

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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IN RE: WHOLESALE GROCERY ) Court File No.  
PRODUCTS ANTITRUST LITIGATION ) 09-MD-2090 (ADM/AJB)  
)  
)  
) Courtroom 13 East  
) Wed., September 15, 2010  
) Minneapolis, Minnesota  
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**P R E T R I A L   C O N F E R E N C E**

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

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

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1 (1:30 p.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 afternoon. Please be seated.

5 THE CLERK: The Court calls the case of In re:  
6 Wholesale Grocery Products Antitrust Litigation, Case Number  
7 09-MD-2090.

8 Would counsel note their appearances for the  
9 record, please.

10 THE COURT: Counsel?

11 MR. DRUBEL: Richard Drubel, Boies Schiller, for  
12 the plaintiffs.

13 MS. SCHULTZ: Kimberly Schultz, Boies Schiller,  
14 for the plaintiffs.

15 MR. MAGNUSON: Kevin Magnuson, Kelley, Wolter &  
16 Scott, for the plaintiffs.

17 THE COURT: And back table?

18 MR. KOTCHEN: Daniel Kotchen from Kotchen & Low  
19 for the plaintiffs.

20 MS. ODETTE: Elizabeth Odette, Lockridge Grindal  
21 Nauen, for the plaintiffs.

22 MR. DANGEL: Edward Dangel, Dangel and Mattchen,  
23 from Boston for the plaintiffs and for Deluca's in  
24 particular.

25 MR. MEREDITH: Joel Meredith, Meredith Cohen, for

1 Plaintiffs.

2 THE COURT: Over on the defense side of things.  
3 Mr. Loughlin.

4 MR. LOUGHLIN: Good afternoon, your Honor.  
5 Charles Loughlin, Howrey LLP, for C&S Wholesale Grocery.

6 MR. SAFRANSKI: Steve Safranski, Robins, Kaplan,  
7 Miller & Ciresi, for SuperValu.

8 MS. CHOU: Marta Chou, Robins, Kaplan, Miller &  
9 Ciresi, for SuperValu.

10 MR. WIND: Todd Wind, Fredrikson & Byron, on  
11 behalf of C&S.

12 THE COURT: Good afternoon. I'm happy that you  
13 all found me down here. I'm feeling like I'm operating in  
14 the mirror image of my courtroom. If I seem more  
15 discombobulated than usual, that would be at least part of  
16 the reason.

17 I have reviewed the report and given the pressures  
18 of some other matters have not had very long to review it,  
19 but my understanding on a brief perusal is that it looks to  
20 me that you're pretty much in accord on an awful lot of the  
21 items, I would say most of the items. It seems to me that  
22 the fundamental difference between the areas that weren't  
23 able to be resolved is how much of the schedule should be  
24 set prior to my ruling on the class certification motion.

25 Is that an accurate assessment of where you think

1 we are, Mr. Drubel?

2 MR. DRUBEL: Yes, your Honor. That's one. I've  
3 identified four areas of disagreement. First is the number  
4 of document requests.

5 THE COURT: If you could tailor my discussion of  
6 that to where that appears. I do feel like I'm having  
7 flashbacks to my days as a magistrate. I haven't done  
8 26(f)s since 1996, but -- okay.

9 MR. DRUBEL: Page 6 of the 26(f) report, your  
10 Honor.

11 THE COURT: And we're stuck between 75 and 50.

12 MR. DRUBEL: That's correct, your Honor. And I  
13 don't know -- shall I just go over the --

14 THE COURT: Tell me the four areas. That relates  
15 to documents?

16 MR. DRUBEL: Correct. The second is the number of  
17 fact depositions per side. That's on page 7.

18 THE COURT: Correct.

19 MR. DRUBEL: And there the difference is 26.

20 THE COURT: And maybe more.

21 MR. DRUBEL: And maybe more, particularly in light  
22 of the defendants' initial disclosures of at least 30 people  
23 they may rely on in their defenses.

