No. 20-___

IN THE

Supreme Court of the United States

D&G, INC., DOING BUSINESS AS GARY'S FOODS; BLUE GOOSE SUPER MARKET, INC.; NEMECEK MARKETS, INC.; MILLENNIUM OPERATIONS, INC., DOING BUSINESS AS DICK'S MARKET; ELKHORN-LUEPTOWS, INC.; JEFFERSON LUEPTOWS, INC.; EAST TROY LUEPTOWS, INC.,

Petitioners,

v.

C&S WHOLESALE GROCERS, INC.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Sherman Act treats certain agreements among competitors as illegal *per se*, without regard to any claimed pro-competitive benefits of the arrangement. These *per se* violations include price fixing, bid rigging, and horizontal agreements among competitors to divide up markets.

Here, the plaintiffs sought to present two separate *per se* market-division theories to the jury: (1) that the competitor defendants had agreed to allocate *territories*; and (2) that the defendants had agreed to allocate *particular customers*. But over the express objection of the plaintiffs, the Court refused to instruct the jury that these theories—if proven—represented separate and independently sufficient *per se* violations of the Sherman Act. Instead, the district court imposed—and the Eighth Circuit affirmed—a requirement that the plaintiffs prove *both* a territorial allocation *and* a customer allocation to establish a *per se* violation. In doing so, the Eighth Circuit created a disagreement among the courts of appeals over whether a customer allocation agreement is a *per se* violation separate from any theory of territorial allocation.

The question presented is:

Whether an agreement between horizontal competitors not to compete for certain customers is a *per se* violation of the Sherman Act, separate from the *per se* theory of territorial allocation?

RULE 29.6 STATEMENT

None of the petitioners has a parent corporation, and no publicly held company owns 10% or more of any of the petitioners' stock.

RELATED PROCEEDINGS

Proceedings directly on review:

D&G, Inc. v. C&S Wholesale Grocers, Inc. (In re Wholesale Grocery Products Antitrust Litigation), No. 18-2121 (8th Cir. Apr. 27, 2020)

In re Wholesale Grocery Products Antitrust Litigation, No. 0:09-md-02090-ADM-TNL (D. Minn. May 23, 2018; Apr. 20, 2018)

Other related proceedings:

King Cole Foods, Inc. v. SuperValu, Inc. (In re Wholesale Grocery Products Antitrust Litigation), No. 11-3768 (8th Cir. Feb. 13, 2013)

Blue Goose Super Market, Inc. v. SuperValu, Inc. (In re Wholesale Grocery Products Antitrust Litigation), No. 11-3773 (8th Cir. Feb. 13, 2013)

D&G, Inc. v. SuperValu, Inc. (In re Wholesale Grocery Products Antitrust Litigation), No. 13-1297 (8th Cir. May 21, 2014)

Millennium Operations, Inc. v. SuperValu, Inc. (In re Wholesale Grocery Products Antitrust Litigation), No. 15-1786 (8th Cir. Mar. 1, 2017)

Colella's Super Market, Inc. v. SuperValu, Inc. (In re Wholesale Grocery Products Antitrust Litigation), No. 15-3089 (8th Cir. Mar. 1, 2017)

JFM Market, Inc. v. SuperValu, Inc. (In re Wholesale Grocery Products Antitrust Litigation), No. 15-3174 (8th Cir. Mar. 1, 2017)

JFM Market, Inc. v. SuperValu, Inc. (In re Wholesale Grocery Products Antitrust Litigation), No. 15-8014 (8th Cir. Sept. 30, 2015)

D&G, Inc. v. SuperValu, Inc. (In re Wholesale Grocery Products Antitrust Litigation), No. 16-8019 (8th Cir. Nov. 7, 2016)

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Petitioners D&G, Inc., d/b/a Gary's Foods; Blue Goose Super Market, Inc.; Nemecek Markets, Inc.; Millennium Operations, Inc., d/b/a Dick's Market; Elkhorn-Lueptows, Inc.; Jefferson Lueptows, Inc.; East Troy Lueptows, Inc. (collectively, petitioners or plaintiffs) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 957 F.3d 879. The relevant determinations of the district court (*id.* at 9a-14a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 2020. A petition for rehearing was denied on June 9, 2020 (Pet. App. 15a). On March 19, 2020, the Court extended the time within which to file a petition for a writ of certiorari to 150 days from the date of an order denying a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

15 U.S.C. § 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be

> deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 15(a) provides in relevant part:

> Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

PRELIMINARY STATEMENT

Petitioners are small, Midwestern family-owned retail grocery stores who allege that the two largest grocery wholesalers in the United States—C&S Wholesale Grocers (C&S) and SuperValu, Inc. (SuperValu)—agreed as horizontal competitors to allocate *both* (1) certain territories *and* (2) certain customers in violation of the Sherman Act. More specifically, plaintiffs alleged both (1) that C&S agreed with SuperValu to split up the Midwest and New England markets between themselves, and (2) that, even if C&S and SuperValu had not allocated the entire Midwest territory in this way, they had agreed not to compete for certain Midwest customers. Plaintiffs presented evidence to

support both of these *per se* theories at trial, and expressly asked the district court to instruct the jury that either showing was sufficient to establish a *per se* Sherman Act violation. But the district court refused and required the jury to find that the defendants agreed "to divide territories *and* customers," Pet. App. 24a (emphasis added). The jury did not so find, and presented with the same argument that these should have been regarded as separate and independently sufficient *per se* violations of the Sherman Act, the Eighth Circuit affirmed.

This Court should review that decision for three reasons.

First, in failing to hold that plaintiffs' customer allocation claim should be adjudicated separately by the jury from its territorial allocation claim, and in failing to find that a customer allocation agreement constitutes a separate *per se* violation of the Sherman Act, the Eighth Circuit strayed from this Court's precedent—and split from decisions of the Second, Fifth, and Seventh Circuits addressing similar fact patterns.

Second, the Eighth Circuit's erroneous decision undermines the very purpose of *per se* treatment under the antitrust laws. Every other circuit court that has heard the issue has held that territorial allocation and customer allocation are each, separately, *per se* violations of the Sherman Act. This is consistent with one hundred years of jurisprudence that agreements among horizontal competitors not to compete along any axis are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality. That includes agreements not to compete on price, agreements not to compete within certain terri-

tories, agreements not to compete over particular customers, and agreements to divide up markets in any other ingenious way that horizontal cartelists can devise.

Third, this case is an ideal vehicle to consider this important issue. It explicitly and cleanly highlights the precise issue before the Court, and the error below quite likely affected the outcome of the jury's deliberations. Plaintiffs never received a jury's consideration of their independent and sufficient customer allocation claim. As a result, this Court should grant the petition and reverse.

STATEMENT OF THE CASE

I. Legal Background

Section 1 of the Sherman Act, 15 U.S.C. § 1 *et seq.*, prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. This Court has construed this language as "outlaw[ing] only unreasonable restraints." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)). But while this Court has made clear that this "rule of reason" is "the accepted standard for testing whether a practice restrains trade in violation of § 1," *id.*, it has also held that practices that are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality" are treated as *per se* unlawful under the Act, *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978). A "*per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue." *Leegin*, 551 U.S.

at 886. But once the courts have found a restraint to fall within the *per se* rule, such restraints are deemed unlawful without further consideration of the practices' alleged procompetitive effects in any given case. *See id.*; *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 349-50 (1982).

The archetype of a *per se* violation is a horizontal agreement among competitors to raise price or restrict output. Such cartelization is plainly anti-competitive, largely because it wholly short-circuits the *process* through which competition corrects for unduly high prices or low supplies of goods for customers. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 225-26 n.59 (1940). Cartels are not the only *per se* violations, however: Other agreements among competitors likewise bypass the competitive process to customers' unambiguous detriment. A particularly troublesome example occurs when competitors agree to avoid competing altogether for certain segments of business. Accordingly, such "horizontal agreements among competitors ... to divide markets" are likewise treated as *per se* violations of the Sherman Act. *Leegin*, 551 U.S. at 886. And so, if a plaintiff proves that the defendant engaged in such a naked market division, a violation is established without any further inquiry into the "reasonableness of [the] individual restraint in light of the real market forces at work" in any particular case. *Id*.

