IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

IN RE: IOWA READY-MIX CONCRETE ANTITRUST LITIGATION	**No. 5:10-CV-04038-MWB (CONSOLIDATED CASES)**

DEFENDANT GCC ALLIANCE CONCRETE, INC.'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED CONSOLIDATED COMPLAINT

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SUMMARY OF ARGUMENT

Plaintiffs find themselves at bat again after having struck out in their first stand at the plate. In this second at-bat, Plaintiffs have re-jiggered their allegation of a single "overarching" conspiracy into allegations of three "overlapping conspiracies." Plaintiffs, however, have not addressed fundamental problems with their claims, including their failure to allege antitrust injury and their failure to allege a claim that is plausible in light of the nature of the ready-mix concrete industry that is the basis of their suit. Defendant GCC Alliance Concrete, Inc. ("GCC"), therefore moves to dismiss plaintiffs' claims with prejudice.

BACKGROUND FACTS

1. The Product

The product at issue in this case is ready-mix concrete. Second Amended Consolidated Class Action Complaint ("Second Amended Complaint" or "SAC") ¶ 27. Ready-mix concrete is a construction material that is a blend of cement, aggregates (generally sand and gravel), water, and other materials. *Id.* Ready-mix concrete is used for commercial, governmental, and residential construction projects, like sidewalks, driveways, bridges, tunnels, and highways. *Id.*

2. The Parties

The named plaintiffs each allegedly purchased ready-mixed concrete directly from certain identified plants of one or more defendants during the alleged class period, January 1, 2006 through November 2010. *Id.* ¶¶ 2, 11-16. Each of the corporate defendants allegedly produced and sold ready-mix concrete from the identified plants to members of one or more of the three alleged classes. *Id.* ¶¶ 17-21.

Defendant GCC Alliance, however, did not even exist during the first two years of the proposed class period. GCC Alliance was incorporated as Corn Corner Acquisition, Inc. on January 8, 2008. *See* Exhibit A to Defendant GCC Alliance Concrete, Inc.'s Motion to Dismiss

Plaintiffs' Consolidated Complaint (Dkt. No. 149-2), Iowa Secretary of State Records for GCC Alliance.[1] Its name was changed to GCC Alliance on January 14, 2008. *Id.*

3. The Purported Conspiracies

Plaintiffs allege that the five corporate and three individual defendants entered into and engaged in three "overlapping antitrust conspiracies" in the "Northwest Iowa Region" (which apparently includes pieces of Nebraska, South Dakota, and Southwest Minnesota, as well as some but not all of Iowa), between at least January 1, 2006 through November 2010. This new configuration of their claims follows this Court's dismissal of the plaintiffs' First Amended Complaint in its Memorandum Opinion and Order of March 8, 2011 ("Order").

In its Order, the Court expressed skepticism at plaintiffs' attempt to plead a grand, overarching conspiracy to fix prices for ready-mix concrete in the ill-defined "Iowa region," identifying three specific defects: (1) plaintiffs' reliance on a hub-and-spoke conspiracy theory was "a remarkably poor fit" in the absence of vertical relationships between VandeBrake as the hub and other ready-mix concrete distributors as the spokes, (2) plaintiffs failed to plead facts sufficient to support the plausible existence of an overall plan to fix prices, and (3) allegations of any overarching conspiracy throughout the "Iowa region" were not plausible in light of the constrained geographical nature of ready-mix concrete delivery. Order at 24-26.

Rather than addressing them head-on, plaintiffs attempt to end-run the defects identified by the Court by now alleging not one, but three separate yet allegedly "overlapping" conspiracies. The Second Amended Complaint, however, alleges no additional facts to support

[1] "It is well-established . . . that a district court may take judicial notice of public records, such as documents filed with the Secretary of State and judicial rulings, and consider them on a motion to dismiss." *Shirley Med. Clinic, P.C. v. United States*, 446 F. Supp. 2d 1028, 1035 (S.D. Iowa 2006) (citing *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 802-03 (8th Cir. 2002)), *aff'd*, 243 Fed. App'x 191 (8th Cir. 2007).

plaintiffs' new theory that an "overlapping" conspiracy plausibly can be found even when an "overarching" one cannot. After ample discovery, the only additional facts plaintiffs allege all relate to the existence and the workings of the three separate agreements to which VandeBrake has already confessed. The existence of the three discrete agreements is not contested by any defendant, yet that is the only issue for which plaintiffs provide any additional factual allegations in their Second Amended Complaint.

