UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: REFRIGERANT COMPRESSORS ANTITRUST LITIGATION	Master Docket No. 2:09-MD-2042 MDL Hon. Sean F. Cox
THIS DOCUMENT RELATES TO: *General Electric Company v. Whirlpool Corporation, et al.*	Civil Action No. 2:13-cv-12638 **Oral Argument Requested**

MOTION BY DEFENDANTS DANFOSS FLENSBURG GMBH AND DANFOSS LLC TO DISMISS THE COMPLAINT

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Danfoss Flensburg GmbH and Danfoss LLC hereby move to dismiss the Complaint filed by Plaintiff General Electric Company and pursuant to Rule 12 (b)(2) of the Federal Rules of Civil Procedure Defendant Danfoss Flensburg GmbH moves to dismiss the Complaint on the ground that the Court lacks personal jurisdiction over it.

This motion is supported by the points and authorities set forth in the accompanying Memorandum of law.

As required by E.D. Mich. L.R. 7.1(a), Lawrence Kill, counsel for Danfoss

Flensburg GmbH and Danfoss LLC, sought concurrence from Nathaniel Wood, counsel for General Electric Company, via telephone on February 27, 2014. Plaintiff's counsel did not consent to the relief requested.

Dated: February 28, 2014

by: s/ Lawrence Kill

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MEMORANDUM OF LAW IN SUPPORT OF DANFOSS FLENSBURG GMBH'S AND DANFOSS LLC'S MOTION TO DISMISS THE COMPLAINT OF GENERAL ELECTRIC COMPANY

STATEMENT OF ISSUES PRESENTED

1. Whether plaintiff has standing under *Illinois Brick v. Illinois*, 431 U.S. 720 (1977) to recover damages where the refrigerant compressors at issue were purchased by Controladora Mabe, S.A. de C.V., a Mexican corporation, and incorporated into refrigerators which were then sold to plaintiff?
2. Whether the four (4) year statute of limitations applicable to private antitrust claims should be tolled for plaintiff's conspiracy claims due to (a) the pendency of class actions, (b) criminal proceedings, or (c) fraudulent concealment?
3. Whether plaintiff has alleged sufficient factual support to make it plausible that moving defendants engaged in a conspiracy after February 2009 in view of public announcements by governmental agencies of investigations of anti-competitive practice in the refrigerant compressor industry, the multiple antitrust class actions filed in February 2009, and subsequent criminal proceedings?
4. Whether plaintiff's allegations of conspiracy for the period prior to April 2004 fail to meet the pleading requirements under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)?

5. Whether plaintiff alleges fraudulent concealment with the requisite particularity required for the periods after February 2009 and before April 2004?
6. Whether this Court has personal jurisdiction over Danfoss Flensburg GmbH?

MOST APPROPRIATE AUTHORITY FOR RELIEF SOUGHT

1. Motion to Dismiss under Fed. R. Civ. P. 12(b)(6)

   Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)

   Novell, Inc. v. Microsoft Corp., 505 F.3d 302 (4th Cir. 2007)

   In re Refrigerant Compressors Antitrust Litig., 795 F.Supp.2d 647 (E.D. Mich. 2011)

   Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)

   Michigan v. Morton Salt Co., 259 F.Supp. 35 (D. Minn. 1966)

   Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1975)

2. Motion to Dismiss under Fed. R. Civ. P. 12(b)(2)

   Singh v. Daimler, AG, 902 F.Supp.2d 974 (E.D. Mich. 2012)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

Defendants Danfoss Flensburgh GmbH ("Flensburg") and Danfoss LLC ("LLC") respectfully submit this memorandum of law in support of their Motion to Dismiss Plaintiff General Electric Company's ("GE") Complaint.

I. Introduction and Summary

GE's Complaint is breathtaking in its expansion of the alleged conspiracy period – seventeen years – compared to the multiple treble damage class actions and the multiple criminal proceedings involving the very same alleged conspiracy. The length, however, cannot mask its pleading deficiencies or avoid applicable law. First, GE admittedly is an indirect purchaser of refrigerant compressors and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) bars such claims. Second, having waited four years after public disclosures and announcements and multiple class actions to file suit, it needs to rely on "tolling" the four year statute of limitations to try to salvage its claims in whole or in part. This effort fails. Third, its pleadings, although expansive, do not come close to satisfying the pleading requirements of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and its progeny for any period before April 2004 or after February 2009 and, in addition, utterly fails to allege the requisites for fraudulent concealment for such periods. Finally, there exists no basis to allege personal jurisdiction over Flensburg.

