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)**

PLAINTIFFS' BRIEF IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENTS AND PRELIMINARY CERTIFICATION OF SETTLEMENT CLASSES

Introduction

Plaintiffs Randy Waterman, Frank Audino Construction, Inc., Sioux City Engineering Co., the City of Le Mars, Iowa, Holtze Construction Company and Brown Commercial Construction, Inc. (collectively "Plaintiffs"), by Interim Co-Lead Counsel, have moved this Court for Orders preliminarily approving three class-wide Settlement Agreements (the "Settlements") that would together resolve all of Plaintiffs' claims against all Defendants in this litigation; preliminarily certifying three Plaintiff Settlement Classes; and directing notice of the three Settlements to members of the Settlement Classes. Specifically, Plaintiffs request preliminary approval of the following three Settlements:

- The Settlement Agreement with Tri-State Ready Mix, Inc., VS Holding Company, f/k/a Alliance Concrete, Inc., GCC Alliance Concrete, Inc., Chad Van Zee and Steven Keith VandeBrake ("Alliance/Tri-State Settlement"), which resolves the claims of a proposed direct purchaser Alliance/Tri-State Settlement Class in exchange for payments by Alliance/Tri-State Settling Defendants in the combined amount of $10,730,335.

- The Settlement Agreement with Great Lakes Concrete, Inc., VS Holding Company, f/k/a Alliance Concrete, Inc., GCC Alliance Concrete, Inc., Kent Robert Stewart and Steven Keith VandeBrake ("Alliance/Great Lakes Settlement"), which resolves the claims of a

proposed direct purchaser Alliance/Great Lakes Settlement Class in exchange for payments by Alliance/Great Lakes Settling Defendants in the combined amount of $5,121,412.

- The Settlement Agreement with Siouxland Concrete Company, VS Holding Company, f/k/a Alliance Concrete, Inc., GCC Alliance Concrete, Inc. and Steven Keith VandeBrake ("Alliance/Siouxland Settlement"), which resolves the claims of a proposed direct purchaser Alliance/Siouxland Settlement Class in exchange for payments by Alliance/Siouxland Settling Defendants in the combined amount of $2,648,253.

Plaintiffs further request that the Court schedule a hearing to consider the parties' request for final approval of the Settlements and entry of final judgments, and Interim Co-Lead Counsel's request for an award of attorneys' fees, incentive awards for the named Plaintiffs, and the reimbursement of expenses.

Despite the potential complexity of the underlying litigation, each of the Settlements is structurally and procedurally fair. For example, each Settlement has been entered on behalf of one of the three plaintiff classes proposed in the Plaintiffs' Second Amended Consolidated Complaint (Dkt. 236) ("Second Amended Complaint"), and resolves the distinct claims of antitrust conspiracy that are alleged by that proposed Class in the Second Amended Complaint. Each Settlement was also negotiated by well-informed counsel, and followed extensive criminal sentencing proceedings, comprehensive document and data production, depositions, and a thorough expert analysis of the conspiracies, the relevant market, and ensuing damages. Each Settlement was also the result of intensive, arms-length negotiation, including several full-day mediation sessions with The Honorable James M. Rosenbaum (Ret.), additional phone mediation sessions with Magistrate Judge Paul A. Zoss, and direct discussions among counsel for the parties. *See* Declaration of Irwin B. Levin in Support of Plaintiffs' Unopposed Motion for

Preliminary Approval of Settlement Agreements and Preliminary Certification of Settlement Classes ("Levin Dec.") ¶3.[1]

Moreover, the substantial Settlement payments are fair and adequate to proposed Class members. In fact, the payments under the Settlements, with a combined value of $18.5 million, will permit members of each proposed Settlement Class to recover on a pro rata basis at least the approximate full value of the preliminary single damages calculation of Plaintiffs' expert, even if the Court chooses to award the Plaintiffs' anticipated requested attorneys' fees, incentive awards, settlement expenses, and costs of litigation. These results were obtained despite aggressive opposition in the litigation by all Defendants, and serious financial limitations on some Defendants. Levin Dec. ¶4.

The Settlements reflect the risks to all parties of continued litigation, plainly qualify as fair, reasonable and adequate, and easily satisfy the standards for preliminary approval. Further, the proposed Settlement Classes satisfy the requirements of Fed. R. Civ. P. 23(a) and (b), and the Settlements and incorporated exhibits provide for a notice program that provides Class Members with the protections required by Rule 23 and due process. Plaintiffs therefore request that the Court preliminarily approve each of the Settlements, certify each of the proposed Settlement Classes, approve the manner and form of notice proposed by the parties, and schedule this matter for a final fairness hearing.

