

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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IN RE: WHOLESALE GROCERY ) Court File No.  
PRODUCTS ANTITRUST LITIGATION ) 09-MD-2090 (ADM/AJB)  
)  
)  
) Courtroom 13 West  
) Tuesday, March 29, 2011  
) Minneapolis, Minnesota  
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H E A R I N G O N

DEFENDANTS' MOTION TO COMPEL PRODUCTION  
OF DOCUMENTS FROM PLAINTIFFS

[ DOCKET NO. 102 ]

PLAINTIFFS' MOTION TO COMPEL DISCOVERY

[ DOCKET NO. 108 ]

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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1 (1:30 p.m.)

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

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

4 THE COURT: Good afternoon. Please be seated.

5 All right. Let's note appearances for the record,  
6 please.

7 Ms. Schultz, we'll start with you.

8 MS. SCHULTZ: Yes. Kimberly Schultz from Boies,  
9 Schiller & Flexner for the plaintiffs.

10 THE COURT: All right.

11 MR. MAGNUSON: Your Honor, Kevin Magnuson, Kelley,  
12 Wolter & Scott, for the plaintiffs.

13 THE COURT: All right.

14 Back table?

15 MR. BRUCKNER: Good afternoon, your Honor. Joe  
16 Bruckner for the plaintiffs.

17 MS. ODETTE: Elizabeth Odette for the plaintiffs.

18 THE COURT: All right. And over at the defense  
19 table?

20 MR. LOUGHLIN: Good afternoon, your Honor.  
21 Charles Loughlin, Baker Botts, LLP, for defendant C&S  
22 Wholesale Grocers.

23 THE COURT: Mr. Safranski?

24 MR. SAFRANSKI: Good afternoon, your Honor. Steve  
25 Safranski, Robins, Kaplan, Miller & Ciresi, for defendant

1 SuperValu.

2 THE COURT: And Ms. Moen I know as well.

3 MS. MOEN: Good afternoon, your Honor. Nicole  
4 Moen for defendant C&S.

5 THE COURT: We have two motions to compel, one  
6 from each side, probably not coincidentally, and I think  
7 perhaps the -- let's see. Document 105 is the defendants'  
8 motion to compel and document 110 is the plaintiffs', so I  
9 guess we'll proceed with the defense motion first.

10 Mr. Loughlin?

11 MR. LOUGHLIN: Thank you, your Honor.

12 The defendants' request in this motion is simple.  
13 We want the plaintiffs to produce documents regarding their  
14 purchases of grocery products and services from all  
15 suppliers. This is essentially the same --

16 THE COURT: Now, this would not just be  
17 wholesalers, right?

18 MR. LOUGHLIN: Not just wholesalers, also  
19 specialty suppliers, farms, manufacturers, any suppliers  
20 where they buy grocery products or services. And this is  
21 essentially the same discovery that Plaintiffs are asking  
22 for from Defendants regarding their -- Defendants' sales of  
23 grocery products and services, and these documents, your  
24 Honor, are directly relevant to the definition of the  
25 relevant market.

1           The plaintiffs claim that the relevant product  
2 market in this case is full-line grocery wholesale products  
3 and services, and they say that retailers want and need a  
4 full-line wholesaler, but Defendants are entitled to  
5 discovery to test that assertion and see if it's true.

6           And the point here is very simple. The more that  
7 Plaintiffs buy from suppliers other than full-line  
8 wholesalers, the less they need to buy from full-line  
9 wholesalers, and that is central to the question of whether  
10 or not a full-line wholesaler is the relevant market or not,  
11 or whether other suppliers, other types of suppliers who  
12 sell competing grocery products and services, are  
13 competitive alternatives.

14           For example --

15           THE COURT: But isn't the relevant market that  
16 we're focusing on the wholesale grocery market?

17           MR. LOUGHLIN: Well, your Honor, the plaintiffs  
18 buy products from a number of different suppliers, including  
19 wholesalers, including specialty wholesalers, regional  
20 wholesalers, but also from -- directly from manufacturers  
21 and from other farms or manufacturers. The question is what  
22 is the relevant market here, are these other sources  
23 competitive alternatives to Defendants for products and  
24 services, because those companies do sell products that  
25 compete with the products that Defendants sell.

1           So, for example, if Plaintiffs are buying produce  
2           from a farm, that produce is displacing or at least  
3           competing with produce that could be sold by SuperValu or  
4           C&S. Those are competitive alternatives, or at least we  
5           think we have a right to discovery to determine whether or  
6           not they are viable competitive alternatives. Again, this  
7           is not a motion to decide the relevant market. It's a  
8           motion for discovery from which we can determine the  
9           relevant market.

