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

IN RE: IOWA READY-MIX CONCRETE ANTITRUST LITIGATION	No. C10-4038 MWB (CONSOLIDATED CASES)

REPLY OF VS HOLDING COMPANY TO PLAINTIFFS' OMNIBUS OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Plaintiffs themselves cite, and do not dispute, the public record presented by VS Holding to establish that it sold on a cash basis 100% of its ready-mix business assets to GCC effective January 14, 2008. Courts have held as a matter of law that such action constitutes an effective withdrawal from an alleged antitrust conspiracy. For example, in Mortons's Market Inc. v. Gustafson's Dairy Inc., 198 F.3d 823 (11th Cir. 1999), amended in part, 211 F.3d 1224, cert. denied, 529 U.S. 1130 (2000), plaintiff milk retailers brought an antitrust action against large dairy producers alleging a price-fixing conspiracy. One of the alleged defendant co-conspirators had sold its dairy and gone out of business. The court held (at 839):

> Did [the selling defendant] effectively withdraw? With the sale of its dairy, [defendant] certainly "retired" and totally severed its ties to the milk price-fixing conspiracy. It did nothing more to assist or participate in the price-fixing activities of the other dairies. This retirement was communicated to the other dairies by the media. They knew from that time on [that defendant] would not lend its services to the conspiracy. Thus, the purposes of a conspiracy were defeated at least as to [that defendant]. We conclude, therefore, that [defendant] did effectively withdraw from the price-fixing conspiracy upon the sale of its dairy.

The decisions relied upon by Plaintiffs to assert that this court should not grant VS Holding's motion to dismiss post-2007 claims as to VS Holding based upon the sale of 100% of its ready-mix business assets are distinguishable. None involved the withdrawal of an otherwise completely legitimate corporate defendant from a conspiracy based upon the sale of all of its assets, as was the case in Morton's Market. *See* U.S. v. Sax, 39 F.3d 1380 (7th Cir. 1994) (defendant's sale of his marijuana distribution "business" not sufficient to show withdrawal, in part because he continued to set up investments for fellow conspirators to launder drug money); U.S. v. Williams, 2003 WL 42471 (3d Cir. 1/7/03) (all damages caused by conspiracy could be considered in defendant's sentencing where company formed solely to commit fraud and defendant was personally involved in carrying out that fraud); In Re Corrugated Container

Antitrust Litigation, 662 F.2d 875 (D.C. Cir. 1981) (relevant only because it cites boilerplate language for vicarious liability for actions of co-conspirators); U.S. v. Patel, 879 F.2d 294 (7th Cir. 1989) (court analogized withdrawal of individual from drug conspiracy as attempting to "absolve self of guilt of bombing by walking away from the ticking bomb", but acknowledged defendant's communication to his co-conspirators of abandonment of conspiracy was sufficient to establish withdrawal); In Re Potash Antitrust Litigation, 1994 WL 1108312 (D. Minn. 12/5/94) (pre-Bell Atlantic decision that relied upon the now retired Conley "no-set-of-facts" gloss on Rule 8, denying motion to dismiss because plaintiffs had alleged a direct claim against the moving defendant, not just against the subsidiary it had previously sold, and because plaintiffs "have alleged a continuing conspiracy on the part of all Defendants").[1]

Since GCC lacked any Iowa ready-mix business prior to January 14, 2008, and VS Holding lacked one after, Plaintiffs can not plausibly allege that they were fixing prices with each other. So any case against VS Holding would have to involve a price fixing conspiracy not involving GCC back in 2006 or 2007. But these Plaintiffs have not adequately pled when the alleged antitrust conspiracy began. Plaintiffs obviously rely heavily upon the plea of guilty by Steve Vande Brake (who was involved in sales for VS Holding and then for GCC Alliance) to violations of Section 1 of the Sherman Act. Only Count III of the Information to which he pled guilty does not explicitly exclude calendar years 2006 and 2007, when VS Holding (f/k/a Alliance Concrete) was still in the ready-mix concrete business. With respect to the timing of

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[1] Plaintiffs also cite as purported authority (Reply at 16) an unreported order from a court in another federal district. Marine Hose Antitrust Litig., No. 08-MDL-1888, Doc. No. 630 (S.D. Fla. 7/29/10). In its order, the court noted that none of the defendants in that case had resisted the plaintiff's motion for summary judgment, and accordingly, deemed the facts set forth in plaintiffs' statement of undisputed fact to be established. Id. Doc. No. 658 (9/10/10). No legal authority is cited by the court for the legal proposition asserted by Plaintiffs here. A court's grant of an unresisted motion for summary judgment is less than persuasive authority, particularly when it was against a defendant that had never entered an appearance in the case.

the illegal agreement charged in Count III, the Information alleges Vande Brake violated the Act "[b]eginning at least as early as January 2006 and continuing until as late as August 2009. . . ." This broad-brush time period is then adapted by Plaintiffs' in their Complaint at ¶ 7(B) ("'Class Period' means the period from at least January 1, 2006 through at least April 26, 2010") and ¶ 47 ("Throughout the Class Period, Defendants and their co-conspirators conspired to set agreed-upon prices. . . .").

