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Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 welcome to town.

2 All right. For Defendants.

3 MR. SAFRANSKI: Good afternoon, your Honor.

4 Steven Safranski from Robins Kaplan representing SuperValu.

5 THE COURT: Good afternoon.

6 MR. WIND: Good afternoon, your Honor. Todd Wind,
7 Fredrikson & Byron, on behalf of C&S Wholesale; and with me
8 is Erik Koons from the Baker Botts firm, as well.

9 THE COURT: Good afternoon. Welcome to court,
10 folks.

11 Mr. Dangel, you have the floor.

12 MR. DANGEL: Thank you, your Honor. Thank you
13 very much for having the hearing on this motion. It's an
14 important motion from the Plaintiff's point of view.

15 And how I want to proceed, your Honor, is to tell
16 you what the motion -- what this is really about, but then I
17 would like to go back and make my argument. And I promise I
18 will be done in about 5 to 7 minutes, something like that,
19 or some number that you give me that's shorter or longer.

20 THE COURT: Make it 15 total, and then the other
21 side will do 15.

22 MR. DANGEL: It will be.

23 THE COURT: Go ahead, counsel.

24 MR. DANGEL: The real reason we're here today,
25 your Honor, is that the Court -- and I say this with the

1 greatest respect -- the District Court, in essence, put us
2 out of court, the New England Plaintiffs out of court by
3 ruling that we could not file a new, narrow, limited class
4 motion, certification motion, of any kind. Your Honor will
5 recall that this Court, the Magistrate Court, ruled that
6 Colella's could not intervene in the case. The net effect
7 of those rulings, your Honor, is there cannot be a New
8 England plaintiffs' case unless there can be a class action
9 or unless, at a minimum, the door is opened for other
10 plaintiffs from New England to intervene in the case.

11 And the reason is this, your Honor. Just -- and I
12 would say as a practical matter, except that so many courts
13 have recognized --

14 THE COURT: Let me slow you down for just one
15 second just to make sure I understand what your argument is.
16 Your argument is the classes, the New England class, is out
17 at this time. That's subject to appeal, right?

18 MR. DANGEL: That's correct.

19 THE COURT: Now you're not saying that we throw
20 out the individual claims that are still active in the case,
21 are you?

22 MR. DANGEL: In de facto you did, your Honor.

23 THE COURT: But de jure, did I?

24 MR. DANGEL: No.

25 THE COURT: Okay. Thank you.

1 MR. DANGEL: No, you certainly did not. And by
2 the way, just to make it perfectly clear, you also did not
3 rule that New England could not bring a class. You just
4 ruled that a party could not intervene for the purpose of
5 appearing or bringing a class. It was through an appeal of
6 your Honor's ruling that SuperValu obtained a ruling that no
7 New England class, limited class, could be brought.

8 The point is that these cases are so expensive to
9 maintain that --

10 THE COURT: You're making the de facto argument
11 now, right?

12 MR. DANGEL: I am. I'm telling you why we're here
13 today. These cases are so expensive to maintain that unless
14 we obtain relief from the Court of Appeals in some fashion,
15 there really cannot be New England participation in the case
16 at all. And I'm going to take my brother's papers -- and
17 may I say, I'm not someone who attacks a lawyer; I attack a
18 lawyer's position -- and to show you that they understand
19 that that's what this is really about, and that the way they
20 are presenting it hides what the real purpose for my motion
21 is, and what the real need for the relief is.

22 But just to make it clear, in order to obtain an
23 appeal of the judge's -- Judge Montgomery's ruling, I had to
24 demonstrate that what I said to you is true. That is, I had
25 to show that absent a class being certified, or some other

1 appropriate relief, it was a death knell to the litigation.
2 Both sides agreed that that was one of the standards for
3 accepting the appeal and the Eighth Circuit did accept the
4 appeal.

5 And, in fact, as I've shown you, unfortunately it
6 was the very last piece of paper that I provided, it's the
7 last attachment to my reply brief to the Court of Appeals,
8 even SuperValu acknowledges that if a New England Plaintiff
9 has to go it alone -- and albeit it was in the context of an
10 arbitration argument, not a litigation argument, and no one
11 thinks that arbitration is more expensive than litigation,
12 litigation is clearly more expensive -- but even they showed
13 through a matrix that they provided that an individual
14 Plaintiff in every practical way could not maintain a case
15 alone.

16 So that's what the name of the game is here, and
17 that's why I'm so uptight that I had to -- "uptight" being,
18 of course, a legal phrase -- that I had to file a motion and
19 had to seek this clarification.

20 So to go along with it, I just would like to refer
21 to -- and I don't think we have to get it out, I'm going to
22 say it to you quickly -- at page 4 of my brother's
23 opposition to the motion -- by the way, I think I should say
24 what I'm looking for so it's absolutely clear. Your Honor
25 issued an order that seems to include, and we've all taken

1 to include, New England plaintiffs. That is, we have taken
2 it that the Court would like us to complete fact discovery
3 and get moving on the case. And while I initially thought
4 that wasn't appropriate for my Plaintiffs, I soon saw from
5 reading the order that there really isn't going to be much
6 to do to get the discovery done.

7 And I just want to mention as I transition into my
8 actual argument, getting away from the practical to the
9 legal, I find it ironic, your Honor, that the opposing side
10 argued to you so strenuously that they were so deeply
11 prejudiced by having to do discovery in this case that they
12 couldn't bear the notion of any New England plaintiff, such
13 as Colella's, appearing here.

14 Now they are in the position of saying, Hey, we
15 want this discovery. We're willing to -- now that they have
16 the Plaintiffs basically out of the case, we want this
17 discovery. This discovery isn't too expensive after all.

18 And so that brings me to the first reason why the
19 motion -- it's important to decide this motion and important
20 to obtain a clarification or, in practicality, a stay. And
21 that is this: On March 1st all class motions are due. As
22 we all know, we cannot file a class motion. We have been
23 ordered not to do so. As we also all know, that issue is
24 before the Court of Appeals. Why then would they oppose a
25 clarification that simply says you don't have to file a

1 motion? If you're successful in the Court of Appeals, you
2 can file your motion then. That would seem to be the
3 easiest relief in the world.

4 And the reason is, your Honor, is they would like
5 to do what they did before, which is put more intermediate
6 steps into place so that even if I get a result from the
7 Court of Appeals, I still have to come back and ask for
8 permission. They still get to raise more reasons why, if it
9 isn't discovery that's too expensive, there's some other
10 thing out there that holds us up further. So the only
11 reason they could possibly have for opposing the first part
12 of the motion, that is that it be made clear that we do not
13 have to file any class motion or that we're not waiving the
14 filing of the class motion because of an appeal, is in order
15 to try to bollocks up the case some more.

16 Now, the second point is this: They say, Well,
17 okay, so you can't file a class motion. You can still do
18 all of the expert witness work. And that's bogus. That's
19 just kidding the Court along. And what I mean by that is
20 this. It costs at least 150 to \$200,000 to do the economist
21 expert work to analyze the numbers to know that 1, 2, 5 or
22 500 Plaintiffs have a legitimate class action. Yes, that's
23 due at the time of class certification, but if I don't have
24 to do it at the time of class certification because I don't
25 have to do a motion, I still might have to make that

1 showing -- that \$200,000 showing, I'll call it -- if by some
2 chance the judge quickly decides class certification and the
3 time is running for merits discovery to be completed.

