

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

Elkhorn-Lueptows, Inc., Jefferson Lueptows, Inc., East Troy Lueptows, Inc., and Nemecek Markets, Inc., Plaintiffs, v. C&S Wholesale Grocers, Inc., Defendant.	Civil Action No. _____ CLASS ACTION COMPLAINT JURY TRIAL DEMANDED
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1. This is an antitrust case in which the two largest full-line wholesale grocers in the United States, SuperValu Inc. (“SuperValu”) and C&S Wholesale Grocers, Inc. (“C&S” or “Defendant”), secretly agreed to allocate customers and territories in their respective home markets: (1) the Midwest, where SuperValu is headquartered and which it calls its “heartland operations,” and (2) New England, where C&S is headquartered and its business is concentrated. C&S and SuperValu accomplished this through a sham “Asset Exchange Agreement,” which purported to exchange all of C&S and SuperValu’s distribution facilities and customer contracts in New England and the Midwest, respectively. However, all of the distribution facilities “exchanged” by C&S and SuperValu were shut down by C&S and SuperValu at or shortly after the “Asset Exchange Agreement” closed. C&S and SuperValu in fact had no intention of operating the distribution facilities they “exchanged” with each other – indeed, SuperValu had decided to shut down the Midwest facilities it was to receive from C&S even before the

“Asset Exchange Agreement” had closed – a fact which Defendant concealed from the Federal Trade Commission (the “FTC”), from their customers and from the public.

2. As part of their “Asset Exchange Agreement,” C&S and SuperValu also secretly agreed not to compete with each other with respect to the New England and Midwest customers they exchanged. The net effect was simply a naked agreement between competitors not to compete for over a thousand customers in New England and the Midwest. C&S and SuperValu’s “Asset Exchange Agreement” is thus more accurately described as a “Customer and Territorial Allocation Agreement” given the reality of the transaction.

3. C&S and SuperValu’s illegal customer and territorial allocation has caused substantial harm to competition. As a result of C&S and SuperValu’s illegal agreement, Plaintiffs and class members have been injured in their business or property in that prices for full-line wholesale grocery goods and related services purchased by Plaintiffs and class members have been artificially inflated and capacity and output for full-line wholesale grocery goods and services have been artificially reduced.

4. SuperValu’s October 21, 2009 10-Q SEC filing revealed that on September 14, 2009, the FTC issued a subpoena to SuperValu for documents relating to the “Asset Exchange Agreement” as part of the FTC’s investigation into whether SuperValu and C&S engaged in unfair methods of competition.

5. Plaintiffs’ causes of action arise from the same nucleus of operative facts as those alleged in *In re: Wholesale Grocery Prods. Antitrust Litig.*, No. 09-md-02090 ADM/TNL (D. Minn.) (“MDL No. 2090”).

The Parties

6. Plaintiffs Elkhorn-Lueptows, Inc., Jefferson Lueptow's, Inc., and East Troy Lueptows, Inc. (collectively "Lueptows") are Wisconsin corporations with their principal places of business in Elkhorn, Wisconsin. Lueptows operates retail grocery stores in Wisconsin and paid Activity Based Sell ("ABS") fees on wholesale grocery products in all four SuperValu ABS product lines (grocery, dairy, frozen and general merchandise/health and beauty care products) purchased directly from SuperValu's Pleasant Prairie distribution center during the Class Period (December 31, 2004 through September 13, 2008). Lueptows did not have an arbitration agreement with C&S.

7. Plaintiff Nemecek Markets, Inc. ("Nemecek") was a Wisconsin corporation with its principal place of business in Green Bay, Wisconsin. Nemecek operated a retail grocery store in Wisconsin and paid ABS fees on wholesale grocery products in all four SuperValu ABS product lines (grocery, dairy, frozen, and general merchandise/health and beauty care products) purchased directly from SuperValu's Green Bay distribution center during the Class Period (December 31, 2004 through September 13, 2008). Nemecek did not have an arbitration agreement with C&S.

8. Co-conspirator SuperValu is a Delaware corporation with its principal place of business in Eden Prairie, Minnesota. SuperValu is a full-line grocery wholesaler with revenues in 2009 in excess of \$9 billion. SuperValu is the second largest full-line grocery wholesaler by dollar volume in the United States, supplying approximately 5,000 stores from distribution centers in 21 states.