Procedural Background

This lawsuit brings claims on behalf of customers damaged as a result of three antitrust conspiracies involving the four largest Ready-Mix Concrete ("RMC") producers in northwest Iowa. The Plaintiffs allege that from at least January 1, 2006 through November 2010,

[1] The Levin Declaration affirms (and largely duplicates) portions of the instant Brief that contain factual assertions or opinions of Interim Co-Lead Counsel.

Defendant GCC Alliance, Inc. and its predecessor Alliance Concrete, Inc. (collectively herein "GCC") – with Defendant Steven VandeBrake in charge of sales and pricing – participated in three conspiracies: one with Defendant Tri-State Ready Mix, Inc. ("Tri-State") and its owner Chad Van Zee ("Van Zee"); one with Great Lakes Concrete, Inc. ("Great Lakes") and its owner Kent Stewart ("Stewart"); and one with Siouxland Concrete Company ("Siouxland"). Plaintiffs allege that in each instance GCC and its "competitor" entered into and engaged in a combination and conspiracy in order to suppress and eliminate competition in the market for Ready-Mix Concrete by fixing prices, rigging bids and/or allocating territories, and that each of the conspiracies caused direct purchasers of RMC to pay artificially inflated prices.

The Plaintiffs' allegations stem from an investigation into suspected antitrust violations, among the Defendants, by the United States Department of Justice ("DOJ"). That investigation began after Defendant Siouxland Concrete Company ("Siouxland") approached the DOJ in early 2009, pursuant to the DOJ's Antitrust Leniency Program[2] and § 213 of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), P.L. 108-237, 118 Stat. 666, 15 U.S.C. note, with information that certain of its employees had been involved in antitrust violations in the RMC market in northwest Iowa. Beginning in May 2010, the targets of the investigation began pleading guilty to violations of Section One of the Sherman Act, 15 U.S.C. § 1. The first charging Information was filed on April 26, 2010, against Defendant VandeBrake, who then pleaded guilty on May 4, 2010, to fixing prices and rigging bids in the RMC market in violation of Sherman Act Section One.[3] During the subsequent 14 months nearly all of the other

[2] *See*, U.S.D.O.J., Antitrust Div., Corp. Leniency Policy, http://justice.gov/atr/public/guidelines/0091.htm.
[3] *United States v. Steven Keith VandeBrake*, Case No. 5:10-cr-04025-MWB.

corporate and individual Defendants in the civil litigation have also pleaded guilty to price-fixing and bid-rigging in the RMC market in violation of the Sherman Act.[4]

Beginning on May 3, 2010, direct purchasers of RMC from the Defendant companies began filing civil actions seeking class action status and damages for the overcharges caused by the Defendants' criminal conduct. On June 10, 2010, the Court consolidated the first ten civil cases filed into the instant case and under the foregoing caption. *See* Order Re Consolidation, Stay and Procedures for Selecting Interim Class Counsel. (Dkt. 24). An additional four cases were later consolidated into the instant case. (Dkt. 32, 34, 40, 81). On July 9, 2010, the Court appointed the undersigned, Irwin Levin of Cohen & Malad, LLP and Gregory Hansel of Preti, Flaherty, Beliveau & Pachios, LLP, as Interim Co-Lead Plaintiffs' Counsel. (Dkt. 100).

On July 26, 2010, the Plaintiffs filed their Consolidated Class Action Complaint. (Dkt. 104). On September 17, 2010, all Defendants except Siouxland filed motions to dismiss the Consolidated Complaint. (Dkt. 149, 150, 151, 153). On December 21, 2010, the Court granted the Plaintiffs' unopposed motion to amend the Consolidated Complaint to add Defendants Tri-State Ready-Mix, Inc. and Chad Van Zee, subject to the pending motions to dismiss. (Dkt. 176).

During the second half of 2010 and the first months of 2011, the parties engaged in substantial discovery. Each of the named parties responded to interrogatories and requests for production of documents. During this time Interim Co-Lead Counsel obtained, organized and reviewed nearly 60 thousand pages of documents from the Defendants, including internal financial, transactional and operational documents, as well as materials related to or produced

[4] *See, United States v. Tri-State Ready Mix Inc.*, Case No. 5:11-cr-04073-MWB; *United States v. Chad Van Zee*, Case No. 5:10-cr-04108-MWB; *United States v. Kent Robert Stewart, a/k/a Kent Stewart*, Case No. 5:10-cr-04028-MWB; *United States v. GCC Alliance Concrete, Inc.*, Case No. 5:11-cr-04071-MWB; *and United States v. VS Holding Co. f/k/a Alliance Concrete, Inc.*, Case No. 5:11-cr-04091-MWB.

during parallel criminal proceedings. More importantly, Interim Co-Lead Counsel obtained – with substantial effort and the Court's assistance – a substantial and detailed production of transactional data from each of the Defendants related to the sale of RMC during the conspiracies alleged by the Plaintiffs. Levin Dec. ¶6.

