

EXHIBIT D

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)

DEFENDANT SIOUXLAND CONCRETE COMPANY'S
MEMORANDUM OF LAW IN SUPPORT OF
ITS MOTION FOR FINDING OF "SATISFACTORY COOPERATION"

Defendant Siouxland Concrete Company ("Siouxland") has moved for a determination by this Court that pursuant to Section 213(b) of the Antitrust Criminal Penalty Enforcement and Reform Act of 2004 ("ACPERA"), Siouxland provided "satisfactory cooperation" in this matter and is therefore entitled to the limitation of damages provided thereunder.

Factual Background

In March of 2009, Siouxland, through its counsel, advised the Antitrust Division of the United States Department of Justice ("DOJ") of a violation of the Sherman Act, 15 U.S.C. § 1. *See* Declaration of David E. Everson, attached hereto as Exhibit 1, ¶ 2. Following its investigation and with Siouxland's cooperation, DOJ issued Siouxland a conditional agreement of leniency, which is attached hereto as Exhibit 2. *Id.* at ¶ 3. Siouxland must await the final sentencing related to this matter before receiving unconditional leniency.

Shortly after the initial civil actions were filed in this case, Siouxland's counsel contacted Irwin Levin, one of the counsel for the putative class, advised him of the conditional leniency and of Siouxland's intent to cooperate with Plaintiffs within the meaning of ACPERA. Exhibit 1, ¶ 4. Throughout the course of this litigation, Siouxland has provided information to Plaintiffs, made witnesses available, provided access to its facilities for Plaintiffs' expert and refrained from joining motions in opposition to Plaintiffs. *Id.* at ¶ 5.

Siouxland's cooperation has been noted by Plaintiffs in their Brief in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, the Reimbursement of Expenses, and Incentive Awards for Class Representatives (docket no. 286-2) ("Plaintiffs' Motion") and the Declaration of Irwin B. Levin in support thereof (docket no. 286-1) ("Levin Declaration"). Plaintiffs refer to a "series of meetings and interviews with Siouxland Concrete, its counsel and its current and former employees" as part of Siouxland's responsibilities under the conditions set forth in ACPERA. Plaintiffs' Motion, p. 4; Levin Declaration, ¶ 8. In particular, Plaintiffs state that

Class Counsel made every effort to maximize the cooperation provided by Siouxland, as well as by former Siouxland employees. These efforts resulted in information related to the three conspiracies and their participants, the characteristics of an participants in the relevant geographic and product markets, and the common methods and practices of manufacturing, marketing and selling RMC. These efforts also assisted in Class Counsel's conduct of further discovery.

Plaintiffs' Motion, pp. 4-5; Levin Declaration, ¶ 8. Furthermore, Plaintiffs note that Siouxland was the only defendant in the instant action that did not seek a dismissal of the claims against it, challenge Plaintiffs' efforts for class certification or portray the "geographic, temporal and monetary reach" of the conspiracies at issue as "highly limited." Plaintiffs' Motion, p. 3; Levin Declaration, ¶ 5. Thus, Plaintiffs themselves appear to be satisfied with Siouxland's cooperation in this matter.

Argument

Section 213(a) of ACPERA provides that the damages faced by a leniency applicant who provides "satisfactory cooperation" as defined in subsection (b) "shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation." Antitrust Criminal Penalty

Enforcement and Reform Act of 2004, Pub. L. No. 108-237, Title II, § 213(a), 118 Stat. 665, 666 (2004). A corporate leniency applicant attains "satisfactory cooperation" by

- (1) providing a full account to the claimant of all facts known to the applicant that are potentially relevant to the instant action;
- (2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody or control of the applicant, wherever they are located; and
- (3) using its best efforts to secure and facilitate cooperation from its current or former directors, officers and employees by:
 - a) making them available for interviews and depositions in connection with the civil action as the claimant may reasonably required; and
 - b) encouraging them to respond completely and truthfully, without making any attempt to either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews and depositions associated with the civil action.