10           And a good example of this is class plaintiff  
11           DeLuca's. DeLuca's is a small grocery store that uses C&S  
12           for supply, but it also uses a gourmet wholesaler as an  
13           additional supplier. We would like to know what do they buy  
14           from that other wholesaler, how much do they buy from that  
15           wholesaler, but also, what do they buy from other types of  
16           suppliers, are they using specialty suppliers. All of that  
17           is relevant to the question of whether or not DeLuca's  
18           actually uses C&S as a full-line wholesaler or not. It's  
19           not obvious to us that they do, but we would like discovery  
20           to find that out.

21           THE COURT: I can, I think, pretty readily  
22           understand your interest in knowing sort of the percentages,  
23           how much do they rely on the wholesale grocers for these  
24           sorts of products, and I can see some need to put this in  
25           sort of a scale of what are we talking about here with

1 regard to market niche and whatever. As to the particular  
2 types of products, the specifics of that, I have a hard time  
3 understanding why that would be relevant.

4           Would you be satisfied with knowing what  
5 percentage of their business comes from wholesale retailers  
6 and what portions come from farmers market sources,  
7 specialty sources and such?

8           MR. LOUGHLIN: I think, your Honor, we would be --  
9 certainly be willing to take that if that's what we can get.  
10 I think it's -- I think we prefer to have the actual  
11 invoices to see how much they're buying, what are they  
12 buying, how much they're paying, but certainly getting at  
13 least the percentages, that information would be very  
14 helpful, because right now we don't have any.

15           THE COURT: All right.

16           MR. LOUGHLIN: Thank you, your Honor.

17           THE COURT: Ms. Schultz, I'm guessing -- no,  
18 Mr. Bruckner. I was guessing based on your proximity to the  
19 lectern you were going to respond.

20           MR. BRUCKNER: Thank you, your Honor.

21           THE COURT: Mr. Bruckner.

22           MR. BRUCKNER: Joe Bruckner for the plaintiffs.

23           Your Honor, let's first make sure we're all on the  
24 same page here. We've agreed to produce information about  
25 our purchases from all wholesalers, not just full-line,

1 full-service wholesalers like the defendants are, but from  
2 all wholesalers.

3 THE COURT: That would be competitors of the  
4 defendant.

5 MR. BRUCKNER: Arguably so.

6 THE COURT: Okay.

7 MR. BRUCKNER: And our initial position was -- the  
8 defendants themselves say that their competition is  
9 full-line, full-service, and in the course of discovery  
10 conferences we agreed with the defendants to expand the  
11 scope of discovery to all wholesalers, not limit it to  
12 full-line, full-service wholesalers, but to expand it to  
13 all, partial wholesalers, beyond what the defendants  
14 themselves do.

15 THE COURT: I understand we have a lot of  
16 retailers as class members.

17 MR. BRUCKNER: Correct.

18 THE COURT: Do you have any sense of what  
19 percentage of the business roughly the mean class member  
20 might have in terms of -- so that I can have a sense, what  
21 are we talking about? Does 90 percent of the business of --  
22 the things in grocery stores come from wholesalers and ten  
23 percent, or is it 50-50, or give me a sense of what we're  
24 talking about.

25 MR. BRUCKNER: I hesitate to commit, your Honor,

1 because I don't know specifics, but my sense is that it is a  
2 small proportion that does not come from the full-line  
3 wholesalers.

4 THE COURT: So you think the lion's share of the  
5 things that are in the retail grocery stores comes from  
6 wholesalers?

7 MR. BRUCKNER: That's my belief, your Honor.

8 THE COURT: All right.

9 MR. BRUCKNER: But what we are talking about on  
10 this motion is, Defendants want information about our  
11 purchases from every supplier, from specialty bakeries to  
12 local truck farms, from Coke and Pepsi and other entities  
13 from whom we can only buy directly. That's the only way we  
14 can get certain products. Coke, Pepsi, Frito-Lay are good  
15 examples. Frozen pizza is another good example, milk is  
16 another example. That's how you get those products from  
17 those manufacturers. And they want information regarding  
18 accountants and ad companies, and the question really is  
19 where do you draw the line, where do you draw the outer  
20 boundary on the scope of relevant discovery. We say these  
21 nonwholesaler specialty suppliers just aren't part of any  
22 relevant market because they don't compete with the  
23 defendants.

24 Now, for starters, we disagree that defining a  
25 relevant product market is even appropriate in this case and

1 especially not on a discovery motion. We've said and we're  
2 going to argue that the defendants' agreements not to  
3 compete for each other's customers are a *per se* violation  
4 of the Sherman Act, or at the very least they're entitled to  
5 a quick-look analysis, and therefore definition of a  
6 relevant product market is not required. We think this  
7 motion is more about getting the Court in the frame of mind  
8 of seeing this as a rule-of-reason case, and we're just not  
9 there and it's certainly something that ought not to be  
10 decided on a discovery motion.