4 So what they are really saying is why don't you
5 just drop the case now and save yourself \$200,000. And what
6 I'm saying is I believe every Plaintiff who is sent to a
7 Federal Court under an MDL deserves a day in court; and that
8 I do not want the Plaintiffs in New England to be denied
9 that day in court. This Court felt that that could be
10 denied, but that's before the Court of Appeals. I do not
11 want a default. I do not want to have to spend \$200,000 to
12 recover \$100,000, or \$300,000 to recover \$400,000. Because
13 nobody prudently would do that.

14 And so the reason why Section 5 is as important as
15 Section 4 is, if we get to a situation where merits
16 discovery is due and the Court of Appeals hasn't decided the
17 case, your order, which I know was -- I have no -- your
18 order puts us out of court, basically. Section 5 puts us
19 out of court. And so we need to have this relief.

20 If your Honor feels -- and may I say it's an honor
21 to be before you. I want you to know -- no, you let me get
22 off the phone when it was important to me last August. I
23 think you could tell it meant a lot to me to be allowed to
24 get off. My grandchildren were there and so forth. I don't
25 want any advantage --

1 THE COURT: Mr. Dangel, you must be good in front
2 of a jury.

3 MR. DANGEL: Aren't you a jury? I'm in the wrong
4 courtroom. Thank you, your Honor.

5 THE COURT: No, no.

6 MR. DANGEL: But anyway, until they find me in the
7 wrong direction, so old that I'm in the wrong direction that
8 I'm not even facing the jury correctly, I plan to keep being
9 in front of juries. It's the greatest thing I have done in
10 my life, so thank you.

11 But anyway, I guess I've gotten emotional then and
12 I didn't mean to. It is something more than dollars and
13 cents. There is an MDL proceeding here. The issues before
14 the Court of Appeals are important. We shouldn't de facto
15 or de jure six months from now be put out of court. This
16 is -- what I'm asking for is so simple. Just say that
17 requirements 4 and 5 don't apply because of the situation,
18 and a new schedule will be created if we succeed in the
19 Court of Appeals. I'm somewhat flabbergasted that it's
20 opposed, but I'll give the rest of my time to listen to why
21 it's --

22 THE COURT: Let me ask you one question.

23 MR. DANGEL: Whatever you want, your Honor.

24 THE COURT: And I hear your argument. The one
25 thing I'm not that clear on what your response is, if it's

1 so cost prohibitively expensive for your individual clients
2 to go forward on an individual basis, why aren't you all
3 willing to agree to that, okay, if the Eighth goes against
4 us in the New England class issues, we will be done with it?

5 MR. DANGEL: That's what I said. I said that in
6 my papers. If I didn't say it clearly, that's the truth.

7 THE COURT: So you combined everyone and say
8 you're done?

9 MR. DANGEL: I can't. You know why? *Standard*
10 *Fire Insurance* says that an individual plaintiff, until a
11 class is certified, cannot bind on an amount or on something
12 like that. What I can tell you is this. There are only two
13 New England plaintiffs in this case. They are the
14 plaintiffs before you. They are not going to go forward.
15 There is a serious statute of limitations problem,
16 obviously, if others want to join in, unless we get relief
17 from the Court of Appeals. And so I can't bind anybody but
18 I can see experience dictates that that's where we are.

19 THE COURT: Okay. Who wants to go first?

20 MR. SAFRANSKI: I'll take a shot. Thank you, your
21 Honor. May it please the Court:

22 Your Honor, I recognize that there's been a lot of
23 papers filed on this what seems to be a very straightforward
24 scheduling issue, and I want to just keep it very brief and
25 cut right to the heart of things.

1 The fact is that Village Markets, Mr. Dangel's
2 clients, fought tooth and nail to be in this court instead
3 of arbitration, and that's where they are. And the Court's
4 scheduling order by its terms applies to all of the parties
5 to this case, including Village Markets. And Rule 23(f),
6 the rule that permitted Village Markets to petition the
7 Eighth Circuit for appeal, is very clear and it says that
8 just because you get an appeal does not mean that the
9 proceedings in the District Court are stayed.

10 So what we're asking -- we're looking at here is
11 two requests by Village Markets. One is to stay the class
12 certification briefing schedule as it applies to Village
13 Markets; and a second is to stay expert disclosures as it
14 applies to Village Markets.

15 THE COURT: And fact discovery, isn't it, and any
16 remaining fact discovery?

17 MR. SAFRANSKI: No, your Honor. Village Markets,
18 as I understand it, is not asking for a stay of fact
19 discovery which closes in January.

20 MR. DANGEL: That's correct.

21 MR. SAFRANSKI: The first request is difficult to
22 understand. And as I listen to Mr. Dangel's argument, maybe
23 we're -- both sides are saying the same thing in different
24 ways. There really doesn't need to be a modification of
25 Section 4 of the pretrial schedule because it doesn't apply

1 to Village Markets.

2 THE COURT: What about the individual claim?

3 MR. SAFRANSKI: The individual claim?

4 THE COURT: As it relates to the expert.

5 MR. SAFRANSKI: Well, on that one, your Honor, the
6 real practical question is that expert discovery doesn't
7 even begin until some 45 days after a ruling on class
8 certification. And practically speaking, the most prudent
9 thing would be to say, Well, let's look at it after -- at
10 that point. Because Judge Montgomery may grant class
11 certification, she may deny class certification. And
12 there's more than a decent chance that whoever loses that
13 issue is going to try to appeal to the Eighth Circuit.

14 Now if the Midwest plaintiffs are appealing to the
15 Eighth Circuit because they lost, they may also be asking
16 for a stay of expert discovery, maybe they aren't. But
17 really the Court is going to be in a much better position to
18 address the expert discovery question once class
19 certification has been decided. And that's why we argued in
20 our opposition that that request is really premature.

21 THE COURT: Counsel, how do you respond to
22 Mr. Dangel's argument that in essence that, look, if you
23 apply the scheduling order to the individual Village Markets
24 claim, as a de facto or practical matter, it's prohibitively
25 expensive for them to continue the litigation on an

1 individual basis and, therefore, we're in essence not
2 letting them have their day in court?

3 MR. SAFRANSKI: Well, any Plaintiff that loses
4 class certification can make that argument. But the fact is
5 that Judge Montgomery has decided in this case that there
6 isn't a basis to certify class in New England. And I
7 recognize that the Plaintiffs can appeal that if they want,
8 and they are appealing that, but that doesn't change her
9 order. And if an individual plaintiff wants to come forward
10 and pursue an individual claim, they are going to have to do
11 that with the resources available to them. And if they
12 decide it's not worth it to pursue it, that's fine. But all
13 of that -- all of those issues really can be deferred until
14 after Judge Montgomery rules on the class certification
15 motions posed by the Midwest plaintiffs. Because surely the
16 Midwest plaintiffs, having lost class certification the
17 first time around, they still found it worthwhile to pursue
18 their claims individually.

