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 GREAT LAKES CONCRETE, INC.'S AND DEFENDANT KENT STEWART'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED CONSOLIDATED COMPLAINT

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SUMMARY OF ARGUMENT

Although Plaintiffs have reconfigured their allegation of one overarching conspiracy into allegations three separate conspiracies, Count II of the Second Amended Consolidated Class Action Complaint ("Second Amended Complaint" or "SACC") still lacks the factual allegations to establish that a conspiracy between Defendants GCC, VS Holding, VandeBrake, Great Lakes and Stewart existed in 2006 and 2007. Because Count II of the Second Amended Consolidated Complaint does not set forth sufficient facts to make the existence of a conspiracy plausible in 2006 and 2007, none of the named Plaintiffs has standing to sue Defendants Great Lakes or Stewart. Defendants Great Lakes and Stewart therefore move to dismiss Count II of Plaintiffs' Second Amended Consolidated Complaint with prejudice.

ARGUMENT AND AUTHORITIES

1. Plaintiffs' Allegations Regarding the Length and Scope of the Count II Conspiracy Are Non-Factual and Conclusory

In Count II of their Second Amended Complaint, Plaintiffs allege that Defendants GCC, VS Holding, VandeBrake, Great Lakes and Stewart "engaged in a continuing combination and conspiracy in unreasonable restraint of trade and commerce in Ready-Mix Concrete" from "at least 2006 through at least 2009" (the "Count II Conspiracy"). SACC ¶ 219; 113. However, Plaintiffs do not set forth sufficient factual allegations to support their contention that the Count II Conspiracy existed in 2006 or 2007[1].

Plaintiffs set forth *ad nauseum* allegations regarding the Count II Conspiracy that were taken directly from the criminal investigation against Defendants Great Lakes and Stewart, but these allegations, of course, are confined to the 2008-2009 time period. Beyond these limited

[1] As this Court knows, allegations in the criminal proceedings and facts relied upon at the sentencing hearing support, at most, a bilateral agreement between GCC and Great Lakes beginning in late-2008 and ending in 2009. *See* Memorandum Opinion and Order Regarding Sentencing, CR10-4025-MWB, February 8, 2011.

allegations, all of Plaintiffs assertions regarding conspiratorial activity in 2006 and 2007 are conclusory and non-factual, and thus "not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545, 127 S. Ct. 1955, 1959 (2007) (“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") (citation omitted).

Plaintiffs rely on twelve assertions to support their allegations that the Count II Conspiracy existed in 2006 and 2007. Each of these assertions is conclusory and based on assumption or a non-factual basis. First, Plaintiffs rely on the false analogy of "if there, then here" to support the alleged existence of the Count II Conspiracy in 2006 and 2007. In several allegations, Plaintiffs attempt to use discussions and alleged agreements between Defendants VandeBrake and Van Zee to support their contention that the same behavior must have occurred between Defendants VandeBrake and Stewart:

(1) "Defendant VandeBrake's existing agreement with Defendant Van Zee to fix prices at this time indicates that Defendant VandeBrake would have an interest, incentive and willingness to discuss 'keeping prices up' with Defendant Stewart. It is highly likely that VandeBrake would seek agreements on price or price increases from Defendant Stewart during the period of 2006 through 2009 because doing so would allow GCC to successfully maintain the price increases to which VandeBrake had agreed with Defendant Van Zee for this time period with customers seeking delivery in areas where GCC competed with Great Lakes." SACC ¶ 115.

(2) "Evidence supports the conclusion that Defendants VandeBrake and Stewart also agreed to territorial allocations for the delivery of Ready-Mix Concrete sold from their companies' respective plants for the period of 2006 through 2009. … It is also consistent with

evidence supporting the conclusion that Defendants Tri-State and GCC had a long-standing agreement to allocate territory. It is also highly likely that VandeBrake would seek agreements on territorial allocation from Defendant Stewart during the period of 2006 through 2009 because doing so would allow GCC to successfully maintain the price increases to which he had agreed with Defendant Van Zee for this time period with customers seeking delivery in areas where GCC would otherwise compete with Great Lakes." SACC ¶ 126.

(3) "Defendant Stewart first engaged in attempted territorial allocation several years earlier. According to Ryan Lake, when he first opened Lakes Ready-Mix he was visited by the owners of Defendant Great Lakes … The owners of Great Lakes first offered to purchase Lakes Ready-Mix at cost. When Ryan Lake refused to sell, the owners of Great Lakes then suggested that he should 'stay in Lake Park.' Defendant Stewart had therefore already displayed a willingness to attempt to avoid the effects of competition by discussing with competitors the idea of staying within their own geographic areas." SACC ¶ 127.

