

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

CIVIL NO. 09-MD-2090 (ADM/TNL)

IN RE: WHOLESALE GROCERY PRODUCTS
ANTITRUST LITIGATION

ORDER

I. INTRODUCTION

This matter is before the Court, United States Magistrate Judge Tony N. Leung, for resolution of the following issues: (1) whether Plaintiffs should be allowed to move to certify a narrower class of SuperValu customers; (2) whether the complaint filed in *Elkhorn-Lueptows, Inc. v. C&S Wholesale Grocers, Inc.*, File No. 14-cv-4031 (ADM/TNL), should be treated as a later-filed, tag-along action; and (3) whether Colella's Market should be allowed to intervene in this action. The Court held an extensive status conference and received written briefing from the various interested parties. The Court has carefully reviewed the submissions and hereby issues the following case management order.

II. BACKGROUND

A. Multi-District Anti-Trust Litigation

This multi-district litigation consolidates several antitrust lawsuits brought by retail grocers against SuperValu, Inc. ("SuperValu") and C&S Wholesale Grocers, Inc.

(“C&S”), two of the largest wholesale grocers in the country. *See* Second Consol. Am. Class Action Compl. (ECF No. 99) (“Second Am. Compl.”) ¶ 1. SuperValu does business primarily in the Midwest, whereas C&S focuses primarily on the New England market. *Id.*

Broadly, Plaintiffs operate retail grocery stores and purchased wholesale grocery products and services directly from SuperValu and C&S. *Id.* ¶¶ 9-10. As set forth in the Second Amended Complaint, Plaintiffs allege that SuperValu and C&S violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by conspiring to allocate customers and geographical territories through a September 6, 2003 Asset Exchange Agreement (“AEA”), and using those allocations to charge their customers supra-competitive prices. *Id.* ¶¶ 34-44. D&G, a grocery store in Cedar Rapids, Iowa, purported to represent affected grocers in the Midwest. Deluca’s, which owns and operates two small specialty food and wine shops in Boston, Massachusetts, purported to represent all affected grocers in New England. At the class certification stage, Plaintiffs pursued the certification of a class of Midwest Plaintiffs (represented by D&G) and a class of New England Plaintiffs (represented by Deluca’s). *See* Pls.’ Mot. for Class Certification (ECF No. 202) at 1 (defining Midwest Class with reference to Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, and Wisconsin); *id.* at 2 (defining New England Class with reference to Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont); Order, July 16, 2012, ECF No. 350 (“Class Certification Order”), at 4 n.3-4 (adopting Plaintiffs’ definitions).

B. Relevant Procedural History

1. From Filing of Complaint to Summary Judgment

Plaintiffs filed two putative class actions asserting antitrust claims against SuperValu and C&S, and the matters were consolidated for pretrial proceedings as multidistrict litigation in this Court. (*See* ECF No. 1.) Defendants moved to dismiss any plaintiffs that had an arbitration agreement with only one of the Defendant Wholesalers, arguing that those “Arbitration Plaintiffs” should not be allowed “to use an antitrust conspiracy theory to bring suit against the [defendant w]holesaler with whom it neither does business nor has an arbitration agreement.” (ECF No. 437 at 1.) On August 30, 2011, the Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota, granted Defendants’ motion to dismiss the Arbitration Plaintiffs. (Order, July 5, 2011, ECF No. 141.) Judge Montgomery certified this as a final judgment under Rule 54(b), and the Arbitration Plaintiffs appealed to the Eighth Circuit. (*See* ECF Nos. 191, 192.)

While that appeal was pending, the case proceeded. Plaintiffs moved to certify two putative classes: one class of New England Plaintiffs and one class of Midwest Plaintiffs. (Pls.’ Mot. for Class Certification, ECF No. 202.) On July 25, 2012, Judge Montgomery denied Plaintiffs’ motion, determining that class certification was inappropriate because neither the New England Plaintiffs nor the Midwest Plaintiffs could prove impact through evidence common to the putative class members. (Class Certification Order at 27, 33.)

Defendants moved for summary judgment on August 27, 2012, and Plaintiffs moved for partial summary judgment on September 9, 2012. (ECF Nos. 353, 375.) On

November 9, 2012, D&G also requested leave of the Court to file a second class-certification motion seeking to certify a class of grocers that was serviced by the SuperValu distribution center in Champaign, Illinois. (*See* ECF No. 420.)

On January 11, 2013, Judge Montgomery denied Plaintiffs' motion for partial summary judgment and granted Defendants' motion for summary judgment. (ECF No. 427.) Judge Montgomery determined that *per se* analysis of Plaintiffs' antitrust claims was inappropriate and analyzed Defendants' motion under a rule-of-reason standard. (*Id.* at 21 (citing *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 386-87 (8th Cir. 2007))). Applying the rule of reason, Judge Montgomery determined that D&G had (1) failed to present evidence for a reasonable jury to conclude that practical alternative wholesalers were not available in the Midwestern market, and (2) failed to submit sufficient evidence on which a reasonable jury could find that it suffered detrimental effects resulting from an unreasonable restraint on trade. (ECF No. 427 at 22-26.) Judge Montgomery also determined that Deluca's had failed to present sufficient evidence on which a jury could find that it suffered damages as a result of supra-competitive prices. (*Id.* at 27-28.)

