UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE REFRIGERANT COMPRESSORS ANTITRUST LITIGATION	Master Docket No. 2:09-md-02042 Hon. Sean F. Cox
THIS DOCUMENT RELATES TO *General Electric Company v. Whirlpool Corporation et al.*	Civil Action No. 2:13-cv-12638

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 claims adequately pled under Rule 8?

   GE answers yes.

2. Are GE's claims timely?

   GE answers yes.

3. Does the control exception to *Illinois Brick* apply to GE's claims?

   GE answers yes.

4. Does the Court have personal jurisdiction over Danfoss Flensburg GmbH?

   GE answers yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Carrier Corp. v. Outokumpu Oyj,
673 F.3d 430 (6th Cir. 2012).

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INTRODUCTION

Starting no later than 1996, the largest manufacturers of household refrigerant compressors began conspiring to inflate prices, allocate customers, and restrict supply and innovation. Central to this plot were the Danfoss defendants, including movants Danfoss LLC and Danfoss Flensburg GmbH.[1] This scheme specifically targeted GE, which has purchased over a billion dollars' worth of compressors at cartel-fixed prices. GE filed this suit to recover overcharges it incurred for the tens of thousands of compressors it purchased from the cartelists.

Despite GE's detailed allegations supporting each of its claims, Danfoss seeks dismissal of portions of GE's claims on the following grounds: (1) Danfoss asserts that portions of GE's allegations fail to state a claim, on the theory that the conspiracy can be carved into "mini-conspiracies," each of which should be evaluated separately under *Twombly*; (2) Danfoss argues that GE's claims are time-barred; (3) Danfoss argues that certain of GE's purchases are "indirect" and thus not actionable under federal antitrust law; and (4) Danfoss Flensburg argues that it is not subject to personal jurisdiction in this Court.

Danfoss's arguments are without merit for the following reasons:

First, Danfoss does not even attempt to dispute that the Complaint

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[1] Referred to herein as "Danfoss." Danfoss A/S moved to dismiss separately, challenging only whether this Court has personal jurisdiction over it.

adequately alleges a conspiracy from 2004 to 2009. Danfoss's argument that GE's allegations can be carved into "mini-conspiracies" was previously denied by this Court, and should be again.

Second, Danfoss's effort to capitalize on the fraudulent concealment of the cartel by arguing that GE's claims are time-barred should be rejected. GE's claims are timely because it has alleged that the conspiracy lasted into 2013 – the same year GE filed its Complaint. And GE is entitled to seek damages for the entirety of the conspiracy period – back to 1996 – because GE's claims were tolled until February 2012, when it was on constructive notice of its claims.

Third, Danfoss's argument that *Illinois Brick* bars GE's claims based on purchases made through MABE wholly ignores GE's allegations demonstrating that those purchases qualify under the Supreme Court's "control exception" to *Illinois Brick* because of GE's control over MABE and its compressor purchases.

Fourth, Danfoss Flensburg's challenge to this Court's jurisdiction is utterly without merit given that GE's claims are based in part on Danfoss Flensburg's sale of price-fixed compressors to GE in the United States.

Danfoss offers no credible reason why GE's Complaint is deficient, and GE respectfully requests that the Court deny the Motion.

ARGUMENT

I. GE Adequately Alleges Its Claims Under *Twombly* And Rule 8.

A plaintiff bringing a claim under section 1 of the Sherman Act must "allege either an explicit agreement to restrain trade, or sufficient circumstantial evidence tending to exclude the possibility of independent conduct." *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 457 (6th Cir. 2011) (internal quotation marks omitted). But Rule 8 does "not require heightened fact pleading of specifics." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). At the pleading stage, the Court is to "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." *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 444 (6th Cir. 2012) (internal quotation marks omitted).

A. GE has adequately alleged a Sherman Act claim.

GE's Complaint easily satisfies Rule 8. Danfoss concedes the sufficiency of GE's "expansive" Complaint for the period from April 2004 to February 2009. (Br. at 1.) Yet it claims that GE's pleadings fail to cover the entire alleged conspiracy period, 1996-2013 (Compl. ¶¶ 1, 62). This Court should reject Danfoss's argument now just as it did in 2011, when Danfoss moved to dismiss subperiods of the direct purchaser class complaint. *See In re Refrigerant Compressors Antitrust Litig.*, 795 F. Supp. 2d 647, 660-61 (E.D. Mich. 2011).

