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Wholesale Grocery Suppliers Beat Antitrust Suit

By **Aaron Taube**

Law360, New York (January 14, 2013, 6:14 PM ET) -- A Minnesota federal judge Friday dismissed the claims of the two remaining plaintiffs in a suit alleging wholesale grocery suppliers SuperValu Inc. and C&S Wholesale Grocers Inc. conspired to inflate prices by entering into a noncompete agreement.

U.S. District Judge Ann D. Montgomery granted the defendants' summary judgment motion in a Jan. 11 opinion, finding that D&G Inc. and DeLuca's Market Corp. failed to demonstrate how the two largest U.S. wholesale grocery companies harmed competition when they swapped distribution centers located in each other's territories and agreed not to solicit customers of the transferred facilities for five years afterward.

"Like D&G, DeLuca's fails to present evidence of the state of competition in the relevant market or articulate a case theory as to how that market was detrimentally affected by the" agreement, the opinion said.

Stephen P. Safranski, who represented SuperValu in the case, hailed the decision Monday as proper confirmation of the asset exchange agreement at issue, which he says was reviewed by the Federal Trade Commission before and after its consummation.

"The court's decision is a complete vindication of the 2003 asset exchange agreement between SuperValu and C&S, which allowed both companies to serve their independent retailer customers more efficiently and at a lower cost," Safranski said.

Phone calls to plaintiffs' counsel were not immediately returned Monday.

The consolidated antitrust action was filed on behalf of grocery stores in 13 states alleging that their grocery suppliers, C&S and SuperValu, colluded to consolidate regional market power in violation of the Sherman Act and the Clayton Act.

A group of six plaintiffs alleged in lawsuits dating back to 2008 that C&S and SuperValu restrained competition with a 2003 agreement through which New England-based C&S sold assets it had purchased from Midwestern rival Fleming Cos. to Minnesota-based SuperValu in exchange for four distribution facilities SuperValu owned inside C&S' New England footprint.

Included in the asset exchange agreement was a noncompete clause that prohibited C&S from supplying customers transferred to SuperValu for two years following the agreement and from soliciting them for five years. SuperValu signed off on a reciprocal agreement with regard to customers serviced by the distribution centers it was transferring to C&S. According to the Jan. 11 opinion, both companies shut down the facilities they received in the deal within a year of its completion.

Judge Montgomery, who denied a class certification bid by the plaintiff in July, said D&G's claims that C&S' absence from the Midwest market allowed SuperValu to inflate prices were undermined by the Iowa grocery store's ability to switch to an alternative supplier after it grew tired of dealing with SuperValu.

Though the judge granted that the asset exchange agreement did consolidate SuperValu's market share, she said D&G's defection is proof that it did not create the sort of market power that would allow the company to charge higher prices without losing customers.

"Indeed, D&G's own actions before and after the [asset exchange agreement] in September 2003 reinforces that D&G was not limited to a market dominated by SuperValu," the opinion said. "Whether or not C&S would have been a viable alternative for the Midwestern market but for the [asset exchange agreement], wholesalers clearly had a competitive market with or without C&S between September 2003 and August 2005."

Massachusetts-based DeLuca's had said that C&S had used its newfound market power to decrease the quality of its service and to charge DeLuca's Market Corp.'s two specialty food and wine stores a higher freight rate than the one DeLuca's had previously negotiated with SuperValu.

Judge Montgomery found those claims were contract disputes, if anything, and that while C&S provided evidence it offered former SuperValu customers lower rates to retain them, DeLuca's did nothing to show how market competition suffered after the agreement.

"Even though DeLuca's was clearly unsatisfied with the upcharge rate and delivery problems, without evidence that C&S' prices were supra-competitive, summary judgment is appropriate for defendants," the opinion said.

Though D&G and DeLuca Corp.'s claims were the last remaining in the district court suit, the Eighth Circuit is currently considering appeals from five grocery retail companies that want the court to overturn a July 2011 order that dismissed their claims and ordered them to undergo arbitration. The district court entered final judgment against the companies sent to arbitration in order to allow them to appeal. The appellants are Blue Goose Super Market Inc., Millennium Operations Inc., JFM Market Inc., MFJ Market Inc. and King Cole Foods Inc.

The plaintiffs are represented by Richard B. Drubel and Kimberly H. Schultz of Boies Schiller & Flexner LLP, W. Joseph Bruckner, Elizabeth R. Odette and Kristen G. Marttila of Lockridge Grindal Nauen PLLP, Daniel A. Kotchen and Daniel L. Low of Kotchen & Low LLP, Joel C. Meredith of Meredith & Associates and Kevin M. Magnuson of Kelley Wolter & Scott PA.

SuperValu is represented by Stephen P. Safranski, Martin R. Lueck, K. Craig Wildfang, Damien A. Riehl, Heather M. McElroy and E. Casey Beckett of Robins Kaplan Miller & Ciresi LLP.

C&S is represented by Charles A. Loughlin, Christopher J. MacAvoy and David S. Shotlander of Baker Botts LLP and Todd A. Wind and Nicole M. Moen of Fredrikson & Byron PA.

The case is In re: Wholesale Grocery Products Antitrust Litigation, case number 09-MD-2090, in the U.S. District Court for the District of Minnesota.

--Additional reporting by Jonathan Randles and James Armstrong. Editing by Jeremy Barker.