UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE: READY-MIXED CONCRETE ANTITRUST LITIGATION	MASTER DOCKET NO. 1:05-CV- 00979-SEB-VSS
THIS DOCUMENT RELATES TO: ALL ACTIONS	

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

I. Introduction

The Clayton Act's four year statute of limitations, 15 U.S.C. § 15b, bars plaintiffs' claims for any period prior to June 30, 2001. Plaintiffs' attempt to plead fraudulent concealment to toll the statute does not satisfy the fraud pleading standards of particularity established by Federal Rule of Civil Procedure 9(b). Plaintiffs' fraudulent concealment allegations are conclusory and do not set forth in sufficient detail either alleged acts of affirmative concealment by the IMI defendants or the substance of plaintiffs' alleged due diligence investigation. The IMI defendants are entitled to judgment on the pleadings (or, alternatively, dismissal) with respect to any claims beyond the four year period.

II. Background And Plaintiffs' Allegations

Section 4B of the Clayton Act provides:

> Any action to enforce any cause of action under Section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued.

15 U.S.C. § 15b. Plaintiffs' claims accrue at the time of their purchase at an allegedly inflated price. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188-89, 117 S.Ct. 1984, 1990-91 (1997); *Zenith*

Radio Corp. v. Hazeltine Research Inc., 401 U.S. 321, 338, 91 S.Ct. 795, 806 (1971). In the absence of exceptional circumstances, then, plaintiffs' claims in this suit filed on June 30, 2005 are barred with respect to any purchase made prior to June 30, 2001.[1] The Supreme Court has emphasized that tolling of the statute is indeed "the exception, not the rule." *Rotella v. Wood*, 528 U.S. 549, 561, 120 S.Ct. 1075, 1084 (2000).

Anticipating the limitations defense,[2] plaintiffs allege "fraudulent concealment" to toll the statute. Complaint, ¶¶ 50-54. The allegations, however, are presented in only the most conclusory form. Plaintiffs allege that the defendants "did affirmatively and fraudulently conceal their wrongful conduct and the existence of their unlawful combination and conspiracy from plaintiff" by holding "secret meetings and conversations, often conducted at undisclosed, out-of-the-way locations." Complaint, ¶¶ 50-51. "No one other than the co-conspirators was invited or present at these meetings, and, by design, note taking was restricted." *Id.* at ¶ 51. Plaintiffs provide no further allegations with respect to the attendees, dates, locations or the substance of communications allegedly occurring in the meetings or conversations.

Plaintiffs allege that they "and their counsel had been investigating possible pricing irregularities by defendants for approximately one year prior to the June 2005" guilty plea by IMI but that "as a result of defendants' efforts to conceal their wrongdoing, 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 offer no detail

[1] It is clear that plaintiffs are attempting to raise at least some claims beyond the limitations period. Plaintiffs' class definition specifies as the "Class Period" the period "from at least July 1, 2000 through at least May 25, 2004." *See* Amended Consolidated Class Action Complaint (Complaint), ¶'s 7(b) and 36. Where a limitations defense is apparent on the face of the complaint, a judgment on the pleadings is appropriate. 5C Wright & Miller, *Federal Practice and Procedure*, § 1368, p. 254 (2004). Alternatively, to the extent appropriate, the IMI defendants present this motion under Rule 12(b)(6).

[2] The IMI defendants are filing together herewith their Answer to Plaintiffs' Amended Consolidated Class Action Complaint. The limitations defense is raised in the IMI Defendants' Answer.

with respect to the steps taken to investigate "possible pricing irregularities"; nor do they explain why the investigation allegedly began in or about June 2004. Plaintiffs conclude, once again without any factual elaboration, that they "could not have discovered the combination and conspiracy" prior to June 2005, due to unspecified steps taken by the defendants "to avoid detection of and affirmatively conceal their actions." *Id.* at ¶ 53.

III. Argument: Plaintiffs Have Failed To Allege Fraudulent Concealment With The Particularity Required By FRCP 9(b).

A. Plaintiffs Fail To Allege Affirmative Concealment With Particularity.

Allegations of fraudulent concealment to toll the statute of limitations are subject to the particularity requirements of FRCP 9(b). *Wolin v. Smith Barney Inc.*, 83 F.3d 847, 854 (7th Cir. 1996) ("In either form, however, fraudulent concealment is a species of fraud (and so for example must be pleaded with particularity) . . ."); *Larson v. Northrop Corp.*, 21 F.3d 1164, 1173 (D.C. Cir. 1994) (same). Rule 9(b) is an exception to the notice pleading standard and requires plaintiffs to "include . . . 'particularity' about the details – 'the who, what, when, where, and how: the first paragraph of any newspaper story.'" *Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 261 (7th Cir. 1998); *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990).