II. Background

A. GE's Claims

On February 15, 2013, GE filed this action against Whirlpool Corporation,

Whirlpool S.A., Embraco North America, Inc., Danfoss A/S, Danfoss Flensburg GmbH, Danfoss, LLC, Household Compressors Holding SpA, and ACC USA, LLC.[1] Compl. ¶1. GE seeks to recover for injuries caused by Defendants' alleged seventeen year conspiracy - from at least as early as January 1, 1996 until at least into 2013 - to fix the price of refrigerant compressors sold by Defendants and incorporated into household refrigerators that GE manufactured and/or sold in the U.S. Compl. ¶¶1-2, 4. GE seeks to recover for two categories of refrigerator compressors: (1) compressors purchased by GE "for inclusion in the refrigerators it manufactured itself for sale in the United States" and (2) compressors purchased by Controladora Mabe, S.A. de C.V. ("MABE"), an alleged "joint venture" in which GE purportedly owns a 48% interest, for incorporation into refrigerators MABE manufactured for GE for sale in the U.S. Compl. ¶¶46-49. GE asserts a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, and also asserts state law claims for fraud and conspiracy. Compl. ¶¶204-224.

GE's Complaint was filed nearly four years after a putative class of purchasers of refrigerant compressors or products containing compressors filed multiple class actions (the "Class Action") in New Jersey and Michigan against

[1] GE names as co-conspirators Tecumseh Products Company, Tecumseh do Brasil, Ltda. ("TdB"), and Tecumseh do Brasil USA, LLC (collectively, "Tecumseh") and Panasonic Corporation (formerly known as Matsushita Electric Industrial Co., Ltd.) and Panasonic Corporation of North America (collectively, "Panasonic").

sixteen named defendants, including various Danfoss entities[2] (Compl. ¶120), alleging that defendants had conspired to fix the price of household and light commercial refrigerant compressors sold in the U.S. and elsewhere during the period 2004 to 2008, which putative class actions were transferred pursuant to 28 U.S.C. § 1407 to the Eastern District of Michigan. Compl. ¶121. A consolidated Master Amended Complaint was filed on June 30, 2010. Compl. ¶122. Class certification was preliminarily approved on January 9, 2014. *See* 2:09-MD-2042 Dkt. 460.

GE's Complaint states that by the end of February 2009, the U.S. Department of Justice ("DOJ"), the European Commission ("EC") and the Secretariat of Economic Law of the Ministry of Justice of Brazil ("SDE") had each publicly announced their investigation of anticompetitive practices in the refrigerator compressor industry. Compl. ¶¶118-119. Tecumseh issued a press release announcing its agreement to cooperate with the DOJ concerning an alleged criminal cartel in the compressor industry on February 25, 2009 (Compl. ¶117) and Embraco sent GE a letter on February 18, 2009, informing it directly of the DOJ's investigation (Compl. ¶181). Less than a year later, on September 30, 2010, Panasonic and Embraco pled guilty to conspiring to fix the price of refrigerant

[2] The Danfoss companies named in the Class Action complaint were Danfoss A/S, Danfoss Commercial Compressors, Ltd., Danfoss Scroll Technologies, LLC f/k/a Scrolll Technologies, LLC, and Danfoss Turbocor Compressors, Inc.

compressors in the U.S. Compl. ¶124. On October 4, 2011, Flensburg pled guilty to conspiring to fix the price of light commercial compressors (the "Flensburg Indictment"). Compl. ¶128. Judgments were entered in the aforementioned proceedings on November 23, 2010, January 6, 2011 and December 19, 2011, respectively. Compl. ¶124, 128. In addition, on September 27, 2011, the DOJ indicted three former executives from Whirlpool SA, TdB, and Panasonic Corporation, Mssrs. Heinzelmann, Verissimo, and Adachi (the "Heinzelmann Indictment"). Compl. ¶127. The Heinzelmann Indictment remains open. Compl. ¶127.[3]

III. Argument

A. GE Lacks Standing to Assert Claims for MABE's Compressor Purchases

This Court has already decided that only direct purchasers of compressors have standing to assert federal antitrust claims. *In re Refrigerant Compressors Antitrust Litig.*, 795 F.Supp.2d 647, 659 (E.D. Mich. 2011). The Court's ruling was squarely in line with the direct purchaser rule as enunciated in *Illinois Brick v. Illinois*, 431 U.S. 720 (1977) and remains applicable here. GE can only recover from Defendants if GE is a direct purchaser of compressors. Because GE admits

[3] All the criminal cases, except that involving Flensburg, alleged a conspiracy from "at least as early as October 14, 2004, and continuing until on or about December 31, 2007." The Flensburg case alleged a conspiracy from "at least as early as October 14, 2004, and continuing until on or about to September 7, 2007."

that MABE, a Mexican corporation, was the direct purchaser from Defendants of compressors (Compl. ¶49-53, 55), GE has no standing to sue with respect to those sales.

