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

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

Samsung's opposition brief does not dispute that the information requested in Defendants' subpoena is highly relevant in defending the challenged acquisition against the Government's antitrust claims. Instead, Samsung tries to obscure that fact by exaggerating the alleged burdens and costs of complying with the subpoena, primarily with respect to its temporal scope and the number of potential document custodians covered. But such objections cannot possibly justify Samsung's categorical failure to comply with any of the subpoena's requests. Nor can such objections justify Samsung's belated compromise proposal, which omits two key categories of information (*i.e.*, Samsung's strategic business plans and its communications about the challenged acquisition) that do not remotely implicate Samsung's asserted concerns about burden. Likewise, Samsung misses the point in debating whether the subpoena's 19-day response period was reasonable, because it has now been 45 days since the subpoena was served. Yet Samsung still has not produced a single document or even represented when it will do so — including for those documents covered by its own proposed compromise — notwithstanding that

discovery closes on September 30th and trial starts on November 9th. Although Samsung's failure to comply with the subpoena in good faith would justify an order by this Court compelling it to comply immediately and in full, Defendants are willing to accept a compromise order that remedies the most serious deficiencies in Samsung's proposal so that Defendants may timely obtain information needed to adequately defend against the Government's case. Below, Defendants first detail the flaws in Samsung's opposition brief, and then provide the details on a compromise order that would be acceptable.

1. Importantly, Samsung does not meaningfully dispute the relevance of the information requested in Defendants' subpoena. Indeed, Samsung all but concedes that the information is in fact highly relevant.

Defendants' opening memorandum explained at length why it is well established that each of the subpoena's 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 — is relevant in defending the challenged acquisition against the Government's antitrust claims. Memo., ECF No. 88, at 9-12. Samsung does not address this detailed showing, much less refute it. To the contrary, Samsung itself emphasizes that the subpoena requests the same types of information that the Government typically demands from parties during its administrative investigations of whether to challenge proposed transactions. Opp., ECF No. 98, at 5.

Notably, while Samsung does object to the burden of complying with the 10-year time-period of some of the requests, *see id.* at 6-7, it does not contest Defendants' explanation of why that time-period is relevant in the circumstances of this case (as confirmed by the Government's

own evaluation of information dating back that far when investigating the proposed acquisition). Namely, the last decade was a critical period in the appliances industry, due to the increasing competition and the natural experiment created by the 2006 Whirlpool-Maytag merger, and thus Samsung's conduct during that period is highly probative of its present capabilities and future conduct. *See* Memo., ECF No. 88, at 15.

To be sure, Samsung does briefly assert a single, limited relevance objection. It contests the subpoena's inclusion of certain non-cooking appliances such as refrigerators and dishwashers, because those products supposedly "are not at issue in this case" as they are not "reasonable substitutes for the cooking appliances in the complaint." Opp., ECF No. 98, at 8. Yet that not-a-substitute objection wholly ignores Defendants' explanation of why information about these products is relevant in defending against the Government's theories: (1) evidence of Samsung's capabilities for these non-cooking products is necessary to rebut the allegation in the Government's complaint that there is a significant barrier to entry in the so-called "contract channel" because the purchasers there demand that sellers provide "full lines of kitchen appliances, including … refrigerators[] and dishwashers"; and (2) evidence of Samsung's past expansion strategies for these non-cooking products is highly probative of its likely present and future expansion strategy for cooking products. *See* Memo., ECF No. 88, at 16.

2. Since it cannot meaningfully contest the relevance of the subpoena's requests, Samsung instead emphasizes the alleged burden of compliance. Samsung generally tries to analogize the burden of complying with Defendants' subpoena in this litigation to the well-recognized burdens of complying with a so-called "Second Request" for information during the Government's administrative investigations of proposed acquisitions. *See* Opp., ECF No. 98, at 5-8. And Samsung especially complains that the subpoena includes some requests going back

three to ten years, and that the subpoena does not limit the number of Samsung's potential custodians who are covered. *See id.* at 6-7.

These objections are a red herring in light of Samsung's categorical failure to comply with the subpoena. The alleged burden imposed by certain aspects of the subpoena's scope cannot possibly justify Samsung's failure — *in the 45 days* since the subpoena was issued — to produce *any* documents for *any* of the six categories of information from *any* custodian for *any* time period. It is obvious that Samsung does not want to comply with the subpoena at all (perhaps motivated by the competitive benefit it will receive if Defendants' pro-competitive transaction is erroneously enjoined), and that it is trying to use its exaggerated objections about certain aspects of the subpoena's scope as a pretext for running out the clock on the subpoena in its entirety given the fast-moving nature of this antitrust litigation.