Danfoss argues that GE did not allege a conspiracy before April 2004 (Br. at

18-19), ignoring allegations that between 1996 and April 2004, the cartelists made "explicit agreement[s] to restrain trade," *Watson Carpet*, 648 F.3d at 457, including agreements to allocate customers (Compl. ¶¶ 64-70), to restrict capacity (*id.* ¶¶ 84-85), and to stabilize and inflate prices (*id.* ¶¶ 89-93).[2]

Danfoss also asserts that GE failed to "detail when and where Defendants agreed to conspire and which Defendants were involved." (Br. at 18.) This is demonstrably false with respect to dozens of GE's allegations, but even some of the paragraphs that Danfoss cherry picks as deficient (Br. at 18 (citing Compl. ¶¶ 62, 64-68, 86)) contain ample detail: paragraph 62 asserts that as far back as 1996, Danfoss, Tecumseh, Embraco, ACC, and Panasonic held secret meetings, and paragraph 66 describes a June 2001 meeting between Embraco and Tecumseh, identifying meeting participants by name.[3]

Danfoss protests that it "ought not to be saddled with defending a Complaint

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[2] GE's alleged start date for the conspiracy (1996) easily meets the "plausibility" standard as it is based on a coconspirator admission, and in any event, Danfoss's evidentiary challenge (Br. at 19 n.6) has no place in a motion to dismiss and only underscores that this case cannot be resolved on the pleadings. *See Carrier*, 673 F.3d at 442 (observing that it is impermissible "to question the evidentiary foundation of [plaintiff's] complaint, thereby depriving [plaintiff] of the presumption of truth to which it is entitled at this stage of litigation").

[3] Danfoss characterizes paragraph 66 as "only broadly alleg[ing] that Defendants had discussions concerning the supply of compressors" (Br. at 19), but paragraph 66 also alleges that Embraco and Tecumseh agreed to share "with each other and the other Conspirators information about planned supply agreements with their major customers prior to consummating the agreements."

which hardly mentions it until 2004." (Br. at 19.) But the Complaint clearly alleges that Danfoss participated in the cartel from the start. (Compl. ¶¶ 62, 84, 85, 93-95, 98, 99, 103, 192, 193.) And even if it did not join the cartel until 2004, it is subject to joint and several liability for the entire cartel period. *See Chiropractic Coop. Ass'n of Mich. v. Am. Med. Ass'n*, 867 F.2d 270, 274-75 (6th Cir. 1989).

Danfoss also contends that GE failed to allege a conspiracy after February 2009. (Br. at 15-16.) But GE pled that throughout 2009, Embraco continued to employ the cartel-developed strategy of falsely representing the reasons for price increases. (Compl. ¶¶ 183-87.) And until at least 2011, the cartel agreed to allocate the supply of high-efficiency compressors to Embraco and of low-efficiency compressors to Panasonic, thus denying GE access to certain products. (*Id.* ¶¶ 75, 80, 83). The Sixth Circuit has upheld similar allegations, finding "good grounds for suspicion" when a "compan[y] refrain[s] from entering a market and then suddenly do[es] so after a cartel dissolves." *Carrier*, 673 F.3d at 442.

GE has sufficiently alleged that the conspiracy started in 1996 and lasted into 2013, and Danfoss's *Twombly* challenge to the Complaint should be rejected.

B. GE's state-law claims are adequately pled.

Danfoss's argument that GE's Kentucky fraud and conspiracy claims are deficient under *Twombly* is without merit. (Br. at 24-25.)

Kentucky defines fraud as a "(a) material representation (b) which is false

(c) known to be false or made recklessly (d) made with inducement to be acted upon (e) acted in reliance thereon and (f) causing injury." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 436 (6th Cir. 2008) (internal quotation marks omitted). GE has pled these elements in detail. For example, paragraph 158 explains how Ernesto Heinzelmann of Embraco represented to Robert Braggs of GE that rising materials costs led to increased compressor prices. Knowing this statement was false, Heinzelmann sought to, and did, mislead GE into believing that compressor prices were caused by market forces and into paying supracompetitive prices. (Compl. ¶ 158.)

A conspiracy to defraud consists of two or more persons entering into an illegal agreement to defraud. *See Brown v. Student Loan Xpress, Inc.*, No. 11-cv-00090, 2012 WL 1029467, at *9 (W.D. Ky. Mar. 26, 2012). The Complaint details how Danfoss and its coconspirators conspired to defraud GE by, among other things, misrepresenting the causes of price movements. (Compl. ¶ 94.)

II. GE's Claims Are Not Time-Barred Because GE Alleged A Conspiracy Lasting Into 2013 And Filed Its Complaint That Same Year.

GE's Complaint is unquestionably timely: GE alleged a conspiracy from 1996 to 2013 (Compl. ¶ 62), and filed its Complaint on February 15, 2013. Without tolling, GE's federal claims reach back to February 15, 2009. *See* 15 U.S.C. § 15b. There is simply no merit to Danfoss's suggestion that GE may not seek damages for the period after February 2009. (Br. at 16-18.) As to the period predating

February 2009, GE's claims are timely under the doctrines of fraudulent concealment (which extends the damages period back to 1996), government-suit tolling (which extends the damages period back to September 2006) and class-action tolling (which extends the damages period back to February 2005).