24 THE COURT: And the defense says ten.

25 MR. DRUBEL: Ten, but they're willing to go to 15.

1 THE COURT: Okay.

2 MR. DRUBEL: Then, number 3 is the time period for  
3 document production and that's on page 9.

4 THE COURT: Okay.

5 MR. DRUBEL: And then the fourth, your Honor,  
6 would be the schedule that your Honor spoke about, whether  
7 or not to go beyond the close of fact discovery and, if so,  
8 what the appropriate schedule would be.

9 THE COURT: Okay.

10 Mr. Loughlin, you seem to be closest to the  
11 lectern there, so I'm guessing you'll speak to --

12 MR. LOUGHLIN: Your Honor, there are a few other  
13 areas that I'd like to identify.

14 THE COURT: Just a second. Let me make a couple  
15 of notations.

16 All right.

17 MR. LOUGHLIN: In addition to the case schedule,  
18 there are some issues regarding specifically the expert  
19 discovery schedule and the order in which those reports  
20 should go in and some timing issues of when they should go  
21 in. There is an issue -- and I can -- those differences are  
22 spelled out on pages 15 and 16 for Defendants and page 13  
23 for the plaintiffs.

24 There's also a disagreement about whether or not  
25 Plaintiffs' 26(a) report should include a computation of

1 damages. Their disclosures did not include those  
2 computations, and that's discussed in the 26(f) report at  
3 pages 17 and 18.

4 Third, your Honor, there are some differences  
5 between when the parties should be ready for trial and when  
6 the final pretrial schedule should be -- final pretrial  
7 hearing should be held, and that is laid out on page 16 for  
8 Defendants and page 13 for the plaintiffs.

9 And then finally, there's a small dispute in terms  
10 of the amount of time as to when dispositive motions would  
11 be due.

12 Your Honor, there is also -- Mr. Safranski  
13 reminded me that there is also a dispute about whether or  
14 not the two plaintiffs who are trying to dismiss should be  
15 giving 26(a) initial disclosure. Prathers was still in the  
16 case but has filed a motion for voluntary dismissal, and  
17 Wentworth, who has in fact agreed to a stipulation of  
18 dismissal, did not file initial disclosures. We think they  
19 should have, but I don't think we're pressing that  
20 particular dispute. But we do have an issue with regard to  
21 Prathers.

22 THE COURT: All right. Well, it seems to me at  
23 least some of these issues, I'm not sure I'm helped by  
24 hearing argument beyond what's said in the 26(f) report as  
25 to numbers of document requests and depositions.

1           Anybody think they need to enlighten me further  
2           than my reading of the 26(f) report?

3           MR. DRUBEL: Well, just one thing, your Honor,  
4           that's occurred since the 26(f) report was filed that I  
5           alluded to in my initial remarks, and that is, beyond the  
6           affidavit that's attached to the 26(f) report in which  
7           SuperValu identified at least 43 witnesses with knowledge of  
8           the Asset Exchange Agreement, since the 26(f) report was  
9           filed, both sides have exchanged initial disclosures, and as  
10          your Honor knows, one of the elements of the initial  
11          disclosures is to identify witnesses who have or are likely  
12          to have discoverable knowledge which a party may rely on to  
13          prove its claims or defenses. And in this case, in the  
14          initial disclosures, your Honor, Defendants have identified  
15          30 such witnesses, just defense witnesses. In other words,  
16          these are employees of either C&S or SuperValu, so they're  
17          not going to be folks that we can likely get any kind of  
18          useful information from without deposing.

19          So I think that -- frankly, I think in light of  
20          that, the 26 that we have proposed is light. I mean, that  
21          would mean we couldn't even depose the witnesses that they  
22          have identified as potential witnesses in their case to  
23          support their defenses, and that doesn't even take into  
24          account third-party depositions.