Samsung's strategy is vividly illustrated by its conduct during the meet-and-confer process and its misleading description of that process. Samsung accuses Defendants of having been unwilling to compromise, as purportedly evidenced by an email on August 18th that Defendants failed to include in their motion. *See* Opp., ECF No. 98, at 1-2. But, in actuality, the opening paragraph of that email from Electrolux's counsel *itself confirms* that, during the August 13th meet-and-confer, counsel had "described the categories of materials that Electrolux is seeking and their preferential importance to our case" "[i]n an effort to move the ball forward," and had specifically asked whether "Samsung would be willing to provide <u>any</u> documents in response to the subpoena or if there was *any room for compromise*." *See* Exh. C, ECF No. 98-3 (emphases added). Yet Samsung did not provide a proposal for compromise until August 25th, *see* Exh. D, ECF No. 88 — nearly a month after the subpoena was initially served, nearly two weeks after the meeting in which Samsung had reiterated its categorical objection to the

subpoena, and nearly a week after the subpoena's production date, *see* Exhs. A-C, ECF No. 88. Moreover, that purported compromise omitted any documents from the important categories of strategic business plans and communications about the challenged acquisition, *see* Exhs. D-E, ECF No. 88 — *notwithstanding that those recent and forward-looking documents* do not implicate Samsung's asserted objections that the subpoena goes back too many years and covers too many potential custodians. Nor has Samsung yet provided any of the documents covered by its compromise proposal, or even represented when such production will occur, despite having identified and collected at least some of them. *See* Exh. G, ECF No. 98-7, ¶¶4-6. In sum, Samsung is simply holding hostage all of its highly relevant documents, including even those where it is undisputed and indisputable that production would not be unduly burdensome.

Samsung's unwillingness to negotiate in good faith also demonstrates the flaw in its attempted analogy to the burdens associated with Second Requests during the Government's administrative investigations. Even accepting *arguendo* Samsung's (erroneous) assertion that the subpoena is as broad as a Second Request, a major problem unique to Second Requests is that, as explained in the article cited by Samsung, the Government "unilaterally decide[s] how to draw the line between the relative burdens on the agencies and the parties": it does not need to negotiate over the scope of the request, because it can simply refuse to approve the transaction, and thus force the parties to litigation, unless it gets exactly what it wants. *See* Joe Sims et al., *Merger Process Reform: A Sisyphean Journey?*, Antitrust, Vol. 23, No. 2, Spring 2009, at 60. By contrast, as discussed above, Defendants here were willing to negotiate if Samsung had reasonable concerns about the unduly burdensome nature of specific aspects of the requests. But Samsung instead initially refused to produce any documents based on categorical objections to the subpoena, then belatedly proposed an inadequate compromise with key omissions that do not

even track its asserted concerns, and ultimately still has not produced any responsive documents or even represented when such production will occur. That is why Defendants were forced to move to compel, and this Court should consider Samsung's objections about burden in that light.

3. Samsung's objections to the alleged costs of complying with the subpoena are likewise flawed. Any asserted concerns about the expense of full compliance cannot possibly justify Samsung's failure to comply with respect to the myriad documents whose production would not be a significant expense for such a significant competitor in appliance sales. *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 alleged subpoena-compliance costs of more than $225,000, given FedEx's ability to pay and financial interest in the case). For example, Samsung does not dispute that its purchase and sales data — the most important category of information requested — is "tracked and maintained in the usual course of business." *Compare* Memo., ECF No. 88, at 9, *with* Opp., ECF No. 98, at 8-9, *and* Exh. G, ECF No. 98-7, ¶¶ 7-12. Similarly, it is implausible that Samsung would incur significant expense producing recent and forward-looking documents concerning strategic business plans and communications about the challenged acquisition; notably, Samsung does not specifically attest otherwise. *See id.*

More importantly, though, rather than resolving cost issues at this junction, this Court should simply order Samsung to comply now but allow it to move for cost-shifting afterward. *See, e.g.*, *Cornell*, 2015 WL 4747260, at *1-2. Not only would that provide this Court with a more "developed record to determine whether significant expenses have indeed been reasonably incurred," *id.*, but it is the more appropriate course of action in this fast-moving antitrust litigation. Unlike Samsung, Defendants do not have the luxury of extended pre-trial disputes over the cost of discovery, given the imminent close of discovery and start of trial. Samsung

should not be allowed to hold its documents hostage now, when it can later seek reimbursement for any significant expenses that it is entitled to recoup.[1]

4. Nor can Samsung justify its position by objecting that the subpoena's 19-day response period was unreasonably short. *See* Opp., ECF No. 98, at 10-11. That argument is both irrelevant and wrong.

Most fundamentally, it is besides the point whether 19 days was a reasonable period to comply with the subpoena, because Samsung has now had *45 days* to comply with the subpoena, and it has yet to produce a single page of responsive material. *See In re Rule 45 Subpoena to Fid. Nat. Info. Servs., Inc.*, No. 3:09-mc-29, 2009 WL 4899399, at *2 (M.D. Fla. Dec. 11, 2009) ("By virtue of the motion practice brought before this Court, Non–Party FIS has now had ample time to review the subpoena and formulate its responses.").

