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

IN RE: IOWA READY-MIX CONCRETE ANTITRUST LITIGATION	**NO. C10-4038-MWB (Consolidated Cases)**

PLAINTIFFS' OMNIBUS OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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Plaintiffs Randy Waterman, Frank Audino Construction, Inc., Sioux City Engineering Co., the City of Le Mars, Iowa, and Sioux Contractors, Inc. ("Plaintiffs"), by their undersigned counsel, respectfully submit their Omnibus Opposition to Defendants' Motions to Dismiss.[1]

I. INTRODUCTION

All of the Defendants named to date[2] – either directly or through their principals – have admitted to engaging in discussions and entering agreements with other Defendants in order to artificially inflate or fix the price of ready mix concrete sold to their customers. They admit they did so by discussing projects, customers, price lists and bids, and by fixing or raising price lists and/or rigging bids, all in violation of the Sherman Act, 15 U.S.C. § 1. The Plaintiffs allege that these admitted criminal acts were part of a continuing combination and conspiracy among all Defendants to artificially inflate or fix the price of ready mix concrete, that the conspiracy was possible (*i.e.* "plausible") in part because it occurred in a market with all the characteristics conducive and necessary to an effective price-fixing conspiracy, and that the conspiracy

[1] This opposition responds to Defendant GCC Alliance Concrete, Inc.'s Motion to Dismiss Plaintiffs' Consolidated Complaint (Dkt. No. 149), Defendant Steven Keith VandeBrake's Motion to Dismiss Plaintiffs' Consolidated Complaint (Dkt. No. 150), Motion to Dismiss VS Holding Company (Dkt. No. 151), and Defendants Great Lakes Concrete, Inc.'s and Kent Stewart's Motion to Dismiss Plaintiffs' Consolidated Complaint (Dkt. No. 153). Each of the moving Defendants largely incorporated the arguments made by Defendant GCC Alliance Concrete, Inc.'s Brief in Support of Its Motion to Dismiss Plaintiffs' Consolidated Complaint (Dkt. No. 149-1) ("Defs.' Br.").

[2] In addition to the guilty pleas of Defendants Steven Vande Brake (of VS Holding and GCC Alliance) and Kent Williams (of Great Lakes Concrete), Defendant Siouxland Concrete Company, Inc. ("Siouxland") has confirmed in its Answer (Dkt. No. 152) that it engaged in antitrust violations and that it is the "antitrust leniency applicant" pursuant to § 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. Answer, ¶¶ 1-3, 40-42, 47-50, p. 9. In order to participate in the Department of Justice ("DOJ") Leniency Program, an applicant must confess to illegal antitrust activity. *See,* U.S. Dept. of Just., Antitrust Div., Corporate Leniency Policy, at http://justice.gov/atr/public/guidelines/0091.htm.

impacted the prices paid by all the Defendants' customers from at least January 2006 until at least April 2010.

In their nineteen pages of combined briefing, Defendants only raise two arguments against the sufficiency of Plaintiffs' Consolidated Class Action Complaint ("Complaint"): (1) that "there must be one named plaintiff that purchased from *each* of the defendants" (Defs.' Br. at 5) (emphasis added); and (2) that "Plaintiffs allege no facts of a direct agreement or conspiracy among any of the defendants *other than* the three separate and discrete agreements admitted in the plea agreements" (Defs.' Br. at 8) (emphasis added). Both arguments understate the reasonable inferences from the facts alleged and are inconsistent with controlling case law.

First, it is well settled that a class plaintiff has standing to pursue claims against every member of a conspiracy, even if that plaintiff did not make purchases from every defendant. *See* Part III.A. (below). Second, the Complaint plainly alleges a conspiracy among *all* Defendants affecting the price paid for ready-mix concrete by *all* of their customers. Such a conspiracy is highly plausible under *Bell Atlantic*[3] in light of the wide range of price-fixing conduct set forth in guilty pleas implicating every Defendant. As alleged by the Plaintiffs, these admissions include both broadly-described conduct of price-fixing among all Defendants as well as a host of specific acts of price-fixing between Defendants. When considered together with the specific characteristics of the relevant ready-mix concrete industry alleged by the Plaintiffs, these price-fixing allegations easily establish the plausibility of a conspiracy among all Defendants.

