

dividing the ready-mix concrete (“RMC”) market in the U.S. Virgin Islands, resulting in price increases and overpayments by consumers. *See* [ECF 37] at 1. The lawsuit alleges this conspiracy is in violation of both Section 1 of the Sherman Act, 15 U.S.C §1, and Section 3 of the U.S. Virgin Islands Antimonopoly Law, 11 V.I.C. § 1503(1)(c). *Id.* at 7–8. The original complaint was filed on December 19, 2019, naming Heavy Materials, LLC (“Heavy Materials”), Spartan, and Mosler as defendants. [ECF 1]. A first amended complaint (“FAC”) was filed on September 28, 2020. [ECF 37]. In both the original complaint and the FAC, the plaintiffs were comprised of Loctar, John St. Rose (“St. Rose”), and Derrick James (“James”) (collectively “Plaintiffs”). *See generally* [ECF 1] and [ECF 37].

On May 11, 2020, Plaintiffs moved to dismiss all claims against Heavy Materials pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). *See* [ECF 22] and [ECF 41]. Thereafter, on March 4, 2021, St. Rose and James moved to dismiss their claims against the remaining defendants pursuant to Rule 41(a)(2), as neither wished to continue to prosecute this putative class action. [ECF 70]. The Court accepted Plaintiffs’ notice of dismissal against Heavy Materials and additionally granted St. Rose and James’ motion to dismiss their claims. *See* [ECF 96]. Loctar is therefore the only remaining plaintiff in this action, with the remaining defendants being Spartan and Mosler.

The FAC⁵ alleges that from 2010 to 2013, Defendants Heavy Materials and Spartan “. . .

this appears to be an error. The public docket of the Superior Court—of which this Court takes judicial notice pursuant to Fed. R. Evid. 201(b)(2)—reflects that the case was assigned a St. Thomas case number (ST-2017-CV-00486) and was originally assigned a St. Thomas Superior Court Judge. However, by an Order of Reassignment dated August 10, 2018, the case was transferred to the Complex Litigation Division on St. Croix due to its “class action” status. Nonetheless, the Court takes judicial notice that the case retains its St. Thomas case number and that the original complaint, a copy of which is accessible via said public docket, was filed on December 12, 2017.

⁵ Prior to dismissal of the above-mentioned Plaintiffs, a motion for leave to amend the complaint was filed by Plaintiffs following Defendants’ Motion to Dismiss [ECF 24], which argued that Plaintiffs’ claims were time-barred under the four-year statute of limitations for antitrust claims. *See* [ECF 28]. The motion to amend set forth additional facts to support the fraudulent concealment exception. This Court granted the motion, finding that the proposed amendment satisfied the pleading requirements for alleging fraudulent concealment as a basis for tolling the statute of limitations. *See* [ECF 36] at 6–8. The first amended complaint (“FAC”) was filed shortly thereafter on September 28, 2020. [ECF 37].

competed aggressively with one another for the sale of ready-mix concrete in the U.S. Virgin Islands.” [ECF 37] at 3, ¶ 13. The FAC further asserts that Mosler is a member and/or manager of Spartan. *Id.* at ¶ 16. It contends that sometime around the fall of 2013, Spartan—at the behest of Mosler—and Heavy Materials began engaging in negotiations to restrict trade competition and divide the ready-mix concrete market between St. Thomas and St. Croix. *Id.* at 3–4, ¶¶ 17–19. The FAC alleges that on December 15, 2013, Heavy Materials and Spartan executed two separate written agreements known as the “Requirements Supply Agreement” and the “Assignment of Lease.” *Id.* at 4, ¶ 19. Under the purported terms of said agreements, Heavy Materials and Spartan agreed to cease competition with one another for “. . . the sale of concrete in St. Thomas and St. Croix for at least 5 years and provided for an option for an additional 10 years of noncompetition.” *Id.* at ¶ 20.

The FAC asserts that following the execution of the agreements, “Heavy Materials took the market in St. Thomas; Spartan took the market in St. Croix; and neither would interfere in the other’s market.” *Id.* at 4, ¶ 22. It alleges that after Heavy Materials and Spartan withdrew from the markets as agreed, each began to significantly increase the prices for RMC on both St. Thomas and St. Croix due to the absence of any competition. *Id.* at 4-5, ¶¶ 25–27. Count One of the FAC asserts that Spartan and Mosler violated the Sherman Act under 15 U.S.C. § 1 by engaging in a conspiracy “to allocate and divide customers, territories, supplies, sales, and markets, both functionally and geographically, of ready-mix concrete in the U.S. Virgin Islands.” *Id.* at 7, ¶¶ 38–43. Further, Count One alleges that the conspiracy was a result of Mosler’s intent to engage in a scheme designed to suppress competition in the RMC market. *Id.* at ¶ 42. Count Two asserts the alleged scheme also violated the U.S. Virgin Islands Antimonopoly Law, pursuant to 11 V.I.C §

1503(1)(c). *Id.* at 8, ¶¶ 44–48.⁶ Finally, Count Three is brought exclusively against Mosler and alleges that he is liable in his capacity as “participating agent” of Spartan, who had actual and apparent authority to execute the purported illegal agreements. *Id.* at 8-9, ¶¶ 49–54.

Loctar brings the lawsuit as a class action pursuant to Federal Rule of Civil Procedure 23(b)(3). *Id.* at 5–7.⁷ In doing so, Loctar maintains that he qualifies as a class representative for the following class: “All persons who purchased ready-mix concrete or aggregate directly from any defendant at any time during the Class Period.” *Id.* at 5, ¶ 32. The FAC alleges that the class period runs from approximately December 2013 through October 2015. *Id.* at 3, ¶ 12(b). Further, the FAC maintains that during the class period at issue, Spartan and Mosler took steps to fraudulently conceal their scheme from the class members. *Id.* at 10–13, ¶¶ 63-80. According to the FAC, the earliest point at which a consumer could have learned of the existence of the agreements between Spartan and Heavy Materials was July of 2017, when the purported conspiracy came to light during the trial of a separate matter before this Court (the “*Argos* trial”). *Id.* at 10–11, ¶ 65; *see also Spartan Concrete Products, LLC v. Argos USVI Corp.*, Civ. No. 3:15-cv-00004 (D.V.I. Jul. 17, 2017).⁸ In that 2017 trial, it is alleged witnesses provided testimony about the Requirements Supply Agreement and the Assignment of Lease, which were entered into between Spartan and Heavy Materials, revealing publicly for the first time the broader scheme to divide the ready-mix concrete market in the territory. *Id.*

⁶ Although Heavy Materials is no longer a party to this action, the allegations of the FAC still assert that it was involved in the purported conspiracy that comprise Counts One and Two of the lawsuit. *See generally* [ECF 37].

⁷ At this juncture, determination as to class certification remains pending. [ECF 100].

⁸ The Court again takes judicial notice pursuant to Fed. R. Evid. 201(b)(2) of the docket of *Spartan Concrete Products, LLC v. Argos USVI Corp.*, 3:15-cv-00004 (D.V.I. Jul. 17, 2017). Loctar contends that the *Argos* trial was the first time any class member could “have known that he suffered an injury as a result of Defendants’ unlawful agreement” as the agreement was revealed publicly for the first time. [ECF 109] at 4. The Court also takes judicial notice that the defendant’s Motion for Leave to Amend its Answer in that matter, a copy of which is accessible via said public docket, was filed on November 17, 2016. *See* 3:15-cv-00004, at [ECF 115]. Loctar states that said motion contains the first allegations against Spartan of its purported illegal agreement with a competitor to “geographically divide the market for ready-mix concrete in the U.S. Virgin Islands.” *Id.* at 1.

Given the assertion of class certification, the Court entered a trial management order (“TMO”) that was largely limited to discovery as it pertains to class issues, as opposed to merits discovery.⁹ [ECF 53]. The TMO further stipulated that “[a] more complete merits schedule will be provided later.” *Id.*¹⁰ Notwithstanding the scope of the TMO being limited to class issues, Spartan and Mosler conducted the deposition of Loctar on March 31, 2021. *See* [ECF 73]; *See also* [ECF 103–3].

