

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: WHOLESALE GROCERY) Court File No.
PRODUCTS ANTITRUST LITIGATION) 09-MD-2090 (ADM/AJB)
)
)
) Courtroom 13 West
) Thursday, April 22, 2010
) Minneapolis, Minnesota

H E A R I N G O N

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS'
CONSOLIDATED AMENDED COMPLAINT

[DOCKET NO. 24]

- A N D -

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

[DOCKET NO. 28]

BEFORE THE HONORABLE ANN D. MONTGOMERY
UNITED STATES DISTRICT JUDGE

TIMOTHY J. WILLETTE, RDR, CRR, CBC, CCP
Official Court Reporter - United States District Court
1005 United States Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415
612.664.5108

A P P E A R A N C E S :

For the Plaintiffs:

BOIES, SCHILLER & FLEXNER, LLPBy: RICHARD B. DRUBEL, ESQUIRE
KIMBERLY H. SCHULTZ, ESQUIRE
MATTHEW J. HENKEN, ESQUIRE26 South Main Street
Hanover, New Hampshire 03755**KOTCHEN & LOW, LLP**By: DANIEL A. KOTCHEN, ESQUIRE
2300 M Street NW - Suite 800
Washington, D.C. 20037**KELLEY, WOLTER & SCOTT, P.A.**By: KEVIN M. MAGNUSON, ESQUIRE
431 South Seventh Street - Suite 2530
Minneapolis, Minnesota 55415**MEREDITH, COHEN, GREENFOGEL
& SKIRNICK, P.C.**By: JOEL C. MEREDITH, ESQUIRE
DANIEL B. ALLANOFF, ESQUIRE
1521 Locust Street - Eighth Floor
Philadelphia, Pennsylvania 19102**DANGEL and MATTCHEN, LLP**By: EDWARD T. DANGEL, III, ESQUIRE
Ten Derne Street
Boston, Massachusetts 02114-9505**LOCKRIDGE GRINDAL NAUEN, PLLP**By: W. JOSEPH BRUCKNER, ESQUIRE
ELIZABETH R. ODETTE, ESQUIRE
100 Washington Ave. S. - Suite 2200
Minneapolis, Minnesota 55401-2179

* * * * *

For the Defendants:

ROBINS, KAPLAN, MILLER & CIRESI, LLPBy: STEPHEN P. SAFRANSKI, ESQUIRE
K. CRAIG WILDFANG, ESQUIRE
E. CASEY BECKETT, ESQUIRE800 LaSalle Avenue - Suite 2800
Minneapolis, Minnesota 55402-2015

A P P E A R A N C E S: [Continued]

For the Defendants: **HOWREY, LLP**
By: CHARLES A. LOUGHLIN, ESQUIRE
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

FREDRIKSON & BYRON, P.A.
By: TODD A. WIND, ESQUIRE
200 South Sixth Street - Suite 4000
Minneapolis, Minnesota 55402-1425

* * * * *

1 (9:00 a.m.)

2 **P R O C E E D I N G S**

3 **I N O P E N C O U R T**

4 THE COURT: Good morning. Please be seated.

5 THE CLERK: The matter before the Court is In re:
6 Wholesale Grocery Products Antitrust Litigation.

7 Counsel, would you please note your appearances for
8 the record.

9 MR. DRUBEL: Good morning, your Honor. Richard
10 Drubel; Boies, Schiller & Flexner, for Plaintiffs in the
11 class.

12 MR. KOTCHEN: Good morning, your Honor. Dan Kotchen
13 from Kotchen & Low for Plaintiffs in the class.

14 MR. MAGNUSON: Good morning, your Honor. Kevin
15 Magnuson; Kelley, Wolter & Scott, for Plaintiffs in the class.

16 THE COURT: All right.

17 MS. SCHULTZ: Good morning, your Honor. Kimberly
18 Schultz from Boies, Schiller & Flexner, for the plaintiffs.

19 MR. HENKEN: Good morning, your Honor. Matthew
20 Henken; Boies, Schiller & Flexner, for Plaintiffs in the
21 class.

22 THE COURT: All right.

23 MR. BRUCKNER: Good morning, your Honor. Joe
24 Bruckner with Lockridge Grindal Nauen for the plaintiffs.

25 MS. ODETTE: Elizabeth Odette, Lockridge Grindal

1 Nauen, for the plaintiffs.

2 MR. ALLANOFF: Good morning, your Honor. Daniel
3 Allanoff for the plaintiffs in the class.

4 MR. MEREDITH: Good morning, your Honor. Joel
5 Meredith for the plaintiffs in the class.

6 MR. DANGEL: Good morning, your Honor. My name is
7 Terry Dangel and I'm here for the plaintiffs.

8 THE COURT: Any further appearances for the
9 plaintiffs?

10 (No response)

11 THE COURT: All right. Should be more than enough
12 lawyers to do business here.

13 Counsel, Mr. Wildfang?

14 MR. WILDFANG: Good morning, your Honor. Craig
15 Wildfang; Robins, Kaplan, Miller & Ciresi, for SuperValu.

16 MR. SAFRANSKI: Good morning, your Honor. Stephen
17 Safranski; Robins Kaplan, for SuperValu.

18 MR. LOUGHLIN: Good morning, your Honor. Charles
19 Loughlin from Howrey, LLP, representing C&S Wholesale Grocers.

20 MR. WIND: Good morning, your Honor. Todd Wind from
21 Fredrikson & Byron on behalf of C&S Wholesale.

22 MR. BECKETT: Good morning, your Honor. Casey
23 Beckett; Robins, Kaplan, Miller & Ciresi, on behalf of
24 SuperValu.

25 THE COURT: Good morning, one and all.

1 We have before the Court this morning, of course,
2 the plaintiffs' summary judgment motion as well as the
3 defendants' dismissal motion. I think we will proceed first
4 with the defense dismissal motion.

5 If you -- even though I've got a chart of your
6 names, if you would please reintroduce yourself as you begin
7 your argument. It would help me if we're going to have more
8 than two counsel arguing this.

9 I think under the circumstances the appropriate
10 allotment of time should be 20 minutes per side on the motion
11 with a five-minute rebuttal of the maker of the motion. So
12 with regard to the motion to dismiss, we'll begin with
13 defendants' 20 minutes, followed by the plaintiffs' 20
14 minutes, a rebuttal of five minutes. And similarly, on the
15 partial summary judgment motion, we'll do 20 minutes, 20
16 minutes, and a five-minute rebuttal. I think that -- I've
17 read the briefs. I think that that's more than adequate time
18 to fully argue these motions and of course we'll have briefing
19 in front of us to review after the argument.

20 So, Mr. Wildfang, you seem to be in the driver's
21 seat there, so I'll hear from you first.

22 MR. WILDFANG: Good morning, your Honor. Craig
23 Wildfang; Robins, Kaplan, Miller & Ciresi, for SuperValu, and
24 on the dismissal motion I will be arguing also on behalf of
25 our co-defendant, C&S.

1 Your Honor, I have a couple of boards that I may
2 make reference to.

3 THE COURT: All right.

4 MR. WILDFANG: And, Steve, if you'd hand up a copy
5 of the booklet to the Court.

6 We have hard copies for your Honor as well --

7 THE COURT: All right.

8 MR. WILDFANG: -- that I may make reference to.

9 (Document handed to the Court)

10 MR. WILDFANG: Your Honor, we are here this morning
11 on a motion to dismiss brought by the defendants. I'll be
12 brief in the factual background since I know your Honor is
13 familiar generally with the facts.

14 This is an antitrust action that arises seven years
15 after -- roughly seven years after the -- a transaction
16 between the two defendants which was originally triggered by
17 the bankruptcy of another food wholesaler. It was an asset
18 exchange agreement whereby SuperValu exchanged certain assets
19 first with C&S and vice versa in New England and in the
20 Midwest.

21 This was a completed acquisition in September of
22 2003 and that is one of the bases for our motion. We believe
23 that the claims are barred by the statute of limitations and
24 also are barred by the Twombly case for failure to adequately
25 plead.

1 Your Honor, let me start with the statute of
2 limitations issue and let me start with what the policy
3 question is underlying the statute of limitations issue in
4 this case.

5 The federal courts and Congress have recognized that
6 there is a policy in favor of repose. At some point in time
7 persons, businesses, should be able to basically put the past
8 behind them and go forward with their business. And both the
9 Eighth Circuit in the Concord Boat case, the Sixth Circuit in
10 the Travel Agent case and lots of other courts have mentioned
11 that policy when they're thinking about and deciding issues
12 related to the statute of limitations. So, I have a timeline
13 here which I'd like to make quick reference to.

14 So, your Honor, this acquisition took place in
15 September of 2003. The accrual date, which is the starting
16 point of the running of the statute of limitations, was
17 September 6th, 2003.

18 THE COURT: When was the Fleming bankruptcy filed
19 originally? This all relates to the dissolution, but I take
20 it sometime --

21 MR. WILDFANG: Yes, sometime prior. I don't have
22 that date at my fingertips, but it was earlier in 2003, I
23 believe.

24 THE COURT: All right.

25 MR. WILDFANG: So, what happened was that C&S bought

1 Fleming assets out of bankruptcy, obtained an order from the
2 Bankruptcy Court permitting the disposition of those assets,
3 and some of the assets C&S kept, some of the other assets they
4 sold off to a variety of parties, one including SuperValu.
5 But there's really no dispute between the parties as to the
6 accrual date. Plaintiffs agree that the accrual date was
7 September 6th, 2003 because they've defined their class period
8 as beginning on that date, so they've alleged that their
9 damages began on September 6th, 2003.

10 Now, in September of 2003, these are the things that
11 took place that are referenced in the complaint. The AEA, the
12 Asset Exchange Agreement, was signed and it exchanged the
13 wholesale businesses of SuperValu in New England and C&S in
14 the Midwest. It also included an exchange of customer
15 accounts and contained ancillary noncompetition agreements
16 that were limited in time and geographic scope and also
17 limited to certain customers. The parties filed HSR
18 notification with the FTC and the FTC did not make a second
19 request and did not challenge the transaction.

20 Now, since the parties agree that the accrual date
21 is September 6th, 2003, absent some -- some application of
22 some tolling doctrine, that means that on September 6th of
23 2008 -- I'm sorry -- 2007 the statute of limitations expired.

