

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Wholesale Grocery)
Products Antitrust Litigation) File No. 09-MD-2090
(ADM/TNL)
)
)
This Document Relates To:) St. Paul, Minnesota
All Actions) December 18, 2015
) 10:35 a.m.
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)
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BEFORE THE HONORABLE TONY N. LEUNG
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

(MOTIONS HEARING)

Proceedings recorded by mechanical stenography;
transcript produced by computer.

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1 THE COURT: All right. Good morning. Welcome to
2 court, everyone.

3 I guess moving party, do you want to go ahead?

4 MR. BRUCKNER: Thank you, Your Honor. Joe
5 Bruckner for the plaintiffs. Your Honor, we are here this
6 morning seeking --

7 THE COURT: Can I just ask some questions? Maybe
8 it would be good to --

9 MR. BRUCKNER: Yes, sir.

10 THE COURT: We'll go roughly about 15 minutes a
11 side. We can go a little over, but let's try to ballpark
12 that.

13 What's your response to defendants' argument that
14 you have had these documents for over three years and been
15 using them in prior litigation? If you didn't ask about
16 foundational authenticity type of questions, that's an
17 indication of your problem and not a good cause. I guess
18 maybe there's a link to some concept of lack of due
19 diligence in that.

20 MR. BRUCKNER: No, I'm glad you asked the
21 question, Your Honor, because I think that's a central
22 point.

23 We've been diligent throughout the course of this
24 litigation in addressing these issues of authentication and
25 admissibility. Just like in any case, we've addressed it

1 through the course of depositions and that's fine as far as
2 it goes and it's effective as far as it goes, but I don't
3 think any party by the time they get to trial can be
4 100 percent certain that they're going to have authenticated
5 every single last document. That's why we have the process
6 at the end of the case after discovery is closed and before
7 trial starts.

8 Number two, we asked the defendants three-plus
9 years ago. In requests for admissions we asked them to
10 admit that the documents they produced from their own
11 business files written by their own employees during the
12 course of those employees' employment at the defendants
13 admit that they're authentic and admit that they're business
14 records under Rule 803(6). And they said, no, we're not
15 going to admit that. Supervalu admitted that their
16 transaction database was authentic and a business record,
17 but beyond that they declined to admit.

18 THE COURT: Counsel, let's say defendants
19 hypothetically are okay with the concept of obviously
20 working out authenticity and foundational admissibility
21 issues before trial. You know, that isn't -- conceptually
22 that's fine.

23 But could it also be said that given the breadth
24 of the scope of what you're saying, as a defendant wouldn't
25 you be somewhat uncomfortable? You would want to have a

1 little more specificity before you just say, oh, yeah, give
2 a blanket okay on everything.

3 And, again, you know, all the years trying cases,
4 I'll be candid, I don't think we ever had to call a 30(b)(6)
5 witness for, you know, sort of cleaning up foundation or
6 admissibility and authenticity because usually people work
7 out most of the exhibit lists, you know.

8 And once you figure out, okay, what's the class
9 situation, what's the dispositive situation, what other
10 types of rulings or factors or maybe even some, you know,
11 bifurcated concept at trial or, you know, locations
12 possibly, all those things can shape the course of a
13 litigation and we wouldn't know that until we get very close
14 to the pretrial conference and everyone is putting together
15 their trial materials.

16 It would -- let's say hypothetically I'm sitting
17 on the defendants' side and I'm okay conceptually with what
18 you're saying, yeah, of course we should have those things
19 cleaned up before trial --

20 MR. BRUCKNER: Right.

21 THE COURT: -- except, you know, some rare things,
22 but I don't want to give you a blanket okay on this because
23 I don't know what I'm exactly agreeing to right now. How do
24 you respond to that?

25 MR. BRUCKNER: I think you're exactly right, Your

1 Honor, and I think both of us, both sides agree that
2 that's -- of all the ways to do this, that's the least
3 efficient way, is to try to do it now before the issues are
4 narrowed for trial and before we're close to trial.

5 Really to cut to the chase, what we don't want to
6 find ourselves in the position of is for us to -- we'll
7 complete discovery. We've done everything. We've acted
8 diligently. We've authenticated as many documents as we
9 can, issues get narrowed for trial.

10 Maybe they produce some on the last day of
11 discovery. Maybe they don't. Maybe they produce a lot.
12 Maybe they produce a little. But there's some unknowns.
13 I'm not saying that it could swamp the case, but there will
14 be some unknowns between now and the time that we get to
15 trial.