25          So, we would -- in addition to the arguments we

1 made in the 26(f) report, your Honor, we would say at a  
2 minimum fairness requires that we be allowed to at least  
3 have the opportunity -- I'm not saying we will depose every  
4 one of them, I hope it won't be necessary, but at least have  
5 the opportunity to do so.

6 THE COURT: All right.

7 MR. LOUGHLIN: Can I address that briefly, your  
8 Honor?

9 THE COURT: All right.

10 MR. LOUGHLIN: I think Mr. Drubel is off a little  
11 bit in terms of what the 26(a) disclosures are. They are  
12 not a list of witnesses. They are a list of individuals  
13 with discoverable information. That could include that they  
14 have documents as opposed to the fact that we think they're  
15 going to be witnesses at trial. And the Rule 26(a)  
16 disclosures are not intended to be, by the rules, a listing  
17 of the numbers of depositions. The deposition rules do not  
18 say that depositions are limited to the number of  
19 individuals listed in 26(a) reports.

20 And so we think what's appropriate here is for  
21 Plaintiffs to get the documents, they can see who the  
22 appropriate people are for deposition, take the depositions  
23 that are within the rules or slightly beyond that -- we've  
24 offered 15 total -- and then if they need more depositions,  
25 they can come to us and we can have a meet-and-confer about

1 that, and if they show that there's some need for more  
2 depositions, we can talk about that or maybe they can go to  
3 the Court if necessary, but we don't see any reason to  
4 arbitrarily raise the number now without them even getting  
5 through the number that's in the rule. And we've cited,  
6 your Honor, some cases that discuss the fact that simply  
7 citing to a larger number of people with discoverable  
8 information is not sufficient to expand the discovery  
9 limit -- excuse me -- the deposition limit.

10 THE COURT: All right. Do I know what I need to  
11 know?

12 (No response)

13 THE COURT: First of all, backing up to the  
14 document requests per side, one of -- I guess I would  
15 consider it a benefit of the MDL treatment here is that I  
16 function in both the role as the magistrate and the District  
17 Court so you don't need to do two steps of getting back in  
18 front of me. So I'm going to set some numbers here, and if  
19 good cause shows that you need more, then you can come back  
20 in front of me and tell me why you need more, but I think  
21 it's important to have some guidelines.

22 So, with regard to the document requests, the  
23 number will be 60 and we'll have that set in the new  
24 pretrial order which will come out.

25 With regard to factual depositions, I'll set that

1 number at 26 and probably not more. Twenty-six is likely to  
2 be the number, but if there's something that comes up that  
3 convinces me or that you need to ask me for a higher number,  
4 then I'll consider that, but we'll go with 26 there.

5 Let's see. The next matter of dispute is page 9  
6 and the time for document production. How far are you off  
7 on that one?

8 Let's see. Where is that discussion?

9 MR. DRUBEL: I believe it's on page 9, your Honor.

10 THE COURT: Page 9. Okay. Does somebody want to  
11 enlighten me on that, what your thinking is on that? Is it  
12 obvious from what's written there?

13 MR. DRUBEL: Sure, your Honor. Let me see if I  
14 can do that.

15 The restraints in this case were in effect for  
16 five years, one or more of the restraints. The total period  
17 there were -- one or more of the restraints was in effect  
18 was five years, which is 60 months.

19 What we have asked for with respect to just  
20 targeted discovery with respect to sales, markets and market  
21 power, is information that will allow us, our experts,  
22 really, to compare the pre-restraint period, which amounts  
23 to 33 months if you start from January 1, 2001, to the  
24 60-month period that the restraint was in effect.

25 So it's pretty straightforward, I think, that in

1 many antitrust cases -- and this one included -- one of the  
2 important ways to measure the effect of the restraint is to  
3 see what the market's behavior was before the restraint went  
4 into effect, and what we are asking for for a 60-month  
5 restraint is a comparison period of 33 months. That would  
6 give our expert probably, if the reports and information  
7 that will likely be the guts of this are produced on a  
8 monthly basis, which many businesses do -- for example,  
9 their margins, their costs, their analysis, they'll do those  
10 reports on a monthly basis. That would give our expert 33  
11 data points to compare to the 60 months, the 60 data points  
12 during which the restraint was in effect, which we think is  
13 very reasonable.