ARGUMENT AND AUTHORITIES

1. Plaintiffs Must Plead a Factual Basis for Their Claims, Not Labels and Conclusions, To Survive a Motion to Dismiss

Plaintiffs are required to allege a factual basis for their claims to survive a motion to dismiss. As this Court has explained, "[i]n its decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), the Supreme Court revisited the standards for determining whether factual allegations are sufficient to survive a Rule 12(b)(6) motion to dismiss." *Armstrong v. Am. Pallet Leasing Inc.*, 678 F. Supp. 2d 827, 851 (N.D. Iowa 2009) (Bennett, J.). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citation omitted).

A complaint also must state a claim that is plausible on its face, *i.e.*, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not show[n]--that the pleader is entitled to relief." *Id.* at 1950.

2. The Revised Allegations of Plaintiffs' Second Amended Complaint Fail to Provide Any Additional Basis on Which to Find a Plausible Claim

A. While Eschewing Use of the Word, Plaintiffs Continue to Allege an "Overarching" Conspiracy Without a Factual Basis to Support It

Plaintiffs try to address the Court's criticism that they failed to allege a "larger picture" from which inferences of a wider conspiracy could plausibly be drawn by simply splitting their alleged class into three parts, each alleging a purportedly separate bilateral conspiracy--one between GCC Alliance and Tri-State, a second between VandeBrake and Great Lakes, and a third between VandeBrake and Siouxland. But from the beginning of the proposed SAC, plaintiffs continue to make joint allegations against all defendants. For example, Paragraph 5 alleges:

> In truth, the three overlapping conspiracies among Defendants were highly effective. The conspiracies occurred in highly concentrated markets, concerned a highly standardized and interchangeable product, and occurred against a background of supply and demand factors that were common to all customers. As a result, the conspiracies caused or allowed identical prices and/or parallel price movements among the conspirators, not only on price sheet or "list" prices, but also in transactional pricing. As a result, the Defendants were able to suppress and eliminate competition and artificially sustain or raise the price of Ready-Mix Concrete paid by their customers. The Defendants' customers therefore paid substantially more for Ready-Mix Concrete than they would have in the absence of the conspiracies and have suffered antitrust injury to their business or property.

SAC at ¶ 5; *see also id.* ¶ 50 ("The Defendant Companies possessed market power in the Northwest Iowa region").

These allegations set the stage for the remainder of the Second Amended Complaint. In fact, virtually all of plaintiffs' allegations related to market power, market concentration, product market, and geographic market refer to defendants collectively. *See, e.g.,* ¶¶ 65-69 (alleging substantial "cross-ownership among nearly all Defendant companies"); ¶ 70 (alleging that Defendant companies regularly purchased raw materials from each other); ¶ 71 (alleging that the relevant geographic market "is well-defined by the delivery ranges of the Defendants' plants");

¶ 77 (alleging that "almost every Defendant plant was able to deliver Ready-Mix Concrete to locations that could also be served by at least one plant operated by another Defendant company," and that "Defendant companies would be expected--in the absence of a conspiracy regarding prices or territory--to compete with at least one other Defendant company on the basis of price"); ¶ 80 (alleging that defendants had "the ability to effectively sustain or raise the price of Ready-Mix Concrete in their service areas through collusion on prices, bids, and territory"). In splitting their alleged class into three purportedly overlapping parts, plaintiffs clearly want the best of both worlds--the ability to tar the defendants as a group with allegations of an overarching, now "overlapping," conspiracy--without having to actually allege facts sufficient to make out a plausible claim based on a purportedly over-something conspiracy.