Interim Co-Lead Counsel also took twelve individual and corporate designee depositions during this time, and also obtained transcripts of testimony provided during the criminal sentencing hearings for Defendants VandeBrake and Stewart. Interim Co-Lead Counsel engaged in several conferences with counsel for the Leniency Applicant, Siouxland, and interviewed a number of its current and former employees, in Omaha and Sioux City, about the details of the Alliance/Siouxland conspiracy, the characteristics of and participants in the geographic and product markets, and the common methods and practices of manufacturing, marketing and selling RMC. On occasion counsel for the Leniency Applicant also obtained additional information, or attempted to answer specific questions, at the request of Interim Co-Lead Counsel. Levin Dec. ¶7.

On March 8, 2011, the Court granted the Defendants' pending motions to dismiss, but allowed Plaintiffs time to request leave to file a second amended complaint. (Dkt. 207). On March 29, 2011, Plaintiffs filed their motion for leave to file a second amended complaint, along with the proposed Second Amended Consolidated Class Action Complaint. (Dkt. 214). On March 25, 2011, the Court granted the Plaintiffs' motion for leave and the Second Amended Complaint was docketed as the operative pleading. (Dkt. 235, 236).

The Second Amended Complaint alleges claims on behalf of three proposed Classes – the Alliance/Tri-State Class, the Alliance/Great Lakes Class and the Alliance/Siouxland Class.[5]

[5] For the proposed classes, the name "GCC" was used instead of "Alliance" in the Second Amended Complaint. The "Alliance" name is used here to be consistent with the Settlements.

Each of the three Classes corresponds to one of the three conspiracies and is comprised of all individuals and entities that directly purchased RMC from plants affected by the conspiracy during a specified Class Period. Each proposed Class brings claims for violations of the Sherman Act, 15 U.S.C. § 1, against Defendants GCC, VS Holding and VandeBrake, and also against: (i) Tri-State and Chad Van Zee; *or* (ii) Great Lakes and Kent Stewart; *or* (iii) Siouxland. For each Class, Plaintiffs with direct purchases from affected plants during the relevant Class Period have been proposed as Class representatives.

The Defendants, proposed Plaintiff Class, proposed Class Period and proposed Class Representatives for each of the three conspiracies alleged in the Second Amended Complaint are summarized in the following Table:

GCC/SIOUXLAND CONSPIRACY	
Defendants	GCC Alliance, Inc., Steve VandeBrake and Siouxland Concrete
Plaintiff Class	Direct purchasers of RMC from the GCC Le Mars North, Le Mars South, Remsen, Akron, Moville and Sergeant Bluff plants, and the Siouxland 11th Street, South Sioux City, and Sioux City plants.
Class Period	July 1, 2008 through December 31, 2009
Class Representatives	Frank Audino, Sioux City Engineering, City of Le Mars, Iowa, and Brown Commercial Construction

GCC/TRI-STATE CONSPIRACY	
Defendants	GCC Alliance, Inc., VS Holding Company, Steve VandeBrake, Tri-State Ready-Mix, Inc. and Chad Van Zee
Plaintiff Class	Direct purchasers of RMC from the GCC (or Alliance) Hawarden, Orange City, Sioux Center and Sheldon plants, or the Tri-State Rock Valley plant.
Class Period	January 1, 2006 through December 31, 2009
Class Representatives	Frank Audino, Randy Waterman and Brown Commercial Construction

GCC/GREAT LAKES CONSPIRACY	
Defendants	GCC Alliance, Inc., VS Holding Company, Steve VandeBrake, Great Lakes Concrete and Kent Stewart
Plaintiff Class	Direct purchasers of RMC from the GCC Hartley, Lake Park, Sanborn, Sibley and Spencer plants, and the Great Lakes Northwest, Spencer and Spirit Lake plants.
Class Period	January 1, 2006 through December 31, 2009
Class Representatives	Brown Commercial Construction

On April 1, 2011, Plaintiffs filed their Motion for Class Certification ("Class Motion"), Supporting Brief ("Class Brief") and Supporting Declaration ("Class Declaration"). (Dkt. 217, 218). The Class Motion seeks certification of the three Plaintiff Classes proposed in the Second Amended Complaint and described in the summary Tables above. The Class Brief includes an extensive discussion of the Defendant companies and their interrelationships, the details of the three antitrust conspiracies, facts supporting the efficacy and class-wide impact of the conspiracies, the product and geographic markets for each conspiracy, and the relevant economic characteristics of the northwest Iowa RMC market, all of which are supported by documentation included in the Class Declaration. The Brief also relied on and included throughout references to the Declaration of Russell Mangum, Ph.D., which was part of the Class Declaration.[6]

The Mangum Report (later amended to reflect minor corrections) (Dkt. 229), provided a highly-detailed and rigorous analysis of the northwest Iowa RMC market, the admitted and alleged conspiracies, the Defendants' transactional data from the proposed Class Periods, and the impact of the conspiracies on the members of the proposed Classes. Based on the Defendants'

