IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. AB ELECTROLUX, ELECTROLUX NORTH AMERICA, INC., AND GENERAL ELECTRIC COMPANY, *Defendants*.	Case No. 1:15-cv-01039-EGS

DEFENDANTS' MOTION TO COMPEL SAMSUNG ELECTRONICS AMERICA, INC., TO PRODUCE ALL DOCUMENTS RESPONSIVE TO THEIR SUBPOENA *DUCES TECUM*

On July 24, 2015, Defendants validly served Samsung Electronics America, Inc. ("Samsung") with a subpoena *duces tecum*, requesting production of the documents in question by August 12, 2015. Samsung initially refused to produce anything, despite having produced documents to the Government during its administrative investigation and despite Defendants' efforts to negotiate a production that would minimize the burdens of compliance. And while Samsung has belatedly made a compromise offer to comply in part, its proposal continues to omit certain key categories of documents, and it still has not actually produced even a single document to Defendants, more than two weeks after the subpoena's return date and a month after the subpoena was served.

Samsung is a significant competitor in the sale of appliances in the United States, and it cannot be allowed to shield its documents from consideration in this litigation. That is especially true given that Samsung has a business incentive to refrain from disclosing documents about its future competitive plans that will help Defendants show that the challenged acquisition will not

likely have an anticompetitive effect, because Samsung stands to benefit as a competitor if this pro-competitive transaction is erroneously enjoined.

In light of the rapidly approaching discovery deadlines and trial date, and Samsung's tardy and inadequate negotiations, Defendants must now ask this Court to compel Samsung to comply in full with the subpoena. And for the same reasons, Defendants respectfully suggest that this Court should expedite the remaining briefing on this motion. Counsel for Electrolux discussed with counsel for Samsung that this motion would be filed if the parties could not reach a negotiated resolution, and Samsung opposes the motion.

Dated: August 28, 2015

Respectfully submitted,

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(with permission, by John M. Majoras)

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2015, I caused this document to be filed electronically and served electronically via ECF pursuant to LCvR 5.4. Notice of this filing will be sent to all parties by operation of the court's electronic filing system or by email and U.S. mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing.

Dated: August 28, 2015

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL SAMSUNG ELECTRONICS AMERICA, INC., TO PRODUCE ALL DOCUMENTS RESPONSIVE TO THEIR SUBPOENA *DUCES TECUM*

As this Court held when it granted Defendants' Hague Convention Letter of Request, information from competitors that sheds light on how they (and customers) may respond to the challenged acquisition is "relevan[t] and importan[t]" to this antitrust case. ECF No. 77. It was for this very reason that Defendants served a subpoena for documents on Samsung Electronics America, Inc. ("Samsung") over a month ago. Exhibit A. The subpoena was validly issued and served and Samsung has not asserted otherwise.

As detailed below, the subpoena's twenty-two requests encompass six general categories of information: (1) sales and purchase data; (2) strategic plans and other business analyses of competition; (3) contracts, bids, proposals, and other operative agreements; (4) information about installation, distribution, and service capabilities; (5) communications about the challenged acquisition; and (6) organizational charts. Such information is essential to assessing the contours of the markets alleged by the Government, to evaluating Samsung's ability to compete in those spaces, and thus to determining the likely competitive effects of the challenged acquisition.

Notwithstanding the plain relevance of the information sought, Electrolux explained in the cover letter to the subpoena that it was willing to negotiate over the terms of the subpoena and to work with Samsung to minimize the burden of the production. *Id.* at 1. But Samsung did not formally respond to the subpoena until fourteen days later — the very last day it could issue objections under the Federal Rules — and it did so by interposing 12 single-spaced pages of objections. Exhibit B. Through its litany of objections, Samsung made clear that it had no intention of producing any responsive information to comply with the subpoena. *See id.* at 1-2.

