

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: WHOLESALE GROCERY) Court File No.
PRODUCTS ANTITRUST LITIGATION) 09-MD-2090 (ADM/AJB)
)
)
) Courtroom 13 West
) Thursday, December 3, 2009
) Minneapolis, Minnesota

S T A T U S C O N F E R E N C E
- A N D -
H E A R I N G O N M O T I O N S

[DOCKET NOS. 4, 8 & 105 (09-0983)]

BEFORE THE HONORABLE ANN D. MONTGOMERY
UNITED STATES DISTRICT JUDGE

TIMOTHY J. WILLETTE, RDR, CRR, CBC, CCP
Official Court Reporter - United States District Court
1005 United States Courthouse
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Minneapolis, Minnesota 55415
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(2:00 p.m.)

P R O C E E D I N G S

I N O P E N C O U R T

THE COURT: Good afternoon. Please be seated and welcome to United States District Court.

This is an MDL that's gotten off to a very bad start because you guys don't know up from (indicating) down.

(Laughter)

It's supposed to be from my perspective and everybody wrote upside down, so we'll change it around here.

Let's see. Let's start over here at the Robins Kaplan table. Mr. Safranski, I believe. Oh, no. This is really the other way around. Okay. This way.

Mr. Safranski.

MR. SAFRANSKI: Yes, Stephen Safranski from Robins Kaplan on behalf of Supervalu.

THE COURT: All right.

MR. WILDFANG: Craig Wildfang, your Honor, from Robins Kaplan on behalf of Supervalu.

MR. LOUGHLIN: Charles Loughlin, your Honor, from Howrey on behalf of C&S.

THE COURT: All right.

MR. WIND: Good afternoon. Todd Wind, Fredrikson & Byron, on behalf of C&S.

THE COURT: All right. Good afternoon.

1 Now over to the defense side -- or excuse me. I'm
2 thinking Robins is the plaintiff. Lots of things are wrong
3 about this chart. All right. To the plaintiffs' side.

4 Mr. Drubel?

5 MR. DRUBEL: Yes, your Honor. Good afternoon.
6 Richard Drubel from Boies, Schiller & Flexner on behalf of D&G
7 and Rangeley.

8 MR. KOTCHEN: Good afternoon, your Honor. Daniel
9 Kotchen from Kotchen & Low on behalf of D&G, Inc. and
10 Rangeley.

11 THE COURT: All right. Mr. Magnuson?

12 MR. MAGNUSON: Good afternoon, your Honor. Kevin
13 Magnuson, Kelley, Wolter & Scott, on behalf of D&G and
14 Rangeley.

15 MS. CHAVEZ: Kathleen Chavez on behalf of Blue
16 Goose.

17 MR. CURRIE: Good afternoon, Judge. Peter Currie
18 on behalf of Blue Goose.

19 THE COURT: Okay. Back table.

20 MR. ESADES: Good afternoon. Vincent Esades from
21 Heins, Mills & Olson on behalf of the DeLuca plaintiff.

22 THE COURT: All right.

23 MR. ALLANOFF: Good afternoon, your Honor. Dan
24 Allanoff from Meredith, Cohen, Greenfogel & Skirnack on behalf
25 of DeLuca as well.

1 MR. MEREDITH: Good afternoon, your Honor. Joel
2 Meredith, Meredith Cohen, on behalf of DeLuca and Prather.

3 MR. CREIGHTON: Your Honor, Richard Creighton from
4 Cincinnati, Ohio, Keating, Muething & Klekamp, on behalf of
5 Charles W. Prather Company, doing business as Prathers IGA.

6 THE COURT: Mr. Bruckner?

7 MR. BRUCKNER: Good afternoon, your Honor. Joseph
8 Bruckner with the Lockridge firm in Minneapolis, also on
9 behalf of the plaintiff Charles Prather.

10 MS. ODETTE: Elizabeth Odette, Lockridge Grindal
11 Nauen, also on behalf of plaintiff Charles Prather.

12 THE COURT: And finally Ms. Stoering.

13 MS. STOERING: Good afternoon, your Honor. Rachel
14 Stoering from Heins, Mills & Olson on behalf of plaintiff
15 DeLuca.

16 THE COURT: All right. Good afternoon.

17 Counsel, I realize that I have before me some
18 motions to appoint counsel with regard to co-lead counsel and
19 liaison counsel as well as issues with regard to entering of a
20 case management and scheduling order. And I don't know how
21 many of you are apprised of the issue with regard to a
22 potential conflict that I wanted to have you in and discuss
23 before I made a decision about this.

24 By way of background, this case arrived to me by way
25 of a conflict itself after Judge Schiltz of this bench chose

1 to recuse himself. Judge Hansen of the MDL panel and also an
2 Eighth Circuit judge called and asked me if I would accept
3 appointment in this MDL despite the fact I have an ongoing MDL
4 and lots of other special responsibilities beyond my ordinary
5 caseload right now, and I said yes, feeling that it was my
6 duty to say so if asked by him, so I did say yes. Subsequent
7 to that time I became aware that Heins, Mills & Olson had a
8 role in here as potential interim liaison counsel.

9 I want to make complete disclosure on the record the
10 Olson of the name is my brother Eric Olson. I was an Olson by
11 maiden name. Eric, my brother, has been gone from the firm,
12 as I understand it -- Mr. Esades, you're going to have to help
13 me on the details -- but I think '03, and any financial
14 interest that he would retain in the firm, as I understand,
15 would relate only to some old cases that were existing and is
16 remote, I think was the word I heard used; is that fair to
17 say?

18 MR. ESADES: That's correct, your Honor. I think
19 it's '03 and it's a complex interest in cases in existence
20 that are still dragging on, you know, for ten years, five
21 years, quite awhile. So that's the nature of it.

22 THE COURT: Clear to say, though, with I think no
23 complications, he has no financial interest whatsoever in this
24 case.

25 MR. ESADES: No, unless the firm were to go under

1 in the next --

2 THE COURT: Oh, okay. All right.

3 MR. ESADES: I mean, he has a financial interest in
4 seeing the firm not go bankrupt, but I don't think that has
5 anything to do with this case necessarily.

