IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE: READY-MIXED CONCRETE PRICE FIXING LITIGATION	Master Docket No. 1:05-cv-00979-SEB-VSS
THIS DOCUMENT RELATES TO: ALL ACTIONS	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO IMI DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS REGARDING CLAIMS OUTSIDE STATUTE OF LIMITATIONS

I. Introduction

In bringing their Motion for Judgment on the Pleadings for Claims Outside the Statute of Limitations (the "Motion"), Defendants conspicuously fail to set forth the standard for pleading fraudulent concealment in the Seventh Circuit. Significantly, the Seventh Circuit specifically recognizes "self-concealing" fraudulent concealment as an exception to a plaintiff's duty to plead defendants' independent affirmative acts of concealment. *See Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1094, 1096 n.19 (7th Cir. 1992) (finding on summary judgment that defendants' fraudulent kick-back scheme was self-concealing). As the Seventh Circuit explained in *Martin*:

> Cases generally distinguish between two types of acts that can constitute fraudulent concealment: acts that are self-concealing (such as frauds)[;] and acts where, absent a subsequent act of concealment, only the perpetrator, but not the fact that a cause of action might exist, would be unknown (such as a burglary). In the former case, concealment is established by the nature of the act; in the latter case, additional acts of concealment are required to trigger the tolling doctrine.

Id. at 1095, quoting *Hobson v. Wilson*, 737 F.2d 1, 34 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Indeed, in the Seventh Circuit, plaintiffs pleading "self-concealing" fraudulent concealment need only show a "misleading, deceptive, or otherwise contrived action or scheme,

in the course of committing the wrong that is designed to mask the existence of a cause of action." *Id*. at 1094, quoting *Hobson,* 737 F.2d at 34.

The Seventh Circuit has held that plaintiffs alleging fraudulent concealment must show due diligence in discovering their claim where the alleged unlawful conduct was "self-concealing." *See Martin,* 966 F.2d. at 1096 n.19. However, "[i]n the other category of concealment—active concealment separate from the underlying wrong ... [t]he cases in [the Seventh Circuit] have generally held that diligence is not required … ." *Id*. at 1095 n.7 ("[t[he law of this circuit is that tolling applies to a statute of limitations where there is fraudulent concealment of either type [self-concealing or active fraudulent concealment], and diligence is required on the part of the plaintiff in the case of self-concealing frauds"). The Plaintiffs' Amended Consolidated Class Action Complaint ("Complaint") adequately alleges fraudulent concealment under both scenarios. Accordingly, the IMI Defendants' Motion must be denied.

II. Argument

A. Standard for Judgment on the Pleadings

The IMI Defendants have moved the court for a judgment on the pleadings or, in the alternative, dismissal of Plaintiffs' claims for purchases occurring outside the statute of limitations pursuant to Fed. R. Civ. P. 12 (b)(6). *See* Defs.' Mem. at 1 and 2 n.1. A motion for judgment on the pleadings is subject to the same standard applicable to a motion under Rule 12(b)(6). *Guise v. BMW Mortg., LLC*, 377 F.3d 795, 798 (7th Cir. 2004). As such, "[b]y moving for a judgment on the pleadings, the defendants have invited the court to consider the case under a legal standard that is one of the most generous to plaintiffs under the law." *Firestone v. Standard Mgmt. Corp.*, 2005 WL 1606955, at *1 (S.D. Ind. July 5, 2005). The court must treat as true all well-pleaded facts set forth in the Complaint, construe the allegations liberally, and view all inferences reasonably drawn from the alleged facts in the light most

favorable to the Plaintiffs. *Forseth v. Village of Sussex*, 199 F.3d 363, 368 (7th Cir. 2000). Further, "[p]laintiffs may even posit facts in their brief. So long as those facts are not inconsistent with the complaint, the court must assume they are true for purposes of deciding the motion." *Firestone*, 2005 WL 1606955, at *1.

B. Plaintiffs Adequately Allege a "Self-Concealing" Price-Fixing Conspiracy and Are Not Required to Plead Defendants' Independent Affirmative Acts of Fraudulent Concealment With Particularity.

