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' PRE-TRIAL BRIEF

Paul T. Denis (DDC No. 437040)
DECHERT LLP
1900 K Street NW
Washington, DC 20006
Telephone: (202) 261-3300
Facsimile: (202) 261-3333
paul.denis@dechert.com

Lead Counsel for Defendant
General Electric Company
(Additional counsel listed below)

John M. Majoras (DDC No. 474267)
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
jmmajoras@jonesday.com

Lead Counsel for Defendants
AB Electrolux and Electrolux North America, Inc.
(Additional counsel listed below)

TABLE OF CONTENTS

Page

INTRODUCTION 1

BACKGROUND 5

A. Relevant Products 5

B. Principal Competitors 6

C. Sales Routes to Consumers 7

ARGUMENT 8

I. THE CLAYTON ACT DOES NOT PROHIBIT AN ACQUISITION WHERE THE INCREASED CONCENTRATION IN THE RELEVANT MARKET WILL NOT LIKELY HAVE ANTICOMPETITIVE EFFECTS GIVEN THE PARTICULAR NATURE OF COMPETITION IN THE MARKET 9

A. The Government Bears The Initial Burden Of Defining A Relevant Antitrust Market For The Acquisition 10

B. Although An Undue Increase In Market Concentration May Establish A Presumption That An Acquisition Will Likely Reduce Competition, Defendants Can Rebut That Statistical Presumption With Various Types Of Real-World Evidence Concerning The Nature Of Competition In The Particular Market 12

C. Rebuttal Of The Statistical Presumption Requires The Government To Produce Additional Evidence That The Acquisition Will Likely Reduce Competition........ 16

II. THE GOVERNMENT'S CONCENTRATION STATISTICS INACCURATELY PREDICT THE LIKELY EFFECT ON FUTURE COMPETITION IN THE U.S. MARKETS FOR RANGES, COOKTOPS, AND WALL OVENS 17

A. Three Characteristics Of The Overall Cooking-Appliance Markets Powerfully Rebut The Government's Statistics And Other Evidence........ 18

1. Ease Of Entry, Expansion, And Repositioning........ 18

2. Powerful And Sophisticated Buyers 23

3. Heterogeneous Products And Producers........ 26

B. The 2006 Whirlpool-Maytag Merger Is Strong Empirical Confirmation That The Post-Merger Concentration Levels Are Not Likely To Cause Anticompetitive Effects In The Overall Cooking-Appliance Markets 27

C. The Government Fails In Its Additional Efforts To Demonstrate The Likelihood Of Anticompetitive Effects 29

III. THE GOVERNMENT CANNOT SAVE ITS CASE BY ATTEMPTING TO NARROW THE RELEVANT ANTITRUST MARKETS 32

A. The "Value" And "Mass" Segments 32

B. The "Contract Channel" 35

1. The "Contract Channel" Is Not A Relevant Antitrust Market 35

2. Even If The "Contract Channel" Were A Relevant Antitrust Market, The Government Is Not Entitled To A Presumption Of Anticompetitive Effects 38

3. Even If The "Contract Channel" Triggered The Presumption, It Would Be Rebutted Because The Acquisition Is Unlikely To Cause Anticompetitive Effects There Either 38

IV. THE MERGER WILL GENERATE SUBSTANTIAL PROCOMPETITIVE EFFICIENCIES 43

CONCLUSION 45

TABLE OF AUTHORITIES

Page(s)

CASES

Brown Shoe Co. v. United States,
370 U.S. 294 (1962) 34, 35

Cargill, Inc. v. Monfort of Colorado, Inc.,
479 U.S. 104 (1986) 10

FTC v. Arch Coal,
329 F. Supp. 2d 109 (D.D.C. 2004) .... *passim*

FTC v. Butterworth Health Corp.,
946 F. Supp. 1285 (W.D. Mich. 1996) 44

FTC v. Cardinal Health, Inc.,
12 F. Supp. 2d 34 (D.D.C. 1998) 10, 11, 15

FTC v. CCC Holdings, Inc.,
605 F. Supp. 2d 26 (D.D.C. 2009) 13, 16, 43

FTC v. H.J. Heinz Co.,
246 F.3d 708 (D.C. Cir. 2001) .... *passim*

FTC v. PPG Indus., Inc.,
798 F.2d 1500 (D.C. Cir. 1986) 12

FTC v. R.R. Donnelley & Sons Co.,
No. 90-1619, 1990 WL 193674 (D.D.C. Aug. 27, 1990) 15, 34, 37

FTC v. Staples, Inc.,
970 F. Supp. 1066 (D.D.C. 1997) 17, 44

FTC v. Tenet Health Care Corp.,
186 F.3d 1045 (8th Cir. 1999) 17

Hospital Corp. of Am. v. FTC,
807 F.2d 1381 (7th Cir. 1986) 14

New York v. Kraft Gen. Foods, Inc.,
926 F. Supp. 321 (S.D.N.Y. 1995) 15, 26

Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,
792 F.2d 210 (D.C. Cir. 1986) .... *passim*

United States v. Baker Hughes, Inc.,
908 F.2d 981 (D.C. Cir. 1990) .... *passim*

United States v. Citizens & Southern Nat'l Bank,
422 U.S. 86 (1975) 13

United States v. Falstaff Brewing Corp.,
410 U.S. 526 (1973) 15

United States v. General Dynamics Corp.,
415 U.S. 486 (1974) 10, 13, 14, 17

United States v. Gillette Co.,
828 F. Supp. 78 (D.D.C. 1993) 11, 13, 15

United States v. H&R Block,
833 F. Supp. 2d 36 (D.D.C. 2011) 11, 14

United States v. Oracle Corp.,
331 F. Supp. 2d 1098 (N.D. Cal. 2004) .... *passim*

United States v. Waste Mgmt., Inc.,
743 F.2d 976 (2d Cir. 1984) 13, 15

STATUTES

15 U.S.C. § 18 .... *passim*

OTHER AUTHORITIES

DOJ & FTC, Horizontal Merger Guidelines (2010) .... *passim*

INTRODUCTION

Electrolux's acquisition of GE's appliance business will enhance competition in the U.S. and global appliance industry. Rivalry among appliance suppliers, facilitated and encouraged by the retailers, distributors, and home builders that are their customers, has created a dynamic industry that has benefitted U.S. consumers with continuous change, innovative product features, and better value. The acquisition will make the merged entity a more efficient and effective competitor against the myriad of national and global firms, including Whirlpool, Sears/Kenmore, Samsung, LG, Bosch, Haier, and Arçelik, that all presently offer a full line of appliances in the U.S. For four reasons in particular, the Government cannot possibly meet its burden of proving that the acquisition will likely reduce this intense competition in the cooking-appliances industry.

First, this is a highly competitive marketplace in which new and existing competitors readily enter, expand, and reposition themselves in response to competitive dynamics, thus foreclosing any likelihood that any market participant could engage in anticompetitive behavior. This characteristic is readily seen in the competitive facts over the last decade, during which concentration has been steadily decreasing due in large part to the aggressive, innovative entry and expansion of major foreign appliance manufacturers. Nearly 10 years ago, Whirlpool acquired Maytag in a combination that produced more concentration in the U.S. appliance industry than the Electrolux-GE transaction will. Yet concentration fell after that merger as new competitors entered the market, smaller firms expanded, and larger firms lost share. Between 2005 and 2014, among other things, Samsung and LG dramatically increased their shares, and other global suppliers like Haier and Arçelik are forging their way into the U.S. The Electrolux transaction will similarly leave unchanged the dynamic nature of this industry, and competition will only be enhanced because the merged entity will be better able to serve its customers with lower prices and better quality. Indeed, any anticompetitive conduct by the merged entity would only enable further competitive growth by its rivals.

Second, this is also a marketplace where retail sales are dominated by powerful and sophisticated buyers. The "Big Four"—Lowe's, Sears, The Home Depot, and Best Buy—

account for roughly 66% of retail sales. These buyers have a demonstrated ability to force manufacturer competition. The evidence will show that they can demand lower prices and better features for their customers, and that they have increasingly made their floor space available to new appliance suppliers who could offer more features at the same or lower prices than currently available. That surely explains why none of the Big Four have opposed this deal and one of them [REDACTED] strongly supports it. They all understand that the post-merger combination of reduced costs and steadily increasing competition will enable them to demand better products at lower prices, which will attract more consumers and increase their sales.

Third, cooking appliances are highly differentiated products that are sold by producers who also sell differing shares of complementary products such as refrigerators and dishwashers. This is important because it is well recognized that such heterogeneity among products and producers impedes anticompetitive behavior, by making it more difficult for the merged entity to coordinate conduct with other firms or to determine the effects of its own unilateral conduct.

Fourth, and perhaps most fundamentally, the Department of Justice itself relied on these very same market forces when it cleared the Whirlpool-Maytag merger in 2006. There, DOJ took proper account of the growing competition from then-recent entrants like Samsung and LG, the existing power of the large retailers, and the significant efficiencies the merger would create. DOJ thus publicly concluded that, while the merger might temporarily increase market concentration—in fact, beyond the levels even alleged here—overall competition would remain robust and, indeed, ultimately increase. History has proven the DOJ's conclusion to be correct. Despite the initial increase in concentration, since the 2006 merger, concentration levels have significantly fallen along with the shares of the legacy suppliers: Whirlpool ([REDACTED]); Kenmore ([REDACTED]); GE ([REDACTED]); and Electrolux ([REDACTED]). Prices did not rise, and quality unquestionably improved, as even a moment's reflection on the appliances in one's own home will readily confirm.