6 THE COURT: And I also have no financial interest
7 whatsoever in my brother's assets. He has children of his own
8 and whatever.

9 Nonetheless, some of you are sitting there thinking:
10 "Oh, no. Now she's going to ask us if we object to that and I
11 hate to make a decision on who wants to tick off a judge on
12 the first day of an MDL status conference." I'm not going to
13 ask you if you have any problems or concerns with that because
14 I think it's unfair to ask you that and I'm not sure I would
15 get candid answers.

16 Much of this information has really come to my
17 attention in very short form. Mr. Esades has very, I think,
18 professionally indicated to me that the firm would withdraw if
19 I have a problem or concern about that and that's what I'm
20 interested in gaining some information from you on both sides
21 of the equation here.

22 One of the fears I have about any sort of issue in
23 this regard is that, even assuming that I were to ask you the
24 question and no one had any problem or saw any conflict --
25 because I clearly think it falls in the appearance of

1 impropriety, not any actual impropriety context, because I
2 really have nothing whatsoever to gain from the situation,
3 but -- would be the fact that in an MDL there can be
4 additional cases that could be added on and come down the
5 line.

6 Does anybody have any knowledge as to whether there
7 are such cases out there or do we have the population of who's
8 going to be involved in this case established at this point?

9 Let me look to you just because you're sitting in
10 the alleged driver's seat right now, Mr. Drubel. What's your
11 understanding as to whether there would be add-on,
12 transferee-type cases?

13 MR. DRUBEL: We're not aware, your Honor, of any
14 other tagalong cases out there.

15 THE COURT: Okay. So you think this is it. And I
16 think we're four cases; is that what we have?

17 MR. DRUBEL: That's correct, your Honor. That's
18 correct.

19 THE COURT: All right. Mr. Safranski, are you in a
20 position to know anything more --

21 MR. SAFRANSKI: No, Defendants are not -- or
22 Supervalu, anyway, is not aware of any other cases that would
23 be tagalong cases.

24 THE COURT: Okay. All right. Well, that's
25 something that I'm going to think about a little bit, I guess,

1 before I make a real resolution of that. If anybody has any
2 strong feelings that they want to convey to me about that, I
3 don't expect you to do it today, but if you want to get me
4 that word in whatever way you're comfortable. I mean, I don't
5 even care if you use a third-party neutral person to call and
6 say, because I don't care who it is -- I really don't -- that
7 would have a problem with that.

8 And Mr. Esades, I may take you up on your offer to
9 withdraw regardless of what I hear from them, but I do want a
10 couple days to ponder that.

11 All right. So that gets us to the issue of who
12 should be lead counsel, and if I understand the way this is
13 postured, the -- I don't know. If they were to withdraw, I
14 guess Kelley, Wolter & Scott would be the only candidate for
15 liaison counsel, so that makes it difficult. You're running
16 unopposed, I guess.

17 (Laughter)

18 THE COURT: All right. And it's my understanding
19 that there's also an agreement that we should have two
20 plaintiffs' firms as co-lead counsel, but we have three in
21 contention. Is that what we basically boil down to?

22 Okay. Let's hear from, I guess, from the
23 plaintiffs' side of things as to how that should be dealt
24 with. Do you want to be heard in that regard? Who are the
25 spokespersons on this issue?

1 Mr. Meredith, it looks like you've got something to
2 say.

3 MR. MEREDITH: Good afternoon, your Honor. Joel
4 Meredith.

5 We have papers in and I'm not going to belabor the
6 points that we made there, but I did want to add a few things.
7 We put in our biography and I failed to add in about 50 or 60
8 cases that I've tried over the years, because frankly, I don't
9 want to remember most of them.

10 But the juxt of this -- the case here has -- there
11 are two groups of plaintiffs, but there's more than that.
12 There's two geographical groups. Not necessarily -- we are
13 separate and distinct, but you've got the Northeast where we
14 filed in New Hampshire, and the Midwest, which is now
15 Minnesota, was Wisconsin, and we've taken the position there
16 should be two voices. I think Mr. Drubel also takes the
17 position there should be co-lead counsel. The question is
18 who.

19 We believe that our group is best represented -- I
20 don't believe, but the people in our cases believe that I best
21 represent our group. Not that it's in any way deprecating Mr.
22 Drubel or Mr. Kotchen, but the voices need to be different,
23 and the voice -- the Drubel/Kotchen group is one group.
24 They're together. They're together in this case and frankly,
25 in almost all cases that Mr. Kotchen has been in are with Mr.

1 Drubel. It doesn't mean to deprecate him in any way, but it's
2 not a separate voice. It is the voice of
3 Mr. Drubel when you hear Mr. Kotchen.

4 Since we got into this, we initially -- I think it
5 was a stipulation or something and Mr. Drubel I think said,
6 "Our group," meaning them, "this is our position." And we
7 talked and he and I talked and talked and I don't think he'll
8 disagree. There were some negotiations, but we worked out
9 things and he moved and I moved and we put together the
10 stipulation that's going to be heard by your Honor a little
11 bit later today. We think there's a need to have a second
12 voice. We think that the second voice should be from our
13 group. It should be Mr. Drubel and myself because my people
14 have asked me to. There's one other point that I think needs
15 to be made.

16 The two cases that are represented by Mr. Drubel and
17 Mr. Kotchen, neither of them now exists, or at least is a
18 buyer now. And the initial complaint as we pointed out in our
19 brief, they had an injunctive relief demand in there. They
20 don't have it now, they've dropped it, because they had to.
21 They're not operating anymore, or at least not purchasing from
22 either of the defendants. DeLuca's is operating, has operated
23 throughout the entire period and I think it's -- obviously
24 somebody needs to be representing the interests of somebody
25 that's seeking injunctive relief.

