No. 18-2121

In the United States Court of Appeals For the Eighth Circuit

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., and East Troy Lueptows, Inc.,

Plaintiffs-Appellants,

v.

C&S Wholesale Grocers, Inc.,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Minnesota
Civil No. 09-md-2090 (ADM/TNL)

BRIEF OF PLAINTIFFS-APPELLANTS

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I. SUMMARY OF THE CASE

This appeal presents a serious and fundamental denial of a plaintiff's substantial right to a jury verdict on the claims it alleged and brought to trial. Plaintiffs-Appellants are small, Midwest grocery retailers who brought claims individually and on behalf of five classes of Midwest grocers against Defendant-Appellee C&S Wholesale Grocers, Inc. ("C&S"), the largest wholesale grocer in the United States, for agreeing with its horizontal competitor, SuperValu Inc., the nation's second largest grocery wholesaler, to allocate territories and customers. Plaintiffs alleged in their complaint and submitted evidence to the jury at trial of both a territorial allocation and a customer allocation—each of which is a *per se* violation of the Sherman Act. Over Plaintiffs' objections, the District Court instructed the jury to find liability under the Sherman Act only if the jury concluded that C&S had agreed to allocate *both* territories and customers. ADD1-3. The District Court's special verdict form repeated this error. ADD4-5. The District Court erroneously required the jury to return a defense verdict if it found that C&S agreed to allocate territories but not customers, or if it found that C&S agreed to allocate customers but not territories. That was a fundamental error of law under the Sherman Act which materially affected Plaintiffs' substantial rights. For these reasons, Plaintiffs respectfully request 20 minutes of oral argument.

II. CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1A, Midwest Plaintiffs state:

1. D&G, Inc. d/b/a Gary's Foods does not have a parent corporation and 10% or more of its stock is not owned by a publicly held corporation.

2. Blue Goose Super Market, Inc. does not have a parent corporation and 10% or more of its stock is not owned by a publicly held corporation.

3. Nemecek Markets, Inc. does not have a parent corporation and 10% or more of its stock is not owned by a publicly held corporation.

4. Millennium Operations, Inc. does not have a parent corporation and 10% or more of its stock is not owned by a publicly held corporation.

5. Elkhorn-Lueptows, Inc. does not have a parent corporation and 10% or more of its stock is not owned by a publicly held corporation.

6. Jefferson Lueptows, Inc. does not have a parent corporation and 10% or more of its stock is not owned by a publicly held corporation.

7. East Troy Lueptows, Inc. does not have a parent corporation and 10% or more of its stock is not owned by a publicly held corporation.

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III. JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1337(a) (commerce and antitrust regulation) because the claims in this action arise under § 1 of the Sherman Act, 15 U.S.C. § 1, and § 4 of the Clayton Act, 15 U.S.C. § 15(a). On April 20, 2018, the District Court entered judgment for Defendant C&S that disposed of all parties' claims. ADD6. On May 23, 2018, the District Court entered an amended judgment for C&S, adding a description of the five classes the District Court had certified. ADD7-8. Plaintiffs filed a timely notice of appeal on May 18, 2018. A timely notice of appeal from the District Court's final judgment establishes this Court's jurisdiction under 28 U.S.C. § 1291.

IV. STATEMENT OF THE ISSUE

Whether the District Court committed reversible error by instructing the jury that Plaintiffs were required to prove an agreement between horizontal competitors to allocate *both* territories *and* customers in order to establish a § 1 Sherman Act violation, when under the law an agreement to allocate *either* territories *or* customers constitutes a *per se* violation of § 1 of the Sherman Act.

The most apposite cases are *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728 (8th Cir. 2014); *United States v. Topco Assocs., Inc.*, 405 U.S. 596

(1972); *Fed. Enterprises, Inc. v. Greyhound Leasing & Fin. Corp.*, 786 F.2d 817 (8th Cir. 1986).

V. STATEMENT OF THE CASE

This Court has previously heard three appeals in this matter, and two of the resulting opinions describe in detail the factual background of the antitrust claims at issue. *See In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 729-31 (8th Cir. 2014); *In re Wholesale Grocery Prods. Antitrust Litig.*, 707 F.3d 917, 920-21 (8th Cir. 2013). The facts relevant to the current appeal are set forth below.