11 But if you do assume that relevant product market  
12 is appropriate in this case, then the scope of discovery  
13 ought to be defined, first of all, by how the defendants  
14 themselves see this market and who the plaintiffs could turn  
15 to as reasonable alternatives for supplying the goods and  
16 services that Plaintiffs buy from the defendants.

17 I'd like, your Honor, if I could, to hand up one  
18 exhibit. It's pertinent to know how the defendants  
19 themselves see the market and how they define their  
20 competition, because as the court in the FTC vs. Cardinal  
21 Health case noted -- and we cited that in our brief -- the  
22 definition of a relevant market is a matter of business  
23 reality, and that is of how the market is perceived by those  
24 who strive for profit.

25 What I've handed up, your Honor, are excerpts from

1 the defendants' own supply agreements to our clients and  
2 other retailers. We've excerpted C&S's trade discount  
3 rebate agreement on the left-hand side and SuperValu's on  
4 the right. They're essentially identical if you look  
5 through them, but there are three provisions that I want to  
6 point out here that are present in each one of the  
7 agreements.

8 First, Section 1.3 of each agreement says, in a  
9 nutshell, that the wholesaler -- that's C&S or SuperValu --  
10 will be deemed competitive unless the retailer gets a better  
11 offer from another supplier, better offer in terms of price,  
12 terms, what have you.

13 The next section, 4.1 in the case of C&S and 5.1  
14 in the case of the SuperValu agreement, tells the retailer  
15 what to do if it comes across a circumstance where it  
16 doesn't think that C&S or SuperValu is being competitive,  
17 and in a nutshell, they're to notify the wholesaler in  
18 writing, they're to provide documentation of the other  
19 better offer that they got from another supplier.

20 Now, who's the other supplier that they're talking  
21 about? That's defined in each agreement too and each one  
22 defines that other supplier as a competing, independent,  
23 full-service, full-line grocery wholesaler. It specifically  
24 excludes retail chains. It specifically excludes in-house  
25 distribution systems. So that's pertinent, that the

1 defendants themselves consider their competition to be  
2 full-line, full-service grocery providers, grocery  
3 wholesalers.

4 Second, your Honor, consider what alternative  
5 suppliers the plaintiffs could turn to to provide reasonable  
6 substitutes for what they get from the defendants. That too  
7 is pertinent. The Supreme Court said in Brown Shoe that the  
8 outer boundaries of a relevant product market are determined  
9 by the reasonable interchangeability of goods and services.

10 Now, remember, the other wholesalers, the partial  
11 wholesalers, they're off the table. We've already agreed to  
12 produce information on that, so that's not at issue here.  
13 What we're talking about now are the nonwholesale specialty  
14 suppliers. They are suppliers of fresh produce, they're  
15 local truck farmers, they're specialty bakeries. None of  
16 these nonwholesale suppliers are a reasonable substitute for  
17 the goods and the services that the defendants offer.

18 If the plaintiffs and the class members had to  
19 turn to these alternatives as a substitute for the goods and  
20 services they get from the defendants, they'd be out of  
21 business in a month. It is not realistic to expect a  
22 retailer who's trying to run a grocery store as an  
23 alternative to buying from a wholesaler to cobble together  
24 its own network of suppliers and to invest the time, the  
25 business interruption, the transportation costs of dealing

1 with who knows how many different suppliers as a reasonable  
2 substitute for what they get from the defendants. It's just  
3 not feasible and it's just not a reasonable substitute.

4 Finally, your Honor, if this really is relevant in  
5 this case -- and we strenuously argue that it's not --  
6 there's no question that the defendants have much better  
7 access to much better market data on this particular  
8 question than they are going to get from obtaining purchase  
9 information from five plaintiffs who happen to be class  
10 representatives in this case. If they want to do a market  
11 study on this issue, they've got access to that data and  
12 it's going to be a lot more comprehensive than what they're  
13 going to get from the plaintiffs here.

14 THE COURT: All right.

15 MR. BRUCKNER: Thank you, your Honor.

16 THE COURT: Mr. Loughlin, I'll give you the final  
17 word as the maker of the motion here.

18 MR. LOUGHLIN: Your Honor, just a few points.

19 In terms of the percentage of sales that come from  
20 wholesalers, I don't have exact numbers on that, but we did  
21 cite as an exhibit a study done by a grocery marketing  
22 association that said that direct store delivery, meaning  
23 deliveries from -- directly from manufacturers to retail  
24 stores can have up to 30 percent of a retailer's sales.

25 Second --

1 THE COURT: That's sort of an across-the-board  
2 generic. That's not plaintiff-based here, right, this is  
3 just retail grocers generally?