[6] Plaintiffs incorporate herein the Brief in Support of Plaintiffs' Motion for Class Certification and the Declaration of Irwin B. Levin in Support of Plaintiffs Motion for Class Certification, filed under seal on April 1, 2011, (Dkt. 217, 218), and the Amended Declaration of Russell Mangum, filed under seal on April 12, 2011. (Dkt. 229).

transaction data and publicly available information, Mangum determined that industry characteristics – a highly concentrated market, high barriers to entry, an interchangeable product, inelastic demand, and a history of structured pricing and communications among Defendants – are conducive to price fixing. In addition, he performed extensive empirical analysis of the markets and transactional prices related to the claims of each Class, and established that: (i) members of each Class were subject to common impact from each of the conspiracies, and (ii) the damages incurred by each Class are readily ascertainable using widely-accepted economic methodologies. Most importantly, the Mangum Report estimated specific damages in the form of overcharges incurred by each Class during the proposed Class Period as a result of the corresponding conspiracy.[7]

On May 16, 2011, all Defendants except Siouxland again moved to dismiss the Second Amended Complaint. (Dkt. 239, 242, 243, 244, 245). The deadlines for Plaintiffs to oppose the second motions to dismiss, and for Defendants to oppose the motion for class certification, were stayed on May 23, 2011 pending finalization of the parties Settlements. (Dkt. 247). At the time that the parties finalized the Settlements for which they now seek approval, therefore, the Defendants' second motions to dismiss and the Plaintiffs' motion for class certification were pending.

Mediation and Settlement Discussions

Plaintiffs' Interim Co-Lead Counsel engaged in initial settlement discussions with counsel for the Leniency Applicant, Siouxland, in December 2010, but did not reach any points of agreement. In March 2011 counsel for the parties agreed to attempt mediation using the

[7] "Overcharges, the difference between the actual price and the presumed competitive price multiplied by the quantity purchased, provide what the long-recognized principal measure of damages for plaintiffs injured as customers … ." *In re Relafen Antitrust Litig.,* 218 F.R.D. 337, 344 (D. Mass. 2003) (citing *Chattanooga Foundry & Pipe v. Works Atlanta,* 203 U.S. 390, 396 (1906)).

services of The Honorable James M. Rosenbaum, retired United States District Judge for the District of Minnesota and a member of JAMS Resolution Experts, as mediator. In anticipation of mediation counsel for each party submitted to Judge Rosenbaum written answers to specific questions, a confidential mediation statement, and copies of relevant documents. In its mediation statement, and initial demands to counsel for the Defendants, Plaintiffs' Interim Co-Lead Counsel were clear that all negotiations would be on behalf of the three Plaintiff Classes proposed in the Second Amended Complaint and for which Russell Mangum had estimated damages. Levin Dec. ¶8.

Under the guidance of Judge Rosenbaum, counsel for the parties participated in full day mediation sessions in Omaha on April 27 and 28, 2011, and May 11, 2011. At least one named Plaintiff from each proposed Settlement Class was present or available for consultation during the mediation sessions. Negotiations during mediation were often intense and hard fought on both sides, as the parties, with Judge Rosenbaum's assistance, worked through a number of difficult issues in addition to the ultimate question of compensation for three distinct Settlement Classes. Although no agreement was reached during these mediation sessions, counsel for the parties continued to negotiate, and within days settlements in principle were reached between the relevant Defendant groups and the three Settlement Classes. Levin Dec. ¶9.

Plaintiffs then presented three draft Settlement Agreements (with exhibits) for review by the Defendants. After two exchanges of draft agreements and further discussions among counsel, a number of major sticking points remained. By agreement, counsel for all parties therefore sought the assistance of Magistrate Judge Zoss to mediate the remaining issues. Following an exchange of letters to Magistrate Zoss and the preparation of an agreed redline of a sample Settlement Agreement illustrating the parties' respective positions, counsel participated

in at least three telephonic mediation sessions. With the assistance of Magistrate Zoss and continued negotiation among counsel, the parties were able to reach a consensus on the terms of the Settlement Agreements now presented to the Court for preliminary approval. Levin Dec. ¶10.