A. Factual Background

This appeal arises out of 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 a conspiracy to restrain trade under the Sherman Act, 15 U.S.C. § 1, based on C&S's agreement with its horizontal competitor, SuperValu Inc., the second largest grocery wholesaler in the United States, to allocate (1) territories and (2) customers. APP1 ¶ 1, APP2 ¶ 2, APP10 ¶ 31, APP11-12, ¶ 36, APP13 ¶ 39, APP28-29 ¶¶ 76-79. Plaintiffs alleged that this agreement had the purpose and effect of allowing SuperValu to charge supra-competitive prices in the Midwest. APP2 ¶ 3, APP13-14 ¶ 40, APP15 ¶ 44, APP30 ¶ 83. As a result, Plaintiffs paid supra-competitive prices for wholesale grocery products and services. *Id.*

The key triable issue of fact below was what the wholesalers "*actually agreed to*." *In re Wholesale Grocery Prod. Antitrust Litig.*, 752 F.3d at 734 (emphasis in original).[1] Although it is black letter law that *either* a territorial allocation *or* a customer allocation constitutes a *per se* violation of the Sherman Act, *see id.*; *infra* § VII.A, the District Court erred when it instructed the jury — over Plaintiffs' objection — that a Sherman Act violation requires proof of *both*. ADD1-3. The District Court repeated this error in the special verdict form by mistakenly conflating territorial and customer allocation violations into a single, conjunctive question. ADD4-5. The jury essentially was instructed to find no Sherman Act violation if it concluded that C&S agreed to allocate territories but not customers, or if it concluded that C&S agreed to allocate customers but not territories. That is a clear error of law since either a territorial allocation or a customer allocation is a *per se* violation of the Sherman Act.

[1] In September 2003, C&S and SuperValu signed an Asset Exchange Agreement ("AEA"), by which C&S agreed to designate SuperValu to receive Fleming's Midwestern assets which it had acquired following Fleming's bankruptcy, and in exchange SuperValu agreed to transfer all of its New England assets to C&S. The agreement also contained reciprocal non-compete provisions that the parties generally agree were limited to former customers in the regions, theoretically permitting the wholesalers to compete for existing and future customers. The factual issue at trial was if, based on extrinsic evidence, "what the wholesalers *actually agreed to* was a naked division of territory and customers." *In re Wholesale Grocery Prod. Antitrust Litig.*, 752 F.3d at 730, 734 (emphasis in original). *See infra* § VII.B.

Plaintiffs objected to the jury instructions and special verdict form on this basis before they were given to the jury, thereby preserving their objections for appeal. APP153:16-APP154:15; APP157:13-15 158:16.

B. Procedural History

On February 9, 2011, Plaintiffs filed their Second Consolidated Amended Class Action Complaint, which is now the operative complaint. APP1-34. On September 7, 2016, the District Court certified five classes of retailers to pursue antitrust claims against C&S and SuperValu. On November 16, 2017, the District Court granted final approval to a class settlement with SuperValu and dismissed SuperValu from the case. On April 9, 2018, a jury trial commenced against C&S, and the District Court gave closing instructions to the jury on April 19, 2018 over Plaintiffs' objections. The jury returned a verdict in favor of C&S on April 19, 2018. On April 20, 2018, the District Court entered judgment in favor of C&S. ADD6. On May 18, 2018, Plaintiffs timely filed a notice of appeal. On May 23, 2018, the District Court entered an amended judgment for C&S to include a description of the five classes that the District Court had certified. ADD7-8.

VI. SUMMARY OF THE ARGUMENT

Plaintiffs brought antitrust claims under Clayton Act § 4 against C&S, the largest grocery wholesaler in the United States, for violations of Sherman Act § 1. Plaintiffs alleged that C&S agreed with its largest horizontal competitor to allocate

territories and customers in the Midwest. Since both territorial allocations and customer allocations violate the Sherman Act, proof of either is sufficient to establish a Sherman Act violation. Over Plaintiffs' objection, the District Court incorrectly instructed the jury that proof of *both* a territorial and a customer allocation was necessary for a Sherman Act violation, thereby prejudicing Plaintiffs' substantial rights and entitling Plaintiffs to a new trial.