In any event, courts have already repeatedly rejected the attempt now made by Defendants to use the plea agreements as protection from more expansive liability. After all, it would be premature (and ill-advised) in a civil case to limit the scope of an alleged conspiracy to

[3] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

what has already been admitted in carefully-negotiated plea agreements in criminal proceedings (in which there is a higher standard of proof), or to require Plaintiffs to plead the minutiae of an admittedly secret conspiracy at this stage of the litigation. *See* Part III.B. (below).

Finally, VS Holding's separate argument that it should be dismissed from the case because of its sale of the assets of Alliance Concrete Inc. to GCC should similarly be rejected. VS Holding has not made the requisite showing to establish that the sale of its business was an effective withdrawal from the alleged price-fixing conspiracy, and courts nationwide have held that such sales do not warrant dismissal as a matter of course. Moreover, it is possible that the terms of the sale agreements themselves will be relevant to VS Holding's ongoing liability, a consideration inappropriate on a motion to dismiss. *See* Part III.C. (below).

II. COUNTER-STATEMENT OF FACTS

This Court is familiar with the criminal proceedings against the individual Defendants, Steven Keith VandeBrake and Kent Robert Stewart, that run parallel to this civil case. Nonetheless, Defendants VandeBrake and Stewart have each already pleaded guilty to criminal charges that correspond to the price-fixing alleged by Plaintiffs in the Complaint. (Complaint ¶¶ 43-46.) In addition to these guilty pleas, Defendant Siouxland admits in its Answer (Dkt. No. 152) that it engaged in illegal price-fixing activities which harmed class members:

> Siouxland admits that . . . it had conversations with Alliance Concrete Company about which company would have priority in discussions with certain customers. Siouxland further admits that those discussions violated § 1 of the Sherman Act. . . . Siouxland admits that as a result of its conversations with Alliance Concrete, certain customers paid higher prices on identifiable jobs for a limited period of time.

(Siouxland Answer ¶¶ 1-3.) Siouxland also admits that it is the "antitrust leniency applicant" pursuant to § 213 of ACPERA. (Answer at 9.) The criminal proceedings, which are also pending before the Court, are not yet fully resolved.

These admissions of conspiring to fix prices effectively implicate every Defendant in this case. Defendants VandeBrake, Stewart, and Siouxland have each directly admitted to the alleged price fixing. Defendant VandeBrake was a former employee of Defendant GCC Alliance and its predecessor, Defendant VS Holding (formerly known as Alliance Concrete) (Complaint ¶ 17), and he conducted the wrongdoing to which he has admitted as the agent of these two Defendants – a fact Defendants have conceded (*see* Defs.' Br. at 8). Similarly, as a former executive of Great Lakes, Defendant Stewart's plea implicates that Defendant as well. (Complaint ¶ 18.)

Contrary to Defendants' argument, the conduct to which VandeBrake admitted in his guilty plea includes not just agreements to rig bids on discrete projects, but also *agreements to fix prices generally.* Further, the geographical scope of this admitted conduct extends beyond the Northern District of Iowa. As VandeBrake's plea agreement states:

> For each count, . . . the defendant [VandeBrake] participated in a conspiracy with another company . . . the primary purpose of which was *to set agreed-upon prices, to set agreed-upon price increases*, and/or to submit non-competitive and rigged bids for ready-mix concrete sold in the Northern District of Iowa *and elsewhere.* During conversations between the co-conspirators, agreements were reached *to set agreed-upon prices, to set agreed-upon price increases*, and/or to submit non-competitive and rigged bids for ready-mix concrete to be sold in the Northern District of Iowa *and elsewhere*.

(*See* VandeBrake Plea Agreement ¶ 4 (emphasis added).)[4] VandeBrake also agreed to plead guilty to the criminal charges filed against him. (*Id*. ¶¶ 2-3.) The Information to which VandeBrake subsequently pleaded guilty included the following allegations:

> (a) engaging in discussions in the Northern District of Iowa concerning price increases for the conspirators' annual price lists for ready-mix concrete sold in the Northern District of Iowa;
>
> (b) agreeing during those discussions to raise prices on their respective price lists for ready-mix concrete sold in the Northern

[4] A copy of the VandeBrake plea agreement is available at http://justice.gov/atr/cases/f260100/260124.htm.