Moreover, in their effort to make their "overlapping" conspiracy allegations appear plausible, plaintiffs allege that defendants ***as a group*** "manufactur[ed] the vast majority [of] the Ready-Mix Concrete in the region," "possessed market power in the Northwest Iowa region," and "dominated" the "manufacture and sale of Ready-Mix Concrete in Northwest Iowa." SAC ¶¶ 50, 51. Plaintiffs, however, carefully avoid alleging any facts supporting these conclusions, such as the relative market share of any of the defendants or other market participants. Without pleading any actual facts, plaintiffs' conclusory allegations of "market power" cannot render their inference of a broader conspiracy plausible. *See, e.g., Process Controls Intern., Inc. v. Emerson Process Mgmt.*, No. 4:10-cv-645, 753 F. Supp. 2d 912, 927-28 (E.D. Mo. 2010) ("conclusory" assertion that defendant "has a dominant share" in the relevant market cannot withstand motion to dismiss); *Korea Kumho Petrochemical v. Flexsys America LP*, No. C07-01057, 2008 WL 686834, *8-9 (N.D. Cal. 2008) ("formulaic" allegation that a defendant had "dominance" in the relevant market was insufficient to withstand motion to dismiss);

CCBN.Com, Inc. v. Thomson Fin., Inc., 270 F. Supp. 2d 146, 155-56 (D. Mass. 2003) (conclusory allegations that a firm "is the dominant provider" in a market inadequate to plead market power). Plaintiffs' conclusory allegations do not add the requisite plausibility to their claims.

B. Plaintiffs' "Overlapping" Conspiracies Are Not Plausible Given the Undisputed Realities of the Ready-Mix Concrete Business

Plaintiffs' failure to meaningfully address the Court's criticism that a region-wide conspiracy is implausible because of the nature of ready-mix concrete delivery requirements further demonstrates that the alleged three-class approach is nothing more than window dressing. As the Court pointed out in its Order, "[t]o survive a motion to dismiss, a complaint must contain factual allegations sufficient 'to raise a right to relief above the speculative level.'" Order at 7 (quoting *Pankhurst v. Tabor*, 569 F.3d 861, 865 (8th Cir. 2009)). Despite conceding that they have obtained extensive discovery since filing their previous complaint, plaintiffs carefully avoid pleading important facts in their Second Amended Complaint that would be necessary to make out more than a speculative claim. In particular, plaintiffs have failed to plead facts necessary to respond to the Court's criticism that "allegations of an overall conspiracy appear to be implausible in light of the nature of ready-mix concrete." Order at 13.

Plaintiffs' previous complaint alleged an overall conspiracy to fix prices for ready-mix concrete in an undefined "Iowa region." However, because ready-mix concrete must be produced and delivered within a limited time, thus limiting the geographic area to which it can be delivered from the plant, the Court held that more specific facts were required to allege that defendants competed in any geographic region, much less the entire region alleged by plaintiffs. Order at 13. If competition occurs in the overlapping delivery areas around adjacent plants, one would expect plaintiffs to allege the locations of the defendants' various plants and where

delivery overlap occurs, particularly because each of the three alleged classes now makes allegations against only a subset of defendants. However, the SAC contains but a single section addressing any geographic market, and plaintiffs again allege that the now-overlapping conspiracies cover the "Northwestern Iowa region." *See, e.g.*, SAC ¶ 50.[2]

This single geographic market alleged by plaintiffs is even less plausible in the context of the three currently proposed classes than it was when plaintiffs alleged a single class. In addition to the complicating factor of the delivery requirements of ready-mix concrete, plaintiffs must now deal with the fact that each of the three proposed classes makes allegations against a different set of defendants with different plant locations. Plaintiffs address this issue only in passing, by predictably alleging in a conclusory fashion that "it is apparent that almost every Defendant plant was able to deliver Ready-Mix Concrete to locations that could also be served by at least one plant operated by another Defendant company." SAC ¶ 77. But plaintiffs make no effort to allege facts supporting a conclusion that the economic reality of distribution of the defendants' plants actually matches their proposed classes covering the "Northwestern Iowa region."