What makes collusive market division so plain a violation is that it prevents consumers and small businesses from accessing the competitive forces necessary to combat anticompetitive prices. For that reason, it does not matter in theory or practice *how* cartelists choose to divide up markets. They can segment the

market into distinct and mutually exclusive territories, *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); they can divvy up individual customers, *United States v. Consol. Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961); they can agree to stay out of each other's way for particular kinds of buyers, *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367 (6th Cir. 1988) (per curiam); or they can rotate customers by agreeing who will be the winning bidder each time for a given customer, *United States v. Flom*, 558 F.2d 1179 (5th Cir. 1977). This Court has clearly understood that cartelists are creative, and that the reach of the *per se* rule cannot be circumscribed by arbitrarily distinguishing one kind of industry or version of an agreement not to compete from another. *See, e.g.*, *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), *overruled in part on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1088 (5th Cir. 1978). Accordingly, agreements between competitors at the same level of the market to allocate territories *or* customers in order to restrain competition have been treated as *per se* violations of the Sherman Act for the last fifty years. *United States v. Topco Assocs.*, 405 U.S. 596, 608, 612 (1972); *see also Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam).

II. Factual Background and Proceedings Below

This petition arises from an antitrust case brought by five classes of mostly small, family-owned retail grocery stores against C&S, the largest grocery wholesaler in the United States. Plaintiffs alleged

that C&S agreed with its horizontal competitor, SuperValu, the second-largest grocery wholesaler in the United States, to allocate *both* (1) territories and (2) customers, and that this agreement was a conspiracy to restrain trade in violation of the Sherman Act, 15 U.S.C. § 1. Pet. C.A. App. 1-2 ¶¶ 1-2; 10 ¶ 31; 11-12 ¶ 36; 13 ¶ 39; 28-29 ¶¶ 76-79. Plaintiffs alleged that this agreement had the purpose and effect of allowing SuperValu to charge supra-competitive prices in the Midwest. *Id.* at 2 ¶ 3; 13-14 ¶ 40; 15 ¶ 44; 30 ¶ 83. As a result, plaintiffs paid supra-competitive prices for wholesale grocery products and services. *Id.*

Plaintiffs alleged that in conjunction with a formal written Asset Exchange Agreement (AEA) between C&S and SuperValu, those parties also agreed to two separate and unwritten *per se* violations of the Sherman Act. First, C&S and SuperValu agreed not to compete in the Midwest by allocating that market to SuperValu, while SuperValu exited the Northeast market and left that area to C&S alone (the "territorial allocation claim"). Second, separately and in the alternative, plaintiffs alleged that C&S and SuperValu had agreed not to compete for certain Midwest customers—allocating those customers to SuperValu—even while permitting C&S to compete for other Midwest customers (the "customer allocation claim").

Throughout the proceedings below, plaintiffs were careful to identify these as separate and independently sufficient theories of a *per se* Sherman Act violation. For example, at the pre-trial conference, plaintiffs explicitly confirmed that they were pursuing both of these claims. *See* Resp. C.A. App. 13, 14 (Tr. 51:5-10, 53:1-12); Pet. C.A. App. 104:11-105:9.

Accordingly, the evidence presented at trial supported each of the two *per se* violations plaintiffs alleged. In particular, plaintiffs provided sufficient evidence to permit a reasonable jury to conclude that C&S's real agreement with SuperValu involved allocating territories (the Midwest and New England) rather than merely certain customers within those territories. *See, e.g.*, Pet. C.A. App. 204. The direct, factual evidence of this agreement was supported by expert testimony regarding economic evidence that showed that C&S had allocated the entire territory of the Midwest to SuperValu. *See, e.g.*, *id.* at 123:8-125:15, 127:15-132:9, 133:4-7. Notably, however, plaintiffs' theory of the case was that—even if the jury disagreed that there had been such a complete territorial allocation—there was *at least* an agreement between C&S and SuperValu not to compete over certain customers within the Midwest region.

To that end, the jury heard separate evidence supporting plaintiffs' customer allocation claim. *See, e.g.*, Pet. C.A. App. 115:25-116:14, 140:8-142:1. For example, plaintiffs' expert Dr. Jeffrey Leitzinger testified that C&S never competed for customers from its distribution centers in Maple Heights, OH; Superior, WI; Minneapolis, MN; and Laurens, IA. *Id.* at 120:24-121:2, 122:3-23, 125:23-126:2. This evidence supported plaintiffs' claim that C&S had at least agreed to allocate certain Midwest customers to SuperValu, even if their agreement permitted C&S to compete for other Midwest customers out of other distribution centers.

In their closing argument, plaintiffs explicitly distinguished between their territorial allocation claim and their customer allocation claim. Pet. C.A. App.

159:3-10; *see also* Pet. App. 10a-11a. Plaintiffs then requested, but were denied, an instruction on customer allocation and a special verdict form question on whether C&S agreed with SuperValu to allocate customers. *See, e.g.*, Pet. C.A. App. 73. The district court's Jury Instruction No. 20 ultimately contained no instruction on customer allocation at all, to which plaintiffs objected. Pet. App. 9a-14a, 21a-23a. Rejecting plaintiffs' argument, the court created a single instruction that required plaintiffs to prove *both* a territorial allocation and a customer allocation to prevail. *Id.* at 21a-23a (Jury Instruction No. 20 requiring plaintiffs prove that the real terms of C&S's agreement with SuperValu were "to allocate customers *and* territories along geographic lines") (emphasis added); *see also id.* at 11a-12a; *id.* at 24a (Special Verdict form asking: "Did the Plaintiffs prove that C&S and SuperValu were competitors or potential competitors, and that they entered into an Unwritten Agreement to divide territories *and* customers along geographic lines which restricted competition more broadly than the Asset Exchange Agreement?") (emphasis added).

The jury did not find that C&S had committed *both* a territorial allocation *and* a customer allocation and so, as required by the special verdict form, found no violation of the Sherman Act. Plaintiffs appealed.

On appeal, a panel of the Eighth Circuit affirmed. The panel found that it was not error to require plaintiffs to prove that C&S agreed to allocate both customers and territories because, while plaintiffs argued that C&S "agreed to allocate customers in the Midwest and New England," plaintiffs did not contend that "C&S agreed to divide up customers outside those regions or to allocate those territories without allocating

customers in them." Pet. App. 6a. The panel did not address plaintiffs' argument and evidence that C&S agreed to allocate *some* customers *within* the Midwest and New England without agreeing to allocate all of them. Plaintiff's petition for rehearing *en banc* was denied on June 9, 2020 (*id.* at 15a), and this petition followed.

REASONS FOR GRANTING THE WRIT

The decision below presents a straightforward error that is well-suited for this Court's certiorari review. It is important that this Court clarify that the antitrust laws are violated by *any* market allocation agreement among horizontal competitors, whether they agree to a typical geographical or territorial market-division scheme, or whether they agree more narrowly to allocate customers within overlapping territories. The Eighth Circuit's holding failing to recognize customer allocation as a separate and sufficient *per se* theory under the Sherman Act should therefore be corrected. That holding conflicts with decisions of the other courts of appeals recognizing customer allocation as an independent theory, as well as the relevant precedents of this Court. And this case presents an especially good vehicle for addressing this conflict because the plaintiffs very clearly sought to preserve and present both of their market allocation theories, and the courts below expressly decided to require an agreement to allocate territories "and" customers, rather than territories "or" customers, as plaintiffs (correctly) requested.

I. There Is Now a Division Among the Courts of Appeals as to Whether Customer Allocation and Territorial Allocation Are Separate *Per Se* Violations of the Sherman Act.

In its decision, the Eighth Circuit required that a plaintiff alleging both customer and territorial allocations must prove the conspirator allocated *both* customers *and* territories to prevail in establishing a *per se* violation, rather than proving *either* of these market-division schemes separately or individually. This holding directly conflicts with the law in every other circuit that has considered the issue. The cases in the other circuits establish, correctly, that territorial allocation and customer allocation are separate *per se* violations of the Sherman Act.

A. Territorial allocations between horizontal competitors have long been held *per se* illegal.

This Court has long held agreements "between competitors at the same level of the market structure to allocate territories in order to minimize competition" to be *per se* violations of the Sherman Act. *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972); *see also Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam).

Since at least *Topco*, this Court has recognized that both agreements to divide markets into distinct territories *and* agreements limiting competition over certain customers between horizontal competitors are independent, *per se* violations of the Sherman Act. In *Topco*, approximately 25 independent small to medium-sized grocery store chains formed a cooperative association, Topco, to supply them with a line of items

marketed under the "Topco" trademark. 405 U.S. at 598. The member grocery stores owned and controlled Topco, and through its bylaws, assigned each member an exclusive territory where it could sell Topco products. *Id.* at 602. Additionally, bylaws prohibited member stores from selling wholesale products supplied by the association without first receiving special permission from the association. *Id.* at 603.