Plaintiffs allege in their Complaint that the IMI Defendants and their co-defendants and co-conspirators (collectively "Defendants") engaged in price-fixing in the ready-mixed concrete industry in violation of Section 1 of the Sherman Act, 15 U.S.C. §1. *See* Complaint, ¶¶1-56. Plaintiffs allege that the Defendants' antitrust conduct began on or before July 1, 2000, and continued through at least May 25, 2004. Complaint, ¶1. A month after this period, on June 29, 2005, the United States Department of Justice announced that the IMI Defendants had agreed to plead guilty and pay a $29.2 million criminal fine, the largest fine ever levied in a domestic antitrust investigation, for conspiring and fixing the price of ready mixed concrete in violation of the Sherman Act. Complaint, ¶47. The Complaint expressly alleges that the Defendants' fraudulent concealment of their unlawful conduct from Plaintiffs and other class members tolled the applicable four-year statute of limitations. Complaint, ¶¶50-54.

In *Martin*, *supra*, the Seventh Circuit recognized the "self-concealing" acts doctrine, which allows plaintiffs to prove fraudulent concealment without asserting any independent affirmative acts from a defendant where there exists some "misleading, deceptive, or otherwise contrived action or scheme, in the course of committing the wrong that is designed to mask the existence of a cause of action." *Martin*, 966 F.2d at 1096 n.19. The Seventh Circuit's recognition of "self-concealing" fraudulent concealment adopts the same formulation of the

doctrine as the Second Circuit.[1] *See New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083-84 (2d Cir. 1988) ("fraudulent concealment may be proved by showing either that the defendant took affirmative steps to prevent plaintiffs' discovery of injury or that the wrong itself is of such a nature as to be self-concealing"). Applying this rule, the *Hendrickson* court found that price-fixing conspiracies are inherently self-concealing. *Id*.

In their Complaint, Plaintiffs have pleaded conduct by the Defendants that was both: (i) inherently self-concealing, and (ii) specifically designed to mask a cause of action from Plaintiffs and other Class members. In particular, Plaintiffs allege that:

- Throughout the Class Period, defendants and their co-conspirators intended to and did affirmatively and fraudulently conceal their wrongful conduct and the existence of their unlawful combination and conspiracy from plaintiffs and other members of the Class, and intended that their communications with each other and their resulting actions be kept secret from plaintiffs and other class members. Complaint, ¶50.

- Defendants discussed and formed their anticompetitive agreements during secret meetings and conversations, often conducted at undisclosed, out-of-the way locations. No one other than the co-conspirators was invited or present at these meetings, and, by design, note taking was restricted. Defendants conducted these meetings in secrecy to prevent the discovery of their conspiracy by the members of the Class. Complaint, ¶51.

[1] The IMI Defendants mistakenly rely on disparate case law from the Fourth Circuit. *See* Defs.' Mem. at 5. In *Supermarket of Marlington, Inc. v. Meadow Gold Dairies, Inc*., 71 F.3d 119 (4th Cir. 1995), the Fourth Circuit only recognizes the self-concealing conspiracy exception "when deception or concealment is a *necessary* element" of the alleged unlawful conduct. *Id.* at 122 (emphasis added). In contrast, the Seventh Circuit recognizes a self-concealing conspiracy exception where there exists "a misleading, deceptive, or otherwise contrived action or scheme, in the course of committing the wrong that is designed to mask the existence of a cause of action." *Martin*, 966 F.2d at 1094.

Even so, *Marlington* adopted an "intermediate" affirmative acts standard whereby a plaintiff could demonstrate fraudulent concealment by merely showing "affirmative acts of concealment by [the defendant]. Those acts, however, need not be separate and apart from the acts of concealment involved in the antitrust violation." *Id*. at 126. As discussed below, Plaintiffs have not only alleged a self-concealing price-fixing conspiracy but have also alleged Defendants' affirmative acts of concealment. As such, they have met the intermediate standard set forth in *Marlington* as well.

Similarly, the IMI Defendants' reliance on a single District of Minnesota decision, *In re Milk Prods. Antitrust Litig*., 84 F.Supp.2d 1016 (D. Minn. 1997) is misplaced. Defs.' Mem. at 5. In that case, the district court did not even consider the issue of self-concealing fraudulent concealment. *Milk Prods*., 84 F.Supp.2d at 1023.

These allegations track language that has routinely been held sufficient to allege fraudulent concealment.