Despite the success of this natural experiment, the Government now asks this Court to turn a blind eye to the dynamic changes within this competitive landscape and instead to focus

on static guidelines and dated measurements. The Government principally argues that the acquisition should be enjoined because it will cause the market-share concentration figures for the domestic sales of certain cooking appliances (ranges, cooktops, and wall ovens) to increase to levels that have been treated as presumptively anticompetitive under Section 7 of the Clayton Act, 15 U.S.C. § 18. At trial, the Government's formulaic and theoretical approach, and its expert's focus on data from 2014 and before, will founder on real-world industry evidence of what is happening now and what will be happening in the future. While significant market concentration can in some contexts facilitate anticompetitive conduct by firms that remain after a merger, the evidence will demonstrate that the Government's fixation on concentration statistics fails to account for the particular context of the domestic markets for these cooking appliances. Namely, under well-established law, the several market characteristics discussed above rebut any presumed likelihood of anticompetitive effects that might arise under the static measurements. And this is amply confirmed by the fact that the same static measurements of concentration were even higher for the Whirlpool-Maytag merger, which ultimately did not reduce competition.

While relying mostly just on concentration statistics, the Government also tries, but fails, to prove a likelihood of anticompetitive effects. The Government offers a speculative analysis by its expert to claim that the merged entity can unilaterally raise prices on either firm's products because it will now be able to recapture enough lost sales that are diverted to the other firm's products. Here again, the evidence will show that the Government's analysis is not only implausible, but also fundamentally flawed due to its static, backward-looking nature. For example, the Government's expert simply assumes that, if Electrolux (or GE) were to raise its prices, then those customers who divert to other suppliers would do so in direct proportion to their current market shares, but such reductive metrics say nothing about which particular suppliers would be considered by the diverting customers to be the closest competitors of the price-raising firm. Likewise, the Government's expert simply ignores the likelihood that, in the event of any such supracompetitive pricing, other suppliers would reposition their products to become closer competitors and thereby capture more of the lost sales. The dynamic nature of

competition here thus dooms the Government's reliance, not just on concentration statistics, but also on its theories of so-called "diversion ratios" and "upward pricing pressure."

The Government similarly fails to improve its case by trying to slice and dice the relevant cooking-appliance markets. The Government alleges special concern about the acquisition's impact on sales of lower-priced appliances in the "value" and "mass" segments of the markets, and also on sales to home builders and others through the non-retail "contract channel." Yet these segments and channels do not constitute proper antitrust markets under well-established law. Indeed, the Government does not even argue to the contrary as to the "value" and "mass" segments. Moreover, as to the alleged "contract channel" market, the Government also fails to prove that the acquisition would sufficiently increase concentration to trigger any presumption of anticompetitive effects. In calculating contract-channel market shares, the Government completely overlooks that retailers like [REDACTED] already recognize that a significant percentage of their appliance sales go to contract customers.

More fundamentally, even assuming that the Government could invoke the presumption of anticompetitive effects for either of these two alleged sub-markets, the presumption would be rebutted for essential the same reasons that it was for the broader cooking-appliance markets. The evidence will show that these segments and channels likewise reflect ease of expansion and repositioning, powerful and sophisticated buyers, and heterogeneous products and producers. For example, as to the so-called "contract channel," suppliers like Samsung and LG already have aggressive plans to expand their sales to contract customers. And tellingly, here again, the acquisition is supported by two major contract buyers ([REDACTED]), and it has caused no concern for major contract distributors (such as [REDACTED]).

At bottom, the Clayton Act does not permit the Government to stop a merger simply because static concentration has increased or there exists a speculative possibility that competition might be harmed. The Government must adduce credible evidence that the merger will likely reduce competition, and no such evidence exists for this vigorous and dynamic industry. To the contrary, the acquisition is very likely to increase competition by creating

hundreds of millions of dollars in verifiable cost-saving efficiencies that otherwise would not be achieved, further enhancing the market forces that permit and encourage the intense competition in the U.S. appliance business. For all these reasons, under the applicable law and the evidence that will be adduced at trial, this Court should grant judgment against the Government on its claims that the acquisition violates § 7 of the Clayton Act.

BACKGROUND

A. Relevant Products

The Government limits its challenge to the acquisition's effects on sales in the U.S. of certain residential cooking appliances: ranges, cooktops, and wall ovens. Complaint, ECF No. 1, ¶¶ 1-5, 20-27. A wall oven is an oven built into a wall or cabinet. *See* DX-0567-070. A cooktop has burners or hot plates and is installed on top of a kitchen counter or cabinet. *See* DX-0197-001 to -002. And a range combines the functions of a wall oven and cooktop into a single appliance that is free-standing or slides into cabinetry. *See* DX-0486-001 to -003.

Each of these three cooking appliances can be sold with widely varying features. For example, there can be differences in the widths and capacities, burner configurations, and heating elements. *See* DX-0482-016 to -023; DX-0486-001 to -003; DX-0506; DX-0507; McLoughlin Dep. Tr. 39:17-21. Likewise, there can be differences in capabilities, such as whether the appliance is self-clean or manual-clean. *See* DX-0508; DX-0509-001 to -002. And there can be differences in the stylistic finishes, such as whether the appliance comes in stainless steel or white or black painted metal. *See* DX-0506; DX-0508. Accordingly, the prices of these highly differentiated appliances can vary widely along a continuum, from a few hundred dollars to several thousand. *See, e.g.*, DX-0482-018 to -023; DX-0509; DX-0560-11, -012, -020.

Although the claims here are limited to these three cooking appliances, both sides in this case will have to address other major household appliances, such as dishwashing, refrigeration, and laundry. For a variety of reasons that will be explained below, the past, present, and future competition for the sales of those non-cooking appliances will illuminate and affect the competition for the sales of the cooking appliances (and vice versa).

B. Principal Competitors

This case, of course, involves Electrolux's proposed acquisition of GE's appliance business. Electrolux sells kitchen and laundry appliances in the U.S. under several well-known brands, including Electrolux and Frigidaire. Chambers Dep. Tr. 12:13-13:3. Likewise, GE sells kitchen and laundry appliances in the U.S. under several well-known brands, including GE, GE Artistry, GE Monogram, GE Café, GE Profile, and Hotpoint (in addition, of course, to selling a wide array of other products in various industries). Posthauer Dep. Tr. 135:20-136:4. Electrolux and GE are two of many manufacturers competing for the sale of cooking appliances in the U.S. The industry is already highly competitive and grows more competitive by the day.

Currently, there are five other main competitors in the U.S. selling a full-line of kitchen appliances (cooking, dishwashers, and refrigerators): Whirlpool, Kenmore, Samsung, LG, and Bosch. *See* DX-0120-010, -012, -015; Chambers Dep. Tr. 62:7-24. Whirlpool is the largest supplier of major appliances in the U.S. and in the world, and it sells appliances under many brands, including Whirlpool, Maytag, KitchenAid, Amana, and Jenn-Air. DX-0525-004. [REDACTED] Samsung, a Korean company, is the world's largest electronics company and a significant and vigorous competitor in laundry and kitchen appliances, including cooking. DX-0034-004; [REDACTED] LG is another major Korean electronics company that is a strong and growing competitor in the U.S. market. [REDACTED] Chambers Dep. Tr. 62:16-18. Bosch, as part of the German company B/S/H, is the largest manufacturer of major appliances in Europe and also has substantial and increasing sales of appliances in the U.S. and other regions. DX-0569-014; Chambers Dep. Tr. 62:22-24.

There are also major foreign appliance manufacturers that have recently begun offering, or announced the intention to offer, a full-line of kitchen appliances in the United States. For example, [REDACTED] It has been selling cooking appliances in the U.S. and

recently expanded with the ability to sell a full line of appliances. DX-0468-001. Likewise, Arçelik is a Turkish company that is the third largest appliance company in Europe and sells appliances under ten brands in more than 130 countries. DX-0191-001; DX-0344-016, -019. In the U.S., Arçelik sells a full line of appliances under the Blomberg brand, and is also expanding with a second, lower-priced brand called Beko. DX-0359; DX-0191-001. Other major foreign appliance manufacturers that are selling cooking appliances in the U.S., or in a position to begin, include Miele, Midea, and Bertazzoni. DX-0451-001; DX-0459; DX-0351-003.

Finally, there are many smaller U.S.-based competitors that have a presence in cooking appliances across various price points, including Peerless-Premier, Summit Appliance, Avanti, Brown Stove Works, Danby, and Marvel for lower-end models, and Viking, Sub-Zero/Wolf, and Dacor for higher-end models. DX-0471; DX-0395; DX-0522; DX-0498; DX-0346; DX-0397;

C. Sales Routes to Consumers

Generally speaking, cooking appliances travel through one of two sales channels to reach the ultimate consumers.

Four large, sophisticated retailers buy roughly two-thirds of all appliances that enter the retail channel: Lowe's, Sears, The Home Depot, and Best Buy. DX-0519-004 to -007. The remaining appliances are primarily purchased by retailers varying in size from large regional chains to small, family-owned stores. *Id.*

Similarly, there are also large, sophisticated contract customers. For example, of the top 100 builders of single family homes, the top five are estimated to account for about one third of the total home closings and revenues, and the top ten are estimated to account for nearly three fifths. DX-0420. Manufacturers sell to contract customers in the same two ways as to retail customers: either directly from their factories or regional distribution centers, or indirectly through distributors. McLoughlin Dep. Tr. 15:24-16:8. And for direct sales, suppliers likewise rely on third parties for "last mile" delivery and installation. *See* Cope Dep. Tr. 90:9-24.

Finally, it is important to note that, in addition to buying from manufacturers and contract distributors, home builders and other such contract customers can and do purchase from retailers as well. *See infra* at 36-37. There is thus no clear line between the contract and retail channels.

ARGUMENT

Under the Clayton Act, the Government must prove that the challenged acquisition will likely reduce competition in a relevant antitrust market. The Government cannot make that showing for the markets for the domestic sales of ranges, cooktops, or wall ovens.