The Court first addressed the territorial restrictions. It acknowledged that a classic example of a Section 1 Sherman Act violation consists of "an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition," and held that the horizontal territorial restraints effectuated by Topco constituted such a violation. 405 U.S. at 608, 610-11. Next, the Court considered the association's requirement that its members receive permission before selling products at wholesale. The Court determined that this restriction amounted to "*regulation of the customers* to whom members of Topco may sell Topco-brand goods," and accordingly concluded that the restriction constituted a *per se* Sherman Act violation for this reason separate from the territorial restraints. *Id.* at 612 (emphasis added). Indeed, the Court recognized that like the territorial division scheme, the association's customer allocation conspiracy inhibited competition between the association's members and constituted a "naked restraint[] of trade with no purpose." *Id.* at 608, 610 (internal quotation marks omitted). Accordingly, this Court's decision quite clearly implied that proving *either* territorial allocation *or* customer allocation sufficed to establish a *per se* violation of the Sher-

man Act. *See id.* at 610; *see also United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1088-89 (5th Cir. 1978) (citing *Topco* for the proposition that customer allocation independently violates the Sherman Act).

This Court also confirmed in *Palmer* that territorial allocation, on its own, constitutes a *per se* violation of the Sherman Act. There, two bar exam preparation course companies, Harcourt Brace Jovanovich Legal and Professional Publications (HBJ) and BRG of Georgia, Inc. (BRG), entered into an agreement providing BRG an exclusive license to market HBJ's materials in Georgia, requiring that BRG not compete with HBJ outside Georgia, and requiring that HBJ not compete with BRG inside Georgia. 498 U.S. at 47. The companies argued that this agreement did not constitute a *per se* violation of the Sherman Act because there was no evidence that they, while executing their purported territorial allocation scheme, subdivided a market in which they previously competed. *Id.* at 48. This Court rejected that argument, explaining that "[e]ach [defendant] agreed not to compete in the other's territories. Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other." *Id.* at 49-50 (citing *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 344 n.15 (1982)).

Since then, every court of appeals has recognized that territorial allocation, alone, is a black letter *per se* violation of Section 1, without any further requirement that there be an allocation of customers. *See, e.g.*, *Blackburn v. Sweeney*, 53 F.3d 825, 827-28 (7th Cir. 1995); *Seagood Trading Corp. v. Jerrico, Inc.*, 924

F.2d 1555, 1569 (11th Cir. 1991); *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 995 (4th Cir. 1990); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 478 (10th Cir. 1990); *Hahn v. Or. Physicians' Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988); *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1371 (6th Cir. 1988) (per curiam); *Serv. Merch. Co. v. Boyd Corp.*, 722 F.2d 945, 950 (1st Cir. 1983); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 892 (8th Cir. 1978); *Cadillac*, 568 F.2d at 1088 (5th Cir.); *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1242 (3d Cir. 1975); *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 683-84 (D.C. Cir. 1973); *United States v. Consol. Laundries Corp.*, 291 F.2d 563, 574 (2d Cir. 1961).

B. Unlike the Eighth Circuit, several other circuits treat customer allocation agreements as independent, *per se* illegal agreements.

Consistent with the directive of *Topco*, it has long been held that proving customer allocation, even without accompanying evidence of territorial market allocation, constitutes a *per se* violation of Section 1 of the Sherman Act. Indeed, several courts of appeals outside of the Eighth Circuit have so held, and plaintiffs' case would have been decided differently under the standards articulated in those circuits. No court of appeals outside the Eighth has declined to recognize customer allocation as an independent *per se* violation, whether coupled with a territorial allocation or not.

Even before *Topco*, the Second Circuit had recognized that customer allocation, without accompanying evidence of territorial allocation, constitutes a *per se*

violation of the Sherman Act. *Consol. Laundries*, 291 F.2d 563. There, corporations, trade associations, and individuals engaged in the linen supply business agreed to allocate their customers. *Id.* at 567. Acknowledging that "certain types of restraint of trade are unreasonable *per se*, including territorial division of markets," the Second Circuit held that proof of customer allocation *also* was sufficient to establish a *per se* violation of the Sherman Act. *Id.* at 574-75 ("Assuming that customers were allocated in the case at bar, no more need be proved; we agree that the *per se* rule should be applied."). This holding could not be more inconsistent with the Eighth Circuit's ruling below; it explicitly recognized that "no more need be proved" than a customer allocation, condemning the express requirement of the district court and the Eighth Circuit in this case that plaintiffs prove *both* in order to prevail on their customer allocation theory at trial.

The Fifth Circuit likewise adopted this holding in *United States v. Cadillac Overall Supply Co.* The conspirators in *Cadillac* consisted of industrial garment suppliers who agreed to refrain from soliciting each other's existing customers. 568 F.2d at 1081. They also orchestrated a system where, if a customer of one conspirator stopped doing business with that conspirator and began doing business with a different conspirator, the two conspirators would trade customer accounts until they each had an equivalent volume of business. *Id.* Citing *Consolidated Laundries*, the Fifth Circuit expressly considered and rejected the conspirators' argument that a horizontal restraint of trade must be territorial to constitute a *per se* violation of the Sherman Act. *Id.* at 1088-90. In doing so, the

Fifth Circuit held that customer allocation alone is sufficient.* *Id.* at 1090 ("We hold that the allocation of customers is a *per se* violation of Section One of the Sherman Act."). The Fifth Circuit's assessment in *Cadillac* would lead to a different outcome for the plaintiffs here. The court in *Cadillac* was clear that any horizontal allocation agreement by itself would constitute a *per se* violation of the Sherman Act—it need not be combined with another kind of restraint (for example price fixing or a territorial division). *Id.* at 1088-89.

The Sixth and Tenth Circuits have also established that customer allocation, without proof of territorial allocation, suffices to establish a *per se* violation of the Sherman Act. In *United States v. Cooperative Theatres of Ohio, Inc.*, the conspirators, two theater booking agents, agreed to refrain from soliciting each other's theater customers in Ohio and West Virginia. 845 F.2d at 1368. At trial, the court instructed the jury that "[a]n agreement between two competitors to not attempt to become the booking agent for each other's customers is ... a *per se* unreasonable unrestraint of trade." *Id.* at 1369. The jury found the two theater booking agents guilty and they appealed, at-

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* Other Fifth Circuit cases have held that conspiracies consisting of customer allocation, price fixing, and bid rigging constitute *per se* violations of the Sherman Act. *See United States v. Rose*, 449 F.3d 627, 630-32 (5th Cir. 2006) ("[C]onspiracies to submit collusive, noncompetitive, rigged bids, allocate customers, and fix prices are *per se* violations of the Sherman Act.") (citing *inter alia Cadillac*, 568 F.2d at 1090) (internal quotation marks omitted); *United States v. Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977) ("An agreement to fix prices, allocate customers, rig bids, and coerce others to join the conspiracy violated the Act.") (alteration and internal quotations omitted).

tempting to distinguish their case from cases containing an "allocation of specific customers *according to geographic location*." *Id.* at 1371 (emphasis added). But the Sixth Circuit disagreed with the significance of that distinction, holding that the conspirators' agreement not to solicit each other's customers constituted a customer allocation scheme condemned as a *per se* violation of the Sherman Act. *Id.* at 1373.

In *United States v. Suntar Roofing*, the Tenth Circuit also concluded that customer allocation independently constituted a *per se* violation of the Sherman Act. The plaintiffs there alleged that the conspirators, two roofing companies and their agents, conspired to divide customers among themselves for the construction and installation of roofs in the Kansas City metropolitan area. 897 F.2d at 472. The conspirators argued that the district court should have analyzed the customer allocation allegations under a rule of reason analysis, but the Tenth Circuit disagreed, holding "an agreement to allocate or divide customers between competitors within the same horizontal market constitutes a *per se* violation § 1 of the Sherman Act." *Id.* at 473. That court has also *expressly* distinguished between the two kinds of market allocation, recognizing that either is sufficient for a *per se* violation. *See Midwest Underground Storage, Inc. v. Porter*, 717 F.2d 493, 497 n.2 (10th Cir. 1983) ("The essence of a market allocation violation ... is that competitors apportion the market among themselves and cease competing in another's territory *or* for another's customers.") (emphasis added). Notably, in *Suntar Roofing*, the Tenth Circuit determined that a jury instruction providing that "a conspiracy to allocate customers is an agreement or understanding between

competitors not to compete for the business of a particular customer or customers," adequately instructed the jury as to the conspiracy element of a Sherman Act violation, without any mention of territorial allocation. 897 F.2d at 474 (emphasis and alteration omitted). It is thus beyond doubt that the Tenth Circuit would not have denied plaintiffs here the precise instruction that they requested, and that the Eighth Circuit refused.

The Third and Eleventh Circuits have implicitly held the same, suggesting that they would draw the same conclusion as the courts above. *See United States v. Goodman*, 850 F.2d 1473, 1476 (11th Cir. 1988) (reversing convictions of two conspirators who allocated customers within a discrete territory on other grounds while emphasizing that "a customer allocation agreement alone is a *per se* violation of 15 U.S.C. § 1"); *id.* at 1476 n.5 (citing *Cadillac* as binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc)); *United States v. Pa. Refuse Removal Ass'n*, 357 F.2d 806, 808-09 (3d Cir. 1966) (implicitly acknowledging customer allocation alone sufficient for *per se* treatment).

