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BEFORE THE SECRETARY OF

THE UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL MARKETING SERVICES

In the Matter of Proposed Amendments to Tentative Marketing Agreements and Orders	)))))	Docket Numbers AO-14-A77, et al. DA-07-02

National Public Hearing

Friday, April 13, 2007

9:10 o'clock a.m.

Radisson Hotel Circle Centre

31 West Ohio Street

Indianapolis, IN 46204

BEFORE:

JUDGE VICTOR W. PALMER

U.S. ADMINISTRATIVE LAW JUDGE

UNITED STATES DEPARTMENT OF AGRICULTURE

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JUDGE PALMER: I received a motion from Mr. Vetne. I guess everybody got copies of it. A memorandum of law and it's about whether or not we should receive in evidence, basically, the prior testimony of Dr. Stevenson.

It's a bit complex. I've looked at it on the surface. The rules of practice seem to accord with Mr. Vetne's motion. On the other hand, I think, as I recall, when we ruled on it there was a lot of contention about it and I thought I made the right ruling at the time. And rather than spend this morning arguing it, my thought is that everybody should be given a chance to brief it. And since this hearing is going to reconvene in July, we'll decide it before the hearing, but we'll do it by mail; and the only thing I would like to know now is what's a good date to set for briefing of this particular topic?

Any thoughts about it? Mr. Vetne, how about you? Do you have any thoughts of the date.

MR. VETNE: I've done my work.

JUDGE PALMER: You've done your part, that's right. Okay. That's easy for you then.

I understand we're going to have this reconvened in July?

MR ROWER: I'll be able to confirm everything a little later this morning. We're waiting to hear from the venue, proposed location. As soon as they tell me, I'll ask you to let us announce it.

JUDGE PALMER: I'd appreciate it if it wasn't the first week of July, but okay.

MR ROWER: It won't be July 4th.

JUDGE PALMER: Well, looking at the fact that it's probably going to be in July.

And how do we want to do the briefing? Does that get sent to me? Does everybody have my -- do it either by e-mail or mail. If you mail it, I'll never get it.

Probably the only person that doesn't know his own address.

MR. ROSENBAUM: It's on the USDA website.

JUDGE PALMER: Send it to me on my e-mail on the website by, let's say June 4th; that gives everybody plenty of time. And I'll try to get a ruling out within a week or so after that.

Anything else preliminary before we put Mr. Yale back on the stand?

Back on the stand Mr. Yale -- or wait a moment, before we put him on the stand, do we have the other witnesses available now?

MR. ROSENBAUM: Yes, he's here, but let's just finish Mr. Yale.

JUDGE PALMER: Let's see what happens that way.

Who wanted to question Mr. Yale next, was that Mr. Beshore? Do you have questions? Looks like Mr. Beshore.

CROSS-EXAMINATION,

QUESTIONS BY MR. MARVIN BESHORE:

Q Marvin Beshore for Dairy Farmers of America and Dairylea.

Ben, I would like to first direct your attention to page 47 of your testimony, Exhibit 32, if you have it.

A Well, I thought I had it, but I don't know if I have a complete. I think I left half of my back at the --

JUDGE PALMER: I have 32 right here.

A We're getting one here. I apologize.

What page again was that?

Q Forty-seven.

A Okay.

Q Do you have it?
A What part?
Q There's a paragraph that begins "document BBBB."
A Okay.
Q In which you discuss some comparison between California pricing and Federal Order pricing. I'm wondering, there's a lot of reference in these Federal Order class price and make allowance hearings to comparisons with California; and I, at least, have never -- do not recall the -- an elaboration of the comparison that you have presented on the referenced paragraph there on page 47 of your testimony.

And I wonder if you would be willing to just discuss that a little more and tell us what you think it shows?

A Well, this report, CDFA puts this out, and generally it's always -- it used to be, I thought, in anticipation of hearings where they would set prices. CDFA prices -- they imply a basis, I believe it's $0.21 -- or $0.252 off of the CME. And what they do it in anticipation of the hearing, one of the issues always is how does that compare to what the plants are

actually selling the cheese for. So that's what this study does. And if you look back at NNN, it does have -- is it three N's, yeah, triple N, we have the CDFA formula for Class IV(b) and you will notice that it is like the second page of that. One of the those factors it says is this .0252, and that's always an issue because when you put it into comparison to what the make allowance is, effectively, they work together and they give you a net adjustment off the CME.

What this to me shows is that those cheese plants are making an additional, almost a dime -- or dime -- a penny a hundredweight that ought to be factored into consideration of their make allowance.

I don't know if that answers the question.

Q Well, that starts it. How do you mean that? Should it be added to or subtracted from their effective make allowance?

A Well, in the NASS, we use actual basis. We capture -- in fact, the NASS captures the 1.6, or whatever that average, 1. -- whatever that average is, it captures that and we subtract the make allowance off of that. They're not capturing that in theirs, and so I think that

that means that their make allowance effectively is the difference between their factor of .0252 and what their make allowance is.

Q If you're comparing it to Federal Order plants?

A If you're going to compare it to Federal Order plants.

Q So you say effectively it reduces the nominal California make allowance from $0.178 to $0.169?

A Right.

Q Now, you also, then, indicate that is for a 10.2 yield.

A Right.

Q Versus FMMO of 9.89. Can you discuss -- elaborate on that just a little bit?

A Well, yeah, they use a higher yield for the amount of milk that goes in. Now, I believe, though, that that yield may be a test which you might have to adjust it down to the 3-5, but it still ends up with a higher yield than what we're doing with the 9.89. So they're getting more than the Federal Order -- the yield generates more, oh, cheese than what ours does, and they're not fully capturing the full basis.

So I think when you start to add those and look at them in total, that's always been our

contention, you've got to look at the total package because I think there was a witness earlier in the week that was talking about how the algebra, you can shift the variables, but you can come up with the same number. So you look at the same thing. I think that it shows it; effectively, the make allowances in California are less than what they're purported to be.

And if the Department's going to combine those with what we're doing in our formula, then you've got to make that adjustment either -- you need to make the adjustment of that NASS into this before you do the multiplication times the study of Stevenson.

Q And that's what you mean when you say you've got to compare -- you can't mix apples and oranges, but compare apples to apples.

A Yeah, you've got to compare them. They sound alike, but you've got to find those differences and make sure we're really looking at the right thing.

Q Now, Mr. Rosenbaum asked you some questions yesterday about how in your double K baseline model, how you calculated Class IV prices.

A Right.
Q Okay. The formula which you've laid out in your testimony is different than the formula he proposed to present to you?
A Right.
Q Now, is it your thought that since your formula is a baseline intended to reflect changes, that if you use a different formula as a baseline, the changes may be similar to what you have?
A I would think that the magnitude of the changes would be very, very close regardless of the method.
Q So long as your method's consistent?
A As long as your method's consistent. With the real number that we were heading for with that was some kind of a blend value. And when you get to the blend value, the net change in the blend value that I'm purporting, it's only 10 percent of whatever difference there was anyhow.

So I think that between the two, the difference is so minimal, you know, it doesn't make any difference. And the point of it is, is more to show the direction of where these formulas go. It's to provide the Department

some concept that if you make this change and this change only, these are the values that are going to change. This is the approximate amount that they're going to change, so that they can weigh -- all of that's factors in deciding what is an appropriate thing to do.

I mean, that's the whole purpose was to lay that out and give a number. And the people in the room, I mean, these are complex formulas. I wanted to show something so that somebody can say well, if he changes that, what does that do to the blend and somebody doesn't have to sit down there with a pencil, they can come up with a number.

That's all we were trying to do, was just reflect the direction on approximate magnitude, and I believe we've done that, even by our methodology.

Q Okay. One other question. With respect to the issue of farm-to-plant shrinkage, do you recall that Mr. Galarno (phonetic) from Michigan Milk provided an exhibit, I think it's Exhibit 13 --

A Right.

Q -- which showed their data with respect to farm-to-plant volumes. And I believe that the

notation on that was that it was primarily scaled weights, 70 plus percent, if I remember correctly, scaled weights, but nevertheless showed some loss.

A Right.

Q What are your thoughts or comments on that with respect to the position you're taking that essentially if you scale it, you don't have any loss?

A Well, you know, if you consistently are scaling off the farm into the -- I mean, if your beginning point and ending point both use scales and you do that consistently, and these are certified scales, there should be -- there should not be any loss attributable to the management of the weighing and measuring and testing, and you take a sample out of each load. There should not be any loss due to the method of the measuring and the testing.

And in the -- also, I guess I would add is that -- yeah, I mean, that's why I think there should be very little. And if there is any, then that's something that needs to be addressed. I think you've got some other issue that's there.

Other than draining the silo, going from a weighted truck to a silo, there is going to be some loss, but it should be very, very, very, very minimal.

I don't know if that answers the question or not.

MR. BESHORE: Yep, I don't have any other questions at this time.

JUDGE PALMER: Any other questions? Mr. Schad? Mr. Vetne?

THE WITNESS: I think Steve had some. Oh, my copy of the statement.

JUDGE PALMER: Mr. Rosenbaum, do you want to ask?

RECROSS-EXAMINATION,

QUESTIONS BY MR. STEVEN J. ROSENBAUM:

Q My questions relate to the issue that Marvin just raised with respect to Exhibit BBBB.

A Yes.

Q And your related testimony on page 47.

Just to orient ourselves, USDA has chosen to use data from the California cost surveys in setting the federal milk allowance.

A Yes.

Q Which you oppose.

A That's right.
Q And is it your understanding that when USDA goes to use the California data, what they're looking at is the California cost of manufacturing surveys, correct?
A That's right.
Q I mean, the fact -- California, itself, then, uses that information to set its make allowance, but USDA isn't looking directly to California's make allowance; it's actually looking to the underlying data.

Is that your understanding?

A Right. But the problem is, is that we're also -- we're both using their make allowances and we're using their reported sales data in the NASS, okay.

I mean, the sales from those plants -- that table BBBB in a different form has shown up in NASS reports, but the underlying numbers are there. So we're not getting -- there's a disconnect in there in terms of how this system is working in terms of what they're selling their stuff for and what they're paying to do it and how the formulas actually work because those plants get a discount of almost a penny a pound

that I think reflects in their make allowance.

Q Well, but if the USDA is continuing to be interested in knowing what it costs to operate these cheese plants in California, you're not challenging the accuracy of the audited cost data that the CDFA puts out, are you?

A I have no dispute that it says what it says that it is.

Q Okay. And then when it comes to the question of how much the cheese is being sold for, you're not suggesting that the NASS survey is picking up incorrectly what California plants are selling their cheese for, are you?

I assume to the extent that these plants are participants in the NASS, survey they're accurately reporting what they actually get for their cheese FOB.

A It accurately has the number. The concept, Mr. Rosenbaum, is that it's a regulated market in California. And I think you had questions yesterday or the day before about the interaction of the regulated market and if you changed the Federal Order of California can quickly change, or something like that.

It's a regulated market and the make

allowances that the CDFA uses is audited and developed in the context of that regulated market. And it's developed in the context of a policy that ensures plant profitability. And this additional factor, the $0.9, I believe contributes to that, and it reflects in terms of what they sell their cheese for, for what they make; and also what it really says, and this is the point that I'm going to make, you assume that the cheese plants are selling the cheese at a profitable level, all right? And the fact that they're selling it for 9/10 less than the formula will allow is telling me that their make allowance, by and large, for the bulk of the cheese sold is higher than what it takes to make the cheese because they're selling it for less.

It's a piece of evidence that tells me that just to take it carte blanche, to take it carte blanche and say it's the same thing as we're doing with Stevenson, it's the same system, is not an accurate thing to do when there's too much at stake.

Q Now, I want to press you, frankly, on whether you're misapplying the $0.9 difference, and whether that in fact suggests the effective make

allowance in California is 9/10 of a cent more than stated.

Let me just take you through it.

A That's fine.

Q The CME -- California uses the CME --

A That's right.

Q -- unlike the federal system for setting minimum milk prices.

And it's the CME minus a fixed amount of $2.52?

A Right.

Q Minus the make allowance, correct?

A Right.

Q And as you understand it, the minus $2.52 is supposed to reflect the lower value of cheese in California as compared to the CME price, correct?

A They've come up with some statewide basis that they want to apply, yes.

Q And what Exhibit BBBB shows is that in fact in reality the price that California cheese makers get for their cheese is not the CME minus $2.52, but the CME minus $1.62?

