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VOLUME VIII

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8:00 a.m.

THE COURT: We're back on the record. It's Friday morning.

MS. DESKINS: Judge Hillson, this is Sharlene Deskins. When you finish, I'd like to make a small statement if I could.

THE COURT: Okay. I was just saying what day it was.

MS. DESKINS: Oh, okay.

THE COURT: Now, you threw me off, I can't remember what day it is now.

It's the eighth -- it's the 21st. It's the eighth day of our hearing and I was going to just do one reminder, which is people who are thinking about staying at the Embassy Suites in Alexandria for the next segment, I guess you can let Mr. Tosi -- you're the ones who are --

MS. DESKINS: It's going to be Mr. Rower.

THE COURT: Okay. Mr. Rower who's sitting in the front row in the light blue shirt, if you don't know him by now. Just let him know. What was your announcement, Ms. Deskins?

MS. DESKINS: I just -- in regards to where the hearing location was, I don't know if the Agency's position got put on the record as to what we thought about the

1 hearing location. I know there's some informal talks, but
2 I represent the Agency, so I feel I need to get their
3 position on the record.

4 And the AMS' position is for rule-making
5 hearings, we try to hold them in the area that's being
6 regulated, so that the people who live in that area can
7 come. I understand you've made a decision, but I did want
8 the Agency's position on the record.

9 THE COURT: Okay. Well, I thought the people who
10 had a chance to come to Phoenix, and the people had a
11 chance to come to Washington, and I also pretty much
12 canvassed the representatives and the -- both the
13 proponents and the opponents, and I didn't see anyone
14 really objecting to having it in Washington, so I weighed
15 that in, as well as my own personal proclivities, I guess
16 you could say.

17 MS. DESKINS: Well, just for the record, the
18 Agency has a longstanding policy of holding things in the
19 area where people are regulated.

20 THE COURT: Yeah, I get you.

21 MS. DESKINS: And --

22 THE COURT: You just said that.

23 MS. DESKINS: And that's our position. Always
24 our position.

25 THE COURT: And I think the Agency more than met

1 their obligation on that, and I think this last wrap-up
2 part of the hearing can be in D.C. unless I see a vehement
3 opposition from the regulated parties, which I don't --
4 which I haven't, and no one's expressed that to me.
5 Everyone seemed like okay, so okay.

6 You had something to say, Mr. Marshall?

7 MR. MARSHALL: Yes, I do, Your Honor. Doug
8 Marshall, Northwest Dairy Association, good morning.

9 Along the lines of that last topic, it would be
10 important for us given the fact that the hearing will be in
11 D.C., and that's a full plane ride and an extra day and all
12 that. It would be important for us to determine what we
13 need to do to prepare, and particularly what witnesses to
14 utilize, in fact, whether I even attend.

15 And so I would ask that you direct the parties to
16 designate at some point in advance of the convening of the
17 hearing, what they expect -- what witnesses they expect to
18 put on, so that I can determine whether it makes sense, and
19 maybe even we can get a sense of how many days of hearing
20 it may require, so that I can get a sense of whether to
21 attend.

22 THE COURT: Okay.

23 MR. UNIDENTIFIED: I would join that request.

24 THE COURT: Okay. Well now, I've gotten a list
25 for witnesses that are remaining for the opponents, and

1 I'll go over that again and see if there will be anymore
2 and then I will check. I assumed from what I've heard,
3 that there's going to be a few rebuttal witnesses recalled,
4 I mean by the proponents, and I have the list for the
5 opponents. I think I may have said that backwards. People
6 have asked me when we're going through the hallways here,
7 how late we're going to go and all that.

8 I mean, I plan to start on Tuesday morning at a
9 reasonable time, 8:30 to 9:00, depending on how it looks,
10 I'm willing to go -- do whatever it takes to get it done in
11 that four-day week. I would like to -- there's only -- I
12 mean, for example, the opponents only have if my list is
13 correct, and I'll go over it again, have seven witnesses to
14 call, and I assume we're going to get through at least one
15 of them today, although that might be naive on my part.
16 But we have seven witnesses, and I don't know at this point
17 what -- who's going to be called in rebuttal.

18 I mean, here's the list I have now that the
19 opponents have given me. Either one of the brands, Mr.
20 Flanagan, both Henigers (phon.), Tom Swanson, a Costco
21 representative and Joe Allbright (phon.). Is that list
22 still the right list?

23 MR. UNIDENTIFIED: We may have both brands.

24 THE COURT: It might be both brands.

25 MR. UNIDENTIFIED: (Indiscernible).

1 THE COURT: Okay.

2 MR. UNIDENTIFIED: And, Your Honor, I'll probably
3 (inaudible) list I gave you (inaudible). Sarah Farms.

4 THE COURT: Okay. And what's the -- I mean, I
5 don't want to push you on this, because you have a few
6 months, but what's the sense from the proponents in terms
7 of how many witnesses they will be calling as rebuttal
8 witnesses. Is there a sense at this point?

9 MR. YALE: Not much of one, but Mr. Holland will
10 testify, at least briefly with respect to the language.

11 THE COURT: The witness that was suggested
12 earlier?

13 MR. YALE: (Inaudible.)

14 THE COURT: Okay.

15 MR. YALE: And we expect to distribute -- mark
16 those proposed language modifications as an exhibit here
17 before we leave and distribute it so that the content will
18 be available to everyone.

19 THE COURT: Okay. Mr. English, do you have any
20 thoughts?

21 MR. ENGLISH: Well, having heard not a wick from
22 one factual witness on the Arizona side, we can't say one
23 way or the other.

24 THE COURT: Okay.

25 MR. MARSHALL: In the case of Northwest Dairy

1 Association, Your Honor, I would say that we do feel some
2 rebuttal evidence is necessary. It may be possible for Mr.
3 Holland to put that in, or one of the other rebuttal
4 witnesses that are called. So whether we do or not will
5 depend on what we determine between now and the time of the
6 hearing.

7 My earlier request was designed to have some
8 sense of it during the first part of January by the parties
9 might notify you, or in some other way communicate, so that
10 we could make an intelligent decision as we prepare for
11 that third phase of the hearing.

12 THE COURT: Go ahead. Mr. Beshore is talking.
13 You might as well identify yourselves.

14 MR. BESHORE: It's possible that Dr. Kyron may
15 wish to testify. There were some rather pointed comments
16 directed to his testimony yesterday and he certainly would
17 have the opportunity to rebut those, if he would wish to.
18 And Mr. Herbine is a possibility.

19 THE COURT: Okay.

20 MR. YALE: This is Ben Yale. I forgot. We have
21 today, if time permits, Scott Highland (phon.), and if he
22 does, he's been on the original list with Smith Farms, is
23 very short. And if he doesn't get on today, then he
24 doesn't get on, and that's fine, too.

25 THE COURT: Okay.

1 MR. YALE: But just for today.

2 MR. RICCIARDI: Al Ricciardi for Sarah Farms.

3 My only concern, Judge, is that I want to make
4 sure that we have real rebuttal, as opposed to additional
5 evidence that they didn't get in and now they want to get
6 in on that, and that's one issue.

7 Second is to the extent that they're going to
8 amend the language for a proposal to make any comments on
9 it, I would like to have that in essentially their case in
10 chief, because it may mean that I want to call another
11 witness.

12 THE COURT: Well, they never heard the language
13 until questioning by Counsel, so I don't think it's fair to
14 have them come up with it as far as their -- I mean,
15 they've already put on their case in chief and, you know,
16 in terms of commenting on their -- on language.

17 MR. RICCIARDI: I don't know what they're going
18 to say until they say it.

19 THE COURT: Yeah, you may have to put on another
20 witness after that, if it comes to that. I mean, we need
21 to get a full hearing on it, you know, we certainly had
22 plenty of time devoted to this case.

23 MR. ENGLISH: I apologize, Your Honor. But while
24 we are certainly in the interest of finishing this hearing,
25 we're the ones that want to have it finished quickly, there

1 is no rule that says something has to be only rebuttal, as
2 opposed to something that could've been said.

3 Obviously, the rules of non-repetitive, non-
4 cumulative, all of those apply, but there's no rule about
5 what --

6 THE COURT: I know the rules that govern this
7 proceeding are pretty vague, I'd say, and that's being
8 kind. And we're just trying to -- I just want to try to
9 make it a fair hearing, let everyone have their say, and
10 we'll do the best we can.

11 And at this point, I'll ask Mr. Yale, you can
12 call your witness.

13 MR. YALE: (Inaudible.)

14 THE COURT: Okay.

15 MR. MILTNER: Your Honor, we call Charlie
16 Flanagan (phon.) of Mallory's Dairy.

17 THE COURT: Mr. Flanagan, if you would raise your
18 right hand.

19 MR. UNIDENTIFIED: State your name.

20 MR. MILTNER: I'm sorry, Ryan Miltner.

21 CHARLES FLANAGAN, WITNESS, SWORN

22 THE COURT: And could you please state and then
23 spell your name.

24 THE WITNESS: My name is Charles Flanagan, C-h-a-
25 r-l-e-s, F-l-a-n-a-g-a-n, middle initial R.

1 THE COURT: Okay. You may proceed with your
2 questions.

3 MR. MILTNER: Thank you, Your Honor.

4 EXAMINATION

5 BY MR. MILTNER:

6 Q. Mr. Flanagan, can you give us, for the record,
7 some background on your education and employment?

8 A. I have a bachelor's degree in Animal Science from
9 Oregon State University, and a bachelor's degree in
10 accounting from Arizona State University. I have worked on
11 several dairy farms, including my family farm, and for the
12 last 21 years, I've been employed by Mallory's Dairy, Inc.

13 Q. And in your employment with Mallory's Dairy, what
14 is your job title and job description?

15 A. My job title is business manager and my duties
16 mainly consist of dealing with whatever other people don't
17 want to do. There are people that run the plant, run the
18 dairy and do various things, and I take care a lot of the
19 administrative headaches and accounting, payroll, things
20 like that.

21 Q. Are you familiar with the general operations of
22 the dairy?

23 A. Yes.

24 Q. How many employees does Mallory's Dairy have?

25 A. 80 plus.

1 Q. And of those 80 employees, are any of them
2 minorities?

3 A. Probably 60 percent are Hispanic. Mostly
4 Mexican, but some from other Central American countries.

5 Q. Do you employ any women?

6 A. Yes, we do.

7 Q. Do you have any idea about how many women you
8 employ?

9 A. Oh, about eight to ten.

10 Q. Okay. I think you said that Mallory's Dairy is a
11 corporation, did I hear you correctly?

12 A. Yes.

13 Q. How is it that corporation owned? Is it owned by
14 -- is it a closely-held corporation?

15 A. All the shares are owned by members of the
16 Mallory family.

17 Q. And what percentage of the company is controlled
18 by women?

19 A. 75 percent, a little better. A little more than
20 that.

21 Q. As part of your job duties as the business
22 manager for Mallory's, have you had a chance to examine the
23 proposals that are before us at this hearing?

24 A. Yes, I have.

25 Q. And you've had discussions within the dairy about

1 those proposals?

2 A. Yes.

3 Q. Have you, along with others at the dairy,
4 investigated the possible effects of those proposals on the
5 operation of the dairy?

6 A. Yes.

7 Q. Have you made any determinations or have you made
8 any analysis of how those proposals have adopted would
9 effect the operation of Mallory's Dairy?

10 A. Only to the extent that we would probably have to
11 re-evaluate everything we do, and possibly some things that
12 we don't now do.

13 Q. What types of things have you -- in your
14 analysis, what types of things would you have to do
15 differently, or might you have to do differently if
16 proposals were adopted?

17 A. Well, we would have to look at whether it's
18 feasible to continue to milk the cows, to continue to run
19 the plant, or to do both, or some other alternative that we
20 probably haven't come up with. It opens up a whole can of
21 worms so that there's a lot of things that would have to be
22 considered that we haven't thought about, I'm sure.

23 Q. Have you made any determinations in the business
24 as to what definitive steps you might take if the proposals
25 were adopted?

1 A. No. We would -- I guess we would kind of have to
2 see how it goes and then react to that when in any
3 business, or actually any system, if you make a small
4 change, it can have a variety of effects that are not
5 always predictable. So some of it would just be a matter
6 of seeing what happens.

7 Q. But one of the possibilities is that you said you
8 may give up the farming end of your producer/handler
9 operation; is that correct?

10 A. That would be one option.

11 Q. And one option might be that you would give up
12 the processing end of your producer/handler operation?

13 A. Yes, and another option would be that we might
14 expand it. You know, if you change the economic equation
15 the way it is, then some things that are not feasible now
16 might become options you'd have to look at.

17 Q. Have you done any estimate as to what the
18 monetary costs of these regulations might be to Mallory's
19 Dairy?

20 A. Estimate in the range of \$60,000 a month, around
21 that area.

22 Q. And if my math is right, that's somewhere around
23 700, \$750,000 a year?

24 A. Right.

25 Q. And is that economic cost, how have you measured

1 that? I mean, how did you come up with that number?

2 A. Took the percentage of the different classes
3 where we sell now and adjusting that to the pool-wide
4 average for the different classes.

5 Q. And did you take into account the benefit that
6 you might receive from receiving the blend price on some of
7 your milk?

