

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

IN RE: X DOCKET NOS. AO-368-832,
X AO-271-837, DA-03-04
PACIFIC NORTHWEST AND X HELD JANUARY 22, 2004
ARIZONA-LAS VEGAS X 1:00 P.M.
MARKETING AREAS X Embassy Suites Hotel
X 1900 Diagonal Road
X Alexandria, Virginia

VOLUME XI OF XI

APPEARANCES:

FOR USDA:

HON. MARC HILLSON
ADMINISTRATIVE LAW JUDGE
USDA
Washington, D.C.

COUNSEL FOR USDA:

CHARLENE DESKINS, ESQ.
U. S. Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2331 South Building
Mail Stop 1417
1400 Independence Avenue S.W.
Washington, D.C. 20250

JACK ROWER, Marketing Specialist
GINO TOSI, Marketing Specialist
RICHARD CHERRY, Marketing Specialist
U. S. Department of Agriculture
Agricultural Marketing Service
Dairy Programs
Room 2965 South Building
1400 Independence Avenue S.W.
Washington, D.C. 20250

OPPONENTS:

ON BEHALF OF EDALENE DAIRY, SMITH BROTHERS, MALLORIE'S DAIRY, SELECT MILK PRODUCTS, CONTINENTAL MILK PRODUCTS:

BENJAMIN F. YALE, ESQ.

KRISTINE REED, ESQ.

RYAN MILTNER, ESQ.

Benjamin F. Yale & Associates, L.P.A.
102 West Wapakoneta Street
Waynesfield, Ohio 45896

ON BEHALF OF SARAH FARMS:

ALFRED W. RICCIARDI, ESQ.

Hebert Schenk, P.C.

Missouri Commons

Suite 125

1440 East Missouri Avenue
Phoenix, Arizona 85014

PROPONENTS:

ON BEHALF OF DAIRY FARMERS OF AMERICA:

MR. MARVIN BESHORE, ESQ.

Milspaw & Beshore

130 State Street

P. O. Box 946

Harrisburg, Pennsylvania 17108-0946

ON BEHALF OF UNITED DAIRYMEN OF ARIZONA:

MR. SYDNEY BERDE, ESQ.

11126 East Cannon Drive

Scottsdale, Arizona 85429

ON BEHALF OF DEAN FOODS & SHAMROCK FOODS:

MR. CHARLES M. ENGLISH, JR., ESQ.

Thelen, Reid & Priest

701 Pennsylvania Avenue, N.W.

Suite 800

Washington, D.C. 20004

ON BEHALF OF NATIONAL MILK PRODUCERS FEDERATION:

ROGER CRYAN, Director of Economic Research
National Milk Producers Federation
Suite 400, 2101 Wilson Boulevard
Arlington, Virginia 22201

REPORTER: _____ MR. BOB ADDINGTON

CONTRACTOR (NOT PRESENT): _____ R & S TYPING SERVICE

I N D E X

	<u>Page</u>
<u>VOLUME XI:</u>	
<u>Opening, by the Court</u>	<u>2957</u>
<u> JOHN MYKRANTZ</u>	
<u>Direct Examination, by Ms. Deskins</u>	<u>2959</u>
<u> KEITH MURFIELD</u>	
<u>Direct Examination, by Mr. Berde</u>	<u>2962</u>
<u>Cross-Examination, by Mr. Ricciardi</u>	<u>2965</u>
<u> CARL D. HERBEIN</u>	
<u>Direct Examination, by Mr. Beshore</u>	<u>2970</u>
<u>Cross-Examination, by Mr. Ricciardi</u>	<u>3010</u>
<u>Cross-Examination, by Ms. Deskins</u>	<u>3015</u>
<u>Cross-Examination, by Mr. Rower</u>	<u>3017</u>
<u>Redirect Examination, by Mr. English</u>	<u>3019</u>
<u>Redirect Examination, by Mr. Beshore</u>	<u>3020</u>
<u>Recross-Examination, by Mr. Miltner</u>	<u>3021</u>
<u>Recross-Examination, by Mr. Rower</u>	<u>3031</u>
<u>Recross-Examination, by Mr. Tosi</u>	<u>3031</u>
<u>Recross-Examination, by Mr. Yale</u>	<u>3033</u>
<u>Redirect Examination, by Mr. Berde</u>	<u>3040</u>
<u> THOMAS SWANSON</u>	
<u>Direct Examination, by Mr. Ricciardi</u>	<u>3042</u>
<u>Cross-Examination, by Mr. Berde</u>	<u>3048</u>
<u>Cross-Examination, by Mr. English</u>	<u>3051</u>

1	<u>Cross-Examination, by Mr. Beshore</u>	3053
2	<u>Further Cross-Examination, by Mr. Berde</u>	3055
3	<u>Further Cross-Examination, by Mr. Beshore</u>	3058
4	<u>Cross-Examination, by Ms. Deskins</u>	3061
5	<u>MICHAEL KRUEGER</u>	
6	<u>Direct Examination, by Mr. English</u>	3064
7	<u>Cross-Examination, by Mr. Ricciardi</u>	3075
8	<u>Redirect Examination, by Mr. Beshore</u>	3081
9	<u>Redirect Examination, by Mr. Berde</u>	3082
10	<u>Recross-Examination, by Mr. Ricciardi</u>	3086
11	<u>ED BRANDSMA</u>	
12	<u>Direct Examination, by Mr. Yale</u>	3088
13	<u>Hearing Concluded</u>	3098

E X H I B I T S

<u>EXHIBIT NO.</u>	<u>MARKED</u>	<u>RECEIVED</u>
<u>Exhibit No. 66</u>	<u>2959</u>	<u>2961</u>
<u>Exhibit No. 67</u>	<u>2962</u>	<u>2963</u>
<u>Exhibit No. 68</u>	<u>2971</u>	<u>2991</u>
<u>Exhibit No. 69</u>	<u>3090</u>	<u>3090</u>

P R O C E E D I N G S1:00 p.m.

1
2
3 THE COURT: Good morning. It is January 22nd,
4 it's the 11th day, perhaps the last day, of our hearing, and
5 it's 1 o'clock in the afternoon, as we mutually agreed to
6 start later today due to witness schedules and airline
7 schedules and all that.

8 Before we start taking testimony, I just want to
9 go over what I'm told the order is. I guess, Mr. Berde,
10 you're going to call Mr. Murfield first, is that correct, or
11 recall him first?

12 MR. BERDE: He'll be the first witness.

13 THE COURT: And was Mr. Herbein then going to be
14 the second witness?

15 MR. BERDE: Yes, we believe so.

16 THE COURT: Okay. And then were you going to
17 have any other witnesses at that time or are you going to
18 wait to hear the rest -- then Mr. Ricciardi told me he's
19 going to call Mr. Swanson, and that's going -- and we're
20 going to have a recall also of our very first witness, who's
21 also been -- it'll be your fourth appearance, Mr. Mykrantz.
22 It might be a record for one hearing, I don't know, I hope
23 one you don't want to repeat.

24 Do we want to have Mr. Mykrantz on first and get
25 these next couple -- he was requested to do a couple more

1 tables, I guess. Do you want to do that first? I'm as
2 flexible as you guys want to be, I don't care -- okay, so
3 we're going to have Mr. Mykrantz, Mr. Murfield, Mr. Herbein,
4 and then Mr. Swanson, and then --

5 MR. ENGLISH: I'll call Mr. Krueger after
6 Mr. Swanson.

7 THE COURT: Okay. And Mr. English has told me
8 that he needs a break at 6:30 today for an hour, if we're
9 still going, and we can decide, and I'm as flexible as you
10 all want me to be, we can either -- if we're still going at
11 6:30 and we're an hour or two away, we can either have a
12 one-hour break and come back or we can come back tomorrow
13 morning. I don't care, either way is okay by me. I'd even
14 go by majority vote on that one. Today I'm flexible, as
15 long as I'm not -- I'm not going -- I don't have a plane to
16 catch --

17 VOICE: We won't need to make that decision.

18 THE COURT: That'd be great.

19 MR. ENGLISH: My client advises me that he's not
20 available at 7:30, I misunderstood, so if we're not done by
21 6:30, I guess we've got to come back in the morning.

22 THE COURT: Okay.

23 MR. ENGLISH: Maybe that will encourage people to
24 get it done by 6:30.

25 THE COURT: Okay. Mr. Mykrantz, I don't need to

1 remind you but you're under oath, and I think the Reporter
2 already has the spelling of your name. Do you need it
3 again?

4 COURT REPORTER: No.

5 THE COURT: You have it already, okay.

6 Ms. Deskins, are you going to question
7 Mr. Mykrantz to --

8 MS. DESKINS: Yes.

9 THE COURT: Go ahead.

10 MS. DESKINS: This is Charlene Deskins, Office of
11 the General Counsel, USDA.

12 JOHN MYKRANTZ, GENERAL COUNSEL'S WITNESS, PREV. SWORN

13 DIRECT EXAMINATION

14 BY MS. DESKINS:

15 Q. Mr. Mykrantz, you have before you a document.

16 Could you please identify what it is.

17 A. It's a table that was requested by Ben Yale.

18 Q. Okay. And just tell us what's in this table.

19 A. The title of the table is "Producers and Producer
20 Milk," total number, number small, and small as a percentage
21 of total, and total pounds, pounds represented by small
22 producers, and small producers as a percentage of total for
23 the Pacific Northwest Order and the Arizona-Las Vegas Order,
24 and the month represented is June 2003.

25 MS. DESKINS: All right. Judge Hillson, could we

1 have this marked as an exhibit.

2 THE COURT: Yes. I'll have this document marked
3 as Exhibit 66.

4 (Exhibit No. 66 was marked.)

5 BY MS. DESKINS:

6 Q. Now, Mr. Mykrantz, was this prepared under your
7 supervision?

8 A. Yes, it was.

9 Q. And have you had a chance to review the figures
10 in this table?

11 A. Yes, I have.

12 Q. Are they correct, to the best of your knowledge?

13 A. Yes, they are.

14 Q. Now, I notice that there's a footnote here. Can
15 you tell us what's in the footnote.

16 A. The footnote, number 1, explains that the word
17 "small" in the table is defined as: having -- a producer as
18 having less than 500,000 pounds of producer milk in the
19 month.

20 Q. Okay. Did you do that at the direction of
21 Mr. Yale?

22 A. That was the definition that we used in the
23 previous table.

24 Q. Okay.

25 A. I can't remember exactly what exhibit that was.

1 Q. Okay. I don't think -- well, I don't have it in
2 front of me, I'm not -- I don't remember either. All right.

3 MS. DESKINS: At this time, Judge Hillson, I'd
4 move for the admission of Exhibit 66.

5 THE COURT: Okay. Any objection?
6 (No response.)

7 THE COURT: Exhibit 66 is admitted into evidence.
8 (Exhibit No. 66 was received.)

9 THE COURT: Do you have any further questioning
10 on it?

11 MS. DESKINS: No.

12 THE COURT: Okay. Mr. Yale, do you have
13 questions on it?

14 MR. YALE: Other than, Your Honor, I just want to
15 thank him for preparing the information. We don't have any
16 questions.

17 THE COURT: Okay. Anyone else have -- anyone
18 have questions on it?
19 (No response.)

20 THE COURT: Okay. You may carefully step down,
21 Mr. Mykrantz.

22 (Laughter.)

23 (Witness excused.)

24 THE COURT: Okay, Mr. Berde, were you going to
25 call the next witness?

1 MR. BERDE: Yes. Keith Murfield is the next
2 witness. And I've marked for identification as Exhibit 67 a
3 one-page document headed "Arizona Dairy Demographics," which
4 will be explained as to source, et cetera, by Mr. Murfield.

5 THE COURT: Okay, if you'd give me a copy and
6 I'll get it marked.

7 (Exhibit No. 67 was marked.)

8 THE COURT: And Mr. Murfield, you've already been
9 sworn in, although it seems like a long time -- I guess it
10 was a long time ago.

11 THE WITNESS: Last year.

12 THE COURT: But for the benefit of the Reporter,
13 if you would just state and then spell your name for the
14 record.

15 THE WITNESS: Okay. Name is Keith Murfield,
16 K-e-i-t-h, last name M-u-r-f-i-e-l-d.

17 KEITH MURFIELD, PROPONENT'S WITNESS, PREV. SWORN

18 DIRECT EXAMINATION

19 BY MR. BERDE:

20 Q. Mr. Murfield, what has been marked for
21 identification as Exhibit 67, a single-page document headed
22 "Arizona Dairy Demographics," was that a document prepared
23 by members of your staff?

24 A. Yes, it was.

25 Q. And did the members of your staff obtain the

1 information which appears on that document from UDA's human
2 resources person and from the human resources personnel of
3 Kroger and Safeway?

4 A. Yes, and Shamrock --

5 Q. And Shamrock.

6 A. -- all four companies, and we also used as far as
7 on members and other members of -- out of the agriculture
8 department of Arizona.

9 MR. BERDE: Okay. Your Honor, we offer Exhibit
10 67.

11 THE COURT: Any objection?

12 (No response.)

13 THE COURT: Okay, Exhibit 67 is now admitted into
14 evidence.

15 (Exhibit No. 67 was received.)

16 BY MR. BERDE:

17 Q. You have a statement prepared?

18 A. Yes.

19 Q. Go ahead.

20 A. Several producer-handler witnesses who testified
21 in Seattle claim that regulating them the same as other
22 handlers are regulated would threaten their survival and
23 cause particular injury to their minority employees. I fail
24 to understand how applying to producer-handlers the same
25 rules that apply to all other handlers with whom they

1 compete can have the same effect that the producer-handler
2 witnesses claim.

3 What we do know is that the unlimited exemption
4 of producer-handlers from pricing and pooling in Order 131
5 marketing area has caused UDA members alone over 11 and a
6 half million dollars and reduced blend prices during January
7 2000 through July 2003, and the comparable losses of 10 to
8 14 cents a hundredweight, as shown in our Exhibits 9 and 16
9 earlier in this process.

10 Every pound of Class I sales in Order 131
11 marketing area by the exempt producer-handler Sarah Farms
12 results in a monetary loss to the marketing area producers.
13 Unlimited expansion of Class I sales by Sarah Farms poses a
14 serious threat to the federal order system and the operation
15 of regulated dairy plants in Arizona, as Shamrock and Kroger
16 witnesses testified earlier.

17 Maintenance of a healthy and viable industry in
18 Arizona is important not only to the member owners of UDA
19 and the regulated handlers but also to their employees,
20 including many women and minority employees whose livelihood
21 is tied to the Arizona dairy industry.

22 Our survey of the Arizona dairy demographics,
23 Exhibit 67, discloses how important the dairy industry is to
24 the protected class of our population. As the exhibit
25 shows, Arizona dairy industry employs approximately 500

1 women and 1887 Hispanic males, most of whom are employed by
2 -- on Arizona dairies.

3 Eroding the income of all producers, which is the
4 certain effect of producer-handler expansion of Class I
5 sales, will only result in reducing the employment opponents
6 of the most vulnerable members of our population.

7 THE COURT: Do you have any further questions,
8 Mr. Berde, of this witness?

9 MR. BERDE: No.

10 THE COURT: Any Cross-examination of this
11 witness? Go ahead, Mr. Ricciardi.

12 CROSS-EXAMINATION

13 BY MR. RICCIARDI:

14 Q. Good afternoon, Mr. Murfield. Al Ricciardi, on
15 behalf of Sarah Farms. Do you have the Arizona demographics
16 exhibit with you?

17 A. Yes.

18 Q. Okay. Who actually prepared the document?

19 A. Well, I was involved in gathering some of the
20 information. We did make some -- also my -- one of my staff
21 people did, and then a couple of our field departments were
22 -- personnel -- were involved in it.

23 Q. And what data did they utilize to prepare the
24 document, do you know?

25 A. Yes. What we did is we made phone calls, first

1 of all, to the other -- Tolleson, Safeway, and Shamrock,
2 human resources, and they gave them to them, and obviously I
3 have permission to use that information.

4 The Department of Ag, we did call up the -- used
5 the resources from the -- from their office, and then what
6 we did is -- most of these dairies -- if you notice, we say
7 88 dairies on there, and then we see 22 that are -- what
8 that means is non-UDA dairies. So if you add that up, you
9 see that's 110, and you notice that I used 126, and the
10 reason I used that is: our 88 dairies are on 104 farms, so
11 we added 104 and 22 together, and that's how we got that.

12 Q. Did you call Sarah Farms?

13 A. No, I did not.

14 Q. So you don't know what percentage of Hispanics
15 work at any of the Sarah Farms dairies; correct?

16 A. No.

17 Q. Did you call Sunrise Dairy?

18 A. No. I -- okay, I'll tell you who -- exactly who
19 I called --

20 Q. Okay.

21 A. -- and then -- the calls that we made to
22 different dairies were: the two co-ops that are involved in
23 Arizona; and two independents also that are -- that we know
24 of, that are -- in Arizona, that are shipping in our Order.
25 So I --

1 Q. That would include the four that are here: UDA,
2 Safeway, Shamrock, and Tolleson, those are the calls you
3 made?

4 A. Well, those calls, but then the dairies --
5 because, you know, I -- the confusion is sometimes the word
6 "farms" and "dairies." In Arizona they use "farms" or they
7 call them "dairies" out there. In the Midwest when they
8 talk about dairies they're talking about bottling plants.
9 But in Arizona, when we're talking dairies, we're talking
10 the farms.

11 Q. Okay. So splitting it out between plants and
12 dairies, again, you didn't call either Sarah Farms or
13 Sunrise and you haven't listed the actual number of dairies
14 that you called under the dairy heading?

15 A. No. No, we didn't. We had some, but what we did
16 is we used the information of -- of taking -- we know how -
17 - according to the statistics, how many cows there are in
18 Arizona. Now, I'll give or take, I'm not going to -- it
19 says 151,200, and that's the numbers that you see come out,
20 and they're very, very close. We do know that they -- and
21 that's where I kind of explain that the average is about a
22 hundred cows per employee, and that's how we come up with
23 that number, and we do know that we are very, very close to
24 95 -- out in the dairies, out in the farms, 95 percent of
25 the workers are Hispanic.

1 Q. And you made that calculation how?

2 A. By asking dairymen what percent of their
3 workforce was Hispanic.

4 Q. And you got that figure back from whom?

5 A. Well, many of our -- many of our board members
6 and some of the other calls that we have -- we've made,
7 other than board members.

8 Q. Under "Dairies," in talking about the number of
9 memberships which include females, you list 80 here; am I
10 correct?

11 A. Where you at?

12 Q. I'm under "Dairies," and under "Owners," and with
13 regard --

14 A. Oh, yes.

15 Q. UDA lists a number of memberships which include
16 females, and you have "80."

17 A. Yes.

18 Q. Arizona, as you know, is a community property
19 state; correct?

20 A. Correct.

21 Q. And UDA requires that if someone is married, that
22 the spouse sign off on the membership agreement; correct?

23 A. That is correct.

24 Q. Okay. So whether or not a person, female, for
25 example, let's assume in my example the member's actually a

1 male, if that male is married, UDA requires that the female,
2 his wife, sign off on the membership agreement in order to
3 bind both of those because it's a community property state;
4 correct?

5 A. That is correct.

6 Q. Whether or not that individual, meaning the
7 spouse, the wife in that case, runs the dairy, has any
8 involvement in the dairy, or whatsoever; correct?

9 A. That's correct.

10 Q. So as a practical matter, when you say that 80
11 memberships include females, it's a legal issue because they
12 had to sign the UDA membership agreement and they're not --
13 they may not be actual individuals who operate a dairy;
14 right?

15 A. That is correct, and we were just showing what
16 the effect was on both male and female.

17 Q. Okay. Lastly, you don't have a copy of the
18 statement that you read provided in the back, do you?

19 A. No, I don't.

20 Q. Okay. With regard to the impact on minorities or
21 the impact on anybody, your testimony concerning the figures
22 -- and I think you used "\$11 million" -- depends upon the
23 acceptance by the Secretary of the claims and arguments made
24 by the proponents; correct?

25 A. It states as if that milk was in the pool, you're

1 correct, that's how we looked at it.

2 MR. RICCIARDI: Okay. Nothing further. Thanks.

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

4 MR. YALE: No.

5 THE COURT: Ms. Deskins, do you or your
6 colleagues have any questions?

7 MS. DESKINS: No.

8 THE COURT: Any redirect?

9 MR. BERDE: No.

10 THE COURT: You may step down.

11 (Witness excused.)

12 THE COURT: Mr. Beshore, you were going to call
13 the next witness; is that correct?

14 MR. BESHORE: Yes. Mr. Herbein, Carl Herbein.

15 THE COURT: Okay, Mr. Herbein, you were sworn in
16 some months ago in this case, so that oath is good for your
17 testimony now. I would like you to, for the benefit of the
18 Reporter, please state and then spell your name for the
19 record.