A. Fraudulent concealment extends the damages period to 1996.

GE may recover damages for the entire conspiracy period, dating back to 1996, because the Complaint alleges fraudulent concealment. *See Carrier*, 673 F.3d at 446-49 (allowing discovery on 1988-2001 conspiracy period pled in 2006 complaint).

To establish fraudulent concealment, a plaintiff must plead three elements: "(1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of [its] cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts." *Carrier*, 673 F.3d at 446 (internal quotation marks omitted).

A plaintiff has a duty to investigate only after the plaintiff is on *inquiry notice*. *See New Eng. Health Care Emps. Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003) (explaining that "knowledge of suspicious facts" triggers "duty to investigate"). But inquiry notice alone does not start the limitations clock; tolling continues until "a reasonably diligent investigation would have discovered" the basis for a claim, that is, when the plaintiff acquires

constructive notice. *Id.*[4]

After constructive notice, a plaintiff has four full years to file suit. *Norton-Children's Hosps., Inc. v. James E. Smith & Sons, Inc.*, 658 F.2d 440, 441 (6th Cir. 1981) (reversing district court for not allowing full "four years after [plaintiff] discovered or should have discovered that it had a cause of action"). The Court may dismiss allegations of fraudulent concealment only "when it is obvious from the complaint that the plaintiff conducted absolutely no investigation." *Carrier*, 673 F.3d at 448; *see also id.* ("[W]hen there is some question as to the depth and scope of that investigation, a plaintiff should be allowed to proceed forward.").

GE has sufficiently alleged all three elements of fraudulent concealment. First, GE has described defendants' wrongful concealment (Compl. ¶¶ 141-87), including dates, names, and places detailing those efforts (*id.* ¶¶ 147, 150, 151, 158-71, 173, 175-78, 180, 181, 186). Second, GE alleged that it was ignorant of the "operative facts" forming the basis of its claim until it acquired constructive notice in late February 2012. (*Id.* ¶¶ 188-202.) And third, GE alleged its due diligence by asserting the investigative steps it took, starting when it was placed on inquiry notice in February 2009, to discover these operative facts. (*Id.* ¶¶ 195-200.)

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[4] *See also Carrier*, 673 F.3d at 446, 448 (2006 complaint timely despite 2001 inquiry notice); *Montgomery v. Jones Chems., Inc.*, No. 94-cv-00847, 1995 WL 523617, at *1, *2 (N.D. Ohio June 7, 1995) (1994 complaint timely despite 1986 inquiry notice).

Danfoss wrongly asserts that GE unreasonably delayed filing despite GE's doing so within one year of constructive notice. Danfoss also improperly seeks to carve up the conspiracy period and asserts that the Court must draw inferences *against* GE. Danfoss's approach is contrary to the controlling law in this Circuit.

1. GE was diligent because it filed suit within four years of acquiring constructive notice of its claim.

Danfoss argues that GE cannot assert fraudulent concealment because it took too long to file suit after learning in late February 2009 of the governmental investigations into the compressor industry. (Br. at 16-17.) Danfoss's theory is completely at odds with the facts and the law.

Danfoss seems to think that GE's duty to file was triggered by media reports of governmental investigations or by class complaints filed in February 2009. (Br. at 16-17.) But at most, these facts put GE on *inquiry notice*, not the *constructive notice* required to start the limitations clock. *See New Eng.*, 336 F.3d at 501; *Mich. ex rel. Kelley v. McDonald Dairy Co.*, 905 F. Supp. 447, 453 (W.D. Mich. 1995) ("The filing of a similar lawsuit . . . does not in itself, as a matter of law, constitute sufficient notice to end the tolling of the statute of limitations.").[5]

[5] Even if Danfoss were right that the statute of limitations started running on February 18, 2009, GE filed its Complaint on February 15, 2013, three years and 363 days afterward and thus within the four-year limitations period. GE's federal claims are timely as a matter of law. *See, e.g.*, *McDonald Dairy*, 905 F. Supp. at

(continued…)

Danfoss further argues that the period after February 2009 must be excluded from GE's claims because GE failed to allege the wrongful-concealment and due-diligence elements of fraudulent concealment during this period. (Br. at 16.) Danfoss is wrong for three reasons. First, GE does not need tolling to reach damages within four years of filing. *See* 15 U.S.C. § 15b. Second, no case supports Danfoss's novel theory that a plaintiff must allege fraudulent concealment's elements throughout a conspiracy period.