See id. at § 213(b). The determination of whether the leniency applicant provided "satisfactory cooperation" is for the trial court. *Id.*

Throughout the course of this litigation, Siouxland used its best efforts to cooperate with Plaintiffs. Siouxland took responsibility for its actions and sought to make amends. The Plaintiffs do not oppose Siouxland's motion and have highlighted in their independent pleadings the extent to which Siouxland has cooperated herein. For the foregoing reasons, Siouxland respectfully requests that this Court enter an Order: (i) finding that Siouxland has provided Plaintiffs with "satisfactory cooperation" under Section 213(b) of the Statute, and (ii) pursuant to

Section 213(a) of the Statute, limiting the damages recoverable against Siouxland for its wrongful conduct, so that Siouxland is not subject to treble damages or joint and several liability.

DATED this 17th day of October, 2011.

Respectfully submitted,
STINSON MORRISON HECKER LLP

/s/ David E. Everson

David E. Everson (*pro hac vice*)

Mark S. Foster (*pro hac vice*)

Misty Cooper Watt (*pro hac vice*)

1201 Walnut, Suite 2900

Kansas City, MO 64106

Telephone: (816) 842-8600

Facsimile: (816) 691-3495

deverson@stinson.com

mfooster@stinson.com

mwatt@stinson.com

Bryan S. Hatch, Iowa #AT0009481

1299 Farnam Street, Suite 1500

Omaha, NE 68102

Telephone: (402) 342-1700

Facsimile: (402) 930-1701

bhatch@stinson.com

Attorneys for Defendant Siouxland Concrete Co.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 17, 2011, a true and correct copy of the forgoing was electronically transmitted to the Clerk of the Court using the ECF System for filing, which served notice on all registered counsel of record.

/s/ David E. Everson

Attorney for Defendant Siouxland Concrete Co.

EXHIBIT 1

**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)**

ORDER

DECLARATION OF DAVID E. EVERSON

David E. Everson declares as follows:

1. I am a partner in the firm of Stinson Morrison Hecker LLP. I represent the defendant Siouxland Concrete Company ("Siouxland") in this action. I have personal knowledge of the facts stated in this Declaration.

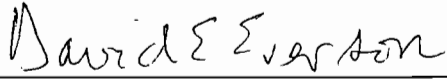
2. In March of 2009, on behalf of Siouxland, I advised the Antitrust Division of the United States Department of Justice ("DOJ") of a violation of the Sherman Act, 15 U.S.C. § 1.

3. Following its investigation and with Siouxland's cooperation, DOJ issued Siouxland a conditional agreement of leniency under the terms of the DOJ's Corporate Leniency Policy (the "Conditional Agreement"). A true and accurate copy of the Conditional Agreement is attached to Siouxland's Memorandum of Law in Support of its Motion for Finding of "Satisfactory Cooperation" as Exhibit 2.

4. Shortly after the initial civil actions were filed in this case, Siouxland's counsel contacted Irwin Levin, one of the counsel for the putative class, advised him of the conditional leniency and of Siouxland's intent to cooperate with Plaintiffs within the meaning of the Antitrust Criminal Penalty Enforcement and Reform Act of 2004 ("ACPERA").

5. Throughout the course of this litigation, Siouxland has provided information to Plaintiffs, made witnesses available, provided access to its facilities for Plaintiffs' expert and refrained from joining motions in opposition to Plaintiffs.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 13, 2011.



