back.

10 The point is that if a producer's cost of  
11 production exceeds the blend price, then, at a minimum, that  
12 producer-handler's cost for milk is the cost of production,  
13 not the blend price; right?

14 A. I would guess. I don't know this but I would  
15 guess that even though it's one entity, one legal entity,  
16 that they consider it the farm and the plant. It's more  
17 than one person out there and they probably have the farm

18 guys and they probably have the plant guys. And when they  
19 do their management review and whatnot, they probably  
20 compare how much the plant makes.

21 So one month, if it's above the blend price, that  
22 would probably be accounted to the farm, you know, as they  
23 didn't make money last month. The next month it may be  
24 below the blend price. Even though it's one entity, I would  
25 guess -- and I don't know this because everybody manages

Cropper & Associates, Ltd.  
602.277.8882

670

For public distribution

1 differently, but I would guess they keep their books, keep  
2 the farm and the plant records at least separate from a  
3 management perspective.

4 Q. But at the end of the day, that whole operation  
5 has to make a profit or it can't exist; right?

6 A. Absolutely.

7 Q. All right. And the point comes down again.  
8 You're asking the Secretary to regulate for minimum  
9 pricing -- I would suggest producer-handlers are already  
10 regulated. They have to report. They are subject to some  
11 regulation. They are not subject to minimum pricing. But  
12 that there are certain plants, my clients included, that,  
13 under this proposal, would become fully regulated plants  
14 under the Federal Order; right? That's your proposal?

15 A. Yes.

16 Q. All right. And the basis of that, as I understand  
17 it, is that you have an opinion -- no facts but an  
18 opinion -- that they are spending less for their milk than

19 you would?

20 A. It's my opinion if you -- if you get the  
21 information from the MA and measure our payment to the  
22 Producer Settlement Fund and compare that to the  
23 producer-handler's payment to the Producer Settlement Fund,  
24 then that's the advantage. It can be made even though I  
25 don't know today what that number is.

Cropper & Associates, Ltd.  
602.277.8882

671

For public distribution

1 Q. You indicate that you had this competition with a  
2 plant in Texas and you state in here that they had a bid of,  
3 what was it here, 11 -- I lost my place here -- 11.5 cents  
4 per one-half-pint of 1 percent milk; right?

5 A. Right.

6 Q. And what was Dean Foods' bid?

7 A. I don't recall.

8 Q. Isn't that important to be able to compare the  
9 two? I mean, for us to make a decision?

10 A. Ours was higher.

11 Q. How much higher?

12 A. I don't recall.

13 Q. Was it 15 cents?

14 A. Ben, I saw the number and I didn't write it down.  
15 I'm trying to keep my testimony brief.

16 Q. Well, I would suggest that -- let me ask -- the  
17 question is, though, how can the Secretary determine whether  
18 this is truly a comparable number other than it's high? Was  
19 it 11.76? Was it 12.76, was it 17 --

20           A.    Well, I would suggest -- actually, what we're  
21 trying to suggest is that even smaller operations are  
22 competitive and this was a regulated handler. So they did  
23 have a payment to the Producer Settlement Fund and they are  
24 still fierce competitors in the marketplace.

25           Q.    How long have they been in the marketplace?

Cropper & Associates, Ltd.  
602.277.8882

672

For public distribution

1           A.    A long time. I don't know.

2           Q.    And do you know whether they are in a position to  
3 continue to be in the marketplace?

4           A.    I do not know that. It's a family operation.

5           Q.    And is this a situation where -- you heard  
6 testimony yesterday from some of these handlers that they  
7 sold prices below total cost, fully burdened cost in order  
8 to obtain sales; right?

9           A.    I don't know if I was in the room when that  
10 happened.

11          Q.    I mean, you hear that; right?

12          A.    I've heard that before.

13          Q.    So does this one sale represent the fact that this  
14 is what they could sell all of their milk for at that price  
15 and be profitable?

16          A.    I don't know. I just know that they are strong  
17 competitors in their neighborhood.

18          Q.    But they had that one sale that you have got here,  
19 but we don't know if that represents all of their sales and  
20 the level that they sell all of their milk; right?

21 A. It's just an example.  
22 Q. Just an example. So we're going to regulate and  
23 change structures of family operations that are 50 and 60  
24 years old based upon one example of one sale in Texas in  
25 which we only know one-half of the competitive situation?

Cropper & Associates, Ltd.  
602.277.8882

673

For public distribution

1 A. This plant is already regulated. We're not going  
2 to regulate this plant. It's already regulated.  
3 Q. I understand that. But you're using as evidence  
4 to regulate plants; right?  
5 A. Yeah. I figured there would be some more evidence  
6 besides that one thing.  
7 Q. I understand that. But you understand, Mr. Yates,  
8 that for my clients, this is a life-or-death situation;  
9 right? Do you understand that?  
10 A. No.  
11 Q. You don't believe that?  
12 A. I think that there are going to be strong  
13 competitors once they are regulated.  
14 Q. You honestly believe that you can assess an  
15 ongoing operation today \$1.2 million per year and it's not  
16 going to have an impact on the likelihood -- or the  
17 livelihood of that business?  
18 A. Absolutely it will have an impact. It will have  
19 an impact on the producers in the marketplace that are now  
20 sharing in those Class I dollars.  
21 Q. I'm talking about the producer-handlers you are



22 trying to regulate.

23 A. I mean, it's more than just them.

24 Q. Well, I understand that. That's part of the

25 government -- that's part of the larger role.

Cropper & Associates, Ltd.  
602.277.8882

674

For public distribution

1 A. Yeah.

2 Q. Okay. But I want to come here to this standard  
3 that Dean Foods -- by the way, you're the largest dairy  
4 processing company in the country; right?

5 A. That's my understanding. I don't have the facts  
6 right here to prove it but that's my understanding.

7 Q. At least that's what's been tallied; right?

8 A. Yes.

9 Q. You want to regulate and impact some small,  
10 family-owned operations. Is yours a family-owned operation  
11 or are there stockholders? Are you publicly traded?

12 A. My family owns some of the stock.

13 Q. I understand that. Is it one of those .0005  
14 percent or something like that?

15 A. Probably. I haven't calculated it.

16 Q. That's a good answer. I owe you on that one.  
17 That's a great answer. I should have seen that one coming.

18 But the point is that it's a publicly traded  
19 company; right?

20 A. Yes, it is.

21 Q. And these are small operations; right? These are  
22 family operations that we're dealing with on these PDs;

23 right?

24 A. Well, they are competitors.

25 Q. They are competitors. I want to come back to this

Cropper & Associates, Ltd.  
602.277.8882

675

For public distribution

1 point --

2 A. And we are regulated and we compete against some  
3 plants that are not regulated. And because of that, we  
4 think that they have an advantage and we are just asking  
5 that USDA take a look at that.

6 They have made decisions in other -- at other  
7 Federal Order hearings and whatnot that handlers are not  
8 paying similar prices or minimum prices, that that's  
9 disorderly marketing. And we agree with that.

10 Q. I understand that's what your point is. I'm  
11 coming down to the amount of evidence that you believe is  
12 necessary for the Secretary to make this decision.

13 Can it be based upon people's opinion of what is  
14 going on in the marketplace rather than evidence of what's  
15 going on in the marketplace?

16 A. I think they will probably take into consideration  
17 testimony here which includes opinions and facts and  
18 analysis. I think it's part of the decision.

19 Q. All right. You also mentioned something about  
20 competing with a -- or somebody in California.

21 Do you know what the prices were that that product  
22 was sold at or that the bid was accepted and the prices that  
23 Dean Foods offered it at?

24 A. Not specifically.

25 Q. All right. You heard the testimony the other day

Cropper & Associates, Ltd.  
602.277.8882

676

For public distribution

1 of Mr. Hitchell that he said 70 percent of cost is the fluid  
2 milk. Does that sound like a reasonable number, do you  
3 know?

4 A. I have no --

5 Q. You're in --

6 A. I have no comment on that.

7 Q. So do you get involved in the sales of product to  
8 companies like Sam's and Costco and Albertson's? Are you  
9 involved in those?

10 A. Usually when it's just a quality issue, trying to  
11 chase it back to where the origin was.

12 Q. But not in negotiating the prices and setting up  
13 the price to get the contract; right?

14 A. No.

15 Q. And you're not ordinarily privy to what the prices  
16 that are provided by Dean Foods to those plants; right?

17 A. That's correct.

18 Q. And what they get back, you're not privy to that;  
19 right?

20 A. That's correct.

21 Q. And you're not privy to any rebates or any other  
22 programs that Dean Foods may have with its customers; right?

23 A. I don't know the specifics of those.

24 Q. And you're not privy to know whether Dean Foods,

25 in their selling of the milk, take on a strategy that -- in

Cropper & Associates, Ltd.  
602.277.8882

677

For public distribution

1 some markets that they are willing to sell at less than cost  
2 in order to -- or at a lower price in order to obtain new  
3 business? You are not privy to that?

4 A. That's not my side of the business. I focus on  
5 our cost of raw milk into our plants and what we pay into  
6 the Producer Settlement Fund.

7 Q. But you don't know what a PD pays for its milk,  
8 actually pays out --

9 A. I just know he doesn't have that --

10 Q. He doesn't have the obligation to the pool?

11 A. He doesn't have that obligation cost.

12 Q. That's pretty important; right? I think you made  
13 a statement up here, and the first -- well, the first full  
14 paragraph, it says: When our competitors face competition  
15 from plants that do not pay regulated minimum prices or do  
16 not have obligations to Producer Settlement Funds, we are  
17 most definitely affected; right? Is that a fair statement?

18 A. Yes.

19 Q. And is that one that we all need to be concerned  
20 about, that producers and processors comply?

21 A. I think in a regulated industry such as this.

22 Q. You testified here that Dean Foods is building a  
23 plant in Las Vegas?

24 A. Yes.

25 Q. And how much milk is that projected to produce or

For public distribution

1 to market?

2 A. I don't know. It's going to be a full-size milk  
3 plant. I don't know.

4 Q. Is it going to be 50 million pounds a month?

5 A. Ben, I hadn't worried about it yet.

6 Q. But it's --

7 A. It's a full-size plant.

8 Q. It's not going to be a 3 million efficient plant  
9 like the one in Texas; right?

10 A. Hopefully not.

11 Q. And there's enough milk in Nevada to supply that  
12 plant?

13 A. I guess. I haven't really taken a look at that  
14 specific.

15 Q. You don't know where that milk will come from;  
16 right? And you say you're going to market it in Las Vegas;  
17 right, the milk?

18 A. We have existing customers in Las Vegas and right  
19 know we don't have a plant in that area. That area is  
20 growing and we're servicing that market from -- well, as  
21 many as six, and I was looking at the report from USDA and  
22 maybe seven or more plants, Dean plants, that actually are  
23 partially regulated.

24 Q. And are you indicating that plant will also supply  
25 Arizona, some sales in Arizona?

For public distribution

1           A.   Well, it could. It could have sales. We're going  
2 to -- we're like everybody else. We'll be trying to grow  
3 our business. Our customers, they may expand. So we could  
4 have sales into Arizona, Phoenix.

5           Q.   And Arizona is -- obviously by this is regulated.  
6 It's a Federal Order; right?

7           A.   Yes, m'hum.

8           Q.   Sales other than the producer-handlers that are  
9 subject to regulation; right?

10          A.   Right.

11          Q.   And there was a press release that indicated that  
12 there would be sales into New Mexico from that plant?

13          A.   I haven't seen that.

14          Q.   You're not aware of this, that it was going to  
15 sell into five states?

16          A.   We'll probably sell --

17          Q.   Throughout the region --

18          A.   -- where we can.

19          Q.   -- wherever you can?

20          A.   Right.

21          Q.   And right now you're aware that Clark County, by  
22 statute, is not subject -- a plant there is not subject to  
23 any minimum pricing under the Federal Order; right?

24          A.   I'm aware of that.

25          Q.   All right. Doesn't that existence of a Dean

## For public distribution

1 plant, the largest processor in the country locating a  
2 full-size plant -- I would assume an efficient one -- in a  
3 Federal Order-free zone, isn't that going to create  
4 disorderly marketing conditions?

5 A. And that's why we support legislative changes to  
6 that situation.

7 Q. But what if those changes don't happen? You'll be  
8 an unregulated plant; right?

9 A. Well, I don't know why they wouldn't -- it  
10 wouldn't happen if everybody in this room supports them.

11 Q. Well, you have congressmen and senators, who knows  
12 what they think from day to day; right? You would hope and  
13 you would assume, but you don't know that for a fact; right?

14 Let me rephrase that.

15 Let's say can the Secretary depend upon its  
16 decision about the possibility that some day Congress will  
17 change legislation?

18 A. We hope that that will be changed.

19 Q. We can't guarantee it; right?

20 A. Well, no, I can't guarantee it.

21 Q. I hope you don't want to say that. You're under  
22 oath today.

23 A. It makes sense to change. Hopefully, we're a  
24 rational industry and we'll make those sensible changes.

25 Q. But if it doesn't get changed, you will be in an

For public distribution

1 unregulated plant; right? You will have an unregulated --  
2 not subject to Federal Order; right? Unless that changes  
3 and as it currently stands, until Congress changes it, you  
4 are in an area that is not subject to regulation; right?

5 MR. ENGLISH: Object to the legal characterization  
6 which is incorrect. There is something called the Nevada  
7 Dairy Commission.

8 JUDGE HILLSON: I'll let him answer it if he knows  
9 the answer. If he doesn't know the answer, just say, "I  
10 don't know."

11 THE WITNESS: I'm trying to listen to every word;  
12 he's saying. When you say federally regulated, regulated --  
13 BY MR. YALE:

14 Q. Let's talk about federally regulated.

15 The plant that is -- under current law and current  
16 regulations, the plant in Las Vegas, Nevada, is not subject  
17 to minimum pricing under the Federal Milk Market Orders; is  
18 that correct?

19 A. That's my understanding. It will be subject to  
20 the Nevada Milk Commission minimum pricing.

21 Q. But that's only on the in-state milk, though;  
22 right?

23 A. You know, I'm not familiar enough with the Nevada  
24 Milk Commission --

25 Q. Well, you're familiar with the interstate commerce



For public distribution

1 clause and some of the other things; right? But it's not  
2 subject to a Federal Milk Marketing Order; right?

3 A. That's my understanding.

4 Q. All right. Now, there is a statement in the  
5 record put in by the USDA on Tuesday that said the average  
6 producer-handler in the Northwest in that middle or the  
7 upper end, the three -- up in the upper thing, averaged just  
8 shy of 5 million pounds a month. I don't know if you recall  
9 that. It's in Exhibit 7 or 5 or something like that. But  
10 approximately, you know, 5 million pounds. So the three of  
11 them would be total about 15 million pounds.

12 As I understand it by your testimony, that creates  
13 disorderly marketing conditions in Order 124 because they  
14 are unregulated; right?

15 A. Yes.

16 Q. If Congress doesn't change the law and we have --  
17 we can't assume that -- and you got a plant in -- the  
18 full-size plant, whatever that is, in Nevada, is that also  
19 going to create disorderly marketing conditions?

20 A. In Las Vegas?

21 Q. Yes, your plant that you're building in Las Vegas.

22 A. It's regulated by the Nevada --

23 Q. But it's not regulated by the Federal Order;  
24 right?

25 A. Well, it's regulated by the state. I mean, we

For public distribution

1 have plants in California and it's not federally regulated,  
2 but they are regulated by the state.

3 Q. Do you buy milk in your California plants from  
4 out-of-state producers?

5 A. I think we have.

6 Q. And -- is that price regulated?

7 A. I'm not for sure.

8 Q. It's not, is it? Isn't that part of a court  
9 decision?

10 MR. ENGLISH: I object to the legal  
11 characterization. Being the lawyer in that case, I can say  
12 in the present state, it is regulated.

13 JUDGE HILLSON: That was Mr. English, by the way.

14 BY MR. YALE:

15 Q. So coming back to this point, is it fair to expect  
16 a small, family-owned producer organization to have to be  
17 changed, change their organization to be fully regulated  
18 because it's disorderly and yet the largest processor in the  
19 country gets to build a plant in an area that is not subject  
20 to the same federal regulations?

21 A. Wow. That's a big question I was trying to keep  
22 up with. Okay. Is it fair for them to have the same cost  
23 of milk, have an obligation to the Producer Settlement Fund?  
24 In my opinion, it would be fair.

25 Q. Even though Dean Foods would not be subject to the

Cropper & Associates, Ltd.  
602.277.8882

684

For public distribution

1 Federal Order regulations?

2 A. For our plant that we haven't built that we're in  
3 the process of building and that we're supporting  
4 legislation to change that and it's regulated by the state  
5 milk commission?

6 Q. Yes.

7 A. I think all of that is fair.

8 Q. You think that's all fair?

9 A. Yes.

10 Q. So we have to trust all -- we have to trust  
11 Nevada. We have to trust its ability to regulate interstate  
12 sale of milk.

13 A. I think it's fair.

14 Q. You think it's fair. Very well. I wouldn't be  
15 surprised if you had said anything else, frankly.

16 Now, when did you start with Fleming Dairy?

17 A. '88.

18 Q. And you were with --

19 A. It was Malone and Hyde and then it went to  
20 Fleming.

21 Q. And since '88, how many new dairy processing  
22 plants, new companies, have you seen enter into the  
23 processing business in the area in which you worked?

24 A. A few.

25 Q. Can you name some?

Cropper & Associates, Ltd.  
602.277.8882

685

For public distribution

1 A. Publics.

2 Q. And where is that?  
3 A. Atlanta, Georgia.  
4 Q. Was that at the replacement of any other plant?  
5 A. No.  
6 Q. That was a new plant?  
7 A. Yes.  
8 Q. Some others?  
9 A. Mayfield.  
10 Q. And when were those -- those were in the '80s?  
11 A. Wow. I think they were in the '90s. It seems  
12 like a long time ago. I think those two plants were in the  
13 '90s.  
14 Q. Other than the Las Vegas plant that Dean Foods  
15 built, are you aware of any other new plants that are  
16 replacing some, remodeling a new plant, a new company  
17 entering into that market in the last five years?  
18 A. Into the Las Vegas market?  
19 Q. Any market that you know of in the last five  
20 years.  
21 A. You sort of caught me off guard here. None pop to  
22 mind.  
23 Q. Isn't it true that one of the most effective ways  
24 to enter into -- as a new processor -- into the market as a  
25 producer-handler -- that Sarah Farms is probably the most

Cropper & Associates, Ltd.  
602. 277. 8882

686

For public distribution

1 recent farm that built one.  
2 A. Oh, that's right.

3 Q. See, I'm helping.

4 And in other markets, if they want to compete,  
5 that's the only way they are going to be able to enter into  
6 the market?

7 A. If who wants?

8 Q. A processor, to be one of the most effective  
9 entrances.

10 A. If he doesn't have obligations to the Producer  
11 Settlement Fund. If he can avoid the obligations to the  
12 Producer Settlement Fund, he would have an advantage and  
13 that would be a better way to enter the market for him.

14 Q. Now, just to make sure, you do not have any plants  
15 subject to any regulation under Order 124?

16 A. We do not have a fully regulated.

17 MR. YALE: I don't have any other questions.

18 Thank you.

19 MR. MARSHALL: Doug Marshall with Northwest Dairy  
20 Association.

21 EXAMINATION

22 BY MR. MARSHALL:

23 Q. A couple of quick questions.

24 I was intrigued by the conversation about Las  
25 Vegas and I can see that potentially there might be some

Cropper & Associates, Ltd.  
602.277.8882

687

For public distribution

1 issues of comparison between the plant of Sarah Farms, which  
2 is here in the Southwest, and a plant in Las Vegas, but  
3 Mr. Yale's clients are in the Pacific Northwest, as you may

4 know.

5 Now, just to clarify for the record, my  
6 understanding is that -- and I'm going to ask you what your  
7 understanding is. My understanding is that the schedule for  
8 Federal Order regulation applies only to a client in Clark  
9 County, Nevada, not throughout the entire state of Nevada.  
10 Is that your understanding, too?

11 A. That's my understanding, too.

12 Q. And that if a plant would be located near the  
13 Pacific Northwest Order, in, say, Northwest Nevada, that  
14 plant would be fully regulateable?

15 A. If it's not in Clark County, then the rule doesn't  
16 apply.

17 Q. My reason for inquiring about this is to ask you,  
18 in your judgment as somebody that has been in the dairy  
19 business as long as you have, whether it would be feasible  
20 for a plant in Clark County, Nevada, to effectively compete  
21 with processing plants in the Pacific Northwest Order which,  
22 I'll remind you, is Washington and Oregon, essentially.  
23 Would it be feasible for a plant in Clark County, Nevada, to  
24 compete with plants in Washington and Oregon given the  
25 transportation costs that would be involved to move product

Cropper & Associates, Ltd.  
602.277.8882

688

For public distribution

1 from Las Vegas, Clark County, up north?

2 A. It would be a function of the transportation cost  
3 and depending on what those costs are in the market. It  
4 stops at some point, so -- I don't know how many miles it is

5 from Las Vegas to Washington state but I know it's a long  
6 way.

7 Q. I want you to assume for the purposes of the  
8 question that the distance might be at least 750 miles to  
9 the southern end of the market area, that is to say to the  
10 populated portion of the market area, 750 miles. That's a  
11 long ways, isn't it?

12 A. That's a long ways. Probably.

13 Q. You've commented on the record that Dean Foods  
14 presently does not intend to market in California --

15 A. Right.

16 Q. -- from Clark County, Nevada?

17 A. Right.

18 Q. Would you care to comment on the record whether or  
19 not Dean Foods intends to market from Clark County, Nevada,  
20 into Washington or Oregon presently?

21 A. Well, I'm the procurement guy; okay? Just knowing  
22 what I know about geography out here, a plant can only  
23 service customers so far away. It's a function of  
24 transportation costs, and I would say that we have no plans  
25 to market milk from Las Vegas to the Pacific Northwest.

Cropper & Associates, Ltd.  
602.277.8882

689

For public distribution

1 Q. Thank you.

2 One other line of questioning from Mr. Yale  
3 included a question that, if I recall correctly, was stated  
4 something like my clients are small businesses, right, or  
5 supposedly small, family-owned businesses; right? And I

6 don't recall your answer. But regardless of what your  
7 answer may have been, you don't know whether they are small,  
8 family-owned businesses, do you?

9 A. Well, I guess I don't.

10 Q. In fact, the regulatory status of a  
11 producer-handler does not depend on being a small,  
12 family-owned business, does it?

13 A. That's my understanding. It does not.

14 Q. So I want you to assume hypothetically that they  
15 were a producer-handler in Washington state that was a  
16 small, family-owned business and another producer-handler in  
17 Washington state that was a small, family-owned business but  
18 sold its business to a very large multinational  
19 conglomerate.

20 As you understand it, would that sale to a large  
21 multinational conglomerate change the regulatory status of  
22 that producer-handler's operations?

23 A. It's my understanding that the same -- that the  
24 farm and the plant has to be owned by the same entity. I do  
25 not know if -- as far as I know, there's not a size limit on

Cropper & Associates, Ltd.  
602.277.8882

690

For public distribution

1 that entity, as far as I know.

2 Q. From a policy standpoint, do you think there  
3 should be a distinction drawn between regulating one  
4 producer-handler of a certain size -- pick a round number, 5  
5 million pounds a month -- versus another producer-handler of  
6 the same volume, same 5 million pounds a month? Should



7 there be a distinction on regulation status just because one  
8 is a small, family-owned business and the other might be  
9 owned by a large, multinational conglomerate?

10 A. I think in our regulated market that we have,  
11 that -- I think we have to treat everybody as similar as  
12 possible for the system to survive.

13 Q. And, similarly, then, if there were another plant  
14 of 5 million pounds volume in the Pacific Northwest that was  
15 owned by a family but bought its milk from others, they  
16 would be treated the same; right?

17 A. I think that the plants should be treated the  
18 same.

19 MR. MARSHALL: Thank you, Ernie.

20 EXAMINATION

21 BY MR. RICCIARDI:

22 Q. Mr. Yates, good morning. Al Ricciardi for Sarah  
23 Farms.

24 A. Good morning.

25 Q. Has this competitive disadvantage that Dean Foods

Cropper & Associates, Ltd.  
602.277.8882

691

For public distribution

1 has suffered limited growth in any particular geographic  
2 area in the country?

3 A. Not that I'm -- well, you know, I don't really --  
4 it's hard for me to draw that correlation between being  
5 competitive with a producer-handler on its raw milk cost and  
6 Dean Foods, you know, acquiring a plant in Wisconsin.

7 Q. So the answer is, it hasn't --

8 A. I think it's apples and oranges there.  
9 Q. It hasn't limited the growth; right?  
10 A. Well, if we lost customers, we lost that return, I  
11 guess, off of those customers, then we had less money to buy  
12 new plants. So I don't know.  
13 Q. Ifs, ands, candy and nuts.  
14 A. Well, yellow apples and orange apples and red  
15 apples. I'm just giving you -- you're asking me a big  
16 question. I'm trying to answer it the best I can.  
17 Q. Well, you gave big testimony so I'm just trying to  
18 find out what you're saying. Let me see if I can get at it  
19 like this:  
20 Isn't it true that -- let's use the New England  
21 market alone, that more than 70 percent of the Class I  
22 marketed in New England currently is controlled by Dean  
23 Foods?  
24 A. I'm not going to respond to that. I don't know.  
25 I'm the procurement guy and I haven't done an analysis on

Cropper & Associates, Ltd.  
602.277.8882

692

For public distribution

1 market share.  
2 Q. Am I off by a percent or so, sir?  
3 A. I don't know how much you're off by.  
4 Q. Is it 80 percent?  
5 A. I have no comment on that.  
6 Q. Is it 50 percent?  
7 A. I have no comment.  
8 Q. You have no comment or you don't know?

9 A. I have no comment.

10 Q. So you do know but you don't want to say?

11 A. I have no comment.

12 Q. Tell me what means. Either you know and you can't  
13 tell us or you're not telling us. I want to know.

14 MR. BERDE: Syd. How many times does the witness  
15 have to tell you, "I don't know"?

16 MR. RICCIARDI: How many times do you have to  
17 interrupt me? Why don't you sit down and let the witness  
18 answer the question.

19 MR. BERDE: That's a permissible interruption when  
20 you are repeating the same question to a witness that says,  
21 "I don't know."

22 JUDGE HILLSON: Mr. Berde and Mr. Ricciardi, he's  
23 asked, I believe, that -- Mr. Ricciardi's question is  
24 legitimate. He's only asking you if you know and you are  
25 not telling for, I guess, confidentiality reasons or if you

Cropper & Associates, Ltd.  
602.277.8882

693

For public distribution

1 don't know. I think that that is a legitimate question.

2 MR. RICCIARDI: That's the distinction I'm trying  
3 to draw, Your Honor.

4 BY MR. RICCIARDI:

5 Q. Which one is it?

6 A. Okay. I have more than zero information about  
7 that answer. I have less than 100 percent accuracy of being  
8 able to answer that. So I'm not sure and I would just  
9 rather not even comment on it.

10 Q. Do you have an estimate?  
11 A. I'm not going to even estimate. I just don't want  
12 to . . .  
13 Q. Fair enough.  
14 Dean Foods currently has a full milk supply  
15 arrangement with Dairy Farmers of America; correct?  
16 A. At some plants.  
17 Q. At how many of the plants in the country?  
18 A. Several.  
19 Q. Give me the number. And if you need help, I'll  
20 help you out.  
21 Dean Foods currently has 113 plants in the  
22 country; is that correct?  
23 A. I would rather not -- what do you mean? What's "a  
24 plant"?  
25 Q. I don't want to fence with you. You tell me.

Cropper & Associates, Ltd.  
602.277.8882

694

For public distribution

1 A. I'm just asking you because that's a good  
2 question. I've been asked to count the plants. I can count  
3 the plants, you can count the plants and we'll come up with  
4 different numbers because we've got several plants that one  
5 person may consider them one plant. There may be a street  
6 that divides them. Other folks say, "Well, no, that's the  
7 ice cream plant on that side of the street. That's the milk  
8 plant." And then another plant that's three miles away, we  
9 consider that one plant. But it's about 100 plants. How  
10 about that?

11 Q. That's fine.

12 Of those 100 plants, how many of them have an  
13 agreement or arrangement with Dairy Farmers of America for  
14 full milk supply?

15 A. I would have to really think about which ones and  
16 think through 100 plants right now with probably -- it would  
17 probably take a little bit more time. I would rather not  
18 answer that question.

19 Q. Well, we'll give you thinking time.

20 A. Then I'm not -- I guess that's proprietary  
21 information.

22 Q. So you won't tell us?

23 A. Right.

24 Q. So the Secretary is not going to be able to rely  
25 upon that information in this hearing?

Cropper & Associates, Ltd.  
602.277.8882

695

For public distribution

1 A. Each one of our plants completes a handler report  
2 every month. So the Secretary is full aware of how much  
3 milk we buy from each one of our suppliers.

4 Q. Well, we don't have those at this hearing.

5 A. The Secretary knows that.

6 Q. We don't have this as part of the hearing record.  
7 I'm asking you. You're not going to answer that question;  
8 correct?

9 A. I'm not going to go through 100 plants and try to  
10 sort them all out.

11 Q. Now, who made the decision to construct this plant

12 in Clark County, Nevada? Was that you?

13 A. Dean Foods made that decision.

14 Q. Who at Dean Foods?

15 A. I don't know who the individual is.

16 Q. My assumption is that Dean Foods could have  
17 constructed a plant either inside Clark County or outside  
18 Clark County; right?

19 A. Yeah.

20 Q. Okay. So we can at least reasonably assume that  
21 one of the reasons that they decided to construct within  
22 Clark County is because it's not regulated by the Federal  
23 Order; correct?

24 A. I'm not going to -- that's proprietary  
25 information. I don't want to answer that question.

Cropper & Associates, Ltd.  
602.277.8882

696

For public distribution

1 Q. Fair enough.

2 Once this plant is completed, it's going to have  
3 sales in Nevada; correct?

4 A. Yes.

5 Q. And it will sell into Arizona?

6 A. Hopefully.

7 Q. Will it pay anything into the pool for those  
8 sales?

9 A. If the legislature passes it, it goes through,  
10 what we're supporting.

11 Q. Let me ask you that question. It's kind of  
12 interesting. I mean, obviously Dean Foods, whatever the

13 I legislation, could make a business decision to pay into the  
14 pool anyway; right?

15 A. I don't think they would take our money.

16 Q. They could make the decision to pay into the pool  
17 whether or not the regulation is changed or not; correct?

18 A. It's my opinion that if the plant does not have an  
19 obligation to the Producer Settlement Fund, even if we sent  
20 a check to the Producer Settlement Fund, they would send it  
21 back.

22 Q. Let me see if we can get at my question because  
23 you haven't answered it yet. Dean Foods could make the  
24 decision, whether the regulation is changed or not, to pay  
25 money into the pool if it wanted to?

Cropper & Associates, Ltd.  
602.277.8882

697

For public distribution

1 MR. ENGLISH: Your Honor, I do object. That is  
2 asked and answered. He has said twice now that he couldn't,  
3 that the money would be sent back.

4 THE WITNESS: So we cannot.

5 JUDGE HILLSON: I think that was -- I think he did  
6 answer your question.

7 MR. ENGLISH: Let's at least get it down twice.

8 JUDGE HILLSON: That was Mr. English. I think the  
9 reporter knows who everyone is by now, but just try to do  
10 that, still.

11 BY MR. RICCIARDI:

12 Q. How many competitors in the Texas market have Dean  
13 Foods purchased in the last five years?

14           A.    Our list of plants are actually on our Web site.  
15    So -- and there is a public history of one of our annual  
16    reports that is also on our Web site.

17           So I would rather just -- if I can, defer to that.

18           Q.    Your Web site isn't here.  You're here.

19           MR. ENGLISH:  Your Honor, this is Charles English.  
20    I object as to relevance.  The number of plants purchased in  
21    Texas, which is not part of this proceeding, cannot possibly  
22    be relevant to the question of whether or not the  
23    producer-handlers -- if we're going to go through the number  
24    of plants purchased in Texas and the number of years, we  
25    aren't going to get done in Seattle before Thanksgiving.

Cropper & Associates, Ltd.  
602.277.8882

698

For public distribution

1           MR. MARSHALL:  Your Honor, may I join in that  
2    objection?  May I speak to it?

3           JUDGE HILLSON:  Yes, you can.

4           MR. MARSHALL:  This is Doug Marshall with the  
5    Northwest Dairy Association.  I don't mind you all coming  
6    and joining us in Seattle for a week.  That would be great.  
7    It works for me.  I live there.  I do want to be done in  
8    Seattle at the end of that week.

9           At this juncture, what we are seeing is a lot of  
10   thrashing around and questions that are way off the point  
11   that are delaying the hearing unnecessarily to the effect  
12   that we leave this city without having heard the principal  
13   evidence in support of the proponents' proposals, as a  
14   result of which we will continue to thrash around in



15 Seattle.

16 My belief is that unless people understand what  
17 the primary case is of the proponents, they can't  
18 effectively cross-examine. We're shadow-boxing at this  
19 point with early witnesses. We have yet to hear the real  
20 substantive witnesses who have the stuff to offer that  
21 should be cross-examined.

22 The procedure -- I appreciate the fact that His  
23 Honor wants to give Mr. Ricciardi every opportunity to ask,  
24 arguably, relevant questions. But I think it's time to  
25 bring this thing under control or we're not going to make

Cropper & Associates, Ltd.  
602.277.8882

699

For public distribution

1 it.

2 JUDGE HILLSON: I do note that the witness did  
3 raise some -- mention some Texas events himself. So I don't  
4 know if you are following up on that, Mr. Ricciardi or not.

5 MR. RICCIARDI: Your Honor, you're right on point.  
6 I'll wait for these people to object first.

7 MR. BESHORE: I do want to join in Mr. Marshall's  
8 objection and Mr. English's. The rules clearly provide that  
9 immaterial and irrelevant evidence should be -- may be  
10 disallowed, and should be disallowed, must be disallowed.  
11 The history of Dean's acquisitions in Texas or anywhere  
12 around the country is in that category, clearly, and we're  
13 not going to get to the heart of the matter.

14 JUDGE HILLSON: Having heard Mr. Yates -- heard  
15 and read Mr. Yates' testimony, he did raise some issues that

16 were outside of the immediately affected areas. He raised  
17 those issues, and I think if the proponents are going to  
18 raise the issue, I don't want to go into them ad nauseam if  
19 it's clear that it's immaterial. He's at least entitled to  
20 ask a few questions on the issues that were raised by the  
21 witness on direct, Your Honor. You are exactly right. They  
22 chose to open this particular door with regard to Texas.  
23 They made an example of it. I'm entitled to go into this  
24 area and I've already heard a million times from this side  
25 of the room that there essentially aren't any rules, and now

Cropper & Associates, Ltd.  
602.277.8882

700

For public distribution

1 they want to impose some limitations when they raise the  
2 issue.

3 I'm entitled to explore those things and my  
4 clients are entitled to have me explore them.

5 MR. BESHORE: Well, you've never heard from our  
6 table on this side of the room that there aren't any rules  
7 here.

8 JUDGE HILLSON: People commented on the relative  
9 liberality of the rules versus what I would say was an  
10 adjudicatory hearing. This is obviously not that.

11 I'm trying to keep the testimony relevant. But,  
12 on the other hand, when somebody in writing and orally makes  
13 a few Texas points, I think that the opponents are entitled  
14 to inquire into that.

15 MR. BESHORE: The competitors in Texas which he  
16 mentioned may be pertinent. But the history of Dean's

17 acquisitions in Texas is beyond the panel.

18 JUDGE HILLSON: He only asked one question on it  
19 at this point. I don't know if it's -- I don't know or I  
20 don't want to tell or look at the Web page. He's entitled  
21 to find out the answers. If the witness knows it -- if we  
22 had a lot more yes-or-no answers to yes-or-no questions,  
23 maybe we would be able to move on faster. I'm going to let  
24 you ask a few questions on this line. If it becomes clear  
25 that it doesn't matter, the big issues in this case, then we

Cropper & Associates, Ltd.  
602.277.8882

701

For public distribution

1 can stop. But you're entitled to a little follow-up. So go  
2 ahead.

3 MR. RICCIARDI: Can you read it back, please.

4 (The following question was read: How many  
5 competitors in the Texas market have Dean Foods purchased in  
6 the last five years?)

7 JUDGE HILLSON: I'm going to ask you to answer  
8 that question. If you don't know the answer, say you don't  
9 know or that you don't want to say because it's proprietary.  
10 That you have, too. So just answer the question.

11 THE WITNESS: I have some information on that but  
12 I need you to clarify your question. Are you including  
13 Sui za Foods?

14 BY MR. RICCIARDI:

15 Q. No. Excuse me, yes, I am in that question. Prior  
16 to the merger you're talking about?

17 A. That's what I want to clarify.

18 Q. Yes. Yes.

19 MR. ENGLISH: When you say that, do you mean the  
20 merger of Sui za and Dean as an acquisition of Texas plants?  
21 Is that what you're thinking, Mr. Yates, because I don't  
22 think that's what the question means.

23 THE WITNESS: Dean Foods had one plant in Texas.  
24 Sui za had, I don't know, five or six or seven. Now those  
25 are put together and that's it.

Cropper & Associates, Ltd.  
602.277.8882

702

For public distribution

1 BY MR. RICCIARDI:

2 Q. So no other smaller plants were purchased by  
3 either Sui za or Dean's before the merger?

4 A. There was one. I can't think of the name of it.

5 Q. Okay. How much of the Class I fluid milk sales by  
6 percentage does Dean's have in Texas?

7 A. That's proprietary information. I'm not going to  
8 comment on it.

9 Q. Is it more than 50 percent?

10 A. That's proprietary information. I have no  
11 comment.

12 Q. Would you agree that in 2002 Dean Foods had sales  
13 of about \$8.120 billion?

14 A. It was a lot.

15 Q. Am I off by a billion or two?

16 A. I don't have that number with me. It's not that I  
17 don't want to agree with you. You have given a very  
18 specific number. If you read that from our annual report --

19 well, I think our annual report is right.

20 Q. Would you agree with me that Dean's -- let's hope  
21 it is.

22 Would you agree with me that Dean Foods has annual  
23 sales of more than twice the next largest producer in the  
24 country?

25 A. Who is it?

Cropper & Associates, Ltd.  
602.277.8882

703

For public distribution

1 Q. Kraft.

2 A. Kraft? How much do they have? I can do the math  
3 for you.

4 Q. Let me do it for you. I just need you to be able  
5 to confirm that for me.

6 A. I don't know what Kraft has.

7 Q. 4.1 billion?

8 A. I don't know what Kraft has. We're a big company.

9 Q. Would you say an enormous company?

10 A. Compared to?

11 Q. Anyone else in this industry.

12 A. Wal-Mart?

13 Q. Anyone else in this industry, sir.

14 A. Huh?

15 Q. In this industry, sir.

16 A. We're a big company.

17 Q. Does the fact that you have a significant size and  
18 you have the agreement that you do with Dairy Farmers of  
19 America for a full supply arrangement with a significant

20 number of your plants give you a competitive advantage over  
21 companies of smaller size?

22 A. No.

23 Q. You're the director of procurement; right?

24 A. Right.

25 Q. What do you procure?

Cropper & Associates, Ltd.  
602.277.8882

704

For public distribution

1 A. Dairy. Dairy procurement.

2 Q. What do you procure?

3 A. Milk, cream, condensed, bulk.

4 Q. Do you procure on behalf of the plants, the other  
5 supplies other than the milk itself?

6 A. Supplies? What supplies?

7 Q. Well, do you bottle your own milk?

8 A. Yes, we bottle our milk.

9 Q. Do you procure the supplies for the bottles that  
10 contain it?

11 A. The resin?

12 Q. Whatever it might be.

13 A. No.

14 Q. You just procure the milk?

15 A. Dairy procurement.

16 Q. So that limits it to --

17 A. I'm familiar with what we pay in to the Producer  
18 Settlement Fund.

19 Q. And that -- are you familiar with what you pay for  
20 labels?

21 A. No.  
22 Q. Are you familiar with what you pay for bottles?  
23 A. No.  
24 Q. Caps?  
25 A. No.

Cropper & Associates, Ltd.  
602.277.8882

705

For public distribution

1 Q. Anything? Transportation?  
2 A. On bulk dairy commodities.  
3 Q. Okay. Would you agree with me that given your  
4 size, that with regard to those other commodities, leaving  
5 milk out, that you would pay less than someone of a smaller  
6 size?  
7 A. I don't know. Hopefully we're buying as good as  
8 we can.  
9 Q. And if you're buying in the quantities of your  
10 size, the probability is that you are getting the better  
11 deal than somebody who won't buy at those quantities;  
12 correct?  
13 A. I don't know that.  
14 Q. And that will give you the ability to be able to  
15 go ahead and sell the milk at a cheaper price given the fact  
16 that --  
17 JUDGE HILLSON: He answered that he didn't know  
18 that. Your answer is assuming he said yes but he didn't say  
19 yes. He said he didn't know.  
20 MR. RICCIARDI: I know what he said, Judge. I'm  
21 trying to explore his knowledge and I'm also attempting to

22 try to lay the foundation as to whether this witness has  
23 knowledge in this area or only has knowledge in the areas he  
24 wants to have knowledge in.

25 MR. BESHORE: I object to the question, Your

Cropper & Associates, Ltd.  
602.277.8882

706

For public distribution

1 Honor. Asked and answered.

2 MR. RICCIARDI: Fair enough.

3 BY MR. RICCIARDI:

4 Q. How much money is Dean investing in this plant in  
5 Clark County, Nevada?

6 A. I don't know.

7 Q. Do you have any idea?

8 A. More than a dollar.

9 Q. More than a buck. Okay. All right. So it's  
10 putting, let's say --

11 A. We're going from this zero. I know it costs money  
12 to build a milk plant.

13 Q. Let's say it's \$2.

14 A. I don't know. I don't know what it is.

15 Q. I'm going to use a hypothetical. Let's say it's  
16 \$2; okay?

17 Now, at the time that it's building its plant and  
18 investing the \$2 that it's investing up in Clark County,  
19 Dean Foods is relying upon the current state of the statutes  
20 and the regulations and the laws in Clark County to ensure  
21 that whatever it does in terms of its investment is going to  
22 have a return on its investment; correct?