Moreover, plaintiffs' ongoing attempt to create a single geographic market makes little sense in light of their class allegations. In defining each alleged class, plaintiffs allege that class members purchased from certain defendant plants. For example, plaintiffs define the GCCA/Tri-State class to include purchasers of ready-mix concrete from GCCA's Hawarden, Orange City, Sioux Center, and Sheldon plants, and from Tri-State's Rock Valley plants. *Id.* ¶ 112. However, none of the named plaintiffs proposed as representatives of the GCCA/Tri-State class--Brown, Audino, Holtz, and Waterman--are alleged to have purchased from the Orange City or Sioux

[2] "[T]he area of northwest Iowa, northeast Nebraska, southeast South Dakota, and southwest Minnesota served by the Defendants."

Center plants. Similarly, plaintiffs define the GCCA/Great Lakes Class to include purchasers from GCCA's Hartley, Lake Park, Sanborn, Sibley, and Spencer plants, and from Great Lakes' Northwest, Spencer, and Spirit Lake plants. *Id.* ¶ 135. Again, however, Brown--the only named plaintiff proposed as a representative of the alleged GCCA/Great Lakes Class--is not alleged to have purchased from GCC's Hartley, Sanborn, or Spencer plants. Only in the case of the proposed GCCA/Siouxland class have the proposed representative plaintiffs actually purchased from all of the plants alleged.[3] Plaintiffs fail entirely to explain either (1) how or why they chose certain plants for each of the alleged conspiracies out of the numerous plants owned by defendants in the "Northwestern Iowa region," or (2) why they did not choose the plants from which the proposed representative plaintiffs actually purchased ready-mix concrete.

Additionally, plaintiffs take great pains to explain that ready-mix concrete has a limited delivery area affected by the physical nature of the concrete and economic factors including delivery costs, and plaintiffs conclude that each plaint has a "conservative" delivery range of approximately 20 miles. *See* SAC ¶¶ 71-77. Despite this explication, however, plaintiffs do not limit their proposed classes to the zones in which the delivery areas of the selected plants overlap. Instead, plaintiffs propose classes that include ***every*** direct purchaser from the selected plants, regardless of whether the purchaser or the project was located in an area where delivery zones overlapped. *See* SAC ¶¶ 172, 184, 196. Indeed, plaintiffs fail to even allege that they themselves were located in an area where delivery zones overlapped. In the absence of factual allegations supporting the named plaintiffs' presence in an area actually affected by the alleged conspiracies, plaintiffs' claims are not plausible.

[3] GCC Alliance's Le Mars North, Le Mars South, Remsen, Akron, Moville, and Sergeant Bluff plants and Siouxland's 11th Street, South Sioux City, and Sioux City plants. *Id.* ¶ 153.

Plaintiffs' continuing effort to define the product market, geographic market, market power, and market concentration in terms of the entire group of defendants demonstrates that still underlying the Second Amended Complaint is the fundamental theory that defendants engaged in an overarching conspiracy--now labeled "overlapping conspiracies"--to fix ready-mix concrete prices in the entire Northwestern Iowa region. Although plaintiffs now dress their claims in three separate classes, plaintiffs' attempted end-run around the Court's finding is belied by their continuing attempt to make collective allegations against all defendants, and their failure to address the economic and geographic consequences of splitting their alleged "overarching" conspiracy into three "overlapping" conspiracies with three classes making allegations against three different combinations of different defendants with plants in many different locations.