4 MR. LOUGHLIN: In general.

5 THE COURT: That's fine.

6 MR. LOUGHLIN: On the supply agreements, the C&S  
7 agreement that Mr. Bruckner put up is not a supply  
8 agreement. It is a rebate agreement. It is a holdover from  
9 a previous agreement with SuperValu. It is not a supply  
10 agreement. C&S's supply agreements do not contain language  
11 designating other suppliers as their primary or otherwise  
12 their competitors. The SuperValu supply agreement does  
13 contain the language that Mr. Bruckner indicated.

14 What SuperValu does when it negotiates supply  
15 agreements is that it tries to negotiate a purchase  
16 commitment from the retailer in terms of a portion of their  
17 sales that they're going to buy from SuperValu in exchange  
18 for various concessions that SuperValu makes. In doing  
19 that, SuperValu is competing against all other suppliers who  
20 can supply that portion of sales, not just against full-line  
21 wholesalers, but against everybody.

22 Now, there is a provision in terms of  
23 competitiveness that says that a retailer can modify that  
24 purchase commitment if a full-line wholesaler offers  
25 materially better terms, but that does not in any way

1 suggest that those are the only competitors to SuperValu or  
2 for any other wholesaler.

3 Finally, your Honor, it is absolutely not the case  
4 that all retailers who are in the class can only use  
5 full-line wholesalers or wholesalers generally, Target, for  
6 example. We cited an article as an exhibit to our papers.  
7 Target extensively uses self-distribution methods, uses C&S  
8 for a very limited amount of products, such as frozen  
9 products, but nothing else, the same with SuperValu. So  
10 there are class members or putative class members who have  
11 very different circumstances in terms of how much they buy  
12 from wholesalers at all or full-line wholesalers and how  
13 much they buy from other sources.

14 And with regard to -- as I mentioned, DeLuca's  
15 uses a specialty wholesaler. We have not -- despite what  
16 Mr. Bruckner says, we have not been provided with any  
17 documentation whatsoever regarding their sales from the  
18 alternative wholesale grocers.

19 THE COURT: Okay. I think I understand the  
20 outlines at least of that issue, so let's move on to the  
21 issue with regard to the plaintiffs' motion as well.

22 Ms. Schultz, it looks like you do have the  
23 laboring oar on that.

24 MS. SCHULTZ: Kimberly Schultz for the plaintiffs.

25 Your Honor, Plaintiffs have moved to compel two

1 categories of information relative to the claims and  
2 defenses in this case, and specifically we moved the  
3 defendants to identify and produce all agreements with other  
4 grocery wholesalers which either swap or exchange assets or  
5 contain any agreement not to compete, not to supply  
6 customers or not to solicit customers.

7 We have also moved the defendants to produce all  
8 documents concerning communications between the defendants  
9 relating to wholesale grocery products and services, but  
10 excluding documents concerning communication between one  
11 defendant and a retailer owned by the other defendant.

12 And, your Honor, we have been working with the  
13 defendants to try to narrow these requests to exclude any  
14 documents that they have told us about that they don't  
15 believe are relevant. We believe that what's left are  
16 clearly relevant, starting with the first category of  
17 information, which are Defendants' agreements with other  
18 wholesalers to swap assets or agree not to compete. These  
19 agreements are relevant to testing the defendants' claims in  
20 support of their defenses in this case.

21 Specifically, Defendants contend that their  
22 noncompete agreement should be examined under a  
23 rule-of-reason analysis. And under a rule-of-reason  
24 analysis, your Honor, a court must consider the facts  
25 peculiar to the business to which the restraint is applied,

1 the history of the restraint, the evil believed to exist,  
2 the reason for adopting the particular remedy, the intent  
3 and effect of the practice challenged, and whether the  
4 restraint imposed is justified by legitimate business  
5 purposes and is no more restrictive than necessary.

6 Defendants, your Honor, have already claimed,  
7 number one, in support of their defenses, that noncompete  
8 agreements are commonly included in asset swaps. They've  
9 also claimed that their reason, purpose and intent for  
10 entering into the noncompete agreement was to protect the  
11 value of Defendants' assets. So, discovery of Defendants'  
12 agreements with other competitors, other grocery  
13 wholesalers, to exchange assets or agree not to compete will  
14 help us test these claims. It will help us test whether the  
15 noncompete agreements are in fact garden variety provisions  
16 and agreements as Defendants claim, whether the noncompete  
17 agreements are usual and necessary in order to preserve the  
18 value of the assets, and whether the noncompete in this case  
19 is no more restrictive than necessary.

20 And contrary to Defendants' argument, just because  
21 Plaintiffs have not located a case in which the court has  
22 addressed discovery of similar agreements in a noncompete  
23 case doesn't mean it's not relevant. I mean, they haven't  
24 cited anything to the contrary, and in fact, it's probably  
25 because these documents are so clearly relevant that we

1 haven't seen a reported case.