> District of Iowa; . . . .

(*See* VandeBrake Information ¶ 3.)[5]

The Plaintiffs allege an overarching conspiracy among all Defendants that is entirely consistent with these admissions (and with the more specific admissions on which Defendants rely):

> 2. Defendants and their co-conspirators carried out their unlawful combination by, *inter alia*, engaging in discussions about the price at which they would sell Ready-Mix Concrete or submit bids for the sale of Ready-Mix Concrete, agreeing to specific pricing levels and price lists for the sale of Ready-Mix Concrete, issuing price announcements or price quotations for the sale of Ready-Mix Concrete based on their agreements, rigging bids for the sale of Ready-Mix Concrete at collusive and noncompetitive prices, allocating customers and/or markets, and selling and receiving payment for Ready-Mix Concrete at agreed-upon supracompetitive prices.
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>
> 47. Throughout the Class Period, Defendants and their co-conspirators conspired to set agreed-upon prices, to set agreed-upon price increases, and to submit non-competitive and rigged bids for Ready-Mix Concrete sold in the Northern District of Iowa and elsewhere.
>
> 48. Throughout the Class Period, Defendants and their co-conspirators reached agreements to set agreed-upon prices, to set agreed-upon price increases, and to submit non-competitive and rigged bids for Ready-Mix Concrete sold in the Northern District of Iowa and elsewhere.
>
> 49. As a result of the combination and conspiracy between Defendants and their co-conspirators, the prices of Ready-Mix Concrete paid by the Plaintiffs and Class members were artificially sustained or increased.

(Complaint ¶¶ 2, 47-49.) "Class members" are defined by the Complaint as direct purchasers of ready-mix concrete from any of the Defendants from at least January 1, 2006 through at least April 26, 2010.[6] (Complaint, ¶ 7.)

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[5] A copy of the VandeBrake information is available at http://www.justice.gov/atr/cases/f260100/260126.pdf.

[6] The Defendants' focus on the "entire Iowa region" is misplaced. (*See, e.g.*, Brief in support of
(footnote continued …)

Defendants also ignore that Plaintiffs' Complaint pleads a host of factual allegations regarding the nature of the ready-mix concrete industry generally that support the plausibility of their claims. Among these allegations are that: (i) ready-mix concrete is manufactured, delivered and tested in common ways (Complaint ¶¶ 20-22); (ii) ready-mix concrete is sold and priced in common units (*id*. ¶ 23); (iii) that the ready-mix concrete industry in which Defendants conspired is highly concentrated with very few producers (*id.* ¶ 25); (iv) that the price of ready-mix concrete is inelastic, such that increases tend not to cause consumers to switch to other products (*id.* ¶¶ 26-28); and (v) that ready-mix concrete is an interchangeable commodity (*id.* ¶¶ 29–30). The Plaintiffs allege that these characteristics are conducive to, facilitate, and aid monitoring of price-fixing conduct.[7] (Complaint ¶¶ 20-30.)

III. ARGUMENT

The Court is well-acquainted with the legal standard established by Federal Rule of Civil Procedure 12(b)(6) following the Supreme Court's decision in *Bell Atlantic*. *See, e.g.*, *McFarland v. McFarland*, 684 F. Supp. 2d 1073, 1080-82 (N.D. Iowa 2010) (Bennett, J.) (discussing Fed. R. Civ. P. 12(b)(6) and *Bell Atlantic*); *Armstrong v. Am. Pallet Leasing, Inc.*, 678 F. Supp. 2d 827, 851-52 (N.D. Iowa 2009) (Bennett, J.) (same) *Leventhal v. Schaffer*, No. C 07-4059-MWB, 2009 U.S. Dist LEXIS 1569, *8-12 (N.D. Iowa Jan. 9, 2008) (Bennett, J.) (same). As this Court has stated, "a complaint attacked by a Rule 12(b)(6) motion to dismiss

(…footnote continued)
GCC's Motion to Dismiss (Dkt. No. 149-1) at 2, 4, 10.) The term appears only once, when describing concentration in the ready-mix industry. (Complaint ¶ 25.) The Complaint plainly alleges a conspiracy defined by its membership – the Defendants. (Complaint ¶¶ 7, 49.)