C. Plaintiffs' Attempt to Expand the Scope of the GCC/Siouxland and GCC/Great Lakes Conspiracies Fails to Support a Plausible Claim

Plaintiffs' broad global allegations against defendants are insufficient to mask the fact that plaintiffs have not sufficiently asserted a plausible claim based on their allegations of Great Lakes and Siouxland conspiracies. Plaintiffs' claims regarding the Great Lakes and Siouxland conspiracies fundamentally rest on the plea agreements of VandeBrake and Stewart and on the answer filed by Siouxland. Tellingly, however, in their Second Amended Complaint, plaintiffs separate their allegations relating to the actual scope of the plea agreements from their conspiracy allegations. This is because the plea agreement themselves are far narrower than the plaintiffs' conspiracy allegations.

Plaintiffs initially allege that that Kent Stewart admitted that he conspired, on behalf of Great Lakes, with VandeBrake by: "(i) engaging in discussions concerning project bids for sales of Ready-Mix Concrete; (ii) agreeing during those discussion to submit rigged bids at collusive and noncompetitive prices to customers; (iii) submitting bids and selling Ready-Mix Concrete at

collusive and non-competitive prices; and (iv) accepting payment for sales of Ready-Mix Concrete at collusive and noncompetitive prices." SAC ¶ 88. Plaintiffs also quote from Stewart's plea agreement, in which Stewart agreed that he "engaged in discussions with representatives of another ready-mix concrete company" during which "agreements were reached regarding the submission of non-competitive and rigged bids for ready-mix concrete." *Id.* ¶ 89. Similarly, plaintiffs quote Siouxland's answer in this case, in which Siouxland admits that "it had conversations with Alliance Concrete Company about which company would have priority in discussions with certain customers," and that "certain customers paid higher prices on identifiable jobs for a limited period of time. SAC ¶ 96 (quoting Siouxland's Answer, Dkt. No. 152 at ¶¶ 1-3). The plea agreements and Siouxland's answer are narrow, and suggest at most an agreement to rig bids on certain projects.

In contrast, plaintiffs, in a separate portion of the Second Amended Complaint, attempt to bootstrap their bid-rigging allegations grounded in the plea agreements and Siouxland's answer into much broader price-fixing allegations. *See* SAC ¶¶ 113-123 (alleging conspiracy between VandeBrake and Great Lakes); *id.* ¶¶ 136-153 (alleging conspiracy between VandeBrake and Siouxland). Each of these sets of allegations, however, contain only limited and once-again conclusory allegations regarding price fixing, instead primarily relying on a mix of unrelated bid-rigging allegations and speculation based on allegedly parallel price movements to draw an inference of price-fixing. That conclusion, however, is not plausible based on the allegations made by plaintiffs.

In particular, plaintiffs assert without any factual support, that both the GCC/Great Lakes and GCC/Siouxland Conspiracies were broad price-fixing conspiracies "enforced" and "enhanced" by a bid-rigging conspiracy. *See, e.g.,* ¶¶ 132-34 (GCC/Great Lakes bid rigging);

¶¶ 148-52 (GCC/Siouxland bid rigging). Plaintiffs do not, however, allege any facts to suggest that bid rigging was actually used as a tool by the defendants to enforce, enhance, or otherwise effect a price-fixing scheme--indeed, that inference is implausible because of the characteristics of the market in which plaintiffs allege these conspiracies occurred. As the Second Amended Complaint alleges, VandeBrake and Stewart agreed to rig bids on between 12 and 15 projects, SAC ¶ 132, while VandeBrake and Siouxland representatives agreed to rig bids on between 15 and 18 projects, SAC ¶ 148. By contrast, plaintiffs allege that the GCC/Great Lakes class contains more than 2,900 unique direct purchasers, ¶ 186, and the GCC/Siouxland class contains more than 900 unique direct purchasers. Plaintiffs fail to allege any facts to explain how the defendants' alleged rigging of bids for a small number of discrete projects supports a plausible allegation of price fixing on behalf of a class of hundreds or thousands of purchasers who had no alleged connection to any project on which bid rigging occurred. Indeed, plaintiffs fail to allege any facts that explain any connection at all that might exist between the alleged bid rigging and the alleged price fixing, much less that one was used "enforce" or "enhance" the other.