2 Also, just quickly, I don't think these may be  
3 burdensome to produce. The defendants have given no  
4 indication if there's a lot of agreements that they've  
5 entered into with their competitors in which they've swapped  
6 assets or agreed not to compete, and all of the agreements  
7 that they have produced in this case to date have come from  
8 the files of the legal department, so most likely they could  
9 start there and probably identify and produce all of the  
10 documents from looking in their legal department files.

11 Now, your Honor, I'd like to turn to our second  
12 request, which is, we've asked -- we're moving to compel the  
13 defendants to produce all documents concerning  
14 communications between themselves relating to wholesale  
15 grocery products and services.

16 Your Honor, Plaintiffs have alleged that  
17 Defendants conspired with one another to allocate customers  
18 and territories in the sale of wholesale grocery products  
19 and services. As co-conspirators, all communications  
20 concerning wholesale grocery products and services are  
21 relevant to our understanding of Defendants' agreement not  
22 to compete and the claims and defenses in this case.

23 I mean, basically, these are the two -- they are  
24 the two largest grocery wholesalers in the United States,  
25 your Honor, and we don't believe that there should be that

1 many communications between the two. And it's very  
2 important for us to understand what were they talking about  
3 before they entered into the Asset Exchange Agreement. Were  
4 they talking about competition in New England and the  
5 Midwest? Had they talked about how to increase  
6 profitability? Had they talked about less restrictive ways  
7 to address competition or inefficiencies in these areas that  
8 they chose not to engage in here? Simply asking for  
9 documents related to the Asset Exchange Agreement would  
10 likely overlook these documents, because perhaps they don't  
11 mention the Asset Exchange Agreement. You know, Plaintiffs  
12 should not have to depend on Defendants' lawyers for a close  
13 reading of which communications relate to the Asset Exchange  
14 Agreement or which do not. In fact, your Honor, courts have  
15 allowed discovery of all communications between  
16 co-conspirators in antitrust cases.

17 For example, in the In re Mushroom Direct  
18 Purchaser antitrust litigation, the court noted that it  
19 allowed discovery of all communications between defendants  
20 and co-conspirators there. Now, Defendants will argue that  
21 in that case they believe that the court did so to establish  
22 the existence of a conspiracy, but that's just their own  
23 presumption. The court did not explain why it had allowed  
24 that discovery. But if the Defendants' argument were true,  
25 then the court would have limited those communications to

1 mushrooms, but it didn't.

2           Additionally, the cases that Defendants cite in  
3 support of their argument that we should not be allowed  
4 discovery of all communications between the defendants, none  
5 of them are conspiracy cases between competitors. Instead,  
6 all of the cases that they cite, almost all of them, involve  
7 communications between, like, in a breach-of-contract claim  
8 where it's between noncompetitors, and it may -- like, for  
9 example, one of them was between a provider of lease  
10 employees in its insurance company, so they are entities or  
11 persons that are normally and routinely engaged in  
12 communicating with each other. They're not competitors,  
13 they're not the two largest competitors communicating with  
14 each other, and so we would say that those are not relevant.

15           Finally, with respect to the burden claim in  
16 producing these communications, your Honor, as I said  
17 earlier, there should not be a lot of communications between  
18 the two largest defendants. Also, we wouldn't think that  
19 the search would be unduly burdensome. We would imagine  
20 that there are probably only a handful of people at each of  
21 the defendants that is -- that has the authority to  
22 communicate with the competitor, and at least at the minimum  
23 they should be able to search the same custodians that  
24 they're searching for documents that are responsive in this  
25 case for these communications.

1 THE COURT: Okay. I think I understand your  
2 position.

3 Mr. Safranski, are you the respondent on that  
4 argument?

5 MR. SAFRANSKI: Yes, I will take the laboring oar.  
6 Thank you.

7 Your Honor, as the Court is probably well aware,  
8 this is a case about a specific written Asset Exchange  
9 Agreement that was entered into eight years ago, and the  
10 focus of this case is on the ancillary restrictive covenants  
11 in that specific agreement which applies to a specific list  
12 of stores that were involved in the asset exchange. The  
13 ultimate issue that the Court's going to have to decide in  
14 this case is whether those ancillary restrictive covenants  
15 were reasonably ancillary restraints, and to the extent  
16 whether, if at all, there was any effect on the relevant  
17 markets, part of which is what Mr. Loughlin just addressed a  
18 few minutes ago. We believe the discovery in this case  
19 should be focused on those issues.