Rather than focusing on how appliances are actually sold in practice, the Government distorts antitrust analysis into a theoretical numbers game. It presumes that anticompetitive effects will follow by fixating on statistics concerning the post-merger levels of market-share concentration and on speculative mathematical models concerning "diversion ratios" and "upward pricing pressure." But abundant real-world evidence will show that the dynamic, vigorous, and complex nature of the competition in these particular markets rebuts any notion of anticompetitive effects that the Government's theories might predict based on static metrics.

Nor can the Government improve its case by focusing on narrower portions of the relevant markets, such as sales to price-conscious buyers in the "value" segment or sales to home builders in the "contract channel." The evidence will show that those are not proper antitrust markets. Even if they were, the Government has also failed to prove that the merger would sufficiently increase concentration within them to trigger any presumption of anticompetitive effects. In any event, these alleged sub-markets exhibit the same fundamental competitive features that would defeat the likelihood of anticompetitive effects in the overall markets.

Finally, far from a reduction in competition, the evidence will show that the acquisition will increase competition by creating significant, verifiable, merger-specific efficiencies. These efficiencies will enable Electrolux to reduce prices and to innovate.

I. THE CLAYTON ACT DOES NOT PROHIBIT AN ACQUISITION WHERE THE INCREASED CONCENTRATION IN THE RELEVANT MARKET WILL NOT LIKELY HAVE ANTICOMPETITIVE EFFECTS GIVEN THE PARTICULAR NATURE OF COMPETITION IN THE MARKET

Section 7 of the Clayton Act forbids an acquisition only when the effect in "any line of commerce" "may be substantially to lessen competition." 15 U.S.C. § 18. In *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990), the D.C. Circuit clarified the framework for analyzing an acquisition under § 7. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001). As *Heinz* summarized *Baker Hughes*, the Government initially "must show" that there is a "relevant market" for antitrust purposes. *Id.* Proof that the acquisition would cause a "significant" and "undue" increase in concentration in that market "establishes a 'presumption' that the merger will substantially lessen competition." *Id.* The burden then shifts to the defendants to produce evidence that "the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition." *Id.* The defendants may rely on a wide range of evidence that "casts doubt on the persuasive quality of the statistics to predict future anticompetitive consequences." *Id.* at 715 n.7. Once they produce such evidence, "the burden of producing additional evidence of anticompetitive effect shifts to the government." *Id.* Notably, the "ultimate burden of persuasion … remains with the government at all times" to

prove that a substantial lessening of competition is "probable." *Baker Hughes*, 908 F.2d at 983, 984 n.5.

In applying this framework, courts have repeatedly emphasized two overarching points. *First*, the core question in any § 7 case is "whether the challenged acquisition is likely to hurt consumers." *Id.* at 991 n.12 (quoting *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986)). "The Supreme Court, echoed by the lower courts, has said repeatedly that the economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws." *Id.* at 990-91 n.12; *accord Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 (1986) ("[The Clayton Act] protects competition, not competitors." (quotation marks omitted)); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) (same). *Second*, the statute focuses on "future competitive conditions in a given market," *Baker Hughes*, 908 F.2d at 988, and so it is "critical to maintain a dynamic view of the relevant market," *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 58 (D.D.C. 1998). After all, "[e]vidence of past production, does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete." *United States v. General Dynamics Corp.*, 415 U.S. 486, 501 (1974). Similarly, the decisions of competitors and customers before the merger may not accurately predict their decisions "*after* the merge[r]" "if prices reach supracompetitive levels." *See Baker Hughes*, 908 F.2d at 989 n.9.

A. The Government Bears The Initial Burden Of Defining A Relevant Antitrust Market For The Acquisition

In order to prove that an acquisition violates § 7 of Clayton Act, the Government must first satisfy "'[the] necessary predicate'" of establishing a "relevant market," which is a concept that the courts have adopted to implement the statutory requirement that the merger must substantially lessen competition in a "line of commerce." *FTC v. Arch Coal*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004) (quoting *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974)); *accord Heinz*, 246 F.3d at 715. It is well established that the "boundaries of a product market are determined by the reasonable interchangeability of use [by consumers] or the

cross-elasticity of demand between the product itself and substitutes for it." *United States v. H&R Block*, 833 F. Supp. 2d 36, 50-51 (D.D.C. 2011) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)); *see also Rothery Storage*, 792 F.2d at 218 (explaining that cross-elasticity of demand measures the "degree to which a similar product will be substituted for the product in question" if its price increases). In other words, an alleged market for a particular product is too narrow if it excludes too many reasonable substitutes for that product—*i.e.*, "those products to which consumers will turn given reasonable variations in price." *United States v. Gillette Co.*, 828 F. Supp. 78, 81 (D.D.C. 1993). Substitution is key to defining an antitrust market because "the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level." *Rothery Storage*, 792 F.2d at 218.[1]

There are two principal methods for evaluating whether an alleged market includes sufficient substitutes to constitute a relevant antitrust market. *First*, courts often use a theoretical econometric method called the "hypothetical monopolist test." *See, e.g.*, *Arch Coal*, 329 F. Supp. 2d at 120-21; *see also* DOJ & FTC, Horizontal Merger Guidelines § 4.1.1 (2010) ("Guidelines"). Beginning with the smallest potential group of competing products, the test asks whether a hypothetical firm holding a monopoly on all those products could profitably impose a small but significant and non-transitory increase in price ("SSNIP"), generally deemed to be a price increase of 5%. *See* Guidelines § 4.1.1, 4.1.2. If a SSNIP would not be profitable because too many customers would respond by purchasing substitute products from outside the alleged market, then the market is too narrow; it thus must be expanded until the hypothetical monopolist could profitably impose a SSNIP. *Id.* *Second*, the Supreme Court has identified a set of "practical indicia" that aid in defining a relevant market, including "industry or public recognition of the [market alleged] as a separate economic entity, the product's peculiar

[1] The Government also bears the burden of defining the relevant market's geographical boundary, which is "the region in which the seller operates, and to which the purchaser can practicably turn for supplies." *Cardinal Health*, 12 F. Supp. 2d at 49. Here, it is expected that both sides will treat the entire United States as the appropriate geographic scope.

characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Rothery Storage*, 792 F.2d at 218 (quoting *Brown Shoe*, 370 U.S. at 325). These qualitative factors are used as "evidentiary proxies for direct proof of substitutability." *Id.* at 218 & n.4.

B. Although An Undue Increase In Market Concentration May Establish A Presumption That An Acquisition Will Likely Reduce Competition, Defendants Can Rebut That Statistical Presumption With Various Types Of Real-World Evidence Concerning The Nature Of Competition In The Particular Market

Once the Government establishes a relevant product market, it can obtain a presumption that the merger will likely reduce competition if it shows that the "merger would produce a firm controlling an undue share of the relevant market and would result in a significant increase in the concentration of the market." *Arch Coal*, 329 F. Supp. 2d at 116; *Heinz*, 246 F.3d at 715. Market concentration is frequently measured using the Herfindahl-Hirschman Index (HHI), which measures both the number of competitors and the relative sizes of their respective market shares. *See Rothery Storage*, 792 F.2d at 220; Guidelines § 5.3. In particular, "[t]he HHI is calculated by summing the squares of the individual market shares of all the firms included in the market." *Rothery Storage*, 792 F.2d at 220; Guidelines § 5.3. To properly calculate HHI market concentration under its own Guidelines, the Government must account for all "market participants," which include "all firms that currently earn revenues in the relevant market" and "firms not currently earning revenues … but that have committed to entering the market in the near future." Guidelines § 5.1. Under the Guidelines—which are a "useful illustration," though "by no means to be considered binding on the court," *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986)—markets with an HHI above 2500 are considered "highly concentrated," and mergers "resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points" are presumptively viewed as raising anticompetitive concerns. Guidelines § 5.3; *see also Baker Hughes*, 908 F.2d at 982 (showing of undue concentration "establishes a 'presumption' that the merger will substantially lessen competition").

Critically, though, the defendants can "rebut the presumption by producing evidence that market-share statistics produce an inaccurate account of the merger's probable effects on competition." *Arch Coal*, 329 F. Supp. 2d at 116; *Heinz*, 246 F.3d at 715. Courts recognize that the static numbers do not tell the whole story, because the presumption that high concentration will likely reduce competition does not necessarily reflect economic reality about future competition in a particular market. *General Dynamics*, 415 U.S. at 498; *see also Arch Coal*, 329 F. Supp. 2d at 116 ("[A]ntitrust theory and speculation cannot trump facts."); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1122 (N.D. Cal. 2004) ("The biggest weakness in the Guidelines' approach appears to be its strong reliance on particular market share concentrations."). Accordingly, courts at all levels have repeatedly held that defendants may rebut—and have successfully rebutted—the presumption, for a variety of reasons. *See, e.g.*, *General Dynamics*, 415 U.S. at 498-99; *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 120-21 (1975); *Baker Hughes*, 908 F.2d at 992; *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 982 (2d Cir. 1984); *Arch Coal*, 329 F. Supp. 2d at 158; *Gillette*, 828 F. Supp. at 84. Indeed, the D.C. Circuit has held that the presumption was rebutted despite an increase in HHI that was far more significant (from 2,878 to 4,303) than the Government alleges here. *See Baker Hughes*, 908 F.2d at 983 n.3. In short, the "Herfindahl-Hirschman Index cannot guarantee litigation victories." *Id.* at 992; *see also FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 46 (D.D.C. 2009) (emphasizing that whether a "transaction represents a 'merger to duopoly'" "has minimal significance to the analysis").

The common thread in these cases is that, while high market concentration is a relevant first step in the analysis, such concentration is not sufficient to support the types of anticompetitive effects that implicate the Clayton Act. To fully understand why, it is necessary to first understand the rationale underlying the presumption that significantly increased concentration will likely reduce competition.

