UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

SURREPLY BRIEF IN SUPPORT OF GE'S OPPOSITION TO MOTION BY DEFENDANTS DANFOSS FLENSBURG GMBH AND DANFOSS LLC TO DISMISS THE COMPLAINT

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STATEMENT OF ISSUES PRESENTED

1. Are GE's indirect purchaser claims barred by the FTAIA?

GE answers no.

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Panel Rehearing or Rehearing En Banc, *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003 (7th Cir. filed Apr. 29, 2014).

Letter from Donald Verrilli Jr., Solicitor General, to Gino Agnello, Clerk, Seventh Circuit (May 19, 2014).

Lotes Co. v. Hon Hai Precision Industry Co., __ F.3d __, 2014 WL 2487188 (2d Cir. June 4, 2014).

Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845 (7th Cir. 2012).

I. Introduction

In their Reply, Danfoss Flensburg GmbH and Danfoss LLC (Danfoss) argued for the first time that GE's claims based on purchases of price-fixed compressors through its MABE joint venture are barred by the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a. They rely on a single, noncontrolling decision by the Seventh Circuit[1] for which numerous parties, including the U.S. Department of Justice and Federal Trade Commission,[2] have requested rehearing or hearing en banc on the basis that it was wrongly decided. This novel and unsettled decision does not apply here and provides no basis on which to dismiss any of GE's claims. First, *Motorola* is distinguishable because unlike in *Motorola*, GE has asserted indirect purchaser claims under the exceptions in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 n.16 (1977), and thus GE's claims are not barred by the FTAIA. Second, *Motorola* is unsupported by precedent, remains unsettled, and should not be applied at this early stage of the proceedings before GE has even been permitted to develop a record on the FTAIA. The Court should deny Danfoss's tardy FTAIA argument.

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[1] *Motorola Mobility LLC v. AU Optronics Corp.* (*Motorola II*), 746 F.3d 842 (7th Cir. 2014), *aff'g Motorola Mobility, Inc. v. AU Optronics Corp.* (*Motorola I*), No. 09-cv-06610, 2014 WL 258154 (N.D. Ill. Jan. 23, 2014).

[2] Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Panel Rehearing or Rehearing En Banc at 6, *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003 (7th Cir. filed Apr. 29, 2014) (U.S. Brief) (attached as Exhibit A).

II. *Motorola* Does Not Apply to GE's Claims.

Danfoss's FTAIA argument rests entirely on the Seventh Circuit panel's decision in *Motorola II*, which dismissed the majority of Motorola's Sherman Act claims. *Motorola* is highly unusual, in that the panel decided the merits of the appeal on the application for review under 28 U.S.C. § 1292(b) without giving Motorola or other interested parties the chance to fully brief the issue. The panel affirmed the trial court which, on a motion for reconsideration, overruled the MDL court's earlier ruling that there were triable issues of fact regarding whether Motorola's Sherman Act claims were barred by the FTAIA. Danfoss now seeks to apply this series of peculiar and novel rulings to this case to dismiss part of GE's Sherman Act claim. Danfoss's argument is without merit and should be rejected.

A. The FTAIA and the *Motorola* Decisions.

The FTAIA excludes certain foreign anticompetitive conduct from the Sherman Act's reach, unless that conduct "*both* (1) sufficiently affects American commerce, *i.e.*, it has a 'direct, substantial, and reasonably foreseeable effect' on American domestic, import or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.*, the 'effect' must 'giv[e] rise to a Sherman Act claim.'" *Motorola I*, 2014 WL 258154, at *5 (quoting *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004) (quoting 15 U.S.C. § 6a)).

In *Motorola I*, the district court held that direct purchases by Motorola's foreign affiliates of price-fixed components that were incorporated into finished goods abroad and then sent to the United States did not satisfy the FTAIA. The court held that the purchases by the foreign affiliates made abroad could not give rise to an antitrust claim, since "[f]or Sherman Act purposes, the injury arose when Motorola's foreign affiliates purchased LCD panels at inflated prices, not when Motorola decided at what price those purchases would be made." *Id.* at *9.

The Seventh Circuit affirmed, holding that no Sherman Act claim arose under the second prong of the FTAIA where the alleged price fixing affected Motorola's foreign subsidiaries. *See Motorola II*, 746 F.3d at 845. Although the issue was not before the court, the Seventh Circuit also evaluated whether Motorola's claims satisfied the FTAIA's first prong by alleging a "direct effect" on U.S. commerce. *Id.* at 846; *see also id.* at 844-45. The court held that the first prong was not satisfied because the price-fixed goods were sold "abroad to foreign companies (the Motorola subsidiaries) that incorporate them into products that are then exported to the United States for resale by the parent." *Id.* at 844. According to the court, "action in a foreign country [that] filters through many layers and finally causes a few ripples in the United States" is not "direct" as required by the first prong. *Id.* (internal quotation marks omitted).