[7] *See, e.g., Todd v. Exxon Corp.*, 275 F.3d 191, 208 (2d Cir. 2001) ("Generally speaking, the possibility of anticompetitive collusive practices is most realistic in concentrated industries.").

does not need detailed factual allegations." *McFarland*, 684 F. Supp. 2d at 1081 (quoting *Bell Atlantic*). Rather, "the complaint must allege 'only enough facts to state a claim to relief that is plausible on its face.'" *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 569 F.3d 383, 387 (8th Cir. 2009) (quoting *Bell Atlantic*, 550 U.S. at 570). The Eighth Circuit has also held that the complaint should "be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009).

In evaluating whether a complaint states a claim, the Court must "accept as true the plaintiff's well pleaded allegations." *McFarland*, 684 F. Supp. 2d at 1081 (quoting *Parkhurst v. Tabor*, 569 F.3d 861, 865 (8th Cir. 2009)); *see also B&B Hardware*, 569 F.3d at 387 ("[W]e 'assume[ ] as true all factual allegations of the complaint'") (quoting *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007)). "The court must also still 'construe the complaint liberally in the light most favorable to the plaintiff.'" *McFarland*, 684 F. Supp. 2d at 1081 (quoting *Eckert v. Titan Tire Corp.*, 514 F.3d 801, 806 (8th Cir. 2008)); *see also MacDonald v. Summit Orthopedics, Ltd.*, 681 F. Supp. 2d 1019, 1022 (D. Minn. 2010) ("Any ambiguities concerning the sufficiency of the claims must be resolved in favor of the nonmoving party.").

As demonstrated below, Plaintiffs' Complaint satisfies these pleading standards.

A. <u>Plaintiffs Have Pleaded Their Standing to Sue All Defendants.</u>

Whether or not the Plaintiffs specifically purchased concrete from each and every Defendant is irrelevant because Plaintiffs' Complaint alleges an antitrust conspiracy for which Defendants are jointly and severally liable. Plaintiffs allege that the Defendants' conspiracy caused the ready-mix concrete prices paid by all of their customers during the Class Period to be artificially high, thereby causing Plaintiffs and the other Class members to incur antitrust

damages. (Complaint ¶¶ 3, 49, 56.) The Plaintiffs seek a finding of joint and several liability against all Defendants pursuant to federal law. (Complaint ¶ 4, and at p. 15.)

Courts nationwide have definitively held that a plaintiff has standing to pursue claims, on his own behalf or as a class representative, against defendant co-conspirators, even if he did not purchase from or deal with every defendant. *E.g.*, *Paper Syst. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 634 (7th Cir. 2002) ("If Nippon Paper participated in a cartel of thermal fax paper . . . then it is jointly and severally liable for the cartel's entire overcharge. That the plaintiffs did not buy from Nippon Paper directly, or at all, does not matter."); *Presidential Life Ins. Co. v. Milken*, 946 F. Supp. 267, 280 (S.D.N.Y. 1996) ("A class representative who alleges a conspiracy by a group of defendants has standing to sue each defendant, even if it did not enter into separate transactions with each defendant."); *Reiter v. Sonotone Corp.*, 486 F. Supp. 115, 120 (D. Minn. 1980) ("the purchaser from any member of a price-fixing conspiracy [i]s a direct purchaser"); *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 208 & n.8 (E.D. Pa. 2001) (rejecting defendants' argument that named plaintiffs were atypical or inadequate class representatives because they had purchased, with one minor exception, only from one defendant; "The fact that the purchases were not made from all the defendants, or that all of the methods through which the conspiracy was allegedly effected were not utilized against the named defendants is not dispositive of their ability to represent the class."), *aff'd*, 305 F.3d 145 (3d Cir. 2002); *In re Nasdaq Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 508 (S.D.N.Y. 1996) ("Because antitrust liability is joint and several, a Plaintiff injured by one Defendant as a result of a conspiracy has standing to represent a class of individuals injured by any of the Defendant's co-conspirators.").