Because price-fixing conduct is "self-concealing" by nature, federal courts have consistently held that a plaintiff to a price-fixing cause of action is not required to plead the defendants' independent affirmative acts of fraudulent concealment. *See, e.g., Hendrickson Bros.*, 840 F.2d at 1083-84 (because price-fixing conspiracies are inherently self-concealing plaintiff did not need to show defendants' independent affirmative steps of fraudulent concealment)*; In re Pressure Sensitive Labelstock*, No. 3:03-MDL-1556 (M.D. Pa. Jan. 19, 2006) (finding plaintiffs had adequately pleaded a price-fixing conspiracy and, therefore, had satisfied "the requirement of alleging with particularity Defendants' concealment of the cause of action"), submitted herewith as Exhibit "A; *In re Issuer Plaintiff Initial Public Offering Antitrust Litig.*, 2004 WL 487222, at *4 (S.D.N.Y. Mar. 12, 2004) (where plaintiffs had pleaded a price-fixing conspiracy which was inherently self-concealing, they did not need to show defendants took affirmative steps to fraudulently conceal their conduct); *In re Mercedes-Benz Antitrust Litig.*, 157 F.Supp.2d 355, 371-73 (D.N.J. 2001) (finding price-fixing conspiracy a "self-concealing conspiracy" satisfying fraudulent concealment pleading requirement); *In re Nine West Shoes Antitrust Litig.*, 80 F.Supp.2d 181, 192-193 (S.D.N.Y. 2000) ("by alleging a price-fixing scheme, [plaintiff has] no need to require the pleading of affirmative actions by the defendants to prevent the plaintiff's discovery of its claim."); *In re Infant Formula Antitrust Litig.*, 1992 WL 503465, at *2 (N.D. Fla. 1992) (denying motion for judgment on the pleadings regarding fraudulent concealment where, "[a]t the heart of plaintiffs' claims regarding fraudulent concealment is an allegation that any price-fixing was kept secret."); c*f. In re Sumitomo Copper Litig.*, 120 F.Supp.2d 328, 346 (S.D.N.Y. 2000) (finding in RICO action that, where plaintiffs

had alleged a self-concealing conspiracy, they did "not need to demonstrate that any of the Defendants took affirmative acts of concealment" to satisfy fraudulent concealment pleading requirement.)

The IMI Defendants do not contest that Plaintiffs have adequately alleged a price-fixing antitrust claim. *See generally* Defs.' Mem. Moreover, Plaintiffs have specifically alleged that Defendants' antitrust conduct was conducted secretly for the specific purpose of hiding a cause of action. *See* Complaint, ¶¶50-53. As the courts have recognized, "[r]egardless of whether concealment is an essential element of price-fixing, secrecy is its natural lair." *In re Pressure Sensitive Labelstock*, quoting *In re Mercedes-Benz*, 157 F.Supp. at 372. In particular, the *Mercedes-Benz* court found that in the price-fixing context, defendants' unlawful conduct is inherently self-concealing because "where a cartel does not control an entire market, they will agree to conceal their price-fixing conspiracy to reduce the risk that purchasers will substitute other products for the price-fixed product. In such a case, secrecy is sufficiently 'intertwined' with the aims of the conspiracy that it should be considered self-concealing." *Id*. at 371 (quotation and citation omitted). Such allegations of secrecy and concealment are exactly alleged in Plaintiffs' Complaint regarding Defendants' price-fixing conspiracy. Complaint, ¶¶50-53.

C. Plaintiffs Have Pleaded Defendants' Independent Affirmative Acts of Fraudulent Concealment With Particularity.

Regardless of the self-concealing nature of Defendants' unlawful conduct, Plaintiffs have pleaded, with particularity, that Defendants engaged in independent affirmative acts designed to conceal their unlawful conduct from Plaintiffs and other class members. Complaint, ¶¶50-53. Affirmative acts of fraudulent concealment occur where a defendant "takes active steps to prevent the plaintiff from suing in time." *Jackson v. Rockford Housing Auth*., 213 F.3d 389, 394

(7th Cir. 2000) (quotation omitted). These active steps "include hiding evidence or promising not to plead the statute of limitations." *Id*.