23           A.    We are building that plant to service our  
24 customers.  
25           Q.    I understand.  And are you relying upon the

Cropper & Associates, Ltd.  
602.277.8882

707

For public distribution

1   current state of the law to ensure that whatever --  
2           A.    We are supporting a change to the law.  
3           Q.    I haven't finished my question, sir.  
4           A.    I thought you did.  
5           Q.    I had not.  Sometimes I pause.  I may try to fool  
6 you a little bit but I'm not done yet.  
7           A.    I apologize.  
8           Q.    Not a problem.  Let me try again.  
9                    The \$2 that Dean is investing in this plant in  
10 Clark County, it expects a return on its investment;  
11 correct?  
12          A.    Absolutely.  
13          Q.    And it is relying upon the current state of the  
14 law in Clark County to ensure that it gets its return on the  
15 investment; correct?  
16          A.    I hope we're not relying on the state laws.  
17          Q.    On any laws?  
18          A.    I hope we're not relying on that.  
19          Q.    You're not taking into consideration the current  
20 law and trying to make that investment?  
21          A.    I just hope we're not relying on it.  
22          Q.    Let's assume for a moment that what happens is  
23 just prior to the time that it opens its doors, that Clark

24 County says, "Well, wait a minute. You know, I told you  
25 this was the state of the law before, but now you have to

Cropper & Associates, Ltd.  
602. 277. 8882

708

For public distribution

1 pay another million dollars because we've now changed the  
2 law in terms of the taxation or in terms of the use  
3 privilege tax or whatever it is and it may have been this  
4 before but now that you've opened the doors, it's that." Do  
5 you think that's fair?

6 A. Well, things like that happen, I understand.

7 Q. I understand that, too. Do you think it's fair?

8 A. It's never fair when I have to pay more money.

9 Q. Never fair when Dean Foods has to pay more money;  
10 right?

11 A. Whoever. Put anybody in that blank.

12 Q. And it wouldn't be fair for Sarah Farms to have to  
13 pay more money for changing the rules in the middle of this  
14 game, would it?

15 A. Just fill in the blank. It's never fair when I  
16 have to pay.

17 Q. Okay.

18 As the Director of Procurement, were you involved  
19 in the contract with Swiss Dairy -- I mean, excuse me, that  
20 Swiss Dairy had in California?

21 A. No.

22 Q. Is it within the scope of responsibilities as  
23 Director of Procurement to be involved in contracts for  
24 customers?

25 A. No.

Cropper & Associates, Ltd.  
602.277.8882

709

For public distribution

1 Q. Where is your office?

2 A. Nashville.

3 Q. Have you ever been to California to the customer  
4 that you claim that Swiss Dairy lost?

5 A. Have I been to each one of the 20 Costco stores?

6 Q. That would be a good question to answer.

7 A. No, I have not been to each one of the 20 Costco  
8 stores.

9 Q. So it was Costco that you claim is lost?

10 A. I think so.

11 Q. As Director of Procurement, do you have any  
12 information regarding issues of quality and service with the  
13 customers of Dean Foods?

14 A. From time to time, if there's a quality issue  
15 that, for some reason, may get traced back to the raw milk,  
16 I get involved.

17 Q. Is quality an important issue for customers?

18 A. Absolutely.

19 Q. Is service an important issue for customers?

20 A. Yes.

21 Q. Have customers sometimes made decisions not to buy  
22 milk based upon either quality or service issues?

23 A. I would really rather not comment on what our  
24 customers think and how they made decisions. I don't know.  
25 I would be speculating.

For public distribution

1 Q. So you don't know what your customers were  
2 thinking in California either, do you?

3 A. Well, no, I do not. I was told by our guy out  
4 there that they changed because of the lower price.

5 Q. Okay. And have you been told by the guy out there  
6 that people changed from Dean Foods due to quality of  
7 service issues?

8 A. He didn't tell me that.

9 Q. Tell me other examples of times when people,  
10 customers, have changed from Dean Foods based upon  
11 quality-of-service issues.

12 A. To tell you the truth, I can't think of anyone  
13 changing for quality issues.

14 Q. Service?

15 A. And, again, that's not my piece of the business,  
16 but I'm not aware of any of our customers that have left us  
17 because we didn't serve them, you know, properly or we  
18 didn't have good quality products.

19 Q. How much was Dean Foods' Swiss Dairy operation  
20 selling to Costco in California for fluid milk?

21 A. I don't know.

22 Q. You don't know or you're not going to tell me?

23 THE WITNESS: I answered the question.

24 JUDGE HILLSON: He said he didn't know.

25

For public distribution

1 BY MR. RICCIARDI:

2 Q. And then, therefore, the information that you have  
3 concerning this alleged loss of business is really something  
4 that's not within the purview of your knowledge; correct?

5 A. I was told this, so I know about it.

6 Q. Have you been told about any other places in the  
7 United States where Dean Foods has lost business based upon  
8 price?

9 MR. ENGLISH: This is Charles English. I assume  
10 you mean other than what he's stated in his testimony  
11 already.

12 JUDGE HILLSON: Just answer the question that he  
13 asked.

14 MR. RICCIARDI: What I don't need is your help.  
15 He knows what's going on.

16 THE WITNESS: I'm trying to answer the question  
17 correctly.

18 BY MR. RICCIARDI:

19 Q. And I appreciate that.

20 A. Because you're asking the questions very  
21 specifically and I'm trying to answer them as correctly as I  
22 can.

23 Let me look at something first.

24 Q. If you've got some information you're going to  
25 rely upon that I haven't seen, I'd like to see it.

For public distribution

1           A.    This is my testimony. I was just going to reread  
2   that we're not complaining because customers -- we know and  
3   understand that the lost customers and lost sales happen.  
4   So I'm aware that, I guess -- just generally, I'm aware that  
5   we have lost customers. But specifically, I don't know if I  
6   can recall -- it's like trying to remember the plant that  
7   was built this year. I'm just not recalling that right now  
8   specifically.

9           Q.    All right. Let me give you a more general  
10   question and see if you can handle this one. Can you tell  
11   me, then, whether Dean Foods has ever lost sales or  
12   customers to regulated handlers based on price?

13          A.    I testified to that.

14          Q.    So that's occurred?

15          A.    I testified to it today, yes.

16          Q.    And has Dean Foods also lost sales to  
17   producer-handlers in other areas of the country?

18          A.    I just don't know.

19          Q.    Because that's not within the scope of your  
20   operation as a procurement --

21          A.    I probably just don't have a good enough memory to  
22   recall.

23          Q.    Has Dean Foods made a decision to downsize?

24          A.    Downsize what?

25          Q.    Its operation.

## For public distribution

1 A. In Las Vegas?

2 Q. Anywhere.

3 A. Do you mean have we decided -- have we made a  
4 decision to -- you need to define "downsize." From 8.632  
5 billion to 8. -- just define "downsize" for me.

6 Q. That would work. Let me get the --

7 You testified that competitiveness and efficiency  
8 is not necessarily a function of size. You say that;  
9 correct?

10 A. I testified to that.

11 Q. If that's the case, then why has Dean Foods  
12 decided to grow to be the largest in the country by double  
13 in competitiveness and efficiency is not a function of size?  
14 Why grow to be double the size of anybody else?

15 A. I can't answer that question. I don't know.

16 Q. And I look at your testimony regarding no present  
17 intention, and I quote it and close quote it on page 2, that  
18 "essentially sells to the California market." I've been  
19 listening to political discussion for too long to understand  
20 parceling words. I want to see if I can talk about that a  
21 little bit.

22 You don't know whether tomorrow Dean Foods, once  
23 it completes the plant in Clark County, will make a decision  
24 to sell into California; correct?

25 A. We haven't talked about it. It takes special

For public distribution

1 equipment to be able to do that processing.

2 Q. And if Dean Foods were to sell into California,  
3 would it have to pay any specific price under the Federal  
4 Order?

5 A. I think Clark County, the exemption is that if  
6 you're located in Clark County, that you're exempt from the  
7 federal regulation. That's my understanding. Now, there is  
8 a state milk commission in Nevada --

9 Q. Yes. I understand.

10 A. -- that regulates the price.

11 Q. What is the level of production of that facility,  
12 if you know?

13 A. The one that's being built?

14 Q. That would be true.

15 A. Zero today.

16 Q. That I understand. What's the level of  
17 anticipated production, sir? I don't want to fence with  
18 you.

19 A. It's a full-size plant. I don't know what it's  
20 going to be. I don't know what the volume is going to be.

21 JUDGE HILLSON: I think we've already had this  
22 dialogue maybe when Mr. Yale was questioning.

23 MR. RICCIARDI: He did ask that question, Judge.  
24 I was trying to see whether or not he had any knowledge  
25 whatsoever and I will explore and stop in just a little bit



For public distribution

1 longer.

2 JUDGE HILLSON: Well, I don't know -- what,  
3 Mr. English?

4 MR. ENGLISH: It was explored -- three times the  
5 question was asked with two or three paraphrasings of it by  
6 Mr. Yale. To say a different questioner, that's  
7 repetitiveness, when you start asking the same question just  
8 because it's a different questioner. If he wants to ask one  
9 more question, fine.

10 JUDGE HILLSON: If it's the same question, I'll  
11 just ask you to move on. If you are going to ask a  
12 different question --

13 MR. RICCIARDI: I am going to ask a different  
14 question, Judge.

15 JUDGE HILLSON: Go ahead. Ask it.

16 MR. RICCIARDI: I will.

17 BY MR. RICCIARDI:

18 Q. When you say a full-size plant, what do you mean  
19 by that?

20 A. It means they will have silos, fillers, and  
21 coolers, and it will --

22 Q. Let me get at it this way. Does Dean Foods  
23 currently have a full-size plant of the same size as  
24 anticipated in Las Vegas anywhere else in the country?

25 A. We have about 100 plants that range in size. So

For public distribution

1 that would match up with one of these other hundred. I'm  
2 almost sure it probably will. I don't know which one.

3 Q. Okay. And give me -- you told me there are 100  
4 plants. Lowest production number to highest production  
5 number, please.

6 A. I don't have that information.

7 Q. Can you tell me -- can you tell me a range of, by  
8 pounds if you want to do it or by gallons, if you can tell  
9 me that, of the production facility that is full-size in the  
10 current Dean's array?

11 A. I'm not prepared to answer that question.

12 Q. You're not prepared meaning you don't have the  
13 information today or you're not going to tell us because you  
14 think it's competitive?

15 A. It's competitive.

16 JUDGE HILLSON: Does that mean you do know but  
17 you're just not telling us because it's proprietary?

18 The question is, do you know --

19 THE WITNESS: The size of our plants are  
20 proprietary information so I won't answer it because it's  
21 proprietary information.

22 MR. RICCIARDI: Nothing further, Judge. Thanks.

23 JUDGE HILLSON: Thank you, Mr. Ricciardi.

24 Are there any further questions for the witness?

25 Go ahead, Mr. Beshore.

Cropper & Associates, Ltd.  
602.277.8882

717

For public distribution

EXAMINATION

1

2 BY MR. BESHORE:

3 Q. Earlier you were asked I think by Mr. Yale whether  
4 there have been new dairy plants built in the United States  
5 in the last few years. Aside from new construction, has  
6 Dean and other people invested substantial amounts of  
7 capital in expanding and enhancing existing facilities?

8 A. Yes.

9 Q. Isn't it the case that everybody in the dairy  
10 industry operates with the certain knowledge that there will  
11 be changes in the regulations which you are under from time  
12 to time?

13 A. Yes. I would almost state that another way is  
14 that, you know, we don't count on the regulations to never  
15 change.

16 Q. And in fact, there have been changes -- I mean  
17 Deans or Suiza, predecessors, bought fluid milk plants  
18 sometime before 2000 that had a Class I price that changed?

19 A. We've gone through MW to the BFP to the Class I  
20 differential to 33 Federal Orders down to whatever orders  
21 that we have now for base excess programs to blend prices  
22 that from the IB to the IA modified. I mean, yeah, we  
23 actually would be shocked if things didn't change.

24 Q. Okay. And that's part of the business and part of  
25 the cost of business?

Cropper & Associates, Ltd.  
602.277.8882

718

For public distribution

1 A. Part of the regulating of an industry is that the

2 regulations, I guess, are trying to, you know, evolve to the  
3 next place.

4 Q. Okay. Now, let's talk a little bit about the  
5 effect -- the way regulations work on your -- the dairy  
6 farmers that supply Dean's plants.

7 Isn't it correct, Ernie, that every year hundreds  
8 and hundreds of dairy farmers that supply Dean-regulated  
9 Federal Order plants exit the dairy business because,  
10 economically, that's required of them or that's their  
11 choice?

12 A. Yes, they go out of business. And sometimes they  
13 have got caught up in the regulation being associated with a  
14 small Federal Order with a high Class I utilization and a  
15 corresponding high blend price and then that order being  
16 merged in with seven or eight other orders and now, you  
17 know, they get a lot less blend price, a smaller blend  
18 price.

19 Q. So that the Federal Order blend price that the  
20 regulations provide them is insufficient for them to  
21 continue and they go out of business?

22 A. I don't know why they go out of business.

23 MR. BERDE: Okay. Thank you.

24 JUDGE HILLSON: Go ahead, Mr. English.

25 EXAMINATION

Cropper & Associates, Ltd.  
602.277.8882

719

For public distribution

1 BY MR. ENGLISH:

2 Q. Mr. Yates, you were asked a number of questions

3 about the costs faced by competitive dairy farmers. In the  
4 competitive marketplace, isn't it the case that dairy  
5 farmers receive a value for their milk which is the blend  
6 price?

7 A. Yes.

8 Q. And if producers who are participating in the  
9 program through regulated handlers receive the value of that  
10 blend price -- and assume for a moment a producer-handler  
11 has costs at the producer level higher than the blend  
12 price -- doesn't that mean, as a result of the exemption,  
13 that the procedures in the order are subsidizing the  
14 inefficiency of that producer-handler?

15 A. Yes.

16 Q. And is that the purpose of Federal Orders?

17 A. Is that the purpose?

18 Q. Is that the purpose of Federal Orders for such a  
19 subsidy to exist? And if a producer-handler does have  
20 higher costs at the farm, isn't it also the case that  
21 handlers, in a regulated marketplace, oftentimes face higher  
22 costs in the form of overorder premiums?

23 A. Right.

24 Q. And turning for a moment to the question of change  
25 in regulation, prior to 2000 and Federal Order Reform being

Cropper & Associates, Ltd.  
602. 277. 8882

720

For public distribution

1 implemented, plants in California that are regulated under  
2 the California program sold into Federal Order territory  
3 based upon one rule of compensatory payment. But after

4 2000, for all Federal Orders, including the Central  
5 Arizona-Nevada Order, isn't it true that a new rule applied  
6 to California, cross-selling in Phoenix specifically applied  
7 to California processors selling in federal market  
8 territories?

9 A. I'm aware of that.

10 Q. And that was a change to the system that, in fact,  
11 if you look at the Market Administrator statistics, affect  
12 Dean Foods' sales into the Central Arizona-Nevada market  
13 from California plants; correct?

14 A. I'm aware of that, yes.

15 Q. And you certainly didn't count on that in making  
16 any investment decisions in California; correct?

17 A. No.

18 Q. But it didn't surprise you; right?

19 A. Things change. You have to roll with the punches.

20 Q. And going to the Clark County exemption, that  
21 exemption resulted from the request of a processor who has  
22 not appeared in this proceeding; correct?

23 A. Yes.

24 Q. And Dean Foods certainly never requested that  
25 change in Clark County; correct?

Cropper & Associates, Ltd.  
602.277.8882

721

For public distribution

1 A. That's correct.

2 Q. And you've mentioned this legislation that Dean  
3 Foods has been supporting that would federally regulate the  
4 Los Angeles plant if they had sales into Arizona?

5 JUDGE HILLSON: You said Los Angeles.

6 BY MR. ENGLISH:

7 Q. I'm sorry. Las Vegas. Plants located in Las  
8 Vegas, under legislation, if they sell into Arizona or, for  
9 that matter, into California and if they are not regulated  
10 by the Nevada Dairy Commission, what you support is federal  
11 regulation?

12 A. Yes.

13 Q. And isn't it the case that the entity playing the  
14 largest role in opposition of that legislation is Sarah  
15 Farms?

16 A. I've been told that.

17 MR. ENGLISH: I have no further questions.

18 JUDGE HILLSON: Any other questions for the  
19 witness?

20 Mr. Ritchey?

21 MR. RITCHEY: Alan Ritchey.

22 EXAMINATION

23 BY MR. RITCHEY:

24 Q. Mr. Yates, do you all pay all of the premiums on  
25 some of your milk in some locations?

Cropper & Associates, Ltd.  
602.277.8882

722

For public distribution

1 A. Yes.

2 Q. Do you know what those premiums are?

3 A. I have some knowledge of what those premiums are,  
4 but I don't know if I could recite any of them exactly.

5 Q. Do you know some of the highest premiums you paid

6 in the Southeast in the past two months?

7 A. They were pretty high in Miami.

8 Q. Would you tell us how high?

9 A. You know, I can't remember the number.

10 Q. Within a --

11 A. It was north of three bucks, Miami.

12 Q. Does Dean Foods have plants in the Southeast in

13 towns that other competitors have plants?

14 A. Yes.

15 Q. Did Dean Foods pay the same premium that other

16 plants pay?

17 A. I don't know what the other plants pay but it's my

18 understanding that it would be the same.

19 Q. Can you tell me what your September price -- and

20 I'm not asking you to give it to me. Just you have

21 knowledge today of what your September Class I milk price is

22 going to be in every plant, have access to that price?

23 A. Yes.

24 Q. Do you have access to October's Class I price in

25 all of your plants?

Cropper & Associates, Ltd.  
602. 277. 8882

723

For public distribution

1 A. Or I can get access to it.

2 Q. I mean, October's price is available to you?

3 A. It's been announced, yes.

4 Q. Myself, being an independent dairy farmer, here it

5 is coming on late September. Can you have access to what my

6 blend price will be for September milk for milk with no



7 penalties for grades -- no premiums for grades available?  
8 A. I know the Class I portion of it. And I guess I  
9 didn't give a complete answer to your previous question.  
10 It's just the Class I prices that we know ahead of time.  
11 Q. That was the question I asked.  
12 A. Yeah. We have Class II, III, and IV that we have  
13 those classifications, too, in your plant. And we're in the  
14 same situation that you are. It's about the fifth day  
15 following the next month before you really know what that  
16 price is. But on the Class I portion of your blend, we do  
17 know what that Class I price and Class I premium is.  
18 Q. And that's true for September and that's true for  
19 October; right?  
20 A. Yes.  
21 Q. But of all the milk I ship during the month of  
22 September, I have no idea what I'm going to receive for it.  
23 A. Well, you know your Class I portion of it. You do  
24 not know the -- all of the II, III, and IV.  
25 Q. And do you know any other commodity that anybody

Cropper & Associates, Ltd.  
602.277.8882

724

For public distribution

1 sells that has no idea when they sell it on the 1st of the  
2 month the price they are going to get for it after the 15th  
3 of the next month?  
4 A. Well, once you sell it, usually you know. I mean,  
5 you put the corn up in the bins and you might hold that for  
6 months.  
7 Q. No. I'm talking about when you ship it.

8 A. Yeah, yeah.

9 Q. Do you know of any other commodity -- and I'm not  
10 just talking about farm commodities. I'm talking about  
11 crude oil, anything else that you ship that you don't know  
12 what you're going to receive for it for 45 days.

13 A. I can't think of any. Of course, you know, you  
14 can forecast that number. You keep track of the weekly NAS  
15 prices and work that into the formula and then factor that  
16 into your Federal Order blend price and you get pretty  
17 close. But to know it exactly, I agree with you 100  
18 percent. You don't know.

19 Q. Do you think that's fair for the dairy farmers  
20 that have to ship their milk, not knowing what they are  
21 going to get for it for 45 days?

22 A. Are you asking me if I think it's fair to have a  
23 regulated pricing system?

24 Q. No. I'm asking you if you think it's fair for us  
25 to have to ship milk --

Cropper & Associates, Ltd.  
602.277.8882

725

For public distribution

1 A. Well, are you asking me if the market is fair?

2 Q. No. I'm asking you a specific question. Do you  
3 think it's fair for a dairy farmer to have to ship milk 45  
4 days before he knows what he's going to get paid for it, yes  
5 or no?

6 A. Our obligation to the Producer Settlement Fund --

7 JUDGE HILLSON: Why don't you just answer the  
8 yes-or-no question.

9 THE WITNESS: That's what the regulations say. I  
10 mean --

11 BY MR. RITCHEY:

12 Q. I'm just asking you your opinion, your sole  
13 opinion, not the company's opinion. Just your opinion.

14 A. Considering the regulations, I think that's  
15 probably the best way to do it.

16 Q. I'm not asking you to consider the regulations.  
17 I'm just asking if it is fair for us to ship stuff off our  
18 property with no way in hell of getting it back and not  
19 having any idea what we're going to get paid for it.

20 A. We have been a proponent of forward contracting on  
21 Class I but it's not available to us.

22 JUDGE HILLSON: Mr. Yates, I'm going to suggest to  
23 you that you are going to get off the stand quicker if you  
24 answer the question, "Yes," "No," or, "I don't know."  
25 That's my suggestion.

Cropper & Associates, Ltd.  
602.277.8882

726

For public distribution

1 THE WITNESS: I don't know.

2 JUDGE HILLSON: He said he didn't know. He just  
3 answered it this time. He said he didn't know. He couldn't  
4 answer yes or no. He didn't know. So I think that  
5 question -- that's as close as you're going to get to an  
6 answer. I tried my best. I gave him three options and that  
7 was it.

8 BY MR. RITCHEY:

9 Q. Okay. But it is your understanding that you would

10 pay the same overorder premium in each area that every other  
11 plant in that area pays?

12 A. For the appropriate class?

13 Q. Yes, for the Class I milk.

14 A. That's my understanding, yes.

15 MR. RITCHEY: No further questions.

16 JUDGE HILLSON: Thank you, Mr. Ritchey.

17 Do you have some more questions, Mr. Ricciardi, or  
18 not?

19 MR. RICCIARDI: I have a couple follow-up, Judge.

20 FURTHER EXAMINATION

21 BY MR. RICCIARDI:

22 Q. Mr. Yates, do you consider yourself an expert on  
23 the federal statutes or federal regulations regarding milk?

24 A. I'm probably not an expert.

25 Q. So you're not here to give us expert testimony;

Cropper & Associates, Ltd.  
602.277.8882

727

For public distribution

1 correct?

2 A. I'm here to give my testimony and answer  
3 questions. I don't have data that I've done an analysis on  
4 or -- you know, I'm very familiar with the statutes but I  
5 don't know all of them.

6 Q. You're not here to give expert opinion; correct?

7 A. No.

8 Q. Okay. Have you ever operated a dairy yourself?

9 A. Yes.

10 Q. Have you ever operated as a producer-handler?

11 A. No.

12 Q. Tell me what -- in what ways you believe --

13 A. When you said "a dairy," I'm sorry, I might have

14 misunderstood you. Do you mean a farm or a plant?

15 Q. I'm talking about a farm.

16 A. Yes.

17 Q. This is a follow-up on some of the questions you

18 were asked by Mr. English.

19 When is a producer-handler inefficient?

20 A. I don't know.

21 Q. When would his operation be inefficient?

22 A. I don't know. I think his gallon-filler probably

23 runs the same speed as our gallon-filler runs.

24 Q. Can you tell me when a regulated producer would be

25 inefficient?

Cropper & Associates, Ltd.  
602.277.8882

728

For public distribution

1 A. Again, I don't have an opinion on that. I haven't

2 done an analysis on that.

3 Q. Would you agree with me that if there is a

4 regulated producer that's inefficient, that you're

5 subsidizing them?

6 A. If we do what?

7 Q. If there is a regulated producer who is

8 inefficient in whatever market you're in and you're paying

9 into the pool, that you're subsidizing that inefficient

10 regulated producer?

11 A. If the definition of -- before we were comparing

12 it to the blend price. So if you can give me a question  
13 like that, I could probably analyze it better in my mind.  
14 Q. That's not my question.  
15 A. Well, see, the word "inefficient," I don't know  
16 what the definition is.  
17 Q. You gave an opinion on it before.  
18 A. What was it? I don't remember.  
19 Q. That's the whole point.  
20 A. What's that?  
21 Q. You don't have any idea as to whether or not or  
22 what the word "inefficient" means in terms of an operation  
23 of a producer-handler; correct?  
24 A. I've answered the questions the best I can.  
25 Q. That's fair enough. Thanks.

Cropper & Associates, Ltd.  
602.277.8882

729

For public distribution

1 JUDGE HILLSON: Okay. Did you have another  
2 question, Mr. English? The way you were leaning there. . .  
3 You may step down, Mr. Yates.  
4 (Witness excused.)  
5 JUDGE HILLSON: I have 10:17.  
6 MR. BESHORE: If I might, Mr. Herbein is going to  
7 be the next witness. We are going to make available in the  
8 back of the room for everybody to collect during the break  
9 the copies of his statement and his curriculum vitae will be  
10 a minute.  
11 JUDGE HILLSON: I'm going to have Mr. Ritchey  
12 testify next. I'm going to have him testify. 15-minute

13 break then Mr. Ritchey, then Mr. Herbein.

14 (Recess at 10:16; resumed at 10:34.)

15 JUDGE HILLSON: All right. Let's go back on the  
16 record. Mr. Ritchey is seated here and I'm going to swear  
17 him in and he's going to give his testimony.

18

19 ALAN RITCHEY,  
20 a witness herein, having been first duly sworn by the Judge  
21 to speak the truth and nothing but the truth, was examined  
22 and testified as follows:

23

24 JUDGE HILLSON: Can you please state your name and  
25 spell it for the record and then make your statement.

Cropper & Associates, Ltd.  
602.277.8882

730

For public distribution

1 THE WITNESS: My name is Alan, A-L-A-N, Ritchey,  
2 R, as is Robert, I-T-C-H-E-Y. I am here on behalf of Alan  
3 Ritchey, Incorporated.

4 Alan Ritchey, Incorporated is a family-owned  
5 business owned by my wife and I, four of our five children  
6 and one nephew. It was started by my wife and I in 1963.

7 We have been feeding dairy cattle since 1987. And  
8 what I mean by "feeding," since 1987, we've owned a feed  
9 mill and the feed mill -- back in 1987 when we was feeding  
10 25 to 30,000 head of dairy cattle in North and Northeast and  
11 Central Texas and some in Southeastern Oklahoma.

12 We have been operating the dairy since the 1990s.  
13 We started thinking about dairying in the late '70s,

14 actually started the groundwork on the dairy in 1982.  
15 Unfortunately, I lost a son in the middle of it and that ended  
16 the plans for that time.

17 We built our dairy with the intentions of maybe  
18 sometime bottling our own milk. As for me being here today,  
19 you know, I'm here for several reasons. We have a vested  
20 interest in Arizona, New Mexico, California, and Washington  
21 with both employees in those four states and business  
22 operations in those four states and also we have a vested  
23 interest in the hearing because we see under the present  
24 conditions, the only way we can survive as a dairyman is by  
25 becoming a producer-handler. So we are very interested in

Cropper & Associates, Ltd.  
602.277.8882

731

#### For public distribution

1 trying to see that this proposal does not pass.

2 Now, for the guts of this program -- and "this  
3 program," I'm talking about the dairy program.

4 In 1937 when this law was first enacted, we were a  
5 rural nation with very little electricity on farms and most  
6 dairies having only the amount of cows that they could milk  
7 by hand. Of course, the lawmakers did not envision any of  
8 today's conditions in 1937.

9 In 1937, the weight laws in Texas was you could  
10 only haul 7,000 pounds net on a truck. Today, the trucks  
11 running over the nation can haul anywhere from over 80 to  
12 120,000 pounds gross.

13 In 1937, they was envisioning something like 12  
14 cows on a dairy versus 1200 to 12,000 cows that we have



15 today on many, many dairies.

16           And cream was transported in cans. They didn't  
17 envision 5,000 gallon tanker trucks hauling cream from the  
18 West Coast to the East Coast, milk for a thousand, 1400  
19 miles in a 24-hour period, unrefrigerated. I mean, it's  
20 refrigerated when it goes in the tank.

21           In 1937, there was very little refrigeration, if  
22 any, on farms. The milk had a very short life and there was  
23 very little milk sold in the stores as compared to what we  
24 sell today because so many people had their own milk yard.  
25 Even in cities everyone had their own milk yard.

Cropper & Associates, Ltd.  
602.277.8882

732

For public distribution

1           I wasn't born until 1938 and I was living 12 miles  
2 north of Ft. Worth at the time, and I was a pretty  
3 good-sized kid before we had milk at our local grocery store  
4 in town that we could go and buy. We had our own milk.  
5 Unfortunately, I'm the one that milked.

6           I seen my mom -- well, I won't say I seen her. My  
7 brother nowadays. But we turned a long way. My mom made a  
8 lot of cheese. In 1937, the lawmakers didn't envision  
9 grocery chains, Wal-Mart, Safeway and all of the grocery  
10 stores coast to coast, you know, had more inventory than  
11 most of the wholesale grocery houses had back at that time  
12 in one store.

13           They didn't envision the big co-ops like DFA and  
14 some of the other ones. They didn't envision bottling  
15 plants like Dean Foods that had bottling plants all over the

16 United States.

17           When I was small, even in Texas, why, it was  
18 little ice cream plants, cheese plants, small bottling  
19 plants in -- I'm going to say in towns of 12,000 people and  
20 above.

21           In 1937 the lawmakers didn't envision farms of  
22 10,000, 100,000 acres which is common today. They didn't  
23 envision feedlots with 10,000 head being a very small  
24 feedlot today and on up over 100,000 head.

25           They didn't envision the big chicken farms, the

Cropper & Associates, Ltd.  
602.277.8882

733

For public distribution

1 big hog farms.

2           And they dang sure didn't envision milk being so  
3 cheap that when you go into a small quick-stop grocery store  
4 that you pay as much or more for a bottle of water as you do  
5 for milk. I mean, that would be unheard of in 1937 to pay  
6 as much for a bottle of water as you did for a bottle of  
7 milk.

8           In 1937, they didn't envision a truck costing  
9 \$37,000, which is very common today. In 1937, you could buy  
10 one for \$700 or less. In 1937, my father traded in two  
11 Chevrolet trucks -- they was Chevrolet truck-tractors -- two  
12 Chevrolet pickups, one Chevrolet car for lots of 1938  
13 models, and he paid \$1,000 trade for the whole five units.  
14 That's \$200 apiece. \$200 apiece won't lease you a milk  
15 truck for a week today.

16           Now back to dairying. If ever -- I'm going to use

17 the word "dairyman" but that's either dairy man, dairy woman  
18 or dairy family, partnership or whatever. If every dairyman  
19 in the United States paid their family help -- and that's  
20 people that, you know, belongs to the family or the  
21 partnership or whatever -- as much as Dean Foods or any  
22 other company that has route sales pays their route truck  
23 and if they paid themselves just interest on the investment,  
24 I doubt that 5 percent would have made a profit in the past  
25 two years. If anybody has got something to tell me about

Cropper & Associates, Ltd.  
602.277.8882

734

For public distribution

1 that, I'd like to see it.

2 Yet with co-ops, with this outdated law, it's said  
3 to -- let me rephrase that a little bit.

4 Supposedly, in the eyes of everybody, the big  
5 co-ops and the further law which I think is extremely  
6 outdated, close to 70 years old, they are supposed to take  
7 care of the dairymen. I'm talking about the co-ops and the  
8 law. If they are doing such a good job of taking care of  
9 the dairyman, why is the dairyman not making money today?  
10 It's because of the regulation.

11 You know, to my way of thinking, the dairymen,  
12 especially the larger dairymen and even the small dairymen,  
13 they are going to have to take care of themselves. This  
14 business that somebody else is taking care of you, it's  
15 gone. It's gone on the farms, in the workplace. It's gone  
16 everywhere in the United States. You are going to have to  
17 take care of yourself.

18                   Today, on the way out to -- taking care of  
19 themselves is we determine for a producer-handler will -- on  
20 a small dairyman, taking care of themselves by start making  
21 some type of cheese besides cheddar cheese, which there is  
22 many, many hundreds of different types of cheese that can be  
23 made.

24                   We are a nation of a free universe. Russia tried  
25 total regulations for over 70 years and everybody knows what

Cropper & Associates, Ltd.  
602.277.8882

735

For public distribution

1 happened there. It failed. They are coming back just as  
2 fast as they can with pretty well total deregulation.

3                   I don't know how many of you have been to Russia  
4 but I've been over there once in the last four years. My  
5 wife has been twice. I was in some parts of the Soviet  
6 Union but this was right after the war, right after the wall  
7 came down and you should have seen the state that those  
8 farms was in and the state that people had to live in.

9                   We as a nation have done away with most all  
10 regulation as to price and size in the last 25 years with  
11 the exception of milk.

12                   What has happened with milk in the last 25 years,  
13 milk consumption per person has gone down, and I'm talking  
14 about fluid milk per person has gone down. The dairyman  
15 can't make a living dairying alone, most of them, a big  
16 percent of them.

17                   I brought this up a little bit in my question, but  
18 what commodity do any of you know of besides milk that is

19 priced by its use? If you buy a gallon of gasoline, no one  
20 asks you whether you are going to use that in your lawn  
21 mower, whether you are going to use it going to the store or  
22 going to church or going to work. For the same price of  
23 gasoline, it's all priced the same price, the same location.  
24                   The same thing goes with wheat or gold or crude  
25 oil or steel or vegetables. I mean, you are talking about

Cropper & Associates, Ltd.  
602.277.8882

736

#### For public distribution

1 milk being a short shelf life. It is not short compared to  
2 some vegetables that you buy. There are ways of storing  
3 lots of milk products over a long period of time. It's  
4 pretty hard to store a head of lettuce over a long period of  
5 time that I know about.

6                   In 1972 when our family started running trucks  
7 from Texas to the West Coast, we was driving along I-10,  
8 I-20 until we got to Phoenix -- I-20 starting out, I-20 run  
9 into I-10 and then, you know, when we got out here south of  
10 town, we had to take Interstate 8 down to Yuma because I-10  
11 wasn't finished on to the California line.

12                   But at that time, most all trucking was fully  
13 regulated. I had to drive that highway. I could name all  
14 of the trucking companies' fleets of trucks on my two hands  
15 that traveled that highway that had a fleet of more than 50  
16 trucks.

17                   Today, since deregulation, it's hundreds, if not  
18 thousands of trucks running up and down this highway with  
19 fleets of over 100 trucks.

20 Many of them are operating and operating  
21 successfully at a cheaper price than what the price was in  
22 1972.

23 Why is milk being left behind? This is my  
24 thinking. And that's because the little dairyman can't  
25 leave the farm long enough to go to Congress and lobby and

Cropper & Associates, Ltd.  
602.277.8882

737

For public distribution

1 do anything. They pretty well have to be there seven days a  
2 week. The big farmers, big dairy farmers -- it's almost  
3 impossible for them to get on the board of some of the  
4 co-ops because a lot of --

5 MS. DESKINS: Your Honor, I'm sorry to interrupt  
6 Mr. Ritchey. The reason I'm interrupting is it looks like  
7 we're getting into a conduct that's beyond the scope of the  
8 notice of this hearing. You know, just it was noticed here  
9 to talk about the producer-handler status within these two  
10 orders.

11 The issues you are bringing up are certainly  
12 interesting but it's not something that is relevant to this  
13 hearing.

14 THE WITNESS: I'm just almost through, but I'll  
15 try to keep it --

16 MS. DESKINS: Okay.

17 THE WITNESS: I'll just close by thinking it's my  
18 judgment that I don't have to become a producer-handler to  
19 stay in the dairy business, and I can work on the  
20 regulations and I have to work under many regulations, but I

21 can't work under a cap. There is not a cap on the size of  
22 Dean Foods. There's not a cap on the size of DFA and I  
23 don't think there should be a cap on us as to how much milk  
24 we produce or the milk that we sell as a producer-handler or  
25 any other outfit we may choose.

Cropper & Associates, Ltd.  
602.277.8882

738

For public distribution

1 Thank you.

2 JUDGE HILLSON: Thank you. Let me see if we have  
3 questions for you.

4 EXAMINATION

5 BY MS. DESKINS:

6 Q. I was wondering if I could try to clarify your  
7 position.

8 You have a farm that's located in Texas and  
9 Oklahoma?

10 A. Our dairy farm is located in Oklahoma and  
11 nine-tenths of our farming operations is in Oklahoma and  
12 one-tenth in Texas.

13 Q. Do you have any farms that are located in Arizona  
14 or in Oregon or Washington?

15 A. No, but we do have other business. We do have  
16 employees.

17 Q. Employees that are located in Arizona or  
18 Washington?

19 A. Right. We do pay state income taxes in the states  
20 that are applicable in those four states.

21 Q. Okay. When you say four states, you mean Arizona,

22 Oregon, Washington -- what's the fourth one?

23 A. Nevada and California, but California doesn't  
24 pertain to this.

25 Q. Okay. But your dairy herds are located in Texas

Cropper & Associates, Ltd.  
602.277.8882

739

For public distribution

1 and Oklahoma?

2 A. Right. All of our milking is in Oklahoma but we  
3 do bring young calves and heifers over on the Texas side and  
4 we do raise some of the feed on the Texas side. Our land  
5 joins the Texas-Oklahoma border.

6 Q. Okay. Now, are you shipping milk into the four  
7 states we've just mentioned?

8 A. Not at the present time and probably never there  
9 due to the freight weight from this location, our present  
10 location.

11 Q. Your concern is -- now, your concern is that you  
12 want the status of producer-handler to remain part of the  
13 Milk Marketing Order system?

14 A. Right. You know, I would prefer the milk  
15 marketing system completely go away. But if it stays, I  
16 definitely do not want a cap on the number of pounds that a  
17 producer-handler has to operate under.

18 Q. Okay. So you're in opposition to the proposal  
19 that suggests some kind of cap on how big a producer-handler  
20 could be?

21 A. Absolutely.

22 Q. Okay. And then just also -- don't give away



23 anything proprietary, but does your business have more than  
24 500 employees?  
25 A. Yes, ma'am, but let me also say it's also entirely

Cropper & Associates, Ltd.  
602.277.8882

740

For public distribution

1 owned by my wife and I and four of our five kids and one of  
2 two nephews.

3 Q. You said something about small dairymen are  
4 affected by these regulations. Can you tell us how they are  
5 affected? And I'm talking about just what's been noticed  
6 about the producer-handler status.

7 A. Well, they have been affected mostly by the price,  
8 not by the producer-handler. It's just when the price of  
9 milk fluctuates as much as 40 percent in a few months,  
10 that's an awful lot of fluctuation that a small dairyman has  
11 to contend with.

12 As I stated in my proposal, we have a feed  
13 operation and so we sell a lot of feed to small dairymen and  
14 large dairymen, too. But in 1987 our dairy feed business  
15 was the biggest percent of our business, in the feed. But  
16 we have probably lost over 80 percent of our customer base  
17 since 1987 by these farmers going out of business. The  
18 reason they went out of business is because they could not  
19 make a living. The reason most of them went out of  
20 business, they could not make a living on the dairy just  
21 milking cows. They had to sell the cows and build a town  
22 and get a job and make a living. And also, an older man  
23 that wants to retire and they have sons that -- could and

24 would inherit the dairy and many of them did inherit the  
25 dairy, but their wives -- today's young wife will not

Cropper & Associates, Ltd.  
602.277.8882

741

For public distribution

1 stand -- very few of them; there's exceptions to  
2 everything -- very few of today's young wives will stand for  
3 their husband to have to be right there on that job seven  
4 days a week, 365 days a year and from early morning to late  
5 at night when all their other friends, you know, work a  
6 four- or five-day week and are off on the weekends to go to  
7 the lake, to go to the movies or go to the parties, dances,  
8 you know, you name it. And their husbands get home at 5  
9 o'clock, eat and take the kids to the soccer games and go to  
10 the basketball games and all of that.

11 Q. Maybe they need to marry a different kind of  
12 woman.

13 A. Find that woman for me.

14 Q. I have another question for you. You said you  
15 have a feed operation. Are you selling feed into those four  
16 states we talked about?

17 A. No. We -- as far as the best of my knowledge is  
18 New Mexico.

19 Q. That's just what I was trying to find out about.  
20 You say New Mexico is where you have been selling for the  
21 feed operation?

22 A. Our feed operation is in Texas -- I mean our feed  
23 manufacturing plant is in Texas. But as far west that I'm  
24 familiar of that we've sold feed is the State of New Mexico.

25 Q. So you're selling feed all around where your plant

Cropper & Associates, Ltd.  
602.277.8882

742

For public distribution

1 is located in Texas?

2 A. Yes, in Texas, Oklahoma, Louisiana, and Arkansas  
3 is our main distribution area.

4 Q. Okay. Okay.

5 MS. DESKINS: I have no further questions for you.  
6 Thank you.

7 JUDGE HILLSON: Mr. Marshall?

8 EXAMINATION

9 BY MR. MARSHALL:

10 Q. Good morning, Mr. Ritchey. We've never met. My  
11 name is Doug Marshall. I'm with the Northwest Dairyman's  
12 Association co-operative in Seattle.

13 You mentioned you had employees in Washington.  
14 Could you clarify for me what the nature of your business is  
15 within Washington or Oregon?

16 A. I don't have any business in Oregon. We do have  
17 business in Washington state. It's -- most of the business  
18 is transporting with the postal system, United States  
19 Postal.

20 Q. You contract with the United States Postal  
21 Service; is that correct?

22 A. Yes, sir.

23 Q. So that's not related to the dairy business?

24 A. That's right.

25 Q. You are here today expressing a general concept.

For public distribution

1 Do you have a specific knowledge about the Pacific Northwest  
2 market and/or the concepts of Proposal No. 1 as they would  
3 apply in the Pacific Northwest market?

4 A. I have more knowledge than a lot have about the  
5 way they would apply to the producer-handlers.

6 Q. Are you expressing an opinion as to Proposal No. 1  
7 which relates to producer-handlers in the Pacific Northwest  
8 Order?

9 A. Right.

10 Q. You are?

11 I was interested in a comment that you made in  
12 your prepared statement. Again, I'm not going to beat up on  
13 you. That's not the kind of cross-examination I want to do.  
14 I just want to ask some questions. If this is confidential,  
15 just say so.

16 You said that you felt that a dairyman would need  
17 to become a producer-handler in order to survive. Did I  
18 hear that correctly?

19 A. I said I think that's one of the reasons that --  
20 excuse me. I said I think that that's one of the ways that  
21 a large dairyman is going to have to operate under to  
22 survive.