After receipt of the objections, Electrolux promptly requested a meet-and-confer with Samsung (its second) and reaffirmed its desire to work with Samsung to minimize the burden and expense of compliance. To that end, Electrolux grouped the various requests into the six categories above, in order to prioritize which sets of requests were most important to Defendants (e.g., data for the experts) and which were not (e.g., organizational charts). Electrolux explained that it was providing this preferential ranking to facilitate further negotiation and compromise.

Samsung initially stood on its objections and refused to respond with any offer of compromise or explanation regarding the extent of its ability to comply, but finally agreed to make a counter-offer after Electrolux said it was going to move to compel. Exhibit C. Although Samsung's proposal was productive, it failed to address the two important categories of strategic business plans and communications about the acquisition. Exhibit D. Electrolux raised this deficiency with Samsung, yet Samsung has dragged its feet in responding and to date has offered nothing to fill the glaring hole in its proposal. Exhibit E. Accordingly, given the inadequacy of Samsung's offer and the rapid approach of the close of discovery and the start of trial, Defendants must now move to compel Samsung to comply in full with the subpoena.

Samsung's objections to the subpoena essentially boil down to three concerns. Each one is meritless under the applicable law and the facts presented.

First, Samsung erroneously asserts that the subpoena's 19-day response deadline is unreasonably short. Exhibit B at 1. Courts widely regard 14 days as presumptively reasonable. *See, e.g.*, *Elliot v. Mission Trust Servs., LLC*, No. 14-cv-9625, 2015 WL 1567901, at *4 (N.D. Ill. Apr. 7, 2015). And, under the circumstances of this case, 19 days is unquestionably reasonable, to say nothing of the 35 days that have actually elapsed without any compliance by Samsung. Like most antitrust merger challenges, this one is fast-moving. The deadlines are tight and the parties do not have the luxury of a prolonged discovery period. Moreover, Samsung's vast resources render the modest document production here easily manageable, and Samsung's prior cooperation in the Government's nine-month pre-suit investigation should have removed any surprise associated with Defendants' subpoena.

Second, Samsung erroneously asserts that the subpoena is overbroad and unduly burdensome. Exhibit B at 1-2. That objection cannot possibly justify Samsung's failure to produce any responsive documents. More fundamentally, Samsung's argument is based on the gross exaggeration that the subpoena "seeks virtually every shred of information regarding [its] home appliances business that was created, sent or received over a 10-year time period." *Id.* For example, many of the requests are expressly limited to a three- to five-year period. And while some requests reach beyond those years, they do so because of the significance of the last decade in the appliances industry. In the wake of the 2006 Whirlpool-Maytag merger, Samsung (among others) has entered new appliance lines and aggressively competed to expand its sales — all of which is probative of Samsung's likely future conduct in the wake of the challenged transaction here. Likewise, while Samsung objects that Defendants seek documents about appliances other

than the cooking products in the markets alleged in the Government's complaint, the Government and Defendants both maintain that analyzing the effect of the challenged acquisition in the alleged markets will require considering evidence about competition in other discrete product areas, for a variety of reasons. Similarly, Samsung cannot justify omitting from its counter-proposal any documents concerning its strategic plans and communications about the acquisition, as such documents are critical to assessing the transaction's likely competitive effects. *See, e.g.*, *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 147-49, 158-59 (D.D.C. 2004).

Third, Samsung erroneously contends that it need not provide any documents unless Defendants pay for all of the costs associated with producing them. Exhibit B at 2. Rule 45 contemplates that a non-party will bear its own costs for complying with a subpoena unless the non-party can demonstrate "undue burden" or "significant expense." Fed. R. Civ. P. 45(d)(1), (d)(2)(B)(ii). Samsung cannot satisfy — and certainly has not proven that it satisfies — this standard. Especially in light of this Court's recognition of the "relevance and importance" of non-party competitor information, ECF No. 77, Samsung will not incur any unwarranted financial hardship. Samsung is a multi-billion-dollar competitor in the appliances industry who can and should bear the costs of complying with the subpoena, not a small player who is being hit was an excessive and disproportionate cost. *See, e.g.*, *Cornell v. Columbus McKinnon Corp.*, No. 13-cv-02188, 2015 WL 4747260, at *4 (N.D. Cal. Aug. 11, 2015) (denying motion by FedEx to shift costs of subpoena compliance, given FedEx's ability to pay and own financial interest in the litigation).