After granting Defendants' motion for summary judgment, Judge Montgomery declined to address D&G's request for leave to move for narrower class certification, determining that the issue was moot given that Defendants prevailed on summary judgment. D&G appealed the summary-judgment and class-certification rulings on February 7, 2013. (Notice of Appeal, ECF No. 429.)

On February 13, 2013, the Eighth Circuit reversed the district court's order dismissing the Arbitration Plaintiffs and remanded with directions to consider whether the arbitration agreements at issue were enforceable against the Arbitration Plaintiffs via a successor-in-interest theory. *In re Wholesale Grocery Prods. Antitrust Litig.*, 707 F.3d 917 (8th Cir. 2013). By this point in time, Defendants had already been granted summary judgment, and D&G had appealed the class-certification and summary-judgment rulings.

2. Eighth Circuit Reverses and Remands with Instructions

On May 21, 2014, the Eighth Circuit issued its decision with respect to the class-certification and summary-judgment rulings. *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728 (8th Cir. 2014). The Eighth Circuit found that summary judgment “was not warranted because D&G submitted enough evidence to create a genuine factual dispute about (1) the relevant market and (2) the injury caused by the wholesalers’ alleged antitrust violation.” *Id.* at 735. As such, the Eighth Circuit concluded that “neither side is entitled to summary judgment—partial or ‘targeted’—and this case should be tried to a jury following any further pretrial discovery and proceedings on remand.” *Id.*

Turning to D&G’s class-certification appeal, the Eighth Circuit affirmed the District Court’s ruling, determining that the District Court did not abuse its discretion by denying Plaintiffs’ motion to certify Midwest and a New England classes. *Id.* at 736. With respect to D&G’s request to seek certification of a narrower class, the Eighth Circuit stated:

We . . . vacate the denial of D&G’s request to certify a narrower class of SuperValu customers who were charged according to the ABS formula and supplied from Champaign,

Illinois. Although the evidence suggests the ABS fee inputs would be standardized for this narrow class, at this stage we decline to opine whether “questions of law or fact common to class members predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3). We merely request the district court to consider, in light of our holding that the wholesalers are not entitled to summary judgment, whether to certify this class.

Id.

The Eighth Circuit denied Defendants’ petition for rehearing en banc, and the mandate issued on August 26, 2014, recommitting the action to the district court. (ECF Nos. 481, 483.)

3. *Elkhorn-Lueptows* Complaint

On September 29, 2014, Nemecek Markets, Inc. (“Nemecek”), and Lueptows¹ (collectively, “*Elkhorn-Lueptows* Plaintiffs”) filed a new complaint that is substantially identical to the Second Amended Complaint in this matter. *See* Compl., ECF No. 1, *Elkhorn-Lueptows, Inc. v. C&S Wholesale Grocers*, 14-cv-4031 (ADM/TNL) (“*Elkhorn-Lueptows* Complaint”). Nemecek was a Wisconsin grocer that purchased goods from SuperValu’s Green Bay distribution center during the relevant time period. *Id.* at 3. Lueptows are grocers in Wisconsin that purchased goods from SuperValu’s Pleasant Prairie distribution center during the relevant time period. *Id.* Nemecek purports to represent a class of SuperValu customers supplied from the Green Bay distribution center, and Lueptows purports to represent a class of SuperValu customers supplied from the Pleasant Prairie distribution center. Neither of the *Elkhorn-Lueptows* Plaintiffs had an

¹ Lueptows comprises Elkhorn-Lueptows, Inc., Jefferson Lueptows, Inc., and East Troy Lueptows, Inc.

arbitration agreement with C&S. Plaintiffs seek to treat the *Elkhorn-Lueptows* matter as a later-filed, tag-along action to the instant matter, *see* J.P.M.L. R. 1.1(h), which would automatically make it part of these proceedings. Defendants argue that the *Elkhorn-Lueptows* Complaint should be dismissed because the statute of limitations on the claims asserted therein has run.