24 So, what do the plaintiffs say about that issue?
25 Well, they claim first that there's a continuing violation.

1 Now, they have a big problem with that, because there are two
2 Eighth Circuit cases directly on point that go against that
3 argument, Concord Boat and Midwestern Machinery. In both of
4 those cases the Eighth Circuit considered the continuing
5 violation doctrine and found that in those cases the
6 acquisition having been more than four years prior to the
7 filing of the case was a single event and triggered the
8 running of the statute of limitations and four years from that
9 date was the expiration.

10 Let me turn to the other board I have up, which is
11 Varner vs. Peterson Farms. In 2004 the Eighth Circuit
12 considered another case where the allegation was there's a
13 continuing antitrust violation. What Varner said was, if you
14 have a continuing antitrust violation claim, the "cause of
15 action accrues each time a plaintiff is injured by an act of
16 the defendants," but when a plaintiff alleges a continuing
17 violation, it still must point to an overt act that took place
18 during the limitations period that is required to restart the
19 statute of limitations, and the statute, importantly, runs
20 from the last overt act. So, Varner says there are two
21 elements to an overt act. First, "it must be a new and
22 independent act that is not merely a reaffirmation of a
23 previous act," and "Acts that are merely the 'unabated
24 inertial consequences' of a single act do not restart the
25 statute of limitations."

1 So, back to the chart. The record and the complaint
2 assert these various facts that were known to the plaintiffs
3 in the fall of 2003. As I said earlier, your Honor, it went
4 through HSR review, there was a bankruptcy case with -- it was
5 in the papers, both the trade press and the popular press,
6 that this transaction had taken place. In the fall of 2003
7 there were numerous press articles --

8 THE COURT: Did the HSR review and the Bankruptcy
9 Court review include any information about the exchange of
10 customer accounts or the noncompete agreement?

11 MR. WILDFANG: Yes, your Honor. If you would look
12 at tab 4 in the booklet, which is an excerpt from the HSR
13 filing, if you will turn to the third page, you'll see in
14 paragraph 14 -- and this is the letter of intent that the
15 parties had entered into which was provided to the FTC along
16 with the HSR filing. And as you can see from paragraph 14,
17 the parties were very explicit with the FTC that the
18 definitive agreement which had not yet been entered into would
19 contain a noncompetition provision, so there's no argument
20 here that there was a failure of disclosure to the FTC.

21 And, you know, one of the arguments that the
22 plaintiffs make is that the AEA was a sham. They call it
23 window dressing for a noncompetition agreement. You know, I
24 find it odd that parties, if they were actually wanting to
25 enter into a secret noncompetition agreement, would create

1 this large Asset Exchange Agreement that was required to be
2 filed with the FTC and sort of invite scrutiny.

3 THE COURT: Now, tell me a little bit about the
4 character of this particular letter in 3, the July 29th, '03
5 letter. It is labeled "Confidential." I take it it was filed
6 with the FTC.

7 MR. WILDFANG: That's right.

8 THE COURT: Who has access to that document then?

9 MR. WILDFANG: Your Honor, HSR filings are
10 confidential, they're not public documents --

11 THE COURT: Okay.

12 MR. WILDFANG: -- so the, you know, Government
13 officials obviously have access to this, the parties to the
14 transaction have access to this, but it's not --

15 THE COURT: It's not a public document.

16 MR. WILDFANG: It's not a public document in the
17 sense that I think you're using it.

18 THE COURT: All right.

19 MR. WILDFANG: So, back to the timeline.

20 You'll notice that the last date here is April 2004
21 of any what might be called overt acts. Assuming for the
22 moment, as we must in a Rule 12 motion, that the facts alleged
23 are true, all of this was known -- fully known to the
24 plaintiffs at this time or in the exercise of due diligence
25 could have been known.

1 The plaintiffs point to closing the warehouses as an
2 overt act. Well, that was all done not later than April of
3 2004.

4 So, the Eighth Circuit has said in this kind of a
5 transaction you can't have a continuing violation, but in
6 Concord Boat the court said, well, giving the plaintiffs the
7 benefit of the doubt and if it is a continuing violation, if
8 it falls into that category of analysis, you still must have
9 an overt act within four years from the filing of the case,
10 and you can see, your Honor, there's nothing here. There are
11 no allegations of any overt acts during this period of time
12 except one, and that is the argument by the plaintiffs that
13 the simple act of charging high prices is sufficient to
14 trigger or restart the statute of limitations.

15 THE COURT: When was the last of the warehouses that
16 were closed? Now, I understand one was reopened later, but --
17 in Connecticut, I believe, but when were the warehouses
18 closed? Are those all in '03 and '04?

19 MR. WILDFANG: Yes. The last closure was in I
20 believe April 2004, and then subsequently one of the
21 warehouses was reopened.

22 So, the case law does not support the plaintiffs'
23 argument with respect to continuing violation. You've got
24 Concord Boat and Midwestern Machinery, which say these kind of
25 transactions, which are essentially merger transactions, don't

1 fall into the category of analysis using continuing violation,
2 but even if it did, there's no overt act during that period
3 that would restart the statute of limitations.

4 And it is also clear under the case law that the
5 reaffirmation of a prior agreement, even if there had been
6 simply a reaffirmation -- and we think there was none -- even
7 that does not qualify as an overt act that would restart the
8 statute of limitations, and the Varner decision,
9 Midwestern Machinery and others all stand for that
10 proposition.

11 And if I might, your Honor, let me read briefly from
12 Midwestern Machinery, and I'm reading from 392 F.3d at 270.

13 THE COURT: That's an Eighth Circuit case, right?

14 MR. WILDFANG: That is an Eighth Circuit case. The
15 court said the statute of limitations, quote: "begins to run
16 from the initial violation where defendants are accused of
17 passably implementing anticompetitive policies." The court
18 went on to say: "The statute runs when the defendant
19 initiates anticompetitive policies that do not require
20 additional anticompetitive action to implement. In such
21 circumstances, implementation is only a reaffirmation of the
22 policy's adoption."

23 Your Honor, there are lots of other cases on this,
24 but you may want to look at Lomar Wholesale Grocery, the Cipro
25 case which we cite in our brief, and the Travel Agent

1 Commission Antitrust Litigation. Also on this point, Pace
2 Industries from the Ninth Circuit, which is a 1987 case which
3 was cited and relied on by Concord Boat and -- I'm sorry --
4 Midwestern Machinery and Varner.

5 The other exception that the plaintiffs try to avail
6 themselves of on the statute of limitations is fraudulent
7 concealment. Your Honor, that argument fails for three
8 reasons.

9 First of all, the plaintiffs knew in the exercise of
10 diligence or in the exercise of diligence could have known of
11 their claims before 2005. They have not alleged any
12 fraudulent acts of concealment, only nondisclosure and failure
13 to admit liability, and they do not even plead the exercise of
14 due diligence.

15 So, as to the first --

16 THE COURT: Well, I think they argue that -- I think
17 even one of the events on your timeline there, this
18 questioning of the prices, is one of the elements of due
19 diligence and inquiries made. Your point is that it wasn't
20 pled sufficiently in the complaint?

21 MR. WILDFANG: Your Honor, under the case law -- and
22 the cases include Cipro that I made reference to earlier --
23 the simple denial of a question is not an affirmative act.

24 THE COURT: You have to be more persistent?

25 MR. WILDFANG: The case law says once -- there's a

1 nice phrase I like. It says that anything that excites the
2 interest of the plaintiff or the potential plaintiff is
3 sufficient to run the statute of limitations. And if you look
4 at what was going on in 2003, 2004, all of the press articles
5 and the inquiry that was made, it's clear that these
6 plaintiffs, if they did not know, they certainly could have
7 known of sufficient facts to file this complaint.

8 And let me point your Honor to tab 7 in the booklet,
9 which is a portion of the DeLuca's complaint in this case, and
10 on the second page in paragraph 40 they allege that SuperValu
11 and C&S "traded retail accounts, thereby eliminating
12 competition between themselves, and reducing substantially the
13 supply of wholesale goods in New England and the Midwest by
14 closing distribution facilities that had served retailers for
15 years." Your Honor, all of that was known in 2004, and the
16 DeLuca's complaint that was filed did not even mention the
17 noncompetes which now appear to be the centerpoint of the
18 plaintiffs' case.

19 So let's go on to the second failure in the
20 fraudulent concealment claim by the plaintiffs. They have not
21 alleged that anything -- no affirmative allegation of anything
22 in that long period between 2004 and 2008. They are required
23 to at least plead what they did and they did not do that, and
24 in fact, they did not exercise due diligence. In fact, it is
25 clear from the record, your Honor, that the only fact that the

1 plaintiffs did not know in 2004 was the issue of the specific
2 noncompete clause in the Asset Exchange Agreement, yet they
3 had plenty of other information from which to conclude that
4 perhaps there was a competition issue here. In fact, the
5 press, the trade press, was openly speculating about what the
6 competitive impact would be of this transaction.

7 So, let me go through briefly the things that are
8 alleged in the complaint that the plaintiffs argue should form
9 the basis for fraudulent concealment.

10 First, they argue that there was a publicity
11 provision in the AEA and you'll find that at tab 3. It's a
12 standard provision whereby the parties to this transaction
13 agree that they will not disclose it, they will not engage in
14 publicity without the other's approval, and you can find that
15 at the page ending in --

16 THE COURT: 45, I think?

17 MR. WILDFANG: I think it's 60 in tab 3, the last
18 page in that set.

19 THE COURT: Okay.

20 MR. WILDFANG: Section 7.6 of the Asset Exchange
21 Agreement said: "Publicity. Neither C&S nor SUPERVALU shall
22 issue or cause the publication of any press release or other
23 public announcement with respect to this Agreement without
24 prior written approval with the other parties"
25 Absolutely standard provision, doesn't say anything about

1 making misrepresentations.

2 Second, the plaintiffs argue that SuperValu tricked
3 the FTC into clearing the transaction by concealing the
4 noncompete. Well, as your Honor can see from the provision I
5 pointed out earlier, it was plainly disclosed to the FTC.

6 Third, the plaintiffs argue that the defendants
7 issued misleading press releases, because when they were
8 describing the Asset Exchange Agreement, they did not
9 specifically talk about the limited noncompetition provision,
10 but under case law, including Ripplinger and Milk Products,
11 which is a Minnesota case, those kinds of press releases are
12 perfectly lawful. They're not fraudulent. The fact that they
13 didn't include each and every detail from the Asset Exchange
14 Agreement does not mean that they're fraudulent.

15 The fourth point they make is that SuperValu falsely
16 represented that Fleming would close Midwest warehouses when
17 in fact it was SuperValu's decision to do so.