None of the cases cited by Defendants has anything to do with antitrust standing, and none stands for the proposition that the Plaintiffs lack standing here. Each of the cases Defendants cite stands for the inapposite principle that a plaintiff must be injured. *See Allee v. Medrano*, 416 U.S. 802 (1974) ("a person cannot predicate standing on injury which he does not share");[8] *In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d 518, 522 ("a plaintiff must . . . suffer the same injury shared by all members of the class he represents"); *Karim v. AWB Ltd.*, No. 06-cv-15400, 2008 U.S. Dist. LEXIS 76796, at *20 (S.D.N.Y. Sept. 30, 2008) ("[N]amed plaintiffs who represent a class must allege and show that they personally have been injured."); *German v. Fed. Home Loan Mortgage Corp.*, 885 F. Supp. 537, 547 (S.D.N.Y. 1995) ("a plaintiff may not use the procedural device of a class action to bootstrap himself into standing *he lacks under the express terms of the substantive law*") (emphasis added).

Each Plaintiff alleges that they have been injured through their direct purchases of ready-mix concrete from one or more of the Defendants, and Defendants do not question the sufficiency of these allegations. (Complaint ¶¶ 8-12.) Thus, each Plaintiff has standing to sue each Defendant.

B. Plaintiffs' Complaint Alleges a Price Fixing Conspiracy Among All Defendants.

Every Defendant named to date has either admitted to price-fixing, or been implicated by a principal's admission to price-fixing, in the ready-mix concrete market in northwest Iowa and into surrounding states during the same or overlapping periods of time. It is therefore at least plausible – given the host of offenses admitted, the unique suitability of the relevant ready-mix

[8] The language that Defendants rely on from *Allee* is from a *dissent*. (*See* Defs.' Br. at 5–6 (quoting *Allee*, 416 U.S. at 828-29 (Burger, C.J., dissenting)).) The majority in *Allee* upheld the plaintiff labor union's standing to sue on behalf of its members. *See Allee*, 416 U.S. at 819 n.13 ("In this case the union has standing as a named plaintiff to raise any of the claims that a member of the union would have standing to raise.").

concrete market to price-fixing, and the fact that Defendants were (absent the conspiracy) competitors for the same customers (Complaint ¶ 24) – that Defendants were in fact part of a conspiracy among all of them to fix or raise concrete prices. This is what the Plaintiffs allege.

Incredibly, though, the Defendants now argue that the admitted felonies of Steve VandeBrake and Kent Stewart actually *protect* all of them from any such broader inference. In fact, the Defendants seem to believe that the only facts available to the Plaintiffs in this case are the very narrowest statements set forth in the plea agreements of VandeBrake and Stewart.[9] This argument is untenable. There is simply no reason that a criminal defendant's carefully-negotiated and narrowly-worded guilty plea should set the outer bounds of "plausibility" in a victim's subsequent civil action for relief against that defendant. Any such rule would create a potential damages escape route for criminal conspirators and fraudsters.

More importantly, the admissions in the plea agreements (which are not as limited as the Defendants would claim) are wholly consistent with the overarching conspiracy among all Defendants alleged by the Plaintiffs. Indeed, even the most discrete confessions made by VandeBrake, Stewart and Siouxland (thus far), when coupled with the market conditions alleged by the Plaintiffs, support the plausibility of a conspiracy to fix prices among all Defendants. It is only by construing the Complaint's allegations *in favor of the Defendants* that the VandeBrake, Stewart and Siouxland admissions could be seen as limiting their potential liability and not as evidence of a broader conspiracy among all Defendants as alleged by the Plaintiffs.

[9] Defendants include a discussion of the various elements that Plaintiffs must plead (antitrust injury, causation, and damages) (*see* Defs. Br. at 7-8), but they do not dispute that Plaintiffs have adequately alleged causation and damages.