The cases cited by Samsung to justify its continued delay do not support that position. *See Bartz v. Wal-Mart Stores, Inc.*, No. 14-cv-3353, 2015 WL 1968837, at *2 (C.D. Ill. May 1, 2015) (extending response period from 15 days to 50 days); *In re Rule 45 Subpoena to Fid. Nat. Info. Servs., Inc.*, 2009 WL 4899399, at *2 (extending response period from 15 days to 69 days where non-party had timely moved for an extension before the response period elapsed and the party's refusal to consent to the extension was not reasonable). Indeed, one of Samsung's own cases confirms that "fourteen days [is] the measure of reasonableness." *Mann v. Univ. of Cincinnati*, No. 95-3195, 1997 WL 280188, at *5 n.5 (6th Cir. 1997).[2]

[1] It also warrants mentioning that, in stark contrast to *Cornell*'s holding regarding FedEx, none of the cases cited by Samsung to support subpoena cost-shifting involved a non-party that was a profit-making corporation, let alone a major one. *See Legal Voice v. Stormans Inc.*, 738 F.3d 1178, 1182 (9th Cir. 2013) ("Legal Voice, f/k/a Northwest Women's Law Center"); *Linder v. Calero-Portocarrero*, 251 F.3d 178, 182 (D.C. Cir. 2001) (various federal agencies); *N. Carolina Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 50 (D.D.C. 2005) (Pew Charitable Trusts); *cf. In re Exxon Valdez*, 142 F.R.D. 380, 381 (D.D.C. 1992) (trade association) .

[2] Nor is Samsung correct to suggest that the cases cited by Defendants to support the presumptive reasonableness of a 14-day responsive period were limited to subpoenas for testimony, not documents. Neither case drew any such distinction, and both relied on caselaw involving document subpoenas. *See*

Moreover, as Samsung emphasizes, the reasonableness of the time-period "depends on the underlying circumstances." Opp., ECF No. 98, at 10. And two special circumstances in this case warrant emphasis. *First*, this is fast-moving merger litigation, with a complaint filed on July 1st, the close of discovery on September 30th, and the start of trial on November 9th. In those circumstances, it is unreasonable for Samsung to insist that it need not produce any documents for 45 days, let alone not even represent when its production will begin and end. *Second*, Samsung can hardly complain of unfair surprise from Defendants' subpoena given its involvement in the Government's pre-suit administrative investigation. As Samsung's in-house counsel attests, Samsung produced documents to the Government between February and May 2015, and so it should have been well aware of the prospect that Defendants would seek additional discovery during the typically fast-moving litigation to follow, and it could have taken preparatory steps to facilitate a prompt production. *Cf. Elliot v. Mission Trust Servs., LLC*, No. 14 C 9625, 2015 WL 1567901, at *4 (N.D. Ill. Apr. 7, 2015) (noting that non-party "presumably had no knowledge of the proceedings prior to the subpoenas").

5. Although it would be appropriate, in light of the foregoing, for this Court to order Samsung to comply immediately with the subpoena in full, Defendants are willing to accept a compromise order. Namely, this Court should order Samsung to produce the documents proposed in Samsung's August 25th email to Defendants, *see* Exh. E, ECF No. 98-5 — which Samsung presumably does not believe will be unduly burdensome — but subject to the following important qualifications.

(continued…)

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) (citing *In re Rule 45 Subpoena Issued to Cablevision Sys. Corp.*, No. Misc. 08–347, 2010 WL 2219343, at *5 (E.D.N.Y. Feb. 5, 2010)); *Elliot v. Mission Trust Servs., LLC*, No. 14 C 9625, 2015 WL 1567901, at *4 (N.D. Ill. Apr. 7, 2015) (citing *Tri. Invs.*).

First, Samsung must also provide all documents concerning strategic plans and other business analyses of competition for the period of 2013-2018, and all communications about the challenged acquisition. Samsung's proposal inexplicably omits any information from these categories, even though they are highly relevant and do not remotely implicate Samsung's purported objections about the scope of the subpoena.

Second, Samsung must also include the covered documents for all of the appliances listed in the subpoena, not just cooking appliances. As discussed above, non-cooking-appliances are unquestionably relevant in defending against the Government's antitrust theories.

Finally, in order to ensure that Defendants have time to make beneficial use of the documents (including by noticing depositions of Samsung employees), this Court should order Samsung to begin producing the documents immediately, and going forward on a continuing rolling basis, with the production of the documents covered by Samsung's August 25th email to be completed no later than September 11, 2015, and the entire production completed no later than September 23, 2015.

In sum, Defendants' motion to compel should be granted in full or, at a minimum, on the terms set forth above.

Dated: September 7, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 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.

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