16 What we don't want to find ourselves in the
17 position of is we try to raise it now and we're told it's
18 premature, we don't want to do it yet and nobody knows for
19 sure. Then we get to trial or before trial, immediately
20 before trial and they say those are some issues you should
21 have pursued during discovery. We don't want to hear later
22 that the discovery deadline ran and that we should have
23 pursued something that we didn't pursue. If we didn't
24 pursue it, that's fine, that's our problem and that's our
25 fault, but we do think we've pursued it.

1 We just think that there are documents that both
2 sides are going to want to use at trial and we hope -- Your
3 Honor, I think you're right, if we have leave of the Court
4 to conduct the kind of deposition that we're talking about,
5 my bet is that it would never take place because I think
6 once we get to trial or close to trial, both sides are going
7 to sit down, we're going to work this out, and in 99 cases
8 out of 100 we're going to agree on the documents.

9 But what we would like to do is have that option
10 so that before we come to Your Honor or to Judge Montgomery
11 with any intractable disputes on these documents, we'd like
12 to have the option -- if there's some foundational aspect
13 that would get one side or the other off the dime on a
14 document, we'd like to have that available to us.

15 Frankly, as I say, if we have leave to do these
16 depositions, I suspect that the parties acting in good
17 faith, they're going to come to an agreement on most of
18 these documents either on our own or with the Court's
19 guidance, advice, and possibly orders.

20 THE COURT: Counsel, I tried a lot of cases in
21 17 years in state court. They're not going to be
22 multidistrict litigation, but I've had some really
23 significant, significant cases with a lot of volumes of
24 documents and so forth. I don't ever recall having actually
25 to do a formal 30(b)(6) depo before trial to -- in order to

1 take care of some authenticity and foundation for
2 admissibility issues. We've had issues come up that we've
3 had to deal with, but we've never gotten to that point where
4 we have to have one.

5 And this is more of a rhetorical -- well, no, it's
6 an actual question. Am I encouraging you or basically going
7 to encourage a 30(b)(6) depo if I grant your order? Do you
8 see what I'm saying? In other words, now it's there.

9 Because usually you just leave it and then at the
10 time you get so close to trial, everyone is thinking about
11 so many other things and you're not going to goof around
12 with, you know, sort of this and that.

13 Sometimes, of course, I've seen one side or the
14 other try to use a foundation objection in the middle of
15 trial because everyone knows what the key documents are and
16 they try to throw out foundation, authenticity, something
17 that will break up the presentation.

18 MR. BRUCKNER: Sure.

19 THE COURT: But I'm a little concerned if I just
20 say now at this point so early in the litigation that, yeah,
21 you have the right to a 30(b)(6), I'm actually going to
22 encourage that.

23 MR. BRUCKNER: Your Honor, I don't think so. I
24 actually think that the possibility of having that out there
25 is going to be therapeutic on both sides because, frankly,

1 the lawyers can disagree on things and we will go back and
2 forth and we will negotiate, but frankly, I think having the
3 possibility of a deposition for either side is going to
4 be -- how shall I put it? -- therapeutic on both sides
5 because they aren't really going to want to take it to that
6 level. But if we do need to take it to that level and if
7 there's a foundational aspect that we need to address, we'd
8 rather address it before we bring it to the Court.

9 You know, there's a couple of other ways that this
10 could be handled and it's been handled in other cases like
11 this too. The Court could order instead or the parties
12 could agree -- we tried this, but it wasn't successful --
13 that no document produced by one of the parties from its own
14 files requires a sponsoring witness to attest to its
15 authenticity or best evidence or status as a business
16 record. That's what the parties agreed to in the LCD case
17 and the court entered it as an order. We proposed that to
18 the defendants and they told us that they weren't
19 interested. We could have certifications by the --

20 THE COURT: How early was that agreement made in
21 that other case?

22 MR. BRUCKNER: It was made, as I recall, Your
23 Honor, about a year before trial, so it was at the close --
24 it was either at the close or after the close of discovery,
25 but about a year before trial.

1 THE COURT: Had all the -- I mean, we've got some
2 potentially big issues coming up --

3 MR. BRUCKNER: Right.

4 THE COURT: -- in this case. Was it after that
5 point in that trial, do you know?

6 MR. BRUCKNER: Your Honor, I'm sorry, I don't know
7 the answer to that question. I'm sorry that I don't because
8 it's a good question.