4. Colella's Motion to Intervene

On October 22, 2014, two months after the Eighth Circuit denied re-hearing en banc and remanded this matter to this Court, Colella's Market ("Colella's") moved to intervene in this matter by adopting the Second Amended Complaint and seeking to amend it to include factual allegations relating solely to it. (ECF No. 488.) Colella's is a family-owned grocer in Hopkinton, Massachusetts. (ECF No. 489 at 1.) Colella's was a SuperValu customer, but its account was transferred to C&S as part of the AEA. (*Id.* at 2.) Colella's asserts that, if antitrust conspiracy and impact are proved, it "would be entitled to damages from both defendants and would be able to represent those stores in the Greater Boston Area, which extends from Cape Cod to Southern New Hampshire in the East, North, and South, and to Springfield, MA, and Providence, Rhode Island to the West of Boston." (*Id.*) Defendants argue that Colella's attempt to intervene as a class representative after class certification has been denied is improper, untimely, and highly prejudicial. Colella's argues that (1) the issues of impact and injury are still being readied for class-certification proceedings and trial; (2) it did not delay filing its motion to intervene; and (3) Defendants would face little to no prejudice by the addition of another New England putative class representative.

5. Arbitration Plaintiffs Are Reinstated

On March 16, 2015, Judge Montgomery entered an order addressing Defendants' remaining arguments to dismiss the Arbitration Plaintiffs. (Order, Mar. 16, 2015, ECF No. 516.) Judge Montgomery determined that (1) Defendants cannot use a successor-in-interest theory to enforce arbitration agreements to which they are not signatories, and (2) Defendants are not entitled to assert rights under arbitration agreements that they voluntarily and unconditionally transferred as part of the AEA. (*Id.* at 7-8, 9.)

III. DISCUSSION

The issues before this Court at present are: (1) whether Plaintiffs should be allowed to move to certify a narrower class of SuperValu customers; (2) whether the *Elkhorn-Lueptows* Complaint should be treated as a later-filed, tag-along action; and (3) whether Colella's should be allowed to intervene as a class representative notwithstanding that no New England Plaintiff appealed the order dismissing their class claims.

A. Narrower Class Certification

The Court first turns to whether Plaintiffs should be allowed to move to certify a narrower class of SuperValu customers, namely, those that were supplied from the Champaign, Illinois distribution center. In its May 21, 2014 order, the Eighth Circuit stated the following concerning Plaintiffs' request to seek certification of a narrower class:

We . . . vacate the denial of D&G's request to certify a narrower class of SuperValu customers who were charged according to the ABS formula and supplied from Champaign,

Illinois. Although the evidence suggests the ABS fee inputs would be standardized for this narrow class, at this stage we decline to opine whether “questions of law or fact common to class members predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3). We merely request the district court to consider, in light of our holding that the wholesalers are not entitled to summary judgment, whether to certify this class.

Id. at 14. Plaintiffs argue that they should be allowed to move for narrower class certification based on the language of the Eighth Circuit’s opinion.

Defendants assert that no basis exists for renewed class proceedings and that this Court should revisit its class certification decision “only if Plaintiffs demonstrate *materially changed circumstances, based on newly discovered facts*, that render the Court’s original class certification decision ‘unsound.’” Defs.’ Mem. (ECF No. 509), at 15 (citing *Gardner v. First Am. Title Ins. Co.*, 218 F.R.D. 216, 217 (D. Minn. 2003), and *Newberg on Class Actions* § 7:47 (4th ed. 2002)). Defendants posit that Plaintiffs should be required to show (1) some justification for filing a second motion beyond a change in strategy, and (2) good cause for filing the motion after the deadline for class certification has expired. *Id.* at 15-16. Defendants further argue that even if Plaintiffs were allowed to move for certification of this narrower class, certification is inappropriate because individualized issues predominate.

Defendants liken this case to *Friend v. Hertz Corp.*, No. C-07-5222 MMC, 2014 WL 4415988 (N.D. Cal. Sept. 8, 2014). In that case, the plaintiffs took an interlocutory appeal of the district court’s denial of their class-certification motion, arguing (1) that the decision should be reversed, or (2) in the alternative, that common issues should be

certified for class-wide disposition under Rule 23(c)(4). *Id.* at *2. On appeal, the Ninth Circuit Court of Appeals affirmed the denial of class certification. *Friend v. Hertz Corp.*, 564 Fed. App'x 309 (9th Cir. 2014). Because the plaintiff's Rule 23(c)(4) argument was neither presented to nor decided by the district court, the Ninth Circuit dismissed the Rule 23(c)(4) claim "without prejudice to it being raised in the district court." *Id.* at 310 n.1. At a post-appeal case management conference, the district court set a deadline for seeking leave to move for class certification under Rule 23(c)(4). *Friend*, 2014 WL 4415998 at *2. The plaintiffs timely filed a motion for leave to seek class certification, which the district court subsequently denied. *Id.* Defendants argue that, like the *Friend* plaintiffs, Plaintiffs must seek permission of the Court before moving for class certification on a new basis.

The instant matter, however, rests on different post-appeal footing than *Friend*. In *Friend*, the Ninth Circuit declined to consider the plaintiffs' motion for class certification without prejudice, which allowed the plaintiff to raise the issue of certification under Rule 23(c)(4) to the trial court. Thus, for the *Friend* plaintiffs even to move for certification under 23(c)(4), they still had to seek leave from the trial court.