19 MR. DANGEL: No.

20 MR. SAFRANSKI: And they still litigated their
21 claims to summary judgment. And they only waited until the
22 plenary appeal from judgment to also appeal the class
23 certification ruling. So it is not a given that if class
24 certification is denied, then no plaintiff would continue to
25 litigate the case, because that's not what happened the

1 first time around when Judge Montgomery denied class
2 certification in July 2012 and the parties continued
3 litigating.

4 THE COURT: Isn't that Mr. Dangel's point that,
5 well, they aren't going to sink a lot of money into pursuing
6 the individual claims. Therefore, if they lose the
7 individual claim, at that point they will be past all the
8 deadlines and they will be out of luck for that reason for
9 following the schedule?

10 MR. SAFRANSKI: Well, first of all, that takes us
11 back to Section 4. We're saying Section 4 doesn't need to
12 be changed because it doesn't apply to Village Markets as it
13 is. But certainly if Mr. Dangel's client prevails on
14 appeal --

15 THE COURT: No, it doesn't apply to Village
16 Markets from the class perspective.

17 MR. SAFRANSKI: Right.

18 THE COURT: But from the individual perspective it
19 does, doesn't it?

20 MR. SAFRANSKI: Section 4, it deals with the class
21 certification motion.

22 THE COURT: But the overall order applies to --

23 MR. SAFRANSKI: Correct.

24 THE COURT: -- all remaining claims, right?

25 MR. SAFRANSKI: That is correct. So if

1 Mr. Dangel's client wins or if Village Markets wins on
2 appeal, obviously we're not going to say that the deadline
3 for class certification motions is expired. The Court's
4 going to have to set up a new schedule based on whatever the
5 Eighth Circuit mandate happens to be.

6 But as far as expert discovery goes, expert
7 discovery on the merits of this case would have to go
8 forward whether it's an individual claim or a class claim.
9 And that's the part of this that really doesn't make sense.
10 And what the Plaintiffs are suggesting is that we stagger
11 merits expert discovery. We have two different phases of
12 it. And that would force the Defendants to have to prepare
13 expert reports to respond to the expert discovery provided
14 by the Midwest plaintiffs. And then if there's an appeal,
15 we're going to have to go back through the same exercise
16 again. And really --

17 THE COURT: But if the Court of Appeals goes
18 against the trial court and lets other folks back in as a
19 class, you're going to have to do that anyway under the
20 existing scheduling order, aren't you?

21 MR. SAFRANSKI: Well, we would have to redo class
22 certification, but merits expert discovery would not
23 necessarily have to be redone because the same issues apply
24 to the individual claims as they do to the class claims.
25 Namely, issues of whether the active exchange agreement

1 violated the antitrust laws, questions of relative market
2 definition. All of those things apply to both individual
3 claims and to class claims. And what we're saying is that
4 it would be prejudicial to the Defendants to have to go
5 through expert discovery twice.

6 But I think our bigger point here is that the
7 Court doesn't have to decide expert discovery scheduling now
8 because it will be in a much better position to do that
9 after we know whether there's any other appeals of class
10 certification rulings on the motions that the Midwest
11 plaintiffs are going to bring.

12 THE COURT: Let's say if the motion is denied and
13 basically the individual claims have to be litigated,
14 including merits. Wouldn't the other side have to go
15 through with their merits now or else they are going to --
16 will have waived it, right?

17 MR. SAFRANSKI: Are you talking about the Midwest
18 plaintiffs?

19 THE COURT: No, the New England ones.

20 MR. SAFRANSKI: Okay. So the New England
21 plaintiffs, whether class certification is granted or
22 denied, expert discovery would go forward unless there's a
23 motion, a renewed motion, to stay at that time.

24 THE COURT: I'm sorry. Say that again. I didn't
25 follow.

1 MR. SAFRANSKI: So regardless of what Judge
2 Montgomery's ruling is on class certification, the
3 forthcoming one, expert discovery would go forward within 45
4 days after that ruling. And what I'm suggesting is that if
5 there's going to be a decision on whether to stay that
6 expert discovery, the Court would be in a better position to
7 address it once it knows whether Judge Montgomery has denied
8 it, has granted it, or if there's any appeals from that
9 order.

10 THE COURT: Maybe it's my misunderstanding of this
11 whole scenario, but it seems to me the concern, one of the
12 concerns articulated by the Plaintiffs is that, look, if you
13 force us -- they have an individual -- to the extent their
14 individual claims are alive, the Village Markets people,
15 they just have an individual claim right now. Right?

16 MR. SAFRANSKI: Correct.

17 THE COURT: And they are saying as a practical
18 matter, they aren't going to sink money into litigation
19 unless they get the class. Okay?

20 MR. SAFRANSKI: That's true.

21 THE COURT: So then they are saying if they don't
22 get the class, then they are going to be out of luck, so
23 don't hold them to the deadline now. In essence, give them
24 a chance to think about it later or something; or they might
25 be willing to give it up altogether now, I don't know.

1 That's what I understand what they are talking about.

2 MR. SAFRANSKI: No, and that's what I understand
3 they are saying as well. And I completely understand where
4 they are coming from on that. But what I'm saying is that
5 the Court doesn't have to decide that issue now because the
6 Midwest plaintiffs might be in the exact same position or
7 they might not after Judge Montgomery has ruled on their
8 forthcoming motions for class certification.

9 And what we'd like to have is ultimately, from the
10 defense perspective, if there's going to be expert
11 discovery, we want one round of expert discovery, not
12 multiple staggered rounds of expert discovery. That's
13 what's gotten -- that's one of the type of issues that's
14 become a problem in this case.

15 THE COURT: Okay. Let's say the motion is denied,
16 okay? Plaintiffs' motion, current motion, is denied.
17 You're going to have to get ready for whatever issues are
18 still alive, right? If you need class experts, you got to
19 do class experts. Later on let's say the Eighth Circuit
20 says no, New England has to come back. You would have to do
21 that as a class again, wouldn't you? Wouldn't you have
22 another round under that scenario?

23 MR. SAFRANSKI: Another round of class
24 certification? That's correct.

25 THE COURT: Yeah. If the Eighth Circuit brings

1 that class back, you're going to have another round, aren't
2 you?

3 MR. SAFRANSKI: That's correct. But there only
4 needs to be one round of merits expert discovery, regardless
5 of what the class certification rulings are. And that's the
6 bottom line. We don't -- we oppose any suggestion to split
7 that up into different phases of merits expert discovery,
8 especially now before we even know if the Judge is going to
9 be allowing classes to go forward in the Midwest. And it
10 may be that if class certification is denied on all the
11 Midwest classes, it may be that both sets of plaintiffs are
12 going to come forward and say, You know, maybe now it's a
13 good time to stay everything pending an appeal.

14 And that suggestion might be more credible -- more
15 acceptable from the defense perspective if -- at that point
16 because all there would be left of the case would be an
17 appeal.