In *Packaged Ice*, on which Defendants heavily rely,[10] the court rejected Defendants' exact argument that the complaint should be limited to the plea agreements, stating: "Nor can this civil litigation be circumscribed or defined by the boundaries of the criminal investigations or plea agreements." 2010 U.S. Dist. LEXIS 65549, at *72-74 (citing *In re Vitamins Litig.*, No. 99-misc-197, 2000 U.S. Dist. LEXIS 7397, 2000 WL 1475705 at *11 (D.D.C. May 9, 2000) (rejecting the "notion that the guilty pleas and cooperation agreements and the class settlement foreclose a broader conspiracy. Guilty pleas are negotiated instruments which take into account not only the culpability of the accused but the Justice Department's resources and other cases requiring the government's attention."); *In re Polypropylene Carpet Antitrust Litig.*, 178 F.R.D. 603, 620 (N.D. Ga. 1997) ("[T]he court is aware of no authority that requires a civil antitrust plaintiff to plead only the facts of a prior criminal indictment. To the contrary, several cases flatly reject that theory.")).

The defendants in *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 599 F. Supp. 2d 1179 (N.D. Cal. 2009), raised similar arguments when both direct and indirect purchaser plaintiffs alleged a conspiracy extending back to 1996 even though defendants had only pled guilty to conspiring between 2001 and 2006. The court in that case agreed with plaintiffs "that there are any number of plausible reasons why the criminal guilty pleas would cover the 2001-2006 time

[10] Defendants reproduce at length the facts of *In re Packaged Ice Antitrust Litigation*, Case No. 08-MD-1952, 2010 WL 2671306 (E.D. Mich. July 1, 2010). (*See* Defs.' Br. at 10-13.) While Defendants attempt to marshal those facts to support dismissal, they have the opposite effect. First, the court in *Packaged Ice* held that the plaintiffs satisfied the pleading standards, denied the defendants' dismissal motions and sustained the complaint in all respects. Second, just as in *Packaged Ice*, the complaint here alleges multiple guilty pleas. Moreover, and similar to the situation in *Packaged Ice*, there is also a leniency applicant in this case (Siouxland). Plaintiffs here have thus pleaded their complaint with a level of specificity sufficient to satisfy Rule 8 and the result here should mirror that in *Packaged Ice*.

period while still allowing for civil liability during the 1996-2001 period, such as criminal statutes of limitation and higher burdens of proof in criminal cases" and decided not to "limit the class period at this stage of the litigation." *Id.* at 1185. The court denied motions to dismiss both the direct and indirect plaintiffs' complaints.

Similarly, in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583 (N.D. Cal. 2010), the court rejected the Defendants' attempt to "divide the alleged conspiracy into smaller pieces" in order to defeat the indirect purchaser plaintiffs' motion for class certification:

> The Court rejects defendants' attempts to recharacterize plaintiffs' allegations, as well as defendants' attempts to limit the alleged conspiracy by reference to the criminal guilty pleas and DOJ's statements. The Court agrees with plaintiffs that defendants may not recast plaintiffs' allegations, and plaintiffs have consistently alleged a single, overriding conspiracy spanning the entire class period. As plaintiffs note, the Supreme Court has held that "[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962). In addition, the scope and nature of the criminal guilty pleas are not determinative of the plaintiffs' potential claims in a civil antitrust suit.

Id. at 607. The same conclusion should prevail here.

The Defendants' arguments provide no reason to depart from these established holdings or to deprive Plaintiffs of the reasonable inferences and "benefit of the doubt" to which they are entitled under Rule 12(b)(6). Defendants do not even contest that the allegations based on the individual Defendants' guilty pleas are sufficient to plead a conspiracy under *Bell Atlantic*, and for good reason. Numerous post-*Bell Atlantic* decisions have upheld antitrust complaints supported by a defendant's guilty plea.[11] And nothing in *Bell Atlantic* requires that Plaintiffs

[11] *See, e.g., In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2010 U.S. Dist. LEXIS 65549, at *61 (E.D. Mich. July 1, 2010) ("The government investigations and guilty pleas of the various Defendants and their corporate executives support the plausibility of a nationwide conspiracy."); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 06-MD-1775 (JG) (VVP), 2009 U.S. Dist. LEXIS 97365, at *63-64 (E.D.N.Y. Aug. 21, 2009) (noting that certain defendants had
(footnote continued …)

guess correctly as to the exact nature and scope of Defendants' conspiracy at the complaint stage. The specific allegations of the Plaintiffs' Complaint easily establish the plausibility of the conspiracy among all Defendants that Plaintiffs assert. This is all that *Bell Atlantic* requires. 550 U.S. at 570 ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.").