David E. Everson

EXHIBIT 2



U. S. Department of Justice

Antitrust Division

Office of the Deputy Assistant Attorney General

950 Pennsylvania Ave., NW, Suite 3218
Washington, D.C. 20530-0001

RECEIVED

SEP 03 2008

Siouxland Concrete Co.
c/o David Everson, Esq.
Stinson Morrison Hecker LLP
1201 Walnut, Suite 2900
Kansas City, MO 64106

Dear Mr. Everson:

This letter sets forth the terms and conditions of an agreement between the Antitrust Division of the United States Department of Justice and Siouxland Concrete Co. ("Applicant"), in connection with bid rigging or other conduct constituting a criminal violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, in the ready-mix concrete industry in Sioux City, Iowa and surrounding areas. This Agreement is conditional and depends upon Applicant (1) establishing that it is eligible for leniency as it represents in paragraph 1 of this Agreement, and (2) cooperating in the Antitrust Division's investigation as required by paragraph 2 of this Agreement. After Applicant establishes that it is eligible to receive leniency and provides the required cooperation, the Antitrust Division will notify Applicant in writing that it has been granted unconditional leniency. It is further agreed that disclosures made by counsel for Applicant in furtherance of the leniency application will not constitute a waiver of the attorney-client privilege or the work-product privilege. Applicant represents that it is fully familiar with the Antitrust Division's Corporate Leniency Policy dated August 10, 1993 (attached), which is incorporated by reference herein.¹

AGREEMENT

1. **Eligibility:** Applicant desires to report to the Antitrust Division bid-rigging activity or other conduct constituting a criminal violation of Section 1 of the Sherman Act in the ready-mix concrete industry in Sioux City, Iowa and surrounding areas ("the anticompetitive activity being reported"). Applicant represents to the Antitrust Division that it is eligible to receive leniency in that, in connection with the anticompetitive activity being reported, it:

- (a) took prompt and effective action to terminate its participation in the anticompetitive activity being reported upon discovery of the activity; and
- (b) did not coerce any other party to participate in the anticompetitive activity being reported and was not the leader in, or the originator of, the activity.

¹ For a further explanation of the Antitrust Division's Corporate Leniency Policy and how the Division interprets the policy, see Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (November 19, 2008), available at <http://www.usdoj.gov/atr/public/criminal/leniency.htm>.

Applicant agrees that it bears the burden of proving its eligibility to receive leniency, including the accuracy of the representations made in this paragraph and that it fully understands the consequences that might result from a revocation of leniency as explained in paragraph 3 of this Agreement. As used in this Agreement, discovery of the anticompetitive activity being reported means discovery by the authoritative representatives of Applicant for legal matters, either the board of directors or counsel representing Applicant.

2. Cooperation: Applicant agrees to provide full, continuing, and complete cooperation to the Antitrust Division in connection with the anticompetitive activity being reported, including, but not limited to, the following:

- (a) providing a full exposition of all facts known to Applicant relating to the anticompetitive activity being reported;
- (b) providing promptly, and without requirement of subpoena, all documents, information, or other materials in its possession, custody, or control, wherever located, not privileged under the attorney-client privilege or work-product privilege, requested by the Antitrust Division in connection with the anticompetitive activity being reported, to the extent not already produced;
- (c) using its best efforts to secure the ongoing, full, and truthful cooperation of the current directors, officers, and employees of Applicant, and encouraging such persons voluntarily to provide the Antitrust Division with any information they may have relevant to the anticompetitive activity being reported;
- (d) facilitating the ability of current directors, officers, and employees to appear for such interviews or testimony in connection with the anticompetitive activity being reported as the Antitrust Division may require at the times and places designated by the Division;
- (e) using its best efforts to ensure that current directors, officers, and employees who provide information to the Antitrust Division relevant to the anticompetitive activity being reported respond completely, candidly, and truthfully to all questions asked in interviews and grand jury appearances and at trial;
- (f) using its best efforts to ensure that current directors, officers, and employees who provide information to the Antitrust Division relevant to the anticompetitive activity being reported make no attempt either falsely to protect or falsely to implicate any person or entity; and

- (g) making all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution to any person or entity injured as a result of the anticompetitive activity being reported, in which Applicant was a participant. However, Applicant is not required to pay restitution to victims whose antitrust injuries are independent of any effects on United States domestic commerce proximately caused by the anticompetitive activity being reported.