The instant motion, which was filed following the deposition of Loctar, seeks summary judgment on all claims. [ECF 101].¹¹ Spartan and Mosler note that the “original Complaint was filed on December 19, 2019, more than four (4) years after the close of the class period and nearly four and a half (4½) years from Loctar’s purchase of ready-mix [concrete] from Spartan in July 2015.” [ECF 101] at 1. They further argue that Loctar has failed to demonstrate the elements of fraudulent concealment, thereby preventing him from avoiding the statute of limitations. [ECF 102] at 4–5.¹² Specifically, Spartan and Mosler contend that Loctar’s deposition testimony forecloses his ability to satisfy the elements of fraudulent concealment to toll the statute of limitations on Counts One and Two. *Id.* at 1–4. In addition, the motion argues that Count Three is duplicative of Count Two in that it is a theory of liability under common law for the violation of the Virgin Islands Antimonopoly Law. [ECF 102] at 4, n.3. Thus, Spartan and Mosler assert that

⁹ An amended TMO was entered twice in this case. *See* [ECF 71] and [ECF 78]. However, those orders only address the prior deadlines set forth in the first TMO [ECF 53] with respect to class-discovery issues.

¹⁰ The TMO specified to the parties that “[t]he related Superior Court action should provide a good start for the discovery in this case, particularly with respect to class issues. It was noted that statute of limitations issues were not in that other case, so some discovery up front on the timing issue will be required.” [ECF 53] at 1.

¹¹ Defendants originally filed their motion for summary judgment on June 22, 2021. [ECF 79]. However, the Court struck the motion due to Defendants’ failure to comply with LRCi 7.1(c)(1) and ordered that a corrected version of the motion be refiled no later than April 15, 2022. *See* [ECF 98].

¹² The Court notes that Defendants assert that a four-year statute of limitations is similarly applicable to Plaintiff’s Virgin Islands law claims under 11 V.I.C. § 1503(1)(c). *See* [ECF 102] at 3, n.2 (“Accordingly, the references herein to ‘statute of limitations’ encompass both the federal and the Virgin Islands statutory limitation periods.”). The Court addresses this in more detail below.

if summary judgment is granted as to Count Two, then Count Three will automatically fail. *Id.*

Loctar counters that he has adequately pled the elements of fraudulent concealment, as evidenced by this Court’s order granting the motion for leave to amend the complaint. *See* [ECF 109] at 5–6; *see also* [ECF 36]. In addition, Loctar argues that just because he knew of a price increase in RMC prior to July 2015 does not demonstrate that he had notice of the alleged collusion between Spartan and Heavy Materials. [ECF 109] at 6 (citing [ECF 79] at 11).¹³ Again, according to Loctar, the earliest any consumer could have learned of this conspiracy was during the *Argos* trial, where the terms of said agreement were disclosed publicly for the first time. [ECF 109] at 4. As such, he contends the statute of limitations was tolled, with the instant lawsuit having been filed within the requisite four-year period. *Id.*¹⁴ Should the Court disagree, however, Loctar alternatively seeks relief under Fed. R. Civ. P. 56(d) for an opportunity to conduct additional discovery on the merits. *Id.* at 7.

For purposes of the summary judgment motion, the parties do not dispute that Loctar purchased RMC from Spartan on July 7, 2015. *See* [ECF 103] at ¶ 1; *See also* [ECF 109–1]. Nor do they dispute that during the class period of December 2013 to October 2015, Loctar “observed the price of ready-mix concrete “jump up” from “about 130-something” to “a hundred and seventy-

¹³ Loctar cites to Defendants’ initial summary judgment motion [ECF 79], as opposed to the present motion. As noted earlier, that initial motion, however, was struck by the Court due to Defendants’ failure to comply with LRCi 7.1(c)(1). Notwithstanding this fact, the present motion—via its memorandum of law [ECF 102] at 11—makes the same argument as that countered by Loctar in his opposition.

¹⁴ As an aside, Loctar states that a related Superior Court action—as the first putative class action on these facts—was filed on December 12, 2017. [ECF 109] at 2. Loctar then contends that for purposes of the present action, the “relevant period is the time prior to four years before this action was filed, which is December 12, 2015.” *Id.* The present action was not filed on December 12, 2019, however, it was filed on December 19, 2019. *See* [ECF 1]. Moreover, to recover damages under the Sherman Act, an antitrust plaintiff must establish that he suffered an antitrust injury. *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 101 (3d 2010) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). “Antitrust injuries have three elements: (1) an injury-in-fact; (2) that has been caused by the Act’s violation; and (3) that is the type of injury contemplated by the Act.” *Marjam Supply Co. v. Firestone Bldg. Prod. Co., LLC*, 2019 WL 1451105, *6 (D.N.J. Apr. 2, 2019) (citing *Brunswick Corp.*, 429 U.S. at 489. In this instance, Loctar’s injury-in-fact purportedly occurred on July 7, 2015, the date he purchased RMC from Spartan. *See* [ECF 103] ¶ 1; *see also* [ECF 109–1] at SUMF 1, Counter 1. Thus, the Court finds that the statute of limitations will have begun to accrue as of July 7, 2015, unless otherwise tolled by the fraudulent concealment doctrine.

something.” [ECF 103] at 2, ¶ 6. According to Loctar, he believed the price of RMC to be high as of his purchase in 2015 because “Spartan was the only concrete company on island at the time.” *Id.* at ¶ 7.¹⁵ Loctar further testified that prior to his purchase of RMC in 2015, he had heard of an agreement that took place between Spartan and Heavy Materials whereby Spartan acquired Heavy Materials “...shut them down, and then jack up [*sic*] the price on us.” *Id.* at 3, ¶ 10. However, neither Loctar nor the people he spoke with during this period took any action or made any complaint regarding the price increase of RMC. *Id.* at ¶ 19. Lastly, the FAC alleges there are “high barriers that make entry into the ready-mix concrete business difficult” including “. . . high capital costs and regulatory requirements.” [ECF 37] at 5, ¶ 31.

II. LEGAL STANDARDS

A. Motion for Summary Judgment

“Generally, the movant's burden on a summary judgment motion in an antitrust case ‘is no different than in any other case.’” *In re Blood Reagents Antitrust Litig.*, 266 F. Supp. 3d 750, 766 (E.D. Pa. 2017) (citing *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 158 (3d Cir. 2003)). Summary judgment is appropriate where the “[m]ovant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

The movant for summary judgment bears the initial burden of demonstrating no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is “material” only if it impacts the outcome of litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–248 (1986). Moreover, a “genuine” factual dispute exists if “the evidence is such that a reasonable

¹⁵ Loctar seeks to clarify in his opposition that he *mistakenly* believed the prices of ready-mix concrete to be high at the time of his July 7, 2015 purchase, because Spartan had acquired Heavy Materials and was the only producer of ready-mix. *See* [ECF 109–1] at 6–7, Counter 7–9. Defendants did not provide a response to Loctar’s counterstatement of undisputed facts.

jury could return a verdict for the nonmoving party.” *Id.* The movant supports its factual assertions with citations from the record, “including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials[.]” Fed. R. Civ. P. 56(c); *see Favata v. Seidel*, 511 F. App'x 155, 158 (3d Cir. 2013) (citation omitted). Thus, the “mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *Anderson*, 477 U.S. at 247–48.

Once the movant meets the initial burden, the non-moving party “may not rely merely on allegations of denials in its own pleadings; rather, its response must ... set out specific facts showing a genuine issue for trial.” *De La Cruz v. Virgin Islands Water & Power Auth.*, 2011 WL 13291512, at *1 (D.V.I. Feb. 25, 2011); Fed. R. Civ. P. 56(e)(2); *see also Jones v. United Parcel Serv.*, 214 F.3d 402, 407 (3d Cir. 2000) (“At summary judgment, a plaintiff cannot rely on unsupported allegations, but must go beyond pleadings and provide some evidence that would show that there exists a genuine issue for trial.” (citing *Celotex Corp.*, 477 U.S. at 324)). The court must review the record as a whole, “‘draw[ing] all reasonable inferences in favor of the non-moving party’ but not weighing the evidence or making credibility determinations.” *Hill v. City of Scranton*, 411 F.3d 118, 124–25 (3d Cir. 2005) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)). Only if the court determines there to be no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law, will summary judgment be appropriate. *Hill*, 411 F.3d at 125.