At bottom, Defendants' document requests are eminently reasonable, and Samsung's objections are entirely unreasonable. Thus, having failed to negotiate a resolution, it should now be ordered to comply in full.

BACKGROUND

On July 1, 2015, the United States commenced a civil action to enjoin Electrolux's proposed acquisition of GE's assets relating to its appliance business unit. The Government claims that the proposed acquisition violates Section 7 of the Clayton Act, 15 U.S.C. § 18, because it allegedly will have anticompetitive effects on the sale of ranges, cooktops, and wall ovens in this country. Compl., ECF No. 1, ¶¶1–5, 13–14, 20–35. The Government further alleges that, due to significant barriers to entry, "new entry or expansion by existing competitors is unlikely to prevent or remedy" the alleged anticompetitive effects of the acquisition. *Id.* ¶36. Indeed, the Government asserts that the proposed acquisition "would create a duopoly" between Electrolux and Whirlpool in the so-called "contract channel" to supply home builders, property managers, etc. *Id.* ¶2. The ultimate result, the Government claims, will be "less competition, higher prices, and fewer options for millions of Americans who buy major cooking appliances each year." *Id.* ¶1.

Defendants disagree. The appliances industry in the United States and around the world is intensely competitive. Appliance suppliers are continually innovating in order to offer more highly featured products at lower prices, and the number of appliance suppliers competing for business has steadily increased in the United States in recent years. Samsung is a superb example of this. Over the last decade, Samsung has grown its presence in the U.S. marketplace for appliances and taken share away from traditional suppliers such as Whirlpool, GE, and Electrolux. Defendants intend to show at trial that the competition in this already competitive industry will continue to increase following the acquisition as (among other things) Samsung continues to expand and compete in this business.

All of this, however, requires evidence from competitors, including Samsung. As in any antitrust action seeking to enjoin an acquisition, determining the competitive effects of the

acquisition will turn heavily on predictions about how competitors (and customers) will likely respond, based on their past conduct and future plans. This explains why the Government sought information from Samsung during its pre-suit investigation and why both the Government and Defendants have requested documents from a host of competitors in the appliances industry, including Samsung.

Defendants served Samsung with their subpoena on July 24th and requested a response by August 12th — 19 days later. Exhibit A at 1. In the cover letter, Electrolux expressly invited Samsung to "discuss ways in which the requests can be clarified or potentially revised to minimize the burden and expense of compliance." *Id.* Samsung did not respond until 14 days later — the last day objections were due under the Federal Rules — and did so with 12 single-spaced pages of objections. Exhibit B. Notably, Samsung did not agree to produce a single piece of data or single page of responsive information. *Id.* Electrolux immediately requested a meet-and-confer to reaffirm its desire to reach an agreement regarding the requests.

As part of this effort, Electrolux divided the subpoena's twenty-two requests into six general categories, and ranked them in order of importance, which Electrolux has found helpful in negotiating with the other non-party competitors besides Samsung. The first bucket covers sales and purchase data, which are critical to defining the relevant markets and identifying how each competitor is currently positioned in it. The second category covers strategic plans and competitive analyses, which are essential to determining how actual competitors view the ever-changing state of the relevant markets and thus to predicting the likely competitive effects of the proposed acquisition. The third category covers contracts, bids, proposals, and operative agreements, which are necessary to identify current competitors in the sales of appliances (including through the contract channel) and to reveal any trends suggesting that non-party

competitors like Samsung have been and will continue to be a growing force in competing with Defendants and Whirlpool for such sales. The fourth category covers installation, distribution, and other service capabilities. The Government has alleged that a preference for certain service capabilities presents sizable barriers that preclude entry or expansion in the alleged markets; this information bears on whether such barriers in fact exist and, if so, whether competitors are positioned to surmount them, either directly or through the use of third-party distributors. The fifth category covers any external or internal communications about the acquisition, which would be directly relevant to Samsung's competitive response to the acquisition and thus to the transaction's likely competitive effects. The final category is for organization charts, which are relevant to assessing competitors' current infrastructure and potential capacity to expand further into the cooking segment and to increase their contract-channel sales.