And third, contrary to Danfoss's claim, GE has alleged wrongful concealment and due diligence after February 2009. GE alleges that on February 18, 2009, Embraco sent GE a letter vaguely referencing the investigation into "business practices in the refrigeration compressor industry" (Compl. ¶ 181) and pledging to contact GE "[i]f other significant information becomes available" (*id.* ¶ 182), but without mentioning that the investigations related to antitrust violations or that GE had been a target of the cartel. (*Id.* ¶ 181.) Despite having affirmatively promised to update GE with any significant information, Embraco provided GE no further information. (*Id.* ¶ 185.) Moreover, throughout 2009, Embraco continued to misrepresent the causes of price movements. (*Id.* ¶¶ 183-87.)

(continued…)

453 ("Under federal law, even if the plaintiffs should have known of the federal claim at the time the United States Department of Justice requested documents on the bids in 1991, the filing of the suit in 1994 was within the four-year limit.").

The Complaint also describes GE's due diligence after being put on inquiry notice in February 2009.[6] *See Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975). It monitored the class actions and retained counsel after the September 2010 criminal proceedings against Embraco and Panasonic, then conducted an intensive factual and economic investigation. (Compl. ¶¶ 198-200.) At the end of February 2012, GE's investigation had finally yielded enough information to put GE on constructive notice of its claims. (*Id.* ¶ 202.)

Danfoss cites four cases, including this Circuit's *Dayco* decision, to support the proposition that a plaintiff that delays filing after "public disclosure of operative facts forming the basis of the claim has failed to exercise due diligence." (Br. at 16-17.) But unlike GE, the plaintiff in *Dayco* failed to allege "what steps were taken" and filed its case 14 years after congressional hearings should have "aroused [its] suspicions." 523 F.2d at 394; *cf. Carrier*, 673 F.3d at 448 (distinguishing *Dayco* as an "instance in which the plaintiff presented 'a mere

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[6] GE took many steps to protect itself years before the governmental investigations became public, such as obtaining noncollusion warranties from suppliers (Compl. ¶¶ 141-47, 189), seeking explanations about the causes of price increases (*id.* ¶¶ 159-71, 183-87, 190, 191, 194), and encouraging competition by soliciting bids from a variety of suppliers (*id.* ¶¶ 172-80, 192-93). This is sufficient to establish GE's diligence. *See McDonald Dairy*, 905 F. Supp. at 453 (finding diligence in sealed bid system and careful review of contracts); *see also Mich. ex rel. Kelley v. C.R. Equip. Sales, Inc.*, 898 F. Supp. 509, 513 (W.D. Mich. 1995) (same); *Ohio ex rel. Fisher v. Louis Trauth Dairy, Inc.*, 856 F. Supp. 1229, 1237-38 (S.D. Ohio 1994) (same).

allegation of due diligence without asserting what steps were taken.'" (quoting *Dayco*, 523 F.2d at 394)). The other cases Danfoss cites are also readily distinguished because in one, the plaintiffs alleged no details showing a diligent investigation after inquiry notice, the second involved failure to provide evidentiary proof of due diligence at summary judgment, and the third found no concealment and did not discuss diligence at all.[7]

2. Fraudulent concealment allows GE to reach back through the entire conspiracy period.

Danfoss concedes that GE sufficiently alleged fraudulent concealment between April 2004 and February 2009 but asserts that it was not adequately alleged outside this period. (Br. at 14.) Danfoss's argument has already been rejected by the Court. *See Refrigerant Compressors*, 795 F. Supp. 2d at 660-61.

Just as Danfoss points to no law allowing it to carve up a conspiracy period under *Twombly*, *see* Part I, it has no basis for doing the same to allegations of fraudulent concealment. "'[T]he conduct which is denominated "concealment" may take place before the cause of action accrues as well as afterwards.'" *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1470 (6th Cir. 1988)

[7] *See In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 226-27 (E.D.N.Y. 2003) (no diligence allegations); *In re Aluminum Phosphide Antitrust Litig.*, 905 F. Supp. 1457, 1471 (D. Kan. 1995) (no diligence proof at summary judgment); *Wolf v. Wagner Spray Tech Corp.*, 715 F. Supp. 504 (S.D.N.Y. 1989) (no diligence discussion).

(quoting *Gaetzi v. Carling Brewing Co.*, 205 F. Supp. 615, 620 (E.D. Mich. 1962)). But even if Danfoss were right that a conspiracy period could be carved up into subperiods, GE has sufficiently alleged fraudulent concealment both after 2009, as explained in Part II.A, and before 2004, as explained below.