8 A. Yes.

9 Q. You mentioned that if the proposals were adopted,
10 one of the -- something that might be available to you is
11 the expansion of your operation. Does Mallory's Dairy have
12 any current plans to expand their operation?

13 A. No. Our last expansion in cow numbers was in
14 1985. We're milking the same number of cows that we were
15 then, although we are getting more milk out of them, and
16 hope to continue to get more milk out of the same numbers,
17 but there are many, many factors that keep you from
18 expanding, and we're at a level where we think we're fairly
19 efficient and don't have any plans to change.

20 Q. What types of factors might -- you mentioned that
21 there are factors that effect the ability and the plans for
22 expansion. Can you provide for the record and for the
23 Secretary what some of those factors might be and how they
24 would effect your ability to expand?

25 A. Capital is a big one. Dairy operations don't

1 generate a lot of extra capital, so you have to be very
2 careful what you do. It's very difficult to get a new
3 market. You can't just produce all the milk you want and
4 hope you can sell it. Any time you expand an operation,
5 you run the risk of exceeding the capacity of your
6 management and your ability to bring on a good workforce.
7 The example, the other day, if Bill Gates came and wanted
8 to go into business with us, he would require a certain
9 return on investment, which I think most dairies probably
10 wouldn't be satisfactory for an investor.

11 Q. You mentioned that capital is one factor, and as
12 I understood your testimony, you were talking about capital
13 in the form of money.

14 A. Right. And also you're limited, at least we're
15 limited by our land base. We're -- we've got a river on
16 one side, a creek on the other, a swamp on one side, and
17 the city limits of Silverton on the other, so we can't
18 expand on that location.

19 Q. So you would need to make a substantial capital
20 investment in additional land?

21 A. You'd have to get the land first and then
22 everything else.

23 Q. On the land that you do own, even though it may
24 be bounded by certain obstacles, is there room to build
25 additional facilities for either your farming or your

1 processing operation?

2 A. There is a small amount available. A lot of it
3 is in the flood plain and is not practical for
4 construction.

5 Q. Now, if you wanted to expand your operation and
6 you wanted to add additional cows, I assume you have to
7 have a place to house those animals, correct?

8 A. Right.

9 Q. What's Mallory's Dairy's situation currently with
10 available existing space to house the livestock?

11 A. We're maxed out.

12 Q. And --

13 A. And we have been for a long time.

14 Q. So when you say maxed out, I mean, how many cows
15 do you think you may be able to add? Any cows at all, or a
16 few cows?

17 A. Oh, if we crowded them, we could add 50 to a
18 hundred cows, but we have two milking parlors running 24
19 hours a day, so you know, that's another constraint is they
20 only shutdown to do clean-up, and then they start up again.
21 So, you know, I guess you could run cows through slightly
22 faster, but there's a cost of doing that, too.

23 Q. So even if you could add the cows to the farm
24 itself, you wouldn't have the capacity to produce their
25 milk or to harvest their milk?

1 A. Not efficiently.

2 Q. Once you have the livestock and you've milked the
3 cows, as a producer/handler you have to process that into
4 products.

5 A. Right.

6 Q. Do you currently have sufficient capacity to add
7 additional processing of milk at your facility?

8 A. We could probably process maybe 20 percent more
9 than we are, but it would reduce our efficiency, because
10 now what we're running through the plant is pretty well
11 matched with the labor force with two shifts running a
12 certain number of days. If we go over that, it would
13 require more employees and they probably wouldn't be
14 employed to capacity.

15 Q. And that would be an inefficiency at your plant?

16 A. Right.

17 Q. Have you been in attendance at the entire
18 proceeding here in Seattle?

19 A. Yes.

20 Q. But as I recall, you were not at the Phoenix
21 hearing, right?

22 A. No, I wasn't.

23 Q. A couple of days ago, there was testimony from
24 Mr. McBride, I believe. Did you hear his testimony?

25 A. Yes, I did.

1 Q. And he made some statements about Mallory's
2 Dairy, do you recall any of those statements that he made?

3 A. There was some listing of customers and things
4 like that, yes.

5 Q. Do you recall he talked about Mallory's Dairy
6 servicing some -- I believe it was 11 or so grocery stores
7 in the Portland area.

8 A. Yes.

9 Q. And there was some -- Mr. McBride, I don't think
10 was certain as to what grocery stores those were. They
11 were either Roth's grocery stores or what was the other, I
12 don't recall, that we thought it may have been?

13 A. It was some Thriftway. Thriftway is another
14 group of independents.

15 Q. Mallory's Dairy does service Roth grocery stores;
16 is that correct?

17 A. Yes, we do and we have for about 40 years. We
18 started out when they had one store and now they have 13
19 stores.

20 Q. Do you also service Thriftway stores?

21 A. We have a few. We had probably a dozen or more
22 at one time, but we've lost most of those. We have three
23 left now, I think.

24 Q. So you once had those sales and you do not
25 anymore?

1 A. No.

2 Q. Do you know who services those stores today?

3 A. I think they're serviced by the warehouse. The
4 unified, who's their main grocery provider. I don't know
5 that for sure, but at one time that was the case.

6 Q. If they are served by the warehouse, do you know
7 if that's a regulated handler or if that's regulated milk
8 going through there?

9 A. I assume the milk coming to the warehouse comes
10 through a regulated handler.

11 Q. Do you know why Thriftway chose to switch
12 accounts?

13 A. Not fully, but a lot of it had to do with the
14 warehouse revamp, their rebate program, and volume
15 discounts and all of that, to where it was in their best
16 interests to go with that program. We couldn't compete
17 with that, with the price with all the discounts and
18 everything else.

19 Q. Do you find that even without rebate programs
20 that other regulated handlers can compete with you on
21 price?

22 A. They seem to. We gain some sometimes and we lose
23 some.

24 Q. A few years ago, say three years ago, who was
25 Mallory's largest customer?

1 A. Probably would've been Roth's or possibly
2 Albertson's. They were both about the same.

3 Q. Is either Roth's or Albertson's your largest
4 customer today?

5 A. No. As a matter of fact, we lost our Albertson's
6 accounts.

7 Q. Who did you lose those accounts to?

8 A. Wilcox.

9 Q. And to your knowledge is Wilcox a regulated
10 handler?

11 A. I believe they are.

12 Q. Do you know why you lost those accounts to
13 Wilcox?

14 A. Not fully, but it had to do with probably grocery
15 store consolidation, want to go with a single supplier. I
16 think price might have been a factor.

17 Q. Who is your -- if you don't want to use an actual
18 name, that's fine, but who is your largest customer today?

19 A. It is one of our independent distributors.

20 Q. How many independent distributors do you have?

21 A. Two and they have both have been with us for over
22 30 years.

23 Q. Do you have any idea besides the loss of the
24 Albertson's account, to what do you attribute the large
25 volume of this independent distributor purchases from you?

1 A. He has picked a large number of small customers
2 that wouldn't be efficient for us, ourselves to handle, and
3 I believe are not efficient for the other bigger
4 distributors to handle either. So he has moved into that
5 market.

6 Q. Am I hearing you say that part of the reason he
7 may have been able to pick up those accounts is because
8 there was less competition for those accounts than other
9 accounts in the marketplace?

10 A. Yes.

11 Q. There's been talk in the testimony throughout the
12 hearing about the balancing costs of producer/handlers, and
13 Mallory's, I think it's in the record, that all dairies
14 have balancing costs. Mallory's has balancing costs just
15 like all other dairies, correct?

16 A. Yes.

17 Q. In your experience, is it easy or even possible
18 to put a dollar value on your actual balancing costs?

19 A. It's very difficult.

20 Q. Why would that be difficult to do? I mean, we
21 talk about it as a cost, and you might think logically that
22 you can assign a dollar value to that. Why do you say that
23 that's difficult to do?

24 A. Because a lot of it has to do with risk and
25 factors that you not only don't know, but are unknowable

1 until they actually happen.

2 Q. What are some of those risks that we can't put a
3 dollar value on?

4 A. Disruption to your customer if something happens
5 to your milk supply, if you -- it's inadequate to service
6 their needs. Also, on the other end, if you have more milk
7 than you need, how are you going to get rid of that, and
8 what will be the cost. And just the balancing that
9 sometimes during the month you're short of milk, other
10 times during the month you're long on milk.

11 Q. You mentioned the risk posed by a disruption to
12 your milk supply. If you as a producer/handler have a
13 disruption in your milk supply, how would you treat that
14 differently than would a regulated processor?

15 A. I -- well, if we -- if we're short of milk for
16 whatever reason, the economic costs of replacing that milk
17 beyond a certain limit is prohibitive.

18 Q. Can you expand on that a little bit for us?

19 A. Well, it's true that we can buy up to 150,000
20 pounds of milk within our PD exemption, but basically if
21 you go over that by even a few pounds, then you kick in as
22 a -- you know, a regulated handler and so if -- that few
23 pounds would be very expensive and prohibitive to actually
24 do that.

25 Q. But you and the other people at Mallory's are

1 fully aware of that risk, correct?

2 A. Right. It is a risk and it's one that we live
3 with and it's -- I think it's a legitimate part of the
4 checks and balances of the producer distributor exemption.

5 Q. So it's not only something that you're aware of
6 and you accept, but you know, you think it's fair in the
7 context of the regulations today?

8 A. Yeah, I'm not complaining about it. I think it's
9 -- there are some pluses to being a producer/distributor
10 and there's some negative things, and on the whole, I think
11 they balance.

12 Q. Do you recall in the testimony today that the
13 Northwest Milk Marketing Federation was discussed a little
14 bit?

15 A. Yesterday, yes.

16 Q. And there was some suggestion that
17 producer/handlers didn't participate in that. Do you
18 recall that?

19 A. I recall the statement.

20 Q. Did Mallory's did participate at all in that
21 federation?

22 A. We participated for the whole time it existed,
23 voluntarily.

24 Q. Who initiated that participation?

25 A. We did.

1 Q. Do you have an estimate as to how much money
2 Mallory's contributed to that, that federation during its
3 operation?

4 A. In excess of 87,000.

5 Q. \$87,000?

6 A. Right, over a two or three year period.

7 Q. Do you -- well, first of all, why would Mallory's
8 want to participate in that?

9 A. Because we thought it was in the best interests
10 for the dairymen in this federal order, and we attended a
11 meeting where there was some opposition expressed by some
12 of the other processors that it would give
13 producer/distributors an unfair advantage if they didn't
14 have to pay. So our decision was that maybe we could help
15 that process along, if we voluntarily agreed to
16 participate. Now, what effect that had, I don't know, but
17 it did get it going and it did operate. And it did help
18 dairymen, I think, including us.

19 Q. As a producer, who is a producer/handler, are
20 they guaranteed a market for the milk they produce at their
21 farm?

22 A. No.

23 Q. How is that different from a producer who might
24 be a member of a cooperative?

25 A. Well, from experience working on other dairies,

1 one of the nice things about that, is every day or every
2 other day, a truck shows up, takes away all of your
3 production, and you don't have to worry about marketing.
4 In return for that guarantee, I think a lot of producers
5 are willing to settle a little less money. They also have
6 the option to become a producer/distributor, or a
7 producer/distributor has an option to go back the other
8 way. So I think it's a very big benefit that you don't
9 have to worry about where your production is going to go.

10 Q. And that I think would factor into some of those
11 risks you talked about earlier, of being a
12 producer/handler.

13 A. If you want to take on that additional risk, you
14 can move on into the processing your own milk, but finding
15 a market for that milk -- building a plant, you know,
16 that's feasible, I guess, but it takes expertise and it
17 takes the ability to get some market before you can do
18 that.

19 Q. Mr. Flanagan, is there anything else you want to
20 have put into the record, any testimony you'd like to give?

21 A. Well, I'd just like to say a little bit about
22 Mallory's Dairy. It was founded by Robert Mallory around
23 1954, he at that time, was a veterinarian, and in the early
24 days, he did all the work himself. But as he built it up,
25 you know, he hired more people, bought more cows, and did

1 whatever he had to do. It's now starting in its third
2 generation, but up until he died in 1996, he was out there
3 most -- for the most part seven days a week. He put
4 everything he had into that dairy, even after he lost his
5 leg to diabetes, he got a golf cart and he was still out
6 there making sure what was going on, and keeping the rest
7 of us on our toes.

8 I think that's another cost you can't put a value
9 on that, that it's a family that has provided a lot for a
10 lot of people. They've helped a lot of Hispanics move from
11 seasonal farm laborers to full time work. It's -- there's
12 just so many contributions that have been made, that I hope
13 the Secretary won't take these things too lightly.

14 Q. I think one of the things that Rob had stated
15 when he was still around, is that he thought to be
16 successful, that dairymen needed to take some
17 responsibility for selling their own product. Is that an
18 accurate statement of part of his philosophy?