Here, however, the Eighth Circuit did not remand with directions to allow Plaintiffs to request leave to move for narrower class certification. The Eighth Circuit instead vacated the denial of Plaintiffs' motion for leave to seek certification of a narrower class and remanded with a plain request for the district court "to consider, in light of [its] holding that the wholesalers are not entitled to summary judgment, whether to certify" a class of grocers supplied from the Champaign, Illinois distribution center.

752 F.3d at 736. The Eighth Circuit's directions were to consider not whether to allow Plaintiffs to *move for certification* of this narrower class, but *whether to certify* this narrower class. In doing so, the Circuit noted that the evidence suggests that the pricing mechanism SuperValu used might be standardized across the proposed narrower class, but left that determination to be made in the first instance by the district court. *Id.* With this history in mind, requiring Plaintiffs to ask permission to file a motion that the Eighth Circuit has already said should be considered is simply inefficient and unnecessary.

Finally, Defendants also argue that individualized issues would predominate over any questions of law and fact common to the narrower class members. This argument, however, goes to the merits of Plaintiffs' yet-to-be-filed motion for certification of the narrower class. No court has yet addressed whether questions of law or fact common to members of the narrower classes predominate over any questions affecting only individual grocers, and this Court will not do so at this time. Accordingly, based on the foregoing, and all the files, records and proceedings herein, and in light of the direction of the Eighth Circuit, Plaintiffs will be allowed to move for certification of the narrower class.

B. Plaintiffs' Newly-Filed *Elkhorn-Lueptows* Complaint

The *Elkhorn-Lueptows* Complaint was filed on September 29, 2014. Plaintiffs argue that this action should be treated as a later-filed tag-along action, *see* J.P.M.L. R. 1.1(h), and automatically made part of the instant proceedings. Defendants argue the class claims in the *Elkhorn-Lueptows* Complaint should be dismissed because (1) the

claims were brought outside the four-year limitations period, *see* 15 U.S.C. § 15B, and (2) *American Pipe* tolling does not apply.

1. *American Pipe* Tolling – Individual vs. Class Claims

In *American Pipe & Construction Co. v. Utah*, putative class members sought to intervene after the trial court denied a motion for class certification. 414 U.S. 538, 540-44 (1974). Before the attempted intervention, the statute of limitations on the putative class members' individual claims had run. *Id.* The Ninth Circuit affirmed the denial of the motions to intervene. *State of Utah v. Am. Pipe & Constr. Co.*, 473 F.2d 580 (9th Cir. 1973). The Supreme Court, however, reversed, holding:

where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.

American Pipe, 414 U.S. at 552-53. Thus, under *American Pipe*, the filing of a putative class action tolls the statute of limitations on the individual claims of asserted members of the class who seek to intervene after class certification is denied based on deficiencies in the class representative.

Almost a decade later in *Crown, Cork & Seal Co. v. Parker*, the Court extended *American Pipe* tolling and held that the filing of a class action tolled the statute of limitations for the individual claims of *all asserted members of the class*, not just those who sought to intervene. 462 U.S. 345 (1983). Without this protection, putative class members would be incentivized to file unnecessary individual lawsuits to protect their

individual rights regardless of whether a class action was already in progress, just in case class certification was eventually denied. In *Crown*, the Court “clearly contemplated tolling for subsequent *individual, separate lawsuits* following denial of class certification.” *Burns v. Ersek*, 591 F. Supp. 837, 841 (D. Minn. 1984) (emphasis added) (analyzing *Crown*), *abrogated on other grounds by Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (2013). As set forth in *Crown*, *American Pipe* tolling extends to the individual claims of all putative class members, whether seeking intervention or filing their own suit, in order to give full effect to the efficiency and economy goals of class-action procedure.

In its usual application, *American Pipe* tolls the statute of limitations for only the individual claims of putative class members. *See, e.g., Burns*, 591 F. Supp. at 842 (concluding that “perpetual tolling of class claims by the filing of subsequent class action suits . . . is not a proper application of the *American Pipe* doctrine”); *see also Satterwhite v. City of Greenville*, 578 F.3d 987, 997 (5th Cir. 1978) (“The statute . . . is tolled for putative class members’ individual claims . . . and remains tolled as to those . . . members who intervene or who file individual claims”); *Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 869 (7th Cir. 1978) (“The statute of limitations on their individual causes of action may be tolled from the . . . filing of the class action complaint.”); *Green v. United States Steel Corp.*, 481 F. Supp. 295, 299 (E.D. Pa. 1979) (“[T]he filing of a class action complaint tolls the statute . . . on the filing of individual claims If the class is later decertified, the statute begins to run again and the individual class members must either file new law suits or timely request to intervene”). *See also Smith v. Bayer Corp.*,

131 S. Ct. 2368, 2379 n.10 (2011) (describing *American Pipe* as allowing a putative class member of an uncertain class to wait until after the court rules on the certification motion to file an individual claim or move to intervene).

