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

INTERVENOR SAMSUNG ELECTRONICS AMERICA, INC.'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL

On July 24, 2015, Defendants served on Samsung Electronics America, Inc. ("SEA") an incredibly burdensome subpoena for documents going back more than ten years. Ex. A. Complying with the subpoena would take many months at a cost of millions of dollars. SEA timely objected to the subpoena, and attempted to negotiate reasonable limitations to the requested documents and data at an August 13, 2015, meet and confer. During those negotiations, Defendants dismissed out of hand every single objection SEA made, and in response to the direct question whether Defendants were willing to limit and modify the subpoena, Defendants unequivocal response was "No." Defendants stated that the requests could not be narrowed and that "all of the requests are still operative." Defendants only "compromise" was to list the order in which they wanted compliance to occur. Ex. D at 1 (Aug. 24, 2015, 6:05pm; Aug. 24, 2015, 3:34pm).

Although Defendants now assert that they were willing to negotiate at the meet and confer, Defendants' follow-up email on August 18, five days after the parties met and conferred,

belies the assertion. Defendants did not provide that email to the court; SEA has included it as Exhibit C. In the email, Defendants stated that SEA has the burden of showing the subpoena is unduly burdensome and that "Samsung has failed to meet that burden." *Id*. at 1. Defendants also stated that "the proposed 19-day compliance date is eminently reasonable." *Id*. In other words, five days after the parties' meet and confer, Defendants were still taking the position that the subpoena was not burdensome, that the specifications would not be modified, and that full compliance was required within 19 days. While Defendants' strategy may have been intended to keep the overbroad subpoena hanging over SEA's head while they attempted to extract in an unlimited fashion more and more documents on a rolling basis, there is no authority for such a strategy. Fed R. Civ. P. 45(d)(1). On August 20, SEA responded to Defendants' unwillingness to acknowledge burden (Ex. D at 4-5 (Aug. 20, 2015, 11:27am)), and on Sunday, August 23, Defendants finally conceded a willingness to limit the subpoena's scope, including the time-frame of the document requests. *Id*. at 3-4 (Aug. 23, 2015, 10:40am). But Defendants still made no proposals regarding what specific documents they really wanted, how the time-frame could be modified, or how any other element of their search requirements would change. *Id*.

On August 25, SEA took it upon itself to identify relevant information that it could provide in a timely manner, even though Defendants had failed to identify a smaller universe of documents they actually needed. Ex. E at 2-3 (Aug. 25, 2015, 7:16pm). SEA's proposal covered most of the subpoena requests, including the category of specifications Defendants wanted to see first. SEA also suggested another meet and confer to define precisely the kinds of business and planning documents—which were not covered by SEA's initial proposal—that Defendants really needed. *Id*. The next day, Wednesday, August 26, counsel conferred to discuss the remaining issues, what the Defendants referred to as the "one big bucket" that SEA's proposal missed. *Id*.

at 1 (Aug. 26, 2015, 8:49am). This "bucket" was defined as Specifications 1, 3, 16, 18, and 19 of the subpoena, and by itself would have required a search of hundreds of marketing and sales people in numerous locations for documents spanning ten years. During the meet and confer, Defendants outlined the final two categories of documents that they wanted: recent forward-looking business plans, including expansion plans, and documents assessing the proposed merger. Two days later, and despite assurances that SEA was investigating what types of business and planning documents it could locate and produce, as well as assurances that SEA employees were "not sitting on their hands," Defendants filed their Motion to Compel. Ex. F at 1 (Aug. 27, 2015, 5:23pm); *id*. at 2 (Aug. 27, 2015, 9:24am).