9. Defendant C&S is a Vermont corporation with its principal place of business in Keene, New Hampshire. C&S is a full-line grocery wholesaler with revenues in 2009 in excess of \$19 billion. C&S is the largest full-line grocery wholesaler by dollar volume in the United States, supplying approximately 5,000 stores from distribution centers in 12 states.

Jurisdiction, Venue and Interstate Commerce

10. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1337(a) (commerce and antitrust regulation), because certain claims in this action arise under Section 1 of the Sherman Act (15 U.S.C. § 1) and Section 4 of the Clayton Act (15 U.S.C. § 15(a)).

11. Venue in this District is proper pursuant to 28 U.S.C. § 1391(b) and (c) and 15 U.S.C. § 15 in that Defendant C&S resides in this District, and a substantial part of the events giving rise to Plaintiffs' claims occurred in this District, as acknowledged by Defendant C&S in its motion to transfer venue to the District of Minnesota in a related case (*D&G Inc. v. SuperValu, Inc.*, No. 08-C-761 (Feb. 6, 2009 W.D. Wisc.) (e.g., admitting that: C&S would be subject to personal jurisdiction in Minnesota, the "Asset Exchange Agreement" was negotiated by representatives of SuperValu and C&S at SuperValu's headquarters in Eden Prairie, Minnesota, and nearly all SuperValu personnel involved with the "Asset Exchange Agreement" with C&S were located in Minnesota and worked out of its Eden Prairie headquarters).

12. Defendant's anticompetitive activities were within the flow of, and had a proximate, direct, substantial and reasonably foreseeable effect on, interstate commerce.

The Wholesale Grocery Industry

13. Grocery wholesalers purchase products directly from consumer goods manufacturers, store the products in distribution facilities and then resell the products to grocery retailers like Plaintiffs. Grocery wholesalers also provide related services such as transportation, administrative and other services. Some wholesalers, including C&S and SuperValu, specialize in providing a “full line” of grocery products and related services to grocery retailers. Full-line grocery wholesalers stock tens of thousands of different products, including produce, meat, dairy products, deli products, bakery items, health and beauty aids and candy.

14. Leading full-line wholesalers (including C&S and SuperValu) serve multi-state areas through a network of distribution centers and trucking fleets.

15. Full-line grocery wholesalers compete for retail accounts principally on the basis of price and service. Prices that grocery wholesalers charge retailer customers include a price for the purchase of a product, transportation fees, fuel surcharges, warehouse fees and other fees. Product costs depend in turn on discounts, allowances, fees, payments and other economic concessions (collectively “discounts”) given or made to wholesalers by manufacturers of grocery products. These discounts can be reflected directly on manufacturers’ invoices to wholesalers, or indirectly in wholesaler “bill backs” or other forms of rebates.

16. As the largest full-line grocery wholesalers in the United States, C&S and SuperValu have been particularly aggressive and effective in securing discounts from manufacturers. For example, C&S requests that large manufacturers that sell product to

C&S participate in C&S' Crossroads program, a program designed to maximize manufacturer discounts to C&S. Manufacturers that do not participate in Crossroads typically suffer significant financial penalties from C&S in the form of deductions (with little or no basis) or other discounts imposed by C&S.

17. By virtue of their size and associated leverage over grocery manufacturers, C&S and SuperValu were uniquely positioned to compete with one another.

SuperValu's Growth, Pricing and Competition with C&S

18. SuperValu's full-line grocery wholesale business grew substantially in the 1990's and early 2000's. Two business strategies generated this growth.

19. First, SuperValu expanded into new geographic territories by acquiring wholesalers within those territories. For example, in 1994, SuperValu acquired Sweet Life Foods, Inc., a full-line grocery wholesaler that served hundreds of retailers in New England. This acquisition gave SuperValu an immediate and competitively significant foothold in New England, an area that had been dominated by C&S. SuperValu maintained large distribution facilities in Portland, Maine, Andover, Massachusetts and Cranston, Rhode Island.

20. Each year – from 1995 to 2003 – SuperValu took accounts and market share from C&S and grew its New England-based grocery wholesale business. By 2003, SuperValu had achieved sales of roughly \$1.5 billion in New England. While C&S remained the market leader in New England, competition from SuperValu benefited retailers in the form of lower prices.