19 A. That was his philosophy.

20 MR. MILTNER: Okay. We don't have anything
21 further, Your Honor.

22 THE COURT: Cross-examination?

23 MR. BESHORE: Marvin Beshore for Dairy Farmers of
24 America.

25 EXAMINATION

1 BY MR. BESHORE:

2 Q. Good morning, Mr. Flanagan.

3 A. Good morning.

4 Q. How many cows does Mallory Dairy have?

5 A. About 1,900.

6 Q. Okay. And that's been -- you've been steady at
7 that level since 1985?

8 A. 1985.

9 Q. Okay. What's your production per cow per year?

10 A. It's in 80s.

11 Q. 80 pounds per cow?

12 A. 80 pounds per day.

13 Q. On an average year round basis?

14 A. Right.

15 Q. Okay. What's the -- what products are produced
16 at your dairy?

17 A. Limited number of gallons.

18 Q. Plastic or cardboard?

19 A. All plastic. We have done a lot of things in the
20 past. I'm just talking about now.

21 Q. That's all I'm asking about.

22 A. Okay.

23 Q. Plastic gallons. A full line, I assume, of --

24 A. Right.

25 Q. -- whole milk; two percent, one percent, skim,

1 that sort of thing?

2 A. Right.

3 Q. What other size of containers?

4 A. We do pints of whipping cream.

5 Q. So gallons -- plastic gallons and pints of
6 whipping cream and that's it?

7 A. Gallons, half gallons and pints of whipping cream
8 only.

9 Q. Okay. As far as fluid milk then, it's gallons
10 and half gallons, correct?

11 A. right.

12 Q. Are the half gallons plastic or cardboard?

13 A. Plastic.

14 Q. Okay. Now, the stores, you sell to 13 Roth's
15 stores, is that --

16 A. That's right.

17 Q. Okay. Can you tell us what a Roth store is. I'm
18 not from Oregon or --

19 A. It's --

20 Q. -- haven't spent much time there.

21 A. -- a chain that's owned by the Roth's family,
22 started with one store in Silverton, and over the years,
23 oh, probably 40 years, they've expanded it to 13 stores
24 throughout the Valley, northern Valley or Central Valley.

25 Q. And a Roth store is a supermarket, I take it?

1 A. Right.

2 Q. They offer their customers milk in quart
3 containers?

4 A. I believe they do.

5 Q. Where do they get those? They don't get those
6 quarts from Mallory's?

7 A. They don't get them from us.

8 Q. Okay. Well, do you know where they get them?

9 A. I know Wilcox is in there. There may be others.

10 Q. And do they offer pints of milk also?

11 A. Yes.

12 Q. And they're from sources other than Mallory's, I
13 take it?

14 A. Right.

15 Q. From pool sources?

16 A. I assume so.

17 Q. Okay. Do they offer gallons and half gallons
18 from other dairies, also?

19 A. Yes, they do.

20 Q. Okay. And they're from pool sources, I take it?

21 A. Yes.

22 Q. Okay. Is -- Thriftway, works the same way?
23 They're supermarkets also?

24 A. Yes, independent supermarkets.

25 Q. Independent supermarkets. And does it work the

1 same there, you supply some of the gallons, some of the
2 half gallons, and the rest of the dairy products are from
3 pool sources?

4 A. Yes. Almost all those stores carry more than one
5 distributor in there.

6 Q. Okay. By the way, on plastic, do you buy the
7 plastic containers?

8 A. Yes, we do.

9 Q. Now, the independent distributor that's your
10 largest customer, their volume is greater, I take it, than
11 your volume in those 13 Roth's supermarkets combined.

12 A. Yes.

13 Q. Does that distributor distributes to convenience
14 stores and the like, I take it? Convenience-type stores?

15 A. All kinds of places, convenience stores, gas
16 stations, drug stores, coffee shops.

17 Q. Which geographic area does it cover?

18 A. Portland through Eugene probably. Maybe along
19 the coast, I don't know for sure every place he goes.

20 Q. Does he handle products from any other dairies?

21 A. Yes, he does.

22 Q. Pool sources?

23 A. I would assume so.

24 Q. Do you know what pool areas he purchases from?

25 A. Not for sure.

1 Q. So he supplies his customers a full line of dairy
2 products, I assume, correct?

3 A. Yes.

4 Q. And gallons from Mallory, half gallons from
5 Mallory. Does he have gallons and half gallons from any
6 other dairies?

7 A. He may have, I don't know.

8 Q. But to the extent that his small customers want
9 to provide their customers with quarts and pints, they
10 would be supplied with pool sources, correct?

11 A. Most of those small customers, a lot of them
12 don't use anything except gallons. The drug stores, gas
13 stations, things like that, only use gallons.

14 Q. Well, hasn't and maybe it's not this way in
15 Oregon, but in other areas where I've been, back East, a
16 lot of convenience stores, gas stations and what not,
17 they've gone to, you know, the convenient quart or a pint,
18 I'm sorry, you know, single serve milk containers.

19 A. There may be some of those.

20 Q. Okay. You don't supply those?

21 A. No, we don't.

22 Q. If they have them, they'd be from pool sources.

23 A. Right.

24 Q. Now, you're an accountant, as well as --

25 A. Yes.

1 Q. You've got double degrees in animal science and
2 accounting if I understood you correctly.

3 A. Yes.

4 Q. Okay. And you apply your accounting in your
5 business management of Mallory's Dairies, correct?

6 A. Yes.

7 Q. And you've used those abilities and your
8 knowledge to calculate what you believe to be the cost,
9 dollars and cents of full regulation of Mallory Dairy under
10 Pacific Northwest Order, correct? That's your \$60,000 a
11 month figure?

12 A. Yes.

13 Q. And you -- did you make that calculation
14 yourself?

15 A. Yes.

16 Q. Okay. And you took your utilization, Class One,
17 basically you've got Class One and Class Two use at your
18 dairy, correct?

19 A. Yes, plus any surplus we have would be lower of
20 Class Three or Four. Well, it'd be Class Four paid at the
21 lower of Three or Four.

22 Q. Okay. So when you say it would be Class Four,
23 why do you say that? Do you sell it only for butter and
24 powder?

25 A. It goes to a powder plant.

1 Q. Okay. And where is that?

2 A. Farmers Crock Creamery in McMinville, not always,
3 but they're --

4 Q. They're your main outlet for surplus?

5 A. Right.

6 Q. And is your surplus, since you're mostly a gallon
7 and half gallon, do you -- is your surplus predominantly
8 cream or skim?

9 A. That would all be whole milk.

10 Q. Just whole milk. Do you take your surplus direct
11 from the farm to McMinville?

12 A. Right. Well, our farm and our plant are hooked
13 together with a pipeline, so.

14 Q. Okay. So you don't have a lot of farm to plant
15 hauling cost at Mallory's Dairy?

16 A. No. As a matter of fact, if you stand on the
17 loading dock of our cooler, and you reach out, you could
18 probably pet a cow if she has her head out of the back
19 door.

20 Q. Okay. So the milk comes directly from the
21 milking parlor into the plant's processing tanks or holding
22 tanks, I guess.

23 A. Well, they're slightly separated, but it's part
24 of the plant, right.

25 Q. Okay.

1 A. If we have to send it, then we pump it onto a
2 tanker from there.

3 Q. Before skimming it or --

4 A. Right.

5 Q. Do you have a contract with Farmers Cooperative
6 Creamery at McMinville?

7 A. No, we don't.

8 Q. Okay. Do you have an long-standing arrangement
9 with them that they'll purchase your surplus milk?

10 A. I guess it's long-standing, they won't always
11 take it. Sometimes they're plugged up.

12 Q. Okay.

13 A. So -- but most of the time they will take it.

14 Q. Okay. And how many years has that arrangement
15 existed?

16 A. Oh, 20 years that I've been there, probably a lot
17 longer than that.

18 Q. Okay. And they pay you the lower of Class Three
19 or Four price?

20 A. Minus a healthy sum.

21 Q. Okay. Have you -- now you've calculated, you
22 know, the cost of regulation but you say if I understood
23 your testimony correctly, that basically you can't
24 calculate things like the cost of balancing; is that
25 correct?

1 A. That's basically true.

2 Q. Okay. Well, can you tell me why that is?

3 A. Well, for one thing if we have to get rid of a
4 load, we don't necessarily don't know where it's going to
5 go or how long we're going to have to wait to get it
6 unloaded, or a lot of factors like that. In a worst case
7 scenario, it might not have a home. We have not had that
8 happen, but we have hauled milk long distances to get rid
9 of it.

10 Q. Okay.

11 A. And it's -- also the mismatch of when you need
12 milk and when you have milk, what your plant needs are, if
13 a chain goes on sale, and their volume goes up by 30
14 percent, it's hard to tell a cow to you need 30 percent
15 more milk.

16 Q. Well, how is that a cost of balancing? In other
17 words, you supply them everything you've got, right, but
18 you don't have -- but they want more, that's what you're
19 telling us, right, sometimes?

20 A. Sometimes.

21 Q. Okay. Now, how is that a cost of balancing?

22 A. Because we might have to run our plant on a day
23 that we normally don't. We might have to wait for the milk
24 to come in. Sometimes there's people sitting around
25 waiting for that next thousand gallons of milk to come in,

1 so they can fire it up again, and put that on a truck and
2 make a delivery to a store, if it's not on the regular
3 route.

4 When your milk supply is limited, there are a lot
5 of things that can kick in that run up your costs, reduce
6 your efficiency.

7 Q. Okay. Well, I think you testified you feel like
8 you're operating pretty efficiently at 80 percent of your
9 plant capacity?

10 A. For the most part.

11 Q. Two shifts, how many days a week?

12 A. Four days a week usually.

13 Q. Okay. So you bottle just four days a week?

14 A. Usually.

15 Q. And the other three days when the milk
16 production, you hold it for the next bottling shift?

17 A. That's right.

18 Q. And that's a -- you've found that to be an
19 efficient production system at Mallory Dairies, correct?

20 A. Yes.

21 Q. Okay. The four days you bottle, that's when your
22 supermarket customers basically want their deliveries, I
23 take it?

24 A. Well, we deliver six days a week.

25 Q. Okay. But you just bottle four days a week?

1 A. We usually bottle Monday, Tuesday, Thursday,
2 Friday. If we need to, we can run some on Wednesday and
3 some on Saturday. One day a month, we usually run juice.

4 Q. Okay. Let's get back to the you run juice.

5 A. Yes.

6 Q. What juice volumes do you run through your
7 facilities?

8 A. Minimal.

9 Q. Pardon me?

10 A. Minimal.

11 Q. Okay. Now, with respect to the cost of
12 balancing, you can calculate, of course, the percentage of
13 your total production at Mallory Dairies that you marketed
14 off the farm to sources without processing in your plant,
15 to McMinville or wherever, right?

16 A. We could look back historically. That doesn't
17 necessarily tell us much about what will happen next month.

18 Q. I understand. But you could calculate how much
19 that percentage was last year, correct?

20 A. Yes.

21 Q. And, in fact, when you calculate it, it's going
22 to cost you \$60,000 per month in the future. The only way
23 you can do that is make some estimates about what your
24 Class Three and Four utilization would be; isn't that
25 correct?

1 A. It was based on what happened in the past year.

2 Q. That's what I'm getting at.

3 Okay. Now, in the past year, how much -- what
4 percentage of your total production did you market at Class
5 Three and Four?

6 A. Well, probably ten percent.

7 Q. Okay. And that was -- that went into that 60,000
8 calculation, correct?

9 A. Yes.

10 Q. Okay. So you're basically at 90 percent roughly
11 Class One utilization?

12 A. No, there's a bunch Class Two in there, too.

13 Q. The whipping cream.

14 A. Plus, there's a bunch of specialty milk that we
15 do for other food processors that we sell bulk.

16 Q. Oh, okay, what's that?

17 A. We make some 8.1 percent product. We make some
18 7.4 percent. We send some --

19 Q. What are those products, 8.1 percent?

20 A. What is it?

21 Q. Yeah.

22 A. It's milk.

23 Q. Pardon?

24 A. It's 8.4 percent milk.

25 Q. Okay. So it's a --

1 A. 8.1.

2 Q. 8.4 percent butter fat?

3 A. Right.

4 Q. And 7 percent butter fat?

5 A. 7.4.

6 Q. 7.4. And what products are those? That's bulk
7 milk that you've skimmed off some of the -- taken off some
8 of the skim and concentrated to those higher butter fat
9 levels, correct?

10 A. Well, actually we've added butter fat. It's --

11 Q. Okay. From your own production I take it?

12 A. Right.

13 Q. Okay. What do those bulk cream products go to?

14 A. Some of them are made into quiche, into soup
15 mixes, into a variety of products.

16 Q. Are those regular sales you've had for years?

17 A. Oh, for three to five years, yes.

18 Q. Okay. Are they sales that you make every week?

19 A. Yes.

20 Q. Every month?

21 A. Yes.

22 Q. Fixed volumes?

23 A. No, it varies.

24 Q. Okay. So they're sold to what I think we usually
25 refer to as commercial food establishments?

1 A. I would guess so. That sounds reasonable.

2 Q. Okay. And those -- what portion of your volume
3 are those sales?

4 A. I'd rather not go there.

5 Q. Let me ask this, when your supermarkets need what
6 you've talked about, you know, not being able to meet the
7 needs of your supermarket customers for milk, do you still
8 make those sales to the commercial --

9 A. Yes, we do.

10 Q. Okay. I take it that's an economic decision
11 because they're good sales.

12 A. We have other ways of covering the supermarkets,
13 where those customers don't have a good way to cover their
14 needs, or at least that they're willing to.