A Right.

Q And that would indicate to me that California

manufacturers are therefore being given an extra $0.9 a pound above and beyond the make allowance for them to keep and not have to pass on in the form of higher minimum milk prices.

A I think that they absolutely keep it, yes.

Q I mean, I think -- to be blunt, I think your testimony has it backwards. You say that this phenomena effectively reduces the California make allowance from $0.178 to $0.169, and I suggest to you that, in fact, what it does is effectively increase the make allowance from $0.178 to $0.187.

A But then when you look at that phenomena in the butter, it goes the other way. I think it suggests the other way; that's the opinion I look at.

It's really not the numbers, Mr. Rosenbaum, it is the fact that there are some subtle differences going on there that have to be considered when we start using California both in terms of their NASS data and in terms of their cost of production -- or cost of make in setting prices for the rest of the Federal Order.

Q Okay.

A That's the real point that I want to make.

MR. ROSENBAUM: That's all I have.

JUDGE PALMER: Questions? Yes, Mr. Smith.

CROSS-EXAMINATION,

QUESTIONS BY MR. DANIEL SMITH:

Q Good morning, Ben.

A Good morning.

Q At the end of your statement you summarized the impact on -- of the different calculations and it comes out to $0.63 a hundredweight?

A Yes.

Q Not a substantial amount of money?

A No, that would be a long way to helping the dairy farmers.

Q I would like you to track through how you think the market would respond to that change in the floor price between impacts on premiums, sales, or absorption in the margin and with regard to premiums, your assessment of the impact on the premium structure from a regional standpoint at --

MR. VETNE: Your Honor, let me interject. Mr. Yale has provided a boilerplate, a structure for analysis of how you apply arithmetic to three things, the reference price, the price of

commodity that you use in the system, the manufacturing costs that you use in the system, and the yield that you use in the system.

Mr. Smith is asking Mr. Yale to put on a hat of expertise that he hasn't demonstrated in any voir dire or testimony, and that is that of an economist to project market response.

I suggest the witness is not competent to express an opinion on an area which he has not developed his expertise in testimony or in his curriculum vitae.

JUDGE PALMER: Let's hear from either Mr. Yale or his counsel on that.

What do you say to that, sir? Do you feel that's going beyond the area that Mr. Yale is testifying in respect to?

MR. MILTNER: No, I don't think it's beyond his testimony at all. Our position all along has been that the Secretary can afford the weight of his testimony whatever -- for his testimony what weight he finds appropriate.

As long as Mr. Yale is comfortable answering the question, we don't have any problem with it.

MR. SMITH: Your Honor, if I could just

add --

JUDGE PALMER: You want to ask it again? Ask your question one more time. Let me hear it again.

MR. SMITH: The testimony at the end of his statement is an increase $0.63 per hundredweight calculated out $14,000 in change to the producer. Implication is it's a straight passthrough of the increases at the manufacturer price to the farmer.

My question is how the market in between or downstream market might actually respond if premiums are reduced, the amount is not fully passed on to the farmer. So it's within his testimony.

JUDGE PALMER: Is that within your expertise?

THE WITNESS: I think I can answer it in a way.

JUDGE PALMER: Well, let's hear your answer.

A The answer is this: That my experience has been that when there are changes such as that made in the Federal Order, there is an institutional over-order premium structure that exists in all

of the markets, and it may be zero in some and it might even be negative from time to time in some that I know of, but there's a structure that exists all over; and initially and fundamentally that structure doesn't change.

And I think that's the contention of the proponents has always been is that, you know, that they'll always have their premium. They want to lower that basis. I think that the change would not -- that the market would absorb it and move it into the marketplace; that would be my initial opinion.

JUDGE PALMER: I would overrule your objection, then, and allow the question and answer to stand.

A Let me add one other thing, though, it wasn't my testimony, but I do rely upon a statement made by Dr. Bailey at the prior session in which he said that the econometric model which USDA did, which he seemed satisfied with, really doesn't kick in for a year in terms of supply and demand response; and that almost for that first year, you could use a more basic model like I've done to show impact that that probably does actually reflect what you're going to see in the first

year in terms of income to producers and changes.

And I think even -- and I may be wrong and the record will reflect otherwise. But I think Dr. McDowell at the first make allowance hearing suggested as much.

So, I think all of that kind of answers your question. And, again, the number I gave is to give you some indication -- the Department some indication this is the magnitude of what we're seeking, this is the full impact. So everybody knows -- if you're for producers, it's not big enough, and if it's for processors, it's too much, but that's the whole purpose of that number.

Q I think the point is then in terms of magnitude, at $0.60 you're into a larger increment of magnitude in terms of market impact.

I would like to follow-up -- there's testimony of prices at or below the regulated minimums in the Southwest, substantial premiums in the Midwest, and somewhere in between in the Northeast.

Would you say just in general terms that's a reasonable reflection of the regional premium

structure?

JUDGE PALMER: I think now we're getting over into making him an economist. He's not here as an economist.

THE WITNESS: I will say that I do follow those structures. I mean, that's part of my job is to know what those structures look like in general. In general, I can say that his characterization is probably true.

JUDGE PALMER: All right.

Q Would your expectation be what you described before, how would the market respond in the Southwest in that situation? And what I'm thinking is at that point the plants coming into direct competition with California with a quite different price surface.

A Well, I think we're starting to get into a difficult issue, and that is trying to have a national market for dairy products and essentially three regulatory schemes with substantial milk supplies in all three of them, and that includes the Federal Order program and that includes the California with its regulation, and it includes the Idaho unregulated, and the Southwest is on the edge of

both of those. And the pressure from all of those tend to mix.

I think that what it does is that it helps because we have seen in time that, you know, we can somewhat stay ahead of where the others are at based on our location and some other factors. So I think that we would be able to sustain that money into the system and it would probably force the others to respond accordingly.

Because there's economic pressure at the farm level out there, too, in both those states to change their structures.

MR. SMITH: Thanks, Ben.

JUDGE PALMER: Mr. Vetne.

RECROSS-EXAMINATION,

QUESTIONS BY MR. JOHN H. VETNE:

Q Just one more follow-up to cross by Mr. Beshore and Mr. Rosenbaum.

Let me see if I understand correctly. You do not suggest that the plant manufacturing costs surveyed and reported by CDFA are inaccurate; what you suggest is that there is a revenue stream in the sale of cheese that's not reflected elsewhere in the formula, correct?

A You could say that, but it also --

Q No, I'm asking you if you're saying that?
A I'm saying, yeah, there's another income stream. But I'm also saying that there's more going on in California in a different way responding to a different set of regulations than what we have in the Federal Order; and that to simply take the numbers from one, whether it's their sales or their manufacturing costs, and apply them by some simple mathematic thing to the federal, then it is not going to give us the right response.
Q I want to make sure your response is not ambiguous on this record.

You do not contend that the manufacturing costs surveyed and reported by CDFA are inaccurate, yes or no?
A I don't say they're inaccurate, I think they're irrelevant to our discussion.
Q Okay. It's relevance. Because there are other things going on having to do -- what you're suggesting is that the price that's used by California from which manufacturing costs are subtracted, that that price is understated; that's what you're suggesting?
A Well --

Q Yes or no? And then you can elaborate.
A I mean, I think that their price is understated -- or their difference.

But you look at any regulated industry that's as regulated as California's, and it is far more regulated than the Federal Order. You cannot purchase milk from farms in California at less than those prices, okay. You can do that in the Federal Order program. There's ways that that can be purchased, if you need to, okay. It's a highly regulated situation.

You have these audited plants. It's not unlike a public utility, okay. And if there is income --

Q You said it's not unlike?
A It's not unlike a public utility. The Federal Order is grossly unlike a federal utility -- or public utility, but California is not because it's so total in terms of retail price regulation, producer price regulation, plant audits, all this make allowance stuff, so that if there is extra income that is available in the marketplace, as that exhibit reflects, the expectation would be is that the economic pressure on the plants to be more economically

efficient in terms of its cost, is much reduced as compared to plants, particularly those that have testified at these last couple of hearings, in which economic pressure on them is intense because they don't have that regulatory protection and, therefore, those numbers may be higher. We've seen that in every regulated to deregulated industry in the United States is that once they got out of deregulation, the costs, the things that they did, disappeared because they couldn't afford them. And I don't know what that is.

What they do buy and what California investigates and audits, it's the right number. But if it was in a situation, an economic regulation identical to the Federal Order, I cannot say and I do not believe that those plants would spend as much and it would be the same number; and that's why they can't be compared.

Q Okay. Let me see if I understand that answer. Plants that operate under the federal system, whether they're receiving diverted milk or being fully regulated, have a greater incentive than California plants to cut costs and to maximize

revenues in the sale of product?
A I think that's true.
Q Would it not be equally true that there is what you have talked about as apples and oranges, comparing California to plants in the federal system, would there not equally be apples and oranges comparison, or perhaps apples and bananas, if you throw, for example, Idaho plants into the mix where there is no regulation at all. And Idaho plants, of course, were included in Dr. Stevenson's cost study.
A And that's the reason we think Stevenson -- that's why we said just rely on Stevenson because I think it comes close to regulating where we're at.
Q To have apples to apples, should not the Idaho data be excluded from the Stevenson report?
A We thought about that. I don't know that we have a firm position. I think it's not an unreasonable one. I think I testified at some point, or maybe it was questions, that maybe we ought to just focus on the milk that's going into the plants that are subject to the regulation and leave it at that.
Q Okay. So to some degree, we haven't measured

it, but to some degree the differences in location, circumstances, regulation, that applied between California and the federal areas, also apply between federal areas and Idaho, for example?

A Sure.

MR. VETNE: Thank you.

JUDGE PALMER: Looks like your testimony is concluded, sir, thank you.

THE WITNESS: Thank you.

JUDGE PALMER: I don't know if we need a recess or not.

MR. ROSENBAUM: Your Honor, I marked three exhibits during my cross-examination of Mr. Yale.

JUDGE PALMER: Let me look for them here. You did; that would be 59, 60, 61?

MR. ROSENBAUM: I think 58 as well.

JUDGE PALMER: That's Dr. Barbano's?

MR. ROSENBAUM: 58 was the excerpt from the Federal Register, there were four actually.

JUDGE PALMER: Right. Okay, 58. What's the feeling about that? Is there any objection to 58, 59, 60, 61?

MR. BESHORE: My recollection is that 59,

60, and 61, they were already enacted upon by the judge in terms of having them received for reference to the examination, as opposed to received as if they were testimonial information.

MR. ROSENBAUM: Your Honor, I believe that Exhibit 59 sort of relates to the issue that Mr. Vetne has raised in his motion.

JUDGE PALMER: I know it does.

MR. ROSENBAUM: So I think I would suggest that we defer on that until we look at the broader issue.

JUDGE PALMER: Reserve ruling on that?

MR. ROSENBAUM: On 59 seems to me.

JUDGE PALMER: Wouldn't 60 and 61 be the same?

MR. ROSENBAUM: Let's reserve on all three, I'll agree.

MR. BESHORE: 60 and 61 are different in that they were never exhibits in the prior hearing.

MR. ROSENBAUM: They were raised slightly --

JUDGE PALMER: All right, I'll reserve on all of them. You'll include some thoughts about

it in your briefs.

Somebody might also, in the course of their brief, find whatever I said when I ruled on Mr. Vetne's motion originally. I can't find it in my notes here. I was just looking for it. I don't know if I ever ruled on it. I sort of reserved it the first day and I presume I've ruled on it.

Did I rule on it? I gave you a ruling, didn't I, John? That motion you brought up, I gave you a ruling, didn't I, or did I not?

MR. VETNE: Originally, yes.

JUDGE PALMER: I did give you a ruling. If somebody can find in the transcript my ruling, that would be helpful.

MR. VETNE: It's in the footnote in my memorandum of law.

JUDGE PALMER: Oh, you've got it. All right. We'll receive 58, though.

Do you wish to now bring forward --

MR. ROSENBAUM: We're ready for the next witness, Your Honor. We would call Mr. Dean Sommer.

DEAN SOMMER,

having been duly sworn to tell the truth, the whole truth, and nothing but the truth relating to said matter was examined and testified as follows:

DIRECT EXAMINATION,

QUESTIONS BY MR. STEVEN J. ROSENBAUM:

Q Mr. Sommer, you've prepared a written statement for today's hearing; is that right?

A I have, yes.

