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' CONSOLIDATED COMPLAINT

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SUMMARY OF ARGUMENT

Plaintiffs allege a conspiracy among all defendants to fix the price of ready-mix concrete in the Iowa region over a four-plus year period. Plaintiffs provide only two factual allegations in support of the vast conspiracy they have alleged: a guilty plea by Steven VandeBrake (a former employee of GCC Alliance Concrete, Inc. ("GCC Alliance") and former president of VS Holding Co.) and a guilty plea by Kent Robert Stewart (an executive of Great Lakes Concrete, Inc.). The guilty pleas, however, admit only to three separate and discrete agreements, each of which is between only two companies. The pleas provide no support for the conspiracy plaintiffs have concocted. Moreover, plaintiffs are so parsimonious in providing any facts that they do not even allege a factual basis to establish that the named plaintiffs have standing to sue each of the defendants. Plaintiffs' claims must be dismissed.

BACKGROUND FACTS

1. The Product

The product at issue in this case is ready-mix concrete. Consolidated Complaint ("CC") ¶ 25. Ready-mix concrete is a construction material that is a blend of cement, aggregates (generally sand and gravel), water, and other materials. *Id.* ¶¶ 21, 24. Ready-mix concrete is used for commercial, governmental, and residential construction projects, like sidewalks, driveways, bridges, tunnels, and highways. *Id.* ¶ 24.

2. The Parties

Plaintiffs each allegedly "purchased Ready-Mixed Concrete directly from one or more Defendants during the class period." *Id.* ¶¶ 8-12. Each of the corporate defendants allegedly "produced and sold Ready-Mix Concrete to members of the Class." *Id.* ¶¶ 13-16.

Defendant GCC Alliance, however, did not even exist during the first two years of the alleged class period. GCC Alliance was incorporated as Corn Corner Acquisition, Inc. on

January 8, 2008. *See* Exhibit A to this Brief, Iowa Secretary of State Records for GCC Alliance.[1] Its name was changed to GCC Alliance on January 14, 2008. *Id.*

Defendant VandeBrake, a former employee of GCC Alliance, was also the president of defendant VS Holding Co. f/k/a Alliance Concrete, Inc. *See* Exhibit B to this Brief, Iowa Secretary of State Records for VS Holding Co.

3. The Purported Conspiracy

Plaintiffs allege that the two individual and four separate corporate defendants "entered into and engaged in a combination and conspiracy to suppress and eliminate competition by fixing the price of Ready-Mix Concrete" in "the Iowa region" during the period "from at least January 1, 2006 through at least April 26, 2010." *See* CC ¶¶ 1, 25. Plaintiffs make no attempt in their consolidated complaint to define what they mean by the Iowa region.

Despite having ample time before they filed their consolidated complaint, it is apparent that plaintiffs did not make use of that time to undertake even the most superficial investigation into the alleged conspiracy. For example, plaintiffs allege that "[f]or the purpose of forming and effectuating their combination and conspiracy, Defendants and their co-conspirators did those things which they combined and conspired to do, including, among other things, discussing, forming and implementing agreements to raise and maintain at artificially high levels the prices for Ready-Mix Concrete." CC ¶ 42. In other words, to form their alleged combination or conspiracy to artificially inflate prices in the Iowa region, defendants combined and conspired to artificially inflate prices. Quite the tautology that.

[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).

At bottom, stripped of its labels and conclusions, plaintiffs' complaint contains only two scant factual allegations. The first is that on April 26, 2010, defendant VandeBrake (a former employee of GCC Alliance) was charged with violations of Section 1 of the Sherman Act, to which he subsequently pled guilty in a May 4, 2010 plea agreement. *Id.* ¶¶ 17, 43-44. But contrary to plaintiffs' implication, VandeBrake did not plead guilty to entering into a conspiracy with all of the defendants in this case to suppress and eliminate competition by fixing the price of ready-mix concrete anywhere in the "Iowa region" from January 2006 through April 2010.