9 THE COURT: I don't think I've ever heard the
10 connection between 30(b)(6) and therapeutic.

11 (Laughter.)

12 THE COURT: So you have now coined something I've
13 never heard.

14 MR. BRUCKNER: Maybe I was being too candid, Your
15 Honor, but honestly, I think that's how it will play out.

16 Another way we could do this is that each party
17 could certify -- they could have a records custodian certify
18 that the documents are authentic business records. That
19 would be a simple, efficient way to do it. The defendants
20 have conceded in their papers that that could take place
21 after the cutoff. They haven't said that they'd agree to
22 it, but it certainly would be an efficient way that you
23 could do it.

24 And as I said, at the end we could leave it to
25 Your Honor or to Judge Montgomery and we'll handle it at

1 trial, but what we don't want is to find ourselves in the
2 position of you should have addressed that during discovery.

3 If it was a legitimate fault on either side that
4 we should have addressed it in discovery and we didn't, then
5 that's that party's fault and that's that party's problem
6 and each of us will have to deal with that.

7 But I do say that we have been diligent in
8 pursuing this throughout the course of discovery both in
9 depositions -- each time we have a witness we'll run that
10 witness through his or her documents and any other documents
11 that we can take care of -- and we asked in a request to
12 admit, not only request Wholesale to admit everything you
13 produced falls in the following categories, but we gave them
14 a specified list too and they declined to admit either one
15 of those.

16 Now, I will add, as we've been discussing, I don't
17 think that is the most effective way to go about it because,
18 as Your Honor pointed out, we're going to have class cert.
19 We don't think any more summary judgment motions are
20 appropriate, but the defendants may have a different view.

21 Anyway, there are some steps that have yet to take
22 place that are going to hone issues for trial and they're
23 going to really cause each of us to focus in on what
24 documents we care about and which ones we're going to use at
25 trial.

1 So to have to address it now is not the most
2 effective way to do it by any means. We just don't want to
3 get caught in the trap of someone saying the discovery
4 deadline ran and you should have addressed this before the
5 discovery deadline ran. So that's why we raised it with the
6 defendants. We couldn't get their agreement, so that's why
7 we're here before the Court.

8 THE COURT: All right. Thank you.

9 MR. BRUCKNER: Thank you.

10 MR. KOONS: Good morning, Your Honor.

11 THE COURT: Good morning.

12 MR. KOONS: I think --

13 THE COURT: Counsel, what if I were to deny this
14 motion hypothetically and we get closer to trial and things
15 sort of play out as I sort of described?

16 Now we've got the class issue determined, any
17 dispositive things are done, and any other rulings that
18 might shape the litigation or any concepts of bifurcation
19 that all the parties and the court may or may not agree to,
20 once that's shaped and we're in the process of, you know,
21 exchanging exhibit lists and -- again, we're cutting out
22 certain types of authentication and foundational things like
23 fraudulent documents or if, you know, someone says, oh, no,
24 this is backdated or whatever it is. Those types of things
25 obviously are wholly different.

1 At that point you'd meet and confer. Obviously at
2 that point everyone knows what each side is going to really
3 focus on. Ironically you might already sort of know that in
4 many respects, but at that point then you say, well, we
5 can't work it out even after the most serious of meet and
6 confers.

7 Yes, you've resolved a thousand of the documents,
8 but, you know, there's going to be these 50 that we can't
9 agree on and the objection is, well, if you look back on
10 your deposition, you didn't on this document cover: Have
11 you seen this before? Yes. In what context? What's the
12 context you have seen this? The business record type of
13 foundational stuff. Usually people don't spend their seven
14 hours getting to that level of detail because you'd never
15 get to the real issues and the purposes of the 30(b)(6).

16 At that point you object, no, we're not going to
17 do -- no, we're not going to stipulate to that. And the
18 other side says, well, we don't want this to bog things down
19 in the trial, we want a 30(b)(6). What's your answer at
20 that point when they ask for that?

21 MR. KOONS: What is my response if they ask for a
22 30(b)(6) at that point?

23 THE COURT: At that point in that context.

24 MR. KOONS: Well, if I could answer one question
25 first before I do, I think --

1 THE COURT: Okay.

2 MR. KOONS: -- one relates to the other. I would
3 not anticipate us needing to be in a situation where a
4 30(b)(6) would be necessary for all the reasons I think that
5 you've addressed earlier.