Terms of the Settlements

The parties have executed three separate Settlement Agreements that structurally track the three conspiracies and three classes alleged in the Second Amended Complaint. The Alliance/Tri-State Settlement Agreement resolves the claims of a proposed Alliance/Tri-State Settlement Class of direct purchasers from specified plants against Tri-State, VS Holding, GCC Alliance, Van Zee and VandeBrake in exchange for payments by the Alliance/Tri-State Settling Defendants in the combined amount of $10,730,335. The Alliance/Great Lakes Settlement Agreement resolves the claims of a proposed Alliance/Great Lakes Settlement Class of direct purchasers from specified plants against Great Lakes, VS Holding, GCC Alliance, Stewart and VandeBrake in exchange for payments by the Alliance/Great Lakes Settling Defendants in the combined amount of $5,121,412. The Alliance/Siouxland Settlement Agreement resolves the claims of a proposed Alliance/Siouxland Settlement Class of direct purchasers from specified plants against Siouxland, VS Holding, GCC Alliance and VandeBrake in exchange for payments by the Alliance/Siouxland Settling Defendants in the combined amount of $2,648,253. The combined payments by Settling Defendants for the three Settlements total $18.5 million. Levin Dec. ¶11.

The terms of the Settlements are straightforward and consistent with those found in similar settlements for claims brought under Section 1 of the Sherman Act for price fixing. The key elements of each of the Settlements are:

- The certification as to the Settling Defendants, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3), of a Settlement Class of direct purchasers from specified Defendant plants, the appointment of the certain Plaintiffs to represent the Settlement Class, and the appointment of Interim Co-Lead Counsel as Settlement Class Counsel;
- The issuance of notice of each Settlement, by mail to known Settlement Class members and by publication twice in the *Sioux City Journal* and additional newspapers recommended by the claims and notice administrator, that advise members of the Settlement Class of the terms of the Settlement and their right to exclude themselves from or object to the Settlement;
- The scheduling of a final fairness hearing to consider whether the Settlements should be finally approved;
- The payment by the Settling Defendants of their respective share of the settlement amounts set forth in each Settlement Agreement, in installments, into a Settlement Fund for the benefit of the respective Settlement Class;
- The cooperation and assistance of Settling Defendants and their officers in the Plaintiffs' prosecution of this action against any Defendant that may not settle (for example in the event a Defendant has and exercises a right of withdrawal), including as necessary affidavits and declarations under oath, trial testimony, and depositions if the Settling Defendant's cooperation cannot be secured voluntarily;
- The cooperation and assistance of Settling Defendants in the issuance of notice and administration of claims by Settlement Class Counsel and the claims and notice administrator; and

- The release of claims that were or could have been asserted in this action against the Settling Defendants and related persons by the Plaintiffs and Settlement Class members, and
- A final judgment dismissing the Plaintiffs' and Settlement Class members' claims against the Settling Defendants.

The Settlements do not result in a release or dismissal of the claims of the Plaintiffs and Settlement Class Members against any Defendants who are not parties to the respective Settlement. Levin Dec. ¶12.

The Settlement payments will be deposited into a secure account established by Settlement Class Counsel for each Settlement at a commercial bank and maintained as the Settlement Fund. Settlement Class Counsel will seek permission from the Court to make distributions from each Settlement Fund to Settlement Class members who submit qualifying claims. Settlement Class Counsel will propose a process of claims administration that utilizes purchase information for Settlement Class members already known to Settlement Class Counsel in order to minimize the effort required to submit a qualifying claim and maximize the participation of Settlement Class members. Settlement Class Counsel will propose a distribution of amounts from each Settlement Fund net of any attorneys' fees, costs and expenses awarded by the Court, in direct proportion to the amount of a Settlement Class member's purchases of ready-mixed concrete from the Settling Defendants during the relevant Class Period. The proposed claims process would occur promptly after the Court has granted final approval to the Settlements and all settlement payments have been made. Levin Dec. ¶13.

Standard for Preliminary Approval

Under Rule 23(e), "The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Court approval may only be granted to a class settlement after notice in a reasonable manner is given to class members who will be bound by the settlement, granting them a right to object or exclude themselves, and only after a subsequent hearing and a finding that the settlement is "fair, reasonable and adequate." *Id*. When applying Rule 23 to consider settlement approval, "the district court acts as a fiduciary, serving as a guardian of the rights of absent class members." *In re Wireless Telephone Federal Cost Recovery Fees Litigation,* 396 F.3d 922, 932 (8th Cir. 2005), citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975). A district court's approval of a class action settlement is reviewed for an abuse of discretion. *Id*.

Settlements are strongly favored by the courts as a method of resolving litigation. *Justine Realty v. American Nat. Can Co.*, 976 F.2d 385, 391 (8th Cir. 1992). In class actions the policy favoring settlements has been found to be particularly strong:

> In the class action context in particular, "there is an overriding public interest in favor of settlement." Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources.

Armstrong v. Board of School Directors of City of Milwaukee, 616 F.2d 305, 313 (7th Cir. 1980), citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). The U.S. Court of Appeals for the Eighth Circuit has held that settlements should be deemed presumptively valid. *Petrovic v. Amoco Oil Co.,* 200 F.3d 1140, 1148 (8th Cir. 1999) ("[S]trong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor.")