1 I can speak for three hours if your Honor likes, but
2 unless there's any questions --

3 THE COURT: Please don't.

4 MR. MEREDITH: -- I have really not an awful lot
5 more to add.

6 THE COURT: Okay.

7 MR. MEREDITH: Thank you very much.

8 THE COURT: All right. Thank you.

9 Mr. Kotchen, you look like --

10 MR. KOTCHEN: Thank you, your Honor.

11 THE COURT: -- you're ready to go here.

12 MR. KOTCHEN: What we thought we would do is, I
13 would talk a little bit about some of the background of the
14 case to introduce you to the case and turn it over to
15 Mr. Drubel, who will talk to you about -- a little bit how we
16 think about litigating this case, some of the other issues --

17 THE COURT: Well, I really would like to hear more
18 about the framework and the structure of the co-lead counsel
19 before I get to the --

20 MR. KOTCHEN: Okay, and I'll turn it over for
21 Mr. Drubel to talk about that.

22 But I do want to respond to Mr. Meredith's points
23 about me and whether I essentially am spoken for by
24 Mr. Drubel. I assure you that I'm not. Kotchen & Low has a
25 number of cases that we're litigating. We are separate from

1 Mr. Drubel and Boies Schiller. I have my own separate
2 experience. The attorneys with Kotchen & Low have their own
3 separate experience.

4 We've worked hard to originate this case in
5 collaboration with Boies Schiller, and our position -- and I
6 think you'll hear a little bit about this from Mr. Drubel --
7 is, the counsel who originate the case typically are the
8 counsel who are appointed as co-lead counsel. And
9 Mr. Meredith, in all due respect, has taken the work that
10 we've done to originate the case -- over 20 paragraphs of his
11 complaint were taken almost verbatim from the complaint that
12 we developed. And he is entitled, of course, under the rules
13 to come here and tell you how his voice is distinct and we are
14 not saying that Mr. Meredith can't be part of this litigation.

15 What Mr. Drubel and I have talked about is having
16 Mr. Meredith and other lawyers participate in this case on an
17 executive committee. We think that because we originated the
18 case, because we are the counsel that have been working on
19 this case for quite some time, having them participate on an
20 executive committee under our shared leadership is equitable.
21 But when Mr. Meredith says that Mr. Drubel speaks for me and
22 Kotchen & Low, he is absolutely wrong. That's the first I've
23 ever heard of it.

24 I'll turn it over to Mr. Drubel.

25 THE COURT: All right.

1 Mr. Drubel?

2 MR. DRUBEL: Thank you, your Honor. I'm going to
3 take a chance, if you bear with me, on using your ELMO.

4 THE COURT: Okay. Go for it.

5 MR. DRUBEL: Is that legible to your Honor?

6 THE COURT: It is. Fine.

7 MR. DRUBEL: Your Honor, there are four cases in
8 this matter that are before the Court and two cases support
9 the appointment of Kotchen & Low and Boies Schiller as co-lead
10 counsel in this case, and two cases support Meredith Cohen,
11 Joel Meredith's firm, DeLuca's and the Prathers case.

12 The fact is that under the rules -- and all the
13 plaintiffs' counsel agree on the framework for the rules --
14 that when you've got more than one law firm applying for lead
15 counsel in a class case before a class is certified, the court
16 is directed to consider the criteria under Rule 23(g) for
17 selection. It's not a matter of favoritism. It's a matter of
18 picking the lawyers who can best represent the interest of the
19 class.

20 There are four categories under 23(g)(1)(A), four
21 criteria that the court's supposed to look to, and I'll be
22 very candid with the Court.

23 With respect to criteria (ii) through (iv), while I
24 think there are differences, I don't think the differences are
25 overwhelming. Mr. Meredith is a very good lawyer. I think

1 he's eminently qualified to represent -- as co-lead counsel to
2 represent a class, but not the class in this case, and that's
3 because the very first criteria that Rule 23(g) mentions is
4 the work counsel has done in identifying or investigating
5 potential claims in the action. And, your Honor, we think
6 that the evidence that falls under that criteria so favors, is
7 overwhelmingly favorable to
8 Kotchen & Low and Boies, Schiller & Flexner, that we believe
9 the Court -- that we are, this group is in fact the best able
10 to represent the class in this case, and let me tell you a
11 little bit about that.

12 Boies Schiller and Kotchen & Low are responsible for
13 identifying, investigating and advancing the plaintiffs'
14 claims in this action. We filed the very first case on
15 December 31, 2008. It was filed by Kotchen & Low. We've
16 interviewed and I'll say Mr. Kotchen has interviewed scores of
17 employees, ex- and former employees of the defendants,
18 including a very key employee, your Honor, who identified and
19 described to Mr. Kotchen the very noncompete agreement between
20 the defendants that is at the heart of this case.

21 We also retained and consulted with industry and
22 economic experts over many months analyzing the conditions of
23 competition in this case and analyzing the competitive effects
24 of this agreement.

25 We've also negotiated a protective order with

1 Defendants that was entered by this Court on July 20th, 2009.

2 We obtained a copy of the defendants' asset exchange
3 agreement and the agreement not to compete and analyzed that
4 production of 3500 pages.

5 We've researched and drafted briefs in opposition to
6 the motions to dismiss that Defendants have filed.

7 We've researched and drafted a motion for partial
8 summary judgment, your Honor, on behalf of the plaintiffs that
9 we would like an opportunity to present to this Court early in
10 this litigation to try to streamline it, because we believe
11 that Defendants' agreement not to compete is a *per se*
12 violation of the Sherman Act as a matter of law. No other
13 counsel has done that.

14 We've also prepared a legal road map and a discovery
15 plan to be able to get this matter before the Court on a class
16 certification hearing within 11 months. No other counsel has
17 done that.

18 Now, Mr. Meredith, Mr. Meredith says, well, one of
19 the -- he says, well, you know, there have to be different
20 groups. Well, there are different groups. I mean, the two
21 markets that are at stake here are the New England and the
22 Midwest markets and we have a plaintiff from each.

23 Mr. Meredith says, well, but -- well, wait a minute.
24 You don't have a claim for preliminary -- you don't have a
25 claim for injunctive relief. Well, the fact is, although Mr.

1 Meredith has not seen the asset exchange agreement, the
2 noncompetition agreement that is at the heart of this case
3 ended in 2008, so we did not believe it would be prudent to
4 include a claim for injunctive relief based upon an agreement
5 that terminated by its own terms the previous year.