B. *Motorola* Does Not Apply to GE's Claims.

The *Motorola* case is inapposite because the court held that Motorola alleged that its antitrust injury arose out of purchases made by its affiliates abroad – not by Motorola. GE's allegations are different. GE has alleged that it sustained injury in the United States as a result of its own indirect purchases from the Defendants.

As the Supreme Court held in *Illinois Brick*, an indirect purchaser may pursue an antitrust claim where "market forces were superseded and the buyer-seller relationship between the defendants and the [plaintiff] effectively was direct." *Jewish Hosp. Ass'n of Louisville, Ky., Inc. v. Stewart Mech. Enters., Inc.*, 628 F.2d 971, 974 (6th Cir. 1980) (citing *Ill. Brick*, 431 U.S. at 736 n.16). Under such circumstances, the transaction at issue is converted "from a two step transaction into the equivalent of a single sale." *City of Cleveland v. Cleveland Electric, Illuminating Co.*, 538 F. Supp. 1320, 1323 (N.D. Ohio 1980).

GE has alleged that its indirect MABE purchases fall under the exceptions set forth in *Illinois Brick*, such that the MABE purchases were, in effect, direct purchases by GE from Defendants. As such, GE's claims also satisfy the FTAIA.

1. *Illinois Brick* Allows GE's Indirect-Purchase Claims.

In *Illinois Brick*, the Supreme Court stated that an indirect purchaser has standing to assert an antitrust claim "where the direct purchaser is owned or controlled by its customer." 431 U.S. at 736 n.16. For these purposes, GE controls

MABE. Danfoss challenges GE's assertion of the control-test exception on three grounds, none of which have merit.

First, Danfoss argues that GE has not cited any Sixth Circuit cases applying the control-test factors. (Reply at 5.) The Sixth Circuit test is whether there is "functional economic or other unity between the direct purchaser and either the defendant or the indirect purchaser that there effectively has been only one sale." *Jewish Hosp.*, 628 F.2d at 975. Although the Sixth Circuit has yet to enumerate specific factors for this test, that is no reason to discard GE's claim, particularly when GE has pled facts that other courts have specifically identified as relevant to evaluating the existence of functional unity.[3] (Compl. ¶¶ 46-56.)

Danfoss next argues that the control-test applies only in situations involving "a defendant's control over the direct purchaser," rather than a plaintiff's control of the direct purchaser. (Reply at 5 n.4.) But the Supreme Court has stated that the control-test exception applies "where the direct purchaser [here, MABE] is owned or controlled by its customer [here, GE]." *Ill. Brick*, 431 U.S. at 736 n.16. And in *Jewish Hospital*, the Sixth Circuit stated that the requisite functional unity may arise "between the direct purchaser and *either* the defendant *or* the indirect

[3] *See, e.g., Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 372 (3d Cir. 2005); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 605-06 (7th Cir. 1997); *In re G-Fees Antitrust Litig.*, 584 F. Supp. 2d 26, 33 (D.D.C. 2008).

purchaser." 628 F.2d at 975 (emphasis added). The control factors thus are relevant whatever side of the transaction featured the functional unity; to hold otherwise would contravene Sixth Circuit and Supreme Court precedent.

Finally, Danfoss argues that the Sixth Circuit has applied the control-test exception only "in cases involving circumstances where 'market forces were superseded' such that there is no '[p]roblem[] of proving the amount of the pass-on.'" (Reply at 6.) But GE pled exactly that: GE negotiated and controlled the price and quantity of compressors that MABE purchased for refrigerators it manufactured for GE, and GE paid MABE the total cost of each refrigerator unit, plus a mark-up over that total cost, such that MABE passed on to GE the full, direct material costs of acquiring the compressors. (Compl. ¶¶ 48, 54.) This type of relationship is a proper basis for an indirect-purchase claim under *Illinois Brick*.

GE has met its pleading burden regarding applicability of the control-test exception.[4] That the Sixth Circuit has yet to evaluate identical facts is no reason to discard GE's claims, particularly at the motion-to-dismiss phase.

[4] Moreover, as the FTC and DOJ have noted, it is an open question whether the *Illinois Brick* bar exists at all "when the Sherman Act does not apply to the direct purchasers' claims because they cannot satisfy the 'gives rise to' requirement. In that circumstance, it may be that the indirect purchasers whose claims do arise from the effect on U.S. commerce can recover damages because full recovery cannot be concentrated in the direct purchaser and duplicative recoveries are not possible." Ex. A, U.S. Br. at 14.

