

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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IN RE: WHOLESALE GROCERY  
PRODUCTS ANTITRUST  
LITIGATION

Civil No. 09-CV-00983 (ADM/AJB)  
Civil No. 09-CV-2940 (ADM/AJB)  
Civil No. 09-CV-2932 (ADM/AJB)  
Civil No. 09-CV-3191 (ADM/AJB)

This Document Relates to:

MDL DOCKET NO. 2090

All Actions

**DEFENDANT C&S WHOLESALE  
GROCERS, INC.'S ANSWER TO THE  
SECOND CONSOLIDATED  
AMENDED CLASS ACTION  
COMPLAINT**

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Defendant C&S Wholesale Grocers, Inc. ("C&S") hereby answers the Second Consolidated Amended Class Action Complaint (herein after "complaint") in the above-captioned matter as follows:

1. C&S admits that this is a purported antitrust case seeking to challenge a September 6, 2003 Asset Exchange Agreement between C&S and SuperValu, Inc. C&S denies the remaining allegations in Paragraph 1 of the complaint.

2. C&S admits that the Asset Exchange Agreement contains reasonable, ancillary non-competition and non-solicitation provisions, and respectfully refers the Court to Sections 5.8 and 6.2 of the Asset Exchange Agreement. C&S denies the remaining allegations in Paragraph 2 of the complaint.

3. C&S denies the allegations in Paragraph 3 of the complaint.

4. Upon information and belief, C&S admits that on October 21, 2009, SuperValu filed a Form 10-Q with the Securities and Exchange Commission, and

respectfully refers the Court to that filing. To the extent any further response is required, C&S denies the remaining allegations in Paragraph 4 of the complaint.

5. C&S denies that Blue Goose Super Market, Inc. purchased wholesale grocery products and related services directly from C&S within the purported Class Period (as defined by Plaintiffs in the complaint, and as modified by the Court's July 7, 2010 Order), and is without sufficient information to form a belief as to the truth of the remaining allegations in Paragraph 5 of the complaint.

6. C&S denies that D&G, Inc. d/b/a Gary's Foods purchased wholesale grocery products and related services directly from C&S within the purported Class Period (as defined by Plaintiffs in the complaint, and as modified by the Court's July 7, 2010 Order), and is without sufficient information to form a belief as to the truth of the remaining allegations in Paragraph 6 of the complaint.

7. C&S admits that DeLuca's Corporation purchased certain wholesale grocery products and related services directly from C&S within the purported Class Period (as defined by Plaintiffs in the complaint, and as modified by the Court's July 7, 2010 Order). C&S is without sufficient information to form a belief as to the truth of the remaining allegations in Paragraph 8 of the complaint.

8. C&S denies that King Cole Foods, Inc. ("King Cole") purchased wholesale grocery products and related services directly from C&S within the purported Class Period (as defined by Plaintiffs in the complaint, and as modified by the Court's July 7, 2010 Order), and is without sufficient information to form a belief as to the truth of the remaining allegations in Paragraph 8 of the complaint.

9. C&S denies that Plaintiff Millennium Operations, Inc. d/b/a/ R.C. Dick's Market ("Millennium") purchased wholesale grocery products and related services directly from C&S within the purported Class Period (as defined by Plaintiffs in the complaint, and as modified by the Court's July 7, 2010 Order), and is without sufficient information to form a belief as to the truth of the remaining allegations in Paragraph 9 of the complaint.

10. C&S denies that Plaintiffs MFJ Market, Inc. and JFM Market, Inc. (collectively, "Village Market") operate retail grocery stores in Scituate, Massachusetts. C&S admits Village Market purchased wholesale grocery products and related services from C&S within the period from December 31, 2004 through September 13, 2008, and was party to a supply agreement that contains an arbitration agreement during that time.

11. Upon information and belief, C&S admits that SuperValu, Inc. is a Delaware corporation with its principal place of business in Eden Prairie, Minnesota, that SuperValu operates a grocery wholesale business as part of its food distribution and logistics business, that SuperValu is the second largest grocery wholesaler by dollar volume in the United States, and admits that SuperValu's publicly-reported revenues from its supply chain services business, which includes wholesale groceries, were approximately \$9 billion in fiscal 2010, which covers the period between February 28, 2009 to February 27, 2010. C&S denies the remaining allegations in Paragraph 11 of the complaint.

