

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re Wholesale Grocery Products
Antitrust Litigation

**MEMORANDUM OPINION
AND ORDER**

Court File No. 09-MD-2090 ADM/AJB

This Order Relates to All Actions

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I. INTRODUCTION

This matter is before the undersigned United States District Judge for a ruling on Defendant C&S Whole Grocers, Inc.'s ("C&S") and Defendant SuperValu Inc.'s ("SuperValu") Motion to Alter or Amend Judgment [Docket No. 187]. Plaintiffs King Cole Foods, Inc., Millennium Operations, Inc., JFM Market, Inc., MFJ Market, Inc., and Blue Goose Super Market, Inc. (collectively, the "Arbitration Plaintiffs") oppose the motion. For the reasons set forth below, the motion is denied.

II. BACKGROUND

The factual background of this multidistrict litigation has been set forth at length in the Court's previous orders and will not be repeated here, but rather is incorporated by reference. The Arbitration Plaintiffs each have an agreement to arbitrate claims against either C&S or SuperValu or both. On that basis, the Court dismissed without prejudice the claims of each of the Arbitration Plaintiffs by Order dated July 5, 2011 [Docket No. 141] (the "July 5, 2011 Order"). The Arbitration Plaintiffs requested permission to file a motion to reconsider and permission was denied on July 21, 2011 [Docket No. 154].

On August 1, 2011, the Arbitration Plaintiffs then filed a Motion Requesting Certification of Final Judgment Pursuant to Fed. R. Civ. P. 54(b) [Docket No. 161] seeking entry of final judgment as to the Arbitration Plaintiffs to allow appeal of the Court's ruling in the July 5, 2011 Order. That motion was granted by Order dated August 30, 2011 [Docket No. 178] (the "August 30, 2011 Order"). Judgment [Docket No. 179] was then entered on August 31, 2011.

On September 6, 2011, the U.S. Court of Appeals for the Eighth Circuit (the "Eighth Circuit") issued its opinion and decision in Green v. Supershuttle Internat'l, Inc., 563 F.3d 766 (8th Cir. 2011). In Green, the Eighth Circuit ruled that where it is not clear that all contested issues will be resolved by arbitration, a trial court ruling in favor of arbitration must stay, rather than dismiss, the action in order to prevent prejudice to the parties. 563 F.3d at 769-70.

On September 21, 2011, in light of Green, Defendants (C&S and SuperValu are collectively "Defendants") filed the present Motion to Alter or Amend the Judgment, seeking to amend the July 5, 2011 to stay rather than dismiss the claims of the Arbitration Plaintiffs, and to vacate the August 30, 2011 Order and the Judgment. On September 23 and 26, 2011, the

Arbitration Plaintiffs filed their Notices of Appeal to 8th Circuit [Docket Nos. 191 & 192]. However, the parties agree that this Court retains jurisdiction to rule on Defendants' present motion.

III. DISCUSSION

A. Motion to Alter or Amend Standard

Defendants' motion is made under Rule 59(e) of the Federal Rules of Civil Procedure. A district court has broad discretion to alter or amend a judgment under Rule 59(e). Matthew v. Unum Life Ins. Co. of Am., 639 F.3d 857, 863 (8th Cir. 2011) (quotation omitted). "Rule 59(e) motions serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence." Id. (quoting United States v. Metro. St. Louis Sewer Dist., 440 F.3d 930, 933 (8th Cir. 2006)). "Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment." Metro. St. Louis Sewer Dist., 440 F.3d at 933 (internal quotations omitted). An intervening change in controlling law "customarily warrants post-judgment relief." U.S. ex rel. Roop v. Hypoguard USA, Inc., 559 F.3d 818, 823 (8th Cir. 2009).

B. Stay v. Dismissal of Arbitrable Claims

The Federal Arbitration Act generally requires a district court to stay rather than dismiss an action pending an arbitration. 9 U.S.C. § 3. A judicially-created exception exists that allows a district court to dismiss, rather than stay, a case "when all of the issues before the court are arbitrable." Bercovitch v. Baldwin School, Inc., 133 F.3d 141, 156 n.21 (1st Cir. 1998). In Green, the Eighth Circuit clarified that in this Circuit, stay is appropriate and dismissal is improper where "gateway" issues of arbitrability exist but are delegated for decision to the

arbitrator. Green, 653 F.3d at 769-70. Because the arbitrator could potentially resolve those “gateway” issues in favor of litigation rather than arbitration, a stay would allow the parties to return to litigation without prejudice. Id. at 770.

