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' SURREPLY MEMORANDUM IN OPPOSITION TO IMI DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS.

I. Introduction

In their Reply Brief in Support of Motion for Judgment on the Pleadings ("Reply"), the IMI Defendants concede that the Seventh Circuit's February 6, 2006 decision in *In re Copper Antitrust Litigation*, 436 F.3d 782, 789-90 (7th Cir. 2006) ("*Copper*"), "requires that the Court deny, in part, this Motion." Reply, p 1. However, Defendants give no indication of which part of their Motion for Judgment on the Pleadings (the "Motion") could possibly survive in light of the *Copper* decision. In fact, as the opinion in *Copper* confirms, under Seventh Circuit jurisprudence, the IMI Defendants' Motion must be denied in its entirety.

II. Argument

A. *In re Copper Antitrust* Conclusively Establishes That the IMI Defendants' Motion Must Be Denied in Its Entirety.

In *Copper*, the Seventh Circuit reversed the district court's determination on a motion for summary judgment[1] that certain of the plaintiffs' antitrust claims fell outside the statute of

[1] Significantly, the IMI Defendants' Motion is one for judgment on the pleadings which has a more generous legal standard than a motion for summary judgment. *See Firestone v. Standard Mgmt. Corp.*, 2005 WL 16006955, at *1 (S.D. Ind. July 5, 2005) (stating that a motion for judgment on the pleadings has "a legal standard that is one of the

limitations. 436 F.3d 789-90. In particular, the Seventh Circuit found that: (i) "a dispute of material fact exists regarding when a diligent inquiry on the part of the plaintiffs would have revealed [defendant's] involvement"; *id.* at 790; and (ii) that "the facts taken in the light most favorable to the plaintiffs also support a finding that equitable estoppel [fraudulent concealment], should be invoked to toll the statute of limitations." *Id*. at 790; Reply, p. 1.

The Seventh Circuit, in holding that the plaintiffs in *Copper* had sufficiently established due diligence in discovering their claims, reaffirmed "the general rule that accrual [of a plaintiff's claims] occurs when the plaintiff discovers that 'he has been *injured* and who *caused* the injury.'" 436 F.3d at 789 (emphasis in original), quoting *Barry Aviation, Inc. v. Land O'Lakes Mun. Airport Comm'n*, 377 F.3d 682, 688 (7th Cir. 2004).

In their Reply, the IMI Defendants specifically concede that, in light of the court's clarification in *Copper*, Plaintiffs have pleaded due diligence under this discovery rule. *See* Reply, p. 1. They are correct. Plaintiffs have alleged facts indicating that they could not have discovered the Defendants' unlawful conduct until after the Department of Justice's June 2005 announcement that the IMI Defendants had agreed to plead guilty to conspiring and fixing prices for ready-mixed concrete. *See*, Compl. ¶¶ 52, 47; Pl. Opp., pp. 9-10. Accordingly, for purposes of the Motion, Plaintiffs have adequately alleged the exercise of due diligence in discovering their claims against the Defendants.

In *Copper*, the Seventh Circuit also reversed the district court's determination that the plaintiffs had not presented evidence sufficient to show that a question of fact existed as to whether the defendant had committed independent affirmative acts to conceal his wrong-doing. 436 F.3d at 790-92. Specifically, the Seventh Circuit held that the grounds submitted by the

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most generous to plaintiffs under the law."); Plaintiffs' Memorandum in Opposition to IMI Defendants' Motion for Judgment on the Pleadings ("Pl. Opp."), p. 2-3.

plaintiffs in support of their fraudulent concealment claim, based on evidence obtained during discovery, were sufficient to survive under the summary judgment standard. *Id*. at 792 ("at the summary judgment stage, this evidence is enough to show that material facts are in dispute as to whether plaintiffs can benefit from tolling under fraudulent concealment.") Further, the Seventh Circuit concluded that, by speculating that the plaintiffs could have discovered their cause of action earlier, the district court only emphasized the issues of fact inherent to the inquiry. *Id*., quoting *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 832-33 (11th Cir. 1999) ("[a] defendant who does this has succeeded in demonstrating only that there is a jury question regarding the tolling of the statute of limitations by fraudulent concealment").

In the present case, Plaintiffs have pleaded with particularity that the Defendants engaged in independent affirmative acts of concealment, above and beyond the alleged price-fixing. Compl. ¶¶ 50-51; Pl. Opp., p 7. Plaintiffs have also pleaded that Defendants attended secret meetings and deliberately precluded the creation of evidence by restricting note taking. Compl. ¶ 51; Pl. Opp., p 7. Further, Plaintiffs have alleged that these affirmative and fraudulent acts of concealment were designed specifically to prevent Plaintiffs and other Class members from detecting Defendants' unlawful conduct. Compl. ¶ 50; Pl. Opp., p. 7. None of these acts are essential to a price-fixing conspiracy – they are independent affirmative acts of concealment above and beyond the Defendants' alleged wrong-doing.[2] Under the standard confirmed in *Copper*, Plaintiffs' allegations of fraudulent concealment easily satisfy the generous standard for