12. C&S admits the first sentence of paragraph 12 of the complaint. C&S further admits that it is, in part, a grocery wholesaler, and that its grocery wholesale sales

amounted to over \$19 billion in 2009. C&S also admits that it is presently the largest grocery wholesaler by dollar volume in the United States. C&S denies the remaining allegations in Paragraph 12 of the complaint.

13. Paragraph 13 states conclusions of law, and therefore no response thereto is required.

14. Paragraph 14 states conclusions of law, and therefore no response thereto is required.

15. C&S denies the allegations in Paragraph 14, except states that to the extent paragraph 15 states conclusions of law, no response thereto is required.

16. C&S admits that the first two sentences of paragraph 15 identify some of the activities of certain grocery wholesalers. C&S further admits that certain grocery wholesalers, such as C&S, offer a full line of grocery products and related services and stock tens of thousands of different products, including produce, meat, dairy products, deli products, bakery items, health and beauty aids and candy, although C&S states further that the term “full line” has varying definitions, and that Plaintiffs do not define the term in the complaint. C&S denies the remaining allegations in Paragraph 16 of the complaint.

17. C&S admits that it and certain other grocery wholesalers serve multi-state areas through, among other things, networks of distribution centers and trucking fleets, and denies the remaining allegations in Paragraph 17 of the complaint.

18. C&S admits that grocery wholesalers compete for retail accounts on the basis of many factors, including price and service. Upon information and belief, C&S

admits that some grocery wholesalers may charge prices to retail customers that could include some combination of a price for the purchase of the product, transportation fees, fuel surcharges, warehouse fees and/or other fees, and that for some grocery wholesalers, product costs could depend on discounts, allowances, fees, payments, and other economic concessions given or made to wholesalers by manufacturers of grocery products. C&S further admits, upon information and belief, that those discounts may in some circumstances be reflected on manufacturers' invoices to wholesalers or indirectly through some other means. C&S denies the remaining allegations in Paragraph 18 of the complaint.

19. C&S admits that it attempts to obtain discounts from manufacturers, in part by requesting that manufacturers participate in C&S's Crossroads program. C&S denies the remaining allegations in Paragraph 19 of the complaint.

20. C&S denies the allegations in Paragraph 20 of the complaint.

21. Upon information and belief, C&S admits that SuperValu's grocery wholesale business grew in the 1990s and early 2000s. C&S is without sufficient knowledge or information to admit or deny the allegations in the second sentence of paragraph 21 of the complaint. C&S denies the remaining allegations in Paragraph 20 of the complaint.

22. Upon information and belief, C&S admits that in 1994, SuperValu acquired Sweet Life Foods, Inc., a grocery wholesaler located in New England, and that SuperValu maintained distribution facilities in, among other places, Portland, Maine,

Andover, Massachusetts, and Cranston, Rhode Island. C&S denies the remaining allegations in Paragraph 22 of the complaint.

23. C&S denies the allegations in Paragraph 23 of the complaint.

24. C&S is without sufficient knowledge or information to admit or deny the allegations in Paragraph 24 of the complaint.

25. C&S is without sufficient knowledge or information to admit or deny the allegations in Paragraph 25 of the complaint, except states that to the extent those allegations contain conclusions of law, no response thereto is required.

26. C&S admits that Fleming Companies, Inc. was a grocery wholesaler with operations in various parts of the country, and that in 2003, Fleming filed for bankruptcy. C&S further admits that Fleming had distribution facilities in La Crosse, Wisconsin, Waukesha, Wisconsin, and Massillon, Ohio, among other facilities, which were used to serve retailers in parts of the Midwestern United States. C&S denies the remaining allegations in Paragraph 26 of the complaint.

27. C&S admits that in late June 2003, C&S announced an agreement to purchase Fleming's assets out of bankruptcy, and admits that the quoted language from Fleming's June 27, 2003 Form 8-K appears in that document. C&S denies the remaining allegations in Paragraph 27 of the complaint.

28. C&S admits that the quoted language from the article cited in Paragraph 28 of the complaint appears in that cited article.