Merger law principally "rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to

restrict output and achieve profits above competitive levels." *Heinz*, 246 F.3d at 715. As a result, high market concentration has historically been relevant primarily because the presence of relatively few competitors provides a possible setting that may facilitate the ability of firms both to settle on a coordinated course of action and to detect and punish deviations that would undermine the coordinated interaction. *See, e.g.*, *Arch Coal*, 329 F. Supp. 2d at 130-31; *Hospital Corp.*, 807 F.2d at 1386-87. More recently, going beyond the traditional focus on the likelihood of coordinated effects, some courts and the Guidelines have considered the likelihood of "unilateral" anticompetitive effects, which rests upon the theory that in some circumstances a merged firm may be able to profitably increase prices unilaterally in a concentrated market. *See, e.g.*, *H&R Block*, 833 F. Supp. 2d at 81; *Oracle Corp.*, 331 F. Supp. 2d at 1113 ("There is little case law on unilateral effects merger analysis."); Guidelines § 6. The theory goes that unilateral effects are possible where (1) the products sold by the merging firms are close substitutes, and the few other products in the market are sufficiently different from the products offered by the merging firms, such that a merger would allow the merging firm to profitably increase prices without losing too many sales to rivals; and (2) it is unlikely that other firms would enter the market or that rivals would reposition existing products to compete more closely with the products offered by the merged firm. *See, e.g.*, *H&R Block*, 833 F. Supp. 2d at 81; *Oracle Corp.*, 331 F. Supp. 2d at 1117-18; *see generally Baker Hughes*, 908 F.2d at 989 n.9 (emphasizing that the relevant question is what would happen "*after* the merge[r]" "if prices reach supracompetitive levels").

Accordingly, regardless of concentration levels, such coordinated or unilateral effects will not likely occur unless the market's specific "structure, history, and probable future" are otherwise conducive to them. *General Dynamics*, 415 U.S. at 498. A wide variety of additional market factors may undermine the likelihood that a merger will cause either coordinated or unilateral effects even in a concentrated market. *See, e.g.*, *Baker Hughes*, 908 F.2d at 984; *Heinz*, 246 F.3d at 715 n.7; *Arch Coal*, 329 F. Supp. 2d at 150; *H&R Block*, 833 F. Supp. 2d at 81. Three factors are particularly relevant here.

First, a "crucial consideration[] in a rebuttal analysis" is whether it is likely that new competitors could enter the concentrated market or that existing competitors could expand or reposition within it. *Baker Hughes*, 908 F.2d at 987. That is because, "[i]n the absence of significant barriers" to entry, expansion, and repositioning, companies "probably cannot maintain supracompetitive pricing for any length of time." *Id.*; *accord Waste Mgmt.*, 743 F.2d at 982; *Gillette*, 828 F. Supp. at 84. In fact, even "the threat of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs." *Baker Hughes*, 908 F.2d at 988 (citing *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532-33 (1973)). Thus, it is powerful rebuttal evidence when the market has a history of prior successful entry, *Waste Mgmt.*, 743 F.2d at 982-84, when existing competitors have credible plans to expand, *Arch Coal*, 329 F. Supp. 2d at 147-49, or when the market was already highly concentrated pre-merger and yet had an established history of functioning competitively, *Baker Hughes*, 908 F.2d at 986.

Second, "considerable support" for rebuttal of the presumption exists where buyers have "power" or "sophistication," because they can deter and defeat efforts by concentrated sellers to act anticompetitively. *Id.* at 986-87; *see also Cardinal Health*, 12 F. Supp. 2d at 58 ("[S]ophistication and bargaining power of buyers play a significant role in assessing the effects of a proposed transaction."); *FTC v. R.R. Donnelley & Sons Co.*, No. 90-1619, 1990 WL 193674, at *4 (D.D.C. Aug. 27, 1990) ("[The buyers'] size and economic power, and the other characteristics of the 'market,' make any anti-competitive consequences very unlikely."). Relatedly, "[t]he conclusions of well-informed and sophisticated customers on the likely impact of the merger" is probative "because customers typically feel the consequences of both competitively beneficial and competitively harmful mergers." Guidelines § 2.2.2; *see also New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 350 (S.D.N.Y. 1995) (rejecting a claim of anticompetitive effects in part because "Plaintiff offered no evidence that retailers object to, or have been harmed by, the Acquisition"); *Rothery Storage*, 792 F.2d at 218 n.4 ("[Courts] assume that economic actors usually have accurate perceptions of economic realities.").

Third, the "heterogeneity of products and producers" can eliminate the likelihood of anticompetitive conduct in a concentrated market. *Arch Coal*, 329 F. Supp. 2d at 140. Products can be heterogeneous because they are differentiated in terms of features, and producers can be heterogeneous because they vary in the extent of their respective sales of complementary goods (products used together with the relevant product). *CCC Holdings*, 605 F. Supp. 2d at 60-61. Both product differentiation and complementary goods hinder coordinated anticompetitive conduct among the firms remaining in the market post-merger, because the complexity "limit[s] or impede[s]" the ability of firms to "reach[] terms of coordination," let alone "detect and punish deviations" from those terms. *Id.* Likewise, the sale of complementary goods also complicates unilateral anticompetitive conduct by the merged firm. As Defendants' expert will explain, in evaluating whether to raise prices after the merger, the merged firm must predict the risk and magnitude of lost sales, not just for the relevant product, but also for the complementary ones.

C. Rebuttal Of The Statistical Presumption Requires The Government To Produce Additional Evidence That The Acquisition Will Likely Reduce Competition

Once the defendants produce evidence to rebut the presumption, the Government may no longer rely solely on concentration statistics. The burden of producing additional evidence shifts to the Government and merges with its ultimate burden of proving that the acquisition will likely substantially lessen competition. *Baker Hughes*, 908 F.2d at 983. The case "must be resolved on the basis of the record evidence relating to the market and its probable future," since "focus[ing] on [the] actual rather than [the] theoretical guards against false condemnation that may chill conduct that antitrust laws are designed to protect." *Arch Coal*, 329 F. Supp. 2d at 116-17.

Finally, in considering the likelihood of anticompetitive effects, courts also must consider the likelihood of procompetitive effects stemming from the merger's "potential to generate efficiencies." *Heinz*, 246 F.3d at 720; *see also Arch Coal*, 329 F. Supp. 2d at 151 (noting that such efficiencies are at a minimum "relevant to … whether the proposed transaction will substantially lessen competition," and may even "support an outright defense" in some

circumstances); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054-55 (8th Cir. 1999) (holding that district court erred by not considering claimed efficiencies as part of its analysis of competitive effects). As the Government itself has recognized, mergers can substantially reduce the costs of production and increase the potential for innovation, leading to price reductions and improved products. *See Heinz*, 246 F.3d at 720 (citing Guidelines). The defendants thus may seek to defend the merger by showing that it would create significant "efficiencies that are merger-specific and verifiable by reasonable means." *Arch Coal*, 329 F. Supp. 2d at 150; *see also FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1089 (D.D.C. 1997) (holding that proof of likely efficiencies must reflect "sound business judgment" rather than "mere[] speculat[ion]," but need not constitute "clear and convincing evidence").

II. THE GOVERNMENT'S CONCENTRATION STATISTICS INACCURATELY PREDICT THE LIKELY EFFECT ON FUTURE COMPETITION IN THE U.S. MARKETS FOR RANGES, COOKTOPS, AND WALL OVENS

This case presents a perfect example of how market-concentration statistics can "inaccurately predict[] the relevant transaction's probable effect on future competition." *Baker Hughes*, 908 F.2d at 991. The Government principally contends that the challenged acquisition triggers the presumption of likely anticompetitive effects because of the amounts by which it will increase the HHI concentration statistics in the overall domestic markets for ranges, cooktops, and wall ovens. As a threshold matter, the Government has not actually shown an increase in concentration in the alleged markets that would trigger the presumption: as Defendants' expert will show, when post-merger HHIs are properly calculated using the best available information, they result in figures that fall below the thresholds of the Government's own Guidelines.

More fundamentally, even if the Government could correctly calculate concentrations that would trigger a presumption, the evidence will nevertheless show that the "structure, history, and probable future" of the relevant markets strongly rebut it. *General Dynamics*, 415 U.S. at 498. These highly dynamic and competitive markets possess several characteristics that likely prevent this acquisition from causing any anticompetitive effects. Indeed, the Department of

Justice relied on these very factors when it declined to challenge the Whirlpool-Maytag merger in 2006 despite its producing higher HHI concentration statistics than the Electrolux-GE deal. And the natural experiment of market performance since that merger confirms that DOJ made the right decision there and the wrong decision here.

A. Three Characteristics Of The Overall Cooking-Appliance Markets Powerfully Rebut The Government's Statistics And Other Evidence

The overall markets for ranges, cooktops, and wall ovens each have three particular characteristics that rebut any presumption that a near-term increase in market concentration will likely lead to anticompetitive effects: (1) these markets have been characterized by substantial and successful new entry as well as expansion and repositioning by existing rivals, and they remain conducive to such dynamic competition; (2) these markets have been and continue to be dominated by large and sophisticated buyers, who leverage their power to ensure that sellers compete and who notably do not oppose the acquisition; and (3) these markets involve heterogeneous products and producers, because cooking products are highly differentiated in both prices and features and cooking producers sell differing shares of complementary non-cooking products. *See generally* DX-0525-005 (Whirlpool 2014 securities filing emphasizing these precise aspects of the competitive marketplace).