20 THE WITNESS: Carl D. Herbein, H-e-r-b-e-i-n.

21 THE COURT: Go ahead, Mr. Beshore.

22 CARL D. HERBEIN, PROPONENT'S WITNESS, PREV. SWORN

23 DIRECT EXAMINATION

24 BY MR. BESHORE:

25 Q. Mr. Herbein, this is your second time to the

1 witness stand in this proceeding; correct?

2 A. That's correct.

3 Q. And you testified previously at Phoenix; correct?

4 A. Yes.

5 Q. Okay. Now, in connection with your testimony
6 today, were you asked to evaluate -- on the basis of
7 information which has been presented for the record and on
8 the basis of the best information that you could assemble
9 and have available, were you asked to evaluate on a
10 pro forma basis the possible operation as regulated handlers
11 of entities which are presently producer-handlers in Order
12 124?

13 A. Yes, that was my engagement.

14 MR. BESHORE: Your Honor, could I have the
15 exhibit that I've distributed, 2-page exhibit, marked as the
16 next --

17 THE COURT: It would be Exhibit Number 68.

18 (Exhibit No. 68 was marked.)

19 BY MR. BESHORE:

20 Q. And have you prepared, Mr. Herbein, a 2-page
21 document that has been marked as Exhibit 68, in response to
22 the engagement that you have just indicated?

23 A. Yes, I have.

24 Q. And the first page is titled "Regulated Handler,
25 Federal Order 124, Pro Forma Income Statement - 12-Month

1 Period Ended December 31, 2003"; is that correct?

2 A. Yes.

3 Q. And the second page, then, of Exhibit 68 is
4 captioned "Regulated Handler, Federal Order 124, Statement
5 of Assumptions - 12-Month Period Ended December 31, 2003";
6 correct?

7 A. That's correct.

8 Q. Let's look, then, at Exhibit 68, and first of
9 all, what is a pro forma income statement?

10 A. A pro forma income statement is a financial
11 presentation that is based upon assumptions as opposed to
12 something that is extracted from an entity's books. This is
13 not actual activity but a presentation on a pro forma basis
14 of a set of facts and circumstances put into proper form to
15 show an income statement.

16 Q. Okay. And in this case, the information that may
17 be available in any of the entity's books has not been made
18 available for the hearing record; correct?

19 A. That's correct.

20 Q. Now, in doing the pro forma income statement,
21 first of all, what -- you've got three columns on Page 1 of
22 Exhibit 68, and the footnotes 1, 2, and 3 have some
23 information with respect to those columns. Could you
24 describe to us what the three separate columns represent.

25 A. Yes. First of all, the characterization here

1 began with a size determination, and based upon USDA's
2 average of the Order 124 larger producer-handlers, the
3 overall average was 4.7 million pounds of Class I milk per
4 month.

5 Q. Okay. So that 4.7-million-pounds-per-month
6 figure is not an assumed figure but an actual figure from
7 the hearing record information provided in one of
8 Mr. Mykrantz's exhibits; correct?

9 A. Yes, that's correct.

10 Q. Okay.

11 A. And that's the middle column.

12 Q. Okay. And go, then, I interrupted you.

13 A. As I was saying, the middle column is the 4.7
14 million pounds of Class I. So as to test the pro forma and
15 the market, the column 1 is 75 percent of column 2, or a 25
16 percent reduction in pounds, to 3,525,000 pounds of Class I
17 per month. In column 3, as is indicated in Footnote 3, is
18 25 percent more than the average, to 5,875,000 pounds.

19 And I chose those three sizes so that the -- so
20 that this proceeding could have statistical analysis of both
21 the average and something below and something above the
22 average.

23 Q. Okay. If we could look, then, at -- kind of on a
24 line-by-line basis, your pro forma information, and let's
25 just use the numbers in the first column, for the smaller

1 entity. The revenue has two components: Class I sales and
2 Class III/IV sales; correct?

3 A. That's correct.

4 Q. Okay. And could you explain, just using the
5 smaller pro forma entity, the numbers there, how the revenue
6 numbers were derived.

7 A. Yes, I'll be glad to. First of all, as to the
8 split between Class I sales and Class III/Class IV sales,
9 that ratio is 85.5 percent Class I sales and 14.5 percent
10 Class III or Class IV sales, and that information, again, I
11 extracted from this proceeding, and that is explained in
12 Footnote 2 on the second page.

13 So that was the first step, in taking the pounds
14 and dividing the pounds into how they were utilized. The
15 second was: to apply a value to those pounds, and for that
16 purpose, I converted the pounds into gallons of milk and
17 then utilized USDA's published retail prices for 2 percent
18 milk, average of three outlets, selected cities, by month,
19 in 2003, for the first 7 months of 2003, for Seattle,
20 Washington, and Portland, Oregon, and I used that basis for
21 the value of the -- of the milk at the first step.

22 And then the second step, since that survey done
23 by USDA is an out-of-store price survey, the next step was
24 to get that into an into-store price, which is what these
25 handlers would be selling, they're selling into store, not

1 out of store, and the reduction from out of store to
2 in store that was applied was a 40 percent reduction.

3 So that process was utilized, applied to the
4 gallons, and that was how the \$9.9 million was calculated.

5 The Class III and Class IV value was arrived at
6 by taking the lower of Class III or Class IV and an
7 assumption, again, described on Page 2, is that those sales
8 were done at the market price, USDA's lower of III or IV,
9 and that's how the \$704,000 revenue number was calculated,
10 and also the \$704,000 cost.

11 Q. Okay. Let's -- just a couple other questions
12 about those numbers. Why did you use the first 7 months of
13 2003?

14 A. To be consistent, I quoted -- extremely important
15 that we not confuse the record with a lot of statistics from
16 different time periods, and the 7 months -- the first 7
17 months of 2003 were used when this hearing began and when I
18 testified the last time, so I felt that that was an
19 appropriate category -- an appropriate time period to use.

20 Q. So some of your earlier -- your earlier exhibits
21 presented in this hearing were based on price and other data
22 for that same time period.

23 A. That's correct.

24 Q. Okay. Now, how did -- did you then project the
25 volumes over a 12-month period, to show a pro forma annual -

1 =

2 A. Yes. I assumed that, for example, with column 1,
3 the 3,525,000 pounds, that was the statistical number that I
4 used, times 12, to get to a 12-month number, I wanted to
5 show a full year of activity, that's what CPAs like to do
6 when they report on financial activities, use a full year,
7 so that you have a 12-month period, and in applying the --
8 both revenue and cost factors on a per-gallon basis from an
9 average developed over a 7-month period, to 12 months, is an
10 acceptable thing to do because the-- the issue there is the
11 margin on a per-gallon basis, so if the prices in the last
12 five months of the year are higher or lower, it's irrelevant
13 when you're doing a pro forma presentation like this,
14 because it's the margin that determines the bottom line.

15 Q. Okay. Now, let's talk about the 40 percent
16 discount just a bit. I gather, if I understand you
17 correctly, to get to the top line of Class I sales you took
18 the price of USDA-published retail price series for out-of-
19 store prices and reduced that by 40 percent to --

20 A. That's correct.

21 Q. -- to arrive at an into-store wholesale fluid
22 milk product price; correct?

23 A. Yes, that's precisely what I did.

24 Q. Okay. How did you come to use the 40 percent
25 discount figure?

1 A. There were a few factors, and in pro forma and
2 analyzing assumptions, one must use all of the data that's
3 available, and one piece of data that was available from
4 this proceeding was the testimony of a Mr. Ellis, who talked
5 about his margin in his business, and his margin was in the
6 30- to 40-percent range, buying milk from Smith Dairy and
7 reselling it, and he explained his margin.

8 I also reviewed our firm's information on sales
9 to stores and store margin-type information in markets such
10 as Seattle and Portland, where there are some unusual
11 characteristics with respect to other parts of the country,
12 store specials and special distributor discounts. Many
13 markets are different, and Order 124 has a good dose of
14 difference.

15 So all of that considered led me to the 40
16 percent being the right reduction, so that the store owner
17 would have an adequate margin to operate in this -- in this
18 market and the distributor would have a margin and that we
19 would have considered the specials, and then that gives you,
20 after subtracting that 40 percent, an into-store price,
21 which is what the revenue base for a processor is.

22 Q. Did you check the validity of that estimated
23 into-store price with regulated handlers that you had access
24 to in Order 124?

25 A. Yes, I did.

1 Q. And did they confirm that it was a reasonable
2 number to use for a pro forma?

3 A. Yes. And we had -- we had detailed conversation
4 about that, on pro forma, and this pro forma -- there
5 certainly are transactions in this marketplace that would
6 require more than 40 percent and less than 40 percent, so
7 this is an average to be used, and that is also the concept
8 of USDA's survey, is that it's an average of more than one -
9 - one customer, or one type of customer.

10 Q. Okay. Now, just to get back to Mr. Ellis's
11 testimony for a moment: is it your understanding that
12 Mr. Ellis is a customer, a distributor, who acquires his
13 product -- by his testimony in this hearing -- from Smith
14 Brothers, one of the producer-handlers in Order 124?

15 A. Yes. And I heard Mr. Ellis's testimony
16 personally.

17 Q. Okay. And he testified that he sells it for
18 prices that are in the range of the prices on the
19 supermarket shelves, in fact between the lower -- the store
20 brand and the non-store brand price; correct?

21 A. Yes, that was my understanding of his testimony.

22 Q. Okay. And he arrived at those sales prices to
23 his customers by purchasing the product at Smith Brothers
24 and marking it up 30 to 40 percent, by his testimony.
25 Correct?

1 A. Yes, that is, that was his testimony.

2 Q. Okay. Now, your total revenue line, then,
3 represents the simple aggregate of the revenue from Class I
4 sales and Class III and IV sales, as you've calculated them;
5 is that correct?

6 A. Yes. It's a simple addition.

7 Q. Could you then review how you -- for your
8 pro forma, the operating expense entries that you
9 calculated.

10 A. Yes. The first, and the largest, operating
11 expense that these pro forma regulated handlers have is the
12 cost of raw milk for the Class I portion of their business,
13 and that has been reflected at the Class I price that USDA
14 announced, again, for the first 7 months of 2003, and, as I
15 said earlier, the next line, the cost of III -- or Class III
16 or Class IV is again at USDA's announced price. So in this
17 cost of raw milk, those two numbers do not include any
18 premiums, co-operative handling fees, or anything of that
19 nature, it is simply the Class prices.

20 The next four lines that we have, and we'll deal
21 with them one at a time, containers: this, again, assumes
22 that for this pro forma handler, that we're selling this
23 product in plastic gallons, and from my earlier exhibits, we
24 reflected the container costs from plant C, from Exhibit
25 25(a), and the plant C, as you'll recall, was a 5-million-

1 pound-per-month Class I operation. So that's the cost of
2 containers.

3 Plant and overhead was extracted from that same
4 exhibit, at the same per-gallon cost. Shrink, the next
5 item, was extracted from that same exhibit and is reflected
6 here.

7 And then delivery. As you remember, 25(a) did
8 not deal with a delivered product; we had a dock price in
9 that scenario of exhibits. So the delivery cost here of
10 \$1,832,000 is determined by -- I determined that what we
11 needed to do is reflect an average delivery cost, because
12 the -- this type of handler would be selling to different
13 outlets, convenience stores, small stores, we heard some
14 testimony about serving coffee shops and retail customers
15 and other outlets, and from our database I determined that
16 the average cost for this type of handler in this type of
17 geography that we have in Order 124, 37.24 cents per gallon
18 is what's reflected for this average delivery cost.

19 And then the next and final two steps in this
20 process of pro forma would be to total the operating
21 expenses, and as we can see here in column 1, the total is
22 \$9,914,000, and then to arrive at a net income before income
23 taxes, we subtract the operating expenses from the revenue
24 and we arrive at a bottom line of \$694,000.

25 O. And the bottom line for the middle column and the

1 right column, the larger columns, would be as indicated on
2 the first page of Exhibit 68; correct?

3 A. Yes, that's correct. And there the process for
4 each one of those columns is identical, the only difference
5 is the size, so there are more gallons in column 2 and 3.

6 Q. Now, let's just talk about delivery costs just a
7 minute. To the extent that the top line -- that you used
8 Mr. Ellis's testimony, the only testimony we have in the
9 record about wholesale costs at any of these producer-
10 handlers, to the extent that you used that for the top line
11 and Mr. Ellis acquired the product at the plant dock and
12 delivered it himself, by including delivery costs and
13 operating expenses here, have you been as conservative, in
14 essence, as you could possibly be about delivery expenses
15 here?

16 A. Yes, I think we have been conservative, and it's
17 also been my experience that when a circumstance like a dock
18 pickup takes place, we have a reduction, generally, of some
19 extent, to some extent, of the -- of the sale price, you get
20 some credit for picking up at the dock. There's still a
21 cost associated with a dock pickup, the truck has to be
22 loaded, there's a security issue of having someone other
23 than an employee enter your facility, so they -- there's
24 generally -- however, there's generally an additional
25 discount, and I mention that in my Footnote Number 5.

1 Q. But to the extent that sales at any of these
2 producer-handlers locations were made at the plant dock,
3 such as, you know, with Mr. Ellis, those plants would not
4 have anywhere near the 37-cent-per-unit delivery cost, would
5 they?

6 A. No, they would not, clearly.

7 Q. So for instance, with respect to Smith Brothers,
8 if 70 percent of their sales are to home-delivery
9 distributors of the -- such as Mr. Ellis, their operating
10 statement would reflect considerably less delivery expense
11 than you do on Exhibit 68; correct?

12 A. I would think that they definitely would.

13 Q. And of course the same thing would apply to any
14 other volumes to the -- of any of the -- the three producer-
15 handlers, to the extent that they were selling from their
16 dock as opposed to delivering them to the customers'
17 location.

18 A. Yes.

19 Q. Now, let's look at the second page of Exhibit 68
20 just a minute. Have you -- I think you've probably covered
21 all of your assumptions in describing the first page of
22 Exhibit 68, but could you just review those, to be certain
23 that you've explained all of the assumptions that went into
24 your calculations.

25 A. Yes, I'll be glad to, and we'll make this -- make

1 this quick.

2 Footnote 1, as I said earlier, is the basis upon
3 which we pro forma'd and calculated the revenue under
4 consideration here, and again, USDA publishes on a monthly
5 basis out-of-store prices, and I've referred to that -- that
6 document. And we used the 7 months, January through July,
7 of '03 for Seattle, Washington, and Portland, Oregon, and
8 then reduced those out-of-store prices by 40 percent, to
9 reflect a wholesale or into-store price.

10 The allocation between Class I and other classes,
11 again, I extracted that 85.5 and 14.5 from the -- from this
12 hearing record, from previous witnesses.

13 The operating costs, Footnote Number 3, I
14 extracted from my own exhibit, 25(a), which was presented in
15 Arizona.

16 Footnote 4, it should be clear to everyone that
17 the cost of milk that's reflected here is the -- is a
18 regulated cost of milk, it's Class I or the lower of III or
19 IV, so this is not a cost to produce or a market blend; this
20 is the Class price for milk, without regard to any premiums,
21 market administrator fees, or any costs of that -- of that
22 sort.

23 And then Item Number 5 is the delivery cost, from
24 our firm's database, for average deliveries for plants that
25 are handling various kinds of customers.

1 Q. Okay. Now, going to the revenue mix just for a
2 minute: to the extent that any of these producer-handlers
3 have sales of Class II products, you know, valuated Class II
4 products, ice cream or, you know, sour creams or creamers,
5 you've not taken that into account at all; correct?

6 A. That's correct.

7 Q. Okay. So those Class II values are higher than
8 Class III and IV minimum values, are they not?

9 A. Oh, yes. There's more value to that -- that part
10 of the business.

11 Q. So, you know, the gross sales -- you haven't been
12 able to capture, you know, the total gross sales on any of
13 these businesses because of your -- the limited information
14 available for the pro forma.

15 A. That's correct. However, one of the requirements
16 that one has in presenting pro forma information is that --
17 that it passes the "smell test," and that's one of the --
18 one of the things that we did when we finished this -- this
19 analysis, was to look at it, does it make sense, is this a
20 reasonable set of assumptions and conclusions that can be
21 reached from this, and it's my opinion that this is a
22 reasonable presentation of what a handler of these sizes
23 would -- would realize.

24 Q. And that conclusion is made on the basis of your
25 experience in dairy plant cost accounting for how many

1 years?

2 A. This whole adventure began in 1975.

3 Q. And you have in your database -- you may have
4 testified to this earlier, but just so we're clear on it:
5 approximately how many plants?

6 A. A hundred and fifty.

7 Q. Let me just ask you a few other questions, then,
8 Mr. Herbein. Dr. Knutson made some comments about your
9 previous presentation. Did you hear his testimony, by the
10 way?

11 A. Yes, I did.

12 Q. And do you recall that he made a comment about
13 the statistical validity, or something to that effect, of
14 your previous study? Do you recall that?

15 A. I remember that, and I've read his -- read the
16 transcript of his testimony also, to make sure of my
17 recollection.

18 Q. Okay. Now, from a -- as an accountant, certified
19 public accountant: what standards does the accounting
20 profession have for selecting data to -- what methods can
21 you use to select data to depict data and arrive at
22 conclusions about it?

23 A. There are two, two methods: one is statistical
24 selection based on the use of random number tables, as one
25 method; and judgmental selection is also an acceptable

1 method, depending upon the universe that you're studying.

2 Q. Okay. And so when -- when accounting work is
3 peer-reviewed, it's peer-reviewed under whatever method it
4 utilized, I assume.

5 A. Yes. In a peer review of CPA firms, that would
6 be one of the -- not "would be" -- that is one of the
7 subjects that the peer review team looks at very carefully,
8 is the universe that's being studied in -- for example, if
9 it's verification of accounts receivable or inventory: what
10 did you study? how did you do it? how did you decide what
11 study -- what items needed to be -- need to be reviewed? so
12 that you can be comfortable that the inventory and/or
13 receivables are properly stated.

14 Q. Okay. What method did you use to select the data
15 that went into your study that was presented in Exhibit 25
16 and your earlier testimony?

17 A. This -- the selection methodology used was:
18 judgmental selection.

19 Q. It was not presented as or intended to -- or
20 represented to be a statistical random sample of some sort.

21 A. No, not at all.

22 Q. Was it a sound -- did you use the standards of
23 the profession in your applying the judgmental method?

24 A. Yes, I believe so, especially in light of the
25 universe to be studied here. When we think about -- when I

1 think about -- strike that. When I reviewed Professor
2 Knutson's comments and thought about and looked at what I
3 did, I believe that the use of statistical sampling to
4 select the plants that I was asked to look at would have
5 been wrong because what was really important here was to
6 present to USDA information for plants and types of plants
7 of various sizes, and when one uses statistical sampling, if
8 we took all of the 300 plants in the country and we assigned
9 them random numbers and selected them on that basis, we
10 could very easily have in our study a plant in Milwaukee
11 that produces and sells their milk in glass bottles, which
12 would be a whole different ball game than the kind of plants
13 we're studying here. So I believe it a far superior method
14 to use judgmental selection, and what I did is I went into
15 our -- our database, which since -- as I said, the key
16 element was size, that we chose to study, and looked at the
17 plants that were of the size that we decided to study, as
18 shown on the -- Exhibit 25 and the other letters to 25, and
19 I personally know these plants and was able to select plants
20 from our database based on the size criteria that fit the
21 need of this study.

22 Q. And let me ask you one -- I want to ask you one
23 very specific and very important question about your
24 judgmental selection process. Did you know the cost of the
25 plants that you selected for your study before you made --

1 identified the plants to be utilized?

2 A. No. The cost did not at all enter into the
3 selection process, it was -- the size and the type of plant
4 was the selecting criteria.

5 Q. Now, let me ask you just one question. You were
6 not here this week, previously during this week, correct, in
7 the hearing room?

8 A. I arrived at the very, very end of yesterday.

9 Q. Okay. You did not hear Mr. Hettinga testify.

10 A. No, I did not.

11 Q. Okay. Did you have the opportunity to review his
12 written testimony, which was presented by Mr. Ricciardi?

13 A. Yes, I did, I had an opportunity to -- to read
14 his testimony.

15 Q. Okay. Do you -- I just have one question.
16 There's a comment made on -- about that, regarding the cost
17 of -- per-unit cost of processing, packaging, and labeling
18 on -- I think it's on Page 11 of the -- of that testimony.
19 Do you have any comments or observations, from a
20 professional accounting perspective, with respect to that
21 comment?