It is well-settled that only the direct purchasers of an allegedly price-fixed good have antitrust standing to seek damages under the federal antitrust laws. *Kansas v. Utilicorp United Inc.*, 497 U.S. 199 (1990); *Illinois Brick*, 431 U.S. 720; *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 493 (1968). In *Illinois Brick*, 431 U.S. at 726, the plaintiffs alleged that defendants, distributors and manufacturers of concrete block, had conspired to fix the price of concrete block. The plaintiffs were purchasers of buildings which incorporated defendants' concrete block, "which [was] purchased directly from [defendants] by masonry contractors and used by them to build masonry structures; those structures [were] incorporated into entire buildings by general contractors and sold to [plaintiffs]." *Id.* at 726. The Court found that plaintiffs could not recover for any overcharge that was passed on by the masonry and general contractors, reasoning that allowing indirect purchasers of a price-fixed good to recover would involve apportioning damages among indirect and direct purchasers, which would be too complex and undermine the effectiveness of treble-damages suits. *Id.* at 737. The Court declined to carve out exceptions to this rule to individual markets. *Id.* at 744.

Like the plaintiffs in *Illinois Brick*, GE seeks to recover for overcharge

allegedly passed on by MABE to GE, however, the same problems preventing plaintiffs from recovering in *Illinois Brick* are present here and similarly bar GE from recovering for MABE's purchases. Here, as in *Illinois Brick*, the price-fixed good is merely one of numerous components of a larger product sold to GE. Also like *Illinois Brick*, this case presents the problem of how to apportion damages between MABE – who is not even a party to this action – and GE. While GE alleges that it participated in meetings between MABE and the alleged conspirators (Compl.¶48) and had a pre-existing arrangement with MABE, where material costs, and other costs, plus a percentage mark-up of acquiring a compressor and manufacturing a refrigerator are passed on by MABE to GE (Compl. ¶54), the transaction between GE and MABE as alleged in GE's Complaint is not simply a resale of the price-fixed refrigerant compressors to GE. Compl. ¶54. The compressors MABE purchased were merely one of many components incorporated into refrigerators which MABE manufactured and sold to GE. MABE must also factor into any amounts it charges GE the costs of labor and other cost in addition to the costs of the parts it purchases for the refrigerators. Clearly, MABE is not simply a middleman, supplying GE with single-component product at costs plus a percentage markup. Indeed, the arrangement described by GE is typical of any party that seeks to recover all its costs (material, labor and overhead) plus a profit.

Under federal antitrust laws, only the seller (here, MABE which purchased

the alleged price-fixed product and resold it), not the buyer (GE), has a cognizable claim. The Supreme Court has cautioned against litigating exceptions to *Illinois Brick* under such circumstance. *Utilicorp United Inc.*, 497 U.S. at 217. Here, there is no possible exception to *Illinois Brick* alleged – the alleged price-fixed component, the compressor, is purchased by MABE, not GE, from the alleged conspirators which then installs the compressor into the finished product, the refrigerator, which finished product is sold to GE by MABE. *See Jewish Hospital Assoc. v. Stewart Mech. Enters., Inc.*, 628 F.2d 971, 974 (6th Cir. 1980)(finding that hospital, as indirect purchaser of construction services, could not recover for overcharge caused by subcontractors' conspiracy as no exceptions to the *Illinois Brick* rule applied). Accordingly, this Court should find that GE does not have standing to recover for MABE's compressor purchases.

B. GE's Claims Are Barred by the Statute of Limitations

GE filed this action on February 15, 2013. Under § 4, 15 U.S.C. §15, GE may recover damages only for the four years preceding the date the Complaint was filed - here, back to February 15, 2009 - unless the four year limitations period was tolled due to (a) the filing and pendency of the Class Actions under the principles of *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974); (b) § 5(i) of the Clayton Act, 15 U.S.C. § 16(i); or (c) fraudulent concealment. None of the above suffice to save GE's untimely complaint.

"All presumptions are against [a party seeking to avoid the statute of limitations], since his claim to exemption is against the current of the law and is founded on exceptions." *Akron Presform Mold Co. v. McNeill Corp.*, 496 F.2d 230, 233 (6th Cir. 1974).

1. *American Pipe* Does Not Toll the Statute of Limitations for GE's Antitrust Claim

In *American Pipe*, 414 U.S. at 554, the Supreme Court held that the "commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." However, the 6th Circuit has limited that doctrine as applying only to plaintiffs who file an independent action *after* the class is certified. *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 568-69 (6th Cir. 2005). *Cf. Vertrue v. Vertrue, Inc. (In re Vertrue Mktg. & Sales Practices Litig.)*, 719 F.3d 474, 480 (6th Cir. 2013)(finding that "plaintiffs … satisfied the dictates of *Wyser-Pratte* by waiting to file their new action until the district court had confirmed that it would not address the class certification issue").

The first Class Action complaints were filed on February 25, 2009. Compl. ¶¶119-120. GE filed the instant action on February 15, 2013. However, the Court only approved certification of the settlement class on January 9, 2014. *See* 2:09-MD-2042 Dkt. 460. Allowing GE to proceed would plainly violate the 6th Circuit rule that there is no tolling for plaintiffs who file independent actions prior to class

certification. For this reason, GE's claims against Danfoss are not tolled due to the filing of the Class Action.