It is well established that a district court's approval of a class action settlement should proceed in two steps. The first step is to determine whether to preliminarily approve the

settlement, conditionally certify a settlement class and to notify class members of the pending settlement and their right to participate in a final fairness hearing. The second step is the fairness hearing itself, which can occur only after class members have been notified of their right to participate in the hearing or to opt out of the class altogether. *See* Federal Judicial Center's Manual for Complex Litigation, Fourth §§ 21.632-33 (2010).

Before granting final approval, "[a] district court is required to consider four factors in determining whether a settlement is fair, reasonable, and adequate: (1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement." *In re Wireless Telephone,* 396 F.3d at 932, citing *Grunin,* 513 F.2d at 124; *Van Horn v. Trickey,* 840 F.2d 604, 607 (8th Cir. 1988). For purposes of preliminary approval the burden of satisfying these requirements is somewhat lessened. "At the preliminary approval stage, the 'fair, reasonable, and adequate' standard is lowered, with emphasis only on whether the settlement is within the range of possible approval due to an absence of any glaring substantive or procedural deficiencies." *Schoenbaum v. E.I. DuPont De Nemours & Co.,* 2009 WL 4782082, *3 (E.D. Mo. Dec. 8, 2009), citing *White v. Nat'l Football League,* 836 F.Supp. 1458, 1466 (D. Minn. 1993); *Schwartz v. Dallas Cowboys Football Club, Ltd.,* 157 F.Supp.2d 561, 570 (E.D. Pa. 2001).

The Court Should Preliminarily Approve the Settlements

One court has observed that the "bar is low" when considering a settlement for preliminary approval. *In re Bromine Antitrust Litig.,* 203 F.R.D. 403, 416 (S.D. Ind. 2001). But even without a "low bar," the presumption of reasonableness, or the lower standard applied to preliminary approval, the Settlements presented to the Court in this case easily satisfy the factors

relevant at the preliminary approval stage for finding a settlement fair, reasonable and adequate.[8] The Settlements are therefore well within "the range of possible approval." *Schoenbaum,* 2009 WL 4782082, *3.

1. The Merits of the Plaintiffs' Case Weighed Against the Terms of the Settlements.

Although the Plaintiffs are confident that they would prevail on behalf of each proposed Class if this matter proceeded to trial, there are significant risks remaining in the case that could prevent or at least minimize a significant recovery. Undoubtedly, the criminal guilty pleas, the record on sentencing and the investigative materials obtained from the Federal Bureau of Investigation ("FBI") and Department of Justice ("DOJ") would aid the Plaintiffs in reaching trial and presenting their case. Nonetheless, these materials, and the discovery obtained to date from Defendants, do not guarantee a result for the proposed Classes commensurate with the proposed settlement benefits. Levin Dec. ¶14.

Before obtaining class-wide relief Plaintiffs would need to successfully obtain class certification and survive any appeal of the certification decision, either before trial pursuant to Rule 23(f) or after a trial on the merits. At this time, class certification has been briefed by the Plaintiffs but Defendants have not filed opposing briefs or an opposing expert opinion. Defendants have made it clear that, but for the settlements, they would vigorously oppose class certification. Class certification remains a significant point of risk, and a denial of certification would make it extremely difficult and costly for most Class members to obtain relief. Levin Dec. ¶15.

Similarly, risks remain in the case on the merits. At the time of settlement, Defendants' motions to dismiss the Second Amended Complaint have not been addressed by the Court. Nor

[8] The fourth factor, "the amount of opposition to the settlement," *In re Wireless Telephone,* 396 F.3d at 932, cannot be considered until notice is provided to members of the Classes.

have the parties engaged in summary judgment practice. And, of course, Plaintiffs would have to prove their entitlement to a judgment at trial and successfully defend any appeal if they prevailed. Despite the strength of the merits-related evidence in this case, motion practice or the results of a trial could prevent recovery in a complex matter such as this. Levin Dec. ¶16.

Finally, even if they were to prevail at trial as to liability, Plaintiffs would still face aggressive opposition on the measure of damages. The parties are in sharp disagreement over the impact of the Defendants' antitrust conduct, and any jury would be presented with vastly differing analyses of impact and damages. Thus, a win at trial could be for an amount far less than Plaintiffs seek and for far less than the proposed Settlements. Further, even a substantial judgment for the proposed Classes would have to be collected from the Defendants, an effort that is itself fraught with risk and expense. At the very least, a trial and collection proceedings would substantially delay any recovery for the Classes. Levin Dec. ¶17.