23 Q. Okay.

24 A. One of the . . .

25 Q. How large is your milking operation as distinct

For public distribution

1 from your feeding operation?

2 A. At the present time, we are milking in the  
3 neighborhood of 3200 cows.

4 Q. Do you feel, as to your market situation in  
5 Oklahoma, that you need to become a producer-handler in  
6 order to survive? Is that what you're telling us?

7 A. That's right.

8 Q. You indicated that you're a feeder of dairy  
9 cattle. I take it you have clients for whom you take in  
10 small heifers and raise them to milking size; is that  
11 correct?

12 A. No. There's times that we do buy heifers and feed  
13 them and sell them as heifers, whatever. What I was  
14 referring to is we own and operate two fairly large feed  
15 mills in Texas and we furnish a lot of dairies. There used  
16 to be a tremendous amount of dairies. It's getting fewer  
17 every year. We furnish them with feed all the way from  
18 complete feed to feed supplement and we have new things that  
19 help our customers.

20 Q. You're a feed manufacturer rather than a feeder of  
21 cattle; is that correct?

22 A. Right. We do raise cattle.

23 Q. Well, a moment ago, in answer to my question, you  
24 said you think a large dairyman may have to become a  
25 producer-handler to survive and you counted yourself in that

## For public distribution

1 category. Would you urge that all dairy farmers become  
2 producer-handlers in order to survive?

3 A. Well, I don't think all dairymen are capable of  
4 becoming a producer-handler.

5 I foresee that there's going to be -- if something  
6 doesn't change, there's going to be a large shake-up among  
7 large dairymen and small dairymen alike.

8 I know we bank with B of A. They have a large  
9 presence in the dairy industry in the West as well as some  
10 at home. And they tell me that 50 percent of the business  
11 is in bad shape.

12 Q. So you think becoming a producer-handler would be  
13 a way to get it out of bad shape and into good shape?

14 A. If you had to --

15 Q. It's just yes or no. Was becoming a  
16 producer-handler your thought that they could become more  
17 profitable as a producer-handler?

18 A. I'll have to qualify that. They have to have the  
19 financial backing and the mentality to --

20 Q. To operate a bottling business as well as a farm  
21 business?

22 A. Right.

23 Q. If all producers in the country were to become  
24 producer-handlers, do you think they would all be able to  
25 survive?

For public distribution

1           A.   Well, there is not -- not everybody survives in  
2 any business.

3           Q.   I guess my point is, there isn't enough market, is  
4 there, for all of the milk in the country to be bottled by  
5 producer-handlers if every producer is going to become a  
6 producer-handler?

7           A.   Not to be bottled. But there's -- you know,  
8 there's cheeses to make, all kinds of things to be made. I  
9 think it would -- that there's a lot of producer-handlers in  
10 the other -- Sarah Farms, for instance, they have done  
11 extremely well in marketing their milk by the quality of  
12 their milk, the advertising that they put into it, and it's  
13 been a very successful operation.

14          Q.   Let me just make a statement and ask you to  
15 comment on it as a way of getting to my point here. If  
16 there's only a limited amount of Class I market for bottled  
17 milk and if a producer needs to become a producer-handler in  
18 order to survive, then isn't it true that only a small  
19 number of producers can become producer-handlers before that  
20 entire market is filled?

21          A.   I wouldn't say a small number.

22                JUDGE HILLSON: When someone asks you a question,  
23 it can be answered, "Yes," or, "No," or, "I don't know," I  
24 would like you to try to answer it that way rather than  
25 giving a full explanation unless he asks for one, just to

For public distribution

1 keep us moving.

2 THE WITNESS: Would you repeat the question?

3 BY MR. MARSHALL:

4 Q. Let me help by just restating a different  
5 question.

6 There's not enough -- would you agree that there's  
7 not enough market for all producers to become  
8 producer-handlers?

9 A. Right.

10 Q. So if all producers who need to become  
11 producer-handlers to survive do so, what will happen to  
12 those who no longer have a market and who also need to  
13 become producer-handlers in order to survive?

14 A. That's not a yes-or-no answer; right?

15 Q. That was not. I'm inviting you to address --  
16 seriously, sir, I'm inviting you to address one of the key  
17 issues of the hearing in your own words, which is, if the  
18 market for Class I milk is taken by producer-handlers  
19 because they need to become producer-handlers to survive,  
20 there will be others who will not be producer-handlers  
21 because there's no market left. All of the Class I market  
22 will have been used up and they will not have access to the  
23 Class I market either as producer-handlers or through the  
24 blend price.

25 Will they be able to survive? Comment at length.





1           A.    The dairy and the farming is on our best --  
2 considered one operation.  There's somewhere in the range of  
3 90 employees.

4           Q.    90?

5           A.    Yes.

6           Q.    Okay.  Thank you.

7           A.    Give or take 10.

8           Q.    But less than 500 definitely?

9           A.    Yes.

10          Q.    In your area of the country, can you give us an  
11 estimate as to the size of new dairy farms that may enter  
12 the marketplace?  Just roughly how large are those farms in  
13 terms of number of cows?

14          A.    To the best of my knowledge, there hasn't been  
15 many dairies within 200 miles of us in the last few years.

16          Q.    Do you have an estimate as to the average herd  
17 size of the farms that are existing in your area right now?

18          A.    We tend to have three different dairy areas in our  
19 market.  The dairies in East Texas, most of those dairies  
20 run from a little less than 100 to a couple of hundred head.

21                 The state of -- Waxahachie area, ten years ago  
22 there was a lot of dairies moving in that area.  Today they  
23 are moving out.  But they probably average over a thousand  
24 head.  Some of them 2,000 head.

25                 There's a little area southwest of Wichita Falls,

Cropper & Associates, Ltd.  
602.277.8882

750

For public distribution

1   Windthorst area, that's a little German town, there's --

2 those dairies, you know, run from 200 to 500 plus cows,  
3 approximatel y.

4 Q. Okay. Do you have an estimate as to how many cows  
5 a dairy farmer would have to milk to produce 3 million  
6 pounds of milk each month, roughly?

7 A. Well, we don't get those. Some of the people out  
8 here did. Right today, it's been awful hot. Last month we  
9 were averaging around 3200 head and we produced over 7  
10 million pounds. But we had a lot of 105-degree days and  
11 85-degree nights. So you can calculate the math out.

12 Q. So you did about 7 million pounds with 3200 cows?

13 A. Last month.

14 Q. Last month.

15 A. It's times that we go up to maybe 9 million  
16 pounds.

17 Q. Okay. We'll do the math. We won't make you do  
18 it.

19 You testified that you have explored or at least  
20 you thought about becoming a producer-handler, thought that  
21 that could be an option for you and other dairy farmers. Is  
22 it your opinion that being a producer-handler would increase  
23 the options you have in marketing your milk?

24 A. Right.

25 Q. What options do you have right now for marketing

Cropper & Associates, Ltd.  
602. 277. 8882

751

For public distribution

1 your milk? Are you a member of a co-operative?

2 A. Yes.

3 Q. Which co-operative are you a member of?  
4 A. DFA.  
5 Q. Okay. So you market all of your milk right now  
6 through DFA?  
7 A. That's right.  
8 Q. What other options would you have as far as  
9 marketing your milk if you weren't a member of Dairy Farmers  
10 of America?  
11 A. It would be extremely limited.  
12 Q. Is there any real option for you?  
13 A. There are a couple of small co-ops affiliated with  
14 DFA. So it's really not any change.  
15 Q. So they are the only game in town?  
16 A. That's right.  
17 Q. Okay. Is it your opinion that becoming a  
18 producer-handler involves a significant amount of risk?  
19 A. It involves an extreme amount of risk.  
20 Q. And as a businessman, if you're going to take on  
21 additional risk, would you assume that there would be some  
22 kind of additional return on your investment for undertaking  
23 that risk?  
24 A. I would certainly hope so.  
25 Q. Okay. I think I just have one more thing I'd like

Cropper & Associates, Ltd.  
602.277.8882

752

For public distribution

1 to follow up on.

2 The production you experience at your farm, you  
3 said you get 7 million pounds out of your 3200 cows for the

4 last month and you indicated that could go as high as 9  
5 million pounds.

6 The production on your farm, like most dairy  
7 farms, fluctuates from season to season, month to month. Is  
8 that accurate?

9 A. Right.

10 Q. How does that production fluctuate? I mean as far  
11 as time of year. Is this time of year a period of high  
12 production or low production or average production?

13 A. Well, we're just getting out of the lowest  
14 production. But it all depends on the temperature. When  
15 the temperature runs 105 in the daytime and 85 at night,  
16 when it's an 85 percent relative humidity, it's hard to keep  
17 the cows -- the cow is under stress all the time.

18 Q. In the spring months, do you have higher  
19 production than you would at this time of year?

20 A. Right.

21 Q. Okay. In the springtime, would your production be  
22 closer to 9 million pounds than 7 million?

23 A. I would hope it is this next spring.

24 Q. Would it -- could it be even higher than 9 million  
25 pounds?

Cropper & Associates, Ltd.  
602.277.8882

753

For public distribution

1 A. I hope it's in the 9 million range.

2 Q. Okay. I guess I thought that was my last point  
3 but I have one more thing I want to explore with you.

4 The past two years have been kind of hard for

5 dairy farmers across the country, haven't they?

6 A. That's right.

7 Q. Is that because of low prices in general that they  
8 receive for their milk?

9 A. That would be the number one challenge, yes.

10 Q. In the past two years, and I'm not asking you to  
11 disclose specific figures, at any time during that period,  
12 did you, for instance, experience a situation where the  
13 blend price you received for your milk was lower than the  
14 cost of producing your milk?

15 A. In every month in the last 24 months.

16 Q. Every month for the past two years, the cost to  
17 produce your milk has exceeded the blend price you've  
18 received?

19 A. That's right.

20 Q. So your milk check doesn't cover your cost of  
21 expenses?

22 A. That's right.

23 Q. Do you think that other dairy farmers that you've  
24 talked to in your area or throughout the country have had  
25 similar experiences?

Cropper & Associates, Ltd.  
602. 277. 8882

754

For public distribution

1 A. Yes.

2 Q. Do you have any reason to think that a  
3 producer-handler might have similar problems with the cost  
4 of producing their milk being higher than what the blend  
5 price is in their area?

6 A. Right.

7 MR. MILTNER: Thank you. I don't think I have  
8 anything else.

9 EXAMINATION

10 BY MR. RICCIARDI:

11 Q. Good morning, Mr. Ritchey. Al Ricciardi. How are  
12 you?

13 A. Just fine.

14 Q. Good. A couple of things. I understand from your  
15 testimony that you're fairly familiar with the dairy  
16 industry. Am I correct in that assumption?

17 A. Well, I hope I'm somewhat familiar.

18 Q. Somewhat familiar. Are you familiar with a  
19 company by the name of Dean Foods?

20 A. Yes.

21 Q. Would you describe Dean Foods as the -- and these  
22 are my words -- 800-pound gorilla in the dairy industry?

23 A. Well, no. They are probably 1200-pound.

24 Q. Okay. Fair enough.

25 Does Dean Foods have either fluid milk plants or

Cropper & Associates, Ltd.  
602.277.8882

755

For public distribution

1 other milk plants in Oklahoma and Texas?

2 MR. BESHORE: Your Honor, with all due respect,  
3 asking Mr. Ritchey about his opinions of Dean Foods'  
4 operations I don't think is going to assist the Secretary in  
5 getting to the issues in this hearing. And I object to it.

6 JUDGE HILLSON: I'll let him ask a few questions

7 in that direction. I hope we don't take a whole long time.

8 MR. RICCIARDI: I'm moving on, Judge.

9 JUDGE HILLSON: Okay.

10 THE WITNESS: Dean Foods does have several plants  
11 in Texas.

12 BY MR. RICCIARDI:

13 Q. And this gets to the point of some questions that  
14 were asked by Mr. Marshall.

15 Would you agree with me that if Dean Foods  
16 continues with acquisitions and the type of growth that it  
17 has shown over the last few years, that a number of  
18 independent producers in the areas that you live in,  
19 Oklahoma and Texas, are going to be out of business?

20 A. Are you talking about dairy plants or dairy farms?

21 Q. Both.

22 A. Yes.

23 Q. Is becoming a producer-handler one way to attempt  
24 to compete with a megacorporation like Dean Foods?

25 A. Yes.

Cropper & Associates, Ltd.  
602.277.8882

756

For public distribution

1 Q. Let me ask you some questions and ask you, would  
2 you agree that producer-handlers assume the full risk  
3 associated with operating the production, processing, and  
4 distribution business?

5 A. Yes.

6 Q. Would you agree that those risks are real and the  
7 capital requirements and management skill required by such



8 an operation is substantial?  
9 A. Very much so.  
10 Q. Would you agree that producer-handlers have a  
11 strong economic incentive to produce their own milk  
12 market -- to their own milk market demand only?  
13 A. Would you repeat that question?  
14 Q. It's probably not a good one. Let me ask a  
15 different one.  
16 Would you agree that balancing milk production to  
17 market demand requires careful planning and efficient  
18 management by a producer-handler?  
19 A. Yes.  
20 Q. Would you also agree that the existence of a  
21 producer-handler can promote a fresher, more local milk  
22 supply?  
23 A. Most definitely.  
24 Q. And that actually, the existence of a  
25 producer-handler would promote competitiveness in the fluid

Cropper & Associates, Ltd.  
602.277.8882

757

For public distribution

1 milk area?  
2 A. Most definitely.  
3 MR. RICCIARDI: I don't have anything further.  
4 JUDGE HILLSON: Okay. Mr. English.  
5 EXAMINATION  
6 BY MR. ENGLISH:  
7 Q. Sir, this first question may get to confidential  
8 information, and if you don't want to give it to us, you are

9 certainly welcome not to.

10 I did some quick math back here with respect to 7  
11 million pounds which works out to 70,000 hundredweight  
12 which, at \$10 a hundredweight, would be \$700,000 in one  
13 month.

14 Would it be fair to say that as opposed to the  
15 number of employees, your income for your farm for a year  
16 exceeds \$750,000?

17 A. Yes.

18 Q. And when you -- you're presently a producer  
19 marketing milk through Dairy Farmers of America, and as a  
20 result, your milk is pooled on a Federal Order; correct?

21 A. I'm assuming so, yes.

22 Q. And if a producer-handler built an operation in  
23 the market in which DFA is pooling your milk and that  
24 producer-handler sold, for instance, 10 million pounds of  
25 Class I, that would be 10 million pounds less of Class I

Cropper & Associates, Ltd.  
602.277.8882

758

For public distribution

1 contributing to your milk check; correct?

2 A. That's the way I understand it. But I actually  
3 don't know what area my milk is pooled in.

4 Q. I appreciate your coming here today, especially  
5 from Oklahoma.

6 What is your -- you were asked questions about  
7 your business in Washington. What is your business interest  
8 in Arizona?

9 A. It's contracting with the Postal Service and

10 Amtrak, the railroad.

11 Q. Is it a trucking business that you're involved in  
12 here in Arizona?

13 A. That's right.

14 Q. And how did it come about that you came to this  
15 hearing? Did somebody at this hearing today ask you to  
16 come?

17 A. No, sir.

18 Q. How did you first hear about this hearing?

19 A. I believe I found it on the Web site. I won't say  
20 Web site -- on the Web. I was looking at different rules on  
21 the producer-handlers in different areas.

22 Q. And you were looking at those rules,  
23 producer-handlers for different areas, because you continue  
24 to be interested in becoming a producer-handler?

25 A. That's right.

Cropper & Associates, Ltd.  
602.277.8882

759

For public distribution

1 Q. And how did you get here for the hearing, sir?

2 A. By plane.

3 Q. Was that commercial or private?

4 A. I don't think that's --

5 JUDGE HILLSON: Is there a reason you want to know  
6 this?

7 MR. ENGLISH: I'll stop here.

8 JUDGE HILLSON: Anything else? Okay, Mr. Ritchey.  
9 Thank you very much for your testimony. You may step down.

10 THE WITNESS: Thank you, Judge, for letting me

11 speak.

12 JUDGE HILLSON: You're welcome.

13 Let's get Mr. Herbein's direct testimony and then  
14 we'll break for lunch.

15 (Witness excused.)

16 MR. BESHORE: I call Carl Herbein.

17

18 CARL D. HERBEIN,

19 a witness herein, having been first duly sworn by the Judge  
20 to speak the truth and nothing but the truth, was examined  
21 and testified as follows:

22 JUDGE HILLSON: I'll ask you if you could please  
23 state and spell your name for the reporter.

24 THE WITNESS: Carl D. Herbein, C-A-R-L, middle  
25 initial D, Herbein is spelled H-E-R-B-E-I-N.

Cropper & Associates, Ltd.  
602.277.8882

760

For public distribution

1 MR. BESHORE: Before we go into Mr. Herbein's  
2 testimony, I would note that I've asked the court reporter  
3 to mark for the record and I would represent -- Your Honor,  
4 you need four copies?

5 JUDGE HILLSON: Right. It's four copies of --  
6 well, the four copies. One goes to the court reporter, you,  
7 me, and the witness. Four copies total. And I think the  
8 first one will be number 24. How many exhibits do you have?

9 MR. BESHORE: I have two exhibits. I would like  
10 number 24 to be Mr. Herbein's curriculum vitae and number 25  
11 a ten-page set of exhibits, the first page entitled Cost

12 Structure of Fluid Milk Plants of Various Sizes.

13 JUDGE HILLSON: Exhibit 24 is the curriculum vitae  
14 and Exhibit 25 is the table.

15 (Exhibit Nos. 24 and 25 marked for  
16 identification.)

17 EXAMINATION

18 BY MR. BESHORE:

19 Q. You've stated your name. Did you provide us your  
20 address?

21 A. I did not.

22 Q. Could you tell us your business address?

23 A. Yes. 401 Olney, O-L-E-Y, Reading, Pennsylvania.

24 Q. And you are a certified public accountant by  
25 profession; is that correct?

Cropper & Associates, Ltd.  
602.277.8882

761

For public distribution

1 A. Yes, sir.

2 Q. Is the document that has been marked as Exhibit 24  
3 a copy of your curriculum vitae?

4 A. Yes, it is.

5 Q. Would you please provide us with some highlights  
6 of your profession, background, and experience as it relates  
7 to the testimony you're going to give today?

8 A. Yes. I'd be delighted to.

9 First of all, my current position is managing  
10 partner of Herbein & Company, a CPA firm with approximately  
11 100 employees. We are headquartered in Reading,  
12 Pennsylvania. As I mentioned earlier, I'm a CPA in the

13 Commonwealth of Pennsylvania. As to my particular  
14 experience in the dairy industry, beginning in the mid-'70s,  
15 I have been the partner in charge of services for all of our  
16 dairy clients. I've worked extensively with the dairy  
17 processors in Pennsylvania in the rate-making process which  
18 is managed by the Pennsylvania Milk Marketing Board.

19 I've previously testified before USDA at federal  
20 milk hearings. I visited on site and have provided various  
21 types of accounting services to more than 150 dairy plants.

22 I've been a frequent speaker at dairy association  
23 meetings, including the Pennsylvania Association of Milk  
24 Dealers, the All-Star Dairy conventions, Quality Check  
25 Dairies national conventions, Master Dairies meetings, the

Cropper & Associates, Ltd.  
602.277.8882

762

For public distribution

1 New York State Dairy Foods annual meeting and also the  
2 International Association of Milk Control Agencies.

3 I've published three articles on agriculture and  
4 milk: One, "Financing Agribusiness Growth," a second one  
5 concerning product costing in a volatile environment, and my  
6 most recent article was entitled "Milk Costing and  
7 Regulation -- Is There a Conflict?"

8 I also developed, in conjunction with the  
9 International Dairy Foods Association, the Dairy Cost  
10 Accounting Workshop which is presented -- which I present  
11 annually to the industry.

12 I've also been engaged by several state agencies  
13 to provide consulting services in the cost of production at

14 the processor level. The State of Colorado and the State of  
15 New Jersey are those two examples.

16 Q. I don't think there has been -- or I don't know  
17 that there will be a witness from the International Dairy  
18 Foods Association in this hearing.

19 Q. Could you just identify for the record what that  
20 organization is and who its constituency is?

21 A. Yes. The IDFA, as we call it, is a trade  
22 association, the members of which are the vast majority of  
23 milk and ice cream and dairy product manufacturers in the  
24 United States and the suppliers to those companies. It's  
25 headquartered in Washington and involved with providing

Cropper & Associates, Ltd.  
602.277.8882

763

For public distribution

1 educational services to their members, trade shows, and also  
2 very actively involved with the regulation of the industry  
3 from monitoring change in the orders and so forth.

4 Q. Okay. For how many years have you presented that  
5 dairy cost accounting workshop for IDFA?

6 A. At least 10.

7 Q. And did you, in fact, design and create that  
8 program for IDFA?

9 A. Yes, that's a Herbein creation.

10 Q. Mr. Herbein, to your knowledge, do you know any  
11 other CPAs in the United States that have done as much work  
12 with dairy processing plants from coast to coast as you  
13 have?

14 A. I've not encountered anyone.

15 MR. BESHORE: Your Honor, at this point, I would  
16 offer Mr. Herbein as an expert in dairy plant cost  
17 accounting and to testify in that capacity and express  
18 opinions as an expert in that capacity.

19 JUDGE HILLSON: Do you want his CV moved into  
20 evidence?

21 MR. BESHORE: Oh, absolutely. Yes.

22 JUDGE HILLSON: Any objection?

23 Okay. He can testify as an expert and, as well,  
24 Exhibit No. 24 is admitted into evidence.

25 MR. BESHORE: And Mr. Herbein has been recognized

Cropper & Associates, Ltd.  
602.277.8882

764

For public distribution

1 as an expert for his testimony?

2 JUDGE HILLSON: Yes. That's fine. I mean, it's  
3 up to the Administrator to weigh the testimony in any event.  
4 He's qualified as an expert.

5 MR. BESHORE: Thank you.

6 BY MR. BESHORE:

7 Q. Now, Mr. Herbein, have you prepared a statement, a  
8 brief two-page statement, which summarizes the work that you  
9 have done for this hearing?

10 A. Yes. It's a three-page statement.

11 Q. A three-page statement. Could you proceed with  
12 that statement?

13 A. Yes. I'd be glad to.

14 I've been engaged by Dairy Farmers of America to  
15 analyze the value of unpriced raw milk to a large



16 producer-handler and to compare that value with the cost of  
17 milk to regulated processors. I've also been asked to  
18 compare the economic impact of a regulated handler competing  
19 with an unregulated producer-handler.

20 The scope of my engagement: I utilized our firm's  
21 proprietary database of dairy manufacturers' operating costs  
22 to conduct my comparison. This database is maintained on a  
23 confidential basis utilizing financial information extracted  
24 from the financial statements and other accounting data of  
25 our clients. We are authorized to utilize this information

Cropper & Associates, Ltd.  
602.277.8882

765

For public distribution

1 on a confidential basis for this engagement. Additionally,  
2 our use of client data is required to be confidential so as  
3 to be in accordance with the Code of Professional Conduct of  
4 the American Institute of Certified Public Accountants.

5 My findings: The results of our analysis are  
6 presented on Exhibit 25.

7 The first exhibit presents, for dairy plants of  
8 six sizes, the costs of processing and packaging raw milk  
9 into fluid milk products. The data depicts the actual costs  
10 of 20 dairy plants from our database selected to provide a  
11 representative set of plant costs of various sizes. The  
12 costs have been adjusted, using a regional CPI adjustment  
13 index, to show the costs for both the Order 131 and Order  
14 124 areas.

15 The data show that as plant volumes increase, the  
16 cost of processing decreases on a per-unit basis. The

17 change in cost per unit is greatest at the low end of the  
18 volume spectrum. Column A shows the costs of a  
19 producer-handler in the 90,000 pound per month production  
20 range, a volume which approximates the median size of  
21 producer-handlers in the Federal Order system. Column B  
22 shows the costs for a fully regulated pool plant, with 2  
23 million pounds per month of package fluid milk products.  
24 Columns C, D, E, and F, show the costs of plants of 5  
25 million, 12 million, 18 million, and 30 million pounds

Cropper & Associates, Ltd.  
602.277.8882

766

#### For public distribution

1 respectively.

2           The slope of the curve on this exhibit is quite  
3 steep at the lower volumes and flattens out as volumes  
4 increase. The difference in the cost of processing 100  
5 pounds of producer milk into fluid milk products decreases  
6 by between \$4.40 and \$4.75 per hundred pounds between  
7 columns A and B, an amount far greater than the cost  
8 advantage of being unregulated.

9           At the 2 million-pound-per-month size, a  
10 producer-handler can be fully competitive with regulated  
11 pool plants on a cost-of-processing and packaging basis. At  
12 this point, the competitive interaction between these  
13 handlers in the marketplace will be determined by their  
14 respective cost of raw milk.

15           Q. Could I interrupt you there just a second,  
16 Mr. Herbein?

17           A. Yes.

18 Q. Could you, for purposes of identifying the set of  
19 10 tables and graphs in Exhibit 25 -- have you labeled them  
20 with letters A to K?

21 A. I have not but I will.

22 Q. Okay. If you would, when you go back to your  
23 statement, then, indicate which page, by letter, of  
24 Exhibit 25 you're referring to.

25 A. Continuing, Exhibit E is a comparative analysis of

Cropper & Associates, Ltd.  
602.277.8882

767

For public distribution

1 the cost of serving a warehouse store count by fluid milk  
2 plants and a large producer-handler. The starting point for  
3 the study is the actual retail sales prices of a gallon of 2  
4 percent milk in the Phoenix area during January to June of  
5 2003 from warehouse stores.

6 From that point, by accumulating and subtracting  
7 the store markup, and the processing, packaging, and  
8 delivery costs to service such an account, I've calculated  
9 the value of the raw milk to the handler and compared those  
10 values to the minimum Federal Order Class I price and the  
11 statistical uniform price for producers.

12 The exhibit shows that a large producer-handler  
13 can service such an account and return a substantially  
14 above-market premium over the uniform producer price;  
15 however, the handler paying the Class I price for its raw  
16 milk supply will have little or no margin, even under the  
17 specific cost assumptions I have utilized.

18 When the average cost of processing and packaging

19 milk in the representative plants as summarized on  
20 Exhibits -- this would be F through K.

21 Q. Exhibit 25, pages F through K?

22 A. Yes. -- Exhibit 25, F through K, are compared to  
23 the actual costs of servicing these warehouse stores in  
24 Phoenix, each plant would suffer a large loss in supplying  
25 the account.

Cropper & Associates, Ltd.  
602.277.8882

768

#### For public distribution

1 In other words, the producer-handler's cost  
2 advantage on value milk enables it to serve these stores  
3 quite profitably at an into-store price that cannot be  
4 matched by pool plants. This analysis could be repeated for  
5 any type of customer which the producer-handler chooses to  
6 serve and the result would be the same.

7 The large producer-handler is in a position to  
8 acquire any account which it chooses to service by offering  
9 a price which the regulated plant could not possibly meet  
10 while staying in business.

11 My conclusion: The current Federal Order  
12 regulations provide the unregulated producer-handler with  
13 the significant cost advantage that cannot be matched by  
14 handlers that are regulated. The type and size of  
15 producer-handler that has developed utilizing these cost  
16 advantages is not at all comparable to the small  
17 producer-handler with a retail outlet located at the farm.  
18 Today's largest producer-handlers are vertically integrated  
19 competitive forces in the fluid milk industry serving large

20 wholesale customers. The elimination of the unfair economic  
21 advantage of the large producer-handler, while protecting  
22 the integrity of the small producer-handler, is easily  
23 accomplished by providing the specific control points  
24 requested at this hearing.

25 Q. Now, I'd like to turn to Exhibit 25, Mr. Herbein,

Cropper & Associates, Ltd.  
602.277.8882

769

For public distribution

1 and ask you to review that in more detail. You have it  
2 available on PowerPoint. I want to just take a minute and  
3 have that set up so we can have it on the screen and discuss  
4 it.

5 MR. RICCIARDI: And, Your Honor, one point. This  
6 is Al Ricciardi. We did receive the first two pages of the  
7 prepared statement. I haven't seen the third page and I'm  
8 assuming that that is going to be made available.

9 MR. BESHORE: It will be made available.  
10 Apparently, the reproduction process didn't pick up the  
11 third page. I will make that available. We'll get it done  
12 and have it available for everyone.

13 BY MR. BESHORE:

14 Q. Let's look at page A, the first page of  
15 Exhibit 25. Could you just review the information you've  
16 presented in that document, Mr. Herbein?

17 A. Yes, I will. And just to -- for the participants,  
18 my intention will be to review each of these exhibits  
19 highlighting what we did, what we're showing, and explaining  
20 briefly the content of the exhibits.

21 Q. Okay.

22 MR. BESHORE: Before you go any further, can we  
23 turn down the lights a bit, Your Honor, to assist --

24 JUDGE HILLSON: I don't have any problem with  
25 that. Don't ask me where the switches are.

Cropper & Associates, Ltd.  
602.277.8882

770

For public distribution

1 This is not going to be real easy to see. I guess  
2 you can follow along in your charts. If people need to move  
3 up, do what you have to do.

4 THE WITNESS: The handouts are exactly the same as  
5 the PowerPoint presentation. Please use whichever you're  
6 more comfortable with, Mr. Beshore.

7 Should I continue?

8 BY MR. BESHORE:

9 Q. Yes, please do.

10 A. The first exhibit -- in this first exhibit, which  
11 is actually a two-page exhibit, we're going to compare and  
12 present the cost structure for fluid milk plants of various  
13 sizes. The first line, monthly volume, it's important to  
14 note that this is Class I pounds only. Beginning with a  
15 producer-handler, as I mentioned in my prepared statement,  
16 with 90,000 pounds per month we are showing both the costs  
17 for both Order 131 and 124.

18 It's important to note that we've adjusted our  
19 database, that we have costs that are applicable to the two  
20 areas so that we are making an apples-and-apples comparison  
21 for the Secretary.

22                   The first page we show the producer-handler. Then  
23 the next size is a 2 million-pound-per-month plant,  
24 processing 2 million pounds of Class I product. Group C is  
25 a 5 million-pound-per-month Class I.

Cropper & Associates, Ltd.  
602.277.8882

771

#### For public distribution

1                   Included in these groupings, the producer-handler  
2 also in the B and C group, we have multiple entities whose  
3 information I've extracted from our database. There are two  
4 producer-handlers. There are four B size companies. There  
5 are four C size companies.

6                   Now focusing on the rest of the exhibits, the  
7 first item we are going to see after the monthly volume will  
8 be to show a per-gallon basis and how many gallons per day  
9 to show the production volume. Then it's important to note  
10 the container. That's a very large and important component  
11 of the cost of the dairy product. And the container source,  
12 as you'll see, is of two types. We are either purchasing  
13 our dairy containers or we're blow-molding them at the site  
14 of the dairy itself.

15                   Then we have our costs on a per-gallon basis for  
16 plant processing; the packaging cost, which is the  
17 container; and then we have our product shrink, which is the  
18 amount of milk that does not end up in a container because  
19 it's lost during the processing of the plant -- in the milk  
20 in the plant. Some milk goes down the drain. Some milk  
21 remains in the fillers at the end of the day, inaccuracies  
22 of production and so forth. And that's what, in the

23 industry, we call shrink.  
24 Then we're going to see a per-gallon number and  
25 we've converted that to a per-hundredweight number, which is

Cropper & Associates, Ltd.  
602.277.8882

772

For public distribution

1 what's pertinent.

2 Let's take a look at the results. For the  
3 producer-handler in 131, his costs, on a per-hundredweight  
4 basis, are \$11.71. In 124, that number is \$12.55.

5 Moving on to the results in the B size, for 131  
6 the cost is \$7.31 and in 124, \$7.80. For the C type, 5  
7 million pounds per month, the cost is \$6.88 in 131 and \$7.33  
8 in 124.

9 Now we'll go to Exhibit 25B and review the larger  
10 processors. Again, the same headings, the same information.  
11 I won't repeat that, just simply focus on the result.

12 The per-hundredweight cost at 12 million pounds  
13 Class I monthly is \$6.45 in the 131 area. In the 124 area,  
14 it's \$6.87.

15 In the 18 million pound per month, we have a \$5.54  
16 cost per 100 in 131 and in 124 \$5.91.

17 Now, here's an important break point as far as  
18 what happens with the container.

19 When a plant has volume of 12 million pounds or  
20 less, it's not economically feasible to blow-mold bottles,  
21 and those companies purchase their bottles. You'll see in  
22 the packaging cost area that they cost 14.2 cents at this  
23 point in time.



24                   When we blow-mold the bottles, much more  
25 efficient, you make the bottles on site. The cost drops to

Cropper & Associates, Ltd.  
602. 277. 8882

773

For public distribution

1 11.3 cents. Almost three cents per gallon in cost saving at  
2 that point. That's very significant in the dairy industry.

3                   In our largest group, the 30 million pounds per  
4 month, we see that the cost in 131 is \$5.32 and in 124, it's  
5 \$5.67.

6                   A few other comments.

7                   The plant processing costs that are reflected here  
8 are actual costs. They are not theoretical engineering  
9 studies but the costs that have been extracted from the  
10 annual financial statements for the plants that are in the  
11 various cost sizes.

12                  And shrink is another point to highlight. As you  
13 review the shrink from the smallest group to the largest  
14 group, the shrink on a per-gallon basis decreases because of  
15 the increased efficiency in the dairy plants as they get  
16 larger. Typically, that results from longer production  
17 runs, less changeover going from 1 percent to skim milk and  
18 back to chocolate milk and things of that sort. That's  
19 called changeover and that results in product loss.

20                  Q. Now, the information that you have depicted on  
21 pages C and D of Exhibit 25, is that the information on A  
22 and B in a graphic fashion?

23                  A. Yes. There are two graphs which I will just  
24 highlight quickly.

Cropper & Associates, Ltd.  
602.277.8882

For public distribution

1 numbers all the time. When I get an opportunity to look at  
2 something with a picture, I would like to do that.

3 And this first graph, which is C, shows the -- on  
4 this axis, we're looking at the per-gallon cost and the  
5 Class I pounds is the horizontal axis.

6 Area 124 is the top line, the light-colored line.  
7 131 is the bottom line.

8 And, again, the slope ties in with -- as we get  
9 larger, essentially our costs go down, a big drop from the  
10 producer-handler down to the 2 million group.

11 Let's now look at this on a per-hundredweight  
12 basis which is designed for this hearing. And, again, the  
13 same order. 124 is the top line. 131 is the bottom line.  
14 Again, the same slope as you would imagine because all we've  
15 done here is converted the per-gallon cost to a  
16 per-hundredweight.

17 What I'd like to do next is move to 25F and then a  
18 series of exhibits that follow really for each sized plant  
19 for which we present costs.

20 Q. You would be starting with 25E, right, I think?

21 A. Yes. Thank you.

22 Q. And 25E is titled Comparative Analysis of Return  
23 to Producer-Handlers and Regulated Distributing Plants  
24 Supplying a Warehouse Store; is that correct?

25 A. Yes.

For public distribution

1 Yes. Thank you. I shuffled a page out of order.

2 This Exhibit 25E is a Comparative Analysis of  
3 Return to Producer-Handlers and Regulated Distributing  
4 Plants Supplying a Warehouse Store. We're going to walk  
5 through the preparation of this exhibit so we can all  
6 understand the -- what the exhibit demonstrates.

7 First of all, the information as to the prices  
8 that we're going to see in just a moment are January to June  
9 2003 for a reduced fat 2 percent two-gallon package. It's  
10 important to remember that it's two gallons of milk of 2  
11 percent. The average was arrived at by simply taking the  
12 retail prices for January through June and adding them  
13 together and divided by 6. So it's a simple average of the  
14 prices.

15 The average retail out of store -- this is the --  
16 what a consumer would pay going into a warehouse store,  
17 which is \$3.29.

18 Q. Now, where did you obtain that information,  
19 Mr. Herbein?

20 A. That information came to me, and I'll go in  
21 reverse order, from you, Mr. Beshore, who received it from  
22 Mr. English, who received it from Shamrock Farms.

23 Q. And is that the information that Mr. Krueger  
24 indicated yesterday was collected by his employees?

25 A. Yes.

For public distribution

1 Q. Okay. And what stores did the -- were the prices  
2 applicable to? Where were they charged?

3 A. These were the prices charged by Sam's and Costco.  
4 And I included both chains in the calculation of my average.

5 Q. And that was in Arizona?

6 A. Yes. In the Phoenix market.

7 Q. Okay. And from January to June 2003, actual  
8 out-of-store prices?

9 A. Yes, absolutely, actual out-of-store prices.

10 The next part of the exhibit -- and there are two  
11 items that I would like to next discuss which are very  
12 important, the warehouse store markup -- and I've calculated  
13 it under two scenarios, one being 8 percent and the other  
14 being 14 percent.

15 In reviewing this part of our -- performing this  
16 part of our project, we've reviewed actual client cost  
17 studies for clients that were selling and are selling fluid  
18 milk products to warehouse accounts.

19 The lowest store markup in the information that we  
20 reviewed was 8 percent and the largest was 14 percent.

21 So that we could cover the spectrum of  
22 profitability and cost and value of milk, I've made  
23 calculations under oath of those scenarios at 14 percent and  
24 at 8 percent.

25 The next line entitled Price Paid to Dairy

For public distribution

1 Supplier is arrived it by subtracting the 14 percent  
2 discount, 14 percent discount -- excuse me, 14 percent  
3 markup from the out-of-store price to arrive at 2.8294. And  
4 the same mathematics, the 8 percent markup is subtracted to  
5 give the dairy supplier invoice amount of 3.0268.

6 So at that point, what we have is on the processor  
7 end, what the processor would be invoicing the warehouse  
8 store for a delivered product in their store.

9 The next part of the project was to develop dairy  
10 supplier costs, because what we're doing is we need to  
11 present what are the costs to get a gallon of milk to a  
12 store, and that involves plant costs, packaging costs,  
13 distribution costs, shrinkage, and our milk PEP fee. And  
14 the total for the 14 percent analysis of those costs is  
15 1.1372 and, in the 8 percent, it's 1.1372 also, same cost  
16 structure.

17 Now, it's important to understand the basis upon  
18 which these costs were determined. First of all, the plant  
19 costs are the result of specific cost studies in plants with  
20 dedicated departments to process this type of milk, this --  
21 a product being placed in two-gallon packages with a  
22 blow-molding operation on site.

23 The packaging is two blow-molded gallons but the  
24 labels and caps and the box that holds the two gallons.  
25 Distribution? Very efficient and somewhat unusual

For public distribution

1 distribution. All on pallets delivered to these warehouse  
2 stores. In many cases, tractor-trailer loads to a store.  
3 So it's very efficient, low-cost distributions.

4 Shrinkage is appropriate. Shrinkage for a large  
5 plant processing a high-volume gallon item, which is a very  
6 efficient product, and milk, PEP, again is the 20 cents a  
7 hundredweight that is paid to support what I call the milk  
8 mustache program.

9 Q. That's the Milk Processors Education Program?

10 A. Yes.

11 Q. That's the same program that's been referred to  
12 and handlers 3 million and above are obligated to pay the 20  
13 cents per hundredweight and handlers below the 3 million  
14 volume are exempt?

15 A. That's correct. And that's a cost that the  
16 processor has to pay, again, when they are above that 3  
17 million level.

18 So at this point, what we have is we have the  
19 net -- the invoice going to the warehouse store in the 14  
20 percent column, 2.8294. And then we've accumulated and  
21 accounted for all of the costs that are in that package of  
22 milk except the raw milk.

23 So the next item, the next line, is to simply  
24 subtract from the invoice to the warehouse store from the --  
25 from 2.8294 we subtract all of the costs. 1.6922 -- and we

## For public distribution

1 arrive at the value of the raw milk at 1.6922 or 1.8896.

2 Q. Those are all per-gallon figures?

3 A. That's two gallons.

4 Q. Per two gallons?

5 A. That's two gallons.

6 And then the next line, Mr. Beshore has converted  
7 to one gallon and there we have .8461 and .9448, and then  
8 we've converted that to hundredweight and that's \$9.83 and  
9 \$10.97 on the 14 and 8 percent scenarios.

10 Q. Can you just stop right there for a second?

11 On the basis of the actual known retail prices  
12 from these wholesale warehouse stores, warehouse stores, in  
13 Phoenix for the period January to June, comparing -- we  
14 don't know the markup. You do know, from your database of  
15 information of prior studies, that warehouse stores market  
16 fluid milk in two-gallon packages up at least 8 percent and  
17 in some cases as high as 14 percent, so that gives us the  
18 full range of possibilities --

19 MR. BERDE: 14 percent?

20 THE WITNESS: Yes. 8 to 14 percent.

21 BY MR. BESHORE:

22 Q. That gives us the full range of possibilities, and  
23 you, from your information in the database of plant cost  
24 information, you've calculated the costs of providing that  
25 particular package to those stores, distribution costs,

For public distribution

1 plant costs, packaging costs, shrinkage cost and milk PEP as  
2 you've indicated. That leaves a residual value for the  
3 processor to pay for raw milk ranging from 9.83 per  
4 hundredweight to 10.97 per hundredweight; correct?

5 A. Yes.

6 Q. And that's a 2 percent butterfat level?

7 A. 2 percent. I neglected to mention why we selected  
8 2 percent.

9 In reviewing the Market Administrator's  
10 information for 131, and this is a calculation based upon  
11 Phoenix, 131, the average butterfat test for fluid milk  
12 products is almost dead on 2 percent.

13 So that was the appropriate package to use.

14 Q. So that's the blended -- if we can use that  
15 terminology here, the blended fat percentage of fluid milk  
16 products in the market?

17 A. That's correct.

18 Q. Okay. Now, what did you do with that -- the  
19 figures of the value of raw milk?

20 A. The next step was to compare the value of the milk  
21 on a per-hundredweight basis with our Class I cost for F0  
22 131 of \$10.53. And, again, this a six-month average so that  
23 we're comparing apples to apples. We've taken a Class I  
24 cost of butterfat, adjusted it to a 2 percent package and  
25 it's \$10.53.



For public distribution

1           We then also compared both columns, 14 and 8, with  
2 the Federal Order 131 uniform price. Again, that's a  
3 six-month average, butterfat adjusted. And that number is  
4 \$8.79. And then the results are when we compare in the 14  
5 percent column to Class I, we find a 70-cent under Class I  
6 value at the 14 percent margin and an excess over the  
7 uniform price of \$1.04 for the 14 percent column. And in  
8 the 8 percent approach, when we compare with Class I, we  
9 have an excess of 40 cents; and at the uniform price, \$2.18.