15 Q. How do you cover the supermarket's needs?

16 A. We can run extra trips. We can give them a
17 partial delivery and then make it up later.

18 Q. Okay. Of course, they can always replace your
19 volumes with volumes from the pool for their customers,
20 too.

21 A. If they wanted to, they could.

22 Q. Okay. Have you -- you've talked about the risks
23 involved in taking advantage of the -- and utilizing the
24 150,000 allowance from the pool. Do you buy bulk milk from
25 pool sources?

1 A. We have.

2 Q. Okay. Do you regularly buy from pool sources?

3 A. Not regularly.

4 Q. In the last year, can you tell us what volume
5 you've purchased from pool sources?

6 A. I would guess we might've bought ten tanker
7 loads.

8 Q. Okay. 500,000 for the year roughly.

9 A. Yeah, something like that. I think that'd be in
10 the ballpark.

11 Q. Okay. Now, did you buy more than one tanker load
12 a month at any time?

13 A. Yes.

14 Q. When you buy the tankers before you unload them,
15 you know how much is in there, right?

16 A. Yes.

17 Q. Okay. So you know whether you're getting 50,000,
18 48,000, whatever it is, right?

19 A. Right.

20 Q. Okay. I mean, is there -- would you -- so you
21 can tell whether you're going to buy 150,000 or more than
22 150,000, can't you?

23 A. We know how much we're getting.

24 Q. And the only way you'd go over 150 is if you pump
25 the tanker off, and you had already -- and you went over

1 the amount knowingly, right?

2 A. Right. It'd be a decision we'd have to make.

3 Q. Okay. When you haven't purchased from those pool
4 sources, I assume it's because you didn't need the supply.

5 A. Right or we were able to juggle it some other
6 way.

7 Q. Okay. Okay. Thank you, Mr. Flanagan.

8 THE COURT: Mr. Berde, do you have some
9 questions?

10 MR. BERDE: Sidney Berde.

11 EXAMINATION

12 BY MR. BERDE:

13 Q. Mr. Flanagan, if you were to become regulated,
14 and continued to process own farm milk and operate the
15 plant, as a regulated handler, you would still be employing
16 the same minorities in the same number as you do now,
17 wouldn't you?

18 A. Yes, as long as we don't change the way we do
19 business.

20 Q. Did you -- does Mallory's compete with Anderson
21 Dairy?

22 A. Probably do in some areas.

23 Q. Okay. And did you compete with Anderson Dairy
24 when it was an exempt producer/handler?

25 A. We may overlap, I'm not sure exactly. I think

1 most of their market is different than ours, but there may
2 be some overlap.

3 Q. You're aware that Anderson Dairy was a
4 producer/handler.

5 A. Yes, I am.

6 Q. And you are aware, also, that it is now
7 regulated.

8 A. Yes.

9 Q. And has continued to operate as a regulated
10 handler producing and processing its own milk.

11 A. Yes.

12 Q. And did you compete with Wilcox when it was a
13 producer/handler?

14 A. I don't think so.

15 Q. You're aware that Wilcox was an exempt
16 producer/handler?

17 A. Yes.

18 Q. Isn't that correct?

19 A. Yes.

20 Q. And you're aware also that it became regulated?

21 A. Yes.

22 Q. And has continued to operate as a regulated
23 producer/handler?

24 A. Yes.

25 Q. You also indicated that in the event that you

1 were to become regulated, you might expand your operation;
2 is that correct?

3 A. I just -- what I was saying was we would have to
4 consider every option that the -- once the equilibrium is
5 broken, then you have to look at some things that may be
6 weren't feasible in the past, or desirable.

7 Q. But that would be one option.

8 A. It would be an option on how to increase our
9 efficiency or to make up for the loss of revenue that would
10 be caused by paying into the pool.

11 Q. If you adopted that option, would you expand by
12 continuing to produce own farm production and buy milk from
13 outside sources?

14 A. That would probably be the one alternative.

15 Q. And what would motivate you to expand in the
16 event of regulation?

17 A. Because of the absence of the limitation, that
18 the limitation of buying 150,000 kind of puts a ceiling on
19 where we want to go. If that is eliminated, well then that
20 opens other options.

21 Q. And you would expand in order to increase your
22 market share, in effect, wouldn't you?

23 A. Well, there'd be no other reason to do it. And
24 I'm not saying that's even feasible. It's just that if we
25 get into a situation where the current rules no longer

1 apply, then we would have to consider every option.

2 Q. You also indicated that there are some pluses in
3 being a producer/handler. Is that correct?

4 A. Yes.

5 Q. And is the most important plus the fact that you
6 do not -- you're not required at the present time, to pay
7 into the pool the difference between the blend price and
8 your use value?

9 A. That is a plus.

10 MR. BERDE: Thank you.

11 THE COURT: Mr. Marshall.

12 EXAMINATION

13 BY MR. MARSHALL:

14 Q. Good morning, Mr. Flanagan.

15 A. Good morning.

16 Q. Doug Marshall, Northwest Dairy Association.

17 I was interested in your comments about Northwest
18 Milk Marketing Federation, I do appreciate your efforts
19 there. Would you agree that the over-order premiums
20 charged by Northwest Milk Marketing Federation increased
21 opportunities for producer/handlers as Dr. Knutson
22 testified to yesterday?

23 A. Could you repeat the question?

24 Q. Sure, I'm sorry.

25 Would you agree that Northwest Milk Marketing

1 Federation was beneficial to your Mallory's Dairy
2 operation?

3 A. It was.

4 Q. And I was referencing the fact that Dr. Knutson
5 had testified to that yesterday. Do you recall his
6 testimony on higher Class One prices generally helping
7 producer/handlers?

8 A. Yes, I do. Well, it helps every dairyman.

9 Q. It does.

10 A. In the short-term, at least.

11 Q. Do you have any idea why other producer/handlers
12 did not support Northwest Milk Marketing Federation as you
13 did?

14 A. I don't know that they didn't. We were not in
15 communication with the others.

16 Q. Fair enough. Would you agree with me that lower
17 Class One prices or lower cooperative premiums would
18 jeopardize your producer/handler --

19 (Tape change.)

20 Q. -- would be in jeopardy?

21 A. I'm not sure about that. I -- it would make it
22 harder to benchmark what a fair price is. I don't know all
23 the other ramifications. But I do believe that it's a good
24 idea to have a federal order, don't get me wrong there.

25 Q. Okay. Let's take it a step at a time. By

1 benchmarking, I think you're referring to the allocation to
2 your farm side of your operation of a --

3 A. Well, I'm saying that the Class One price that's
4 announced is a standard that everybody uses, and that
5 customers are somewhat used to seeing.

6 Q. You're referring to the uniform pricing
7 provisions of the order, which give you some understanding
8 of what the cost structure of the regulated handlers; is
9 that what you're referring to, as your benchmark?

10 A. Yeah, I guess you would call that cost structure,
11 yeah.

12 Q. I meant to mean the milk ingredient cost
13 structure --

14 A. Right.

15 Q. -- that regulated handlers have. You understand
16 that and can use that in your marketing.

17 A. I think that's part of a level playing field, is
18 that everybody knows what the price is.

19 Q. Does everybody know what your price is?

20 A. Well, I would tell you we start with the Class
21 One price, and that's all the more I know about your
22 organization, as far as that goes.

23 Q. Okay. So it's your testimony that in your
24 pricing, you always charge more than the Class One price?

25 A. Yes, for Class One products.

1 Q. You talked a little bit ago about a commercial
2 food processing establishment that's one of your customers.
3 Do you know if such an establishment is covered at all by
4 the regulatory structure by a federal order?

5 A. I don't know.

6 Q. Do you know what the class prices would be that
7 would be charged -- excuse me. Let me withdraw that and
8 rephrase.

9 Do you know what the regulated handler would be
10 accounting to the pool at if the regulated handler were to
11 be making the same product and selling the same product to
12 the same commercial food processing establishment that you
13 described?

14 A. I don't know.

15 Q. You don't know whether we would have to pay Class
16 One, Two, or Three, or Four?

17 A. I don't know that.

18 Q. Do you believe that your price for that exceeds
19 the Class One price, for the product you described, the
20 high butterfat product?

21 A. Yes, it does.

22 Q. You've heard some testimony about innovation and
23 market niches in this hearing, as you've sat through it, do
24 you utilize the marketing niche of marketing milk not made
25 from -- not produced by cows treated with artificial

1 hormones?

2 A. Some of it, yes.

3 Q. I'm sorry, what are you saying?

4 A. Some of our products use that, yes.

5 Q. Okay. So you say when you market some of your
6 products, you do utilize --

7 A. Yes.

8 Q. -- that determination or that description?

9 And yet, you buy milk from outside sources,
10 you've testified. How do you manage that problem?

11 A. We handle it separately and it goes into other
12 product lines that don't require that label. That is
13 another cost.

14 Q. A cost of what?

15 A. Of shutting down the line and running -- it's run
16 as a separate batch when we do have to do that.

17 Q. When Sunshine does that, do they have the same
18 costs?

19 A. I would assume so.

20 Q. Sunshine's a regulated handler.

21 A. I assume they are.

22 Q. No, I'm asking you to identify Sunshine for me.
23 They're a regulated handler in Portland, are they not?

24 A. Well, yes.

25 Q. We're talking about those extra costs earlier.

1 Well, still an innovation and so forth. What other
2 innovations and marketing or operations do you believe that
3 Mallory's has taken advantage of?

4 A. Well, we realized we can't do everything. So we
5 specialize in those areas where we thought we could be the
6 most competitive.

7 Q. So your innovation, you believe, is
8 specialization?

9 A. Yes, that's a part of it.

10 Q. And I believe you testified to Mr. Berde that you
11 would make you similar to Anderson Dairy in Portland, in
12 terms of the specialized product lines?

13 A. The difference with people like Anderson Dairy
14 and Wilcox Dairy is because they are considerably bigger
15 than we are. They have access to some larger markets that
16 we are -- we're shut out of.

17 Q. What markets specifically are you shut out of
18 that Anderson Dairy is able to serve because of it's
19 somewhat larger size?

20 A. I believe they are in some of the warehouse
21 stores.

22 Q. Are they the sole supplier to those warehouse
23 stores?

24 A. That I don't know, but I know that we can't
25 penetrate those markets, because we don't have the milk

1 production.

2 Q. Isn't it true, though, that when you have
3 marketed to various types of grocery store accounts,
4 including Albertson's, you were never the sole source
5 supplier, were you? You were always a secondary or
6 supplemental supplier, were you not?

7 A. With Albertson's?

8 Q. Well, with any of them. Albertson's, Thriftway,
9 Roth's.

10 A. We've always been the primary supplier at Roth's.

11 Q. And no other gallon or half gallon --

12 A. But our share of the milk sales in Roth's stores
13 has always been much more than anybody else.

14 Q. But you're not the exclusive supplier to Roth's?

15 A. No, every grocery store has a variety of products
16 for customer choice.

17 Q. And that's my point. You could always compete
18 against an Anderson or a Curley's -- excuse me, a Wilcox by
19 aiming for that secondary supplier market, could you not?

20 A. Most of those warehouses don't have a secondary
21 supplier. They all are one brand from what I've seen.

22 Q. Okay. So other than those warehouses, though,
23 you could compete with other grocery stores on that basis,
24 right?

25 A. If we have the production.

1 Q. And you've seen labels in Safeway other than
2 their in-house labels, too, have you not?

3 A. Yes.

4 Q. And with Kroger or Fred Meyer stores. Fred Meyer
5 is the brand Kroger's uses in the Portland market, is it
6 not?

7 A. I don't know very much about Fred Meyer or
8 Kroger.

9 Q. Okay. Well, since you don't know them, we won't
10 identify them.

11 You talked about -- you talked to Mr. Beshore
12 about balancing costs and your relationship with Farmers
13 Cooperative Creamery. Would you agree with Mr. Knutson's -
14 - Professor Knutson's characterization of the costs that
15 you're charged by FCC for balancing? That is to say the
16 low net price that you're charged, that you're paid, would
17 you call that exorbitant fee for balancing?

18 A. I would say it's a huge disincentive to ship milk
19 over there. As far as -- I don't know. I guess I can't
20 comment on whether it's exorbitant or not. I don't know
21 that much about how they sell the milk from thereon, or
22 what they do with it. So I couldn't comment on that.

23 Q. So other than the economics of your alternatives,
24 you don't have any criticism of FCC for its pricing policy,
25 or its purchase price policy?

1 A. No, I don't criticize it. I think it's one of
2 the checks and balances in the PD system that keeps things
3 in line, and if we're going to play by those rules, then
4 you know, we can't really complain about how they run their
5 business.

6 Q. And if it were exorbitant, you'd always have the
7 option, would you not, of putting in a cheese vat or
8 finding some other way to handle your surplus.

9 A. That would be an alternative, yes.

10 Q. So would it be fair for the Secretary to conclude
11 that you were able to find balancing from FCC at a lesser
12 cost than doing that?

13 A. At this time, yes. I've never pencilled out what
14 it would cost to build a cheese plant, but I assume it
15 probably wouldn't be feasible at this point.