Requiring Plaintiffs to plead the precise structure and details of the alleged conspiracy or its exact temporal and geographical scope would be inappropriate at this stage of the litigation. Indeed, conspiracies are by nature secretive, and Plaintiffs cannot be expected to know the precise circumstances of a conspiracy before having had a chance to conduct discovery. *See United States v. Pitre*, 960 F.2d 1112, 1121 (2d Cir. 1992) (quoting *United States v. Provenzano*, 615 F.2d 37, 45 (2d Cir. 1980)) ("[A] conspiracy by its very nature is a secretive operation, and it is a rare case 'where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel.'"); *NCR Credit Corp. v. Underground Camera, Inc.*, 581 F. Supp. 609, 611 (D. Mass. 1984) ("Given the secretive nature of conspiracies, parties are often unable to plead facts directly showing the existence of a conspiracy."). Given the higher burden of proof in a criminal case, prosecutorial discretion and the existence of negotiated guilty pleas, it is entirely

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(…footnote continued)
pled guilty and holding that "the admissions of price-fixing by so many of the defendants certainly 'are suggestive enough to render a § 1 conspiracy plausible'") (quoting *Bell Atlantic*, 550 U.S. at 556); *In re Korean Air Lines Co., Ltd. Antitrust Litig.*, MDL No. 07-01891, 2008 U.S. Dist. LEXIS 111722, at *33-34 (C.D. Cal. June 25, 2008) ("Unlike in *Twombly* . . . , where mere parallel conduct was insufficient to support the existence of a price-fixing conspiracy, the existence of such a conspiracy is beyond doubt in the present case given Korean Air's guilty plea."); *In re Graphics Processing Units Antitrust Litig.*, No. C 06 07417 WHA, 2007 U.S. Dist. LEXIS 57982, at *25 (N.D. Cal. July 27, 2007) ("Nor is this a case where it is almost certain that the complaint is viable, such as is often true where guilty pleas have already been entered in a parallel criminal case.").

plausible that the scope of admissions in the criminal informations and guilty pleas are narrower than that of the actual price-fixing conspiracy.

Finally, at a minimum, even if Plaintiffs' Complaint were strictly held to the discussions explicitly admitted in the guilty pleas (which, as explained above, it should not be), it is axiomatic that a plaintiff need not establish a direct agreement among all defendants in order to allege a conspiracy among them. Instead, 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. (Complaint ¶ 44.) The Eighth Circuit has applied this test for establishing a hub-and-spoke conspiracy in an antitrust context: "(1) that there is an overall-unlawful plan or 'common design' in existence; (2) that knowledge that others must be involved is inferable to each member because of his knowledge of the unlawful nature of the subject of the conspiracy but knowledge on the part of each member of the exact scope of the operation or the number of people involved is not required; and (3) there must be a showing of each alleged member's participation." *Impro Prods., Inc. v. Herrick*, 715 F.2d 1267, 1279 (8th Cir. 1983) (quoting *Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc.*, 459 F.2d 138, 146-47 (6th Cir. 1972)).[12] Each of those elements is satisfied here.

C. VS Holding's Sale of the Assets of Its Ready-Mix Concrete Business Does Not Establish Withdrawal from the Conspiracy.

VS Holding Company separately argues that, based solely on the sale of the assets of its ready-mix concrete business on January 14, 2008, it cannot be held liable for conduct occurring

[12] *See also AnchorBank, FSB v. Hofer*, No. 09-cv-610-slc, 2010 U.S. Dist. LEXIS 20259, at *12 (D. Wis. Mar. 5, 2010) ("A hub-and-spoke conspiracy does not require every alleged coconspirator to participate in every alleged overt act.") (citing *State v. Haynes*, 582 F.3d 686, 699 (7th Cir. 2009)).

after that date.[13] VS Holding's argument, which lacks legal support, runs aground on the well-settled principle that a conspirator is liable for all acts done in furtherance of the conspiracy, regardless of when the conspirator began or ceased its own involvement. *See United States v. Patel*, 879 F.2d 292, 294 (7th Cir. 1989) ("[H]aving set in motion a criminal scheme, a conspirator will not be permitted by the law to limit his responsibility for its consequences by ceasing, however definitively, to participate."); *In re Corrugated Container Antitrust Litigation*, 662 F.2d 875, 886 (D.C. Cir. 1981) ("[T]he individual remains liable for his own criminal acts, and also for the acts of his co-conspirators including those acts occurring after the individual's own last overt act in furtherance of the conspiracy.").