A principled distinction, however, exists between putative class actions where class certification is denied and putative class actions where no final class-certification determination was made. In *In re Vertrue Inc. Marketing & Sales Practices Litigation*, the Sixth Circuit addressed whether the plaintiffs' class claims were entitled to the benefit of *American Pipe* tolling. 719 F.3d 474 (6th Cir. 2013). The plaintiffs in *Vertrue* asserted class claims that had first been raised in a predicate action. The district court in the predicate action, however, dismissed the action before determining whether to certify a class of plaintiffs. The *Vertrue* court reasoned that, if *American Pipe* tolling extended the statute of limitations on putative class members' class-based claims despite an overt denial of class certification, class plaintiffs would be able to re-litigate class certification in perpetuity until they achieved a desired result.² But, because no determination on class certification had been made in the predicate action, tolling the statute of limitations for the *Vertrue* plaintiffs' class claims did not present such a risk. The Sixth Circuit determined that, because class certification had not been decided in the predicate action, the risks of "repetitive and indefinite class action lawsuits addressing the same claims" were simply not present. *Id.* at 479-80. Accordingly, the Sixth Circuit determined that the

² This is occasionally referred to as the non-piggyback rule. *E.g.*, *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986).

commencement of the predicate action tolled the statute of limitations of the plaintiffs' class claims under *American Pipe*. *Id.*

Other circuits have reached similar results where the court in the previous action did not make a class-certification determination. *See Yang v. Odom*, 392 F.3d 97, 104, 112 (3d Cir. 2004) (holding that tolling applies to a subsequent class action when the prior denial of class certification was based solely on deficiencies in the putative class representative under Rule 23); *Catholic Social Servs., Inc. v. I.N.S.*, 232 F.3d 1139, 1149 (9th Cir. 2000) (en banc) (holding that the filing of a previous class action tolled the applicable statute for a later class action where the later action was not an attempt to relitigate the denial of certification or correct a procedural deficiency in the purported class); *cf. Great Plains Trust Co. v. Union Pacific R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007) (assuming without deciding that *American Pipe* analysis applies in cases where one putative class action suit was dismissed without prejudice and one was voluntarily dismissed). Thus, where no class certification determination has occurred in a previous class action, *American Pipe* tolls the statute of limitations for both the individual and class claims of putative class members.

To sum up, in putative class actions where class certification is ultimately denied, *American Pipe* tolls the statute of limitations for only the putative class members' *individual* claims from the date of filing until the denial of class certification. At that point, the individuals would be on notice of the need to protect their individual claims. In putative class actions that are resolved *before* the court issues a determination on class

certification, however, *American Pipe* tolls the statute of limitations for both the individual claims *as well as* the class-based claims of the class members.

2. *American Pipe* Tolling Applies to the *Elkhorn-Lueptows* Plaintiffs' Class Claims

The present litigation is analogous to *Vertrue*. As it currently stands, the Eighth Circuit chose not to disturb the District Court's denial of class certification for all SuperValu customers in the Midwest region. Nonetheless, the Circuit vacated the denial of D&G's request to certify a narrower class and remanded the case to the District Court with directions "to consider, in light of [its] holding that the wholesalers are not entitled to summary judgment, whether to certify" the proposed "narrower class of SuperValu customers who were charged according to the ABS formula and supplied from Champaign, Illinois." ECF No. 478 at 14.

Based on the foregoing analysis of *American Pipe* tolling, this Court determines that the statute of limitations for the individual and class-based claims in the *Elkhorn-Lueptows* Complaint was tolled from the filing of this putative action in December 2008. Once the Eighth Circuit directed the District Court to consider whether to certify a narrower class, the *Elkhorn-Lueptows* Plaintiffs were on notice (1) that their claims were no longer being protected in the putative class action, and (2) that the narrower class certification issue remanded to the District Court remained an open question. Under these specific circumstances, the *Elkhorn-Lueptows* Complaint is not an attempt to piggyback one class action onto another and "thereby engage in endless rounds of litigation . . . over

the adequacy of successive named plaintiffs to serve as class representatives” over the same putative class. *Griffin*, 17 F.3d at 359.

The *Elkhorn-Lueptows* Plaintiffs are in a position analogous to that of the plaintiffs in *Vertrue*. No court “has definitively ruled” whether to certify the plaintiffs’ putative class. 719 F.3d at 480. Although the District Court held that class certification of all Midwest Plaintiffs was inappropriate, no court has yet definitively ruled on the question posed by the Eighth Circuit: whether to certify a narrower distribution-center-based class of plaintiffs—the same type of classes proposed by the *Elkhorn-Lueptows* Plaintiffs. As such, the risk that allowing the *Elkhorn-Lueptows* Plaintiffs to assert their class claims will result in repetitive and indefinite attempts at class certification is absent. D&G, the proposed class representative of the larger putative class to which the *Elkhorn-Lueptows* Plaintiffs belonged, was no longer an appropriate class representative for the *Elkhorn-Lueptows* Plaintiffs. Filing a separate complaint, therefore, was an appropriate way for the *Elkhorn-Lueptows* Plaintiffs to preserve their individual and class-based claims and benefit from the earlier rulings in this case.