1. Ease Of Entry, Expansion, And Repositioning

The evidence will show that the cooking-appliance markets are very dynamic: (a) the markets are amenable to easy entry, expansion, and repositioning, in light of the significant resources available to the likely competitors and the relative simplicity of manufacturing, distributing, and selling cooking appliances; and (b) as a result, entry, expansion, and repositioning has already been occurring at a rapid pace and will continue to do so, especially if existing competitors were to attempt to engage in anticompetitive conduct post-merger.

a. A hallmark of the U.S. cooking appliances markets in the past decade has been the ready ability of global appliance sellers to enter the market and rapidly grow their market shares. As Defendants' expert will show, from 2007 to 2014, HHI declined from approximately

2,200 to 1,700 for retail sales of all major appliances (cooking, refrigerators, dishwashers, and laundry), and declined for retail sales of cooking appliances from 2,100 to 1,800.[2] Several factors make the markets for ranges, cooktops, and wall ovens amenable to such entry, expansion, and repositioning.

First, the likely market entrants are global appliance companies with abundant experience and massive resources. *See* DX-0571-009; *see also infra* at 20-23. As these companies are not *de novo* entrants and do not need to start from scratch, they are particularly well situated to accomplish the tasks needed to grow their market share, such as manufacturing, distribution, and developing brand recognition.

Second, by today's commercial standards, manufacturing cooking appliances is a relatively simple process. Although suppliers continuously innovate by offering new features, the core process relies on mature technology, and suppliers can purchase readily-available components from third parties, in sharp contrast to those industries, such as pharmaceuticals or automotives, in which entry is obstructed by the need for years of research and development or extensive patent licensing. *See, e.g.*, Pike Dep. Tr. 49:9-21. For those companies with existing manufacturing facilities in the U.S. or abroad, it would not be unduly complicated or expensive to retool for different specifications (and purchase any additional components). *See, e.g.*, *id.* at 49:4-53:15. In fact, even building or expanding plants can be done relatively quickly and effectively. *See, e.g.*, [REDACTED] DX-0415-001 to -002.

Third, developing a distribution and delivery network (*see supra* at 8) is not a significant impediment. [REDACTED]

[2] The HHI figures presented in this brief are at the retail segment level, as the data produced in this proceeding was not sufficient to estimate these metrics at the industry level.

Fourth, the relevant firms already have well-established brands in the U.S. or in the global market. *See, e.g.*, DX-022-021; This preexisting brand recognition facilitates the growth of market share. *See, e.g.*, DX-0329; DX-0353.

b. The likelihood of entry, expansion, and repositioning in the U.S. cooking-appliance markets is not just theoretical, but entirely realistic. In fact, entry, expansion, and repositioning have been the principal competitive dynamics that have reshaped the appliance industry in the last decade. Several global appliance firms have already been quite successful in doing so, others have the intention to do so, and still others have the capability to do so. Of course, all this would accelerate if Defendants were to try to raise prices above competitive levels after the merger, as that would provide even more opportunity and incentive for rivals.

Samsung and LG: Over the past decade, both companies leveraged their well-known brands to expand aggressively into the U.S. appliance industry, including cooking products. *See, e.g.*, DX-0185-019; As Defendants' expert, Jonathan Orszag, will show, the combined retail revenue share of the two companies for all appliances increased between 2005 and 2014 by 22 percentage points, corresponding with a decline of 23 percentage points in the combined retail revenue shares of Whirlpool, GE, Kenmore, and Electrolux. The companies expanded, for example, by leveraging their brand recognition and selling their products through major retailers like where they could expand on their already formidable presence in selling electronics. *See, e.g.*, DX-0329; DX-0353.

Indeed, a telling indication of their rapid growth is the significant increase in their market share just from 2014 through 2015. For example, as Orszag will show, Samsung's retail share in cooking ranges increased by almost half, from approximately in 2014 to by mid-2015. (The Government's expert, by contrast, stopped his market-share calculations in 2014 and did not bother to look at what is happening in 2015.)

Moreover,

Haier:

Haier sells a full line of appliances outside the U.S. and has already entered the U.S. appliance markets, focusing initially on laundry and refrigeration and then expanding into cooking. *See, e.g.*, DX-0468-001. In 2012, Haier acquired Fisher & Paykel, which sells higher-end ranges, cooktops, and wall ovens in the U.S., including through *See, e.g.*, DX-0571-048, -050; DX-0049-004. Last year, the company hired, as the CEO of its U.S. subsidiary, industry veteran Adrian Micu, who was previously Whirlpool's vice president of Global Engineering. DX-0549. One month later, Haier announced the opening of a 30,000-square-foot research and develop center in Indiana to focus on developing products for U.S. consumers and expanding into new product categories, including cooking. DX-0418-001 to -002.

Bosch: Bosch, which has 43 manufacturing facilities in Europe, Latin America, Asia and the U.S., is a strong current competitor with capability to reposition and expand. DX-0369-001. Bosch is the largest manufacturer of major appliances in Europe and is increasing its substantial U.S. sales of appliances, including its well-established Thermador brand. *See, e.g.*, DX-0569-014. Bosch already sells a full line of appliances in the U.S. and manufactures its products in North Carolina and Tennessee. *See, e.g.*, DX-0367. Bosch

currently competes with Defendants at intermediate and higher price points, *see, e.g.*, DX-0182-001; DX-0544-010, [REDACTED] Bosch employs over 45,000 researchers and developers, and it invested 10% of its sales revenue in research and development in 2014. DX-363-021.

Arçelik: Arçelik is another example of a large global company that has recently expanded to sell appliances in the U.S. A Turkish company with global revenue of roughly $5.4 billion, DX-0341-008, Arçelik is the third largest appliance company in Europe, DX-0344-019 , Arçelik began selling a full line of appliances in the U.S. in 2014 under the Blomberg brand. *See, e.g.*, DX-0359; [REDACTED] Later this year, the company plans to launch in the U.S. its Beko brand, which is the second largest brand in Europe. *See, e.g.*, DX-0191-001 to -002; DX-0341-034. Arçelik has seven research and development centers worldwide, and it has plans to establish a research and development center in the U.S. later this year. *See, e.g.*, DX-0344-038; DX-0516-001.

Others. Several other competitors with the potential to either enter the U.S. cooking-appliance markets or expand/reposition within those markets include Midea, Miele, Viking, Sub-Zero Group, and Dacor. Evidence will show that they too are competitive threats that would restrain anticompetitive effects post-merger, as are the legacy competitors Whirlpool and Kenmore, who constantly introduce new models of cooking appliances.

2. Powerful And Sophisticated Buyers

The evidence will show that buyers in the cooking-appliance markets can restrain anti-anticompetitive pricing: (a) these markets are dominated by four powerful and sophisticated retailers, who have the ability as customers of appliance manufacturers to induce seller competition even in a concentrated market; (b) those retailer-customers exercise their power to restrain price increases; and (c) tellingly, the retailer-customers do not oppose the acquisition and at least one of them strongly supports it.

a. The "Big Four" retailers—Lowe's, Sears, The Home Depot, and Best Buy—are the major customers of appliance manufacturers, accounting for roughly two-thirds of all retail sales of major residential appliances. DX-0519-004. As a result of this buyer concentration, these retailers have the means to force competition even among concentrated sellers, because each manufacturer knows that losing all or even some of the business of just a single retailer would mean a massive loss of revenue.

For example, the Big Four foster competition by encouraging manufacturers to vie for floor space and to participate in promotional activity. Manufacturers and retailers recognize that floor space availability and positioning strongly influence what consumers purchase. *See, e.g.*, [REDACTED]; DX-0177-016, -019; [REDACTED] In order to assure their floor space is allocated appropriately, retailers demand periodic product line reviews and will replace one manufacturer's product with another if unsatisfied by the results for any reason. [REDACTED]); [REDACTED]

The Big Four also control a multitude of other factors that affect a consumer's decision to purchase appliances, including advertising, display, sales-force knowledge, and interaction with the consumer. [REDACTED]. [REDACTED].

b. Again, the Big Four's power to constrain prices is not just theoretical, but actual. They have exercised that power in a variety of ways.

To start, these retailers routinely demand that appliance manufacturers justify unilateral price increases. For example, in 2013,

c. Indeed, the Big Four's position on the acquisition is telling evidence that it will not likely have anticompetitive effects. : . and there is no evidence that oppose it either. Accordingly, because "[courts] assume that economic actors usually have accurate perceptions of economic realities," *see Rothery Storage*, 792 F.2d at 218 n.4, the absence of "evidence that retailers object

to, or have been harmed by, the Acquisition" cuts strongly against the Government's case, *see Kraft*, 926 F. Supp. at 350.

3. Heterogeneous Products And Producers

The cooking appliances at issue differ in prices and features, and they are sold by producers who also sell varying shares of non-cooking appliances that are complementary goods. These two forms of heterogeneity impose a significant constraint on anticompetitive conduct.

First, the products in the cooking-appliance markets are highly differentiated along a continuum of price and features. For example, Defendants' expert, Jonathan Orszag, will show that, in 2014, Whirlpool offered five brands of cooking ranges, with an average wholesale price per brand varying from [REDACTED] All brands combined, Whirlpool offered 707 different cooking-appliance products, running the gamut from a low end of $189 to a highly featured, ultra-premium range priced at $5,402. Similarly, GE offered six different brands of cooking ranges in 2014, varying in average price from $306 to $4,772. Electrolux offered five brands at average price-points from $262 to $1314, while Kenmore's two brands sold from $393 to $976. [REDACTED]

Second, the producers in the cooking-appliance markets also differ in that they have varied shares in the markets for complementary goods like refrigerators and dishwashers. As Orszag will show, the market shares for the non-cooking appliances do not track the market shares for the cooking appliances. For example, in 2014, GE's share in units sold of cooking-appliances was [REDACTED] its share of dishwasher sales was [REDACTED], its share of refrigeration sales was [REDACTED], and laundry [REDACTED]. That same year, Electrolux's share in units sold of cooking-appliances was [REDACTED], its share of dishwasher sales was [REDACTED], its share of refrigeration sales was [REDACTED], and laundry [REDACTED].