10          Q. Now, is there any profit margin in these figures  
11 at the plant level?

12          A. No, there's not. This is strictly a cost-base  
13 approach.

14          Q. I take it your analysis shows that if the markup  
15 is 14 percent, the handler paying Class I costs is providing  
16 the product at a loss approximating 70 cents per  
17 hundredweight?

18          A. That's correct.

19          Q. Somewhere in between the 8 percent and 14 percent  
20 you get close to a break-even point for the regulated  
21 handler without any profit -- any margin whatsoever;  
22 correct?

23          A. Yes. And that's something that I considered for  
24 this presentation, Mr. Beshore, is the inclusion of profit,  
25 because it's my opinion that without profit in a dairy

Cropper & Associates, Ltd.  
602. 277. 8882

782

For public distribution

1 processing plant, we have no future.

2 But I decided to not confuse things or complicate  
3 things with an artificial profit number because that would  
4 have just been my judgment.

5 These are actual, hard numbers that are not at all  
6 judgmental. They are real.

7 Q. For a handler that is not required to pay the  
8 Class I price, the producer-handler to account to the pool  
9 and its suppliers at the minimum Class I price, the return  
10 over the uniform price which all other producers in the  
11 order get ranges from a minimum of \$1.04 per hundredweight  
12 to \$2.18 per hundredweight; correct?

13 A. Yes. And that's a sizable advantage over the  
14 uniform price. That's very material in my opinion.

15 Q. Could you proceed to the next page of Exhibit 25,  
16 then.

17 A. 25F is the analysis of supplying a warehouse store  
18 for the producer-handler, and the results of this are losses  
19 of 1.23 per two-gallon or \$7.16 per hundred pounds of milk.

20 So this shows a real loss. And, again, this is a  
21 raw milk cost that is calculated at Class I values.

22 Q. So Exhibit F is a comparison or an analysis of the  
23 viability of supplying that product to the warehouse store  
24 at the prices it pays by a small producer-handler, the  
25 column A group in Exhibit 25, page A; correct?

Cropper & Associates, Ltd.  
602.277.8882

783

For public distribution

1 A. That's correct.

2 Q. So the costs that are based upon your actual  
3 financial information from small producer-handlers and said  
4 if they were going to supply the warehouse store at what it  
5 pays for milk, here's how viable it is and it shows that  
6 they can not economically do it except at a massive loss; is  
7 that correct?

8 A. That's correct. I would just like to emphasize  
9 that we gave them one fairly sizable break in this analysis  
10 and that is in distribution. The distribution cost that's  
11 presented here at .296 per two-gallon package is the  
12 efficient delivery system, the producer-handler and the rest  
13 of the processors convert their normal distribution into a  
14 warehouse distribution scenario, tractor-trailer pallets.

15 So if we used average delivery costs to their  
16 average customer, we would have a much more dreadful result.

17 Q. Okay. Could you proceed, then, to the next page,  
18 G, which is the analysis of a warehouse store being supplied  
19 by the pool distributing plant, B?

20 A. Yes. And this supplied -- we'll get the entire  
21 thing here.

22 We have to make a correction to this -- to the  
23 overhead. The handout has the correct numbers but there's a  
24 typographical error in this -- in the slide. The milk PEP  
25 of .03 should not be here. This milk is not subject to the

Cropper & Associates, Ltd.  
602.277.8882

784

For public distribution

1 milk PEP at a 2 million pound-per-month level. The total  
2 cost number on the exhibit is 3.502. The loss per two

3 gallons is .475 and the loss per hundredweight is 2.76.

4           Again, the handout is correct. It's the  
5 PowerPoint that is not correct.

6           Q.    Would you proceed through the rest of Exhibit 25  
7 then?

8           A.    Yes.    Again, the loss here per hundredweight was  
9 \$2.76.

10           Moving on to plant C, again, we'll conserve some  
11 time here and go to the very end. Here, this distributing  
12 plant C would have a loss of \$2.53 per hundred, 43.5 cents  
13 per two gallons. Again, a sizable loss for an even larger  
14 plant.

15           Moving on to the next category, plant D, plant  
16 group D, again, going to the results, we have a loss per two  
17 gallons of 36.1 cents for every two gallons or \$2.10 per  
18 hundred. So, again, not at all economically viable to serve  
19 that account.

20           Q.    And plant D is at the 12 million-pound level?

21           A.    That's 12 million.

22           The next group, E, is the 18  
23 million-pound-per-month group, and the results here, again,  
24 we have a loss per two gallons of 21.5 cents and a \$1.25 per  
25 hundredweight. So, again, a loss far too large to make it

Cropper & Associates, Ltd.  
602.277.8882

785

For public distribution

1 feasible to serve that account profitably.

2           The last category, the 30 million-pound group, the  
3 results here are that we have a loss for every two gallons

4 of .177, 17.7 cents and, on a per-hundredweight basis,  
5 \$1.03.

6 Q. Now, the costs in the columns A through F of 25A  
7 and 25B as they have been portrayed in pages F through K,  
8 those costs are average plant production costs for plants of  
9 those size ranges; is that correct?

10 A. Yes, from our proprietary database.

11 Q. But the distribution costs have been tailored  
12 strictly to the two-gallon package in the warehouse store?

13 A. Yes. That's correct.

14 Q. Packaging costs are queued to the type of package  
15 being produced, being produced to the warehouse store?

16 A. That's correct. The product being studied here in  
17 this analysis is a two-gallon package of 2 percent milk.

18 Q. And your conclusion, Mr. Herbein, from your study  
19 is that -- let me just ask you. Is it possible for  
20 regulated plants of any size to compete with the unregulated  
21 producer-handler at the prices analyzed for serving this  
22 warehouse account?

23 MR. RICCIARDI: Let me object to that opinion,  
24 Judge. I don't think he's established that he has the  
25 expertise to be able to give us, based upon CPA -- based

Cropper & Associates, Ltd.  
602.277.8882

786

For public distribution

1 upon his background, that type of an opinion.

2 JUDGE HILLSON: I'll let him answer the question  
3 and then I'll ask his reasons to support his opinion.  
4 Before I do, just in terms of breaking, how much longer do

5 you anticipate you'll have, that the direct testimony will  
6 be?

7 MR. BESHORE: I'm about complete.

8 JUDGE HILLSON: Okay. In that case, we'll  
9 continue.

10 BY MR. BESHORE:

11 Q. Do you recall the question?

12 A. The question that I recall is do I believe it to  
13 be possible for a regulated handler of any size to compete  
14 for this type of customer.

15 Q. Yes.

16 A. And my opinion, based on my study and the --  
17 really, the economic results, I believe that it's  
18 self-evident when looking at the exhibits that when you have  
19 a loss on the bottom line, when you've accounted for all of  
20 your costs in accordance with Generally Accepted Accounting  
21 Principles and you have a loss, it doesn't make sense, from  
22 a business standpoint, to pursue that sort of business  
23 because you are losing money, and that's -- you can't pay  
24 your bills if you lose money.

25 Q. One final question, Mr. Herbein.

Cropper & Associates, Ltd.  
602.277.8882

787

For public distribution

1 In your experience working with fluid milk plant  
2 owners and operators, do they have knowledge of the accounts  
3 that their competitors service and the volumes supplied to  
4 those accounts?

5 A. Yes.

6 Q. What is your basis for that statement?

7 A. The basis is my practical experience in providing  
8 accounting advice to fluid milk -- in this case, we're  
9 talking about fluid milk to fluid milk plant operators  
10 including the most recent example that I've seen and I've  
11 seen it in a couple of scenarios.

12 The first time I saw this was a client called and  
13 was very excited. They had an opportunity to bid on a chain  
14 of stores, supermarkets, and it was going to be pretty much  
15 a blind bid. The milk buyer really didn't want to change  
16 suppliers but went out on bid because of pressure from upper  
17 management. So he didn't supply very much information. So  
18 I was called in to help analyze and review the study that  
19 the cost accountants and salespeople had put together.

20 And they had store locations and sales volumes for  
21 every store. I inquired as to where they got that. They  
22 developed that themselves by sending their sales force to  
23 visit all of the stores. They counted the returned milk  
24 cases that were on the loading dock. They just asked  
25 questions of people and they came up with estimates.

Cropper & Associates, Ltd.  
602. 277. 8882

788

For public distribution

1 So the estimates turned out to be surprisingly  
2 accurate. That was the first time I saw that. Maybe 10  
3 years ago.

4 About six weeks ago, our firm was engaged by a  
5 fluid milk processor that was very interested in acquiring  
6 another dairy.

7                   There was a business intermediary involved  
8 representing the seller. There were confidentiality  
9 agreements which my staff and I had to sign and all of the  
10 people involved from our client's end signed. We got a  
11 great big book from the business intermediary which included  
12 a lot of confidential information.

13                   I had it at my office and spent a weekend studying  
14 it and then we had a very important meeting on Monday  
15 morning, just a few weeks ago, and included in this  
16 information was -- were customer names and volumes.

17                   So we got to our client's location and the  
18 president of the company came in and he had a schedule that  
19 they had prepared based upon their knowledge of the market.  
20 And the study that their sales force had and the customer  
21 names, the products being sold and the volumes were almost  
22 identical to what was shown by the business intermediary and  
23 they didn't copy from one another; it was developed by the  
24 sales staff. And the margin of error was probably about 1  
25 percent. It was a very eye-opening experience.

Cropper & Associates, Ltd.  
602.277.8882

789

For public distribution

1                   We discussed this and my client's personnel said,  
2 "Our competitors know exactly who our customers are."

3                   And we heard some testimony here yesterday -- I  
4 think it was about the plant code that is on the bottom  
5 of -- on each container. And it's pretty easy to see who is  
6 supplying the product. And if you're a knowledgeable milk  
7 salesperson, one of your jobs -- most milk salespeople have



8 either territories or specific customers. Where there is a  
9 territory, you're expected to know every milk outlet in your  
10 territory and who is supplying it if you're not and develop  
11 an estimate of the volume for sales leads and market  
12 programs.

13 MR. RICCIARDI: Is there going to be a question in  
14 our lifetime, Judge?

15 JUDGE HILLSON: I don't know what the question was  
16 but I think he's finished his answer.

17 MR. BESHORE: The record will show he's answered  
18 the question.

19 MR. RICCIARDI: And it will show it has nothing to  
20 do with what the question was.

21 JUDGE HILLSON: You didn't move that exhibit into  
22 evidence.

23 MR. BESHORE: I move Exhibit 25.

24 JUDGE HILLSON: In the absence of an objection, I  
25 will allow --

Cropper & Associates, Ltd.  
602.277.8882

790

For public distribution

1 MR. YALE: Your Honor, there are some numbers that  
2 are very suspect based on our knowledge. We think before  
3 it's admitted, we have a right to voir dire on that exhibit  
4 and the contents of that exhibit because it has the surface  
5 of having some truth to it that we believe will not be  
6 there. And just admitting it -- until that's done I think  
7 it's premature.

8 JUDGE HILLSON: Go ahead, Mr. Beshore.

9 MR. BESHORE: We think the same rules that apply  
10 to everybody else ought to apply to our exhibits. That is,  
11 they have been admitted subject to being examined by and the  
12 Secretary considering them for the full weight that they  
13 present.

14 MR. YALE: None of my exhibits have been admitted  
15 under that statement, Jim.

16 JUDGE HILLSON: At this point, I'm going to admit  
17 it. You're going to have a full opportunity to  
18 cross-examine him on it and show it's worthwhile or nothing  
19 as the case may be. I'm going to admit Exhibit 25 into  
20 evidence.

21 MR. RICCIARDI: Subject, Your Honor, to  
22 cross-examination, to showing the veracity of the  
23 information, and I'm assuming we would have the opportunity  
24 to move to strike the exhibit and I'll ask you to do that.

25 JUDGE HILLSON: You can move it, yes. You will

Cropper & Associates, Ltd.  
602.277.8882

791

For public distribution

1 have that opportunity.

2 It's just after 12:30. Let's take an hour for  
3 lunch and be back at 1:30.

4 MR. YALE: Your Honor, because of the nature of  
5 this testimony and this exhibit, we would request that we  
6 have an hour and a half in order to eat and prepare the  
7 cross-examination.

8 JUDGE HILLSON: I don't think we have that much  
9 time. I promised we would try to work a full day today.

10 Was this exhibit available last night?

11 MR. YALE: I saw it, basically, just before he  
12 presented it. I mean, this is really, in all honesty, it is  
13 the first time that we've had something now that is starting  
14 to get to the issue two days into the hearing. This is a  
15 very, very important witness for them. It's a very  
16 important witness for us to cross-examine. I would suggest  
17 that an hour --

18 JUDGE HILLSON: We'll recommence our hearing at  
19 1:45; okay?

20 MR. YALE: Thank you, Your Honor.

21 (Whereupon, these proceedings were recessed at  
22 12:31 p.m.)

23

24

25

Cropper & Associates, Ltd.  
602.277.8882

792

For public distribution

1 STATE OF ARIZONA )  
2 ) SS.  
3 COUNTY OF MARICOPA )

4

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 1-792, 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 30th day  
15 of October 2003.

16

17

18 

---

Elaine M. Cropper  
19 Certified Court Reporter  
Certificate No. 50491

20

21

22

23

24

25

Cropper & Associates, Ltd.  
602.277.8882

For public distribution

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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 III B

(Pages 793 through 984)

Tempe, Arizona  
September 25, 2003  
1:47 p.m.

Prepared By:

LORENA MARIN-GARCIA  
Registered Merit Reporter  
Certified Realtime Reporter  
Certified Court Reporter #50541  
CROPPER & ASSOCIATES, LTD.  
77 East Columbus, Suite 102  
Phoenix, AZ 85012-2351

(Copy)

For public distribution

1	I N D E X		
2			
3	EXAMINATION		
		Page	Line
4	CARL D. HERBEIN, CPA		
	Examination by Mr. Ricciardi .....	801	8
5	Examination by Mr. Miltner .....	842	6
	Examination by Mr. Marshall .....	861	6
6	Examination by Mr. Yale .....	863	18
	Examination by Mr. Ricciardi .....	867	8
7	Examination by Mr. Ritchey .....	868	6
	Examination by Mr. English .....	869	10
8	Examination by Ms. Deskins .....	870	12
	Examination by Mr. Berde .....	872	18
9	Examination by Mr. Beshore .....	873	19
	Examination by Ms. Deskins .....	879	2
10	Examination by Mr. Ricciardi .....	879	24
	Examination by Mr. Yale .....	881	13
11	Examination by Mr. Tosi .....	884	7
12	ROGER CRYAN, Ph. D.		
	Examination by Mr. Yale .....	913	10
13	Examination by Mr. English .....	947	21
	Examination by Mr. Ricciardi .....	948	24
14	Examination by Mr. Marshall .....	960	2
	Examination by Mr. Berde .....	967	23
15	Examination by Mr. Beshore .....	969	2
	Examination by Mr. Rower .....	973	2
16	Examination by Ms. Deskins .....	974	11
17	E X H I B I T S		
18		Admitted	
	Number	Page	Line
19			
	26 NMPF Statement by Roger Cryan, Ph.D. ...	907	10
20			
	27 Document entitled "National Milk .....	910	1
21	Producers Federation requests that		
	the following be given official		
22	notice: "		
23	27A Xeroxed copy of cover entitled .....	910	1
	"Early Development of Milk Marketing		
24	Plans in the Kansas City, Missouri,		
	Area, May 1952		
25			

CROPPER & ASSOCIATES, LTD.  
 (602) 277-8882

For public distribution

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

E X H I B I T S

Number		Admitted Page	Line
27B	Document entitled "Fluid Milk Processing Costs: Current State and Comparisons," authored by Dalton, Criner and Halloran	910	1
27C	Document entitled "An Analysis of Productivity and Costs in 35 Fluid Milk Plants," by Erba, Aplin and Stephenson, 2/97	910	1

RECESSES

	Page	Line
(Recess at 3:20; resumed at 3:34.)	860	23
(Recess at 5:15; resumed at 5:30.)	933	7

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

For public distribution

1 TRANSCRIPT OF PROCEEDINGS,  
2  
3 taken on September 25, 2003, commencing at 1:47 p.m., at  
4 the Sheraton, 1600 South 52nd Street, Tempe, Arizona,  
5 before Lorena Marin-Garcia, a Certified Court Reporter,  
6 Certificate No. 50541, in and for the State of Arizona.

7 For the USDA:  
8 U. S. Department of Agriculture  
9 Office of the General Counsel  
10 Marketing Division  
11 SHARLENE DESKINS, ESQ.  
12 Room 2331 South Building, Mail Stop 1417  
13 1400 Independence Avenue, S.W.  
14 Washington, D.C. 20250  
15 202.690.4323 202.690.4299 (Fax)

16 and: U. S. Department of Agriculture  
17 Agricultural Marketing Service  
18 Dairy Programs  
19 JACK ROWER, MARKETING SPECIALIST  
20 GINO TOSI  
21 RICHARD CHERRY  
22 1400 Independence Avenue, S.W.  
23 Washington, D.C. 20250  
24 202.720.2357 202.690.0552 (Fax)

25 For United Dairymen Association:  
26 SYDNEY BERDE, ESQ.  
27 11126 East Cannon Drive  
28 Scottsdale, AZ 85259

29 For Dairy Farmers of America:  
30 MARVIN BESHORE, ESQ.  
31 130 State Street, P.O. Box 946  
32 Harrisburg, PA 17108  
33 717.236.0781 717.236.0552 (Fax)

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

797

For public distribution

1 For Shamrock Foods, Shamrock Farms & Dean Foods  
Company:



- 2 Thelen Reid & Priest, L. L. P.  
CHARLES M. ENGLISH, JR., ESQ.  
3 701 Pennsylvania Avenue, N.W., Suite 800  
Washington, DC 20004  
4 202. 508. 4000 202. 508. 4321 (Fax)
- 5 For Northwest Dairy Association:  
DOUGLAS MARSHALL, SR. V. P., NDA  
6
- 7 For Maverick Milk Producers Association:  
Robbins & Green, P. A.  
BRIAN IMBORNONI, ESQ.  
8 3300 North Central Avenue, Suite 1800  
Phoenix, AZ 85012  
9 602. 248. 7620 602. 266. 5369 (Fax)
- 10 For Sarah Farms:  
Hebert Schenk, P. C.  
11 ALFRED W. RICCIARDI, ESQ.  
1440 East Missouri Avenue, Suite 125  
12 Phoenix, AZ 85014  
602. 248. 8203 602. 248. 8840 (Fax)  
13
- 14 For Smith Brothers Farms, Edaleen Dairy, and Mallorie  
Dairy:  
Benjamin F. Yale & Assoc. Co., L. P. A.  
15 BENJAMIN F. YALE, ESQ.  
RYAN K. MILTNER, ESQ.  
16 KRISTINE H. REED, ESQ.  
102 West Wapakoneta Street, P. O. Box 100  
17 Waynesfield, OH 45896  
419. 568. 5751 419. 568. 6413 (Fax)  
18  
19  
20  
21  
22  
23  
24  
25

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

798

For public distribution

1 TRANSCRIPT OF PROCEEDINGS  
2

3

4 JUDGE HILLSON: Let's go back on the record.

5 Before we resume, before we start the  
6 cross-examination of our witness, I just wanted to make  
7 a couple of announcements.

8 One is that, when we're done today, we're  
9 going to next reconvene in Seattle on November 17th. We  
10 already have a room at the -- for the hearing at the  
11 Doubletree Airport -- Doubletree Hotel at the Seattle  
12 airport. We can Xerox that and put all that information  
13 in the back of the room.

14 I plan to start on Monday morning,  
15 November 17th, at 8:30 in the morning and go until we  
16 finish or Thanksgiving, whichever comes first, okay?  
17 I'm hoping that we can finish by Thursday, the 20th. We  
18 have the room reserved until about noon of the 21st.

19 If for some reason we can't finish by then,  
20 we may just have to wrap up the last day or two, if it  
21 goes that long, in Alexandria or somewhere in the D.C.  
22 area just to do the final wrap-up.

23 The other thing is that there were plans that  
24 Mr. Mykrantz would testify again today. He's prepared a  
25 number of documents on request that are in the back of

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

799

For public distribution

1 the room. I'm trying to ascertain whether people  
2 actually want him called again today or whether they  
3 just want to see the information in the back of the room

4 or if they have any other ideas that they want to  
5 discuss with respect to Mr. Mykrantz, so you can think  
6 about that in the next short while.

7           The schedule I have today that we're going to  
8 try to get through is, after Mr. Herbein is done, the  
9 proponents are going to call Mr. Cryan and Mr. Hollon  
10 and try to get through those two witnesses.

11           That's about the best we can hope for today;  
12 is that correct? That's the optimistic view?

13           MR. BESHORE: Quite optimistic. That's the  
14 order.

15           JUDGE HILLSON: Our court reporter is willing  
16 to go late, but I promised her that if we go -- if we're  
17 going to think about going late, I'm going to call a  
18 break every hour and a half just to give her a little  
19 break. Instead of having one 15-minute break, we  
20 probably may have two or three or four, depending how  
21 late we go, 10-minute breaks just to give her a chance  
22 to recharge her batteries, figuratively, and literally  
23 in the case of her machine.

24           So anyone have any thoughts about calling  
25 Mr. Mykrantz? Do you just want to see the documents

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

800

For public distribution

1 prepared, or do you need him to come up and say what he  
2 did for five minutes?

3           These documents wouldn't be -- certainly  
4 wouldn't be put into evidence today. They were just

5 prepared. They wouldn't be put into evidence at this  
6 time unless people want him to testify and get them into  
7 evidence. They're mainly here at the request of various  
8 parties, various calculations, and as long as you have  
9 them, I would think that that might be good enough for  
10 now. I could call him just to get them marked or not.  
11 I just don't have a preference in that.

12 MR. YALE: Calling him to be marked is not  
13 worth the while, okay? And I guess if we get time,  
14 maybe he might be a nice one to fit in. We may not have  
15 time for Mr. Hollon. If we've got time left over, we  
16 can deal with him.

17 JUDGE HILLSON: At this point, the documents  
18 he prepared are in the back of the room. Feel free to  
19 take whatever you need.

20 And at this point, I guess it's time for the  
21 cross-examination of Mr. Herbein.

22 Who's our first cross-examiner?

23 MR. YALE: Go ahead.

24 MR. RICCIARDI: Okay. I will.

25

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

801

For public distribution

1

2

CARL D. HERBEIN, CPA,

3 a witness herein, having been first duly sworn to speak

4 the truth and nothing but the truth, was examined and

5 testified as follows:

6

7

EXAMINATION

8 BY MR. RICCIARDI :

9 Q. Mr. Herbein, Al Ricciardi on behalf of Sarah  
10 Farms.

11 When were you first called to consult on this  
12 matter?

13 A. I'm not sure of the exact date. 30, 45 days  
14 ago.

15 Q. And did you prepare an engagement letter?

16 A. Yes, I did.

17 Q. Okay. And was an engagement letter signed by  
18 someone?

19 A. Yes. It was executed between our firm and  
20 DFA.

21 Q. What are you being compensated for your time?

22 A. I'm being compensated on an hourly basis.

23 Q. And at what rate?

24 A. The rates vary for different people that have  
25 worked on this engagement with me, with a range of 150

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

802

For public distribution

1 to 250 per hour.

2 Q. And 250 an hour is your rate?

3 A. Yes.

4 Q. How many hours have you spent on this project  
5 so far?

6 A. I'm not exactly sure. My personal time is

7 probably 60 hours.

8 Q. Can you give us the amount that you have --  
9 your firm has billed to DFA thus far for the work you've  
10 done?

11 A. Yes. Zero.

12 Q. You haven't billed it yet?

13 A. No, I have not billed anything.

14 Q. Okay. Can you give me an estimate as to what  
15 the amount has been that's been expended in hourly time  
16 and costs?

17 A. Actually, I can't. I haven't checked our  
18 time and billing system in the last week. I've been  
19 busy getting ready for this hearing.

20 Q. That I understand.

21 You keep billing records for your time;  
22 correct?

23 A. Yes, I do.

24 Q. And the people who are working for you on  
25 your project would also keep billing records?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

803

For public distribution

1 A. Yes. We all individually enter our time into  
2 our computerized time and billing system.

3 Q. You'd be willing to provide the engagement  
4 letter and your billing records to us prior to the time  
5 we convene again?

6 MR. BESHORE: Your Honor, why do you need all  
7 this? He said what the compensation rate was. Why do

8 you need to know the exact total of that?

9 Object to the question on the grounds of  
10 materiality.

11 JUDGE HILLSON: Okay. I'm just curious  
12 myself.

13 MR. RICCIARDI: Your Honor, if we're going  
14 through any kind of a regular piece of litigation when  
15 we're doing what amounts to deposition testimony, which  
16 is effectively what we're doing here, we're certainly  
17 entitled to get the engagement letter. We're certainly  
18 entitled to get the billing records to confirm the  
19 information that the witness is providing.

20 And this witness is telling me at this point  
21 that he has no idea as to the amount of time that's been  
22 expended. I think it's information that should be in  
23 the record for the Secretary to look at so that the  
24 Secretary can look at issues about bias and prejudice  
25 and amounts being paid, et cetera.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

804

For public distribution

1 MR. BESHORE: This is -- I would remind  
2 Mr. Ricciardi that this is not a regular piece of  
3 litigation being conducted pursuant to the Federal  
4 Rules of Civil Procedure relating to expert depositions,  
5 et cetera. This is an administrative proceeding before  
6 the Secretary of Agriculture, simple rules of practice,  
7 and this type of information is not material.

8 MS. DESKINS: Judge Hillson, maybe I can help

9 out with this just a little bit.

10 If he thinks it's relevant, of course, he can  
11 inquire into it, but I think for the Secretary's  
12 purposes, once he's established they have been  
13 compensated that they have particular biases. I don't  
14 know the need for additional information to establish  
15 that because I think he's established it on the record.

16 JUDGE HILLSON: I think -- you have his  
17 hourly rate. You have a general number of hours. I  
18 think as far as -- based in large part on his  
19 representations, I think the administrator and the  
20 Secretary have all they need to know in terms of that,  
21 so why don't we just move on.

22 MR. RICCIARDI: Fair enough, Judge.

23 Q. BY MR. RICCIARDI: Have you in the past  
24 provided consulting services to DFA?

25 A. Yes, a few times.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

805

For public distribution

1 Q. How many times have you provided such  
2 services to DFA?

3 A. The work that we've done with DFA prior to  
4 this engagement has been with some of their operating  
5 subsidiaries, and there are -- there was one ongoing  
6 engagement where DFA was a partner in a joint venture  
7 where we were the regular accountants and auditors.  
8 That engagement continued for many years, more than 10.  
9 There was another engagement that we did a



10 special accounting study for one of DFA's joint venture  
11 partners. That was one engagement and done. And that  
12 really, I believe, in my memory, is the extent of our  
13 DFA work.

14 Q. Can you tell me approximately, prior to this  
15 engagement, how much your firm has been compensated by  
16 DFA for work that your firm has done?

17 MR. BESHORE: Your Honor, could I just  
18 interpose an objection at this point? The testimony, as  
19 I heard it from Mr. Herbein, did not indicate any direct  
20 engagement by DFA, but apparently by some joint ventures  
21 involved in DFA in the past, so I don't think --

22 JUDGE HILLSON: This was dispositive to the  
23 question. You could answer the question, but generally,  
24 it's clearly established that you say he's done a lot of  
25 work with DFA over the years and he's getting

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

806

For public distribution

1 compensated for that.

2 How much does the Administrative Secretary  
3 need to know about it? I guess not too much. So if  
4 you -- you can answer that last question if you know  
5 what it was. It was how much compensation --

6 THE WITNESS: Yes. And I have no objection  
7 to answering that.

8 The ongoing audit and tax work for one of  
9 their joint venture partners amounted to about \$25,000 a  
10 year. That continued for perhaps about five or six

11 years.

12 That's over now because the ownership has  
13 changed. The once-and-done accounting system engagement  
14 was \$15,000, and that was a few years -- it was about  
15 three years ago.

16 Q. BY MR. RICCIARDI: How many clients do you  
17 have that are in the dairy business?

18 A. Presently, my estimate would be 75.

19 Q. How many of those 75 are members of DFA?

20 A. Really, other than DFA as a client, none.

21 Q. Okay.

22 A. We currently have no work other than this  
23 engagement with DFA or any of its affiliates.

24 Q. Are any of your clients producer-handlers?

25 A. Yes.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

807

For public distribution

1 Q. In what area of the country?

2 A. Pennsylvania.

3 Q. And can you tell us the name of your  
4 producer-handler client in Pennsylvania?

5 A. No. As I said in my prepared statement, the  
6 existence and the identity of our clients is considered  
7 to be confidential -- required to be confidential.

8 Q. I understand from your statement that, in  
9 order to prepare Exhibit 25, that you utilized  
10 information in a database of dairy manufacturing  
11 operating costs; correct?

12 A. Yes:  
13 Q. Can you tell me how many dairy manufacturers  
14 were included in that database?  
15 A. I can give you an approximation.  
16 Q. That'll be fine.  
17 A. There are at least 50 active participants in  
18 that database as of this time.  
19 Q. Does your firm currently have as a client any  
20 dairy manufacturer in Order 131?  
21 A. No.  
22 Q. Does your firm currently have any dairy  
23 manufacturer in Order 124?  
24 A. Yes.  
25 Q. How many?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

808

For public distribution

1 A. One.  
2 Q. You indicate that you're authorized to  
3 utilize this information on a confidential basis for  
4 this engagement. Did you actually get the authorization  
5 of all of the dairy manufacturers that you do represent  
6 as clients that are in the database?  
7 A. Yes, but let me just explain the methodology  
8 employed.  
9 When we utilize a company's records in our  
10 database for cost benchmarking or for whatever purpose,  
11 we tell our clients that we're doing that and we give  
12 them our assurance that their identity and the identity

13 of their individual information will not be disclosed to  
14 anyone. And we've been following that policy for more  
15 than 20 years without any problems.

16 Q. In terms of the underlying data for the  
17 operating costs, about how far back does that data go?

18 A. One year. It's the -- this information that  
19 was utilized is the most recent year, calendar year 2002  
20 or fiscal years ending during 2002.

21 Q. Would those be yearly financial statements?

22 A. Yes.

23 Q. And would there be data to accompany the  
24 yearly financial statements to ensure the authenticity  
25 of the information?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

809

For public distribution

1 A. We enter information -- yes. And we enter  
2 information into our database and use the information  
3 only when we understand it and we've worked with the  
4 data in some other capacity.

5 There's no survey-type situation here that we  
6 call Dairy X and ask them to send us their information.  
7 It's not that at all. It's where we're regular  
8 accountants for the company or we've done an engagement  
9 for them, so we understand the information.

10 There is a lot of information in addition to  
11 the financial statements that one needs to utilize,  
12 volume of production and that type of information, which  
13 we also gather.

14 Q. Do you have other clients that are dairy  
15 manufacturers that you did not include in your database?  
16 A. Yes.  
17 Q. Who made the selection as to the companies or  
18 entities or individuals that would be in the database?  
19 A. I did.  
20 In the database?  
21 Q. Yes.  
22 A. I review and approve all of the companies  
23 that go into the database, and I made the individual  
24 selections that were utilized in this engagement.  
25 Q. Did you say -- and I apologize. I'm not

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

810

For public distribution

1 trying to trick you. I don't remember. Is it 15 or 20  
2 that you used?  
3 A. 15 or 20 that were used in this project.  
4 Q. And how many do you have overall?  
5 A. Approximately 50.  
6 Q. Okay. So you selected 20 out of the 50?  
7 A. Correct.  
8 Q. And what was the criteria that you used to  
9 select the 20 out of the 50?  
10 A. Size and the nature of their process, what  
11 they -- what products they'd manufactured. We were  
12 looking -- since this is a fluid milk matter, we were  
13 looking for fluid milk manufacturers in our database.  
14 We have ice cream companies, ice cream mix companies,

15 novelty, cottage cheese, yogurt. And that, of course,  
16 isn't pertinent to what we're doing here, so we selected  
17 fluid milk companies.

18 Q. What are the sizes of the dairy manufacturers  
19 within the 20?

20 A. The 20 are -- the sizes of those companies  
21 are shown on 25A and 25B as to monthly Class I volume in  
22 terms of pounds. So, for example, looking at Group C  
23 where we say 5 million pounds per month, the four  
24 companies that are in that category, where that  
25 information was gathered, would have approximately

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

811

For public distribution

1 5 million pounds of Class I business per month.

2 Q. Okay. So what you've got is, if we look at  
3 Groups A through F, they're going to have volume -- of  
4 the 20 that you used for the database -- within the  
5 range; is that correct?

6 A. Yes, that's correct.

7 Q. And are they equal in number?

8 A. The 20 are comprised of two  
9 producer-handlers, 2B and four in each one of the other  
10 categories.

11 Q. Is one of the producer-handlers in the 124  
12 area?

13 A. No.

14 Q. Is there a reason why you decided not to use  
15 the producer-handler in the 124 area as part of the

16 database?

17 A. I didn't have access to producer-handler  
18 information from 124.

19 Q. And can you tell me, then, in what area of  
20 the country the producer-handler information came from  
21 in Section A?

22 A. Yes. Pennsylvania.

23 Q. Is Pennsylvania regulated by a Federal Order?

24 A. Parts of Pennsylvania are regulated; parts  
25 are unregulated. And the entire state is regulated by

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

812

For public distribution

1 the Pennsylvania Milk Marketing Board.

2 Q. And the producer-handlers that are used in  
3 Section A, are they from the regulated or unregulated or  
4 state regulations?

5 A. State regulated.

6 Q. Is there a reason you chose the state  
7 regulated versus the federal?

8 A. No.

9 Actually, I was looking for what I considered  
10 to be representative producer-handlers and based the  
11 information that Mr. Beshore and Mr. Hollon extracted  
12 from or requested from the market administrator as to  
13 what's average. That played a part, a big part in what  
14 I was looking for, and I felt fortunate to find these  
15 handlers who fit the average size, so I thought that was  
16 a fair representation for these proceedings.

17 Q. Let me go to a different topic, and I'll get  
18 back to where we were headed.

19 If you were engaged by a dairy manufacturer  
20 to conduct an audit of its operating costs, what would  
21 you do?

22 A. That's a good question.

23 First of all, an audit of one's operating  
24 costs, as opposed to an audit of the financial  
25 statements, would be a special assignment. It would be

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

813

For public distribution

1 a special scope engagement, as opposed to an audit like  
2 we do for Wall Street.

3 But under the concept of auditing and under  
4 today's professional guidance and responsibilities, you  
5 would verify the existence of the expenses on a test  
6 basis to make sure that, if the utilities in a plant are  
7 shown as \$100,000, that in fact \$100,000 was paid. And  
8 you do that for all of the major expense categories.

9 Then you would also do what I guess  
10 professionally isn't called a smell test, but I call it  
11 a smell test. You do a comparison of the operating  
12 costs of that organization with industry norms to see if  
13 things are normal. And if they're not normal, then you  
14 investigate any abnormality. And that would be what I  
15 call cross-benchmarking.

16 At the end of all of that, if you were  
17 satisfied that everything was as it was presented, you'd



18 issue a report that would say, "I've examined the cost  
19 of X, Y, Z and my findings are A, B, C, and things have  
20 been done in accordance with Generally Accepted  
21 Accounting Principles."

22 Q. And let me follow up on what you just said.

23 You're required to comply with GAAP,  
24 Generally Accepted Accounting Principles; correct?

25 A. Yes.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

814

For public distribution

1 Q. And you're also required to comply with GAAS?

2 A. Yes.

3 Q. And that is what?

4 A. Generally Accepted Auditing Standards.

5 Q. Okay. That's what you would have to do in  
6 the special type of engagement that I've asked you  
7 about; right?

8 A. Yes.

9 Q. One of the things you would do is you would  
10 attempt to verify the underlying costs, and that would  
11 be a request of the client to "Let me see," for example,  
12 "some documents to show me the costs that you've  
13 expended"; correct?

14 A. That would be one of the procedures that you  
15 might employ. There's a lot of professional judgment  
16 that's employed in doing that sort of an engagement, but  
17 that would be one procedure that's normally employed.

18 Q. And you'd also probably go ahead and visit

19 the operating plant yourself; correct?

20 A. Yes, to the extent that there was examination  
21 of evidential matter that's necessary, it would be  
22 highly unusual not to do that at the place of business,  
23 wherever the headquarters of the company would be.

24 Q. And if I change the scope of your engagement  
25 now for a moment, instead of auditing the costs,

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

815

For public distribution

1 auditing the financial statements, how would that change  
2 what you do?

3 A. Well, the financial statements involve many  
4 aspects that are not in operating costs. For example,  
5 in an audited financial statement, you have a balance  
6 sheet, the assets and liabilities and equity in an  
7 enterprise. And an audit requires the auditor to verify  
8 that all of the assets are properly stated and that the  
9 liabilities are all recorded and recorded at the right  
10 amounts.

11 There's also a requirement to produce a  
12 statement of changes in financial position and cash flow  
13 to be able to have the user of the financials see where  
14 the money came from and where it went to.

15 And then probably the most difficult part of  
16 an audit, frankly, are the footnotes, explaining the  
17 financial statements and the accounting principles and  
18 disclosing other important information for the users of  
19 the financials.

20                   So it's a much more comprehensive engagement  
21 than just auditing, in your initial question, the  
22 operating expenses.

23           Q.     The 20 people that are -- companies that are  
24 used as part of the database that form the basis for  
25 your opinions in Exhibit 25, you've got financial

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

816

For public distribution

1 statements with footnotes that comply with GAAS and GAAP  
2 in your file somewhere; correct?

3           A.     Yes, for the vast majority. There are one or  
4 two out of this 20 where the financial statements are  
5 not audited. They're reviewed or compiled.

6                   And I believe there's one that is a tax  
7 return, that the only formal document that we issued or  
8 that we were involved with is a tax return. But the  
9 majority of them are audited financials.

10          Q.     Now, you did not do any type of an audit of  
11 Sarah Farms in this case; correct?

12          A.     I did not.

13          Q.     You did not do an audit of any of the dairies  
14 in Order 124; correct?

15          A.     I did not.

16          Q.     And you are not allowing me, in order to take  
17 a look at the information in Exhibit 25, to explore the  
18 underlying data that you utilize because you claim it's  
19 confidential; correct?

20          A.     My statement, my written statement disclosed

21 my responsibilities to our clients, and they are as I  
22 said in my direct testimony, and that is that that data  
23 and their identities are confidential.

24 Q. You won't provide to me the 50 dairy  
25 manufacturers that you chose, that was the universe you

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

817

For public distribution

1 chose from to pick the 20; correct? I'm not going to  
2 get those to look at?

3 A. No, sir.

4 Q. I'm not going to get the 20 financial  
5 statements that you utilized as part of the universe  
6 that you used for Exhibit 25; correct?

7 A. That's correct.

8 Q. And I'm not going to be able to determine  
9 whether or not the information that you put in this  
10 document is verified; correct? I'm going to have to  
11 accept what you said; right?

12 A. No, I wouldn't agree with that. I would say  
13 that the -- your ability to ask questions about this  
14 data and how it was put together is -- and I've gone  
15 through this before, and I think that you have adequate  
16 ability to ask questions.

17 And I think there's also the issue of the --  
18 my explanation of where the information comes from. And  
19 as someone said earlier in this proceeding, I'm  
20 testifying under oath. I've spent my life working in  
21 the dairy industry, and I assure you that these are real

22 numbers from our files.

23 Q. Well, you know, I appreciate that, sir, and I  
24 appreciate that you're here being paid for the time that  
25 you've spent as an expert.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

818

For public distribution

1 But you understand that I'm not going to get  
2 to take a look at the underlying data that forms the  
3 basis of Exhibit No. 25, and my client is not going to  
4 have the opportunity to allow me to explore that data,  
5 and I guess my question is, do you think that's fair?

6 A. My response to that would be that I'll just  
7 tell you my thought process on accepting this engagement  
8 with DFA.

9 When one accepts an engagement, you need to  
10 understand the rules of the game. And I talked with  
11 Mr. Beshore as to, you know, what were we doing, how  
12 were we going to do it, what was the proceeding going to  
13 be like. And based upon that, I accepted my engagement  
14 to go forward, knowing what the rules of the game were,  
15 and I think that's frankly what you and your client need  
16 to look at as well.

17 Q. Well, for Sarah Farms, this isn't a game.  
18 This is important to its business. And I would like the  
19 opportunity to review the underlying data to make sure  
20 that I agree with your conclusions, and without having  
21 the underlying data, I have to accept it at face value  
22 and I don't think it's fair. But let me go on.

- 23 Does your firm do any work for Dean Foods?  
24 A. Yes.  
25 Q. How much, in the last year, has your firm

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

819

For public distribution

- 1 received from Dean Foods?  
2 A. Something around \$100,000.  
3 Q. Would that also include work for any  
4 subsidiaries of Dean Foods?  
5 A. Yes. That would be the work we've done at  
6 the corporate level, and we also -- excuse me -- do work  
7 for Dean Foods in Pennsylvania, in the Pennsylvania Milk  
8 Marketing Board work. But my recollection would be it  
9 would be about \$100,000.  
10 Q. Same question with regard to Kraft Foods.  
11 A. Unfortunately, zero.  
12 Q. Okay. Land O' Lakes?  
13 A. Unfortunately, zero. I'm working on it.  
14 Q. Okay. I don't want to spend time to go  
15 through the Dairy 100 with you.  
16 A. We have some clients on that list, I'm happy  
17 to tell you.  
18 Q. Well, I'm happy for you.  
19 Let me ask you a question. You indicate in  
20 your C.V. that you -- and I'm going to quote here -- you  
21 lead the firm's engagements in industry consolidation,  
22 including due diligence, valuation and consolidation  
23 benefit analysis, closed quote. I hopefully read that

24 correctly.

25 A. I think you did.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

820

For public distribution

1 Q. Okay. What does that mean?

2 A. Well, industry -- so we are on the same page,  
3 industry consolidation is, as we heard some discussion  
4 about that subject earlier this week, is where one  
5 company acquires another and there were two and then  
6 after the consolidation, there's one.

7 There's a lot of that that has taken place in  
8 the dairy foods manufacturing business, and we --  
9 sometimes we have normal ongoing audit and tax dairy  
10 clients that sell their business and we assist them in  
11 the sale.

12 In other cases, our clients -- and I like  
13 this better, frankly, when our clients are going out  
14 buying someone else.