SEA negotiated at all times in good faith. Indeed, SEA thought the parties had reached an agreement with respect to most of the subpoena, including the specifications Defendants deemed most crucial. *See* Ex. E. SEA had already begun collecting that information. With regard to the final category of specifications—business and planning documents—SEA was in the process of tracking down traveling executives (in late August) to identify the types and quantity of documents responsive to the two-day old guidance that SEA had spent weeks trying to obtain. In fact, earlier this week SEA was able to identify documents relevant to the parties' narrowed proposals. Ex. G at ¶ 6 (affidavit of Elizabeth Kim). But Defendants apparently are disclaiming any agreement with respect to the matters SEA thought were settled and are ignoring SEA's efforts to resolve the last issue. Defendants instead seek to enforce the entire, unreasonably broad subpoena, a subpoena that could not possibly be complied with in full until well into calendar year 2016. *Id*. at ¶ 11.

Defendants' subpoena duces tecum is unduly burdensome and Defendants' 19-day compliance date was unrealistic and unreasonable. Defendants' Motion to Compel should be denied.

ARGUMENT

I. The Subpoena is Unduly Burdensome

Federal Rule of Civil Procedure 45 specifies that the Court "*must* quash or modify a subpoena that . . . subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iv) (emphasis added); *In re Micron Tech., Inc. Sec. Litig.*, 264 F.R.D. 7, 8-9 (D.D.C. 2010). Rule 45 also makes clear that the parties and attorneys who issue a subpoena have an affirmative duty to prevent undue burden or expense to the persons subject to the subpoena. Fed R. Civ. P. 45(d)(1). As such, courts in this circuit are "sensitive to the costs imposed on third parties when considering a motion to compel," and can limit discovery to prevent undue expense even if the discovery sought is within the permissible scope of Rule 45 and Rule 26. *Millennium TGA, Inc. v. Comcast Cable Commc'ns LLC*, 286 F.R.D. 8, 11 (D.D.C. 2012) (citing *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *Watts v. SEC*, 482 F.3d 501, 508 (D.C. Cir. 2007)); *see also Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998) ("concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs" in Rule 45 inquiry). Courts look to a number of case-specific factors to determine whether an undue burden exists, including the time period covered by the request, the breadth of the documents requested, the particularity with which the documents are described, whether the discovery is obtainable from a source that is more convenient, less burdensome, or less expensive, and whether the burden or expense of the proposed discovery outweighs its likely benefit. *Watts*, 482 F.3d at 509; *Linder v. Dep't of Defense*, 133 F.3d 17, 24 (D.C. Cir. 1998)

("[w]hether a burdensome subpoena is reasonable must be determined according to the facts of the case" (internal quotations omitted)); *North Carolina Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 51 (D.D.C. 2005).

The subpoena issued by Defendants is similar in many respects to the DOJ's and FTC's typical "Request for Additional Information" (also referred to as a "Second Request") used with parties in merger investigations. *See* Federal Trade Commission, Model Request for Additional and Documentary Material (Second Request) 4-16 (2015).[1] Both the subpoena and the typical Second Request call for, among other things, all types of business and marketing plans, all analyses of competitors and the market, all documents relating to pricing and pricing strategy, all meeting competition documents, all contracts with customers and documents relating to the negotiation of contracts, all bid requests and documents relating to all bids, all plans for growth and expansion, and an enormous amount of sales data. With Second Request-like definitions of "document,"[2] "relating to,"[3] and "Samsung,"[4] the subpoena calls for literally every document in the company going back ten years. Such a subpoena is neither reasonable nor specific, and SEA rightfully objected to the subpoena's burdensome requests, definitions, and instructions. *See*,

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[1] *Available at* https://www.ftc.gov/system/files/attachments/merger-review/guide3.pdf; *see also* http://www.justice.gov/sites/default/files/atr/legacy/2012/06/01/220239.pdf (similar DOJ model).

[2] The term "'Document' (or 'documents') is defined as broadly as that term is construed under Rule 34 of the Federal Rules of Civil Procedure, and is meant to include, but is not limited to, all tangible and intangible modes of communicating, conveying or providing any information such as writings, correspondence, communications, notes, letters memoranda, drawings, graphs, charts, photographs, discs, computer recordings, electronic mail, spreadsheets, data, databases, and any other data compilations from which information can be obtained." Ex. A (Subpoena Attachment) at 6.