MR. ROSENBAUM: Your Honor, we distributed that yesterday at the close of the hearing, so everyone should have a copy. We would ask that it be marked as Exhibit 62, I think is the next number.

The court reporter doesn't have a copy?

THE REPORTER: No.

(Exhibit 62 was marked for identification.)

MR. ROSENBAUM: Let me get you a copy.

Q Exhibit 62 is your statement. Could you please proceed to read it, sir.

A Yes. My name is Dean Sommer. I have a Master of Science Degree in Food Science from the University of Wisconsin, 1981, and Bachelor of Science Degree in Biology/Chemistry from the

University of Wisconsin-Stevens Point 1977. For approximately the last four years, I have been employed at the University of Wisconsin Center for Dairy Research as a cheese and food technologist. In that capacity, I work to further the interests of dairy farmers and the entire domestic dairy industry. I do this through working with cheese plants of all sizes across the entire country, as well as the cheese customers they serve in order to strengthen and expand the use and markets for cheese.

Prior to this position, I worked for Alto Dairy Cooperative in Waupun, Wisconsin for 18 years. My positions with Alto Dairy included manager of technical services, 1985 to 1990, vice-president of technical services, 1991 to 1999, and vice-president of operations, 2000 to 2003. In these roles I was responsible for all technical aspects of the business, milk quality, cheese quality, research and development, regulatory affairs, cheese technology. And in the last four years I was responsible for all aspects of cheese and whey operations, including cheese yield. Alto Dairy at the time of my employment was an approximately $400 million

business producing approximately 200 million pounds of cheese per year in three large modern up-to-date cheese manufacturing facilities. Cheese plant No. 1 in Waupun, Wisconsin was completed in 1983, and was, at the time and for most of the 1980s, the largest and most modern cheese plant in the country. Cheese plant No. 2 in Waupun was completed in 1997 with the most technologically up-to-date cheese vats and tables in existence. The Black Creek cheese plant, although an older facility, was also updated with some of the most modern, up-to-date cheese equipment during the 1980s and 1990's.

Q Mr. Sommer, let me interrupt at this point.

MR. ROSENBAUM: I would ask that he be declared and recognized an expert in cheese science technologies and operations, Your Honor.

JUDGE PALMER: I would think there is no objection, is there? He is so recognized.

Q Please continue.

A Milk fat recovery in cheese. The recovery of milk fat in cheese is one of the key elements in maximizing cheese yields. The Van Slyke equation, widely used in the industry to predict cheese yield, typically uses a figure of

93 percent as the maximum possible recovery of milk fat in cheese. All cheese plants try to maximize their recovery of milk fat in cheese in order to maximize cheese yields and overall profitability. Their ability to efficiently recover milk fat is a function both of the cheese-making equipment they have, as well as the skill of their cheese makers in operating that equipment.

The greatest loss of milk fat during cheese making occurs during the cutting of the coagulum. Subsequently this is where most cheese plants concentrate their efforts in maximizing milk fat recovery. In my experience, there are basically three types of cheese vats in commercial use; the traditional open vats, the vertical enclosed vat of the Damrow OO style, and the horizontal enclosed vats. The open vats were used by virtually the entire industry until the 1970s, when the first vertical enclosed vats came on the market. However, many cheese plants, in particular medium to smaller cheese plants, still use open vats. The vertical enclosed vats became the standard of the industry by the 1980s and

remained so until the 1990s, when the horizontal enclosed vats came on the market. However, there are hundreds of vertical enclosed vats still in use today, including 10 at the Alto, Waupun large cheese plant No. 1 and four at the Alto, Black Creek facility. Today, most large new cheese plants install horizontal enclosed vats.

One of the driving forces behind this progression of technology in cheese vats was fat recovery. It is widely recognized that among vat styles, open cheese vats have the least efficient recovery of milk fat at cutting, followed by vertical enclosed fats, and with horizontal enclosed having the most efficient milk fat recovery at cutting. Open cheese vats typically have fat levels and whey at draw in the area of 0.4 percent or higher. Using some simple mathematics, one can calculate, using a yearly average milk fat content in milk of 3.75 percent fat, that this fat loss in whey represents 9.6 percent of the total milk fat that you started with. This means that with open vats at draw of whey, and not including all of their other fat losses that occur in cheddar

cheese manufacturer, which I shall detail later in this document, you're already down to a maximum of 90.4 percent fat recovery compared with the Van Slyke theoretical figure of 93 percent. This is also documented in the scientific literature by Dr. David Barbano at Cornell University, Barbano and Sherbon, *Journal of Dairy Science*, 1984.

Vertical enclosed vats typically have better fat recovery at draw than do open vats. This is a result of the physics involved with cutting the coagulum in this style vessel. In my 18 years of experience at Alto Dairy, I would say the average milk fat concentration in whey at draw using this style vat was .29 percent. This number is also documented in Barbano studies cited above. Again, using some simple mathematics, this represents seven percent of the original milk fat in the starting milk, which means that you are down to the maximum theoretical fat recovery in cheese of 93 percent without taking into account unavoidable and significant fat losses at further steps in the cheese making process.

Lastly, with horizontal enclosed vats, like

we had at Alto in Waupun cheese plant No. 2, the efficiency of fat recovery is better than with the other style vats previously mentioned. In my experience at Alto, I would say that our typical milk fat content of whey at draw with this style vat for cheddar cheese was .24 percent. This represents six percent of the original milk fat in the starting milk. This means that the maximum theoretical fat recovery in cheese was 94 percent, again, without taking into account unavoidable and significant fat losses at further steps in the cheese making process.

Total fat losses in the cheese making process. At Alto Dairy we recognized the critical importance of milk fat recovery in the cheese making process to the overall profitability of the business. Because of this, I assigned an able person at Alto, Mr. John Boortz, to spend the majority of his time devoted to this issue over a period of a number of years. Our attempt was to get a firm handle on the mass balance of both milk fat and milk protein during the cheese making process, that is to say, knowing how much milk fat and milk

protein we started with in our raw milk, measured how much of it ended up in our finished cheese, and by difference as well as by some measurements, determine how much milk fat and milk protein were lost in the whey, as well as in other byproducts and streams. This was a daunting task in a large cheese plant. However after years of study and using the statistically advantageous technique of gathering large data sets over long periods of time and using averages, we concluded that in general, depending on seasonality and other factors, our recovery of milk fat in our finished cheddar cheese ranged from 89 to 91 percent. If I would be asked to use a figure for realistic average milk fat recovery during the manufacture of cheddar cheese in a typical cheddar operation, I believe that number would be very close to 90 percent. Traditional open vat plants would have figures lower than this. Plants with enclosed vertical vats would have values very close to this. The newest plants in the country with the very latest horizontal vats with latest innovations in curd cutting cooking, stirring and handling equipment would have figures higher

than this.

Other loss points for milk fat during cheddar cheese manufacture. As previously mentioned, while the largest single loss of milk fat during cheese making occurs during the cutting of the coagulum, and due to this, most cheese plants concentrate their milk fat recovery efficiency efforts at this point, there are numerous other significant points in the cheese making process where milk fat is lost. The following is a general listing and discussion of those milk fat loss points.

Milk silos: For the purposes of these discussions, I will pick up the cheese making process at the milk silo storage area, knowing full well there are other milk fat losses prior in the process to this during pickup of the milk at the farm and delivery of the milk to the intake at the cheese plant. Some milk fat loss occurs at the milk silo stage due to the fact that normally there is always a small amount of milk left in the silo when it is emptied. It is very difficult to get every last drop of milk out of the silo during the pumping process.

Milk clarifier/milk filters: Virtually all

cheese plants use some sort of mechanical milk clarifier or milk filter system to remove any extraneous foreign materials in the milk prior to cheese making. If the equipment is a clarifier, significant milk solids, including milk fat, is lost from the system during the frequent de-sludging cycles that the clarifier must undergo to remain effective. This lost milk fat and milk solids goes directly down the drain. In the case of milk filters, they, too, must be cycled or they will plug up often with milk fat, and all of this fat and milk solids is typically lost to the drain.

Start-ups, changeovers, and shut-downs: At the start-up to the day, the milk lines are filled with water. This water is chased with milk at the start of pasteurization, and there is a significant period of time when there is a dilute to milk/water mix that is typically sent to drain because it is inefficient and may result in cheese defects to put this dilute mix into the vat. The same process occurs during midday wash-ups, some changeovers, and always during the shutdown process, but in this case reverse; you chase milk with water. In any

regard, during these times significant amounts of milk fat are unavoidably lost.

Cheese fines: Cheese fines represent one of the potentially largest sources of loss of milk fat. All cheddar cheese making processes results in the generation of fines. There are many techniques used to recover these fines, ranging from recovering most of them to put back into the cheese, a microbiologically dangerous and ill-advised process, all the way to using none of them back in the cheese. It all depends on the equipment the cheese plant has at its disposal, the type of cheddar cheese they are making, aged cheddar versus mild cheddar versus cheddar for processing, i.e, process cheese. In any regard, all cheddar plants just lose fines, it's just a matter of how much. These fines are, as in the case of cheddar cheese, rich in fat and will start out at roughly the same fat content of cheddar cheese itself, which would be 33 percent. Cheddar cheese plants can lose up to hundreds and even thousands of pounds of cheddar fines per day. For example, in the case of our Black Creek plant making cheddar cheese for aging, losses of fines that were not put

back into the finished cheddar cheese averaged over 600 pounds per day. This represents approximately 0.4 percent of the total milk fats in their starting milk per day, meaning if they had a 93 percent milk fat recovery at whey draw, just the further loss in fines would lower their overall milk fat recovery to 92.6 percent.

Salt whey: After draw of the whey in the vat the curds are typically pumped into a finishing table or matting conveyor. This process inevitably disrupts and shatters some curd, resulting not only in fines generation, but in larger fat losses in the whey generated at this point than is seen at cutting. Furthermore, after all the sweet whey is removed, the curd is dry, salted and stirred. This process results in the generation of salt whey, which is much higher in milk fat than in sweet whey. While the overall volume of salt whey is much smaller than the volume of sweet whey, the relatively large fat content seen in salt whey represents a significant loss of milk fat during cheddar cheese manufacture.

Curd loss: After salting, the curd must be put into some sort of form or shape, hooping.

Inevitably, this process results in loss of product onto the plant floor. I have yet to see a cheese plant, whether Alto or any of the many other ones I have been in, that doesn't have some cheese curds on the floor. This is, with current technology, an unavoidable part of the process of transferring cheese, either by traditional shovel, or by auger, or pneumatically by air, from one point in the process and into a form. Furthermore, with customers typically wanting fuller and fuller forms, to reduce trim losses at cutting/conversion operations, this results in even more cured loss as plants try and stuff every last pound of cured into the form, particularly 640 forms. Again, this cheese curd is one-third milk fat and these losses represent a significant loss of milk fat which totally was lost from the system as it is disposed of as waste.

Equipment surfaces: All cheese product contact surfaces must be cleaned at least one time per 24 hours. The reason for this is that these contact surfaces become coated with product over the course of the day, primarily

milk fat and milk protein. This can be easily demonstrated by seeing how greasy they become. One only has to look inside an alkaline wash solution tank of a CIP system after it has washed the equipment to see how much fat has been removed during the washing of the equipment. This, too, represents loss of pounds of fat in the system.

Milk fat recovery efforts. Cheese plants do everything they reasonably can to recover milk fat lost in the whey and fines. Milk fat recovered from whey is called whey cream. It should be noted that this cream is of lower value to the industry than is sweet cream. This cream typically cannot be used in AA butter manufacture. The value of whey cream varies regionally depending on the availability of alternative markets for this product. Not all milk fat and whey can be recovered. Much of this milk fat represents physically damaged fat which cannot be recovered in a typical separator. This is especially true of salt whey cream where the skimmed salt whey is typically disposed of and any remaining milk fat in it is totally lost. Milk fast lost in the skimmed

sweet whey will end up in the finished dry sweet whey, that is why we typically see a fat content in dry sweet whey of around 1 percent. Nevertheless, this represents a significant loss of value compared to if this milk fat could have been recovered in cheese or even in whey cream.

Many plants use a whey clarifier prior to whey cream separation to improve the efficiency of milk fat recovery at this point. However, one will see a significant volume of sludge generated at this point, which represents very small cheese fines that couldn't be captured at upstream points. This sludge is typically disposed of at a total loss. In many cases, these cheese fines are captured is some sort of a sieving process prior to the clarifier. If these fines are not returned to the cheese, which in my opinion they should not be due to microbiological risks, unless the cheese is barrel cheddar for further processing and pasteurized anyway. They are typically pressed in some sort of form and sold for process cheese manufacture at perhaps around 50 percent or less of the value of the finished cheese itself.