14 With respect to the post-restraint time period,  
15 we're asking for data points of 24 months. And you might  
16 ask yourself, well, why do the plaintiffs need to look at  
17 the post-restraint period. And the answer is, in some  
18 cases, your Honor, Defendants try to make an argument that  
19 something that happened in the post-restraint period cast  
20 light on -- usually in a way that's not good for the  
21 plaintiffs' case -- cast light on the effect of the  
22 restraints during the restraint period.

23 I will say this: If the -- and the  
24 defendants have -- the defendants in this case have said  
25 that they're only willing to produce data through

1 December 31, 2009. If the defendants are willing to  
2 stipulate that they will not use any post-restraint evidence  
3 or information to try to argue in favor -- in their defenses  
4 in this case, we don't need the post-restraint information,  
5 if they're willing to make that stipulation. But if they  
6 are not and they leave themselves the opportunity to argue  
7 somehow that post-restraint information is relevant to any  
8 of their defenses in this case, then we need the opportunity  
9 for discovery on it and we think the 24 months or 24 data  
10 points, again, is very reasonable.

11 That's the gist of this, your Honor.

12 THE COURT: Okay. Mr. Loughlin, the gauntlet has  
13 been thrown down to you with regard to post-restraint  
14 evidence.

15 MR. LOUGHLIN: Well, your Honor, with respect --  
16 let me explain where we are and I'll deal with pre-restraint  
17 and post-restraint if that's all right with your Honor.

18 The parties have agreed to a time -- a cutoff  
19 period of January 1st, 2002 to December 31st, 2008. That  
20 is --

21 THE COURT: That's agreed, right?

22 MR. LOUGHLIN: That is agreed to and that is a  
23 year and a half before the asset exchange took place and  
24 it's the date that the plaintiffs filed their first  
25 complaint, December 31st, 2008, which is after the time

1 period that the final noncompetes ended, expired, in  
2 September of '08. The issue is whether or not there are --  
3 there are certain exceptions that both parties are willing  
4 to do and the plaintiffs have a broader set of exceptions  
5 than we are willing to agree to.

6 Defendants are willing to provide to Plaintiffs  
7 from January 1st, 2001 through December 31st, 2009 -- that  
8 is over two and a half years before the asset exchange and  
9 over a year after the expiration of the noncompetes at issue  
10 in this case -- to give them sales data, and that will allow  
11 them to -- their expert to look at the sales data to do  
12 whatever kind of calculations he or she wants to do with  
13 sales and pricing, et cetera.

14 But what Plaintiffs are asking for, your Honor, is  
15 not just data. They're saying they want all documents from  
16 January 1st, 2001 to September 13th, 2010 regarding  
17 documents related to sales, pricing and factors such as  
18 competition that could affect pricing, or profitability, or  
19 margins. That can be any document in the company. We're  
20 talking about e-mails regarding -- you know, with a vendor  
21 or something. That can be any number of documents. It's  
22 going to swallow the entire rule, whereas our exception is  
23 limited. People understand what data is.

24 Their other exception is documents related to the  
25 relevant market -- which again could be a huge set of

1 documents, it's undefined, we don't know what -- there are  
2 no document requests -- and third-market power. So again,  
3 that's an undefined set of documents, but it can be -- it  
4 can swallow the entire rule when they're talking about  
5 e-mails and internal business documents as opposed to data.  
6 We're trying to keep this confined -- these exceptions  
7 confined to data which we think gives them what they need in  
8 terms of an expert report but doesn't require us to start  
9 getting into a huge amount of data after they've already  
10 filed a complaint in this case and after the expiration of  
11 the noncompetes.