15 And so I'm involved with those engagements  
16 either directly leading our engagement team or, at a  
17 minimum, reviewing our findings, providing consulting to  
18 my partners, whoever would be working on that.

19 Due diligence is what I call kicking the  
20 tires. If somebody is -- if one of our clients is  
21 buying another dairy, we want to make sure we don't get  
22 a "pig in the poke." We do audits and review, you know,  
23 the financial part of due diligence. We're not checking  
24 bacteria counts in their product. We're not scientists.

25 We're CPAs.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

821

For public distribution

1 Valuation would be, a client comes to me and  
2 says, "Carl, my son's sons became lawyers. They don't  
3 want to run this dairy. I think I want to sell it.  
4 What do you think it's worth?"

5 And benefits of consolidation would be when a  
6 client is looking at acquiring another business and  
7 we're going to close a plant, close depots and  
8 consolidate things in a more efficient manner.

9 We do a lot of work of that sort. It's very  
10 interesting work. And, you know, it helps our clients  
11 know what their financial opportunities are if they're  
12 fortunate enough to bring the transaction to completion.

13 Q. I appreciate that.

14 I've got a lot of questions based upon your  
15 testimony, but as an aside, I will tell you your example  
16 of going from a dairy field into being a lawyer is an  
17 example of frying pan and fire, so I'd stay away from  
18 that.

19 A. Neither of my sons became CPAs, so I'm not  
20 sure what that tells us.

21 Q. Yeah, I understand.

22 Let's talk about industry consolidation for a  
23 moment because we have heard some testimony during the  
24 course of these last few days.

25 Would you agree with me that in the last 10



For public distribution

1 years that there has been a significant amount of  
2 consolidation in the dairy industry?

3 A. Yes. And my yes comes from the manufacturing  
4 end. I'm much more familiar with that end than any  
5 other part of the industry.

6 Q. And has that consolidation had an impact on  
7 the dairy industry in your view?

8 A. Yes.

9 Q. And in what way?

10 A. Well, there are less entities. There were  
11 hundreds of dairy plants, thousands of dairy plants in  
12 the United States, and now we're in the hundreds. So  
13 there are less plants. They're bigger.

14 Frankly, I think we have better -- we've been  
15 able to modernize and become more efficient through this  
16 consolidation process. I think we have -- I see a  
17 higher level of sophistication scientifically in the  
18 plants. Lower product shrink is one example that we  
19 quantify on a regular basis.

20 We see research and development now in the  
21 larger companies because they have the financial  
22 wherewithal to do that. It's something lacking in the  
23 industry.

24 So as much as it, I guess from my personal  
25 standpoint, hurts to see a family-owned business be

For public distribution

1 acquired, from the industry standpoint and the long-term  
2 viability of the industry, I think consolidation was  
3 inevitable.

4           And my final thought on that is that there  
5 still are some amazingly successful small dairy  
6 manufacturers that have developed product, customer or  
7 geographic niches that will survive for many, many years  
8 into the future that are not giants like Dean.

9           Q.    Let me follow up on that response with some  
10 questions and conclusions that I think I've drawn from  
11 your testimony and my experience in this hearing.

12                    Would it be true that as we reduce the size  
13 of the number of processors, for example, in the  
14 industry, that as consolidation increases, that the  
15 market share of the larger consolidator is also going to  
16 increase?

17           A.    Yes, that would be a conclusion that you  
18 would reach just by the mathematics.

19           Q.    And that's what's happened in the dairy  
20 industry, for example, with Dean Foods, which now has  
21 somewhere in the -- 20 to 25 percent of the market in  
22 the country; is that right?

23           A.    I'm not sure -- I've seen industry  
24 publications where statistics like that are presented.  
25 I'm not sure that I can recall the precision.

For public distribution

1           One of the things that does give the country  
2 some comfort -- and we'll just continue to pick on Big  
3 Brother Dean -- when they do an acquisition of a certain  
4 type or size in a certain part of the country, the  
5 Justice Department is involved.

6           The Justice Department reviews these  
7 transactions and requires Dean to do certain things that  
8 they believe maintains the integrity of competition.

9           Q.     The Justice Department may have some comfort,  
10 but the small independent operator in the area where  
11 Dean makes an acquisition and has its market strength  
12 behind it, it then goes out of business. It's not going  
13 to have any comfort, will it?

14          A.     That would be a case-by-case situation. I've  
15 certainly seen -- like I said, I've seen some small  
16 family-owned businesses that they'd love to have Dean as  
17 a competitor because they can outmaneuver them. They  
18 can just zip around their decisions and come up with  
19 creative ways of doing things, finding customers that  
20 Dean's not interested in because they're too small, and  
21 can prosper in that respect.

22          Q.     And they could also, in your example, be able  
23 to provide better quality or better service to their  
24 customers given the fact that they are owner-operated,  
25 versus a conglomerate like Dean; correct?

For public distribution

1           A.     That's a case-by-case situation. I've seen  
2 big and bad and I've seen small and wonderful.

3           Q.     Let's talk for a minute, then, about your  
4 second issue on due diligence.

5                     As I understand it, and you'll correct me if  
6 I'm wrong, what happens in this area of your business is  
7 someone may make a decision that they're interested in  
8 making an acquisition, and they ask you to assist them  
9 in the due diligence as to whether or not financially it  
10 would make sense for that acquisition; correct?

11          A.     Yes, that's a good generalization.

12          Q.     And one of the things that you would do is  
13 you would look at the financial statements -- audited,  
14 hopefully; unaudited if you have them -- to be able to  
15 make that determination; correct?

16          A.     That would be one of the things that we would  
17 utilize.

18                     The financial statements to an organization  
19 like ours, with our experience in the dairy industry, we  
20 actually utilize other information perhaps more in some  
21 cases than the balance sheet of a dairy, which is a  
22 pretty boring thing. It doesn't tell you very much.  
23 There are a lot of other statistics and circumstances  
24 and facts that are more important than the traditional  
25 financial statements in due diligence.

For public distribution

1           Q.     As a CPA charged with the request to conduct  
2 due diligence for a potential acquisition, or as a  
3 reasonable person, and it may be mutually exclusive or  
4 it may be combined, if, in the circumstance I'm going to  
5 ask you, what happened was you had somebody come to you  
6 and say, "I want to buy a company. They won't give me  
7 the financial statements. They're just going to give me  
8 a statement that says, 'I have a database regarding the  
9 financial statements. Trust me. Everything is okay,'"   
10 would you allow your client to go ahead, based upon that  
11 information, to acquire that company?

12           A.     Well, I wouldn't -- your hypothetical isn't  
13 as hypothetical as you might think. I've been faced  
14 with circumstances just like that in the beginning  
15 phases of an acquisition, where somebody's not sure if  
16 they want to sell, so they don't want to disclose much  
17 of anything, so what you do is you take whatever  
18 information you can gather about the company.

19                     And I've worked on -- some of this is  
20 almost -- certainly not direct accounting, but, for  
21 example, if you take a knowledgeable dairy person and we  
22 want to find out what the sales are for that company,  
23 we'll send someone out to the area where the trucks are  
24 parked at night and we'll count the trucks and the size  
25 of the trucks, and then the next day or two, we'll see

For public distribution

1 how many trucks leave the yard. And we know how many  
2 cases of milk go in a truck and what the approximate  
3 load of a truck would be, and you can get a pretty good  
4 idea of what the sales level would be of that company.

5           You then do a market survey, as I mentioned  
6 earlier. You go into the supermarkets and convenience  
7 stores and look at the packages and see what the retail  
8 out-of-store price is. That'll give you an idea of what  
9 the into-store price is, because retailers have very  
10 similar markup percentages.

11           So you can do some "what if" calculations and  
12 you get certain information, like sales, cost of sales,  
13 and then we would apply to that our industry benchmarks  
14 to say, "If this plant is operating at normal  
15 efficiency, the cost in the plant would be X. The cost  
16 to deliver the product would be Y." And we can come up  
17 with a hypothetical P & L. We've done that a number of  
18 times over the years. It's not the preferred way by any  
19 means, but you can get a pretty good comfort level.

20           Q. Let me ask you a follow-up hypothetical.

21           Let's assume that, again, you're asked to do  
22 due diligence on a potential acquisition. Rather than  
23 financial statements, all you get is a statement from  
24 the president or CEO of the publicly traded, or  
25 privately held company in my example would be better,

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

828

For public distribution

1 that simply says, "We have a database. The financial  
2 statements are all good. We're making this much money."  
3 And you have the opportunity in the next 24 hours -- you  
4 can't do anything else. You've got to rely upon this by  
5 the company. What would you advise your client to do?

6 A. Well, that wouldn't happen in real life.

7 Q. I asked in my hypothetical to go ahead and  
8 answer it.

9 A. If that was all we had to do, I would say to  
10 my client, "This guy's a nut. Stay away from him." But  
11 that wouldn't happen.

12 Q. I don't consider you to be a nut.

13 A. Thank you.

14 Q. Okay. I have some questions on Exhibit 25,  
15 if you've got it there.

16 A. I do.

17 Q. As I understand your testimony with regard to  
18 the container source for Sections A through D, you  
19 determined that there would be a purchase of the  
20 container for E and F, that what would happen is you'd  
21 go out and get your own blow-mold and make your own  
22 containers; correct?

23 A. Yes. And I would only change the tense in  
24 your statement. These are actual numbers, so it isn't  
25 you would go out and get it. They've already done it.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

829

For public distribution

1 Q. Okay. Well, let me ask you a question.

2                   Let's assume -- and I think your testimony  
3 was, and you'll tell me if I'm wrong about this, that  
4 you didn't believe it would be cost effective in A  
5 through D of Exhibit 25 for someone at that value to go  
6 out and actually purchase a blow-mold machine or  
7 operation; correct?

8           A.     It typically is not.

9           Q.     On the other hand, people could do that?

10          A.     They could. It would also depend upon their  
11 product mix, what percentage of their business is in  
12 gallons, because gallon and half-gallon are the  
13 predominant plastic packages that are blow-molded, so  
14 you could probably justify, if you were a gallon and  
15 half-gallon shop, only at something lower than  
16 18 million, but not much lower.

17          Q.     Well, let's assume for a moment that somebody  
18 that was at 2 or 3 or 4 million decided that they were  
19 going to expend the capital cost to buy the blow-mold  
20 operation or machine.

21                   Would they after a period of time be able to  
22 have a reduced cost in terms of a sale of their milk  
23 based upon their initial capital acquisition costs?

24          A.     Well, the way that would work in the books of  
25 that company that purchased the blow-molder and as

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

830

For public distribution

1 they -- and let's just think about the depreciation  
2 expense and the capital cost for a million dollars to



3 put a blow-molder and the related equipment and  
4 building.

5                   So we spent a million dollars and we  
6 manufactured bottles that cost us a fully loaded cost of  
7 20 cents a bottle and we could have bought it for 14, so  
8 after 10 years of losing 6 cents a gallon, the  
9 depreciation expense is gone. The loan is paid off if  
10 you had capital -- money from other sources of your  
11 business. Then you would have a cheaper bottle in that  
12 eleventh year, but you've lost a lot of money in the  
13 intervening ten.

14                   So I typically -- the typical dairy, we've  
15 done many studies of "Should we blow-mold or shouldn't  
16 we," and the smaller companies have much better  
17 alternatives today, and those alternatives are two:

18                   One is to enter into a joint venture with  
19 companies that are experts in operating blow-mold  
20 operations, and in some cases they'll build a plant  
21 adjacent to your plant or you'll build one for them.  
22 They'll rent it from you. You get through-the-wall  
23 blow-molding and then that company, that management  
24 company will sell the excess capacity to other bottlers.

25                   And the other alternative is to join up with

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

831

For public distribution

1 one of the buying co-operatives. There are a number of  
2 dairy buying co-operatives that collectively put their  
3 volume together and can buy bottles for a lower cost

4 than you can manufacture, so that's the basis of my  
5 statement, my opinion.

6 Q. Do you know if Sarah Farms has a blow-mold  
7 machine or operation?

8 A. I know -- I do not know that. I have no idea  
9 how they do their bottles.

10 Q. And you don't know what the amount of monthly  
11 volume is for Sarah Farms; correct?

12 A. The monthly volume?

13 Q. Yes, sir.

14 A. The only thing I know is what I heard at this  
15 hearing.

16 Q. And you don't know, assuming they did  
17 purchase a blow-mold machine, when they purchased it, at  
18 what volume?

19 A. No. I have no information on that subject.

20 Q. And you don't know for Sarah Farms what its  
21 plant processing costs are; correct?

22 A. Their actual costs, I do not know.

23 Q. You do not know the actual packaging costs;  
24 correct?

25 A. I do not know their actual packaging costs.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

832

For public distribution

1 Q. You don't know their actual transportation  
2 costs; correct?

3 A. I don't know their actual transportation  
4 costs, no.

5 Q. In fact, to cut through all of this, you  
6 don't have any actual cost figures for Sarah Farms;  
7 correct?

8 A. That's correct.

9 Q. Now, let me ask you, on Exhibit 25, page E,  
10 your comparative analysis document --

11 A. I have it.

12 Q. Thanks.

13 Since they're identical for both, it makes no  
14 difference whether you're using the 14 percent or the  
15 8 percent, based upon my question, anyway.

16 The distribution that you have listed for  
17 dairy supplier costs for distribution at .2960, what  
18 does that actually work out to in dollars?

19 A. It's 29.6 cents, the distribution cost for  
20 every two-gallon package that is delivered.

21 Q. And how can -- can you give me what that  
22 would equate to for one truckload, please?

23 A. Depends on the size of the truck.

24 Q. Well, did you assume a particular size in  
25 looking at your document?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

833

For public distribution

1 A. We assumed trailer-load deliveries.

2 Q. And trailer load is usually how much?

3 A. I'm not sure, without checking my files, as  
4 to the exact number of two-gallon packages that are on a  
5 skid. Obviously, that's part of the study we did. I

6 don't recall. There's a lot of details in that.

7 Q. Would that equate to about 5,000, 5,400  
8 gallons?

9 A. That's pretty close, I think.

10 Q. Okay. So if that's the case, then -- and  
11 these are approximate numbers because I didn't have a  
12 calculator when I did this.

13 Your freight figure for a load is around 700,  
14 \$750; correct?

15 A. I'll accept that.

16 Q. Okay. So if in fact the actual freight per  
17 load is closer to 400 to 450, then your cost figures on  
18 this document are overstated by that figure; correct?

19 A. There's more to these cost figures than just  
20 the truck.

21 Q. No. I understand that. But obviously your  
22 cost figure's overstated, because if I'm correct that  
23 it's closer to 4- to 450 and you've got 750 for  
24 transportation, then it's overstated by that much;  
25 correct?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

834

For public distribution

1 A. No, I don't agree with that at all.

2 Q. Okay. So if you would, then, figure for  
3 transportation, rather than 750, as you have actual --  
4 actually, 450, and then recalculate for me the actual  
5 cost, if you can.

6 A. I don't agree with your 450.

7 JUDGE HILLSON: That isn't the point. He's  
8 saying, assuming it's 450, what is the effect of that?  
9 Q. BY MR. RICCIARDI: That's exactly right.  
10 I'm asking you to assume.  
11 JUDGE HILLSON: If he's totally wrong on the  
12 450, that's not the point. What he's saying is, what's  
13 the impact of 450 instead of 7?  
14 MR. BESHORE: I think he's misunderstood  
15 Mr. Herbein's testimony with respect to the total  
16 transportation cost. It's not just trucking. It's not  
17 just the cost of the truck.  
18 MR. RICCIARDI: I don't need to be educated.  
19 I'll ask my questions.  
20 MR. BESHORE: The question was misleading.  
21 MR. RICCIARDI: It wasn't at all.  
22 JUDGE HILLSON: The question was  
23 transportation cost as 450, instead of 700.  
24 Q. BY MR. RICCIARDI: That's all I want to know.  
25 A. And I don't recall your estimate of the

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

835

For public distribution

1 gallons.  
2 Q. I didn't go back and do that.  
3 A. Well, we can't recalculate the \$300  
4 difference without knowing the gallonage.  
5 Q. I understand. But go along with me on this.  
6 If you assume my figure is correct, that it's  
7 closer to 450 as opposed to 750, which you have on your

8 document, would you agree with me that your costs on  
9 this document are overstated by whatever that figure is?

10 A. Well, that's as obvious as your mustache.

11 Q. And you know what? I can't make it obvious  
12 on the record until you say it. So yes, it's obvious,  
13 isn't it?

14 A. If the number that I've calculated, which I  
15 stand by and we've done a study, and the .2960 per two  
16 gallons, if that is overstated by some amount, then my  
17 results would be overstated. I mean, that's just simple  
18 math.

19 Q. It is simple math. And, actually, it follows  
20 from A to B, and so, therefore, if in fact your study  
21 gives you the figure for transportation and that figure  
22 is wrong, then we have to challenge the veracity of your  
23 study at least with regard to transportation costs;  
24 correct?

25 A. Well, I'm certainly not going to agree with

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

836

For public distribution

1 you that my study is wrong, because my study is very  
2 precise.

3 JUDGE HILLSON: He's not asking you that.

4 Q. BY MR. RICCIARDI: I'm not asking that.

5 JUDGE HILLSON: He said if --

6 Q. BY MR. RICCIARDI: I'm not asking that. I  
7 want you to assume for me that what's going on is you  
8 have overstated the transportation costs, and I'm asking

9 you then to conclude, as night follows day, your  
10 study -- I have to question the veracity of your study;  
11 correct?

12 MR. BERDE: Your Honor, may I make an  
13 objection?

14 JUDGE HILLSON: Sure.

15 MR. BERDE: That makes about as much --

16 JUDGE HILLSON: Mr. Berde, you need to say  
17 who you are.

18 MR. BERDE: Sydney Berde.

19 That makes about as much sense as requesting  
20 the witness to assume that 2 and 2 is 5 instead of 4.

21 MR. RICCIARDI: In the milk regulation area,  
22 Mr. Berde, it may be.

23 JUDGE HILLSON: Okay. Look --

24 MR. BERDE: I don't know what school you went  
25 to, but 2 and 2 is 4 no matter what industry you're in.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

837

For public distribution

1 JUDGE HILLSON: Okay, guys. Come on. Look,  
2 the administrator and the Secretary, who's making the  
3 final decision here, I think will understand that if the  
4 costs are less than what he says, then the study is  
5 incorrect to that degree. If that's the point you're  
6 trying to make, it is a very basic point, and I can't  
7 believe you just spent about eight minutes on it, to  
8 tell you the truth.

9 MR. RICCIARDI: If in fact I got some quicker

10 answer as opposed to --

11 JUDGE HILLSON: I understand.

12 MR. RICCIARDI: -- the right side of the room  
13 applauding when they don't understand the fact, that's  
14 the way it goes. Apparently you did.

15 Q. BY MR. RICCIARDI: Now, also, with regard to  
16 the Costco prices that you utilized as the other portion  
17 of your report, you never actually went into a Costco  
18 store in the Phoenix area to get those figures; correct?

19 A. I did not.

20 Q. Okay. As I understand it, and I don't mean  
21 to make this a double-play combination like Tinkers to  
22 Evers to Chance, but it went like this: Some unknown  
23 person at Shamrock to Kroger to English to Beshore to  
24 Herbein. That's how you got the figure for Costco?

25 A. Yes.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

838

For public distribution

1 Q. And there's nothing in your file as an  
2 accountant to confirm that pricing; correct?

3 A. I have a document that was transmitted in  
4 that sequence which shows the dates and the prices for  
5 the two -- for Costco and Sam's.

6 Q. I understand. And that was from one of the  
7 individuals I named in that group; correct?

8 A. Yes.

9 And we did have discussion about how the data  
10 was gathered, and it was my -- it is my opinion that it



11 was a legitimate way of gathering the data, didn't  
12 appear unusual or out of line in any way, and I've  
13 accepted it as valid.

14 Q. Do you have any clients that are selling to  
15 Costco?

16 A. Yes.

17 Q. Where do they sell to Costco?

18 A. We have in two locations, in the Pacific  
19 Northwest and also in Colorado.

20 Q. And the client in Colorado, is that a  
21 regulated entity as opposed to a producer-handler?

22 A. Yes, regulated.

23 Q. And do you know what Costco in Colorado was  
24 selling the milk for?

25 A. No.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

839

For public distribution

1 Q. Do you know what your client is selling to  
2 Costco for?

3 A. No.

4 Q. Do you know what the costs of your client in  
5 the sale to Costco in Colorado are?

6 A. Not -- no, not as I'm -- I mean, I didn't  
7 look at that as part of this project.

8 Q. In anywhere on Exhibit 25, did you factor in  
9 for a producer-handler the cost of balancing milk?

10 A. No.

11 Q. Would you agree with me that the cost of

12 balancing milk for a producer-handler is a real cost?

13 A. I've never studied the balancing cost for a  
14 producer-handler, and I heard the discussion here the  
15 last two days about it, and I do know from the  
16 producer-handlers that our firm represents, where they  
17 produce milk and ice cream, that that's a pretty nice  
18 combination. And I think we heard some of that from the  
19 gentleman from Braum's, that you build ice cream  
20 inventory as part of your balancing, so --

21 But I've not made any analysis, and there  
22 is -- I want the record to be clear -- there is no  
23 balancing cost included in my analysis.

24 Q. Have you ever done any analysis of balancing  
25 costs at a co-operative?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

840

For public distribution

1 A. In the co-operative? Yes, sort of. And the  
2 "sort of" is, co-operatives provide balancing in a  
3 couple of different ways. The most common way is that  
4 they have controlled outlets that manufacture butter and  
5 powder, powdered milk.

6 And the operation of those butter and powder  
7 plants can either make or lose money, depending upon  
8 what happens to the balancing costs. So if that powder  
9 plant is losing money, then that means there's a cost to  
10 balance the supply. And I've been involved with some  
11 projects over the years in that regard.

12 Q. So you'd agree with me that the co-operative

13 has balancing costs that it has to deal with in terms of  
14 trying to balance its milk source; correct?

15 A. Yes.

16 One of the things that we want to be clear  
17 about in this record, and I'll answer your question, is  
18 there are certain elements that we're talking about in  
19 this hearing that are material in size and there are  
20 others that are rather immaterial in size.

21 And the cost of balancing is not one of those  
22 big numbers. It's not like the cost of a plastic jug.  
23 We're talking about pennies per hundred pounds divided  
24 by 11.62 to get to a gallon equivalent, as opposed to  
25 10, 13, 15 cents a gallon for a container. So it's a

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

841

For public distribution

1 relatively small number.

2 Q. But there is a cost?

3 A. There is a cost.

4 Q. And to confirm, you didn't include that cost  
5 in your study; correct?

6 A. That's correct.

7 Q. Did you assume, in terms of looking at the  
8 cost on Exhibit 25 for packaging, that the  
9 producer-handler in that circumstance -- in any of the  
10 circumstances would use a foil seal underneath the  
11 regular plastic seal for a gallon jug?

12 A. The gallon -- the two gallons that are  
13 included on 25E do not include the foil seal.

14 Q. Okay. So if there is a foil seal that is  
15 used by a producer-handler, then we'd have to add that  
16 cost into your figures; correct?

17 A. Yes. That would be -- that was -- that's a  
18 nuance that was not in our study. We used a normal  
19 58-gram bottle with a cap and a label and the box to  
20 hold it, and that's the cost.

21 Q. And in terms of the container for the two  
22 gallons, did you assume that it was a cardboard  
23 container?

24 A. Yes.

25 MR. RICCIARDI: Okay. I don't have any

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

842

For public distribution

1 further questions. Thanks.

2 JUDGE HILLSON: Anyone else?

3 I thought so.

4

5 EXAMINATION

6 BY MR. MILTNER:

7 Q. Mr. Herbein, my name is Ryan Miltner. I  
8 represent Smith Brothers Farms, Mallorie's Dairy, and  
9 Edaleen Dairy in the Pacific Northwest.

10 JUDGE HILLSON: I'm sorry. Ryan, I didn't  
11 catch your name.

12 MR. MILTNER: It's Miltner, M-i-l-t-n-e-r.

13 Q. BY MR. MILTNER: If I could start, I have a  
14 couple questions on Exhibit 25, and I'm looking at pages

15 A and B.

16 I first wanted to confirm -- because I think  
17 you mentioned in your answers to Mr. Ricciardi's  
18 questions, but I wanted to make sure I have this  
19 correct -- the number of plants in your groupings here.  
20 Two in A, two in B, and four for the remainder of the  
21 categories. Is that correct?

22 A. That's correct.

23 Q. I'm looking at the Group C and Group E.

24 A. C and E.

25 Q. C and E, okay?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

843

For public distribution

1 And I'm looking under the column for 124. I  
2 want to make sure that I'm interpreting this correctly.

3 The bottom line, literally the bottom line  
4 demonstrates, I assume, that the cost for processing a  
5 hundredweight of milk in Order 124, if you produce  
6 5 million -- if you process 5 million pounds per month  
7 in Class I is \$7.33?

8 A. For a hundred pounds, yes.

9 Q. For a hundred pounds.

10 And in the same Order, at 18 million pounds,  
11 the cost per hundredweight is \$5.91; right?

12 A. Yes.

13 Q. So there's an added efficiency, cost savings  
14 of 1.42 per hundredweight between those two plants?

15 A. I believe your math is right.

16 Q. Okay. Good. My subtraction isn't so good.  
17 And that would mean that a 5 million pound a  
18 month processor has a disadvantage compared to an  
19 18 million pound per month processor of that amount?  
20 A. Yes.  
21 Q. Okay. And should a processor want to  
22 increase their production from 5 million to 18 million  
23 pounds a month, he would have to add capacity to his  
24 plant one way or another by adding to his capital  
25 investment, I would assume; right?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

844

For public distribution

1 A. No, not necessarily.  
2 Q. Okay.  
3 A. You would have to have a baseline of what is  
4 the capacity of the existing facility. There's two  
5 ways -- some plants are operating at 50 percent of  
6 capacity and have the ability to add volume. That's a  
7 lot less expensive than if we're operating at 75 percent  
8 of capacity and we need to build a building and add  
9 fillers.  
10 Q. Okay.  
11 A. So you'd have to know the specifics of the  
12 circumstance.  
13 Q. So in some cases, it can be capital  
14 investment, capital expenses; but in other cases, if  
15 they're operating at under capacity, they would be  
16 expenses, but not necessarily capital expenses?



18 because farming has a lot of fixed costs, and if we  
19 have -- if we expand our herd but we don't have to buy  
20 more land because we can bring in the feed, I mean, I  
21 could see -- I think that's something that was missed in  
22 the analysis over the last two days.

23 Q. I guess what I'm hearing in your answer is,  
24 there are a lot of variables that have to be taken into  
25 account, then?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

846

For public distribution

1 A. Yes. And the variables are not all expenses  
2 on the producer-handler side. There is the revenue for  
3 the value of the milk that those extra cows produce that  
4 must be considered in that study.

5 Q. Okay. And you're assuming that the value of  
6 the additional milk produced is offset by the income  
7 from selling that milk?

8 A. Yes, or utilizing it in the -- you know, in  
9 your example, in a bottling facility at the farm in a  
10 producer-handler scenario.

11 Q. I'm curious. Have you had the opportunity  
12 to, in any of your consulting, examine the additional --  
13 the marginal benefit of adding an additional cow to a  
14 producer-handler operation?

15 A. Not for a producer-handler. But we just did  
16 a fairly major project for one of our old dairy farmer  
17 clients. One of my partners handled this study, and I  
18 consulted with he and our client on the results.



19                   And the study was designed to land a bank  
20 loan to add 500 cows to their herd, and the -- and I was  
21 actually thinking about that study early this morning  
22 and thought about the discussion yesterday.

23                   And that analysis took the cost of the cows,  
24 the interest expense to borrow the money. There was a  
25 need for another barn. That cost was included. And

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

847

For public distribution

1 then the expected production per cow and the estimated  
2 value of that milk and the butter fat of 3.7 and all of  
3 that was in my partner's study to show that they could  
4 afford, even at today's low milk prices, to service that  
5 debt for those 500 cows, so I think it would be -- that  
6 would be the approach that you should use in analyzing  
7 that circumstance.

8           Q.     That's your opinion as to what approach you  
9 should use?

10          A.     That is my opinion as to --

11          Q.     Okay.

12          A.     -- the approach that should be used.

13          Q.     And that was for a pooled handler and not a  
14 producer-handler?

15          A.     Yes, that study happened to be for a pooled  
16 handler.

17          Q.     And even so, that pooled handler did have  
18 additional capital costs to expand the size of his  
19 dairy?

20 MR. BESHORE: I think you were talking about  
21 farmers, not handlers there.  
22 Q. BY MR. MILTNER: I'm sorry.  
23 A. I was talking about a farmer.  
24 MR. MILTNER: Thank you, Marvin?  
25 Q. BY MR. MILTNER: But even so, that farmer did

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

848

For public distribution

1 have additional capital expenditures that were  
2 associated with the expansion of his dairy?  
3 A. Yes.  
4 Q. And that -- and, of course, you mentioned  
5 that he had debt service costs, which, of course,  
6 involves a certain degree of risk that would be  
7 reflected in the interest the bank was charging him and  
8 whatnot?  
9 A. There's risk every time you borrow money and  
10 there is always risk in business.  
11 Q. Thank you.  
12 I wanted to -- I think Mr. Ricciardi got  
13 answers to these questions. I want to make sure that I  
14 got mine, if I wrote down accurately what you had said.  
15 The 20 --  
16 JUDGE HILLSON: You're not going to ask him  
17 the exact same questions to check your notes, are you?  
18 MR. MILTNER: No. I'm not just checking my  
19 notes. Thank you, Your Honor.  
20 Q. BY MR. MILTNER: The 20 plants that you

21 selected for Exhibit 25 were hand-picked by you and not  
22 randomly selected; is that correct?

23 A. That's correct.

24 Q. Okay. And did you provide us with the  
25 Class I utilization of the plants that were included in

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

849

For public distribution

1 the study? Can you provide us that information?

2 A. I certainly would have in my files their  
3 utilization. I don't know that as I'm sitting here,  
4 other than to say that, in the selection, these are high  
5 utilization Class I plants. In other words, this isn't  
6 40 percent Class I and 60 percent cottage cheese. These  
7 are predominantly fluid milk operations.

8 Q. Okay. So these plants in this study wouldn't  
9 necessarily have large ice cream production facilities  
10 or anything of that nature?

11 A. Not in the financial information. There are  
12 companies in here that have ice cream subsidiaries, but  
13 not in the plant.

14 Q. Not in the plant information you used?

15 A. That's correct.

16 Q. If you have that information in your file,  
17 would you be willing to provide the average Class I  
18 utilization of those plants to us?

19 A. I think that would have to follow the  
20 confidentiality discussion that Mr. Ricciardi and I had.

21 Q. Okay. Would the -- whatever that Class I

22 utilization is, would that not be something useful in  
23 determining whether your model applies to another  
24 subject dairy, whether it's an accurate predictor of  
25 their costs?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

850

For public distribution

1 A. I considered that. And I'll just repeat what  
2 I said before because it's in a little different  
3 context.

4 My engagement for this proceeding was to  
5 present financial information for, as we say in the  
6 headings, fluid milk plants, so that's what I've  
7 selected.

8 Now, when you say "utilization" and we think  
9 about the federal market administrator's report, every  
10 plant has utilization other than Class I. There's  
11 always something else: bulk sales, bulk cream, Class II  
12 products. But these products are predominantly fluid  
13 milk. And the utilization -- I mean, it would be more  
14 than 70 percent, I'm sure.

15 Q. Okay. And the study is based on a model for  
16 producing one gallon 2 percent white milk in a plastic  
17 jug; is that correct?

18 A. That depends which exhibit you're referring  
19 to. And the answer to that is yes on 25F through K.

20 Q. Including E?

21 A. Including -- E is a 2 percent two-gallon  
22 package, yes.

23 Q. Okay. And does it -- do pages A through D  
24 assume that the plant is bottling that same type of  
25 milk, white milk, 2 percent?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

851

For public distribution

1 A. I'm sorry. Which plants?  
2 Q. The first four pages. You're saying that the  
3 cost of processing a gallon of milk for these 6 or 12  
4 categories, however you want to look at it --  
5 A. You're looking at 25A and B?  
6 Q. 25A and B.  
7 A. Okay. Yes, I'm with you.  
8 Q. -- is that based on putting that raw milk  
9 into plastic one-gallon containers, and 2 percent?  
10 A. No.  
11 Q. Okay.  
12 A. The plant costs on 25A and B are the plant  
13 costs for those plants, and they produce more than  
14 gallons. This is their plant cost for gallons and  
15 half-gallons and half-pints to go to schools.  
16 Q. Okay. And the information as to each of  
17 these plants, what their breakdown is as far as how many  
18 gallons, half-gallons, half-pints they're producing is  
19 also proprietary information from your database; is that  
20 correct?  
21 A. Yes, it is.  
22 Q. And you're not -- as such, you're not going  
23 to provide that information?

- 24 A. That's correct.
- 25 Q. So if a plant produced a higher percentage of

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

852

For public distribution

1 half-pint containers than those used in your study,  
2 would that change the applicability of your estimates to  
3 that particular subject plant?

4 A. It would if I had selected plants with a  
5 predominance of half-pints. Again, that's part of why  
6 Herbein judgment selection was used out of our database  
7 as opposed to my laptop's random number table.

8 So I selected plants that fit the mold of  
9 what I was doing, which is looking for volume product  
10 production; however, all those -- all of these plants,  
11 the 18 nonproducer-handlers in my study do more than  
12 gallons. Every one of them has a full product line.

13 Q. Okay.

14 A. But the predominance would be in the volume  
15 products.

16 Q. But the predictive value of your conclusions  
17 is dependent somewhat on the particular mix of products  
18 produced by the plant you're trying to analyze?

19 A. Yes, there is an effect, and the effect --  
20 there is an effect.

21 Q. I just want to shift gears a little bit and  
22 kind of leave the exhibit for a second.

23 In your background, do you have any work or  
24 consulting that would provide you with specific

25 knowledge about the operating efficiencies of

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

853

For public distribution

1 producer-handlers in the Pacific Northwest?

2 A. No.

3 Are we talking about their plant operation?

4 Q. I'm talking about the specific efficiencies  
5 of any particular dairy, not in general, but have you  
6 worked with any of the producer-handlers in the Pacific  
7 Northwest that gives you specific knowledge of their  
8 efficiencies?

9 A. No.

10 Q. This information you've provided us in  
11 Exhibit 25, again, is primarily based on processing  
12 costs? It doesn't include any of the costs and expenses  
13 of producing raw milk at the farm level. Is that  
14 accurate?

15 A. That's correct.

16 Q. In one of your answers to one of the  
17 questions Mr. Ricciardi asked you, you corrected him in  
18 referring to Exhibit 25 in the future tense, at least as  
19 to the blow-molds that a plant in Order 124 would use a  
20 blow-mold. You suggested that these were past tense  
21 hard figures and that it was more correct, more accurate  
22 to say that these plants in Order 124 did have  
23 blow-molds.

24 How many plants in Order 124 did you analyze  
25 that had greater than 30 million pounds per month?

For public distribution

1           A.     We need to be sure the record's clear on what  
2 the 124 and the 131 column are.

3                     These are statistics from our database. And  
4 just to look at column F, the four plants that are in  
5 the 30 million pound range are plants from our database  
6 that may or may not be located in 124. They're not all  
7 located in 124 or in 131.

8                     We took our database of information and made  
9 regional CPI adjustments so that we have the costs  
10 adjusted to the local market. It's a very accepted  
11 accounting practice to do that so that we're not  
12 comparing Mississippi wages with North Jersey wages.

13           Q.     Okay.

14           A.     So that's how we've localized the results.

15           Q.     So -- and, actually, I think I remember you  
16 stating that you only -- in this pool of 20, there was  
17 only one Pacific Northwest plant; right?

18           A.     That's correct.

19           Q.     Okay. And if I could ask you about the use  
20 of the CPI to adjust the results or to, I guess, make  
21 the results more accurate. Is that --

22           A.     Localize the results --

23           Q.     To localize the results?

24           A.     -- is how I would describe them.

25           Q.     CPI is the Consumer Price Index; right?



For public distribution

1 A. Yes.

2 Q. As determined by the federal government?

3 A. U.S. Department of Labor.

4 Q. Is there a particular reason you chose to use  
5 the Consumer Price Index as opposed to the Produce Price  
6 Index?

7 A. Yes. I believe that the CPI was the  
8 appropriate index to use --

9 Q. For these --

10 A. -- for this study.

11 Q. For these producers, these producing  
12 facilities, you used the consumer index?

13 A. These plants, yes.

14 Q. And because you've only used one plant that's  
15 actually physically located in the Pacific Northwest,  
16 again, this is a -- this is for predictive value only?  
17 This doesn't reflect the actual costs, necessarily?  
18 Because we have six different categories in the Pacific  
19 Northwest and one plant. It doesn't reflect the actual  
20 costs of processing milk in the Pacific Northwest? It's  
21 whatever its predictive value is?

22 A. I believe that the application of the CPI  
23 index to the data that I've used for both 131 and 124 is  
24 an accurate reflection of the costs in those markets for  
25 these plants.

For public distribution

1 Q. Okay. And by the way, the methodology that  
2 you used, was this just based on averages, or was it  
3 like a statistical regression analysis? How did you --  
4 how did you blend the four plants for C, D, E, and F to  
5 arrive at these rather specific and precise figures?

6 A. Okay. Good question, and that should be in  
7 the record.

8 There was a three-step process. The first  
9 step is to identify these four plants, where are they  
10 and what is their CPI index. And then I adjusted each  
11 one of their statistics, up or down, to Phoenix, to 131.  
12 And then I adjusted the 131 statistics to the Pacific  
13 Northwest. And I did that for each one of the  
14 categories.

15 Q. So you took your plant data, adjusted it to  
16 Phoenix, and then you adjusted Phoenix to the Northwest?

17 A. Yes.

18 Q. So it's two steps to get there?

19 A. Yes, actually.

20 Q. I just want to make sure I have it correct.

21 A. Yes, you didn't miss anything.

22 Q. Okay. But I want to get this. You had four  
23 plants, and you've now scaled the data using the  
24 Consumer Price Index for these four plants. And let's  
25 just look at D, okay?

## For public distribution

- 1 A. I'm sorry. D?
- 2 Q. D. I mean, it could be any of them, but
- 3 we'll just pick D. And you've determined that the cost
- 4 per gallon for plant processing in the Northwest is 43.4
- 5 cents; right?
- 6 A. Yes.
- 7 Q. Plant processing?
- 8 A. Yes, I'm with you.
- 9 Q. Now you have four plants. You've scaled it.
- 10 You add them up and divide by four?
- 11 A. Weighted average.
- 12 Q. Weighted average?
- 13 A. Weighted average.
- 14 And the weighting is very similar to a simple
- 15 average because the plants are all approximately the
- 16 same size.
- 17 Q. Did you do any statistical analysis of that
- 18 formula to see what the confidence of its predictive
- 19 value is?
- 20 A. No.
- 21 Q. So these aren't necessarily statistically
- 22 significant figures? You didn't do anything to
- 23 guarantee -- not that they couldn't be, but you didn't
- 24 check on their statistical significance?
- 25 A. My approach was not to use statistics to

For public distribution

1 verify the numbers. I've used my experience in the  
2 industry, my knowledge of the plants that are in this  
3 study to know that they would be representative, and my  
4 knowledge of the dairy industry, so it's my professional  
5 judgment as opposed to a regression analysis.

6 Q. Okay. So there was no -- just to make it  
7 clear, no analysis of standard deviation and confidence  
8 intervals or anything of that nature?

9 A. I made no such analysis.

10 Q. Okay. Finally --

11 JUDGE HILLSON: "Finally," that was the word  
12 I was looking for.

13 Q. BY MR. MILTNER: Yeah, finally, I just want  
14 to ask a couple questions about the producer-handlers in  
15 the Northwest.

16 As I've stated, I represent Smith Brothers  
17 Farms and Mallorie's Dairy and Edaleen Dairy. Have you  
18 had the opportunity to work with any of those  
19 operations?

20 A. No, I have not.

21 Q. Okay. Are you at all familiar with the  
22 specific processing costs of any of those dairies?

23 A. No.

24 Q. How about the packaging costs of any of those  
25 dairies?

For public distribution

- 1 A. No.
- 2 Q. The distribution costs of any of those  
3 dairies?
- 4 A. No.
- 5 Q. Their shrinkage rates?
- 6 A. No.
- 7 Q. And their specific cost of balancing?
- 8 A. No.
- 9 Q. And you made --
- 10 MR. MILTNER: I'm sorry, Your Honor, one very  
11 last thing.
- 12 Q. BY MR. MILTNER: You stated that in your  
13 estimation the cost of balancing was insignificant and  
14 you estimated it was pennies per hundred pounds;  
15 correct?
- 16 A. Yes.
- 17 Q. Okay. And you represent one  
18 producer-handler -- or you've consulted with one  
19 producer-handler in Pennsylvania?
- 20 A. No. Several.
- 21 Q. Several. I'm sorry.  
22 There's some in this study?
- 23 A. There are two in this study.
- 24 Q. Two in this.  
25 Where's the one besides Pennsylvania?

For public distribution

1 A. They're both in Pennsylvania.

2 Q. They're both in Pennsylvania.

3 And did you also state that the difference in  
4 the packaging costs between a purchased container source  
5 and a blow-mold container source was 3 cents per gallon?

6 A. It's the difference between 14.2 and 11.3.

7 Q. 3.9 per gallon?

8 A. 2.9.

9 Q. And I think you characterized that couple  
10 cent difference as significant in the dairy industry.  
11 Would that be accurate?

12 A. Yeah, that's per gallon. And the 6 cents is  
13 per hundred.

14 Q. I understand.

15 A. Sorry.

16 Q. Those couple cents you said were significant?

17 A. Yes, those few cents in relation to the  
18 bottom line in the dairy industry is significant.

19 MR. MILTNER: Okay. Thank you, Your Honor.  
20 I don't have anything else.

21 JUDGE HILLSON: It's break time, 10-minute  
22 break time.

23 (Recess at 3:20; resumed at 3:34.)

24 JUDGE HILLSON: We can go back on the record  
25 now.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

861

For public distribution

1 Mr. Marshall.  
2 MR. MARSHALL: Thank you.  
3 Doug Marshall, Northwest Dairy Association.  
4

5 EXAMINATION

6 BY MR. MARSHALL:

7 Q. A couple very quick points.  
8 If I understand the graph that you've shown  
9 in Exhibit 25 on page D or C -- I'm looking at D, the  
10 data on the first -- from the first point -- the  
11 category A volume are for producer-handler plants and  
12 the data from the remaining plants are to the right of  
13 the cost curve, as you testified earlier.