The Second, Third, Fifth, Sixth, Tenth, and Eleventh Circuit cases cited above are all instances where customer allocation agreements have been *analogized* to a form of a territorial agreement that, when proven *alone*, is subject to *per se* treatment under the Sherman Act, whether or not a territorial element is also present. But the Eighth Circuit's error is perhaps best illustrated by Judge Posner's decision in *Hammes v. AAMCO Transmissions, Inc.*, where the Seventh Circuit demonstrated that customer allocation alone may establish a *per se* Sherman Act violation even when

the allegations also contain a geographical component. 33 F.3d 774 (7th Cir. 1994). *Hammes* involved a conspiracy in which a franchisee-dealer of AAMCO was required to join an advertising pool along with four other dealers. *Id.* at 777. The advertising pool would purchase advertisements in the Yellow Pages listing each pool member's telephone number and address along with five other phone numbers that did not have accompanying addresses and instead were only associated with general locations, such as a neighborhood name. *Id.* When someone called one of these other "phantom" phone numbers, the call would automatically be forwarded to an actual dealer in the pool whose location was nearest to the neighborhood associated with the phantom number. *Id.* The plaintiff, however, was excluded from this call-forwarding scheme, and brought suit against AAMCO, the advertising pool, and the other pool members alleging a violation of the Sherman Act. *Id.*

While recognizing the geographical components of the allegations, the Seventh Circuit characterized the allegations as *also* establishing a customer allocation conspiracy:

> A type of conspiracy that has effects almost identical to those of price-fixing and is treated the same by the law is a conspiracy between competitors to rotate or otherwise allocate customers among the conspirators, so that each customer faces a monopoly seller. The AAMCO dealers in Indianapolis are located in different parts of the city and each presumably has an advantage in competing for the customers nearest to it. Under conditions of unrestricted competition, customers on the

> borderline of these zones of advantage would be courted by two or more dealers. The allocation of these customers among the dealers by means of automatic call forwarding from phantom dealers supposedly located in the borderline areas could eliminate competition for customers who, not being within the gravitational field of any dealer by reason of proximity, would, were it not for the allocation, have a real and not merely theoretical choice between dealers. Such an out-and-out scheme of customer allocation would be a *per se* violation of section 1.

33 F.3d at 782 (citing *Palmer*, 498 U.S. 46). Accordingly, while the Seventh Circuit recognized that the dealers were using the advertising pool to divide customers along geographical lines, the Seventh Circuit characterized this conspiracy as unlawful based solely on its element of customer allocation, and therefore did not require proof of *both* customer *and* territorial allocation. *Id.*

As with the circuits above, the Seventh Circuit's analysis in *Hammes* would also result in a different decision for the plaintiffs in the instant case. There, the Seventh Circuit concluded that even if the plaintiffs had not alleged any different geographic location or proximity for the customers involved, the customer allocation itself would be a *per se* violation of Section 1. 33 F.3d at 782. Under the Eighth Circuit's rule, however, the jury would be instructed that an "out-and-out scheme of customer allocation" would not by itself establish a *per se* violation of the Sherman Act without additional evidence of territorial allocation—evidence the Seventh Circuit concluded it did not need. *Id.*

In sum, the Eighth Circuit's sister circuits have conclusively established that either territorial allocation *or* customer allocation may independently establish a *per se* violation of the Sherman Act. Indeed, as illustrated by the Seventh Circuit's decision in *Hammes*, customer or territorial allocation alone may create Sherman Act liability even when the conspiracy contains elements of both. By requiring plaintiffs to prove customer *and* territorial allocation in order to establish Sherman Act liability, the Eighth Circuit's decision deviated from a well-founded rule applied by the other circuits, and this Court's intervention is now necessary to correct that disagreement.

II. The Eighth Circuit's Effective Elimination of Customer Allocation as a Separate, *Per Se* Violation of the Sherman Act Is an Important Error of Law.

A. The Eighth Circuit's reasoning is flawed.

Plaintiffs presented evidence both that C&S agreed to allocate the entire Midwest territory to SuperValu and that C&S agreed to allocate small, independent Midwest grocers (such as plaintiffs) to SuperValu while still reserving some rights to at least approach larger, chain grocery stores in the same territory. *See* Part III, *infra*.

Despite this evidence, the directive from *Topco*, and holdings in other circuit courts, the district court rejected plaintiffs' objections that the special verdict form and related instructions should permit the jury to find that C&S violated the Sherman Act if C&S agreed either to allocate territories or to allocate customers. As the district court put it:

> [T]he special verdict form is obviously constructed in light of the evidence which has been received at trial and is tailored to address the specific issues of the case, and I think the agreement in this case has always had a hybrid of territories and customers within territories. There aren't separate agreements about territories separate from customers. And I think the "and" language has consistently been used throughout the trial and pleadings and the way the case has been presented so that the jury won't be confused by the territories and customers and treating them in conjunction with each other.

Pet. App. 12a. The court's explanation reveals its error. Plaintiffs should not have been required to prove "separate agreements" in order to have C&S's conspiracy evaluated under separate theories of territorial allocation and customer allocation. Put another way, even a single agreement necessarily violates the Sherman Act if it involves *either* a territorial allocation *or* a customer allocation, without regard to the fact that the plaintiff alleges that it involves both. Indeed, under the law of this Court and that of every other circuit that has addressed this issue, the *same* agreement or conspiracy can separately establish a customer allocation or a territorial allocation, or both. *See* Part I, *infra*.

Accordingly, plaintiffs were entitled to a finding of a Sherman Act violation if C&S's agreement with SuperValu amounted to either kind of *per se* violation. In other words, *whatever* kind of conspiracy plaintiffs alleged and sought to prove, the law should treat that conspiracy as a *per se* violation if it has either of the market-division characteristics discussed above. Any

holding requiring the plaintiffs to prove both allocations thus necessarily reflects the wrong legal rule, regardless of how plaintiffs presented their case.

The Eighth Circuit's contrary conclusion simply tacks on to the correct legal test or instruction a further showing that the plaintiff need not make. The panel thus upheld the district court's use, *over plaintiffs' express objection*, of a verdict form that required the jury to find that defendant C&S agreed to allocate both customers and territories in order to find any Sherman Act violation, along with a jury instruction that impermissibly conflated the two claims.

As the foregoing indicates, the Eighth Circuit's erroneous reasoning is in no way saved by the panel's finding that "D&G's theory in the case melded the two" claims. Pet. App. 6a. The panel suggested that, while "D&G argued that C&S and SuperValu agreed to allocate customers in the Midwest and New England," it did not contend "that C&S agreed to divide up customers outside those regions or to allocate those territories without allocating customers in them." *Id.* But under the correct legal rule, that is entirely beside the point because if the agreement amounts to *either* kind of *per se* illegal agreement, a Sherman Act violation has been established without regard to the plaintiffs' contention that the agreement "melds" both kinds of violations and so is doubly inappropriate.

Moreover, the Eighth Circuit's reasoning is manifestly illogical. All customers are located somewhere (*e.g.*, the Midwest, the United States, the Mid-Atlantic, California), and by the Eighth Circuit's logic, all agreements to allocate customers are thus agreements to allocate customers within a certain territory and thus are "melded" with a territorial allocation in the

minimal sense indicated by the panel. The result of the panel's opinion is thus that any plaintiff bringing a customer allocation claim will be forced to prove that the defendant agreed to allocate customers *and* territories in order to win a jury verdict. The Eight Circuit's novel rule thereby erroneously eliminates customer allocation as a separate, *per se* violation of the Sherman Act.

Contrast this reasoning with the approach taken not only in the other circuits (Part I, *supra*) and this Court (Part II.B., *infra*), but also in the American Bar Association (ABA) model instructions. The ABA model instructions recognize that a customer allocation may include a geographic component while remaining distinct from a territorial allocation. The first element of a customer allocation is that "defendant and one or more other persons agreed that [*state nature of allocation alleged, e.g., one would not submit a lower bid in the county in which the other was located*]." Pet. C.A. App. 245 (reproducing excerpts of ABA, *Model Jury Instructions in Civil Antitrust Cases* (2016)). The bracketed text plainly suggests that parties should insert a common-sense reference to location if applicable. But as the model instructions illustrate, describing the location of the allocated customers does not convert a customer allocation into a territorial allocation and does not "meld" them into a single *per se* Sherman Act violation. Each claim retains its separate character; that is why the ABA model instructions also include a separate instruction for territorial allocation. *Id.* at 247-48 (requiring plaintiff to prove that "defendants agreed that they would not compete with each other in certain territories or geographic areas"). The gist is that a territorial allocation

excludes competition for *all* customers within the territory, whereas a customer allocation excludes competition for *certain* customers *regardless of whether or not those customers are further identified as located within a certain territory*.

