UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

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

RESPONSE TO GENERAL ELECTRIC COMPANY'S SURREPLY BY DEFENDANTS DANFOSS FLENSBURG GMBH AND DANFOSS LLC

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Defendants Danfoss Flensburgh GmbH and Danfoss LLC ("Danfoss") respectfully submit this memorandum of law in response to Plaintiff General Electric Company's ("GE") Surreply Brief in Support of GE's Opposition to Motion by Defendants Danfoss Flensburgh GmbH and Danfoss LLC to Dismiss the Complaint ("Surreply").

I. Introduction

In the instant case, certain facts are not in dispute: Controladora Mabe, S.A. de C.V. ("MABE"), a Mexican company, not GE, purchased allegedly price-fixed refrigerant compressors *outside* the U.S. and incorporated them into finished refrigerators *outside* the U.S. "at [MABE's] plant in Celaya, Mexico." Compl. ¶54*; see* Compl. ¶¶46-56. GE then "purchased" the finished "refrigerators from MABE" and MABE then shipped the refrigerators to GE in the U.S. Compl. ¶¶54-55. GE subsequently resold the refrigerators to U.S. consumers. Compl. ¶54.

The FTAIA bars GE's claims to the extent that they are based on MABE's compressor purchases. *First*, there is no dispute that the conduct alleged does not involve import commerce. *See generally* GE's Surreply Brief. *Second*, such conduct does not have the required "direct, substantial and reasonably foreseeable effect" on domestic commerce (the FTAIA's first prong), nor does "such effect give[] rise to" the plaintiff's claims (the FTAIA's second prong). 15 U.S.C. § 6a. GE must satisfy *both* prongs of the FTAIA to have an actionable claim - it has

satisfied neither prong.

II. Argument

A. The FTAIA Bars GE's Claims Since GE Fails to Satisfy the Requirements that the Conduct Challenged Directly Impacts Domestic Commerce and that the Effect on Domestic Commerce Gives Rise to GE's Sherman Act Claims.

GE argues that Danfoss's FTAIA argument is moot because *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir. 2014), *vacated and reh'g granted*, No. 14-8003, Order (7th Cir. July 1, 2014) ("*Motorola II*") has been vacated.[1] Opp. Br. at 1-2.[2] Not so. Despite the decision being vacated, the issues raised by Judge Posner in *Motorola II* continue to threaten the viability of GE's claims and, in any event, GE's claims must be dismissed under the reasoning in *Motorola* at the district court level, a decision that remains extant.[3] GE's claims

[1] Contrary to GE's suggestion otherwise, the Seventh Circuit did not vacate its prior decision because it supports GE's position. It merely established a schedule and procedure for the appeal to be heard consistent with Seventh Circuit rules of procedure. *See* Dkt. 74 in *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003 (7th Cir. July 15, 2014).

[2] "Opp Br." refers to GE's Response to the Motion by Danfoss Defendants for Leave to File a Response to General Electric's Surreply, filed July 2, 2014.

[3] Furthermore, Judge Posner's reasoning in *Motorola II* is eminently sensible and worthy of consideration here. Judge Posner found that Motorola's claim would not suffice under prong 2 of the FTAIA:

> No one supposes that Motorola could be sued by its U.S. customers for an antitrust offense merely because the prices it charges for devices that include such components may be higher than they would be were it not for the price fixing. (We say may be, not would be,

not only fail to satisfy the requirements of the first prong of the FTAIA, but, in any event, are defective as a matter of law since GE cannot satisfy the second prong of the FTAIA, *i.e.*, that the domestic effect of defendants' conduct gives rise to GE's claim under the Sherman Act.[4] *See Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., Ltd.*, 753 F.3d 395, 414 (2d Cir. 2014) (Exhibit 1 hereto) ("The FTAIA thus includes two distinct causation inquiries, one asking whether the defendants'

> because Motorola's ability to pass on the higher price to consumers would depend on competition from other cellphones and on consumer demand for cellphones.) So the effect in the United States of the price fixing could not give rise to an antitrust claim. Motorola's claim against the defendants is based not on any illegality in the prices Motorola charges . . . but rather on the effect of the alleged price fixing on Motorola's foreign subsidiaries. And as we said in the *Minn-Chem* case, "U.S. antitrust laws are not to be used for injury to foreign customers."

Motorola II, 746 F.3d at 845 (citations omitted).

[4] As noted by Areeda and Hovenkamp:

> [I]n speaking of the requisite effects, the legislative history focuses on *transactions* in determining the nature of the commerce. . . . Presumably, then, domestic commerce involves transactions between a United States seller and a United States buyer. . . . [T]he focus of the provision is on transactions, not on the identity or nationality of the parties.