12 Now, with respect to Mr. Drubel's stipulation, I  
13 don't know what stipulation particularly he has in mind. I  
14 mean, I can say this: We are willing to provide certain  
15 data after the time period of the expiration and we're not  
16 willing to provide other data. And so I'm not sure what  
17 we're going to be relying on after that time period, but if  
18 he wants to give us a stipulation, we'll certainly consider  
19 it, but in the abstract we can't make a decision about that.

20 THE COURT: Well, no surprise, I'm sure, to any of  
21 you is, I tend to believe that you know your case better  
22 than I do and you should be able to -- a lot of these things  
23 work out well and I think you've gone a long way to doing  
24 that and I'm not critical of the results so far. But it  
25 does strike me that the post-restraint period is too long to

1 run it all the way up to September 13th, basically now, I  
2 guess, and that it should be something less than that. It  
3 may be that there's some middle ground in there with regard  
4 to what particular data you're looking at. You refer to  
5 data points and monthly reports. If we're talking about one  
6 monthly report, I think the period should be longer. If  
7 it's a greater burden than that and there's more things, I  
8 think it should be a shorter period of time.

9 So, let me just give you that guidance. I'm going  
10 to ask at the conclusion of this that you memorialize my  
11 rulings today in a new Rule 26(f), and if that becomes a  
12 sticking point and you can't work that out, then I'll take  
13 that on, but given that guidance that I'm not going to run  
14 the post-period all the way up to September, maybe you can  
15 have a more robust exchange of the type of documents that  
16 you seek that can resolve that issue.

17 All right. Then I guess the next issue is what I  
18 called the threshold issue about how much do we forecast the  
19 schedule beyond class certification, and I guess my thought  
20 is that I think this case -- let's get through class  
21 certification and see where we are before we go much further  
22 on the schedule. I'd like to get those motions, keep that  
23 timetable, which I think we're pretty much agreed on up  
24 through that. And, you know, I'm going to be around. We  
25 can on very short notice get another conference in front of

1 me and go forward at that time. So, I think that obviates  
2 the need for changing some of these other times.

3 Let's see. Now, my list with regard to your  
4 identified areas of dispute is a little bit more confused,  
5 Mr. Loughlin, so if you can tell me other -- the computation  
6 of damages issue, is that -- obviously that can await  
7 post-certification, I think, as well.

8 MR. LOUGHLIN: Well, your Honor, Rule 26(a), the  
9 initial disclosure rule, requires Plaintiffs to provide a  
10 computation of damages and provide documents upon which the  
11 computation is based. That is in their initial disclosure  
12 obligation.

13 THE COURT: All right. When is that due  
14 currently?

15 MR. LOUGHLIN: That was due on September 1st, your  
16 Honor. The parties did submit 26(a) initial disclosures,  
17 but Plaintiffs did not include that. Their argument is that  
18 because some of their damages calculations will depend upon  
19 information from the defendants, they shouldn't have to  
20 provide that now.

21 However, your Honor, the rule requires that they  
22 should provide initial disclosures based on information  
23 reasonably available to them. They have said in their  
24 initial disclosures that they do have sales data, they have  
25 data on their purchases, they can -- which we believe would

1 allow them to make an initial disclosure as of the current  
2 time period of their individual damages.

3 THE COURT: All right. So what do you have? You  
4 have nothing from them on the damages, just this  
5 representation that they have some of this.

6 MR. LOUGHLIN: In their initial disclosures  
7 they've said that -- for each of their plaintiffs, they have  
8 said that the plaintiffs have purchase data, sales data from  
9 wholesalers. When they get to the damages section of their  
10 report they have declined to provide that information,  
11 deferring to an expert report at a later time.