6 I will not, I don't anticipate -- I'll speak for
7 myself at this point. I do not anticipate us sticking to
8 what I'll call nickel and dime objections on authenticity,
9 maybe, when someone didn't ask the exact right questions at
10 a deposition, because I don't want to be here defending that
11 in front of you because you'll hang me and rightly so. So
12 on those types of --

13 THE COURT: I might be upset, but don't worry, I'm
14 not going to do that.

15 MR. KOONS: My point is that we've all been doing
16 this long enough to know that the procedure that's been in
17 place for resolving these types of issues, which this court
18 and virtually every other court in the country follows, that
19 procedure irons out these issues and I'm not going to
20 sacrifice my reputation with this court. I'm too old and
21 I've got too little hair already to keep fighting over these
22 little things. We're going to work most of these things
23 out.

24 And as the plaintiffs have identified, that in
25 almost every instance they don't think -- they say it in

1 their brief 12 times and I heard it this morning, they think
2 that we're probably not going to need a 30(b)(6).

3 If they ask me -- to your specific question, Your
4 Honor, if they ask me for a 30(b)(6) later down the road, I
5 suspect that we would probably be resistant to that. I
6 would have to know what the circumstances specifically are,
7 but I would imagine that the documents that we can't resolve
8 between the two of us would be the ones that would require
9 court intervention and a 30(b)(6) is not going to resolve
10 those types of things.

11 And that's one of the dangers, I think, of the
12 plaintiffs' request, is that they have language in their
13 brief that says that this will kind of solve everything once
14 and for all and no one will ever have to -- the Court won't
15 have to deal with objections going on in the future. And I
16 don't think that's right. There will be any number of
17 objections that cannot be resolved by a 30(b)(6).

18 So in the end I think this is an overly complex
19 proposal to a problem that everyone agrees doesn't even
20 necessarily exist right now and where we know there's a
21 perfectly good procedure in place that this Court has used
22 in other cases. And we know that that procedure works, so
23 why mess with something that's not broken?

24 THE COURT: Plaintiffs' counsel cited the Manual
25 for Complex Litigation on a number of occasions. How do you

1 respond to his arguments relating to that?

2 MR. KOONS: Yeah, I think that the manual on
3 balance favors the traditional approach that this and other
4 courts follow. And even the language that the plaintiffs
5 cite in their brief says that the types of -- the way that
6 these types of authenticity and admissibility disputes would
7 be resolved would be through things like stipulations.

8 Let me be perfectly clear. The defendants are not
9 anti-stipulation in general. We're just anti-stipulation on
10 this issue that they've asked about. As I said, I would
11 anticipate -- in fact, I would be surprised if when we got
12 closer to trial that the parties didn't enter into some
13 stipulations about a lot of documents, the authenticity
14 issues and admissibility.

15 So I guess my response is that the Manual for
16 Complex Litigation reinforces that the traditional process
17 that we know that works here should be employed here and
18 does not support the existence -- or getting a free pass for
19 a 30(b)(6) at some point down the road should the plaintiffs
20 decide to invoke it.

21 And I think, Your Honor, you raised a good point
22 earlier in that is this going to encourage 30(b)(6)s. And I
23 think the answer is probably it is or at least it's
24 possible. Whereas, if there is no 30(b)(6), it removes that
25 temptation.

1 And what I'm concerned about, and this goes back
2 to my point about there being a perfectly good procedure in
3 place that I've used for the last 17 years that shouldn't be
4 messed with, and that is if they're given a prophylactic
5 30(b)(6) and they decide to invoke it because they disagree
6 with my position on whether or not something should be
7 deemed authentic or admissible and then they take that shot,
8 then I might be in the position where I need to come in and
9 ask you for a protective order saying we all agreed on
10 December 18th that -- or I think we all agreed that there
11 are certain categories of documents that can't be resolved
12 by a 30(b)(6).

13 Well, reasonable minds may disagree about what
14 falls into that category and what doesn't and so the
15 plaintiffs might say, yeah, that 30(b)(6) is going to solve
16 that problem and I know it won't, so I've got to come back
17 in here and now have another motion related to this, where
18 we could just follow the regular procedure. It's worked out
19 so many times in so many different trials. Why don't we
20 just stick with that?

21 THE COURT: Should I be concerned that -- let's
22 say anticipating that this trial -- you know, it's an
23 antitrust case. The evidence sometimes is not that exciting
24 and takes a while to develop and so forth. How do I know
25 you're not just going to use these foundation objections to

1 make their case even more difficult and dragging it out more
2 and so forth?