3. Corporate Leniency: Subject to verification of Applicant's representations in paragraph 1 above, and subject to its full, continuing, and complete cooperation, as described in paragraph 2 above, the Antitrust Division agrees conditionally to accept Applicant into Part A of the Corporate Leniency Program, as explained in the attached Corporate Leniency Policy. Pursuant to that policy, the Antitrust Division agrees not to bring any criminal prosecution against Applicant for any act or offense it may have committed prior to the date of this letter in connection with the anticompetitive activity being reported. The commitments in this paragraph are binding only upon the Antitrust Division, although, upon request of Applicant, the Division will bring this Agreement to the attention of other prosecuting offices or administrative agencies. If at any time before Applicant is granted unconditional leniency the Antitrust Division determines that Applicant (1) contrary to its representations in paragraph 1 of this Agreement, is not eligible for leniency or (2) has not provided the cooperation required by paragraph 2 of this Agreement, this Agreement shall be void, and the Antitrust Division may revoke the conditional acceptance of Applicant into the Corporate Leniency Program. Before the Antitrust Division makes a final determination to revoke Applicant's conditional leniency, the Division will notify counsel for Applicant in writing of the recommendation of Division staff to revoke the conditional acceptance of Applicant into the Corporate Leniency Program and will provide counsel an opportunity to meet with the Division regarding the potential revocation. Should the Antitrust Division revoke the conditional acceptance of Applicant into the Corporate Leniency Program, the Antitrust Division may thereafter initiate a criminal prosecution against Applicant, without limitation. Should such a prosecution be initiated, the Antitrust Division may use against Applicant in any such prosecution any documents, statements, or other information provided to the Division at any time pursuant to this Agreement by Applicant or by any of its current directors, officers, or employees. Applicant understands that the Antitrust Division's Leniency Program is an exercise of the Division's prosecutorial discretion, and Applicant agrees that it may not, and will not, seek judicial review of any Division decision to revoke its conditional leniency unless and until it has been charged by indictment or information for engaging in the anticompetitive activity being reported.

4. Non-Prosecution Protection For Corporate Directors, Officers, And Employees: Subject to verification of Applicant's representations in paragraph 1 above, and subject to Applicant's full, continuing, and complete cooperation as described in paragraph 2 above, the Antitrust Division agrees that current directors, officers, and employees of Applicant who admit to the Division their knowledge of, or participation in, and fully and truthfully cooperate with the Division in its investigation of, the anticompetitive activity being reported, shall not be prosecuted criminally by the Antitrust Division for any act or offense committed during their period of

employment at Applicant prior to the date of this letter in connection with the anticompetitive activity being reported. Such full and truthful cooperation shall include, but not be limited to:

- (a) producing in the United States all documents and records, including personal documents and records, and other materials, wherever located, not privileged under the attorney-client privilege or work-product privilege, requested by attorneys and agents of the United States in connection with the anticompetitive activity being reported;
- (b) making himself or herself available for interviews in the United States upon the request of attorneys and agents of the United States in connection with the anticompetitive activity being reported;
- (c) responding fully and truthfully to all inquiries of the United States in connection with the anticompetitive activity being reported, without falsely implicating any person or intentionally withholding any information, subject to the penalties of making false statements (18 U.S.C. § 1001) and obstruction of justice (18 U.S.C. § 1503 *et seq.*);
- (d) otherwise voluntarily providing the United States with any materials or information, not requested in (a) - (c) of this paragraph and not-privileged under the attorney-client privilege or work-product privilege, that he or she may have relevant to the anticompetitive activity being reported; and
- (e) when called upon to do so by the United States, testifying in trial and grand jury or other proceedings in the United States, fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401-402), and obstruction of justice (18 U.S.C. § 1503 *et seq.*), in connection with the anticompetitive activity being reported.