21. Second, in an effort to improve revenues and margins, in the late 1990's SuperValu implemented a new pricing approach it referred to as Activity Based Sell ("ABS"). Under ABS, SuperValu stated that it would charge retailers fees that would enable SuperValu to "earn an adequate profit margin." SuperValu 1998 10-K at 5.

22. As SuperValu implemented ABS in the Midwest, where SuperValu was the dominant grocery wholesaler, SuperValu's prices increased substantially. Facing competition from C&S, SuperValu did not implement ABS in New England.

C&S' Entry Into the Midwest

23. In the early 2000's, C&S was looking to expand the geographic territories in which it sold full-line wholesale grocery products and related services. C&S' business was concentrated primarily in New England and the wholesaler sought growth opportunities in other geographic areas. In 2003, an opportunity presented itself to C&S: Fleming Companies, Inc. ("Fleming") – a major full-line grocery wholesaler with operations in many parts of the country – filed for bankruptcy and sought to sell its wholesale operations, including its operations in the Midwest. Fleming operated three Midwestern distribution facilities, one in each of the following locations: La Crosse, Wisconsin, Waukesha, Wisconsin, and Massillon, Ohio. Fleming used these distribution facilities to serve retailers throughout the Midwest. Purchasing Fleming's Midwest distribution facilities provided C&S an efficient means for entering the Midwest.

24. In late June 2003 – roughly three months after Fleming filed for bankruptcy – C&S announced that it would purchase Fleming's assets. According to Mike Gross, the

C&S Executive Vice President at that time, buying Fleming's assets allowed C&S to expand its grocery wholesale business into new territories:

The purchase of Fleming's wholesale grocery operations would allow us to expand our business into parts of the country where we do not presently operate. We are excited about working with Fleming and its chain and independent supermarket customers in a mutually beneficial transition for all parties.

Fleming's June 27, 2003 Form 8-K at 1 (quoting Mark Gross).

25. C&S stated that it expected to operate Fleming's Wisconsin-based distribution facilities:

Last week, C&S Executive Vice President Mark Gross told the Tribune his company expects to operate Fleming distribution facilities in La Crosse and Waukesha if its bid for Fleming's wholesale grocery business succeeds.

"Fleming Auction Moves Forward," La Crosse Tribune (July 19, 2003).

26. In order to retain the business of Fleming's retailers, C&S agreed to immediately supply Fleming with consumer goods products so that Fleming had a sufficient inventory to supply retailers. C&S also began meeting with retailers to secure the retailers' business by promising to offer wholesale goods and services at low prices. C&S met with retailers in and around La Crosse and retailers in and around Milwaukee. Also as part of its entry into the Midwest, C&S met with Fleming employees working in the La Crosse and Waukesha distribution facilities to discuss the employees transitioning to C&S to service retailers that purchased product from C&S. Using the Fleming distribution facilities to enter the region, competition between C&S and SuperValu in the Midwest had commenced.

27. C&S' expansion into the Midwest – where SuperValu's ABS pricing prevailed – was a substantial threat to SuperValu, particularly considering the intense price competition between the wholesalers in New England. When C&S announced that it would acquire Fleming's assets, SuperValu's stock declined ten percent on the news that "a stronger rival" was to acquire "an immediate stronghold in certain Midwest states, key areas for SuperValu:"

Shares of SuperValu (SVU) tumbled 10 percent as investors worried that a stronger rival was stepping into the wholesale grocery picture. Bankrupt Fleming said Friday it was selling its wholesale business to privately held C&S, a large regional player in the grocery business. The sale gives C&S an immediate stronghold in certain Midwest states, key areas for SuperValu.

"Monday's Decliners," CBS MarketWatch.com (June 30, 2003).

SuperValu and C&S' Conspiracy to Suppress Competition

28. Faced with the prospect of competing against C&S in the Midwest, SuperValu had one of two options: either embrace that competition, which would have meant substantially reduced prices for retailers, or conspire with C&S to eliminate that competition. SuperValu (and C&S) chose the latter option.

29. Competition-limiting arrangements with competing wholesalers were not a novel concept for SuperValu. At the same time that C&S began its entry into the Midwest, SuperValu was negotiating a joint venture with Associated Grocers, Inc., a wholesaler that competed against SuperValu in the Pacific Northwest. Negotiations between SuperValu and Associated Grocers abruptly ended when Associated Grocers

won a contract to supply SuperValu's largest retailer in the Pacific Northwest by offering lower prices than SuperValu.