VII. ARGUMENT

A. The District Court Abused Its Discretion by Requiring the Jury to Find that C&S Agreed to Allocate Both Territories and Customers in Order to Find that C&S Violated the Sherman Act.

Where, as here, Plaintiffs have raised specific objections to the form or content of a jury charge, this Court reviews jury instructions and use of a special verdict form for abuse of discretion. *Reimer v. City of Crookston*, 421 F.3d 673, 677 (8th Cir. 2005). This Court considers whether the instructions and the verdict form "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." *Id.* (quotation omitted.) "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996) ("The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions."). Here, the District Court erred as a matter of law by instructing the jury that it was required to conclude that C&S allocated *both*

territories and customers in order to find a Sherman Act violation when it is black letter law that either is sufficient. Given this significant legal error, the District Court's "charge as a whole" failed to state the governing law fairly and accurately and constituted an abuse of discretion.

The District Court should have instructed the jury that C&S violated the Sherman Act if the jury were to find that C&S had agreed with its horizontal competitor, SuperValu, to allocate either territories or customers. Territorial allocations and customer allocations can co-exist in the same case, as here, and either one can accomplish a conspirator's intended result—reduced competition and resulting higher prices to purchasers. But these two types of unlawful market division are not the same, and as a matter of law, proof of both is not required in order to establish a Sherman Act violation. This Court acknowledged this distinction in its 2014 opinion by relying on separate authority in describing Plaintiffs' two Sherman Act claims as *per se* claims. *In re Wholesale Grocery Prod. Antitrust Litig.*, 752 F.3d at 734 ("[A]greements between competitors to allocate territories to minimize competition are illegal [and] . . . '*per se* violations of the Sherman Act.'" (quoting *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972)))); *id.* ("[C]ustomer allocation agreements are among the 'most elementary' violations [of the Sherman Act,] and are generally subject to a *per se* analysis."

(quoting *Nitro Distrib., Inc. v. Alticor, Inc.*, 565 F.3d 417, 423 (8th Cir. 2009) (quoting *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir. 1994))).

The Supreme Court and this Court's sister circuits agree that territorial allocations and customer allocations are distinct *per se* violations of the Sherman Act. *See, e.g.*, *Topco Assocs., Inc.*, 405 U.S. at 612 (separately holding that customer allocations—as distinct from territorial allocations—were *per se* unlawful); *United States v. Consol. Laundries Corp.*, 291 F.2d 563, 574-75 (2d Cir. 1961) (recognizing as matter of first impression that customer allocation is distinct from territorial allocation and holding that district court properly applied *per se* rule to complaint alleging customer allocation); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir. 1978), *cert. denied*, 437 U.S. 903 (1978) (relying on *Topco* and *Consolidated Laundries* to conclude that customer allocation—as distinct from territorial allocation—was *per se* violation); *United States v. Goodman*, 850 F.2d 1473, 1476 (11th Cir. 1988) ("In *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), *cert. denied*, 437 U.S. 903. . . (1978), the former Fifth Circuit held that a customer allocation agreement alone is a *per se* violation of 15 U.S.C. § 1."); *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1372 (6th Cir. 1988) (rejecting defendants' argument that *per se* rule did not apply to customer allocation scheme because it did not

involve, *inter alia*, "allocation of specific customers according to geographic location").

It is black letter law that an agreement to allocate *either* territories *or* customers is sufficient to establish a Sherman Act violation. *See, e.g.*, W. Holmes & M. Mangiaracina, *Antitrust Law Handbook* § 2:9 (2017-2018 ed.) ("Practices considered per se illegal include . . . horizontal territorial, customer, output, and other market restraints between competitors."); *id.* § 2:13 ("In a series of cases extending back to the early years of the Sherman Act, the Supreme Court has repeatedly asserted that a standard of per se illegality applies to horizontal conspiracies allocating territories, reducing output, dividing up customers, or otherwise imposing nonprice restraints upon competition between actual or potential competitors.").

Because territorial allocation and customer allocation claims are distinct, the ABA's Model Jury Instructions in Civil Antitrust Cases provide separate instructions for each. Model Jury Instruction in Civil Antitrust Cases (2016) APP245-46 ("Instruction 1: Allocation of Customers"); APP247-48 ("Instruction 2: Allocation of Territories or Geographies"). The notes to the instructions collect cases showing that each is a distinct per se violation of the Sherman Act. APP246 ("Horizontal customer allocation is generally a per se violation of the

Sherman Act."); APP248 ("Market divisions between competitors or potential competitors generally are illegal *per se*.").