6 As Mr. Kotchen pointed out, we are not proposing to
7 exclude Mr. Meredith or any of the fine lawyers who he's
8 working with. We would propose to in fact -- and we've
9 offered -- to include Mr. Meredith in a steering committee and
10 we have included the option of a steering committee in the
11 proposed Pretrial Order Number 1 that we provided to your
12 Honor. Mr. Meredith declined, but we hope that if your Honor
13 appoints Boies Schiller and Kotchen & Low as lead counsel in
14 this case, that he will reconsider and in fact will
15 participate in this case but as a member of the steering
16 committee, because we feel very strongly that the people whose
17 work created the case and have sustained the case and are
18 prepared to pursue the case should also control the case as
19 co-lead counsel.

20 I'm happy to answer any questions your Honor may
21 have.

22 THE COURT: No, I think that's fine.

23 Another counsel wishes to speak to that issue? This
24 is Mr. --

25 MR. CREIGHTON: Creighton, your Honor.

1 THE COURT: -- Creighton. All right.

2 And Mr. Creighton, remind me who you're with.

3 You're with --

4 MR. CREIGHTON: Your Honor, I'm with Keating,
5 Muething & Klekamp in Cincinnati.

6 THE COURT: Okay.

7 MR. CREIGHTON: And my client, Prather, is from a
8 small town, West Union, Ohio, about 60 miles to the east of
9 Cincinnati, a little north of the Ohio River.

10 THE COURT: All right.

11 MR. CREIGHTON: A little IGA store.

12 Your Honor, I support Mr. Meredith's position in
13 this. Mr. Drubel is absolutely correct on points two, three
14 and four that he outlines. Both counsel, Mr. Drubel and
15 Mr. Meredith, rate very high on those lists and so we're only
16 talking about this issue of origination, which I think, quite
17 frankly, is a bit overstated here.

18 In any event, your Honor, the very fact that we have
19 some disagreements at this stage would lead you to conclude, I
20 hope, that there are different viewpoints about how this case
21 should proceed and I represent a client that I would like to
22 have a voice where it counts, because lead counsel as a
23 practical matter will make the decisions. If you go with what
24 Mr. Drubel has suggested, you still get one voice. It's the
25 same two attorneys from the same two cases. They've been

1 involved in the thing from the beginning. They're going to
2 speak with one voice. We've already seen that in our
3 discussions that we've had among Plaintiffs' counsel before we
4 get here today to lay this little dispute in your lap.

5 So what I'm urging, your Honor, is simply this: It
6 makes eminent good sense to have two lead counsel. We don't
7 need to have any kind of a committee behind it. That just
8 complicates structure. It adds time that in my experience is
9 a lot of times wasted, having committees and people involved
10 in stuff that you really don't need to discuss. Lead counsel
11 can decide it and move forward. And I think if you have two
12 excellent attorneys like Mr. Drubel and Mr. Meredith, that's
13 your best way of assuring what you really need to assure, and
14 your only job here is to make sure that the class, the entire
15 class, is represented by the best you can get.

16 Thank you, your Honor.

17 THE COURT: Thank you.

18 Mr. Bruckner.

19 MR. BRUCKNER: If I can make a couple of brief
20 comments, your Honor.

21 It's always awkward to stand up before the court and
22 tell the court how smart somebody is or how good they are, so
23 I'm not going to do it on my own behalf.

24 THE COURT: Okay.

25 MR. BRUCKNER: But I do want to say that --

1 THE COURT: Oh. You're not going to talk about how
2 smart I am?

3 MR. BRUCKNER: I may talk about that if your Honor
4 would like. I'm happy to do that.

5 (Laughter)

6 MR. BRUCKNER: But my point in coming up here was
7 to tell the Court we support Mr. Meredith as a co-lead counsel
8 in the case, and emphasize co-lead counsel.

9 I've known Mr. Meredith and his firm, and my
10 partners, especially Mr. Lockridge, has known Joel and his
11 firm for decades. Mr. Lockridge and Mr. Meredith have tried
12 cases together and I can tell you that Mr. Meredith's
13 experience in just these kinds of cases, class actions
14 alleging anticompetitive conduct, is broad and deep and I
15 think it is as extensive as any firm in this room.

16 What we're proposing is two co-lead counsel. It's
17 not a top-heavy organization. I'm agnostic on the question of
18 whether to have a steering committee. Frankly, I think if you
19 have two co-lead counsel that fairly and give a balanced
20 representation of all of the cases, you know, it's -- I'm
21 frankly agnostic on the question of having an executive
22 committee.

23 I've personally worked with Mr. Drubel and his firm
24 and I have a lot of respect for Mr. Drubel and his firm. I've
25 worked with Mr. Meredith and his firm and I have a lot of

1 respect for them. We've worked well and efficiently together
2 and I have no doubt that they can do so in this case as well.

3 THE COURT: Lockridge is not taking any position as
4 a firm with regard to being, I take it -- you said you were
5 agnostic on the steering committee -- either on the steering
6 committee or as liaison counsel?

7 MR. BRUCKNER: Your Honor, I wasn't aware of the --
8 until earlier this week the issue with Heins Mills. You know,
9 as your Honor knows, we're experienced in these cases as well.
10 If your Honor would like us in that position as liaison
11 counsel, we're happy to serve, but I guess I'll leave it at
12 that.

13 THE COURT: All right.

14 MR. BRUCKNER: I'd also note, as I think
15 Mr. Creighton alluded to, on who developed the case.

16 I think if you look at the chronology and if you
17 look at how the complaints have developed and they have
18 developed as the case has gone on, as you would hope and
19 expect that they would -- they'd become more refined and
20 become more developed -- I think it's clear that the -- what
21 I'll call the Wisconsin cases have benefited as much from the
22 DeLuca complaint that Mr. Meredith filed as *vice versa*, and I
23 think that's an important fact to keep in mind.