As Orszag will explain, the existence of differentiated products and complementary goods will impede the ability of Electrolux and other remaining competitors to engage in coordinated anticompetitive conduct, because such heterogeneity renders it extremely difficult for firms all to reach agreeable terms, to monitor compliance with those terms, and to punish defections from those terms. Likewise, the existence of complementary goods will impede the ability of Electrolux to engage in unilateral conduct, because it must consider the adverse impact of raising prices for its cooking appliances on its profits from non-cooking appliances as well.

B. The 2006 Whirlpool-Maytag Merger Is Strong Empirical Confirmation That The Post-Merger Concentration Levels Are Not Likely To Cause Anticompetitive Effects In The Overall Cooking-Appliance Markets

The foregoing analysis of market characteristics—which shows that this acquisition is not likely to reduce competition notwithstanding the increased market-concentration statistics—is confirmed by the "natural experiment" after the 2006 merger of Whirlpool and Maytag Corporation. This real-world, empirical comparison provides a far better window into the probable effects of the challenged transaction than the Government's theoretical speculation. *See* Guidelines § 2.1.2 ("The Agencies look for historical events, or 'natural experiments' that are informative regarding the competitive effects of the merger," including "the impact of recent mergers … in the relevant market.").

1. In 2006, Whirlpool, the world's largest appliance competitor, acquired Maytag, the third largest U.S. appliance competitor. The Government's pre-merger investigation focused primarily on the market for laundry appliances. DX-0399-001.

As Defendants' expert, Jonathan Orszag, will show, the Whirlpool-Maytag merger resulted in more concentrated sales in laundry appliances, and caused a greater increase in concentration, than will the Electrolux-GE acquisition in the cooking-appliance markets. For the Whirlpool-Maytag merger, the pre-merger HHI for retail laundry was 1,976, while the post-merger HHI was 3,057, an increase of 1,081. By comparison, here, the current HHI for all retail cooking appliances is approximately 1,785, while after Electrolux's acquisition the HHI will be

only 2,371, an increase of only 586; more specifically, for ranges (the cooking appliance with the largest post-merger HHI level and increase), the HHIs go from 1,789 to only 2,445, an increase of only 657. In short, the post-merger HHI level and increase in the overall cooking-appliance markets here will be significantly smaller than they were for the laundry appliances at issue in the Whirlpool-Maytag merger.

2. After investigating the Whirlpool-Maytag merger, the Department of Justice concluded that the transaction was not likely to harm competition, "despite the two companies' relatively high share" of the relevant market and despite what market concentration statistics alone would predict. DX-0399-001. In its statement terminating the investigation, DOJ said that any "attempt to raise prices" would be unsuccessful, because "existing U.S. manufacturers have excess capacity and could increase their production," and because "newer brands such as LG and Samsung have quickly established themselves in recent years." *Id*. Further, the major customers were "large appliance retailers" who "have alternatives available to help them resist an attempt by the merged entity to raise prices," including by switching to other suppliers, such as LG. *Id*. And finally, the merger would result in "large cost savings and other efficiencies" that would "further reduce the likelihood that the transaction might harm consumer welfare." *Id.* at -003.

3. Time has shown that DOJ's conclusions about the Whirlpool-Maytag merger were correct. In an analysis two years after the merger closed, the then-head of DOJ's antitrust division concluded that wholesale laundry prices had decreased and quality had increased, consistent with DOJ's earlier analysis. DX-0394-001, -015 to -020. More recently, Orszag conducted a detailed econometric analysis of the merger's effect on prices and margins for residential appliances sold by Whirlpool and also GE. Using a regression analysis to control for market factors unrelated to the merger, his study demonstrates that the merger did not lead to higher prices or profit margins for the products of either Whirlpool or GE. That is, there was no pattern of an increase in wholesale prices on any appliance categories for the merged firm (Whirlpool) or another market participant (GE) after the merger. Nor was there evidence of post-merger coordination. Rather than lead to a period of stability as the Government's

theorizing would suggest, the Whirlpool-Maytag merger presaged a period of dramatic shifts among appliance suppliers, prompted in large part by increased innovation.

This real-world event demonstrates why reading just the numbers is likely to be a misleading story. The appliance markets were competitive before the Whirlpool-Maytag merger, and the transaction did not change that fact. Today, the appliance markets are even more competitive than they were a decade ago: as a simple illustration, recall the dramatically increased presence of Samsung and LG, and the smaller post-merger HHI figures now. The Government thus bears the burden of explaining its counter-intuitive position that the likely competitive effects of this merger will somehow be significantly different and worse. It has not done so and it will not do so, because it cannot do so.

C. The Government Fails In Its Additional Efforts To Demonstrate The Likelihood Of Anticompetitive Effects

Perhaps recognizing that it cannot rest on the market-concentration presumption alone given the strength of Defendants' rebuttal case, the Government made a few additional arguments that this merger is likely to have anticompetitive effects on the overall markets for each of the cooking appliances at issue. Yet these arguments are also flawed.

To begin, notwithstanding that coordinated effects are the primary concern of merger law, the Government's Complaint and expert reports have made only a few half-hearted assertions that the merger will facilitate explicit or tacit coordination in the overall cooking-appliance markets. And critically, the Government does not rely on much more than the general theoretical point that, all else being equal, coordination is easier in highly concentrated markets; it essentially ignores the real-world evidence that all else is not equal in the particular markets for cooking appliances. Those markets are characterized by: ease of entry, expansion, and repositioning; powerful and sophisticated buyers; and heterogeneous products and producers—all of which constitute well-recognized deterrents to coordinated effects. *See supra* at Part I.B, II.A. Indeed, the Government's expert fatally undermines his position by repeatedly emphasizing the price and feature differentiation among cooking products.

Thus, doubtless aware of the futility of its coordinated-effects claim, the Government instead has focused nearly all its energy on its "unilateral effects" claim. Recall that, according to this theory, a merged firm can profit by unilaterally raising prices on some of its products if enough lost sales are recaptured because they are diverted to products formerly sold by the acquired firm, but now sold by the merged firm. *See supra* at 14. To show that unilateral effects will likely occur as a result of the challenged acquisition, the Government rests its case on yet another static structural metric: "upward pricing pressure" (UPP), which the Government's expert, Michael Whinston, uses to purportedly calculate mathematically whether Electrolux would have an incentive to unilaterally raise prices on Electrolux or GE products after the acquisition. The magnitude of UPP depends on the relative profit margins of the Electrolux and GE products involved as well as the "diversion ratio," which is measured by the share of lost sales in a merging firm's product (following a price increase on that product) that is recaptured in increased sales of its merging partner's product. According to Whinston, if the amount and value of recaptured sales were high enough—as he opines it would be—then Electrolux would have the incentive to raise prices post-merger. But Electrolux's expert will show that Whinston's UPP analysis is flawed in myriad ways, including the following most critical ones.

First, Whinston's analysis is a static inquiry that ignores the dynamic nature of competition in this industry. His analysis of diversion ratios is limited to proxies based on a static snapshot of 2014 market shares and certain GE static data. In addition to thus overlooking 2015 events, Whinston's UPP analysis is fundamentally flawed because it assumes that competitors will not respond to any effort by the merged entity to raise prices above a competitive level. UPP analysis is only predictive to the extent that the estimated diversion accounts for competitor responses to the assumed price increase. *Oracle Corp.*, 331 F. Supp. 2d at 1118. And in this industry, which is already characterized by continuous expansion, repositioning, and entry (*see supra* at Part II.A.1), it is a counter-factual, ivory-tower assumption that the intense dynamic competition will suddenly cease to exist in response to a unilateral price increase. That alone is sufficient reason to reject Whinston's static analysis.

Second, even Whinston's static analysis of 2014 lacks any foundation, because he relies on an untenable assumption rather than actually measuring the diversion ratios that are critical to his UPP calculation. In particular, as he admittedly lacked the required data to reliably estimate the diversion ratios between GE and Electrolux products, Whinston simply assumed that, if GE (or Electrolux) were to raise its prices, the customers who switched to a different firm would do so in relative proportion to the other firms' 2014 market shares. But this reliance on market-share statistics is nonsensical in the context of UPP, because there is no reason even to presume that the views of GE (or Electrolux) customers about the closest substitute to GE (or Electrolux) products bears any relationship to the current relative market shares of other firms (which reflects instead the relative preferences of those firms' customers). To the extent Whinson tries to cure these defects by relying on certain GE data about bid competition, he fares no better. Although that data sometimes references known competitors for a particular bid, it captures only bids in which GE was involved and does not identify who actually won the bid, much less identify the relative rates at which GE loses customers to Electrolux rather than others. As Whinston's diversion ratios are thus divorced from reality, his UPP calculation is meaningless.

Third, Whinston's analysis also ignores the presence of complementary products, including refrigerators, dishwashers, and laundry appliances. The existence of complementary goods requires a more complicated UPP model to determine how the incentive to raise prices on cooking products is impacted by the effect on those non-cooking products. *See supra* at 16.

Finally, Whinston's UPP methodology leads to demonstrably erroneous results when applied to the natural experiment of the 2006 Whirlpool-Maytag merger. Whinston's methodology would have predicted a 10% price *increase* for dryers and a 5% *increase* for washers. What actually happened is that prices *decreased by roughly those amounts respectively*. This starkly underscores the utterly unreliable nature of Whinston's methodology.

In sum, the Government's UPP analysis fails to demonstrate that the acquisition will likely lead to unilateral anticompetitive effects in the overall markets for ranges, cooktops, and wall ovens. And the Government's concentration statistics alone cannot possibly show that the

acquisition will likely lead to coordinated anticompetitive effects, given the particular characteristics of the competition in those markets and the natural experiment of the Whirlpool-Maytag merger. Accordingly, the Government cannot carry its burden of proof with respect to the principal antitrust markets that it has alleged.