18 If you'd look at tab 5, there is an article about
19 this on the second page of tab 5. There's a description of
20 what the transaction includes and that description is
21 accurate. The fact again that it didn't specify each and
22 every provision of the Asset Exchange Agreement does not make
23 it fraudulent.

24 I think those things are illustrative of the failure
25 to plead anything that rises to the level of fraud.

1 Your Honor, let me conclude briefly by making two
2 other points. The plaintiffs' claims in this case have
3 evolved, I think to be charitable, so that now they're pinning
4 the anticompetitive claim only on the noncompete. In fact, at
5 page 33 of their brief they say -- they no longer claim that
6 the Asset Exchange Agreement itself was necessarily
7 anticompetitive. It's now the noncompetes that they claim
8 harm competition. But they have not pled a causal connection
9 between the noncompetes and the injury they claim they have,
10 and the failure to make that connection, your Honor, is fatal
11 to their claim.

12 Let me conclude talking about Twombly. I know
13 federal judges have heard a lot about Twombly in the last --

14 THE COURT: And Iqbal.

15 MR. WILDFANG: And Iqbal. Your Honor, I just want
16 to make a couple of points.

17 As the case law makes clear that we cite in our
18 brief, it takes more than just alleging an agreement under
19 Twombly and Iqbal to survive a Rule 12 motion in an antitrust
20 case. It is true that in some cases there's not a written
21 agreement so the plaintiff has to plead that there is an
22 agreement, but they also have to plead that it is an unlawful
23 agreement in the sense that it restrains competition. And
24 here again the plaintiffs have made only conclusory
25 allegations about the agreement and the connection to harmful

1 injury to them and they simply don't get over the Iqbal test,
2 your Honor.

3 There's a case in this district, Buetow vs. A L S
4 Enterprises, where the court rejected the plaintiff's argument
5 that simply referencing a written agreement is sufficient to
6 plead a conspiracy, and that's because obviously, you know,
7 every contract is an agreement, but the courts require that in
8 an antitrust case the parties plead not only what the
9 agreement is but how it harms competition, and they have not
10 done that, your Honor.

11 Thank you.

12 THE COURT: All right. Thank you, Mr. Wildfang.

13 Mr. Drubel, are you the respondent here for the
14 plaintiffs?

15 MR. DRUBEL: I am, your Honor. We also have some
16 slides that I'll be using, at least some of, this morning.

17 THE COURT: Okay.

18 MR. DRUBEL: May I proceed, your Honor?

19 THE COURT: Sure.

20 MR. DRUBEL: Your Honor, Plaintiffs in this case are
21 seeking to recover overcharges on their purchases of wholesale
22 grocery products and services from Defendants resulting from
23 Defendants' secret agreement not to compete.

24 I have a slide. I don't know if your Honor -- does
25 it come up on your Honor's screen --

1 THE COURT: The overview slide?

2 MR. DRUBEL: -- the overview slide? Yes.

3 So, in this case we have alleged, first, that
4 Defendants had an agreement that began on September 6, 2003 --
5 this is their agreement not to compete -- that ran until
6 September 13, 2008, and as a result of that agreement, the
7 plaintiffs allege, the class paid artificially high prices, in
8 other words, overcharges, on their purchases during that
9 period that the agreement was in effect. That's the basis of
10 the plaintiffs' claim.

11 Now, I heard Mr. Wildfang say, well, there's no
12 connection, Plaintiffs haven't pled any connection between the
13 two, between the violation and the high prices. That's
14 incorrect.

15 Could I have slide -- I think it's slide 4, the
16 injury slide quoting from the complaint? I'm sorry. It's
17 slide 6.

18 For example, in paragraph 39 we plead:

19 "As a result" -- this is of Defendants' illegal
20 agreement -- "retail customers both in the Midwest and in
21 New England have sustained overcharges" on their "repeated
22 purchases of grocery wholesale products and services"

23 And the next paragraph, please.

24 "The contract, combination or conspiracy consisted
25 of continuing agreements, understandings and a concert of

1 action between Defendants, ... including Defendants' secret
2 agreement not to compete."

3 I would also draw your Honor's attention to
4 paragraph 3 of our complaint in which we specifically allege:

5 "As a result of Defendants' illegal agreement,
6 Plaintiffs and members of the class have been injured in their
7 business and property in that prices for full-line wholesale
8 grocery goods and related services purchased by Plaintiffs and
9 members of the class have been artificially inflated and
10 capacity and output have been artificially reduced."

11 I think it couldn't be clearer, your Honor, that at
12 least Plaintiffs have alleged a connection between Defendants'
13 agreement not to compete and the resulting overcharges, prices
14 that were higher than they would have been if there had been
15 competition, as a result of that agreement.

16 Now, returning to the timeline, your Honor,
17 Plaintiffs are looking to recover all of these overcharges.
18 Plaintiffs have argued that the statute of limitations has
19 tolled starting for overcharges beginning on September 6th,
20 2003, running through September 13, 2008, because of
21 Defendants' fraudulent concealment. If your Honor holds that
22 the statute of limitations was fraudulently concealed, then
23 all of these overcharges are recoverable. If, however, even
24 if your Honor decides that the statute of limitations is not
25 tolled, then at least for all of the overcharges within the

1 four years of the filing of the Plaintiffs' complaint, namely
2 between December 31, 2004 and September 13, 2008, those
3 overcharges are clearly recoverable.

4 THE COURT: Can I, in your opinion, equate every
5 overcharge to being an overt act?

6 MR. DRUBEL: Yes, your Honor.

7 THE COURT: Okay. What's the law that says that?

8 MR. DRUBEL: Let me jump to slide 5, the Klehr case.
9 In Klehr, the Supreme Court said that: "Antitrust law
10 provides that in the case of a 'continuing violation,' say, a
11 price-fixing conspiracy that brings about a series of
12 unlawfully high-priced sales over a period of years" -- and
13 we're alleging in this case that Defendants' agreement
14 produced an unlawful series of high-priced sales over this
15 period, during the period it was in force -- "'each overt act
16 that is part of the violation and that injures the plaintiff'"
17 -- and here's the key, your Honor -- "[for example], each sale
18 to the plaintiff" -- so the court is saying that each sale to
19 the plaintiff, for example, is an overt act -- that's what
20 Klehr is saying -- "'that starts the statutory period running
21 again, regardless of the plaintiff's knowledge of the alleged
22 illegality at much earlier times.'"

23 THE COURT: Aren't most of those cases, though, or
24 at least I think the particular ones you're citing there,
25 cases that arise out of an agreement between the parties in a

1 different factual context than a sale in the situation we have
2 here?

3 MR. DRUBEL: Well, your Honor, the sale here is --
4 for the purposes of analyzing whether or not the agreement
5 between two competitors is a violation of the Sherman Act we
6 would submit has nothing to do with it. I mean --

7 THE COURT: Now, a lot of those cases, though, are
8 cases in which competitors get together and form the sort of
9 classic price-fixing agreements that I think we talk about.
10 This seems to me to be contextually a little bit different
11 than that.

12 MR. DRUBEL: Well, my colleague, Mr. Kotchen, is
13 going to address that at some length --

14 THE COURT: All right.

15 MR. DRUBEL: -- in the motion for summary judgment,
16 but I'll just briefly allude to the fact that, for example, in
17 Palmer, which is a case that we believe controls the
18 disposition of this motion, the Supreme Court was also faced
19 with a sale. It was faced with a sale of a business of a bar
20 review course in Georgia to another competitor, Harcourt Brace
21 Jovanovich, a bigger competitor, and the --

22 THE COURT: But that was sort of a clear dividing up
23 of territories.

24 MR. DRUBEL: Yes, your Honor, just like in this case
25 there's a clear dividing of the sale of customers in the

1 Midwest and the customers in New England and an agreement
2 between these two multibillion dollar corporations not to
3 compete for those customers.

4 Now, they're going to say, I think, looking at their
5 briefing, that, well, that's totally different. You know,
6 this isn't a territorial allocation. Well, gosh, your Honor,
7 I mean, what does it mean to allocate territories if not for
8 the customers in them? I mean, that's the whole idea of
9 allocating territories. I mean, allocating markets means
10 allocating customers and these two defendants allocated the
11 customers in the Midwest to SuperValu and the customers in
12 New England to C&S.

13 THE COURT: And anything else, I take it, that's in
14 the agreement, such as the warehouses and stuff, is part of
15 your sham window-dressing argument for the fact that this is
16 what they were doing?

17 MR. DRUBEL: Yes, your Honor. We believe that in
18 fact it is a sham, but as we said in our briefs, that's not a
19 separate cause of action, and frankly, it doesn't matter with
20 respect to the *per se* motion. I mean, the fact is that -- for
21 example, in the Palmer case, there was no allegation that the
22 licensing of the trademark to the competitor in Georgia was a
23 sham. It was a legitimate asset transfer, a license of
24 intellectual property, but the Supreme Court said in that case
25 it doesn't matter. That's a violation. That's a *per se*

1 violation.

2 We also have another case out of the Ninth Circuit
3 that my colleague is going to talk about involving a swap, an
4 asset exchange between two utility companies where
5 multimillion dollar assets were exchanged, I mean, electrical
6 plants, and the court said Palmer per se violation, because it
7 doesn't matter.

8 THE COURT: Well, I guess -- and I derailed you and
9 all of a sudden we're really talking about issues that I think
10 belong more in the partial summary judgment motion, so let's
11 get back to the statute of limitations and what happened in
12 that period.

13 MR. DRUBEL: So, your Honor, the fact is that Klehr
14 cites specifically overpriced sales to the plaintiff starting
15 the statutory period running again.

16 You know, your Honor, it's like -- it would be like
17 if two defendants decided that they were going to agree to
18 pick the pockets of their customers. When they make the
19 agreement to pick those pockets, that is a violation of the
20 law like the agreement here. However, every time they pick
21 the pockets of those customers, that is an additional injury
22 like each additional overcharge to a customer is an additional
23 injury, and the customers whose pockets are picked have a
24 cause of action each time their pockets are picked. They
25 don't have just one cause of action going back here to when

1 the agreement was signed. And in fact, under the Clayton Act,
2 your Honor, actually, they don't have any cause of action
3 until there is injury, until their pockets are picked.

4 If I could have the slide 3, please.

5 Your Honor, it's important, I think, to take a
6 minute to understand the statutory framework that governs the
7 statute of limitations for antitrust claims.