3 MR. KOONS: My response is something that you
4 would have to take on faith because it deals with, I guess,
5 the way that we try cases and the way that we don't try
6 cases. I can't, I guess, give you any guarantees other than
7 my assurance that there's certainly no intention for those
8 types of objections, where they're unfounded, to be made.

9 I know a lot of judges, most judges don't want a
10 lot of interruptions during the trial. I certainly would
11 have no intention of doing that type of grandstanding or
12 however you want to describe it. But beyond me giving you
13 my representations to that effect, I don't know that there's
14 any procedure that can be implemented that would, you know,
15 make it impossible. I just don't see that happening.

16 THE COURT: Okay.

17 MR. KOONS: I really don't.

18 Your Honor, there's a lot of briefing that we
19 submitted on issues of good cause and diligence, whether or
20 not the relief that is requested here is necessary,
21 prejudice and the relevance of prejudice here. I'm happy to
22 rest on the briefs or if you think it would be useful for me
23 to talk about that, I'm happy to do it, but I don't want to
24 waste Your Honor's time. Do you have a preference?

25 THE COURT: No.

1 MR. KOONS: You don't have a preference?

2 THE COURT: I do not.

3 MR. KOONS: Well, then I'll hit one or two minor
4 points and not belabor it and I won't go through our brief
5 again and then I'll sit down.

6 THE COURT: Go ahead.

7 MR. KOONS: I think, Your Honor, on the issue of
8 prejudice, that's important. Frankly, I think I probably
9 could have done a little bit better job in the brief
10 articulating that point.

11 One prefatory issue on that, though, is that
12 there's maybe some disagreement at least on the face of the
13 briefs as to whether prejudice is required to be -- whether
14 prejudice is relevant inquiry.

15 The plaintiffs cite one case that says that
16 prejudice is not necessary, on page 9 of their brief. On
17 page 10 then they cite another case that says that prejudice
18 is a necessary element of your analysis. We cite cases that
19 say it is and there are certainly a few others, more recent
20 cases, that all uniformly say that prejudice is a relevant
21 inquiry.

22 And I think we've laid out some of the prejudice
23 issues. One of them that I had not briefed, Your Honor, was
24 this need to potentially seek a protective order. I think
25 there's a real risk of having to do that in the future.

1 That's additional time and expense for us in addition to the
2 nine depositions that we've already given them.

3 The last thing that I wanted to point out, Your
4 Honor, is that I think that it's fair to characterize this
5 dispute as one where the plaintiffs need to satisfy their
6 burden both as to adjusting the schedule, and there also is
7 just in general the good cause requirement for that, and
8 there's the requirement to adjust the schedule to allow for
9 more than one 30(b)(6) where I think the rules specifically
10 say you get one 30(b)(6) and if you're going to ask for
11 another one, you need to again shoulder another burden to
12 establish that you are entitled to a second one.

13 And with that, Your Honor, I'll stop.

14 THE COURT: Thank you.

15 MR. KOONS: Thank you.

16 THE COURT: Any response?

17 MR. BRUCKNER: Just a few points, Your Honor.

18 Number one, on the notion of whether this would encourage us
19 to take more depositions, we have no interest on the
20 plaintiffs' side in spending any more time and effort on
21 unnecessary procedures than we absolutely have to in order
22 to get to trial and to get to a resolution. So I don't
23 think it is going to encourage depositions.

24 As I said earlier, I think the prospect of having
25 it out there will focus the parties and we will be able to

1 reach agreement on all or nearly all issues. What it will
2 do is enable us to resolve these issues or at least give us
3 a fighting chance of doing so before we bring it to the
4 Court for you to address before trial or for all of us to
5 address during trial.

6 I think any of the alternatives that we've
7 suggested, the motion we made which would allow a 30(b)(6)
8 after the close of discovery or the alternatives that we
9 talked about, have a certification from a records custodian,
10 have a stipulation that if it came from your own -- it's a
11 record from your own business files, that it's authentic,
12 it's a business record under the rules, I think any of those
13 would solve the problem here. We haven't been able to reach
14 agreement on that and that's why we're here today.

15 I think that's all I have, unless Your Honor has
16 questions.

17 THE COURT: No, I think both sides have answered
18 whatever questions I have and presented their case. Thank
19 you to both sides.

20 Let's take a ten-minute break and we'll go back on
21 the record. We are in recess.

22 (Recess taken at 11:04 a.m.)

23 * * * * *

24 (11:21 a.m.)