In the face of these uncertainties, the Plaintiffs have negotiated three extremely favorable Settlements. During settlement negotiations, Plaintiffs used the detailed damages analysis of their expert, Russell Mangum, as a touchstone for obtaining a fair result for Class members. In the end, each Settlement will permit members of the corresponding proposed Settlement Class to recover on a pro rata basis at least the approximate full value of the preliminary single damages calculation of Plaintiffs' expert, even if the Court chooses to award the Plaintiffs' anticipated requested attorneys' fees, incentive awards, settlement expenses, and costs of litigation. *See* Amended Mangum Report, ¶¶ 176-78, Tables 24-26 (Dkt. 229). In exchange, the Class members grant only a release of the claims for which they are receiving compensation. Levin Dec. ¶18.

When weighed against the strength of the proposed Classes' claims, as well as the risks of continued litigation, these settlement terms easily fall not only within a range of possible approval but also warrant final approval after notice to Class Members and a final fairness hearing.

2. The Defendants' Financial Condition.

During settlement negotiations, the financial condition of all Defendants was raised as an important factor. Interim Co-Lead Counsel were able to assess the financial condition of several Defendants from information presented during criminal sentencing. For other Defendants Interim Co-Lead Counsel requested and obtained additional financial information. In one instance, Counsel also employed a Certified Public Accountant to review financial records and interview a Defendant representative. Levin Dec. ¶19.

For each Defendant, Interim Co-Lead Counsel are confident that the Defendant's settlement obligations are consistent with their financial condition and ability to pay. Many or all Defendants are liquidating or even retrieving already-transferred assets in order to pay their settlement amounts, including assets that would be difficult or impossible to reach to satisfy a judgment. More importantly, however, none of the settlements reflect a significant discount based upon a Defendant's inability to pay. Despite significant financial strain for some Defendants, and a difficult economy for the foreseeable future, Plaintiffs succeeded in obtaining settlement benefits that would be highly favorable even if ability to pay were not an issue. Levin Dec. ¶20.

3. The Complexity and Expense of Further Litigation.

As discussed above, continued litigation would require the Plaintiffs to address and overcome several significant hurdles, including class certification, proof of impact and damages,

a likely appeal and collection. These issues are complex and would entail substantial expense and risk. Trying the case to a jury on behalf of three separate Classes for three separate antitrust conspiracies would exacerbate the already substantial complexity and expense of class action antitrust litigation and impose a significant risk of an unfavorable outcome. Although the Plaintiffs are confident that they would prevail if litigation continued, these factors weigh heavily in favor of the preliminary and final approval of these Settlements.

The Court Should Conditionally Certify the Settlement Classes

In each of the Settlements, the parties have stipulated to the certification of a Settlement Class as against certain Settling Defendants. The Alliance/Tri-State Settlement requests the certification of the following Alliance/Tri-State Settlement Class:

> Direct purchasers of Ready-Mix Concrete who purchased Ready-Mix Concrete from January 1, 2006 through December 31, 2009 directly from the Hawarden, Orange City, Sioux Center, and Sheldon plants that were formerly owned by VS Holding and that GCC Alliance acquired on January 14, 2008, and the Tri-State Rock Valley plant, but excluding federal government entities, Defendants named in the Second Amended Consolidated Class Action Complaint in the above-captioned consolidated action pending in the United States District Court for the Northern District of Iowa and their co-conspirators and respective predecessors, parents, subsidiaries, and affiliates.

The Alliance/Tri-State Settlement also requests the appointment of Plaintiffs Brown Commercial Construction, Inc., Frank Audino Construction, Inc., Randy Waterman, and Holtze Construction Company as Settlement Class Representatives and Interim Co-Lead Counsel as Settlement Class Counsel.

The Alliance/Great Lakes Settlement requests the certification of the following Alliance/Great Lakes Settlement Class:

> Direct purchasers of Ready-Mix Concrete who purchased Ready-Mix Concrete from January 1, 2006 through December 31, 2009 directly from the Hartley, Lake Park, Sanborn, Sibley, and Spencer plants that were formerly owned by VS Holding and that GCC Alliance acquired on January 14, 2008, and the Great

> Lakes Ocheyden, Milford, Spencer, or Spirit Lake plants, but excluding federal government entities, Defendants named in the Second Amended Consolidated Class Action Complaint in the above-captioned consolidated action pending in the United States District Court for the Northern District of Iowa, and their co-conspirators and respective predecessors, parents, subsidiaries, and affiliates.

The Alliance/Great Lakes Settlement also requests the appointment of Plaintiff Brown Commercial Construction, Inc. as Settlement Class Representative and Interim Co-Lead Counsel as Settlement Class Counsel.

The Alliance/Siouxland Settlement Agreement requests the certification of the following Alliance/Siouxland Settlement Class:

> Direct purchasers of Ready-Mix Concrete who purchased Ready-Mix Concrete from July 1, 2008 through December 31, 2009 directly from the GCC Alliance Le Mars North, Le Mars South, Remsen, Akron, Moville, and Sergeant Bluff plants, and the Siouxland 11th Street and Steuben Street plants located in Sioux City, Iowa and the South Sioux City, Nebraska plant, but excluding federal government entities, Defendants named in the Second Amended Consolidated Class Action Complaint in the above-captioned consolidated action pending in the United States District Court for the Northern District of Iowa and their co-conspirators and respective predecessors, parents, subsidiaries, and affiliates.