30. SuperValu then sued Associated Grocers in this Court, claiming Associated Grocers had an obligation to notify SuperValu of any intent to compete for SuperValu's customers while their joint venture negotiations were ongoing. Associated Grocers responded that SuperValu's position would violate the antitrust laws. This Court agreed, noting that any agreement by the wholesalers not to compete for each other's customers would be *per se* illegal under the antitrust laws:

An agreement to notify one another of any intent to compete for each other's customers or to refrain from such competition altogether would have been a *per se* violation of the Sherman Act. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596, 612 (1972) (holding that territorial and customer allocation scheme among sellers of private label groceries violated antitrust laws).

SuperValu Inc. v. Associated Grocers, Inc., 428 F. Supp. 2d 985, 992 (D. Minn. 2006) (Davis, J.).

31. While SuperValu's efforts to agree to eliminate competition with Associated Grocers were unsuccessful, SuperValu found that C&S was more receptive to a similar agreement. Shortly after C&S began its entry into the Midwest, SuperValu and C&S started negotiating an arrangement that would prove devastating to retailers.

32. Negotiations did not take long. On or about September 6, 2003, Defendant C&S entered into a written "Asset Exchange Agreement" with SuperValu whereby SuperValu acquired all of C&S' distribution facilities in the Midwest in exchange for C&S acquiring all of SuperValu's distribution facilities in New England. The only other

significant assets exchanged by C&S and SuperValu were the customers served by the Midwest and New England distribution facilities. The “Asset Exchange Agreement” was signed on September 6, 2003 and closed on September 13, 2003.

33. The real point of C&S and SuperValu’s “Asset Exchange Agreement” was eliminating each other as a competitor in the Midwest and New England, allocating the Midwest to SuperValu and New England to C&S. The “Asset Exchange Agreement” contained a secret, written agreement that C&S and SuperValu would not compete with each other with respect to the customers they exchanged. The non-compete agreement included two blatantly anticompetitive restraints: (1) C&S and SuperValu each agreed to an absolute ban on supplying the Midwest and New England customers that were served out of the exchanged distribution facilities for a period of two years following the closing date of the “Asset Exchange Agreement” (from September 6, 2003 through September 13, 2005); and (2) C&S and SuperValu each agreed to an absolute ban on soliciting these customers for a period of five years following the closing date of the “Asset Exchange Agreement” (from September 6, 2003 through September 13, 2008). C&S and SuperValu’s non-compete agreement also covered customers served by Fleming’s former Massillon, Ohio facility, which was not exchanged but simply shut down before the “Asset Exchange Agreement” was closed. Thus, C&S and SuperValu explicitly agreed not to compete with each other in the Midwest and New England for the business of over one thousand customers for at least five years.

34. C&S and SuperValu took affirmative steps to conceal their secret non-compete agreement, for example, by removing any mention of it in each of their public disclosures regarding their “Asset Exchange Agreement.”

35. Defendant C&S’s “Asset Exchange Agreement” with SuperValu had no legitimate business purpose and was simply a sham transaction used by C&S and SuperValu to conceal their secret, illegal non-compete agreement allocating the New England market and customers to C&S and the Midwest market and customers to SuperValu. C&S and SuperValu entered into the “Asset Exchange Agreement” with the purpose and intent of closing the very distribution facilities they were acquiring, thereby reducing capacity and output, raising prices and eliminating competition. SuperValu has admitted to making the decision to shut down the Midwest facilities it was acquiring even before the “Asset Exchange Agreement” closed. Within eight months of entering into the “Asset Exchange Agreement,” all of the distribution facilities C&S and SuperValu had exchanged with each other were closed. Over two thousand people lost their jobs.

36. C&S and SuperValu’s customer and territorial allocation was a naked restraint of trade. Its purpose and effect was to limit or eliminate competition between C&S and SuperValu in order to allow them to charge supra-competitive prices in the Midwest and New England.

37. Defendant C&S and SuperValu actively used their secret customer and territorial allocation to harm retailers in a number of ways. For example, C&S and SuperValu charged retailers higher prices for grocery wholesale goods and related services than they would have paid if SuperValu and C&S had competed. SuperValu

ensured the continuation of ABS pricing in the Midwest rather than having to engage in aggressive price competition like that which it experienced in competing with C&S in New England, and C&S no longer had to engage in intense price competition in New England with SuperValu. As a result, retail customers both in the Midwest and in New England have sustained overcharges in their purchases of grocery wholesale products and services from C&S and SuperValu. These overcharges continue to the present (with retailers' repeated purchases of grocery wholesale products and services from C&S and SuperValu at inflated prices) and constitute independent acts injuring Plaintiffs and the classes.