Plaintiffs have pleaded that Defendants took active steps to prevent Plaintiffs and other Class members from discovering their unlawful conduct. In particular, Plaintiffs allege that "throughout the Class Period, defendants and their co-conspirators intended to and did affirmatively and fraudulently conceal their wrongful conduct and the existence of the unlawful combination and conspiracy. . . ." Complaint, ¶50. Far from mere "silence or passive conduct," Defs.' Mem. at 4-5, Plaintiffs have alleged "affirmative and fraudulent" acts of concealment executed for the specific purpose of concealing the "unlawful combination and conspiracy from plaintiff and other members of the Class," so as to prevent Plaintiffs and other Class members from being able to file a timely claim against them. Complaint, ¶50.

These active steps included Defendants' hiding of evidence, or the analogous act of deliberately not creating evidence, for the purpose of keeping the details of their unlawful conduct from Plaintiffs and other Class members. As Plaintiffs allege in their Complaint, during Defendants' secret meetings, "by design, note taking was restricted. Defendants conducted these meetings in secrecy to prevent the discovery of their conspiracy by members of the Class." Complaint, ¶51.

Defendants have not offered a single case which suggests that in order to plead fraudulent concealment with adequate particularity, a plaintiff must plead the "'who, what, when, where and how'" of a defendants' fraudulent concealment. *See* Defs.' Mem. at 3, citing *Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 261 (7th Cir. 1998) (discussing pleading a fraudulent omission claim), and *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990) (discussing pleading securities fraud). Indeed, under Rule 9, a plaintiff need not plead facts that, due to the nature of

the alleged fraud, are within the defendant's control. *In re Craftmatic Secs. Litig*., 890 F.2d 628, 645 (3d Cir. 1989) ("courts have relaxed the rule when factual information is peculiarly within the defendant's knowledge or control").

Nonetheless, Plaintiffs have met this pleading standard. In particular, Plaintiffs have pleaded that Defendants and their co-conspirators affirmatively and fraudulently concealed facts and evidence regarding their unlawful antitrust conduct, throughout the Class Period, by keeping their communications secret from Plaintiffs, by holding secret meetings at undisclosed and out-of-the way locations, and by restricting any note taking to prevent the discovery of their conspiracy by members of the Class. Complaint, ¶¶51-53. These allegations are more than sufficient to plead fraudulent concealment under Rule 9(b). *See, e.g., In re Catfish Antitrust Litig*., 826 F.Supp. 1019, 1031-32 ("[p]roof of fraudulent concealment is found with any evidence of efforts designed to keep price fixing activities secret" – finding allegations of "clandestine meetings and telephone conversations" sufficient).

D. Plaintiffs Have Pleaded Due Diligence With Particularity.

Plaintiffs have adequately pleaded that they acted with due diligence but could not have discovered Defendants' alleged antitrust conduct, with information conclusive enough to file a claim, any earlier. Specifically, Plaintiffs allege that:

- Although one or more Class members and their counsel had been investigating possible pricing irregularities by defendants for approximately one year prior to the June 2005 announcement by the United States Department of Justice of the guilty plea entered by IMI, as a result of defendants' efforts to conceal their wrong doing such investigation did not result in the discovery of sufficiently conclusive information to file a claim prior to the Department of Justice's June 2005 announcement. Complaint, ¶52.

- Plaintiffs and members of the Class could not have discovered the combination and conspiracy alleged herein at any earlier date by the exercise of reasonable due diligence, because of the deceptive practices and techniques of secrecy

> employed by defendants and their co-conspirators to avoid detection of and affirmatively conceal their actions. Complaint, ¶53.

Any due diligence pleading requirement is satisfied by these allegations.

Initially, under Seventh Circuit jurisprudence, plaintiffs who have pleaded a defendant's independent affirmative acts of fraudulent concealment are typically not even required to prove due diligence. *See Martin*, 966 F.2d at 1096 n.19. Further, "whether a party has exercised due diligence is a factual issue which cannot be decided on a motion to dismiss unless it appears beyond doubt that plaintiff can prove no facts to support the claim." *Bethlehem Steel Corp. v. Fischbach and Moore, Inc.*, 641 F.Supp. 271, 275 (E.D. Pa. 1986). S*ee also Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 196 (1997) (noting that due diligence is a "fact-based question"); *In re Pressure Sensitive Labelstock*, at 9 ("[a]s a general rule, rejection of a fraudulent concealment claim on the pleadings for failure to allege due diligence is not appropriate"); *In re Catfish Antitrust*, 826 F.Supp. at 1031 ("[i]n any event, whether plaintiffs' duty was triggered before or immediately after January 1992 is a question of fact that need not and should not be decided on a motion to dismiss"). Indeed, the IMI Defendants' inquiry merely emphasizes the factual nature of the due diligence inquiry: "When and why did plaintiffs begin to investigate? If it was just 'one year prior to . . . June 2005' why then?" Defs.' Mem. at 6. *See Morton's Market, Inc. v. Gustafson Dairy, Inc.*, 198 F.3d 823, 833 (11th Cir. 1999) (defendant who invokes questions of why a plaintiff did not investigate at a different time "has succeeded in demonstrating only that there is a jury question regarding the tolling of the statute of limitations by fraudulent concealment").