16 Q. How about sales to others than FCC. Have you
17 sold in the past to Upquad Dairy (phon.) in Roseburg,
18 Oregon?

19 A. We have at one time, yes.

20 Q. And just for the record here, is it true that
21 Upquad is a handler and bottler in Roseburg?

22 A. Yes, they are.

23 Q. Approximately how far from your operation?

24 A. Oh, a hundred miles maybe. I'm not absolutely
25 sure.

1 Q. Excuse me for interrupting you. And did you bear
2 the cost of transportation to Upquad in those transactions?

3 A. Yes.

4 Q. Did you receive a price from Upquad sufficient to
5 cover your goal of the Class One price plus your costs?

6 A. We did not get Class One price.

7 Q. Did you get at least the blend price?

8 A. No.

9 Q. What other balancing costs did you identify if
10 any, I don't recall?

11 A. I don't recall either.

12 Q. Okay. You did talk about the difficulty of
13 purchasing additional quantities because of the fact that
14 if you exceeded 150,000 a month in purchases, you would
15 lose your producer/handler exemption.

16 Have you ever had that situation occur to you?

17 A. No, we haven't.

18 Q. You always managed your operation to stay within
19 that 150,000 pound limit?

20 A. We got 148,000 one time.

21 Q. We call that managing.

22 A. Normally, we're not near that limit, so it hasn't
23 been an issue, but once or twice we've had to keep an eye
24 on it.

25 Q. I was interested in your comments about the Bill

1 Gates hypothetical that was used in my cross-examination
2 yesterday of Mr. Heerspink, and you commented today that
3 Mr. Gates would probably want a higher return on investment
4 that dairies produce. Would you agree with me that margins
5 are very tight in our business?

6 A. All across the business.

7 Q. Including the processor level?

8 A. Processors, producers, PDs, everybody.

9 Q. And if it's -- if there's a high spread between
10 the farm price and the retail price, would you -- would it
11 be your impression that that's not going to any of the
12 people you just identified?

13 A. I haven't done extensive analysis, but my general
14 opinion is that that would be true, that the people that
15 handle the milk from the bottom up, probably are not the
16 ones that are getting rich. Whether anybody else is or
17 not, I couldn't say. There's a lot of other things going
18 on to running a retail store that I'm not familiar with.

19 Q. Did you -- by the way, did you identify where
20 Silverton is relative to say the Portland or Salem area?

21 A. No, I didn't.

22 Q. Would you please?

23 A. Salem is 50 miles south of Portland and
24 Silverton's about 12 miles or 15 miles east of Salem, and
25 just as you start to go to the foothills.

1 Q. So you're roughly 50 miles away from the Portland
2 area?

3 A. Roughly.

4 MR. MARSHALL: Excuse me one moment.

5 Q. (By Mr. Marshall) I guess the last area of
6 inquiry is with respect to the risk factors that you were
7 identifying as a producer/handler and that Mr. Knutson,
8 Professor Knutson testified to yesterday. I have a
9 question for you.

10 Your -- you've not disclosed your exact poundage,
11 but we've estimated that you're roughly in the four million
12 pound range, and if our estimates are correct, you would be
13 perhaps one-fifth the size of a 20 million pound dairy.

14 You've heard the testimony here the last few days
15 to the effect that to be economic -- at least to be of a
16 sufficient interest to the Cornell economists, you'd have
17 to be at least at a 20 million pound level.

18 If you were to expand four to five times,
19 whatever it would take to get you to 20 million, do you
20 believe your risk factors would be greater as a 20 million
21 pound plant, or less as a 20 million pound plant, assuming
22 that you had a market, a contract with a warehouse chain or
23 with anyone else?

24 A. That's a pretty difficult question. Like, if you
25 said, you had a guaranteed market, that would definitely

1 reduce the risk. I have no experience with a 20 million
2 pound plant. I can't even imagine what that would be like.

3 Q. Well, let's assume for the purposes then of
4 analyzing risk, which you've testified to that you've got
5 an existing market. Let's say we are talking from your
6 perspective analyzing risk about two different plant
7 operations, both producer/handlers, one at four to five
8 million pounds, one at 20 and each of them has today a
9 market for all that volume.

10 Would you say that proportionately the risks of
11 the 20 million pound plant are greater, or are the risks of
12 the four to five million pound plant compared to, say
13 investment or size?

14 A. I don't think I can answer that.

15 Q. Do you think that if the larger and more diverse
16 an operator gets, that he would have less risk?

17 A. I can see some advantages and some disadvantages.
18 I can't answer which would outweigh the other.

19 MR. MARSHALL: Fair enough. Thank you so much.

20 THE COURT: Does anyone else have any questions
21 from the proponents side of this witness?

22 Mr. Ricciardi, do you have questions?

23 MR. RICCIARDI: I do, Your Honor.

24 EXAMINATION

25 BY MR. RICCIARDI:

1 Q. Al Ricciardi for Sarah Farms.

2 Mr. Flanagan, good morning.

3 A. Good morning.

4 Q. Part of your testimony you talked about the
5 inception of Mallory Dairy and the fact that it is a third
6 generation business.

7 A. Yes.

8 Q. Does it continue to be a family business?

9 A. Yes.

10 Q. Do the members of the family work at the business
11 seven days a week?

12 A. Six days a week.

13 Q. You actually get a day off?

14 A. Me?

15 Q. Yes.

16 A. Yeah, I do and so does everybody else for the
17 most part.

18 Q. Okay. How many hours do you work normally in
19 your six day week?

20 A. 9:00 to 10:00.

21 Q. You get less than that half a day, so --

22 A. Yeah.

23 Q. Okay. The Albertson's account that you lost to
24 Wilcox, my assumption is that unlike Wilcox, you do not
25 have any type of a joint venture agreement with DFA?

1 A. No, we don't.

2 Q. So you don't have DFA's money to be pumped into
3 your operation.

4 A. No.

5 Q. Okay. Mr. Berde asked you a question and it was
6 primarily directed at employees and would you have the same
7 number of employees if you were regulated as opposed to
8 producer/handler, do you remember that question or series
9 of questions?

10 A. Yes.

11 Q. Okay. Let's assume this.

12 If you were regulated based upon the proponents
13 have advanced to the Secretary, and essentially, you had to
14 pay into the pool about three-quarters of a million dollars
15 for nothing, wouldn't you have to deal with that loss of a
16 three-quarter of a million dollars, as in your position on
17 behalf of the dairy in some fashion?

18 A. We would have to deal with it.

19 Q. Okay. One of the potential ways of dealing with
20 that, would be to cut back on employees, correct?

21 A. Yes, indirectly.

22 Q. So people, if you became regulated, there's a
23 significant potential that people would lose their jobs.

24 A. If we have to shrink or change our operation, it
25 could involve loss of employment, possibly even mine.

1 Q. I didn't get that far, but I understand.

2 With regard to the current product mix and I
3 think in the fluid sales, you indicated that it was
4 basically gallons and half gallons that you were producing;
5 am I correct?

6 A. At this time.

7 Q. Now, the decision to limit the fluid production
8 to gallons and half gallons, that was a business decision
9 that you made?

10 A. Yes. At one time we had paper half pints,
11 quarts, paper half gallons. We had all that, just didn't
12 have the volume to make it pay, so we got out of it.

13 Q. And given that situation, was it more efficient
14 on a cost basis for you to limit the product line to
15 gallons and half gallons?

16 A. Yes, it was.

17 Q. Okay. So it saved you, Mallory's, cost in terms
18 of the production of the milk, right?

19 A. Right.

20 Q. And that savings would go to the bottom line,
21 correct?

22 A. Yes.

23 Q. And therefore, either your profits would increase
24 by the reduction of cost, or you could pass that on to the
25 customer, in terms of being competitive by price.

1 A. Yes.

2 Q. Okay. Are you aware of things that are going on
3 nationally in the dairy industry, do you keep up with that?

4 A. Somewhat.

5 Q. Based upon your position and how long have you
6 been with Mallory's by the way?

7 A. 21 years.

8 Q. Okay. That's enough. Have you noticed that
9 there are larger players nationally that are garnering more
10 and more of the market share milk?

11 A. Yes.

12 Q. Would you say that DFA is one of the largest
13 players?

14 A. Yes.

15 Q. I asked you a question before and I included
16 Wilcox in it. And I guess I'll -- since we're in the
17 Northwest and Mr. Marshall has raised it, I'll use Mr.
18 Gates.

19 While certainly \$1.6 billion in dairy sales pales
20 in comparison to Mr. Gates' bank account, the fact is, in
21 comparison to Mallory's, certainly DFA would be in the Bill
22 Gates' category, right?

23 A. Yes.

24 Q. Okay. DFA does not pump any kind of money into
25 Mallory's with regard to --

1 MR. ENGLISH: Your Honor, I'm going to interpose
2 an objection to this line of questioning. There's no jury
3 box here, and that kind of question is designed to
4 influence a jury. It has no relevance at all to what we're
5 here for. I'm simply -- it's unduly prolonged this
6 hearing, simply because you have that kind of a line of
7 questioning.

8 THE COURT: I don't remember where that line of
9 questioning began, but you know, I do have some doubts as
10 to how it's going to help the Secretary make a decision.
11 I'll let you go on just a little bit longer, but in terms
12 of helping out the Secretary --

13 MR. RICCIARDI: Judge, I've probably got enough
14 to help the Secretary and in terms of the longation of the
15 hearing, I would put most of the blame on the right side of
16 the room, not the left, so I'm done.

17 THE COURT: Do you have questions, Ms. Deskins.

18 MS. DESKINS: Yes, Sharlene Deskins, Office of
19 General Counsel, USDA.

20 EXAMINATION

21 BY MS. DESKINS:

22 Q. Sir, have you had a chance to look at the changes
23 to the language of the proposal that have been made during
24 the hearing?

25 A. Yes.

1 Q. Okay. Under these changes as proposed, would you
2 still qualify as a producer/handler?

3 A. No, we wouldn't.

4 Q. Okay. Would the reason be because of the three
5 million pound limit that's placed in there?

6 A. Yes.

7 Q. Is there any other language that's been changed
8 that would make you not qualify as a producer/handler?

9 A. Well, there's some language in there about
10 producing or selling into the same market as another
11 handler, I'm not totally familiar with what that means, but
12 there could be a risk there as well.

13 Q. Okay. So even if the three million pound was
14 taken out, there's some other language in here that would
15 effect the current status you have?

16 A. It could. It could limit our ability to service
17 some of the customers we now have.

18 Q. Okay.

19 MS. DESKINS: I don't think I have any other
20 questions, but thank you.

21 THE COURT: Mr. Miltner, do you have any
22 redirect?

23 MR. MILTNER: Yes.

24 THE COURT: Oh, I'm sorry.

25 MR. MILTNER: Go ahead.

1 THE COURT: I'll let him do his redirect after
2 you cross, which makes more sense.

3 MR. UNIDENTIFIED: Okay.

4 EXAMINATION

5 BY MR. UNIDENTIFIED:

6 Q. Mr. Flanagan, I didn't ask you this. I didn't
7 think about it when I was there.

8 With respect to your fluid milk products, do you
9 do any private labeling, or is it all your own label?

10 A. Private labeling.

11 Q. You do do private labeling? Is it all private
12 label?

13 A. No.

14 Q. Okay. Now, when you do private label, do other -
15 - to your knowledge, do other dairy plants, regulated
16 plants package milk under the same private label?

17 A. They may.

18 Q. Okay. Is that one of the problems you foresee
19 regulation-wise?

20 A. I -- it could be an issue, yes.

21 Q. Okay. Now, what -- who do you -- what private
22 labels do you --

23 A. We do some under the Thriftway label. We do it
24 under our label. In the past, we've done a variety of
25 private labels, depending on customer needs.

1 Q. Okay. Well, let's talk about the Thriftway
2 label. When you put the Thriftway -- you package gallons
3 and half gallons in the Thriftway label and supply them to
4 this Thriftway stores.

5 A. Yes.

6 Q. And do you know what other dairy also packages
7 milk under Thriftway label and supplies it to the Thriftway
8 stores?

9 A. I don't.

10 Q. But you know that you're not the sole supplier --

11 A. We're not the sole supplier.

12 Q. -- of Thriftway labeled gallons to Thriftway
13 stores?

14 A. In the stores we're in, I believe we are.

15 Q. Okay.

16 A. But there are Thriftway labels in a lot of stores
17 we're not in.

18 Q. Okay. Besides Thriftway, what other private
19 labels do you package?

20 A. We bottle some under the Spring Valley label.

21 Q. And who's private label is that?

22 A. It's one of our distributors.

23 Q. Okay. Now, do any other dairies supply that
24 distributor with products under the Spring Valley label?

25 A. It's possible, yes.

1 Q. And do you know what dairies would do that?

2 A. I'm not for sure.

3 Q. Do you have an inkling of what dairies do?

4 A. I suspect it might be Wilcox, but it might be
5 others as well.

6 Q. Okay. In any event, it would be pool dairies,
7 correct?

8 A. Yes.

9 Q. Okay. Any other private labels you do?

10 A. Not that I can think of.

11 Q. Okay. Now, there's a lot of innuendo here from
12 Mr. Ricciardi about DFA pumping money places. You don't
13 know anything about DFA's -- the economics of DFA's joint
14 venture with Wilcox?