D. Plaintiffs' Allegations Provide No Basis for Any Plausible Claims Against GCC Alliance Before its Acquisition of Alliance Concrete

Notwithstanding plaintiffs' early allegation that GCC Alliance "produced and sold Ready-Mix Concrete … [d]uring the respective Class Periods…," SAC ¶ 17, plaintiffs acknowledge that in fact, GCC Alliance acquired Alliance Concrete's assets in January 2008, SAC ¶ 55. More specifically, Alliance Concrete's assets were purchased by an acquisition vehicle, which in turn became GCC Alliance, Inc. *See id.* SAC ¶¶ 55, 155.

Importantly, to hold GCC Alliance jointly and severally liable for the acts of the conspiracy prior to its acquisition of the assets of Alliance Concrete, plaintiffs must allege that GCC Alliance had knowledge of the conspiracy and an intent to pursue the same objections and

"joined" it. *See Havoco of Am. Ltd. v. Shell Oil Co.*, 626 F.2d 549, 554 (7th Cir. 1980) ("It is well recognized that a co-conspirator who joins a conspiracy ***with knowledge of what has gone on before and with an intent to pursue the same objectives*** may, in the antitrust context, be charged with the preceding acts of its co-conspirators.") (emphasis added). Indeed, this Court has recently recognized this general rule, noting that "'[b]efore a person who joins an existing conspiracy will be held liable for what was previously done pursuant to the conspiracy, … it must be shown that he or she joined the conspiracy with knowledge of the unlawfulness of its object or of the means contemplated.'" *McFarland v. McFarland*, 684 F. Supp. 2d 1073, 1085 (N.D. Iowa 2010) (quoting *In re Welding Fume Products Liab. Litig.*, 526 F. Supp. 2d 775, 802 (N.D. Ohio 2007); 16 Am. Jur. 2d Conspiracy § 57 (2007)) (alterations in original).

In *MacMillan Bloedel Ltd. v. Flintkote Company*, 760 F.2d 580 (5th Cir. 1985), the Fifth Circuit addressed a claim for indemnity brought by MacMillan against Flintkote after MacMillan settled antitrust conspiracy claims related to price fixing in the corrugated cardboard market. MacMillan had purchased two plants from Flintkote during the middle of the alleged conspiracy, and sought indemnity for a portion of the settlement attributable to conduct that occurred during Flintkote's operation of the plants before to the acquisition. The Fifth Circuit observed that MacMillan could have been liable in the underlying case for Flintkote's conduct before the acquisition "only if it had been a co-conspirator with Flintkote in the alleged price-fixing conspiracy." *Id.* at 585. Further, "[t]hat joint liability could be established ***only*** by proving that MacMillan Bloedel itself had engaged in antitrust violations ***before*** buying the Hankins assets." *Id.* (emphasis added). In that case, unlike GCC Alliance in this case, the court found that MacMillan operated other facilities in the same market during the pre-acquisition period and would be liable as a co-conspirator even in the absence of the acquisition.

Here, however, plaintiffs make no factual allegation that GCC Alliance had knowledge of the alleged conspiracies before it acquired the assets of Alliance Concrete. In fact, they allege just the opposite. Plaintiffs allege that "***[f]ollowing the sale of the assets*** of Alliance to Defendant GCC, Defendant GCC possessed the same knowledge of the three conspiracies described above that was previously possessed by Alliance--including the knowledge and participation of defendant VandeBrake and co-conspirators Lee Knoz, Ryan Lake and David Bierman." SAC ¶ 160 (emphasis added). Plaintiffs' allegation that GCC Alliance ***subsequently*** acquired knowledge of the conspiracy through its employment of VandeBrake as a sales manager is plainly insufficient to plausibly allege that GCC Alliance *entered* the conspiracies with knowledge. Moreover, plaintiffs allegation that GCC Alliance as an entity ever acquired knowledge of the alleged conspiracies is a legal conclusion--plaintiffs allege no facts to support a plausible claim that VandeBrake informed GCC Alliance management of the existence of his alleged agreements.