Contrary to the IMI Defendants' assertion that Plaintiffs did not detail the time in which they discovered the Defendants' unlawful conduct or the nature of the discovery, Defs.' Mem. at 7, the Complaint plainly indicates that Plaintiffs discovered Defendants' conduct after the June

2005 Department of Justice announcement indicating that the IMI Defendants had agreed to plead guilty to "conspiring and fixing the price of ready-mixed concrete in violation of the Sherman Act." *See* Complaint, ¶¶52, 47. Moreover, Plaintiffs timely filed a Complaint in this matter on June 30, 2005, within the same month of the DOJ's announcement. *See In re Nine West Shoes*, 80 F.Supp.2d at 193 ("[o]nce plaintiffs were alerted to their potential claims by the media, they promptly filed suit and thus have satisfied the due diligence requirement"); *Am. Copper & Brass, Inc. v. Donald Boliden AB*, 2005 WL 1631304, at *7 (W.D. Tenn. July 6, 2005) (plaintiffs had shown due diligence where they alleged discovery of antitrust conspiracy through a "press release of September 3, 2004, which sets forth the concerted conspiratorial acts" and on "September 24, 2004 ... filed their original complaint").

Finally, the IMI Defendants' sole reliance on the opinion in *In re Milk Prods.*, 84 F.Supp.2d 1016 (D. Minn. 1997), for the proposition that raised prices of ready-mixed concrete should have put Plaintiffs on notice of their claims, is misguided. As the *Mercedes-Benz* court noted, "[t]he issue is not whether plaintiffs knew that the prices they paid were higher than they should have been, rather, the primary issue is whether the named plaintiffs and the members of each of the classes knew of the alleged conspiracy among defendants." 157 F.Supp.2d at 373; s*ee also In re Vitamins Antitrust Litig.*, 2000 WL 1475705, at *5 (D.D.C. May 9, 2000) ("market trends as a matter of law do not constitute notice that particular defendants were engaged in acts of price fixing"), citing *King & King Enter. v. Champlin Petroleum Co.*, 657 F.2d 1147, 1156 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982) ("[m]ere knowledge that [defendant] was raising and lowering prices does not provide knowledge that [defendant] was agreeing with other members of the ... industry to fix prices ...").

Unlike in *Milk Prods.*, Plaintiffs here have pleaded the precise reason they were unable to discover Defendants' alleged antitrust conduct at an earlier date, specifically because of "the deceptive practices and techniques of secrecy employed by defendants and their co-conspirators to avoid detection of and affirmatively conceal their actions." Complaint, ¶53. *See also In re Nine West Shoes*, 80 F.Supp.2d at 193 (plaintiffs adequately pleaded due diligence where complaint alleged that "[p]laintiffs and other class members could not have discovered the conspiracy at an earlier date by the exercise of due diligence because of the affirmative, deceptive practices and techniques of secrecy employed by Defendants"). Accordingly, Plaintiffs have adequately pleaded due diligence.

III. Conclusion

In light of the foregoing, Plaintiffs respectfully urge the Court to deny the IMI Defendants' Motion for Judgment on the Pleadings.

Dated: January 26, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2006, a copy of *Plaintiffs' Memorandum in Opposition to IMI Defendants' Motion for Judgment on the Pleadings Regarding Claims Outside Statute of Limitations* was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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I hereby certify that on January 27, 2006 a copy of *Plaintiffs' Memorandum in Opposition to IMI Defendants' Motion for Judgment on the Pleadings Regarding Claims Outside Statute of Limitations* was mailed, by first-class U.S. Mail, postage prepaid and properly addressed to the following:

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