38. These overcharges created a windfall for SuperValu and C&S, both of which enjoyed higher margins from their territorial and customer allocation than they would have earned had C&S and SuperValu competed in the Midwest and New England. For example, in the year following their territorial and customer allocation, SuperValu's grocery wholesale sales volume declined by \$100 million but its net income rose 26.2 percent, as the wholesaler sacrificed its less profitable sales volume in New England to increase profitable sales volume in the Midwest. Not surprisingly, SuperValu's president was hopeful that SuperValu could find other opportunities like the territorial and customer allocation with C&S to improve SuperValu's gross margins:

Supervalu here said last year's asset swap with C&S Wholesale Grocers resulted in a sales decline of about \$100 million for the second quarter ended Sept. 11, but net income rose 26.2% compared with the year-ago period. Jeff Noddle, chairman, president and chief executive officer, pointed out that gross margins improved since the swap, "and we hope we

can find more opportunities like that, though nothing is imminent.”

“Supervalu’s Sales Decline as Earnings Rise 26.2%,” Supermarket News (Oct. 18, 2004).

39. Second, C&S and SuperValu eliminated substantial capacity and output for full-line grocery wholesale goods and services in the Midwest and New England by closing the distribution facilities. The closed distribution facilities were sold and all or portions of them were redeveloped for use in non-grocery wholesale industries. This reduction in the supply of full-line grocery wholesale goods and services to retailers helped SuperValu and C&S maintain higher prices (as capacity was limited) and perpetuate their dominance in the Midwest and New England, as competing wholesalers no longer had an ability to efficiently enter territories through acquisition.

40. Further, by closing distribution facilities in the Midwest and New England, the co-conspirators increased transportation fees for a number of retailers that received product from the closed facilities. Transportation fees are generally assessed to retailers based on the retailers’ proximity to distribution facilities. Nearby retailers that had received product from these facilities were forced to pay higher transportation fees following the closure of the facilities.

41. The increased prices and reduced capacity and output described above all constitute actual detrimental effects resulting from C&S and SuperValu’s territorial and customer allocation agreement.

The Market for Full-Line Grocery Wholesale Goods and Related Services

42. SuperValu and C&S compete in the market for full-line grocery wholesale goods and related services. C&S and SuperValu and other full-line wholesale grocery businesses that compete in the market for full-line grocery wholesale goods and related services offer a cluster of goods and services to grocery retailers. From the standpoint of retailers, the cluster of products and services offered by different full-line grocery wholesalers able to serve their facilities are reasonably interchangeable and have a high cross-elasticity of demand.

43. Full-line grocery wholesale goods and services constitutes a separate product market that is significantly different from, and appeals to buyers on a different basis than, partial-line grocery wholesale goods and services. This is because full-line grocery wholesalers provide purchasers with the benefit of certain economies of scale and scope that are not available from partial-line grocery wholesalers. Specifically, by purchasing in bulk and taking advantage of a larger distribution network, full-line wholesalers are able to deliver a broader range and volume of goods and services more cheaply, quickly and efficiently than partial-line grocery wholesalers. Thus, the goods and services offered by partial-line wholesalers generally are not reasonable substitutes for the wholesale grocery products and services offered by full-line wholesalers and are not reasonably interchangeable.

44. Grocery retailers generally strongly prefer dealing with full-line suppliers. For example, Plaintiffs Lueptows and Nemecek use full-line grocery wholesalers as their primary wholesalers. It is not practicable for them to use partial-line wholesalers as a

substitute for a full-line grocery wholesaler due to the disparity in the volume and range of products, services and efficiencies offered by the two different types of wholesalers.

45. New England constitutes a relevant geographic market for full-line grocery wholesale goods and services. The New England market includes the states of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont (“New England”). New England is the geographic area in which Defendant C&S operates and draws an overwhelmingly large percentage of its business. The distribution facilities in New England that were closed by C&S are all located in New England and served each of the states included in this market. New England is the geographic area in which C&S and SuperValu competed prior to their customer and territorial allocation agreement. Full-line grocery wholesalers located in New England sell only a very small percentage of their full-line wholesale grocery products and related services to grocery retailers outside of New England.