22 A. Yes, I do, and I think it's important for
23 everyone involved in this process to understand the -- what
24 appears to be a criticism, but I believe it is a
25 misunderstanding.

1 The way I interpret Mr. Hettinga's testimony is
2 that when a filling machine is running, packaging equipment
3 in a plant, on a per-package basis, the costs of the label,
4 for example, could be very, very similar, if not the same,
5 on a gallon and a half-gallon, and perhaps even on a quart,
6 but -- so if that's 1 cent for a gallon and 1 cent on a
7 half-gallon and 1 cent on a quart, my statistics are
8 presented on a gallon-equivalent basis, so that we take into
9 account, as you must, for proper cost accounting, the volume
10 of the package.

11 So when we talk about costs per gallon, if it's 1
12 percent per gallon, it's a half a cent per half-gallon and
13 it's a quarter of a cent for a quart, so that -- so that we
14 don't have the record misled, and it's very clear to anyone
15 in the industry that filling a gallon container on a volume
16 basis is much more efficient than filling a quart, and the
17 statistics from any public or private source would support
18 that.

19 Q. Okay. I have one final question. When you did
20 the pro forma study, you didn't have the opportunity to hear
21 any of the testimony that was presented this week; correct?

22 A. That's correct.

23 Q. Mr. Hettinga's or anyone else's; right?

24 A. I heard none of that.

25 Q. Okay. Now, one of the witnesses this week was

1 Mr. Brandsma, from Edaleen, and he provided some additional
2 incremental information about store prices and producer-
3 handler -- their operation and their profitability.

4 I want you to assume that he testified that in
5 Whatcom County, Washington, where they're located, the
6 convenience stores that they service sell gallons of milk at
7 2.19 to 2.29 per gallon -- okay?

8 A. Yes.

9 Q. -- and that their sales to their stores are
10 profitable.

11 A. Okay.

12 Q. Okay. Taking just current prices in this month,
13 January 2003 [sic.], which -- for the order, which you have
14 available to you the exhibit published by the market
15 administrator of the minimum Class I cost per gallon on --

16 THE COURT: When you said 2003, did you mean
17 2004?

18 MR. BESHORE: 2004, I'm sorry. 2004. Thank you,
19 Your Honor.

20 BY MR. BESHORE:

21 Q. You have that exhibit?

22 A. Yes, I do, Exhibit 62.

23 Q. 62. Okay. Now, have you had a chance to just,
24 using January figures and those out-of-store prices,
25 evaluate whether in your view, assuming a Class I cost,

1 those sales could still be profitable to a producer-handler
2 of the size that you're talking about in Exhibit 68?

3 A. Yes, I have.

4 Q. And what is your conclusion?

5 A. My conclusion is -- and I'll provide some detail
6 to this calculation so that it can be understood. My
7 conclusion is that the -- using the Class price for a
8 2 percent gallon of milk for January of 2004, which Exhibit
9 62 reflects at 1.0402; then using a plastic gallon cost,
10 from my exhibits, for a handler of the 5-million-pound-per-
11 month size, which is a cost of .1420; using a plant cost,
12 from that same exhibit, of .4710; and a shrink factor, to
13 consider that condition in a plant, of .0180; and for
14 delivery to a convenience store chain, a cost of 28 cents a
15 gallon for that delivery: the ending profit on a per-gallon
16 basis would be 7 cents.

17 So I believe that that witness's testimony that
18 he had a profitable transaction, it -- based on that --
19 based on my analysis, it would be profitable at the Class
20 prices.

21 And the 7 cents a gallon would be about 3 and a
22 half percent on the bottom line, before tax, which
23 ironically is the statutory-mandated profit in the state of
24 Pennsylvania, by the Pennsylvania Milk Marketing Board.

1 So it made sense to be a normal transaction.

2 MR. BESHORE: Thank you. No other questions for
3 Mr. Herbein on direct. I would like to move the admission
4 of Exhibit 68.

5 THE COURT: Any objection to its admission?

6 MR. YALE: We would object until we have an
7 opportunity to cross-examine, Your Honor.

8 THE COURT: Well, whatever you cross-examine,
9 it'll probably still be admissible, just be -- you know, it
10 might affect the weight that the Secretary gives it, so --

11 MR. YALE: Would you just note our objection.

12 THE COURT: Your objection is noted, overruled.
13 Exhibit Number 68 is admitted into evidence.
14 (Exhibit No. 68 was received.)

15 THE COURT: And the witness, I presume, is
16 available for cross-examination. Mr. Ricciardi, Mr. Yale,
17 who's going to go first?

18 MR. YALE: Just a minute, we're trying to figure
19 out our order here.

20 (Pause.)

21 MR. YALE: Benjamin F. Yale, on behalf of
22 Mallorie's Dairy, Edaleen Dairy, and Smith Brothers Farms.
23 I tried not to be first, but I still end up being first.

24 CROSS-EXAMINATION

25 BY MR. YALE:

1 Q. Good afternoon, Mr. Herbein.

2 A. Hello, Mr. Yale.

3 Q. I want to talk about this Exhibit 68. You've
4 talked about how it met standards, I guess, of a CPA for a
5 pro forma?

6 A. Yes.

7 Q. Would you recommend that a person enter into a
8 buy or sell agreement based upon the information that's
9 presented here? Is this sufficient to enter into that type
10 of a decision?

11 A. The use of a pro forma to determine a buy/sell
12 arrangement, in the context of milk, would certainly be
13 something that could be considered, and it is many times
14 done, customer and processor meet and review what their milk
15 program is going to be on a pro forma basis, so that it's
16 not an unusual consideration. In most cases, when it gets
17 right down to doing business, it's done, obviously, on an
18 actual basis, using actual numbers.

19 Q. So the point of it is, is that this is not -- in
20 the ordinary course of business affairs, this in itself is
21 not of that standard that you commonly provide your clients
22 to make business decisions; right?

23 A. Not exactly. It is a -- the use of pro forma in
24 negotiating, again, a milk deal, milk arrangement, is --
25 would be one of the factors. This is not a complete normal

1 decision-making set of documents or operating documents, but
2 it would clearly be a consideration, and an appropriate one.

3 Q. Now, you referenced your -- I think in your
4 digression from the 2.19 a gallon, or whatever, price, you -
5 - first of all, you used your exhibit that identified --
6 what you identified as costs for various size plants, it was
7 testified, I believe, in Phoenix. You recall that?

8 A. Yes. That is --

9 Q. That's where you came up with the numbers.

10 A. That's correct.

11 Q. And you would agree, would you not, that even
12 with your limited data, those were averages within the range
13 of the size of that plant? Right?

14 A. The 25(a), from Phoenix, in the 5,000-pound-per-
15 month category, was the average cost for -- I believe we had
16 four plants in that -- in that grouping.

17 Q. And I think we've already been through it.
18 There's none from the Order 124 area; right? I mean, this
19 is out of your database and did not include a plant out of
20 124; right?

21 A. That's correct. However, you'll recall that I
22 adjusted the costs to reflect -- to localize the costs to
23 the standards of living -- cost of living into those
24 markets.

25 Q. But not to adjust to the methodologies of

1 business practices within the local economy, in the labor
2 markets within that local economy, or the cost of energy in
3 that local economy; right?

4 A. No. My adjustments would have done just that,
5 they would not have reflected business practices, but they
6 would have reflected utility costs and labor costs. That
7 was precisely why I made that adjustment.

8 Q. Okay. So -- I want to come back to this Exhibit
9 68 so I understand it. What -- as I understand what you're
10 saying is, is that a plant of 3.5 million pounds per month,
11 selling milk under this mix -- assuming that that is in fact
12 the mix that they have for that Class; right? We don't know
13 that for a fact, but we're assuming that; right?

14 A. That's an assumption to the pro forma.

15 Q. Okay. And then you -- they have to pay out their
16 costs based upon their classified use, right? The raw milk
17 price for their classified use, into the pool. Right?

18 A. Yes, in this case, that's the assumption,
19 correct.

20 Q. Okay. Now -- and I think you just testified that
21 based upon a snippet of information that came out of Duane
22 Brandsma's testimony, about 2.19 for some milk at the
23 convenience stores, that that appeared to be, based upon
24 your analysis, a market price at the retail level that would
25 be commensurate with milk being sold at a Class I price as

1 set up by the market administrator plus your costs of plant
2 manufacturing and reasonable distribution, and a profit, and
3 a markup for the store; right?

4 A. The -- yes, as to the Whatcom County analysis,
5 that is precisely what we've concluded from the analysis
6 that I did.

7 Q. So what it reflects is that those sales in that
8 particular case most likely represented sales by the
9 producer-handler that were using or at least not taking away
10 from the Class I prices in the marketplace, even though they
11 weren't required to pay that; right?

12 A. That's one of the frustrating parts of this
13 proceeding, is we don't -- I don't know that. I'm left with
14 making assumptions for the calculations. I really don't
15 know what their into-store price was, I've made -- I've had
16 to make assumptions of that. We only know the out-of-store
17 price from the testimony as I understand it.

18 Q. But we notice in here that the analysis, though,
19 that you just did on Mr. Brandsma's testimony at least does
20 not suggest that they're selling it at less than Class I --
21 using less than Class I prices; right?

22 A. Yes, that's correct.

23 Q. All right.

24 A. It appears that you can have a normal profit and
25 include the Class I price -- cost, rather -- in that

1 determination. That's the conclusion that -- one of the
2 conclusions you can reach from that analysis.

3 Q. And there's -- I don't know how much of the
4 testimony you've read or has been related to you, but the
5 testimony has been -- at least from some of the producer-
6 handlers, was that they do not try to sell below the Class I
7 price. In fact I think one of them even said, "I take the
8 Class I price plus my costs plus distribution plus packaging
9 plus a profit and use that to set my prices for my
10 customers," right? Are you aware of that testimony?

11 A. Other than the testimony about Whatcom County, I
12 unfortunately did not hear most of the producer-handler
13 testimony.

14 Q. Okay. For the moment, though, let's just -- you
15 have no reason to believe, for what you know, though, that
16 any of the producer-handlers do in fact sell at a Class --
17 less than a Class I price at this point; right?

18 A. I really don't know.

19 Q. Okay. Now, basically, as I see it here, your raw
20 product -- in a sense, you might have a cost of goods -- it
21 depends on where you draw the line, but let's just use it on
22 the raw product issue. You've got the price that you pay
23 into the -- that you sell it for, and then you've got back -
24 - I mean you sell it, and then you would pay a classified
25 price for that; right?

1 A. Yes.

2 Q. Now, the assumption -- now, this was on the plant
3 side; right? You've done no tie-in to the farm side; right?

4 A. This is the plant side, that's correct.

5 Q. And I think your assumption, and I think even
6 some of your testimony in Phoenix, was that then the
7 producers get the blend price, the farm gets the blend
8 price, and then they have to make it or break it at the farm
9 level based upon that blend price. Right?

10 A. Yes. A regulated handler -- a regulated farmer
11 would receive the blend price, that's correct.

12 Q. So in this particular situation, if they were
13 fully regulated, they would get back -- the farm part would
14 get the blend price, assuming that they're two different
15 entities, but for the moment we'll do that. They get the
16 blend price; right?

17 A. The farmer would get --

18 Q. And then -- but the -- and the plant -- but the
19 plant pays in the classified price.

20 A. Farmer gets blend, plant pays Class.

21 Q. Now, as I recall, you haven't done any accounting
22 for farms, to speak of; right? I mean, you don't really
23 know farm costs or anything of that nature, right, on a --
24 as extensively as you know plant costs?

25 A. The firm and my personal involvement with -- on

1 the farm side of things is considerably less than on the
2 processor side. However, the -- you can't be in the dairy
3 business, in the dairy consulting business, like I am and
4 like our firm is without paying attention to the main -- the
5 major raw material that the processor buys, so I do follow
6 costs to produce statistics as published by USDA and the
7 Pennsylvania Ag Statistic Service and have attended many,
8 many hearings where those statistics are presented, and we
9 do represent several dozen dairy farmers in our -- in
10 Pennsylvania, in our practice. So I have some exposure to
11 it.

12 Q. Isn't it safe to say, with that exposure, that
13 during the year 2003, that for many farms, we can't say, you
14 know, percentages, we don't know that, we don't have all the
15 statistics nationwide, but by and large the cost of
16 production exceeded the blend prices that they were
17 receiving? Right?

18 A. I've seen some of that, yes.

19 Q. So when there was producer-handler testimony to
20 the fact that there were months and periods of time in which
21 their costs of production exceeded the blend price, you
22 would not find that, in general, unbelievable, would you?

23 A. And I think I've heard some of that testimony,
24 and I would say that cost to produce is very dependent upon
25 the size of the -- of the farm operation, so the smaller

1 farmer would be less likely to be -- strike that -- would be
2 more likely to be above the blend than the very large
3 producer, where he would be at or perhaps below the blend.

4 But 2003 was a challenging year for farmers,
5 there is no question about that.

6 Q. So if you take your pro forma and you take the
7 position that they are selling their milk, basically, at the
8 Class price, and I think even your assumption here is that
9 it's at that level, and instead of -- the difference there
10 would be that their cost of their raw milk or their cost of
11 sales is what they're actually paying on the farm; right?

12 A. For a producer-handler, that's correct.

13 Q. All right. And to the extent that they are
14 approximating those prices now, a change by the Secretary
15 would mean that they have an additional cost of the
16 difference between the classified price and the blend into
17 the pool, that they don't get back; right?

18 A. Your assumption is that their cost to produce is
19 at or above the Class price now.

20 Q. That's correct.

21 A. And I think the -- and maybe I misspoke, so I
22 want to make sure that we're clear on this communication.

23 The -- I thought that the question earlier was:
24 if I thought -- if I was aware that the cost to produce was
25 above the blend price.

1 Q. That was right, and I forgot to take you to the
2 next step. There's even some testimony that at times it
3 exceeded the Class prices.

4 A. I have not seen that sort of an analysis. I've
5 seen statistics where cost to produce is above blend, and
6 that I would agree with. Class above the Class prices in a
7 heavy Class I situation, as this pro forma is prepared, I -
8 - I would -- I would question that.

9 Q. Are you aware of what the differential is in
10 Seattle, the Class I differential?

11 A. Not without looking.

12 Q. If I told you it was a dollar-ninety, do you know
13 if that's correct or incorrect?

14 A. I certainly -- I don't see any lawyers jumping up
15 and objecting.

16 Q. So with the low prices last year, I mean, it
17 could have been a very low Class I price; right?

18 A. Yes, we did have a low Class I price in -- I
19 mean, I studied 2003, and we had what I would label "a low
20 Class I," there isn't any question.

21 Q. And then there was some -- and Class II is the
22 Class IV price plus 70 cents?

23 A. Yes.

24 Q. And there were some Class IV prices in the 8-,
25 9-dollar range?

1 A. Yes.

2 Q. And do you know many farmers, even of the larger
3 size, that were producing milk at 10 dollars?

4 A. There are costs to produce numbers, in America,
5 of -- in that 10-dollar range.

6 Q. Small percentage, though, right, of a very large
7 size?

8 A. Yeah, large -- as I said, the larger the size --
9 and some of it is also determined upon the age of the
10 operation.

11 Q. And there's a lot of variables, but the point of
12 it is that the price -- the classified prices last year were
13 -- and the record will reflect what they were, but they were
14 low; right?

15 A. Yes. And I would say -- and I think this is in
16 response to last year's price, I don't want to lecture here
17 at all. I think it's important that we focus on some more
18 average kind of activities and not focus on just the very
19 lowest or the very highest, because that would lead the
20 Secretary to, you know, perhaps the wrong conclusion, so I
21 think it would -- you know, I'd encourage all of us to, you
22 know, take a -- take a view of a little longer time period.

23 Q. But your statistics, or I mean your table, 68,
24 only deals with January through June or July of 2003,
25 though; right?

1 A. That's correct.

2 Q. You chose that period.

3 A. Yes, I did, and I --

4 Q. And you chose that in the exhibit that talks
5 about the cost of plants and looking at an analysis of box
6 sales in Phoenix, right, for January through June?

7 A. Yes.

8 Q. Okay. Now, to the extent -- that is, if we look
9 at it from a producer-handler standpoint, that's going to
10 make the change, and assuming this is accurate, okay, their
11 cost of production, as compared to the classified prices
12 that they have to pay, they'd have to make an adjustment to
13 reflect that; right? Because all they're going to get's the
14 blend price.

15 A. They would -- we're separating producer-handler
16 into two pieces?

17 Q. Right. I mean, try to look to see whether this
18 would have an impact on producer-handlers.

19 A. Well, on the producer-handler -- and that's a
20 good question. On the producer-handler, on the plant side
21 of things, his operation would be precisely what I'm
22 presenting here.

23 Q. Right.

24 A. -- precisely, because we've included the Class
25 price.

1 Q. Right.

2 A. So the payment to the pool is in this P & L as an
3 expense. On the production side, the cost to produce would
4 be exactly the same --

5 Q. That's right.

6 A. -- as it is now; and if their cost to produce was
7 the blend or lower, their -- they would be at the same spot
8 of profitability, because they would be receiving that blend
9 price.

10 Q. But what -- in the past they were receiving the
11 classified price.

12 A. Well, in the --

13 Q. So they're receiving -- they're receiving right
14 now, at the farm side, they're receiving the classified
15 price for their milk.

16 A. When they sell it.

17 Q. When they sell it.

18 A. When they sell it at retail -- when they sell it
19 at wholesale.

20 Q. Right.

21 A. Yes. I think that the bottom line of this
22 analysis and the reason that we chose to do this pro forma
23 was to -- to test the theory of: is the business of the
24 regulated -- excuse me: is the business of the producer-
25 handler viable when regulated? That was something that we

1 thought was important for this proceeding.

2 Q. All right. Now, let's take that step. But if
3 the testimony was that their costs were at or near the
4 classified pricing, okay, as it stands today -- which they
5 get to keep all of, right, because they don't have to pay
6 into the pool. Right? They keep all their income.
7 Correct?

8 A. That's my understanding, yes.

9 Q. And they have their Class I sales, that you're
10 approximating; right?

11 A. Yes.

12 Q. The difference would be that they have to pay the
13 difference between the Class price and the blend price into
14 the pool, that they're not paying now; right?

15 A. That would be the difference. And again, just so
16 that everyone's clear, that is -- that is what's in these
17 numbers on the pro forma, on Exhibit 68.

18 Q. They're already included in here?

19 A. Yes, they are.

20 Q. And the total enterprise, with the farm --

21 A. I don't have any farm information.

22 Q. I understand that, but I want to bring this up,
23 is that with the farm level, they're receiving -- and it's -
24 - because it's one entity and it's hard to separate, right?
25 I mean, you know, you can do enterprise accounting, but

1 there's still -- it's still one tax return and one net
2 profit, right, you would agree with that?

3 A. That's generally how it's done.

4 Q. So you start with the gross sales, that you've
5 talked about, okay -- PD. We're forgetting that they're
6 regulated. PD. They have their plant costs, their
7 distribution costs, the costs associated with their
8 marketing, and what's left comes back to the farm, whatever
9 that is. Right?

10 A. That'd be one way of looking at it, yes.

11 Q. Okay. Well, let's look at it that way for the
12 moment. Okay?

13 A. Okay, I will.

14 Q. Now, the way that you have described that is, the
15 difference now -- I mean they -- at the point of being a PD,
16 they don't have to pay anything into a pool. Okay? They
17 get it all themselves. I think that's been the whole
18 dispute here.

19 A. And that's my understanding of how the operations
20 are now.

21 Q. All right. Now, if the testimony shows that
22 their costs have been approximating -- their cost of
23 production at the farm has approximated the Class prices --
24 okay? Are you with me?

25 A. I'm with you.

1 Q. Okay. -- then this scenario, in terms of the
2 profitability of the plant and their operation, doesn't
3 change, does it? They would be profitable as a total
4 enterprise, by the amounts that you have here; right?

5 A. That's correct. If their cost to produce --

6 Q. -- is at the Class price.

7 A. -- is at the Class price.

8 Q. Okay. Now, moving that -- everything the same,
9 but moving from the PD to the regulated handler -- okay?

10 A. Yes.

11 Q. -- the difference now between this and what we
12 just talked about is, is that they have an additional change
13 now, because instead of paying that classified price to the
14 farm -- right?

15 A. (Nods head.)

16 Q. -- they're going to have to pay the classified
17 price to the pool, and the pool's going to pay back a blend
18 price. Right?

19 A. Yes, that's the way it works.

20 Q. So now we've got the difference between those two
21 prices, that in a sense is going to be a cost to these
22 producer-handlers -- again assuming that their cost of
23 production is at the classified price.