Hanging the case against VS Holding on the conclusory word "throughout", without any factual detail at all, is insufficient to satisfy the pleading standard under Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).[2] "Throughout" is an ambiguous word that can mean either "every part of" or just "here and there in". Work Connection v. Bui, 749 N.W.2d 63, 68-69 (Minn. App. 2008). The plaintiffs in Bell Atlantic asserted a time period using some of the same language found in the Information in the present case: "'[b]eginning at least as early as February 6, 1996, and continuing to the present, the exact dates unknown to plaintiffs . . .'" Bell Atlantic at 551, n. 2. Given the overall deficiency of the plaintiffs' factual allegations, the court in Bell Atlantic was critical of this type of broad-brush allegation as to time (at 564, n.10):

> If the complaint had not explained that the claim of agreement rested on the parallel conduct described, we doubt that the complaint's references to an agreement among the [defendants] would have given the notice required by Rule 8. Apart from identifying a seven year span in which the § 1 violations were supposed to have occurred . . . , the pleadings mentioned no specific time, place, or person involved in alleged conspiracies. This lack of notice contrasts sharply with the model form for pleading negligence, Form 9, which the dissent says exemplifies the kind of "bare allegation" that survives a motion to dismiss [cite omitted]. Whereas the model form alleges the defendant struck the plaintiff with his car while plaintiff was crossing the particular highway as specified date and time, the complaint here furnishes 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. A defendant wishing to prepare an answer in the

[2] Even if this pleading were sufficient under Bell Atlantic, it still would plausibly allege only a more limited conspiracy, as discussed in GCC's reply brief.

simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiff's conclusory allegations in the Section 1 context would have little idea where to begin.

Some courts have noted that pleading a specific time, place or person should not be required if there is sufficient pleading of parallel conduct (e.g., Starr v. Sony BMG Music Entertainment, 592 F.2d 314, 325 (2d Cir. 2010)), but Plaintiffs' Complaint in the present case lacks such parallel conduct pleading as to VS Holding or any other defendant. Other courts have held that just alleging a broad time period, without specifics, is not sufficient to state a claim. In re Urethane Antitrust Litigation, 663 F.Supp.2d 1067, 1077 (D.Kan. 2009) (price-fixing complaint dismissed due to lack of specifics as to time: "Under Twombly, plaintiffs cannot simply allege a conspiracy beginning at a particular time; rather, they must allege facts to support the existence of a conspiracy during the entire period").

"To survive a motion to dismiss, a complaint must contain factual allegations sufficient 'to raise a right to relief above the speculative level. . . . '" Parkhurst v. Tabor, 569 F.3d 861, 865 (8th Cir. 2009), cert. denied, ___U.S.___, 130 S. Ct. 1140 (2010). Courts have recognized that the degree of specificity necessary to establish plausibility and fair notice depends on the type of claim involved. Robins v. Oklahoma, 519 F.3d 1242, 1248-49 (10th Cir. 2008) (section 1983 claim). Those courts have recognized that "complex claims against multiple defendants" tend to "pose a greater likelihood of failures in notice and plausibility", justifying a more exacting application of the guidance provided by Bell Atlantic. Id. *See also* PSKS Inc. v. Leegin Creative Leather Products Inc., 2009 WL 938561 *8 (E.D. Tex. 4/6/09), affirmed, 615 F.3d 412 (5th Cir. 2010) (dismissing alleged "hub and spoke" price-fixing conspiracy among retailers, and noting that Bell Atlantic "rejected an antitrust claim because the horizontal conspiracy was alleged without the level of detail - - the who, what, when, where, and how");

Livingston v. Borough of Edgewood, 2008 WL 5101478 *7 (W.D. Penn. 11/26/08) (noting, in relation to granting plaintiff 20 days within which to file an amended complaint comporting with Rule 11, that allegations of conspiracy "should be pled with specificity, e.g., identification of dates and times, participants, objects, and actions"). *Contrast* Standard Iron Works v. Arcelormittal, 639 F. Supp. 2d 877, 902 (N.D. Ill. 2009) (denied motion to dismiss because complaint "adequately states facts which address the questions of who, what, when, and where", including allegations of numerous specific dates when defendants' executives met and discussed restricting output and specific parallel action taken on particular dates by each defendant soon thereafter to reduce output).

The court in Bell Atlantic assumed the truth of the allegation that the defendants there had entered into illegal agreements "'[b]eginning at least as early as February 6, 1996 and continuing to the present'", but it still found such an allegation furnished "no clue as to . . . when and where the illicit agreement took place." Id. at 564, n. 10. Plaintiffs' conclusory allegation here, that VS Holding conspired to fix prices "from at least January 1, 2006 through at least April 26, 2010", should not fare better. The Complaint in its present form should be dismissed as to VS Holding for this reason, in addition to the reasons set out in GCC's motion to dismiss in which VS Holding has joined.

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2010, I presented the foregoing to the Clerk of the Court for filing and uploading into the ECF system. Notice of this filing will be sent to counsel of record by operation of the Court's ECF system.

/s/Hayward L. Draper
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