25 **IN OPEN COURT**

1 THE COURT: Okay. We are back on the record in
2 the case of In re: Wholesale Grocery Products Antitrust
3 Litigation, Case No. 09-MD-2090, and we've had oral
4 arguments on plaintiffs' motion in this matter.

5 First of all, I guess thanks for your arguments.
6 Every once in a while in these types of situations it's nice
7 to hear some colorful metaphors and word choices. We don't
8 all have to agree with some of the word choices, but it
9 keeps things lively. So thank you to both sides. And
10 obviously you presented your arguments well and thanks for
11 answering my questions. Here's the ruling of the Court:

12 Basically I think the parties agree that good
13 cause is needed to amend the existing amended pretrial
14 scheduling order to permit depositions to occur after the
15 close of discovery, which is coming up very quickly on
16 January 15, 2016. And obviously there's a lot of case law
17 on that: Federal Rules of Civil Procedure 16(b)(4), our
18 Local Rule 16(b)(1), and case law like Sherman v. Winco
19 Fireworks, 532 F.3d 709, 715, Eighth Circuit from 2008.
20 That case also stands for the proposition that the primary
21 measure of good cause is the moving party's diligence.

22 In this context the Court does appreciate the
23 plaintiffs trying to take action before the close of fact
24 discovery ends so that there's an attempt here by plaintiffs
25 to avoid some potential dispute that may arise at a later

1 point. The issue, of course, and emphasis on the word "may"
2 there I just read, is that in the Court's view this issue is
3 not a ripe dispute. And there is some case law that
4 supports that proposition. You can look at Parrish v.
5 Dayton, 761 F.3d, 873 at 875 to 76, Eighth Circuit opinion
6 from 2014. Addressing issues of authenticity and
7 admissibility at this point in the litigation would be
8 premature.

9 There are other alternatives available and those
10 procedures may be set as we get closer to trial as the
11 structure of the litigation gets more formalized and at that
12 time the issues of authenticity and admissibility can become
13 more crystallized.

14 And the less costly expenses are the norm and the
15 Court anticipates that the parties would well take advantage
16 of those less expensive approaches to resolving these types
17 of issues.

18 The Court would expect and anticipate that the
19 parties would be able to reach agreement on the vast
20 majority of these types of issues and resolve this in those
21 types of other less expensive ways that we referenced.

22 Rule 1 of the Rules of Federal Procedure states
23 that the rule should be construed and administered and
24 employed by the court and the parties to secure the just,
25 speedy, and inexpensive determination of every action and

1 proceeding.

2 Granting plaintiffs' motion could result in a
3 codification at a very premature stage of the litigation
4 that a 30(b)(6) deposition is available pursuant to such an
5 early court order.

6 The Court also is concerned that somehow that
7 would not be misconstrued to mean that somehow the Court
8 prefers a 30(b)(6) type of approach to resolving these types
9 of matters, because it is not. Those other less expensive
10 approaches would be the preferred method.

11 The rationale that disputes regarding authenticity
12 and admissibility may reasonably occur is an insufficient
13 basis for granting the additional depositions, as set forth
14 by some orders issued by colleagues on this district bench,
15 for example, in Webb v. Ethicon Endo-Surgery Inc.,
16 No. 13-CV-1947. That was in 2014, WL7685527 at 6. That's
17 from 2014, District of Minnesota.

18 In short, plaintiffs have not shown good cause for
19 modification of the existing amended pretrial scheduling
20 order. Plaintiffs' motion is denied without prejudice.

21 It would be unusual, but not inconceivable, that
22 the parties can't agree on authenticity and foundation for
23 admissibility. In that instance it is conceivable that in
24 the future there may be some arguments about the
25 appropriateness of a 30(b)(6) type of witness only for

1 purposes of authenticity and foundation for admissibility.

2 And so that's the ruling of the Court. I guess
3 from the oral arguments here you probably get the gist of
4 where the Court is coming from on a lot of this stuff. So
5 that's the ruling of the Court and we'll issue a short, you
6 know, minute order, but we're not going to write out an
7 extensive order. We will probably incorporate this by
8 reference.

9 Thank you. We are in recess.

10 COUNSEL: Thank you, Your Honor.

11 THE COURT: Thank you. We are in recess.

12 (Court adjourned at 11:28 a.m.)

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17 I, Lori A. Simpson, certify that the foregoing is a
18 correct transcript from the record of proceedings in the
19 above-entitled matter.

20

21 Certified by: s/ Lori A. Simpson

22 Lori A. Simpson, RMR-CRR

23

24

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