Despite Electrolux's efforts to facilitate compliance with the subpoena and Samsung's major, multi-billion-dollar role in the U.S. appliances industry, Samsung initially asserted that it need not produce *any* information in response to the validly-served subpoena, merely because of the time, burden, and cost of production. Exhibits B-C. And while Samsung eventually did make a proposal for partial compliance with the subpoena, even that proposal refused to produce any documents on the important issues of Samsung's strategic business plans and communications about the challenged acquisition. Exhibits D-E. At this point, negotiations have broken down given Samsung's unacceptable position, and Defendants have no choice but to ask this Court to compel Samsung to comply in full with the subpoena, given the rapidly approaching close of discovery and start of trial.

ARGUMENT

A party has a right to subpoena any person to produce documents for inspection and copying. *See* Fed. R. Civ. P. 45(a). Because courts apply the standards of Rule 26 to subpoena requests under Rule 45, *Coleman v. District of Columbia*, 275 F.R.D. 33, 36 (D.D.C. 2011), the scope of permissible discovery under Rule 45 is broad. A party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1); *see also Wyoming v. U.S. Dep't of Agric.*, 208 F.R.D. 449, 452 (D.D.C. 2002) ("Generally, courts construe the scope of discovery liberally in order to ensure that litigation proceeds with the fullest possible knowledge of the issues and facts before trial." (quotation marks omitted)). Where a party objects to a subpoena, that party must martial particular facts establishing the basis for its objection. *See, e.g.*, *Flatow v. Islamic Republic of Iran*, 201 F.R.D. 5, 8 (D.D.C. 2001) ("When the burdensomeness of a subpoena is at issue, the onus is on the party alleging the burden to prove that the subpoena violates Rule 45."); *Alexander v. F.B.I.*, 194 F.R.D. 305, 315 (D.D.C. 2000) ("[I]n order to support its objection, the EOP must make a specific, detailed showing of the burden such a search would require."). Broad allegations of harm, unsubstantiated by specific examples or reasoning, are insufficient. *See, e.g.*, *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 837 F. Supp. 454, 458 n. 2 (D.D.C.1993) (assertions of a burden without "specific estimates of staff hours needed to comply" will be "categorically rejected"). If the objections are unfounded and the party refuses to comply, the serving party may file a motion to compel compliance under Rule 45. Fed. R. Civ. P. 45(d)(2)(B)(i).

Here, Defendants' subpoena to Samsung seeks information that falls well within the scope of permissible discovery, and the grounds that Samsung offers for refusing to comply are baseless. An order directing Samsung to comply is therefore necessary and proper.

I. Defendants' Subpoena Requests Are Narrowly Tailored Toward Obtaining Information That Is Highly Relevant To Their Defense Of This Case

Evidence from current and potential competitors is highly relevant to analyzing the likely competitive effects of a challenged acquisition. *See, e.g.*, *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 54 (D.D.C. 1998); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 982 (2d Cir. 1984). That is certainly true here. The Government has alleged that Whirlpool, GE, and Electrolux dominate the alleged markets for cooking appliances, that the proposed acquisition will thus substantially increase concentration and thereby lessen competition, and that sizable barriers preclude the kind of entry or expansion into these markets that would likely prevent the alleged anticompetitive effects of a merger. By contrast, Defendants intend to prove at trial that, over the last decade, competition from Samsung and other non-party competitors has significantly increased and will continue increasing despite the proposed acquisition, which undermines the Government's claim that the acquisition will adversely affect competition.