Tolling the statute of limitations on the *Elkhorn-Lueptows* Plaintiffs’ class-based claims does not pose the danger of limitless bites at the class-certification apple. The class-certification issues are narrow in comparison to the original proposed classes. Finally, it would be inequitable to allow one member of a class that was denied certification to seek to certify a narrower class, but to refuse to allow other members of the larger purported class to seek to certify similarly narrower classes to which they belong. Accordingly, the *Elkhorn-Lueptows* Complaint shall be treated as a later-filed,

tag-along action. The *Elkhorn-Lueptows* Plaintiffs shall be allowed to seek certification of their proposed narrower, distribution-center-based classes.

C. Colella's Motion to Intervene

Finally, this Court will address Colella's Motion to Intervene. On August 26, 2014, the Eighth Circuit remanded this action. On October 24, 2014, Colella's moved to intervene as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure or, in the alternative, for permissive intervention under Rule 24(b). Defendants oppose Colella's motion, arguing that (1) intervention on behalf of a narrower New England class is improper after class certification has been denied; (2) Colella's motion is untimely; and (3) if the Court determines that Colella's can intervene, only its individual claims are appropriate. Because motions for intervention as of right and for permissive intervention must both be timely, "the timeliness of a motion [to intervene] is a threshold issue." *United States Ritchie Special Credit Invs., Ltd.*, 620 F.3d 824, 832 (8th Cir. 2010). Accordingly, this Court turns to the timeliness of the motion.

1. Timeliness of Colella's Motion to Intervene

Whether a motion to intervene is timely "is determined by considering all the circumstances of the case," and "[n]o ironclad rules govern this determination." *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 998 (8th Cir. 1993). Courts do, however, consider several factors when making this determination: "(1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervener's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing

parties.” *ACLU of Minn. v. Tarek ibn Ziyad Academy*, 643 F.3d 1088, 1094 (8th Cir. 2011) (internal quotation marks omitted); *WaterLegacy v. E.P.A.*, 300 F.R.D. 332, 342 (D. Minn. 2014) (same).

a. Extent Litigation Has Progressed

Defendants argue that this case has progressed too far to allow a new party to intervene. When courts examine the extent of the litigation’s progress, “absolute measures of timeliness should be ignored.” *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994). Courts consider “not only the current stage of the litigation but also what has occurred in the litigation before the filing of the motion to intervene.” *WaterLegacy*, 300 F.R.D. at 342. The timeliness requirement “is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner.” *Espy*, 18 F.3d at 1205; *see also, Mountain Top Condo. Ass’n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369 (3d Cir. 1995) (“While four years had elapsed before the Seipels filed their motion to intervene, the critical inquiry is: what proceedings of substance on the merits have occurred?”).

Defendants assert that “[f]act discovery is complete, other than additional discovery remaining from any remaining Arbitration Plaintiffs, and the parties have litigated class certification, three summary-judgment motions, and two Eighth Circuit appeals.” ECF No. 509 at 34. This Court agrees.

Unlike in *WaterLegacy*, much more than private settlement discussions have occurred in this case. The parties have briefed and argued motions to dismiss, motions for summary judgment, and motions for class certification; they have engaged in extensive

discovery to support those motions; and they have twice argued this case before the Eighth Circuit. Although this Court does not necessarily agree with Defendants' characterization of the scope of remaining discovery, Defendants have litigated this matter without the involvement of New England Plaintiffs since February 2013 and without Colella's involvement since the litigation's inception. Moreover the Eighth Circuit left intact the District Court's denial of the broader Midwest and New England classes, and only specifically addressed D&G's request for a narrower distribution-center-based class of Midwest Plaintiffs. In light of the substantial proceedings that have occurred, Defendants would be prejudiced by the addition of plaintiffs who did not appeal either the denial of the New England class or the grant of summary judgment, and who have never been a part of this five-year-old litigation. Accordingly, the Court concludes that the extent to which this litigation has progressed weighs against intervention.

b. Colella's Knowledge of This Litigation and Reason for Delay in Seeking Intervention

Because Colella's knowledge of the litigation and its reason for delay are intertwined, the Court will address the two factors at the same time. The parties agree that Colella's had knowledge of this litigation long before it moved to intervene. In his declaration, counsel for Colella's represents that he became aware that lead Plaintiffs' counsel intended to pursue class certification only for Midwest Plaintiffs when the Eighth Circuit's decision was still subject to Defendants' request for an *en banc* hearing in 2013. (ECF No. 492 at 3.) Colella's posits that, therefore, by the time it learned its interests

were no longer being protected, it could not have moved to intervene until the Eighth Circuit issued its mandate and the case was returned to this Court.