24 A. Your analysis, you know, includes a very large
25 and key assumption, and that is --

1 Q. I understand that. We're going to get there.

2 A. -- and -- if I would just finish, please.

3 -- the assumption that the Class -- that the cost
4 to produce milk on the farm is equal to or approximately
5 equal to the Class value of that is something that I really
6 -- I have -- I can't comment on because I don't know.

7 Q. I'm not asking you to.

8 A. Okay.

9 Q. All right. I'm just asking you to assume it.

10 A. I will.

11 Q. Okay. Now, the record has reflected that during
12 this -- roughly this same period, that the average
13 difference between the blend and the classified pricing has
14 been about a dollar-seventy a hundredweight, and it varies
15 month to month, right, you would understand.

16 A. (Nods head.)

17 Q. Okay. So if you were to take, for example, the
18 3,525,000 pounds of Class I per month, times a dollar-
19 seventy --

20 And that may not be the right -- it may be a
21 little -- a number a little higher or a little bit lower,
22 but just to keep the math simple we'll say a dollar-seventy.

23 -- what do you get? Do you have a calculator
24 there? You do have a calculator; great.

25 A. The -- just to -- the dollar-seventy is a

1 per-hundredweight.

2 Q. Per-hundredweight.

3 A. So we have 35,250 hundredweights per month, times
4 a dollar-seventy, is 59,925.

5 Q. And that times 12 is what?

6 A. 719,000.

7 Q. Okay. So that exceeds -- for this moment,
8 assuming that the classified pricing is what their cost of
9 production is, that exceeds their current profit, under that
10 theory; right?

11 A. 719,000 is larger than 694,000.

12 Q. All right. Now, the only way, with this change
13 that's being proposed, in which that can turn from a
14 negative number into a positive number, is to the degree
15 that their cost of production is less than the classified
16 pricing; right?

17 A. That would be one element. There is obviously
18 another element.

19 Q. Which would be --?

20 A. Increase in their sale price to their wholesale
21 customers, which -- which is a -- that is an issue that the
22 statistics that I've looked at in this market would indicate
23 the prices do move with the federal announcements, up and
24 down.

25 Q. They move up and down. But it's also -- I think

1 if you looked at the statistics -- did you look at these
2 national statistics of retail price, is that where you got
3 the number?

4 A. Yes.

5 Q. And you'll notice that Seattle was one of the
6 highest markets in the country, wasn't it?

7 A. I did notice that.

8 Q. Yeah. Although it had one of the lowest Class
9 prices. I don't know whether you -- you're probably not --
10 didn't see that, but, you know, it's one of them.

11 Now, with that, the probability of a small
12 producer-handler being able to change the market -- it's a
13 very competitive business; right?

14 A. Sure.

15 Q. There are techniques, and some are better than
16 others, at getting more out of the market than others, but
17 that's pretty well -- you know, that's not going to be a
18 major movement. I mean, you'd have to agree with that;
19 right?

20 A. I would say that the -- as a market incurs
21 additional costs -- and I'm not talking about just the
22 producer-handlers but the entire fluid milk market. As they
23 incur additional costs, they pass them through the system to
24 their customers. Some struggle, sometimes, to have that
25 happen, but that does happen.

1 So I would say that in addition to the cost to
2 produce going up or down, the price into the stores or to
3 the customers, whoever they are, is the other source of
4 revenue that a handler would have.

5 Q. I agree with that, but what I want to point out
6 -- but for your static analysis for this period of time, to
7 change that, we would have to change the cost of production;
8 right?

9 A. Again, not to be repetitive: either that or the
10 sale price to the customers.

11 MR. YALE: Thank you.

12 THE COURT: Mr. Ricciardi, do you have some
13 questions of this witness?

14 MR. RICCIARDI: I do, Your Honor. Do you want me
15 to get started or do you want to look at whether or not
16 you're going to take a break?

17 THE COURT: It's too early for a break.

18 MR. RICCIARDI: Okay. That's fine.

19 THE COURT: Unless someone really needs one.
20 Does anyone need a break?

21 (No response.)

22 THE COURT: Let's keep going for a while.

23 MR. RICCIARDI: Al Ricciardi, for Sarah Farms.

24 CROSS-EXAMINATION

25 BY MR. RICCIARDI:

1 Q. Good afternoon, Mr. Herbein, once again.

2 A. Hello, Mr. Ricciardi.

3 Q. Nice to see you. One of the things that CPAs
4 will also do, in trying to do an analysis, is to rely upon
5 actual data if it's available; correct?

6 A. Yes.

7 Q. And I think you testified at the previous hearing
8 that there are -- there is at least one client in the
9 Pacific Northwest that does business with Costco, and I
10 assume that client is Wilcox Dairies?

11 A. Yes.

12 Q. So in your files at your firm, you would have the
13 actual costs of production for the Wilcox Dairy operation;
14 correct?

15 A. Yes.

16 Q. And also in your files you would have the actual
17 invoices that Wilcox has with regard to any agreement it has
18 to sell to Costco; correct?

19 A. No. Our engagements at Wilcox have not been that
20 comprehensive, as to see contracts with -- with any of their
21 customers.

22 Q. And for your engagement in this particular
23 matter, you have not requested that information from Wilcox;
24 correct?

25 A. No.

1 Q. And you have not relied upon the actual plant
2 data for plant costs, transportation, et cetera, in your
3 study, as part of Exhibit 68; correct?

4 A. 68 has really nothing to do with a Costco-type
5 analysis. That -- that analysis was our Exhibit 25(e) in
6 the Phoenix --

7 Q. You didn't use any actual data from Wilcox for
8 Exhibit 68; correct?

9 A. That's correct.

10 Q. And one of the conclusions that you drew in
11 Phoenix was, essentially, that with regard to box stores --
12 and Costco would be one of those, in fact Costco was the one
13 you were talking about -- that a regulated handler could not
14 compete with a producer-handler for that type of business;
15 correct?

16 A. Or a producer-handler would have a substantial
17 advantage, if you look at it from the other side of the
18 coin.

19 Q. I think what you actually testified to is the
20 regulated handler couldn't do the business because it
21 wouldn't be profitable for them, and I can find that
22 testimony, if you'd like me to.

23 A. Yes. No, I think that's -- I think that is the
24 conclusion you can reach from my study.

25 Q. Wilcox makes a profit; correct?

1 A. That's really a proprietary issue that I'm not
2 authorized to discuss.

3 Q. Wilcox is a reasonable operator; correct?

4 A. I would think so.

5 Q. They're efficient; correct?

6 A. Yes.

7 Q. They would not continue in business if they were
8 losing money; correct?

9 A. It would be difficult.

10 Q. So we can make an assumption, therefore, that
11 they are in fact profitable and the business that they have
12 with Costco is profitable; correct?

13 A. That would require a detailed analysis of Costco
14 and all the other elements of their -- their business. It's
15 been my experience that sometimes companies survive and
16 sometimes even prosper with having one segment of their
17 business as being very profitable, another segment not being
18 profitable, and I haven't made any analysis of Wilcox in
19 that regard.

20 Q. So we can't -- given at least that information,
21 we can't take a broad conclusion, as Exhibit 25(a) attempts
22 to, that in fact a regulated handler can't compete with a
23 producer-handler for business such as Costco, can we?

24 A. No.

25 Q. Okay. And --

1 A. Excuse me.

2 Q. Yes.

3 A. I think we can -- I had your question in reverse.
4 I'd like to change my answer to:

5 You can, because my analysis is a detailed cost
6 analysis, a specific cost center analysis, of what the
7 likely outcome would be of a regulated handler doing
8 business with Costco.

9 Q. And we -- I don't want to go through this in --
10 because we've done it before, but: that's based upon a
11 database that you hand-selected from 150 down to 50 down to
12 20, and it has nothing to do with any producer-handlers in
13 131 or 124, and so we don't have actual cost data; that is
14 your assumption based upon your own proprietary data.
15 Correct?

16 A. Not with -- no. With respect to the Costco
17 analysis, that's a specific cost study. You're taking part
18 of your analysis out of my plant-by-size study and
19 interphasing that into the like-Costco study, and they are
20 two separate analyses, done, as I testified, really entirely
21 different ways.

22 Q. I'm going to let the previous testimony stand,
23 other than this, to make sure that I understand: that you
24 don't have, in your study, in any of the studies, any
25 specific cost data from Sarah Farms; correct?

1 A. That's -- unfortunately, that's the answer, yes.

2 Q. And you also -- your firm represents a regulated
3 handler in Colorado, that also does business with Costco;
4 correct?

5 A. Yes.

6 Q. And what is the name of that client?

7 A. Well, the -- a former supplier of Costco as --
8 Robinson Dairy.

9 Q. And you weren't here for the testimony of
10 Mr. Hettinga, but he also testified that he was asked by
11 Costco to provide a price and wasn't able to get the
12 business because it wasn't even close to what Costco wanted,
13 and so now we have other information that a producer-handler
14 is having a difficult time in trying to price with Costco,
15 at least in another market.

16 You didn't include any of that information in
17 your original study; correct?

18 A. I wasn't aware of that -- actually, that might
19 have been in the direct testimony of Mr. Hettinga, that I
20 did read, but I did not use it in any way.

21 (Musical tone playing.)

22 MR. RICCIARDI: I'm enjoying the serenade.

23 (Laughter.)

24 MR. RICCIARDI: After the serenade, Judge, just
25 give me a moment.

1 THE COURT: You can have it.

2 MR. RICCIARDI: It did break my concentration for
3 a bit. It was lovely, though.

4 (Pause.)

5 MR. RICCIARDI: No further questions at this
6 time. Thanks.

7 THE COURT: Ms. Deskins, do you or your
8 colleagues have any questions at this time?

9 MS. DESKINS: I do have some questions. Charlene
10 Deskins, Department of Agriculture, USDA.

11 CROSS-EXAMINATION

12 BY MS. DESKINS:

13 Q. On your -- I just want to understand, on Exhibit
14 68 you have -- it's for a 12-month period ended December 31,
15 2003?

16 A. Yes.

17 Q. Okay. And you said at the end, though, it came
18 from a 7-month period?

19 A. That's correct.

20 Q. What's the 7-month period?

21 A. January 1st, 2003, through July 31st, 2003.

22 Q. Is there any reason you couldn't have used say a
23 12-month period starting from July 2003 and then going back
24 12 months?

25 A. That could have been done. I chose to use the --

1 as I think I said earlier -- the 7 months of 2003 because
2 that's what was being utilized by myself and others in the
3 earlier session of this hearing, so I simply didn't want to
4 have different sets of statistics in the hearing record, I
5 thought it would be clearer this way.

6 Q. Okay. And in order to get it for a 12-month
7 period you did some sort of a factor, to change the 7, to
8 normalize it for 12 months?

9 A. Yes. What I did specifically is: both for the
10 cost of milk and the sale, I determined an average cost and
11 an average net sale price for the 7-month period, simply by
12 taking the 7 months and dividing the total by 7, and that
13 gave me a number, and then I applied that to the number of
14 gallons for a 12-month period, to give me revenue and cost
15 of milk.

16 Q. Okay. And then for these other figures in here,
17 such as shrink, you just used the same number for each
18 month?

19 A. Per gallon.

20 Q. Per gallon.

21 A. It's -- these are all per-gallon numbers.

22 Q. Okay.

23 A. So then I -- I simply used an annual volume times
24 a per-gallon number to get a full calendar year of results,
25 of pro forma results.

1 MS. DESKINS: I don't have any other questions.

2 CROSS-EXAMINATION

3 BY MR. ROWER:

4 Q. Jack Rower, Mr. Herbein. Welcome back.

5 A. Thank you. Pleased to be here.

6 Q. In the plant overhead line item and the delivery
7 line item, is labor cost embedded in there?

8 A. Yes. Both of those categories include labor,
9 payroll, taxes, and all costs associated with employment.

10 Q. And labor costs are just averaged somehow, from
11 across the country, using -- you used the CPI, if I
12 understood --

13 A. Yes. What I did, as I testified to in Arizona --

14 Q. Yeah, I apologize if I'm asking you to repeat.

15 A. That's fine. The statistics come from Exhibit
16 25(a), plant C --

17 Q. Okay.

18 A. -- and there is an "Order 124" column, and that
19 column was calculated by taking information from our
20 database and adjusting it to the local costs in the Seattle-
21 Portland region, using a CPI factor, so that if in my
22 database I have New York City and Miami, I've adjusted to
23 Seattle and Portland based upon the respective CPI
24 difference in those regions.

25 Q. The reason I ask is, Mr. Yale in his cross-

1 examination was asking about business practices, and in your
2 -- to your knowledge, are the plants in Order 124, the
3 larger plants, especially subject to collective bargaining
4 agreement, are they unionized?

5 A. Yes.

6 Q. And how would that compare, in your opinion, to
7 producer-handler operations which may or may not be, I mean
8 in your experience?

9 A. My experience, I've never encountered a producer-
10 handler that was organized -- that had an organized labor
11 contract, and the dairy industry pretty much throughout the
12 United States has a heavy preponderance of organized labor,
13 a lot of Teamsters contracts, throughout the country.

14 Q. And how would you expect that that might affect a
15 comparison of 124 as it is versus 124 as it appears --
16 regulated handlers in 124, Order 124, as it appears in your
17 pro forma, would that make a large -- would it skew the
18 results somewhat here?

19 A. I would --

20 Q. -- especially as you get to the larger plants?

21 A. I think there is -- I think you're on an area
22 that would have an effect and my costs would have a union
23 taint to them, because the majority of the companies in our
24 database are union. So I would say that the localized --

25 Q. They would be biased --

1 A. -- wage -- excuse me. The localized wage level
2 in 124, in a producer-handler, would be slightly lower
3 because of the lack of union influence.

4 Q. And those kind of influences just wouldn't be
5 reflected in the use of the CPI on your data overall, those
6 localized --

7 A. The statistics, I -- as a matter of fact, the
8 labor statistics that are included in the data that I used
9 for adjustment would reflect whatever portion of region is
10 subject to organized labor, because they use average labor
11 dollars, so I think it would be -- it would be in there, but
12 I think we're comparing that to a part of the market, that
13 being producer-handlers, that are largely non-union.

14 Q. Exactly, yeah. That was my point.

15 A. So I think that when we bring these numbers for
16 labor into 68, we probably overstated the labor cost to some
17 extent.

18 MR. ROWER: Thank you very much.

19 THE COURT: Any redirect? Mr. English.

20 MR. ENGLISH: Charles English, for Shamrock Foods
21 and Dean Foods.

22 REDIRECT EXAMINATION

23 BY MR. ENGLISH:

24 Q. Just so the record is clear, and I'm not sure
25 what your answer actually was to the question, but you were

1 asked a question or two by Mr. Ricciardi with respect to
2 Mr. Hettinga's testimony, for which you weren't here
3 yesterday, and as part of that he did not -- and this had to
4 do with the idea that Mr. Hettinga had been solicited by
5 Costco for business, outside of Order 131.

6 As part of that, he did not tell you that
7 Mr. Hettinga acknowledged that that was not California, that
8 the market -- that solicitor for Costco was not California,
9 but beyond that he refused to disclose where the market was.

10 In that event, given not knowing where the market
11 is, can you reach any conclusion about the ability of a
12 producer-handler in Arizona to compete on Costco business
13 somewhere outside of Arizona and California?

14 A. I sure can't.

15 MR. ENGLISH: Thank you.

16 THE COURT: Mr. Beshore, you had one?

17 MR. BESHORE: Just one question.

18 REDIRECT EXAMINATION

19 BY MR. BESHORE:

20 Q. The study that you did in Exhibit 25, testified
21 to down at -- in Phoenix, with respect to the Costco sale,
22 was an Order-131-specific study, was it not?

23 A. Yes.

24 Q. And it started with known out-of-store prices in

1 Phoenix as the top line; correct?

2 A. Yes. The 3.29 was an actual price that was
3 obtained from the stores.

4 Q. Over a period of months, the months reflected in
5 the table, whatever it is.

6 A. Yes.

7 Q. Okay. And the -- you know, the cost -- the milk
8 price was the Order 131 price, and it was all Order-131-
9 specific, was it not?

10 A. Yes, January to June of 2003.

11 Q. Okay. So when you're asked whether Wilcox's
12 sales in another order don't show something about that,
13 you're dealing with apples and oranges, aren't you, or
14 something like that?

15 A. Yeah. That would be -- it would have been wrong
16 to include Wilcox's milk costs because we were looking at
17 the other order, 131.

18 Q. And if you were going to do a study in 124, you'd
19 have to have all the information about 124 that you -- you
20 know, that you had for 131, and you didn't do any study in
21 124 about -- like that.

22 A. That's correct, I did not.

23 MR. BESHORE: Thank you.

24 THE COURT: Anything further? Go ahead.

25 MR. MILTNER: Ryan Miltner, for Mallorie's Dairy,

1 Smith Brothers Farms, and Edaleen Dairy.

2 REDIRECT EXAMINATION

3 BY MR. MILTNER:

4 Q. Good afternoon, Mr. Herbein.

5 A. Hello, Ryan.

6 Q. You had a brief comment which addressed
7 Dr. Knutson's criticism of your data selection. Do you
8 recall making some comments on that?

9 A. Yes, I do.

10 Q. Okay. I'd like to follow up on that just a
11 little bit. You described two methods for choosing data
12 from your database, and I think you called them judgmental
13 selection and random selection, and you indicated that both
14 were proper methods of selecting data, depending on the type
15 of study you were conducting. Is that accurate?

16 A. Yes. And I -- if I said random, I intended to
17 say "statistical."

18 Q. Okay. And that may have been my substitution,
19 not yours.

20 And you indicated that when you may have a study
21 peer-reviewed, one of the things they look at is: to
22 ascertain whether you chose the correct method of selection;
23 is that correct also?

24 A. Yes. Yes, peer review of our CPA firm by the
25 peer review team that is selected to look at our way of

1 doing audits.

2 Q. And will they -- so they'll look at the data
3 you've compiled and make a determination as to whether you
4 made the right pick in -- no pun intended, but the right --
5 you were correct in using a judgmental selection versus a
6 statistical selection.

7 A. Yes, that is one of the -- one of the elements
8 that the peer review team reviews in reviewing audit work
9 done by our firm.

10 Q. Okay. What will the peer review team look at, if
11 you know, to make that determination, as to whether your
12 selection was correct?

13 A. They -- and again, just so the record's clear:
14 the peer review process of CPAs is performed on the ad test
15 [phonetic] function engagements, meaning audits, and they -
16 - and what they look at in that -- and I gave the example, I
17 think, of inventory and accounts receivable auditing, they
18 would look at: what is it that's being audited; they would
19 look at: how was the selection conducted, what was the
20 results of the selection and of the audit; and then there is
21 a -- there's professional judgment that is applied by the
22 peer review team captain, and they either conclude that your
23 selection methodology was correct or incorrect.

24 Q. So they will want to know -- if it was a case of
25 judgmental selection, they'll want to know what criteria you

1 used to make your selections.

2 A. Yes, and that would be documented in the work
3 papers, in the accountant's work papers, there'd be a
4 memorandum to the file, something of that sort, that --

5 Q. Okay.

6 A. -- would explain that. And we have a series of
7 checklists that we utilize to -- to document those -- those
8 factors.

9 Q. And would they want to look at perhaps the total
10 pool of data from which those -- those selections were made?

11 A. Yes. They'd look at the universe.

12 Q. And would they want to look at -- and they would
13 get this perhaps by process of elimination, by -- but: what
14 data was rejected in making those selections?

15 A. They would focus on the universe, what type of
16 components are in the universe, and they would look at the
17 extent of testing performed and the method by selecting the
18 testing degree. They, as far as I've observed, and as far
19 as the -- my training, you don't have to look at what you
20 didn't test.

21 Q. But by knowing what the universe is, and the
22 criteria, they will have some idea of what was screened out
23 of the selection.

24 A. Sure.

25 Q. And if I recall your testimony in Phoenix, the

1 150 plants that were in your database contained proprietary
2 information and you were asked some questions about the data
3 that was in that database, that you would not provide
4 because it was proprietary information.

5 A. Yes, that's correct, that's our agreement with
6 our -- with the participants: that the data is not
7 disclosed on an individual company basis.

8 Q. Okay. And the criteria that you've provided for
9 the Secretary -- you were asked about the criteria that you
10 used to select the 20 plants you chose, and you said that
11 "The criteria we were looking for was plant size."

12 A. That was the primary criteria.

13 Q. Okay. And so if all we know is that you picked
14 by plant size, and we know that there were -- there was
15 minimal representation, if any, in the two orders affected
16 by this hearing, those would be important criteria, in a
17 peer review, to determine whether a judgmental selection was
18 properly done, or even if a judgmental selection was
19 preferable to a statistical selection; is that correct?