Conclusions. The capture of the maximum

amount of milk fat in the finished cheese is the goal of every cheese plant. The Van Slyke equation has historically used a maximum figure of 93 percent for this milk fat recovery effort. My 18 years at Alto Dairy followed by nearly four years at the University of Wisconsin Center for Dairy Research has indicated to me that cheddar cheese plants typically achieve significantly less milk fat recovery than this. I even believe that many cheese plants, when they casually talk about their own milk fat recovery, are specifically and somewhat misguidedly referring to only the loss of milk fat at whey draw and not at the overall loss of milk fat that occurs during the entire cheese making process from starting milk to finished cheese product. However, as I have discussed, milk fat recovery into cheese is a function not only of the loss of milk fat at whey draw, but also of the recovery efficiency and subsequent losses at the numerous other typical milk fat loss points that I have outlined above. In my experience at Alto and in the general industry, my belief is that an average cheddar cheese milk fat recovery percentage in the entire industry

would be in the area of 90 percent.

I have the following comments regarding the written testimony of Ben Yale, Exhibit 32.

Point number 1, definition of commodity cheddar, page 26, the written definitions used by the author of cheddar cheese are misleading and incorrect. Cheddar cheese doesn't come in many varieties; cheddar cheese is cheddar cheese. But it does come in many styles, some of which he has listed. Colby/Longhorn is not cheddar cheese; Colby has its own standard of identity. I would dispute that because a cheese plant makes cheddar in some of the styles he has listed it cannot be counted. Any plant that makes cheddar in 40-pound blocks can trade their cheese at the CME, and any 40-pound block cheddar has the potential to be commodity cheddar. Millions of pounds of 40-block commodity cheddar ends up in slices, dice, shreds and cubes. All cheddar cheese produced, other than that used for manufacturing, needs to conform to the 21CFR 133.113 he has listed. It does not differentiate between commodity cheddar and specialty cheddar. These terms are not legally defined. Beauty is in the eyes of the

beholder when it comes to differentiating between commodity cheddar and specialty cheddar.

Point number 2. There is not a total lack of data on cheese yields and fat retention in cheddar cheese making, page 27. Although there is not a wealth of public information available, a number of studies, including some by Dr. Dave Barbano of Cornell University, as well as some studies of the Irish Dairy industry speak to the level of fat retention, as well as overall cheese yields in cheddar manufacture. The reality is that cheese yield information generated by individual plants is widely considered as proprietary information that could result in competitive disadvantages if publicly disclosed. Furthermore, in my experience as vice-president technical services of Alto Dairy, as well as dealing with a number of cheese plants across the U.S. in my current capacity at the University of Wisconsin Center for Dairy Research, it is my opinion that more often than not individual plants don't accurately know their own fat retention data because it is so difficult to determine. Finally, I think it is wrong to say that just because plants aren't

complaining, that means that they have yields and fat recovery higher than the current USDA standards, or that all plants have yields above the current standards. I believe this to be untrue for the reasons I have already discussed.

Point number 3, whey cream sometimes is returned to the vat, but in my opinion it is unwise practice. In my 18 years of work at Alto Dairy, a large commodity cheddar producer, we never once, to my recollection, returned whey cream to the vat. Lastly, I have had years' worth of experience using ultrafiltrated milk in cheese making and it normally does not increase the recovery of butterfat and Casein in the cheese. If used in extremely high concentrations, it can capture some of the soluble proteins in the cheese matrix, i.e., whey proteins. Unfortunately, this results in an inferior quality cheese not normally suitable for table cheddar.

Point number 4, the bases stated in the final decision for using the 90 percent fat recovery factor in cheese are still reasonable and very supportable, pages 34 to 35. While I don't have direct experience with how Kraft

makes their cheddar cheese, all cheddar cheese is made using basically the same procedure with respect to cutting the coagulum and cooking the curd. The author refers to the making of a "higher quality cheese of different value." This is not true in my opinion. The cheese may indeed be of high quality, but it is not necessarily higher in quality than many other commodity cheddars produced, only different. These differences have nothing to do with the basic, time honored cheddar manufacturing techniques, rather they are driven by different cultures used, the use of flavor-producing enzymes, the expertise of the cheese maker in handling the curd, as well as different aging regiments. This does nothing to alter the basic milk fat recovery. Finally, using milk fat recovery numbers from vats over 20 years old is not wrong. Rather, it is the right thing to do to incorporate some of these data to obtain a valid overall picture of the current industry. In many cases these vats are still the workhorses of the industry and represent current standard cheese making practices. Furthermore, most of these vats have been mechanically

updated to significantly improve their milk fat recovery efficiencies compared to when they were new. To me it would be a huge mistake to only use milk fat recoveries from ideal conditions using only the latest, newest vats when these vats represents only a fraction of the current reality of vats in use. This would not accurately reflect current overall industry results. Furthermore, even these newest, most efficient vats will lose milk fat recovery, efficiency as they age, wear, and their knives become dull.

Point number 5. Obtaining a 90 percent milk fat recovery is not low, it is reality. The truth is there are plants that are below this level, whether they know it or not. There is no doubt in my mind that some plants, more than a few, are on the short side of this factor. As I have indicated in my own testimony, at Alto Dairy, even though we were a large modern cheddar cheese plant, didn't always obtain 90 percent fat recovery. In reality, the higher quality cheeses that the plant produces, the lower their fat recovery will be. Why? Because they won't succumb to ill-advised

practices to boost their fat recoveries, such as putting fines back in the cheese or adding whey cream back to the cheese milk. These cheese plants that have the best chance of having highly efficient milk fat recovery rates are those that produce a cheddar cheese destined for manufacturing, process cheese, where they feel they can get away with using inferior whey cream and poor quality fines in their finished cheese since their cheese is just going to be ground up, re-pasteurized, mixed with emulsifying salts and made into process cheese, or those that just make a substandard quality cheddar cheese at a discount price. But this does not represent the norm for producing cheddar cheese across the country that needs to meet typical customer expectations and standards, as well as meet the standard of identity for cheddar cheese.

Point 6. The author cited a number of California studies showing higher yields, page 36. The reality is these data have little or nothing to do with efficient milk fat recovery during cheese making. What these data show is that cheese plants are heavily fortifying the raw milk with additional milk solids, most

likely concentrated milk of some sort and/or sweet cream, and/or whey cream, and/or condensed skim milk, and/or nonfat dry milk solids. One needs to remember that higher cheese yields do not automatically translate into higher cheese plant profitability. All too often I have seen cheese plants increase their yield through fortification of their raw milk with additional milk solids without realizing that they have increased their input cost higher than they are able to recover with their output, i.e., cheese, whey solids, whey cream gains. I believe the data the author cites in this section have no merit in his case he is presenting.

Point 7. I do not believe the calculation the author apparently did to estimate the butterfat recovery in California cheese plants is accurate. While this does not appear in his written testimony, I am informed that he has provided a range of 93 to 95 percent in his oral testimony. The estimation of milk fat recovery in cheese making is not as simple of a process as the author would have one believe. There are too many other complex interactions involved to calculate milk fat recovery in this way,

including protein recovery rates, the factor used for recovery of other solids, typically 1.09 used for cheddar cheese, but in my work at Alto Dairy, we demonstrated that this, too, varies and can lead to errors is estimating milk fat recovery efficiencies, moisture levels, and laboratory inaccuracies in testing the various components. Furthermore, it is incorrect to assume that all the additional fat in cheese milk above levels seen in protein milk is whey cream fat. This is not true. Cheese plants can and do use other sources of milk, namely, concentrated milk and sweet cream, to boost the levels of milk fat in their cheese milk prior to cheese making. Also, the author says that cheese makers add butter to their vats. This is absolutely untrue. They can only add fat in the form of cream or milk streams. Lastly, looking at the California cheese plants in isolation does not give you a true picture of the entire nation's cheese industry.

Point number 8. The statement that FMMO data shows that for milk that goes into Class III that virtually 100 percent of the milk fat remains in the cheese is a just plain wrong

assumption, page 41. This would imply that no whey cream is generated that doesn't go back into cheese, which is patently false, that all cheese plants are perfect and no cheese ever is lost to the floor, or milk is lost for that matter, or liquid whey is lost for that matter, that all milk fat can be recovered from whey, that the fat content of dry whey powder would be zero, since all the milk fat was captured in the cheese, which it obviously isn't, and that all fat is captured from salt whey, which it isn't.

The author states that they know that the butterfat recovery in the cheese making process is far greater than the current 90 percent used in the formula, and that this figure grossly understates the butterfat recovery that cheese plants currently obtain in the making of cheddar cheese, page 41. The figure of 90 percent recovery of milk fat in cheese making remains a valid number to estimate the reasonable amount of milk fat that cheese makers across the country making cheddar cheese can expect to achieve if using reasonable equipment in good repair and also using generally regarded as acceptable cheese making practices.

MR. ROSENBAUM: Your Honor, at this point I would ask that 62 be admitted?

JUDGE PALMER: All right. Received.

MR. ROSENBAUM: The witness is available for cross-examination?

JUDGE PALMER: Questions? Mr. Beshore.

CROSS-EXAMINATION,

QUESTIONS BY MR. MARVIN BESHORE:

Q Good morning, Mr. Sommer.

A Good morning.

Q My name is Marvin Beshore. I'm an attorney representing Dairy Farms of America and Dairylea Cooperative.

A Okay.

Q Which I assume you --

A Very familiar with.

Q You're in the cooperative industry, you're familiar with those organizations.

A Yes.

Q When did you first become involved in reviewing any materials for this hearing?

A Um, probably about two weeks ago; something like that.

Q Was that an assignment given to you by the University of Wisconsin?

A It was not.
Q Who assigned you the task?
A I'm doing that as an independent individual.
Q What led you to take on the task of involvement in this hearing?
A The party that I'm working with called me with some technical questions about my thoughts on milk fat recovery.
Q And who --
A We had a number of discussions about that, which led to them asking me to testify.
Q Who called you?
A Sue Taylor.
Q Now, have you been, then, retained by Ms. Taylor's company or by IDFA to participate in this hearing?
A Yes.
Q What's your compensation for that?
A $850 per day.
Q Now, when did you last review any of the Alto records?
A When I left there, which would have been in 2003.
Q So all of your testimony with respect to Alto's production numbers is from memory?

A No, I have subsequently talked to some of the Alto personnel to review how they've done since I've left. So it's not totally from memory, it's from some further discussions -- recent discussions with some people that remain in the employment of Alto Dairy.

Q Okay. In addition to Mr. Yale's testimony, is there any other testimony that you've reviewed that's part of this hearing record?

A No.

Q Who prepared your statement, No. 62?

A This document?

Q Yes.

A I did.

Q Okay. Who reviewed it before you testified here?

A Who reviewed it?

Q Yes.

A The parties that I'm working with looked at it.

Q Mr. Rosenbaum, for instance?

A Yes, I assume. I don't know just how they did it, but they looked at it before, yes.

Q I noticed that your name is spelled two different ways on the document. I assume you did not spell your name two different ways.

MR. ROSENBAUM: Your Honor, I stuck the heading on it myself and managed to misspell it. He e-mailed me his testimony, I stuck that on top.

JUDGE PALMER: We accept the explanation. Go ahead, sir.

Q Are there any other portions -- was your statement reviewed and commented upon and revised in the course of its preparation in your communications with Mr. Rosenbaum and his clients?

A I'm sorry, could you repeat that question again.

Q Did your testimony go through drafts and reviews and revisions in consultation with Mr. Rosenbaum and his clients?

A Yes, one.

Q Now, with respect to Alto's operations, what was Alto's average yield of cheddar cheese from 100 pounds --

A I'm speaking from memory, but probably was in the area of -- I would say right in the area of 10.3 percent.

Q 10.3 pounds per hundredweight of milk?

A Correct.

Q How did that vary from plant to plant, since you

had different -- if it did?
A It didn't vary much.
Q Okay.
A It would only vary based on moisture of cheese, which is, of course, what Van Slyke equation would predict.
Q So the 10.3 yield, what moisture level would that be?
A Yeah.
Q At what moisture?
A Probably around 38 percent on the average.
Q And can you tell us what the average components were in the milk received at Alto on an annual basis?
A From memory, as I said in here, around 3.75 percent fat, probably a protein. Just from memory, probably around -- true protein probably around 305, something like that.
Q And the cheese yield, then, was about the same at the three plants on that milk?
A Season to season, yes, roughly.
Q Can you just explain for us how you calculate what the fat recovery is in your cheese making process at your plant?
A How you calculated it?