8 As your Honor may know -- well, let me start this
9 way. With respect to the statute of limitations, the statute
10 of limitations runs from when the cause of action accrues, so
11 in order to figure out whether or not the statute of
12 limitations has run on any cause of action, one has to know
13 when the cause of action accrued.

14 With respect to the cause of action accruing, as
15 your Honor may know under -- there's no direct cause of action
16 for a violation of the Sherman Act. Unlike, for example, the
17 Securities Exchange Act, 10b, where the courts have implied a
18 right of action, under the Sherman Act, the only way to get a
19 private right of action is under Section 4 of the Clayton Act.

20 Section 4 of the Clayton Act, although it can be
21 combined in different ways, basically has three elements to
22 it. One is, there has to be a violation of the antitrust
23 laws, for example, the Sherman Act violation that we say
24 Defendants' agreement of noncompete was, and two, there has to
25 be some kind of injury of the kind the antitrust laws are

1 designed to prevent, for example, overcharges, and three,
2 ascertainable damages.

3 So, when all of these elements are present, a cause
4 of action accrues to plaintiffs under Section 4 of the Act and
5 the statute of limitations starts to run. Conversely, until
6 all of these elements are present, a plaintiff's cause of
7 action under Section 4 has not accrued and the statute of
8 limitations does not begin to run.

9 Under Section 4, injury is a necessary element. A
10 violation of the Sherman Act by itself does not give rise to a
11 cause of action under Section 4 of the Sherman Act. Unless
12 and until there is injury to plaintiffs, no cause of action
13 accrues.

14 Go to slide 4, please.

15 So in the case of an ongoing violation of the
16 Sherman Act, which is what Plaintiffs have alleged here under
17 the five-year agreement not to compete, the Supreme Court has
18 repeatedly stated that each injury resulting from an ongoing
19 Sherman Act violation results in a new cause of action.

20 If you'd go to slide 5.

21 Klehr is particularly important because although in
22 Zenith that's what the court said, in Klehr the court
23 specifically talked about overcharges, that each overcharge
24 results in a restarting of the statute of limitations.

25 And, your Honor, you can see how the reason that's

1 true is because of what we went over in the Clayton Act. The
2 Clayton Act requires a violation of the law and injury. If
3 there's an ongoing violation, that's the first element.
4 That's ticked off. So each time there's an overcharge, the
5 Supreme Court says, there's a new injury. Each time there's a
6 new injury there's a new cause of action under Section 4 of
7 the Clayton Act.

8 So, when Mr. Wildfang says, well, we all agreed that
9 in fact Plaintiffs' cause of action accrued on September 6,
10 2003, that's incorrect. In fact, each time there was an
11 overcharge during this period a new cause of action accrues to
12 the plaintiffs. Each time there's a new cause of action the
13 statute of limitations begins to run again. That's the
14 teaching of Klehr. But it's not just the teaching of Klehr,
15 your Honor. The fact is that every case that has considered
16 the matter that we have found follows that reasoning.

17 If I could go to slide 8, please.

18 We have cited to your Honor the cases of Morton's
19 Market, an Eleventh Circuit case reversing summary judgment on
20 statute of limitations grounds for defendants in an alleged
21 20-year price-fixing and market division conspiracy because
22 there were sales overcharges within the four-year Clayton Act
23 statute of limitations period before the complaint was filed.

24 In K-Dur, for example -- that's on page -- I think
25 that's the next page. In K-Dur -- that's a District of New

1 Jersey case -- in that case they denied defendant's motion to
2 dismiss because "Plaintiffs ... alleged that they were
3 overcharged and paid supra-competitive prices for K-Dur as a
4 result of Defendants' settlement agreements. As such it
5 appears that Plaintiffs' claims are not barred by the statute
6 of limitations to the extent that they bought and overpaid for
7 K-Dur within the applicable time limitations."

8 What you're talking about there, your Honor, is
9 these overcharges in green up (indicating) here. These are
10 the overcharges that took place, that occurred within four
11 years of the filing of Plaintiffs' complaint. In those, each
12 one of those triggered a new cause of action, a new statute of
13 limitations.

14 The Meijer case is to the same effect, although it
15 happens to be -- it's a Section 2 monopolization case, but the
16 same logic applies. Plaintiffs' claims were not barred by the
17 statute of limitations where there were overcharges within
18 four years of the filing of the complaint.

19 THE COURT: Under that theory, though, when would
20 the statute of limitations ever toll?

21 MR. DRUBEL: Oh. Well, the statute of limitations
22 tolls, your Honor -- each one of these causes of action has a
23 little -- you think of it as having a little alarm clock
24 attached to it -- four years later.

25 So, for example, unless the statute of limitations

1 is tolled in this case --

2 THE COURT: You're saying every time there's an
3 overcharge, as long as they're continuing to operate in
4 separate territorial things and you're claiming an overcharge,
5 then it would run forever, right?

6 MR. DRUBEL: Oh, no, your Honor. The fact is, what
7 we're claiming is that there was an overcharge due to their
8 agreement not to compete, which is five years, five years. So
9 what that means is that at the end of this period, if in
10 fact -- now, we of course don't know for sure, we haven't had
11 discovery, that their agreement ended in five years, but
12 that's what the AEA says, so let's take it at its word. If
13 that's true, then that means that the last sale took place on
14 September 13, 2008, so that would mean that the statute of
15 limitations for that sale would run four years later,
16 September 13, 2012. Each one of these causes of action has a
17 little Clayton Act four-year alarm clock attached to it.

18 So that means, for example -- that's why the
19 overcharges to the left of this, unless the statute of
20 limitations is tolled, the statute has run on these. The
21 statute has run on this overcharge because it took place more
22 than four years before Plaintiffs filed their complaint, so
23 the statute has run on overcharges from September 6, 2003
24 through December 30th, 2004.

25 So this is not a situation unlike the Section 7

1 claims in Concord Boat and Midwestern Machinery where the
2 court said, look, in a Section 7 challenge to a merger we're
3 not going to apply the continuing violation, because among
4 other things it would repeal the Clayton Act statute of
5 limitations. The arguments in those cases were that following
6 the merger, anything that the merged companies did could be
7 challenged under Section 7 and that would mean that there
8 would be no end to the statute of limitations.

9 I would like to just pull up slide 21 for a second,
10 because it's interesting what the Eighth Circuit did in
11 talking about that.

12 If you go down to point 3, the Eighth Circuit
13 said -- and this was a case, by the way -- the factual
14 contexts are very important here. In both Concord Boat and
15 Midwestern Machinery you had two corporations that merged by
16 acquisition. They became one. That's not what you have here.
17 You have an asset sale which is technically a merger, but
18 we're not challenging this case under -- the transaction as a
19 merger case. This is not a Section 7 case. We're challenging
20 this case under Section 1. And it's not their transaction,
21 we're not saying, "Gee, you can't have gone ahead with the
22 asset swap," but what you can't do is agree not to compete.

23 It's very interesting, though, what the Eighth
24 Circuit says. "Even if a continuing violation were applicable
25 to the Section 7 claims here, [plaintiffs] have not shown any

1 overt act that would restart the limitations period." Because
2 all the plaintiffs were saying was, "Well, gee, you acquired
3 this company and their assets and you continued to hold them
4 and use them just the way you had at the time of the merger
5 which took place years and years before. We think that's a
6 violation." And the Court of Appeals said: No, we're not
7 going to apply the continuing violation doctrine because we
8 don't think it makes any sense in a Section 7 case, but even
9 if it did, "where a company is merely holding or using assets
10 in the same manner as at the time of acquisition, there is no
11 'separate new overt act' to restart the limitations period" --
12 and here's the interesting part -- "as is found, for example,
13 in each new sale by a Sherman Act price-fixing defendant."

14 So what the Eighth Circuit is saying is: Look,
15 there's no overt act in a Section 7 case like this as there is
16 in each new sale or overt act "as is found, for example, in
17 each new sale by a ... price-fixing defendant."

18 If you scroll back out, pull back out, because I
19 think -- I think, your Honor -- I can't remember right off the
20 top -- well -- and I think, your Honor, they cite Klehr. I
21 think they cite Klehr. In any event, that is exactly what
22 Klehr says. That's exactly what Klehr says.

23 THE COURT: Okay. I think you've used up your 20
24 minutes.

25 MR. DRUBEL: May I have just -- I know Mr. Wildfang

1 ran over a few minutes. May I just --

2 THE COURT: I added a couple minutes to give you the
3 same amount of time, but I'll give you a minute. Go ahead.

4 MR. DRUBEL: All right. Thank you very much, your
5 Honor.

6 Your Honor, Defendants in this case are mightily
7 trying to portray this as a garden variety business
8 transaction. Frankly -- I've been at this over 30 years --
9 I've never seen a case where two multibillion dollar
10 competitors swap customers in their home markets and agree not
11 to compete for them.

12 Can you imagine if Coke and Pepsi decided to swap
13 customers on each side of the Mississippi and agreed not to
14 compete for them? Would anyone think that that was not a
15 *per se* violation?

16 Did the defendants try to keep this a secret? Of
17 course they did. If this had gotten out, they know they would
18 have faced antitrust lawsuits, both private antitrust lawsuits
19 and possible FTC enforcement action. As it is, we know that
20 the FTC in fact has subpoenaed documents from them. It is
21 investigating this very agreement.

22 THE COURT: I'm having a little trouble figuring out
23 what the indicia of secrecy are.

24 MR. DRUBEL: Well, the indicia are, your Honor, that
25 they intended to keep this --

1 THE COURT: I mean, there was a lot of press release
2 and much discussion in the media about the asset exchange.

3 MR. DRUBEL: Absolutely, but there is not one
4 mention, topside or bottom, in any of those to the agreement
5 not to compete, which is the linchpin of Plaintiffs' claims.

6 THE COURT: But kind of a Johnny-come-lately
7 linchpin, because it wasn't originally asserted as part of
8 your action.

9 MR. DRUBEL: Oh, your Honor, it was originally
10 asserted as part of our action. It originally was asserted as
11 part of our action. Now, not all of the tagalong complaints
12 did that, but I don't think it's proper to hold that against
13 the consolidated amended complaint.