The information that Defendants seek directly bears on these competing theories. Indeed, the Government has already relied in its interrogatory responses on such evidence produced by Samsung during the pre-suit investigation. Moreover, this Court has already held that the similar Hague Convention Letter of Request for Samsung's Korean parent company seeks evidence that is "relevan[t] and importan[t]." ECF No. 77. The same is true for the six general categories of information requested in the subpoena to Samsung.

The first category of requests is for Samsung's purchase and sales data for both cooking and non-cooking appliances. Exhibit A (Subpoena Request Nos. 4, 7-10, 13). This includes, for example, product line-ups, future product introduction plans, U.S. sales data for its appliances, and profitability data. Such information is commonly tracked and maintained in the usual course of business and, on its face, is highly relevant to defining the relevant markets, as well as

understanding Samsung's competitive position in those markets. *See, e.g.*, DOJ, Horizontal Merger Guidelines (2010) ("Merger Guidelines") § 5.2 ("In most contexts, the Agencies measure each firm's market share based on its actual or projected revenues in the relevant market. Revenues in the relevant market tend to be the best measure of attractiveness to customers.").

The second category of requests is for documents reflecting Samsung's business plans, strategy documents, and views on competition in the appliances industry. Exhibit A (Subpoena Request Nos. 1, 3, 16-19, 22). Responsive documents include strategy or growth plans targeted at the cooking segment and contract-channel sales, plans to expand into new geographic areas, products, or price points, and documents discussing competition for the sales of appliances. This information is critical to projecting future competitive dynamics, growth, and industry trends in the relevant market — all of which are relevant to assessing the proposed acquisition' impact on future competition. *See, e.g.*, *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 147-49, 158-59 (D.D.C. 2004) (discussing competitors' business strategies, including expansion plans); *FTC v. Sysco Corp.*, No. 15-cv-00256, --- F. Supp. 3d ----, 2015 WL 3958568, at *56 (D.D.C. June 23, 2015) (same); Merger Guidelines § 9 (noting importance of evidence of "planning" when assessing the likelihood of "entry efforts an entrant might practically employ").

The third category of requests is for operative agreements governing Samsung's business relationships and, to the extent available, negotiation documents, such as bids, proposals, or requests for quotation. Exhibit A (Subpoena Request Nos. 11-12). This information will reveal who is competing for sales of appliances (including through contract-channel sales), and thus will identify the extent to which Samsung and other non-party competitors are a growing force in competing for sales that the Government alleges can only be made by Defendants or Whirlpool. Because such information about bidding and negotiations often provides a more comprehensive

picture of competition than sales data alone, it is highly relevant in antitrust case. *See, e.g.*, *Arch Coal*, 329 F. Supp. 2d at 133, 138, 144–45, 146–47 (discussing bid processes, requests for proposals, and bid solicitations and receipts); Merger Guidelines § 6.2 ("In many industries, especially those involving intermediate goods and services, buyers and sellers negotiate to determine prices and other terms of trade.").

The fourth category of requests specifically relates to the Government's allegations regarding barriers to entry. Exhibit A (Subpoena Request Nos. 2, 21). The Government has argued that entry into the U.S. appliances market, and selling through the contract channel in particular, requires "a large and sophisticated distribution network that can meet the specific delivery, scheduling, and service needs of contract-channel purchasers." Compl., ECF No. 1, ¶ 2. The requests in this category seek information that will show the extent to which Samsung already has — and can easily develop more of — the service capabilities allegedly necessary to expand its appliances sales through the contract channel. *See, e.g.*, *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 531-32 (1973) ("The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated.").