20 And just to be clear, we've produced the Asset  
21 Exchange Agreement. We've produced all the related  
22 agreements and proposed agreements that led up to it. We've  
23 produced all the communications that led up to the Asset  
24 Exchange Agreement. There's tens of thousands of documents  
25 we've already produced. We've produced documents regarding

1 each defendant's motivations and reasons for entering into  
2 the transaction. C&S has produced all of its agreements  
3 with other wholesalers that involve the Fleming assets that  
4 it purchased from Fleming out of bankruptcy and then sold to  
5 other wholesalers out around the country. And we've  
6 produced masses of thousands of documents discussing  
7 markets, pricing, competition, and so on. And we're in the  
8 process of producing billions of lines of data involving our  
9 sales. But neither the plaintiffs' demand for unrelated  
10 agreements with other wholesalers nor their omnibus demand  
11 for every communication involving the wholesale business are  
12 remotely calculated to uncover relevant information.

13 Now, with respect to the request for other  
14 agreements, I think there is a clear-cut difference in views  
15 between the two sides. The defendants want the discovery to  
16 focus on the reasonableness and the alleged effects of the  
17 transaction at issue in the case. What the plaintiffs want  
18 to do is, they want to open discovery into an examination of  
19 all the other unrelated agreements with other wholesalers on  
20 two stages. First, they want to see what the agreements  
21 are, and then following on that they want all the due  
22 diligence, all the communications, all the people involved  
23 with those other agreements.

24 And I believe the idea behind the plaintiffs'  
25 approach -- and we heard some of that from Ms. Schultz's

1 arguments -- is that they want to open this case up into a  
2 bunch of collateral issues about did this agreement have a  
3 noncompete in it, did this agreement have a noncompete in  
4 it, what were the reasons for the noncompete in this  
5 agreement or why didn't they have a noncompete in that  
6 agreement. And the plaintiffs try to do that by arguing  
7 that, well, it's all relevant under the rule of reason,  
8 because under the rule of reason you look at the history,  
9 nature and effect of the restraint at issue to evaluate  
10 whether it's reasonable. But those cases are talking about  
11 the history, nature and effect of the agreement in question,  
12 not all noncompetes that have been entered throughout  
13 history and certainly not all the noncompetes that the  
14 defendant has ever entered with other people in the same  
15 business.

16 And as I mentioned, we've produced fulsome  
17 discovery about the history, nature and intent behind this  
18 agreement already in discovery. Nothing in the rule of  
19 reason says that you need to go through discovery of all the  
20 unrelated transactions with every other defendant.

21 You know, it's interesting. Plaintiffs point to  
22 the idea that the rule of reason requires specific  
23 information about the relevant business, and they quote the  
24 **Craftsmen Limousine** case to say that, but that phrase is not  
25 a blank check to get discovery on anything that might pique

1 an attorney's curiosity.

2 Now, the noncompete cases cited in our briefs,  
3 every single one of them, we have not found any that  
4 involved an examination of the defendant's other agreements  
5 with other parties to decide whether the noncompete was  
6 ancillary or whether it was reasonable, and the plaintiffs  
7 haven't cited any either.

8 And that leads to the second Plaintiffs' argument,  
9 that we somehow opened the door by arguing that in fact  
10 courts routinely uphold noncompetes in the sale of a  
11 business.

12 Now, Plaintiffs seem to be misreading our  
13 argument. We're not saying that the noncompetes at issue in  
14 this case are legal because the defendants do them with  
15 other parties. We're saying they're legal because they're  
16 reasonable in the context of this transaction and because  
17 courts in the Eighth Circuit and throughout the United  
18 States consistently uphold noncompetes entered in the sale  
19 of a business against an antitrust challenge.

20 So, in short, we don't see any basis to open this  
21 case up to an examination of every other possible noncompete  
22 that might be out there or every other asset transaction  
23 that might be out there. We think the case, the discovery  
24 in this case, should be focused on the transaction at issue.

25 Second, the problem with the request for all

1 documents concerning all communications or proposed  
2 communications between the defendants is that there is  
3 simply no parameters on the scope of that request. The  
4 problem isn't that that request isn't going to yield some  
5 relevant documents. In fact, we've already produced many,  
6 many hundreds and hundreds of communications between the  
7 parties, between the defendants, that led up to and  
8 otherwise relate to the asset exchange transaction. The  
9 problem is that without any subject matter limitations to  
10 guide the search, it's going to be overly broad on its face.

11 Now, the plaintiffs say, well, this case is  
12 different because it involves a conspiracy and that means  
13 that every communication between the defendants is  
14 discoverable.

15 And I see here -- they didn't cite this in their  
16 brief, but they cite the Potash case as one example. I was  
17 a clerk on that case, and that case, like the other case  
18 cited in their brief, the Mushroom case, involved a question  
19 of whether there was a conspiracy. And when you have a case  
20 involving the question of whether there is an agreement,  
21 you're going to necessarily look more broadly at  
22 communications to see what circumstantial evidence can be  
23 pieced together to create the outlines of some agreement  
24 that you want to challenge. In this case the agreement is  
25 black and white. We've produced it, we know exactly what it

1 says, we know exactly what its terms are. The question now  
2 is whether that agreement was reasonable and whether it had  
3 any improper effect on competition.

