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 REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED COMPLAINT

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Plaintiffs are tilting at windmills. GCC Alliance is not arguing that a guilty plea should set the outer bounds of plausibility in a victim's subsequent civil action, that guilty pleas foreclose a civil plaintiff from pleading a broader conspiracy, that a civil antitrust plaintiff can plead only the facts of a prior criminal indictment, or that anyone guilty of price fixing should get off scot free. *See* Plaintiffs' Omnibus Opposition, Docket Entry ("D.E.") 163 at 10-11, 16. To the contrary, GCC Alliance makes the unremarkable point that when the facts of prior plea agreements are the only factual basis a civil antitrust plaintiff pleads in its complaint, then the plea agreements necessarily constrain the scope of the plaintiff's conspiracy claims. In other words, the factual allegations in the complaint set the outer bounds of plausibility.

1. Plaintiffs Do Not Plead A <u>Factual</u> Basis To Support A Conspiracy Broader Than The Agreements Admitted In The Guilty Pleas

As *Packaged Ice* and the cases plaintiffs cite demonstrate, alleging additional facts beyond those found in plea agreements can, of course, extend the scope of a civil plaintiff's conspiracy allegations. For example, in *In re Korean Air Lines Co., Ltd. Antitrust Litig.*, No. 07-01891, 2008 U.S. Dist. LEXIS 111722, at *35-37 (C.D. Cal. June 25, 2008), the price-fixing plea was limited to travel from the U.S. to Korea. The plaintiffs' factual allegations that the conspiracy included flights from Korea to the U.S. were sufficient to support a broader conspiracy in both directions. The court found, however, that the plaintiffs had not met their burden to allege sufficient facts to support their additional claims based on travel that included a U.S.-Korea segment where the original departure or ultimate arrival country was not Korea or the U.S. *Id.*

The guilty pleas in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1185 (N.D. Cal. 2009), only covered 2001-2006, but "numerous allegations about the period prior to 2001" sufficiently alleged anticompetitive conduct during 1996-2001, including

allegations that (1) beginning in at least 1996, three of the defendants met or talked with at least one other defendant to agree on product prices and production quantities, and (2) unusual pricing practices before 2001 were indicia of price fixing and market manipulation Similarly, in *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-1775, 2009 WL 3443405, at *1 (E.D.N.Y. Aug. 21, 2009), "the fact that numerous defendants ha[d] pled guilty to criminal charges of fixing prices on air cargo shipments" was just one among the many factual allegations in the plaintiffs' complaint making it plausible to infer an agreement among the defendants to artificially inflate the prices of airfreight shipping services. Plaintiffs' other case, *In re Graphics Processing Units Antitrust Litig.*, No. 06-07417, 2007 U.S. Dist. LEXIS 57982, at *25 (N.D. Cal. July 24, 2007), involved a discovery dispute where there had "been no indictment, much less any guilty plea by any defendant."[1]

Here, the only allegations other than the guilty pleas to which plaintiffs point are their entirely conclusory conspiracy allegations, D.E. 163 at 5, which provide no more than generic antitrust labels,[2] and their allegations regarding the nature of the ready-mixed concrete market generally, *id.* at 6. Plaintiffs provide no specific factual allegations that could render their allegations plausible.

For example, plaintiffs allege that "[t]he Ready-Mix Concrete in the Iowa region is highly concentrated, with just a handful of major producers manufacturing the vast majority [of]

[1] Plaintiffs' also a cite class certification decision, but the plaintiffs' allegations there also provided a factual basis for conspiracy allegations broader than the guilty pleas. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 588 (N.D. Cal. 2010) (plaintiffs alleged, among other things, (1) three levels of formalized meetings among the defendants' top executives, management-level personnel, and lower-level sales and marketing personnel, and (2) emails and memoranda documenting the meetings in which defendants shared price information and production levels, reached agreements on prices, planned consistent public statements on anticipated supply and demand, and disciplined new market entrants and pressured them to abide by agreed-upon pricing and production).

[2] *See* GCC Alliance's Memorandum in Support of its Motion to Dismiss, D.E. 149 at 9-10.

the Ready-Mix Concrete used in the region." D.E. 104 ¶ 25. As GCC noted in its opening brief, plaintiffs do not define the Iowa region. Nor do plaintiffs provide a factual basis for their conclusion that the market is highly concentrated, identify the handful of major manufacturers, or even allege whether or which of the defendants are included within that handful. Moreover, plaintiffs nowhere explain why their allegations would provide factual support for the overarching conspiracy they allege as opposed to the three discrete agreements admitted in the guilty pleas, particularly given that the admitted volume of commerce affected is between $1 and $10 million.