These cases and the ABA model jury instructions thus show that the Eighth Circuit erred in upholding the district court's instructions and verdict form. That straightforward error leaves the Eighth Circuit alone among the courts of appeals, and this Court should bring it back in line with its own precedent and its sister circuits.

B. The Eighth Circuit's rule will harm customers if allowed to stand.

Without the ability to bring a customer allocation claim as a separate *per se* violation of the Sherman Act, there will be no practicable private remedy for a common anticompetitive practice that clearly harms competition and consumers. *Topco* is instructive. Although the Court in *Topco* concluded the territorial allocation alone was enough to constitute a *per se* violation of the Sherman Act, the Court did not end its analysis of the conspiracy there. *Topco*, 405 U.S. at 612. Instead, the Court separately addressed the conspirators' agreement that members of the cooperative association receive permission before selling products at wholesale, emphasizing this scheme constituted an allocation of customers which, independent from the territorial division scheme, had the purpose of inhibiting trade with no redeeming quality. *See id.* at 608, 612. In doing so, the Court underscored that customer allocation schemes, *by themselves*, have "no purpose except stifling of competition," and therefore receive *per*

se treatment. *Id.* at 608, 612 (internal quotation marks omitted).

For a century now, the Court has recognized that certain agreements in restraint of trade between horizontal competitors, such as those at issue here, clearly harm competition and consumers to such an extent that *per se* treatment is appropriate. The purpose and spirit of the antitrust laws are undermined whenever a court makes it more difficult to demonstrate that a naked horizontal restraint of trade should be found anticompetitive. Accordingly, it is inconsistent with the Court's approach to *per se* rules for there to exist a requirement that in order to be found anticompetitive, an agreement between horizontal competitors that qualifies for *per se* treatment must also be shown to restrain trade in *another* way.

Territorial market allocations have been considered unlawful since the passage of the Sherman Act, and *per se* violations for nearly half a century. Customer allocations have reached similar status: The first determination of illegality was more than a half century ago. If the Eighth Circuit's elimination of customer allocation as an independent claim were allowed to stand, it would not be because it re-evaluated the harm to competition by the allocation of customers between horizontal competitors—such allocations clearly remain harmful, whether complete territorial allocation is proven or not. The protection against such naked restraints by the *per se* rule will thus be missing in the Eighth Circuit for no reason other than legal error, and that error should be remedied by this Court.

III. This Case Is an Ideal Vehicle for Correcting This Error and Resolving This Split.

This case is a particularly strong vehicle to establish that customer allocation and territorial allocation can each be brought as separate *per se* theories in a single case. At every stage of the proceedings below, the allegations, arguments, and evidence supported both a finding of customer allocation and a finding of territorial allocation, and plaintiffs' proposed jury instructions and special verdict form clearly and expressly delineated the two. The question presented was thus addressed squarely, and resolved erroneously, by the district court and by the Eighth Circuit panel. The question presented has thus been well preserved throughout the record below.

Plaintiffs' Second Consolidated Amended Class Action Complaint alleged that C&S's agreement violated the Sherman Act if C&S's agreement constituted *either* (i) a territorial allocation *or* (ii) a customer allocation. *See* Pet. C.A. App. 26 ¶ 70(a) (listing one of the common questions of law or fact as "Whether the Defendants combined, agreed or conspired to allocate territories *or* customers for full-line grocery wholesale goods and services....") (emphasis added); *cf. id.* at 30 ¶ 83 ("As a direct and proximate result of Defendants' *violations* of the Sherman Act….") (emphasis added).

Then, at the pre-trial conference, plaintiffs explicitly confirmed that they were pursuing both of these independent claims. *See* Resp. C.A. App. 13 (Tr. 51:5-10) ("THE COURT: But is this a customer allocation case, do you think, or a territorial? MR. BRUCKNER: Well, we think it's both, Your Honor. I mean, we think they allocated customers in those geographic markets, but we also think it was a territory-wide or geographic

area-wide agreement."). Plaintiffs' commitment to these two separate claims at trial was reflected in the discussion of jury questions at the same pre-trial conference. *Id.* at 14 (Tr. 53:1-12) ("THE COURT: … And you're willing, as I understand all of the pleadings at this point, to rise or fall upon a jury answering a question—and I'm not formulating the way it would be, but was there a secret agreement between SuperValu and C&S to divide up customers *and/or* territories or what we work onto that would be a *per se* violation if proved? MR. BRUCKNER: Exactly right, Your Honor…. [W]e think the jury should be told exactly what you just said….") (emphasis added).

At the pre-trial conference, plaintiffs clearly identified that they had asserted "two different claims," both "a customer allocation claim and a geographic territory allocation claim." Pet. C.A. App. 104:11-15. Plaintiffs thus requested that the jury determine whether the wholesalers' real agreement was a "geographic-wide allocation" or a more limited one in which "C&S and SuperValu agreed not to compete for customers within those areas, those being the independent retail grocers that we represent and that are in our classes." *Id.* at 104:16-105:9.

Accordingly, the plaintiffs' evidence at trial supported (and the defendants' evidence attacked) each of the two *per se* violations plaintiffs alleged. Plaintiffs provided sufficient evidence to permit a reasonable jury to conclude that C&S's agreement with SuperValu involved allocating territories (the Midwest and New England). Among other things, this evidence included "revealing ... e-mails, written by C&S's executive vice president [Mark Gross], indicating 'the basis of the deal' was that SuperValu would 'depart[] from

New England' and 'wo[uld]n't compete with [C&S] in New England' and C&S was 'not interested in a transaction that leaves SuperValu in New England'" because "all customers in New England are part of the deal" and SuperValu "is agreeing to leave New England. We are not on board [with] a deal that excludes New England customers shipped from some other facility" since C&S and SuperValu "have always been discussing [SuperValu's] departure from New England. No carve-outs." *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 734 (8th Cir. 2014); Pet. C.A. App. 172, 174. These were supported by further statements from C&S Senior Vice President Mark Gross stating that "SVU is agreeing to leave New England," and "SuperValu does not want to compete with us anywhere." Pet. C.A. App. 199-202, 203. The jury heard that, after C&S's agreement with SuperValu, SuperValu's then-CEO Jeff Noddle stated that "the two companies will not be competing at the wholesale level anywhere in the United States." *Id.* at 204. This is stark evidence of a *per se* violation of the Sherman Act.

To refute this theory, defendants suggested that no such agreement actually existed, because C&S continued to serve chain stores with locations in the Midwest. But this gambit was exactly what plaintiffs' separate customer allocation theory was meant to cut off. As plaintiffs explained to the jury, C&S had abandoned any effort to serve *independent* (*i.e.*, non-chain) grocers in the Midwest, allocating those customers to SuperValu. And that was proven in part by the fact that, prior to the AEA, C&S had started a major "push" to serve precisely those customers from its Maple Heights, Ohio distribution center (Pet. C.A. App.

117:23-119:2), which C&S Chairman and President Rick Cohen said was a "beachhead in the Ohio market" where C&S was "looking to add additional customers" (*id.* at 115:25-116:14). After C&S signed the AEA, this major push for new Midwest independent grocers stopped dead and the record accordingly reflected not a single sale to an independent Midwest grocer after the AEA was consummated. Had the jury been correctly instructed on the customer allocation theory and its independent sufficiency, this evidence would have been a very strong basis for the jury to conclude that a *per se* violation had in fact been committed.

Indeed, after the presentation of the evidence (and expecting to get a legally correct instruction), plaintiffs explicitly distinguished between their territorial allocation claim and their customer allocation claim, and argued that the jury should return a verdict for plaintiffs even if C&S competed for some chain customers in the Midwest:

> [I]f you find, for example, that C&S agreed not to compete for independent grocers in the Midwest, you should find for the plaintiff, and we think in fact the agreement is broader than that, but if you disagree, you're the judge of the facts. If you disagree and find that C&S, well, maybe they competed for some chains, but they didn't compete for independent retailers, then you should answer yes to Question 1.

Pet. C.A. App. 159:3-10. And yet, when it was presented to the jury on the verdict form and in instruction 20, the relevant question required not just the allocation of independent grocer customers, but *both*

that allocation and a territorial allocation as well. *See* Pet. App. 21a, 24a.