2. Section 5(i) of the Clayton Act Does Not Save GE's Claims

Section 5(i) of the Clayton Act, 15 U.S.C. § 16(i), provides for the tolling of private antitrust claims "based in whole or in part on any matter complained of" in a government civil or criminal antitrust proceeding during the pendency of that proceeding and for one year thereafter. "Section 5(i) represents a balance struck by Congress between competing policy objectives. On the one hand, a 'grudging interpretation' of § 5(i) 'would collide head-on with Congress's … belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws.' On the other hand, § 5(i) reflects a 'congressional emphasis on certainty and predictability in the application' of the tolling provision so as to avoid 'undue prolongation of [antitrust proceedings].'" *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 320 (4th Cir. 2007), *cert. denied*, 552 U.S. 1276 (2008) (citations omitted).

The criminal proceeding against Panasonic and Embraco terminated on November 23, 2010 and January 6, 2011, respectively (Compl. ¶133) and obviously GE failed to bring an action within the one year period thereafter. The Flensburg criminal proceeding (which did not even involve household refrigerant compressors, the subject of GE's complaint) terminated on December 19, 2011

(Compl. ¶135) and again GE failed to sue within the one year tolling period, even assuming any toll arises from a criminal proceeding involving a different product. Also, GE refers to the Heinzelmann Indictment on September 27, 2011, which is still pending and claims "the tolling period under Section 5(b) has not concluded." Compl. ¶134.

GE is wrong for two reasons. First, the corporate criminal cases have concluded and allowing GE to toll based on the Heinzelmann Indictment would violate the purpose behind § 5(i), which is "to permit private claimants to obtain the benefit of the evidence and legal rulings involved in the Government's action." *New Jersey v. Morton Salt Co.*, 387 F.2d 94, 97 (3d Cir. 1967); *Charley's Tour & Transp., Inc. v. Interisland Resorts, Ltd.*, 618 F.Supp. 84, 86 (D. Haw. 1985). GE would not obtain any information to use in its claim from the government's prosecution of Heinzelmann *et al. See Charley's Tour*, 618 F.Supp. at 86-87 (finding that tolling of statute of limitations would be inequitable where tolling government antitrust enforcement action would not benefit plaintiffs aside from giving them "more time to file its suit"). *Cf. Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 830 (11th Cir. 1999) (tolling against alleged conspirators who were not the subject of government suit appropriate because "the evidence adduced in the government suit is of practical assistance to plaintiffs in proving their own complaint"). Whatever evidence had not been developed in the

initial prosecution against Panasonic and Embraco necessarily would have been churned up against Flensburg in that prosecution. While one can understand the theory that permits a toll against unindicted alleged co-conspirators until the government's case is completed, when the government actually sues a defendant which is then sued by private plaintiffs, the relevant evidence is definitionally in.

In addition, allowing GE to toll its statute of limitations based on the Heinzelmann Indictment would violate § 5(i)'s "goals of certainty and predictability" because such an indictment is likely to remain open indefinitely. The docket of the Heinzelmann prosecution is revealing in its sparseness; nothing has happened for over two years as far as one can tell. *See* 2:11-CR-20605 (E.D. Mich.) Dkt. This is not an indictment; it is an assurance of exile. This indictment may, as a narrow technical matter, remain open until the last of the indictees dies, but there is no realistic possibility the case will ever proceed. There is nothing evidentiary that can possibly arise out of the Heinzelmann prosecution, and all the evidentiary assistance envisioned by the tolling cases has already occurred. "It may be that in some instances tolling the statute during successive actions would result in treble damage claims of such vintage that it would be patently unreasonable to assume that Congress meant to allow 'tacking' under § 5(b)." *Michigan v. Morton Salt Co.,* 259 F.Supp. 35, 51 (D. Minn. 1966). This is such an instance.

Moreover, GE to the extent it purports to rely on such criminal indictment,

must "prove, by 'comparison of the two complaints on their face[s],' a significant overlap of subject matter between the two actions. Although there is no requirement of complete identity, there must be some reasonable relationship between the violations alleged in the public and private lawsuits.

In *Novell*, 505 F.3d at 321, the plaintiff Novell, Inc. sought to toll the statute of limitations for its claims concerning Microsoft's monopolization of the office-productivity software market based on a DOJ complaint which alleged anticompetitive conduct by Microsoft in the personal computer operating systems market and the market for internet browsers. The 4th Circuit found that the statute of limitations should not be tolled by the DOJ complaint because Novell's argument would require the court to look beyond the face of the DOJ complaint and would contravene the different-markets rule. *Id.* at 321. The court noted that "the Supreme Court has accepted tolling only where the private plaintiffs make claims in markets identical to, or completely encompassed by, those at issue in the earlier government suit." *Id.* at 321. The Court opined that tolling the statute of limitations based on the DOJ complaint would allow Novell to "'sit on [its] rights' and to assert, years after the traditional statute of limitations has run, 'claims so much broader than those asserted by the government that they open entirely new vistas of litigation.'" *Id.* at 322. In addition, to extend tolling under Section 5(i) for Novell's claims "would contravene the goals of certainty and predictability in this

area, as well as avoidance of the 'undue prolongation of [antitrust] proceedings.'" *Id.* (alteration in original).