14 My question of you, Mr. Herbein, is whether  
15 the nature of the plant, as being a producer-handler  
16 plant or a fully regulated plant, is at all relevant to  
17 the numbers that show on this page, or alternatively,  
18 would these numbers be the same to reflect bottling  
19 costs without regard to the ownership structure or the  
20 regulatory structure of the plants?

21 A. The information shown on 25A and B and on  
22 graphs 25C and D are reflective of the costs of  
23 manufacturing, the costs per gallon or per  
24 hundredweight, and are simply that. There's no  
25 adjustment made for regulated, not regulated, pooled or

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

862

For public distribution

1 not pooled.

2 Q. Would it be a fair interpretation of your  
3 data that you would expect, if either of the two  
4 producer-handlers in your category A were to expand  
5 their volume to the 2 million pound level of category B,  
6 that their cost structure would look more like those in  
7 category B than their current cost structure?

8 A. Yes.

9 Q. This is a cost curve that shows declining  
10 costs as you move from left to right?

11 A. That's correct.

12 Q. You're an accountant. Perhaps you've also  
13 studied microeconomics at some point along the way.

14 A. My first major in college was economics, and  
15 then my adviser, at the end of my freshman year, asked  
16 me what I was going to do for employment as an  
17 economist, and I was stumped. And he recommended  
18 accounting because I'd always have work. He was right.

19 Q. So I take it you do recognize the concept of  
20 a microeconomic cost curve model?

21 A. Yes, at least the basic elements of it.

22 Q. If you had a lot of data points -- you only  
23 have 20 firms in this survey. If you had a hundred or a  
24 thousand, would you expect the numbers that you're  
25 showing here to look more like a traditional cost curve,

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

863

For public distribution

1 that is to say, a smoothed cost curve when you did a  
2 regression or other analysis?





4 you had this benchmark or smell test or something like  
5 that, right --

6 A. Yes.

7 Q. -- on other numbers? Right?

8 A. That was in response to some  
9 cross-examination by Mr. Ricciardi.

10 Q. Okay. Are you aware that the USDA does a  
11 sampling of retail prices of 2 percent and whole milk in  
12 a number of markets throughout the United States on a  
13 monthly basis?

14 A. I've seen some of that information.

15 Q. Did you check that for the period of 2003 for  
16 the Phoenix market?

17 A. I did not.

18 Q. But you know that it's out there; right?

19 A. I know that the market administrator does  
20 some survey. I didn't see any of that information. I  
21 simply relied upon what I've described.

22 Q. And as I understand it, I mean, the  
23 assumption is that the store is not using this as any  
24 kind of a loss leader, that they're going to get an 8 or  
25 14 percent markup; right?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

865

For public distribution

1 A. I didn't -- I don't think that the -- strike  
2 that.

3 The information that I saw would not include  
4 enough information to allow me to have an opinion if we

5 have a loss leader situation here or not.

6 Q. So the point, if we don't know whether or not  
7 your analysis actually proved that this is what a PD or  
8 a processor was selling it for, it's a theoretical value  
9 that, if there was a markup and all this, if it was sold  
10 at this, a producer-handler, if his cost for his milk  
11 was blend, would make a profit, where a handler who's  
12 Class I would not. Is that, in a sense, what you're  
13 saying?

14 A. I wouldn't say it that way at all in that the  
15 out-of-store price for a warehouse store is not  
16 hypothetical or theoretical. It is actual. So -- and  
17 the 8 and 14 percent margin markup is not hypothetical  
18 or assumed. That's actual. I mean, I know that is --  
19 that's the range.

20 And so I believe that the line that says  
21 "Price Paid to Dairy Supplier" is a very accurate  
22 representation of what would be on the invoices from the  
23 supplier.

24 Q. Assuming that the store is selling it at a  
25 markup and not doing loss leader sales during that

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

866

For public distribution

1 period; right?

2 A. That's correct.

3 Q. Okay.

4 A. And we saw in this -- the price survey that I  
5 utilized to have the average of 3.29 didn't have any

6 1.29s or 2.29s. It was a very flat price throughout  
7 that six-month period.

8 Q. Now, I take it, then, under that analysis  
9 that milk was sold. The consuming public bought it;  
10 right?

11 A. Yes.

12 Q. And it was a good and wholesome product?  
13 There's no assumption that it wasn't good milk; right?

14 A. I've heard -- I mean, I didn't make any  
15 scientific --

16 Q. We have to assume that; right?

17 A. Yeah. It was in the store. It was sold.  
18 And I've heard of no product recalls in this market,  
19 so --

20 Q. You're not suggesting, are you, that the  
21 price of Class I -- or Class I differential in the  
22 Phoenix market is too high, that a processing plant  
23 cannot pay that differential and supply the market as it  
24 demands to pay the price in this market, are you?

25 A. No. No. Analyzing the correctness of the

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

867

For public distribution

1 differential was beyond the scope of what I was asked to  
2 do.

3 MR. YALE: And just a follow-up.

4 No. I think we've got that. I'm going to  
5 leave it the way it is. Thank you.

6

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

EXAMINATION

BY MR. RICCIARDI:

Q. Couple follow-ups.

Al Ricciardi again.

I thought we got this during my portion of the examination, but I was unsure based upon some recent testimony, so let me ask this specific question.

In Exhibit 25, there is no actual data from any plant physically located in Order 131; correct?

A. Yes.

Q. And one last question. If you take a look at Exhibit E, the comparative analysis of the return to the producer-handler --

A. I have it.

Q. -- when you say the "Price Paid to Dairy Supplier," you did not have any physical invoices to determine what the actual price paid was; correct?

A. That's correct.

MR. RICCIARDI: Nothing further.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

868

For public distribution

1  
2  
3  
4  
5  
6  
7

JUDGE HILLSON: Any further questions?

Go ahead.

Mr. Ritchey was on his way first.

EXAMINATION

BY MR. RITCHEY:

Q. Just two questions.

8                   In any of your plant costs, was any  
9 adjustment in there for closing down another plant that  
10 they might have bought or a plant that inflated prices  
11 just to get the business, or was this, you know, actual  
12 just for land, building, and equipment?

13           A.     The plant costs do not include any write-offs  
14 for acquisition costs, and for a couple of reasons:  
15 one, that would distort the study; and two, the  
16 accounting rules for writing off goodwill and things of  
17 that sort have changed and we no longer have  
18 amortization expense, so the concerns over the inclusion  
19 of those things are gone as of December 31st of 2002, so  
20 there's nothing of that sort in here.

21           Q.     And the plant cost was relatively new plants  
22 that hadn't transferred ownership?

23           A.     No, they're not -- they're certainly not in  
24 this group of 20, the 18 processing plants. There are  
25 no brand-new plants in here. These are all companies

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

869

For public distribution

1 that have been in business for many years.

2           Q.     But has ownership changed in the last five  
3 years?

4           A.     In two of the 18, there has been ownership  
5 change.

6           MR. RITCHEY:   Okay. Thank you.

7           MR. ENGLISH:   Charles English.

8

9

EXAMINATION

10 BY MR. ENGLISH:

11 Q. Mr. Herbein, questions were asked about a  
12 USDA-sponsored price survey. Are you aware that that  
13 price survey is limited to specific size containers?

14 A. I'm not very familiar with that study and --  
15 I'm not familiar with it. I know that it exists.

16 Q. Regardless if it's a price survey, it would  
17 not, to your knowledge, survey specifically only  
18 warehouse distribution, correct, warehouse-like stores?

19 A. I would be very surprised if that's what the  
20 survey would include. If their intention is to show a  
21 market price, you would have to go to more than  
22 warehouse stores.

23 Q. And you, as opposed to what that might show,  
24 were trying to show a specific warehouse store price;  
25 correct?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

870

For public distribution

1 A. Yes. When I began my study, I began asking  
2 if this information for the warehouse out-of-store  
3 prices existed, and that led to the relay that resulted  
4 in me getting the information.

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

6 JUDGE HILLSON: Anyone else?

7 Hold on. Mr. Beshore first, please.

8 MR. BESHORE: I'll wait. I have redirect.

9 JUDGE HILLSON: Okay. Go ahead.

10

11

EXAMINATION

12 BY MS. DESKINS:

13 Q. I just wanted to clarify some things. You  
14 said that this data is based on 20 dairy -- I'm sorry,  
15 dairy clients that you had data related to them?

16 A. Yes.

17 Q. Okay. And just to clarify, were any of them  
18 located within Order No. 121 or 131?

19 JUDGE HILLSON: You mean 124?

20 Q. BY MS. DESKINS: 124.

21 A. One is from 124.

22 Q. But there's none from 131?

23 A. Correct.

24 Q. Does your -- what's in Exhibit 25, does it  
25 take into account any regional differences in the cost

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

871

For public distribution

1 of dairy suppliers?

2 A. The regional differences have been accounted  
3 for by the regional CPI adjustments that I have made,  
4 and so in that way, we have localized the statistics to  
5 these two marketing areas.

6 Q. Okay. And, also, you said the data that you  
7 used had one producer-handler?

8 A. There are two producer-handlers in column A  
9 on 25A and B.

10 Q. I'm talking about the data that you used to



11 prepare this. Was it based on information you got from  
12 one producer-handler?

13 A. Two producer-handlers.

14 Q. Were any of those located within Orders  
15 No. 131 and 124?

16 A. No. They were both located -- they're both  
17 located in Pennsylvania.

18 Q. And are they in the federally regulated part  
19 of Pennsylvania?

20 A. No. The state-regulated part.

21 Q. Okay. Under the Pennsylvania state program,  
22 do they define a producer-handler the same way as any  
23 Federal Marketing Order?

24 A. I would suggest -- I'm not sure. I think  
25 Mr. Beshore could help you with the legal definitions.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

872

For public distribution

1 No, maybe not.

2 My -- let me just answer it this way.

3 These producer-handlers that I used in  
4 column A were not part of the Federal Order and they're  
5 free to sell their milk out of store without regard to  
6 the Pennsylvania minimum prices. And I think -- and  
7 they have to balance their own supply, so that's what I  
8 know about the rules as they apply in Pennsylvania.

9 MS. DESKINS: Okay. I have no further  
10 questions.

11 JUDGE HILLSON: Go ahead, Mr. Beshore.

12 Oh, Mr. Rower, do you have a question?

13 MR. ROWER: No.

14 JUDGE HILLSON: Go ahead, Mr. Berde.

15 MR. BERDE: Sydney Berde.

16

17 EXAMINATION

18 BY MR. BERDE:

19 Q. Mr. Yale asked you whether the prices  
20 reflected -- the out-of-store prices reflected on your  
21 exhibits, whether you know whether they're loss leader  
22 prices. Do you recall that?

23 A. Yes, I recall that.

24 Q. You know enough about the food industry to  
25 know what a loss leader is, do you not?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

873

For public distribution

1 A. Yes, I've seen them.

2 Q. And do you know whether the marketing  
3 strategy of the warehouse stores that you've talked  
4 about -- Costco, Sam's, et cetera -- ever use  
5 loss leaders in their operations?

6 A. I don't think they do, but I'm not  
7 100 percent sure of that. What I've seen has been level  
8 low prices, as opposed to prices that are high on  
9 Tuesday, Wednesday, Thursday, and down on Friday.

10 Q. As compared, for example, with what Safeway,  
11 Kroger, et cetera, would use?

12 A. That's correct. I did not see that type of

13 pricing at all in the information that was provided to  
14 me for the six months that we studied in June. It was a  
15 level price.

16 MR. BERDE: Thank you.

17

18 EXAMINATION

19 BY MR. BESHORE:

20 Q. Mr. Herbein, I want to first ask you a couple  
21 of questions about your firm and your firm's clients to  
22 make sure we have a full picture. Mr. Ricciardi asked  
23 you a number of questions about that.

24 How many employees are there in your  
25 accounting firm, Herbein & Company?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

874

For public distribution

1 A. About a hundred.

2 Q. And of those employees, how many work in a  
3 department or section called the Dairy Group?

4 A. The Dairy Group.

5 Q. How many of the hundred are in the Dairy  
6 Group?

7 A. Seven.

8 Q. And the other 93 work with clients that are  
9 not in the dairy industry?

10 A. That's correct.

11 Q. You were asked whether you had done work for  
12 DFA, and you talked about two projects that were on  
13 behalf of entities in which DFA was a joint venturer.

14 A. That's correct.  
15 Q. And the current engagement today is the only,  
16 correct, DFA engagement that you have?  
17 A. That's correct.  
18 Q. You may have been asked -- I'm not certain,  
19 but I don't want there to be any inaccuracies or  
20 misinterpretations in the record.  
21 You may have been asked whether you had done  
22 any work for members of DFA. Have you done work for  
23 co-operatives which are co-operative members of DFA?  
24 A. Yes.  
25 Q. Okay. And for which co-operative that is a

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

875

For public distribution

1 co-operative member of DFA?  
2 A. Dairy League, Syracuse, New York.  
3 Q. Now, on Exhibit 25, there were some questions  
4 from Mr. Ricciardi with respect to the distribution  
5 line, and I'm looking at 25E.  
6 A. I have it.  
7 Q. Does the cost line labeled Distribution, is  
8 that strictly a transportation expense line?  
9 A. No.  
10 Q. What did you include in distribution  
11 functions in that line?  
12 A. The proper accounting for distribution cost  
13 is to include all of the costs of maintaining that  
14 function within your company, and that would include,

15 for this sort of customer, things like the pallets that  
16 are used to deliver the product, an allocation of the  
17 garage service department that maintains the fleet of  
18 trucks. Every company has some spare trucks or  
19 trailers, tractors and trailers. They're allocated over  
20 the routes. That is included, along with all of the  
21 direct operating costs of the driver's labor, all of his  
22 fringe benefits. Those types of expenses are all in  
23 this cost.

24 Q. And that's reflected on the distribution line  
25 of 25F through K, the pages after 25E; correct?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

876

For public distribution

1 A. Yes. Correct. Same methodology, same number  
2 throughout.

3 Q. Did you study -- in Exhibit 25, did you study  
4 the cost of producing milk on the farm side of the  
5 equation in any respect?

6 A. No, no study on the farm production side  
7 whatsoever.

8 Q. However -- okay. But you did testify to  
9 having some farm clients for which you've done -- some  
10 dairy farmer clients for which you've done some work in  
11 other respects, such as the feasibility study for a  
12 500-cow expansion.

13 A. Yes. Yes.

14 Q. Now, let's just talk about the production  
15 side for a minute in that -- you know, in that study.

16                   When you were analyzing, evaluating the  
17 feasibility of that expansion, what revenue stream did  
18 you project for cattle?

19           A.     The revenue stream was produced by taking the  
20 number of cows times an assumed annual hundred pounds of  
21 milk per cow times the market blend rate.

22           Q.     The blend price?

23           A.     The blend price, yes.

24           Q.     Going back to Exhibit 25, then, I think it is  
25 your testimony, and I want it to be clear, that the

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

877

For public distribution

1 costs of balancing of milk supply were considered by you  
2 to be on the producer side and were not calculated in  
3 any way in Exhibit 25; correct?

4           A.     That's correct.

5           Q.     Because it just reflects plant handler costs?

6           A.     Plant handler costs. And when we looked at  
7 the value of milk, we used the class price for the blend  
8 price.

9           Q.     Okay. When you used the class price just for  
10 comparative purposes in Exhibit 25E, you didn't  
11 include -- it's the minimum class price and you didn't  
12 include any premiums or handling charges that these 20  
13 handlers may have paid?

14           A.     That's correct. This is the base announced  
15 prices, the advanced prices.

16           Q.     In fact, in calculating the plant costs in

17 Exhibit 25, you didn't utilize their costs for raw milk  
18 in any respect, did you?

19 A. That's correct.

20 Q. You were asked, I think by Mr. Miltner,  
21 whether if a handler wanted to go from a volume of  
22 5 million to a volume of 12 million, that it may or may  
23 not have to add plant capacity.

24 A. I recall that.

25 Q. You indicated it may or may not have capital

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

878

For public distribution

1 expenses for plant capacity. Do you recall that?

2 A. Yes, I recall that line of questioning.

3 Q. Now, if this were a producer-handler on the  
4 producer side, the farm side, wouldn't the same thing  
5 apply, that is, if it had additional Class I sales, it  
6 would only have to add cows if its present herd was  
7 tailored precisely to its Class I sales?

8 A. Yes. I think those -- I agree with that.  
9 And I think those principles that I was attempting to  
10 explain as to capacity would fit on the  
11 producer-distributor side. In addition to the cows, the  
12 rest of the operation, the milking parlor, the barns, if  
13 they are less than 100 percent utilized, you could bring  
14 in additional cattle to increase your production with  
15 variable costs only. It's a case-by-case situation.

16 Q. So if a producer-handler had surplus  
17 production, it would not have -- it could add Class I

18 sales without capital expenses for additional raw milk  
19 production?

20 A. That would be a great thing for their P & L.

21 MR. BESHORE: Thank you. I have no further  
22 questions for Mr. Herbein.

23 JUDGE HILLSON: Okay. I'm not sure if anyone  
24 else does.

25

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

879

For public distribution

1 EXAMINATION

2 BY MS. DESKINS:

3 Q. I've got a couple more questions.

4 This database that you used to prepare  
5 Exhibit 25, you said what's in 25 is based on 20 of the  
6 companies that were in that database?

7 A. That's correct.

8 Q. Did you specify how you picked those 20  
9 companies?

10 A. I did.

11 Q. Okay. And, also, were the majority of the 20  
12 you picked, were they located east or west of the  
13 Mississippi?

14 A. Of the -- we've identified the  
15 producer-handler -- I'm thinking out loud.  
16 Producer-handler, the two are in Pennsylvania.

17 Q. Okay.

18 A. Of the 18 remaining, more than 50 percent are



19 east of the Mississippi.

20 MS. DESKINS: Okay. All right. Thank you.

21 JUDGE HILLSON: Mr. Ricciardi's next.

22 MR. RICCIARDI: All Ricciardi.

23 EXAMINATION

24 BY MR. RICCIARDI:

25 Q. Mr. Herbein, if you would go back to

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

880

For public distribution

1 Exhibit 25E. Based upon some response that you gave to  
2 Mr. Beshore, I had a couple more questions on our  
3 distribution issue.

4 I think you told him that as part of the  
5 distribution, which is about the middle part of the page  
6 under Dairy Supplier Costs, that you included a pallet  
7 cost. And this was for a warehouse store; correct?

8 A. Yes.

9 Q. And I assume the warehouse store was  
10 hypothetically called Costco?

11 A. Yes, that would be one of the warehouse  
12 stores in this analysis.

13 Q. And how much did you include in distribution  
14 costs for the pallet?

15 A. I don't have that information, the details of  
16 that in my -- it's a small number.

17 Q. Okay. But it's an ongoing distribution cost  
18 each time; correct?

19 A. Yes. The pallets -- the dairy supplier has

20 to supply the pallets.

21 Q. But if you assume for me that there is what's  
22 called a pallet exchange program at Costco where you  
23 only pay for it once and then you exchange it from that  
24 point forward if you continue to deliver, then, again,  
25 your distribution costs would be overstated in my

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

881

For public distribution

1 example; correct?

2 A. If your hypothetical is correct.

3 Q. If my facts are correct, then --

4 A. Yes.

5 Q. -- your number's overstated?

6 A. Yes.

7 MR. RICCIARDI: Thank you.

8 JUDGE HILLSON: Do you have a question,

9 Mr. Yale?

10 MR. YALE: Yes, a follow-up.

11

12 EXAMINATION

13 BY MR. YALE:

14 Q. You made -- Mr. Beshore asked this question  
15 in the example of going from a 5 million -- let me back  
16 up.

17 Mr. Miltner asked you a question of going  
18 from a 5 million to an 18 million plant, and you  
19 indicated that the capital costs on the plant side will  
20 change depending on what existing capacity's there and

21 some things can be used at 5 million and 18 million.  
22 You don't need any size adjustments, so on and so forth.  
23 I mean, that was part of your comment. You don't know  
24 what it is. There would be some, but it may not be as  
25 much; right?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

882

For public distribution

1 A. Yes, that's a pretty decent generalization.

2 Q. So Mr. Beshore comes over and says that if  
3 you're going from 5 to 18 million on the producer side,  
4 you may not have to do anything because you may already  
5 have the cattle; right?

6 A. Yes, I think he said something like that.

7 Q. All right. So if you've got a Class I  
8 producer-handler with 5 million in Class I sales and  
9 13 million in non-Class I sales, then there would be a  
10 significant balancing cost associated with that  
11 operation; right?

12 A. I believe the problem that we have here, so  
13 the record doesn't get confused, I didn't take  
14 Mr. Beshore's question to be 5 million pounds to  
15 18 million pounds. I don't believe that he mentioned a  
16 volume.

17 Q. Okay. So really the issue is, though, is  
18 that there is -- for a producer-handler to grow, they  
19 have capital costs that may vary depending on existing  
20 capacity and the like on both the plant side and the  
21 producer side; right?

22           A.     If they're at maximum capacity in both of  
23 those parts of their business the moment before the  
24 expansion begins, then there would be capital costs for  
25 sure.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

883

For public distribution

1           Q.     And there might even be some if they're not  
2 quite at capacity?

3           A.     There's always some.

4           Q.     Right.

5           A.     There's always some. I agree.

6           Q.     But a processor only, they don't want have to  
7 worry about any capital costs on the producer side for  
8 growth whatsoever; right?

9           A.     On the producer side, no. If they're -- if  
10 they have either a co-operative supply or independent  
11 milk available, they just buy more.

12          Q.     And that additional capital makes -- can be a  
13 significant difference in operating costs and decisions,  
14 right, and risks?

15          A.     It is -- a part of the decision process  
16 should always be -- as I think I said earlier, I believe  
17 on the producer side, one of the things that we have to  
18 consider when we look at that capital for expanding a  
19 herd from 2,000 cows to 3- is that, yes, we have to buy  
20 cows, and yes, we may need another barn and more silos  
21 and, you know, more employees, but there's revenue or  
22 milk that's produced that has a value, so that has to be

23 in that equation.

24 Q. As it does on the processing side?

25 A. Absolutely.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

884

For public distribution

1 MR. YALE: All right. No other questions.

2 JUDGE HILLSON: Is that it?

3 Mr. Herbein, you may step down.

4 Sorry, Mr. Tosi. Please proceed.

5

6

EXAMINATION

7 BY MR. TOSI:

8 Q. Mr. Herbein, to the extent that your  
9 analysis -- cost analysis that you presented here in  
10 Exhibit 25 is geared towards warehouse stores, would  
11 your same conclusion be true with respect to  
12 producer-handler advantages? Would they be similar if  
13 we were talking about producer-handler sales versus  
14 regulated handler sales to, say, other types of milk  
15 outlets, like a regular grocery store?

16 A. Yes.

17 Q. Also, you make a conclusory statement in  
18 your written testimony that that producer-handler's cost  
19 advantage on raw milk enables it to service these  
20 stores -- and "these stores" meaning warehouse stores --  
21 quite profitably at an in-to-store price that cannot be  
22 matched by pool plants.

23 In trying to understand the particulars of

24 your Exhibit 25, could you just quickly point out, what  
25 is it that the Secretary should look at in this exhibit

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

885

For public distribution

1 that supports that conclusory statement?

2 A. Yes. And let's utilize 25E.

3 Q. Okay.

4 A. And 25E, if we look at, beginning in the  
5 middle of the page, value of raw milk. This is the  
6 value of the raw milk that the -- and I'm looking at the  
7 8 percent column -- the value of the raw milk that the  
8 producer-handler would have, \$10.97 per hundred.

9 And when we compare that with the Class I  
10 price, it's higher than the Class I price, so the  
11 producer-handler is able to generate value for his milk  
12 even above the Class I value. And when we compare that  
13 to the uniform price, which is what a regulated producer  
14 would receive, we have a \$2 advantage in that value of  
15 milk compared to the blend.

16 So the problem that a regulated handler has  
17 is then shown if we go to 25K. The most efficient  
18 largest regular processor serving a warehouse store at  
19 their costs -- and we've gone through enough with the  
20 costs. I plugged in for raw milk the Class I price and  
21 there is no premium in here. And that handler would  
22 lose 17.7 cents on every two gallons, or the equivalent  
23 of 1.03 on every hundred pounds.

24 Q. Maybe that's where I got a little lost.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

886

For public distribution

1 look at that's representative of the Class I price?

2 A. The raw milk, the \$1.836 in the lower third  
3 of the page.

4 Q. Okay.

5 A. That is the raw milk price for 2 percent at  
6 the Class I price for June of 2003, butterfat adjusted.  
7 It's your announced price adjusted to a 2 percent level,  
8 so that's what a regulated handler would have as their  
9 cost for the raw milk. And these are the other costs  
10 that they incur.

11 The money that they're going to receive from  
12 the warehouse is 3 dollars and .027, and their costs are  
13 3.24 -- 3 dollars and 20.4 cents, so they have a loss.  
14 So my advice to this Plant F, if this were one company,  
15 would be you can't sell to this customer because you're  
16 going to lose money.

17 Q. Okay. Now, if we compare that, then, to what  
18 you're showing on 25F as it would relate to a  
19 90,000-pound producer-handler.

20 A. Now, again, if you notice, up on 25F, I have  
21 shown for raw milk the Class I price for the  
22 producer-handler to have the analysis for all of the  
23 handlers be done in the same way so as to not cause a  
24 distortion by using blend or their value. I used  
25 Class I.

For public distribution

1                   So this says, for this producer-handler, this  
2 small producer-handler who has very high costs, he would  
3 lose \$7.16 per hundred, so he's really way out of the  
4 ball game as far as being able to serve a warehouse  
5 account at his size. Too small.

6                   And this also shows -- if I can just add one  
7 other thing. I don't mean to lecture here late in the  
8 day. I believe that this is also very strong proof that  
9 the small traditional jugger, as I call them, on-farm  
10 store, isn't a competitive threat in the market, doesn't  
11 have a cost advantage and probably should not be  
12 regulated. It's when the size makes them a competitive  
13 force and they have an unfair advantage. This small  
14 producer-handler does not.

15                  MR. TOSI: That's all I have. Thank you very  
16 much. I appreciate it.

17                  JUDGE HILLSON: Anyone else?

18                  Mr. Herbein, you may step down.

19                  THE WITNESS: Thank you.

20                  (Parenthetical)

21                  JUDGE HILLSON: Mr. Cryan is next on the  
22 list.

23                  Mr. Cryan, would you please raise your right  
24 hand.

25



For public distribution

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

5  
6                   JUDGE HILLSON: Please state and spell your  
7 name for the record.

8                   THE WITNESS: My name is Roger Cryan,  
9 R-o-g-e-r C-r-y-a-n.

10                   I have an introductory note and then I'll  
11 read my statement and then I'll explain my analysis and  
12 explain the additional items I'd ask be included in the  
13 record.

14                   My name is Roger Cryan. I am a -- I'm here  
15 representing the National Milk Producers Federation. I  
16 have a Ph.D. in agricultural economics from the  
17 University of Florida. I was the economist for the  
18 Atlanta Marketing Administrator's Office, the USDA, for  
19 four years. I have now been with the National Milk  
20 Producers Federation as the director of economic  
21 research for three years, and we're here contributing to  
22 this hearing because we consider the producer-handler  
23 issue to be one of national importance.

24                   My statement addresses both markets under  
25 consideration at this hearing.

For public distribution

1                   The National Milk Producers Federation is the  
2 voice of America's dairy farmers, representing over  
3 three-quarters of America's 70,000 commercial dairy  
4 farmers --

5                   JUDGE HILLSON: You may want to slow down  
6 just a little bit.

7                   THE WITNESS: I'm sorry.

8                   -- through their membership in NMPF's 34  
9 member co-operative associations.

10                  The federation agrees with the proponents  
11 that the producer-handler exemption should be limited to  
12 3 million pounds and states its support for those  
13 proposed provisions that will do so in both Federal  
14 Order 124 and Federal Order 131. NMPF supports such a  
15 limit in every market in order to address both current  
16 and potential future market disruption arising from the  
17 distortions of the producer-handler exemption.

18                  The current producer-handler exemption began  
19 as a matter of expediency, not principle, and after 70  
20 years, conditions demand its modification. Changes in  
21 technology and the growth of the largest dairy farms  
22 offer a new model of producer-handler.

23                  Large producers can now capture sufficient  
24 economies of scale in processing their own farm milk in  
25 order to exploit the artificial raw milk price advantage

For public distribution

1 offered to exempt producer-handlers, an advantage of as  
2 much as 16 cents per gallon. Such a producer-handler  
3 can by itself disrupt the orderly marketing of milk in  
4 the market.

5 More importantly, such large  
6 producer-handlers could proliferate across a market,  
7 causing even greater disruption in aggregate. This  
8 could thoroughly undermine the pooling of market values.

9 The Federal Milk Marketing Order Program has  
10 its origins in the Agricultural Adjustment Act of 1933,  
11 which generally authorized the Secretary to enter into  
12 agreements with producers and to license handlers in  
13 order to, quote, restore normal economic conditions in  
14 the marketing of, unquote, milk and milk products. The  
15 Department combined these powers to implement marketing  
16 agreements enforced by licensing in numerous markets  
17 across the country in 1933 and 1934. These licenses are  
18 the direct antecedents of the Modern Milk Marketing  
19 Orders.

20 Although many markets were supplied primarily  
21 by handlers who procured milk from producers and  
22 co-operative associations, in the Kansas City market,  
23 producer-handlers sold 50 percent of the milk and cream  
24 consumed when the market's license was instituted in  
25 1935.

For public distribution

1 This license was to regulate them.  
2 However -- this license was intended to regulate these  
3 producer-handlers. However, the market administrator  
4 encountered considerable resistance from a substantial  
5 number of these producer-handlers who generally failed  
6 to submit reports and refused to make payments to the  
7 equalization fund when they did submit reports. Most of  
8 the rest followed suit when the market administrator  
9 failed to enforce these requirements on noncompliers.

10 Successive amendments to the marketing  
11 agreement were made to lessen the burden on  
12 producer-handlers, but since no effective enforcement  
13 accompanied even these changes, noncompliance among  
14 producer-handlers continued to grow.

15 In July 1935, unable or unwilling to surmount  
16 the practical difficulties of enforcement, the  
17 Department abandoned its attempts to regulate  
18 producer-handlers beyond reporting requirements. That  
19 is to say, producer-handlers were exempted from  
20 regulation as a matter of administrative expediency.  
21 This is the status that producer-handlers of all sizes  
22 enjoy today in all Federal Order markets.

23 In May 1935, the Supreme Court invalidated  
24 the National Industrial Recovery Act for its excessive  
25 delegation of congressional authority to the executive

For public distribution

1 branch. The marketing agreement and licensing  
2 provisions of the Agricultural Adjustment Act of 1933  
3 gave the President and Secretary of Agriculture  
4 similarly broad and ambiguous powers over agriculture.

5 In August of 1935, for this reason, Congress  
6 amended this act to codify the previous practices of the  
7 USDA, reestablishing the licensing of handlers as  
8 Federal Milk Marketing Orders.

9 Significantly, these 1935 amendments included  
10 language, quote, providing a method for making  
11 adjustments in payments as among handlers, including  
12 producers who are also handlers, to the end that the  
13 total sums paid by each handler shall equal the value of  
14 the milk purchased by him at prices fixed, unquote, by  
15 USDA.

16 In other words, the regulation of  
17 producer-handlers was specifically authorized. This  
18 language has been retained to the present day as part of  
19 a continuous system of milk market regulation.

20 For example, the recent creation of the  
21 Central Federal Milk Marketing Order incorporated the  
22 Greater Kansas City Order, which had been continuously  
23 in force since its December 1936 establishment as a  
24 successor to the license discussed above. And I cite  
25 sources which are listed specifically and noticed

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

For public distribution

1 specifically on an attachment.

2           The early difficulties in regulating  
3 producer-handlers gave way over the years to  
4 indifference about their regulation due to their  
5 shrinking numbers and small size. Even today, in many  
6 markets, most potential producer-handlers fall under the  
7 150,000 pound size exemption, so that only in this  
8 market, the Arizona-Las Vegas marketing area, does a  
9 large share of the fluid milk market belong to handlers  
10 exempted as producer-handlers.

11           Until recently, the substantial growth in the  
12 scale and efficiency of large fluid milk processors  
13 meant that even the largest farms were unable to take  
14 advantage of these scale economies. With relatively  
15 high unit costs of processing, producer-handlers did not  
16 proliferate and, in fact, they declined in number and  
17 volume processed.

18           In 2002, however, there were 380 dairy farms  
19 with over 2,000 cows, compared to only 235 just four  
20 years earlier when counts were first taken. A 2,000-cow  
21 dairy produces roughly 3 million pounds of milk per  
22 month. The average farm in this category, according to  
23 national statistics, produced 5.6 million pounds per  
24 month in 2002, compared to 4.7 million in 1998; that is,  
25 the average in that category rose from 4.7 million

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

894

For public distribution

1 pounds every month to 5.6 million pounds a month.

2                    These 380 farms now produce 15 percent of the  
3 U.S. milk supply. They are large enough to exploit both  
4 the producer-handler raw milk price advantage and  
5 economies of scale in fluid milk processing. Their  
6 share of production means that they could capture a  
7 large share of the Class I sales in an individual market  
8 or nationally if many of them adopted this model.

9                    My sources were all USDA statistics for that  
10 section.

11                    Regarding the cost advantage of  
12 producer-handlers, fluid milk bottling plants have  
13 increasing economies of scale, that is to say, they have  
14 decreasing costs per gallon as the size of the plant  
15 increases. This has been consistently demonstrated in  
16 industry and academic studies.

17                    These economies of scale flatten out so that  
18 the advantages of increasing plant size are greater near  
19 the bottom of the range than near the top.

20                    Table 1 and the attached graph show results  
21 from several studies, including two studies in Maine, a  
22 nationwide study conducted by Cornell University, and  
23 the numbers presented by Mr. Herbein in Exhibit 25A and  
24 B.

25                    Table 1A shows how a line and equation were

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

895

For public distribution

1 constructed from the results of the Cornell study.

2 Table 1B shows the line and equation fitted to

3 Mr. Herbein's cost estimates for both markets and the  
4 estimated costs for the average-sized Class I plants in  
5 both markets according to both estimations.

6 A producer-handler, by avoiding Federal Order  
7 regulation as a distributing plant, can pay,  
8 effectively, the uniform price for milk at the plant.  
9 As the market price for producer milk on the market, the  
10 uniform price is the appropriate transfer price for  
11 analysis of vertical integration. Its regulated  
12 competitors pay the Class I price for the same milk.

13 Table 2 shows selected statistics for all  
14 Federal Order markets, including a calculation of the  
15 price advantage that a producer-handler has in each  
16 market, equal to the Class I price minus the uniform  
17 price. This difference between the Class I price and  
18 the uniform price at the same base point is the same  
19 across the entire markets, since both producer -- the  
20 producer price and the Class I price are adjusted by the  
21 same location differential.

22 This price advantage is greatly outweighed by  
23 the high processing costs of very small plants, and so  
24 is neither the primary basis for a small  
25 producer-handler's business, nor a disruptive force on

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

896

For public distribution

1 the market. Even if there is no principled  
2 justification for the small producer-handler plant, it  
3 has little impact on the market.



4                    However, as producer-handlers become larger,  
5 their price advantage can become the primary basis for  
6 their existence. A large producer-handler can now enter  
7 into the bottling business, even with uneconomic  
8 processing costs, purely to exploit this regulatory  
9 exemption.

10                   Tables 3 through 6 show the advantage or  
11 disadvantage that regulated plants and producer-handlers  
12 of various sizes have compared to an average-sized plant  
13 in each market. We believe that this shows quite  
14 clearly the perverse incentive that this antiquated  
15 exemption offers to the establishment of uneconomic  
16 processing plants. The numbers derived from the  
17 Cornell -- the numbers derived from the Cornell results  
18 cannot give us results at the low levels we're  
19 discussing since the smallest plant in their study was  
20 13.3 million pounds. And the numbers derived from that  
21 study are included only to demonstrate their consistency  
22 and general principle.

23                   Regarding producer equity, the  
24 producer-handler exemption violates the principles of  
25 producer equity upon which the Federal Orders rest. In

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

897

For public distribution

1 the best case, which is vertical integration of  
2 efficient milk production with efficient milk  
3 processing, the producer-handler exemption robs the  
4 producer pool to pay producer-handlers.

5                   In the worst case, which is the uneconomic  
6 reorganization of farms into producer-handlers, the  
7 exemption also creates deadweight losses in the market  
8 whose whole cost is borne by pooled producers.

9                   Regarding orderly marketing, the  
10 producer-handler exemption also threatens orderly  
11 marketing. As stated above, farms with over 3 million  
12 pounds of monthly production now produce about  
13 15 percent of the U.S. milk supply, which is equal to  
14 about 40 percent of U.S. fluid milk sales. These shares  
15 are steadily increasing. The ability of such farms to  
16 exploit such an exemption threatens both the producers  
17 and the handlers currently supplying the U.S. markets.

18                  Further, such producer-handlers, even if they  
19 bottle all of their milk or buy -- and buy or sell no  
20 more, can now sell to wholesalers or retailers at an  
21 advantageous price. Such wholesalers and retailers can  
22 either balance their own supplies of milk at the expense  
23 of pooled market participants or they can raise and  
24 lower prices seasonally so that consumers themselves can  
25 balance their supply at other stores, also at the

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

898

                  For public distribution  
1 expense of pooled market participants.

2                  Regular home delivery once provided an  
3 argument that a producer-handler could balance its own  
4 supply. It is the only marketing channel that is  
5 consistent enough to make this claim. However, home

6 delivery has declined from 30 percent of fluid milk  
7 sales in 1963 to less than one-half of 1 percent in  
8 1997. These are also from Federal Orders, from USDA  
9 statistics.

10 The conclusion must be that no  
11 producer-handler can truly balance its own supply, or  
12 can be made to truly balance its own supply.

13 There's no justification for the  
14 producer-handler exemption generally, but the Federal  
15 Order objective of orderly marketing demands an end to  
16 the exemption for large plants. However, a recognized  
17 difficulty in limiting the producer-handler exemption,  
18 as opposed to the simplicity of eliminating it  
19 altogether, is determining the appropriate level for  
20 that limit. The analysis discussed above offers one  
21 approach, and its results suggest a limit in the  
22 neighborhood of 3 million pounds.

23 3 million pounds is also the limit recently  
24 set by Congress as the limit for exemption from payment  
25 from the fluid milk promotion assessment.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

899

#### For public distribution

1 In a dynamic dairy market, any attempt to fix  
2 a limit too finely may be self-defeating. Technologies  
3 change, market prices and rates of Class I utilization  
4 change, and there is a risk of setting a limit that is  
5 too high, leading to uneconomic investment that may be  
6 lost when that limit is readjusted.

7 NMPF believes that the limit should be set at  
8 the same level in all markets, concludes that 3 million  
9 pounds is the appropriate level, and supports the  
10 proposals to set the limit at that level in both the  
11 Arizona-Las Vegas and Pacific Northwest markets.

12 Following that text statement are tables that  
13 I'd like to explain a little more than the text. First,  
14 Table 1, as the text said briefly, kind of demonstrates  
15 graphically several studies, several studies of plant  
16 costs by size.

17 I've submitted for inclusion in the record a  
18 copy of the study from three professors at the  
19 University of Maine which examines plant costs,  
20 engineered costs on an engineered plant model, but  
21 several costs remain specific.

22 They have done that -- they've updated that  
23 study several times and this is the most recent one that  
24 I've submitted. The article is from the American --  
25 from the Journal of Dairy Science, which is a

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

900

For public distribution

1 publication of the American Dairy Science Association.

2 I've also submitted for the record a copy of  
3 an analysis of processing and distribution productivity  
4 and costs in 35 fluid milk plants, which is a study by  
5 two professors and a student at Cornell University dated  
6 1997 and which I mentioned earlier as being relevant  
7 primarily for demonstrating the similarity of the curve,

8 rather than specific costs in the ranges we're  
9 discussing.

10 And finally, you've heard Mr. Herbein's  
11 testimony and heard the discussion of his numbers.  
12 Those numbers are the final curve on this chart, and I  
13 think they're the most relevant for this analysis.

14 They demonstrate the table -- the table and  
15 the chart accompanying demonstrate the relationship  
16 between size and cost. They're all consistent in the  
17 general result, although they're not identical. Each  
18 one does not represent an identical measure of cost.  
19 They show the same principles. They are also based on  
20 multiline plants. They're based on plants that produce  
21 more than just jugs of milk.

22 Table 1A explains how I calculated -- I've  
23 calculated the line that I show for the Cornell study,  
24 which is based on an elasticity of plant costs per  
25 gallon with respect to plant volume that's in the

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

901

For public distribution

1 Cornell study.

2 The line is drawn from an average point, the  
3 point representing the average plant in their study  
4 using the elasticity and functional form based on --  
5 just based on their functional form. And that is the  
6 same functional form that I used to fit Mr. Herbein's  
7 data. Mr. Herbein's data, used in that exact same  
8 functional form, also gave me a very good fit in Tables

9 1B -- in the two charts in Table 1B.

10 And using those calculations, I got average  
11 costs for the -- I got a cost per gallon for the  
12 average-size pool distributing plant in both the Arizona  
13 and Las Vegas market and Pacific Northwest market.

14 Now, let me go to Table 2 and explain that.

15 Table 2 has quite a number of things. All  
16 these are either statistics directly from Federal Order  
17 numbers or straight calculations from those. For every  
18 market, they show the amount of producer milk and the  
19 Class I producer milk, class utilizations, the uniform  
20 price, the Class I price, the averages for 2002.

21 And the last two columns -- last three  
22 columns show the number of pool distributing plants in  
23 each market; the million pounds per year for all plants,  
24 all pool plants; their package distribution, their  
25 Class I package fluid milk distribution; and then from

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

902

For public distribution

1 those two numbers and the number of months in the year,  
2 calculation of the million pounds per month per plant of  
3 fluid milk disposition, that is to say, the average  
4 volume of fluid milk product disposition, package  
5 disposition per plant per month, the average for the  
6 Pacific Northwest market.

7 Then the average-size plant had redispotion  
8 of 9.7 million pounds. The average plant in the  
9 Arizona-Las Vegas market had average redispotion of

10 26.7 million pounds.

