

**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)**

**DECLARATION OF IRWIN B. LEVIN
IN SUPPORT OF UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENTS AND
PRELIMINARY CERTIFICATION OF SETTLEMENT CLASSES**

The undersigned, Irwin B. Levin, declares and states as follows:

1. I am the Managing Partner of the law firm of Cohen & Malad, LLP. I have been appointed, together with attorney Gregory P. Hansel of Preti, Flaherty, Beliveau & Pachios, LLP, as Interim Co-Lead Counsel in the above-captioned case. I have substantial experience in class action and complex litigation, including antitrust matters. I submit this Declaration in support of the Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement Agreements and Preliminary Certification of Settlement Classes (the "Motion").

2. Following a lengthy and intense negotiation process over the course of several months, the parties in this case have reached three class-wide Settlement Agreements (the "Settlements") that would, if approved by the Court, together resolve all of Plaintiffs' claims against all Defendants in this litigation. Copies of the Settlements have been submitted to the Court as Exhibits 1, 2 and 3 to the Motion.

3. It is my opinion and the opinion of Interim Co-Lead Counsel that each of the Settlements is structurally and procedurally fair, because it has been negotiated on behalf of one of the three plaintiff classes proposed in the Plaintiffs' Second Amended Consolidated

Complaint (“Second Amended Complaint”) and resolves the distinct claims of antitrust conspiracy that are alleged by that proposed Class. Each of the Settlements 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. And each Settlement was 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.

4. It is my opinion and the opinion of Interim Co-Lead Counsel that the substantial Settlement payments are fair and adequate to proposed Class members. 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.

5. The 14 civil actions consolidated in the instant case were filed between May 3, 2010 and July 1, 2010. After consolidation and the Court’s appointment of Interim Co-Lead Counsel, the Plaintiffs filed their Consolidated Class Action Complaint.

6. 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 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.

7. 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.

8. 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, after the filing of Plaintiffs’ Second Amended Complaint and Motion for Class Certification, counsel for the parties agreed to attempt mediation using the 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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 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.

17. 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.

18. 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. In exchange, the Class members grant only a release of the claims for which they are receiving compensation.

19. 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.

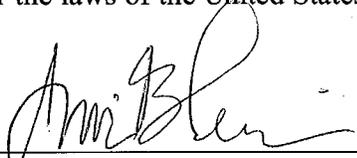
20. For each Defendant, Interim Co-Lead Counsel are confident that the Defendant's settlement obligations are consistent with their financial condition and ability to pay. Many or all Defendants are liquidating or even retrieving already-transferred assets in order to pay their settlement amounts, including 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.

21. It is my opinion and the opinion of Interim Co-Lead Counsel that each of the proposed Settlement Classes satisfies the requirements of Fed. R. Civ. P. 23(a) and (b) for certification, and that the proposed forms and methods of notice to Settlement Class members satisfy the requirements of Rule 23 and due process.

22. On behalf of the Plaintiffs, Interim Co-Lead Counsel 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 with the Motion.

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct.

July 15, 2011
Date


Irwin B. Levin

Respectfully submitted,

/s/ Irwin B. Levin
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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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