B. Statute of Limitations and the Doctrine of Fraudulent Concealment

“[A]n antitrust cause of action generally ‘accrues ... when a defendant commits an act that injures a plaintiff’s business.’” *In re Aspartame Antitrust Litig.*, 416 F. App'x 208, 211 (3d Cir.

2011) (citing *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 105–06 (3d Cir.2010) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971)). The Clayton Act further provides that “[a]ny action to enforce any cause of action under section 15 . . . of this title shall be forever barred unless commenced within four years after the cause of action accrued.” 15 U.S.C. § 15b.

“Although § 15b mandates a four-year statute of limitations for civil antitrust actions, it is well established that the doctrine of fraudulent concealment tolls the limitations period when a plaintiff’s cause of action has been obscured by the defendant’s conduct.” *In re Blood Reagents Antitrust Litig.*, 266 F. Supp. 3d at 784 (citing *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 160 (3d Cir. 2002)). “A plaintiff suffers antitrust injury by purchasing a product whose price was anticompetitively fixed.” *In re Aspartame Antitrust Litig.*, 416 F. App’x at 211 (citing *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997)). However, the Third Circuit has observed “[w]hen plaintiffs seek to demonstrate a case for equitable tolling, and defendants seek summary judgment on the issue,

[A] court must determine (1) whether there is sufficient evidence to support a finding that defendants engaged in affirmative acts of concealment designed to mislead the plaintiffs regarding facts supporting their . . . claim, (2) whether there is sufficient evidence to support a finding that plaintiffs exercised reasonable diligence, and (3) whether there is sufficient evidence to support a finding that plaintiffs were not aware, nor should they have been aware, of the facts supporting their claim until a time within the limitations period measured backwards from when the plaintiffs filed their complaint.”

In re Blood Reagents Antitrust Litig., 266 F. Supp. 3d at 784 (citing *Forbes v. Eagleson*, 228 F.3d 471, 486–87 (3d Cir. 2000)); *see also In re Linerboard Antitrust Litig.*, 305 F.3d at 160. “At the summary judgment stage, the plaintiff must come forward with evidence to support each of these prerequisites.” *In re Blood Reagents Antitrust Litig.*, 266 F. Supp. 3d at 784 (citing *In re Aspartame Antitrust Litig.*, 416 Fed. Appx. at 211). Moreover, a plaintiff’s inaction and failure to “take

reasonable measures to uncover the existence of injury” precludes the application of the fraudulent concealment doctrine. *In re Aspartame Antitrust Litig.*, 416 F. App'x at 211 (citations omitted).

III. DISCUSSION

A. Count One – Sherman Act

This action was filed on December 19, 2019. [ECF 1]. Here, the parties do not dispute for summary judgment purposes that Loctar’s purchase of Spartan ready-mix concrete took place on July 7, 2015. *See* [ECF 103] at 1; [ECF 109–1] at 1. As such, Loctar’s claims—on their face—fall outside the four-year limitations period. Thus, Loctar must rely upon the doctrine of fraudulent concealment if his claims are to survive.

Spartan and Mosler seek summary judgment on the grounds that Loctar’s claims are barred by the four-year statute of limitations, as he is not able to meet the elements necessary to invoke the doctrine. [ECF 102] at 1–4. In particular, Spartan and Mosler assert that Loctar’s deposition testimony demonstrates he understood the prices for RMC had increased substantially during 2013–2015, he believed that Spartan had acquired Heavy Materials, and he discussed both the prices and the alleged agreement with other consumers. *Id.* at 11. On that basis, Spartan and Mosler contend that Loctar’s own testimony forecloses his ability to invoke the doctrine of fraudulent concealment because he “knew of the factual basis for his cause of action no later than July 2015” more than four years before this action was filed on December 19, 2019. *Id.* at 16.

It is not disputed—again, for summary judgment purposes—that from December 2013 to October 2015, Loctar observed “the price of ready-mix concrete ‘jump up’ from ‘about . . .130-something’ ‘to a hundred and seventy-something.’” [ECF 103] ¶ 6.¹⁶ According to Loctar, he believed the price increased because Spartan was the only concrete company on the island at the

¹⁶ *See also* [ECF 109–1] at SUMF 6 (admitting to the fact).

time. *Id.* ¶ 7.¹⁷ Even prior to his July 2015 purchase, Loctar had heard of an agreement in which Spartan purchased Heavy Materials, with Loctar believing that Spartan had “shut them [Heavy Materials] down, and then jack up the price on us.” *Id.* ¶ 10.¹⁸ Thus, Loctar believed this acquisition led to higher prices for ready-mix concrete. *Id.* at 3–4; [ECF 109–1] at 3–4. Finally, the parties do not dispute for purposes of the present motion that neither Loctar, nor those he spoke to about the price increase and alleged agreement between Spartan and Heavy Materials, took any action to file a formal complaint during said class period. [ECF 103] at 3; [ECF 109–1] at 4.

Notwithstanding those facts, Loctar maintains that disputed issues of material fact remain. [ECF 109] at 5. First, Loctar asserts that, while he observed the prices of ready-mix concrete increase prior to and around the time of his purchase, he mistakenly attributed it to Spartan purchasing Heavy Materials. [ECF 109] at 2.¹⁹ Loctar alleges that “[he] did not know that the high prices were a product of Defendants’ agreement to divide the market for RMC by island.” *Id.* Of particular importance, Loctar emphasizes that he was “not aware of any collusive behavior – nor did he understand the nature of the agreement between Spartan and Heavy Materials – until the Summer of 2019.” *Id.* at 6–7. Instead, he contends that—although he incorrectly believed Spartan had acquired Heavy Materials—he had no reason to believe that said arrangement or agreement was unlawful. [ECF 109] at 6–7. Further, Loctar asserts he could not reasonably have discovered the agreement to divide the market before it was publicly disclosed during the *Argos* trial in July of 2017. [ECF 109] at 4.

The Court begins by noting that discovery on the merits remains limited at this stage. The

¹⁷ *Id.* at SUMF 7.

¹⁸ *Id.* at SUMF 10.

¹⁹ In his counterstatement of undisputed material facts, Loctar clarifies that Spartan had not, in fact, acquired Heavy Materials as he originally believed, but that Defendants instead had executed an agreement to divide the ready-mix concrete market. [ECF 109–1] at 6, Counter 7–9; *see also* [ECF 109–3] and [ECF 109–4]. Defendants provided no response to Loctar’s counterstatement of undisputed material facts.

Court further recognizes that an order granting the motion for leave to amend the complaint was entered. *See* [ECF 36]. Prior to the entry of said order, Defendants moved to dismiss the claims in part because the original complaint lacked “any plausible allegation for any sort of tolling exception to the statute of limitations.” [ECF 24] at 12. Plaintiffs²⁰ subsequently moved to amend, *see* [ECF 28], and the Court ruled in their favor, finding that the pleading requirements for invoking the doctrine of fraudulent concealment had been satisfied. [ECF 36] at 4–8. In light of the Court’s findings and the amended complaint, Defendants’ motion to dismiss was mooted. *See* [ECF 95].

After careful consideration of the record at this stage, the Court finds that genuine issues of material fact exist as to Count One.

i. Affirmative Acts of Concealment

To invoke the doctrine of fraudulent concealment, the first element Loctar must show is that Defendants took affirmative acts to conceal their wrongful conduct. *In re Blood Reagents Antitrust Litig.*, 266 F. Supp. 3d at 784. As many other courts have noted in analyzing this element, there is a divide over which standard to apply when determining whether this element has been met. *In re Fragrance Direct Purchaser Antitrust Litig.*, 2025 WL 579639, at *11 (D.N.J. Feb. 21, 2025). In general, courts recognize three different approaches. *Id.*

The Tenth Circuit appears to follow the most rigid approach, requiring a plaintiff to demonstrate that the defendants took separate affirmative steps beyond the original wrongdoing to prevent discovery of the conspiracy. *Colorado v. W. Paving Constr. Co.*, 630 F.Supp. 206, 210 (D.Colo. 1986), *aff’d en banc*, 841 F.2d 1025 (10th Cir. 1988). The intermediate standard—observed by the Fourth, Fifth, and Sixth Circuits—provides that a plaintiff must show that the defendants affirmatively acted to conceal their antitrust conspiracies, but the proof may include acts of concealment involved in the antitrust violation itself. *Supermarket of Marlinton, Inc. v.*

²⁰ At the time of the motion to amend, the plaintiffs were comprised of Loctar, St. Rose, and James. *See* [ECF 28].