Q Right. You've got 10.3 pounds of cheddar cheese that came out of each hundredweight of milk.
A Uh-huh.
Q Now, how did you determine what portion of the butterfat you recovered?
A Well, ultimately the way you have to do it is you have to determine pounds of fat in your milk going into the system and the pounds of fat in the cheese coming out of the system.
Q Is that how you determined it?
A That's how we tried, yes.
Q Okay.
A You try to confirm, then, by measuring some of the slip stream, the whey streams, the salt whey, product loss on the floor and what the fines content is, and try and -- I don't know the accounting term, but you try to compare that and hopefully it adds up to your losses.
Q Now, let me just see if I understand that. You know what the test is of the milk coming into the plants, correct?

The 3.75 was a --

A That's like a yearly average.
Q Is that farm test?
A Farm test.

Q And of that 3.75 percent butterfat at the farm, do you then, what, test the cheese for butterfat percentage to know?
A Yes, yes; that's what everybody does, sure.
Q So in the 10.3 pounds of cheese that you produced at the plant, assume a 90 percent recovery, would the pounds of butterfat in that cheese be .9 times 3.75? If you had a 90 percent recovery --
A Correct, it would be apply that using 10.3. What you have to measure is every pound of cheese from a whole day's production in your cooler, not 10. -- you're not measuring 10.3 pounds, you're measuring it in the whole quantity of cheese produced per day and comparing it to the whole quantity of fat used for that day and try to compare them.
Q I understand. We're working with, and I assume your testimony is based on, you know, averages of large amounts of cheese produced?
A That's correct.
Q And large amounts of milk?
A Millions of pounds of milk in cheese, yes.
Q So you started with -- I just want to make sure this equation is correct and clear on the record

here.

You start with 3.75 pounds of butterfat at the farm?

A Per hundred pounds of milk.

Q Per hundred pounds of milk at the farm?

A Uh-huh.

Q From that, you derive at the -- on the loading dock at the back of the cheese plant, 10.3 pounds of cheese on average?

A Per hundred pounds of milk.

Q For that hundred pounds of milk.

Now, and within -- assuming that you had a 90 percent recovery of the butterfat -- well to get to the 90 percent, you would measure the butterfat in that 10.3 pounds of cheese, correct?

A No, you would measure the fat in all the cheese that you make.

Q Well, but I'm assuming that that measurement reduced down to an average of 10.3.

A You don't look at it that way. No, that's not the way you look at it.

Q Isn't that how you get to the 90 percent?

A No.

Q How do you get to 90 percent?

A Total pounds of fat in your milk that you use -- it's very simple. Total fat in the milk going into the system, total fat in the cheese leaving the system.
Q And if you have just a hypothetical average hundredweight of milk going in --
A Okay.
Q You know, you take the total.
A It has nothing to do with that.
Q Wouldn't the average -- if you take the total, take your hypothetical total, say it's a million pounds of milk. Can we do it that way?
A Sure.
Q How many pounds of cheddar cheese would you have at the end of that million pounds of milk. If you had a 10.3 yield, you would have 103,000 pounds of fat?
A Yeah -- no, cheese.
Q Of cheddar cheese?
A You compare the amount of fat that's in that cheese with the amount of fat that you had in the milk going in.
Q And if the milk had 3.75 percent butterfat, that million pounds, that would 375,000 pounds of butterfat, correct?

A No, no.
Q I'm sorry. 37,500 pounds.
A Correct.
Q Assuming you had a 90 percent recovery of that butterfat in the cheese, how many pounds of the butterfat would be in that cheese?
A Ninety percent of that 37,500.
Q Okay. And just because we try to be simple in these things and work with simplified numbers, if we divided all of those volumes by -- how many hundredweight are in a million pounds, 10,000?
A Yes.
Q If we divided it all down to an average hundredweight, we could do that?
A Yeah, you could.
Q So that's how you determine a 90 percent fat recovery. Thank you.

Now, you've used some numbers -- percentages in the whey at draw.

A Uh-huh.
Q I want to understand what that means.
A Okay.
Q I'll take the middle one, .2.9 percent.
A I understand.

Q Give me the numerator and denominator of the equation that give you that -- of the ratio that gives you the .29 percent?
A There's no ratio. It's a flat test. You take the sample of whey at pre-draw and you test it either through a chemical methodology or infrared methodology, and it gives you the percentage of fat in the whey at that sampling point. It's not a calculation, it's a test.
Q Okay. That's what I'm trying to understand. I thank you.
A Uh-huh.
Q When you say .29 percent, you're saying that for every pound, if I can do it that way, every pound of whey or every hundred pounds of whey, there would be .29 pounds of butterfat?
A Correct.
Q Okay. How many pounds of whey -- what volume of whey do you generate when you use a hundred pounds of farm milk to make cheddar cheese?
A It depends on cheese yield, but roughly 90 percent. Ninety pounds per hundred pounds.
Q Ninety pounds per hundred pounds?
A Roughly.
Q Actually, if you've got 10.3 pounds of cheese,

would it be roughly a little less than 90 pounds?

A 89.7.

Q You can just take the weight and basically the --

A It's --

Q Rough measure --

A Either cheese or it's whey, essentially.

Q Very good. There's been a document that was in Mr. Yale's exhibits, did you see his exhibits as well as his --

A I did not.

Q You did not. Have you ever seen documents -- promotional -- sales materials from the cheese equipment industry?

A Many times.

Q Okay. Do they advertise that their current cheddar technology can recover 94 percent of the butterfat in cheese making cheddar?

Have you seen that?

A Could you repeat that question again because it's very important what words you use.

Q Actually, maybe I can just show you the document that was in Mr. Yale's exhibits. It was a Scherping publication.

A Uh-huh. I'm familiar with them.
Q I want to hand the witness document SSS of Exhibit, what is it, 33?
JUDGE PALMER: 33, I believe.
Q Mr. Sommer, SSS goes on for a number of pages and has the CPS logo --
A Okay.
Q -- on it. And the first page says "CPS Scherping" at the top.
A Uh-huh.
Q Have you had a chance to glance at that?
A I glanced at it, yes.
Q Okay. Have you ever seen any documents like that from Scherping or other manufacturers before?
A Similar, not quite this detailed, quite honestly.
Q Okay. Now on the first page of SSS, the top half shows customer input, the bottom Scherping's results.
Do you see those labels on there?
A Okay.
Q Okay. And on the Scherping's results, right under that, the first line is "percentage of fat recovery," and then it says "expected

95.36 percent;" do you see that?
A Yes, 95.36?
Q Yes.
A Yes.
Q What do you understand that to be stating?
A Well, in my dealings with Scherping, and I've had dealing with them, and we had Scherping vats in our plant 2 at Waupun, what they're typically talking about there is the fat recovery at whey draw, not fat recovery in the total cheese process.
Q Okay.
A So that would relate to those figures that you were quoting a minute ago about the .29 or .24 or .40; fat recovery at that point in the process. Because they're selling vats, and what they're trying to say is their vats hold more fat in the coagulum at that point, which is true, they do. But they're not talking about typically the downstream losses that will occur through the rest of the process, which I outlined in my testimony.
Q So you're saying that this number, 95.36 represents the fat net of what is in the whey stream?

A Only the whey stream at pre-draw because there is further whey stream losses downstream from that, of fat.
Q Did you use Scherping equipment at Waupun?
A Yes, I just mentioned we did in plant 2 in Waupun. We had their very newest vat that we installed there.
Q Did you experience that level of fat recovery at the point of the process that you've indicated?
A I would say not quite that high, but I can see why -- looking at their data, why not.
Q Why is that?
A Because if you look at the customer input, the fat content is relatively low, 3.67 percent, and protein content very high at 3.2. If you lower your fat-to-Casein ratio by lowering the fat and upping the protein, you're going to improve your fat recovery.

Unfortunately, in the marketplace -- or in today's economics, that usually results in total dollar losses to the plant because it's not economical to do that, taking the whole picture into consideration.

So we would never run a fat-to-protein like that because we would lose dollars to that in

our raw milk. We would want a higher fat content compared with the protein. But if you adjust the protein up like that, sure, you can increase the fat recovery, but it's not economically advantageous to do so most of the time.

Q It's not economically advantageous?

A No.

Q And why is that?

A Because your yields go down as your fat decreases per your unit of Casein. So you want to have higher fat-to-Casein in your cheese milk because you'll get more pounds of cheese that way and your total economics of inputs versus outputs will be better.

Q So the 10.37 percent yield here is that realistic given the inputs that they've projected?

A 10.30?

Q 10.37, I'm sorry.

A 10.37.

Q It's right --

A I see it. Yeah, probably. It sounds realistic, yeah.

Q Let me ask you a question about whey. You

comment that whey cream -- your words were I think carefully stated and I can't find them at the moment, but it was something -- page 5.

In the top paragraph. "This cream typically cannot be used in AA butter manufacture."

A That's correct.

Q When you use the word "typically," does that mean that it can be use in AA manufacture sometimes?

A When I say the word "typically," what I mean is by law it should not be. It cannot be.

Q Okay.

A But my understanding is that some butter manufacturers maybe use some blended small amounts in at times.

Q Okay. And you're talking about USDA AA?

A I am.

Q Now, does Wisconsin have a state butter --

A They do.

Q -- brand?

A Yes.

Q And what are those labels?

A I think it's AA and E and B even. I'm not a butter guy, but I believe that's what it is.

Q Do the Wisconsin state labels allow the use of whey cream in AA state butter?
A No.
Q Single A state butter?
A I don't know.
Q How many manufacturers, if you know, of -- how many plants in Wisconsin -- we've heard testimony that there's one major buyer of whey cream, at least, in Wisconsin, Grassland Dairy.
A There's more than that.
Q What other buyers of whey cream are you aware of in Wisconsin?
A Grav-Creamery in Zarco and Elcam (phonetic) Creamery in Richland Center. That might be -- oh, there's one over in the Plymouth area, too, and I can't remember their name.
Q What are the uses for whey cream?
A Usually make B butter out of it.
Q Are there any other uses for it that you're aware of it?
A I'm sure there are, but I don't know what they are.
Q Are you aware of any price information regarding, you know, the average prices at which whey cream is sold and purchased?

A In general, I used to sell it in my Alto days, but it was usually somewhere in the neighborhood of $0.5 to $0.10 a pound less than sweet cream fat.
Q Okay. So was it sold off the AA butter market at a multiple?
A Yeah at a multiple and the multiple was lower for whey cream than it was for sweet cream fat, yeah.
Q And roughly what, five percent lower?
A I think, if I remember correctly, it was like $0.5 or $0.10 a pound of fat less, if I remember correctly.
Q Was it typical --
A It varied though, it varied depending on the strength in the market and fat contents, and things like that.
Q Are you aware of any data series published by, you know, the University of Wisconsin, or USDA, or anybody on either prices of whey cream or of B butter?
A I am not.
Q Are you at all familiar with the types of equipment that are -- cheese making equipment that are being used in the large plants that

have recently been constructed in the western part of the United States?

A I am, yes.

Q What kind of equipment are they using?

A For the most part, they're using OO -- horizontal OO vats and oftentimes some kind of matting conveyor, and then a block-forming tower of some sort; that would be pretty typical.

Q Do you have any information with respect to what percentage of the cheddar cheese manufacturing capacity out there now is using that type of technology?

A Do I have direct information? No.

Q Do you have an estimate?

A I would say very high. I would say -- cheddar cheese we're talking about?

Q Yeah.

A I would say 80 percent plus.

Q Just one other area -- or one other question at the moment.

You comment on page 6, your second point in response to Ben Yale's testimony about the data that's available --

A Uh-huh.

Q -- on cheddar cheese yields and fat retention. And you talk about Dr. Barbano's publications.
A Uh-huh.
Q And the Irish Dairy industry publications.
A Yes.
Q Other than -- set aside the Irish publication for the moment, other than Dr. Barbano's publications, are you aware of any other domestic U.S. publications on cheese yields and fat retention?
A No.
Q Okay.
A Since then you mean, or at all?
Q Since then, for starters.
A Since then, no. But any others? Yeah, there are other ones out there, sure.
Q Prior to?
A That I'm aware of.
Q Okay. What are those?
A I can't tell you off the top of my head. I just remember seeing some in the past.
Q Okay. Is it your view that the reason there isn't more public information of that sort just because cheese makers hold this -- consider this so proprietary to them?