18 So I'm just -- what I'm saying is that the Court
19 certainly doesn't need to modify Section 4 of the schedule
20 because whatever the Eighth Circuit does, we can -- the
21 Court can set a schedule that accommodates its mandate. And
22 Section 5, it's premature to try to change the merits expert
23 discovery schedule before we have an understanding of what
24 classes, if any, are going to be allowed to proceed in this
25 case.

1 THE COURT: So hypothetically the motion is
2 denied. Later on the Eighth Circuit comes back and says
3 the New England class is alive. You're going to oppose any
4 additional merits experts as it relates to the New England
5 folks?

6 MR. SAFRANSKI: If they have already -- if we've
7 already gone through merits expert discovery, then yes.

8 THE COURT: Even on the class claim?

9 MR. SAFRANSKI: Well, what I'm explaining is that
10 the class claim and the individual claim, the merits expert
11 discovery, with the exception of perhaps damages, is going
12 to be the same.

13 THE COURT: Okay.

14 MR. SAFRANSKI: Now, I think my colleague from
15 Baker Botts wanted to address a few issues, as well.

16 THE COURT: Thank you.

17 MR. KOONS: Thank you, your Honor. I will be
18 brief in light of the previous comments.

19 Speaking from C&S Wholesale Grocers' perspective,
20 your Honor, I'm not going to retread all the same ground,
21 but I do think it's fair to say that after hearing the
22 presentations today that fundamentally nobody on this side
23 of the room disagrees on what should happen in the class.
24 If the Eighth Circuit says that New England gets another
25 shot at class, of course that's going to be in effect.

1 There's no possibility that Mr. Dangel would be precluded
2 from doing that. I don't think he needs a clarification of
3 the order from you saying that if the Eighth Circuit tells
4 all of us we're going through that exercise again, then he
5 can do it. He can do it and there's not a thing that I will
6 be able to do about it and I'll participate in that process.

7 The real fight from my client's perspective is on
8 Section 5 which relates to merits and there's a few points
9 that I wanted to make that might be new.

10 One is I think that, as Mr. Safranski said, that
11 if we go through -- it's always easier, I think in general,
12 to go through a process that governs either class or merits,
13 but in this situation merits, once. If you go through that
14 same process more than once, when you can avoid it it's
15 fraught with complexity and it could create all types of
16 problems, some of which we can anticipate now that I want to
17 address, and some of which we might not be able to.

18 But if the Eighth Circuit comes back and says, New
19 England, you're off to the races again on class, and we've
20 already gone through that merits exercise, then we start
21 that process clean and anew and we can keep going on it.
22 Merits is done and now we have a new class for Mr. Dangel
23 and it's simple.

24 If we bifurcate the merits process now, Mr. Dangel
25 talks about potential prejudice to his client based on the

1 return on investment analysis that he does on whether to
2 proceed on an individual basis, we have a prejudice, too, if
3 there's bifurcation. Some of that was addressed by
4 Mr. Safranski. One is we would have at least two rounds of
5 merits experts process; that is, two rounds of reports from
6 the defense side, two rounds of depositions from the defense
7 side from our experts. We'll have to depose the merits
8 experts in the Midwest class under the current schedule, the
9 schedule as it is. We then have to depose his expert at
10 least once. And this bifurcated, it explodes the expenses.
11 It explodes the amount of time it will take to conclude this
12 case.

13 But there's also a practical complexity that I'm
14 not sure -- that I want to make sure gets out. If
15 Mr. Dangel is somehow relieved from the merits expert
16 process, and we are required to serve our merits experts
17 reports for the Midwest plaintiffs, what do we do in that
18 instance? Is Mr. Dangel going to participate in that
19 process as an observer who doesn't have to serve reports?
20 But, for example, when we're doing the depositions of each
21 other's experts, he gets to come and see the Midwest
22 plaintiffs cross-examine my expert, do I have to serve him
23 with my mirror expert report that he then will have five,
24 six, eight, ten months to look at and digest. And then if
25 he wants to come back with his own bifurcation, he has a

1 tactical advantage over me that's massive.

2 So I think there's some real prejudice issues to
3 our clients that would be created only if there's a
4 bifurcation of merits and would be avoided if we stick with
5 the schedule that your Honor has already put into place.

6 The last point I'll make, and then I will be
7 quiet, is that there is some inconsistency that I think
8 needs to be recognized in the request before your Honor
9 today. I got today some renewed or some new discovery
10 requests hand delivered from Mr. Dangel where he wants
11 discovery of my client. He wants discovery of SuperValu.

12 On Monday, Mr. Dangel spoke to me about having
13 five additional depositions of current and former C&S
14 employees. And to some degree my reaction is either you're
15 in the merits part of the case or you're out, and you can't
16 kind of play it in between because I then have to spend all
17 this time and money getting five deposition deponents ready,
18 prepared, defend the deposition, respond to all this written
19 discovery. That's the stuff that leads up to the expert
20 reports that we're talking about on the merits issues. So I
21 don't think it's appropriate for him to be obviated or
22 relieved of that one part of the merits process in this case
23 but be able to participate in the rest of it.

24 So I will be happy to entertain questions of your
25 Honor, but otherwise I will say no more.

1 THE COURT: Okay.

2 MR. KOONS: Thank you for your time.

3 MR. DANGEL: Here, your Honor, is what you haven't
4 been told and the facts that you need to understand to rule
5 on this motion. The expert discovery that we're talking
6 about is the same, almost the same, as expert discovery on a
7 class certification motion. In an antitrust case you have
8 to prove injury and damage. And the only way you can prove
9 an antitrust injury is to prove that they engaged in some
10 practice which kept the prices super competitive. And in
11 order to prove that the prices are super competitive, you
12 have to prove that it was super competitive to a bunch of
13 individuals as well, and that those individuals, if they are
14 common enough, is a class.

15 So what has to happen is you hire experts,
16 economists and statisticians, who tell you whether or not
17 the pricing that was charged was super competitive. That is
18 an enormous undertaking. They have to look at all of the
19 transactions over the time period of the damages, whether
20 that's for one or for five or for 500. It's the same
21 process.

22 So the only difference between class discovery and
23 merits discovery is that in class discovery -- and may I say
24 the Plaintiffs got hung up on this the last time -- in
25 theory, an expert can say, I can prove super competitive

1 pricing through the following means. But the expert doesn't
2 have to say exactly what that pricing was and exactly what
3 the damages are. In merits, he has to do that.

4 So by saying, Oh, well, we'll let you off of the
5 class, but you should still do the merits expert discovery,
6 which is what is really at issue here, we have to spend the
7 same money that will be spent for class discovery; and the
8 additional money, which isn't that much additional, but it's
9 additional. In other words, from the point of view -- from
10 my point of view, I have to pay for the whole thing once;
11 others get to pay for it several times or twice in a
12 two-step process. So I would have to hire experts who show
13 not only that my client paid more than he -- who can show
14 that my client paid more than he should have by showing
15 against the benchmark, which is some other part of the
16 country, and looking at all of those transactions that he
17 paid too much money.

18 It's the same thing as with a class. It costs a
19 fortune to do it. And there's absolutely no way that an
20 individual will do it. So let me address the argument that
21 they made that D&G went forward without a class so maybe
22 individuals will do it. The Midwest argument.