2. Plaintiffs Do Not Plead A Hub-And-Spoke Conspiracy

With respect to GCC Alliance's actual argument -- that plaintiffs have not alleged a factual basis for the overarching conspiracy they allege -- plaintiffs now contend "it is apparent that the Complaint amply pleads a conspiracy under the 'hub and spoke' theory, in which Defendant VandeBrake served as the 'hub' entering into price-fixing agreements with the other Defendants." D.E. 163 at 14 (citing Consolidated Complaint ¶ 44). Plaintiffs' new reliance on the hub-and-spoke conspiracy theory is misguided and misplaced. That is a theory used to treat a series of ostensibly ***vertical*** one-on-one agreements between a dominant buyer (the "hub") and several sellers (the "spokes") to boycott or otherwise disadvantage a competing buyer as actually being a horizontal, multiparty agreement among the sellers, *see, e.g., Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435 n.3 (6th Cir. 2008), but plaintiffs here are complaining only of alleged horizontal agreements between or among competing sellers.

Plaintiffs' *ipse dixit* that "it is axiomatic that a plaintiff need not establish a direct agreement among all defendants in order to allege a conspiracy among them" is simply wrong. When evaluating claims of hub-and-spoke conspiracies, courts invariably turn to the Seventh

Circuit's seminal opinion in *Toys "R" Us, Inc. v. FTC* for guidance. 221 F.3d 928 (7th Cir. 2000). There, the court upheld the FTC's finding that an illegal horizontal agreement existed among a number of competing toy manufacturers, orchestrated by Toys "R" Us as the ringmaster, to boycott warehouse clubs that wanted to sell toys to consumers in competition with Toys "R" Us. The court held that to show an unlawful horizontal, multiparty agreement, rather than a series of lawful vertical, two-party exclusive-dealing arrangements, a plaintiff must establish that "***at a minimum*** [the sellers/spokes] agreed [with the hub/buyer] to join in the boycott '***on the condition that their competitors would do the same***.'" *Id.* at 932 (citation omitted, emphasis added).

Showing that the sellers agreed to the boycott on the condition that horizontally competing sellers would also agree to boycott the buyer's competitors is the *sine qua non* of a hub-and-spoke antitrust violation. *See Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 110 (2d Cir. 2002). Without that "but for" element, there is no "rim" to connect the spokes on the wheel horizontally, and there is thus no basis for inferring a horizontal agreement. Here, even assuming there could be a hub-and-spoke conspiracy without a vertical relationship between the hub and the spokes, plaintiffs make no allegations whatsoever that any seller of ready mix concrete agreed with another seller to fix prices if and only if one or more other sellers would also agree to fix prices. The square price-fixing conspiracy peg that plaintiffs plead simply will not fit into the round hub-and-spoke hole.

Plaintiffs cite *Impro Products, Inc. v. Herrick*, 715 F.2d 1267, 1279 (1983), in which the Eighth Circuit cited *Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc.*, 459 F.2d 138, 146-47 (6th Cir. 1972), but found the plaintiff had insufficient evidence of any of *Elder-Beerman*'s three elements, *id.* at 1279-80, and therefore expressly declined to "determine

whether it [a hub-and-spoke conspiracy theory] properly could be utilized in this case." *Id.* at 1279 n.14.

Plaintiffs also overlook that the Sixth Circuit now embraces *Toys "R" Us* and requires that there must be some evidence of actual agreements between the spokes:

> A hub and spoke conspiracy involves a hub, generally the dominant purchaser or supplier in the relevant market, and the spokes, made up of the distributors involved in the conspiracy. The rim of the wheel is the connecting agreements among the horizontal competitors (distributors) that form the spokes. Each of the three parts is integral in establishing a *per se* violation under the hub and spoke theory.

Total Benefits Planning Agency, 552 F.3d at 435 n.3 (affirming dismissal on the pleadings). And most importantly of all, the Eighth Circuit agrees. *See Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 590-91 (8th Cir. 1987) (refusing to apply plaintiffs' proffered hub-and-spoke theory and affirming Judge O'Brien's summary judgment for defendants where the refusals to deal involved "a rimless, spoked wheel" with no concerted action between the horizontal competitors that were the spokes).

Plaintiffs here do not allege any facts that would plausibly lead to the inference that the alleged spokes entered into an agreement with anyone other than the alleged hub, let alone that they did so only on the condition that their competitors -- the other alleged spokes -- would do the same. Plaintiffs have not alleged a hub-and-spoke conspiracy.

CONCLUSION

For all these reasons and those in its motion and opening brief,[3] 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.

[3] Although GCC Alliance continues to contest the sufficiency of plaintiffs' standing allegations, it hereby withdraws that basis for its Rule 12(b)(6) motion and will, if necessary, preserve and present its challenge using a different procedural vehicle.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 21, 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/ Anne M. Rodgers
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