The foregoing indicates that the plaintiffs' dual *per se* theories of the case could hardly have been more clear, which makes this case a particularly good vehicle for analyzing the error alleged. Given this theory, plaintiffs requested, but were denied, a separate instruction and standalone special verdict form question on whether C&S agreed with SuperValu to allocate customers. *See, e.g.*, Pet. C.A. App. 73. And obtaining that instruction was crucial to its alternative theory of the case. But the district court's Instruction No. 20 ultimately contained no instruction on customer allocation at all, to which plaintiffs objected. Pet. App. 9a-14a, 21a-23a. Under plaintiffs' proposed jury instructions and special verdict form, C&S would have been found to have violated the Sherman Act if the jury concluded *either* that C&S agreed to allocate certain customers in the Midwest to SuperValu *or* that C&S agreed to allocate the entire Midwest to SuperValu. *Id.* at 10a-11a ("And our point is that if we prove either one, we're entitled to prevail, therefore we think that it ought to say 'or'—'or' at the least, 'and/or.' So we would object to that instruction on that basis."). But the district court denied precisely that instruction, and the Eighth Circuit affirmed, squarely presenting the question plaintiffs' petition presents here.

As a result, this case provides an excellent vehicle for this Court to resolve a circuit split, reaffirm decades of case law regarding the purpose and scope of *per se* antitrust violations, and distinguish between territorial and customer allocations that present in the same set of facts but nevertheless constitute independent *per se* violations of the antitrust laws. Under the

rule established in the Seventh Circuit in *Hammes*, and the conclusions drawn by other circuit courts of appeals in establishing customer allocation as a separate *per se* violation even when no territorial allocation is present, plaintiffs should not need to prove that defendant C&S agreed to allocate *both* customers *and* territories. But under the rule established by the Eighth Circuit in the instant case, decades of case law establishing customer allocation as a *per se* violation is in doubt. This Court should grant the petition, resolve this disagreement, and reverse.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 6, 2020

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18-2121

In re: Wholesale Grocery Products Antitrust Litigation

D&G, Inc., doing business as Gary's Foods; Blue Goose Super Market, Inc.; Nemecek Markets, Inc.; Millennium Operations, Inc., doing business as Dick's Market; Elkhorn-Lueptows, Inc.; Jefferson Lueptows, Inc.; East Troy Lueptows, Inc.,

Plaintiffs - Appellants,

v.

C&S Wholesale Grocers, Inc.,

Defendant - Appellee.

Appeal from United States District Court for the District of Minnesota - Minneapolis

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Submitted: October 15, 2019
Filed: April 27, 2020

Before COLLOTON, BEAM, and KELLY, Circuit Judges.

COLLOTON, Circuit Judge.

D&G, Inc., an independent grocery retailer, brought an antitrust suit against C&S Wholesale Grocers, Inc., on behalf of a class of grocery retailers. The retailers alleged that C&S agreed with another grocery wholesaler, SuperValu, Inc., not to compete for customers in certain geographical areas. A jury returned a verdict in favor of C&S. D&G appeals, arguing that the district court[1] erred in its instructions to the jury. We conclude that the instructions fairly and adequately submitted the issues, and we therefore affirm the judgment.

I.

C&S Wholesale Grocers, Inc., provides wholesale grocery services to grocery retail stores primarily in the northeastern United States. In 2003, C&S purchased substantially all the assets of Fleming, a nationwide grocery wholesaler, during Fleming's bankruptcy. C&S later entered into an asset exchange agreement with SuperValu, a grocery wholesaler headquartered near Minneapolis. C&S transferred Fleming's assets and customers located in the Midwest to SuperValu in exchange for SuperValu's assets and customers located in New England. C&S and SuperValu agreed not to supply the exchanged customers for two years after the sale and not to solicit the exchanged customers for five years after the sale.

This transaction prompted extensive antitrust litigation. Customers of both C&S and SuperValu sued the wholesalers, asserting that the written agreement

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[1] The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

and a separate unwritten understanding violated the Sherman Act, 15 U.S.C. § 1. The district court certified five classes of plaintiffs, all grocery retailers, who brought antitrust claims against C&S and SuperValu arising from the transaction. This court has addressed other aspects of the litigation in three previous appeals. *See In re Wholesale Grocery Prod. Antitrust Litig.*, 946 F.3d 995 (8th Cir. 2019); *In re Wholesale Grocery Prod. Antitrust Litig.*, 752 F.3d 728 (8th Cir. 2014); *In re Wholesale Grocery Prod. Antitrust Litig.*, 707 F.3d 917 (8th Cir. 2013).

D&G, Inc., is an independent grocery store representing one of the classes that sued C&S. D&G and the class assert that the agreement between C&S and SuperValu was an illegal antitrust conspiracy. The class alleged that C&S violated the Sherman Act by agreeing with SuperValu to allocate customers and territories for full-line grocery wholesale goods and services, and that this anti-competitive conduct caused retailers to pay supracompetitive prices for wholesale goods and services.

D&G's case eventually proceeded to trial in April 2018. D&G's theory was that in addition to the written agreement about exchanging assets and existing customers, C&S and SuperValu had an unwritten agreement that C&S would not compete for new customers in the Midwest and that SuperValu would not compete for new customers in the Northeast. Alternatively, as the case developed at trial, D&G claimed that even if C&S did not agree to forego competition for *all* new customers in the Midwest, C&S at least agreed that it would not compete for new business from a subset of potential new customers—namely, independent grocery retailers—in that region. After a

two-week trial, a jury returned a verdict for the defendant C&S.

II.

D&G's argument on appeal is that the district court erred in formulating one jury instruction and the verdict form. The district court gave Final Jury Instruction No. 20 as follows:

> Plaintiffs claim that C&S violated Section 1 of the Sherman Act by entering into an Unwritten Agreement with SuperValu to allocate customers and territories along geographic lines. Allocate means to divide.
>
> . . . .
>
> To prevail on this claim against C&S, Plaintiffs must prove each of the following elements by a preponderance of the evidence: (1) C&S and SuperValu were competitors or potential competitors; (2) C&S and SuperValu entered into a conspiracy—specifically, the Unwritten Agreement—in which C&S agreed that it would not compete with Supervalu for new customers in certain territories or geographic areas; and (3) Plaintiffs were injured in their business or property because of the Unwritten Agreement.

R. Doc. 1232, at 21-22.

The district court also asked the jury, on a special verdict form, the following question: "Did the Plaintiffs prove that C&S and SuperValu were competitors or potential competitors, and that they entered into an Unwritten Agreement to divide territories and customers along geographic lines which restricted

competition more broadly than the Asset Exchange Agreement?" R. Doc. 1233.

We review the district court's jury instructions, including special verdict forms, for abuse of discretion. *Wilkins v. St. Louis Hous. Auth.*, 314 F.3d 927, 932 (8th Cir. 2002). The pertinent question is "whether the instructions, taken as a whole and viewed in light of the evidence and applicable law, fairly and adequately submitted the issues in the case to the jury." *M.M. Silta, Inc. v. Cleveland Cliffs, Inc.*, 572 F.3d 532, 536 (8th Cir. 2009) (quoting *Bass v. Flying J, Inc.*, 500 F.3d 736, 739 (8th Cir. 2007)). An error requires a new trial if it had a substantial influence on the verdict. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

D&G argues that the district court mistakenly required the plaintiffs to prove that C&S and SuperValu agreed to allocate both customers *and* territories, but that proof of an agreement to divide one or the other should have been sufficient to establish a *per se* violation of the Sherman Act. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608-12 (1972). D&G focuses on the first sentence of the jury instruction, which referred to a claim that the wholesalers agreed "to allocate customers and territories along geographic lines." And D&G highlights the question in the special verdict form asking whether the plaintiffs had proved an agreement "to divide territories and customers along geographic lines."

D&G proposed different instructions and maintains that the district court should have used them instead. D&G asked for instructions on two different claims. The submission on "Claim 1—Allocation of Customers" would have required proof that "C&S agreed with Supervalu to divide up customers along

geographic lines." R. Doc. 1138, at 37. The proposed instruction for "Claim 2—Allocation of Territories or Geographical Areas" asked whether the plaintiffs had proved that "C&S agreed that it would not compete with Supervalu in certain territories or geographic areas." R. Doc. 1138, at 39-40.

Whether the jury instructions fairly and adequately submitted the issues to the jury must be considered in light of the evidence and legal theories advanced in a particular case. While it is true that an agreement to allocate either customers or territories could violate the Sherman Act, D&G's theory in this case melded the two. D&G argued that C&S and SuperValu agreed to allocate customers in the Midwest and New England. There was no contention that C&S agreed to divide up customers outside those regions or to allocate those territories without allocating customers in them. It was therefore understandable and consistent with the evidence and arguments for the district court to instruct that D&G must prove that "C&S agreed that it would not compete with Supervalu for new customers in certain territories or geographic areas." Likewise, the reference in the verdict form to "an Unwritten Agreement to divide territories and customers along geographic lines" is consistent with D&G's primary theory throughout the case—namely, that C&S and SuperValu agreed to allocate new customers in the Midwest to one company and new customers in New England to the other.