20 A. The peer review of this selection would involve
21 looking at the universe, and the universe is our database,
22 and one of the factors -- and that's why I said size was not
23 the only -- was a primary criteria but not the only one. So
24 for -- and I used the example of: in our database we have -
25 - believe it or not, there are a couple of plants in America

1 that put milk in glass bottles, and that would be something
2 that would be excluded from the sample.

3 So another criteria that would be shown in our --
4 in our work papers is the product mix, and here we're
5 talking about plants that were producing gallons and
6 half-gallons in plastic containers or paper containers, so
7 that would have been -- that would be another thing that the
8 peer review would look at, I believe.

9 Q. And if I remember, we asked about product mix and
10 what product mix was represented in Exhibit 25, and I don't
11 recall what your exact answer was, but either you didn't
12 have that information prepared or you weren't able to
13 provide it, for proprietary reasons.

14 A. The product mix -- and I'll answer that now, and
15 if I -- maybe I -- we didn't have proper communication.

16 The product mix in -- in the plants included in
17 25(a) would include all of the products that we've talked
18 about here at this hearing, gallons, half-gallons, quarts.
19 There would also be some school milk in those plants. So it
20 covers the -- the normal array of products produced by a
21 dairy plant of that size today, really anywhere in the
22 country.

23 Q. And as far as the array of products covered, we
24 may have that, but we don't know the actual mix as far as
25 percentages of gallons produced compared to quarts or school

1 milk.

2 A. No. No, I -- I mean, that data exists in my
3 database, but I don't know that as I'm sitting here.

4 Q. And in fact that probably varies across your six
5 categories, the product mix in column A may be very
6 different from the product mix in column E or G -- or E
7 or F.

8 A. Yes. It tends -- you'll tend to find in the
9 larger -- in the larger plants, E and F, more gallons and
10 half-gallons and less pints and half-pints.

11 Q. And since we're talking about peer review, and
12 the Cornell study has also been brought up in this hearing:
13 The Cornell study was a peer-reviewed study; is that
14 correct?

15 A. I really don't know -- I don't know what review
16 the Cornell study was subjected to, but it would clearly not
17 have been subjected to a peer review in the context that I'm
18 using "peer review." Peer review of CPA firms is an
19 entirely different process than the peer review applied to
20 an academic study at the university level. They're not at
21 all comparable.

22 Q. Okay.

23 A. And I don't really know anything about the
24 university peer review.

25 Q. Was the data you prepared, the report you

1 prepared in Exhibit 25(a) and Exhibit 68, subject to any
2 peer review, either academic or through an accountancy
3 board?

4 A. No. And peer review occurs every three -- no --
5 for a couple of reasons, the primary one of which is: peer
6 review occurs every three years, and it is an after-the-fact
7 review, so our firm's next peer review will be the summer of
8 2005, so -- and would this assignment be selected for
9 review? I have no way of knowing.

10 Q. When you have a compilation done by judgmental
11 selection rather than statistical selection, is there any
12 difference in the predictive value of that study compared to
13 one that has been statistically selected, in your opinion?

14 A. No, none whatsoever. If the selection
15 methodology being statistical or judgmental is correct, the
16 level of confidence would be the same.

17 Q. Provided that the selection was correct.

18 A. If the selection's correct, the results would be
19 comparable.

20 Q. When you were -- Dairy Farmers of America was the
21 organization that contacted you to compile Exhibit 25(a);
22 is that correct?

23 A. Yes.

24 Q. Do you recall when Dairy Farmers of America
25 contacted you to compile that study?

1 MR. BESHORE: Your Honor, may I just object at
2 this point. I think we've been constrained -- this is --

3 THE COURT: I'm going to sustain the objection.

4 MR. BESHORE: It's beyond the scope.

5 THE COURT: He's here to testify on Exhibit 68
6 today, and the questioning about -- there was a lot of
7 questioning, as I recall, about his selection process and
8 his payments [phonetic] and all that on preparation of the
9 exhibit that he presented back in Phoenix, but I think for
10 today you're going way beyond the scope.

11 MR. MILTNER: Your Honor, he's addressed
12 Dr. Knutson's criticism of his selection and reintroduced
13 that topic today.

14 THE COURT: But the question you just asked him
15 was one that he was, I believe, asked -- I mean, I may be
16 wrong, I don't claim to have memorized the 2500-page
17 transcript that we had, coming in here, but just -- you
18 know, maybe I'm just getting deja vu all over again, but I
19 swear that I've heard this question asked of him, but --

20 MR. MILTNER: I don't recall that from the
21 transcript either, Your Honor, and -- I don't recall, but if
22 --

23 THE COURT: Well, you know, okay --

24 MR. MILTNER: -- can answer that, I'll --

25 THE COURT: If you want to ask him a question or

1 two on it, I think -- I'm thinking you're overstepping it,
2 but in the event that my recollection is wrong, and I don't
3 have it all in front of me, I'll let you ask it.

4 MR. MILTNER: That's my last question on 25,
5 Your Honor.

6 THE COURT: I will hold you to that too.

7 MR. MILTNER: Thank you.

8 A. I don't recall the specific timing except that we
9 were all in Phoenix or Tempe, Arizona, at some point, and I
10 was engaged a couple of months before then. I mean, I have
11 a signed engagement letter that has a date on it, but I
12 don't remember exactly.

13 BY MR. MILTNER:

14 O. Okay. My last question deals with Exhibit 68, as
15 promised, and the Department asked some questions about
16 labor costs, and union labor in specific, and its inclusion
17 in the operating expenses on Exhibit 68, and you made the
18 statement that you are not aware of any producer-handler --
19 and I don't recall if you qualified it as producer-handler
20 in the Pacific Northwest or any producer-handler -- that
21 used union labor. Is it your testimony that you're not
22 aware of any producer-handler that uses union labor?

23 A. That's my testimony, and just to be clear: I'm
24 not aware of a producer-handler that has organized labor in
25 the plant, in their distribution, or on their farms, but I

1 haven't studied all producer-handlers in America. There
2 could well be an organized labor -- I find it, with what I
3 know about the industry, unlikely, but I -- you know, that's
4 all I know.

5 Q. So you are unaware that Smith Brothers Farms
6 employs union employees.

7 A. I'm unaware of that.

8 MR. MILTNER: I don't have anything else,
9 Your Honor.

10 THE COURT: Thank you. Anything else, can I let
11 this witness go? Mr. Rower, go ahead.

12 RECROSS-EXAMINATION

13 BY MR. ROWER:

14 Q. Jack Rower again, Mr. Herbein. Based on your
15 studies and Exhibit 68 today, is it your opinion that the 3-
16 million-pound limitation in Proposals 1 and 3 are
17 appropriate?

18 A. Yes. My conclusion, after studying a lot, and
19 looking at a lot of statistics, is that the size -- and this
20 comes from the costing and economic analysis that I've done:
21 as the plant gets bigger, its costs get lower, and the need,
22 the economic need, to not pay into the pool or be regulated
23 disappears because of the advantage of getting bigger. So I
24 -- that's my conclusion.

25 MR. ROWER: Thank you very much.

RECROSS EXAMINATION

1
2 BY MR. TOSI:

3 Q. Thank you for appearing, Mr. Herbein. I'm Gino
4 Tosi, with USDA here in Washington, D.C.

5 A. Good afternoon.

6 Q. Based on your answer that you just gave Mr. Rower
7 to his question, to the extent that federal orders provide
8 no regulatory exemption from pooling and pricing of
9 regulated handlers that are above 150,000 pounds, how does
10 your opinion square with -- to the extent that a handler,
11 who distributes on routes more than 150,000 pounds, why the
12 difference between 3 million pounds for a producer-handler
13 and 150,000 pounds for what the order's referred to as
14 "exempt plants"?

15 A. It's a good question. I haven't really thought
16 about that or studied that at all. However, it seems to me
17 that an issue would be the -- the producer-handler produces
18 his own milk, and so that would be a difference from a
19 processor -- a very small processor who was buying his milk.
20 It would be a middleman kind of situation. But I haven't --
21 I really haven't looked at that at all, so I will have
22 nothing further.

23 Q. And may I ask you a couple of hypothetical
24 questions, that go something like this.

25 Based on your study of the issue and your

1 participation in this proceeding, is there something about
2 the nature of the entity that's called a "producer-handler"
3 where there's the combination of own-farm milk production,
4 their own processing, all done at their own enterprise and
5 risk and distribution, that there's something in that mix of
6 risks, when you combine the features of production with
7 processing and distribution, that gives a degree of
8 reasonable justification for why a level -- or a cushion, if
9 you will, at somewhere between 150,000 pounds and 3 million
10 pounds?

11 A. Yes. I think the justification is the decreasing
12 plant costs as the processing volume increases.

13 Q. And in that regard, there's a certain amount of
14 acknowledgment of the risk of production, production meaning
15 the farm side of the producer-handler's operation, that
16 enters into that mix, that would provide a reasonable
17 justification for why to that level the Secretary should
18 choose to or should consider not regulating the producer-
19 handler up to that 3-million-pound threshold?

20 A. Yes, I think that would be another -- another
21 factor to be considered.

22 MR. TOSI: Thank you very much.

23 THE COURT: You have another question, Mr. Yale?

24 MR. YALE: I have a follow-up on that one.

25 THE COURT: Go right ahead.

1 MR. YALE: Benjamin F. Yale, on behalf of
2 Mallorie's Dairy.

3 REXCROSS-EXAMINATION

4 BY MR. YALE:

5 Q. A follow-up on Mr. Tosi's question. As I
6 understand your testimony today and at Phoenix, you have not
7 done any study of the farm risk involved in a producer-
8 handler -- is that right?

9 A. The farm risk -- none.

10 Q. So how can you now testify that it's 3 million
11 pounds that there's a risk, that it measures off by the
12 production costs?

13 MR. BESHORE: Objection to the question. He did
14 not so testify. He's misleading the witness, it's a
15 mischaracterization.

16 THE COURT: You know, without having -- I'm not
17 taking exact notes on the wording of the question, but why
18 don't you try rephrasing your question.

19 MR. YALE: I'll withdraw the question and restate
20 it.

21 BY MR. YALE:

22 Q. You just answered that between 150,000 and
23 3 million, that there's a mix, I think the question talked
24 about: there was a mix of a risk of a producer on the
25 production side and a producer-handler, and the question is,

1 is at 3 million, in that cushion, cover that risk so that at
2 that 3 million, that the advantage of the production side --
3 the processing side, I'm sorry, offsets that production
4 risk. I think that fairly states the hypothesis that was
5 presented to you.

6 A. And my answer to that, Mr. Yale, is -- and was --
7 that when I look at the cost curve in the plant, I see a
8 decreasing cost as the plant gets larger, and that is -- and
9 at that point, of 3 million pounds, I believe that the
10 producer-handler can properly be included in the pool
11 because of the cost benefits that they arrive -- that they
12 derive from larger production volumes.

13 Q. Okay. But you also have testified you do not
14 know what -- the production risk a producer-handler has;
15 right?

16 A. No, I have no specific knowledge about that.

17 Q. All right. So let's go back to your statement,
18 let's ascribe a value, a variable, we won't put a number to
19 it, but a value of when it becomes profitable at the
20 production -- or the processing side, by your curve, because
21 that's what your study did, okay, and let's say that that's
22 A, and that's that level of profitability, but at -- you
23 would also have to say that on the production side there's a
24 risk value, right? There is some risk, you would agree, on
25 the production side?

1 A. Yes.

2 Q. And you would also agree that in an integrated
3 operation, that the risk of the farm and the risk of the
4 plant intermix and it changes the overall risk picture as an
5 entity, compared to their two separate ones; right?

6 A. I guess, as they say, not exactly, and I think I
7 can shortcut this with a more complete answer to Mr. Tosi's
8 question, and I think I was expecting to walk off the stand
9 here and be finished, and that caused me to be shorter than
10 I should.

11 What was going through my mind as I answered his
12 question was my general knowledge of the cost to produce,
13 and as I think I testified earlier this afternoon: smaller
14 producer, higher cost; larger producer, lower cost. And at
15 hearings like this and at hearings in Pennsylvania and at
16 the dairy forum earlier this week there was discussion about
17 the cost to produce milk, and as a producer-handler gets
18 larger, meaning more cows, intuitively, I assume, that the
19 industry statistics, that we've all seen, goes down.

20 So that's part of that risk: smaller number of
21 cows, higher risk; larger number of cows, lower risk, and
22 the risk is determined by how your cost to produce compares
23 with one statistic, the blend price, in a market.

24 So that's what was going through my mind as I
25 answered Mr. Tosi's question.

1 Q. But you have not identified the value of the risk
2 of a producer-handler at the production side; is that right?

3 A. I have not identified it nor quantified it
4 specifically.

5 Q. Right. So that you may, at a plant side, if it
6 was just a plant, that at 3 million, that there's a break
7 that starts to work your way, but if you add the risk at the
8 producer side, it may have to break at a higher rate to
9 offset the higher risk from the production side; right?

10 A. I haven't studied that.

11 Q. You haven't studied it. So the question, then,
12 is: You cannot tell this Secretary, and in this hearing,
13 that on a producer-handler, with production and processing,
14 that you have studied and identified the fact that at
15 3 million pounds a producer-handler can be profitable and
16 compete with a processor, have you?

17 A. No, I believe they can be.

18 Q. Have you studied that?

19 A. I believe they can be --

20 Q. Have you studied that?

21 THE COURT: If you can calm down.

22 MR. YALE: I'm sorry.

23 THE COURT: And if you could answer the question
24 that he's asking you, we can probably get out of here today.

25 A. It's my opinion, based on the studies that I've

1 done and the testimony that I've given, that the
2 3-million-pound cut-off is the right cut-off, at which time
3 they can be competitive.

4 BY MR. YALE:

5 Q. Without understanding the production value,
6 right? Without quantifying it.

7 A. Without making a specific study of the production
8 costs but having an opinion based upon, what I've just said,
9 I've just testified to, as to the cost to produce and the
10 relationship between size and cost at the farm.

11 Q. All right, let's talk about risk on size. We're
12 unfortunately going through a very difficult time on the
13 farm level, and in the Pacific Northwest you're aware of the
14 BSE?

15 A. Yes.

16 Q. Okay. You're aware of the bovine tuberculosis
17 issue that's starting to crop up in Arizona and Texas?

18 A. Yes.

19 Q. All right. And what's the response that happens
20 at those operations, do you know what happens, when they
21 discover those diseases?

22 A. Yes, I do.

23 Q. And what is that?

24 MR. BESHORE: Your Honor, may I inquire into the
25 relevance? Now, if we're going to get into BSE and bovine

1 tuberculosis, I think we're out of bounds.

2 THE COURT: Why don't you tell me where we're
3 going with this.

4 MR. YALE: I'll tell you exactly the -- Mr. Tosi
5 asked this witness whether he was saying that that 3 million
6 covered the mix of the risk of production.

7 THE COURT: Okay, but didn't you get your answer
8 to that question --

9 MR. YALE: No, I didn't, because he has said that
10 in his opinion, that as you rise and become bigger, that
11 that risk goes down, and I'm identifying a major area where,
12 as you get bigger, the risk increases, and that's what I
13 want to go with.

14 THE COURT: Okay, I'll let you go there, just --

15 THE WITNESS: Your Honor?

16 THE COURT: I'm not sure how relevant it is, but
17 I just want to -- you know, I just want to --

18 MR. BERDE: Your Honor, I object to the
19 mischaracterization of what I recall Mr. Tosi asking the
20 witness about. He asked, if I recall, about why we regulate
21 above 150,000 and why between 150,000 there should not be
22 regulation, up to -- between 150,000 and 3 million there
23 should not be regulation. That's what the correction of Mr.
24 Tosi's questions were about.

25 THE COURT: Yeah, but I think implicit --

1 MR. BERDE: He didn't get into the producer end
2 of the business whatsoever.

3 MR. YALE: We can let the reflect on that.

4 VOICE: Could we have a 1-minute break?

5 THE COURT: Well, I'm either going to call a
6 1-minute break or I'm going to -- I mean if we're going to
7 break, I'd just as soon -- assuming that Mr. Ricciardi is
8 going to be available with his witness -- why don't we just
9 take our 15-minute break now and then we're going to charge
10 on through, with any luck, after that. So it's about 11 or
11 12 minutes after; let's come back just before 3:30, okay,
12 and then hopefully we can go through with this, all the way
13 through. Off the record.

14 (Off the record and reconvened.)

15 THE COURT: On the record. Mr. Yale?

16 MR. YALE: Your Honor, I have no more questions
17 at this time.

18 THE COURT: Thank you, Mr. Yale. Does anyone
19 else have questions of this witness?

20 MR. BERDE: I do, but we're waiting for Mr. Tosi.

21 THE COURT: You need Mr. Tosi to be here for you
22 to ask your questions?

23 MR. BERDE: Well, it relates to a question --

24 THE COURT: Here he comes.

25 (Pause.)

1 THE COURT: Go ahead, Mr. Berde.

2 REDIRECT EXAMINATION

3 BY MR. BERDE:

4 Q. Following up on Mr. Tosi's questions, and I have
5 a couple more, by Mr. Yale:

6 With respect to a producer-handler below
7 3 million, is it fair to say that your conclusion that their
8 costs of operation are such as to not constitute a
9 significant enough impact, competitive impact, in the market
10 as to warrant a regulation?

11 A. That's -- yes, that's one of the -- one of the
12 opinions.

13 Q. And are you aware that the original justification
14 of the Secretary, going way back, in exempting producer-
15 handlers was the conclusion by the Secretary that producer-
16 handlers constituted an insufficient competitive impact in
17 the market as to warrant regulation?

18 A. Yes, I did read that statement in doing research
19 and preparation for this engagement.

20 Q. And essentially that's the rationale for today,
21 by the proponents, choosing that 3 million as the hard cap,
22 below which we permit the continuation of producer-handler
23 exemption and over which we propose their regulation.

24 A. Yes.

25 MR. BERDE: Thank you.

1 THE COURT: Are there any further questions of
2 this witness?

3 (No response.)

4 THE COURT: Mr. Herbein, thank you very much.
5 You may step down.

6 (Witness excused.)

7 THE COURT: Okay, Mr. Ricciardi, are you ready to
8 -- my understanding is that Mr. Ricciardi is going to call
9 his witness now, Mr. Swanson?

10 MR. RICCIARDI: Yes.

11 THE COURT: Mr. Ricciardi, call your next
12 witness, please.

13 MR. RICCIARDI: Al Ricciardi, on behalf of Sarah
14 Farms. Thank you, Your Honor. The next witness that we
15 will call is Tom Swanson.

16 THE COURT: Okay. Mr. Swanson, have a seat,
17 raise your right hand.

18 THOMAS SWANSON, OPPONENT'S WITNESS, SWORN

19 THE COURT: Can you please state and spell your
20 name for the record, Mr. Swanson.

21 THE WITNESS: Thomas Edward Swanson,
22 S-w-a-n-s-o-n.

23 DIRECT EXAMINATION

24 BY MR. RICCIARDI:

25 Q. Tom, thanks for taking the time to come here to

1 present information today. Can you tell us where you live.

2 A. Mesa, Arizona.

3 Q. And what do you do, Tom?

4 A. I am vice president and general manager of Food
5 City.

6 Q. And is Food City a division of Basha's?

7 A. It's one of the divisions under Basha's, Inc.

8 Q. And what is Basha's?

9 A. It's a family-owned company with 144 stores,
10 several different formats, you have the Basha's conventional
11 format, A.J.'s Fine Foods, Food City, and then Basha's
12 Denay.

13 Q. Let me ask you, first of all, where is -- where
14 are the Basha's stores generally located?

15 A. Predominantly in Arizona.

16 Q. Are there stores located outside the Arizona
17 area?

18 A. Yeah. There's one just over the border in
19 California and one in New Mexico.

20 Q. Tell me specifically the type of store that
21 Food City is.

22 A. Food City for the most part caters to the
23 Hispanics.

24 Q. And how many Food City stores does Basha's
25 currently have?

1 A. 57.

2 Q. And before I get into the growth of Food City, I
3 want to get a little bit more into your background. I think
4 that you told us currently that your position vice president
5 and general manager for Food City. Is that correct?

6 A. That's correct.

7 Q. How long have you worked for the Basha's company?

8 A. Around 21 years.

9 Q. And where did you start?

10 A. I started at a Basha's store on 7th Street, in
11 Thunderbird, stocking groceries at night.

12 Q. And tell us just briefly how you progressed up to
13 the current position that you have.

14 A. From there I was promoted to a night manager,
15 maybe a year after that to an assistant manager, then on to
16 a grocery manager, then I became a store director; about ten
17 years ago I was made a division supervisor, where I oversaw
18 a division of maybe 11 or 12 Basha's stores and then the one
19 Food City store, and I was promoted to vice president, oh,
20 four, five years ago.