In January 2004, "Embraco suggested that the companies announce an 8-9% increase in price, with an actual target of a 7% increase in the U.S. market," and later implemented this plan, telling GE falsely that the price increase was caused by rising material costs. (Compl. ¶¶ 89, 91). This is sufficient to allege wrongful concealment because it "identif[ies] which defendants engaged in the alleged conduct." *Refrigerant Compressors*, 795 F. Supp. 2d at 665.[8]

The Complaint also alleges that in and after 2001, Panasonic falsely assured GE that it was developing a high-efficiency compressor (Compl. ¶¶ 76-77), but had actually agreed to let Embraco dominate the high-efficiency segment of the market (*id.* ¶ 74). The Sixth Circuit has explained that this type of misrepresentation – a false assurance that the defendant is "ready, willing and able to do business with" the plaintiff – constitutes wrongful concealment. *See Pinney*, 838 F.2d at 1476.[9]

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[8] Even if Danfoss did not convey the fraud to GE, "[f]raudulent concealment . . . may be established through the acts of co-conspirators." *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 538 (6th Cir. 2008); *see Carrier*, 673 F.3d at 447 n.8.

[9] *Pinney* ultimately reverses the denial of summary judgment because the plaintiff showed no genuine issue relating to due diligence. *See* 838 F.2d at 1477.

Defendants also falsely represented that they were not colluding. (*Id.* ¶¶ 141-147.) Danfoss argues that a false noncollusion representation is not wrongful concealment. (Br. at 21.) But wrongful concealment may include a defendant's "taking steps to conceal the fact of . . . non-competition." *Scrap Metal*, 527 F.3d at 537. The noncollusion representations qualify – they were affirmative statements intended to deter GE from further inquiry. Danfoss was not "merely silent" in response to an inquiry regarding its conduct.

Moreover, even if an affirmative denial of wrongdoing were equated with "mere silence," a denial still rises to the level of an affirmative act of concealment when one has a duty to disclose. *See Pinney*, 838 F.2d at 1471 ("'Mere silence, where there is no duty to speak, does not toll the statute.'" (quoting *Gaetzi*, 205 F. Supp. at 622)).[10] The warranty in the contracts created such a duty,[11] and the cartelists' noncollusion representations thus wrongfully concealed the conspiracy.[12]

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[10] *See also SEC v. Geswein*, No. 10-cv-01235, 2011 WL 4541308, at *10 (N.D. Ohio Aug. 2, 2011) (finding concealment based on silence when duty to disclose), *adopted in relevant part*, 2011 WL 4565861, at *2 (N.D. Ohio Sept. 29, 2011).

[11] *See, e.g., Hansen v. Firestone Tire & Rubber Co.*, 276 F.2d 254, 257 (6th Cir. 1960) ("[B]y making affirmative warranties, [one enlarges one's] duty beyond that imposed by law . . . ." (internal quotation marks omitted)).

[12] Danfoss cites an unpublished, 35-year-old, out-of-Circuit case, *In re Fertilizer Antitrust Litigation*, No. MF-75-1, 1979 WL 1690 (E.D. Wash. Sept. 14, 1979), which states that a false noncollusion affidavit is not fraudulent concealment. *Id.* at *8. This is plainly at odds with *Gaetzi*, 205 F. Supp. at 622 (quoted above), which

(continued…)

See In re Packaged Ice Antitrust Litig., 723 F. Supp. 2d 987, 1019 (E.D. Mich. 2010) (finding wrongful concealment in false statements "of compliance with the very laws [defendants] have now admitted to violating").

Danfoss also argues that offering misleading reasons for price increases is not wrongful concealment. This defies common sense because misleading statements "intended to exclude suspicion" are the *sine qua non* of wrongful concealment. *Pinney*, 838 F.2d at 1467 (internal quotation marks omitted).[13]

GE's fraudulent-concealment allegations are plainly adequate and allow GE

(continued…)

the Sixth Circuit extensively and approvingly quoted in *Pinney*, 838 F.2d at 1469-72. Danfoss also cites *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 874 F. Supp. 721 (W.D. Va. 1994), but this case was reversed because the district court applied an excessively stringent standard to the first element of fraudulent concealment. 71 F.3d 119, 125 (4th Cir. 1995); *see also id.* at 126 (noting that Danfoss's other case, *Colorado ex rel. Woodard v. Western Paving Construction Co.*, 630 F. Supp. 206 (D. Colo. 1986), is "hardly compelling").

[13] Danfoss cites more out-of-Circuit law that does not even address the wrongful-concealment element. *See In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-02002, 2011 WL 5980001, at *8 (E.D. Pa. Nov. 30, 2011) ("[T]he Court need not address . . . the first element of fraudulent concealment . . . ."). The other case it cites, *In re Milk Products Antitrust Litigation*, 84 F. Supp. 2d 1016 (D. Minn. 1997), concludes that whether a letter misrepresenting the reasons for price increases conceals a conspiracy turns on whether the letter conceals the sender's identity. *See id.* at 1023. This reasoning lacks persuasive force, and even the District of Minnesota has not placed much weight on it. *See In re Monosodium Glutamate Antitrust Litig.*, No. 00-md-01328, 2003 WL 297287, at *3 (D. Minn. Feb. 6, 2003) (denying summary judgment where plaintiffs pointed to evidence that defendants, among other things, "orchestrated price increases to avoid arousing customers' suspicions" and "gave false reasons for price increases").

to reach damages across the entire cartel period, 1996-2013.