12 THE COURT: I see. All right.

13 Mr. Drubel?

14 MR. DRUBEL: Your Honor, the damages in this case  
15 are overcharge damages. It's true every plaintiff knows  
16 what they paid for their groceries and services, but they  
17 are not in any position to figure out what they would have  
18 paid but for the anticompetitive acts of the defendants.  
19 That's going to await an analysis of, for example, the  
20 margins, whether or not the margins of the defendants  
21 increased after the AEA was signed. All of that information  
22 is in the hands of the defendants. It's impossible for the  
23 plaintiffs to provide a damage calculation with information  
24 that they don't have.

25 I would note that as we noted on page 17 of the

1 26(f) report that the 1993 Advisory Committee notes to this  
2 provision of 26 says, quote: "[A] party would not be  
3 expected to provide a calculation of damages which, as in  
4 many patent infringement actions, depends on information in  
5 the possession of another party or person." I think this is  
6 not patent infringement, but the same principle applies.  
7 It's a matter of common sense. I mean, we don't have the  
8 ability to do a damage model based on information we do not  
9 have. We cannot figure the overcharge at this stage of the  
10 litigation. I've never -- I'm not aware of any court  
11 anywhere that has ever ordered the plaintiffs at this stage  
12 of an antitrust case to provide a damage calculation.

13 THE COURT: Well, what you do have with regard to  
14 the sales figures and such is information the defendants  
15 already have?

16 MR. DRUBEL: Yes, your Honor, because we bought  
17 the goods and services from them.

18 THE COURT: I'm going to withhold further damage  
19 discovery until after the class certification stage has been  
20 accomplished.

21 What else is on the -- trial readiness date.

22 MR. LOUGHLIN: Your Honor, the other issues were  
23 time period for dispositive motions, time periods for the  
24 final pretrial schedule and time periods and order for  
25 expert discovery. I think given your Honor's decision on

1 not scheduling those right now, I think we can defer those  
2 for now.

3 THE COURT: Okay. It might be helpful to me, even  
4 though I have said that with regard to the class  
5 certification, for you to put in the new 26(f) that you're  
6 going to be filing some ideas of some target dates for that  
7 and what you envision so that I keep that in mind as we go  
8 forward. And I won't hold anybody to that at this point,  
9 but I think it's good -- I mean, if this case goes forward,  
10 I do want to get it on the trial calendar and it's going to  
11 take awhile, so I want to be holding some time for you as  
12 soon as possible.

13 Okay? Anything further that we need to accomplish  
14 from your point of view, Mr. Drubel?

15 MR. DRUBEL: No. Thank you very much, your Honor.

16 THE COURT: Mr. Magnuson, you seem to like hanging  
17 out in my courtroom. Am I going to see you again tomorrow,  
18 too, for --

19 MR. MAGNUSON: I'll do my best, your Honor.

20 THE COURT: Should I file a stalker report?

21 (Laughter)

22 MR. MAGNUSON: I'm afraid that there are enough of  
23 those folks out there already --

24 THE COURT: I think the marshals already know you.  
25 They may be questioning you.

1           Mr. Loughlin, from your point of view, is there  
2 anything I need to --

3           MR. LOUGHLIN: Well, your Honor, the one other  
4 issue is the fact that Prathers IGA has not issued any 26(a)  
5 disclosure at all on the basis that they are planning to  
6 dismiss the case, and they have filed a motion --

7           THE COURT: I signed one dismissal earlier this  
8 week. The entities confuse me. I know it was an IGA.  
9 That's a different --

10          MR. DRUBEL: That's the other --

11          MR. LOUGHLIN: Excuse me. Yes, that was Rangeley  
12 IGA.

13          THE COURT: All right.

14          MR. LOUGHLIN: They agreed to a stipulation with  
15 prejudice and that was signed and they are out of the case.

16          THE COURT: Okay.

17          MR. LOUGHLIN: Another plaintiff, Prathers IGA in  
18 Ohio, has said that they do not have any purchases within  
19 the statute of limitations period as modified by your  
20 Honor's decision.