III. THE GOVERNMENT CANNOT SAVE ITS CASE BY ATTEMPTING TO NARROW THE RELEVANT ANTITRUST MARKETS

In the apparent hopes of further increasing the market-concentration statistics and somehow undermining Defendants' rebuttal evidence, the Government tries in two ways to slice and dice the relevant markets in this case. It alleges concerns about the effects of the acquisition on: (A) sales of lower-priced appliances in the "value" and "mass" segments; and (B) sales to home builders and others through the non-retail "contract channel." On each point, the Government fails at the threshold, because the evidence forecloses any argument that these segments or channels constitute proper antitrust markets. Indeed, the Government never actually hazards that argument for the "value" and "mass" segments. Moreover, as to the alleged "contract channel" market, the Government also fails to prove that the acquisition would sufficiently increase concentration to trigger any presumption of anticompetitive effects. Ultimately, even apart from these defects, the evidence will show that the market characteristics detailed above for the overall cooking-appliance markets similarly rebut any presumed inference of likely anticompetitive effect in these segments and channels.

A. The "Value" And "Mass" Segments

The Government's attempt to narrow the markets for cooking appliances into upper- and lower-price segments should be rejected for three reasons: (1) to begin, the Government does not even satisfy the threshold requirement of proving that the "value" and "mass" segments are themselves relevant antitrust markets; (2) that is no surprise, because those segments plainly are not proper antitrust markets, given the obvious ability of consumers to respond to an anticompetitive price increase by substituting to products with somewhat higher prices, but better features; and (3) even assuming the Government could properly establish "value" or "mass"

markets, anticompetitive effects would be unlikely to occur in the alleged markets for essentially the same reasons they are unlikely to occur in the overall markets for cooking appliances.

1. It is well established under the caselaw that determining the relevant market is "a necessary predicate" to finding that a merger will likely have anticompetitive effects in a line of commerce under § 7. *See supra* at 10. Yet the Government has disavowed any effort to prove that the "value" and "mass" segments are proper antitrust markets. Its Complaint did not so allege, *see* ECF No. 1, ¶¶ 20-26, and its expert report expressly declined to attempt such proof. There has been no argument or evidence that a hypothetical monopolist in those segments could profitably raise prices by a small but significant amount (or even that those segments possess the "practical indicia" that courts have used as proxy for determining cross-elasticity of substitution). *See supra* at 11-12. Having failed to prove the existence of such narrow markets, the Government cannot fixate on these slivers of the broader markets for cooking appliances.

2. Moreover, any attempt by the Government to establish "value" or "mass" markets would be futile. In terms of the hypothetical-monopolist test, a monopolist in these segments would lose money by raising prices anticompetitively, given the high degree of likely substitution among cooking appliances at various price points and features. As Defendants' expert will explain, there is a continuum of appliances with different features throughout different price points. For example, if the price of a $300 range raises anticompetitively to $330, it is true that most consumers likely would not substitute a $3,000 range and that some consumers may not even substitute a range that is competitively priced at $400 or $500 *with better features*, but *enough* consumers likely would make the latter switch that competition from the $500 range would constrain the price of the $300 range.

To be sure, because different customers have different preferences for balancing price against features, suppliers sometimes refer to various segments of the market. But that is hardly circumstantial evidence that the cross-elasticity of demand is sufficiently low between segments that they are distinct antitrust markets. *See Rothery Storage*, 792 F.2d at 218. The mere fact that certain customers *prefer* low prices over better features hardly demonstrates that they will

continue to accept the worse features *even for a higher price*. *See Oracle Corp.*, 331 F. Supp. 2d at 1131 ("[T]he issue is not what solutions the customers would *like* or *prefer* … ; the issue is what they *could* do in the event of an anticompetitive price increase."); *accord R.R. Donnelley*, 1990 WL 193674, at *2. Moreover, there is no standard definition of the "value" or "mass" segments. *See* Pltf's Answers to First Interrogs. at 14 ("The United States is unaware of any strict, industry-recognized standard for identifying such pricing segments by the upper and lower bounds of price."). There are thus no *Brown Shoe* "practical indicia" that these segments constitute separate antitrust markets.

3. In any event, the acquisition would not likely have anticompetitive effects in any alleged "value" or "mass" markets for essentially the same reasons it will not likely have such effects in the overall markets for cooking appliances. Namely, coordinated and unilateral effects would be no less constrained by ease of entry, expansion, and repositioning, powerful and sophisticated buyers, and heterogeneous producers.

Nor does it matter whether, as the Government has claimed, lower margins in the "value" segment have hitherto inhibited some firms from entering this segment. That would presumably change "if prices reach[ed] supracompetitive levels." *Baker Hughes*, 908 F.2d at 989 n.9. (If anything, such margins confirm that this segment is intensely competitive.) Anyway, there are already many suppliers selling at lower-end prices. *See* Pltf's Answers to First Interrogs. at 14 (admitting that there are 25 suppliers beyond Electrolux and GE selling "low and mid-priced" products).

B. The "Contract Channel"

The Government's attempt to narrow each cooking-appliance market down to its "contract channel" should be rejected for three reasons: (1) the "contract channels" are not proper antitrust markets, given the ability of consumers to respond to an anticompetitive price increase in those channels by substituting to the identical products sold through the retail channel; (2) even assuming the Government could properly establish "contract channel" markets, the Government is not entitled to a presumption of anticompetitive effects because it has not calculated an increase in concentration that includes all market participants; and (3) in any event, anticompetitive effects would be unlikely to occur in the alleged markets for many of the same reasons that they are unlikely to occur in the overall markets for the cooking appliances.

1. The "Contract Channel" Is Not A Relevant Antitrust Market

The evidence will show that a hypothetical monopolist in the contract channel could not profitably raise prices because too many customers would respond simply by substituting to the retail channel. Such substitution to retail is highly likely because the two channels are similar in many important respects, and any differences of the contract channel would not preclude substitution in the face of an anticompetitive price increase [redacted] and so there is also insufficient *Brown Shoe* "practical indicia" of a separate antitrust market.

a. The similarities between the contract channel and the retail channel are significant: both channels sell the same products using similar distribution methods.

First, contract-channel customers purchase the very same products, manufactured by the very same factories, as those sold to retailers. [redacted] And that makes sense, of course, because the manufacturers have the identical end goal regardless of sales channel: to sell appliances for use by ultimate consumers.

Second, these identical products also follow largely the same basic distribution and delivery paths from the manufacturing facility to the customer. Suppliers all serve their contract and retail customers similarly—either directly (often selling from their own regional distribution centers) or indirectly through sales to third-party distributors. McLoughlin Dep. Tr. 15:22-16:4; Blankenship Dep. Tr. 27:2-13, 28:10-22, 38:16-23. And to provide "last mile" home delivery and installation for both retail and contract sales,

b. To prove that the contract and retail channels are so different that they should be considered separate markets, the Government has claimed that some contract customers prefer certain services that supposedly are provided only in the contract channel, such as timely and reliable delivery, simplified sourcing, a full line of appliances at all price points, the ability to purchase directly from a manufacturer, good customer service, and quality aftermarket service. But the evidence will show that these alleged differences—which at most matter only to *some* types of contract customers—do not warrant defining the "contract channel" as a distinct antitrust market, for a variety of reasons.

To date, these retailers' efforts at penetrating the contract channel have been notable.

Moreover, retail sales to contractors are not limited to just the Big Four retailers. Smaller retailers like HH Gregg and PC Richards also compete to sell to contractors. ; DX-0037-001; DX-0128-001 to -002.

Second, retailers easily could and would increase their efforts to sell to contract customers if there were a monopoly in the contract channel. The Big Four are sophisticated buyers with enormous competitive strength. *See supra* at Part II.A.2. Nothing is stopping them from targeting contractors, especially if prices in the contract channel were to become supracompetitive.

Third, even if retailers failed to provide contract-channel customers with all of the services they currently receive, there is no evidence that those customers' supposed desire for those services are so strong that they would pay an anticompetitive premium for them. Again, "pointing out the personal preferences of a distinct group of consumers does not suffice for defining a separate product market." *R.R. Donnelley*, 1990 WL 193674, at *2. "[T]he issue is not what solutions the customers would *like* or *prefer* … ; the issue is what they *could* do in the event of an anticompetitive price increase." *Oracle Corp.*, 331 F. Supp. 2d at 1131.

Fourth, all of this is confirmed by the fact that contract-channel customers already constrain prices by soliciting bids from retailers and by leveraging retail pricing.

Finally, this evidence of direct price comparison and competition belies the Government's claim that prices in the so-called contract channel are so different from retail prices that they must be separate markets. As Defendants' expert will show, the efforts of the Government's expert to show price differentials are seriously flawed: Whinston erroneously compares individual prices paid by contract customers with average retail prices paid by consumers; Whinston's price data from contract sales does not include delivery, installation, or haul-away service, whereas the price data from retailers typically does; Whinston's analysis focuses on a few large builders who buy in bulk and therefore tend to pay less than the average single retail customer does; and Whinston's analysis shows that contractors actually paid about the same as retail consumers (on average) when purchasing from one distributor.

2. Even If The "Contract Channel" Were A Relevant Antitrust Market, The Government Is Not Entitled To A Presumption Of Anticompetitive Effects

To calculate market concentration properly, the Government must include all "market participants." Guidelines § 5.1. But in calculating market shares for the "contract channel," the Government's expert did not account for sales made *by retailers* like

to contract customers. Yet the failure to account for those sales can have a substantial impact on the calculated HHIs, given the volumes at issue. *See supra* at 36-37.