Requiring Plaintiffs to prove both territorial and customer allocation in order to establish a Sherman Act violation is clear legal error, and Plaintiffs objected on the record specifically to this aspect of the jury instructions and special verdict form. *See* Fed. R. Civ. P. 51(c)(1)-(2)(A); *Quigley v. Winter*, 598 F.3d 938, 950 (8th Cir. 2010) ("In order to preserve for appeal an objection to a jury instruction or verdict form, appellants must raise specific objections to the form or content of the instruction or verdict form before the district court." (quotation omitted)). Following the ABA Model Jury Instructions, Plaintiffs argued that they were entitled to prevail if they showed either a territorial allocation or a customer allocation. APP157:13-158:16. Accordingly, Plaintiffs argued, the instructions and special verdict form should have separated the two claims and not required a finding of both in order to find a Sherman Act violation. APP153:16-154:5 (proposing change to special verdict language); *and see id.* APP154:12-15 ("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."). Plaintiffs' objections provided the District Court the opportunity to correct its proposed instructions and verdict form, but it did not do so. Instead, the District Court rejected Plaintiffs' argument:

> [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.

APP155:25-156:11. The District Court's explanation reveals its error. Plaintiffs should not have been required to prove "separate agreements" in order to have C&S's anticompetitive conspiracy evaluated under separate theories of territorial allocation and customer allocation. Plaintiffs were entitled to prevail on the finding of a Sherman Act violation if C&S's agreement with SuperValu amounted to either one.

Instead, the District Court created a single instruction that required Plaintiffs to prove *both* a territorial allocation *and* a customer allocation. ADD2-3 (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)). Similarly, the District Court's special verdict form erroneously required the jury to find that Defendant allocated both territories and customers in order to find antitrust liability. Question 1 asked the jury:

> "Did the Plaintiff 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?"

ADD4 (emphasis added). As a result, the jury was instructed on a materially inaccurate statement of the law that did not allow it to find a Sherman Act violation where it found that C&S agreed to allocate territories but not customers, or where C&S agreed to allocate customers but not territories. This is clear legal error.

B. The District Court's Legal Error Prejudiced Plaintiffs and Denied Them Their Substantial Right to a Decision on Each of the Antitrust Violations They Alleged.

Even where a district court abuses its discretion with respect to jury instructions or a special verdict form, this Court reverses "only if an instructional error has affected a party's substantial rights." *Vaidyanathan v. Seagate US LLC*, 691 F.3d 972, 976 (8th Cir. 2012) (quotation omitted) (remanding for new trial where district court's jury instructions misstated the applicable law). An erroneous jury charge affects a plaintiff's substantial rights where "the errors misled the jury or had a probable effect on a jury's verdict," *id.* at 978 (quotation omitted), for example, if the instruction "failed to submit to the jury the disputed factual issue." *Bold v. Simpson*, 802 F.2d 314, 318 (8th Cir. 1986) (remanding for new trial where plaintiff objected to district court's instruction in part because the "jury can believe [plaintiff] and still find against him"). "[A] party is entitled to an instruction

reflecting that party's theory of the case if the instruction is legally correct and there is evidence to support it." *Fed. Enterprises, Inc. v. Greyhound Leasing & Fin. Corp.*, 786 F.2d 817, 820 (8th Cir. 1986) (remanding for new trial where district court's "instructions fail[ed] to state the governing law adequately and fairly, and . . . fail[ed] to inform the jury adequately of the essential issues raised by the evidence at trial"); *and see Rahn v. Hawkins*, 464 F.3d 813, 818 (8th Cir. 2006) (overruled on other grounds) (remanding for new trial where district court's instruction was "markedly different" than the plaintiff's legally and factually correct instruction).