4 And with respect to burden, there is actually a  
5 burden in searching for all communications without  
6 restriction between the two companies. You know, they  
7 described the history of how this played out in our  
8 negotiations and what they want to do is say: You give us  
9 everything and we'll put the burden on you to come back and  
10 say go out and find all the irrelevant communications. Tell  
11 us what they are so that we can exclude them from discovery.  
12 We've told them in the meet-and-confer process that in fact  
13 SuperValu, 90 percent of its business is the retail  
14 business. It owns, for example, Cub, it owns chains  
15 throughout the United States. That retail business buys  
16 groceries from C&S. It has stores in New England that buy  
17 groceries from C&S. They have a business relationship  
18 that's a vertical relationship. There are numerous  
19 communications in the ordinary course of business. Now, I  
20 understand Plaintiffs to say: Well, you can just exclude  
21 that. Don't search for it. The problem is that you're  
22 still -- in searching for communications, you're still going  
23 to have to filter through a lot of irrelevant  
24 communications.

25 Lastly, I understood Ms. Schultz to say that what

1 they really want are the communications from before the  
2 asset exchange that led up to it, and as far as I know --  
3 and Chuck Loughlin can correct me if I'm wrong -- we have  
4 done a complete search for the custodians that we believe  
5 were involved in the asset exchange, and we've done a  
6 complete search for all of the communications that led up to  
7 the transaction and we've produced or substantially produced  
8 those communications. If that's what the plaintiffs want,  
9 they already have it.

10 THE COURT: All right.

11 Ms. Schultz, I'll give you an opportunity to  
12 respond. I guess I'd like you to start with Mr. Safranski's  
13 last point.

14 If it's things that preceded the asset transfer  
15 agreement, don't you have those already?

16 MS. SCHULTZ: Well, they have agreed to produce  
17 all documents relevant to the Asset Exchange Agreement or  
18 related to the Asset Exchange Agreement, the negotiations  
19 and what have you. I don't know if we've gotten all of the  
20 documents. They definitely -- I didn't hear them say that  
21 they were producing all of the communications between the  
22 defendants regardless of what they're talking about before  
23 the Asset Exchange Agreement.

24 THE COURT: I'm focused more on, I guess, the  
25 temporal connection there than the subject matter.

1 MS. SCHULTZ: Okay.

2 THE COURT: The exchanges of information prior to  
3 the transfer or the asset purchase agreement, do you have  
4 those, do you think, or not?

5 MS. SCHULTZ: We have seen -- probably a month or  
6 two months leading up to the agreement, we've seen  
7 communications, some e-mails between the defendants, so we  
8 have seen those, but have they produced all of them? I  
9 don't know.

10 THE COURT: Okay. All right. I think I  
11 understand the parameters of that.

12 All right. I think there's another issue posed in  
13 your letters that arrived yesterday, I think, of issues with  
14 regard to the timing of the -- I guess I didn't grab that  
15 set of letters.

16 Are we still -- as I understand the issue after  
17 looking at these briefly, the plaintiffs seek a little bit  
18 more of a loosey-goosey timetable, that it wouldn't begin  
19 until you receive discovery rather than finite dates.  
20 That's probably an oversimplification, but do you want to  
21 tell me where you are on getting that resolved?

22 MS. SCHULTZ: Yes, your Honor.

23 We have asked specifically and identified to the  
24 defendants three specific categories of information that we  
25 need in order to prepare our class certification motion, and

1 these are all -- and these are set forth in our letter to  
2 your Honor on March 25th, and they are documents sufficient  
3 to show how the defendants set prices for wholesale grocery  
4 products, some basic transactional information, and  
5 defendants' margins. And we need -- again, these are  
6 documents sufficient to show, so we're not asking for all  
7 documents related to these things. We need the documents  
8 sufficient to show and we need three months from the  
9 completion of this discovery in order to compile it, analyze  
10 it, take depositions and prepare our class cert motion. So  
11 we have asked Defendants for a date by which this might be  
12 completed and they have been able to  
13 provide -- first they thought maybe they'd be completed in  
14 March, and we said, well, if that's true, then we could file  
15 our --

16 THE COURT: Now they're saying mid-April.

17 MS. SCHULTZ: Yes, ma'am. Yes, your Honor. And  
18 now, when they're talking about substantially complete, we  
19 have some real concerns. We just want to make sure that  
20 everybody's cards are out on the table and your Honor is  
21 understanding what we need and what the defendants are  
22 promising to provide.