The mandate issued on August 26, 2014. This Court held a status conference on September 11, 2014. The parties filed a joint letter on October 3, 2014, regarding a potential schedule for the litigation going forward. Colella's, however, did not move to intervene until October 24, 2014. (ECF No. 491.)

Colella's insists that it had no opportunity to request intervention until after the Eighth Circuit issued its opinion remanding the case to this Court. In examining this argument, the Court takes guidance from *United Airlines v. McDonald*, 432 U.S. 385 (1977). In *McDonald*, a sex discrimination class action, the original plaintiff challenged the "no-marriage rule" for female United Airlines flight attendants. *Id.* at 387. The trial court denied a motion for class certification, finding that "the [putative] class numbered not more than 30 and in the court's view did not satisfy the numerosity requirement of Fed. Rule Civ. Proc. 23(a)(1)." *Id.* at 388. The trial court then allowed several putative class members to intervene to appeal its denial of class certification and certified its denial for interlocutory appeal. *Id.* The Seventh Circuit refused to take the interlocutory appeal, and the case proceeded. *Id.* Later, the trial court granted plaintiffs' motion for summary judgment on the issue of liability, and after the parties agreed upon the amounts to be awarded to each plaintiff, final judgment was entered. *Id.* at 389.

The original plaintiffs chose not to appeal the trial court's order denying class certification after judgment was entered. McDonald, a former flight attendant who had been discharged as a result of United's no-marriage rule, filed a motion to intervene for

the purpose of appealing the trial court's denial of class certification. *Id.* at 390. The trial court denied McDonald's motion as untimely. *Id.* The Supreme Court reversed.

In finding that McDonald's petition *was timely*, the Supreme Court noted that "the named plaintiffs had attempted to take an interlocutory appeal from the order [denying class certification] at the time the order was entered," and accordingly, "there was no reason for the respondent to suppose that they would not later take an appeal until she was advised to the contrary after the trial court had entered its final judgment." *Id.* at 393-94. The Court found that the "critical fact" was that "the respondent quickly sought to enter the litigation" as soon as the entry of final judgment made the adverse class determination appealable. *Id.* at 394. "In short, as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests." *Id.* "The critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *Id.* at 395-96.

Taking guidance from *McDonald*, this Court finds that Colella's has not provided reason for unduly delaying its attempt to intervene. After judgment was entered following the District Court's grant of summary judgment, all plaintiffs had 30 days to ensure that their interests were being protected and to pursue an appeal of the earlier denial of class certification. *See Fed. R. App. P. 4(a)*. If an unnamed class member wished to appeal the earlier denial, it would have been appropriate to seek intervention at that time. Because only D&G appealed the denial of class certification, and D&G (as representative of the

Midwest class) had no interest in whether a New England class was certified, Colella's was on notice at the time of the appeal that its class-based interests (as a New England putative class member) were no longer being protected by the named class representatives. And despite that notice, Colella's did not quickly seek to intervene and protect its interests. Even assuming that Colella's was unable to move for intervention until after the mandate issued from the Eighth Circuit—an issue that this Court need not and therefore does not address—, Colella's did not move to intervene until 60 days after the mandate issued. This failure to seek intervention quickly is critical. Whether or not a different class representative would have cured the deficiencies that the district court found in the putative class (and this Court states no opinion on that issue), the Federal Rules provided Colella's—or any New England Plaintiff for that matter—an avenue to preserve its interests and its putative class claims. Colella's, however, did not avail itself of that avenue in a timely manner and provides no convincing reason for its delay. Accordingly, Colella's knowledge of the litigation and reason for delay weigh against intervention.

c. Whether Colella's Intervention Prejudices Defendants

Finally, Defendants argue that they will be prejudiced by Colella's intervention, especially if Colella's is allowed to intervene as a putative class representative. Colella's is not now nor has it ever been a party to this action. Thus, any discovery that Defendants would be entitled to from Colella's has not even been requested, let alone produced. If Colella's were allowed to intervene, Defendants would have to commence the discovery process with respect to Colella's. Moreover, if Colella's is allowed to intervene not only

as an individual claimant but as a class representative, this prejudice increases. This is especially true if the only method to determine whether all putative New England class members were injured would be to conduct an individual inquiry into the upcharges actually paid by customers. (*See* Class Certification Order at 25.) Allowing Colella's to intervene as a class representative would also force Defendants to re-litigate class certification for the New England Plaintiffs, despite the fact that no party appealed the District Court's denial of certification for a New England class. To allow Colella's to attempt to represent a putative New England class and seek class certification now—despite the fact that certification for a New England class was sought and denied in this matter once already in this case—would give New England Plaintiffs an unwarranted second bite at the class-certification apple. The prejudice of conducting entirely new discovery and re-litigating an unappealed and (as far as this Court can see) undisturbed denial of class certification weighs against intervention.