Phillip E. Areeda & Herbet Hovenkamp, Antitrust Law ¶272 at 290 (3d ed. 2006) (emphasis in original; citations omitted).

foreign conduct caused a cognizable domestic effect, and the other asking whether that effect caused the plaintiff's injury.").

First, of course, GE fails to sufficiently distinguish the decision by District Judge Gottshall in *Motorola Mobility, Inc. v. AU Optronics Corp.*, No. 09 C 6610, 2014 WL 258154 (N.D. Ill. Jan. 23, 2014) ("*Motorola I*"), which remains applicable. As the District Court stated:

> [T]he fact that Motorola is a domestic company is irrelevant to whether any domestic effect gave rise to Motorola's Sherman Act claim. That claim belongs to the Motorola foreign affiliates who purchased LCD panels at inflated prices from Defendants. . . . For 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. . . Motorola's domestic approval was not the direct cause of Motorola's foreign affiliates' claim; rather, that claim resulted from the overall price-fixing conspiracy itself.

Id. at *9. Accordingly, the District Court found that Motorola's claim failed to meet FTAIA requirements.

Here, GE's claim belongs to MABE, the Mexican company that purchased abroad the allegedly price-fixed compressors from foreign compressor manufacturers (Compl. ¶¶15, 30, 35) and incorporated them in Mexico into refrigerators, which MABE then sold to GE. That GE itself is a U.S. company has no bearing on whether any domestic effect of Defendant's conduct gave rise to

GE's antitrust claim.

Indeed, as the Second Circuit found in *Lotes*, 753 F.3d 395 (2d Cir. 2014), the injury here, MABE's purchase of compressors at allegedly inflated prices, occurred prior to any domestic effect of Defendants' conduct and thus could not give rise to GE's claim. In *Lotes*, 753 F.3d at 413, the Second Circuit affirmed dismissal of plaintiff's claims under Fed. R. Civ. P. 12(b)(6) because they failed under the FTAIA's second prong.[5] There, defendants were manufacturers of USB connectors that were assembled into computer products ultimately sold to U.S. consumers. Plaintiff, a manufacturer of USB connectors in Asia, claimed that defendants leveraged their control over key patents to gain monopoly power over the USB connector industry and exclude plaintiff from the market. The Second Circuit found that plaintiff's claims failed the FTAIA's requirements because the domestic effect of defendant's alleged monopoly (higher prices for U.S. consumers) did not give rise to plaintiff's injury:

> Lotes alleges that the defendants' foreign conduct had the effect of driving up the prices of consumer electronics

[5] The Second Circuit stated that it need not decide whether plaintiff's claims satisfied the first prong of the FTAIA because such claims failed the FTAIA's second prong: "[W]e need not decide the rather difficult question of whether the defendants' foreign anticompetitive conduct has a 'direct, substantial, and reasonably foreseeable effect' on U.S. domestic or import commerce, as that phrase is properly understood. That is because even assuming that Lotes has plausibly alleged a domestic effect, that effect did not 'give[] rise to' Lotes's claims." *Lotes*, 753 F.3d at 413 (quoting 15 U.S.C. § 6a(2)).

> devices incorporating USB 3.0 connectors in the United States. But those higher prices did not cause Lotes's injury of being excluded from the market for USB connectors – that injury flowed directly from the defendant's exclusionary foreign conduct. Lotes's complaint thus seeks redress for precisely the type of "independently caused foreign injury" that *Empagran* held falls outside of Congress's intent.

Id. at 414 (citation omitted). Thus, the Second Circuit concluded, the plaintiff's "injury thus *precede[d]* any domestic effect in the causal chain. And '[a]n effect never precedes its cause.'" *Id.* (emphasis in original; citation omitted; first alteration added).

As in *Motorola I* and *Lotes*, GE's Complaint is defective under the FTAIA and should be dismissed. Here, even were the Complaint to meet the pleading allegations required under prong 1 of the FTAIA, the injury claimed here by GE (which arose when MABE purchased the compressors at allegedly inflated prices) still would *precede* any domestic effect of Defendants' conduct. The indisputable fact is that GE did not purchase the allegedly price-fixed compressors. On the contrary, as GE admits, *MABE* purchased the compressors and did so outside of the U.S. (in Mexico). As a result, GE, as a purchaser from MABE, cannot claim it suffered antitrust injury in the U.S. based upon MABE's compressor purchases in

Mexico and such claims by GE should be dismissed.[6]

B. GE's Complaint Fails to Allege an Exception to *Illinois Brick*. But, Even Assuming *Arguendo* that GE Has Alleged an Exception to *Illinois Brick*, the FTAIA Still Applies.

Danfoss did not oppose GE's motion to file a surreply to the extent that GE's surreply would be limited to addressing Danfoss's argument that the FTAIA bars GE's claims in whole or in part. Dkt. 77. Yet GE allocates more than half of its brief to *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), not the FTAIA. Although GE's arguments should be ignored because GE improperly used its Surreply to argue points outside the scope of what this Court granted it leave to address, GE's arguments to avoid dismissal under *Illinois Brick* should further be rejected because they are still without merit.