Not one of these allegations involves Defendants Stewart and Great Lakes or the Count II Conspiracy at all. Alleged behavior between one Defendant and another party completely unrelated to the Count II Conspiracy does not establish a sufficient factual basis for the Count II Conspiracy to survive a motion to dismiss. Simply because Defendants Tri-State and GCC had an alleged agreement to allocate territory or maintain price increases does not give rise to an inference of conspiracy between Defendants GCC and Great Lakes. *See e.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596-97 (1986) (holding that a "conspiracy to increase profits in one market does not tend to show a conspiracy [ ] in another" because where "conduct is consistent with other, equally plausible explanations, the conduct does not give rise

to an inference of conspiracy").[2] Plaintiffs' use of Defendant VandeBrake's behavior with Defendant Van Zee does not form a sufficient factual basis to make the Court II Conspiracy between Defendants GCC and Great Lakes plausible.

Next, Plaintiffs set forth conclusory allegations of price fixing in 2006 and 2007 to support the Count II Conspiracy. Again, without any supporting facts, these allegations are not entitled to the assumption of truth. *Iqbal*, 129 S. Ct. at 1950.

(1) "Beginning in 2006 and continuing through 2009, Defendants VandeBrake and Stewart engaged in ongoing discussions concerning the need to 'keep prices up' and the prices that their respective companies would charge for Ready-Mix Concrete, and reached specific agreements setting such prices or price increases for some or all of those years. From or before 2006 through 2009, Defendants VandeBrake and Stewart engaged in ongoing discussions concerning the territories in which their respective companies would sell Ready-Mix Concrete, and reached agreements allocating such territories between the companies." SACC ¶ 114.

(2) "From 2006 through 2009, Defendants VandeBrake and Stewart prepared, or instructed others under their supervision and control to prepare, price sheets and/or internal price lists for GCC and Great Lakes that reflected the price increases to which they had agreed." SACC ¶ 122.

(3) "Defendants Stewart and VandeBrake engaged in communications throughout the year during 2006 through 2009 to discuss whether their agreements on price increases were being successfully implemented in prices offered to and/or paid by customers. Defendants

[2] *See also In re Air Cargo Shipping Servs. Antitrust Litig.*, 2008 U.S. Dist. LEXIS 107882, at *88-89 (E.D.N.Y. 2008) (holding that evidence from defendant's DOJ leniency application did not make plaintiffs' claim plausible where it provided "no details…that would tie them to the conspiracy allegations in the instant Complaint"); *In re Cal. Title Ins. Antitrust Litig.*, 2009 WL 1458025, at *18 (holding that "it does not follow automatically that, because they may have set rates collectively in those states with rate setting organizations, the Defendants acted collectively to fix prices in California."

Stewart and VandeBrake were each also able to monitor prices being offered by the other's company for Ready-Mix Concrete from information provided to them by customers and prospective customers." SACC ¶ 124.

(4) "[C]ustomers who received annual price quotes or contracts from Defendants Great Lakes and GCC were offered prices that were derived from an agreed starting point, or reflected agreed increases, as a result of the conspiracy, regardless of the location to which such Ready-Mix Concrete was to be delivered." SACC ¶ 131.

In each of these assertions, Plaintiffs broadly allege that Defendants VandeBrake and Stewart engaged in illegal behavior in 2006 and 2007, but do not support the generic allegations with the necessary facts to pass muster under *Twombly*. Plaintiffs do not provide the "who, what, where, when, how and why" to transform their allegations from conclusions to those with a sufficient factual basis to establish a claim for relief. *See Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 436 (6th Cir. 2008) ("[g]eneric pleading, alleging misconduct against defendants without specifics as to the role each played in the alleged conspiracy was specifically rejected by *Twombly* . . . Plaintiffs only offer bare allegations without any references to the 'who, what, where, when, how, or why'").

Next, Plaintiffs rely on bare assertions of parallel conduct in 2006 and 2007 without alleging the "plus factors" necessary to establish a factual basis for a conspiracy. *See e.g. Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1032-33 (8th Cir. 2000) ([a]n agreement is properly inferred from conscious parallelism only when certain 'plus factors' exists). The plus factors may include evidence demonstrating that the defendants: (1) acted contrary to their economic interests, and (2) were motivated to enter into a price fixing conspiracy. *See Petruzzi's IGA v. Darling–Delaware*, 998 F.2d 1224, 1242 (3d Cir.1993). Even

if Plaintiffs carry the initial burden, this Court must still find, based upon all the evidence before it, that Plaintiffs' evidence tends to exclude the possibility of independent action. *See Matsushita,* 475 U.S. at 588, 106 S.Ct. 1348. Beyond showing that a few ready-mix concrete prices increased by similar increments, Plaintiffs do not set forth plus factors that would indicate that Defendants Great Lakes and GCC entered into a price fixing conspiracy in 2006 and 2007:

(1) "The pricing of Defendants GCC and Great Lakes support the existence of agreements between Defendants VandeBrake and Stewart to coordinate their prices or price increases for Ready-Mix Concrete from 2006 through 2009. The price sheets of Defendants Great Lakes and GCC, from which all prices were obtained or derived, reflect substantial 'parallel pricing' in the annual net price increases. . . . Furthermore, analysis shows that, for 3000, 3500 and 4000 mixes, between 2006 and 2007, Great Lakes and GCC each increased its sheet price by the same increment as the other." SACC ¶ 120.