Here, applying "tolling" based on the Heinzelmann Indictment would seem to run afoul of *Novell* since the indictment involves solely an allegation of "price fixing" of refrigerant compressors for the limited period from "at least October 14, 2004" to on or about December 31, 2007. GE's Complaint alleges a conspiracy period more than five times the period alleged in the criminal proceedings. Such disparity alone should void any possible tolling. We are not aware of any case in which such a gross time disparity resulted in tolling and for those reasons alone, the Court should refuse to toll in favor of GE. But there is more, much more – far beyond any price fixing GE alleges in depth among other things: (a) anticompetitive restrictions on technology innovation, to which GE devotes twelve paragraphs in its Complaint (Compl. ¶¶71-83), and it claims that Panasonic and Embraco adhered to this agreement until at least 2011 thereby avoiding competing with each other (Compl. ¶75) (there is no mention of any of the Danfoss Defendants); and (b) that Panasonic and Embraco had reached a secret agreement not to compete (Compl. ¶65), which was discussed with co-conspirators (although again no mention whatsoever is ever made of any of the Danfoss Defendants, much less any agreement by any of the Danfoss Defendants not to compete). Compl. ¶¶65-70.

On balance, it would be a stretch to allow tolling based on the thin reed that one limited price-fixing indictment against individual fugitives remains open, especially where the corporate defendants have pled guilty and have been sentenced, thereby fulfilling the very purpose of § 5(i).

3. GE's Conspiracy Claims Post-February 2009 and Pre-April 2004 Fail to State a Cause of Action and Fail to Allege Fraudulent Concealment

In its Complaint, GE improperly attempts to expand the approximate three year conspiracy periods alleged in the criminal indictments and the five year conspiracy period alleged in the Class Action to a purported *seventeen year* conspiracy running from "as early as January 1, 1996" to "at least 2013". Compl. ¶1. The woeful inadequacy of GE's allegations for the pre-April 2004 and post-February 2009 periods is analogous to the inadequate pleading of fraudulent concealment that led this Court to dismiss part of the Class Action plaintiffs' claims as time-barred. *See In re Refrigerant Compressors Antitrust Litig.*, 795 F.Supp.2d 647, 662-66 (E.D. Mich. 2011).

Although the Court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff," *Tam Travel, Inc. v. Delta Airlines, Inc. (In re Travel Agent Comm'n Antitrust Litig.)*, 583 F.3d 896, 903 (6th Cir. 2009) (quotation and citation omitted), the Court "need not accept as true legal conclusions or unwarranted

factual inferences,' and '[c]onclusory allegations or legal conclusions masquerading as factual allegations will not suffice.'" *Id.* (citations omitted). Also, to survive a motion to dismiss, "the complaint's '[f]actual allegations must be enough to raise a right to relief above the speculative level,' and 'state a claim to relief *that is plausible on its face.*'" *Id.* at 903 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); emphasis added). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). As the Sixth Circuit wrote, "Plausibility is a context-specific inquiry, and the allegations in the complaint must 'permit the court to infer more than the mere possibility of misconduct,' namely, that the pleader has 'show[n]' entitlement to relief." *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011)(quoting *Iqbal*, 556 U.S. at 679; alterations in original).

(a) Allegations for the Time Period After February 2009

For the period after February 2009, GE's Complaint fails to meet *Twombly* because it fails to provide a single fact that supports the notion that the conspiracy continued after February 2009 and it is simply *implausible* that Defendants continued to conspire to fix the price of refrigerant compressors sold in the U.S. and elsewhere after the DOJ, EC, and SDE began investigating Defendants for

anticompetitive practices in the refrigerator compressor industry and after multiple treble damage class actions were filed, which GE itself alleges occurred as early as February 18, 2009. Compl. ¶¶ 117-119.

GE's allegations for the post-February 2009 period are further defective because they fail to allege the wrongful concealment and due diligence elements of fraudulent concealment.[4] As it is simply implausible that Defendants continued to conspire after February 2009 due to the government investigations and the filing of the class actions (Compl. ¶¶117-119), it is equally implausible that Defendants would continue to fraudulently conceal the alleged conspiracy after February 2009.