46. New England is also the only geographic area where grocery retailers located in New England can practicably turn for sources of full-line wholesale grocery products and related services. Grocery retailers in New England do not, to any significant degree, have economically viable choices among full-line wholesalers located outside of New England. Grocery retailers located in New England thus purchase the overwhelming majority of their wholesale grocery products and related services from within New England. Only a very small percentage of grocery retailers located in New England have suppliers located outside of New England to which the retailers could practicably turn for full-line wholesale grocery products and services. Grocery retailers

located in New England cannot practicably turn to suppliers outside of the New England Market for more than a very small percentage of their purchases of full-line wholesale grocery products and services.

47. The Midwest also constitutes a relevant geographic market for full-line grocery wholesale goods and services. The Midwest market includes the states of Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin (“the Midwest”). The Midwest is the geographic area in which SuperValu operates and draws an overwhelmingly large percentage of its customers. The distribution facilities in the Midwest that were closed by SuperValu are all located in the Midwest and served each of the states included in this market. The Midwest is the geographic area in which C&S and SuperValu competed prior to their customer and territorial allocation agreement. Full-line grocery wholesalers located in the Midwest sell only a very small percentage of their full-line wholesale grocery products and related services to grocery retailers outside of the Midwest.

48. The Midwest is also the only geographic area where grocery retailers located in the Midwest can practicably turn for sources of full-line wholesale grocery products and services. Grocery retailers in the Midwest do not, to any significant degree, have economically viable choices among full-line wholesalers located outside of the Midwest. Grocery retailers located in the Midwest purchase the overwhelming majority of their wholesale grocery products and services from within the Midwest. Only a very small percentage of grocery retailers located in the Midwest have suppliers located outside the Midwest to which the retailers could practicably turn for full-line wholesale

grocery products and services. Grocery retailers located in the Midwest cannot practicably turn to suppliers outside of the Midwest for more than a very small percentage of their purchases of full-line wholesale grocery products and services. Plaintiffs Lueptows and Nemecek, for example, have purchased grocery wholesale products and related services only from wholesalers in the Midwest. Lueptows and Nemecek have never purchased grocery wholesale products and related services from wholesalers located outside the Midwest.

49. At the time SuperValu and C&S entered their territorial and customer allocation agreement, they had market power as reflected by (a) SuperValu having the largest market share in the Midwest, more than three times the market share of the second largest competitor in the Midwest (Roundy's); (b) SuperValu and C&S having the largest combined market share in New England, approximately six times the market share of the second largest competitor in New England (Bozzuto's Inc.); (c) C&S and SuperValu's ability to reduce the supply of grocery wholesale goods and services in the Midwest and New England; and (d) their ability to price their products and/or services in the Midwest and New England above competitive levels.

50. The territorial and customer allocation greatly enhanced the market power of SuperValu & C&S in their respective geographic markets, enabling each to secure its dominance in that market. For example, but for the territorial and customer allocation, C&S would have been the second largest competitor in the Midwest after acquiring Fleming's operations there. By entering into the territorial and customer allocation with C&S, however, SuperValu was able to avoid such competition. Similarly, as a result of

the territorial and customer allocation, C&S increased its market share in New England, ensuring its dominance there.

51. High entry barriers exist in full-line grocery wholesale goods and services markets. Entry requires substantial investments in resources and time to, *inter alia*, (i) build distribution facilities and services (including transportation services) that can successfully compete with established distribution networks, (ii) hire and train employees, and (iii) secure retail accounts. Securing retail accounts is particularly challenging in this industry since retailers are often bound by long-term exclusive contracts and depend upon loans or lines of credit from their current wholesaler. Also, retailers are often reluctant to switch wholesalers because switching can force them to undergo undesirable operational changes, such as changes in delivery schedules. C&S and SuperValu's economies of scale resulting from their large size and financial strength also act as high entry barriers in the Midwest and New England markets.

52. Additionally, full-line grocery wholesalers in the United States, including C&S and SuperValu, have expanded into new territories by acquiring other wholesalers, which requires substantial resources. Since the 1990's, the grocery wholesale industry has experienced substantial consolidation, and limited opportunities currently exist for substantial expansion through acquisition. By closing the distribution facilities in the Midwest and New England, SuperValu and C&S have increased barriers to entry into those territories.