(2) "Further, the transaction data provided by Defendants Great Lakes and GCC indicate that the actual prices paid by customers for most plants were parallel in that they were identical or moved together. For example, the data indicate that prices for 4000 PSI Ready-Mix Concrete sold from GCC's Hartley, Lake Park, Sanborn, Sibley, Spencer plants are correlated with prices for the same product from Great Lakes' Spencer, Spirit Lake, Ocheyedan, and Milford plants. This correlation confirms the co-movement of prices paid to Defendants GCC and Great Lakes from these plants, and indicates that these plants compete in the same geographic market. This correlation also indicates that, when Defendants GCC and Great Lakes entered into conspiratorial agreements on their prices, these agreements had a systematic and class-wide impact on prices actually paid by members of the [Count II Conspiracy]." SACC ¶ 121.

With these allegations, Plaintiffs fail to acknowledge that in 2006 and 2007, Defendant Great Lakes' prices for all types of ready-mix concrete were different than Defendant GCC's prices. Plaintiffs' allegations are based on certain types of ready-mix concrete that Defendants Great Lakes and GCC increased by the same amount in 2006 and 2007, which indicates, at most, conscious parallelism.[3] Out of the plethora of ready-mix concrete products, Plaintiffs focus on three types of concrete, which happened to go up by the same dollar increment on a price sheet in 2006 and 2007. Plaintiffs don't acknowledge that Defendant Great Lakes consistently charged more for these types of concrete in the 2006-2007 time period. Plaintiffs also do not acknowledge that on the same price sheets, Defendant GCC charged more for several types on concrete than Defendant Great Lakes and both companies increased the prices of certain types of by different increments.

Moreover, Plaintiffs do not set forth any plus factors that would allow their generic allegations of certain ready-mix concrete products increasing by similar price increments to establish a sufficient factual basis for their assertion that Count II Conspiracy existed in 2006 and 2007. Plaintiffs do not allege when Defendants Stewart and VandeBrake allegedly came to an agreement to raise certain prices of ready-mix concrete for the 2006-2007 time period. Beyond conclusory statements, Plaintiffs do not set forth factual allegations that would establish why these price increases occurred or that the alleged parallel pricing evidences a conspiracy. Plaintiffs do not set forth any factual allegations that exclude the possibility that Defendants Great Lakes and GCC acted independently with regard to pricing ready-mix concrete in the

[3] Conscious parallelism is a process, "not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a prefixed maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group v. Brown & Williamson Tobacco Corporation,* 509 U.S. 209, 227, 113 S.Ct. 2578 (1993).

2006-2007 time period. *See Matsushita*, 475 U.S. 574, 588, 106 S.Ct. 1348, 1356 (1986). Because of this, Plaintiffs allegations regarding parallel pricing must be disregarded. *Id*.

Finally, Plaintiffs' remaining allegations regarding the Count II Conspiracy existing in 2006 and 2007 are either incorrect or evidence of normal competition. In fact, with the competition that existed in 2006 and 2007, Defendant Great Lakes and GCC had to compete fiercely with each other and other companies to obtain business.

(1) "The delivery territories of several of the plants of Defendants Great Lakes and GCC substantially overlap. In addition Defendants Great Lakes and GCC share very high or complete levels of market concentration and market power for the supply of Ready-Mix Concrete delivered from several of their respective plants. Defendants Great Lakes and GCC are therefore able to collectively control the price of Ready-Mix Concrete sold from these plants because customers do not have the ability to seek a more competitive price from alternative suppliers. SACC ¶ 125.

(2) "In statements to federal investigators, Defendant Stewart admitted that in 2007, in response to observing Alliance Concrete pouring near a Great Lakes plant, he obtained a plat map showing Ocheyedan Township from the County recorder and approached his co-owner Norlyn VandeBrake. Stewart stated that he asked Norlyn VandeBrake to tell his son, Defendant VandeBrake, to keep out of Great Lakes' area. When Norlyn VandeBrake refused to do so, Defendant Stewart met with Defendant VandeBrake to complain about GCC's breach of his expectations, and to discuss each of their respective companies staying in their respective areas." SACC ¶ 128.