Here, there is no question that the District Court's erroneous instruction and special verdict form—both of which defined whether the jury could find that C&S violated the Sherman Act—harmed Plaintiffs' substantial rights. A finding of a Sherman Act violation is an essential element of Plaintiffs' ability to recover under the Clayton Act. *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992) (a plaintiff seeking damages "under § 4 of the Clayton Act, 15 U.S.C. § 15, must establish an antitrust violation . . ."). Plaintiffs were entitled to a jury finding of a Sherman Act violation if the jury found that that C&S's agreement with its horizontal competitor allocated *either* territories *or* customers. The District Court's erroneous conflation of the two deprived Plaintiffs of that right.

Contrary to the District Court's rationale, Plaintiffs have never alleged a "hybrid" market allocation. In the operative Second Amended Complaint, Plaintiffs alleged that C&S agreed to unlawfully allocate territories and customers in a single count brought for Sherman Act § 1 violations. APP28-30, Count 1. That single count is perfectly compatible with Plaintiffs' assertion of a territorial allocation, a customer allocation, or both. APP26 ¶ 70(a) (question common to the class is whether C&S and SuperValu "combined, agreed or conspired to allocate territories *or* customers for full-line grocery wholesale goods and services" (emphasis added)); APP30 ¶ 83 (alleging damages as a result of "*violations* of the Sherman Act" (emphasis added)). It is black letter law that various theories of liability may be advanced though a single count. Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones."); 5 Fed. Prac. & Proc. Civ. § 1282 (3d ed.) ("Consequently, under Rule 8(d)(2), a party may plead alternatively or hypothetically within a single count or defense, or assert separate claims or defenses in an alternative or multiple manner."); *Frank v. Walker*, 819 F.3d 384, 387-88 (7th Cir. 2016) (rejecting defendants' argument that "complaints must contain as many counts as plaintiffs have legal theories—one count per theory").

1. Based on the Evidence Admitted at Trial, the Jury Could Have Found that C&S's Agreement Allocated Territories.

Consistent with the Second Amended Complaint, Plaintiffs presented evidence to support each of their legal theories during the trial. On the one hand, Plaintiffs proffered a significant evidentiary record that this Court has already held was sufficient to permit a reasonable jury to conclude that C&S's real agreement with SuperValu involved dividing territories, namely the Midwest and New England. *In re Wholesale Grocery Prod. Antitrust Litig.*, 752 F.3d at 734. This evidentiary record includes "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." *Id.* All of these emails were admitted as evidence (*e.g.*, APP172-73,[2] APP174-75,[3] APP196-97[4]), as are draft letters of intent containing territorial non-compete agreements (*e.g.*, APP160-63, APP164-67, APP168-71, APP176-95)

[2] Email from C&S Senior Vice President M. Gross stating that "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."

[3] Email from M. Gross stating that C&S and SuperValu "have always been discussing [SuperValu's] departure from New England. No carve-outs."

[4] Email from M. Gross stating: "We are not interested in a transaction that leaves Supervalu in New England."

and additional emails and evidence stating, "SVU is agreeing to leave New England" (APP203), "SuperValu does not want to compete with us anywhere" (APP199-202), and "the two companies will not be competing at the wholesale level anywhere in the United States" (APP204).

Plaintiffs' economic expert, Dr. Jeffrey Leitzinger, testified that the evidence reflects a territorial allocation as an economic matter. *See, e.g.*, APP123:8-125:15 (testimony that the evidence is "consistent as an economic matter with an agreement by C&S not to compete in the Midwest at all"); APP127:15-132:9 (testimony that the only way as an economic matter to make sense of C&S and SuperValu's swap of DCs that they intended to close is as part of an agreement to limit the competition each of them would face in their own home markets, *i.e.*, the Midwest for SuperValu); APP133:4-7 (testimony that the swap and closure of the DCs under the AEA is "absolutely" "consistent with C&S and SuperValu agreeing not to compete with each other in the Midwest and New England at all"). However, due to the District Court's erroneous instruction and special verdict form, the jury was not given an opportunity to decide if this evidence of territorial allocation alone was sufficient to find a Sherman Act violation.