In addition, there is conclusive evidence in GE's Complaint that GE knew of the operative facts underlying its claim in February 2009 but failed to act diligently by filing its Complaint at that time. Compl. ¶¶117-119. Numerous courts have held that a plaintiff which delays in filing its antitrust claim after there is public disclosure of operative facts forming the basis of the claim has failed to

[4] Fraudulent concealment allegations are required to be pled with particularity. *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 446 (6th Cir. 2012) (citation omitted). Concealment is fraudulent if the plaintiff alleges facts that establish, if proven: "(1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts." *Id.* We discuss the standards for the wrongful concealment and due diligence elements of fraudulent concealment with respect to the pre-April 2004 allegations *infra*, since it is self-evident that there is no concealment past February 2009 and, in any event, no due diligence by GE for that period.

exercise due diligence. *See Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) (statute was not tolled where plaintiff failed to file complaint until years after congressional "hearings that explored some of the same violations complained of by [plaintiff]"); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F.Supp.2d 188, 225 (E.D.N.Y. 2003) (statute was not tolled where allegedly illegal settlement agreement was publicly disclosed and "dozens of nearly identical complaints were filed against some of the defendants in several state courts within four years of the challenged settlement"); *Wolf v. Wagner Spray Tech Corp.*, 715 F.Supp. 504, 509 (S.D.N.Y. 1989)(statute was not tolled where plaintiffs had notice of operative facts set forth in prior lawsuit against one of the plaintiffs); *see also In re Aluminum Phosphide Antitrust Litig.*, 905 F.Supp. 1457, 1471 (D. Kan. 1995) (no due diligence where plaintiffs' counsel had been contacted concerning antitrust issues in the aluminum phosphide industry five years before complaint was filed). Not only were there public announcements concerning the DOJ's, EC's, and SDE's investigations of the conspiracy at that time but also at that time, multiple class actions were filed seeking redress for the *very same* violations at issue in GE's Complaint. *See* 2:09-MD-2042 Dkt. 155. The DOJ then indicted some of the *very same* Defendants named in this action in 2010 and 2011. Compl. ¶¶124,127, 128. GE alleges, incredibly, that it needed *four* years after the public announcements, the filing of the class actions (in which GE was a

putative class member) and *two-and-one-half* years after the initial DOJ indictments to investigate its claim.[5] It is simply not plausible that GE, "one of the largest manufacturers and sellers of refrigeration equipment in the United States" and "one of the largest purchasers of refrigerant compressors in the United States" (Compl. ¶4), did not have knowledge of the operative facts underlying its claim in February 2009.

Accordingly, the Court should find that GE has utterly failed to sufficiently plead due diligence in its Complaint and has therefore failed to allege fraudulent concealment for the post-February 2009 period.

(b) Allegations for the Time Period Preceding April 2004

For the time period prior to April 2004, GE's allegations fail to meet *Twombly* because GE does not make sufficiently specific allegations of any agreement among Defendants and in particular, Danfoss. While GE's Complaint alleges that the conspiracy began "at least as early as January 1, 1996" (Compl. ¶1), GE fails to set forth any allegations which detail when and where Defendants agreed to conspire and which Defendants were involved in the alleged agreements. *See, e.g.*, Compl. ¶¶62, 64-68, 86. Indeed, the vast majority of GE's allegations for

[5] GE's sole defense of its inordinate delay, an allegation that in August 2009 it exchanged communications with Embraco (Compl. ¶186), does not, on the facts alleged therein, remotely support fraudulent concealment. In light of government disclosures and multiple treble damages class actions in February 2009, and indeed, the guilty pleas by Embraco and Panasonic in September 2010, GE's claim of concealment to justify its February 2013 filing is frivolous.

this time period do not even assert that Defendants *agreed* to do anything – they only broadly allege that Defendants had discussions concerning the supply of compressors. Compl. ¶¶66, 70, 84. Moreover, the allegations of the so-called pre-April 2004 conspiracy, occupying twenty-three paragraphs of the Complaint (Compl. ¶¶62-85), make one allegation concerning "Danfoss" and do not even identify which "Danfoss" company alleged conspired.[6] They concern, at best, purported anti-competitive activity by Embraco, Tecumseh, and Panasonic and in particular an alleged agreement by Embraco and Panasonic to restrict technology innovation. Compl. ¶¶71-83. Surely the Danfoss Defendants ought not to be saddled with defending a Complaint which hardly mentions it until 2004. For these reasons, GE's claims as against Danfoss for the period prior to April 2004 and after February 2009 should be dismissed.

GE's claims for the period pre-April 2004 also are deficient because they fail to allege the wrongful concealment element of fraudulent concealment.[7] GE

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[6] Only paragraph 62 mentions Danfoss but even that paragraph lacks specificity and is based on double hearsay and a purported conversation *twelve years* after 1996. The earliest mention of Danfoss made with any specificity is alleged in paragraph 84 of the Complaint, but the allegation therein is merely that Danfoss "discussed" on February 28, 2004, the possibility of withholding capacity for the market. This hardly connotes an "agreement" on the part of Danfoss with alleged co-conspirators to do so.