15 A. Very little.

16 MR. UNIDENTIFIED: Thank you.

17 THE COURT: Mr. Miltner.

18 EXAMINATION

19 BY MR. MILTNER:

20 Q. Ryan Miltner.

21 Charlie, you gave us a little bit of the history
22 of Mallory's Dairy. And you also said that you had a 40-
23 year relationship with the Roth's stores. Could you give
24 us a little background on the relationship between
25 Mallory's and Roth's or Mr. Mallory and Mr. Roth?

1 A. About the same time that Bob started out, he was
2 in home delivery and made a little ice cream and peddled it
3 wherever he could, while old Roth started his first store
4 in Silverton, and they were probably our first customer we
5 had, you know, grocery customer of any magnitude. And they
6 hit it off, and so as Roth's expanded, Mallory's expanded.

7 Q. And you've been the supplier, primary supplier of
8 fluid milk to Roth's Stores since then?

9 A. As far as I know.

10 Q. We talked some about the facilities that you
11 currently operate and your ability to expand, and I think
12 we touched on most of the different parts of the operation.
13 We didn't talk about the ability of storage and loading.
14 At your plant right now, could you unload or store greater
15 quantities of milk if you were to expand your operation, or
16 would that require additional capital investment, too?

17 A. Our storage area is pretty well maxed out.

18 Q. How about your ability to load additional
19 vehicles, additional trucks?

20 A. Well, we have some flexibility. We'd have to
21 load more stuff at night, I suppose, but we could load out
22 more product.

23 Q. If you became a regulated handler, and you
24 received from the pool the blend price for your raw milk,
25 and if that condition occurred say during the past two

1 years, would you receive from the pool sufficient funds to
2 cover the cost of your production?

3 A. No. Well, along the past year, no.

4 Q. Sometimes you might.

5 A. Sometimes.

6 Q. But in periods of low milk prices, your cost of
7 production would exceed what you would receive from the
8 pool.

9 A. Yes.

10 Q. I forget exactly who asked you or suggested
11 whether it was Mr. Beshore or Mr. Marshall, but they
12 suggested that you could begin making cheese at your
13 facility as a way to dispose of any surplus milk.

14 A. That would be an option. Well, today or start
15 doing it tomorrow would not be an option, but you know,
16 it's one of many things that could be considered, I guess.

17 Q. Would that require an additional capital
18 investment on the part of Mallory's?

19 A. I would imagine considerable, plus it's a
20 technology we don't have, we don't have expertise in it.

21 Q. So you'd need to go out and find somebody with
22 expertise in making cheese.

23 A. Well, not only making it, but designing and
24 putting together the equipment in the facility and the
25 process, and the whole works.

1 Q. And I think you said you hadn't priced that
2 option?

3 A. No, we're busy enough as it is. I hate to think
4 about adding another complication to the mix.

5 Q. At first blush, does it seem like a viable option
6 to you?

7 A. My concern with it is if we have -- even if we
8 successfully made all these cheese, what would we do with
9 it. We'd have to be back competing in the market and --

10 Q. You'd have to --

11 A. -- be just like everybody else, just like we are
12 with milk.

13 Q. You'd have to either find or create a market for
14 that cheese.

15 A. Right, and I guess there are some people doing
16 it. There's at least one small cheese plant a dairyman has
17 built to capitalize on the boutique, high end market, but
18 there's not room there for a lot of people.

19 Q. And in addition to the cost of finding somebody
20 to design that cheese making capacity, the cost to build
21 and install it, and the cost for people to operate it,
22 you'd have the additional cost of finding or creating a
23 market for that cheese.

24 A. Right.

25 Q. How old is your processing facility?

1 A. The center of our processing plant is -- was
2 originally a hop dryer that was the only building there
3 when Bob bought that place, and it wasn't some kind of
4 marketing genius that he decided to be in Silverton, it was
5 where he could find some property with no money down, no
6 interest, and pay when you can.

7 So he ended up with a small place with a hop
8 dryer, and then he built a small milking parlor onto that,
9 and in the early days, he milked the cows, he processed the
10 milk, loaded it on a truck, delivered it, and hopefully got
11 back in time to catch a few hours of sleep before he milked
12 the cows again, and he ran that way for quite a while.

13 Q. You say hop dry like in beer?

14 A. Right. At one time, that property raised hops.
15 So if you question -- well, I won't -- I'll see what your
16 question is. It's not a fancy facility. I'll let you ask
17 the questions.

18 Q. It's not a fancy facility?

19 A. No, it isn't.

20 Q. You made some comments that you believe you
21 operate your facility pretty efficiently?

22 A. I think we do. There are some areas that aren't
23 very efficient. We probably have more labor costs per
24 gallon than we should. We don't have the degree of
25 automation that a lot of plants have, but for the cramped

1 facility we have, there's a limit to how much automation
2 you can put in there, and there's also the limitation on
3 capital. We have to allocate our capital to the -- you
4 know, where's the highest priority, into the plant, into
5 the dairy, into delivery, whatever. It's -- there's not
6 enough to go around.

7 Q. So you're saying you operate your plant as
8 efficiently as a 40-year old former hop dryer can be
9 operated and not perhaps as efficiently as a newer plant
10 might be operated?

11 A. Yes.

12 MR. MILTNER: I don't think we have anything else
13 right now, Your Honor.

14 THE COURT: Okay. Go ahead, Mr. Rower. Please
15 identify yourself.

16 MR. ROWER: Jack Rower, USDA.

17 EXAMINATION

18 BY MR. ROWER:

19 Q. Mr. Flanagan, could you identify -- I'm following
20 up on Ms. Deskins' question. You suggested that there
21 might be something other than the three million pound limit
22 in the proposal as submitted, that would keep Mallory's
23 Dairy from continuing as a producer/handler. Can you point
24 out what that might be to us?

25 A. I don't know that it would keep us from being a

1 producer/handler, but it would effect the way we do
2 business, and it would effect our access to markets.

3 Q. Which specifically? Which language --

4 A. It had to do with prohibiting a
5 producer/distributor from bottling under the same label as
6 somebody else.

7 Q. Okay. So that's the restriction that would have
8 the biggest impact, other than the three million pound
9 limitation?

10 A. Right.

11 MR. ROWER: Thank you.

12 THE COURT: You may step -- oh, some -- go ahead,
13 Mr. Berde.

14 EXAMINATION

15 BY MR. BERDE:

16 Q. You indicated that one option might be to build a
17 cheese plant to take care of your surplus.

18 A. I didn't suggest that, that wasn't offered,
19 somebody else suggested it, and I said that that was a
20 possible consideration, not one we've ever thought about
21 it, but possible.

22 Q. Isn't that exactly what some producers in the
23 market have done, to handle the surplus that the handlers
24 would not take?

25 A. I'm not sure what their reasons are for doing it.

1 I would imagine to make some money on it.

2 Q. But you would agree, would you not, that other
3 producers have joined together in a joint venture that we
4 call a cooperative, to do exactly that, namely to handle
5 the surplus that the handlers will not take?

6 A. I'm not sure what the distinction is between the
7 people that operate the cheese plant and the handlers.

8 Q. Well, let's call it a cheese plant that they
9 build. That's exactly what they did, didn't they, handle
10 the surplus by building facilities to take care of surplus?

11 A. I'm not sure that was the motivation.

12 Q. Well, why else do you think they built that
13 plant?

14 A. I think they built that plant because they
15 thought they could sell cheese and make some money at it.

16 Q. And isn't that exactly an option that you might
17 have?

18 A. It is an option.

19 MR. BERDE: Thank you.

20 THE COURT: Okay. You can step down. Thank you
21 very much.

22 Mr. Yale, what do you want to do? I mean, it's -

23 -

24 MR. YALE: We have Mr. Highland and he's not
25 available through the week of January.

1 THE COURT: Well, if he testifies, he's going to
2 have to be -- I'm going to allow cross-examination, so.

3 MR. YALE: I don't know how much cross-exam we're
4 (inaudible) two witnesses, and they did their cross and --

5 THE COURT: Okay. But you know, you were the one
6 that wanted to stop last night, too, and we could've gone
7 on last night, so.

8 MR. YALE: Yeah, but we got a third witness in
9 (inaudible). We can -- we're going to call (inaudible).

10 MR. UNIDENTIFIED: We're not complaining.

11 MR. YALE: Well, I was told by several people
12 last night they didn't have any questions of him.

13 THE COURT: Okay. I tell you what, I do want to
14 call one five minute break, okay. Five minute break.

15 (A break was held at this time.)

16 THE COURT: Okay. We're back on the record. Ms.
17 Reed, are you going to call your next witness, please?

18 MS. REED: Yes, Your Honor. Christine Reed, we
19 call Scott Highland of Smith Brothers Farms.

20 THE COURT: And, Mr. Highland, please raise your
21 right hand.

22 SCOTT HIGHLAND, WITNESS, SWORN

23 THE COURT: And please state your name and spell
24 it for the record.

25 THE WITNESS: My name is Scott Highland, S-c-o-t-

1 t, H-i-g-h-l-a-n-d.

2 THE COURT: Go ahead, Ms. Reed.

3 EXAMINATION

4 BY MS. REED:

5 Q. Good morning, Scott.

6 A. Hi.

7 Q. You are currently employed by Smith Brothers
8 Farms; is that correct?

9 A. Yes.

10 Q. And what is the nature of your employment today?

11 A. Today I manage a subpart of Smith Brothers, which
12 is the real estate portion of that business, that's my
13 primary responsibility. In addition to that, I am helping
14 Smith Brothers do budgeting, process improvement, those
15 sorts of things throughout the company. I'm hoping to do
16 more of that as time goes on.

17 Q. Okay. And just tell me a little bit about your
18 educational background.

19 A. I have a bachelor of arts degree in mathematics
20 from Pacific Lutheran University, a bachelor of arts degree
21 in economics from Pacific Lutheran University, a master of
22 science in computer science from Washington State
23 University, and an MBA from University of Washington.

24 Q. When did you first become involved with the Smith
25 Brothers farm operation?

1 A. I went -- after my computer science degree, I
2 worked for Boeing Computer Services for a few years. In
3 1975, I went to work as -- in the accounting side of Smith
4 Brothers Dairy. I worked at the farm through 1978 and then
5 went to work for another one of their companies, Smith
6 Tractor and Equipment Company. I was at Smith Tractor and
7 Equipment Company for 24 years, and was President and CEO
8 of Smith Tractor and Equipment Company.

9 During that time, since 1975, I've been on the
10 Board of Directors of Smith Brothers Farms. So my --
11 really, I've been with the Smith Brothers business since
12 1975. Smith Tractor was eventually sold, and now I'm back
13 at Smith Brothers.

14 Q. And your wife is one of the Smith sisters, right?

15 A. Yes. My wife is Alexis' sister.

16 Q. Okay. And you have some understanding of the
17 proposals that are before the Secretary of Agriculture in
18 this hearing; is that right?

19 A. Yes.

20 Q. And you were present for the entire testimony
21 given during the Phoenix portion of this hearing.

22 A. I missed part of the first day.

23 Q. Okay. And you were present throughout this
24 week's testimony here in Seattle; is that right?

25 A. Yes.

1 Q. Based upon -- you also have knowledge of the
2 Smith Brothers farm operation.

3 A. I do. My knowledge is not as detailed as Alexis,
4 of course, and I wanted to make sure everybody understands
5 that her testimony is probably a better quality testimony
6 about the farm than mine will be.

7 Q. Okay. Based upon her knowledge of the operation
8 and --

9 A. Absolutely.

10 Q. -- her history with the company.

11 A. Right.

12 Q. And I understand that you have some comments that
13 you wish to make and just sort of general comments about
14 the proposals; is that correct?

15 A. Yes.

16 Q. Okay. I'll let you do that at this point.

17 A. Okay. I'm going to read this just because I
18 wrote it the other night at about 1:00 o'clock in the
19 morning when I was wide awake, and I wanted to be careful
20 not to use words that I don't mean.

21 So if you don't mind, it's just a page and a
22 half.

23 My testimony today is my personal testimony. It
24 was not written with the help of our attorneys. It is not
25 made on behalf of Smith Brothers Farms, although I'm sure

1 Smith Brothers agrees with much of what I will say, and in
2 fact, Alexis has read this and she does agree, so.

3 I find that I'm more opinionated and more
4 outspoken than Alexis, the President of Smith Brothers
5 Farms. More opinionated than she would like for me to be
6 at times, and my personal views may not be shared by Smith
7 Brothers. I am also limiting my remarks to Order --
8 Federal Order 124, as I am not personally familiar with the
9 competition in Order 131.

10 The following are a few of my opinions on this
11 hearing and my take on the information that has been
12 brought forth so far.

13 First of all, I believe the Department of
14 Agriculture is trying to do the right thing by this
15 hearing. By this, I mean, they're trying to ensure that
16 supply of quality milk to the public at fair prices.

17 Secondly, I sincerely believe and I sincerely
18 believe this, that there is no disorderly marketing by
19 producer/distributors in Order 124. In fact, with respect
20 to Alexis Kester (phon.) and Smith Brothers Farms, which I
21 know intimately, I believe that no one in this entire room
22 believes that we are acting in a disorderly way.