23 THE COURT: Let me ask you this.

24 MR. DANGEL: Yeah.

25 THE COURT: The law applies equally to both sides.

1 And the law of the case in this instance has gone against
2 you on the class issue. Why do you get to hedge your cost
3 bets and the other side has to live with that to make it
4 more cost effective for you to sue them?

5 MR. DANGEL: No, that's not --

6 THE COURT: Explain that one to me.

7 MR. DANGEL: That was a complete false argument.
8 They don't have to spend a dime on the New England part --
9 expert part of the case until there's class motions, until
10 there's merits discovery. They are only going forward on
11 that part of the case in the Midwest where the Court has
12 ruled that they can bring, at least, class certification
13 motions.

14 So here's the difference between the two
15 positions. It isn't that they are disadvantaged. It isn't
16 that at all. Not at all.

17 In the Midwest, the Midwest has a time table. It
18 moves for class certification on March 1st. It obtains a
19 ruling on class certification. 240 days, or some number
20 like that, after that ruling, it then has to go forward on
21 merits discovery. On merits certification.

22 I have no such time table. The time table I've
23 got is I find out whether I can bring a motion from the
24 Court of Appeals; and then sometime later I bring the motion
25 and then I get a ruling. And at that point, if I win, if

1 the class is certified, just like with the Midwest, then I
2 get to go forward. There is no expert cost to them in New
3 England until we have to go forward with experts.

4 Saying that I don't need relief from Section 4 to
5 begin with, just to start with, is ridiculous. If I don't
6 get relief from Section 4, if you deny this motion, I go to
7 the District Court and then I go to the Court of Appeals.
8 That's not because I'm angry. That's what Rule 8 -- I am
9 here because Rule 8 requires me to do this. It requires me
10 to seek a stay in the District Court first. So I must get a
11 ruling as to Section 4.

12 As to Section 5, no money will be spent on experts
13 in New England of any kind. They are at absolutely no
14 disadvantage, absolutely no disadvantage, unless you deny me
15 the relief. At which point people have to spend hundreds of
16 thousands of dollars probably, or possibly at least, for no
17 reason. Absolutely no reason. Is that clear? Does that
18 statement at least resonate well enough that I can finish up
19 on the next point? I guess I'll just repeat it. Section 5
20 requires --

21 THE COURT: Let me ask you --

22 MR. DANGEL: -- expert --

23 THE COURT: -- with respect to Village Markets and
24 any additional New England claims, if the Eighth Circuit
25 rules against the class, you're saying all the individual

1 claims --

2 MR. DANGEL: Gone.

3 THE COURT: -- of all the clients that you have
4 permission to say that for --

5 MR. DANGEL: Gone, yes.

6 THE COURT: Village markets?

7 MR. DANGEL: I have permission. I absolutely have
8 explained it to the client. The client gets it. The client
9 isn't going to put up the money for it. It would be
10 ridiculous. No. I absolutely have that permission.

11 THE COURT: Have they stipulated to that?

12 MR. DANGEL: What do you mean by stipulated?

13 THE COURT: I mean, have they indicated in writing
14 other than what they have told you?

15 MR. DANGEL: I don't think they are required to do
16 that, your Honor.

17 THE COURT: Okay.

18 MR. DANGEL: By any means.

19 THE COURT: All right. Okay.

20 MR. DANGEL: You have my representation as their
21 counsel that, A, I have discussed that with them; and, B,
22 that is what they are saying. Getting them to sign that on
23 a dotted line may have implications that I don't understand.
24 But if it made a difference -- I don't see why it should
25 make a difference.

1 Let me go on to the next thing. My brother says,
2 he complains that he got some discovery requests from me
3 today. And why should he have to do any discovery at all
4 until we know about the Court of Appeals or why should it be
5 one and not the other. They are taking my client's
6 deposition tomorrow, your Honor, in this case, as a fact
7 discovery deposition under Sections 1, 2 and 3 of your
8 order.

9 THE COURT: Yeah. Go ahead.

10 MR. DANGEL: Okay. Sections 1, 2 and 3 of your
11 order say complete fact discovery by January 15th. At first
12 I wrote you and said we shouldn't be doing that because we
13 don't know whether there's going to be a case or not, okay?
14 The opposing side wrote back and said, Nonsense. We can at
15 least do fact discovery of that sort and get that done. And
16 I agreed with them.

17 That has nothing to do with Section 5 of the
18 order. That has nothing to do with experts in connection
19 with Section 5 of the order. It was a complete -- it's a
20 red herring unless perhaps counsel would like to stand up
21 and say now he doesn't want to take the deposition.

22 I mean, if I have a 60-day window to do the fact
23 discovery, not the experts, not the expert merits discovery
24 which is Section 5, and I have 60 days to do it, and it
25 looks inexpensive to do it and the other side wants to do

1 it, or they are saying to me that I should want to do it,
2 then I don't see how that bears on the issue in front of you
3 at all. It doesn't. Okay.

4 Let me make it clear. If you do not stay Section
5 5 and if the Court of Appeals has not decided the issue as
6 to whether or not a class certification can be brought, the
7 denial of that request for a stay of that section means that
8 the parties have to incur on both sides let's say \$400,000
9 of expert costs before the Court of Appeals rules. That is
10 unreasonable. That is an unreasonable thing to do where the
11 counsel is telling you that if he loses on that appeal, the
12 case goes away. That is an unreasonable thing. That is in
13 essence -- the reason that they are opposing that is because
14 in essence they get a dismissal of the case by default, not
15 by right.

16 I don't know how I can make the arguments any
17 clearer than I've made them, but I am feeling like I should
18 try to clarify more. Is there some concern that the Court
19 has that I haven't addressed? It seems as though there must
20 be. Apparently not.

21 THE COURT: No. Thank you.

22 MR. DANGEL: Thank you, your Honor.

23 Go ahead and make another false argument. I'll
24 get right back up and ask to clarify.

25 MR. SAFRANSKI: Sorry, do you want to state that

1 for the record?

2 MR. DANGEL: Yes, I do. I say go ahead and blow
3 some more smoke. It's the polite way of putting it. And I
4 will get up after you and ask to be heard to clarify.
5 That's what I said.

6 MR. SAFRANSKI: Thank you.

7 I will just be very brief, your Honor.

8 I mean, the main issue here, I think, is that on
9 Section 5 the Court, again, is going to be in a much better
10 position to decide what is the most efficient way to manage
11 expert discovery once we know the scope of class proceedings
12 going forward. And it might be zero. It might be some
13 distribution center classes.

14 But as far as one thing that counsel said
15 regarding the expense of class certification expert work, we
16 have to keep in mind that there already has been a full set
17 of expert discovery on the issue of class certification in
18 New England. They hired an expert. He analyzed not just
19 the narrower class that Village Markets wants to pursue
20 certification of, but the entire New England region. So a
21 lot of that work that we're talking about here has already
22 been done.

23 MR. DANGEL: That's not true.

24 MR. SAFRANSKI: And there's been depositions of
25 experts on both sides on the class certification issues,

1 both in the Midwest and New England.