24 THE COURT: Okay.

25 MR. BRUCKNER: Thank you, your Honor.

1 THE COURT: All right.

2 MR. KOTCHEN: Your Honor, if I could have --

3 THE COURT: Mr. Kotchen?

4 MR. KOTCHEN: -- an opportunity to just respond
5 very briefly.

6 It seems that Mr. Meredith and his group, one of the
7 themes here is that Kotchen & Low --

8 THE COURT: You're the odd man out.

9 MR. KOTCHEN: That's exactly right --

10 THE COURT: All right.

11 MR. KOTCHEN: -- the firm that has worked
12 tirelessly to develop this, and they have certainly benefited
13 from the work that we've done, and they have taken our
14 allegations and essentially copied them verbatim. And that's
15 okay, they can do that, but we think that because we developed
16 the case, because we originated it, we should be the co-lead
17 counsel.

18 We do not speak with one voice. The fact that
19 Mr. Drubel and I align on positions before we connect with
20 other folks speaks to the efficiencies and the streamlining
21 that we try to do to make this as efficient as possible. If
22 we come up with positions that anyone on the steering
23 committee disagrees with, in our proposed pretrial order we
24 give them the right to advance their own positions so long as
25 they don't repeat ours.

1 And I would direct you, your Honor, to the cases
2 that we cite in our lead counsel brief on pages 7 and 8 where
3 we -- this is not an issue of first impression. There have
4 been a number of courts that have addressed counsel who
5 originate cases and whether or not they're in the position to
6 be co-lead counsel as we're arguing here. We think so. We
7 think these cases support it. I haven't seen any case from
8 Mr. Meredith or his group that would -- that are counter to
9 these or that contradict these. This is an issue that
10 typically arises when there's an original case that is
11 developed by originating counsel that faces tagalong attorneys
12 and tagalong cases where the allegations are essentially
13 copied from the originating case. And other courts have said
14 that counsel that originate the cases are typically the
15 counsel that are chosen to be co-lead counsel. And they
16 certainly may not want Kotchen & Low to be a co-lead counsel,
17 but we think under the criteria developed by
18 Rule 23 we deserve to be there.

19 Thank you.

20 THE COURT: All right.

21 Mr. Magnuson.

22 MR. MAGNUSON: Just a brief comment, your Honor. I
23 know we want to move on to some other things here, but I just
24 want to address one point.

25 I noticed in the DeLuca briefing that there's a

1 statement that their complaint was filed before our second
2 amended complaint and alleged or assumed that we had used that
3 complaint in some way as a template or that we had taken some
4 ideas from that. In fact, I just wanted to represent to the
5 Court that we had drafted a complaint several weeks before and
6 had been talking about that and had a complaint that looked
7 like the complaint that we filed at least a couple weeks
8 before the DeLuca complaint was filed. I mean, if that's an
9 issue that the Court's considering, we did not look at the
10 DeLuca complaint in drafting our second amended complaint.

11 The only other point I would add is that having
12 worked with this group now as we've slowly sort of come
13 together, I've watched Mr. Drubel and Mr. Kotchen, the way
14 they're being very deliberate, but I've also watched them as
15 they've interacted with the other attorneys and there really
16 has been quite a give-and-take, and I don't think it's fair to
17 describe the process as any way excluding any voices or
18 anything and I don't know if in order to keep that there needs
19 to be a formal structure to ensure that there is that kind of
20 cooperation. I think it exists and as lead counsel they would
21 be open to the suggestions of the other counsel.

22 Thank you, your Honor.

23 THE COURT: All right. Well, I take it there's
24 nothing in Rule 23 that would prohibit me from, should I
25 choose to, appointing three counsel, is there?

1 MR. DRUBEL: No, your Honor.

2 THE COURT: And that's not going to pose an issue
3 if there's no steering committee, is there?

4 MR. DRUBEL: No, your Honor. There's no
5 prohibition under Rule --

6 THE COURT: I understand that it has repercussions,
7 but I mean --

8 MR. DRUBEL: Yes. It's just that it would appear
9 in this case to be contrary to 23(g)(1), which sets out as one
10 of the criteria, the first one, the work that counsel has done
11 to investigate the case.

12 THE COURT: I understand. Well, I'm going to give
13 that some further thought. These are not matters that I
14 intend to take under advisement for long, but they're not ones
15 that I'm going to rule on this afternoon.

16 All right. As I looked because of some time
17 pressures ever so briefly at the two proposed scheduling
18 orders -- and I understand the defense has a different
19 position with regard to the motion to dismiss, but did you
20 submit one order or were they very similar? I don't know that
21 I saw any real significant differences in the --

22 MR. DRUBEL: Well, we did submit a black-line -- we
23 submitted clean and black-line versions of the preliminary
24 case management order, the black-line one showing the changes
25 that Plaintiffs would propose versus the -- what the

1 defendants have proposed.

2 THE COURT: Just a second.

3 John, do I have that under which tab, do you know?
4 Do I have the black-line version?

5 THE CLERK: I don't --

6 THE COURT: Do you happen to have a copy right
7 there? It might --

8 MR. DRUBEL: Yes, your Honor, I have an extra copy.

9 THE CLERK: Yes. I've got it.

10 THE COURT: I didn't go far enough back. I have
11 it. All right.

12 MR. DRUBEL: Your Honor, the different paragraphs
13 on this order basically follow the agenda that we have
14 proposed.

15 We've also since we submitted the order had further
16 discussions with the defendants and we were able to reach
17 agreement on paragraph 1, paragraph 2, and with one change
18 paragraph 6.

19 THE COURT: All right.

20 MR. DRUBEL: So paragraph 1, the change from
21 Defendants' proposal, that within 30 days of appointment of
22 the plaintiffs' interim lead and liaison counsel that
23 Plaintiffs will file a consolidated class action complaint,
24 they obviously had no problem with us reducing it to 20 days.

25 And with respect to paragraph 2, the defendants

1 agree with this as changed. So the briefing schedule in
2 paragraph 2, the defendants agree with that.