B. Government-suit tolling extends GE's claims to September 2006.

Even without fraudulent concealment, section 5(i) of the Clayton Act extends GE's damages period back to September 2006. *See* 15 U.S.C. § 16(i). Section 5(i) tolls the limitations period "'during the pendency' of the federal proceeding and 'for one year thereafter.'" *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 334 (1978) (quoting 15 U.S.C. § 16(i)).

The government proceeding against the cartelists commenced on September 30, 2010, with criminal actions filed against Embraco and Panasonic. (Compl. ¶ 133.) Within one year after the termination of the actions against Embraco and Panasonic, the government initiated a related criminal action against officers of Embraco, Tecumseh, and Panasonic (Ernesto Heizelmann, Gerson Verrissimo, and Maoki Adachi, respectively) (the "Heinzelmann Action"). (Compl. ¶¶ 133-34.) The Heinzelmann Action is currently pending and hence tolls the statute of limitations under section 5(i). *See Maricopa Cnty. v. Am. Pipe & Constr. Co.*, 303 F. Supp. 77, 86 (D. Ariz. 1969) ("[I]f two or more periods of tolling happen to overlap, as is here the case, then since the statutory tolling period has never become moribund nor buried, the tolling provisions continue to be viable until the end of the one-year extension following the termination of the last government action to end.").

The courts interpret section 5(i) broadly, applying tolling where there is even limited overlap between the criminal charges and the conspiracy alleged in the private suit, and when the conspiracy periods and even the defendants differ. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 335 (1971); *Leh v. Gen. Petroleum Corp.*, 382 U.S. 54, 59, 61, 63-64 (1965); *Chipanno v. Champion Int'l Corp.*, 702 F.2d 827, 832 (9th Cir. 1983). The overlap between GE's Complaint and filings in the Embraco, Panasonic, and Heinzelmann criminal proceedings[14] is sufficient to justify section 5(i) tolling.[15]

Although Danfoss argues that allowing tolling based on the Heinzelmann Action "would violate the purpose" of section 5(i), it does not offer a single case supporting its position that lack of overlap between defendants does not apply to the indictment of one of key players in the conspiracy. (Br. at 10.) Indeed, Danfoss's assertion flatly contravenes the Supreme Court's repeated rulings that section 5(i) tolling is to be construed broadly, and applies even when "the defendant named in the private suit was named neither as a defendant nor as a

[14] Declaration of David M. Schnorrenberg, Ex. 15.

[15] Danfoss's only authorities on this issue are inapposite. *See Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 321 (4th Cir. 2007) (affirming dismissal where complaint and indictment alleged different markets); *Charley's Tour & Transp., Inc. v. Interisland Resorts, Ltd.*, 618 F. Supp. 84, 86 (D. Haw. 1985) (same). *Novell* moreover explains that section 5(i) does not require "complete identity of the means, objectives, or statutory violations in the public and private lawsuits." 505 F.3d at 320; *accord Leh*, 382 U.S. at 59.

coconspirator by the Government." *Zenith*, 401 U.S. at 335.[16]

C. Class-action tolling extends GE's claims to February 2005.

Class-action tolling extends GE's damages period back to February 2005, four years before the first class actions were filed against Danfoss and its coconspirators. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). GE recognizes that the Sixth Circuit has suggested that class-action tolling applies only after a ruling on class certification. *See Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 569 (6th Cir. 2005). But *Wyser-Pratte*'s discussion of *American Pipe* was dictum because it involved a suit found untimely regardless of tolling. *See id.*

Moreover, *Wyser-Pratte*'s *American Pipe* analysis relied on a district court decision that was reversed on appeal on this issue. *See id.* (citing *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d 431, 452 (S.D.N.Y. 2003), *vacated*, 496 F.3d 245, 256 (2d Cir. 2007)). GE respectfully submits that if presented squarely with this issue, the Sixth Circuit would follow other circuits in finding that class-action tolling applies to an individual suit filed before class certification. *See State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1235 (10th Cir. 2008); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1008-09 (9th Cir. 2008);

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[16] Nor can Danfoss blithely assume that "there is no realistic possibility the [Heinzelmann case] will ever proceed" (Br. at 11), as illustrated by the DOJ's recent extradition of an Italian national from Germany on a three-year-old indictment (Schnorrenberg Decl., Ex. 16).

WorldCom, 496 F.3d at 256.[17]

D. GE's state law claims are timely.

Danfoss also urges the Court to dismiss GE's Kentucky conspiracy and fraud claims as untimely. (Br. at 25.) Danfoss's argument is without merit.