[3] The terms "concerning," "related to" and "regarding" are defined to "mean analyzing, alluding to , concerning, considering, commenting on, consulting, comprising, containing, describing, dealing with, evidencing, identifying, involving, reporting on, relating to, reflecting, referring to, regarding, studying, mentioning, or pertaining to, in whole or in part." Ex. A (Subpoena Attachment) at 5.

[4] "'Samsung' means Samsung Electronics America, Inc., its parent, Samsung Electronics, Co., Ltd., and all of its predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives, including Samsung's appliances business and brands." Ex. A (Subpoena Attachment) at 7; *see also id*. (defining "you" even more broadly).

e.g., *Legal Voice v. Stormans Inc.*, 738 F.3d 1178, 1185 (9th Cir. 2013) (failure to narrowly tailor a subpoena can be grounds for sanctions); *In re Grand Jury Proceedings*, 601 F.2d 162, 168 (5th Cir. 1979) (discussing Rule 45 and noting that subpoena duces tecum must be "sufficiently definite to provide guidance as to what is to be produced" and not "unreasonable and oppressive" in its scope).

The most significant difference between the subpoena at issue here and a Second Request is that the subpoena goes back in time more than ten years and does not limit the number of custodians who must be searched. The model Second Request limits both the time-frame of the production and the number of document custodians. Such limitations acknowledge the reality that "complying with a second request in a significant transaction routinely costs millions of dollars and requires months to respond." Deborah Platt Majoras, Chairman of the Federal Trade Commission, *Reforms to the Merger Review Process* 2 (2006).[5] Indeed, in 2006 the FTC created a presumption that parties need not produce documents that go back more than two years from the date of issuance of the Second Request in order to curtail the tremendous costs. *Id*. at 19; *see also id*. at 9 (establishing a presumption regarding maximum number of custodians).

Even with such limitations, however, the burden of responding to a Second Request is well-known. In 2012, the ABA Section of Antitrust Law examined the costs associated with Second Requests and concluded, "The costs associated with complying with a Second Request are significant." ABA Section of Antitrust Law, *Controlling Costs of Antitrust Enforcement and Litigation* 30 (2012).[6] The ABA noted that the average compliance cost in 2007 was $5.2

[5] *Available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/mergerreviewprocess.pdf.
[6] *Available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/2013_agenda_cost_efficiency_kolasky.authcheckdam.pdf.

million, with anecdotal evidence suggesting that the average volume of pages generated per custodian, a major driver of the costs, continues to increase given the prevalence of email and the low cost of data storage. *Id.*

Joe Sims, counsel for Electrolux in this matter, did his own survey of burden associated with Second Requests in 2007 and found that even after the Second Request reforms were made, the estimated cost of a second request was $5-6 million, with a Second Request investigation taking six to seven months. Joe Sims et al., *Merger Process Reform: A Sisyphean Journey?*, Antitrust, Spring 2009, at 61, 65.[7] Sims noted that "for larger deals costs can quickly rise to the $10-$20 million range." *Id.* at 61. Defendants refer to SEA as a "multi-billion-dollar going concern," which presumably would put SEA's compliance costs near the top of the cost spectrum. Dkt. 88 (Mem.) at 17. The Sims article also notes that from 2005 until 2008, the volume of electronic documents per person jumped from 43,396 to 179,205, with that number expected to rise each year. Sims, *Merger Process Reform* at 63. The number of electronic documents per person undoubtedly is much higher today. In Mr. Sims' words, "The one constant in all the various reform efforts over the years—again, no doubt well-intentioned and undertaken in good faith—is that they have not solved the basic problem of Second Request burdens." *Id.* at 60.

The subpoena at issue here is much worse. Nine of the subpoena specifications call for documents that go back more than ten years. Three specifications go back more than five years, and another goes back more than three years. The subpoena purports to require a search of all employees (as well agents and others) who might have responsive documents, including all

[7] *Available at* http://www.jonesday.com/files/Publication/2b1280d6-4240-404c-9b46-260a50aee4b4/Presentation/PublicationAttachment/14fb43c1-7cca-4095-874a-9551d8459a1b/Spring09-SimsC.pdf.

electronic documents. The subpoena also seeks all documents and data relating to products that are not at issue in this case. Although the DOJ complaint is limited to ranges, cook tops, and wall ovens, the subpoena also asks for all documents and information relating to refrigerators, dishwashers, clothes washers, clothes dryers, and freezers. None of those products are reasonable substitutes for the cooking appliances in the complaint.