Instead, the plea agreement admits to three very discrete offenses: (1) ***an agreement with one company*** to fix prices and submit rigged and noncompetitive bids for sales of ready-mix concrete in the Northern District of Iowa and elsewhere from June 2008 until March 2009; (2) ***an agreement with a second company*** to fix prices and submit rigged and noncompetitive bids for sales of ready-mix concrete only in the Northern District of Iowa from January 2008 until August 2009; and (3) ***an agreement with a third company*** to fix prices for sales of ready-mix concrete only in the Northern District of Iowa from January 2006 until August 2009. *See* VandeBrake Plea Agreement at 2-3, *available at* *http://www.justice.gov/atr/cases/f260100/260124.htm*.[2] The parties to the plea agreement estimate that the total volume of commerce for all three counts combined is between one and ten million dollars. *Id.* at 6. Any alleged overcharge to any impacted customers would, of course,

[2] The Court may consider documents referenced in plaintiffs' complaint in deciding this motion to dismiss. *E.g.*, *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 323 (2007) ("courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice") (citing 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004 and Supp. 2007)).

be a small fraction of that. *See* U.S. Sentencing Guidelines Manual § 2R1.1 cmt. n.3 (2007) ("It is estimated that the average gain from price-fixing is 10 percent of the selling price.").

The second alleged fact is that on May 6, 2010, defendant Stewart (a former Great Lakes Concrete executive) was charged with violations of Section 1 of the Sherman Act, to which he subsequently pled guilty in a May 24, 2010 plea agreement. CC ¶¶ 18, 45-46. Plaintiffs misconstrue the scope of Stewart's plea agreement, using it as the sole factual basis for alleging that Stewart and Great Lakes Concrete entered into a conspiracy with all of the defendants in this case to suppress and eliminate competition by fixing the price of ready-mix concrete anywhere in the "Iowa region" from January 2006 through April 2010.

In fact, Stewart's plea agreement only admits to one distinct charge -- that Stewart reached ***agreements with a single competitor*** to submit non-competitive and rigged bids for sales of ready-mix concrete in the Northern District of Iowa from January 2008 until August 2009, which affected between $20,000 and $1 million of commerce. *See* Plea Agreement at 2-3, 8, *available at* http://www.justice.gov/atr/ cases/f260100/260128.htm.

There is no factual basis in plaintiffs' complaint to support plaintiffs' alleged four-plus year conspiracy among all of the defendants covering the entire Iowa region. Specifically, there are:

- No factual allegations supporting any agreement among all defendants;
- No factual allegations supporting any agreement whatsoever among all defendants outside of the Northern District of Iowa;
- No factual allegations supporting a conspiracy encompassing all of Iowa;
- No factual allegations supporting any agreement among all defendants to fix prices for ready-mix concrete;
- No factual allegations supporting any agreement among all defendants to submit rigged or non-competitive bids;

- No factual allegations supporting any agreement among all defendants to set agreed-upon prices or price increases.

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. Plaintiffs Have Not Alleged a Factual Basis To Establish Their Standing To Sue

As a threshold matter, plaintiffs' complaint fails because plaintiffs do not allege a factual basis to establish their standing to sue on behalf of an alleged class "of all individuals and entities who purchased Ready-Mix Concrete directly from any of the Defendants." CC ¶ 1. 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) (affirming dismissal for lack of standing; "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) (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).

Therefore, if there is no named plaintiff that purchased concrete from a particular defendant, then no named plaintiff has standing to sue that defendant. Plaintiffs here allege only that each of the named plaintiffs "purchased Ready-Mixed Concrete directly from one or more Defendants during the class period." CC ¶¶ 8-12. They do not inform whether they all bought only from only one defendant, whether they each bought from each defendant, or whether it is somewhere in between. CC ¶¶ 8-12. That information is obviously within plaintiffs'

knowledge, yet they have not alleged sufficient facts to establish their standing to sue on behalf of the alleged class. The consolidated complaint should be dismissed for that reason alone.

3. Private Plaintiffs Must Plead a Sherman Act Violation And the Clayton Act Requirements of Antitrust Injury, Causation, and Damages

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 criminal convictions 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 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).[3]

A. Plaintiffs' Factual Allegations Provide No Basis for the Vast Conspiracy They Have Alleged

Plaintiffs allege no facts of a direct agreement or conspiracy among any of the defendants other than the three separate and discrete agreements admitted in the plea agreements: (1) an agreement between VandeBrake/GCC Alliance ***and one other company*** to fix prices and submit rigged and noncompetitive bids from June 2008 until March 2009; (2) an agreement between VandeBrake/GCC Alliance ***and a second company*** to fix prices and submit rigged and noncompetitive bids from January 2008 until August 2009;[4] and (3) an agreement between VandeBrake/Alliance Concrete/GCC Alliance ***and a third company*** to fix prices from January 2006 until August 2009. *See* Plea Agreement at 2-3, *available at* *http://www.justice.gov/atr/cases/f260100/260124.htm*.