Danfoss argues that GE's fraud claim is limited to five years before filing, but it ignores that a fraud claim does not accrue "until the discovery of the fraud," and that a plaintiff may reach fraud committed up to 10 years before a complaint is filed. Ky. Rev. Stat. Ann. § 413.130(3). Kentucky's discovery rule delays the limitations clock until "the date of the discovery of the injury, or from the date it should, in the exercise of ordinary care and diligence, have been discovered." *Wiseman v. Alliant Hosps., Inc.*, 37 S.W.3d 709, 712 (Ky. 2000).[18] Even if Danfoss were right that GE "discovered its claim" in February 2009, GE's Kentucky fraud claim is still timely since GE filed within five years. *See* Ky. Rev. Stat. Ann. § 413.130(3).

Danfoss also contends that GE filed its conspiracy claim too late. But under Kentucky law, the limitations period does not begin "until the last overt act

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[17] Danfoss cites *In re Vertrue Inc. Mktg. & Sales Practices Litig.*, 719 F.3d 474 (6th Cir. 2013), suggesting that the Sixth Circuit has reaffirmed *Wyser-Pratte*, but that case mentions *Wyser-Pratte* only to distinguish it. *See Vertrue*, 719 F.3d at 480.

[18] Kentucky courts distinguish between discovery of *harm*, which could result from innocent causes, and discovery of *injury*, which includes discovering the wrongdoing that caused the harm. *See Wiseman*, 37 S.W.3d at 712.

performed in compliance with the objective of the conspiracy has been accomplished." *Dist. Union Local 227 v. Fleischaker*, 384 S.W.2d 68, 72 (Ky. 1964). GE has alleged that the cartel agreed to allocate the market for high-efficiency, variable-speed compressors and delayed GE's access to them even up to the date GE's Complaint was filed in February 2013. (Compl. ¶¶ 75, 79.)

The conspiracy claim is also timely because fraudulent concealment tolled the limitations period. *See Brown*, 2012 WL 1029467, at *10 (applying fraudulent concealment to toll Ky. Rev. Stat. Ann. § 413.140(1)(c)); *see also McAnly v. Middleton & Reutlinger, P.S.C.*, 77 F. Supp. 2d 810, 815 (W.D. Ky. 1999). As explained above, *see* Part II.A, fraudulent concealment tolled GE's claims at least until late February 2012, less than a year before filing. (Compl. ¶ 202.)

III. GE Has Standing To Recover For The MABE Purchases.

Danfoss argues that GE's purchases through its joint venture MABE should be dismissed because they are "indirect" purchases that are not actionable under federal antitrust laws. (Br. at 4-5.) But Danfoss ignores that the indirect purchaser rule does not bar claims on purchases "where the direct purchaser is owned or controlled by its customer." *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 n.16 (1977).

The Sixth Circuit applies the control exception in cases "involving such 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. Ass'n of Louisville, Ky., Inc. v. Stewart Mech. Enters., Inc., 628 F.2d 971, 975 (6th Cir. 1980). Functional unity between the direct purchaser and the indirect purchaser converts a two-step transaction – with first, the price-fixer selling to the direct purchaser and second, the direct purchaser selling to the indirect purchaser – into the equivalent of a one-step transaction, with the price-fixer effectively selling to the indirect purchaser. *City of Cleveland v. Cleveland Elec., Illuminating Co.*, 538 F. Supp. 1320, 1323 (N.D. Ohio 1980).

Factors such as minority stock ownership and interlocking directorates demonstrate the requisite unity of interests for an indirect purchaser to avail itself of the control exception. *See 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).

Here, GE has alleged sufficient facts to invoke the control exception. GE has alleged that it owns more than 48% of MABE, has representation on MABE's board of directors, and holds veto rights over certain categories of board decisions. (Compl. ¶ 46.) GE has also made detailed allegations demonstrating that sales by the cartelists to MABE were, effectively, sales to GE. GE's own procurement teams negotiated and controlled the price and quantity of compressors that MABE purchased for the refrigerators it manufactured for GE. (*Id.* ¶ 48.) GE sat side-by-

side with MABE in negotiations with defendants and their coconspirators regarding the price and volume that each of GE and MABE would purchase for incorporation into refrigerators, GE directed and controlled these negotiations, and GE cosigned with MABE joint contracts with certain defendants and coconspirators. (*Id.* ¶¶ 49-51.) GE also paid MABE for 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. (*Id.* ¶ 54.) Thus, applying the control exception to these circumstances does not raise the "complex problem of how to apportion damages" on which Danfoss relies so heavily.[19]

GE has alleged sufficient facts to establish functional unity with MABE for purposes of the control exception. Moreover, courts have held that control is a fact-