3 And then in paragraph 6, your Honor, which deals
4 with scheduling in the event Defendants' motion to dismiss is
5 denied where the plaintiffs have proposed a Rule 26(f)
6 conference with regard to discovery not addressed in a class
7 certification discovery plan within one week of the date the
8 defendants filed their answers, the defendants and the
9 plaintiffs now agree on 14 days.

10 THE COURT: All right. So in controversy, not
11 agreed to, are 3, 4 and 5?

12 MR. DRUBEL: Yes, your Honor.

13 MR. SAFRANSKI: Your Honor, just --

14 THE COURT: Mr. Safranski?

15 MR. SAFRANSKI: -- a quick clarification.

16 In paragraph 6, we haven't agreed that there would
17 be a class certification discovery plan. I mean, we agreed to
18 the 14-day delay after an answer before there's a 26(f)
19 conference, but we would propose that that 26(f) conference
20 cover the entirety of discovery and not what would be left
21 over after a class certification discovery plan that we
22 oppose.

23 THE COURT: All right.

24 MR. DRUBEL: That's correct.

25 THE COURT: Okay. I'll look at that and compare

1 them in that regard.

2 Let's see. Mr. Safranski, maybe I should hear from
3 you next then with regard to the issue with regard to the
4 timing of the motion to dismiss.

5 MR. SAFRANSKI: Thank you, your Honor.

6 I believe we're in agreement on the timing of the
7 motion to dismiss itself, which is we understand that the
8 plaintiffs intend to file a consolidated amended complaint
9 within 30 or 20 days of the Court's appointment of interim
10 lead counsel, and if they want to take 30 days, that's fine, I
11 mean, with the holidays coming up and everything, but what we
12 don't --

13 THE COURT: I might just say so that nobody's
14 caught short on this, I probably am going to go with the 20,
15 because I'm not going to get the order out for a few days, so
16 you've got some time now --

17 MR. SAFRANSKI: Sure.

18 THE COURT: -- instead of signing an order today.
19 So I'll probably go with the shorter limit, guessing that it's
20 -- since if I don't get it done tomorrow, I'm out of town for
21 four days of next week at a meeting, so you might get a week
22 at this front end of it anyway. So rather than take a week
23 and then give you 30 days, which would push it further out,
24 it's likely to be a few days and then 20 days.

25 MR. SAFRANSKI: And we also agree that there would

1 be 30 days for the defendants to respond to the consolidated
2 amended complaint we presume with a motion to dismiss. There
3 have been three complaints filed in the D&G case so far. We
4 have filed three motions to dismiss, one in Wisconsin, two
5 motions to dismiss in this district. The one in Wisconsin
6 wasn't addressed because the case was transferred.

7 THE COURT: Judge Crabb decided to send it to
8 Minnesota.

9 MR. SAFRANSKI: That's right. We renewed that
10 immediately when it came to Minnesota. Then the plaintiffs
11 amended their complaint to drop most of their claims and then
12 we renewed the motion to dismiss by stipulation, again, at the
13 end of July of this year. We came very close to finishing
14 briefing on that, but then Judge Schiltz stayed the entire
15 case pending the outcome of the proceedings before the MDL
16 panel.

17 So we agree on the schedule for filing the motion to
18 dismiss, but what we don't agree on, apparently, is whether
19 discovery should be stayed while the motion to dismiss is
20 pending. We had this disagreement before in both the
21 Wisconsin case and when the case came here.

22 In the D&G case, the parties reached a resolution
23 that was adopted in an order by Judge Boylan that we would
24 agree to produce a copy of the asset exchange agreement,
25 including the covenant not to compete in that agreement, in

1 exchange for which there would be no discovery until there was
2 a resolution of our motion to dismiss the second amended
3 complaint. Now, all of that's been overtaken by events with
4 respect to the MDL proceedings, but as we sit here today we're
5 basically in the same position. We have a complaint coming
6 up, we've provided the agreement that they requested, and we
7 would like to continue the stay of discovery until the motion
8 to dismiss is resolved. And there's really good reasons for
9 this which, you know, can be drawn back to the Twombly
10 decision in which the Supreme Court recognized that parties
11 should not have to undergo costly discovery in a factually
12 complex case, such as an antitrust case, unless the complaint
13 can survive a motion to dismiss.

14 Now, I understand that Plaintiffs in this case have
15 proposed, well, let's have just targeted discovery, we only
16 need discovery necessary to create a record for class
17 certification. Well, your Honor, that discovery is neither
18 going to be targeted nor inexpensive. Class certification
19 discovery is going to involve the common issues, the questions
20 of common impact of the alleged market allocation that's
21 spread across all of the retailers in the proposed class.
22 According to the plaintiffs' most recent complaint, there are
23 thousands of class members in 13 different states and the
24 plaintiffs' complaint alleges that there are common issues
25 with respect to impact, that according to the plaintiffs the

1 prices increased as a result of the defendants' acquisition
2 six years ago, so what that's going to involve is looking at
3 -- is discovery related to pricing over the last six years
4 covering several thousand retailers, and that is simply not
5 going to be something that can be quickly or inexpensively
6 addressed.

7 So, you know, I think when the Court looks at
8 whether to stay discovery, this is an exercise of the Court's
9 equitable power to manage its docket, and if you balance the
10 equities, you have -- on the one hand, if the motion to
11 dismiss is granted and we undergo all of this discovery in the
12 meantime, there's certainly a large expense that could have
13 been avoided. If, on the other hand, there's a stay of
14 discovery but the motion to dismiss is denied, the plaintiffs
15 really don't have any claim of injury from a delay of four or
16 maybe five months.

17 In fact, you know, Judge Crabb addressed a similar
18 issue in the transfer motion out of Wisconsin when the
19 plaintiffs had argued that, well, we shouldn't be transferred
20 to Minnesota because it's going to delay our case. And Judge
21 Crabb pointed out that in fact the plaintiffs had already
22 significantly delayed by waiting several years to file their
23 complaint. They had no plausible claim of injury from the
24 delay, in part because neither of those plaintiffs had bought
25 groceries from Supervalu or C&S in the last four or five

1 years, and really there is no valid claim that there would be
2 a harm from a delay of discovery, even class discovery,
3 pending the motion to dismiss. The plaintiffs have never
4 claimed, for example, that they need discovery to respond to
5 the motion to dismiss, and our motion to dismiss is going to
6 raise very threshold 12(b)(6) issues, most prominently the
7 statute of limitation, because it's Defendants' position that
8 the alleged secret agreement not to compete was an asset
9 exchange agreement between Supervalu and C&S that was
10 negotiated, consummated, and publicly disclosed in 2003, and
11 the plaintiffs here claim they were injured by that back in
12 2003.