Class Action Allegations

53. Plaintiffs bring this action, pursuant to Fed. R. Civ. P. 23, on behalf of the following two classes of direct purchasers located in the Midwest:

- a. All entities located in the Midwest that paid ABS fees on wholesale grocery products in all four SuperValu ABS product lines (grocery, dairy, frozen and general merchandise/health and beauty care products) purchased directly from SuperValu's Green Bay distribution center from December 31, 2004 through September 13, 2008 (the "Class Period") (the "Green Bay Class"); and
- b. All entities located in the Midwest that paid ABS fees on wholesale grocery products in all four SuperValu ABS product lines (grocery, dairy, frozen and general merchandise/health and beauty care products) purchased directly from SuperValu's Pleasant Prairie distribution center during the Class Period (the "Pleasant Prairie Class").

54. Excluded from the classes are (a) the Court and its officers, employees and relatives, C&S and SuperValu and their parents, subsidiaries, affiliates, shareholders, employees and co-conspirators, and government entities; and (b) any customer of SuperValu who, prior to C&S and SuperValu's September 6, 2003 AEA, entered into a contract with SuperValu that established the prices (including upcharges) the customer would pay for wholesale grocery products and related services throughout the entire Class Period and who did not amend or renegotiate the prices set in any such contract

during the Class Period. Additionally excluded are Tops Friendly Markets, LLC and the Great Atlantic & Pacific Tea Company, Inc. (also known as A&P).

55. Members of the classes are so numerous and geographically dispersed that joinder is impracticable. While the exact number of class members is unknown to Plaintiffs, it is believed to be more than one hundred. Members of the classes are readily identifiable from information and records in possession of C&S and SuperValu.

56. Questions of law and fact common to members of the classes predominate over questions, if any, that may affect only individual classes members because Defendant has acted on grounds generally applicable to the classes. Such generally applicable conduct is inherent in Defendant's wrongful conduct. Common questions of law or fact include, but are not limited to:

- a. Whether the Defendant C&S and SuperValu combined, agreed or conspired to allocate territories or customers for full-line grocery wholesale goods and services in order to suppress competition and charge supra-competitive prices in the Midwest;
- b. Whether the contract, combination or conspiracy caused the prices for full-line grocery wholesale goods and services to be higher than they would have been in the absence of Defendant C&S and SuperValu's conduct;
- c. Whether Defendant C&S's conduct violates the Clayton and Sherman Acts; and
- d. Whether Plaintiffs and class members have sustained or continue to sustain damages as a result of Defendant's wrongful conduct, and, if so, the proper measure and appropriate formula to be applied in determining such damages.

57. Plaintiffs' claims are typical of the claims of the members of the classes. Plaintiffs and all members of the classes were damaged by the same wrongful conduct by

the Defendant, *i.e.*, they have paid artificially inflated prices for full-line grocery wholesale goods and services as a result of Defendant's wrongful conduct. Plaintiff Nemecek was not a party to an arbitration agreement with C&S and paid ABS fees on wholesale grocery products in all four SuperValu ABS product lines purchased from SuperValu's Green Bay distribution center and is a member of the proposed Green Bay Class. Plaintiff Lueptows was not a party to an arbitration agreement with C&S and paid ABS fees on grocery wholesale products in all four SuperValu ABS product lines purchased from SuperValu's Pleasant Prairie distribution center and is a member of the proposed Pleasant Prairie Class. Plaintiffs will fairly and adequately protect the interests of other class members because they have no interest that is antagonistic to or which conflicts with those of any other class member, and Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel experienced in litigation of this nature to represent Plaintiffs and other members of the classes.

58. The prosecution of separate actions by individual members of the classes would create the risk of inconsistent or varying adjudications with respect to individual members of the classes, which could establish incompatible standards of conduct for Defendant.

59. This class action is the superior method for the fair and efficient adjudication of this controversy. Class treatment will permit a large number of similarly-situated entities to prosecute their claims in a single forum simultaneously, efficiently and without the unnecessary duplication of evidence, effort and expense that numerous individual actions would produce. The damages sustained by individual class members,

although substantial, do not rise to the level where they would have a significant interest in controlling the prosecution of separate actions against this well-financed corporate defendant.