D&G complains that the instructions did not allow the jury adequately to consider its alternate theory that the defendants agreed to allocate a certain segment of the new customers in the two regions (*i.e.*, independent grocery retailers) even if they did not divide

up all new customers in the two territories. Final Instruction No. 20, however, was sufficient to accommodate the alternate theory. It did not require a finding that the defendants agreed to allocate *all* new customers. The marshaling instruction said that D&G must prove an agreement that C&S "would not compete with Supervalu for new customers in certain territories or geographic areas." If the jury was convinced that C&S agreed that it would not compete with SuperValu for new independent grocer customers in the Midwest, then there was ample room under the instructions to find liability.

We are fortified in this conclusion by the fact that D&G's proposed instructions do not differ meaningfully from the final instruction on this issue. D&G proposed separate instructions asking whether "C&S agreed with Supervalu to divide up customers along geographic lines" or whether "C&S agreed that it would not compete with Supervalu in certain territories or geographic areas." Neither of these instructions parses a distinction between *all* new customers and *a subset* of new customers. D&G's proposed reference to dividing up "customers" along geographical lines is no different from the final instruction's focus on allocating "new customers" in certain territories or geographical areas. If D&G's proposed instruction could accommodate a theory of liability based on dividing up independent grocery retailers along geographical lines, then Final Instruction No. 20 could too.

We are not convinced by D&G's contention that the reference in the verdict form to the defendants dividing "territories and customers along geographic lines" misled the jury. The jury was told in Final Instruction No. 20 that it "must find" liability if "C&S

agreed that it would not compete with Supervalu for new customers in certain territories or geographic areas." We consider the instructions as a whole and evaluate the verdict form in light of the instructions. If the jury was persuaded that C&S agreed not to compete for new independent grocer customers in the Midwest, such that it was directed to find for the plaintiffs under the jury instruction, then it is not reasonably likely that any variation between the wording of the instruction and the verdict form caused the jury to believe that it must reject D&G's claim. As Chief Justice Rehnquist once wrote for the Court:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde v. California, 494 U.S. 370, 380-81 (1990).

* * *

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Wholesale Grocery Products Antitrust Litigation	Court File No. 09-MD-2090 ADM/TNL Courtroom 13 West Thursday, April 19, 2018 Minneapolis, Minnesota 9:30 A.M.

[1447]

JURY TRIAL PROCEEDINGS

(VOLUME IX)

BEFORE THE HONORABLE ANN D. MONTGOMERY
SENIOR UNITED STATES DISTRICT JUDGE
AND A JURY

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[1452]

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THE COURT: … [1453] The record should reflect that we have had an ongoing process with regard to the jury instructions and the special verdict form. I've been—your arguments and positions have been relayed back to me through my law clerks in this process and we have made a number of rulings which are incorporated in the final set of instructions that you have now been provided, but I want to make sure you have

an opportunity to make any record you would like as to the rulings which have been made.

Let's start with the special verdict form. Mr. Bruckner, does the plaintiff wish to preserve any objections to the Court's proposed special verdict form?

MR. BRUCKNER: Yes, Your Honor, we do. We have two.

THE COURT: Okay.

MR. BRUCKNER: On the special verdict form in Question Number 1, specifically what we would propose is to change language so that it would read:

"Did the Plaintiffs prove that C&S and SuperValu were competitors or potential competitors, and that they entered into an Unwritten Agreement to divide territories"—we would change the word "and" to "or," or at least at a minimum we would change it to "and/or," a phrase only lawyers can love, and the point is this, Your Honor, the reason is this:

[1454] We do allege that C&S entered into an agreement to allocate customers and territories, but it's our view and our position that if we prove either one, we're entitled to prevail. So it does say "and" throughout the instructions, "customers and territories."

THE COURT: And in the complaint.

MR. BRUCKNER: Correct, and in the complaint.

THE COURT: And the Eighth Circuit—

MR. BRUCKNER: Absolutely. And that's all accurate.

THE COURT: Okay.

MR. BRUCKNER: And our point is that if we prove either one, we're entitled to prevail, therefore we

think that it ought to say "or"—"or" at the least, "and/or." So we would object to that instruction on that basis.

The other point on the verdict form and throughout the instructions, as we have raised with Your Honor's law clerks, rather than call it an unwritten agreement, we would suggest that the Court refer to it as the broader agreement. We think that is clearer. It is more accurate. It will avoid the inevitable jury confusion that if they are instructed that they must find an unwritten agreement, a juror could conclude: Well, I saw lots of writings about this broader agreement. I saw some emails and I saw some internal corporate presentations, so those are in writing [1455] and therefore I guess that's not the agreement that they're talking about." So wherever it says "unwritten," we would propose to change that to "broader."

THE COURT: And that would be true throughout the instructions.

MR. BRUCKNER: Correct, correct.

I would note just for purposes of clarifying, for example, on Jury Instruction Number 23, if there is a concern that calling it the broader agreement does not sufficiently differentiate it from the written AEA agreement, if you look on Jury Instruction Number 23 in the third paragraph, it reads:

"You must decide whether C&S's decision about whether and how to do business in the Midwest was more probably than not the result of"—if you change the word "unwritten" to "broader," it would say: "the result of a broader agreement or understanding between C&S and SuperValu that was above and beyond the written AEA."

I don't think anything could be more clear than that the two agreements are being differentiated.

So those are our two points on the special verdict form. We would object to the form as presently drafted on those two grounds and I think that's all I have on the verdict form.

THE COURT: All right. Well, the special verdict [1456] form is obviously constructed in light of the evidence which has been received at trial and is tailored to address the specific issues of the case, and I think the agreement in this case has always had a hybrid of territories and customers within territories. There aren't separate agreements about territories separate from customers. And I think the "and" language has consistently been used throughout the trial and pleadings and the way the case has been presented so that the jury won't be confused by the territories and customers and treating them in conjunction with each other.

We gave a lot of thought to how to call this unwritten agreement something other than "secret agreement" or lawyerly language about "broader" or "supplemental" agreement and decided that—I decided that "unwritten" was the fairest way to label the issue for the jury to distinguish between the AEA and what else is happening.

I think the concern about jury confusion as to whether emails or documentary issues that circumstantially may prove an unwritten agreement are really handled by the instructions as we sort that out and certainly can be addressed in argument, that there are—that these emails and the circumstantial evidence which may be construed as showing an

unwritten agreement should be and can be considered as part of the evidence to prove that there was [1457] such an agreement.

So both of those issues are noted and preserved, but overruled, and the Court based on the plaintiffs' objections will stay with the special verdict form as proposed.

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[1466]

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MR. BRUCKNER: The only other point that we would note, Your Honor, is on the Court's Instruction Number 20. And as I understand it, it is an effort to address both the customer allocation claim and the territorial allocation claim in one instruction, and we've noted our objection to the verdict form on that ground and we hope—or we intend that to apply to the instruction as well.

THE COURT: It does.

MR. BRUCKNER: My additional point on that, Your Honor, is that if the Court is going to proceed with a single unitary instruction on customer and territorial allocation, is that the Court ought to include the paragraph from the model instructions on customer allocation.

On Jury Instruction Number 20 in the third paragraph there is the paragraph from the model rules on describing a conspiracy to allocate territories or geographic areas. What we would think would be appropriate is that after that paragraph the Court add the paragraph from the model instructions, and that was—that was captured in our proposed customer

allocation instruction, which was in document number 1138 in this case on page 37. [1467] And that paragraph, additional paragraph, we think ought to be included would read:

"A conspiracy to allocate customers is an agreement between two or more competitors not to compete with one another for the business of particular customers. Customer allocation exists, for example, where two or more competitors agree that they will not sell or try to sell to one another's existing customers or to certain customers along geographic lines."

That's from our proposed instruction—

THE COURT: And I see that's from the model instructions as well.

MR. BRUCKNER: Correct. So we would note our objection to Instruction No. 20 to the extent that that paragraph is not included in what is told to the jury.

THE COURT: All right. Noted.

And I take it, Mr. Hochstadt, the defense opposes the separation out of the customer and territorial arguments in the context of the case.

MR. HOCHSTADT: Yes. That will lead to the same jury confusion with the AEA not being challenged.

THE COURT: I think we'll be consistent on that. The objection is noted, but I won't break out or bifurcate the issues with regard to the agreement between customers and territories given the fact that the evidence says that [1468] they were treated here as together throughout the case.

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2121

In re: Wholesale Grocery Products Antitrust Litigation

D&G, Inc., doing business as Gary's Foods, et al.
Appellants

v.