VS Holding's motion is essentially a motion for summary judgment seeking an order that its sale of the assets of Alliance Concrete was more than just a cessation of its participation in the conspiracy, but rather its affirmative withdrawal from it. (*See* Brief in Support of Motion to Dismiss VS Holding Company, Dkt. No. 151-1.) The mere sale of a business, however, does not establish withdrawal from a conspiracy. Indeed, where a conspirator sells his business to a co-conspirator, he may be deemed to be *reaping the benefits of the conspiracy* rather than abandoning it. *See United States v. Sax*, 39 F.3d 1380, 1387 (7th Cir. 1994) ("To accept Sax's argument that he had withdrawn from this conspiracy at the moment he sold his business to Eichorn would turn the doctrine of withdrawal on its head. . . . Where the defendant merely changes roles in the very same conspiracy that he himself had previously set in motion, his hands remain soiled."); *United States v. Williams*, 57 F.3d 907, 909 n.1 (3d Cir. 2003) ("Perhaps if

[13] The proceeds to VS Holding from the sale of the assets of Alliance Concrete were over $80 million, according to the 2008 financial statement for Defendant GCC Alliance's parent, Grupo Cementos de Chihuahua, S.A.B. de C.V., which is available at http://www.gcc.com/opencms/export/sites/default/portal/eng/investors_relations/reports/galeria_infomres_y_reportes/anual_reports/2008.pdf.

Williams had truly *abandoned* MICOM, walking away without taking any compensation for his ownership interest in the criminal conspiracy, this case would present a more difficult question. However, selling one's interest is hardly equivalent to abandoning that interest." (emphasis in original). Selling one's interest is monetizing and pocketing that interest.

This principle holds true in the antitrust context as well. In *In re Potash Antitrust Litigation*, MDL No. 981, Civ. No. 3-93-197, 1994 U.S. Dist. LEXIS 20836 (D. Minn. Dec. 5, 1994), the district court denied a motion to dismiss by defendant PPG Industries, in which PPG argued that it had withdrawn from an alleged price-fixing conspiracy seven years earlier, when it sold its subsidiary, Kalium Canada, Ltd., to Vigoro Corporation. *Id.* at *43. The court rejected PPG's statute of limitations argument because whether the transfer of PPG's ownership interest in Kalium "was an effective withdrawal from the conspiracy, so as to avoid liability for subsequent conspiratorial acts" was "a fact-intensive question" that could not be resolved on a motion to dismiss. *Id.* at *46 n.16. Since the *Potash* plaintiffs alleged a continuing conspiracy, the absence of an effective withdrawal from the conspiracy "would remain a viable claim within the applicable period of limitation." *Id. See also Marine Hose Antitrust Litig.*, No. 08-MDL-1888 (S.D. Fla. Sept. 10, 2010) (finding an intermediate owner of one of the conspiring businesses "liable for the entire period of the conspiracy," which extended many years before it acquired the business and many years *after* it sold the business). This situation is no different.

VS Holding does not get off scot-free simply by selling its assets. In fact, it seems only reasonable that the effect (if any) of the sale of VS Holding's assets on the issues of this case could be informed by the actual terms of the agreement, something VS Holding never discusses. That consideration would require designation of the agreement itself, and would be inappropriate on a motion to dismiss.

IV. CONCLUSION

For all the reasons stated herein, Defendants' motions to dismiss should be denied.[14]

Respectfully submitted,

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[14] If the Court is inclined to grant Defendants' dismissal motions, Plaintiffs respectfully ask that any such dismissal be without prejudice and with leave to amend the Complaint within a reasonable time.

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2010, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system.

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