The Alliance/Siouxland Settlement also requests the appointment of Plaintiffs Frank Audino Construction, Inc., Sioux City Engineering Co., the City of Le Mars, Iowa, Brown Commercial Construction, Inc., and Holtze Construction Company as Settlement Class Representatives and Interim Co-Lead Counsel as Settlement Class Counsel.

In order to be certified under Rule 23, proposed classes must meet all four requirements of Rule 23(a) and one of the three sub-sections of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Rule 23's standards for class certification – apart from consideration of whether the case would be manageable to try as a class action – are equally applicable and rigorous in the settlement context. *Id.*, 521 U.S. at 620. In *Amchem*, the Supreme Court noted that Rule 23(b)(3)'s predominance requirement is "readily

met" in antitrust cases like this one. *Id.*, 521 U.S. at 625. Indeed, in *Amchem,* the United States Supreme Court recognized that "[s]ettlement is relevant to class certification." *Id.*, 521 U.S. at 619. "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Id.* at 620 (citing Fed. R. Civ. P. 23(b)(3)(D)).

Unlike some settlement-approval scenarios, the Court here has the benefit of Plaintiffs' submissions on the issue of class certification. For each of the proposed Settlement Classes, Plaintiffs have presented a detailed assessment of each element of Rule 23(a) and the "predominance" and "superiority" requirements of Rule 23(b), supported by an appendix of supporting documentary evidence and a detailed expert report. *See* Brief in Support of Plaintiffs' Motion for Class Certification (Dkt. 217) ("Class Brief"); Declaration of Irwin B. Levin in Support of Plaintiffs' Motion for Class Certification (Dkt. 218); Amended Mangum Report (Dkt. 229). Plaintiffs have incorporated these documents herein.

Thus, Plaintiffs have already presented cogent argument and supporting evidence establishing numerosity (Class Brief at 61), commonality (*id*. at 61-64), typicality (*id*. at 64-66), adequacy (*id*. at 66-67), predominance (*id*. at 68-78), and superiority (*id*. at 78-80) – supported by the detailed economic analysis of Russell Mangum, PhD – for each of the same direct purchaser Classes that are requested in the Settlements. The briefing and evidence in the record, particularly when combined with the Defendants' stipulations to conditional certification, easily support the Court's certification of the proposed Settlement Classes for the purpose of issuing notice and proceeding to final approval.

The Proposed Form and Manner of Notice

In addition to the certification of the Settlement Classes, the Settlements set forth a comprehensive method of providing effective notice of the Settlement to Class members. Due process requires direct notice to all class members who can be identified through reasonable effort. *See Eisen v. Carlisle & Jacqueline,* 417 U.S. 156, 173-77 (1974); *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985). The Settlements call for direct mail notice to all persons falling within the Settlement Class definitions, based upon information that has been provided by Defendants. Each of the mailed notices, in the question-and-answer format proposed by the Federal Judicial Center for class action settlement notices, provides a thorough explanation of the pertinent Settlement and Class members' rights and exceeds the basic requirements of Rule 23(e). The form of each proposed mailed notice is attached to the Settlements as Exhibit "A."

For potential class members who cannot be identified through reasonable efforts or who have changed addresses, notice by publication is recognized as a suitable method for providing notice of the litigation and certification order. WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D, § 1786. *See also* ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS (4th ED.), § 8:2. The Settlements also call for published notice to appear twice in the *Sioux City Journal* and additional newspapers recommended by the notice and claims administrator. Local publications have already been identified for this purpose in several Counties in which Class members are likely to be located. Though a summary, each proposed published notice also provides a thorough explanation of the pertinent Settlement and Class members' rights. It also explains that additional information can be obtained from Settlement Class Counsel, from the notice and claims administrator, and from a website that will provide

additional information and access to documents from the litigation and the Settlements. The form of the proposed published notice is attached to each Settlement as Exhibit "B."

This combination of mailed and published notices provides "notice in a reasonable manner to all class members who would be bound by the proposal," as required by Rule 23(e)(1). As required under Rule 23(c)(2), the notices also provide "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," including a clear statement of: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3). The Court should therefore approve the proposed methods and form of notice and direct their consummation according to the terms of the Settlements.

Conclusion

In light of the foregoing, the Plaintiffs respectfully request the Court's preliminary approval of the Settlements, preliminary certification of the Settlement Classes, approval of the forms and method of notice of the Settlements to members of the Settlement Classes, and approval and entry of the Preliminary Approval Orders in the form attached to the Settlements as Exhibit "C" and submitted herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2011, the attached document was 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.

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