29. C&S admits that it worked with manufacturers to help ensure they continued to supply Fleming. C&S further admits that as part of its due diligence efforts

and in deciding whether to operate or sell the various parts of Fleming's wholesale grocery operations, C&S talked with Fleming employees and Fleming retailers in various parts of the country, including Wisconsin. C&S denies the remaining allegations in Paragraph 29.

30. C&S is without sufficient knowledge or information to admit or deny whether or how SuperValu's stock price was affected by C&S's announcement of its purchase of Fleming, if at all, and denies the remaining allegations in Paragraph 30 of the complaint.

31. C&S denies the allegations in Paragraph 31 of the complaint.

32. C&S is without sufficient knowledge or information to admit or deny the allegations in Paragraph 32 of the complaint.

33. C&S is without sufficient knowledge or information to admit or deny the allegations in Paragraph 33 of the complaint, except states that to the extent paragraph 33 states conclusions of law, no response thereto is required.

34. C&S denies the allegations in Paragraph 34 of the complaint.

35. C&S admits that C&S and SuperValu entered into a written Asset Exchange Agreement in which C&S acquired SuperValu's wholesale grocery business in New England, along with 23 retail stores, and SuperValu acquired the former Fleming wholesale grocery business in parts of the Midwest. C&S further admits that the Asset Exchange Agreement was signed on September 6, 2003, and closed on September 13, 2003. C&S denies the remaining allegations in Paragraph 35 of the complaint.

36. C&S denies the allegations in Paragraph 36 of the complaint, and to the extent that Plaintiffs are attempting to characterize the terms of Sections 5.8 and 6.2 of the Asset Exchange Agreement, C&S respectfully refers the Court to those sections.

37. C&S denies the allegations in Paragraph 37 of the complaint.

38. Upon information and belief, C&S admits that SuperValu has stated that it made the decision to consolidate the Fleming wholesale distribution business acquired from C&S into its own existing distribution network before the Asset Exchange Agreement was consummated. C&S denies the allegations in Paragraph 38 of the complaint.

39. C&S denies the allegations in Paragraph 39 of the complaint.

40. C&S denies the allegations in Paragraph 40 of the complaint.

41. C&S is without sufficient knowledge or information to admit or deny whether in the years after the Asset Exchange Agreement, SuperValu's grocery wholesaler sales volume declined by \$100 million or its net income rose 26.2%, and denies the remaining allegations in Paragraph 41 of the complaint.

42. C&S admits that certain distribution facilities exchanged pursuant to the Asset Exchange Agreement were sold to entities that used them in non-grocery wholesale industries, and denies the remaining allegations in Paragraph 42 of the complaint.

43. Upon information and belief, C&S admits that grocery wholesalers may charge transportation fees based, among other things, on the retailers' proximity to distribution facilities. C&S denies the remaining allegations in Paragraph 43 of the complaint.



44. C&S denies the allegations in Paragraph 44 of the complaint.

45. C&S denies the allegations in Paragraph 45 of the complaint, and states further that the Court's July 7, 2010 Order has barred any claims based on alleged "fraudulent concealment."

46. C&S denies the allegations in Paragraph 46 of the complaint, and states further that the Court's July 7, 2010 Order has barred any claims based on alleged "fraudulent concealment."

47. C&S admits the allegations in the last two sentences of paragraph 47, denies the remaining allegations in Paragraph 46, and states further that the Court's July 7, 2010 Order has barred any claims based on alleged "fraudulent concealment."

48. C&S denies the allegations in Paragraph 48 of the complaint, and states further that the Court's July 7, 2010 Order has barred any claims based on alleged "fraudulent concealment."

49. C&S denies the allegations in Paragraph 49 of the complaint, and states further that the Court's July 7, 2010 Order has barred any claims based on alleged "fraudulent concealment."

50. C&S denies the allegations in Paragraph 50 of the complaint, and states further that the Court's July 7, 2010 Order has barred any claims based on alleged "fraudulent concealment."

51. C&S denies the allegations in Paragraph 51 of the complaint, and states further that the Court's July 7, 2010 Order has barred any claims based on alleged "fraudulent concealment."

52. C&S denies the allegations in Paragraph 52 of the complaint, and states further that the Court's July 7, 2010 Order has barred any claims based on alleged "fraudulent concealment."

53. C&S denies the allegations in Paragraph 53 of the complaint, and states further that the Court's July 7, 2010 Order has barred any claims based on alleged "fraudulent concealment."