Mead Gold Dairies, Inc., 71 F.3d 119, 122, 125 (4th Cir. 1995); *see also Texas v. Allan Const. Co.*, 851 F.2d 1526, 1532 (5th Cir. 1988); *see also Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir. 1988). Finally, the Second Circuit observed the most lenient approach, known as the “self-concealing” standard. *New York v. Hendrickson Bros.*, 840 F.2d 1065, 1083–84 (2d Cir. 1988). This approach provides that the statute of limitations will be tolled when the alleged conspiracies are of the inherently self-concealing type—such as price-fixing or bid-rigging. *Id.*; *see also Phhphoto Inc. v. Meta Platforms, Inc.*, 123 F.4th 592, 604–05 (2d Cir. 2024) (“To plead concealment, the plaintiff can either: (1) identify “affirmative steps” taken by the defendant to conceal the plaintiff’s claim; or (2) show that the defendant’s misconduct was inherently “self-concealing.”)

The Third Circuit has not yet addressed which approach applies within its circuit. A district court within the circuit has, however, compiled a series of decisions that reflect a general trend towards adopting the “self-concealing” standard in antitrust cases—particularly in those involving price-fixing. *In re Fasteners Antitrust Litig.*, 2011 WL 3563989, at *4–5 (E.D. Pa. Aug. 12, 2011) (“Where a plaintiff alleges a price-fixing conspiracy, the self-concealing standard is consistent with the principles of equitable tolling.”) (collecting cases). *Fasteners* observed that although some courts held differently, “for the most part courts in this Circuit have applied the ‘self-concealing’ standard to antitrust conspiracies.” *Fasteners*, at *4.²¹

A recent decision in this circuit also cites to *In re Magnesium Oxide Antitrust Litig.*, 2011 WL 5008090 (D.N.J. 2011) (not for publication), wherein the court in that case adopted a hybrid

²¹ Citing *In re Aspartame*, 2007 WL 5215231, at *5–6 (applying self-concealing standard); *see also In re Bulk [Extruded] Graphite Prods. Antitrust Litig.*, No. 02–6030, 2004 U.S. Dist. LEXIS 29586, at *10–11 (D.N.J. Oct. 26, 2004) (same); *Pennsylvania v. Milk Indus. Mgmt. Corp.*, 812 F.Supp. 500, 504 (E.D.Pa.1992); *Bethlehem Steel Corp. v. Fischbach & Moore, Inc.*, 641 F.Supp. 271, 274 (E.D.Pa.1986); *In re Mercedes-Benz Anti-trust Litig.*, 157 F.Supp.2d 355, 371 (D.N.J.2001) (recognizing the self-concealing and intermediate standards), with *Pennsylvania v. Lake Asphalt & Petroleum Co. of Pa.*, 610 F.Supp. 885, 888 (M.D.Pa.1985) (requiring an affirmative act independent of the alleged underlying conspiracy).

of the intermediate and “self-concealing” approaches. *In re Fragrance*, 2025 WL 579639, at *11 (citing *In re Magnesium Oxide Antitrust Litig.*, 2011 WL 5008090, at *22 (D.N.J. Oct. 20, 2011) (citing *In re Publ’n Paper*, 2005 WL 2175139 (D. Conn. Sept. 7, 2005))). According to the *In re Magnesium* approach, certain antitrust conspiracies are inherently “self-concealing” where a plaintiff pleads “circumstances indicating that a price increase ‘carries with it a pretense of legitimacy’ or ‘that it would necessarily be assumed that [it was] the result of legitimate market forces.’” *In re Magnesium Oxide*, 2011 WL 5008090, at *22. The court in that matter provided an initial framework in evaluating whether a conspiracy is inherently self-concealing:

In a competitive, well-regulated industry it will often be the case that a price-fixing conspiracy, if not concealed, would immediately fail because of governmental or private legal action. In such circumstances, any announcement of a price increase will carry with it an implicit statement that the price increase is legitimate, i.e., the result of competitive forces, not collusion. Nevertheless, not every price-fixing conspiracy is self-concealing. For example, there may be industries in which the participants are aware of collusion but it is not stopped because of indifference, fear, or because the perpetrators are exempt from, or beyond the reach of, antitrust laws. In such circumstances, the defendants' announcement of a price increase will not carry with it any implied certification of legitimacy, and so, absent additional circumstances, will not be self-concealing.

Id. (citing *In re Publ’n Paper*, 2005 WL 2175139, at *4). Indeed, this Court similarly noted the *In re Magnesium* approach in granting Loctar’s motion for leave to amend. *See* [ECF 36] at 5–6.²²

The court in *In re Fragrance* ultimately did not need to determine which approach—the self-concealing or hybrid—was to be applied in its case, as the plaintiffs in that matter satisfied their burden under either theory. *In re Fragrance*, 2025 WL 579639, at *12. In doing so, the court

²² [ECF 36] at 5–6, “However, whether a price-fixing conspiracy is self-concealing may depend on the industry involved. *See, e.g., In re Magnesium Oxide Antitrust Litig.*, 2011 U.S. Dist. LEXIS 121373, at *78 (D.N.J. Oct. 20, 2011) (“a plaintiff must show circumstances indicating that a price increase ‘carries with it a pretense of legitimacy’ or ‘that it would necessarily be assumed that [it was] the result of legitimate market forces.’”) (quoting *In re Publ’n Paper Antitrust Litig.*, 2005 U.S. Dist. LEXIS 19896, at *4 (D. Conn. Sept. 6, 2005)).

nonetheless recognized that “*Fasteners* appears to be correct that courts in this Circuit have come around to the conclusion that the self-concealing standard to antitrust conspiracies, including price-fixing conspiracies specifically,” is the applicable standard for the first element. *In re Fragrance*, 2025 WL 579639, at *12 (citing *Fasteners* at *5) (“Price-fixing conspiracies are inherently self-concealing”); *see also In re Pressure Sensitive Labelstock Antitrust Litig.*, 2006 WL 433891 (M.D. Pa. Jan. 3, 2006) (allegations of price-fixing conspiracy constituted sufficient allegations of self-concealing conspiracy); *In re Aspartame Antitrust Litig.*, 2007 WL 5215231 (E.D. Pa. Jan. 18, 2007) (“[T]he majority of courts examining price-fixing conspiracies have deemed such conspiracies self-concealing.”).

At this stage, based on the allegations and evidence concerning the alleged price-fixing conspiracy, the Court finds that Loctar has met his burden under either the self-concealing standard or the *Magnesium* approach. The Court first considers Defendants’ argument that the four-year statute of limitations on antitrust claims would be rendered meaningless if Loctar satisfies the first element merely by alleging that the conspiracy was self-concealing. [ECF 102] at 9–10. This reasoning—according to Defendants—illustrates why the majority of federal courts of appeals have held that an allegation of a self-concealing conspiracy alone is insufficient. *Id.* at 10. As discussed above, however, the self-concealing standard appears to be recognized by a majority of district courts in this circuit, particularly in price-fixing or bid-rigging conspiracies. *See In re Fasteners*, 2011 WL 3563989, at *4–5 (citing cases). Here, the complaint alleges a price-fixing conspiracy based on Spartan and Heavy Material’s purported agreement to divide the ready-mix concrete market between St. Thomas and St. Croix. [ECF 37] at 7, ¶¶ 38–43. Moreover, according to the FAC, the industry has “high barriers that make entry into the ready-mix concrete business difficult,” including “... high capital costs and regulatory requirements.” *Id.* at 5, ¶ 31.