A Partly that, which I stated in my testimony. Partly that a lot of cheese makers just don't have it because it's so difficult to gather that information well. And if you're going to do it, as a private company and invest all that time and money to do it, you're generally not going to openly share it, I would think.

Q Okay. When you were the manager of operations for Alto -- vice-president of operations, did you have benchmark objectives for your cheese makers on what you expected them to achieve in production efficiencies at the plant? You were supervising them, I take it?

A I was vice-president, I was in charge of all of them.

Could you repeat the second part of your question then.

Q Yeah, as vice-president of operations, which put you in a, I assume, supervisory responsibility for the cheese plant operations.

A Yes.

Q As a manager in that responsibility, did you establish benchmarks, goals, standards for your cheese plant managers and cheese makers to achieve in their operations?

A The answer is yes.
Q And what were those in terms of fat recovery and cheese yield, if you established them on those basis?
A Well, we did, but, again, you have to understand in a big plant, one person on the floor only can control his or her part of the operation. So their goal has to be germane to what they can control.

You can't assign your vat operator, operating vats, a total fat recovery because they have no control over the cheese handling downstream from there. So the goals were for the vat person, typically it would be for the whey -- fat in the whey at draw goals. And then for somebody downstream, things like waste. And for those people operating the separators, how cleanly they could skim the whey to remove the fat. And the idea is if every person at every stage of the operation meets their goal, then the total goal will be achieved of maximum fat retention.

Q Was there one -- at that Waupun 1 plant, let's take that, was there one person there who was the manager who was accountable for that total

operation?
A Yeah, cheese plant manager, yes.
Q And did he have -- did you establish a goal for him for the overall plant operation?
A No, no; it was just for the specific parts, segments of the process.
Q And just take Waupun 1, what was the objective for the cheese maker for the whey in the draw, I guess the fat in the whey draw?
A For plant 1? We really wanted them to try -- the lower the better, obviously, but we really wanted them to try to strive for in that .27 whey fat.
Q How about plant 2?
A With the better vats on cheddar cheese, we were striving to like hit around .22. We didn't get there, but it was a goal.
Q And what would the goal have been over at Black Creek?
A That would have been the same as plant 1 because of similar equipment, so in that .27 range for whey fat at draw.
MR. BESHORE: Thank you very much.
A You're welcome.
JUDGE PALMER: Mr. Yale.

MR. YALE: Can we have a break?

JUDGE PALMER: Yeah, let's do that. Let's take five minutes.

(A recess was taken.)

JUDGE PALMER: Do we have anybody else that's going to question the witness? Yes, sir.

CROSS-EXAMINATION,

QUESTIONS BY MR. RYAN K. MILTNER:

Q Ryan Miltner on behalf of Dairy Produces of New Mexico and other cooperatives.

I'm looking through my notes so we don't go over ground that's already been covered.

A Okay.

Q Mr. Sommer, you referenced a study by Dr. Barbano.

A I did.

Q Do you happen to recall when that study was done?

A I think I referenced the date in my testimony of when it was published. I believe it was 1984, but I'm not -- I can't remember just where it is. Yeah, 1984 it was published in the *Journal of Dairy Science*, it's on page 2. So obviously the data were collected prior to the point of publishing.

Q I see that, thank you.

Once you have butterfat in cheese in the vat, where do subsequent losses of butterfat occur?

A As I outlined in my testimony, cheese fines that don't end up in the finished product, fat that coats the surface of equipment, whey -- further losses of whey, and then especially further losses of salt whey.

Q Once you've taken the whey out, we have curds, right.

A Right, salted curds or curds, right; depending on what part of the process.

Q If we assume the whey is now out of the process and we're just dealing with curds.

A Okay.

Q Are the fines the only area of loss?

A Fines and cheese that would -- waste cheese that would be lost to the floor during the handling of it, which there always is some.

Q Do you have any studies or any surveys of the percentage of loss attributable to those fines?

A I don't have any studies or surveys; I just know how we struggled with it at Alto Dairy and how significant it was.

Q How significant was it; do you recall?
A Yeah, usually we often would have a few hundred pounds of waste cheese per day.
Q Compared to how much cheese?
A Compared to how much cheese production?
Q Yeah.
A Probably about in the neighborhood of 300,000 to 400,000 pounds per day.
Q Okay. So less than half a percent by my math -- no, say that again. 300,000 to 400,000 pounds and a couple hundred pounds would be lost?
A Of waste cheese on the floor.
Q So a 10th of a percent, 2/10 of a percent perhaps?
A Yeah.
Q Have you done, or are you aware of any studies computing a weighted average of yields of plants?
A A weighted average of yields?
Q Yeah, by production. For instance, there have been studies that show the manufacturing costs by plants.
A Okay.
Q And there's been weighted averages to weight those costs by the volume of production of

plants.
A Okay.
Q Any similar studies that you're aware of that measure yields in any similar way so that we can determine an average yield?
A None that come to my mind. I can't remember if that Irish study talked about yields or not. It talked about fat losses. It was a good study because it gave some really good numbers, but I can't remember if they had yields in that or not, they might have.
Q In your statement you provide your opinion that using whey cream put back into the vat is not a practice that you would have used at Alto?
A That's correct.
Q But there are cheese manufacturers that do engage that?
A That is also correct.
Q Do you have any idea as to whether it's a very common practice, a somewhat common practice; any idea as to how many cheese manufacturers out of the population would do that?
A I really don't because that's kind of one of those proprietary things that you don't -- especially since it's not at necessarily

advisable practice, people don't like to openly talk about that, so I don't know.

Q But if doing so would provide a product acceptable to their buyer, certainly it would be something that would increase their -- the total recovery of butterfat from their producer milk.

Would you agree with that?

A Would it increase the total recovery of fat from their producer milk?

Q Yes.

A It won't in terms of the Van Slyke equation, no it decreases it. In terms of overall fat that ends up in cheese in one fashion or another, it increases it.

Q In terms of the percentage of butterfat from what comes in the door to what ends up on the dock, the total amount of butterfat in their cheese product goes up?

A Over time, yes.

Q In your experience at Alto or otherwise, is there an ideal fat-to-Casein ratio for a vat?

A That would depend on your definition of the world "ideal."

Ideal from what standpoint?

Q As a cheese manufacturer, what is optimal for

producing, well, let's say, the most product, first of all.

A Okay.

Q And let's answer that first, if you could.

A That depends on market conditions; that depends on the price of cheese versus the price of cream or fat versus the price of protein sources.

Generally speaking, most of the time you want to maximize the fat content of your cheese milk because it's in the economic best interest of the plant to do so. So generally speaking, you want to reduce the Casein-to-fat ratio.

Everybody talks about a magical .7, but from an economical standpoint, most of the time, depending on market condition, you're better off down in that .66 area, .65, something like that.

Q And you prefaced your answer by saying that the price of components and price of the finished cheese will change the economic optimization of that ratio?

A Correct.

Q Is there an ideal ratio for producing the largest quantity of cheese?

A That would be the same.

Q It would be the same. Okay.

MR. MILTNER: Thank you, I don't have anything else.

JUDGE PALMER: Other questions? Mr. Vetne.

CROSS-EXAMINATION,

QUESTIONS BY MR. JOHN H. VETNE:

Q I'm John Vetne. I represent Agri-Mark and other cooperatives, Mr. Sommer.

A Okay.

Q I have a couple of questions, not a lot.

You indicated that over time the average yield that you observed at Alto was 10.3 pounds of cheese?

A Yeah, that was just a recollection; but that's my recollection, yes.

Q And in response to questions from Mr. Beshore, you related that to the fat content and protein content of incoming producer milk?

A Yes.

Q In your experience, did Alto add either skim solids or milk fat to product, the raw product going into the vat, at any point in order to achieve maximum protein to fat ratio or in order to achieve maximum yields?

A Yes, we did.

Q And the 10.3 pounds of yield would include those

added components?
A Yes, it would.
Q So it would be inaccurate to relate those 10.3 pounds back to the protein and fat content of producer milk?
A Yes.
Q Could you perhaps describe the process by which such supplemental solids, either fat or skim solids, are introduced into the vat received by the plant and introduced?
A There's two -- in general, that process is called fortification of adding additional solids to your raw producer milk prior to making cheese out of it.

There's essentially two different ways you can do that, the batch method or on-the-fly method. In the batch method, you take a storage vessel, typically a silo, you put some producer raw milk in and then you add your additional solids, whether it's condensed skim milk or cream, or whatever is -- rehydrated nonfat dry milk or what have you. Mix it up in that silo in a batch sense. Typically, then you test it to make sure it meets the protein in fat criteria and solids criteria that you're looking

for and then that mix is then pumped to the pasteurizer and then goes in the cheese vats.

The on-the-fly method, which is becoming en vogue in recent years, particularly in the large plants, you have a series of silos or storage vessels with all the different ingredients for cheese making, the milk ingredients, meaning raw producer milk in the silo, cream in the silo, condensed skim, perhaps in the silo, rehydrated nonfat dry milk in a silo. And there will be a pipeline connecting those silos all over towards the pasteurizer with a series of valves in that pipeline, and by proportion you'll add so many pounds out of your raw milk tank, plus so many pounds out of your cream tank, plus so many pounds perhaps out of your condensed skim tank or rehydrated nonfat on the fly, proportionately to come up with the blend solids fat protein that you want in your cheese milk. Typically then it goes through a pipe with a series of swirls in to mix it, then it goes to your pasteurizer and your vats.

The advantage of the latter is that you don't need quite as many storage vessels to pre-blend everything because you're doing it on

the fly.

Q All right. Rehydrated dry -- rehydrated nonfat dry milk.

A Rehydrated nonfat dry milk.

Q Where's the rehydration take place in that process?

A The most common method is you have a storage vessel, a silo of some sort, you put water in it, called a powder horn and a powder mixer, and you recirculate the water through this mixer while you're adding the powder to it, and it kind of blends it into the water.

So it's happening in the silo prior to cheese making, typically.

Q And, typically, does that silo of rehydrated dry skim milk contain skim solids to water proportion similar to producer skim milk or similar to condensed skim milk?

A It can be either, but more typically it's more similar to condensed.

Q And you were shown a page from Exhibit whatever that was, page SSS the Scherping proposal, which at the bottom of the page had a cheese yield of 10.37 pounds.

A Uh-huh.

Q Based on Scherping's proposal and your familiarity with it, can you comment on whether that yield would be a result of the measurement of solids in producer milk or solids as introduced into the vat?
A It would be solids as introduced in the vat.
Q In your testimony, I'll refer you to a page, page three.
A Okay.
Q At the top of the page in the fifth line you're talking about "recovery of milk fat" depending on seasonality and other factors.

Am I correct that the other factors are those listed in continuing testimony on pages three, four, and five?
A That's correct.
Q You didn't give any illustrations for seasonality impact on milk fat recovery.

It's not just because it's June or December that you have a variation, it has something to do with the milk, I assume?
A That's correct.
Q What is it that has to do with the milk that is a seasonality factor that affects fat recovery?
A The actual composition of the milk changes

throughout the season. For instance, in the protein factor, as Dr. Barbano noted in his study on that topic, the ratio of Casein to other proteins changes seasonally, the percentage of nonprotein nitrogen, NPN, changes seasonably. So those type of factors and the protein is critical to cheese yield, will influence fat recovery and ultimate cheese yield. And the very nature of the fat itself because fat is not -- it's not just one compound it's different triglycerides and different fatty acids, and they change depending on the feed the cows receiving. So if the cows are receiving green chop in the spring and summer versus dry hay in the winter, it's going to change that fatty acid composition, which changes the melting point and other things in the milk fat globule, which will affect how easily it's captured and can escape from the cheese matrix.

So those are the type of things that would influence that.

Q Okay. Then finally some questions on whey cream recycling into the cheese making process.

A Okay.