GE argues that it has alleged sufficient control over MABE to satisfy the ownership or control exception to *Illinois Brick* and that this somehow makes GE's antitrust claims sufficient under the FTAIA. Surreply at 4. This conclusion does not follow from the premise. Even assuming *arguendo* that GE could show that *Illinois Brick* does not apply, the FTAIA still bars GE's claims because the purchases of the alleged price-fixed product were made in Mexico, not the U.S., and no domestic effect could give rise to GE's claim. Moreover, the compressors

[6] To the extent GE alleges "ownership and control" over MABE, it is irrelevant for FTAIA purposes since the purchase of the compressors at allegedly inflated prices – the antitrust injury – admittedly was made by a Mexican company in Mexico.

that were purchased by MABE were only one of many components in a refrigerator that MABE manufactured and sold to GE. In addition, to the extent it is found that *Illinois Brick* has any effect on the instant FTAIA analysis, GE's claims fail under *Illinois Brick* for several reasons.

Although GE can cite no supporting Sixth Circuit authority on point, GE claims that it has pled facts that satisfy the "ownership and control" exception to *Illinois Brick* and argues that dismissal "at the motion-to-dismiss phase" is not warranted. Surreply at 6. GE's effort to delay resolution of this issue should be rejected.[7] The Complaint's allegations of "ownership or control" are insufficient to avoid *Illinois Brick* as a matter of law, especially since there is no dispute that GE's antitrust claims admittedly are based on purchases of compressors by MABE, not GE, and further that MABE did not sell compressors to GE, but incorporated the compressors into refrigerators that were sold to GE. *See In re Refrigerant Compressors Antitrust Litig.*, 795 F. Supp. 2d 647, 659 (E.D. Mich. 2011)(dismissing indirect purchasers' claims for failing to sufficiently allege an exception to *Illinois Brick*); Compl. ¶¶47-56. Without more, dismissal is warranted.

[7] To the extent the Court views GE's allegations "sufficient" (and does not dismiss the Complaint on the other grounds cited by Danfoss), it should order discovery limited to this threshold issue since resolution of this issue may very well be dispositive of GE's antitrust claims and thus avoid very time-consuming, expensive, and oppressive discovery.

The cases cited by GE are inapposite. *Jewish Hosp. Ass'n v. Stewart Mech. Enters., Inc.,* 628 F.2d 971, 975 (6th Cir. 1980) limits the control exception to situations where the unity between the direct and indirect purchaser is such that "there effectively has been only one sale," which is far removed from this case where admittedly MABE, a foreign entity, not only purchased the compressors but used them as mere components in finished products – refrigerators – which it then sold to GE in the U.S. *Cleveland v. Cleveland Elec., Illuminating Co.*, 538 F. Supp. 1320, 1323 (N.D. Oh. 1980), if anything, supports Danfoss's position as it found that the facts in the record did not operate to convert a two-step sale into the equivalent of a single sale.[8]

Moreover, irrespective of the degree of GE's alleged "ownership or control," GE's allegations also fail to show that market forces would be superseded and there would be no problem of proving the amount of pass-on. *Jewish Hosp. Ass'n,* 628 F.2d at 975. On the contrary, the allegedly price-fixed compressors are but one of multiple material components in the refrigerators which MABE sold to GE.

[8] We note that the other cases cited by GE in support of its "ownership or control" point do not support GE's argument. *See* Surreply at 5, n.3. All such cases involve the alleged defendant-price fixer's control over the direct purchaser, which, of course, is not the case here. Moreover, as this Court has stated, the Sixth Circuit has not adopted the rule that *Illinois Brick* "does not apply in situations where a plaintiff purchases a product containing a price-fixed component directly from an alleged violator who makes both the component and the product containing the component." *In re Refrigerant Compressors Antitrust Litig.*, 795 F. Supp. 2d at 659.

Indeed, GE alleges that pursuant to "Contract Manufacturing Agreements" between GE and MABE, GE "has paid MABE for the total cost of the unit, plus a percentage mark-up over the total cost" and that this includes not only "the full direct material costs of acquiring a compressor" but also "all other material costs associated with manufacturing refrigerators . . ." Compl. ¶54. Admittedly, the costs of labor and overhead necessarily would also have to be factored into the price paid by GE to MABE for each refrigerator, as well as a profit based on all such costs. The price paid by GE clearly is a combination of factors which creates the very proof difficulties that *Illinois Brick* determined precludes any viable antitrust claims.

III. Conclusion

For all of the reasons previously stated and set forth herein, Danfoss respectfully requests that the Court grant its Motion to Dismiss the Complaint.

Respectfully Submitted on September 8, 2014,

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