14 THE COURT: All right. But you do agree that that
15 is the linchpin and what I should --

16 MR. DRUBEL: That is the linchpin of our case, your
17 Honor.

18 THE COURT: Okay. All right. I'm going to cut you
19 off there.

20 MR. DRUBEL: Thank you very much.

21 THE COURT: Mr. Wildfang, you have five minutes of
22 rebuttal.

23 MR. WILDFANG: Your Honor, I'll try to be brief.

24 Let me start by pointing out that the plaintiffs'
25 timeline also doesn't have -- just like our timeline --

1 doesn't have any overt acts in that long middle period other
2 than sales, and unfortunately for the plaintiffs this case is
3 covered by Eighth Circuit law. So when you asked Counsel, you
4 know, "Are you arguing every sale is an overt act?" and he
5 said, "Yes," and you asked, "What is the law on that?" he went
6 to Klehr. Klehr says: "In the case of a continuing
7 violation." If you look back at the quotation that he put on
8 the screen, it says: "In the case of a continuing violation."
9 In the Eighth Circuit under Concord Boat and Midwestern
10 Machinery, this is not a continuing violation case. This is
11 not the classic case of price fixing.

12 Your Honor, let me read from Midwestern Machinery,
13 which says at page 269:

14 "The typical antitrust continuing violation occurs
15 in a price-fixing conspiracy when conspirators continue to
16 meet to fine tune their cartel agreement."

17 That's not this case, your Honor. There's no
18 allegation in the complaint that C&S and SuperValu continued
19 to meet to try to further some anticompetitive goal. This was
20 a discrete one-time occurrence, and as much as Counsel wants
21 to talk about a continuing violation, this just is not one.

22 Mr. Drubel said in answer to your Honor's question
23 that it doesn't matter if the AEA itself is anticompetitive,
24 and I submit, your Honor, it does matter. By acknowledging
25 that the AEA is not necessarily anticompetitive, which they

1 concede at page 33 of their brief, means that the noncompetes
2 themselves are in fact ancillary, and if they're ancillary,
3 then you're talking about a rule-of-reason analysis and we'll
4 get to that in a moment, your Honor.

5 The other -- excuse me, your Honor. I'm on some
6 medication that makes my mouth dry.

7 THE COURT: That's okay.

8 MR. WILDFANG: If Plaintiffs are correct, there
9 would be the anomalous result here of a complete merger. If
10 these two companies had completely merged on September 6th,
11 2003, there would be no argument that Plaintiffs could
12 challenge that merger after four years, no argument, but
13 plainly a complete merger would be even more anticompetitive
14 than the limited agreement they had. This was a partial
15 merger. It was the exchange of operating businesses in two
16 parts of the country.

17 And the fact that Section 7 applies is demonstrated
18 by the fact that the parties had to file an HSR filing with
19 the FTC. Mr. Drubel also said, well, this is not -- we didn't
20 sue under Section 7 of the Clayton Act, but they could have.
21 And in fact, your Honor, the Department of Justice routinely
22 when they challenge a merger bring it as both a Section 1,
23 Sherman Section 1, and a Section 7 case. It would make no
24 sense to have one rule for Section 1 cases and a different
25 rule on the same case, on the same facts, for a Section 7

1 case.

2 Under Concord Boat and Midwestern Machinery your
3 Honor must grant our motion, because it is clear under that
4 case law that these are not continuing violations.

5 THE COURT: Was the bar review course, territorial
6 divvying up, different than this case?

7 MR. WILDFANG: Your Honor, it has no application to
8 this case. This was not -- and let me go back to the
9 ancillarity question.

10 There was no claim by the parties to that market
11 allocation that the market allocation was connected to any
12 transaction that had potential pro-competitive effects, so
13 there was no question of ancillarity. Here the plaintiffs
14 have agreed, have now conceded by saying that the AEA itself
15 is not necessarily anticompetitive. They've conceded that the
16 noncompetes themselves are ancillary and my colleague will
17 talk a little bit more about that in the next argument. But
18 once you concede that, then Palmer goes out the door.

19 Let me finish with the secret issue. I've been
20 practicing law about as long as my colleague has. I've never
21 seen a case where sophisticated companies with sophisticated
22 counsel enter into what they call a *per se* violation of the
23 antitrust laws and then try to cover it up by creating an
24 agreement that has to be filed with the FTC. It's not
25 plausible, your Honor.

1 Thank you.

2 THE COURT: All right. We'll take a five-minute
3 break and start the motion for partial summary judgment right
4 at 10 o'clock.

5 (Recess taken at 9:55 a.m.)

6 * * * * *

7 (10:00 a.m.)

8 IN OPEN COURT

9 THE COURT: Mr. Kotchen, you seem all ready to go,
10 so I'll hear you in support --

11 MR. KOTCHEN: I hope I am. Thank you, your Honor.

12 THE COURT: -- of the plaintiffs' partial summary
13 judgment motion.

14 MR. KOTCHEN: I had to resist the temptation while
15 sort of getting into some of the summary judgment issues
16 during the last argument to stay in my chair, but Mr. --

17 THE COURT: Well, that's appreciated.

18 MR. KOTCHEN: I'm delighted that Mr. Wildfang
19 started off by talking about the policy implications of this
20 case. Let's talk a little bit about that.

21 There's no dispute here that the agreement not to
22 compete, the five-year agreement not to compete, was kept
23 confidential. Plaintiffs had no reason to know about the
24 agreement not to compete, nothing. If you take the
25 defendants' position here at face value, what they're saying

1 is because they entered into the agreement not to compete
2 here, didn't disclose it to anybody, even if they overcharged
3 Plaintiffs, which we allege, so let's accept that as true for
4 the time being, we couldn't bring a Section 1 case four years
5 after this even though we didn't know about it. So if you
6 take their case at face value, any two competitors, Coke and
7 Pepsi, can agree not to compete forever, literally forever, as
8 long as they're not challenged in the first four years.
9 That's what they're arguing.

10 THE COURT: It sounds like you're arguing statute of
11 limitations to me.

12 MR. KOTCHEN: Yeah. Well, that's -- that is just
13 one point --

14 THE COURT: Okay. Let's talk about the partial
15 summary judgment.

16 MR. KOTCHEN: So to tie that into the partial
17 summary judgment issues, okay, you asked, your Honor, about,
18 well, how does the case law address situations like this, and
19 there are cases directly on point, and I'd like to start with
20 Palmer vs. BRG, and that's -- if you turn to slide 3 --

21 THE COURT: This is the bar review course, right?

22 MR. KOTCHEN: That's exactly right. Here are the
23 facts of the bar review course.

24 One bar review competitor, HBJ, and BRG were
25 competing intensely in Georgia, but not in the rest of the

1 United States. They came up with a deal. HBJ was going to
2 transfer its assets to BRG in Georgia, its bar review
3 materials, a license for BRG to use the bar review materials
4 in Georgia, and the trade name Bar/Bri so BRG could use its
5 trade name in Georgia, *bona fide* assets that were transferred
6 to BRG. There was also mutual covenants not to compete. The
7 two competitors agree not to compete. BRG got Georgia and the
8 customers --

9 THE COURT: I'm going to have you get behind the
10 lectern, because, you know, our sound system is really good
11 and it's geared up and it's much easier to get you --

12 MR. KOTCHEN: Okay.

13 THE COURT: -- recorded --

14 MR. KOTCHEN: Okay.

15 THE COURT: -- if you're --

16 MR. KOTCHEN: BRG gets Georgia and the customers in
17 Georgia, HBJ gets the rest of the United States and the
18 customers in the rest of the United States. The Eleventh
19 Circuit held, well, there's some *bona fide* assets here. That
20 covenant not to compete, the mutual covenant not to compete,
21 is not a naked restraint of trade, so they -- that was their
22 ruling. It was not a *per se* violation of the antitrust laws.
23 The Supreme Court disagreed and what the Supreme Court held
24 was, even though there was the *bona fide* transfer of assets,
25 the bar review materials, the trade name which BRG used to

1 market its bar review course, mutual covenants not to compete,
2 which is exactly what we have here, mutual covenants not to
3 compete are *per se* illegal. There can be no justification for
4 them irrespective of the transfer of assets.

5 So how has that principle been applied since Palmer?
6 Well, if you turn to slide 5, Columbia Steel --

7 THE COURT: Now, this is slide 5 in the book you
8 just gave me, right?

9 MR. KOTCHEN: Yes, your Honor.

10 THE COURT: All right.

11 MR. KOTCHEN: In Columbia Steel you had two electric
12 utility competitors in Portland, and what they did is, they
13 wanted to divide Portland into two exclusive service
14 territories, okay, so they transferred assets to each other
15 just like what we have here, although -- assuming that this
16 was a *bona fide* transfer of assets. That's one thing we
17 should discuss at some point, but let's assume that for the --

18 THE COURT: I didn't hear what you said. Assuming
19 what?

20 MR. KOTCHEN: There's a *bona fide* transfer of assets
21 here as opposed to just customers. But the assets -- I'm
22 going to read from the Ninth Circuit's opinion. Here are the
23 assets that each of the competitors in Portland transferred to
24 each other. They transferred electric distribution plants,
25 distribution substations, poles, lines, transformers, meters,

1 related distribution facilities and all easements necessary
2 for the operation thereof, and their customers, those assets,
3 including their customers.

4 The defendants, or the defendant in Columbia Steel
5 continued to use those assets, didn't shut them down, but they
6 also agreed not to compete. And what the Ninth Circuit held
7 citing Palmer is, even though there is the *bona fide* transfer
8 of assets in that case just like in Palmer, an agreement not
9 to compete, a mutual agreement where two competitors agree not
10 to compete is *per se* unlawful. It cited Palmer.

11 So one more case to discuss and then let's discuss
12 the application of these principles to our case. If you could
13 turn to slide 6, your Honor.

14 Utah vs. Stericycle. This involved medical waste
15 companies that transferred assets and divided territories.
16 One competitor got Arizona, one competitor got Utah and
17 Colorado. They transferred *bona fide* assets, including
18 customers, vehicles, equipment, employees -- and employees,
19 *bona fide* assets that remained intact and those competitors
20 continued to use those assets in offering medical waste
21 services in Arizona and then Utah and Colorado respectively.
22 They also entered a five-year agreement not to solicit each
23 other's customers, shockingly similar to what we have here.
24 What the State of Utah said in that case is, it is a *per se*
25 violation of the Sherman Act to enter into a mutual agreement

1 not to compete.

2 So, three cases we're discussing. What's the
3 application of those cases here? Here what we have are the
4 transfer of distribution facilities from C&S to SuperValu,
5 from SuperValu to C&S that were promptly closed, transfer of
6 customers, and then the agreement not to compete for the
7 customers. Lasted five years. Just like in Palmer, just like
8 in Columbia Steel, just like in Stericycle, it should be
9 *per se* lawful. It is a Section 1 violation.