The Court briefly notes that Defendants’ motion cites a separate decision in *In re Fasteners*

to state that the Third Circuit has not yet determined which of the three approaches applies in this circuit. [ECF 102] at 8; *see also In re Fasteners Antitrust Litig.*, 2012 WL 3194377, at *1 (E.D. Pa. Aug. 6, 2012).²³ While correct, the sentence that immediately follows provides “[a]fter reviewing the caselaw, we determined that the majority of district courts in this circuit have applied the self-concealing standard to antitrust conspiracies. In the context of a price-fixing conspiracy, the self-concealing standard reflects the principles embodied in the doctrine of equitable tolling.” *Id.* at *1 (citing *In re Fasteners*, 2011 WL 3563989, at *4 (citing cases)).

Thus, Spartan and Mosler appear to overlook that other district courts within the circuit not only recognize the self-concealing standard, but also find it consistent with the principles of equitable tolling. *Fasteners*, 2011 WL 3563989, at *5 (“The notion of a self-concealing conspiracy dates back to *Bailey v. Glover*, 88 U.S. 342, 349 (1874)” (“To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.”)). This Court sees no reason to depart from the general trend of district courts in this circuit, particularly given that the allegations in the matter at hand involve a conspiracy that is self-concealing by its nature.

In the alternative, Spartan and Mosler maintain that even if this Court adopts the self-concealing approach, the record here does not permit a finding that such a conspiracy could have existed. [ECF 102] at 10–11. According to Defendants, “the alleged conspiracy cannot be self-concealing because Loctar testified that he and others were aware of alleged collusion between

²³ The cited *In re Fasteners* decision concerns an interlocutory appeal made by defendants specifically as to “whether the allegation that a price-fixing conspiracy is 'self-concealing' is sufficient to satisfy the fraudulent concealment doctrine's requirement of affirmative acts of concealment.” *In re Fasteners Antitrust Litig.*, 2012 WL 3194377, at *2 (E.D. Pa. Aug. 6, 2012). However, the district court ultimately denied defendants’ motion for interlocutory review on the basis that no controlling question of law was shown by defendants, nor that an immediate appeal would materially advance the disposition of the case. *Id.* at *4.

Spartan and Heavy Materials, but they did nothing to stop the alleged conspiracy until well after the limitations period expired.” *Id.* at 11. For that reason, Defendants argue Loctar cannot take the position that he was aware of an agreement between Defendants which impacted the prices of RMC, while simultaneously asserting that the price increases were “the result of legitimate market force.” *Id.* at 11–12.

The Court disagrees with that characterization of Loctar’s testimony. Here, Loctar’s testimony—which Defendants consistently cite to in support of this point—provides that he heard of an agreement where “... Spartan bought Heavy Materials, shut them down, and then jack up the price on us.” [ECF 103–3] at 8. In addition, Loctar states that he and others discussed the price increases and the alleged agreement to acquire Heavy Materials. *Id.* at 8–12. However, nothing in the deposition transcript indicates that Loctar believed the price increases were the result of collusive behavior by Defendants.²⁴

The Court likewise rejects Defendants’ argument that Loctar’s positions are contradictory. *See* [ECF 102] at 11–12 (“Loctar cannot credibly allege that he and other customers were aware of an agreement between Spartan and Heavy Materials with respect to price but, at the same time, they thought the price increases were the result of legitimate market forces.”). A reasonable jury could conclude that Loctar believed an agreement took place with regard to pricing without perceiving it as unlawful, as Loctar argues. Moreover, while it is a violation of Section 2 of the Sherman Act to “monopolize” or “attempt to monopolize,” the mere existence of a monopoly is

²⁴ In his opposition, Loctar attaches a declaration pursuant to 28 U.S.C. § 1746, wherein Loctar states that although he mistakenly believed an agreement was in place when Spartan acquired Heavy Materials, he had no reason to suspect at the time that said arrangement was unlawful. [ECF 109–5] at 2, ¶ 3. The Court notes that while unsworn declarations are permissible at the summary judgment stage, they must conform to section 1746’s requirement that the declarant state the contents of their declarations are true, subject to penalty of perjury. *Phillis v. Harrisburg Sch. Dist.*, 430 F.App’x 118, 122 (3d Cir. 2011). Loctar’s declaration fails to abide by this requirement. Accordingly, the Court does not consider the assertions that have been set forth in Loctar’s defective declaration for purposes of the present motion.

not by itself unlawful. *See* 15 U.S.C. § 2 (2002).²⁵ In fact, to find “[l]iability under § 2 requires ‘(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.’” *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 306–07 (3d Cir. 2007) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)). On that basis, monopolization alone is not, in itself, indicative of an antitrust violation. Again, nothing in Loctar’s deposition testimony reveals that he believed the increased prices around the time of the class period and his purchase of RMC were the result of possible wrongdoing by Defendants.

Lastly, Spartan and Mosler argue that “mere silence or failure to disclose” is insufficient to support a claim of fraudulent concealment. [ECF 102] at 12–14. In particular, Spartan and Mosler advance the position that, absent an affirmative duty to disclose arising from a fiduciary relationship, mere silence cannot constitute fraudulent concealment. *Id.* at 13. We first point out that Loctar does not merely allege “silence” as evidence of fraudulent concealment. In fact, Loctar sets forth several different allegations of affirmative acts taken by Defendants to conceal their wrongdoing. [ECF 109] at 9; *see also* [ECF 37] at 11–13, ¶¶ 66–80. Notwithstanding that point, we find no support for the contention that in an alleged price-fixing conspiracy—the type likely to be self-concealing—a plaintiff must also establish an independent duty to disclose. *See Bethlehem Steel Corp.*, 641 F. Supp. at 274 (“If the conspiracy conceals itself, it would be anomalous to require plaintiff to allege affirmative acts by defendants to conceal the conspiracy because such acts would be unnecessary and therefore never performed.”).

²⁵ “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.” 15 U.S.C. § 2 (2002).

To avail oneself of the doctrine of equitable tolling, the plaintiff must show “(1) that the defendant actively misled the plaintiff; (2) which prevented the plaintiff from recognizing the validity of her [or his] claim within the limitations period; and (3) where the plaintiff’s ignorance is not attributable to her [or his] lack of reasonable due diligence in attempting to uncover the relevant facts.” *Cetel v. Kirwan Fin. Grp., Inc.*, 460 F.3d 494, 509 (3d Cir. 2006) (citations omitted). As we concluded, case law in this circuit indicates that courts apply the self-concealing approach on an industry-specific basis. *Fasteners*, 2011 WL 3563989, at *4–5. Here, the FAC contains allegations that there are “high barriers that make entry into the ready-mix concrete business difficult,” including “high capital costs and regulatory requirements.” [ECF 37] at 5, ¶ 31. Moreover, as this Court has previously determined, those allegations suggest that the “rise in prices during the proposed class period may have been the result of legitimate market forces, and support the claim that the alleged conspiracy was self-concealing.” [ECF 36] at 6.

Based on this record, Loctar has established a genuine issue for trial as to whether the Defendants’ alleged price-fixing conspiracy and secrecy constitute affirmative acts of concealment and thus, has satisfied the first element under the doctrine for purposes of the present motion.

ii. Due Diligence

To benefit from the doctrine of fraudulent concealment, Loctar must also demonstrate that he “neither knew, nor, in the exercise of due diligence, could reasonably have known of the offense.” *In re Aspartame Antitrust Litig.*, 2007 WL 5215231, at *6 (citations omitted). “In order to avoid summary judgment, there must be a genuine issue of material fact as to whether the Appellants exercised reasonable due diligence in investigating their claim.” *Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 257 (3d Cir. 2001). Thus, the plaintiff is expected “to take reasonable measures to uncover the existence of injury.” *Forbes*, 228 F.3d at 486. In considering whether a plaintiff has exercised due diligence in investigating his or her claims, the court must

consider “...the magnitude of the existing storm warnings. The more ominous the warnings, the more extensive the expected inquiry.” *Prudential Ins. Co. of Am. v. U.S. Gypsum Co.*, 359 F.3d 226, 238 (3d Cir. 2004) (quoting *Matthews*, 260 F.3d at 255).