Plaintiffs' allegations of an industry-wide conspiracy in the entire Iowa region over a four-plus year period are inconsistent with the discrete agreements admitted in the plea agreements and are properly disregarded. *See Cohen v. United States*, 129 F.2d 733, 736 (8th Cir. 1942) (the court need not accept as true those factual allegations that "appear by a record or

[3] *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).

[4] The agreement to which defendant Stewart admits is between Stewart/Great Lake Concrete and another company to submit non-competitive and rigged bids for sales of ready-mix concrete in the Northern District of Iowa from January 2008 until August 2009. *See* Plea Agreement at 2-3, available at http://www.justice.gov/atr/cases/f260100/260128.htm. It can reasonably be inferred that the Stewart admission and the second VandeBrake admission refer to the same agreement.

document included in the pleadings to be unfounded"); *Yellen v. Hake*, 437 F. Supp. 2d 941, 953 (S.D. Iowa 2006) ("We are not required to accept as true conclusory allegations which are contradicted by documents referred to in the Complaint.") (citation omitted); *McCarty v. Dana Holding Corp.*, No. 4:08-CV-690, 2008 U.S. Dist. LEXIS 90689, at *7-8 (E.D. Mo. Nov. 7, 2008) ("Given that it is not possible for plaintiff's allegation that she filed her charge on May 3, 2007 to be true in light of the properly considered EEOC charge, the Court need not accept the allegation.").

Beyond that, the consolidated complaint contains no direct factual allegations of conspiracy and no other factual allegations from which the vast conspiracy plaintiffs have alleged can be inferred. Plaintiffs fail to allege any facts that could tie together the specific, discrete incidents of admitted misconduct and the overarching all-defendant four-plus-year conspiracy they wish to prosecute. For example, plaintiffs do not allege that defendants engaged in any parallel conduct, let alone any factual basis to conclude that any "plus factors" exist. *See e.g., Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1032-33 (8th Cir. 2000) ("An agreement is properly inferred from conscious parallelism only when certain 'plus factors' exist.") (citations omitted). Plaintiffs do not allege that defendants ever systematically interacted with each other, much less that they had some mechanism to operate the alleged conspiracy, allocate its profits, and police its participants. *See, e.g.*, *In re Ins. Brokerage Antitrust Litig.*, No. 1663, 2007 WL 2892700 at *30 (D.N.J. Sept. 28, 2007) (rejecting conspiracy that allegedly involved numerous parties and "dozens of transactions" where plaintiffs failed to allege any facts showing that the defendants "interacted with each other and executed their transactions systematically"); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50-52 (2d Cir. 2007) (dismissing antitrust claim where plaintiffs alleged "'basically every type of

conspiratorial activity that one could imagine'" but provided "an insufficient factual basis for their assertions of a worldwide conspiracy") (citation omitted).

Plaintiffs cannot be permitted to maintain a cause of action for an industry-wide, four-year antitrust conspiracy covering the entire Iowa region among four corporate and two individual defendants merely by alleging guilty pleas that admit only to three separate and discrete agreements, each of which was between only two competitors. Other than the two pleas, plaintiffs provide no indication of how or when any defendant purportedly joined or participated in the alleged conspiracy. *See Twombly*, 550 U.S. at 565 n.10 ("[A] defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have little idea where to begin" where the pleadings "furnishe[d] no clue as to which of the four [defendants] (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place."); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 436 (6th Cir. 2008) ("Generic 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 reference to the 'who, what, where, when, how, or why.'").

B. The Recent *Packaged Ice* Decision Reveals the Consolidated Complaint's Shortcomings

The recent decision in *In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2010 WL 2671306 (E.D. Mich. July 1, 2010), which denied the defendants' motions to dismiss, further highlights the deficiencies in plaintiffs' complaint here. The plaintiffs there sued three groups of defendants -- the Reddy Ice defendants, Arctic Glacier defendants, and Home City Ice Company -- claiming they had conspired to allocate customers and markets for the manufacture

and distribution of packaged ice throughout the United States. *Id.* at *1. The plaintiffs alleged that those three defendants had a combined U.S. market share of nearly 70%. *Id.* at *2.