10 So, what do the defendants say about that? Well,
11 what they say is, your Honor -- and we heard this from
12 Mr. Wildfang today. This is the purchase and sale of two
13 businesses, so Palmer and those other cases don't apply. Two
14 responses to that, your Honor.

15 The first is, even if this was a *bona fide* transfer
16 of assets, Palmer, Columbia Steel, Stericycle, mandate this
17 agreement, the covenant not to compete, a mutual agreement not
18 to compete, is *per se* unlawful. That is the holding from
19 those cases. That applies here.

20 The second part, which as a factual matter I will
21 disagree with these folks, but I think as a matter of law it's
22 irrelevant, this wasn't a *bona fide* transfer of assets. They
23 transferred distribution facilities, closed them down. They
24 transferred customers and agreed not to compete for those
25 customers.

1 I will take Mr. Drubel's example from earlier of
2 Coke and Pepsi. The law cannot stand for the proposition that
3 Coke and Pepsi can swap customers on either side of the
4 Mississippi and then agree not to compete for them. That
5 can't be what the law is, yet that is exactly what the
6 defendants are asking that this Court do. So what about the
7 cases that the defendants cite? If you turn to slide 8.

8 The cases that the defendants cite are
9 sale-of-business cases where one business sells its business
10 to another business and enters into a covenant not to compete.
11 Basically, their cases stand for the proposition that --
12 covenants not to compete for the employees of the selling
13 business -- of the purchase business. Not one of their cases
14 your Honor, there's not a single one -- and I'm looking
15 forward to how they address this when they argue. There's not
16 one case where they cite where there's a mutual agreement not
17 to compete, two competitors mutually agreeing not to compete.
18 It's not out there.

19 Another point, secondary point. As a matter of law,
20 I'm not sure it matters for a motion, but I think it's worth
21 discussing. Not one of their cases involves a competitor
22 saying, "Okay. I'll sell this portion of my geography to
23 you." This isn't a sale of a business case. These are two
24 geographies. C&S and SuperValu are the two biggest grocery
25 wholesalers out there. They continue to independently

1 operate. They didn't combine operations. They compete. They
2 compete in the mid-Atlantic. They admit it. They compete in
3 other parts of the country. This isn't a sale of a business.
4 These are two geographies that were exchanged and a covenant
5 not to compete that no one knew about. Plaintiffs didn't know
6 about it. It's a *per se* violation.

7 And their cases -- you know, if you or your law
8 clerk or whoever reads the cases, it's remarkable how off
9 point factually they are. So I'm looking forward to how they
10 address that, two competitors mutually agreeing not to
11 compete. What case out there says anything except that's a
12 *per se* violation. I haven't seen it and these folks haven't
13 seen it and we've looked very hard. They haven't cited them.
14 And we do have Palmer, we have Columbia Steel, we have
15 Stericycle, on top of all the criminal cases in which
16 competitors agreed to allocate customers and the Government
17 and courts upheld *per se* violations.

18 So, turning to slide 9.

19 The defendants -- their logic here. Here's the
20 logic as to why they should be able to agree not to compete.
21 They need an agreement not to compete to protect the goodwill
22 of the customers. They define goodwill as the expectancy of
23 continued patronage. They're willing to step into the shoes
24 of each other to serve the customers. If that justifies an
25 agreement not to compete when Coke is out there selling to

1 retailers and willing to step into the shoes of Pepsi so much
2 that it's willing to offer a lower price to the retailers than
3 Pepsi, does that justify Coke and Pepsi swapping customers and
4 agreeing not to compete for them? Of course these guys are
5 willing to step into the shoes of each other. They're
6 competitors. They go in and make sales calls, they compete on
7 price. That's what stepping into the shoes of your competitor
8 means. It's competition and the Sherman Act explicitly
9 protects that dynamic.

10 Another case that is worth mentioning on that point
11 is Topco. Topco involved 25 retailers that agreed to divide
12 territories, not to sell product out of certain territories.
13 They offered a lot of efficiency rationale for how their
14 agreement enabled them to compete better against larger
15 chains, larger retailers. The Supreme Court said: I don't
16 care about your efficiency rationale. You cannot agree with
17 your competitors not to compete. You are not in the position
18 of determining whether -- how competition should work in the
19 marketplace and how you should or shouldn't compete. That's
20 what our clients want here. The plaintiffs don't want them to
21 determine how competition should work. They want the Sherman
22 Act to make that determination.

23 They talk about the fact that, well, you know,
24 there's this five-year noncompete, but it's essentially kind
25 of like a merger. What if, your Honor -- assume this is a

1 hypothetical, and I think we can prove it in discovery. In
2 fact, I am almost morally certain we can. What if after they
3 agreed not to compete that there were overcharges to our
4 clients? We didn't know about the noncompete, our clients
5 didn't know about the noncompete, no one in the marketplace
6 knew about the noncompete, yet they were being overcharged
7 because these folks had decided: Well, we shouldn't let
8 competition affect things here. That's Section 1 of the
9 Sherman Act and that's what it's designed to protect.

10 Let's move on, if you go to slide 12. Even if your
11 Honor were to believe that Palmer didn't control this case, if
12 that was your determination here, their agreement not to
13 compete would still be *per se* unlawful.

14 Let me explain a principle out there and it comes up
15 in the DOJ and FTC collaboration guidelines. There's a
16 limited exception to agreements not to compete escaping *per se*
17 illegality, and that's when two competitors combine to form a
18 joint venture. In that scenario, as long as the agreement not
19 to compete is ancillary -- and I'm using Mr. Wildfang's term
20 there and that's an antitrust term that's been used a lot. As
21 long as the agreement not to compete is ancillary to that
22 joint venture, the agreement not to compete would not be
23 *per se* illegal. It would be assessed under the rule of
24 reason.

25 But if you look at the collaboration guidelines, if

1 you looks towards the bottom of slide 12 here, the two
2 participants who formed the so-called joint venture, they have
3 to work together, collaborate to perform one or more business
4 functions, such as production, distribution, marketing,
5 purchasing or R&D. That's what the collaboration is. "The
6 mere coordination of decisions on price, output, customers,
7 territories, and the like is not integration, and cost savings
8 without integration are not a basis for avoiding *per se*
9 condemnation." You have to work together in order to perform
10 a function that's going to improve output or reduce price or
11 benefit customers in generally.

12 The Seventh Circuit's decision in Polk Brothers is
13 probably the best encapsulation of it. In that case there
14 were two companies that sold complementary goods. One sold
15 home furnishings and appliances, one sold building materials
16 to build homes. What they decided to do is pool their
17 resources, your Honor, and build a retail center, because they
18 thought customers would probably think it would be efficient
19 and convenient if their stores were located next to each
20 other, because if a customer is going to look at home building
21 materials, the customer might also want to look at appliances
22 and furnishings. Makes lots of sense. They pooled their
23 money, they invested in a retail center, their store shared a
24 parking lot, and they shared in the risk of the venture.
25 There was a covenant not to compete for those two, for those

1 two, just limited to that one joint venture. And Judge
2 Easterbrook from the Seventh Circuit said, well, because that
3 covenant not to compete is ancillary to the overall venture,
4 it's not *per se* illegal. So how does that work in practice in
5 a factual scenario somewhat similar to ours?

6 If you turn to slide 13, Village Voice, this is a
7 DOJ enforcement action. Village Voice involved two
8 competitors that offered weekly newspapers, one in Cleveland,
9 one in L.A. what they did, just somewhat similar to what we
10 have here, is, they swapped their customers, transferred
11 limited assets, agreed not to solicit customers and agreed not
12 to compete. The DOJ found that their agreement not to compete
13 was *per se* unlawful. It was a *per se* violation of the Sherman
14 Act. And the reason it did is because -- the reason it was
15 *per se* is because there was no reason for the defendants or
16 the respondents in that case to agree not to compete. The
17 transfer of assets were so minimal and the swapping of
18 customers that there was no reason that could justify their
19 agreement not to compete, so it found that that was a *per se*
20 violation.

21 The defendants in opposing our *per se* motion also
22 bring up this notion that our motion is a collateral attack on
23 the bankruptcy proceeding. Your Honor, that is just false.
24 As Mr. Wildfang acknowledged in his opening, the Bankruptcy
25 Court had no idea about this agreement not to compete, no

1 idea. It wasn't disclosed to the Bankruptcy Court, wasn't
2 disclosed to the plaintiffs. It's not a collateral attack on
3 anything that the Bankruptcy Court found. It's an attack on
4 two competitors, the largest two grocery wholesaler companies
5 in the country agreeing not to compete in two geographies that
6 are very important to each other.

7 So, just to conclude, your Honor, there's a whole
8 host of cases out there, from Palmer, Columbia Steel, Topco,
9 Stericycle, Village Voice, all of which match up with what we
10 have here, a *per se* violation. They have not cited one
11 sale-of-a-business case, if this indeed is a sale of a
12 business, that involved a mutual agreement between two
13 competitors not to compete. It's not out there.

14 I'll save the rest of the time for rebuttal.

15 THE COURT: Okay.

16 MR. KOTCHEN: Thank you.

17 THE COURT: Thank you.

18 All right. Mr. Loughlin is going to be the opponent
19 of the plaintiffs' motion. You may proceed.

20 MR. LOUGHLIN: Thank you, your Honor. Charles
21 Loughlin from Howrey, LLP on behalf of C&S Wholesale Grocers
22 and also arguing on behalf of SuperValu.

23 Your Honor, in Plaintiffs' opening brief their
24 argument was that the noncompetes in the defendants' Asset
25 Exchange Agreement were *per se* unlawful because the Asset

1 Exchange Agreement itself was a sham. It was a naked --

2 THE COURT: Window dressing I think I read over and
3 over again.

4 MR. LOUGHLIN: -- window dressing for a naked market
5 allocation.

6 In response to that argument, Defendants put in
7 declarations from C&S and SuperValu employees showing that the
8 Asset Exchange Agreement was not a sham. Those declarations
9 are undisputed on this record and they are the only fact
10 record along with the Asset Exchange Agreement itself on this
11 Rule 56 motion.

12 And what those facts show, your Honor, is that the
13 Asset Exchange Agreement accomplished the sales of two
14 businesses, each with ancillary noncompetes that were limited
15 in scope and limited in time, and they came together from two
16 separate transactions that were completely independent of each
17 other.

18 In the first instance, the New England part of the
19 transaction came about in early -- because in early 2003,
20 SuperValu was interested in selling its New England wholesale
21 division and it had discussions with C&S about that in the
22 spring of 2003.