Q You indicated you believe it is done in some

places, but it's not something people advertise.
A Right.
Q I don't know if you were involved in the sale of product, but to the extent that you're familiar with the sale of finished cheese, if a manufacturer offers cheese and makes it known that in order to enhance fat recovery to enhance producer prices, that manufacturer makes it known to its buyers that it recycles the whey cream into the cheese.
A Uh-huh.
Q Would that cheese have the same value in the market?
A Oftentimes not. We had certain customers that wouldn't take it even at all. They prohibited us from re-adding whey cream back into the cheese milk prior to cheese making. So oftentimes it does not; it has a lesser value.
Q So if the objective is to determine a value of milk based on the value of the finished product, if you're going to factor in recycling of whey, you would have to lower the value of the finished product?
A Yes.
MR. VETNE: Thank you.

JUDGE PALMER: Any questions? Yes, Mr. Beshore.

RECROSS-EXAMINATION,

QUESTIONS BY MR. MARVIN BESHORE:

Q Just one follow-up to Mr. Vetne. Since, as you've indicated, Mr. Sommer, there's not much published data on yields and witnesses are reluctant to talk about their own yields, we need to milk you dry on it.

A Okay.

Q With Alto, your yields represented some fortification?

A Yes.

Q Can you tell us any more about that? Was there, you know, a level to which -- did you always fortify?

A No.

Q Okay.

A Much of the time, but not always.

Q What would be the component levels of your milk if you were not going to fortify?

A Well, if you didn't fortify at all, it's whatever it came in as from the producer.

Q How did you determine whether you were going to fortify or not?

A A lot of factors went into that. Pricing, what's the cream worth, what's the price of condensed milk, skim milk, what's the price of cheese. All of that has to be taken into account, as well as availability. Did we have excess sweet cream available. Did we have powder or condensed swim available.

All depends on market conditions, availability, technical aspects of what we could do at any one point in time. It's a very complex decision, actually.

Q Do you have any recollection or can you provide any information on the average fat test after fortification?

A No, I don't know, because that varied. Because we wouldn't always fortify to the exact same level. Again, depends on what we had available, what the raw milk was coming in.

I can't put a number to that.

Q Can you tell us what the -- if you know -- what the yield was on -- well, you said your average farm components were about 3.75 percent butterfat?

A Over the course of a year, typically, real close to that; give or take a few hundred.

Q On true protein it was about what?
A I think it was in that 303 to 305 area, if I remember right.
Q Okay. Do you have any recollection of, over a year, the average components that went into cheese production at your plants?
A After fortification?
Q After fortification.
A No, I don't know. Oh, boy, that would be a tough one; that would take me days to calculate even if I had the data in front of me, which I don't have access to any more.
Q Could you give us any estimate of the average yield without fortification?
A Well, it certainly would be significantly less than 10.3, but I'm not sure. You know, it would be just a guesstimate, I don't know.
Q If you used your components and applied the Van Slyke, would that --
A Yeah, if you used that and applied the Van Slyke and put a fat retention of 10 percent, then it would probably be very close.

MR. BESHORE: Thank you.

JUDGE PALMER: Other questions? Mr. Vetne.

RECROSS-EXAMINATION,

QUESTIONS BY MR. JOHN H. VETNE:

Q My apologies, I missed one here.

A Sure.

Q On page three of your testimony you refer to a small amount, but a real amount of milk fat loss occurring in the silo because you can't get everything out.

Now, in the discussion we had about the process of milk ingredients into the vat on the fly with a cream storage tank. With respect to milk that is stored -- cream that is stored in a silo for introduction into a vat, the fat loss from that cream would be far greater than the fat loss of incoming producer milk?

A That's true, that's true.

Q Because fat tends to adhere to the surface of the silo?

A That's true. And for given volume, because you can never get it all out. You're going to have much higher fat test, you'll lose a heck of a lot more fat that way.

MR. VETNE: Thank you.

JUDGE PALMER: Anybody else. Any more questions for this witness?

Mr. Rosenbaum, do you have anything more for the witness.

MR. ROSENBAUM: I do not.

JUDGE PALMER: You're excused, sir. Thank you very much.

Let's go off the record for a moment.

(A discussion was held off the record.)

RODNEY CARLSON,

having been duly sworn to tell the truth, the whole truth, and nothing but the truth relating to said matter was examined and testified as follows:

DIRECT EXAMINATION,

QUESTIONS BY MR. STEVEN J. ROSENBAUM:

(Exhibit 63 was marked for identification.)

(Exhibit 64 was marked for identification.)

Q Mr. Carlson, you have prepared a written statement?

A Yes, I have.

Q And you also have a set of exhibits to that testimony?

A Yes.

MR. ROSENBAUM: Your Honor, I'm not sure, I don't have the numbers with me.

JUDGE PALMER: 63 for the statement and 64 for the exhibits.

Q Mr. Carlson, could you please proceed to read for us Exhibit 63, your prepared written statement?

A First, I would like to give a little bit of my background and experience, if I may.

Q Please do.

A I was born and raised on a dairy farm in Northwestern Minnesota. Went to school at North Dakota State, where I received both a BS and MS in agricultural economics. Was hired by the Dairy Division of USDA and went to work in the market administrator's office in Denver, Colorado. Worked there under Dr. H. Allen Luke. Worked with a person that a number of you will remember, Richard Glant.

From there, I went to the market administrator's office in St. Louis, Missouri, where I worked under Fred Shipley and later on Donald Nicholson. Worked there for eight years, went to work for Land O'Lakes as market analyst. Worked for Land O'Lakes for five years in that capacity. And all during that time, I was responsible for developing, preparing, and

testifying at Federal Order hearings.

Went to work for Milk Marketing Incorporated, a cooperative headquartered in Ohio, where I was hired as director of marketing which included, again, all of these activities to do with federal milk marketing orders.

Milk Marketing -- at the time that MMI was merged into or was one of the founders of Dairy Farmers of America, I was vice-president of member service, market, fluid milk marketing and economics.

The cooperative merged into DFA. I was employed by DFA for about three years, and then from there I went to where I currently am as director of milk procurement for Sarento Lactalis. And, again, responsibility for all Federal Order activity of that organization.

Q Thank you very much. That's very helpful background.

Are you prepared now to give us your statement?

A I would like to be considered an expert in milk marketing and economics.

Q I think you have established that, sir.

MR. ROSENBAUM: But I will ask that he be

formally identified as such.

JUDGE PALMER: Will so identify.

A My name is Rodney Carlson. I'm Corporate Director of Milk Procurement for Lactalis American Group, Incorporated, or Lactalis. Our corporate headquarters are located at 2376 South Park Avenue, Buffalo, New York, 14220. Lactalis currently operates six cheese plants in the United States, three of which receive milk from handlers regulated under federal milk marketing orders.

I am testifying today in opposition to proposals 3, 6, 7, 8, 15, 16, 18, 19, and 20. I also want to express support for proposals 1, 9, and 12. Lactalis supports the testimony of Dr. Bob Yonkers from IDFA and opposes the same proposals, or portions of proposals as he has identified in his statement.

I am not going to get into the technical points of any of the proposals. Rather, I am going to give a little elderly statesman philosophy regarding the proposals. That philosophy is in the support of the Lactalis position towards the proposal.

In general, Lactalis supports the concept

expressed by USDA employee at the Dairy Forum in January of this year that Federal Milk Marketing Orders should regulate minimum prices, but should not be establishing market prices for milk.

Due to legal restrictions, and in many cases political activity, we are all well aware that USDA simply cannot react quickly enough to changing market conditions to be effective or fair to all industry participants at all times. Participants in the industry have to take responsibility for maintaining the industry to the best of their ability in those periods of rapid market changes. Participants will have more ability to do so if there is flexibility allowed in establishing market prices. In today's price formula, price discovery method, more flexibility means higher make allowances and lower regulated prices.

Today's industry participants are well equipped to deal with the flexibility I am describing. Marketing power of dairy farmers is not what it was in the 1930s when the Federal Order system was established. It is not even what it was in the 1950s or '60s. The reduced

number of farms and increased farm size, consolidation of cooperatives, the establishment of marketing agencies in common, the almost immediate availability of information improved milk cooling and transportation capabilities, all have transformed the dairy industry into one where producers have as much bargaining strength, if not more, than processors.

In addition, today's responsible industry participants understand the need to consider other parts of the industry in maintaining a healthy successful industry. Processors understand that a supply of milk is necessary to meet their needs, and that means producers have to be profitable to stay in business.

Responsible producers understand the need for processor profitability so there will be an ongoing market and demand for the milk produced on their farm. In many cases, the producer groups are also the processor. Obviously, these producer organizations are well aware of the mutual dependency between producer and processor. The mutual need and mature understanding of each other's situation will result in short-term decisions by producers and

processors and can only work in an environment of less interest of regulation.

Higher make allowances prohibit the flexibility needed by -- I'm sorry, that should be lower make allowances prohibit the flexibility needed by the industry to make short-term adjustments to meet ever-changing conditions. Will you please change that first word to lower.

We understand that there is a concern by some dairy farmers that higher make allowances mean lower prices to them for their milk. Some dairy farmer representative have been quite vocal in their statements about recent low milk prices and high input costs that have made many dairy farmers unprofitable.

It is quite obvious to any casual observer of the dairy industry that milk prices have increased significantly in the last few months. The period of low prices has passed just like other periods of low prices in the past 20-plus years. And I will refer to a chart in Exhibit No. 64.

Q The reference here is to the first page of Exhibit 64?

A Yes, that is entitled "Federal Order Class III Price," and it indicates the monthly Class III announced -- or the announced Class III price in Federal Order markets since January of 1979 through March of this year. And it shows a great deal of volatility in that market in those prices.

We have been in a period of ever-increasing milk price volatility since the mid-1980s. Prices have gone up and prices have gone down. It is a result of supply, demand, conditions. The second page of Exhibit 64 is a chart entitled "Percent Change in Milk Production Versus Milk Price." This information, again, uses a Class III milk price and shows a percent change in milk production as provided in the milk production report of NASS, USDA. This exhibit identifies the changes in milk prices reflected by Federal Order Class III milk prices and compares the milk price with changes in milk production. It doesn't take long to identify that significant increases in milk production results in lower milk prices while decreases, or even small increases in milk production, result in higher milk prices.

The next graph of Exhibit 64 is a bar graph, it's entitled "Percent Change in U.S. Milk Production From Year Earlier on a Daily Basis."

Q This is page three of Exhibit 64?

A Yes, it is.

Q All right.

A And it's interesting to note that there have been 32 straight months of production increases reflected by that graph. Again, the source of that information is USDA NASS milk production report.

This exhibit is a bar graph that reflects the changes in milk production from the same month of the previous year since January of 2002. It is interesting to note that February 2007 was the 32nd straight month of milk production increases in a row. This information should make it very clear that increased make allowances are not nearly as dangerous to higher milk prices as increased number of milk cows.

Again, I will go to page four of Exhibit 64. "Milk Cows Versus Federal Milk Marketing Order Class III Milk Price." Again, I graph the

change in milk price along with the number of milk cows as reported in the USDA NASS milk production report for the entire USA.

Now that the increases have slowed down -- production increases, I should have said -- and the international demand for milk proteins has increased, milk prices are increasing. In fact, the Class III milk price announced just last Friday was $15.09 and the increase of $3.98 or 36 percent over the same month of the previous year. It's amazing what a little restraint on the production side has on prices. Making processors the strawman for dairy farmers' recent economic difficulties is detrimental in the long-term challenge to coordinate efforts of cooperation and attempts to enhance total dairy industry profitability. Continuing to do so is very disingenuous, creates hard feelings and animosity within the industry, and serves no real useful purpose.

For those reasons, we support those proposals that increase the Class III and Class IV make allowance and oppose proposals that would decrease the make allowance.

We do have some sympathy for those

proposals that would hasten the adjustment in make allowance for the use of indices. However, we support the testimony of Dr. Yonkers and his concern about additional complexity of regulation and the increased difficulty in trying to use risk management tools.

We also agree with the concept of eliminating the circular nature of pricing addressed by proposal 20. However, we find the proposal to be quite complex and not that practical in the real world.

That's the end of my testimony.

MR. ROSENBAUM: At this point I would ask that Exhibits 63 and 64 be entered.

JUDGE PALMER: All right. They're received.

MR. ROSENBAUM: And the witness is available for cross-examination.

JUDGE PALMER: Questions? Mr. Beshore.

CROSS-EXAMINATION,

QUESTIONS BY MR. MARVIN BESHORE:

Q Good morning, Rod.

A Good morning.

Q Can you tell us a little bit about Lactalis' plants and what products you manufacture?

A We have a plant in Western New York and Buffalo, New York makes mozzarella and provolone cheese, as well as ricotta cheese.