Further plaintiffs make no factual allegation that GCC Alliance engaged in any conspiratorial conduct prior to its acquisition of the Alliance Concrete assets. To the contrary, plaintiffs expressly rest their claims against GCC, including their claims for pre-natal and pre-acquisition liability, solely on post-acquisition conduct.

3. Plaintiffs Fail to Plead Standing and Antitrust Injury

To have standing to sue, there must be at least one named plaintiff that purchased from each of the defendants they have sued. *See, e.g., Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) (finding lack of standing on a suit for injunctive relief; "a named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs"); *In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d 518, 522 (5th Cir. 1995) ("To have standing to sue as a class representative it is essential

that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents.") (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)); *Karim v. AWB Ltd.*, No. 06-cv-15400, 2008 U.S. Dist. LEXIS 76896, at *20 (S.D.N.Y. Sep. 30, 2008) ("That a suit may be a class action adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."); *German v. Fed. Home Loan Mortgage Corp.*, 885 F. Supp. 537, 547 (S.D.N.Y. 1995) ("a plaintiff may not use the procedural device of a class action to bootstrap himself into standing he lacks under the express terms of the substantive law") (citation omitted).

Beyond standing, demonstrating a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, is just the first step for private plaintiffs seeking damages, who must also satisfy the additional requirements of Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a). "Section 1 of the Sherman Antitrust Act prohibits '[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.'" *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1058 (8th Cir. 2000) (citing 15 U.S.C. § 1). "To prove a Section 1 violation, a plaintiff must show an agreement in the form of a contract, combination, or conspiracy that imposes an unreasonable restraint on trade." *Id.* (citation omitted).

And while a criminal conviction may rest solely on a Section 1 violation--an agreement in restraint of trade--Section 4(a) of the Clayton Act requires the additional showing in a private civil suit of standing, causation/impact, and antitrust injury. *Id.* at 1054 (a private plaintiff additionally "must prove for each claim an antitrust violation, the fact of damage or injury, a causal relationship between the violation and the injury, and the amount of damages") (citations

omitted) (internal quotation marks omitted). "Antitrust injury, causation, and damages all are necessary parts of the proof because 'Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.'" *Id.* at 1055 (citation omitted). Private standing, causation/impact, and antitrust injury-in-fact are not presumed even in cases of established underlying violations of Sections 1 and 2 of the Sherman Act (including *per se* violations).[4]

Plaintiffs have failed to allege facts sufficient to demonstrate that they have suffered an antitrust injury from either the alleged bid rigging or alleged price fixing, an essential element of standing necessary to assert an antitrust claim either individually or on behalf of a class. Plaintiffs allege only generally in the Second Amended Complaint that the alleged conspiracy resulted in price increases on the GCC Alliance and Tri-State price sheets or price increases to the conspirators' "base prices." SAC ¶¶ 101-102, 104. Plaintiffs' allegations with regard to price-sheet agreements in the alleged GCC Alliance/Great Lakes and GCC Alliance/Siouxland conspiracies are similar. *See* SAC ¶¶ 122-23 (GCC Alliance/Great Lakes); 142-43 (GCC Alliance/Siouxland). Plaintiffs' price sheet allegations not only fail to allege any facts to support a conclusion that any illegal agreements actually resulted in prices increases to the named plaintiffs, in the case of the alleged GCC/Siouxland conspiracy, plaintiffs appear to accept Mr. VandeBrake's view that "[t]here was a conspiracy but it didn't work!" *Id.* ¶¶ 140-43. Plaintiffs do not allege any facts supporting a plausible inference that actual prices charged to