C&S Wholesale Grocers, Inc.
Appellee

Appeal from U.S. District Court for the District of Minnesota – Minneapolis
(0:09-md-02090-ADM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Stras did not participate in the consideration or decision of this matter.

June 09, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Wholesale Grocery Products Antitrust Litigation	**JUDGMENT IN A CIVIL CASE** Case Number: 09md2090 ADM/TNL

☒ **Jury Verdict**. This action came before the Court for a trial by jury. The issues against C&S Wholesale Grocers, Inc. have been tried and the jury has rendered its verdict.

☐ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

The claim against Defendant C&S Wholesale Grocers, Inc. has been tried and a decision has been rendered. The jury found for Defendant C&S Wholesale Grocers, Inc.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is hereby directed to enter this Partial Final Judgment.

Date: April 20, 2018 KATE M. FOGARTY, CLERK

s/Jackie Ellingson
(By) Jackie Ellingson, Deputy Clerk

s/Ann D. Montgomery
Ann D. Montgomery
U.S. District Court Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Wholesale Grocery Products Antitrust Litigation	**AMENDED JUDGMENT IN A CIVIL CASE**
	Case Number: 09md2090 ADM/TNL

[Filed: May 23, 2018]

☒ **Jury Verdict**. This action came before the Court for a trial by jury. The issues against C&S Wholesale Grocers, Inc. have been tried and the jury has rendered its verdict.

☐ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

The claim against Defendant C&S Wholesale Grocers, Inc. has been tried and a decision has been rendered. The jury found for Defendant C&S Wholesale Grocers, Inc.

The claim against Defendant C&S Wholesale Grocers, Inc., involved five classes certified under Fed. R. Civ. P. 23(b)(3) (the "Classes"). ECF Nos. 647, 651. The certified Classes are defined as follows:

The Champaign DC Non-Arbitration Class: All customers that paid ABS fees on wholesale grocery products in all four SuperValu ABS product categories (grocery, dairy, frozen, and general merchandise/

health and beauty care) purchased directly from SuperValu's Champaign, Illinois DC from December 31, 2004 through September 13, 2008 (the "Class Period"), are located in the relevant geographic market, and did not have an arbitration agreement with SuperValu during the Class Period.

The Champaign DC Arbitration Class: All customers that paid ABS fees on wholesale grocery products in all four SuperValu ABS product categories (grocery, dairy, frozen, and general merchandise/ health and beauty care) purchased directly from SuperValu's Champaign, Illinois DC from December 31, 2004 through September 13, 2008, are located in the relevant geographic market, and had an arbitration agreement with SuperValu during the Class Period.

The Green Bay DC Class: All customers that paid ABS fees on wholesale grocery products in all four SuperValu ABS product categories (grocery, dairy, frozen, and general merchandise/health and beauty care) purchased directly from SuperValu's Green Bay, Wisconsin DC from December 31, 2004 through September 13, 2008, and are located in the relevant geographic market.

The Hopkins DC Class: All customers that paid ABS fees on wholesale grocery products in all four SuperValu ABS product categories (grocery, dairy, frozen, and general merchandise/health and beauty care) purchased directly from SuperValu's Hopkins, Minnesota DC from December 31, 2004 through September 13, 2008, and are located in the relevant geographic market.

The Pleasant Prairie DC Class: All customers that paid ABS fees on wholesale grocery products in

all four SuperValu ABS product categories (grocery, dairy, frozen, and general merchandise/health and beauty care) purchased directly from SuperValu's Pleasant Prairie, Wisconsin DC from December 31, 2004 through September 13, 2008, and are located in the relevant geographic market.

This partial judgment only applies to the claims between the Classes above and Defendant C&S Wholesale Grocers, Inc.

Excluded from each of the five Classes are:

a. the Court and its officers, employees, and relatives;

b. Defendants and their parents, subsidiaries, affiliates, shareholders, employees, and co-conspirators;

c. government entities;

d. any customer of either Defendant who, prior to C&S and SuperValu's September 6, 2003 AEA, entered into a contract with either Defendant 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 such contract during the Class Period; and

e. Tops Friendly Markets, LLC and The Great Atlantic & Pacific Tea Company, Inc. (also known as A&P).

Notice was directed to the five Classes pursuant to Fed. R. Civ. P. 23(c)(2) as "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort" on March 1, 2017. ECF No. 727. Notice was disseminated in accordance with this

Order on April 27, 2017. ECF Nos. 742, 743. A list of all persons and entities who timely requested exclusion was filed with the Court on July 31, 2017. ECF No. 828.

Except for those class members who filed a timely request for exclusion and appear in the list docketed at ECF No. 828, all others not otherwise excluded as above are deemed members of the Classes bound by the judgment.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is hereby directed to enter this Partial Final Judgment.

Date: 5/22/18 KATE M. FOGARTY, CLERK

s/LP Holden
(By) LP Holden, Deputy Clerk

s/Ann D. Montgomery
Ann D. Montgomery
U.S. District Court Judge

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re Wholesale Grocery Products Antitrust Litigation	**JURY INSTRUCTIONS** Civil No. 09-MD-2090 ADM/TNL

[Filed Apr. 20, 2018]

* * *

Date submitted to jury: April 19, 2018

* * *

JURY INSTRUCTION NO. 20

Plaintiffs claim that C&S violated Section 1 of the Sherman Act by entering into an Unwritten Agreement with SuperValu to allocate customers and territories along geographic lines. Allocate means to divide.

A business has the right to select its own geographic area or territory in which it will sell its products or services. Likewise, a business may decide not to sell its products or services in a particular area or territory, provided that the decision results from the exercise of an independent business judgment and not from any agreement with a competitor or potential competitor. The Sherman Act, however, prohibits agreements between competitors or potential competitors to allocate the territories or geographic areas in

which they will market or sell their respective products or services.

A conspiracy to allocate territories or geographic areas is an agreement between two or more competitors not to compete in territories or areas in which they would have otherwise competed. By way of example, this includes an agreement by two competitors not to compete with each other in particular geographic areas; to confine their sales efforts to particular or different territories; to require one to discontinue sales in an area where the other will continue to sell; or to not submit competitive bids in certain territories.

To prevail on this claim against C&S, Plaintiffs must prove each of the following elements by a preponderance of the evidence:

(1) C&S and SuperValu were competitors or potential competitors;

(2) C&S and SuperValu entered into a conspiracy—specifically, the Unwritten Agreement—in which C&S agreed that it would not compete with Supervalu for new customers in certain territories or geographic areas; and

(3) Plaintiffs were injured in their business or property because of the Unwritten Agreement.

In deciding whether the second element has been proven, you should refer to Jury Instructions 21, 22, and 23 to determine whether Plaintiffs have proven an Unwritten Agreement.

In deciding whether the third element has been met, you should refer to Jury Instruction 24 to determine whether Plaintiffs were injured in their business or property because of the alleged Unwritten Agreement.

If you find that the evidence is insufficient to prove any of these elements as to C&S, then you must find for C&S and against Plaintiffs on this claim. If you find that the evidence is sufficient to prove each element as to C&S, then you must find for Plaintiffs and against C&S on this claim.

* * *

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Wholesale Grocery Products Antitrust Litigation	Civil No. 09-MD-2090 ADM/TNL **SPECIAL VERDICT FORM**

[Filed Apr. 20, 2018]

We, the jury in the above-titled matter, find the following answers to the following questions submitted to us by the Court:

1. Did the Plaintiffs prove that C&S and SuperValu were competitors or potential competitors, and that they entered into an Unwritten Agreement to divide territories and customers along geographic lines which restricted competition more broadly than the Asset Exchange Agreement?

Yes _____ No ___X_____

If you answer "Yes" to Question 1, answer Question 2.

If you answer "No" to Question 1, have your presiding juror sign and date the form; your Verdict is complete.

2. Did the Plaintiffs prove that they were injured by the Unwritten Agreement between C&S and Supervalu, that the Unwritten Agreement was a material cause of Plaintiffs' alleged injury, and that Plaintiffs' alleged injury is the type that the antitrust laws were intended to prevent?

Yes _____ No _____

If you answer "Yes" to Question 2, answer Question 3,

If you answered "No" to Question 2, have your presiding juror sign and date the form; your Verdict is complete.

3. What is the amount of damages in the form of ABS fee overcharges paid by Plaintiffs as a result of unlawful conduct of C&S for the five classes of grocers?

a. **Champaign Non-Arbitration Class:** $ _____
b. **Champaign Arbitration Class:** $ _____
c. **Green Bay Class:** $ _____
d. **Hopkins Class:** $ _____
e. **Pleasant Prairie Class:** $ _____

Date: 19th April 2018 SIGNATURE REDACTED