21 Q. Now, you just said, I believe, that about ten
22 years ago there was one Food City store, and I think you
23 told us initially that there are now 57. Is that right?

24 A. That's correct.

25 Q. How has Food City grown so quickly from 1 to 57

1 stores in nine or ten years?

2 A. It's been very successful for the company. About
3 six years ago we bought a chain of 16 stores, there was a
4 Mega Foods, so that helped us grow dramatically, and then a
5 couple years ago we bought 21 of the former Southwest
6 Supermarket stores. So it's been a heck of a ride in ten
7 years.

8 Q. Okay. Let's talk a little bit about -- I think
9 you mentioned that the predominant demographic that
10 Food City serves is the Hispanic population in the Arizona
11 area. Correct?

12 A. In most of our locations, yes.

13 Q. And in terms of income level, can you -- would
14 you describe the income level as lower to middle income?

15 A. Again, in the majority of the locations it's
16 low-income.

17 Q. Okay. Is one of the responsibilities that you
18 have for Food City: determining the suppliers' product line
19 to be put in the stores?

20 A. In some cases, yes.

21 Q. With regard to Food City and Basha's, is it
22 important for the company to have at least two suppliers of
23 product for stores?

24 A. I mean that's very important to our company in
25 all areas, all categories, it's good to have more than one

1 supplier.

2 Q. And why is that?

3 A. If something happens to the other one, you've got
4 somebody to fall back on, whether it's a permanent problem
5 or a short-term problem, and it keeps -- it tends to keep
6 the other one honest.

7 Q. In your experience, if you have less than two
8 suppliers for a product line, does that potentially cause
9 any problems for Basha's, Food City, and its customers?

10 A. Less than two?

11 Q. Less than two. If you only had one, say, for
12 example, on a product line.

13 A. It can cause a problem, yeah.

14 Q. And what would that problem or problems be?

15 A. Again, if something happens to the single
16 supplier you have in that category, and, for whatever
17 reason, you can't get product from -- or merchandise -- from
18 them, you're in trouble at the store level and you're --
19 you're inconveniencing your customer.

20 Q. Does it also potentially have an impact on price?

21 A. Absolutely, it has a big impact on price.

22 Q. In what --

23 A. That's why I say it keeps the other one honest.

24 Q. In what way?

25 A. There's no -- if you've got one supplier, there's

1 no competition.

2 Q. So if you had one supplier, then the cost might
3 be higher and the cost to the customer might ultimately be
4 higher too.

5 A. The cost could go up on the product, and in turn
6 I've got to raise my price, so the customer pays more for
7 it.

8 Q. Okay. With regard to the milk in the Food City
9 stores, currently are there two suppliers for milk at the
10 Food City stores in the Arizona area?

11 A. Yes.

12 Q. And who are those two suppliers?

13 A. Shamrock and Sarah Farms.

14 Q. Approximately how long has Food City had a
15 relationship with Sarah Farms?

16 A. Approximately nine years.

17 Q. And with regard to the products that are supplied
18 by Sarah Farms to Food City, in general, what type of
19 products are they?

20 A. It's fluid milk.

21 Q. And does Sarah Farms supply product, fluid milk,
22 to all the Food City stores in Arizona?

23 A. Yes, they do.

24 Q. So Sarah Farms would have come along for the ride
25 from 1 to 57, that you described before, in terms of the

1 growth of your stores.

2 A. Sarah Farms and a lot of other vendors have
3 grown, right along with us, yes.

4 Q. Including Shamrock.

5 A. Including Shamrock.

6 Q. Tell me in general whether or not, in your
7 experience with Sarah Farms, that they have provided a
8 quality product to Food City?

9 A. Sarah Farms has always had a fine, first-rate-
10 quality product. We're very happy with them as a supplier,
11 the customers are very happy with the product that -- that
12 they sell.

13 Q. Have you been happy with their service?

14 A. Yes.

15 Q. Is quality and service -- are those important
16 factors for Food City in deciding on suppliers?

17 A. Yes. Quality and service are -- if you don't
18 have either one of those, you're in a lot of trouble.

19 Q. And as I understand it, Food City still utilizes
20 both Sarah Farms and Shamrock for its fluid milk. Correct?

21 A. Yes.

22 Q. So in general you're also happy with the quality
23 of Shamrock, as I understand it.

24 A. Shamrock's a good partner as well.

25 Q. I understand you've been authorized to come here

1 by Basha's to provide at least some general testimony, and
2 if I get into an area that's beyond what you're authorized
3 to say or it's confidential, you'll tell us, okay?

4 A. Yes, I will.

5 Q. In general, then -- I don't want to be specific,
6 because I realize you don't have the authority to tell me --
7 are the prices between your two suppliers for fluid milk,
8 Shamrock and Sarah Farms, competitive?

9 A. Yeah, they're very competitive with each other.

10 (Pause.)

11 MR. RICCIARDI: I think at this point, Tom, I
12 don't have any further questions for you. I may have some
13 after you're cross-examined and other questions are asked.
14 Thank you.

15 THE COURT: Any cross-examination of this
16 witness? Mr. Berde.

17 MR. BERDE: Sydney Berde, for United Dairymen.

18 CROSS-EXAMINATION

19 BY MR. BERDE:

20 Q. Good afternoon, sir.

21 A. Good afternoon.

22 Q. Do you handle more than one labeled fluid milk
23 product supplied by Sarah Farms?

24 A. Yes.

25 Q. Is one of the labels Corona?

1 A. Yes.

2 Q. And what is the other label?

3 A. It's a private label, Food City name on it.

4 Q. Food City name on the label.

5 A. Yes.

6 Q. And is there also a Sarah Farms label?

7 A. I don't believe there is today.

8 Q. So the only two fluid milk product -- labeled
9 products are the Corona label and the Food City label,
10 supplied by Sarah Farms.

11 A. Supplied by Sarah Farms, yes.

12 Q. And is there a difference in the out-of-store
13 price for the Corona label than is charged for the Food City
14 label?

15 A. Yes, there is.

16 Q. And is there a difference in your cost of those
17 two products from Sarah Farms?

18 A. Yeah, there's a difference in cost.

19 Q. So one of the products supplied bears an in-store
20 cost that is different from the others; is that correct?

21 A. Yeah.

22 Q. Is the Corona label -- does the Corona label bear
23 a higher cost?

24 A. Yes.

25 Q. Than the --

1 A. Than the Food City --

2 Q. -- Food City label; is that correct?

3 A. Yes.

4 Q. Are these all gallon products or full line sizes?

5 A. We've got gallon products in Corona and in
6 Food City, and then there's half -- we've got pints and
7 half-gallons.

8 Q. From --

9 A. From -- boy, I'm -- that may be a -- I don't know
10 if it's a Food City label or a Sarah Farm label on those
11 sizes.

12 Q. Does Sarah Farms provide you monthly with a price
13 notice that shows an increase in the Class I price, that
14 would in turn trigger a change in your in-store cost?

15 A. I don't want to get into pricing --

16 Q. I don't want to ask you about pricing, I just one
17 -- I'll withdraw that question and ask you a different -- a
18 simpler question.

19 Do you get from Sarah Farms monthly a price -- a
20 letter that tells you that the Federal Order Class I price
21 has changed and that, accordingly, there would be an
22 adjustment of your cost?

23 A. Yes.

24 Q. And your cost is in fact adjusted accordingly
25 because of changes in the Class I price; is that correct?

1 A. Yes.

2 Q. And are those changes made both to the Corona-
3 labeled product and to the Food City product?

4 A. I don't know.

5 MR. BERDE: I think that's all I have. Thank
6 you.

7 THE WITNESS: Thank you.

8 THE COURT: Who wants to go next in cross-
9 examination? Mr. English, go ahead.

10 CROSS-EXAMINATION

11 BY MR. ENGLISH:

12 Q. Mr. Swanson, my name is Charles English, and I
13 represent Shamrock Farms --

14 A. How are you?

15 Q. -- as well as a company called Dean Foods, and I
16 really only have a couple questions for you.

17 You referenced some other stores that are owned
18 by the Basha family. A.J.'s, that's a store name for the
19 Basha family?

20 A. Yes, A.J.'s Fine Foods.

21 Q. Are there ten A.J.'s Fine Foods?

22 A. Nine or ten.

23 Q. And by their name, Fine Foods, would it be fair
24 to say that that's sort of a high-end version of the Basha's
25 stores?

1 A. Well, it's not a version of the Basha stores.
2 It's an upscale market that stands on its own.

3 Q. But it's the upscale market served by the Basha
4 family.

5 A. Yeah, yes.

6 Q. And do you know whether that -- those nine or ten
7 A.J.'s sell only Shamrock Farms-label milk?

8 A. I don't know.

9 Q. And you mentioned the Basha's Denay stores. Are
10 there approximately ten of those?

11 A. Yeah, right in that neighborhood.

12 Q. And do you know whether the only milk sold by
13 Denay's is private labels supplied by Shamrock Farms or
14 Shamrocks Farms-label milk?

15 A. I don't know if that's the only milk they carry
16 or not.

17 Q. And there are 66 Basha's stores?

18 A. Boy, I think there's probably about 76, 78, we
19 open stores pretty fast, so -- 75, 76, 78, somewhere in
20 there. It's hard to keep track.

21 Q. Are you aware whether Sarah Farms -- whether
22 Sarah Farms, as opposed to Shamrock Farms -- Sarah Farms
23 serves any of those Basha's store?

24 A. They serve the Basha's stores in the Tucson area.

25 Q. And that's approximately 8 stores?

1 A. Yeah, right in that neighborhood.

2 Q. And other than the 8 Basha's stores in the Tucson
3 neighborhood, they don't serve any of these other 76, if you
4 subtract 8 from 76, the other 68, to your knowledge?

5 A. I don't believe so, no.

6 Q. And would you know whether the other 68 for milk
7 have only milk supplied by Shamrock Farms, whether under the
8 Shamrock Farms label or private label?

9 A. I don't know for sure. I know there was a small
10 dairy in Show Low, I think, that we were buying from at one
11 time, so I don't know if that's the case in all the rest of
12 them, but --

13 MR. ENGLISH: Thank you, that's all I have, sir.

14 THE COURT: Mr. Beshore.

15 MR. BESHORE: Yes.

16 CROSS-EXAMINATION

17 BY MR. BESHORE:

18 Q. Marvin Beshore, for Dairy Farmers of America.
19 That's who I'm representing, Mr. Swanson. Good afternoon.

20 A. Good afternoon.

21 Q. What is your understanding of the purpose of this
22 proceeding, which brought you to Washington, D.C., from
23 Arizona?

24 A. (Chuckling.) Just that there's some type of
25 legislation that wants to be passed that would change the

1 way the dairy industry's run.

2 Q. In what way do you understand it would be
3 changed?

4 A. Well, the independents would be possibly forced
5 to join the UDA, is my understanding.

6 Q. Okay. And that's your understanding of what this
7 is all about?

8 A. Uh-huh.

9 Q. Okay. You buy milk products at the Food City
10 stores from Sarah Farms. Does Sarah Farms deliver to the
11 stores?

12 A. Yes.

13 Q. So when they send you the monthly price
14 announcement or price letter that Mr. Berde asked you about,
15 they're quoting prices to you that are delivered to your
16 stores?

17 A. Yes.

18 Q. Does any dairy other than Sarah Farms supply your
19 stores with milk products under the Food City label?

20 A. Would you ask that again.

21 Q. I think -- and, you know, correct me if I'm wrong
22 about your testimony -- that you said you -- the dairy
23 products -- the milk products you acquire from Sarah Farm,
24 some of them are under the Food City label, some of them
25 bear the Food City label; correct?

1 A. That is correct.

2 Q. Okay. Does any other supplier supply you fluid
3 milk products that have the same Food City label?

4 A. No, they don't.

5 Q. And there was another label which -- Corona I
6 think -- which -- Sarah Farms also supplies you fluid milk
7 products with that label; correct?

8 A. Yes.

9 Q. Does any other supplier provide you fluid milk
10 products with the Corona label?

11 A. No.

12 Q. What labels are on the Shamrock products that you
13 purchase?

14 A. Shamrock.

15 Q. Is that just their label and no other?

16 A. Right.

17 MR. BESHORE: Thank you, Mr. Swanson.

18 THE COURT: You have another question, Mr. Berde?
19 Go ahead.

20 FURTHER CROSS-EXAMINATION

21 BY MR. BERDE:

22 Q. Mr. Swanson, from whom did you get the
23 information that the purpose of this hearing is to force --
24 I think you called them -- independents to become members of
25 United Dairymen of Arizona?

1 A. Maybe I didn't say that right. I'm not a dairy
2 guy. I was told that -- by Sarah Farms that I could come
3 testify here --

4 Q. Yeah.

5 A. -- and that it might be of some help to the
6 people here.

7 Q. And Mr. Hettinga told you that the purpose of
8 this hearing is to have all independent producers, I assume
9 you mean, join United Dairymen?

10 A. No, no. My understanding of the proceedings
11 today is: they're trying to -- I don't know exactly what's
12 going on with the dairy industry.

13 Q. Uh-huh.

14 A. I was just told I could come here, add some
15 things to it, and I might be able to help the situation
16 here.

17 Q. But you mentioned something about all
18 independents becoming part of United Dairymen and I wondered
19 where that came from.

20 A. If I said all independents I misspoke.

21 Q. I see. I'll ask you another question, which you
22 should know the answer to. Is it correct that most of the
23 fluid product that is delivered to the Food City stores,
24 which is a largely Hispanic customer base, is sold as whole
25 milk; that is, rather than skim or 2 percent?

1 A. We sell more whole milk than any other --

2 Q. Than any other.

3 A. -- varieties.

4 Q. And milk is a large-volume part of your business,
5 isn't it?

6 A. What do you mean "a large" --

7 Q. Well, it -- compared -- I don't know how much you
8 know about other retail outlets and what their volume out-
9 of-store sales of fluid milk are, but Hispanic customers buy
10 a lot of milk, don't they, they have large families?

11 A. Yeah, I would agree to that.

12 Q. And would it be fair to say that Food City stores
13 and the aggregate probably constitute the largest flare of
14 the fluid milk volume in Arizona?

15 A. Oh, I --

16 Q. -- in Phoenix, metropolitan area. Do you know?

17 A. I would have no way of knowing that.

18 Q. Okay. Do you purchase any cream products from
19 Sarah Farms?

20 A. We get a sour cream from Sarah Farms.

21 Q. Or heavy creams or sweet creams, anything like
22 that?

23 A. I don't believe we're getting heavy cream or
24 sweet cream from Sarah.

25 Q. But most of the fluid product is whole milk,

1 isn't it, rather than 2 percent or 1 percent or nonfat?

2 A. Well, we stock all the different kinds, but
3 there's some stores now -- we've got stores in other areas,
4 like Havasu City, for example, that they sell a lot more
5 2 percent than they do whole.

6 Q. But in the aggregate of the 60 stores, or 57
7 stores, whole milk is your big seller, isn't it?

8 MR. RICCIARDI: Your Honor, he's asked it three
9 different times; he's given three different answers.

10 THE COURT: Well, he's asking a different way.
11 It's easier to let him ask it and answer it than --

12 BY MR. BERDE:

13 Q. That correct?

14 A. Yeah.

15 Q. Thank you.

16 THE COURT: See, that was easy. He didn't quite
17 ask it in that way, and I was giving him that chance. Go
18 ahead, Mr. Beshore.

19 MR. BESHORE: I just had one other question.

20 FURTHER CROSS-EXAMINATION

21 BY MR. BESHORE:

22 Q. Who are your -- you have competitors, store
23 competitors, I assume, for the clientele that you serve,
24 people you compete with, other stores?

25 A. Yes.

1 Q. Who are they, or who are your major store
2 competitors?

3 A. Frye's, Safeway, Albertson's, Wal-Mart.

4 Q. Do you know -- to your knowledge, are all of you
5 subject to the same governmental regulations, such as wage
6 and hour laws for employees, you and your competitors?

7 A. Yes.

8 Q. Okay. The same workers' comp laws, things of
9 that nature?

10 A. Absolutely.

11 Q. Would you have a problem if you were subject to
12 those laws and Safeway wasn't?

13 A. I don't understand the question.

14 Q. If you were subject to -- let's talk about
15 employment laws, wage and hour laws, minimum wage, overtime
16 laws, and things of that sort, if you were subject to those
17 laws and Safeway was not, would you have a problem with
18 that?

19 MR. RICCIARDI: Your Honor, come on, I mean, we
20 know what he's doing here in terms of that question. It's
21 not even close to being relevant to anything.

22 THE COURT: Well, I'll let -- you know, I'll let
23 him --

24 MR. RICCIARDI: And Mr. Swanson has no foundation
25 for it.

1 THE COURT: I'll let him answer that incredibly
2 obvious question, and if the answer's "yes" [inaudible].
3 (Laughter.)

4 THE COURT: I mean, you know, it's not really --
5 BY MR. BESHORE:

6 Q. The answer's "yes"?

7 A. Could you ask it one more time, sir.

8 Q. If you -- if Food City -- would you have a
9 problem if Food City was subject to laws relating to minimum
10 wages and other terms of employment of employees and those
11 regulations, those laws, did not apply to your competitors,
12 such as Safeway?

13 A. I don't know how to answer that. There's -- you
14 know, there's different rules and regulations that I think
15 apply to every different company. You know, we don't have
16 all the same rules and regulations, company policies, that
17 some of our competitors do.

18 Q. I'm not talking about company policies. I meant
19 laws.

20 A. There's certain laws we have to follow, and we
21 all have to follow them together, certain criteria, yes.

22 Q. You and all your competitors.

23 A. Yes.

24 Q. Okay. Were you aware that currently with respect
25 to milk pricing regulations, the ones that Shamrock has to

1 follow don't have to be followed by Sarah Farms?

2 MR. RICCIARDI: Your Honor, that is absolutely a
3 misstatement of what's going on here. This witness has no
4 knowledge with regard to those kinds of issues --

5 MR. BESHORE: That was the question.

6 MR. RICCIARDI: -- and it is unfair for this
7 witness to have to answer questions that have no relevance.

8 THE COURT: I mean it's outside his expertise
9 anyway.

10 MR. BESHORE: I asked him was he aware; that was
11 the question.

12 MR. RICCIARDI: Aware of what, you're aware of
13 what, that your misstating is not true?

14 THE COURT: But they're subject to different
15 laws, and the issue is -- I mean, saying that they're
16 subject to different laws sort of begs the question -- I
17 mean the overall law is not different, there's different
18 categories of people, subject to different types of
19 regulations. So I don't think it's a fair question. I
20 don't think his answer is going to help you one way or the
21 other. Why don't you just withdraw that -- I mean -- don't
22 answer that question.

23 MR. BESHORE: Thank you.

24 THE COURT: Ms. Deskins, any questions?

25 MS. DESKINS: Yes. Charlene Deskins, Office of

1 the General Counsel, USDA.

2 CROSS-EXAMINATION

3 BY MS. DESKINS:

4 Q. Mr. Swanson, I just wanted to clarify, I've got
5 one clarifying question for you. When you testified
6 earlier, you said you started at the store on, I think it
7 was, 7th Street; you didn't say what city.

8 A. Oh. In Phoenix.

9 Q. In Phoenix, okay. The other question was in
10 regards to your reason for being here today. Is -- your
11 concern in testifying is you want to ensure that whatever
12 the regulatory changes, you have at least two suppliers for
13 your dairy products?

14 A. That's my big concern, yeah.

15 Q. Okay.

16 A. We believe in a minimum of two suppliers in every
17 category, for the reasons that I've stated.

18 Q. Okay. So that's your concern here today,
19 whatever regulatory change, it should ensure that you have
20 at least two suppliers for dairy products.

21 A. Yeah. I was asked, again, to see if I could come
22 here and answer questions. If Shamrock would have called me
23 and said, "Hey, come down, you might be able to add
24 something," I would have done that.

25 Q. Okay. Because both -- because you deal with both

1 Shamrock and Sarah Farms.

2 A. Yeah, they supply -- they both supply us.

3 MS. DESKINS: Thank you. I have no further
4 questions.

5 THE COURT: Mr. Rower?

6 MR. ROWER: No.

7 THE COURT: Anyone else over there?

8 (No response.)

9 THE COURT: Do you have any redirect?

10 MR. RICCIARDI: I don't, Your Honor.

11 THE COURT: Okay. You may step down. Thank you
12 very much.

13 (Applause.)

14 (Witness excused.)