23 To continue with this line of reasoning, I keep
24 asking myself, if no one thinks we are doing anything
25 wrong, what are we doing here? Possible answers that come

1 to my mind are, first, someone wants to put our 80-year old
2 company out of business so that we can't -- so they can
3 sell to our customers. Perhaps one or more of the larger
4 processors in Order 124 has lost market share to warehouse
5 doors and their processors, and now has to look to the
6 markets that they have not -- they have historically
7 neglected to make up for their lost sales.

8 Since Smith Brothers Farms is fighting to keep
9 its niche market and continues to service historical
10 customer base, the use of regulation to eliminate us is an
11 easier alternative.

12 Another possibility is that some large processors
13 are speculating that a huge dairy farm in Oregon will
14 attempt to build a processing plant. Get PD status and
15 compete with them. They want to stop the possibility of
16 potential future competition, that they speculate may come
17 to this market.

18 But then I ask myself, why the three million
19 pound cap. Certainly, that large farming entity in Oregon
20 would not build a three million or five million or ten
21 million per month plant. We have heard testimony that I
22 believe to be true, that economies of sale and plant
23 technologies require large 20 plus million pound plants to
24 capture true efficiencies. The Oregon farm in question
25 certainly produces more than that amount of milk.

1 The truth may be that the three million pound
2 limit is predatory. These large milk processors, if
3 successful with this hearing, will eliminate potential
4 future competition -- future competitors, and will
5 eliminate existing competitors, specifically Smith Brothers
6 Farms.

7 On a completely different topic, I have been
8 personally involved in setting up benchmarking of the
9 efficiency of our herd and the farming operation at Smith
10 Brothers Farms. Never in this process, have we used the
11 ever changing blend price from Federal Order 124 to judge
12 the efficiency of that operation.

13 I have never used transfer pricing of any type.
14 We are measuring our farm efficiency against a group of
15 metrics, including milk quality metrics, cost per hundred
16 weight broken down into its various components, cost per
17 cow per day broken down into its various components,
18 various breeding statistics, various feeding statistics,
19 and various herd health statistics. I will not share
20 either our metrics or our progress toward achieving those
21 metrics with you today.

22 We view our company's performance -- another
23 item. We view our company's performance as a single
24 enterprise. Our revenues include all of our sales to jobs,
25 schools, et cetera. Our costs include farm costs, plant

1 costs, transportation costs, sales and administration costs
2 and capital costs. We are a single integrated operation
3 and view our success or failure in an integrated way.

4 Since I wrote this, one other thing came to mind
5 this morning during the testimony. You guys -- I mean, I
6 think it's clear that we can't quantify the value of or the
7 cost of balancing, but one thing that I haven't heard much
8 testimony about is the other side of the balancing issue,
9 and that is, we -- and I'm not going to say every day, but
10 we commonly turn away business, or refuse to bid business
11 that is on the brink of taking us beyond our milk supply.

12 We can't take the risk of bidding that business,
13 so we're foregoing business that may put us in certain
14 times of the year, beyond our capacity to produce that
15 milk.

16 An example of this, we turned away the Starbuck's
17 business at one time, because we felt that we couldn't
18 supply all of our customers or our current customer base
19 and do the Starbuck's business, and we actually gave that -
20 - pushed that business away.

21 Now, is there a cost to that? You bet. We lost
22 revenue. We lost margin. And so we lost some business,
23 and then the next question is, well, so you chose not to do
24 business, so what. Well, tomorrow we may lose one of our
25 base customers, and we may regret the fact that we gave

1 that business away. We may have the milk.

2 How do you quantify lost business? I don't know
3 how you could do that, but that's another issue that I
4 thought I'd bring up. So basically that's all I have to
5 say.

6 I told you it'd be short.

7 MS. REED: Christine Reed. I don't have any
8 other questions of the witness.

9 THE COURT: Does anyone want to cross-examine the
10 witness? Mr. Beshore?

11 EXAMINATION

12 BY MR. BESHORE:

13 Q. Marvin Beshore, Dairy Farmers of America.

14 What's the real estate business that you manage
15 for Smith Brothers Farms?

16 A. Smith Brothers owns two pieces of commercial
17 property that I, you know, collect rents. Try to find
18 tenants, that sort of thing. In addition to that, as you
19 know we've moved our farm from Western Washington to
20 Eastern Washington. When we did that, some of the property
21 was vacated in Monroe, Washington. It was my
22 responsibility to find a home -- to try to sell that
23 property, which we have done. Those sorts of issues.

24 Q. Okay. And the commercial properties that you own
25 are what?

1 A. They are two -- there's -- they're roughly five
2 acre pieces of property that have on them what used to be
3 Smith Tractor and Equipment Company branches. You know,
4 construction equipment. We were a construction equipment
5 dealership, so you know, parts, repair facilities, those
6 sorts of things.

7 Q. Okay. So you own -- you now lease those out or
8 rent them out?

9 A. Yes.

10 Q. Okay. And that's part of the same Smith Brothers
11 Farm operation?

12 A. Yeah. Smith Tractor was a subsidiary of Smith
13 Brothers Farms. And when we sold it, we sold the assets,
14 not the company, and so there was some remaining assets
15 that were kept.

16 Q. Is that -- that's part of the same integrated
17 operation that you've talked about?

18 A. It's part of the same corporation and certainly
19 had nothing to do with the farming operation.

20 Q. Okay.

21 THE COURT: Mr. Berde.

22 MR. BERDE: Sidney Berde.

23 EXAMINATION

24 BY MR. BERDE:

25 Q. How many persons constitute the ownership of

1 Smith -- of the Smith Company?

2 A. You know, I could be off by one or two, but I
3 think 16.

4 Q. 16?

5 A. Yes.

6 Q. And they all are owners of shares in the
7 corporate entity?

8 A. Yes.

9 Q. And from prior testimony, I understand that no
10 member or none of those members are involved in the farming
11 operation, as such?

12 A. Well, I personally believe that I'm involved in
13 the farming operation.

14 Q. Yeah. In what manner?

15 A. I'm trying to help create a management process to
16 -- for us to -- as efficiently as we can to produce milk.

17 Q. But then are you one of the owners?

18 A. Yes.

19 Q. You're one of the 16.

20 A. Yes.

21 MR. BERDE: Thank you.

22 THE COURT: Mr. Marshall, you have some
23 questions?

24 MR. MARSHALL: Just a one line of questioning,
25 Your Honor.

EXAMINATION

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BY MR. MARSHALL:

Q. Doug Marshall, Northwest Dairy Association.

Mr. Highland, just a quick question or two about benchmarking and the topic you were just discussing.

Do you evaluate your total costs of milk against the Class One price?

A. No. You're talking about the farming operation?

Q. I'm referring to, I suppose, the cost to the plant of its milk supply?

A. I believe -- this is me talking now. I believe we need to manage the cost at the farm, the production on the farm based on some solid consistent measure that we can on a monthly basis determine if we're gaining ground or losing ground and the ability for us to produce milk in a cost effective manner.

Q. Well, I think any of us in business would agree that everyone needs to do that. My question though is, do you evaluate the total costs of milk to the plant against the Class One price?

A. It would certainly be easy to do. Do I do it?
No.

Q. So you don't know, for example, if your total price exceeds the -- your total cost exceeds the Class One price?

1 A. That's correct. I mean, I could do the math if I
2 had all the data.

3 Q. If the total price -- if the total cost of your
4 milk supply exceeded the Class One price, would you not be
5 better off as a regulated handler?

6 A. If our cost of production of milk was higher than
7 what we could buy it for?

8 Q. Right.

9 A. If we were purchasing instead of raising milk, I
10 think you're right.

11 Q. You don't evaluate that option?

12 A. I have not.

13 Q. If you ever do, please give me a call.

14 MR. MARSHALL: Thank you.

15 THE COURT: Anyone else, any other questions of
16 this witness? Ms. Deskins?

17 EXAMINATION

18 BY MS. DESKINS:

19 Q. Sharlene Deskins, Office of General Counsel,
20 USDA. You said that the regulations would eliminate Smith
21 Brothers. Could you tell us how the proposed changes that
22 are being discussed at this hearing would eliminate Smith
23 Brothers?

24 A. I use eliminate because I was angry when I wrote
25 this the other night. I won't say that this will eliminate

1 Smith Brothers. It certainly could eliminate Smith
2 Brothers. We're talking about a lot of money here, much
3 more money than we make, and so you know, the testimony you
4 just heard, we'd have to re-evaluate. I think that's
5 absolutely true, and I don't know what we would do. That's
6 what I lose sleep.

7 Q. Okay. But it didn't eliminate you, it would have
8 -- you'd have to change the way you operate.

9 A. Absolutely.

10 Q. In order to keep your status as a
11 producer/handler or to become a regulator?

12 A. Yeah, we're much larger than the three million,
13 not much, but we're larger than the three million cap, so
14 we would no longer be a producer/handler. So then we'd be
15 faced with those additional costs and you know, we'd have
16 to change something in our organization.

17 Q. Okay. The other thing I had, and maybe your
18 sister-in-law said this. You said you'd been in business
19 for 80 years approximately. How long has Smith Brothers
20 been a producer/handler?

21 A. I don't know the answer, but I think maybe 40
22 years. I mean, that could be off by five years or ten
23 years, I'm not sure.

24 Q. Okay. And the other question I had was, as you
25 know, there's been besides what was in the notice of

1 hearing, there's been some proposals made here to modify
2 even what was in the Federal Registry. Have you had a
3 chance to look at those changes?

4 A. You know, I've read through all of that, and I
5 was just talking to Alexis when you were asking the prior
6 witness. I think he's right. There's some issues with
7 respect to --

8 Q. When you say he, who do you mean?

9 A. Charlie Flanagan. I think -- I don't know that
10 we do any private labeling right now, but that could limit
11 our ability to access some markets, if that's -- if I
12 understood his answer to say that.

13 Other than that, I'm not -- I'm certainly not an
14 expert on this language in this field.

15 MS. DESKINS: Okay. Thank you.

16 MR. MARSHALL: A quick line of questioning.

17 THE COURT: Please identify yourself again.

18 MR. MARSHALL: Doug Marshall, Northwest Dairy
19 Association.

20 EXAMINATION

21 BY MR. MARSHALL:

22 Q. You indicated that the regulation would cost you
23 more than you make. Now, is that true today in terms of
24 what you make today?

25 A. You know, I think you're asking me to divulge a

1 profitability, and I'm not willing to do that.

2 Q. I'm not asking you to identify a number. I'm
3 asking you if the statement you made that the regulation
4 would cost you more than make, is true today? Well, let's
5 see --

6 A. I think we've estimated what the cost of this is
7 to our company. And by answering that question, I think I
8 may be divulging some information I don't want to.

9 Q. You estimated that over what time frame?

10 A. Could you --

11 Q. Let me ask you a different question and you'll
12 see where I'm going. I withdraw that question.

13 Two years ago when the Class One price was well
14 over \$15, were you losing -- would you have lost money had
15 you been regulated?

16 A. I'm unwilling to answer that question.

17 Q. Well, the reason I'm asking, just so you know,
18 because I'm going to argue in brief about this. At this
19 point in time, I think there's been a lot of testimony at
20 this hearing, the producer prices are very low and many
21 farms are losing business -- losing money, excuse me. And
22 we'd like to separate out whether the regulation would cost
23 you money because milk prices are depressed versus whether
24 the regulation would cost you money over -- on average over
25 a longer period of time including the times when Class One

1 prices are 16 or more dollars a hundred weight.

2 A. As I understand what this being regulated would
3 do to our company, I believe that we would be selling --
4 (Tape change.)

5 A. -- from the pool. We would be paying this price
6 differential.

7 Q. Right.

8 A. And that price differential, maybe it changes
9 during different sorts of markets, but let's say it's \$1.70
10 per hundred weight.

11 Q. Let's take that number, that's fine.

12 A. Whether the price was low or whether the price
13 was high, you're talking about, and I think the word tax
14 yesterday was used. You're talking about taxing our
15 company \$1.70 per hundred weight in good markets and bad
16 markets; is that correct?

17 Q. I'll accept it if that's your characterization.

18 A. I mean, that's my understanding.

19 Q. Okay.

20 A. So the answer is, our cost will be significant,
21 whether the price, the market price of milk is high, or
22 whether the market price of milk is low, and irregardless
23 of its relationship to our farm price.

24 Q. When the price of milk is high, compared to when
25 the price of milk is low; when the price of milk is high,

1 does your company make anymore revenue? Does it enjoy a
2 higher -- ability to charge higher prices because the
3 marketplace is higher?

4 A. You know, I don't price milk, but I would assume
5 if the market -- if the price at market in the grocery
6 store is high, we have a better ability to realize the
7 margins we need in our business than if the price is low.

8 Q. And that's why I asked. When prices have been
9 high, Class One prices, been high to regulated bottlers,
10 when that has been reflected in higher store prices, have -
11 - has it been the case that the cost of regulation, the
12 \$1.70 tax as you describe it, would be more than what you
13 have made during those times of the positive part of the
14 economic cycle in the dairy industry?