21          THE COURT: Right.

22          MR. LOUGHLIN: And as a result they have said that  
23 they plan to voluntarily dismiss without prejudice and they  
24 filed a motion for that. We plan to oppose that --

25          THE COURT: You think it should be with prejudice.

1           MR. LOUGHLIN: We believe it should be with  
2 prejudice and we plan to oppose that motion. In the  
3 meantime, we have said to them they are plaintiffs in the  
4 case, they should have filed 26(a) disclosures on  
5 September 1st along with every other party in the case, and  
6 we have not seen that.

7           THE COURT: All right. Who's the respondent?

8           Mr. Drubel?

9           MR. DRUBEL: Well, I've spoken, your Honor, with  
10 Mr. Creighton, who represents Prathers, and as you've just  
11 heard, they have filed their motion to dismiss, so the only  
12 question --

13          THE COURT: Why would it be without prejudice to  
14 -- obviously I don't have the right person here to ask that,  
15 but I don't understand if it's confined to a statutory  
16 period and they don't have any sales in there --

17          MR. DRUBEL: Well, I think Mr. Creighton's motion  
18 expresses it. It's a matter of discretion with the Court.  
19 It is possible that in the course of discovery the statute  
20 of limitations period might change or something else would  
21 happen. He thinks that it is inappropriate at this stage,  
22 at this early, early stage of the game to dismiss his  
23 client's claims with prejudice. But be that as it may, I  
24 mean, the issue -- those claims will be dismissed, are being  
25 dismissed. He's filed the motion.

1 THE COURT: So you don't think a Rule 26 report  
2 would be helpful.

3 MR. DRUBEL: No, your Honor.

4 THE COURT: Mr. Loughlin, it sounds like we need  
5 to get that teed up in some way that I can rule on it.

6 Gertie, do we have those motion papers?

7 THE CLERK: It has been filed yesterday.

8 THE COURT: Is anyone requesting oral argument on  
9 that?

10 MR. LOUGHLIN: I don't believe so, your Honor.  
11 The papers were filed yesterday. There's no -- there is no  
12 hearing date set. That's my recollection. I don't recall  
13 ever --

14 MR. SAFRANSKI: Your Honor --

15 THE CLERK: There is not a hearing date set at  
16 this time.

17 THE COURT: Mr. Safranski?

18 MR. SAFRANSKI: Sure. Well, my understanding from  
19 the conversation with Ms. Odette was that your Honor was  
20 going to consider this issue at the pretrial status  
21 conference and then maybe set a hearing date and then a  
22 briefing schedule today, if possible.

23 THE COURT: Okay. I guess I'd like you to convey  
24 back to Mr. Creighton that I'm not opposed to putting it on  
25 for oral argument. I don't think it's, quite honestly,

1 going to be very helpful and maybe this is one issue to just  
2 deal with on the briefs, and I have not reviewed your brief  
3 again.

4 But do you want to confer with them, Gertie? If  
5 they call and would like an argument, put it on, and I would  
6 anticipate we can do that in half an hour or so.

7 MR. LOUGHLIN: I don't believe we are requesting  
8 an oral argument. I think we agree, your Honor. We have  
9 not submitted a brief yet. We just got the motion  
10 yesterday.

11 THE COURT: Okay.

12 MR. DRUBEL: And Mr. Creighton's motion and  
13 memorandum, as far as I can see, doesn't ask for oral  
14 argument.

15 THE COURT: Okay. Let's get the response in.  
16 Then, Gertie, I'll just rule on the pleadings.

17 All right. Gertie's handed me a note about a date  
18 for class certification. I believe that's already set in  
19 the timetable in the briefing, correct?

20 MR. LOUGHLIN: Correct.

21 THE COURT: So we'll get the motions and then set  
22 a date for the hearing of that motion later, all right?

23 Anything further?

24 MR. DRUBEL: No, your Honor.

25 THE COURT: Everybody have a safe trip home.

(Proceedings concluded at 2:01 p.m.)

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**C E R T I F I C A T E**

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

*/s/ Timothy J. Willette*

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