Therefore, in the wake of the Green decision, the issue now is whether all contested issues regarding arbitration itself have been resolved, or whether “gateway” issues of arbitrability remain that could be resolved against arbitration and thereby send the parties back into litigation on the merits. No such “gateway” issues remain here. In response to Defendants’ motion to dismiss, the Arbitration Plaintiffs argued that the arbitration clauses were unenforceable against them by a non-signatory Defendant because the doctrine of equitable estoppel did not apply and, in any event, the arbitration clauses were contrary to public policy. The July 5, 2011 Order held that non-signatories could enforce those agreements under the doctrine of equitable estoppel and that the agreements to arbitrate were not unenforceable in light of federal antitrust law. These issues specifically relate to the validity of the agreements to arbitrate, and their application to the Arbitration Plaintiffs, and therefore are not “gateway” issues of arbitrability. See Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2776–78 (2010) (distinguishing “gateway” issues of arbitrability, which may be delegated to the arbitrator, from attacks on validity, which are to be considered by the Court). With one notable exception, to be discussed below, the Court is aware of no remaining arbitrability questions. Indeed, the Arbitration Plaintiffs have expressly represented that no such issues remain. Pls.’ Mem. of Law in Opp. to Defs.’ Mot. to Alter or Amend J. [Docket No. 199] 1 (“Unlike Green, in the case at bar there is no ‘gateway’ issue of arbitrability left open . . .”).

It is noted that two of the Arbitration Plaintiffs JFM Market, Inc. and MFJ Market, Inc.

(collectively, “Village Market”) have equivocated regarding the existence of “gateway” issues of arbitrability. Specifically, Village Market filed the Affidavit of James F. McInnis of the Village Markets Concerning Costs to Litigate an Arbitration and the SuperValu Agreement [Docket No. 136] in opposition to Defendants’ motion to dismiss stating that Village Market had no arbitration agreement with C&S and it was Village Market’s CEO’s understanding that any arbitration agreements it had with SuperValu were terminated rather than assigned to C&S. Village Market also filed the Affidavit of Edward Dangel, III, Counsel to the Village Markets Regarding the Notion of a “New England Arbitration Subclass” [Docket No. 137] stating that Village Market had no arbitration agreement with C&S. These affidavits, being submitted untimely, were not previously considered by the Court. July 5, 2011 Order 4 n.3.

What effect those affidavits would have had if considered, however, is unclear. Defendants have never claimed that Village Market and C&S had agreements to arbitrate directly executed between them, but rather Defendants claimed that SuperValu assigned to C&S agreements to arbitrate with Village Market. If that assignment was ineffective, that question could be a “gateway” issue for the arbitrator. However, based on the affidavits alone, it is unclear if that is Village Market’s position. Village Market’s precise position with respect to assignment is further muddled by the fact that Plaintiffs, in both their Complaint and in their brief in opposition to the motion to dismiss, specifically stated that Village Market and C&S are parties to agreements to arbitrate. See 2d Consolidated Am. Class Action Compl. [Docket No. 99] ¶ 10 (“Village Market was party to a supply agreement with C&S that contained an arbitration agreement”); Pls.’ Mem. in Opp. to Defs.’ Mot. to Dismiss or Stay under the Federal Arbitration Act 8 (“Village Market had arbitration agreements with C&S but has only

sued SuperValu . . .”). However, whatever Village Market’s position may have been is immaterial. At this procedural stage, the Arbitration Plaintiffs have unequivocally stated in their most current brief that no gateway issues remain. Pls.’ Mem. of Law in Opp. to Defs.’ Mot. to Alter or Amend J. 1 (“Unlike Green, in the case at bar there is no ‘gateway’ issue of arbitrability left open . . .”). Therefore, to the extent that Village Market previously wished to contest the existence of agreements to arbitrate with C&S, those arguments have now been abandoned. See United States v. Int’l Business Mach. Corp., 517 U.S. 843, 856 n.3 (1996) (noting that issue not briefed is abandoned); see also Stephenson v. Deutsche Bank AG, 282 F. Supp. 2d 1032, 1062 n.23 (D. Minn. 2003) (deeming argument raised without legal support and then not addressed in subsequent briefing to be abandoned). With no “gateway” issues of arbitrability remaining, the Arbitration Plaintiffs, including Village Market, were properly dismissed.

IV. CONCLUSION

Based upon all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Defendants’ Motion to Alter or Amend Judgment [Docket No. 187] is **DENIED**.

BY THE COURT:

s/Ann D. Montgomery
ANN D. MONTGOMERY
U.S. DISTRICT JUDGE

Dated: December 13, 2011.