15 A. I think you're asking me how much money we make.

16 Q. No, I'm not. I'm asking you whether in a time
17 like say two years ago, when you had very, very high Class
18 One prices, the cost of regulation, the \$170,000 --

19 A. I think the cost of regulation is going to be the
20 same in either of those markets, and it's going to cost us
21 this million or million and a half bucks a year
22 irregardless of the market, I think, and I could be wrong
23 about that, but that's my impression of what I've heard.

24 I know 20 times as much about this issue as I did
25 when I started this hearing process. So now I know about -

1 -

2 Q. I'm going to represent to you that the dollar
3 value of the difference between the Class One price, let's
4 say during the spring of this year versus say the price two
5 years ago, would probably be worth more than a million
6 dollars, of the basic difference in the Class One price.

7 Now, that's why I'm asking the question and --

8 A. Market prices have changed, yes. The market --
9 as I understand it, the Class One price of milk is
10 significantly lower -- well, it's grown a little bit
11 recently.

12 Q. But I think we can sum this up with one question.
13 Have you done an analysis over say a five year or other
14 long-term period of what it would cost to have had the
15 regulatory exemption removed, compared to your profits
16 throughout that long-term period or are you just testifying
17 as to the current economics in this current depressed dairy
18 economy?

19 A. I think I can -- I think I believe that if we had
20 been not a producer distributor and were charged this \$1.70
21 per hundred weight, I believe it would've been a similar
22 number every year for the last five years. I think if we
23 would've been charged this million or million and a half
24 bucks, every year for the last five years.

25 Q. I can accept that. My question is about your

1 statement that the regulation would cost you the \$1.70, the
2 million dollars, whether it would cost you more than you
3 make over the long term. Have you done such an analysis?

4 A. No.

5 Q. Thank you.

6 A. And it's irrelevant to me.

7 Q. I'm sorry. Why is -- if profitability is
8 relevant to your testimony, why wouldn't an analysis of
9 profitability be --

10 A. You have to understand, our cost is our cost. We
11 grow milk, we buy -- we -- our costs are our costs. Our
12 markets is what we can get out of that product at the end
13 of the day after we bottle it and pay all the interest and
14 do all the things we do. And we monitor that profitability
15 very carefully.

16 Q. Do you raise your price when the Class One price
17 goes up to the regulated market?

18 A. I don't do pricing, but I assume that we would
19 price where we can cover our costs and make a margin that
20 will cover our overheads. And if we can't get that price,
21 we lose money; if we can, we make money.

22 Q. What if you could get even more, because the
23 regulated price has gone higher, would that not balance
24 some of the unprofitability that you described currently?

25 A. Well, certainly if you can get more for your

1 milk, you make more money, is that your question?

2 Q. Yes. And my question is, do you do that, when
3 you see the price going up, do you raise your price, or do
4 you not do so? When you see the price of milk going up to
5 regulated handlers and in the store, do you raise your
6 price, or do you not do so?

7 A. I don't do that function, but I --

8 Q. Okay. If you don't know, I'm not going to push
9 you.

10 A. I would hope we would raise prices to the point
11 where the market would allow us to sell our milk.

12 Q. Well, I would hope that the price would rise to
13 the point where producers and regulated handlers could as
14 well. Thank you.

15 THE COURT: Go ahead, Mr. Beshore.

16 EXAMINATION

17 BY MR. BESHORE:

18 Q. Just one question, Mr. Highland. Marvin Beshore,
19 Dairy Farmers of America.

20 Your -- you've talked about benchmarking your
21 dairy herds' operations. Okay. And I gather you're
22 talking about -- and do you personally do that?

23 A. No. I'm helping set up the process.

24 Q. Okay. So you don't do it. Smith Brothers
25 doesn't do it now? You're just --

1 A. Yes, we do do it. Do I personally create the
2 benchmark sheet? No.

3 Q. Do you know what goes into the benchmark sheet?

4 A. The benchmark sheet is currently being changed
5 and there are some things on it that I'm not as familiar as
6 I should be, but I am one of the strong proponents of this
7 benchmarking process.

8 Q. Okay. In that benchmarking, I gather you
9 benchmark things for productivity, such as production per
10 cow, things of that nature. I think you referred to that
11 in your statement, correct?

12 A. You bet.

13 Q. Okay. Do you benchmark with respect to revenues
14 at all?

15 A. There's -- there are no revenues on the herd side
16 of our operation.

17 Q. So you're strictly -- do you use things in terms
18 of benchmarking, are you going to use things like the
19 regional cost of production analysis that's been referred
20 to in the hearing here, put out by the one of the regional
21 dairy accounting firms.

22 A. You know, I've seen that a long time ago. We
23 don't use it on a monthly basis. I think I know what
24 they're talking about, but I can't -- I'm not sure of that.
25 But I think I know what they're talking about, and that's

1 the sort of thing I'm talking -- but that is the sort of
2 benchmarking I'm talking about.

3 Q. Okay. Well -- okay. So it's strictly a cost
4 benchmarking, it has nothing to do with benchmarking for
5 profitability, because you don't have a revenue figure in
6 it.

7 A. There's no revenue side.

8 THE COURT: Mr. Yale. Okay. Mr. Ricciardi?

9 MR. RICCIARDI: Thank you, Your Honor. Al
10 Ricciardi, Sarah Farms.

11 EXAMINATION

12 BY MR. RICCIARDI:

13 Q. Scott, you've been asked some questions with
14 regard to your understanding of what would happen if the
15 cap were imposed, and Smith Brothers would have to deal
16 with that as an operation, right?

17 A. Yes.

18 Q. And I think I heard, and I apologize if I'm
19 misstating you, please correct me. That you think the cost
20 to Smith Brothers for the regulation if the cap were
21 imposed somewhere in the million to million five range.

22 A. That's my belief. And I haven't done as
23 sophisticated analysis as some of the other testimony.

24 Q. I understand. I want to ask you the other side
25 of the equation.

1 The pool, I guess, gets the million, million
2 five, what do you get?

3 A. If we were pooled, I mean, yeah, if we were
4 pooled?

5 Q. Yeah.

6 A. We would get the ability to buy as much milk as
7 we want, as I understand it. We would be assured of a
8 market for that milk, for the milk we produce. If we kept
9 our business the same as it is and produced, bottled our
10 own milk and produced all of our own milk and didn't buy a
11 bunch of additional milk, I don't know that we would get
12 much.

13 Q. Smith Brothers has made a business decision to be
14 a producer/handler, correct?

15 A. Yes.

16 Q. And all of the decisions that you've made,
17 whether they be regarding investments, sale of milk,
18 marketing of milk, et cetera, has been based upon that
19 business decision to be a producer/handler, correct?

20 A. Yes, we are a producer/handler and we have been,
21 and we hope to be, our business is set up.

22 Q. And it is Smith Brothers' wish to continue to be
23 a producer/handler under the regulations that currently
24 exist.

25 A. It's the business we know, and yes.

1 Q. And it's the business you want.

2 A. Yes.

3 MR. RICCIARDI: Thanks.

4 THE COURT: Mr. Yale, do you have any questions?

5 Ms. Reed?

6 EXAMINATION

7 BY MR. YALE:

8 Q. Kind of a follow-up on that thing with Al
9 Ricciardi.

10 THE COURT: If you would identify yourself.

11 MR. YALE: Benjamin F. Yale for Smith Brothers
12 Dairy.

13 Q. (By Mr. Yale) You -- I want to go back to this.
14 Presently now, you have a grass-to-glass operation, right?

15 A. Yes.

16 Q. All right. And it has a risk benefit profile of
17 some kind, right? I mean, you have risks, you have
18 benefits, and maybe there's profitability and the like,
19 right?

20 A. Yes.

21 Q. Now, there's this line of questions about whether
22 or not under this current situation you can make enough
23 money to pay this million or million and a half dollars,
24 right?

25 A. Yes.

1 Q. All right. How -- I mean, just tell me. Is that
2 what we should be doing, is that you don't change anything,
3 but you pay out a million, million and a half dollars.
4 What do you get for it?

5 A. The reason I was angry the other night, is
6 because I believe that this process is trying to extract
7 this million and a half or million dollars from Smith
8 Brothers, and we are a pure operation. We buy feed, we
9 produce milk, we bottle milk, we sell milk, we -- I'm
10 getting emotional right now.

11 Q. Well, let me ask -- I mean, that just follows up
12 that question. What do you -- for Smith Farms as it stands
13 to now, you pay this million, million and a half dollars,
14 let's assume for the point that you have the million to
15 million and a half to pay. What do you get in return for
16 that, as you stand now? What do you get in return?

17 A. I -- the question was asked earlier. There's
18 some -- if you get pooled, you get some things.

19 Q. No. But I mean, if you'd leave the operation the
20 way it is now and --

21 A. Oh, absolutely nothing.

22 Q. Absolutely nothing. So what --

23 A. It comes out of our profitability, whether we
24 have that profitability or not, it comes out of
25 profitability. It reduces our ability to pay our bank

1 lines. It causes additional risk to our company.

2 Q. And it forces you to look at a whole new risk
3 profile of a business, right?

4 A. You bet.

5 Q. That you have not been in for 40 years.

6 A. Right. Our business is tough. Just let me -- I
7 can tell you that. Our business it is tough to make money
8 in the dairy business.

9 Q. And will your customers benefit by changing that
10 risk profile?

11 A. Our customers will suffer by changing that risk
12 profile. Our customers -- there's some customers that we
13 may choose to not have, or may -- we may have to go --
14 start bottling, you know. I don't know what our choices
15 might be.

16 Q. But it will not be the same enterprise?

17 A. It will not be -- I'll guarantee that, it will
18 not be the same enterprise.

19 Q. And you have no testimony whether or not it'd
20 even be a successful enterprise under those circumstances.

21 A. I have serious questions about the viability of
22 our company if this is imposed.

23 Q. Thank you.

24 THE COURT: Okay. The witness may step down.

25 Thank you, Mr. Highland.

1 And at this point, I guess we'll continue the
2 hearing until -- let me make sure I have the right date
3 here. Oh, Mr. Beshore?

4 MR. BESHORE: Well, I wanted to provide an
5 exhibit.

6 THE COURT: Oh, okay.

7 MR. BESHORE: Which is --

8 THE COURT: That reminds me of something else,
9 another exhibit. We had held it open, an exhibit number
10 for the -- I think it was Exhibit 40-A, which was going to
11 be Mr. Morrison's (phon.) testimony, remember that? He was
12 going to have some corrected pages.

13 MR. UNIDENTIFIED: We did not get those done.

14 THE COURT: Okay. We can hold that till
15 whenever. And what were you going to offer, Mr. Beshore,
16 I'm sorry?

17 MR. BESHORE: I have a seven-paged document,
18 which is the order language with some additional fine-
19 tuning or suggestions that Mr. Holland will present in
20 Alexandria. And there just in response to the questions
21 that had been asked before, I want to make it an exhibit
22 now, so that there's no question that everybody has it,
23 it's available between now and the time in Alexandria for
24 everybody to see.

25 THE COURT: Okay. Does anybody have any problem

1 with that? He's making it available now, so he just wants
2 it marked as an exhibit now.

3 Do you want it admitted as well?

4 MR. BESHORE: Yes.

5 THE COURT: Okay. So the number is 45. So we'll
6 mark that as Exhibit 45.

7 MR. BESHORE: Copies are available.

8 THE COURT: Copies are available.

9 MR. BESHORE: We have a few copies, and I'll be
10 happy to arrange for additional photocopies.

11 THE COURT: You can mail them or whatever you
12 want to do. I'll -- and I'm going to admit 45 into
13 evidence, and I'll take one for myself.

14 (Exhibit No. 45 was marked and received.)

15 MS. DESKINS: Thank you, Mr. Beshore.

16 THE COURT: Mr. English, you had something?

17 MR. ENGLISH: Charles English. I did not
18 understand that we were going to have 40-A before we left.
19 Can we have it --

20 MR. YALE: I'll get you a copy before then.

21 MR. ENGLISH: And it'll be based as he testified,
22 right?

23 MR. YALE: Right.

24 THE COURT: Okay. So 40-A, Mr. Yale's going to
25 find a way to get it to everybody.

1 Thank you. At this point then, we will continue
2 the hearing until January 20th, 2004 in Alexandria,
3 Virginia. I haven't decided on that yet. It'll be in the
4 notice. It'll either be 8:30 or 9:00 o'clock.

5 MR. YALE: I thought they started at 9:00.

6 THE COURT: They usually do, but I want to get
7 this thing done, too, so. I'm trying to get this thing
8 done today. Yes, Mr. Yale?

9 MR. YALE: I would just appreciate a later start
10 time when we're on the East Coast.

11 MS. DESKINS: Judge Hillson, a lot of times for
12 these hearings, they will start them at noon, to allow
13 people who are traveling to get there.

14 THE COURT: Then we'll never get it done, though.

15 MR. UNIDENTIFIED: It's on a Tuesday, I mean.

16 THE COURT: I mean, I know we federal employees
17 have a federal holiday, but I think most of the people in
18 the private sector are for better or worse do not, so I'll
19 tell you what, we'll start at 9:00. Will that make
20 everyone reasonably happy? We'll start the first day,
21 Tuesday at 9:00 a.m. and I already asked to have the
22 hearing room as late as we can, and I really would like to
23 get this thing done that week. Okay? Off the record.

24 (Whereupon, the proceedings were concluded.)

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