As written, Defendants' subpoena would require SEA to search the paper and electronic files of at least 500 current employees, as well as the files of hundreds of former employees, spread over dozens of locations. Ex. G at ¶ 7. Each of these employees have (or had) responsibilities for sales, marketing, distribution, installation, service capabilities, financial information, or growth strategies. *Id*. Production of all such documents from the last ten years, including for products well beyond the products at issue in this case, would take many months and would involve a review and production of millions of pages of documents and thousands of gigabytes of data. *Id*. at ¶¶ 8-11. It would take potentially dozens of SEA employees to collect such documents, as well as dozens of outside counsel to review for privilege the documents in question. *Id*. at ¶ 11. The total cost of compliance is well into the millions of dollars. *Id*. at ¶ 12. To impose such a burden on a non-party is unreasonable. *Linder v. Calero-Portocarrero*, 251 F.3d 178, 182 (D.C. Cir. 2001) (court had "no trouble concluding" that $200,000 in costs was significant for purposes of complying with a non-party subpoena); *Legal Voice*, 738 F.3d at 1184-85 ($20,000 deemed significant); *Leake*, 231 F.R.D. at 52 (even for large non-party organizations, a subpoena is "excessive" if compliance will require the time of four to six staff members for a month).

Defendants' position that SEA has failed to meet the burden of demonstrating that the subpoena is unduly burdensome would be laughable were it not for the fact that Defendants are

seeking to impose such an unreasonable burden on SEA, a non-party. If a Second Request similar to the subpoena at issue here is considered unduly burdensome when issued to *the parties to the merger*, seeking to force compliance on a non-party is particularly onerous. *Cf*. Majoras, *Reforms to the Merger Review Process* at 2.

Finally, if Defendants demand compliance with the full subpoena, they must bear enough of the resulting costs to render SEA's expenses non-significant. *Linder*, 251 F.3d at 182 (ordering party seeking discovery from non-party to "bear at least enough of the expense to render the remainder non-significant" (internal quotations omitted)). Defendants' only argument to the contrary is that SEA has made "bald protestations of burden and expense." Dkt. 88 (Mem.) at 16. This is belied by the affidavit attached to this Response, which details the burdens and anticipated expenses imposed on SEA. *See* Ex. G; *Linder v. NSA*, 94 F.3d 693, 696-97 (D.C. Cir. 1996) (affidavit submitted to court can establish need for relief from non-party subpoena). The argument is further belied by the subpoena itself, which goes well beyond a typical Second Request and demonstrates exactly why the antitrust community believes Second Requests impose significant expenses. Sims, *Merger Process Reform* at 60-61. Indeed, during the meet and confer process, SEA referred to the subpoena's Second Request-like breadth and its requirement that SEA produce "virtually every shred of information regarding SEA's home appliances business that was created, sent or received over a 10-year time period." Ex. B at 1-2 (SEA's objections); *see also* Ex. D at 4-5 (Aug. 20, 2015, 11:27am). SEA suggested to Defendants that they consider their own costs in complying with the DOJ's Second Request in this matter as a surrogate for the costs they were seeking to impose on SEA. Ex. D at 4-5 (Aug. 20, 2015, 11:27am).

Taken together, these realities satisfy Rule 45(d)(2)(B)(ii), which directs that the Court "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." SEA is not a party or an officer of a party, and there can be no question that the expense here—millions of dollars—is significant. *See, e.g.*, *Linder*, 251 F.3d at 182; *Legal Voice*, 738 F.3d at 1184-85. SEA, moreover, need not be a mom-and-pop operation for the costs of complying with a subpoena to be significant, as illustrated by both case law and the agencies' decision to reform the Second Request process for all merging parties, including large, sophisticated companies. *In re Exxon Valdez*, 142 F.R.D. 380, 384 (D.D.C. 1992) (non-party, which had tens of millions of dollars in gross receipts, only had to bear 29 percent of costs of complying with document subpoena); Majoras, *Reforms to the Merger Review Process* at 2, 9, 19. As Mr. Sims concluded, "costs can quickly rise to the $10-$20 million range" in large deals involving large companies. Sims, *Merger Process Reform* at 61. Such significant expenses should not be thrust on an unwilling non-party like SEA.