13 We believe the Court should address those threshold
14 issues before deciding -- before getting into discovery. In
15 fact, even if the motion to dismiss isn't granted entirely,
16 the Court's ruling certainly could narrow the scope of class
17 discovery. It could change the scope of the geographic class,
18 could change the temporal scope of the proposed class.

19 Now, there's a second issue that I wanted to
20 address, which is the plaintiffs' proposal to have summary
21 judgment proceedings now as opposed to waiting until after the
22 motion to dismiss is resolved and the same considerations,
23 counsel postponing the plaintiffs' motion for *per se* summary
24 judgment until after these threshold Rule 12(b)(6) issues are
25 decided.

1 Again, the plaintiffs' motion, I know Mr. Drubel
2 believes it would streamline the case, but actually, the
3 plaintiffs' motion would still leave unresolved very
4 significant issues of antitrust injury --

5 (Audio interference)

6 THE COURT: Somebody's got a BlackBerry on or some
7 sort of handheld device we're getting feedback from. Even
8 vibrate makes it do that, so you have to turn your device
9 completely off.

10 Go ahead.

11 MR. SAFRANSKI: Okay. So on the one hand, the
12 plaintiffs' motion for *per se* summary judgment would be moot
13 if the Court grants the motion to dismiss, because the motion
14 to dismiss would be dispositive of the entirety of the
15 plaintiffs' claims.

16 On the other hand, the plaintiffs' motion for
17 *per se* liability, even if it was granted, which, you know,
18 Defendants submit is a long shot given that covenants not to
19 compete are routinely upheld as not being antitrust
20 violations -- but be that as it may, that motion would not
21 significantly streamline the case, because to decide issues
22 such as antitrust injury, you're going to have to look at the
23 market issues and whether the supposed market allocation gave
24 the defendants a sufficient market power to raise prices, and
25 that's still going to involve quite a large discovery

1 undertaking.

2 So in short, what the defendants are suggesting is
3 that we just get first things first. Let's see if this
4 complaint is time barred, let's see if the complaint can
5 survive under Twombly and Ashcroft vs. Iqbal. We'll take a
6 few months to do that and then if there's any part of this
7 case left, then we can address what discovery is needed, we
8 can address class certification issues. But we believe that
9 is the most sufficient and economic way to proceed with the
10 case.

11 THE COURT: All right.

12 MR. SAFRANSKI: Thank you.

13 THE COURT: Thank you. Let's see.

14 What do I need to hear from you on then with regard
15 to this, Mr. Drubel?

16 MR. DRUBEL: It was kind of a *tour de raison* of the
17 defendants' positions. Let me see if I can do a response
18 justice.

19 First of all, I understand that every defendant
20 would like the case to stop while they pursue their motion to
21 dismiss.

22 THE COURT: Well, Iqbal's given them a little more
23 ammunition than they've had in the past as well.

24 MR. DRUBEL: Well, the fact is that Iqbal and
25 Twombly address situations where -- Twombly in particular, for

1 example, talked about preventing, quote: "sprawling, costly,
2 and hugely time-consuming discovery" in footnote 6. That's
3 not what we're talking about. We're not proposing to do
4 anything like that.

5 The fact is there's no automatic stay of discovery
6 when a defendant files a motion to dismiss. It's not what the
7 federal rules provide and that's also -- there are a number of
8 cases that hold that, in fact, one of them cited by the
9 defendants in their letter, the Desotech case, which
10 recognizes that there's no automatic stay of discovery in an
11 antitrust case just because a defendant files a motion to
12 dismiss.

13 The fact is, here, your Honor, we were willing to
14 get some limited discovery at the very relatively outset of
15 the case in order to prepare our motion for partial summary
16 judgment and that was back in June of this year. No one
17 anticipated, I think, that Judge Schiltz would stay
18 everything, but he did, and then he denied their motion to
19 dismiss, without prejudice, but he denied it. We're now six
20 months later. We haven't -- we still don't have a motion to
21 dismiss teed up. We think it is perfectly reasonable to
22 suggest that we go ahead with some phased discovery as your
23 Honor has done in other cases, including the Qwest case, for
24 example, to address class certification.

25 Now, we're not talking about sprawling, costly, and

1 hugely time-consuming discovery for class cert to create a
2 record. I would -- while my respect for Mr. Safranski knows
3 no bounds, I would reluctantly disagree with him that we're
4 going to have to show market power. That's not the law.

5 **Indiana Federation of Dentists**, the Supreme Court case, says
6 that "proof of actual detrimental effects ... obviate[s] the
7 need for an inquiry into market power." We think we can show
8 those detrimental effects, your Honor.

9 As we've alleged in our complaint, following this
10 noncompete agreement which was hidden in their asset exchange
11 agreement -- and by the way, the claim that, oh, everybody
12 knew about the asset exchange agreement, I mean, that was
13 widely publicized, I will say this: Nothing, absolutely
14 nothing in what the defendants have shown in any filing or
15 shown us anywhere once mentions that they had a noncompete
16 agreement. So when they tee up their motion to dismiss, I
17 challenge them right now. If there's a disclosure --

18 THE COURT: Maybe they don't need to tee it up. I
19 think I've just heard both the motion and the response.

20 (Laughter)

21 THE COURT: The stay may have been lifted and maybe
22 I can just rule.

23 I do have a 3:00 o'clock, so I have to move you
24 along. We have to wrap this up.

25 MR. DRUBEL: All right, your Honor.

1 THE COURT: And I understand that there's lots to
2 be said about these issues, but I mean, I think I understand
3 what the issue is with regard to at what point does discovery
4 get going and how long before we hear the motion.