54. C&S denies the allegations in Paragraph 54 of the complaint, and states further that the Court's July 7, 2010 Order has barred any claims based on alleged "fraudulent concealment."

55. C&S denies the allegations in Paragraph 55 of the complaint, and states further that the Court's July 7, 2010 Order has barred any claims based on alleged "fraudulent concealment."

56. C&S admits that it offers numerous goods and services to retailers, admits that it competes with SuperValu in some circumstances, and denies the remaining allegations in Paragraph 56 of the complaint, except states that to the extent paragraph 56 states conclusions of law, no response thereto is required.

57. C&S denies the allegations in Paragraph 57 of the complaint, except states that to the extent paragraph 57 states conclusions of law, no response thereto is required.

58. C&S denies the allegations in Paragraph 58 of the complaint, except states that it is without sufficient knowledge or information to admit or deny the allegations in Paragraph 58 regarding the preferences of Plaintiffs Blue Goose and Gary's Foods.

59. C&S admits that it operates in New England, as well as elsewhere, and admits that the distribution facilities in New England that it closed were located in New England. C&S denies the allegations in Paragraph 59 of the complaint, except states that to the extent paragraph 59 states conclusions of law, no response thereto is required.

60. C&S denies the allegations in Paragraph 60 of the complaint, except states 1) that to the extent paragraph 60 states conclusions of law, no response thereto is required, and 2) that it is without sufficient knowledge or information to admit or deny the allegations in Paragraph 60 regarding the purchasing practices of DeLuca's.

61. Upon information and belief, C&S admits that SuperValu operates in various Midwestern states, as well as elsewhere, and that the former Fleming distribution facilities in the Midwest that were closed were located in the Midwest. C&S denies the remaining allegations in Paragraph 61 of the complaint.

62. C&S denies the allegations in Paragraph 62 of the complaint, except states 1) that to the extent paragraph 62 states conclusions of law, no response thereto is required, and 2) that it is without sufficient knowledge or information to admit or deny the allegations in Paragraph 62 regarding the purchasing practices of Gary's Foods and Blue Goose.

63. C&S denies the allegations in Paragraph 63 of the complaint, except states that to the extent paragraph 63 states conclusions of law, no response thereto is required.

64. C&S denies the allegations in Paragraph 64 of the complaint, except states that to the extent paragraph 64 states conclusions of law, no response thereto is required.

65. C&S denies the allegations in Paragraph 65 of the complaint, except states that to the extent paragraph 65 states conclusions of law, no response thereto is required.

66. C&S admits that the grocery wholesale industry has experienced some degree of consolidation over time, and that SuperValu, C&S, and other grocery wholesalers have acquired other wholesale businesses in regions of the United States. C&S denies the remaining allegations in Paragraph 66 of the complaint, except states that to the extent paragraph 66 states conclusions of law, no response thereto is required.

67. C&S admits that Plaintiffs purport to bring this action as a class action pursuant to Federal Rule of Civil Procedure 23. C&S denies that the purported class is certifiable under Rule 23.

68. Paragraph 68 purports to define an exclusion from the purported class, and therefore does not contain any allegations that require a response. C&S denies that the purported class is certifiable under Rule 23.

69. C&S denies the allegations in Paragraph 69 of the complaint, except states that to the extent paragraph 69 states conclusions of law, no response thereto is required. C&S denies that the purported class is certifiable under Rule 23.

70. C&S denies the allegations in Paragraph 70 of the complaint, except states that to the extent paragraph 70 states conclusions of law, no response thereto is required. C&S denies that the purported class is certifiable under Rule 23.

71. C&S denies the allegations in Paragraph 71 of the complaint, except states that to the extent paragraph 71 states conclusions of law, no response thereto is required. C&S denies that the purported class is certifiable under Rule 23.

72. C&S denies the allegations in Paragraph 72 of the complaint, except states that to the extent paragraph 72 states conclusions of law, no response thereto is required. C&S denies that the purported class is certifiable under Rule 23.

73. C&S denies the allegations in Paragraph 73 of the complaint, except states that to the extent paragraph 73 states conclusions of law, no response thereto is required. C&S denies that the purported class is certifiable under Rule 23.