Given the extent this litigation has progressed, Colella's knowledge of the litigation and unpersuasive reason for delay in seeking intervention, and the prejudice that Defendants will suffer as a result of the delay, the Court determines that Colella's motion to intervene is untimely.

2. Colella's Has No Right To Intervene

Even assuming that Colella's had timely moved to intervene, this Court determines that Colella's is not entitled to intervene as a matter of right. Rule 24(a) provides that the court must grant a request to intervene where the proposed intervenor "claims an interest relating to the property or transaction that is the subject of the action

and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." In short, Rule 24 has been interpreted to require a party seeking mandatory intervention to "establish that: (1) it has a recognized interest in the subject matter of the litigation; (2) the interest might be impaired by the disposition of the case; and (3) the interest will not be adequately protected by the existing parties." *South Dakota ex rel. Barnett v. U.S. Dept. of Interior*, 317 F.3d 783, 785 (8th Cir. 2003).

The issue is whether Colella's maintains a recognized interest in the subject matter of this litigation. The District Court denied class certification for a New England class. No New England Plaintiff attempted to appeal this denial, and the Eighth Circuit remanded for consideration whether to certify D&G's proposed distribution-center-based class before trial. Judge Montgomery's conclusions with respect to class certification for New England Plaintiffs remains undisturbed. Under such circumstances, the Court concludes that Colella's does not have an interest in the instant litigation that might be impaired by its disposition.

Moreover, the Court determines that because class certification was denied for a New England class, this matter can have no preclusive effect on a non-party and absent putative class member such as Colella's. The Supreme Court has "repeatedly emphasized the fundamental nature of the general rule that only parties can be bound by prior judgments" *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011) (quotation omitted).

Colella's—as a non-party to the instant litigation—retains the ability to attempt filing its own suit³ against Defendants to seek damages for any antitrust violations.

3. Permissive Intervention

Colella's also seeks permissive intervention under Rule 24(b). Even assuming that Colella's had filed a timely motion for permissive intervention (which it did not), this Court determines that such intervention should not be allowed. Rule 24(b)(1) provides that, on a timely motion, a court may permit anyone to intervene who “has a claim or defense that shares with the main action a common question of law or fact.” In exercising this discretion, a court “must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.” Fed. R. Civ. P. 24(b)(3).

Colella's argues that it should be allowed to intervene and seek class certification because D&G represented the interests of all grocers on appeal. This argument is unpersuasive. When Plaintiffs moved for class certification, they sought to divide into two putative classes—a Midwest class and a New England class. The Eighth Circuit held that: (1) a fact question remained concerning whether a *per se* antitrust violation occurred; and (2) D&G, the representative of the putative Midwest class, “submitted enough evidence to create a genuine factual dispute about” its alleged damages. The District Court's order with respect to the putative New England class representative DeLuca's, however, remained unappealed, unaddressed, and, therefore, undisturbed. Based on the untimeliness of Colella's motion and the prejudice that Defendants would

³ Any such claims would, of course, be subject to any applicable statute of limitations or other substantive or procedural limitations. These issues were not raised in the briefing to this Court, and accordingly, will not be addressed.

suffer if Colella's were allowed to intervene as set forth above, the Court will deny Colella's motion for permissive intervention.

IV. CONCLUSION

Based on the foregoing, and all the files, records and proceedings herein, **IT IS HEREBY ORDERED THAT:**

1. Plaintiff D&G will be allowed to seek certification of a narrower, distribution-center-based class;
2. The *Elkhorn-Lueptows* Complaint, File No. 14-cv-4301, shall be treated as a later-filed, tag-along action, and the *Elkhorn-Lueptows* Plaintiffs shall be allowed to seek certification of narrower, distribution-center-based classes;
3. Colella's Motion to Intervene is **DENIED**;
4. Counsel for all remaining parties shall participate in the scheduled telephonic status conference on **Tuesday, June 23, 2015**, at **11:00 a.m. central time**;
5. All prior consistent orders remain in full force and effect; and
6. Failure to comply with any provision of this Order or any prior consistent order shall subject the non-complying party, non-complying counsel and or the party such counsel represents to any and all appropriate remedies, sanctions and the like, including without limitation: assessment of costs, fines and attorneys' fees and disbursements; waiver of rights to object; exclusion or limitation of witnesses, testimony, exhibits, and other evidence; striking of pleadings; complete or partial dismissal with prejudice; entry of whole or partial default judgment; and/or any other relief that this Court may from time to time deem appropriate.

Date: June 19, 2015

s/ Tony N. Leung
Tony N. Leung
United States Magistrate Judge
District of Minnesota

In re Wholesale Grocery Prods. Antitrust Litig.

File No. 09-md-2090 (ADM/TNL)