15 THE COURT: Okay. My understanding is that we
16 have one more witness coming up?

17 MR. ENGLISH: Just one more minute, Your Honor,
18 if we could. I'm sorry.

19 MS. DESKINS: Your Honor, I have something I
20 could put on the record now.

21 THE COURT: I was asking you about that,
22 housekeeping business. This would be a good time to do
23 that; go ahead.

24 MS. DESKINS: Okay. Under the rules, we disclose
25 any ex parte communications. I don't know that they're on

1 point, but just so the record is clear: Mr. Yale did send
2 us an email regarding one of the exhibits Mr. Mykrantz put
3 in, I do believe he put all the things in the email on the
4 record, but we did get an email from him. And someone also
5 gave us a press release. I don't think it's on point to
6 this, but we were handed it in case --

7 THE COURT: These aren't being marked as
8 exhibits --

9 MS. DESKINS: No.

10 THE COURT: -- these are just part of the general
11 record that the government has, that's open to public
12 inspection.

13 MS. DESKINS: Right. If someone wants to look at
14 them, they think they should be on the record, we have
15 copies.

16 THE COURT: Fine. Thank you, Ms. Deskins. Are
17 you ready to go, Mr. English?

18 MR. ENGLISH: Yes. Thank you, Your Honor.

19 THE COURT: Okay. Who are you going to call?

20 MR. ENGLISH: I'd call Mr. Mike Krueger as a
21 rebuttal witness, Your Honor, for Shamrock Farms, and my
22 name is Charles English.

23 THE COURT: And you've already testified in this
24 hearing, way back when, so you're already under oath, so
25 I'll just ask you to state and spell your name for the

1 record, please.

2 THE WITNESS: Michael Krueger, K-r-u-e-g-e-r.

3 THE COURT: Proceed, Mr. English.

4 MR. ENGLISH: Thank you.

5 MICHAEL KRUEGER, PROPONENTS' WITNESS, SWORN

6 DIRECT EXAMINATION

7 BY MR. ENGLISH:

8 Q. Mr. Krueger, sort of in context to these
9 questions, the first question relates to a question asked by
10 Mr. Ricciardi of Mr. Herbein and relates to the testimony of
11 Mr. Hettinga yesterday, having to do with the statement that
12 Costco had asked Sarah Farms to provide a quote, and then
13 Mr. Ricciardi asked a question about that. Were you here
14 for that today? Were you here for that question today, from
15 Mr. Ricciardi?

16 A. Yes, I was.

17 Q. Comparing a producer-handler to a regulated
18 handler, or vice versa, where one of the entities is in one
19 geographical area and the other is in another geographical
20 market and therefore can have substantially different
21 freight costs: is that a comparison that you find valid?

22 A. No. My ability to compete for Phoenix business,
23 as an example, as a Phoenix entity, compared to a
24 Los Angeles competitor, competing for that same business, I
25 would be in a much better position than if I were competing

1 against that same Los Angeles handler for business in
2 Southern California.

3 Q. And did you have any further comment on
4 Mr. Hettinga's testimony regarding the area -- he said that
5 that quote from Costco didn't come -- was not California.

6 A. Well, given that Sarah Farms serves the Costcos
7 in Arizona and they serve the Costcos in Southern
8 California, and he indicated that it wasn't Costco in
9 Southern California, then I would presume it's somewhere
10 else, outside of either the state of Arizona or Southern
11 California.

12 Q. Just to be clear, when you said "they": the
13 stores in Southern California, to your knowledge, are they
14 served by the company that has been labeled GH Processing?

15 A. Yes, they are.

16 Q. And the milk sold in Arizona is served from
17 Sarah Farms; is that correct?

18 A. That is correct.

19 Q. Now, in Seattle, there was some testimony by
20 Dr. Knutson with respect to special things that can be done
21 for customers, and I asked him a question regarding labels.
22 Do you recall that, that interchange?

23 A. I do.

24 Q. Does Shamrock Farms do anything special with
25 their labels?

1 A. We have one particular label, SunLand, which is
2 an economy label for us for -- particularly for stores with
3 high levels of Hispanic customers, and that label has dual
4 labeling, both English and Spanish.

5 Q. And turning one moment to the testimony we just
6 heard from Mr. Swanson: the A.J. stores, A.J. Fine Foods,
7 to your knowledge -- do you supply -- does Shamrock Farms
8 supply A.J. Fine Foods?

9 A. We do.

10 Q. And what label do you supply A.J. Fine Foods?

11 A. Shamrock Farms.

12 Q. And to your knowledge, are there any other gallon
13 containers of milk -- is there a second supplier for gallon
14 containers of milk at A.J.'s Fine Foods?

15 A. There is not.

16 Q. And the Basha's Denay, there are ten stores?

17 A. That is correct.

18 Q. And let me go back for a moment. Were there --
19 how many A.J.'s are there, to your knowledge?

20 A. I believe there are ten stores.

21 Q. So the ten Basha Denay's, do you -- does Shamrock
22 Farm serve those stores?

23 A. We do.

24 Q. And do you serve that with both a private label
25 and the Shamrock Farms label?

1 A. We do.

2 Q. And to your knowledge, is there any other
3 supplier of milk in the Basha's Denay stores?

4 A. To my knowledge, there is not.

5 Q. And in the -- in the 76 Basha's stores, there --
6 you've already testified before that in eight of those
7 stores Sarah Farms has the private label; correct?

8 A. That is correct.

9 Q. But you still have the Shamrock Farms label?

10 A. That is correct.

11 Q. But in the other 68, most of the other 68, who
12 serves those stores?

13 A. We do, exclusively, with Shamrock Farms and
14 Basha's label. In the eight Tucson stores, to my knowledge,
15 we also provide the Basha's label half-gallons. So it's
16 just the Basha's-labeled gallons that Sarah Farms is
17 supplying.

18 Q. In the Basha's eight stores.

19 A. That is correct.

20 Q. But otherwise gallons, half-gallons, quarts of
21 milk in those other stores, other than the other eight, to
22 your knowledge, you are the single supplier.

23 A. With the exception of some national-brand items,
24 such as lactate and organic milk and Nesquik and Hershey,
25 that is correct.

1 Q. But unlike the stores described as Food City,
2 where there's a gallon of Shamrock Foods and a gallon of
3 private label from Sarah Farms, as to gallons, Shamrock
4 Farms is the exclusive supplier in all those other stores
5 other than the other eight, to your knowledge.

6 A. Other than the eight Basha's stores and the 57
7 Food City stores, we are the -- essentially the sole
8 supplier to the balance of the Basha's stores, yes.

9 Q. Now I'd like to take you to the testimony
10 yesterday of Mr. Hettinga, and in particular to the
11 statement made that Sarah Farms provides 17-day shelf life
12 on delivery, as opposed to the 10-day shelf life offered by
13 others, and Mr. Hettinga seemed to acknowledge that perhaps
14 that 10-day shelf life provided didn't apply to Shamrock,
15 but could you for the record tell us what -- the shelf life
16 that Shamrock puts on for their milk.

17 A. Sell-by 16 to 18 days, depending on the product,
18 and a 7-day extension beyond that, as far as a use-by.

19 Q. And do you know, from your experience in the
20 marketplace, what Kroger's shelf life is?

21 A. I do. They have a sell-by of 16 days and a
22 use-by of 18 days.

23 Q. And based upon your study in the market, do you
24 know what Safeway does for the sell-by date?

25 A. I do.

1 Q. And what is that?

2 A. They put on an 18-day code.

3 Q. Mr. Hettinga further had the comment: "As far as
4 I know, no other distributors in the market area has been
5 willing to provide this service to their customers,"
6 referring back to providing gallon milk containers in
7 cardboard boxes. Do you recall that testimony?

8 A. I do.

9 Q. Does Shamrock Foods provide gallon containers in
10 cardboard boxes?

11 A. We do.

12 Q. For how long?

13 A. At least for eight years, and it goes back longer
14 than that.

15 Q. Is it fair to say that if a customer asks for
16 something, you're prepared to try to provide it?

17 A. Whatever they want. If they want gallon jugs on
18 an 80-gallon bossy card [phonetic], 120-gallon bossy card,
19 if they want two in a box, four in a box, if they want it
20 palletized or not palletized, whatever they want, we're in
21 the business of providing it to them.

22 Q. And lastly, Mr. Krueger, I'd like to hand you
23 what were marked and admitted yesterday as Exhibits 62 and
24 63 in the cross-examination of Mr. Hettinga by Mr. Berde,
25 and those are the statement -- United States Department of

1 Agriculture, Agricultural Marketing Service, Dairy Programs,
2 December 19th, 2003, pricing statement, and the Sarah Farms
3 December 24th, 2003, statement to Veterans Market.

4 MR. ENGLISH: May I approach, Your Honor?

5 THE COURT: You may.

6 BY MR. ENGLISH:

7 Q. Have you reviewed this material, Mr. Krueger?

8 A. I saw it yesterday, yes.

9 Q. And after seeing it yesterday, have you made any
10 calculations of your own and reached any conclusions
11 regarding these two exhibits together, in particular Exhibit
12 63, the price list, for a dollar seventy-three?

13 A. Well, I would want to emphasize, first of all,
14 that the -- the market for milk at the wholesale level is
15 set by the regulated side of the industry, and I think that
16 that has been testified to by every one of the producer-
17 handlers that I've heard as well, referencing the cost that
18 a regulated handler would have rather than their own cost in
19 setting pricing.

20 And with regards to these two exhibits in tandem,
21 I believe the claim was being made that producer-handler is
22 clearly pricing product at a level that's above the federal
23 order price, minimum price, established for Class I, and I
24 did some calculations, as far as what we would be looking at
25 in terms of competing, just on a hypothetical basis, with --

1 or for business with Veterans Market, which we do, on a
2 regular basis.

3 And so, you know, I took a look at the month of
4 January for 2004 and looked at whole milk and see that we
5 have a raw cost of \$1.21, but what that raw cost does not
6 include would be even the market administrator's assessment
7 fee of 2 cents a hundredweight, would not include a
8 processing loss factor, would not include the additional
9 vitamins, and in our case it would not include a very
10 nominal over-order premium that we would pay.

11 So I would look at this, as far as having a cost
12 of milk processed, including those components, of about a
13 \$1.25.

14 Q. Let me just hold you up for one moment.

15 A. Sure.

16 Q. You said \$1.25, and maybe you're going just a
17 little fast and maybe I didn't hear it, but you mentioned
18 something about loss. Is that what we refer to as
19 shrinkage?

20 A. That is correct.

21 Q. So you calculated that in as part of your cost of
22 your raw product.

23 A. That is correct.

24 Q. And in doing so, you included that when adding up
25 all of those costs, you come up with what?

1 A. I'm at \$1.25 per gallon, roughly. We could
2 quibble over mills, but that's pretty accurate.

3 Q. And what did you do next with your calculation?

4 A. Well, then I looked at the addition of package,
5 gallon jug, cap, and label, and I would actually argue with
6 Mr. Herbein on that, or maybe the time frame is different,
7 but with the recent increases in resin cost, I would say
8 that that combination of package components would add
9 roughly 15 cents.

10 Q. And --

11 A. So now we're at \$1.40.

12 Q. And what did you do next with your calculation?

13 A. Well, then I looked at this specific customer
14 location, and this is a fairly small account, this is
15 certainly not an account that would be on the same level of
16 a Basha's or a Wal-Mart or an Albertson's, this is an
17 account that would buy in the vicinity of 10,000 gallons per
18 month of product. So it's larger than a convenience store
19 but certainly not as large as a -- as a typical supermarket
20 would be.

21 Noqales, Arizona, is 182 miles from our plant in
22 Phoenix, and I looked at the delivery costs that we would
23 have of serving that account, and, you know, depending on
24 factors in terms of whether they wanted it palletized or not
25 or what other kind of services might be performed at store

1 level, just basically the cost of distribution would range
2 from a low of 13 cents a gallon, presuming full utilization
3 of the trailer capacity, in other words a 40,000-pound-plus
4 load, to as high as 21 cents a gallon if that trailer was
5 not fully utilized. Most of the trip cost remains the same
6 regardless of what the payload is.

7 So I would look at that in terms of 80 percent
8 utilization on average and use a factor of 18 cents for the
9 distribution cost to that particular store.

10 Q. And I think, maybe because I interrupted you a
11 couple times, we skipped a stage. You talked about
12 packaging, but what about processing the milk?

13 A. Well, the reason that I did distribution first
14 was to find out what I could do in terms of reflecting all
15 of the other elements of overhead, both fixed and variable,
16 both for plant operations as well as the basic general and
17 administrative items, most of which end up being direct
18 costs and not fixed costs. And so I'm at \$1.58, and in
19 order to put it through my plant and cover my GNA costs,
20 I've only got 15 cents if I were to match Sarah Farms'
21 pricing, and I'll come back to that in a second, as far as
22 if I elected to do that scenario.

23 The fact of the matter is that if I were to
24 reflect direct costs only and allow my fixed costs to be
25 absorbed by other customers that I have, I could do that, I

1 could sell it at \$1.73. But from a variety of perspectives
2 and for a variety of reasons, we would not sell this
3 customer reflecting only direct costs and then go to a
4 Basha's or an Albertson's or a Wal-Mart, or other major
5 customers, and charge them both the direct cost as well as
6 proper allocation of a fixed cost, in order to treat all
7 customers fairly.

8 So on that basis, I would have to decline to
9 price Veterans Market at the \$1.73, even though I could, I
10 could do that. But if I were to do that, the reality of the
11 situation is that Sarah Farms could go to \$1.70. And I
12 could probably go to \$1.70, still looking at just the direct
13 cost. If I didn't have the other conflicts, and they could
14 go to \$1.67, and now I'm probably not having much of an
15 opportunity to move any further, without being below this
16 federal order minimum cost.

17 Q. So what's your conclusion?

18 A. My conclusion is that I can't price Veterans
19 Market, even given what not only I'm contending but have had
20 verified by national customers as being as low or lower than
21 anyone in the country in terms of plant overhead and
22 distribution cost factors and get the business. I cannot
23 meet Sarah Farms' price as a competitive price.

24 MR. ENGLISH: The witness is available for cross-
25 examination.

1 MR. RICCIARDI: Al Ricciardi, Sarah Farms.

2 CROSS-EXAMINATION

3 BY MR. RICCIARDI:

4 Q. Do you know where you obtained Exhibit 63?

5 A. Yes.

6 Q. Where did you get it?

7 A. In this room, yesterday. I didn't have anything
8 to do with submitting those as evidence.

9 Q. Do you know where your lawyers got it?

10 A. I don't.

11 MR. ENGLISH: I thought he asked where his lawyer
12 got it. His lawyer did not get it.

13 BY MR. RICCIARDI:

14 Q. Your lawyers, it's the entire group that I'm
15 talking about. Do you know where this came from?

16 A. No, I don't.

17 Q. Okay. So you --

18 A. I can't remember who submitted it into evidence.

19 Q. You also don't know, because it's not your
20 letter, how this is actually priced, you don't know, for
21 example, whether or not it includes freight or it doesn't
22 include freight; correct?

23 A. No, that's not correct.

24 Q. And tell me what you -- we know about this. How
25 do you know it includes freight or it doesn't include

1 freight?

2 A. Well, because after getting this information
3 yesterday I verified with my sales organization that this is
4 the delivered price that the customer's paying, because
5 we're in there on a regular basis trying to get this
6 business.

7 Q. The processing plant for Sarah Farms in Yuma is
8 located closer to Nogales than your processing plant;
9 is that right?

10 A. I don't know that, but I would guess that that's
11 probably correct.

12 Q. And what you testified to is that you could sell
13 this at \$1.73 and make a profit but you would decline to do
14 so because you would be concerned about some of your other,
15 bigger customers getting this information; correct? Is that
16 your testimony?

17 A. No, that's not.

18 Q. Could you sell it at \$1.73?

19 A. Yes, I could. But it --

20 Q. And make a profit?

21 A. -- would be inequitable with our -- with our
22 reflection of all costs to all customers.

23 Q. And make a profit, at \$1.73?

24 A. On an incremental basis, yes, I could.

25 Q. Okay. Now, you don't know what it costs Sarah

1 Farms to process its milk; correct?

2 A. Other than the testimony of Mr. Hettinga that
3 they're very efficient, no.

4 Q. You don't know what their overhead is; correct?

5 A. Again, other than the claim that they're very
6 efficient, no.

7 Q. You don't know what their price is for freight;
8 correct?

9 A. That is correct.

10 Q. And if in fact they're more efficient than you
11 are, then what we've got is a situation where they're
12 actually making more money, based upon their efficiency,
13 than you could because you're not as efficient as they are;
14 correct?

15 A. Then they would win even if they were paying the
16 same price to the 106 producers in the Arizona pool, as we
17 are.

18 Q. Yeah, and I'm sure they'd like to share in the
19 cost of your jugs and all the profits that you make on that.

20 By the way, you heard that testimony. Was Mr. Hettinga
21 correct as to the number of jugs that you run through your
22 line and how much money is made by Shamrock on those?

23 A. I don't recall what his numbers were, but they're
24 -- they're fascinating.

25 Q. So he's not correct or he is correct?

1 A. I would say he's not correct.

2 Q. He understated how much you were making?

3 A. What's that?

4 Q. He understated how much you were making?

5 A. He did not.

6 Q. Okay. The fact is, making a whole bunch of
7 assumptions, because you don't have the direct information,
8 even if this is a delivered price, your testimony is that
9 you can make a profit but you would decline to sell it at
10 this price to this particular customer; correct?

11 A. My testimony would be: if I sold Veterans Market
12 alone at \$1.73, on top of the current business that I have,
13 at the current pricing that I have, that I could add
14 incrementally because I would cover my direct costs. Okay?
15 But I could not sell all customers at \$1.73 or with the same
16 kind of reflection of costs and be profitable. I would not
17 be covering my fixed costs at that point.

18 Q. You sell fluid milk -- meaning Shamrock,
19 obviously -- in a SunLand label; correct?

20 A. That is correct.

21 Q. And you price that at less than your Shamrock
22 Farms label; correct?

23 A. That is correct.

24 Q. And you price the SunLand label at less than your
25 Basha's label; is that correct?

1 A. No, that is not correct.

2 Q. That's equivalent?

3 A. That is correct.

4 Q. Is the Shamrock Farms-label fluid milk different
5 than the SunLand label or the Basha's label, other than the
6 label itself?

7 A. Different in what respects?

8 Q. In any respect. Is the milk different at all?

9 A. Other than the brand label that's on it, no,
10 there's no difference.

11 Q. So the milk that somebody is paying more money
12 for if they buy the Shamrock Farms is the identical milk
13 that they get through the Basha's label or the SunLand
14 label; correct?

15 A. That is correct.

16 Q. And do you price the milk that you sell for
17 SunLand and Basha's different to your customer than the
18 Shamrock Farms?

19 A. I believe you asked that and I said yes.

20 Q. Okay. You get a higher profit on the Shamrock
21 Farms label to your customer than you do the other two
22 labels; correct?

23 A. Gross profit or net profit?

24 Q. Either, or both.

25 A. Well, gross profit, I would agree with you. Net

1 profit, it depends on -- we support the brand with a variety
2 of marking and promotional activities, that we don't put
3 into either the SunLand or the various private labels that
4 we produce.

5 Q. Well, do you know whether or not you spread that
6 cost of advertising over to those labels too?

7 A. I know for a fact that we do not.

8 Q. Well, when you decide on profitability, don't you
9 have a bottom-line bottom line, as opposed to a bottom line
10 for SunLand, a bottom line for Basha's, and a bottom line
11 for the Shamrock Farms or Foods label?

12 A. Well, I mean, we have a variety of financial
13 statements. Certainly we have an overall business financial
14 statement. We also make a number of different passes at it,
15 to look at it by product line, by customer, by geographical
16 area, so --

17 Q. And so when you're looking at profitability on
18 that sale to Veterans Market, you could make money, process,
19 and deliver at the 1.73 overall; correct?

20 A. I believe what I testified to, and I'm quite
21 confident that what I testified to, is that I could sell
22 Veterans Market, and Veterans Market alone, at \$1.73 and I
23 would more than cover my direct costs, meaning I would have
24 some contribution to the bottom line, and assuming that I
25 would not be increasing any of my fixed costs of doing

1 business.

2 Q. What would your profit margin be?

3 A. I'd have to look it.

4 Q. Tell me. Do you have a general idea?

5 A. No.

6 Q. 10 percent, 15 percent --?

7 A. At \$1.73, I would be covering my fixed costs by
8 -- I'm sorry, covering my direct costs, by, you know,
9 somewhere in the 3- to 5-cent-a-gallon range.

10 MR. RICCIARDI: Nothing further.

11 THE COURT: Any other cross-examination? You're
12 not cross, you're redirect, Mr. Beshore, I want to give
13 these folks a chance, then I want to give Ms. Deskins and
14 her colleagues --

15 MS. DESKINS: No.

16 THE COURT: Okay. Mr. Beshore, redirect.

17 REDIRECT EXAMINATION

18 BY MR. BESHORE:

19 Q. Just on that last -- that last point, when you
20 say -- if you were selling all of your fluid milk products
21 at \$1.73, the Sarah Farms price, would your bottom line be
22 black or red?