(3) In statements to federal investigators, Defendant Stewart admitted that he and Defendant VandeBrake had an agreement concerning the geographic area in which their

respective companies would deliver Ready-Mix Concrete, and that the two agreed to stay out of each other's back yards and stay in their respective 'historic areas.'" SACC ¶ 129.

Plaintiffs one example of any sort of alleged conspiratorial activity in 2007 actually shows the competitive approach Defendants Great Lakes and GCC brought to business. Defendant GCC (Alliance Concrete at the time) did not hesitate to pour near Defendant Great Lakes' plants. When Defendant Stewart got mad about it, Norlyn VandeBrake, who was on Great Lakes' board of directors, told Defendant Stewart to compete harder if he did not want Defendant GCC to get business.

Additionally, Defendant Great Lakes competed with Lake Ready Mix and American Concrete in 2006 and 2007, not just Defendant GCC. Therefore, Defendants Great Lakes and GCC were not able to control what customers paid for ready-mix concrete because customers would have been able to seek out more competitive prices, should Defendants Great Lakes' and GCC's prices have been too high.

Plaintiffs are required to allege a factual basis for their claims to survive a motion to dismiss. *Twombly*, 550 U.S. at 555 ("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.") (citation omitted). Here, every allegation Plaintiffs set forth that to establish that the Count II Conspiracy existed in 2006 and 2007 is conclusory and does not give this Court sufficient factual content for it to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "[W]here 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. Plaintiffs' allegations regarding the alleged Count II Conspiracy existing in 2006 and 2007 are insufficient to survive a motion to dismiss.

2. No Named Plaintiff Has Established Standing to Bring a Class Action Claim Against Defendant Great Lakes or Defendant Stewart

Because Plaintiffs have not set forth a sufficient factual basis to make a cognizable claim that the GCC Alliance/Great Lakes Conspiracy existed in 2006 and 2007, and because plaintiffs have not alleged that any named plaintiff purchased ready mix concrete from a relevant Great Lakes plant in 2008 or 2009, no named Plaintiff has standing to bring this claim against Defendants Great Lakes or Stewart. 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"); *Karim v. AWB Ltd.*, No. 06-cv-15400, 2008 WL 4450265, at *5 (S.D.N.Y. Sep. 30, 2008) (dismissing for lack of standing; "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) (finding plaintiffs had no standing to pursue injunctive relief; "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).

Plaintiffs allege that direct purchasers of ready-mix concrete from "the Great Lakes Northwest [Ocheyedan and Milford], Spencer, and Spirit Lake plants, were substantially impacted by the [Count II C]onspiracy." SACC ¶ 135. Brown Commercial Construction, Inc. is

the only named Plaintiff proposed as a representative of the class allegedly affected by the Count II Conspiracy. To establish Brown's standing to sue on behalf of itself and this proposed class, it must have purchased ready-mix concrete directly from the Great Lakes Northwest, Spencer and Spirit Lake plants during the time the Count II Conspiracy existed. But plaintiffs' proposed SACC only alleges that Brown purchased ready-mix concrete from two of these plants in 2006 and 2007.[4] Plaintiffs' allegation that Brown purchased ready-mix concrete from Estherville in 2008 may be disregarded, because plaintiffs do not allege Estherville to be a Great Lakes plant involved in the alleged GCC Alliance/Great Lakes Conspiracy. SACC ¶¶ 135 & 184. Additionally, plaintiffs do not allege that Brown purchased ready-mix concrete from any Great Lakes plant in 2009.

Plaintiffs' allegations regarding a price fixing or bid rigging conspiracy in 2006 or 2007 lack a sufficient factual basis to survive Defendants Great Lakes' and Stewart's Motion to Dismiss. Additionally, there is not a single Plaintiff in this action that ever purchased ready-mix concrete directly from a relevant Great Lakes' plant in 2008 or 2009. The bottom line is that Plaintiffs attempted to generalize their allegations and stretch out the length of the alleged Count II Conspiracy in order to establish their standing to bring a cause of action against Defendants Great Lakes and Stewart. Because Plaintiffs have not alleged a sufficient factual basis to bring a cause of action against Defendants Great Lakes and Stewart in 2006 and 2007 and because Plaintiffs do not have standing to bring a cause of action against Great Lakes and Stewart in 2008 or 2009, this Court should grant Defendants Great Lakes' and Stewart's motion and dismiss Plaintiffs' Second Amended Consolidated Complaint with prejudice.

[4] Brown "purchased Ready-Mix Concrete from . . . Northwest Ready Mix [Ocheyedan and Milford] [in 2006 and 2007, and] Spirit Lake [in 2006]." SACC ¶ 16.

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,

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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/ Mark C. Laughlin
Mark C. Laughlin