74. C&S denies the allegations in Paragraph 74 of the complaint, except states that to the extent paragraph 74 states conclusions of law, no response thereto is required. C&S denies that the purported class is certifiable under Rule 23.

75. C&S denies the allegations in Paragraph 75 of the complaint, except states that to the extent paragraph 75 states conclusions of law, no response thereto is required. C&S denies that the purported class is certifiable under Rule 23.

76. C&S restates and incorporates by reference its answers to paragraphs 1-75 of the complaint as if fully set forth herein.

77. C&S denies the allegations in Paragraph 77 of the complaint, except states that to the extent paragraph 77 states conclusions of law, no response thereto is required.

78. C&S denies the allegations in Paragraph 78 of the complaint, except states that to the extent paragraph 78 states conclusions of law, no response thereto is required.

79. C&S denies the allegations in Paragraph 79 of the complaint, except states that to the extent paragraph 79 states conclusions of law, no response thereto is required.

80. C&S denies the allegations in Paragraph 80 of the complaint, except states that to the extent paragraph 80 states conclusions of law, no response thereto is required.

81. C&S denies the allegations in Paragraph 81 of the complaint, except states that to the extent paragraph 81 states conclusions of law, no response thereto is required.

82. C&S denies the allegations in Paragraph 82 of the complaint, except states that to the extent paragraph 82 states conclusions of law, no response thereto is required.

83. C&S denies the allegations in Paragraph 83 of the complaint, except states that to the extent paragraph 83 states conclusions of law, no response thereto is required.

### **GENERAL DENIAL**

C&S denies all of the allegations in the complaint except those expressly admitted above.

### **AFFIRMATIVE DEFENSES**

C&S states the following affirmative defenses without assuming the burden of proof on any such defenses that would otherwise fall on Plaintiffs

1. The Consolidated Amended Complaint fails to state a claim upon which relief may be granted.

2. The claims of Plaintiffs and/or members of the putative class are barred, in whole or in part, by the statute of limitations.

3. The claims of Plaintiffs and/or members of the putative class are barred, in whole or in part, by the doctrine of laches.

4. Plaintiffs and/or members of the putative class lack standing to bring claims for antitrust violations because, among other reasons, they cannot show a direct and proximate causal connection between the challenged conduct and their alleged injury and because Plaintiffs have not suffered antitrust injury.

5. The claims of Plaintiffs and/or members of the putative class are barred, in whole or in part, because the Asset Exchange Agreement constituted a lawful, pro-competitive, and bona fide business acquisition transaction and its non-competition and non-solicitation provisions are lawful ancillary restraints.

6. The claims of Plaintiffs and/or members of the putative class are barred, in whole or in part, because Plaintiffs have failed to define a proper geographic and/or product market for their claims.

7. The claims of Plaintiffs and/or members of the putative class are barred, in whole or in part, because there has been no injury to competition either in fact or as alleged in the Consolidated Amended Complaint.

8. The claims of Plaintiffs and/or members of the putative class claims are barred, in whole or in part, by their failure to mitigate damages.

9. The claims of certain members of the putative class are barred, in whole or part, by release.

10. The claims of Plaintiffs and/or members of the putative class are barred, in whole or part, by the doctrines of *res judicata* and/or collateral estoppel.

11. The claims of Plaintiffs and/or members of the putative class are barred, in whole or in part, by the Supplemental Order Designating SuperValu as a Third Party Purchaser and Approving Assumption and Assignment of Certain Executory Contracts, License Agreements and Unexpired Leases to SuperValu, entered by the U.S. Bankruptcy Court for the District of Delaware, dated September 9, 2003, in the case *In re Fleming Cos., Inc.*, Case No. 03-10945 (Bankr. D. Del.).

12. The claims of Plaintiffs and/or members of the putative class are subject to mandatory arbitration agreements.

**PRAYER FOR RELIEF**

WHEREFORE having fully answered Plaintiffs' Consolidated Amended Class Action Complaint, C&S denies that Plaintiffs are entitled to any relief whatsoever, and respectfully requests judgment dismissing the complaint with prejudice and awarding to C&S the costs of the action, expert fees and reasonable attorney fees, as may be allowed by law, and such other relief as the Court deems just and appropriate.

Dated: February 23, 2011

s/Todd Wind

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