5 MR. DRUBEL: To cut to the chase, your Honor, on
6 what we would propose for the class certification discovery
7 which we would discuss them at a Rule 16 conference devoted to
8 that would be some very limited discovery on their pricing, on
9 their margins and on where they sell their products and
10 services, and most of that material should be on a computer.
11 I mean, it's not something that's -- I'm sure they have
12 schedules and periodic reports of their prices and margins.
13 They don't have to go by each individual customer and figure
14 out who paid what. What we have to do is see how they were
15 pricing their product and what their margins were, because we
16 think that both of those rose after the agreement.

17 THE COURT: Well, I take it there's no doubt that
18 we're talking e-discovery in this case.

19 MR. DRUBEL: We're talking about -- sorry, your
20 Honor?

21 THE COURT: E-discovery. We're talking about all
22 sorts of electronic information.

23 MR. DRUBEL: Not at this stage, your Honor, no.

24 THE COURT: Well --

25 MR. DRUBEL: I don't want to see -- if we're

1 successful, your Honor, if we are successful in proving that
2 this is a *per se* violation and that in fact we can show actual
3 detrimental effects by an increase in margins and prices, we
4 don't need to see all their e-mails. We don't need to do all
5 of that.

6 THE COURT: Well, of course, I suppose if they
7 prevail on their dismissal motion we don't get there either,
8 but -- all right. I think I see the --

9 MR. DRUBEL: Thank you, your Honor.

10 THE COURT: All right. Do I need to hear from any
11 other plaintiffs with regard to this issue?

12 Briefly, Mr. Meredith. You've got two minutes.

13 MR. MEREDITH: There was one other issue the
14 plaintiffs raised which was the protective order, and
15 Mr. Drubel and Mr. Kotchen averted to it earlier, that they in
16 their cases signed a protective order. There is no protective
17 order extant for the rest of the cases and we have a problem
18 with it, we've raised it. Mr. Drubel joins us in raising it.
19 We wanted to add one sentence which would simply say the party
20 who asserts the confidentiality has the burden of sustaining
21 it. It is part of the proposed stipulation and order, Form
22 Number 6, if I might give the Court a copy.

23 THE COURT: Please.

24 MR. MEREDITH: And it's also in the protective
25 order in the National Arbitration Litigation which is in this

1 district, both of them. It's simply just adding a line on
2 there that says -- for example, at paragraph 19 of the order
3 in National Arbitration, it simply adds the words -- and we
4 suggested it at paragraph 14 in the extant stipulation: The
5 party asserting that the material is confidential shall have
6 the burden of proving that the information in question is
7 within the scope of protection afforded by Federal Rule 26(c)

8 In this day and age, your Honor, unfortunately every
9 piece of paper gets stamped confidential, and I've tried these
10 cases. The more you have -- it's a nightmare, and we just
11 simply want to -- all we want to say is: Look, stamp them if
12 you want and if we want to object to it, we want you to have
13 the burden. I don't want to spend the rest of my life in
14 court chasing them to get these things unbound so that we can
15 actually go to trial in this case. I think the defendants --
16 but the defendants do not agree to that and they may have
17 changed their position. I don't know.

18 THE COURT: Have you seen paragraph 19 of the
19 National Arbitration before?

20 MR. SAFRANSKI: Your Honor, that's the first time
21 that Counsel pointed that out to us, but I'd like to address
22 that issue and then just return to a couple of things
23 Mr. Drubel discussed.

24 Really, with respect to the protective order there's
25 only two possibilities: one, the law is as the plaintiffs say

1 it is and the designating party always has the burden of
2 proof, or two, the law isn't quite as clear-cut as that.
3 Either way we don't think it's necessary to amend the
4 protective order that the parties specifically and carefully
5 negotiated and agreed on back in June to add this. If it's
6 already part of the law, it doesn't need to be added to the
7 protective order. If it's not part of the law, then it's
8 something that we should address in an appropriate motion
9 should there be a designation.

10 The other point is that when we discussed this with
11 them two days ago, we said that, you know, we could discuss
12 that, but there might be other provisions that we would want
13 to add into the protective order as well if we're going to
14 renegotiate it, and we were flat -- that idea was flatly
15 rejected.

16 What I suggest is that the Court allow the parties
17 if they want to renegotiate a protective order to have a
18 discussion and maybe there can be an agreement, but this sort
19 of take-it-or-leave-it, ram-it-down-your-throat attempt to
20 amend the protective order is really contrary to Rule 16,
21 which requires a party to show good cause if they want to
22 change the protective order.

23 With respect to Mr. Drubel's comment, I totally
24 understand what he's saying. There is no automatic stay of
25 discovery in civil litigation or in antitrust cases. You look

1 at the facts and the facts here are clear. This is a very
2 large, complex antitrust case. Class certification discovery
3 is not going to be a narrow search of pricing documents that
4 are somehow going to prove up, you know, their common impact
5 theory.

6 In fact, speaking for Supervalu anyway, the prices
7 are set individually. There are individual prices for
8 retailers and that information is not necessarily going to be
9 in some paper document. It's going to be electronically
10 stored. It would necessarily involve ESI, would necessarily
11 involve electronic discovery, and all we're saying is let's
12 take a step. Let's just take a break. Let's see if the
13 complaint makes sense. Let's see what the complaint is. We
14 haven't even seen the consolidated amended complaint. Maybe
15 the motion to dismiss will be granted, maybe it will narrow
16 the case, but either way there is a whole lot of common sense
17 and equity behind a brief stay of discovery until we can see
18 if this case can survive 12(b)(6).

19 Thank you.

20 THE COURT: All right. Have I heard everybody out
21 on things I need to hear for these threshold decisions?

22 (No response)

23 THE COURT: Apparently so. And I will try to get
24 you an order as soon as I can. As I indicated, I have some
25 complications in the next week and a half or so, but I'll

1 certainly get you something before the end of the year.

2 Thank you.

3 COUNSEL: Thank you, your Honor.

4 (Proceedings concluded at 3:00 p.m.)

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C E R T I F I C A T E

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

/s/ Timothy J. Willette

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