23 A. No, it would not be black. Those fixed costs
24 have to be paid by somebody --

25 Q. Right, but --

1 A. -- so I can -- as anybody in business
2 understands, you can go out and take one incremental piece
3 of business and not reflect your direct costs, and as long
4 as you're not stair-stepping an increase in your direct
5 costs, you can actually increase your bottom line as a
6 result of doing that. But, you know, two facts are
7 pertinent here: one is that the fixed costs are real and
8 must be borne; and secondly, from a philosophy standpoint, a
9 moral standpoint, or just a good-business standpoint, we
10 think it's vitally important to treat our customers
11 equitably as far as pricing and to not favor or reflect a
12 price advantage to one customer versus another customer.

13 Q. And that's what you would have to do if you were
14 selling your product at \$1.73.

15 A. Correct. I don't sell to Basha's and reflect
16 only my direct cost of doing business with them, I reflect a
17 loaded cost to them; I don't sell to Wal-Mart and reflect
18 just the direct cost to them, I reflect the fully-loaded
19 cost to them; and I could sell Veterans Market at \$1.73 and
20 cover my direct cost, okay, but I would be pricing them in a
21 preferential way to any other customer.

22 Q. And you would also be pricing them in a way that
23 if you did all your business that way, you'd go out of
24 business.

25 A. That's correct.

1 MR. BESHORE: Thank you.

2 THE COURT: Any further questions of this
3 witness? Go ahead, Mr. Berde, if you have a question, you
4 go first.

5 MR. BERDE: Sydney Berde, for United Dairymen.

6 REDIRECT EXAMINATION

7 BY MR. BERDE:

8 Q. Mike, you referred to GH Processing as the
9 supplier of Costco in California, during the course of your
10 testimony.

11 A. That was based on the way that it was identified
12 at yesterday's portion of the hearing, yes. I had not heard
13 it referred to as that previously.

14 Q. Do you know who GH Processing is?

15 A. I would presume that GH is Gerben Hettinga, but
16 that's just my presumption.

17 Q. Do you know where the GH Processing plant is?

18 A. Yes, I do.

19 Q. Where?

20 A. It's in Yuma, Arizona.

21 Q. In Yuma?

22 A. Yes.

23 Q. Is that the Hettinga new plant in Yuma, right
24 close to their --

25 A. Yes.

1 Q. -- existing plant?

2 MR. RICCIARDI: Your Honor -- Al Ricciardi --
3 we've been through this before with regard to --

4 MR. BERDE: No, we have not, because you objected
5 yesterday.

6 MR. RICCIARDI: Can I --

7 THE COURT: I'll let him answer a couple
8 questions on this.

9 MR. RICCIARDI: Can I finish, can I finish my
10 objection before you yell at me?

11 We've been through this before. I object to it
12 because it is not relevant to any issue, Judge, and I don't
13 think this witness should testify about something he's
14 speculating about, anyway.

15 THE COURT: Well, if he's speculating -- if he
16 knows the answers to the questions, it'll be a lot easier
17 just to get it done that way. Yes, Mr. English.

18 MR. ENGLISH: Well, I'm going to speak to the
19 relevancy issue. Yesterday Mr. Hettinga spoke somewhat in
20 opposition -- although later he may have seemed to agree to
21 it -- to Proposal Number 4, which is the double-pooling
22 issue, which has everything to do with California, which has
23 everything to do with this issue.

24 MR. BERDE: Absolutely.

25 BY MR. BERDE:

1 Q. Is that the new --

2 THE COURT: But he didn't testify --- I mean just
3 in terms of scope of direct, scope of cross, I mean, I know
4 we haven't been playing that game too well --

5 MR. ENGLISH: Actually, I did, I did ask him a
6 question about GH Processing, Judge.

7 THE COURT: Okay, fine.

8 MR. RICCIARDI: I don't remember it, Judge.

9 THE COURT: What?

10 MR. RICCIARDI: I don't remember it, it's --

11 THE COURT: Oh, I do remember him asking a
12 question about GH, he did do that.

13 MR. BERDE: Yeah.

14 BY MR. BERDE:

15 Q. And is GH Processing -- is it fair to refer to
16 that plant as: that new Hettinga plant?

17 A. Yes.

18 Q. And it's located in Yuma, right close to their
19 existing producer-handler plant, is it not?

20 A. Yes, it is.

21 Q. And that's the plant that's devoted to the
22 supplying of milk to Costco in California.

23 MR. RICCIARDI: Objection, Your Honor. How in
24 the world -- how in the world does he know that?

25 THE WITNESS: I don't know that it's devoted to

1 Costco in California --

2 THE COURT: You've got to answer -- I mean, he
3 asked you a question; if you don't know the answer, and it's
4 hard to imagine how you would know the answer, but, you know
5 --

6 BY MR. BERDE:

7 Q. Do you know that it does supply Costco?

8 A. I would anticipate that they've got bigger
9 aspirations than just Costco in Southern California.

10 MR. BERDE: Thank you.

11 THE COURT: Go ahead, Mr. Ricciardi, you had
12 another question?

13 MR. RICCIARDI: I do, Judge, just a couple points
14 on redirect.

15 REDIRECT EXAMINATION

16 BY MR. RICCIARDI:

17 Q. You testified, I think it was in response to
18 Mr. -- I think -- it might have been Mr. Beshore's
19 questions, I don't recall, but I'll get to my point: you
20 said specifically that you wanted to ensure that there was
21 equitable fair pricing to all your customers; right?

22 A. To all of our major customers, yes.

23 Q. Now, with regard to that issue, isn't it true
24 that with regard to Basha's, that after giving them a price
25 you also provide rebates or discounts to Basha's?

1 A. I honestly don't know what you're referring to
2 there.

3 Q. You don't know whether or not you give them a
4 particular price but then during the course of the month
5 they're given some kind of rebate or discount depending upon
6 what volume they buy or things like that?

7 A. I know for a fact that the net price that we
8 charge to Basha's is exactly the same as the net price that
9 we charge to Albertson's and Wal-Mart and the other major
10 customers that we do business with.

11 Q. You don't provide any type of a discount either
12 for volume or for freight or for other issues?

13 A. If there are any individual nuances at the
14 customer's request, as far as the pricing structure, it's
15 added on a gross basis so that the net price that we charge
16 to any of our major customers is equitable.

17 Q. Meaning identical.

18 A. Meaning -- not necessarily identical, because
19 there are differences, as far as the customers, in terms of
20 location and in terms of requirements as far as delivery,
21 but the area of delivery and the requirements specific to
22 each respective customer are the only differences that would
23 exist between any of these major customers.

24 MR. RICCIARDI: Nothing further. Thanks.

25 THE COURT: Anything else?

1 (No response.)

2 THE COURT: You may step down.

3 THE WITNESS: Thank you.

4 (Witness excused.)

5 THE COURT: And if my understanding is correct,
6 that was the last witness. Right? No one else is going to
7 call any surprise witnesses at this point?

8 (No response.)

9 THE COURT: Let's discuss -- shall we take a
10 short break and then discuss the briefing schedule and
11 comments and -- let's come back in ten minutes, at a quarter
12 of.

13 (Off the record and reconvened.)

14 THE COURT: On the record.

15 MR. YALE: We'd call Ed Brandsma.

16 THE COURT: Okay, you've already been sworn --

17 MR. YALE: No, he has not testified.

18 THE WITNESS: No.

19 THE COURT: Oh, you haven't been sworn in.
20 You've been here so long that -- okay.

21 THE WITNESS: I've been here a lot of times.

22 THE COURT: In that case, please raise your right
23 hand.

24 ED BRANDSMA, OPPONENTS' WITNESS, SWORN

25 THE COURT: Will you please state your name and

1 spell it.

2 THE WITNESS: Ed Brandsma, E-d, B-r-a-n-d-s-m-a.

3 THE COURT: Your witness.

4 MR. YALE: Yes.

5 DIRECT EXAMINATION

6 BY MR. YALE:

7 Q. Mr. Brandsma, are you associated with one of the
8 producer-handlers that's been the subject of this hearing?

9 A. Yes.

10 Q. And what --

11 A. Edaleen Dairy.

12 Q. Edaleen Dairy.

13 A. Yeah.

14 Q. And you are the founder of Edaleen?

15 A. That's right.

16 Q. And you're the "Ed" of the "Edaleen"?

17 A. That's right.

18 Q. All right. Are you involved in the financing of
19 your enterprise?

20 A. Yes, I am.

21 Q. And do you from time to time have to borrow
22 money?

23 A. Yes, I do.

24 Q. And do you have to put up collateral for that
25 money?

1 A. Yes, I do.

2 Q. And when you go to the banks, what collateral do
3 they ask for?

4 A. Just the collateral that I have in my cattle.

5 Q. Will they accept any collateral from your plant
6 equipment or your plant?

7 A. Zero.

8 MR. YALE: I have no other questions.

9 THE COURT: Any cross on this witness?
10 (No response.)

11 THE COURT: No questions from the government,
12 okay. Thanks very much. You may step down.

13 (Witness excused.)

14 THE COURT: Okay, let's talk about --

15 MS. DESKINS: Judge Hillson, I had one issue, for
16 Proposal Number 5, that's the government's proposal, and
17 usually you put something on the record about it.

18 THE COURT: Sure. Thanks for letting me know.

19 MS. DESKINS: Proposal Number 5 is the USDA
20 proposal, and what it is, it's to make any technical changes
21 to the marketing orders based on any of these proposals if
22 the Secretary does decide to institute them, and those would
23 just be changes to make the other sections of the marketing
24 order consistent with whatever the Secretary decides to do,
25 if she does decide to do anything.

1 THE COURT: Okay, and that's your statement on
2 that.

3 MS. DESKINS: That's it.

4 THE COURT: Okay. And Mr. Berde gave me a
5 document --

6 MR. BERDE: Yes. I've marked as Exhibit 69 a
7 document that lists the items of which official notice is
8 requested, and I have copies here available.

9 THE COURT: So these are documents that I or the
10 Secretary will be taking official notice of, and I'm going
11 to admit this into evidence.

12 (Exhibit No. 69 was marked and received.)

13 THE COURT: All right. I'm trying to --
14 everything is sort of triggered by when the transcript is
15 going to be on the internet, and we're trying to figure out
16 when that would probably be. The guesses from the front row
17 here in the 30-day range?

18 MS. DESKINS: Yes.

19 THE COURT: Okay. So what I'm going to do is I'm
20 going to -- in the next -- as we set these other couple
21 deadlines, or triggers, I'm going to assume that the
22 transcript will be posted within 30 days.

23 If the transcript is not posted for more than 30
24 days, anything we agree to here in terms of when the changes
25 requested, corrections to the transcript, and briefs will

1 slide accordingly, so we won't have to do any new Federal
2 Register notices on briefing, so that people won't have to
3 file for extensions of time to file a brief just on that
4 basis.

5 So I'm going to assume that 30 days would --
6 let's see, what's today, the 22nd?

7 MS. DESKINS: Yes.

8 THE COURT: So 30 days would be the 21st. Let's
9 assume that the transcript will be on the internet on
10 February 21st.

11 MS. DESKINS: It's a Saturday.

12 THE COURT: 23rd, February 23rd. That's what I
13 get for working without a calendar. Okay.

14 Given the fact that the transcript is going to be
15 over 3,000 pages, is there a consensus on how long a period
16 of time you'll need to file corrections to the transcript?
17 30 more days --?

18 VOICE: I think at least 30, because there's some
19 big gaps in there, it's going to be a little more tedious
20 than some.

21 MR. BERDE: There's horrendous errors in the
22 transcript [inaudible].

23 THE COURT: In correcting the errors to the
24 transcript, it would also be a good time to do what
25 Mr. Berde just did here, basically, is that there were a lot

1 of references to documents that people wanted me to take
2 official notice of, where the cites might have been a little
3 fuzzy, so I would just ask you to use that as an opportunity
4 to correct that. Yes, Mr. English.

5 MR. ENGLISH: There's no provision in the rules
6 but it has sort of become standard practice for the parties
7 to exchange their proposed corrections with everybody else.

8 THE COURT: Yes, that would be -- because
9 otherwise I'll be getting --

10 MR. ENGLISH: Well, you'll get all of them
11 anyway, but if we -- but --

12 THE COURT: And there's going to be extensive
13 ones, I've already been told that?

14 MR. ENGLISH: Well, that way, we at least know
15 what they are, so that we can start working on the brief --

16 THE COURT: That seems fair. Do the parties
17 agree to that, including the government, you all agree that
18 you'll serve on each other, or courtesy service --

19 MR. ENGLISH: Yes, rather than --

20 THE COURT: -- exchange the corrections.

21 MR. ENGLISH: Thank you.

22 THE COURT: Okay. So I'm going to go with --
23 should I go with 30 days on that, 30 days to make
24 corrections, or should I make it 45?

25 MS. DESKINS: 45?

1 MR. ROWER: 45 is reasonable.

2 THE COURT: 45 is reasonable? Given the huge
3 length of the transcript, and what several people have said
4 there were dropped lines, I know it's going to make
5 everything slide, that's why I know that you -- we're
6 concerned about getting this thing done with. On the other
7 hand, if you're going to all be sitting there with,
8 effectively, 3,000-page documents on your desks and perhaps
9 have other business to do too, that it's going to take a
10 while to get it done.

11 So I'm going to say 45 days after February 23rd.
12 Is someone going to help me on this one, whatever 45 days
13 after February 23rd is, because I don't have a calendar with
14 me, I didn't bring it.

15 MS. DESKINS: April 9th?

16 THE COURT: This is a leap year too; right?

17 MS. DESKINS: April 9th.

18 MR. TOSI: April 9th or 10th, somewhere in that
19 range.

20 MS. DESKINS: April 9th is a Friday.

21 THE COURT: I get April 8th, doing it in my head.

22 MR. ENGLISH: Yeah, I got April 8th.

23 THE COURT: And that's a --?

24 MS. DESKINS: -- Thursday.

25 THE COURT: Corrections to the transcript will be

1 due on April 8th, and if the transcript -- once again,
2 everything slides if the transcript does not get published
3 on the internet by the 23rd. If it does get done earlier,
4 then everyone's gotten some extra days. It's not going to
5 move the other way, however. All right.

6 Briefs. Should we have a set of -- everyone
7 files initial briefs and everyone files one responsive
8 brief, is that -- would that be the best way to do it or --

9 MR. ENGLISH: We normally just file one,
10 Your Honor.

11 THE COURT: You think you can all do it one
12 brief, and no one's going to file a reply brief, or
13 responsive brief?

14 MR. ENGLISH: Well, if we don't know what the
15 issues are, after all of these days, I mean --

16 THE COURT: Ms. Deskins, what's your feeling?

17 MS. DESKINS: It's usually just one brief.

18 MR. BERDE: Just one file brief and exceptions.

19 THE COURT: You think one brief will do it?

20 MR. BERDE: Oh, yes, and exceptions to the
21 recommended decisions [inaudible].

22 MS. DESKINS: Yes, it's just one brief.

23 THE COURT: Okay. If somebody wants to file a
24 reply, then we have to go through the whole Federal Register
25 notice thing, but --

1 MR. ENGLISH: But Your Honor, there's --

2 THE COURT: This is my first one of these, or my
3 second one of these --

4 MR. ENGLISH: I have never seen -- I mean, I know
5 people have occasionally tried to do it, but there's no
6 provision in the rules and no one's ever done it before.

7 VOICE: Proposed findings and conclusions.

8 THE COURT: Okay, it's a one-shot deal, okay.

9 MR. BERDE: One shot.

10 THE COURT: If that's the consensus. One-shot
11 deal. So should I put like a 10-page limit on the briefs,
12 to make them [inaudible]?

13 (Laughter.)

14 THE COURT: Okay, how many days after the 45 days
15 for the transcript, how many days do you want for the brief,
16 is 30 going to get it done or is -- the brief won't be due
17 until May sometime, if we go to 30 days.

18 VOICE: Why don't we do at least 45.

19 THE COURT: Well, you've already got, you know,
20 the extra month for the transcript to come out, and a month
21 and a half to get your corrections. I think 30 days will
22 work. So 30 days from April 8th is going to be May 8th,
23 actually.

24 MS. DESKINS: That's a Saturday.

25 THE COURT: So you've got an extra two days right

1 there. So briefs are due on May 10th.

2 VOICE: Date of postmark of mailing is
3 sufficient?

4 THE COURT: Do they need to be mailed or do you
5 request hand delivery or is it postmarked by --

6 MR. ENGLISH: The rules provide that a postmark
7 is --

8 THE COURT: Then that'll do it. Postmark it is.

9 MR. ENGLISH: I mean, there's other ways to
10 deliver them --

11 MS. DESKINS: Yeah, but the problem with the
12 postmark is sometimes -- we're having trouble getting mail
13 in the Department because they screen things for anthrax, so
14 it could be delayed up to --

15 THE COURT: And then all the pages stick together
16 after that anyway, so it's pretty --

17 MS. DESKINS: And the pages stick together.

18 MR. ENGLISH: Well, I mean, there's -- there's a
19 way of dealing with that, Your Honor, and -- you know, we've
20 got the internet, and all the rest of these days. People
21 can mail one and email one, and as long as the postmark is
22 in, you can email it the next day, because the postmarked
23 one is the official version.

24 MS. DESKINS: Right.

25 MR. YALE: That's what the rules provide. We

1 can't change them.

2 MR. ENGLISH: Yeah, the rules provide for
3 postmark. So we can do it by postmark, and then, for
4 security reasons, it is, I think, the recommendation of USDA
5 that we try to email or FedEx or --

6 THE COURT: That's what we'll do, then, okay. So
7 the briefs must be postmarked by May 10th, and copies that
8 are going to be served on the government should be served by
9 -- as well by -- I mean, I guess all briefs go to the
10 hearing clerk anyway. We would request that a copy be
11 either emailed or sent by next-day delivery to the
12 government as well. Just to you, Ms. Deskins, or the main
13 hearing clerk --

14 MS. DESKINS: To the hearing clerk.

15 THE COURT: The hearing clerk, okay. Is there
16 anything else? Mr. Yale?

17 MR. YALE: Just a request is that because of the
18 potential flexibility, if we don't make the April 8th --

19 THE COURT: Well, February 23rd is the key date.

20 MR. YALE: February 23rd. If the Department
21 would be so kind as -- so we'd always have a fixed date,
22 that they'd publish it on their website, that we could
23 confirm that we computed the extra days --

24 THE COURT: I guess you all ought to be working
25 on the same day, so if it does slide, while we all agree

1 that everything else slides accordingly, if there's an
2 official date that's posted on the internet that's after
3 February 23rd, I'll ask the government to make sure that
4 they let everyone, all parties, know what that official date
5 is.

6 MR. YALE: That's all I'd ask.

7 THE COURT: So that everything else --

8 MR. YALE: So there's no confusion.

9 MS. DESKINS: We can put it on the -- where it's
10 published on the internet, if it's going to be posted after
11 that we'll put the date it's posted.

12 MR. YALE: That would be great.

13 THE COURT: Okay, that'll work. Anything else?

14 (No response.)

15 THE COURT: Okay, this hearing is closed. Thank
16 you very much.

17 (Applause.)

18 (Whereupon, at 5:00 p.m., the hearing in the above-entitled
19 matter was closed.)

20

* * * * *

1

CERTIFICATE

2

In Re: PACIFIC NORTHWEST AND ARIZONA-LAS VEGAS

3

MARKETING AREAS

4

Docket Nos.: AO-368-832, AO-271-837, DA-03-04

5

Place: ALEXANDRIA, VIRGINIA

6

Date Held: JANUARY 21, 2004

7

Time Held: 1:00 P.M.

8

We, the undersigneds, do hereby certify that the foregoing pages, number 2952 through 3103, inclusive, is the true, accurate and complete transcript prepared from the reporting by BOB ADDINGTON in attendance at the above-identified hearings, in accordance with applicable provisions of the current USDA contract, and the below-signed persons have verified the accuracy of the transcript by (1) comparing the typewritten transcript against the reporting or recording accomplished at the hearings and (2) comparing the final proofed typewritten transcript against the reporting or recording accomplished at the hearing.

10

11

12

13

14

15

16

17

18

19

2/9/04 TRANSCRIBER: Debbie Barnard

20

R & S Typing Service

21

22

23

Signature

24

25

2/9/04 PROOFREADER: Sheila Orms

26

R & S Typing Service

27

28

29

Signature

30

2/9/04 REPORTER: BOB ADDINGTON

31

32

33

Signature

34