The fifth category of requests is for any internal or external communications specifically regarding the proposed acquisition, as well as any documents sent to or received from the Government regarding the same. Exhibit A (Subpoena Request Nos. 5-6). Contrary to Samsung's claims, competitors' views are relevant to defining the relevant markets and otherwise evaluating a transaction's likely competitive effects. *See, e.g.*, *Cardinal Health*, 12 F. Supp. 2d at 46 (noting the relevance of "how the market is perceived by those who strive for

profit in it"); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986) ("we assume that economic actors usually have accurate perceptions of economic realities"); Merger Guidelines § 2.2.3 ("Information from firms that are rivals to the merging parties can help illuminate how the market operates.").

The last category of requests is for organizational charts. Exhibit A (Subpoena Request No. 14-15). This too will assist Defendants in understanding the current and future structure of Samsung's appliances business, the extent to which it has devoted itself to this business, and thus its ability to expand its sales both in cooking and through the contract channel. *See, e.g.*, Merger Guidelines § 5.2 ("[A] firm's competitive significance may depend upon its level of readily available capacity to serve the relevant market if that capacity is efficient enough to make such expansion profitable."); *Arch Coal Inc.*, 329 F. Supp. 2d at 147-48 (relying on competitors' capacity to expand production in evaluating merger's potential anticompetitive effects).

In sum, the foregoing discussion demonstrates that each of Defendants' requests fits comfortably within the broad scope of discovery allowed under Rules 26 and 45. In fact, each request is carefully targeted at high-value materials that will be critical to formulating a defense against the Government's claims, including the specific allegation that Samsung is not a meaningful competitor. All of this underscores the eminent reasonableness of Defendants' requests, while highlighting the gross unreasonableness of Samsung's categorical objections.

II. Samsung's Objections To Producing Any Documents Are Baseless

Samsung has offered a kitchen sink of objections to justify its failure to produce a *single* document. But none can withstand even passing scrutiny.

A. As a threshold matter, a fatal flaw that pervades Samsung's objections is the absence of specificity and facts to support them. Where a party refuses to comply with a subpoena, that party has the burden to identify with particularity the nature of the undue burden.

See Wright & Miller, Federal Practice & Procedure § 2459 ("The burden of proving that a subpoena duces tecum imposes an undue burden is on the person who seeks to have it quashed as unreasonable or oppressive."); *supra*, p. 8 In this case, Samsung's response is long on objections but short on facts. *See* Exhibit B. Samsung provides no details regarding the costs of compliance, the amount of time it reasonably needs to comply with the subpoena, or the number of potentially responsive documents it possesses. This alone is insufficient to carry its burden but enough to justify Defendants' motion to compel.

B. Even setting aside that problem, Samsung's objections fail. While Samsung purports to raise more than ten objections, they essentially boil down to three basic concerns. Each of those complaints lacks merit.

1. Samsung contends that the subpoena is unduly burdensome because Samsung had a "mere" 19 days to respond. Exhibit B at p. 1. While non-parties are entitled to a "reasonable time to comply" with a subpoena, Fed. R. Civ. P. 45(d)(3)(A)(i), the federal rules do not establish a minimum. Instead, courts consider all of the circumstances, with 14 days as the presumptively reasonable benchmark. *See, e.g.*, *Elliot v. Mission Trust Servs., LLC*, No. 14-cv-9625, 2015 WL 1567901, at *4 (N.D. Ill. Apr. 7, 2015) ("Fed. R. Civ. P. 45(d)(2)(B) suggests that 14 days is the benchmark for time for compliance; and courts have found that fourteen days from the date of service is presumptively reasonable"); *Tri Invs., Inc. v. Aiken Cost Consultants, Inc.*, No. 2:11-cv-4, 2011 WL 5330295, at *1 (W.D.N.C. Nov. 7, 2011) ("Although Rule 45 does not define what constitutes a reasonable time, courts have found that fourteen days from the date of service is presumptively reasonable.").