We have two plants in Wisconsin, one that makes brie and fetta and other type of European-style cheeses, soft cheeses. Another plant that makes spreadable cheeses in Merrill, Wisconsin. We have a plant in Nampa, Idaho makes mozzarella. We also buy cheddar cheese to make sticks there for snack cheese. We make string sticks, as well, out there for snack cheese. We have two plants in California, one plant in Turloch that, again, makes brie, fetta, cambre, another plant in Tipton, California that we just recently purchased that makes fresh mozzarella.

Q So Lactalis manufactures no cheddar cheese?

A That is correct.

Q Are your noncheddar cheese products sold off the cheddar block market as a reference price?

A We have retail business as well as food service and industrial. For food service and industrial, yes, we use CME to establish prices.

Q The cheddar block price?

A Yes.

Q Just as a reference. Since you use the cheddar block price as a reference, what's the yield of mozzarella per hundredweight of milk at your plants?

A There's many, many different styles of mozzarella. There's whole milk, there's part skim.

Q Give us a range.

A I can't. I really can't. I do not have that information.

Q You don't know?

A I don't know.

Q Your information on prices, milk prices and input costs and all, you track the USDA data, I take it? I mean, that's the source of Exhibit 64.

A Yes.

Q Do you track the milk-feed price ratio?

A Yes.

Q Did you notice that the most recent month publication, the milk-feed ratio was the lowest in, I think, 43 months?

A I have graphed the milk-feed ratio in relation to cows, number of cows, and have seen that track very closely that the higher the feed

ratio, the -- let me start again.

As the milk-feed ratio decreases, the number of dairy cows end up following and decreasing.

Q Right.

A The milk-feed ratio goes back up just like the price goes up when milk cows go down.

So obviously, yes, it follows milk price and follows cows.

Q But presently, in spite of the increased prices, nominal prices that you've observed, that milk-feed ratio is at near historic low levels; is it not?

A It has been -- there's no question it has been at a very low point in the last few months; and we obviously know that that's going to change in the next few months.

Q Well, the ratio at the present time is a product of what's really an unprecedented high input cost feed at the farm level; isn't that true?

A Mr. Beshore, I go back to the 1970s when we had the Russian grain deal, if you will remember. There were much higher feed costs in relation to milk prices at that time than there are today.

Q And the point of that is?

A It's happened before.
Q In the '70s?
A Yes.
Q When we had a support price that was what, 95 percent of parity?
A I'm not sure that we had a support price that was 90 percent of parity, but we had milk prices that exceeded 100 percent of parity.
Q We're not quite there today, are we?
A Oh, absolutely not.

MR. BESHORE: Thank you.

JUDGE PALMER: Questions?

That's it, sir. Thank you very much.

Off the record.

(A discussion was held off the record.)

GARY G. LATTA,

having been duly sworn to tell the truth, the whole truth, and nothing but the truth relating to said matter was examined and testified as follows:

DIRECT EXAMINATION,

QUESTIONS BY MR. STEVEN J. ROSENBAUM:

(Deposition Exhibit 65 was marked for identification.)

JUDGE PALMER: Mr. Latta's statement is marked as Exhibit 65.

Q Could you please read your testimony for us?

A Yes, sir.

This testimony is submitted on behalf of HP Hood LLC. We are a super-regional and national distributor of high-quality Class I and II dairy products. My name is Gary G. Latta and I am Senior Marketing Analyst with the company. HP Hood has invested substantial capital in dairy products manufacturing and processing facilities in the eastern half of the United States, particularly the northeast. With Class III and IV as the bedrock for Class I and II milk prices, we have a keen interest in the outcome of this hearing.

We feel that as the United States becomes and even more significant player in global dairy markets, we are at a crossroads of opportunities. Some say we are the breadbasket of the world. If this is our future, then we need to expand production, not reduce our herds. Through the opportunities presented to us by the

Farm Bill, we should explore improvements to the U.S. dairy system that will propel us into the future. Having the right dairy policy in place will encourage investment with both producers and processors. The right dairy policy will guarantee that U.S. milk production can continue to profitably expand as we become the dominant player in world markets.

HP Hood is opposed to proposals 1 through 3. These proposals ask for changes to the Federal Order that specifically address make allowances. This hearing was called to address Class III and IV milk pricing formulas. We find it difficult to support proposals that will later be used against Class I and II processors. Experience has taught us that we would likely find ourselves right back in another Federal Order hearing addressing Class I and II markets for relief.

We are opposed to the suggestion that any formula, or portion of, be subject to automatic adjustment or periodic updates. We believe that any adjustments or updating be subject to the hearing process. With this in mind, we ask that USDA remain sensitive to the needs of our

industry and streamline the hearing process to expedite decisions.

Proposal 20 attempts to address the circular nature of our price formula, but we cannot support it because it advocates the use of CME butter and cheese prices as replacement for NASS butter and cheese prices. We feel prices at CME are too thinly traded. Proposal 20 also suggest that periodic updates be performed without a hearing. We are opposed to this process.

Be aware that the industry must be cautious of implementing change that is programmed to depress demand, even for a short time, in trade for higher producer price. Despite the fact that we have economic models that forecast supply-demand impacts, we should remind ourselves that competition from nondairy segments of the food and beverage industry are relentlessly pursuing the consumer dollar. Relying on dairy product demand to always adjust back after higher prices can be risky in today's marketplace where so many nondairy food and beverage alternatives are available and growing.

We understand that proposals 4 and 5 have

been withdrawn.

We are opposed to 6, 7, and 8 that seek changes to yield factors that are not representative of actual industry data as already put forth into the record by IDFA. A degree of shrinkage and plant loss is a reality of processing and manufacturing. Our cost accounting personnel claim that on average we lose 1 1/2 percent on our market administrator reports.

We support the continued use of NASS prices, and that both blocks and barrels remain in the formulas. It is important that we capture as many pounds of NASS cheese and other NASS products as possible in USDA surveys. All NASS prices and volumes should be subject to mandatory and audited reporting.

As previously mentioned, we do not support proposals that advocate the use of CME prices or any combination of CME and NASS prices. We do understand the lag concerns associated with NASS prices. We would suggest that USDA explore the possibility of modern electronic reporting for increased speed and perhaps frequency of reporting. USDA should seek ways we can improve

price discovery by making NASS reporting mandatory and even daily.

We do not support proposals like 17 that make automatic adjustment to energy costs or other input costs. It is challenging enough for our sales managers and our customers to handle the rigors of milk pricing and promotion planning. Additional factors and elements that make milk pricing even more mysterious and challenging for customers is not advised.

We are opposed to proposal 18 because there seems to be a lack of USDA analysis on this proposal that we have been able to examine. USDA Dairy Programs claimed it was unable to perform an economic impact analysis on this proposal.

We are in support of 9, 0, and 12.

We ask that as USDA examines these proposals, that it take time to examine the competitive relationships between federal and nonfederal regulated areas, such as Federal Order 1, and the Western New York State Order. USDA should support proper price alignment and equity with respect to dairy price formulas and producer price between such areas.

We thank you for the opportunity to comment.

MR. ROSENBAUM: We would ask that Exhibit 65 be entered.

JUDGE PALMER: It's received.

MR. ROSENBAUM: The witness is available.

JUDGE PALMER: Questions? Mr. Vetne.

CROSS-EXAMINATION,

QUESTIONS BY MR. JOHN H. VETNE:

Q Good afternoon, Gary.

A Hi, John.

Q In various places of your testimony you express opposition to changing of a formula or portions of a formula without hearing. I want to ask you about that.

You express opposition to automatic adjustment. Is it your position that prior to a change we necessarily have to come back to a place, such as Indianapolis or Strongsville or Pittsburgh and incur both expenses of industry and USDA in a live hearing?

And let me give you the alternative, would it be sufficient, for your purposes, that there would be an opportunity for notice and comment on changes that appear to be indicated by either

index data or other submitted data?

Would that be sufficient if there were no genuine factual dispute?

A It may be sufficient, yes.

MR. VETNE: Thank you.

JUDGE PALMER: Other questions?

Mr. Beshore.

CROSS-EXAMINATION,

QUESTIONS BY MR. MARVIN BESHORE:

Q Good morning, Mr. Latta.

A Hi, Marvin.

Q Your comment with respect to proposal 17, which is on the next to last page. Proposal 17 being the National Milk Producers Federation's energy adjuster.

A Yes, sir.

Q I'm just wondering if the -- the proposal contemplates no additional price announcements.

Do you understand that? I mean, the price is going to be announced once a month like it is now, correct?

A Yes.

Q And, you know, you get the Class III price announcement, Class IV price announcement once a month now; you don't know what it is before you

get it, right?

A With respect to milk price, yes.

Q Yes, yes, milk price, okay.

If proposal 17 was adopted and the adjuster, on the basis of published governmental data, was incorporated in that price when it was announced so that you get an announced price that has already incorporated it, I don't quite understand what the problem would be in terms of changes in complexity for your business.

A Part of the reasoning is that I deal with salespeople every day and I can speak from years of experience that it's becoming more and more difficult for our sales managers, as well as our customers to understand all of the complexities and the month-to-month changes that have to do with what their finished product cost change is at the end of the month.

And what we're trying to say is that let's not complicate this system more than it already is. We have very key customers that are national players in the U.S. market, and some are even international players, that struggle to understand why their products move the way they do every month.

And I work with sales managers that are seasoned sales managers that struggle to understand why the price did what it did. We have to watch cheese, butter, powder, whey, and now you're advocating that we track fuel costs and other energy inputs.

What we're saying is that we caution USDA to be very careful about overcomplicating the system to where the end user, the customers who buy our dairy products, who we're all interested in seeing that they sell more and more product, don't get overly frustrated with the complexity of month-to-month pricing. We have to keep it simple.

Q But what I'm trying to understand, and I'm not sure that I do is, aren't energy costs, which everybody experiences, your buyers experience the changes in energy costs in their daily inputs just like every one of us here, correct?

A Correct.

Q Isn't that one of the most understandable things that people in all walks of life and all lines of business can understand?

A Yes, but you're adding more variables to how that end product can change.

Q But you still have one price. I mean, who can explain what the cheese market's going to do in the next month, I mean, you know?

A Yeah, I understand. What I'm trying to explain is we have major customers, accounts, institutional and at retail, who would like to do things like use the futures markets to hedge and things like that. They're really struggling, and these are national accounts who struggle just being able to understand the milk components, and now we're asking to add other components; and alls I'm saying is that we must be careful that we don't overcomplicate the system.

Whatever USDA does, they have to make it so that it's understandable to our customers.

Q But I guess I'm trying to suggest, and you can respond, that the -- you know, the implementation of an adjustment for costs that everybody in every line of business experience every day, shouldn't really be a challenge for any customers in any line of business to understand; isn't that fair?

A We disagree.

MR. BESHORE: Okay. Thank you.

JUDGE PALMER: Questions? Any more questions? Looks like you can make the plane.

We're going to take a quick break, then we'll come back and talk, okay.

(A recess was taken.)

JUDGE PALMER: We're going to reconvene this hearing at the Sheraton Station Square Hotel.

MR ROWER: Yes.

JUDGE PALMER: In Pittsburgh, Pennsylvania. And it's going to start Monday, July 9, at 1:00 p.m. and will through Thursday, if necessary, July 12th, to 5:00 p.m.

In advance of that hearing, all witnesses will be identified by both proponents and opponents and their counsel by getting material to the Dairy Division by June 9th, and it will be posted on the website.

And then, by June 22nd, all written statements, et cetera, will also be sent to the Dairy Division, which will then do what's necessary to put them on the website.

Is there anything I've overlooked?

MR. ROSENBAUM: I just would like to indicate, as we discussed off the record, to the

extent that a witness intends to provide testimony in opposition to proponent's testimony that will not be revealed until June 22nd.

JUDGE PALMER: Well, June 22nd is the deadline.

MR. ROSENBAUM: That's the deadline for --

JUDGE PALMER: For everybody.

MR. ROSENBAUM: With respect to the State of Maine, we don't yet have a proposal yet on the table; and we won't see that until June 22nd.

So we cannot prepare our opposition testimony by June 22nd as to that particular proposal.

JUDGE PALMER: That's fair. But we would expect you to have it available at the start of the hearing, July 9th.

MR. ROSENBAUM: I think that's reasonable.

JUDGE PALMER: That's it.

Thank you all very much. I will see you in Pittsburgh.

(Thereupon, the hearing was adjourned at 12:15 p.m.)