The complaint incorporated numerous quotes from a former salesman for Arctic Glacier providing copious details of the alleged conspiracy. For example, the former salesman stated that:

- "Reddy Ice, Arctic Glacier, Home City, and smaller packaged ice manufacturers . . ., conspired to allocate territories and customers throughout the United States." *Id.*
- "Arctic Glacier did not and would not compete with Home City," and "Home City and Reddy Ice had agreed to geographically divide the United States market for the sale and delivery of Packaged Ice." *Id.*
- "[R]epresentatives of Arctic Glacier and Home City met in Cincinnati as part of the monitoring of the ongoing conspiracy to address specific customer allocations and to reinforce their agreement to allocate customers and territories." *Id.*
- Reddy Ice curtailed selling its packaged ice in California, which allowed Arctic Glacier to sell in that market free from competition from Reddy Ice. *Id.*
- Arctic Glacier agreed not to compete in Arizona and "withdrew from competing in Oklahoma and New Mexico, while maintaining production and distribution facilities in Kansas and Texas, allowing Reddy Ice to establish a presence in Oklahoma and New Mexico, free of competition from Arctic Glacier." *Id.*

In addition to the insider admissions and guilty pleas, the *Packaged Ice* plaintiffs alleged that the defendants' participation in the International Packaged Ice Association ("IPIA") "provided Defendants with the opportunity to meet and communicate with each other concerning the Packaged Ice markets, customers and pricing." *Id.* at *4. Each of the corporate defendants had executives in leadership positions in the IPIA and regional trade associations, which held regular meetings throughout the year. *Id.*

Finally, with respect to the structure of the industry, the plaintiffs alleged that the market structure had changed from the historical pattern, in that the market was now dominated by the defendants who controlled approximately two-thirds of the sales of packaged ice in the United

States. *Id.* The plaintiffs alleged that "[a]s a result of the Defendants' allocation of territories, 'there is little or no overlap among the areas in which Reddy Ice, Arctic Glacier, and Home City compete.'" *Id.* Reddy Ice, with sales in 31 states and the District of Columbia, allegedly held "the dominant position in the United States." *Id.* at *5. Arctic Glacier allegedly dominated "the eastern seaboard cities such as New York and Philadelphia, as well as New England, California, and the Midwest." *Id.* Home City sold "ice in Ohio, Indiana, Illinois, Kentucky and West Virginia as well as parts of Michigan, Pennsylvania, Tennessee, New York, and Maryland." *Id.* Arctic Glacier had admitted that it serviced markets adjacent to those served by other defendants, but in general, did not compete directly with those companies. *Id.*

Additionally, a distinctive feature in the packaged ice industry is the installed customer base that results from the defendants' installing "refrigeration units at their customers' locations for dispensing ice to retail customers." *Id.* A retail customer's change of ice suppliers would therefore require removing and replacing those refrigeration units. *Id.*

The *Packaged Ice* plaintiffs thus backed up their all-defendant nationwide conspiracy claims with allegations of the following:

> guilty pleas by some of the Defendants to criminal antitrust violations occurring in southeastern Michigan and suspension of key executives for violating corporate policy regarding antitrust compliance; DOJ Antitrust Division raids on corporate headquarters (of a non-Michigan Defendant) related to claimed anticompetitive conduct; allegations of nationwide collusion based upon insider admissions; investigations by state attorneys general into claims of anticompetitive conduct in the packaged ice industry; actions on the part of Defendants against economic self-interest; price increases not explained by increased costs; a market structure conducive to collusion; and opportunities to meet, facilitating conspiratorial conduct.

Id. at *7. The court therefore found that the *Packaged Ice* complaint contained "enough factual content to plausibly suggest that these Defendants' participated in a nationwide conspiracy to

allocate customers and territories." *Id.* at *20. In stark contrast, plaintiffs' meager allegations here provide no support for a four-year Iowa-region-wide conspiracy among all defendants.

C. Plaintiffs Allege No Facts That Would Render the Alleged Conspiracy Plausible

The sparse facts alleged in the consolidated complaint do not make plaintiffs' conclusions of a wide-ranging conspiracy plausible. *Twombly* itself was an antitrust case involving an alleged conspiracy to restrict competition in regional telecommunications markets. The plaintiffs alleged the regional telecommunications companies had illegally restrained competition by "'agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another.'" *Twombly*, 550 U.S. at 551 n.2 (citation omitted).