[7] In order to satisfy the wrongful concealment element of fraudulent concealment, the plaintiff "must point to 'affirmative acts of concealment.' '[M]ere silence or unwillingness to divulge wrongful activities is not sufficient.' Instead, there must be some 'trick or contrivance intended to exclude suspicion and prevent inquiry.'"

fails to make any allegations for that period which involve activity that is separate from the conspiracy itself nor has GE sufficiently alleged that Defendants sought to keep such activity, such as meetings, a secret. *See, e.g.*, Compl. ¶¶62, 66, 70, 84, 85 (alleging that Defendants engaged in meetings, some of which GE characterizes conclusorily as "secret", to discuss and police price increases). *See In re Aluminum Phosphide*, 905 F.Supp. at 1470 (finding that plaintiffs failed to show wrongful concealment where plaintiffs alleged defendants held secret meetings but failed to "cite any specific actions taken by defendants to keep their meetings a secret"); *Dry Cleaning & Laundry Inst. of Detroit, Inc. v. Flom's Corp.*, 841 F.Supp. 212, 218 (E.D. Mich. 1993) (allegations of secret meetings and phone calls is not

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Carrier Corp., 673 F.3d at 446 (citations omitted; alteration in original). "To establish fraudulent concealment, a plaintiff must plead specific affirmative conduct on the part of defendants that is separate from the alleged price-fixing conspiracy itself, and that concealed the means for discovering plaintiffs' claims." *In re Refrigerant Compressors*, 795 F.Supp.2d at 663.

With regard to the due diligence element, the Sixth Circuit has stated that "'[a]ctions such as would deceive a reasonably diligent plaintiff will toll the statute; but those plaintiffs who delay unreasonably in investigating circumstances that should put them on notice will be foreclosed from filing, once the statute has run.'" *Carrier*, 673 F.3d at 447 (citation omitted; alteration in original). "Any fact that should excite [a plaintiff's] suspicion is the same as actual notice of his entire claim.... If the plaintiff has delayed beyond the limitations period, he must fully plead the facts and circumstances surrounding his belated discovery 'and *the delay which has occurred must be shown to be consistent with the requisite diligence.*'" *Dayco*, 523 F.2d at 394 (citations omitted; emphasis added). "[T]he critical determinant is when 'a significant fact emerges,' not when plaintiffs realize the specific details of their alleged claims." *In re Ciprofloxacin Hydrochloride*, 261 F.Supp.2d at 106 (citation omitted).

sufficient to satisfy wrongful concealment).[8]

GE also alleges that Defendants submitted non-collusion certificates as part of GE's purchase orders for compressors (Compl. ¶¶141-146), but it is well-established that such allegations are not sufficient to satisfy wrongful concealment because non-collusion certificates "amount to no more than a denial of wrongdoing, which does not constitute fraudulent concealment." *In re Fertilizer Antitrust Litig.*, 1979 U.S. Dist. LEXIS 9818, at *21-22 (E.D. Wash. Sept. 14, 1979) (finding that the statute of limitations was not tolled where plaintiffs had pled acts of concealment including the "false[] signing [of] non-collusion affidavits and/or certificates of regularity. . ." because such allegations were "not sufficient to permit an inference that the plaintiffs, who are not insensitive to the implications of the antitrust laws nor naïve about the conduct of antitrust violators, would be significantly influenced by a simple denial of wrongdoing").[9]

Nor do GE's allegations concerning Embraco's and Panasonic's

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[8] Indeed, as to the pre-1999 period, there are simply *no* allegations in the Complaint, much less specific allegations, concerning Defendants' attempts to conceal the alleged conspiracy. Compl. ¶62.

[9] *See also Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 874 F.Supp. 721, 730 (W.D. Va. 1994), *rev'd on other grounds,* 71 F.3d 119 (4th Cir. 1995) ("An allegedly false noncollusion certificate is simply a failure to disclose wrongdoing and not an affirmative act of concealment."); *Colorado ex rel. Woodard v. Western Paving Constr. Co.*, 630 F.Supp. 206, 209-10 (D. Colo. 1986), *aff'd by equally divided en banc court*, 841 F.2d 1025 (10th Cir. 1988) (finding that "the submission of an allegedly false noncollusion affidavit is, at most, a failure to disclose or denial of wrongdoing" which does not constitute an affirmative act of concealment).

misrepresentations concerning price increases meet the wrongful concealment standard. Compl. ¶¶ 91, 106, 108-109, 158-168, 170-171. When viewed in the context of GE's Complaint, such alleged misrepresentations are "essentially suspiciously specific anticipatory denials of wrongdoing rather than 'cover up' statements." *In re Processed Egg Prods. Antitrust Litig.*, 2011 U.S. Dist. LEXIS 139995, at *46 (E.D. Pa. Nov. 30, 2011); *see also In re Milk Prods. Antitrust Litig.*, 84 F.Supp.2d 1016, 1023 (D. Minn. 1997) (allegations that defendants attributed price increases to market factors "does not lead to the conclusion that Defendants affirmatively concealed a conspiracy."). For these reasons, GE's Complaint fails to allege wrongful concealment for the period prior to April 2004 and therefore fails to establish fraudulent concealment for that time period.