2 And the second question, I think your Honor hit on
3 it, is, yes, there is a cost to us right now in allowing
4 Mr. Dangel to -- or allowing Village Markets to basically
5 put off expert discovery. Because we are litigating this
6 case right now --

7 THE COURT: The expert as it relates to their
8 merits?

9 MR. SAFRANSKI: As it relates to the Village
10 Markets claims, that's correct. We are litigating this case
11 right now in fact discovery on both sides. And there is a
12 cost to C&S in responding to fact discovery. There is a
13 cost to SuperValu in responding to fact discovery. There's
14 a cost to us in propounding and taking the deposition
15 tomorrow. But you know what? We need to do it because this
16 case has been going on since 2008. And right now Village
17 Markets has a claim. They are pursuing that claim. They
18 didn't want to go to arbitration. And in order to prosecute
19 that claim, we're going to have to take their deposition.
20 If they want to ask for discovery, we'll respond to it.

21 But those are things that are real costs that are
22 going on right now that are going to exist, you know,
23 whether there's merits expert discovery or not.

24 THE COURT: What would your position be if we
25 don't have it at this time? And if Mr. Dangel had an

1 affidavit or some sort of stipulation from his individual
2 clients saying we'll drop our individual claims if the
3 Circuit goes against us on the class, would that change your
4 analysis? That's one question.

5 The second is let's say we keep the schedule and
6 we deny the motion. And they decide, okay, we're not --
7 it's too expensive to go through with the individual merits
8 because, in essence, it's going to be -- well, let me put it
9 this way. Let me ask the second question this way. I
10 apologize. That's why I'm not a litigator.

11 Let's say the motion is denied. Nothing happens.
12 The Eighth Circuit comes back and says, Oh, yeah, you get to
13 go forward with the New England class. Without the merits
14 at that point, wouldn't you move to dismiss, or how does
15 that work?

16 MR. SAFRANSKI: So if -- so are you saying a
17 merits discovery has proceeded?

18 THE COURT: They haven't done anything.

19 MR. SAFRANSKI: Okay. They haven't done anything
20 but the time for providing merits --

21 THE COURT: Yeah. Hypothetically I deny the
22 motion today, and then the Eighth Circuit comes back and
23 says, Oh, no, there's a New England class. And then we say,
24 Let's get back and talk about scheduling now. And part of
25 that scheduling is going to say, Well, we need some merits

1 to establish our underlying claim; and then also class
2 discovery, right?

3 MR. SAFRANSKI: Right.

4 THE COURT: At that point you would say, No, you
5 can have class but that won't matter because you don't have
6 any merits.

7 MR. SAFRANSKI: That is right, your Honor, because
8 if we -- if the Court denies this motion and let's say that
9 by the time there's a ruling on class certification by Judge
10 Montgomery, and 240 days after that we still don't have a
11 ruling from the Eighth Circuit, we would expect that
12 expert -- merits expert discovery would go forward on the
13 individual claims. And if it hasn't --

14 THE COURT: I'm sorry. Give me that sequence
15 again, the hypothetical.

16 MR. SAFRANSKI: Sure. If the Court denies this
17 motion --

18 THE COURT: Yeah.

19 MR. SAFRANSKI: -- we would expect that merits
20 expert discovery would go forward on any individual claims
21 that are still pending before the Court whenever the time
22 for merits expert discovery comes and goes.

23 Now, if the Plaintiff doesn't serve a report, then
24 we would take the position, of course, that, you know, it's
25 too late to come back and do it after the fact two years

1 later. As Mr. Koons explained, we think we can get merits
2 expert discovery done, you know, done now, regardless of
3 whether there's been a class certified. And if the class
4 comes back -- if they come back and he gets his class
5 certified, then we'll be all set.

6 But, you know, I keep coming back to this main
7 point here which is that with it so far off in the future,
8 the Court can just deny this motion without prejudice. And
9 without prejudice to it being renewed after the court has
10 made a class certification ruling on the Midwest plaintiffs.

11 THE COURT: Including the merits part?

12 MR. SAFRANSKI: Yes. Denied without -- and it
13 wouldn't cost Mr. Dangel's client a thing.

14 MR. DANGEL: Yeah, it's better than when I walked
15 in here. It's not as good as a clarification.

16 THE COURT: But the other side is saying they are
17 willing to -- if the circuit comes back and says, Yeah, New
18 England, you're back in the game.

19 MR. DANGEL: Yeah.

20 THE COURT: At that point, if there's a denial
21 without prejudice, Mr. Safranski has said, Look, at that
22 point we can address the merits and the class.

23 MR. DANGEL: Yeah, yeah.

24 THE COURT: Isn't that what you said or no?

25 MR. SAFRANSKI: No.

1 THE COURT: Oh, it isn't?

2 MR. SAFRANSKI: I was referring to --

3 THE COURT: Never mind then.

4 MR. SAFRANSKI: I was referring to Judge
5 Montgomery's ruling on the Midwest plaintiffs' Motion for
6 Class Certification.

7 THE COURT: All right.

8 MR. SAFRANSKI: And so because once she rules,
9 there's going to likely be an appeal by one side or the
10 other. And at that point the Court is going to be in a much
11 better position -- maybe all of the Plaintiffs are going to
12 want all of the merits experts discovery stayed. Who knows,
13 maybe even the Defendants will want it stayed.

14 But to do it now, to make this ruling now in a
15 vacuum when we don't even know what merits expert discovery
16 will have -- will have to go forward because we don't know
17 what the Midwest plaintiffs are going to do, it's entirely
18 premature.

19 THE COURT: What's your reaction to Mr. Dangel's
20 argument that -- or statement here that if they are forced
21 to do merits, it's going to be 2 to 400 grand is what I'm
22 hearing from him?

23 MR. SAFRANSKI: Well, I can't speak to what his
24 expert is telling him as far as the budget for doing merits.
25 One thing I would say is the matrix he is referring to from

1 our briefing was actually based on an estimate that his
2 previous expert, Dr. -- the New England plaintiffs or lead
3 counsel's previous expert, Dr. Leitzinger, had put forward.

4 And, you know, we can't really speak to how
5 much -- you know, the accuracy of that. But certainly, you
6 know, when you bring an antitrust case, there's going to be
7 a significant investment. And not every ruling in the case
8 is going to go your way. And if you're going to say I want
9 to avoid having to undergo any expenses that become
10 inconvenient when I've lost a motion, this case is going to
11 go on forever.

12 And what we're asking for is just to keep the
13 schedule in place. Let's keep pushing it forward. Six
14 months from now, once Judge Montgomery has reached the
15 merits of the class motion, we can revisit this question.
16 But for right now, let's just keep going with the case.

17 THE COURT: All right.

18 Okay. Last word and then we got to be done.

19 MR. DANGEL: Okay. All right. When a judge says
20 that, it's usually a sign you shouldn't speak. But I'm
21 going to jump in just for a minute.

22 You absolutely got it, in my view, a few minutes
23 ago when you asked, Well, aren't you just going to move to
24 dismiss if they don't go forward on the merits? And that's
25 exactly what's going to happen. Because you can't afford to

1 spend the money on experts unless there's a class, they are
2 just going to come forward on summary judgment at the end of
3 whatever the merits period is and, by default, get a
4 dismissal. And what they are saying is, Well, that's just
5 too bad.