11           The other most significant numbers on here  
12 are the difference between the uniform price and the  
13 Class I price expressed both as a difference per  
14 hundredweight and as the difference per gallon.

15           This demonstrates the advantage of a pure  
16 Class I handler, a hypothetical pure Class I handler  
17 relative to pooled milk, to the same plant pooling milk.

18           The value of the milk to the plant is Class I  
19 price. It's just to say the price that the plant would  
20 pay -- which is to say the price that the plant would  
21 pay for the same milk in the absence of the exemption.  
22 The value of the milk leaving the farm is the uniform  
23 price, that is to say, the price the farm would receive  
24 in the absence of the exemption.

25           This use of the uniform price as the basis

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

903

#### For public distribution

1 for the advantage the producer-handler gets is standard  
2 economic analysis, that is to say, in an enterprise, in  
3 an integrated enterprise such as the producer-handler,  
4 the transfer price between part of the enterprise -- the  
5 enterprise within the firm that is producing the raw  
6 material and the enterprise within the firm that is  
7 processing that raw material, the appropriate transfer  
8 price is the market price for that product. The market  
9 price for raw milk coming off the farm is the uniform  
10 price.

11                   So the difference between the uniform price  
12 and the Class I price is the upper limit of the  
13 advantage that the producer-handler gets from this  
14 pricing exemption.

15                   This, again, is a hypothetical 100 percent  
16 Class I plant. In the worst case, the plant would  
17 approach that 100 percent in practice.

18                   So Table 2 gave me the average plant size  
19 that goes back to Table 1B in which I've calculated a  
20 price based on these fitted lines for the cost -- the  
21 processing costs per gallon for the average-size plant  
22 in each market.

23                   On Tables 3, 4, 5, and 6, I do essentially  
24 the same thing using Herbein data and Cornell data for  
25 the two markets we're discussing.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

904

For public distribution

1                   And I'd like to focus on Table 3, which  
2 demonstrates the cost advantage or disadvantage of a  
3 producer-handler in pool plants -- either  
4 producer-handlers or pool plants of various sizes  
5 compared with an average-size pool distributing plant on  
6 the market.

7                   The line with the square box is the  
8 difference between the producer-handler's cost,  
9 including processing, and the raw milk price advantage  
10 and that cost for the average-size plant. And the line  
11 with the triangles is the advantage or disadvantage of a



12 plant of various sizes without the producer-handler  
13 exemption relative to the average-size plant, so that  
14 the plant -- the average-size plant -- the average-size  
15 pool distributing plant should be a point on that line  
16 with the triangles. It is not exactly because of the  
17 way -- the line is not fitted exactly the same way as  
18 the equation. This is used in just a smoothing of the  
19 line, without having a fitted line on this, on this  
20 graph.

21                   But the average plant is shown with the heavy  
22 bar through the middle of this graph at about  
23 9.7 million pounds. That's the average-size plant.

24                   The point of this is to show how small plants  
25 have a hard time competing on costs. A small plant --

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

905

#### For public distribution

1 small producer-handler or any small plant essentially  
2 has to have something special going for it to stay in  
3 business, to compete in a market with processors, with  
4 an average-type processor.

5                   The scale of farms today allows a plant to  
6 get into business as a producer-handler and become  
7 economically viable without having anything special  
8 going for it except the price advantage.

9                   That's the same -- the same analysis  
10 essentially is applied in all four of these tables for  
11 the two different markets based on two different  
12 studies. And, again, I'd point out that the Cornell

13 study, even though in Table 1, I've extended the line  
14 with the dotted line based on the equation. The Cornell  
15 study is very difficult to use at the levels we're  
16 talking about -- around 3 million, 2 million, 5 million  
17 pounds -- because their data did not go below any plants  
18 that had 13.3 million pounds, so the extent of the line  
19 to those lower levels is not really appropriate. And  
20 that's why I've relied on the Herbein data, which I  
21 believe to be reasonable data.

22 I've submitted a list of sources that I'd ask  
23 be given official notice:

24 The two studies that I handed out  
25 copies, that I've given copies to the court reporter,

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

906

For public distribution

1 the Erba, Aplin, and Stephenson study from Cornell; the  
2 Dalton, Criner, and Halloran study from the folks at the  
3 University of Maine.

4 I'd also ask that Dairy Market Statistics  
5 Annual Summary for 2002 be noticed, which is something I  
6 used for some of this, some data that I used for  
7 analysis that was in that.

8 Also, the Federal Milk Marketing Order  
9 Statistics, Annual Summaries for 1999 and 2000, which  
10 were published in 2000 and 2003, be noticed. That is a  
11 statistical compilation published annually by the USDA  
12 Ag Marketing Service.

13 Also, the Milk Production monthly publication

14 for February 2003, which is a publication published  
15 monthly by the USDA's National Agricultural Statistics  
16 Service, be given notice.

17 And finally, the publication entitled Early  
18 Development of Milk Marketing Plans in the Kansas City,  
19 Missouri, Area, which is identified as Marketing  
20 Research Report No. 14 from the USDA Production and  
21 Marketing Administration, Dairy Branch, in Washington  
22 published in 19-- May 1952, be given notice as a  
23 source for the material on the origins of a  
24 producer-handler exemption.

25 JUDGE HILLSON: Mr. Cryan, a couple quick

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

907

For public distribution

1 questions, procedural questions.

2 Can I assume that you want your statement  
3 with the attached graphs admitted into evidence?

4 THE WITNESS: Yes, I would like them  
5 admitted.

6 JUDGE HILLSON: First, let's mark that, just  
7 the first document, stapled document, as Exhibit No. 26.

8 Any objection to this being admitted into  
9 evidence?

10 It's admitted into evidence as Exhibit  
11 No. 26.

12 Now, my second question is, you asked that  
13 documents be given official notice. At the same time,  
14 you've given me actual copies of them. I haven't been

15 doing this that long, but usually it is one or the  
16 other. Usually it is an exhibit or it's noticed it's  
17 going to be noticed as an exhibit.

18 MS. DESKINS: Usually one or the other.

19 JUDGE HILLSON: It's a minor procedural  
20 thing. Since you actually have two of the articles  
21 there, are you asking that they actually be exhibits, or  
22 you just want them noticed and just submit this one-page  
23 noticed document of the documents you want noticed?

24 THE WITNESS: Either way would be fine.  
25 However the staff prefers it.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

908

For public distribution

1 MR. MARSHALL: Can I speak to that, Your  
2 Honor?

3 JUDGE HILLSON: Sure.

4 MR. MARSHALL: If they are admitted as  
5 exhibits, then they will appear on the Internet for  
6 people to use during preview.

7 JUDGE HILLSON: Is that good or bad?

8 MR. MARSHALL: It would be a good thing,  
9 because they may not be in general circulation.

10 JUDGE HILLSON: Well, I tell you what. I'm  
11 going to mark the one-page request as Exhibit 27.

12 And this is just a one-page Early Development  
13 of Milk Marketing, just a cover sheet --

14 THE WITNESS: It's the cover sheet for the  
15 assistance of the staff to help them identify the

16 documents.

17 JUDGE HILLSON: I'll call that 27A.

18 And I'm going to mark the article by Dalton,  
19 Criner, and Halloran as Exhibit 27B and the other  
20 article I have by Erba, Aplin, and Stephenson as  
21 Exhibit 27C.

22 Does anyone object to the fact that -- I can  
23 cross them off the noticed document, those two articles,  
24 if it makes people feel better.

25 Okay. I will.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

909

For public distribution

1 So I'm going to cross out -- and I'll ask the  
2 reporter on her copy, too -- the first two items on  
3 Exhibit 27, the Erba article and the Dalton article, to  
4 just put a line through them because they're not being  
5 officially noticed anymore. They're actually going to  
6 be admitted into evidence.

7 THE WITNESS: I would point out that the  
8 notice here identifies the location on the Internet of  
9 those two.

10 JUDGE HILLSON: Well, people can -- okay.  
11 This sheet of paper is there anyway, so the cross-out is  
12 sort of window dressing.

13 Does anyone have any problems with me  
14 admitting these documents into evidence?

15 MR. BESHORE: I have no problem. What was  
16 27A?

17 JUDGE HILLSON: 27A was the one-page cover  
18 sheet of the Early Development of Milk Marketing Plans.  
19 MR. BESHORE: The May 1952 USDA --  
20 JUDGE HILLSON: Yes.  
21 MR. BERDE: Show my official notice request.  
22 MR. BESHORE: Thank you.  
23 JUDGE HILLSON: He asked to take notice of  
24 the whole document. The sheet is just here to help  
25 people find it, I guess.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

910

For public distribution

1 I'm going to allow Exhibit 27 and then 27A, B  
2 and C. I'm going to admit them into evidence.  
3 I suppose at this time you're ready to --  
4 Do you have anything else you want to say?  
5 THE WITNESS: I guess I'd like to speak to a  
6 couple of things that have been brought up since we  
7 started on Tuesday.  
8 I'd like to speak to -- there's been some  
9 discussion of a question about the Secretary's decision  
10 not to change the regulation of the producer-handlers  
11 during Federal Order reform.  
12 And I would suggest that that was more a  
13 deferral of a decision than a decision. The staff, as I  
14 think a lot of people know, were overworked and  
15 overburdened in the Federal Order reform process.  
16 It is impossible to address in detail, in the  
17 detail that was required, every issue of the Federal

18 Order regulation that is out there, and I believe that  
19 this is the time to address a decision that was  
20 effectively deferred during Federal Order reform.

21           There's a question about Congress not  
22 renewing the language, and I think I agree with  
23 Mr. Berde that the language in several farm bills that  
24 had indicated that the status of producer-handlers  
25 should not change did not actually preclude the

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

911

For public distribution

1 Department from regulating producer-handlers. However,  
2 I believe that the specific decision of Congress not to  
3 continue to add that language represents an implicit  
4 decision not to recommend blanket exemptions of the  
5 producer-handlers.

6           There was a question at one point about  
7 similarities of Federal Milk Marketing Orders with the  
8 Federal Pooling Milk Promotion Order. And I would say  
9 that they are similar in many ways, that they are in  
10 some sense tied together.

11           They are both in the same general section of  
12 the code of federal regulations. They are administered  
13 by the same staff. There's at least a substantial  
14 overlap in the staff administering that. And they both  
15 make certain fluid milk marketing responsibilities  
16 common responsibilities within a market.

17           The fluid milk promotion threshold is  
18 implicitly -- explicitly, I guess, the level above which

19 the individual handler's responsibility to the market  
20 and benefits arising from the program is great enough  
21 that they are required to make a contribution.

22                   And I'm not an attorney, but I would point  
23 out that my understanding is that the Supreme Court in  
24 its decisions about promotion has indicated that  
25 promotion -- the constitutionality of promotion is tied

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

912

For public distribution

1 to promotion being part of a wider scheme of regulation  
2 and that, in that sense, they are specifically and  
3 explicitly tied together.

4                   And I believe I've covered the transfer of  
5 pricing issue, but I would only point out again that  
6 transfer of pricing is the whole field of economics.  
7 And I believe in project analysis and any discussion of  
8 what is the appropriate price paid from one-half of a  
9 business to the other half for raw material, economists  
10 will agree that the appropriate price for analysis is  
11 the market price.

12                   And in the discussion of producer-handler,  
13 the appropriate price for analyzing the price that the  
14 farm is receiving from the plant within the  
15 producer-handler firm, the appropriate principle for  
16 analysis is the market price for milk, and that market  
17 price for milk is the blend price, plus or minus any  
18 premiums, but in terms of the general concept of the  
19 economic analysis, it is the blend price that the rest



20 of the market receives.

21 And by that, the next step is that, since the  
22 handler half of that business receives milk that's put  
23 in fluid use, that the benefit it receives --  
24 essentially, the value that milk receives is Class I --  
25 that that gap is the advantage that the producer-handler

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

913

For public distribution

1 receives at the extreme, that is to say, if they are a  
2 100 percent Class I handler.

3 Again, that is a hypothetical extreme.

4 And now I'm ready to answer any questions.

5 JUDGE HILLSON: Does anyone have any  
6 questions of the witness?

7 Mr. Yale.

8

9 EXAMINATION

10 BY MR. YALE:

11 Q. Ben Yale on behalf of Edaleen Dairy,  
12 Mallorie's Dairy, and Smith Brothers Farms.

13 Good evening.

14 A. Good evening.

15 Q. Afternoon. My body feels like evening. I'm  
16 still out East, so --

17 A. It's been a long day.

18 Q. It's been a long day. Even for three days,  
19 it's been a long week.

20 How many independent producers, actually,

21 farmers, are members of National Milk Producers  
22 Federation?

23 A. Well, through the CWT program, we actually  
24 have quite a number now, but they are not represented  
25 for the purpose of this hearing, so as far as the -- as

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

914

For public distribution

1 far as my role in representing National Milk, I am  
2 representing the 34 co-operatives who are members of  
3 National Milk, and among those co-operatives have  
4 producer members of above 55,000 farmers.

5 Q. And those co-operatives that are a member of  
6 National Milk compete with PDs, do they not?

7 A. I believe there are some producer-handlers  
8 that are members of National Milk, that are members of  
9 National Milk's co-operatives.

10 Q. Are any of those from the Order 124 members  
11 of National Milk?

12 A. I don't know. I don't know.

13 Q. How about Order 131?

14 A. I don't know.

15 Q. My question comes back. Do co-operatives  
16 generally compete with PDs?

17 A. I would -- producer-handlers that are not  
18 members of the co-operatives, that have not made  
19 arrangements as members of co-operatives to participate  
20 in pool and reblending, yes, they are competing with  
21 co-operatives, the same as proprietary handlers are.

22 Q. So National Milk, who is comprised completely  
23 for these purposes of co-operatives, is asking the  
24 Secretary to end what you have described as a  
25 competitive advantage for competitors of your member

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

915

For public distribution

1 organization; is that right?

2 A. I'm sorry. Restate the question, please.

3 Q. Let me just ask this question.

4 You're proposing to end, as I read this over  
5 and over again, the competitive advantage or advantage  
6 that producer-handlers have in the market; right?

7 A. That's right.

8 Q. All right.

9 A. Large producer-handlers.

10 Q. Large producer-handlers.

11 And those, by your acknowledgment, are  
12 competitors of some of your members; right?

13 A. Some of them are competitors with some of our  
14 members, that's right.

15 Q. So just to make it clear, National Milk is  
16 proposing to impose a burden upon competitors of its  
17 members; right?

18 A. No. National Milk is proposing to remove a  
19 privilege that is extended to certain producer -- to  
20 certain handlers because they happen to be producers.

21 And our objective, National Milk's objective  
22 is to enhance the revenue of dairy farmers. Our

23 objective, our -- the goal towards which we work is  
24 higher revenue for dairy farmers.  
25 Q. Is it higher revenue for the dairy farmers

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

916

For public distribution

1 who are producer-handlers?

2 A. For dairy farmers collectively, in aggregate.  
3 As I discussed, there are losses to the market. There  
4 are at least disorderly marketing and deadweight losses  
5 for this particular exemption.

6 Q. We'll get to that in a minute.

7 Are you suggesting that Edaleen Dairy,  
8 Mallorie's Dairy, and Smith Brothers Farms in Order 124  
9 are going to economically gain by the Secretary adopting  
10 what you're recommending?

11 A. Many firms have gained from new competition,  
12 from new competitive circumstances. I don't know  
13 whether they will gain or lose, but I suppose they, in  
14 short run, in static analysis, they would lose from a  
15 loss of this exemption if they are over 3 million  
16 pounds.

17 Q. But the purpose of your proposal is to  
18 benefit producers who aren't producer-handlers?

19 A. Which make up, by far, the majority of  
20 producers.

21 Q. Right. Then that's got to come from  
22 someplace, right, for them to gain? If the adoption of  
23 this proposal benefits the nonproducer-handlers, you say

24 the majority of the producers, and we're just going to  
25 say Order 124 right now, where is the offset that allows

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

917

For public distribution

1 for that advantage for those producers? Where does that  
2 offset come from?

3 A. It comes from removing a privilege that has  
4 been extended to producer-handlers who are not required  
5 to pay the Class I price for the milk that they are  
6 using for fluid milk disposition that regulated handlers  
7 are paying and value that is being removed from the  
8 market with regard to the pool.

9 Q. Simple terms. We're moving money from  
10 producer-handlers and providing it to all the rest of  
11 the producers in the Order; right?

12 A. We're also removing deadweight losses, so  
13 we're increasing the size of the pie by doing this.

14 Q. Where are those deadweight losses occurring?

15 A. I'm glad you asked that.

16 Deadweight losses come from an uneconomic  
17 reorganization of a farm and a plant into a  
18 producer-handler for the purposes of exploiting this gap  
19 in price.

20 If the same firm would not have been created  
21 under regulation, that is to say, if the same firm  
22 cannot be profitable under Federal Order regulation,  
23 then it is incurring deadweight losses in the market and  
24 it is imposing those losses and those costs on the

25 producers and handlers that are participating in the

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

918

For public distribution

1 Federal Order pool.

2 Q. Common economic analysis would suggest that  
3 the vertical integration of operations removes  
4 deadweight losses from an operation; isn't that correct?

5 A. No. No, not necessarily.

6 Q. In this particular case, it's actually the  
7 case, is it not?

8 A. I would not acknowledge -- I don't believe  
9 that to be the case.

10 Q. Because what do co-operatives do? They  
11 collect assorted milk from various locations and make it  
12 available to handlers; right?

13 A. Co-operatives -- the primary role of  
14 co-operatives is to effect a horizontal integration,  
15 collective action by dairy farmers, co-operative action  
16 by dairy farmers.

17 Vertical integration has not particularly  
18 been profitable in fluid milk processing, as I'm sure  
19 several people here will tell you, and as I'm sure  
20 you're very well aware.

21 Q. But there's a cost that the co-operative has  
22 to assess from the market to do that horizontal  
23 collective of the producers to make that milk available  
24 to the market; right?

25 A. I'm sorry. Can you restate the question?

For public distribution

1 Q. There is a cost to bringing together  
2 collectively all of these producers to supply the  
3 market; right?

4 A. There are costs that are outweighed by the  
5 gains to the market, of the market services that are  
6 provided by co-operatives in balancing and providing  
7 services to the handlers who can turn to a co-operative  
8 and sign a single check and make a single phone call,  
9 instead of acquiring a supply of independent  
10 producer-handlers who -- of independent producers who  
11 can come and go and are not organized voluntarily.

12 Q. All right. So you have a handler who makes a  
13 single phone call, writes a single check to a  
14 co-operative, who in turn has to make a number of phone  
15 calls or write a number of checks to deliver the milk;  
16 right?

17 A. All functions that would be carried out one  
18 way or the other.

19 Q. Right. But --

20 A. So there's no loss because they're all  
21 functions that would be carried out on one side or the  
22 other in order to assemble milk supply.

23 Q. But in the case of an integrated operation,  
24 there is no such cost of assemblage; right?

25 A. There are some -- there could be some --

For public distribution

1 there could be some benefits in the reuse transportation  
2 cost, but that would be the case whether the firm was  
3 regulated or not.

4 If they're profitable as producer-handlers on  
5 economic terms, if they're economically profitable,  
6 they'll be profitable under regulation or not. If  
7 they're only profitable because of the exemption, then  
8 they are not economically efficient, to refer back to  
9 your question about what is efficiency.

10 Q. You're an economist --

11 A. I am.

12 Q. -- by training?

13 A. I am. And by profession.

14 Q. Or profession.

15 A. And by inclination.

16 Q. And you do a very good job of it. Thank you.  
17 You carry the profession well.

18 Now, National Milk, as part of its service to  
19 the co-operative members, has, besides yourself, another  
20 economist to do research for these various issues; isn't  
21 that correct?

22 A. Depending on the account -- we have several  
23 accounts. We have a number of people who are not  
24 identified specifically as economists who have economic  
25 training, but we have at least two additional people who



For public distribution

1 are defined as economists on staff.

2 Q. And during the -- from time to time, you have  
3 issues that you need to do research or make some  
4 proposals or adoptions. National Milk goes to the  
5 process of surveying its members or doing other actual  
6 field research to provide the information to do the  
7 analysis, does it not?

8 A. We have done that, yeah.

9 Q. For example, in the Class III and IV hearing  
10 that was held about three years ago, National Milk  
11 surveyed its co-ops that have manufacturing capacity to  
12 see their yields and marketing -- or manufacturing  
13 costs, did they not?

14 A. I believe we did. I was not with National  
15 Milk at that time.

16 Q. I understand that.

17 And just recently, National Milk's made a  
18 proposal to the Secretary regarding the Commodity Credit  
19 Corporation to change its formula for the price of the  
20 program based upon the survey that it's done of its  
21 member co-operatives; right?

22 A. That's correct.

23 Q. And the reason for that, as I understand it,  
24 and correct me if I'm wrong, is that the reason that  
25 you've done that is because you want to have solid data

## For public distribution

1 so that the Secretary can make the right decision;  
2 right?

3 A. The data associated with the requests to the  
4 CCC was backed up by a demonstration that the market  
5 price was falling below the support pricing system.

6 Based on experience, we have not always --  
7 the data received from our members in those types of  
8 surveys have not always been considered by everyone,  
9 including -- especially opposite opponents, to be  
10 unbiased.

11 Q. I'm not suggesting some bias. It's an  
12 important function to be giving hard numbers to the  
13 Secretary to make very important decisions; right?

14 A. When we can. The advantage in the case, the  
15 CCC case, was that we were discussing manufacturing of  
16 cheese, butter, and powder, which are products for which  
17 co-operative -- our co-operative members have a very  
18 substantial market share.

19 I will -- with regard to fluid milk, we have  
20 a relatively small share, so that that would not  
21 necessarily contribute substantially.

22 Q. I'm not asking about that.

23 A. I understand.

24 Q. I want to get back, is with that hard data,  
25 it's more impressive and it's more persuasive than just

For public distribution

1 speculation or suggestion or approximations; right?

2 A. It is complementary and serves as a  
3 complement and supplement to economic theory and  
4 economic analysis, that's true.

5 Q. Because sometimes with economic analysis, in  
6 all due fairness, sometimes without touching base to  
7 reality, we can sometimes veer a little far away; right?

8 A. Good economic analysis is grounded in reality  
9 and does not veer far from reality.

10 Q. So we need to have some hard evidence to know  
11 what's going on?

12 A. Evidence just like Mr. Herbein stated, that's  
13 right.

14 Q. So in your statement that you are proposing  
15 to end the exemption for certain PDs, what research of  
16 producer-handlers did you do in preparation for making  
17 these statements?

18 A. I did not examine any specific data for any  
19 specific producer-handlers. I did see the numbers  
20 Mr. Herbein put together that the producer-handlers were  
21 included, but the real issue was the -- as far as I was  
22 concerned for this analysis, was the processing costs of  
23 the various size plants, and the presumption was that a  
24 processing plant for a producer-handler would be as  
25 efficient as any other processing plant, and vice versa,

For public distribution

1 of the same size.

2 Q. Did you do any economic analysis or review  
3 any records of an entire entity of a producer-handler  
4 from the production of the milk through the processing  
5 and the marketing and all of that milk?

6 A. I did not.

7 Q. Now, you make -- you mentioned earlier  
8 something about CWT. What's CWT?

9 A. CWT is Co-operatives Working Together. It's  
10 a program that National Milk has undertaken which has  
11 included individual producers and co-operatives who are  
12 not mainstream members of National Milk to contribute to  
13 a fund which is being used to encourage producers to  
14 cull calves.

15 Q. Why in the world is that happening? What's  
16 the real underlying purpose for doing that?

17 A. It was -- the program was established in  
18 order to contribute to a more stable marketing  
19 environment, to deal -- at the time that it was  
20 initiated, prices were at record lows, the lowest level  
21 they've been at in 25 years, and it was an attempt to  
22 move us back towards a supply and demand balance.

23 Q. It was a recognition that producers weren't  
24 making enough money on the farm for the milk the way it  
25 was being sold; right?

For public distribution

1 A. That's right.

2 Q. And do you have any reason to believe the  
3 producer-handlers were enjoying any -- or experiencing  
4 any difference in the effects of this economic turn from  
5 any other producer?

6 A. Only relative to producers who were not  
7 enjoying the benefit of the producer-handler exemption.

8 Q. But if in the operation of a  
9 producer-handler -- you know, you can talk theoretically  
10 about transfer costs, but at the end of the day, you  
11 take all the costs, whether it's on the farm or the  
12 plant or everything, and you take the income and you  
13 subtract the cost from the income and at the end of the  
14 day, it tells you whether you've got a profit or loss;  
15 right? I mean, in the net final --

16 A. The firm is involved as -- a profit or loss,  
17 that's correct.

18 Q. So if the cost of production during this  
19 period of time for a producer-handler exceeded the blend  
20 cost, then to the extent that the cost of production  
21 exceeded the blend, that reduced the benefit to the  
22 producer-handler as a whole of being a producer-handler,  
23 did it not?

24 A. It reduced their benefit of being a producer  
25 the same as it reduced the benefit of being a producer

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

926

For public distribution

1 of any kind, but it did not reduce the benefit  
2 associated with the producer-handler exemption.

3 Q. And I'm really perplexed by that. How,  
4 economically, can a farm -- an operation losing money  
5 not be affected by losing money?

6 A. If you find a panhandler and give him a  
7 quarter, he's still panhandler, but he's got a quarter  
8 more than he had before.

9 Q. So you're suggesting producer-handlers are --

10 A. I'm not suggesting that they're panhandlers,  
11 no, I'm not. But if someone who is -- if an industry is  
12 losing money and they're all losing money, but we're  
13 giving a subsidy to one section of that industry and  
14 they're still losing money, they're losing less money  
15 than the rest of the industry.

16 Q. All right. So you're saying, then, that --  
17 how do you know what analysis -- do you know whether the  
18 cost of production on producer-handlers was less than  
19 the Class I price?

20 A. If the cost of production on a  
21 producer-handler farm is higher than the cost of  
22 production for other producers, then it is an uneconomic  
23 enterprise within that firm, unless there's some benefit  
24 from the vertical integration.

25 But if that can't stand on its own and if it

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

927

For public distribution

1 requires the extension to the producer-handlers, then it

2 is an uneconomic organization and firm as a result of  
3 the exemption and is not an appropriate subject for that  
4 kind of an exemption.

5 Q. Do you believe, then, that if there's  
6 co-operatives that are -- whose existence is based upon  
7 an uneconomic regulation or otherwise inefficient, that  
8 that should be ended?

9 A. The Federal Order marketing system as a whole  
10 is aimed at stabilizing marketing, providing more even  
11 terms of -- more even terms of trade between the  
12 producer community and the processing community and as a  
13 whole achieves a -- achieves positive results in terms  
14 of orderly marketing and a stable supply of milk.

15 Q. Part of that whole for the last decade, you  
16 know, since the '40s, at least, has included an  
17 exemption for producer-handlers; right?

18 A. It has. It's included in a lot of things  
19 that have been discarded in the meantime.

20 Q. Now, you mentioned the term "transfer costs."  
21 You were talking about this economic theory that they  
22 should look at what the market is and that the plant  
23 should look at Class I and the farm should look at  
24 blend. You talked about a transfer cost.

25 I mean, why didn't you talk about a purchase?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

928

For public distribution

1 I mean, why don't you talk about it from the plant  
2 buying the milk from itself?

3           A.     Because as has been discussed ad nauseam, a  
4 plant -- if a producer-handler plant can pay whatever  
5 made-up number it wants to to the farm, if they take  
6 care to write themselves a check, the transfer cost is  
7 the economic assessment of what is the appropriate value  
8 of the product as it moves from one enterprise to  
9 another within the firm.

10          Q.     It's a recognition, is it not, that you  
11 really don't purchase it from yourself? There's a  
12 transfer from one part of yourself to another; right?

13          A.     That's correct.

14          Q.     Thank you.

15                 Now, you made a statement, I think, in one of  
16 your comments that the Secretary really didn't decide  
17 whether or not to regulate PDs in Order reform. She  
18 just simply deferred it to a later time; right?

19          A.     The proposed -- I believe the proposal in the  
20 final rule indicated as a matter of policy that Order  
21 reform would not change, would try to avoid changing  
22 regulatory status of any plants.

23                 And I believe from my experience working on  
24 Order reform at the USDA that the decision was more a  
25 question of moving through the bulk of the program

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

929

For public distribution

1 instead of dealing with every detail.

2          Q.     Now, you would agree that regulating an  
3 existing producer-handler over 3 million pounds is an



4 imposition of minimum prices on those producers, right,  
5 under the Order? That would be the result?

6 A. It would bring them under the same regulation  
7 as other handlers.

8 Q. Which would be the imposition for their  
9 requirement to pay minimum prices to the pool for the  
10 Class I milk?

11 A. That's right. To make the contribution --  
12 the same contribution to the pool that other Class I  
13 handlers make.

14 Q. Now, you indicate throughout here this  
15 advantage and the potential of advantage can  
16 proliferate. Why doesn't the history of PDs in the  
17 Federal Order system show that PDs are growing and  
18 proliferating on a consistent basis?

19 A. Times change, and as I said, the numbers just  
20 in the four years, from 1998 to 2002, the number of  
21 farms over that 3 million pound a month level has  
22 increased by, I think, about 50 percent.

23 And I believe -- I assume that the number 10  
24 years ago was almost insignificant. The number of farms  
25 that can -- that are producing enough milk to install

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

930

For public distribution

1 and operate very low-cost processing facilities is  
2 growing. It is changing conditions.

3 And I believe testimony today indicated that  
4 there are producers who are considering the move and are

5 waiting for the results of this hearing. And I think it  
6 would be more appropriate to make a decision to limit  
7 this before more producers invested in plants in order  
8 to achieve some uneconomic reorganization so that when  
9 the decision is made at some future point that it has a  
10 minimal impact.

11 Q. Because you agree that, if they proceed as if  
12 they are unregulated and they become regulated, there's  
13 an economic impact on them; right?

14 A. That's right. I agree. There's no question.

15 Q. Have you done any analysis to determine  
16 whether or not the Secretary is going to be liable to  
17 existing PDs for making that transition from being a PD  
18 and becoming regulated and having to pay to the Federal  
19 Order program?

20 A. No more than they've been liable to any  
21 producer -- any handler that has become subject to  
22 Federal Order regulation in the last 70 years.

23 Q. And has there been any recent challenges to  
24 that in the last 10 years?

25 A. I can't speak to that. I'm sure there has.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

931

For public distribution

1 I'm not aware of them.

2 No, I'm not sure that there has, but I'm not  
3 aware of them.

4 Q. Now, have you interviewed anybody in  
5 preparation for this who intends to be a PD?

6 A. Directly, no.

7 Q. Have you participated or seen any due  
8 diligence done by anybody that seeks to be a PD in  
9 today's market?

10 A. No. I did hear Mr. Ritchey's testimony this  
11 afternoon -- or this morning.

12 Q. But you would agree under current  
13 regulations, the producer has to find a way to handle  
14 all of the milk that's on that farm; right?

15 A. I guess I'm not -- I believe I understand the  
16 regulations to allow certain cases for producers to --  
17 in fact, I believe generally they're allowed to dispose  
18 of surplus production as Class IV milk effectively.

19 Q. But the point is, is that that has to be part  
20 of this model, that they have to understand and analyze  
21 all that; right?

22 A. The model is based on a 100 percent Class I  
23 producer-handler. And I recognize that that is  
24 impossible just because disposing of the cream  
25 associated with fluid milk will push you down to 94 or

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

932

For public distribution

1 96 percent.

2 I guess I understand that there are other  
3 ways that all the milk can be bottled and disposed of to  
4 unregulated marketing areas and plants under alternate  
5 regulation, but I wouldn't -- I guess I can't go into  
6 detail because that's my general understanding, not a

7 specific understanding.

8 Q. Excuse me a second.

9 JUDGE HILLSON: We've gone about an hour and  
10 40 minutes since our last break, and I think we need to  
11 take a break for about 10 minutes. But before we do,  
12 I'm just trying to get a sense as to how much more we're  
13 going to accomplish today.

14 I mean, even if we do another hour and a half  
15 session, I assume we're going to get through with the  
16 current witness in an hour and a half, but in terms of  
17 hopes to get Mr. Hollon in today, I just can't fathom  
18 how we could do that without going till about midnight.

19 MR. BESHORE: That wouldn't do it.

20 JUDGE HILLSON: That wouldn't do it?

21 Okay. Then I think that after we finish with  
22 this witness, which whatever time that will be, we'll  
23 call it a -- not only a day, but we'll call it about two  
24 months until we can go on to the next part of the  
25 hearing.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

933

For public distribution

1 MR. YALE: Is that a hint to make it quick?

2 JUDGE HILLSON: No. I could go another hour  
3 and a half easily. I told our court reporter that we'd  
4 be out of here by 7:00 or 8:00. So let's take that  
5 10-minute break.

6 MR. YALE: That's fine. Thank you.

7 (Recess at 5:15; resumed at 5:30.)

8 JUDGE HILLSON: Let's all be seated and let's  
9 go back on the record, and Mr. Yale's going to resume  
10 his examination of the witness.

11 Let's go.

12 Q. BY MR. YALE: Mr. Cryan, I want to talk to  
13 you again about this decision for a person to be a PD  
14 and I want to raise this question.

15 Isn't it true that in many markets in the  
16 United States that a producer is limited to one or two  
17 co-operatives as an outlet for their milk?

18 A. Well -- I'm sorry. I didn't understand the  
19 question.

20 Q. I mean, if I were to build -- be a producer  
21 in Arizona or the Northwest -- let's do the Northwest.  
22 If I were to be a producer in the Northwest, say  
23 Northern Washington, there are only two co-operatives  
24 that have markets for milk and those producers, other  
25 than the PDs, and that's DFA and DairyCo; right?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

934

For public distribution

1 A. I'm not familiar with the marketing  
2 conditions in the Pacific Northwest, but I would assume  
3 there are also some independent bottlers.

4 Q. Do you know whether they have any long-term  
5 agreements with the co-operatives?

6 A. I do not know.

7 Q. Now, do you know -- in your position with  
8 National Milk, have you done any analysis to know the

9 type of decision-making that producers go into today to  
10 build a new dairy?

11 A. They do -- I believe they do the same kind of  
12 cross-benefit. From my limited experience and reading  
13 and discussing that with producers, they do the same  
14 kind of analysis that a bank requires for any other  
15 business.

16 Q. And one of the things that they're going to  
17 have to show to get capital and financing is to  
18 establish that, even though they may be great producers,  
19 they buy great cows and produce milk, they have to have  
20 a market for that milk; right?

21 A. I would presume so. I don't know.

22 Q. You don't know?

23 A. I would assume so, but I don't know that --  
24 it's a question whether a producer will not find a  
25 market for his milk.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

935

For public distribution

1 Q. Do you have any knowledge of what the  
2 approximate investment of a 3,000-cow dairy farmer has?

3 A. I'm sure it's substantial. I don't know the  
4 number.

5 Q. Maybe 10 million or more dollars?

6 A. Perhaps.

7 Q. Let's say that it is \$10 million for this  
8 question. Do you believe that such investments are made  
9 without making sure that there's some reasonable

10 expectation of a return on that investment?

11 A. No, I suppose not.

12 Q. In fact, one of the major changes that's  
13 occurred in the dairy industry is that the producers are  
14 getting larger and larger and more sophisticated than in  
15 the past; isn't that correct?

16 A. That's correct. One of the reasons for that  
17 is that, as recent data produced by ARS demonstrate,  
18 that the larger producers on average have lower costs of  
19 production.

20 Q. Isn't it reasonable to expect that if you're  
21 going to become a -- if a large producer decides to  
22 become a PD, he's got to make sure that he has a market  
23 for all of the milk that he produces; right?

24 A. Ultimately, he would have to have a market  
25 for all that he produces, but I do not believe that a

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

936

For public distribution

1 firm needs to have a contract for every --

2 Q. I understand that. But he has to have some  
3 expectation -- reasonable expectation that there's a  
4 spot market for the part that he doesn't have, a  
5 long-term part; right?

6 A. Yeah, I would presume so.

7 Q. And in doing that analysis, it's fair to  
8 say, I think you've made the comment, that a  
9 producer-handler isn't 100 percent Class I; right?

10 A. Just because of the average test of fluid

11 milk products in this country, they probably would -- in  
12 practical terms, you'd have to top out at about  
13 96 percent.

14 Q. Right, because of the fat?

15 A. Because of the cream that is most effectively  
16 disposed of is 40 percent cream, rather than -- removed  
17 as butterfat.

18 Q. They couldn't just take the 2 pounds or 1 and  
19 a half pounds or whatever is left; right?

20 A. Right.

21 Q. In addition to that, they have seasonal and  
22 daily variations in comparison to the Class I market  
23 they have to deal with too; right?

24 A. Which is more or less depending on the  
25 market, that's right.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

937

For public distribution

1 Q. And the seasonality of the production on  
2 their farm --

3 A. Right.

4 Q. -- right?

5 A. Right, which is also more or less dependent  
6 on the weather and the location.

7 Q. Right.

8 So in doing this analysis, isn't it  
9 reasonable to believe that a sophisticated farmer making  
10 that kind of investment in a farm and a plant, to cover  
11 that is going to make a provision to process or handle



12 all of the milk that comes off of that farm whether it's  
13 in a Class I market or not; right?

14 A. Well, he won't pour it down the drain.

15 Q. Now, you make a bold statement that -- I  
16 believe it's over here -- the suggestion that in the  
17 uneconomic reorganization, a producer-handler becomes  
18 larger. And I can't find the number.

19 There was a point here where you make the  
20 point that they -- I take it back. It's over here on  
21 the -- your pages aren't numbered, are they? The last  
22 page of your statement, you say, "The conclusion must be  
23 that no producer-handler plant can truly balance its own  
24 supply."

25 What's the basis? I mean, is that really the

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

938

For public distribution

1 case?

2 A. I think -- well, ultimately, it is. I mean,  
3 it's -- I guess that's got two answers, okay? The  
4 answer has two parts.

5 The first part is that the -- one of the  
6 ideas that went into that sentence was the idea that a  
7 producer-handler cannot really be made to balance its  
8 own supply because there are too many ways to impose the  
9 cost of balancing on the rest of the market, including,  
10 as the example I gave in there, that you can put it  
11 through retail outlets that actually will sell milk at a  
12 special price or under special circumstances a certain

13 part of the year and then the consumers will balance  
14 their supply the rest of the year. So that's one part.  
15 The other part is that the costs of adjusting  
16 production to exactly meet the demand for Class I use  
17 are prohibitive so that ultimately a producer-handler  
18 will have to find some means of balancing the  
19 production.  
20 At the moment, they're allowed to balance  
21 production through disposal of their surplus to handlers  
22 of the Class IV value. And as I said before, I believe  
23 there are circumstances -- certain circumstances under  
24 which they can dispose of it as Class I, as a Class I  
25 value, in certain ways, certain places.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

939

For public distribution

1 Q. Let's talk about that handling of that  
2 surplus. You indicate that to perfectly balance the  
3 supply with a demand would be prohibitive, and I think  
4 everybody would agree to that. But there can be -- I  
5 mean at the farm level.

6 A. To balance a predominantly Class I  
7 production. So, for example, if a producer-handler has  
8 a utilization similar to the markets, then conceivably  
9 they can balance the same way the market does.

10 And there is not the disadvantage for a -- to  
11 the market that there is for a predominantly Class I  
12 producer-handler. But I don't believe that there's --  
13 Braum's, as we heard in the testimony, Braum's matches

14 the market, so they go ahead and pool. They don't have  
15 an incentive to be a producer-handler.

16 Q. But going back to this, the producer-handler  
17 balancing -- I want to talk about this balancing.

18 First of all, there are some things that can  
19 be done at the farm level so that there is less surplus  
20 available for the processing plant; right?

21 A. There could be. There could be.

22 Q. And that -- how far one goes with that  
23 depends on the cost benefit; right?

24 A. Depends on the operation, the decisions made  
25 by the individual operation.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

940

For public distribution

1 Q. But there are some costs associated with  
2 making those types of adjustments at the farm level to  
3 handle the surplus; right?

4 A. That depends on how it's done.

5 Q. Right.

6 A. And as I said, my understanding is that there  
7 are means by which the balancing can be done primarily  
8 at the expense of the rest of the market.

9 Q. Right.

10 Now, do you have any knowledge that that's  
11 happening in Order 124?

12 A. I am not here to testify about any specific  
13 plant or any specific market condition.

14 Q. So the three PDs that I'm representing that

15 exist up there, there's no evidence to do that? We  
16 should regulate them because they might? They're not  
17 balancing through this technique that you're mentioning  
18 here, should we regulate them because they could, or do  
19 we just find a way to handle that potentiality and  
20 provide a regulation that prohibits them from using the  
21 market in that manner?

22 A. My testimony is in support of the 3 million  
23 pound cap.

24 Q. Right. So you're not testifying on behalf of  
25 that other proposal dealing with the similar label and

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

941

For public distribution

1 wholesale customer and whatever? I'm not going to quote  
2 the language.

3 A. No.

4 Q. You're not, okay.

5 But that would address that, would it not?

6 A. As an economist, I can say it could -- my  
7 statement indicates that there's a limit to how much  
8 that can help. And the statement indicates that there  
9 are ways to move around that, as the example in there  
10 of, for example, a Costco store offers a better price  
11 during the months when there's more milk and prices more  
12 in line with the rest of the market when there isn't.  
13 So the consumer goes out and balances his own supply at  
14 the expense of the rest of the market.

15 Q. Now, the producer-handler can also produce

16 nonfluid product; right?

17 A. It could.

18 Q. Such as ice cream?

19 A. I understand from testimony this week that  
20 some do.

21 Q. So that's a way that they're getting -- all  
22 their milk isn't going to Class I and they're balancing;  
23 right?

24 A. That's the way they can dispose of the  
25 4 percent of their utilization that's going into ice

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

942

For public distribution

1 cream. It's going into creams and disposal of cream in  
2 a Class I operation, that's right.

3 Q. They could balance their supply by the  
4 production of butter or cottage cheese?

5 A. In theory, they could. I'm not aware of a  
6 producer-handler producing butter or powder.

7 Q. You made a statement here about being a home  
8 delivery. Are you saying that if a producer-handler has  
9 got home delivery, they shouldn't be regulated?

10 A. Home delivery has changed as well. From  
11 every article I read, every newspaper clipping I read  
12 about home delivery is about spot deliveries. It's not  
13 about the old-fashioned regular delivery of the same  
14 amount of milk, the same milkman to the same doorstep on  
15 a regular basis.