II. Given the Scope of the Subpoena, the Time to Respond is Unreasonable

Rule 45(d)(3)(A)(i) states that a court "must quash or modify a subpoena that . . . fails to allow a reasonable time to comply." How much time is reasonable depends on the underlying circumstances. *Schulman v. Saloon Bev., Inc.*, No. 13-cv-195, 2014 U.S. Dist. LEXIS 93070, at *35 (D. Vt. July 9, 2014); *Romano v. City of Hammond Police Dep't*, No. 06-cv-342, 2010 U.S. Dist. LEXIS 79166, at *19 (N.D. Ind. Aug. 5, 2010). Defendants' motion to compel must be denied because the subpoena failed to allow a reasonable time to comply under the circumstances here. As described above, Defendants demand that SEA search hundreds of current and former employees' paper and electronic documents for documents stretching back ten years and covering nearly all of SEA's appliance businesses. It would take many months,

well more than the 19 days set out in the subpoena and well past even the trial date in this case, for SEA to comply with the subpoena as written. Ex. G at ¶ 11. Courts routinely quash or modify subpoenas that request voluminous discovery in a matter of weeks. *See, e.g.*, *Bartz v. Wal-Mart Stores, Inc.*, No. 14-cv-3353, 2015 U.S. Dist. LEXIS 57259, at *4 (C.D. Ill. May 1, 2015) (15-day response deadline "inadequate given the volume of materials requested"); *In re Rule 45 Subpoena to Fid. Nat'l Info. Servs., Inc.*, No. 09-mc-29, 2009 U.S. Dist. LEXIS 122142, at *2-4 (M.D. Fla. Dec. 11, 2009) ("lengthy" subpoena requested responses within 15 days; court enlarged time to over two months when parties could not agree to a compromise).

Defendants cite only two cases to support their argument that 19 days is a reasonable amount of time to produce millions of pages of documents. Neither case dealt with a subpoena duces tecum, let alone one of the enormity here. In *Elliot v. Mission Trust Services, LLC*, No. 14-cv-9625, 2015 U.S. Dist. LEXIS 45412 (N.D. Ill. Apr. 7, 2015), the court quashed a subpoena seeking to compel the testimony of a third party witness in 20 days because the subpoena and requesting party failed to accommodate the witness' personal schedule. *Id*. at *14-19. And in *Tri Investments, Inc. v. Aiken Cost Consultants, Inc.*, No. 11-cv-4, 2011 U.S. Dist. LEXIS 129013 (W.D.N.C. Nov. 7, 2011), the court quashed a subpoena ad testificandum calling for the witness to appear in 6 days. *Id*. at *4-5. Defendants can point to no authority requiring a company to produce virtually every business document in the company within days of its receipt of a subpoena. Indeed, courts that suggest 14 days is a reasonable time-frame often deal with subpoenas that do "not appear to be extensive." *Romano*, 2010 U.S. Dist. LEXIS 79166, at *19; *see also Mann v. Univ. of Cincinnati*, Nos. 95-3795, 95-3292, 1997 U.S. App. LEXIS 12482, at *18 n.5 (6th Cir. May 27, 1997) (explaining that "in general, more than 14 days' notice will be provided" to subpoena recipients to ensure they have time to file objections, let alone comply).

CONCLUSION

For all of the foregoing reasons, Defendants' Motion to Compel should be denied.

Dated: September 4, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2015, a true and correct copy of the foregoing Opposition to Defendants' Motion to Compel was served on all counsel of record via ECF.

/s/ Michael E. Antalics
Michael E. Antalics