6 But you see, there's something more happening here
7 that has to be remembered at all times in connection with
8 this. There are pending appeals. Under Rule 8, there is no
9 automatic stay. One comes to the court to ask for a stay
10 because the appeal will really determine the outcome of the
11 case, which is what I'm telling you. And ordinarily it's
12 granted. The *Landis* case that both of us cited to. It
13 really comes back to because these appeals are so crucial to
14 the future of the case, and because the cost of going
15 forward is so great, the hardship to the Plaintiff, which is
16 the standard, of not having a stay is so great that of
17 course a stay should be granted. But you absolutely got it
18 when --

19 THE COURT: Let's talk about the age of this case.
20 This is an old case. And if we stay the merits --

21 MR. DANGEL: Experts.

22 THE COURT: -- experts merits.

23 MR. DANGEL: That's all. And by the way, they
24 haven't spent a dime on that. You asked him that and he
25 dodged the question. I want you to know, I will represent

1 to you, not a dime has been spent on experts merits in
2 relation to this.

3 THE COURT: And let's say the Circuit comes back
4 then and let's say I grant the motion.

5 MR. DANGEL: Yeah.

6 THE COURT: The Circuit comes back, yeah, you're
7 back on. New England is back on. At that point how much
8 time have I wasted because I stayed this?

9 MR. DANGEL: Well, you know, that's speculation.
10 But I'm going to try to fill in the speculation so that you
11 can -- I'll give you the calculus and then you can decide
12 how it cuts.

13 So they have gotten an extension on their brief,
14 and their brief is due January 11th. My brief is due two
15 weeks later. It will be filed two weeks after they have
16 filed because I'm the last person to want to, you know, ask
17 for an extension in this kind of situation.

18 The Court will then schedule the matter for
19 hearing. And I'm just going to put a very quick parenthesis
20 to let you know the Village Markets, the people that are
21 here today, they are actually on appeal now on their appeal.
22 In other words, you'll remember Judge Montgomery said yes,
23 we can continue, and they appealed that. So possibly we
24 will be out because of that. You know, okay.

25 So the reason why I say that -- well, that's

1 another part of the calculus -- but here is the point that
2 I'm drawing. Those papers have been in front of that court
3 since September, but they haven't scheduled a hearing yet.
4 And the speculation is that they are going to try to do all
5 of them all at the same time. We have consolidated the
6 appeals that I'm involved with. And that's speculation.

7 Let's assume that's true and we get a hearing in
8 May. Under -- I hope I'm not just giving you First Circuit,
9 Second Circuit law -- the legal requirement is sort of
10 nonbinding but the legal requirement is that the Court of
11 Appeals issues its decision in 120 days. So we are really
12 looking at the summer or probably more likely the fall of
13 2016.

14 Now, it could be, however, that there's some
15 special reason that an appellate decision is held up. And I
16 am the last one, and we all are the last ones, to say that
17 they must decide it in a certain time period. But possibly
18 it's as early as the fall. Now what do we have in this
19 case? We have motions being filed on March 1st and then
20 there's -- I think there's a discovery period or there are
21 opposing motions due like 45 days later. I don't -- Steve,
22 what is it?

23 MR. SAFRANSKI: Sorry.

24 MR. DANGEL: We can actually --

25 MR. SAFRANSKI: April 15th is the opposition date.

1 MR. DANGEL: Yeah, so that's 45 days after the
2 motions are due. And then there's some discovery on that,
3 right?

4 MR. SAFRANSKI: Yeah, May 6th is the reply,
5 although we're working out a stipulation with Midwest
6 plaintiffs' counsel to extend those dates by three weeks.

7 MR. DANGEL: Don't do it. Don't do it. No, no,
8 I'm joking. I'm joking. So that means that June 1st that
9 matter is ready for the judge to hear it, correct, or is
10 there discovery after that?

11 MR. SAFRANSKI: No, I think if -- well, assuming
12 there's a -- assuming we file and the Court grants the
13 stipulation.

14 MR. DANGEL: Yeah.

15 MR. SAFRANSKI: Three weeks.

16 MR. DANGEL: Yeah, around June 1st.

17 MR. SAFRANSKI: Three weeks to May 1st, you get to
18 a decision or ready for a decision --

19 MR. DANGEL: Ready for argument.

20 MR. SAFRANSKI: -- ready for argument in the
21 middle of June and whatever the Court's calendar will allow.

22 MR. DANGEL: So if we go by the last standards,
23 roughly, roughly, what should happen, and I'm hoping
24 happens, is that within a month or two of the decision on
25 class certification for the Midwest -- I'm here about New

1 England, okay?

2 So let me -- let me go forward and continue to
3 play out the scenario here. Mr. Safranski has said in all
4 good faith that if certification is granted, or denied,
5 there's likely to be an appeal. But the point that needs to
6 be kept in mind, because I just went through it, is under
7 Rule 23(f) the Court of Appeals does not have to accept that
8 appeal. And we have the very same situation, perhaps on the
9 other side, that is there's no automatic stay if it's
10 granted or denied. So if the certification is granted,
11 Mr. Safranski has to come and ask for a stay and plead his
12 hardship in that situation.

13 But you find out from the Court of Appeals pretty
14 quickly. I found out within a week of my filing the reply
15 whether they were taking the appeal or not. They took it
16 seven days after I filed the reply.

17 So if no appeal actually occurs, what happens is
18 as of the end of September, we're then into the calendar of
19 putting together the merits discovery. And I honestly don't
20 know quite how that -- I know that there's 240 days, but I
21 don't know if it runs from the decision on class
22 certification or what it is, or maybe they have given
23 themselves an appeal period or something for that, but I
24 don't know.

25 So you could say to me, your Honor, please, and a

1 denial without prejudice, I was going to address why that
2 isn't as good as what I wanted. But there is a practical
3 point here. And the practical point is it is quite possible
4 that holding up Section 5 is going to be unnecessary because
5 if I do get a decision by next fall, and we are into a class
6 certification mode, if we do the same kind of schedule, the
7 case is ready for Judge Montgomery to hear it in February of
8 -- roughly of 2017. We're still in that 240 day -- well,
9 anyway, you know what I'm trying to say.

10 What I'm trying to say is this: That if you deny
11 the motion, if you deny the motion, then it is a slap to the
12 Eighth Circuit because if the Eighth Circuit says I've got a
13 class certification, they would surely want me to have a
14 period to do experts and to do expert merits discovery and
15 do all those things that can't be afforded unless we have
16 it. We have a true hardship.

17 And that's -- and so if you deny it without
18 prejudice, here's the problem. As to Section 4, I need to
19 have a stay. In other words, I need to know that if the
20 Court of Appeals rules in my favor, I will have an
21 opportunity to file a Motion for Certification. I need a
22 ruling on this motion for that purpose.

23 And a denial without prejudice is the same as a
24 denial. It goes up through the appeal process. I've got to
25 have it. So I've got to have it.