In this case, Samsung has offered nothing to overcome the presumption of reasonableness to which 14 days is entitled, let alone the presumption that should attend a *19-day* period (to say

nothing of the *35 days* that has actually elapsed since the subpoena was served). Like most antitrust challenges to proposed acquisitions, this one is fast-moving. The Government filed its complaint on July 1; fact discovery closes on September 30; and trial commences on November 9. The parties thus cannot allow snail's pace discovery, let alone Samsung's efforts to run out the clock. Moreover, Samsung has more than adequate resources to complete discovery within this time period. It is a multi-national, multi-billion-dollar enterprise that can easily turn around the modest document production required in the time allotted. This is especially true since Samsung has known for months now that such a subpoena was likely coming. The Government not only obtained documents from Samsung in its pre-trial investigation, but actually deposed one of its then-key officers. So once the Government filed suit on July 1, 2015, Samsung must have known that Defendants would soon be requesting its documents. Given these circumstances, a 19-day response period is more than reasonable.

Samsung generally asserts that the documents are numerous and that some are difficult to access. *See, e.g.*, Exhibit B at 1, 6. While it is difficult to evaluate these assertions without specifics, there is good reason for rejecting them. Some competitors (not to mention customers) have made — or are making — productions on timeframes comparable to the 19-day window offered to Samsung. And others have asked for and received extensions. Because Samsung is a similarly situated, sophisticated profit-making enterprise, it clearly can comply in a timely way.

2. Samsung contends that the subpoena is overly broad because it "seeks virtually every shred of information regarding [its] home appliances business that was created, sent or received over a 10-year time period." Exhibit B at 1-2. As a threshold matter, purported overbreadth cannot possibly justify Samsung's failure so far to produce *any* documents. More fundamentally, though, the purported overbreadth is pure hyberbole. In fact, this Court itself has

already emphasized "the specificity of the requests" in Defendants' Hague Convention Letter of Request to Samsung's Korean parent company, which are quite similar to the primary requests in the subpoena. *See* Govt. Hague Opp., ECF No. 71, at 5-6 (comparison chart).

As for the requests' temporal scope, many of them specifically target materials concerning the last three to five years. Exhibit A (Request Nos. 1, 4, 8, 12, 14, 17, 22). While some requests reach beyond five years, those particular, narrowly-tailored requests are reasonable since the last decade represents a critical period in the appliances industry. In the wake of the 2006 Whirlpool-Maytag merger — which likewise increased concentration among leading appliance competitors at the time and thus had caused some regulators to voice similar theories about potential anticompetitive effects — competition in fact increased dramatically and the anticompetitive concerns never materialized. Samsung (among others) has since entered, and aggressively expanded, into various products in the United States, including laundry and refrigeration. Information from this time period is thus relevant to evaluating the likely effects of the challenged acquisition here — more specifically, to considering Samsung's previous conduct in cooking and other products as indicative of Samsung's present capabilities and future conduct. *See, e.g.*, Merger Guidelines § 2.1.2 ("The Agencies look for historical events, or 'natural experiments,' that are informative regarding the competitive effects of the merger…. Effects of analogous events in similar markets may … be informative."). Tellingly, the Government itself evaluated information dating back this far in investigating the proposed transaction.

As for the requests' product scope, Samsung is simply wrong that information relating to *non-cooking* appliances — such as refrigerators, washers, and dryers — "ha[s] nothing to do with the underlying case." Exhibit B at 4. Although the Government has challenged the competitive effect of the challenged transaction in the alleged markets for certain cooking

products, the Government and Defendants both agree that analyzing that effect will require considering evidence about competition in other product areas. As for the Government, it has argued that a significant barrier to entry for sales of cooking appliances to professional home-builders is that such buyers prefer a manufacturer that can provide "full lines of kitchen appliances, including … refrigerators[] and dishwashers." Complaint, ECF No. 1, ¶36. As for Defendants, they intend to show, as discussed above, that Samsung's past expansion strategies for appliances like laundry and refrigeration presage Samsung's present and future expansion strategy for cooking appliances. Defendants also intend to show that, post-acquisition, the combined entity likely would not be able to take advantage of any increased concentration in the alleged cooking markets, because big-box retailers like Home Depot are well poised to thwart any such efforts, including through strategic use of their power over non-cooking products.