23 Defendants haven't told us what they meant by  
24 substantially complete. If it just means, basically, we'll  
25 produce all these documents sufficient to show these three

1 categories of information except for a handful of  
2 stragglers, that's fine. We don't expect them to be  
3 perfect. But, you know, if they are not going to be  
4 producing some critical components of these documents, I  
5 mean, that could be a problem for us.

6 THE COURT: Okay. I think I understand your  
7 position.

8 Mr. Safranski, I'll give you a chance to respond  
9 to that.

10 MR. SAFRANSKI: I'll give it a shot. Thank you.

11 Your Honor, all along we've given Plaintiffs our  
12 best estimate as to when we would, in our words,  
13 substantially complete the three categories of documents,  
14 and we've been willing to give the plaintiffs an extension  
15 of the class certification deadline. We offered it. We  
16 first offered it to the end of May. Then they said they  
17 need more time. We said, okay, June 30th. How about that?  
18 Then they said: We need more time. We said how about  
19 July 15th, and now they're proposing August 15th. We're  
20 willing to work with them on dates --

21 THE COURT: When can you get them the rest of this  
22 information?

23 MR. SAFRANSKI: Well, I think -- you know, we're  
24 expecting to be substantially complete -- and I'll explain  
25 what that means in a minute -- probably by the middle of

1 April. That's our best estimate. And when I say  
2 "substantially complete," here's what I mean, and I think I  
3 can best explain it by using one of the plaintiffs' requests  
4 as an example. They say -- their Requests Number 7 through  
5 10 want, quote, basic information. So Request Number 7 asks  
6 for, quote: "Documents sufficient to show, in electronic  
7 form where available, price per unit sold net of any price  
8 adjustments, e.g., rebates, discounts, returns, for  
9 wholesale grocery products and services by product or  
10 service, by region, by distribution facility, by customer  
11 and by date on a per-transaction basis in the Midwest and  
12 New England from January 1, 2001 through December 11, 2009."

13 Now, we're doing our best to extract that type of  
14 data and part of it involves identifying, well, what  
15 customers does this data pertain to. Originally, we were  
16 going to offer to give them the customers in the Midwest and  
17 New England states identified in their complaint. Their  
18 request as originally framed had defined those terms in such  
19 a way that would include almost every customer in the  
20 country, so we've negotiated that down, but there's still  
21 the process of identifying the stores that are going to  
22 be -- that we have to produce data for and getting them that  
23 data.

24 THE COURT: Well, let me cut to the chase here a  
25 little bit --

1 MR. SAFRANSKI: Sure.

2 THE COURT: -- because I'm kind of getting more  
3 information than I want, I think.

4 If I gave you till the end of April -- I  
5 understand April 15th is coming up pretty fast, but if I  
6 gave you till the end of April, shouldn't you be able to  
7 get, I mean, really very close to complete? If there's an  
8 item or two that's hanging out there, you know, I'm not --  
9 but it seems to me --

10 MR. SAFRANSKI: I think that's true, but I guess  
11 what I'm saying is that if a customer -- if some chunk of  
12 data is left out because one store was misidentified, it's  
13 going to be more than just a few documents. It would be  
14 lots and lots of data.

15 THE COURT: Well, I'll look to the character and  
16 the nature of what comes after that April 15th deadline, but  
17 I think that you should get done -- and I mean the huge  
18 percentage of it.

19 MR. SAFRANSKI: Yes.

20 THE COURT: A few little straggler pieces of  
21 information, that's not a problem. When you get it, turn it  
22 over. But let's get that done by April 30th. Then if we  
23 work backwards from there, can't the plaintiffs have their  
24 motion for class certification by about August 30th? Isn't  
25 that a fair time?

1 MS. SCHULTZ: Yes, your Honor.

2 THE COURT: Okay. And then that would bump the  
3 defendants' opposition to the certification to mid-November,  
4 about 15 more days on that, and then the reply to that by  
5 the end of the year, so December 30th. Can you all live  
6 with that as a time table?

7 MS. SCHULTZ: Yes, your Honor.

8 THE COURT: All right. I don't intend to issue a  
9 formal order on that timeline. I think I've made that  
10 clear. We'll take the two motions to compel under  
11 advisement. I do intend to turn them around pretty quickly.

12 I would like the defendants' permission to confer  
13 with Mr. Magnuson on a matter totally unrelated to this case  
14 for a few minutes concerning my frustrations with his  
15 father.

16 (Laughter)

17 THE COURT: His father's humility I'm having a  
18 problem with. If I could just chat with you at side bar for  
19 a moment.

20 If you're worried, you can come listen to the  
21 conversation if you want to.

22 (Discussion off the record at the bench between  
23 the Court and Mr. Magnuson)

24 (Proceedings concluded at 2:10 p.m.)

25 \* \* \* \* \*

**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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