The plaintiffs specifically alleged the defendants (1) "assiduously avoided infringing upon each other's markets," (2) "refused to permit nonincumbent competitors to access their networks," (3) "would 'communicate amongst themselves' through numerous industry associations," (4) agreed "both to prevent competitors from entering into their local markets and to forgo competition with each other." *Id.* at 571-72, 589 (Stevens, dissenting). The plaintiffs further quoted a statement from the CEO of one of the defendants "that encroaching on a fellow incumbent's territory 'might be a good way to turn a quick dollar but that doesn't make it right,'" which a consumer group complained was evidence of collusion, and alleged that Members of Congress formally asked the Antitrust Division of the Department of Justice to investigate the "'very apparent non-competition policy.'" *Id.* at 591-92.

Notwithstanding those allegations, the Supreme Court held that the complaint failed to state a claim. *Twombly*, 550 U.S. at 548-49. After noting that "the Sherman Act 'does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract,

combination, or conspiracy,'" *id.* at 553 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 742, 775 (1984)), the Court found the plaintiffs' allegations, which focused primarily on the defendants' parallel conduct, equally consistent with either conspiracy or independent action. *Id.* at 564-70. The Court explained that "an allegation of parallel conduct and a bare assertion of conspiracy" does not by itself state a claim for relief under Section 1 of the Sherman Act. *Id.* at 556-57. "[W]ithout some further factual enhancement" or "circumstance pointing toward a meeting of the minds," the Court reasoned those allegations neither "raise[d] a right to relief above the speculative level" nor offered "enough facts to state a claim for relief that is plausible on its face." *Id.* at 557, 555, 570.

Here too, plaintiffs' alleged conspiracy is not plausible. The guilty pleas involve only three limited agreements, each of which is between one competitor and one other competitor. They do not support the alleged conspiracy among all defendants covering the entire "Iowa region" that apparently managed to last over four years (including two years when GCC Alliance did not even exist). Plaintiffs allege no facts to support the conclusion that "[t]he Ready-Mix Concrete industry in the Iowa region is highly concentrated, with just a handful of major producers manufacturing the vast majority [of] the Ready-Mix Concrete used in the region." *See* CC ¶ 25.

The scope of the alleged conspiracy -- between all defendants and encompassing the entire Iowa region -- is just not plausible in light of plaintiffs' scant factual allegations, which are limited to the guilty pleas. Ready-mix concrete is highly perishable because it begins to set while being driven to the job site where it is poured. CC ¶ 21. As plaintiffs allege, ready-mix concrete "is made on demand at batch plants, where the proportions of input materials are measured, combined with water in a rotating drum mounted on a truck, and then mixed in the

truck's drum on the way to the construction site." *Id.* Concrete is thus made for immediate use at locations close to those concrete plants "[b]ecause the addition of water [to the cement and other materials] begins an irreversible chemical reaction." *Id.* ¶¶ 21, 24.

Indeed, as the U.S. Department of Justice found in a document plaintiffs cite in their complaint, "contractors and state departments of transportation typically limit the time concrete can spend in a truck to 90 minutes or less." *See* Amended Complaint, *United States v. Cemex, S.A.B. de C.V.*, No. 07-cv-00640, at 9 (D.D.C. filed May 2, 2007), *available at* http://www.justice.gov/atr/cases/f223000/223023.pdf. Its limited life span, combined with transportation costs that quickly diminish the profitability of a load of ready-mix concrete, means that "suppliers attempt to stay close to their batch plants to minimize the cost of hauling concrete." *Id.* Thus the location of plants necessarily limits the number of ready-mix concrete suppliers that can service any particular job. *See id.* (noting that depending on the size of a city and the associated traffic, the distance concrete can reasonably be transported may be limited to only portions of a metropolitan area).

Plaintiffs also have not alleged that all of the defendants have plants (and therefore compete with each other) throughout the alleged market. In fact, plaintiffs have not alleged where any defendant has a single plant. The alleged facts support only the existence of three separate and discrete agreements, each of which was between only two defendants. Plaintiffs have simply not alleged enough facts to make plausible on its face a conspiracy among all of the defendants to fix prices for ready-mix concrete over the entire Iowa region for a five-year period.

CONCLUSION

For all these reasons, defendant GCC Alliance Concrete, Inc. respectfully requests that the Court dismiss plaintiffs' consolidated 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 September 17, 2010, 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/ Matthew G. Whitaker
Matthew G. Whitaker