3. Samsung contends that it "will not produce any documents absent Electrolux's agreement to pay SEA's costs." Exhibit B at 2. But "a party is entitled to information that is relevant to a claim or defense in the matter at issue, and even a nonparty is normally expected to bear some or all of the costs of discovery." *Bell Inc. v. GE Lighting, LLC*, No. 6:14-CV-00012, 2014 WL 1630754, at *11 (W.D. Va. Apr. 23, 2014). Indeed, Rule 45 contemplates that a non-party will bear its own costs for complying with a subpoena unless the non-party can demonstrate "undue burden" or "significant expense." Fed. R. Civ. P. 45(d)(1), (d)(2)(B)(ii).

Here, Samsung mouths these buzzwords, but offers nothing to prove they exist. Samsung's bald protestations of burden and expense are not enough to validate its objection. *See, e.g.*, *Sawyer v. Purdue Pharm. Corp.*, No. 12-MC-019, 2012 WL 1949334, at *2 (D.N.H. May 29, 2012) (rejecting a non-party's claims that responding to subpoena would impose undue expense as "speculation, uninformed by any information about the files themselves"). And,

especially in light of this Court's previous recognition of the "relevance and importance" of non-party competitor information, ECF No. 77, Samsung could not demonstrate unwarranted financial hardship. Samsung is not a marginal mom-and-pop appliance dealer for whom compliance would constitute a meaningful and unfair cost; rather, it is a multi-billion-dollar going concern for whom the modest financial demands of compliance will be an ordinary cost of business as a key player in the appliances industry. *See, e.g.*, *Cornell v. Columbus McKinnon Corp.*, No. 13-cv-02188, 2015 WL 4747260, at *4 (N.D. Cal. Aug. 11, 2015) (denying motion by FedEx to shift costs of subpoena compliance, given FedEx's ability to pay and financial interest in the case).

CONCLUSION

Each of Samsung's objections to compliance with the subpoena fails on its own terms, and Samsung's collective failure so far to produce a single document confirms the unreasonableness of Samsung's position. No conceivable concern about time, overbreadth, or expense could justify, for example, Samsung's failure to produce any documents addressing even the next year's sales strategy for the cooking products identified in the Government's complaint. It is unsurprising that Samsung is trying to avoid producing documents that will help Defendants demonstrate that the challenged acquisition will not likely have anticompetitive effects, because Samsung stands to benefit as a competitor if this pro-competitive transaction is erroneously enjoined. But precisely because of Samsung's significant role in the U.S. appliances industry, it should not be permitted to sit on the sidelines of this litigation. And given Samsung's inadequate negotiating position and the rapidly approaching discovery deadlines and trial date, this Court should now compel Samsung to comply in full with Defendants' subpoena.[1]

[1] For the same reasons, Defendants also respectfully suggest that this Court should expedite the remaining briefing on this motion.

Dated: August 28, 2015

Respectfully submitted,

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(with permission, by John M. Majoras)

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LIST OF EXHIBITS

Exhibit A: Letter and Subpoena from counsel for Electrolux to Samsung, dated July 24, 2015.

Exhibit B: Letter of Objections from counsel for Samsung to counsel for Electrolux, dated August 7, 2015.

Exhibit C: Email chain between counsel for Samsung and counsel for Electrolux, dated between August 20, 2015, and August 24, 2015

Exhibit D: Email chain between counsel for Samsung and counsel for Electrolux, dated between August 25, 2015, and August 26, 2015

Exhibit E: Email chain between counsel for Samsung and counsel for Electrolux, dated August 27, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2015, I caused this document to be filed electronically and served electronically via ECF pursuant to LCvR 5.4. Notice of this filing will be sent to all parties by operation of the court's electronic filing system or by email and U.S. mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing.

Dated: August 28, 2015

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