3. Even If The "Contract Channel" Triggered The Presumption, It Would Be Rebutted Because The Acquisition Is Unlikely To Cause Anticompetitive Effects There Either

The same characteristics that demonstrate an absence of anticompetitive effects in the overall cooking-appliances markets are no less applicable, and indeed sometimes more applicable, in the alleged contract-channel market: (a) the market is conducive to easy entry, expansion, and repositioning; (b) the market is dominated by powerful and sophisticated buyers; and (c) the market has heterogeneous products and producers.

a. The evidence will show that, as with the overall markets for the cooking appliances at issue, the alleged contract-channel market does not present significant barriers to entry. To the contrary, entry, expansion, and repositioning within the alleged contract-channel market is highly likely in the event of supracompetitive pricing. Indeed, there already have been recent entrants into the contract channel, including Electrolux itself.

First, neither of the Government's two primary explanations for why there are supposedly significant barriers to contract-channel entry withstand scrutiny.

The Government's principal objection to ease of entry is the need for manufacturers to create a specialized distribution and delivery network. But suppliers can satisfy any such contract customer preferences with minimal work.

All of the manufacturers that currently supply appliances to contract customers *directly* also supply appliances to contract customers *indirectly* through distributors. *See, e.g.*, DX-0448-001 to -002, DX-0066-001 to -002.

Thus, appliance manufacturers that sell to retailers, but not yet to contract distributors, can readily expand to do so without committing many added resources.

The Government's other principal objection to ease of entry is that contract-channel customers prefer a full-line of appliances. This objection is likewise misplaced. Even apart from GE and Electrolux, there are five other main competitors in the United States selling a full-line of kitchen appliances: Whirlpool, Kenmore, LG, Samsung, and Bosch. *See supra* at 6. Each of them is capable of providing customers with a complete set of major kitchen appliances, and thus any one of them can provide the set of products that those contract-channel customers seek. So too, for example, are Haier, Arçelik, and others. *See supra* at 6-7.

Second, the lack of significant barriers is confirmed by the existence of firms that have recently expanded into the contract channel, including Electrolux, Samsung, and LG. And again, even more firms would focus on the contract channel if Electrolux attempted to charge supracompetitive prices after the acquisition.

Electrolux itself is an example of recent expansion into the direct-sales segment of the contract channel.

And the evidence will show that Electrolux's relative growth since then has been significant. (Nor can the Government rejoin

that Electrolux is even still a relatively small player in the contract channel, because that would contradict its argument that the deal would likely reduce competition in the contract channel.) Thus, for competitors who are already —such as Samsung and LG, *supra* at 19-20—it would be even easier to enter the direct-sales component of the contract channel, and all the more so if Electrolux were charging supracompetitive prices.

Finally, the evidence will show that many other manufacturers also compete for sales through the contract channel, including Arçelik, Bosch, and Haier. *See, e.g.*, DX-480-009; [REDACTED]; [REDACTED] [REDACTED]

b. The evidence will also show that, as with the overall markets for the cooking appliances at issue, the alleged contract-channel markets are dominated by large and sophisticated buyers who wield considerable power to restrict any anticompetitive behavior and who have used that power to their advantage. Of the top 100 builders, the top five single-family builders in the contract-channel are estimated to account for about one third of the total home closings and revenues, and the top ten builders are estimated to account for nearly three fifths. *See* DX-0420. [REDACTED]

These larger customers have the power to drive competition. [REDACTED] Likewise, contract distributors are sufficiently powerfully as gateways to contract customers to ensure they are receiving competitive prices. [REDACTED]

All of this is powerfully confirmed by testimony that large contract builders and distributors also support the acquisition. [REDACTED]

002; DX-0420-001. [REDACTED]

c. The evidence will also show that, as with the overall markets for the cooking appliances at issue, the products and producers in the alleged contract-channel markets are heterogeneous in terms of prices and features as well as complementary goods offered, all of which constrains both coordinated and unilateral anticompetitive effects. *See supra* at Part II.A.3. Indeed, insofar as the Government contends that contract-channel customers have a preference for full lines of complementary appliances, that only exacerbates the weakness in the Government's case for coordinated or unilateral effects.

d. Finally, the foregoing illustrates why the Government's fixation on market concentration and the number of competitors is a red herring. Whether the acquisition is a "merger to duopoly" in the alleged contract-channel market is of "minimal significance." *CCC Holdings*, 605 F. Supp. 2d at 46. The question is not what the market will look like immediately after the merger, but what the market would look like if the merged firm tried to act anticompetitively. *See Baker Hughes*, 908 F.2d at 989 n.9.

IV. THE MERGER WILL GENERATE SUBSTANTIAL PROCOMPETITIVE EFFICIENCIES

For all the reasons discussed above, the challenged acquisition is not likely to reduce competition. But even assuming there were some possibility of anticompetitive effects, they would be swamped by the significant procompetitive effects from the cost-saving (and thus likely price-reducing) efficiencies that this deal creates. *See supra* at 16-17 (explaining how such efficiencies are relevant to competitive-effects analysis under § 7 of the Clayton Act).

As Defendants' expert, Jonathan Orszag, will explain, [REDACTED]

Orszag then carefully examined the data and calculations of [REDACTED] to determine the extent to which their identified cost-saving synergies were of the type recognized as legally cognizable efficiencies. Again, relevant efficiencies are limited to likely savings that are "merger-specific" (in that they likely would not have been achieved but for the acquisition) and "verifiable by reasonable means" (in that they reflect sound business judgment rather than mere speculation). *Arch Coal*, 329 F. Supp. 2d at 150; *Staples*, 970 F. Supp. at 1089; *see also FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1300-01 (W.D. Mich. 1996) (crediting efficiencies identified through "the comprehensive studies done by defendants' experts").

As Orszag will demonstrate, of the reasonably verifiable cost savings identified by the merger consultants, [REDACTED] are merger-specific and another [REDACTED] are potentially merger-specific. Moreover, he will show that, when focusing on efficiencies that are attributable to variable costs—which are especially likely to lead to price reductions for consumers—there will be [REDACTED] merger-specific efficiencies and [REDACTED] potentially merger-specific efficiencies. Orszag will explain that these efficiencies will principally come from: (1) manufacturing efficiencies, such as where one company's production will be shifted to the other company's lower-cost facility; (2) purchasing efficiencies, such as where one company will gain the benefit of the lower prices the other company has been able to negotiate or where the merged entity will be able to negotiate lower prices due to greater combined volume; (3) distribution efficiencies, such as where the merged entity will be able to consolidate shipping loads or negotiate lower prices; and (4) design efficiencies, such as where minor changes to products would enable the increased use of common parts at lower prices

across the merged entity. Orszag will further explain why the refusal of the Government's expert, Ronald Quintero, to recognize these efficiencies primarily rests on an unsupported and unsupportable standard for verifying efficiencies and their merger-specificity. Namely, Quintero's proffered standard is so exacting and unrealistic that few if any efficiencies would ever satisfy it (which explains why Quintero implausibly suggests that there are virtually no cognizable efficiencies from this massive acquisition).

Finally, of the variable-cost efficiencies, Orszag will show that [redacted] million are directly attributable to cooking appliances ([redacted] million merger-specific; [redacted] million potentially merger-specific). In addition, he will explain that much of the remaining efficiencies are at least in part indirectly attributable to cooking appliances, because they concern savings for things like distribution that apply to groups of products including but not limited to cooking appliances. Moreover, he will explain that considering efficiencies even for products in markets outside those proven by the Government is not only generally appropriate, but particularly warranted here: as discussed above (and as the Government itself emphasizes), cooking appliances are complementary goods for products like refrigerators and dishwashers given some consumers' preference for the same brand across all kitchen appliances, and thus verifiable, merger-specific, variable-cost efficiencies for those non-cooking products will at least in part benefit consumers of the cooking products at issue here.

CONCLUSION

For all of the foregoing reasons, and based on the evidence to be adduced at trial, Defendants respectfully submit that this Court should deny the Government's claims that the acquisition violates § 7 of the Clayton Act.

Dated: October 26, 2015

Respectfully submitted,

/s/ Paul T. Denis
(with permission, by John M. Majoras)

Paul T. Denis (DDC No. 437040)
Paul H. Friedman (DDC No. 290635)
Mike Cowie (admitted *pro hac vice*)
Steven A. Engel (DDC No. 484789)
DECHERT LLP
1900 K Street NW
Washington, DC 20006
Telephone: (202) 261-3300
Facsimile: (202) 261-3333
paul.denis@dechert.com
paul.friedman@dechert.com
mike.cowie@dechert.com

Counsel for Defendant General Electric Company

/s/ John M. Majoras

John M. Majoras (DDC No. 474267)
Joe Sims (DDC No. 962050)
Michael R. Shumaker (admitted *pro hac vice*)
Hashim M. Mooppan (DDC No. 981758)
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
jmmajoras@jonesday.com
jsims@jonesday.com
mrshumaker@jonesday.com
hmmooppan@jonesday.com

Dana Baiocco (admitted *pro hac vice*)
JONES DAY
100 High Street, 21st Floor
Boston, MA 02110-1781
Telephone: (617) 449-6889
Facsimile: (617) 449-6999
dbaiocco@jonesday.com

Daniel E. Reidy (admitted *pro hac vice*)
Paula W. Render (admitted *pro hac vice*)
JONES DAY
77 West Wacker Drive
Chicago, IL 60601-1692
Telephone: (312) 782-3939
Facsimile: (312) 782-8585
dereidy@jonesday.com
prender@jonesday.com

Thomas Demitrack (admitted *pro hac vice*)
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212

Counsel for Defendants AB Electrolux and Electrolux North America, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 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: October 26, 2015

Respectfully submitted,

/s/ John M. Majoras

John M. Majoras (DDC No. 474267)
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
jmmajoras@jonesday.com

Counsel for Defendants AB Electrolux and Electrolux North America, Inc.