Plaintiffs' fraudulent concealment allegations reveal a fundamental misunderstanding of the doctrine. Initially, plaintiffs' conclusory allegations of affirmative concealment are insufficient. Complaint, ¶¶ 50 ("defendants and their co-conspirators intended to and did affirmatively and fraudulently conceal their wrongful conduct") and 53 (alleging "deceptive practices and techniques of secrecy employed by defendants and their co-conspirators to avoid detection of and affirmatively conceal their actions"). The only "deceptive practices" or "secrecy" alleged, however, are that the alleged conspiratorial meetings were held in private and

no one apart from the alleged conspirators was invited to attend. Complaint, ¶ 51. Plaintiffs add that "by design, note taking was restricted" at the alleged meetings. *Id.*

These allegations cannot withstand even the most generous application of the Seventh Circuit's "who, what, when, where, and how" standard under Rule 9(b). The allegations simply lump together "defendants and their co-conspirators" without specifying who attended the alleged meetings or participated in the conversations. Neither do plaintiffs allege who said what in the meetings or conversations, when and where they occurred or how the conspirators acted to effectuate or enforce any unlawful agreements. *Compare Hemenway*, 159 F.3d at 261; *DiLeo*, 901 F.2d at 627.

Perhaps more fundamentally, mere silence or passive conduct is not sufficient to establish concealment. *Martin v. Consultants & Administrators, Inc.*¸ 966 F.2d 1078, 1097-94 (7th Cir. 1992) ("Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry") (*quoting Wood v. Carpenter*, 101 U.S. (11 Otto) 135, 143 (1879); *Berkson v. Del Monte Corp.*, 743 F.2d 53, 56 (1st Cir. 1984) ("Silence or passive conduct of the defendant is not deemed fraudulent, unless the relationship of the parties imposes a duty upon the defendant to make disclosure"); *Larson*, 21 F.3d at 1173 (same).[3]

Plaintiffs allege nothing other than that the conspiratorial meetings or conversations occurred in private. Complaint, ¶ 51. This is at most an allegation of silence, passive conduct or

[3] *See also Wade v. Hopper*, 993 F.2d 1246, 1250 (7th Cir. 1993) (under Rule 9(b), the pleader "must state the identity of the person making the misrepresentation, the time, place and content of the misrepresentation and the method by which the misrepresentation was communicated"); *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1020 (7th Cir. 1992) (rejecting plaintiffs' contentions under Rule 9(b) that plaintiff was not required specifically to allege the "time, place, and content of the false representations" or that "the exact date and time of each fraudulent act need not be specifically alleged"). These requirements are consistent with the rule that silence, passive conduct or mere failure to disclosure alleged wrongdoing are insufficient to plead fraudulent concealment under Rule 9(b). Rather, the plaintiff must allege facts establishing the speaker, date, time, place and substance of the defendant's alleged misrepresentations.

failure to disclose the alleged wrongdoing. Plaintiffs do not allege that they stand in any fiduciary or other special relationship with IMI such as might impose an affirmative duty of disclosure. Moreover, there is nothing inherently deceptive or self-concealing about allegations of price fixing. *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122-23 (4th Cir. 1995) ("The self-concealing standard is only even arguably proper when deception or concealment is a necessary element of the antitrust violation, *i.e.*, when the antitrust violation is truly self-concealing. . . . Because price-fixing is not inevitably deceptive or concealing, application of the self-concealing standard here would be improper"); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 218-19 (4th Cir. 1987) (antitrust violations are not self-concealing unless deception is an essential element of the underlying violation).

Plaintiffs' allegations of fraudulent concealment bear a close resemblance to those dismissed in *In re Milk Products Antitrust Litigation*, 84 F.Supp.2d 1016 (D. Minn. 1997). In *Milk Products*, plaintiffs attempted to plead fraudulent concealment by alleging defendants' "letters to customers attributing price increases to market factors" and defendants' participation in "clandestine meetings" where they conspired to fix prices. *Id.* at 1023. The Court held such allegations insufficient to establish fraudulent concealment.

In doing so, the Court repeated the well-established principle that mere silence or passive conduct does not constitute "fraud":

> Similarly, alleging that defendants participated in 'clandestine meetings,' is not tantamount to representing to others that the meetings were valid trade association meetings when in fact they were meetings in furtherance of a conspiracy. Additionally, alleging that defendants' silence indicates acquiescence to a conspiracy, does not constitute an allegation of an affirmative act of concealment. Merely claiming that 'all conspiracies are self-concealing,' is simply insufficient.
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> * * *

> As stated earlier, silent acquiescence does not constitute an affirmative act of concealment. Further, this specific allegation of plaintiffs is not plead with particularity. Vaguely alleging that 'something' occurred at 'sometime' fails to satisfy the [Rule 9(b)] particularity requirement. As plaintiffs have not plead defendants' acts of concealment with particularity, plaintiffs have failed to satisfy the first element of fraudulent concealment.