60. This case will be eminently manageable as a class action. Plaintiffs know of no difficulty to be encountered in the maintenance of this action that would preclude its maintenance as a class action.

CAUSES OF ACTION

Count I: Conspiracy to Restrain Trade in Violation of Section 1 of the Sherman Act (Per Se Unlawful and Rule of Reason)

61. Plaintiffs repeat and reallege the allegations in Paragraphs 1 – 60 above as if fully set forth herein.

62. Defendant C&S entered a contract, combination or conspiracy with SuperValu in restraint of trade and commerce, the purpose and effect of which is to allocate customers and territories for full-line grocery wholesale goods and services, to suppress competition and to allow Defendant C&S and SuperValu to charge supra-competitive prices in the Midwest and New England. The contract, combination or conspiracy consisted of continuing agreements, understandings and a concert of action between Defendant C&S and SuperValu, in particular including C&S and SuperValu's secret agreement not to compete.

63. The acts done by Defendant C&S as part of, and in furtherance of, its contract, combination or conspiracy with SuperValu were authorized, ordered or done by

C&S's officers, agents, employees or representatives while actively engaged in the management of C&S's affairs.

64. The contract, combination or conspiracy is a naked restraint of trade that is illegal *per se* under Section 1 of the Sherman Act, 15 U.S.C. § 1.

65. Alternatively, Defendant's contract, combination or conspiracy constitutes a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, under the Rule of Reason or "Quick Look" because:

- a. Defendant's contract, combination or conspiracy with SuperValu constitutes a naked restraint of trade;
- b. Defendant's contract, combination or conspiracy with SuperValu has caused significant anti-competitive effects in the markets for full-line grocery wholesale goods and services. These actual detrimental effects include, but are not limited to:
 - (1) actual elimination of significant competition in the Midwest (*i.e.*, but for the territorial and customer allocation, C&S would have entered the market and assumed Fleming's place as the second largest competitor in the Midwest);
 - (2) actual elimination of significant competition in New England (*i.e.*, but for the territorial and customer allocation, C&S would not have been able to eliminate its second largest competitor and increase its market share in New England);
 - (3) actual increases by Defendant (and SuperValu) in margins and/or prices to supra-competitive levels with respect to full-line grocery wholesale goods and related services; and
 - (4) actual reduction of capacity and output resulting from Defendant and SuperValu's exchange and closing of facilities in their respective markets pursuant to their territorial and customer allocation agreement.
- c. During the relevant time period, Defendant and SuperValu, individually and collectively, possessed market power in the markets

for full-line grocery wholesale goods and services in the Midwest and New England.

66. The territorial and customer allocation resulting from Defendant C&S and SuperValu's contract, combination or conspiracy has no legitimate business purpose. It achieves no legitimate efficiency or pro-competitive benefit to counterbalance the substantial anticompetitive effects it has caused in the markets for full-line grocery wholesale goods and services.

67. Defendant C&S and SuperValu's conduct substantially and adversely affected interstate commerce in the markets for full-line grocery wholesale goods and services.

68. As a direct and proximate result of C&S' violations of the Sherman Act, Plaintiffs and each class member have been damaged (i) in their business or property by paying more for full-line grocery wholesale goods and services than they would have but for C&S' unlawful agreements; (ii) in an amount of ascertainable damages to be established at trial, pursuant to 15 U.S.C. § 15(a). Plaintiffs' injury is of the type that the antitrust laws were intended to prevent.

JURY TRIAL DEMAND

Pursuant to Fed. R. Civ. P. 38(b), Plaintiffs, on their own behalf and on behalf of the classes, demand a trial by jury of all claims asserted in this Complaint so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request entry of judgment:

- a. Certifying this action as a class action with classes as defined in paragraph 53 and appointing Plaintiffs as respective class representatives;
- b. Awarding Plaintiffs and the classes full monetary damages to be proved at trial;
- c. Awarding Plaintiffs and the classes treble their monetary damages, pursuant to 15 U.S.C. § 15;
- d. Awarding Plaintiffs and the classes pre-and post-judgment interest on their damages as allowed by law;
- e. Awarding Plaintiffs and the classes the costs of this action and reasonable attorneys' fees pursuant to 15 U.S.C. § 15; and
- f. Awarding Plaintiffs and the classes such other and further relief as the Court deems just and proper.

Dated: September 29, 2014

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

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