[4] *See, e.g., Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341-42 (1990) ("We also reject respondent's suggestion that no antitrust injury need be shown where a *per se* violation is involved. The *per se* rule is a method of determining whether § 1 of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under § 4 of the Clayton Act."); *Kochert v. Greater Lafayette Health Servs., Inc.*, 463 F.3d 710, 718 (7th Cir. 2006) (to establish civil liability, an antitrust plaintiff must prove standing, a causal connection between the alleged violation and harm to the plaintiff, the directness of the causal link, and antitrust injury-in-fact).

any of the proposed class representatives reflected the price sheet or base price increases. Plaintiffs, therefore, have not alleged that any proposed class representative was within the scope of the price-fixing conspiracy they allege. As a result, plaintiffs' price sheet allegations fail to make out the crucial and necessary link between the alleged agreements and any actual antitrust injury suffered by the plaintiffs. In the absence of a plausible allegation of antitrust injury, plaintiffs' claims must be dismissed for lack of standing. *See Midwest Communications, Inc. v. Minnesota Twins, Inc.*, 779 F.2d 444, 450 (8th Cir. 1985) (In determining "whether a plaintiff has standing to sue under the antitrust laws, the threshold inquiry must focus on the plaintiff's alleged injury. This inquiry is potentially dispositive: if there is no showing of injury ... the plaintiff does not have a claim cognizable under the antitrust laws."); *see also Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1997) (stating that "the nature of the plaintiff's alleged injury is of 'tremendous significance' in determining whether a plaintiff has antitrust standing").

In their Reply in Support of the Motion for Leave to Amend (Dkt. No. 231), plaintiffs responded to this argument by pointing to three substantially similar paragraphs of the SAC, each of which are contained in the sections setting out each count asserted based on the respective conspiracy allegations. *See* Reply (citing ¶¶ 214 (GCC Alliance/Tri-State conspiracy); 224 (GCC Alliance/Great Lakes conspiracy); 234 (GCC Alliance/Siouxland conspiracy)). These paragraphs, however, are not by any stretch of the imagination ***factual*** allegations. Instead, each merely asserts the legal conclusion that "[a]s a result of the combination and conspiracy" the named defendants and class members paid "artificially sustained or increased" prices. *See id.* As a result, these barebones paragraphs are insufficient to allege that any plaintiff has suffered an antitrust injury.

Plaintiffs' bid-rigging allegations suffer from similar deficiencies. Although plaintiffs allege--without any detail or specificity--that GCC Alliance conspired with both Great Lakes and Siouxland to rig bids on certain specific projects, *see* ¶¶ 134 (projects allegedly rigged as part of GCC Alliance/Great Lakes conspiracy); 151 (projects allegedly rigged as part of GCC Alliance/Siouxland conspiracy), plaintiffs do not allege that any proposed class representative bid on any of the projects alleged to have been rigged. As with their allegations of price fixing, plaintiffs fail to allege any link between the alleged agreements to rig bids for a limited number of discrete projects (none of which is alleged to have involved a named plaintiff) and any antitrust injury actually suffered by any named plaintiff.

Finally, the same geographic issues that raise plausibility issues for plaintiffs also raise standing issues. As described above, plaintiffs describe the market in "the Northwestern Iowa region" as being composed of overlapping but limited delivery areas for plants scattered through the region. Plaintiffs have selected some, but not all, of the plants for purposes of alleging a conspiracy, but they have failed to either limit their class definitions to those areas in which delivery zones of the affected plants overlapped, or to allege that any of the named plaintiffs are located in the overlapping zones. In the absence of factual allegations that the plaintiffs are located in one of the zones of allegedly affected competition, plaintiffs cannot demonstrate that they have suffered an antitrust injury as a matter of law.

CONCLUSION

Plaintiffs, in their second at-bat, have struck out again. For all these reasons, defendant GCC Alliance Concrete, Inc. respectfully requests that the Court dismiss plaintiffs' Second Amended Complaint. GCC Alliance requests all other relief to which it may be justly entitled.

Respectfully submitted,

/s/ Anne M. Rodgers

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 16, 2011, I had the attached document electronically transmitted to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to all registered counsel of record.

/s/ Anne M. Rodgers
Anne M. Rodgers