C. Because Flensburg Commits No Overt Acts in the U.S., Flensburg Is Not Subject to the Personal Jurisdiction of this Court

GE's allegations that this Court has personal jurisdiction over Flensburg appear to be based on two factors: one, that Flensburg itself supplied refrigerant compressors to GE in Kentucky and, two, the presence of alleged co-conspirators in Kentucky.

As to the first factor, GE alleges that "Danfoss supplied refrigerant compressors each year from 1996 to 1998 to GE's plant in Louisville, Kentucky." Compl. ¶33. Even assuming that these compressors were manufactured and sold by Flensburg, which in the absence of records from this period none of the Danfoss

Defendants can confirm or deny, such sales do not confer jurisdiction on this Court over Flensburg.

The moving defendants here have demonstrated that GE fails to allege any facts which would support a finding that the conspiracy period began any earlier than 2004. Every alleged sale by Flensburg to GE occurred at least five years before the commencement of the actual conspiracy period. Therefore, Flensburg could not have committed any overt act damaging GE in Kentucky or for that matter anywhere in the United States "in furtherance of the conspiracy", which is required in order to state an antitrust claim against it. *In re Auto. Parts Antitrust Litig.*, 2013 U.S. Dist. LEXIS 80335, at *43 (E.D. Mich. June 6, 2013).

As established in the Declaration of Jesper Vaagelund Christensen, ¶6, n.1,[10] from 2004-2008, Flensburg sold light commercial compressors with a total sales price of $122,001 in the entire United States, and sold those compressors, which are not even the product which is the subject of this action (household compressors), to customers in Missouri and Oregon. This must be compared to sales by Flensburg of close to $500 million worldwide for that time period. Further, Flensburg sold no household compressors at all in the United States during the 2004-2008 period. For jurisdiction purposes, such a modest amount of sales, amounting to less than $25,000 per year, none of them in the forum state, cannot

[10] Declaration attached as Exhibit 1 to Danfoss A/S's motion to dismiss based on a lack of personal jurisdiction.

possibly support a claim that Flensburg "purposely avail[ed] itself of the privilege of acting in the forum…" *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 721 (6th Cir. 2000). The contacts establishing purposeful availment must "result from the actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Conti v. Pneumatic Prods. Corp.*, 977 F.2d 978, 982 (6th Cir. 1992)(citation omitted; emphasis in original).

Absent any allegation that Flensburg sold to GE in the actual conspiracy period, and absent any allegation of sales by Flensburg even of light commercial compressors that could meet any definition of substantiality, the Complaint against Flensburg should be dismissed for lack of personal jurisdiction.

As to the second factor, this Circuit has not accepted the principle that the mere presence of a co-conspirator in a jurisdiction confers personal jurisdiction over a non-present co-conspirator. *See Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1236 (6th Cir. 1981). As this Court stated in *Singh v. Daimler, AG*, 902 F.Supp.2d 974, 981 (E.D. Mich. 2012), "the Sixth Circuit has not adopted this theory of personal jurisdiction." *See also Prakash v. Altadis U.S.A., Inc.*, 2012 U.S. Dist. LEXIS 46337, at *51 (D. Oh. Mar. 30, 2012).

D. GE's Common Law Fraud and Conspiracy Claims Are Barred Entirely Or Severely Limited by the Statute of Limitations

Because GE's common law fraud and conspiracy claims are duplicative of GE's Sherman Act claim, they are deficient under *Twombly* for the same reasons

asserted above in Section II.B.3. In addition, GE's common law claims are barred entirely or substantially limited by the statute of limitations. Because a one year statute of limitations applies to GE's conspiracy claim (Ky. Rev. Stat. Ann. § 413.140) and GE filed its Complaint more than one year after GE's discovery of the conspiracy in February 2009, such claim is barred by the statute of limitations. Moreover, as there is a five year statute of limitations for fraud under Kentucky law and GE discovered its claim not later than February 2009, the Court should find that GE's claims for fraud are limited at best, to the time period after February 15, 2008. Ky. Rev. Stat. Ann. § 413.120(12).

IV. Conclusion

For all the reasons set forth herein, Defendants Danfoss Flensburg GmbH and Danfoss LLC respectfully request that the Court grant their motion to dismiss the Complaint.

Dated: February 28, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2014, I caused to be electronically filed the foregoing document(s) with the Clerk of the Court using the ECF system which will send notification of such filing to the ECF participants.

By: */s/ John W. Allen*
JOHN W. ALLEN (P10120)