“[I]ssues of diligence and constructive notice” are generally considered “inherently factual.” *In re Aspartame Antitrust Litig.*, at *6 (explaining that the factual nature of considering whether a plaintiff exercised due diligence is generally not appropriate to determine on a motion to dismiss) (citing *Bethlehem Steel*, 641 F.Supp. at 275; *see also In re Mercedes-Benz*, 157 F.Supp.2d at 374; *In re Sumitomo Copper Litigation*, 120 F.Supp.2d 328, 346 (S.D.N.Y.2000); *In re Catfish Antitrust Litig.*, 826 F.Supp. 1019, 1031 (N.D.Miss.1993). “The point at which a reasonable person would have appreciated the need for diligent inquiry, or whether a resulting investigation would have produced useful results, are ultimately questions of fact for a juror to decide.” *In re Blood Reagents Antitrust Litig.*, 266 F. Supp. 3d at 787 (citing *In re Sulfuric Acid Antitrust Litig.*, 743 F.Supp.2d 827, 856 (N.D. Ill. 2010); *see also Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 832 (11th Cir. 1999) (“[A]s a general rule, the issue of when a plaintiff in the exercise of due diligence should have known of the basis for his claims is not an appropriate question for summary judgment.”). The Eleventh Circuit has similarly observed that “. . . along with a majority of the circuits, that the issue of when a plaintiff is on “notice” of his claim is a question of fact for the jury.” *Morton's Mkt.*, 198 F.3d at 832 (citing *Ballew v. A.H. Robins Co.*, 688 F.2d 1325 (11th Cir.1982); *Maughan v. SW Serv., Inc.*, 758 F.2d 1381, 1387 (10th Cir.1985); *Lundy v. Union Carbide Corp.*, 695 F.2d 394 (9th Cir.1982); *Renfro v. Eli Lilly & Co.*, 686 F.2d 642 (8th Cir.1982)).

Spartan and Mosler argue that Loctar had knowledge of the factual basis of his claims no later than July 7, 2015, but failed to exercise any due diligence in investigating said claims. [ECF 102] at 17. In particular, according to Spartan and Mosler, the relevant storm warnings prompting

a duty of due diligence for Loctar were: (1) the sudden increase in the price of RMC, (2), the complaints and discussions surrounding the alleged agreement between Heavy Materials and Spartan, and (3) the defendant's November 17, 2016 proposed counterclaim that was filed in the *Argos* matter (3:15-cv-00004).²⁶ *Id.* at 18. Loctar, in turn, disputes that the incidents described above constitute “storm warnings” so as to place him on notice to discover his causes of action. [ECF 109] at 11–13.²⁷ According to Loctar, the earliest discovery of his claims could not have occurred prior to the July 2017 trial in *Argos*, where the purported agreement between Spartan and Heavy Materials was first publicly disclosed. *Id.* at 4.

We first address the purported “storm warning” in the counterclaim that was filed in the *Argos* matter, where the first allegations concerning Spartan and Heavy Materials' agreement to divide the market were raised. *See* 3:15-cv-00004, at [ECF 115]. Even assuming said motion put Loctar on notice to investigate his claims, it was filed on November 17, 2016—well within the applicable four-year statute of limitations. For that reason, the Court finds this argument unpersuasive. Next, we turn to Defendants' contention that the price increases and discussions among purchasers reflect their belief that Spartan had acquired Heavy Materials. Loctar contends the belief that an acquisition occurred is not enough to constitute a “loud and clear storm warning” that an antitrust violation has taken place. The Court agrees. One can certainly argue that the incorrect, but allegedly widespread, belief that Spartan had acquired Heavy Materials supports the inference that the industry is marked by high informational barriers and suggests that accurate information concerning the price increases was not readily available to the public at the time.

Finally, while substantial price increases may invite scrutiny and raise public concerns,

²⁶ *See* 3:15-cv-00004, at [ECF 115].

²⁷ Again, the Court does not consider the assertions set forth in Loctar's defective declaration for the reasons stated earlier.

prices alone are not enough to constitute a “storm warning” requiring Loctar to exercise reasonable diligence to investigate his claims. “[T]he issue is not whether plaintiffs knew that the prices 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.” *In re Blood Reagents Antitrust Litig.*, 266 F. Supp. 3d at 785 (citing *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 488 (W.D. Pa. 1999)). Again, Loctar sets forth evidence that he had no reason to believe the arrangement was unlawful and that he could not become aware of the actual agreement to divide the market until as early as July 2017. *See generally* [ECF 109].

On that basis, the Court finds there to be sufficient evidence to raise a genuine issue of material fact that Loctar satisfied the reasonable diligence element of the doctrine prior to the July 2017 *Argos* trial.

iii. Awareness of Facts Supporting a Claim

As for the final element, the Court must consider whether “. . . there exists sufficient evidence in the record for Plaintiffs to establish that they were not aware, nor should they have been aware of facts supporting their claim four years before the filing of their initial complaint.” *In re Aspartame Antitrust Litig.*, 2008 WL 4724094, at *6 (E.D. Pa. Aug. 11, 2008), *aff'd*, 416 F. App'x 208 (3d Cir. 2011). “[T]he issue is not whether plaintiffs knew that the prices 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.” *In re Blood Reagents Antitrust Litig.*, 266 F. Supp. 3d at 785 (citations omitted).

In addition, there must be some “triggering event” that put [p]laintiff on notice of the existence of the claims. *In re Blood Reagents Antitrust Litig.*, 266 F. Supp. 3d at 786 (citing *In re Aspartame Antitrust Litig.*, 2008 WL 4724094, at *7; *see also Morton's Mkt., Inc.*, 198 F.3d at 827 (identifying the guilty plea of a defendant as a triggering event that put plaintiffs on notice; *In re*

Electric Carbon Prods. Antitrust Litig., 333 F.Supp.2d 303, 315 (D.N.J. 2004) (identifying the indictment of certain defendants by the Department of Justice as an event that put plaintiffs on notice of their claim). Although Loctar was aware of the price increases during the December 2013 through October 2015 class period, a genuine issue of material fact exists as to whether he lacked accurate information about the cause of those increases.²⁸ Loctar argues the triggering event that placed him on notice occurred on July 17 or 18, 2017 in the *Argos* trial, when the agreement was revealed publicly. [ECF 109] at 4.²⁹ The Court finds this argument creates a genuine issue of material fact. Thus, the Court cannot conclude as a matter of law that Loctar was on notice of the facts underlying this action prior to December 19, 2015.³⁰ As such, the Court finds that Loctar has met his burden with respect to the present motion as to this final element as well.

Viewing the evidence in the light most favorable to Loctar—as the Court must do at this stage—the Court concludes that a reasonable jury could find that Spartan and Mosler fraudulently concealed evidence of their purported collusion, as well that Loctar exercised reasonable diligence and was unaware (nor should he have been aware) of the purported collusion prior to July 17, 2017, thereby tolling the statute of limitations on Loctar’s claims to said date. Accordingly, it is recommended that summary judgment as to Count One of the FAC be denied.

B. Count Two – Virgin Islands Antimonopoly Law

Spartan and Mosler move for summary judgment as to Count Two on the same grounds advanced with respect to Count One: (1) that the Virgin Islands law claim is barred by a four-year statute of limitations, and (2) Loctar fails to satisfy the elements of the doctrine of fraudulent

²⁸ Loctar initially believed the prices were high because Spartan was the only producer of RMC on St. Croix at the time. *See* [ECF 109–1] at 6, Counter 7.

²⁹ In the FAC, Loctar further alleges that the transcript of the *Argos* trial was not publicly available until on or about August 14, 2017. [ECF 37] at 10–11, ¶ 65.

³⁰ Again, the original complaint was filed on December 19, 2019 – four years subsequent to this date. *See* [ECF 1].

concealment to toll said claim. [ECF 102] at 5, n.4.³¹ In a footnote, Spartan and Mosler contend that the fraudulent concealment elements adopted by the Virgin Islands Superior Court in *Gerald v. R.J. Reynolds Tobacco Co.*, 67 V.I. 441, 462 (Super. Ct. 2017) do not differ in any meaningful respect from the fraudulent concealment elements as applied to federal claims. *Id.* at n.4. Thus, Defendants provide their “analysis set forth *infra* applies equally” to Loctar’s claims under the Virgin Islands Antimonopoly Law as it does to his claim under federal antitrust law. [ECF 102] at 5, n.4.