16 Q. But if there was regular delivery to the same

17 home on a regular basis like the old milkman, then that  
18 producer-handler shouldn't be subject to regulation?

19 A. If it was 1955, you could say that, yeah.

20 Q. Do you know whether there's such that exists  
21 in 2003?

22 A. I'm not aware of any in 2003, no.

23 Q. But it says one-half of 1 percent in 1997, so  
24 I guess you don't know what the number would be in 2003?

25 A. I do not.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

943

For public distribution

1 Q. All right. But if one were to exist, should  
2 it be subject to regulation?

3 A. I would be interested to read a brief on  
4 whether or not it should be, but I guess I can't make a  
5 conclusion at this point.

6 Q. All right. Now, one of the other things that  
7 a producer-handler can do to balance his costs is to  
8 feed the milk to its cows, right, and its calves?

9 A. It could.

10 Q. All right. Now --

11 A. That's one step above dumping it down the  
12 drain.

13 Q. Dumping it down the drain.

14 Now, your understanding of the pricing  
15 provisions of the Order, if a producer-handler were to  
16 become subject to the minimum pricing, were to dump the  
17 milk down the drain or feed it to the animals, would it

18 be obligated to the pool for the value of that Class III  
19 product or Class IV product, depending on how it's  
20 classified?

21 A. It would become obligated to the pool if the  
22 Class III value -- assuming the dumping was not  
23 intentional, assuming it was not to dump milk for the  
24 purpose of balancing supply. That would not be  
25 acceptable.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

944

For public distribution

1 However, if it was -- I believe if it was --  
2 if it was to be dumped accidentally, and I'm not sure  
3 whether feeding it to animals on purpose -- feeding milk  
4 to animals that could have been used to process is  
5 allowable as a Class III shrinkage or not.

6 Actually, you know, my understanding is that  
7 disposing of milk in various shrinkage ways or  
8 purposefully -- on purpose in order to balance the  
9 supply I don't believe would be acceptable, an  
10 acceptable use. I don't think they would get -- I don't  
11 think they would get a Class III credit for that.

12 Any shrinkage over 3 percent, I believe, I  
13 think because there's no hauling over 1 and a  
14 half percent, I believe would go to Class I.

15 Shrinkage allowance is limited, so even if  
16 they were allowed the full shrinkage allowance for  
17 balancing by dumping and feeding it to animals, it would  
18 be a rather limited allowance.

19 Q. Look, if you would, at Table 1. I want to  
20 run quickly through some of your tables and wrap this  
21 up.

22 Table 1, the only study that goes to plants  
23 less than 12 million pounds per month is the Herbein  
24 study; right?

25 A. That's correct.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

945

For public distribution

1 Q. Now, why don't you look over in Table 2.  
2 I've got some questions on Table 2.

3 Let me ask you as an economist. If you're an  
4 entity that is selling multiple products, do you  
5 determine the profitability based upon just one of those  
6 products, or do you look at the mix of all the products  
7 being sold?

8 A. An appropriate analysis of a multiproduct  
9 firm, a firm with joint products, would have to make an  
10 analysis of the contribution to both products to the  
11 profitability of the firm. However, they're  
12 interrelated. That is to say, the volume -- the  
13 profitability of one can depend on the volume produced  
14 of the other, so that the analysis -- an analysis of  
15 that type would have to look at the products  
16 individually, but ultimately the profitability has to be  
17 maximized for the whole firm.

18 Q. When one would do an analysis to determine  
19 the impact of a producer-handler becoming fully



20 regulated on the blend, one would have to look at all  
21 the classes of milk that they account for; right?  
22 A. Profitability of the --  
23 Q. No, forget the profitability. I want to  
24 change subjects. The contribution. You indicated  
25 earlier in your testimony or your cross-examination that

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

946

For public distribution

1 there's a benefit to the rest of the members of the  
2 Order if you were to impose minimum prices on a  
3 producer-handler because they'll pay the minimum prices,  
4 receive the blend, and that difference then gets  
5 distributed to all producers; right?

6 A. Right.

7 Q. So the contribution to those members of that  
8 federal -- to the Federal Order is going to be based not  
9 on Class I milk but on the contribution from all of the  
10 classes that the handler has; right?

11 A. That's true.

12 Q. All right. And that will be less than the  
13 Class I price, right, on all the milk?

14 A. Again, the table shows the difference between  
15 the uniform and the Class I, which is the -- which is  
16 essentially the upper limit of the benefit that the --  
17 essentially the benefit that would go back to the pool  
18 by removing the exemptions.

19 That is tempered somewhat by utilization at a  
20 producer-handler plant that is lower than 100 percent

21 Class I.  
22 Is that the question?  
23 Q. I think that you've given -- I think you've  
24 answered what the court would need to look at on that.  
25 Your analysis assumes --

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

947

For public distribution

1 No. I think you've answered that question.  
2 I'm done. Thank you.  
3 JUDGE HILLSON: Mr. English.  
4 MR. ENGLISH: Charles English. Couple  
5 questions.  
6 And, actually, a housekeeping matter as well,  
7 Your Honor.  
8 This witness, having put himself on, I think  
9 that maybe there's one issue that needs to be cleared  
10 up, and that is, I move his acceptance as an expert in  
11 agricultural economics.  
12 JUDGE HILLSON: That's fine. I mean, you  
13 know, an expert doesn't mean that much in a rule-making  
14 hearing. We don't have a jury here.  
15 That's fine by me. He has a Ph.D. in  
16 economics. He's testified he put his own work together.  
17 I don't know what significance it has for the  
18 administrator or the Secretary.  
19  
20 EXAMINATION  
21 BY MR. ENGLISH:

22 Q. Dr. Cryan, with respect to the study that you  
23 read from 1952 and the discussion from Kansas City,  
24 isn't it true that in 19-- that that study referring  
25 back to the time period of the '30s and the discussion

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

948

For public distribution

1 about administrative inconvenience that there were 14  
2 traditional distributors and 335 producer-handlers?

3 A. I don't have the numbers in front of me, but  
4 that sounds about right.

5 Q. And so when the Secretary was thinking about  
6 an administrative inconvenience, the Secretary was  
7 looking at regulating 50 percent of the milk with 14  
8 distributors versus the 335 who had 50 percent?

9 A. That's exactly right.

10 And the outstanding obligations -- I believe  
11 the net outstanding obligations from producer-handlers  
12 was something like, I don't know, \$2,000. I don't know  
13 if that was per month or over the course of six months,  
14 but it was -- the money that was outstanding, the money  
15 that was due to the pool that had not been paid by  
16 producer-handlers was substantially less than the money  
17 it would have taken to enforce it, and that was the  
18 expediency that determined -- I believe that determined  
19 the market administrator and USDA to not pursue the  
20 regulation of producer-handlers.

21 MR. ENGLISH: Thank you, sir. That's all I  
22 have.

23

EXAMINATION

24 BY MR. RICCIARDI:

25 Q. Al Ricciardi, Sarah Farms.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

949

For public distribution

1 As I understand the last bit of testimony, in  
2 the early '50s, there were about 335 producer-handlers;  
3 correct?

4 A. That was discussing -- Chuck was discussing  
5 the Kansas City market in the mid '30s, in 1935. There  
6 were 350 producer-handlers serving the greater Kansas  
7 City market in 1935.

8 Q. And in 2000- --

9 A. There were thousands and thousands of  
10 producer-handlers around the country in the 1930s.

11 Q. That's even better. So there were thousands  
12 and thousands in the 1930s. As of 2003, there's about  
13 50 in the entire country?

14 A. I don't have the number. I think it's been  
15 discussed earlier. I don't have it.

16 Q. Do you have an estimate in your work as to  
17 the number of producer-handlers?

18 A. I've seen it this week, but it's not a large  
19 number, no. And most of those are small.

20 Q. And in the Order 131 area, Arizona-Las Vegas,  
21 there are how many producer-handlers?

22 A. One.

23 Is that right? One or two.

24 Two.  
25 And nine in the Pacific Northwest.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

950

For public distribution

1 Q. Okay. As I understand -- let me make sure of  
2 what you're not testifying to and we'll talk about what  
3 you're testifying about.

4 You don't have any specific information as to  
5 market conditions in the Order 131 area; correct?

6 A. I do not.

7 Q. And you're not here to give any specific  
8 testimony regarding Sarah Farms; correct?

9 A. Let me modify the answer to clarify the  
10 answer to the first statement.

11 The analysis does recognize from Federal  
12 Order aggregate statistics the average size of a  
13 distributor, pool distributing plant, and it recognizes  
14 the difference between -- the average difference between  
15 the Class I price and the uniform price in 2002.

16 Those are the only specific -- that's the  
17 only specific data associated with the market in my  
18 testimony or in my analysis.

19 Q. And other than with that exception, you don't  
20 have any specific data either concerning Sarah Farms or  
21 the Order 131 market area; correct?

22 A. I do not.

23 Q. And in reality, it's the position of the  
24 National Milk Producers Federation that the exemption

25 for producer-handlers should be deleted across every

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

951

For public distribution

1 marketing area in the country; correct?

2 A. No. The position of the National Milk  
3 Producers Federation is that the exemption should be  
4 limited to 3 million pounds.

5 Q. And it's the position of National Milk  
6 Producers Federation that the limitation should apply in  
7 every market, not just in 131 and 124; right?

8 A. That's our position, but regarding the  
9 testimony at this hearing, it is only -- it only  
10 pertains to Orders 124 and 131.

11 Q. You say in your statement that you support a  
12 limit in every market. That's in your testimony;  
13 correct?

14 A. I think that it is reasonable to attribute  
15 that as context for our position on the issue of these  
16 particular markets.

17 Q. So if it's in your testimony, that's your  
18 position; right?

19 A. That's our position.

20 Q. Okay. You are an economist --

21 A. I am.

22 Q. -- by trade, vocation, et cetera, whatever  
23 you said before; correct?

24 A. Correct.

25 Q. You're not a lawyer?

For public distribution

1 A. I am not.

2 Q. You're not an expert in the federal milk  
3 regulations; correct?

4 A. That's debatable.

5 Q. Do you present yourself here today as an  
6 expert?

7 A. Many of the people in the industry in the  
8 USDA who are the -- who are experts in the Federal Order  
9 regulations are not attorneys by default.

10 Q. I didn't say you needed to be one. I'm  
11 asking you whether or not you consider yourself to be an  
12 expert in federal milk regulations.

13 A. I am, with the qualification that, like  
14 anyone else who would be considered an expert in Federal  
15 Order regulation, it is impossible to give you an answer  
16 to specific questions about Federal Orders off the top  
17 of your head. It's a very complicated set of  
18 regulations, and if you want to wait, I can answer most  
19 of your questions about federal regulations.

20 Q. I'll get to one of them specifically.

21 You said in direct testimony and I think  
22 again when Mr. Yale asked you a question that it is your  
23 opinion that, in reality, during Federal Order reform in  
24 '99 that there was a deferral of the decision on  
25 producer-handlers rather than a decision; correct?

For public distribution

1 A. Yes.

2 Q. Okay. You've read the Federal Register  
3 concerning the proposed regulations and Order reform in  
4 '99?

5 A. I have.

6 Q. Okay.

7 A. Some time ago. I've read -- yeah.

8 Q. Have you taken a look at Federal Register  
9 Volume 64, Number 63, dated April the 2nd, '99, page  
10 16135 recently?

11 A. Maybe.

12 Q. Okay. Let me give you a couple of quotations  
13 and ask you a question.

14 Quote, one of the public comments received  
15 proposed that the exemption of producer-handlers from  
16 the regulatory plan of milk Orders be eliminated. This  
17 proposal is denied, closed quote.

18 Is that the deferral?

19 A. Literally, it is a denial.

20 Q. It was a denial, not a deferral; correct?

21 A. I could -- the Federal Order reform documents  
22 are a lot like the Bible. You can find a quote to  
23 support any position you want.

24 Q. I just found one that said it was denied, not  
25 deferred; right?



For public distribution

1 A. Just one.

2 Q. And you would agree with me that that's what  
3 it says? I can show it to you.

4 A. I will be happy to ask the judge to give  
5 official notice to the document so that the staff can  
6 find it.

7 JUDGE HILLSON: I'd be happy for you to  
8 answer the question and move on to the next question.

9 MR. RICCIARDI: I will, Judge.

10 THE WITNESS: It was literally denied.

11 JUDGE HILLSON: It was denied.

12 Q. BY MR. RICCIARDI: Thank you very much.

13 You also have referred several times, and  
14 I'll give you various terms you've used, the  
15 producer-handler privilege, the producer-handler  
16 benefit, and producer-handler subsidy.

17 Is that your position?

18 A. Yes.

19 Q. As opposed to an exemption, which is what it  
20 is called by the Secretary and the Department; correct?

21 A. Yes.

22 Q. Okay. Let's make the record clear.

23 Did you draw an analogy and call  
24 producer-handlers panhandlers?

25 A. I do not.

For public distribution

1 Q. So to the extent that's in the record, you'd  
2 want to clear that up? You don't mean that?

3 A. I cleared that up before.

4 Q. Okay. So you don't want to draw that kind of  
5 analogy, do you?

6 A. I did not.

7 Q. Okay.

8 A. I made it very clear that I was not drawing  
9 the analogy the way that you are expressing it.

10 Q. I just wanted to clear it up.

11 A. That's fine.

12 MR. RICCIARDI: Did you want to testify?

13 JUDGE HILLSON: It's cleared up,

14 Mr. Ricciardi. Let's move on.

15 MR. RICCIARDI: Thank you very much, Your  
16 Honor.

17 Q. BY MR. RICCIARDI: Now, with regard to  
18 Mr. Herbein's testimony -- when did you get his report,  
19 by the way?

20 A. I received the numbers -- I did not receive  
21 his full report until today, but I received -- I  
22 received his numbers some time ago, a week or two ago.

23 Q. And your Exhibit 26, your report, your data,  
24 your graphs relies --

25 A. My what?

For public distribution

1 Q. Your graphs, your data, your report relies  
2 upon Mr. Herbein's work; correct?

3 A. Parts of it do, that's right.

4 Q. You didn't do any kind of independent  
5 analysis of his work; correct?

6 A. I was involved in discussions of the sources,  
7 which I believe were credible, were accurate, were the  
8 best numbers that would be available for this  
9 proceeding, which happened to be relatively short  
10 notice.

11 Even if we had wanted to conduct a survey of  
12 the handful of our members who are processing fluid  
13 milk, it would have been very problematic to do that.  
14 And I think, in fact, his numbers are probably the best  
15 anyone's going to find short of a major effort by  
16 government agencies to retrieve those kinds of numbers.

17 Q. You didn't do any kind of survey, correct?

18 A. That's correct, I did not do any survey.

19 Q. Whatever data sources he had, whatever he  
20 relied upon, you're relying upon that information too;  
21 correct?

22 A. With confidence, yes.

23 Q. And to the extent his data is wrong, then the  
24 information in your report would also likely be  
25 erroneous; correct?

For public distribution

1 A. If his data was wrong, yes --

2 Q. Okay.

3 A. -- mine would be as well.

4 Q. You indicate in your statement that large  
5 producer-handlers could proliferate across the market.

6 When I hear things like "could," I assume that that is a  
7 prediction into the future. Am I right about that?

8 A. That's -- yes, that's the meaning of the  
9 tense, using "could."

10 Q. So that as an economist, when you take a look  
11 at information and data and try to predict the future,  
12 you look at information in the past; correct?

13 A. We look at trends.

14 Q. Okay. And the trends in Order 131 have  
15 actually shown a decline in the number of  
16 producer-handlers over the last 20 years; correct?

17 A. They show a decline in the overall number of  
18 producer-handlers and an increase in the number of  
19 producer-handlers that would not be subject to an  
20 exemption that is limited to 3 million pounds.

21 Q. My question was the number.

22 A. That's right.

23 Q. The number has decreased?

24 A. The total number has decreased, yes.

25 Q. And you would expect that if in fact there

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

958

For public distribution

1 was this economic advantage for a producer-handler, the  
2 number would actually increase, not go down, correct,  
3 whether you're an economist or just a normal person?

4 A. I would expect the number of large  
5 producer-handlers to increase, that's correct.

6 Q. Would you expect the number to go up,  
7 proliferate?

8 A. I would expect the number and size of large  
9 producer-handlers to go up, that's correct. And I  
10 believe it has.

11 Q. What's your data that supports that?

12 A. The data I've seen at this hearing.

13 Q. There's nothing in your report or your  
14 testimony that would support the proliferation of --

15 A. I have arrived at conclusions from what I've  
16 heard over the last three days.

17 Q. Are you going to give us a supplemental  
18 report?

19 A. You asked a question --

20 Q. I did.

21 A. -- so I answered it.

22 Q. Okay. So what you're telling us is, at this  
23 point, it could proliferate, but you don't have any data  
24 to show that it has; correct?

25 A. I have data to indicate that the conditions

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

959

For public distribution

1 are ripe for it to happen.

2 Q. In what other marketing area in the country  
3 has there been a proliferation of the number of  
4 producer-handlers?

5 A. This is the case that has -- this is  
6 essentially the -- I'm not going to discuss marketing  
7 conditions in any specific market because I don't have  
8 enough data; however, I believe that the conditions in  
9 this market are an example of the -- I'm not aware of  
10 proliferation of producer-handlers in any other market.

11 MR. RICCIARDI: Thank you. Nothing further.

12 THE WITNESS: You're welcome.

13 Can I --

14 No. That's fine.

15 JUDGE HILLSON: I don't know what you were  
16 going to ask, so I can't say yes or no. You'll have a  
17 chance. You're not represented by an attorney, so  
18 you'll have a chance to sort of redirect yourself or  
19 make a statement, but why don't we hear some more  
20 questions and just make a note of what you want to say  
21 later on. I think that's the fairest way to do it.

22 MR. MARSHALL: Thank you, Your Honor. Doug  
23 Marshall, Northwest Dairy Association.

24

25

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

960

For public distribution

1 EXAMINATION

2 BY MR. MARSHALL:

3 Q. Mr. Cryan, is there anything else you'd like  
4 to say?

5 A. No. I'm okay. No, not right now.

6 Q. Not right now?

7 A. Not right now.

8 Oh, yes. I have something I want to say.

9 I understand that although frequently changes  
10 in the Federal Orders are a result of existing problems,  
11 that it is not inappropriate to project prospectively  
12 that, to use Mr. Yale's analogy of producer-handlers  
13 popping up like measles, an ounce of prevention is worth  
14 a pound of cure.

15 And it is -- I think it's -- I think clearly  
16 some of the attorneys have been trying to establish that  
17 there are going to be losses associated with regulating  
18 producer-handlers, and I think there will be, but there  
19 will be greater -- substantially greater losses if we  
20 wait until they have proliferated around the country.

21 That's what I wanted to say.

22 Q. Thank you.

23 You might also recall some dialog that you  
24 had with Mr. Yale about balancing of a producer-handler  
25 operation by sale to other plants in the market,

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

961

For public distribution

1 including regulated plants, and he asked you a question,  
2 if that's not occurring, do you believe that the  
3 department should act to plug that loophole if -- my

4 term, "loophole," not Mr. Yale's -- should The  
5 Department act to prevent that even if it isn't  
6 presently occurring.

7           Would you like to comment on that? Should  
8 the Department act prospectively to deal with any  
9 loophole that might exist by allowing producer-handlers  
10 in the current regulations to dispose of a very, very  
11 high percentage of their milk, if they wish, to  
12 regulated plants?

13           A. That's a related issue. Again, we don't have  
14 a position on that, but I believe, as I stated, that  
15 it's very difficult to establish -- to close those  
16 loopholes. I don't think those loopholes can be closed.

17           Ultimately, as I said, you can push the  
18 balancing back to the consumer, and there's no way to  
19 regulate the consumer.

20           The federal marketing agreements that were  
21 established in the early 1930s attempted to set minimum  
22 retail prices, and those didn't work. And I don't  
23 believe anyone has the stomach for the Federal Orders to  
24 regulate retail prices, so I don't believe -- I don't  
25 believe there is a way to close those loopholes

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

962

For public distribution

1 effectively.

2           You could make steps in that direction. You  
3 can make it more difficult to -- we can make it more  
4 difficult for producer-handlers to impose the balancing



5 costs on the rest of the market, but you can't stop them  
6 completely.

7 Q. Let's talk about exactly that. I think you  
8 answered in response to one of Mr. Yale's questions  
9 that, if such a sale were to occur, there would be a  
10 sale accounted to the pool at a Class IV value.

11 Are you referring to the down allocation  
12 provisions of the Order?

13 A. That's right. That has the effect of  
14 allowing a sale at Class IV.

15 Q. And if there were enough sale of surplus from  
16 the producer-handler operation to a regulated plant that  
17 exceeded the amount of Class IV used by that plant,  
18 would that remainder be allocated next to Class III?

19 A. Yes, the excess would be bumped up to  
20 Class III and then Class II and Class I. So if it was  
21 being shipped to a distributing plant which only had a  
22 small amount of Class III or IV associated with  
23 shrinkage and then perhaps the rest was Class I, it  
24 could bump up into Class I relatively easily.

25 Q. And if there is enough to be allocated to

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

963

For public distribution

1 Class I, is there a compensatory payment?

2 A. I'm not aware of one.

3 Q. Well, we'll let the Order speak for itself on  
4 that.

5 Mr. Yale -- Mr. Ricciardi challenged you on

6 the issue of a deferral versus a denial, and I would  
7 just ask you if there's anything you would like to  
8 clarify with respect to why you characterized it as a  
9 deferral based on your experience working in the reform  
10 process.

11 A. The decision could not in practical terms say  
12 this decision on this issue is deferred. They had to --  
13 for the time being, they had to make a decision one way  
14 or the other.

15 I believe, as I stated before, the -- I mean,  
16 from experience, I went to work for the landmark  
17 administrator in September of 1996 when Federal Order  
18 reform was just getting started, and when I left four  
19 years later, it had not quite yet been finished, but it  
20 was an overwhelming task for the dairy division staff to  
21 examine every single aspect of Federal Orders in an  
22 integrated way.

23 I believe they did a very admirable job  
24 dealing with classification issues and pricing issues  
25 and some of the things that had to be integrated into

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

964

For public distribution

1 the basic framework. And some of the issues that could  
2 be seen as more stand-alone issues, like  
3 producer-handlers, were not -- could be -- were not  
4 necessarily dealt with.

5 I think there was also a -- I believe that  
6 there was an expectation that, politically, the reform,

7 which was already very difficult, would be less  
8 difficult if there were not a lot of substantial changes  
9 in the regulations of individual handlers.

10 Finally, I want to provide context for what I  
11 said before. The producer-handler issue, although it  
12 can be seen conceptually as stand-alone, it does  
13 represent a kind of a hole in the boat that needs to  
14 be -- potentially needs to be plugged, as conditions in  
15 the markets have changed and as the prospective -- the  
16 potential for large producer-handlers grows.

17 Even though it has not happened yet, I do  
18 understand from testimony -- from hearsay that there are  
19 people who are watching this to see what happens so that  
20 they can make decisions about other markets.

21 Q. Let's talk about another one of those holes  
22 in the boat.

23 Are you familiar with the term "handler  
24 pool"?

25 A. Yes, I am.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

965

For public distribution

1 At one time, a number of Federal Order pools  
2 were based on pooling proceeds for each individual  
3 handler, rather than across the market. And those  
4 were -- those were abandoned.

5 Those were discarded by the folks at the  
6 dairy division over time because they were inequitable  
7 in the sense that they allowed the high Class I handler

8 to capture benefits and pay them to his or her producers  
9 while imposing the balancing costs for the markets on  
10 other plants.

11 And the producers supplying those plants that  
12 had substantially lower Class I utilization -- for  
13 example, that could mean that a co-op -- would be forced  
14 to undercut other co-ops to chase the Class I contracts,  
15 Class I accounts, to not be stuck paying the cost of  
16 balancing the market through manufacturing, without  
17 capturing any of the benefits associated with the  
18 highest value products in the market.

19 Q. That competition to capture the highest value  
20 product in the market, that competition could  
21 become disorderly, and that is the theory for --

22 A. Yes.

23 Q. -- the concern about --

24 A. That's right.

25 Q. -- the handler pool situation?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

966

For public distribution

1 So were handler pools eliminated, then,  
2 during the reform process?

3 A. They were -- well, they were eliminated  
4 before the reform process. I think -- in theory, I  
5 think they were eliminated two or three decades ago.

6 In practice, I think the last one went out,  
7 yeah, with the Order reform. I think the Upper  
8 Peninsula market had a single handler, which was -- I

9 don't know if it was literally or just an effective  
10 single handler pool, but that was the last one.

11 Q. Would you agree that a fundamental tailoring  
12 of the federal theory is marketwide pooling?

13 A. I'm sorry?

14 Q. Would a fundamental -- let me rephrase the  
15 question.

16 Would a fundamental principle of Federal  
17 Orders be marketwide pooling?

18 A. Yes.

19 Q. And the handler pool was an exception to the  
20 marketwide pool, was it not?

21 A. Yes.

22 Q. Would you please draw any comparisons you see  
23 between a handler pool and a producer-handler who is in  
24 effect a handler pool with one producer?

25 A. It's essentially a subset of single handler

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

967

For public distribution

1 pools because it's a pooling of -- it's a pooling of  
2 revenue between a single plant and a single farm that  
3 happened to belong to the same people. And it has all  
4 the same problems with regard to the rest of the market  
5 as a single handler pool, as pooling individual handlers  
6 within a market.

7 Q. And as a result of that same concept with  
8 marketwide pool, there's a concept of uniform producer  
9 prices, sometimes referred to as the blend price; is

10 that right?

11 A. Right. And that principle is violated by the  
12 producer-handler exemption.

13 Q. All right. Thank you, Mr. Cryan. Let me  
14 just ask you one more time if there's anything you'd  
15 like to add that has occurred to you during the course  
16 of your examination today?

17 A. No. I think I covered most of it at the  
18 beginning.

19 MR. MARSHALL: Thank you, Your Honor.

20 JUDGE HILLSON: Next?

21

22 EXAMINATION

23 BY MR. BERDE:

24 Q. During the course of your examination, you  
25 referred to the Secretary's exemption of

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

968

For public distribution

1 producer-handlers in the Kansas City market.

2 Do you recall that?

3 A. Yes, I do.

4 Q. That was done, you said, for administrative  
5 convenience?

6 A. That's right.

7 Q. You recall that in the course of adopting  
8 that exemption, the Secretary also adopted a bright-line  
9 poundage limitation on the exemption?

10 A. That's a very good point. I'm glad you

11 brought that up, because I had not included that, and  
12 that's right. There's a strong precedent in there.

13 They did specifically set exemption -- limits  
14 on the exemption and it was only after those proved  
15 inexpedient that they went ahead and made it a blanket  
16 exemption.

17 Q. And do you recall what the limit was back  
18 then?

19 A. It might have been 50 gallons a day. Is that  
20 right?

21 Q. Would 500 pounds per day be --

22 A. 500 pounds. Okay.

23 MR. BERDE: Thank you.

24 JUDGE HILLSON: Mr. Beshore.

25

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

969

For public distribution

1 EXAMINATION

2 BY MR. BESHORE:

3 Q. Dr. Cryan, would it be correct to state that  
4 your analysis of the professional literature with  
5 respect to plant costs of various size confirmed the  
6 empirical study that Mr. Herbein did and presented in  
7 his testimony concerning plant costs of various size?

8 A. Yes, I would say it did. I would say that  
9 not only did we see a shape of these curves that was  
10 visually similar from looking at this, but that  
11 mathematically, the functional form of the equation that

12 fits Mr. Herbein's data is exactly the same functional  
13 form that Cornell determined to be the best fit for the  
14 data they used in developing their model in the study  
15 that's cited from those folks.

16 Q. Okay. And those mathematical test equations  
17 are ways that professional economists test data?

18 A. That's correct.

19 Q. And that's part of the analysis and testing  
20 that you as an economist performed with respect to  
21 Mr. Herbein's data and the Cornell and the main data?

22 A. Yes, roughly.

23 Q. Do you recall the Table 6 of Exhibit 7 which  
24 Mr. Mykrantz presented relating to the aggregate  
25 utilization of surplus milk by producer-handlers?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

970

For public distribution

1 A. I remember that.

2 I was not sure in the question for  
3 Mr. Mykrantz, maybe, whether that Class III  
4 formulation included any inventory or not. I don't  
5 know if that's the case or not, if that's final  
6 utilization or whether that's -- but anyway, go ahead.

7 Q. Do you recall that it showed roughly that the  
8 aggregate utilization of surplus milk by  
9 producer-handlers in Order 124 was about 70 percent  
10 Class I or Class II?

11 A. I don't remember the numbers, but if you say  
12 so.



13                   70 percent? Only 70 percent? Okay.  
14           Q.       Yeah, the surplus was -- their surplus.  
15           A.       Surplus. Okay.  
16           Q.       You take out all their --  
17           A.       Okay.  
18           Q.       -- all their own fluid Class I utilization.  
19 Just take the milk that's left over, the milk that's  
20 such a problem to balance, okay?  
21           A.       70 percent Class I?  
22           Q.       70 percent Class I and II. Class I and II,  
23 okay? Assume with me for a moment that that's what  
24 Table 6 of Exhibit 7 shows.  
25           A.       In a market that is 33 percent Class I, I

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

971

For public distribution

1   assume?  
2           Q.       Right.  
3                   Okay. Would that indicate to you that those  
4 producer-handlers in aggregate in that Order have found  
5 a way, as you've described, to balance their surplus in  
6 the market?  
7           A.       That would seem to indicate that.  
8           Q.       Now, I don't -- I'm sure Mr. Ricciardi did  
9 not intend to mislead you in any way in his quote from  
10 the Federal Register of April 2, 1999, on Federal Order  
11 reform, but the denial that he read was a denial of the  
12 total -- of elimination of the total exemption of  
13 producer-handlers.

14 Do you recall that?  
15 A. That's right.  
16 Q. Okay. And nobody here is asking for that to  
17 be done --  
18 A. No.  
19 Q. -- isn't that correct?  
20 A. No.  
21 Q. You're certainly not?  
22 A. I'm not.  
23 Q. In fact, you are --  
24 A. I don't know anybody that is. I haven't  
25 heard anybody ask for the total.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

972

For public distribution

1 Q. Well, you're affirmatively supporting the  
2 continuation of the exemption for all producer-handlers  
3 up to the 3 million pound per month on Class I sales?  
4 A. Sales, yes.  
5 Q. Which, of course, is going to be more than  
6 3 million pounds per month of actual production at the  
7 farm level?  
8 A. Right.  
9 Q. Do you recall that in the Federal Order  
10 reform decision, the Secretary stated on multiple  
11 occasions that in those reformed regulations there was a  
12 deliberate attempt not to regulate new -- presently  
13 unregulated handlers?  
14 A. That's right.

15 Q. And that would apply, of course, to the  
16 decision not to impose any new limits on  
17 producer-handlers which might regulate unregulated --

18 A. Right.

19 Q. -- but not fully regulated?

20 A. Order reform was difficult enough without  
21 changing the regulation of individual handlers.

22 MR. BESHORE: Thank you, Dr. Cryan.

23 MR. ROWER: Dr. Cryan, just a quick question.

24 JUDGE HILLSON: Can you identify yourself?

25 MR. ROWER: Jack Rower.

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

973

For public distribution

1 EXAMINATION

2 BY MR. ROWER:

3 Q. In the Herbein study, in your opinion, does  
4 the use of aggregates or averages in the plant  
5 distribution, other dairy supplier costs cause a loss of  
6 information or --

7 A. Yeah, there's no question that it does. I  
8 understand the limits that Mr. Herbein was operating  
9 under. He had to make sure that the data was  
10 confidential, and I didn't have access to his database.

11 The same fitting the line based on the data  
12 from all 20 plants would give us a more meaningful --  
13 more statistically meaningful result. That's a pretty  
14 small number of points on this line, but it is a good  
15 fit and it's consistent with the others.



17 fluid milk products and to do that through adequate  
18 assessments.

19 My question to you is, is that a basis, then,  
20 for determining what the limit should be on that  
21 producer-handler in Order 124 and Order 131?

22 A. Ultimately, you'll make that decision whether  
23 it is, but I would argue -- as a layman, I would argue  
24 that there are substantial similarities between -- I  
25 mean, the Fluid Milk Promotion Order is a Federal Order,

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

975

For public distribution

1 has a similar -- it is similar in the sense that it  
2 addresses marketing responsibilities, marketing issues.

3 Promotion is a common marketing function when  
4 it's undertaken by the Promotion Order, the same as  
5 setting prices becomes a common marketing issue when  
6 it's undertaken by Federal Milk Marketing Orders.

7 It is administered under similar rules for  
8 participation, although in the case of the fluid milk  
9 Promotion Order, the program is done by fluid processors  
10 instead of producers.

11 But it does tie together as a greater scheme  
12 with the farming checkoff, which operates under almost  
13 identical, if not identical, voting rules as the Federal  
14 Orders.

15 Q. Okay. Also --

16 A. I'm sorry.

17 One last thing is that there was that --

18 there were those Supreme Court cases discussing  
19 promotion which, again, according to my lay memory of  
20 the cases, identified the constitutionality of a  
21 Promotion Order as relating to whether or not it's part  
22 of a larger scheme of regulation, marketing regulation.

23 Q. In your opinion, you would then see the fluid  
24 milk research promotion program, in theory, the  
25 promotion research program, as well as these Marketing

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

976

For public distribution

1 Orders as being part of the larger regulatory scheme?

2 A. Yeah, potentially. I believe so. I think  
3 there's an argument for it. I'm not an attorney, so my  
4 opinion is not very fine on that point.

5 Q. Also, in regards to this 3 million pound  
6 limit that's based on the Fluid Milk Act, it comes out  
7 of your definition of who's a fluid processor that's  
8 subject to paying assessments; correct?

9 A. I'm sorry. The 3 million pound limit is  
10 based on the --

11 Q. It's a 3 million pound limit. If you're a  
12 fluid milk processor and you produce above 3 million  
13 pounds, I think, a month, then you have to pay  
14 assessments?

15 A. That's right.

16 Q. If you're below that, you don't?

17 A. That's right.

18 Q. My question to you is, if that 3 million

19 pound limit in the Fluid Milk Act is changed, would that  
20 be a reason for changing your proposal of 3 million  
21 pounds for Order No. 124 and 131?

22 A. Well, it would be a consideration, although I  
23 think -- I probably didn't discuss it as much as I  
24 should have. I believe that the numbers I presented --  
25 the numbers I presented in the tables demonstrate that

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

977

For public distribution

1 the economies -- well, you know, again, these are  
2 associated with Mr. Herbein's numbers, but they seem to  
3 suggest that the economies of scale kind of flatten out  
4 as you get into the range around 2 to 5 million pounds,  
5 so that somewhere in that range is probably an  
6 appropriate number.

7 And that 3 million is a useful single point  
8 within that range, and the Fluid Milk Promotion Act is  
9 reasonable because those two criteria are relatively  
10 consistent.

11 If, however, they raise the limit on the  
12 Fluid Milk Promotion Act to 10 million pounds, which is,  
13 you know, pretty clearly -- from these numbers is pretty  
14 clearly a level at which the plant -- at least according  
15 to Mr. Herbein's numbers is a level at which the plant  
16 has captured almost all the economies of scale, all the  
17 cost savings, the unit cost savings from the larger,  
18 that would have to be looked at a little more closely,  
19 because then there would be two criteria that would have

20 contradictory results.

21 Q. My last question for you is, if the  
22 department should accept a 3 million -- well, no.

23 My question to you is, can you point to what  
24 economic conditions within Order No. 124 and 131 that  
25 would justify the 3 million pound limit?

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

978

For public distribution

1 A. This analysis, as I said, is based on general  
2 processing cost numbers related to size based on plants  
3 across the country.

4 But the calculation in these tables is based  
5 on the benefits that a producer-handler -- they  
6 essentially measure the benefits that a producer-handler  
7 of varying sizes has relative to the average pool  
8 distributing plant in each market.

9 So that means that if the average plant is  
10 smaller -- if the average plant -- if a  
11 producer-handler -- a large producer-handler has a  
12 greater benefit relative to the average plant in  
13 Order 124 than in the other Order, it could suggest  
14 different numbers, but I don't think that's appropriate  
15 because the conditions are changing.

16 Q. I guess my question really is, I'm trying to  
17 find out if there's any conditions unique to either 124  
18 or 131 that would support a 3 million pound limit.  
19 There may not be. I'm just asking.

20 A. I think what I've presented has limited



21 speci fi ci ty, li mi ted order speci fi ci ty. I thi nk that  
22 the cost curve suggests that somewhere in the 2 to  
23 5 mi lli on pound range is reasona ble for any market.

24 And as I said in my statement, I thi nk tryi ng  
25 to defi ne too closely the li mi t for each market

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

979

For publi c distri buti on

1 separa tely is kind of above -- you know, how many angel s  
2 can dance on the head of a pin. I thi nk it makes more  
3 sense to adopt a reasona ble standard for all markets and  
4 apply it across the country.

5 MS. DESKINS: Thank you.

6 JUDGE HILLSON: Any more questi ons?

7 MR. RICCIARDI: Rai si ng the whi te fl ag.

8 JUDGE HILLSON: No more questi ons.

9 You may step down.

10 (Wi tness excused.)

11 JUDGE HILLSON: We'll go over what's going to  
12 happen next.

13 I poi nt out that even though thi s was  
14 proba bly the lon gest day we've had -- we've gone for 10  
15 hours not counti ng lunch and we've exami ned a total of  
16 four wi tnesses, count them, four, whi ch is less than we  
17 di d in the previ ous days, so we're not getti ng more  
18 effi cient, al though the wi tnesses have a lot to say -- I  
19 di dn't fi nd anythi ng to compl ain about genera lly in  
20 terms of the pro ponents' testi mony or the  
21 cross-exami na ti on. I thi nk most everythi ng was

22 legitimate, and that's the way it goes. It's a  
23 complicated case, complicated matter, and it's going to  
24 take a while to get through it all.

25 I would still urge people to consider using

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

980

For public distribution

1 written direct testimonies that is available to  
2 everybody in advance. I mean, if someone's going to  
3 testify at the next session and present 20 graphs and  
4 tables for the first time that the other side hasn't  
5 seen and the other side asks me for some time to look at  
6 it, what am I supposed to do? Say no?

7 I'm trying to be fair about this, but I think  
8 it will behoove everyone to consider getting the  
9 testimony -- at least getting the direct testimony  
10 prepared in advance so that the opponents can see it.  
11 I'm not going to force anyone to do that.

12 So we're going to reconvene 8:30 a.m. on  
13 Monday, November 17th, at the Doubletree Hotel in  
14 Seattle airport. We have the room booked for four full  
15 days, plus a half a day Friday. We're going to call it  
16 a day at noon on Friday.

17 People who are already flying on their own  
18 time from the East Coast to get there for Monday  
19 morning, even at that, won't get home till -- it's  
20 almost a red-eye. Even if you leave at 3:00 in the  
21 afternoon, you won't get home until 11:00, 12:00, so I  
22 want to be reasonable.

23 I shudder to say this. If for some reason we  
24 can't finish in those four and a half days, and that  
25 possibility is in front of me just because of how long

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

981

For public distribution

1 we've been going on, we'll probably consider finishing  
2 the hearing in the Washington, D.C., area if there's an  
3 extra hard day or two. But I think it would be to  
4 everyone's benefit to try to get their acts together --  
5 they have two months to do it -- and make things go a  
6 little bit smoother.

7 Now, normally -- this is not the closer here.  
8 We're just continuing the hearing. But the transcript  
9 of the first three days will likely be available for  
10 purchase and/or on the Web site to help everyone figure  
11 out what they're going to do next, but I'm not asking at  
12 this time for corrections to the transcript.

13 MS. DESKINS: I just want to tell you that I  
14 just talked to AMS and they think they'll be okay  
15 without the transcript off the Internet before the next  
16 session.

17 JUDGE HILLSON: Right. And that's fine. I'm  
18 not asking for corrections to the transcript. If you  
19 see things that are wrong, we'll do all that at once, I  
20 hope, at the conclusion, like November 20th or November  
21 19th -- November 20th.

22 So, Mr. Beshore, do you have something you  
23 want to say on the record?

24 MR. BESHORE: I just wanted to note for the  
25 record that the proposed changes to the language in the

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

982

For public distribution

1 hearing notice that Mr. Hollon is going to advocate --  
2 testify to have been made available as of yesterday to  
3 everyone in the hearing.

4 JUDGE HILLSON: That's excellent. That's the  
5 kind of thing that we need to have a little more of, I  
6 think.

7 As of now, I'm going to assume -- I'm going  
8 to have this -- I have the list of witnesses, and as of  
9 now, I'm going to assume we're going to continue with  
10 that now. I know at some point we need to call  
11 Mr. Mykrantz back on and whoever else. I guess -- I  
12 don't know.

13 There was no need to re-call Mr. Wise at this  
14 point? Those are the two government witnesses, the two  
15 IME witnesses, but I know that -- and I assume that the  
16 exhibits that Mr. Mykrantz prepared -- well, the  
17 requests that he prepared for you are in the back of the  
18 room.

19 Go ahead, Mr. Marshall.

20 MR. MARSHALL: Doug Marshall on behalf of  
21 Northwest Dairy Association wanting to add to  
22 Mr. Beshore's comment about the revisions to Proposal  
23 Number 3, that it is our intent in our testimony to seek  
24 the revision at the hearing, to make the same changes

25 that Mr. Hollon will be describing for Order 131, and we

CROPPER & ASSOCIATES, LTD.  
(602) 277-8882

983

For public distribution

1 would propose that the same change be made in Order 124  
2 as well.

3 JUDGE HILLSON: Okay. All right. So we'll  
4 close the hearing for today and we'll reconvene in  
5 Seattle on November 17th.

6 Off the record.

7 (The proceedings adjourned at 6:38 p.m.)

8 \* \* \* \* \*

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

For public distribution

1 STATE OF ARIZONA     )  
2 COUNTY OF MARICOPA    ) ss.

3

4

5

6

7                   I, LORENA MARIN-GARCIA, hereby certify that  
8 the foregoing pages numbered from 793 to 984, inclusive,  
9 constitute a full, true, and accurate record of the  
10 proceedings had in the above matter, all done to the  
11 best of my skill and ability.

12                   DATED this 29th day of October, 2000.

13

14

15

16

\_\_\_\_\_  
Lorena Marin-Garcia  
Certificate No. 50541

17

18

19

20

21

22

23

24

25

CROPPER & ASSOCIATES, LTD.

(602) 277-8882