2. Based on the Evidence Admitted at Trial, the Jury Could Have Found that C&S's Agreement Allocated Customers.

During the trial below, Plaintiffs also proffered a significant evidentiary record that this Court has already held was sufficient to permit a reasonable jury to conclude that C&S's real agreement with SuperValu involved dividing customers, namely that C&S agreed not to compete for independent grocers in the Midwest. *See In re Wholesale Grocery Prod. Antitrust Litig.*, 752 F.3d at 734. For example, Plaintiffs proffered evidence that "although the written non-compete agreement permitted the wholesalers to compete in each other's regions for new and existing customers, *neither one actually did so.*" *Id.* (emphasis in original). 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. *See* APP120:24-121:2, APP122:3-23 (the AEA left plenty of customers for C&S to compete for in the Midwest, but after the AEA, C&S did not start serving any customers in competition with SuperValu in the Midwest); APP125:23-126:2 (noting that while "C&S had some distribution facilities in the Midwest even after the exchange of facilities in the AEA . . . C&S never used the facilities that it still held in the Midwest to pursue any of the many available customers").

Plaintiffs also presented evidence that, prior to the AEA, C&S was making a push to secure new business from independent grocers in the Midwest. APP198; APP117:23-119:2 (testimony by former C&S Vice President Dale Conklin that in April 2003 C&S was making a push to secure new business for its Maple Heights, OH distribution center). In fact, C&S Chairman and President Rick Cohen referred to the Maple Heights, OH distribution center as a "beachhead in the Ohio market" where C&S was "looking to add additional customers in that market." APP115:25-116:14. However, after C&S signed the AEA, its push for new Midwest independent grocers stopped dead, even though the AEA did not preclude those efforts. As C&S Senior Vice President Mark Gross testified, after the AEA, C&S "never made a single sale" from the Maple Heights, OH distribution center even though C&S "could have served all the Midwest" from that distribution center (APP140:8-141:2) and C&S had "unlimited ability to supply Midwest retailers." APP141:23-142:1.

Moreover, C&S did not proffer any evidence that it attempted to compete for the type of customers for which it would have directly competed with SuperValu, namely Midwest independent grocers. C&S only identified opportunities in which it attempted to secure business from chains with Midwest outlets or large self-supplied grocery retailers. *See, e.g.*, APP146:7-18 (N. Houder testified C&S tried to get business from Miner's, "a major grocery retailer"); APP147:12-21 (N.

Houder testified C&S considered doing business with Roundy's, "a major grocery retailer"); APP148:3-15 (N. Houder testified C&S proposed helping Giant Eagle with its self-supply business); APP148:9-17. (N. Houder testified C&S considered doing business with Schnucks, "a major retailer" which "did self-supply"); APP149:7-10 (N. Houder testified that Spartan "was a major retailer"); APP150:9-23 (N. Houder testified that Farmer Jack was part of A&P Supermarkets, "one of the largest grocery retailers in the United States" and that C&S agreed to supply Farmer Jack as part of a national takeover of A&P distribution business).

Plaintiffs explicitly distinguished between the two theories of liability during closing, arguing that a customer allocation without a territorial allocation was sufficient for a *per se* violation of the Sherman Act:

> [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.

APP159:3-10. But the District Court's use of an erroneous instruction and special verdict form deprived Plaintiffs of the opportunity for the jury to consider whether their evidence of customer allocation alone was sufficient to find a Sherman Act violation.

From the allegations in their operative Complaint, to their evidence presented at trial, to their closing argument, Plaintiffs have long alleged claims of territorial allocation and customer allocation. The District Court substantially harmed Plaintiffs by denying them their right to have the jury individually assess each Sherman Act claim. As a result of the District Court's jury instructions and special verdict form, the jury was required to return a verdict in favor of C&S even if it found that C&S had agreed to allocate territories but not customers, or if it found that C&S had agreed to allocate customers but not territories. Such a result denied Plaintiffs their substantial rights under the law and should not stand.

VIII. CONCLUSION

This Court should vacate the judgment of the District Court and remand with instructions for a new trial.

Dated: July 17, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

The undersigned counsel of record hereby certifies, pursuant to Fed. R. App. P. 32(g), that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 4,393 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14.

Dated: July 17, 2018

s/ Elizabeth R. Odette
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CERTIFICATE OF VIRUS FREE

Pursuant to Local Rule 28A(h)(2) of the Eighth Circuit Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief has been scanned for computer viruses and is virus free.

Dated: July 17, 2018

s/ Elizabeth R. Odette
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CERTIFICATE OF SERVICE AND MAILING

I hereby certify that on July 17, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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