In re Milk Products Antitrust Litigation, 84 F.Supp.2d at 1023-24 (citations omitted); *In re Aluminum Phosphide Antitrust Litigation*, 905 F.Supp. 1457, 1469-70 (D. Kan. 1995) (silence, passive conduct or denial of wrongdoing is not fraudulent concealment). Likewise, in the present case, plaintiffs' boilerplate allegations of "secrecy" or "secret meetings" do not allege fraudulent concealment with the requisite particularity. *Compare Milk Products*, 84 F.Supp.2d at 1023 (allegation of "clandestine meetings" insufficient) *with* Complaint, ¶ 51 (alleging "secret meetings and conversations"). Dismissal is appropriate on this basis.

B. Plaintiffs Fail To Allege Due Diligence With Particularity

Plaintiffs also fail to plead their alleged due diligence investigation with the particularity required by Rule 9(b). Plaintiffs allege solely that they have been "investigating possible pricing irregularities by defendants for approximately one year" prior to filing suit, but that despite "the exercise of reasonable due diligence," plaintiffs were unable to bring suit prior to the Department of Justice's June 29, 2005 announcement. Complaint, ¶¶ 52-53. Once again in this context, plaintiffs allege no *facts* to satisfy the Seventh Circuit's "who, what, when, where and how" standard under Rule 9(b). Who undertook plaintiffs' investigation? When and why did plaintiffs begin to investigate? If it was just "one year prior to . . . June 2005" why then? – and why not any earlier? What specific investigatory steps did plaintiffs take and at what times in the course of their alleged investigation? Plaintiffs provide no hint of an answer to any of these questions.

The cases establish that such conclusory allegations of due diligence are insufficient. In *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975), for example,

the Court affirmed dismissal of fraudulent concealment allegations where plaintiff failed to plead its own due diligence with the particularity required by Rule 9(b). The Court held that plaintiffs' "mere allegation of due diligence without asserting what steps were taken is insufficient" under the standard established by the Supreme Court in *Wood v. Carpenter*, 101 U.S. (11 Otto) 135, 139-41 (1879).

Similarly, in *Pocahontas Supreme Coal*, 828 F.2d at 218-19, the Court affirmed dismissal of fraudulent concealment allegations where plaintiff failed to make "distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the Court may clearly see, whether by the exercise of ordinary diligence, the discovery might not have been before made." *See also Berkson*, 743 F.2d at 56-57 ("Conclusory allegations of due diligence are not sufficient…."); *In re Compact Disc Advertised Price Antitrust Litigation*, 138 F. Supp.2d 25, 28-29 (D. Me. 2001) (same).

The Court in *Milk Products Antitrust Litigation*, 84 F.Supp.2d at 1024-25, dismissed fraudulent concealment allegations in a price fixing case due to plaintiff's failure to plead due diligence with sufficient particularity. Like plaintiffs here, the plaintiffs in *Milk Products* alleged "that the effect of defendants' alleged conspiracy was that milk prices were 'raised and stabilized . . . and price competition was substantially eliminated.' *This fact alone would seem to excite attention and thus put plaintiffs on inquiry notice.* Aside from indicating the date when they became aware of their claim, plaintiffs failed to answer the questions this Court posed in its previous Order. No explanation is made of the steps plaintiffs' used to discover their claim, nor do plaintiffs explain why the facts underlying their claim were not available to them at an earlier date. As a result, plaintiffs have failed sufficiently to allege their due diligence in pursuing their claim." *Milk Products Antitrust Litigation*, 84 F.Supp.2d at 1024-25 (emphasis added).

Plaintiffs' due diligence allegations here are indistinguishable from those dismissed in *Milk Products*. Plaintiffs allege that they paid artificially inflated prices for ready-mixed concrete since "at least July 1, 2000. . . ." Complaint, ¶ 7(b). "This fact alone would seem to excite attention and thus put plaintiffs on inquiry notice." *Milk Products*, 84 F.Supp.2d at 1024. Nevertheless, by their own account, plaintiffs' investigation of the asserted "pricing irregularities" did not begin until approximately June 2004 and "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.

What Rule 9(b) demands is a concrete, *factual* account of why that is allegedly so. Yet plaintiffs provide "no explanation . . . of the steps plaintiffs used to discover their claim" nor do plaintiffs "explain why the facts underlying their claim were not available to them" at least as early as the beginning of their self-appointed "Class Period", July 1, 2000. As in *Milk Products*, plaintiffs' failure to plead the facts of their due diligence investigation with particularity requires dismissal of the fraudulent concealment allegations.

IV. Conclusion.

Plaintiffs' fraudulent concealment allegations do not satisfy Rule 9(b). Without such allegations, plaintiffs have no basis upon which to avoid the prescriptive effect of 15 U.S.C. § 15b. The IMI defendants should be granted judgment on the pleadings with respect to all claims arising prior to June 30, 2001.

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