23 THE COURT: Preceding the bankruptcy of --

24 MR. LOUGHLIN: Before the bankruptcy, before any
25 discussions about the Midwest.

1 Fleming, a national wholesaler, went bankrupt in
2 April 2003. SuperValu independently and completely separate
3 from any discussions with C&S evaluated the possible purchase
4 and bid for the Midwest Fleming assets, and they bid on that
5 independent from anything with C&S.

6 C&S on its own and separate from any discussions
7 with SuperValu decided that it would bid for the entirety of
8 the Fleming wholesale business, and in that regard it followed
9 a practice that it had followed just a few years earlier when
10 it bought the entire Grand Union retail chain out of
11 bankruptcy. There, just like here, it bid on the entirety of
12 that bankrupt business, it evaluated each of the pieces of
13 that business and made decisions about whether to keep parts
14 of it or sell parts of it.

15 And here, for example, C&S won that bidding process.
16 It did evaluations of all the different Fleming regional
17 businesses, decided to keep California and Hawaii, sold off
18 Florida, for example, to a company called Associated Grocers
19 of Florida, sold Texas to a company called Grocer Supply and
20 sold other pieces to other wholesalers.

21 Now --

22 THE COURT: There are other players in this market,
23 right? I mean, you both have -- I think the briefs and the
24 record is consistent that these are the -- C&S and SuperValu
25 are the two big players in the grocery wholesale market, but--

1 MR. LOUGHLIN: No, I don't think that is correct,
2 your Honor.

3 THE COURT: All right.

4 MR. LOUGHLIN: In New England, for example, C&S has
5 a very big competitor, Bozzuto's, and there are a number of
6 other wholesalers as well. In the Midwest, SuperValu has a
7 very big competitor called Nash Finch and has a number of
8 other smaller wholesaler competitors as well.

9 THE COURT: Are there any other national
10 competitors?

11 MR. LOUGHLIN: I don't know if there are -- most
12 wholesaling is regional, your Honor. C&S, for example, is not
13 national. C&S has businesses in the Northeast, some in the
14 Southeast and some in California, but not all over the
15 country, nor does SuperValu.

16 Now, your Honor, after C&S bought the Fleming assets
17 or won the bid for the Fleming assets, that didn't change the
18 fact that SuperValu was still interested in selling its
19 New England division and C&S was still interested in buying
20 it. It didn't change the fact that SuperValu was still
21 interested in buying those Fleming Midwest assets and that C&S
22 was actively considering what it was going to do with those
23 assets, and given those two separate interests, the two
24 parties did those transactions in one document, in the Asset
25 Exchange Agreement.

1 After they did that, they did those two separate
2 sales together in one agreement, it is undisputed that each
3 company did independent analyses on their own of how best to
4 integrate those assets into the new business. In C&S's case,
5 it determined that the best thing to do was to reopen the
6 largest warehouse it acquired from SuperValu. That was in
7 January of 2004, just months after the acquisition. It opened
8 Suffield, Connecticut, it closed three others. SuperValu on
9 its own, completely separate from C&S, decided to close the
10 former Fleming facilities and realign the distribution systems
11 to achieve efficiencies. Those facts are laid out in the
12 declarations and are undisputed. And what they show, your
13 Honor, is that these are sales of businesses with classic
14 ancillary restraints, and the Supreme Court has said that in
15 the context of the sale of a business, the classic ancillary
16 restraint is an agreement by the seller of a business not to
17 compete within the market, and that has been black-letter law,
18 your Honor, for over a hundred years.

19 Now, in response to the defendants' brief showing
20 that the Asset Exchange Agreement was not a sham, could not be
21 a sham, especially given the reopening of a warehouse, the
22 plaintiffs came up with a brand-new argument, your Honor, for
23 the first time in their reply brief. As Mr. Kotchen just
24 said, they said it doesn't matter if the Asset Exchange
25 Agreement was a sham. They said mutual noncompetes done in

1 the same agreement are *per se* unlawful even if they're
2 ancillary to a lawful integration of productive assets.

3 So, for example, their position, it seems to be,
4 that if SuperValu had sold the New England assets to C&S in a
5 separate document with the same noncompete, that would be a
6 rule-of-reason transaction, and if SuperValu bought the C&S --
7 the Fleming assets from C&S in a separate document with its
8 own noncompete, that would also be a rule-of-reason
9 transaction, but when you put them together in one document
10 for convenience sake, suddenly these two pro-competitive
11 transactions are transformed into a *per se* violation. There's
12 absolutely no support for that, your Honor. It is a form over
13 substance argument. And the point of antitrust analysis is
14 for the court to look at the substance of a transaction and
15 determine whether on balance it is pro-competitive or
16 anticompetitive. There is a *per se* rule that is an exception
17 to that factual analysis that the court normally does, but
18 it's only used when the court already knows the answer to the
19 analysis, when the court has had sufficient experience with
20 this type of transaction, that it knows that the answer if you
21 do a rule-of-reason analysis is going to turn out that it's
22 anticompetitive. That is not the case, your Honor, with sales
23 of businesses even if they're done in one agreement.

24 And Mr. Kotchen said there's no case where there's a
25 mutual noncompete that was not *per se* unlawful. **Polk**

1 **Brothers**, of course, is a case in which there is a one-time
2 integration. Mr. Kotchen described that as a joint venture.
3 The Seventh Circuit doesn't describe that as a joint venture.
4 The Seventh Circuit says that it was a one-time integration
5 where both parties decided to build adjoining stores on one
6 lot and they had mutual noncompetes setting out the products
7 that they would not compete with against each other. The
8 Seventh Circuit says that is a rule-of-reason case because the
9 noncompetes were ancillary to the integration of productive
10 assets and it had potential pro-competitive benefits. They
11 didn't say it's a joint venture. They didn't say it's a sale
12 of a business. They looked at it and said is this a
13 transaction that has potential pro-competitive benefits. It
14 was and therefore the rule of reason applied.

15 And that, your Honor, is the standard in the Eighth
16 Circuit under the **Craftsman Limousine** case that we cite in our
17 brief at pages 16 to 17. In **Craftsman**, the Eighth Circuit was
18 very clear that in any transaction where there are plausible
19 pro-competitive benefits, the rule of reason must be applied.
20 And the court said at this stage of the case the court doesn't
21 need to figure out whether those pro-competitive benefits
22 would be sufficient to overcome anticompetitive effects, it
23 doesn't need to do any weighing. In fact, the court isn't in
24 a position to do that. All the court needs to do is to see
25 whether there are plausible pro-competitive benefits.

1 THE COURT: And I'm sorry if I missed it, but tell
2 me what you identify as the pro-competitive benefits of this
3 agreement.

4 MR. LOUGHLIN: Your Honor, here the companies did --
5 In New England, for example, your Honor, C&S acquired the
6 entirety of SuperValu's wholesaling division. It reopened a
7 formerly closed warehouse --

8 THE COURT: In Connecticut.

9 MR. LOUGHLIN: Integrated those assets into its own
10 business. It closed three other warehouses, allowing for
11 consolidations which achieve economies of scale and increased
12 efficiencies. It allowed it to reduce costs, avoid --

13 THE COURT: So the pro-competitive aspects are
14 they're leaner, meaner and more able to compete? Is that --

15 MR. LOUGHLIN: Absolutely, your Honor.

16 THE COURT: Okay.

17 MR. LOUGHLIN: Those are the classic pro-competitive
18 benefits from any sale of a business. They are recognized by
19 the Department of Justice and the Federal Trade Commission in
20 the horizontal merger guidelines. We cite to those in our
21 brief, your Honor. We cite to cases and we cite to
22 discussions of that from the horizontal merger guidelines, and
23 I can find you the cite.

24 THE COURT: That's okay. I'll find it.

25 MR. LOUGHLIN: And, for example, in connection with

1 the SuperValu transaction, their purchase of the Midwest
2 assets, that integration was recognized in an industry
3 publication, your Honor, where a third-party consultant said
4 -- commented -- this is in 2004 -- "SuperValu has taken the
5 new accounts right into its own warehouses, which has resulted
6 in dramatic increases in capacity utilization, productivity
7 and throughput." There are classic pro-competitive benefits,
8 your Honor.

9 Now, Mr. Kotchen described the Palmer vs. BRG case
10 from the Supreme Court. Palmer vs. BRG, your Honor, does not
11 discuss ancillary restraints at all. In Palmer, BRG was a
12 Georgia bar review company. Harcourt Brace Jovanovich was a
13 national bar review company. HBJ agreed to exit Georgia and
14 not compete there, BRG agreed that it would not compete
15 outside Georgia, and the issue and the only question on market
16 allocation that the Supreme Court addressed was whether a
17 market allocation was *per se* unlawful even if the parties were
18 not subdividing a market that they both competed in. The
19 Eleventh Circuit had said that was not the case, but the
20 Supreme Court said yes, it didn't matter whether the two
21 parties were actual competitors currently competing in a
22 market that they subdivide, or whether one agrees it won't
23 compete in some other market and you agree you won't compete
24 in this market as a potential competitor. They said that is
25 still *per se* unlawful. There is no discussion of ancillary

1 restraints in that case. Palmer is not announcing some new
2 rule that somehow mutual ancillary restraints are *per se*
3 unlawful even if they are in fact ancillary to a lawful and
4 pro-competitive integration. That, your Honor, would have
5 overruled a hundred years of ancillary restraint law going
6 back to Addyston Pipe and beyond, and there is no court that
7 interprets Palmer that way, to my knowledge. And in fact, the
8 only people who interpret it that way are the plaintiffs for
9 the first time in their reply brief.

10 Now, they are correct that there was a license in
11 that case on one side of the transaction, a license from HBJ
12 to BRG in Georgia, but the Supreme Court did not address that
13 license issue in connection with the market allocation. The
14 Supreme Court discusses the license in connection with whether
15 or not there was a price-fixing claim in Georgia. In other
16 words, there's an allegation that the license because of
17 revenue-sharing aspects amounted to price fixing and the
18 Supreme Court dealt with that issue separately. It does not
19 play any role in the market allocation discussion.

20 And in fact, Mr. Kotchen discussed the Village Voice
21 consent decree and competitive impact statement by the
22 Department of Justice. In Village Voice the DOJ contrasted a
23 situation where there is a territorial -- an ancillary
24 restraint from a *per se* claim. In fact, in Village Voice the
25 DOJ said this is not a case in which the territorial

1 restraints were ancillary to a lawful business transaction.
2 Such ancillary restraints are not illegal when "reasonably
3 necessary to protect the purchaser of the full enjoyment of
4 the legitimate fruits of the contract," and they cite Addyston
5 Pipe. "The Antitrust Division examines the substance, rather
6 than the form, of the parties' agreement in evaluating its
7 potential effect," and they say: "When the restraints of
8 trade are reasonably ancillary to the agreement's central
9 pro-competitive purposes, then the Division will analyze the
10 restraints under the rule-of-reason standard."