[19] On a related note, Danfoss makes much of the fact that the compressors purchased through MABE were merely components incorporated into finished goods for GE. Danfoss argues – without support from case law – that the compressors' incorporation into finished goods somehow invalidates GE's ability to avail itself of an exception to *Illinois Brick.* In fact, courts have held that the incorporation of a price-fixed component into a finished product has no bearing on the application of the control exception. *See In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 18 (3d Cir. 1978); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 911 F. Supp. 2d 857, 869-70 (N.D. Cal. 2012). In any event, given that GE negotiated, on behalf of MABE, directly with the cartelists the price of just the compressor standing alone (Compl. ¶ 50), Danfoss's purported concern about complications from incorporation of the compressors into a larger product is a red herring. Calculating the overcharge damage on the price of the compressor that GE negotiated for MABE is not different than calculating the overcharge damage for the price of the compressor negotiated by GE for sale directly to GE.

intensive inquiry that is not appropriately considered on a motion to dismiss. *See G-Fees*, 584 F. Supp. 2d at 33; *In re Mercedes-Benz Antitrust Litig.*, 157 F. Supp. 2d 355, 367 (D.N.J. 2001).

IV. The Court Has Specific Jurisdiction Over Danfoss Flensburg.

Danfoss Flensburg argues that it is not subject to personal jurisdiction, contending only that GE has failed to meet the first of the three elements of the Sixth Circuit's personal-jurisdiction test, namely, that Danfoss Flensburg purposefully availed itself of the privilege of doing business in the United States. *See S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 380-81 (6th Cir. 1968).[20]

Notably, Danfoss Flensburg has not submitted a declaration to support its argument. Instead, it relies on a declaration from *Danfoss A/S* (thus highlighting that the entities are alter egos). Danfoss Flensburg has offered no evidence to support its position, and its motion should be denied on that basis alone. However, even if it had properly submitted evidence, its argument still fails as it is based entirely on the contention that GE has not adequately alleged that the conspiracy

[20] Danfoss Flensburg does not even attempt to argue – nor can it – that GE failed to meet the second or third prongs of the *Mohasco* test, *i.e.*, that the "cause of action must arise from the defendant's activities" in the United States, and that exercising jurisdiction over Danfoss Flensburg would be reasonable. *Mohasco*, 401 F.2d at 381. GE's claims arise directly from Danfoss Flensburg's sale of price-fixed compressors to GE in the United States, as well as its other actions directed toward the United States. (Compl. ¶¶ 63-65, 67, 84-85, 88.)

overlapped with the period during which Danfoss sold compressors directly to GE in the United States, 1996-1998. (Br. at 23.) Of course, as discussed above, this argument is specious, as GE has alleged a conspiracy reaching back to 1996.

But even if that argument had some merit, Danfoss Flensburg's contacts with the U.S. are more than sufficient to meet the purposeful-availment prong. GE alleges that Danfoss directly supplied compressors "to GE's plant in Louisville, Kentucky" (Compl. ¶ 33), and Danfoss Flensburg admits it cannot controvert this fact. (Br. at 22-23.) GE's records reflect that Danfoss Flensburg sold and shipped to GE in the United States millions of dollars of compressors during the conspiracy period. Declaration of Tonya Williams ("Williams Decl.") ¶ 4, Ex. A.[21]

It is also undisputed that Danfoss Flensburg employees traveled to the United States for the express purpose of meeting with GE. (Compl. ¶ 34; Christensen Decl. ¶ 29.) Danfoss A/S claims they traveled to the U.S. only to discuss "quality" and "technical" issues (Christensen Decl. ¶ 29), but the record reflects that they addressed financial and sales aspects of the GE-Danfoss relationship as well. (Williams Decl., Exs. C-D.) Further, Lars Snitkjaer, who attended many cartel meetings, was among the Danfoss Flensburg employees who

[21] Moreover, Danfoss Flensburg also admitted in its plea agreement that it sold millions of dollars of compressors into the United States. (Schnorrenberg Decl., Ex. 14 ¶ 4(a), at 3-4.)

directly communicated with GE in the United States regarding the sale of compressors. (Compl. ¶¶ 94, 98, 103; Williams Decl., Ex. B).

Moreover, under *Calder v. Jones*, 465 U.S. 783, 789-90 (1984), Danfoss Flensburg's contacts are enhanced because, as a supplier to GE, it "undoubtedly knew that [GE] had its principal place of business in [the United States] and that the focal point of its actions and the brunt of the harm would be in" the United States. *Air Prods. & Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544, 553 (6th Cir. 2007). Danfoss Flensburg's request to be dismissed should be denied.

CONCLUSION

For the foregoing reasons, GE respectfully requests that the Court deny Danfoss's motion to dismiss.

Respectfully submitted on April 8, 2014,

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 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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