Loctar responds that Counts Two and Three are precluded from summary judgment on the grounds that the Virgin Islands observes the discovery rule in tolling statute of limitations on state law claims. [ECF 109] at 3-5. As mentioned consistently herein, Loctar contends the earliest he could have learned of his injury was July of 2017 during the *Argos* trial, when Spartan and Heavy Materials’ agreement to divide the ready-mix concrete market was disclosed publicly for the first time. *Id.* at 4.³² Loctar further contends that this Court should observe cross-jurisdictional tolling, thereby tolling his state-law claims on December 12, 2017, the date that the first putative class action was filed in the Superior Court. *Id.* at 4-5.³³

³¹ The Court notes that Spartan and Mosler’s briefing on the motion is largely devoted to analyzing the elements of fraudulent concealment as to the antitrust claim under the Sherman Act, 15 U.S.C. § 1. *See* [ECF 102]. However, in a footnote, Defendants assert that the statute of limitations is four years for both the federal and Virgin Islands law claims. *Id.* at 3, n. 2. As such, Defendants seek to clarify that any references in their motion to the “statute of limitations” are meant to include both the federal and Virgin Islands statutory period. *Id.*

³² In the alternative, Loctar mentions the proposed counterclaim filed on November 17, 2016 by the defendant in the *Argos* matter. *See* 3:15-cv-00004, at [ECF 115]. Pursuant to Fed. R. Evid. 201(b)(2), the Court has already taken judicial notice of the *Argos* matter, which includes defendant’s motion for leave to amend its answer to assert a counterclaim. *See supra*, n. 8.

However, Loctar maintains that “the motion for leave did not reveal the factual predicate for the counterclaim. Rather, it was only ‘set forth in the attached proposed counterclaim’ as an exhibit, which is significantly redacted, ostensibly for confidential information. [ECF 109] at 11, n.8. Further, Loctar asserts it was the trial of that matter which disclosed the full terms of Defendants’ arraignment and unlawful agreement for the first time. *Id.* Thus, Loctar argues—regardless of which of the two dates the Court observes as a “storm warning” that put Loctar on notice of his claims—both fall within the applicable four-year statute of limitations. *Id.* at 4.

³³ *See supra*, n. 4.

i. Discovery rule and jurisdictional class action tolling

The Virgin Islands Supreme Court adopted the “discovery rule” to toll the statute of limitations on a state law claim when:

[D]espite the exercise of due diligence, the injury or its cause is not immediately evident to the victim. Under the discovery rule, the focus is not on the plaintiff's actual knowledge, but rather whether the knowledge was known, or through the exercise of diligence, knowable to the plaintiff. Because the application of the discovery rule rests on when a party knew or should have known of its injury, it is typically a question of fact.

United Corp. v. Homed, 64 V.I. 297, 305–06 (V.I. 2016) (citing *Santiago v. Virgin Islands Hous. Auth.*, 57 V.I. 256, 273 (V.I. 2012)).

With respect to the discovery rule, Spartan and Mosler assert Loctar became immediately aware of his alleged injuries “when he purchased ready-mix that the prices had been jacked up by the retailer that bought out its competition.” [ECF 113] at 3–4. As such, Spartan and Mosler contend the discovery rule is inapplicable to the state law claim. *Id.* at 4. For the reasons set forth above as to Count One, the Court finds that Loctar creates a genuine issue of material fact with respect to due diligence and the discovery of his alleged injuries. On that basis, the Court concludes that this issue is also a question of fact for the jury to decide.

The Court notes that the Virgin Islands Supreme Court has yet to address the rule of intra-jurisdictional class action tolling and cross-jurisdictional tolling. *Castillo v. St. Croix Basic Servs., Inc.*, 72 V.I. 528, 534 (Super. Ct. 2020).³⁴ However, given the Court’s finding that a genuine issue

³⁴ In *Casillo*, the Superior Court of the Virgin Islands, after conducting a *Banks* analysis, concluded that the soundest rule for the Virgin Islands is “. . . to recognize intra-jurisdictional class action tolling, and by extension cross-jurisdictional tolling[.]” *Castillo*, 72 V.I. at 534; *see also Stanley v. Virgin Islands Bureau of Corr.*, 77 V.I. 22, 39 (V.I. Super. 2022) (“[C]ourts in other jurisdictions have held ‘that from the filing of a putative class action until the entry of an order denying class certification, the applicable statute of limitations will be tolled for the claim of a plaintiff who would be a member of the asserted class if the class were certified’” (citations omitted)). “Intra-jurisdictional class action tolling is a rule whereby a court tolls the statute of limitations based on the filing of a class action within that same jurisdiction.” *Castillo*, 72 V.I. at 534.

of material fact exists with respect to Loctar’s discovery of his purported injuries, the Court need not reach Loctar’s argument concerning class-action tolling.

ii. Fraudulent Concealment Doctrine

In Count Two, Loctar asserts that Defendants’ alleged price-fixing scheme violated the Virgin Islands Antimonopoly Law. [ECF 37] at 8 ¶¶ 44–48. Under Title 11, Section 1503(1)(c) of the Virgin Islands Code, it is a violation of the Virgin Islands Antimonopoly Law to

(1) [m]ake any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person:

...

(c) allocating or dividing customers, territories, supplies, sales, or markets, functional or geographical, for any commodity or service.

V.I. CODE ANN. tit. 11 § 1503(1)(c). The statute further provides that “[a]ny action for damages be forever barred unless commenced within four years after the cause of action accrued.” 11 V.I.C. § 1507(2).

The Supreme Court of the Virgin Islands has yet to articulate a stance on the equitable tolling doctrine for fraudulent concealment. However, the Virgin Islands Superior Court—in performing a *Banks* analysis—adopted the following standard:

In order to toll the statute of limitations for fraudulent concealment, the plaintiff must allege and prove: (1) that the defendant affirmatively concealed, or failed to disclose despite a duty to do so, material facts critical to plaintiff’s cause of action; (2) that the defendant knew or had reason to know that the material fact had been concealed or suppressed; (3) that the defendant’s conduct prevented plaintiff from discovering of the nature of the claim within the limitations period; and (4) that the plaintiff could not have discovered sufficient facts to identify the particular cause of action despite reasonable care and diligence.

Gerald, 67 V.I. at 466 (concluding the doctrine as the soundest rule for the Virgin Islands with

respect to the equitable tolling for fraudulent concealment).³⁵ In adopting this standard, the Superior Court observed that the “elements encompass the general standard governing equitable tolling for fraudulent concealment uniformly recognized by courts in other jurisdictions in the United States.” *Id.*

Defendants contend that the above standard adopted in *Gerald* does not differ in “any way relevant to the instant matter” from that of the fraudulent concealment standard applied by federal courts. [ECF 102] at 5, n.4. As such, Defendants contend that their analysis under Count One applies equally to the state (i.e., territory) law claims of Counts Two and Three. *Id.* Loctar, in turn, does not even address which elements of fraudulent concealment are applicable to his state law claims. Instead, he contends—as discussed above—that the discovery rule and cross-jurisdictional class tolling preserve his state law claims. [ECF 109] at 3–5. For the reasons set forth by the Court in relation to Count One above, the Court likewise finds that genuine issues of material fact exist as to the applicability of the fraudulent concealment doctrine to Count Two. Specifically, whether the cause of action under Count Two was tolled until July 17, 2017, the date of the *Argos* trial.

Based on the above, the Court recommends denying summary judgment as to Count Two for Spartan. However, given that the Virgin Islands Antimonopoly Law does not provide for statutory liability of directors and agents, it is recommended that summary judgment be granted as to Count Two for Mosler.^{36, 37}

³⁵ The Virgin Islands Superior Court takes care to distinguish the concept of “fraudulent concealment as an equitable tolling doctrine” from “fraudulent concealment as an independent tort claim. *See Gerald*, 67 V.I. at 464 (“Finally, while this Court recently performed a *Banks* analysis with respect to fraudulent concealment as an independent cause of action for purposes of imposing civil tort liability, the concept of fraudulent concealment as an equitable tolling doctrine was not addressed.”).

³⁶ Reference is made to the Court’s analysis as it relates to Count Three below.