11 Your Honor, the DOJ did not announce some rule that
12 mutual noncompetes, the fact that there were simple mutual
13 noncompetes in that case, that the transaction was *per se*
14 unlawful. If that was the case, they wouldn't have had to do
15 all the discussion they had where what they're doing is
16 describing that in Village Voice there was not an integration.
17 The DOJ did a lot of work to show that there was no
18 integration there, that in fact what happened in Village Voice
19 was not an actual exchange of assets. In Village Voice there
20 was two news weeklies competing with each other in two
21 different cities. Each of them agreed to shut down one of
22 their businesses, leaving the other as the only news weekly in
23 one of the cities. They didn't exchange assets, they didn't
24 sell each other assets and allow each company to decide how
25 best to integrate those assets. They shut them down

1 separately. And they included prohibitions, your Honor, in
2 the agreement that prohibited each company from selling its
3 assets to somebody, such as a former employee, who might be in
4 a good position to develop a competing business. None of that
5 is present here, your Honor. These are *bona fide* business
6 transactions with ancillary noncompetes.

7 Now, Mr. Kotchen also discussed the Columbia Steel
8 case from the Ninth Circuit which again they cite for the
9 first time, your Honor, in their reply brief, and he said
10 again that's a case in which there were mutual noncompetes
11 that are -- and the holding of that case is that that is
12 *per se* unlawful. Your Honor, Columbia Steel does not deal
13 with ancillary restraints at all. That term is never
14 discussed in Columbia Steel nor is the question that the Court
15 is deciding, one of *per se* versus rule of reason.

16 In Columbia Steel there were two utilities. For
17 years they had been asking their regulator, their utility
18 commission, if they could do a customer allocation, and they
19 were told no repeatedly. But eventually the regulator said
20 you can do an asset swap and allowed them to remove
21 duplicative electrical poles, take down wiring, and the
22 commission found that was pro-competitive because it avoided
23 costs, had efficiencies.

24 In connection with that, they also did -- they went
25 ahead and did a customer allocation and years later they got

1 sued by a customer who bought from one utility but wanted to
2 buy from another utility and was turned down, and the
3 utilities defended on the ground that the utility commission's
4 decision to allow them to do this exchange of assets was in
5 the fact a state action, that their transaction was immune
6 under the state action doctrine. That was the question, was
7 this application of state action immunity. There was no
8 discussion of ancillary restraints.

9 And in fact, let me also point out that in
10 **Columbia Steel** the court dealt with a statute of limitations
11 issue and found that higher prices were not sufficient to toll
12 the statute of limitations or create a continuing violation.
13 Rather, the only thing that constituted a continuing violation
14 were the specific overt acts in furtherance of the conspiracy,
15 in other words, the refusals to sell to the allocated
16 customer.

17 So, your Honor, at bottom there is frankly no
18 support for this made-up claim that mutual noncompetes done in
19 the same agreement are somehow anticompetitive and *per se*.
20 It's not in **Palmer**, it's not in **Village Voice**. **Utah vs.**
21 **Stericycle** is exactly the same thing as **Village Voice**. It is
22 not in any case, your Honor.

23 Your Honor, in terms of goodwill, we addressed
24 Plaintiffs' arguments on goodwill at pages 25 to 30 of our
25 brief. I'm not going to -- I won't go into detail with that,

1 but let me just point out that the question of whether or not
2 there is sufficient goodwill to justify a noncompete, or
3 whether or not there is enough of an integration, whether or
4 not the integration is real or sufficient to justify a
5 noncompete, those are fact questions that are analyzed under
6 the rule of reason, as part of a rule-of-reason analysis.
7 That is not a *per se* argument, your Honor.

8 As I mentioned before under Craftsman, all the Court
9 needs to do to determine whether this should be *per se* or rule
10 of reason is to look at the transaction and figure out whether
11 it has -- it potentially has pro-competitive benefits, and the
12 Court has all the information it needs to answer that
13 question.

14 The Court knows that the Asset Exchange Agreement
15 accomplished the sales of two entire wholesaling businesses,
16 that the noncompetes that were included in that sale were
17 limited in scope and limited in time, and that the sales have
18 the potential to provide pro-competitive benefits, and those
19 facts, your Honor, are undisputed on this record.

20 Your Honor, unless the Court has further questions,
21 I think my time is up and I'm ready to sit down.

22 THE COURT: Okay. Thank you.

23 Mr. Kotchen will get the final word then.

24 MR. KOTCHEN: Your Honor, just to rebut some of his
25 points.

1 Palmer didn't discuss ancillarity, Columbia Steel
2 didn't discuss ancillarity, Stericycle, which he didn't
3 distinguish, doesn't discuss ancillarity, because they don't
4 need to. The restraints are *per se* unlawful. They're
5 unlawful on their face in those cases irrespective of what the
6 justifications are for the defendants. There is a whole line
7 of cases out there where defendants who engaged in *per se*
8 unlawful agreements tried to offer justifications for the
9 agreements just like the defendants are doing here, and what
10 the courts say is it just doesn't matter. It is *per se*
11 unlawful.

12 Incidentally, the agreement at issue in Palmer is a
13 covenant not to compete. The agreement at issue here, if you
14 look at how it's described, is a covenant not to compete.
15 They're two covenants not to compete. Palmer did not need to
16 get into the ancillarity discussion just because it's *per se*
17 unlawful.

18 The one thing I didn't hear as we discussed before
19 is any case in which two competitors that mutually agreed not
20 to compete did anything but engaged in a *per se* violation.

21 THE COURT: I think Mr. Loughlin talked about Polk
22 Brothers.

23 MR. KOTCHEN: In the sale of a transaction case,
24 Polk Brothers is -- if you read the case, Judge Easterbrook
25 from the Seventh Circuit says that without the restraint,

1 without the agreement not to compete -- it led to a new
2 product -- the product wouldn't have been able to have been
3 offered at all.

4 THE COURT: And then they did go to the rule of
5 reason.

6 MR. KOTCHEN: Then they went to the rule of reason
7 in that case. When they -- they're not saying that this is a
8 joint venture. You look at Polk Brothers and it's not a joint
9 venture. I mean, that's a joint venture case. They're not
10 claiming it's a joint venture. They're saying, well, this is
11 just a sale of a business.

12 And if you look at the competitor collaboration
13 guidelines, which I -- if I could grab a notebook. Go to
14 slide 12.

15 When they talk about what the so-called efficiencies
16 were here, it's cost savings is what they're talking about and
17 they don't discuss the competitor collaboration guidelines at
18 all. If you look at the competitor collaboration guidelines,
19 it's clear that: "The mere coordination" -- at the end of the
20 slide there -- "The mere coordination of decisions on price,
21 output, customers, territories, and the like is not
22 integration, and cost savings without integration," such as
23 what's at issue in Polk Brothers, it's not a basis for
24 avoiding *per se* condemnation. There's no discussion of that
25 in their brief. What they rely on are the merger guidelines

1 that talk about -- this is not a merger. This a Section 1
2 *per se* violation.

3 And their distinguishing of Village Voice. The one
4 thing that Mr. Loughlin did not read is the following from
5 Village Voice. "Third, the anticompetitive restraints at
6 issue" in the Village Voice enforcement action "cannot be said
7 to be ancillary to the sale of assets given that so few assets
8 were actually transferred. None of the assets associated with
9 the actual operations and goodwill of the defendant's two
10 shuttered news weeklies were sold or integrated" --

11 THE COURT: Slow down.

12 MR. KOTCHEN: Oh. I'm sorry. "None of the assets
13 associated with actual operations and goodwill of the
14 defendant's two shuttered news weeklies were sold or
15 integrated into the other defendant's news weekly. The assets
16 defendants actually transferred, which were mainly the
17 accounts receivable of the shuttered paper and the customers,
18 were of little value even by defendant's own calculations."

19 So it said that the agreement not to compete was not
20 ancillary in that scenario. The assets here, SuperValu has
21 told us that the value of the customers in the Midwest for the
22 five-year life of the noncompete is 800 billion -- I'm sorry
23 -- is 8 billion. The asset of liquidating the distribution
24 facility, that's worth 13.4 million to them. It's the same
25 dynamic. Customers being transferred and an agreement not to

1 compete for them is not -- you can't avoid *per se* condemnation
2 on that basis.

3 Mr. Loughlin talked about Craftsman. Craftsman is a
4 standard-setting case in which one organization, Ford,
5 developed a lot -- at the request of the Government invested
6 and developed a lot of capital into designing standards for
7 improvements in safety for the development of limousines.
8 It's a standard-setting group boycott case. It's not relevant
9 to our case here, certainly isn't on point as is Palmer,
10 Columbia Steel, Stericycle, and the other cases that we rely
11 on.

12 Unless you have questions, your Honor, that's all I
13 have.

14 THE COURT: No, I don't think so. Thank you.

15 MR. KOTCHEN: Okay.

16 THE COURT: Well, this has been well argued. I will
17 take the motions under advisement, obviously.

18 I'm going to return your binders to you today and
19 I'm going to ask that you remove from them any exhibit which
20 was not used during the presentation. We're burdened with a
21 lot of paperwork and I don't want to have extra. I'm not sure
22 if there are -- the defense may have used all of theirs, I'm
23 not sure, but if you want to look at those again and please
24 remove the items that were not used during argument, that
25 would be helpful.

1 Otherwise, we'll take this under advisement and I
2 will get you an order as soon as I can. Thank you.

3 (Proceedings concluded at 10:50 a.m.)

4 * * * * *

5
6
7 **C E R T I F I C A T E**

8
9
10 I, **TIMOTHY J. WILLETTE**, Official Court Reporter
11 for the United States District Court, do hereby
12 certify that the foregoing pages are a true and
13 accurate transcription of my shorthand notes,
14 taken in the aforementioned matter, to the best
15 of my skill and ability.

16
17
18 */s/ Timothy J. Willette*

19
20 **TIMOTHY J. WILLETTE, RDR, CRR, CBC, CCP**
21 Official Court Reporter - U.S. District Court
22 1005 United States Courthouse
23 300 South Fourth Street
24 Minneapolis, Minnesota 55415-2247
25 612.664.5108