2. GE's Injury Gives Rise to a Sherman Act Claim.

In *Motorola II*, the court held that "the effect of the alleged price fixing [was] on Motorola's *foreign subsidiaries*" and thus could not give rise to a Sherman Act claim. 746 F.3d at 845 (emphasis added). The court characterized Motorola's argument as asserting that the parent company suffered injury as a result of purchases made by its foreign subsidiaries, and held that "derivative injury rarely gives rise to a claim under antitrust law, especially a claim by the owner of or an investor in the company that sustained the direct injury." *Id*. (citing *Mid-State Fertilizer Co. v. Exch. Nat'l Bank of Chi.*, 877 F.2d 1333, 1335-36 (7th Cir. 1989)). GE is not alleging such a derivative injury. In *Motorola*, the court held that the parent company sought recovery for injury to its subsidiaries. Here, GE is seeking to recover its own damages incurred as a result of its purchases of price-fixed compressors. Thus, the injury is direct – GE sustained harm in the United States as a result of its purchases from Defendants.[5]

GE has alleged that it suffered harm in the United States as a result of what were, effectively, under *Illinois Brick*, direct purchases by GE from Defendants.

[5] And although the *Motorola* courts did not address indirect-purchaser claims – and thus had no occasion to consider the interplay between the FTAIA and *Illinois Brick* – both *Motorola* decisions acknowledge in dicta the same principle that other courts have endorsed: where the economic consequences of a foreign price-fixing scheme are felt in the U.S. economy, a domestic effect gives rise to a Sherman Act claim. *Motorola II*, 746 F.3d at 845; *Motorola I*, 2014 WL 258154, at *9 (citing *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 859 (7th Cir. 2012)).

Thus, GE's injury gives rise to a Sherman Act claim under the FTAIA.

3. Danfoss's Conduct Directly Affected U.S. Commerce.

In *Motorola II*, the Seventh Circuit held that "action in a foreign country [that] filters through many layers and finally causes a few ripples in the United States" is not "direct" as required by the first prong of the FTAIA. 746 F.3d at 844 (internal quotation marks omitted). But GE has not claimed that it was injured by conduct that "filtered through many layers." Rather, it was injured by what were, in effect, "direct" sales by Defendants to GE. *Jewish Hosp.*, 628 F.2d at 974 ("[M]arket forces were superseded and the buyer-seller relationship between the defendants and the [plaintiff] effectively was direct."). And as *Motorola II* acknowledged, the FTAIA's first prong is satisfied where "foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) *sold that product to U.S. customers*." 746 F.3d at 844 (citing *Minn-Chem*, 683 F.3d at 860 (emphasis added)).

GE's MABE purchases were direct purchases under the *Illinois Brick* control exception. Thus, GE satisfies the requirements of the FTAIA even under the *Motorola II* court's narrow construction of the statute.

III. *Motorola II* Is Not Settled Law.

Even if *Motorola II* were applicable to GE's indirect-purchase claims (which

it is not), it would be premature to dismiss GE's claims based on an unsettled decision that is neither supported by precedent, nor binding on this court.

As the DOJ and FTC have noted,[6] *Motorola II* diverges from the mainstream view of the FTAIA, contravening Seventh Circuit precedent, *Minn-Chem*, 683 F.3d at 857 (rejecting the idea that an effect on U.S. commerce is direct only "if it follows 'as an immediate consequence' of the defendant's activity" because requiring such a strict causal nexus "comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA's coverage"), and the precedent of other circuits. *See, e.g.*, *Lotes Co. v. Hon Hai Precision Indus. Co.*, __ F.3d __, 2014 WL 2487188, at *13, 15 (2d Cir. June 4, 2014) (holding that "direct" means only a "reasonably proximate causal nexus," which may be established when a price-fixed component is incorporated into a finished good outside the U.S., before being sold in the U.S.).[7] And the *Motorola II* court itself acknowledged that with respect to foreign purchases of price-fixed components that are incorporated into finished goods that are *then sold in the U.S.*, "there is room for a difference of opinion, as evidenced by the fact that the judge

[6] *See* Ex. A, U.S. Br. at 7-13.

[7] The United States, through a letter brief filed by the Solicitor General, recently reiterated its request that the Seventh Circuit "vacate the panel decision" and order rehearing of the *Motorola* decision. Letter from Donald Verrilli Jr., Solicitor General, to Gino Agnello, Clerk, Seventh Circuit, at 1 (May 19, 2014) (attached as Exhibit B).

presiding at the multidistrict-litigation phase of the proceeding had ruled for Motorola on the issue of the Sherman Act's applicability." *Motorola II*, 746 F.3d at 844.

By waiting to raise the FTAIA issue until after the *Motorola II* decision was issued (and claiming it could not have been raised earlier), *even Danfoss* has implicitly acknowledged that no other case law supports its position that the FTAIA bars GE's indirect-purchase claims. (*See* Danfoss Response to GE Motion to Strike at 1 n.1.) In short, there is no binding or applicable law to suggest that GE's claims are barred as a matter of law by the FTAIA. GE should be allowed to present evidence that Defendants' criminal activity did indeed have a direct effect on U.S. commerce.

IV. Conclusion

For the foregoing reasons, and those stated in GE's opposition brief, GE respectfully requests that the Court deny Danfoss's motion to dismiss.

Respectfully submitted on June 26, 2014,

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2014, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to counsel of record registered to receive electronic service.

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