[2] The IMI Defendants claim that these acts of concealment are insufficiently "above and beyond" Defendants' alleged wrongful conduct. Reply, p. 2. However, multiple decisions have found that acts essentially identical to those alleged in Plaintiffs' Complaint are precisely the "active steps" that constitute a defendant's independent affirmative acts of fraudulent concealment. *See, e.g., Jackson v. Rockford Housing Auth.*, 213 F.3d 389, 394 (7th Cir. 2000) ("[a]ctive steps triggering equitable estoppel include hiding evidence … "); *Barry Aviation, supra*, 377 F.3d at 686 ("[a]mong those steps can be the defendants' concealing evidence from the plaintiff that he needed in order to determine that he had a claim"), quoting *Singletary v. Cont'l Illinois Nat. Bank & Trust Co. of Chicago*, 9 F.3d 1236, 1241 (7th Cir. 1993).

a motion for judgment on the pleadings, and support the conclusion that "fraudulent concealment should be invoked to toll the statute of limitations." *Copper*, 436 F.3d at 790.

B. Plaintiffs Have Alleged "Self-Concealing" Acts of Fraudulent Concealment by the IMI Defendants that Are Recognized by the Seventh Circuit.

While conceding that the opinion in *Copper* regarding fraudulent concealment requires this Court to deny the Motion at least in part, the IMI Defendants mistakenly argue that the decision does not recognize the doctrine of "self-concealing" fraudulent concealment, apparently because it addresses only independent affirmative acts of fraudulent concealment. *See* Reply, pp. 2-4. However, in addition to pleading that Defendants engaged in affirmative and independent acts of concealment, Plaintiffs have also alleged that Defendants' price-fixing conduct constitutes a "self-concealing" unlawful act. As confirmed in *Martin v. Consultants & Administrators, Inc*., 966 F.2d 1078 (7th Cir. 1992), the Seventh Circuit recognizes two kinds of fraudulent concealment, one where "concealment is established by the nature of the act" and the other where "additional acts of a concealment are required to trigger the tolling doctrine." *Id*. at 1095; Pl. Opp., p. 3. *See also, W. Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996) (Seventh Circuit recognizes two categories of fraudulent concealment: "'self-concealing acts' and acts of 'active concealment'").

In their Reply, the IMI Defendants only argue that "equitable estoppel" requires active concealment. Reply, pp. 2-4. Significantly, however, self-concealing fraudulent concealment is characterized as a form of "equitable tolling," and is distinguished from active concealment which is characterized as a form of "equitable estoppel." *See Wolin*, 83 F.3d at 852 (describing "equitable tolling corresponding to self-concealing acts, and equitable estoppel corresponding to active concealment."); *cf. Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-41 (7th Cir.

1990) (describing distinctions between equitable tolling and equitable estoppel). As such, the IMI Defendant's argument against self-concealing fraudulent concealment is unfounded.[3]

Indeed, under Seventh Circuit jurisprudence, a plaintiff 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" to adequately plead self-concealing fraudulent concealment. *Martin,* 966 F.2d at 1096 n.19; Pl. Opp., p. 3. The Plaintiffs' allegations easily meet this standard. In fact, the Second Circuit, under a nearly identical formulation of the doctrine, specifically recognizes price-fixing as an inherently self-concealing unlawful act. *See* Pl. Opp., p. 4, citing *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083-84 (2d Cir. 1988).

The Seventh Circuit has not altered its long-standing recognition of self-concealing fraudulent concealment as an exception to a plaintiff's duty to plead a defendant's independent affirmative act of concealment. If the court did not address self-concealing fraudulent concealment when deciding *Copper,* it means only that it was not required to do so.

III. Conclusion

In light of the foregoing, together with Plaintiffs' Memorandum in Opposition to IMI Defendants' Motion for Judgment on the Pleadings Regarding Claims Outside Statute of Limitations, Plaintiffs' respectfully request that the Court deny the IMI Defendants' Motion in its entirety.

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[3] Significantly, the IMI Defendants never claim that the "self-concealing" fraudulent concealment doctrine, as established in *Martin,* has been overruled. *See* Reply, *passim*. Indeed, the decisions cited in the Reply's footnote 5 either do not address the doctrine of self-concealing fraudulent concealment, or specifically apply its corresponding doctrine of "equitable tolling" to their analyses. *See, e.g., Barry Aviation Inc., supra* (referencing *Martin*'s interpretation of *Cada*'s characterization of "self-concealing frauds"); *Shanoff v. Illinois Dept. of Human Servs*., 258 F.3d 696 (7th Cir. 2001) (only discussing equitable estoppel); *Shropshear v. Corp. Counsel of the City of Chicago*, 275 F.3d 593, 595-99 (7th Cir. 2001) (discussing both equitable estoppel and equitable tolling); *Jackson v. Rockford Housing Auth.*, 213 F.3d 389, 394-98 (7th Cir. 2000) (same); *Hentosh v. Herman M. Finch Univ. of Health Sciences/The Chicago Med. School*, 167 F.3d 1170, 1174-75 (7th Cir. 1999) (same); *Cada, supra* (same).

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Respectfully submitted,

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