1 As to Section 5, it's a little more subtle. If
2 you deny the motion without prejudice as to Section 5, I
3 suppose that means we're still open to arguing whether I
4 should have done the merits discovery or not. But I have a
5 lot of confidence in the courts in America that they are not
6 going to put somebody out of court on that kind of
7 proposition. So if we get a denial without prejudice as to
8 Section 5, I'm certain I can live with that. But I can't
9 live with a denial of any kind as to Section 4.

10 Thank you, your Honor.

11 THE COURT: Thank you.

12 MR. SAFRANSKI: Really?

13 THE COURT: You know, if you're going to go away
14 and not sleep at night, I wouldn't want to deprive you of
15 that, counsel.

16 MR. DANGEL: I'll block my ears so there won't be
17 a rebuttal to a rebuttal.

18 MR. SAFRANSKI: On Section 4, Mr. Dangel, we agree
19 that if you win at the Eighth Circuit, you're going to get a
20 new briefing schedule on a class motion.

21 MR. DANGEL: Okay, good.

22 MR. SAFRANSKI: We don't think you need to change
23 the order to do that, but that's fine.

24 And Section 5, I think what you were just saying
25 just underscores the need to let's just kick this one down

1 the road. Six months from now we're going to know a lot
2 more about whether his appeal and about whether there's
3 going to be other appeals going on. It just seems like it's
4 a lot more sensible of an approach than trying to make the
5 call on whether to stay something that's not even due for
6 seven months this far in advance.

7 MR. DANGEL: So could we do an agreed to order as
8 follows? That I will be granted the relief as to Section 4,
9 but as to Section 5 it will be denied without prejudice?
10 And that way we could write it up and stipulate it to
11 ourselves or his Honor can enter the order in accordance
12 with that. That was worth standing up for.

13 THE COURT: Why don't you guys chat.

14 Folks, we're going to take 15 minutes and then
15 we'll come back on the record. If you guys come to an
16 agreement, let me know. I'll be back in 15 minutes.

17 (Recess taken from 4:06 to 4:20 p.m.)

18 THE COURT: Back on the record in the case of In
19 Re: Wholesale Grocery Products, Inc. Antitrust Litigation,
20 case number 09-md-2090.

21 The record can reflect we've had an extensive oral
22 argument on this matter that went a little longer than I had
23 hoped. Counsel, you're both at the podium.

24 MR. SAFRANSKI: Yes, your Honor. I think we've
25 worked something out. And if I could, I could read what

1 we've agreed to in the record. And Mr. Dangel can correct
2 me if there's something wrong about any of it.

3 So number one, in the event that the Eighth
4 Circuit orders that Colella's or Village Markets is
5 permitted to file a motion to certify a narrowed New England
6 class, this Court will establish a briefing schedule on that
7 motion consistent with the Eighth Circuit's mandate.

8 And then number two, Village Market's Motion to
9 Stay the Expert Discovery Deadlines is denied without
10 prejudice to its renewal after the District Court rules on
11 any Motion to Certify a Midwest Distribution Center Class.

12 MR. DANGEL: And I think there's only one word
13 missing. It is subject to. It should be not -- it's denied
14 without prejudice to, or should be subject to renewal.

15 MR. SAFRANSKI: Sure.

16 MR. DANGEL: So it would be Village Market's
17 Motion to Stay the --

18 MR. SAFRANSKI: Experts.

19 MR. DANGEL: -- discovery deadlines is denied
20 without prejudice subject to its renewal after the District
21 Court rules on any Motion to Certify a Midwest class.

22 MR. SAFRANSKI: And that change is fine.

23 MR. DANGEL: And I agree to it. And the final
24 point they made there is a point I hadn't understood before
25 but there is a very good point. And this will mean that in

1 all likelihood there will at least be an opportunity to do
2 all the merits discovery together, I mean depending on what
3 happens in the Eighth Circuit.

4 MR. SAFRANSKI: Yes.

5 MR. DANGEL: So it was a good point. So we very
6 much appreciate your Honor taking us through it because we
7 wouldn't have reached this without that. I mean that. And
8 so thank you very much, your Honor, for your time.

9 THE COURT: Okay. And it was a good oral
10 argument. I appreciate that. So -- oh, we do need then
11 something on the record, withdrawn as moot, given the
12 agreement, right?

13 MR. DANGEL: I'm sorry, I didn't hear.

14 THE COURT: We need something on the record,
15 withdrawn as moot, given the agreement?

16 MR. DANGEL: No, no, the motions are not
17 withdrawn. This is the ruling we've agreed to on the
18 motions or the stipulation we've made in connection with the
19 motions that were brought. What I would say is that a need
20 for decision is withdrawn because we've reached this
21 stipulation. You don't need -- you want me to withdraw the
22 motions?

23 THE COURT: Yeah, I would think. And then
24 basically you have preserved your argument on the merit
25 stuff for later on if the Eighth comes back.

1 MR. DANGEL: I see. Technically, I could have,

2 THE COURT: We have to clean up the docket.

3 MR. DANGEL: Fine. It's a bit much, but, yes,
4 okay.

5 MR. SAFRANSKI: And I'm withdrawing without
6 prejudice.

7 THE COURT: You can withdraw it without prejudice.
8 I think that's the spirit of the negotiations.

9 Well, you know, gentlemen, I think that agreement
10 certainly comports with the Court's reading of the
11 situation. So I don't think either side is really giving up
12 a lot on the stipulation and certainly saves the Court
13 additional time on this issue. So I think this -- it makes
14 good sense to the Court.

15 MR. DANGEL: Okay.

16 MR. SAFRANSKI: I have one other thing that
17 pertains to the Midwest Plaintiffs.

18 MR. DANGEL: I do want to say, before we leave
19 that, I'm going to order -- and I suppose opposing counsel
20 is going to order -- this portion of the transcript that
21 states the parties' agreement because it's going to be
22 what's in writing. So if that's -- apologize for not
23 ordering all of the -- but from the point that Mr. Safranski
24 started to state the agreement.

25 THE REPORTER: Can we discuss this afterwards,

1 because I think I'm under a mandate to do the entire
2 transcript in an MDL?

3 THE COURT: I think in an MDL we should probably
4 do it. Okay.

5 MR. SAFRANSKI: One other small thing, as long as
6 we're all here. We had worked out a change to the brief --
7 an agreement to change the briefing schedule on the class
8 motion on the Midwest plaintiffs. Would you like us to
9 submit that as a stipulation and order or should we take
10 care of it here?

11 THE COURT: I don't think I'm in a position to
12 comment on what the stipulation is at this time.

13 MR. SAFRANSKI: Okay. We can submit it to the
14 Court if that's the Court's preference.

15 THE COURT: All right. Yep. We'll have to have
16 something in writing anyway, one way or the other, okay, on
17 that point.

18 Okay. Well, again, I thank you for the spirited
19 argument from both sides and it all sort of works out. It
20 just took a while.

21 Thank you, everyone. Safe journeys to wherever
22 you guys are travelling from.

23 MR. DANGEL: Thank you.

24 MR. SAFRANSKI: Thank you.

25 THE COURT: We are in recess.

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(Court adjourned at 4:26 p.m.)

* * *

I, Carla R. Bebault, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: s/Carla R. Bebault
Carla Bebault, RMR, CRR, FCRR