³⁷ Given the statutory nature of this recommendation, the Court finds Loctar’s request for Rule 56(d) discovery to be unwarranted.

C. Count Three – “Participating Agent” Liability as to Mosler

Finally, Spartan and Mosler seek summary judgment as to Count Three on the basis that it does not state an independent claim, but rather advances a theory of liability as to Mosler under Count Two. [ECF 102] at 4, n.3.³⁸ In support of this contention, Defendants cite to a bench ruling in an action in the Superior Court of the Virgin Islands captioned *Gilbert, et al. v. Spartan Concrete Prod., LLC, et al. Id.*; see also [ECF 103–4]. In that matter, the judge³⁹ noted that the Virgin Islands Antimonopoly Law is silent on the issue of potential liability of directors and agents, while the federal antimonopoly statute is not. [ECF 103–4] at 3–5. The judge found this silence as intentional and indicative that such liability under the statute does not exist in the Virgin Islands law. *Id.* This Court agrees.⁴⁰

Count Three, however, is not brought pursuant to the Virgin Islands Antimonopoly Law, nor is it even a statutory claim. See [ECF 37] at 8–9.⁴¹ Instead, it is a cause of action for “participating agent” liability asserted under common law. *Id.* The Court notes that such a cause

³⁸ Spartan and Mosler contend that—in the related Superior Court action involving Defendants—Judge Molloy already determined in a ruling from the bench that “...the Virgin Islands Anti-Monopoly Law is different than the federal antitrust statute in that the Virgin Islands Anti-Monopoly Law does not contain any provision for liability of directors and agents of a corporation.” [ECF 102] at 4, n.3; see also [ECF 103–4], Transcript of October 22, 2019 Hearing, at 59–61. On that basis, Spartan and Mosler assert Count Three is not an independent claim, but a theory of liability “duplicative” of Count Two, as it simply seeks to allege Mosler liable for a violation of the Virgin Islands Antimonopoly Act, a claim already asserted in Count Two as to both Spartan and Mosler.

³⁹ As fate would have it, the presiding judge in the present matter—Chief Judge Robert A. Molloy—was the judge who entered the bench ruling in the *Gilbert* matter while he was serving as a judge with the Superior Court of the Virgin Islands.

⁴⁰ Title 15, Section 24 of the United States Code specifically provides for personal-participation liability for directors and/or agents of a corporation found in violation of the antitrust laws. 15 U.S.C. § 24; see also *City Select Auto Sales Inc. v. David Randall Assocs., Inc.*, 885 F.3d 154, 161 (3d Cir. 2018) (citing 15 U.S.C. § 24) (“For example, corporate antitrust violations are ‘deemed to be also that of the individual directors, officers, or agents ... who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation.’”). The Virgin Islands Antimonopoly Law, in contrast, contains no similar provision. It also bears noting that Virgin Islands courts have observed that “. . . regarding consideration of context, legislatures are presumed to know the common law of the United States and to have incorporated it in all its relevant aspects into any statutory codification of the common law.” *Evans-Freke v. Evans-Freke*, 75 V.I. 407, 445 (V.I. 2021) (citations omitted).

⁴¹ Although Defendants recognize that Count Three is pled as a common law cause of action, they generically contend that the claim is reliant upon an underlying violation of the Virgin Islands Antimonopoly Law without further analysis or argument in support of this contention. [ECF 102] at 4, n.3.

of action was recently examined by the Superior Court of the Virgin Islands, who noted that it was a matter of first impression in the territory. *Nigg v. Marriott Hotel Mgmt. Co. (Virgin Islands), Inc.*, 2025 WL 2180641, at *6 (V.I. Super. Jul. 18, 2025). According to the opinion, a vast majority of jurisdictions apply the general rule that corporate officers or agents may be held personally liable for torts they commit, direct, authorize, inspire, or otherwise participate in, regardless of whether the acts or omissions occurred within their scope of employment. *Id.* Because the “participating agent” theory is a tort of negligence based in agency law, an injured third party is required to prove that the agent or officer personally breached a duty of care owed to said third party, as opposed to any duty the agent owed to the principal or employer. In other words, individual liability arises only when the officer or agent owed an independent duty of reasonable care to the injured party. *Id.* While one might postulate whether Loctar was owed an independent duty by Mosler,⁴² no such challenge is raised by Defendants in their motion and it is certainly not this Court’s place to speculate or do Defendants’ job for them.

Again, in their challenge of Count Three, Defendants argue that the “participating agent” cause of action is a theory of liability and not an independent cause of action and thus, is duplicative of Count Two. [ECF 102] at 4, n.3. But as discussed above, the Virgin Islands Superior Court has since held subsequent to Defendants’ motion that such a cause of action is recognized in the territory. *Marriott*, 2025 WL 2180641, at *6–10. In the end, Defendants chose not to treat Count Three for what it is, a purported common law cause of action, and instead lumped their argument as to this claim (in a single footnote) with that of their arguments on Loctar’s antitrust and antimonopoly statutory law claims.⁴³ The Court finds this to be insufficient for summary

⁴² While such a duty might very well be premised upon a violation of the Virgin Islands Antimonopoly Law, Defendants make no effort to address this premise or debunk that a duty might lie elsewhere.

⁴³ While the Court recognizes that it is not bound by the Superior Court’s decision in *Marriott*, 2025 WL 2180641, it also appreciates that Defendants have made no effort whatsoever to argue why the claim is not an independent cause of action other than to state that Loctar has already asserted an antimonopoly claim against Mosler in Count Two and

judgment purposes.

As for whether intra-jurisdictional tolling applies, Defendants raise the argument for the first time in their reply brief. *See* [ECF 113] at 3–4.⁴⁴ Such a belated argument need not be considered by the Court, with the Court choosing not to do so. *See Helman v. Marriott Intl., Inc.*, 2021 WL 3473480, at *4, n. 6 (D.V.I. Aug. 6, 2021) (citing *United States v. Kolodesh*, 787 F.3d 224, 230 n.3 (3d Cir. 2015) (noting that arguments raised for the first time in a reply brief are deemed waived and need not be considered)).

Having failed to present a viable argument to warrant the dismissal of Count Three, it is recommended that summary judgment be denied as to this count.

IV. CONCLUSION

Based on the foregoing analysis, it is hereby:

RECOMMENDED that the District Court **DENY** Defendants’ motion [ECF 101] for summary judgment in its entirety as to Spartan; it is further

RECOMMENDED that the District Court **DENY** Defendants’ motion [ECF 101] for summary judgment as to Counts One and Three as to Mosler; and it is further

RECOMMENDED that the District Court **GRANT** Defendants’ motion [ECF 101] for summary judgment as to Count Two as to Mosler.

that such a direct claim against an agent is not available under the Virgin Islands Antimonopoly Law. [ECF 102] at 4, n. 3. The FAC is clear on its face, however, that Count Three is not premised upon antimonopoly or antitrust statutory law, but is instead a common law cause of action premised upon agency law. Although the *Marriott* opinion was not available to Defendants at the time of their motion, they certainly could have argued whether such a common law cause of action should be adopted in the territory. It is not this Court’s place to consider an argument that has not been presented before it in the motion and the Court declines to do so.

⁴⁴ Defendants contend that they did not address intra-jurisdictional tolling in their motion as this is Loctar’s defense to make. [ECF 113] at 3. Despite this contention, Defendants addressed in great detail the fraudulent concealment tolling doctrine as it applies under the Sherman Act. They also addressed in a footnote the fraudulent concealment tolling standard found applicable under the Virgin Islands Antimonopoly Law, having cited to a Superior Court of the Virgin Islands case. *See generally* [ECF 102]. Defendants further acknowledged the companion Superior Court class action. *see* [ECF 103] ¶ 17. Had Defendants addressed Count Three as the common law cause of action that it is, they almost certainly would have addressed the applicable tolling theory for this claim as they had with the others.

Any objections to this Report and Recommendation must be filed in writing within 14 days of receipt of this notice. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and Recommendation before the assigned District Court Judge. 28 U.S.C. § 636(b)(1); LRCi 72.3.

ENTER:

Dated: March 4, 2026

/s/ G. Alan Teague
G. ALAN TEAGUE
U.S. MAGISTRATE JUDGE