The commitments in this paragraph are binding only upon the Antitrust Division, although, upon the request of Applicant, the Division will bring this Agreement to the attention of other prosecuting offices or administrative agencies. In the event a current director, officer, or employee of Applicant fails to comply fully with his or her obligations hereunder, this Agreement as it pertains to such individual shall be void, and any conditional leniency, immunity, or non-prosecution (hereinafter "conditional non-prosecution protection") granted to such individual under this Agreement may be revoked by the Antitrust Division. The Antitrust Division also reserves the right to revoke the conditional non-prosecution protection of this Agreement with respect to any current director, officer, or employee of Applicant who the Division determines caused Applicant to be ineligible for leniency under paragraph 1 of this Agreement, who continued to participate in the anticompetitive activity being reported after Applicant took action to terminate its participation

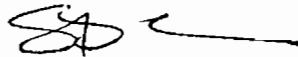
in the activity and notified the individual to cease his or her participation in the activity, or who obstructed or attempted to obstruct an investigation of the anticompetitive activity being reported at any time, whether the obstruction occurred before or after the date of this Agreement. Absent exigent circumstances, before the Antitrust Division makes a final determination to revoke an individual's conditional non-prosecution protection, the Division will notify counsel for such individual and Applicant's counsel in writing of the recommendation of Division staff to revoke the conditional non-prosecution protection granted to the individual under this Agreement and will provide counsel an opportunity to meet with the Division regarding the potential revocation. Should any conditional non-prosecution protection granted to an individual under this Agreement be revoked, the Antitrust Division may thereafter prosecute such individual criminally, without limitation, and may use against such individual in such prosecution any documents, statements, or other information which was provided to the Division at any time pursuant to this Agreement by Applicant or by any of its current directors, officers, or employees, including such individual. Judicial review of any Antitrust Division decision to revoke any conditional non-prosecution protection granted to an individual under this Agreement is not available unless and until the individual has been charged by indictment or information for engaging in the anticompetitive activity being reported.

5. Entire Agreement: This letter constitutes the entire agreement between the Antitrust Division and Applicant, and supersedes all prior understandings, if any, whether oral or written, relating to the subject matter herein. This Agreement cannot be modified except in writing, signed by the Antitrust Division and Applicant.

6. Authority And Capacity: The Antitrust Division and Applicant represent and warrant each to the other that the signatories to this Agreement on behalf of each party hereto have all the authority and capacity necessary to execute this Agreement and to bind the respective parties hereto.

The signatories below acknowledge acceptance of the foregoing terms and conditions.

Sincerely,



Scott D. Hammond
Deputy Assistant Attorney General
Antitrust Division

Date: 8/31/09

Date: _____

Kenton W. Sunderland
President
Siouxland Concrete Co.

David Everson

Date: October 26, 2009

David Everson, Esq.
Counsel for Siouxland Concrete Co.



Department of Justice

CORPORATE LENIENCY POLICY

The Division has a policy of according leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions. "Leniency" means not charging such a firm criminally for the activity being reported. (The policy also is known as the corporate amnesty or corporate immunity policy.)

A. Leniency Before an Investigation Has Begun

Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;

3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
5. Where possible, the corporation makes restitution to injured parties; and
6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

B. Alternative Requirements for Leniency

If a corporation comes forward to report illegal antitrust activity and does not meet all six of the conditions set out in Part A, above, the corporation, whether it comes forward before or after an investigation has begun, will be granted leniency if the following seven conditions are met:

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;
2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;

3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;

4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;

5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

6. Where possible, the corporation makes restitution to injured parties; and

7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

In applying condition 7, the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

C. Leniency for Corporate Directors, Officers, and Employees

If a corporation qualifies for leniency under Part A, above, all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation.

If a corporation does not qualify for leniency under Part A, above, the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually.

D. Leniency Procedure

If the staff that receives the request for leniency believes the corporation qualifies for and should be accorded leniency, it should forward a favorable recommendation to the Office of Operations, setting forth the reasons why leniency should be granted. Staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Director of Operations will review the request and forward it to the Assistant Attorney General for final decision. If the staff recommends against leniency, corporate counsel may wish to seek an appointment with the Director of Operations to make their

views known. Counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

Issued August 10, 1993