IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' MOTION TO RECALL KEITH MCLOUGHLIN

Defendants move to recall Keith McLoughlin to correct a mistaken assertion in his testimony given on November 19, 2015, as described in the declaration attached as Exhibit A. This Court has broad discretion to control the mode of examining witnesses, including recalling witnesses to correct prior testimony. Permitting Mr. McLoughlin to correct his testimony is appropriate in this circumstance because the correction is a simple retraction that benefits the Government. Defendants propose that Mr. McLoughlin retract the erroneous testimony by means of the attached declaration, with no live testimony or cross-examination, given that the correction is a simple retraction that the Government presumably has no reason to oppose. But if the Government declines to consent to the declaration in its response to this motion, then Defendants hereby move to recall Mr. McLoughlin for the sole purpose of providing live testimony on direct and cross examination related to the issue described in Exhibit A.

1. During Mr. McLoughlin's trial testimony on November 19, he stated that both Samsung and LG currently sell cooking ranges priced at $399 and $499. Tr. Vol. 8 at 2130:22-2131:16. After he completed his testimony and was excused, he realized that he had made a

mistake: he was recalling information about a Whirlpool range at those prices, but had attributed it to Samsung or LG ranges. Defendants' counsel promptly raised the issue with the Court the following morning and asked for an opportunity to correct the testimony. Tr. Vol. 9 at 2182:4-25.

Recalling Mr. McLoughlin is well within this Court's broad discretion to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to … determin[e] the truth." Fed. R. Evid. 611(a). In circumstances similar to this, various courts have routinely permitted recalling of a witness to clarify or correct previous testimony, or even to give additional testimony. *See, e.g.*, *United States v. Frazer*, 4 F.3d 982, at *1-2 (1st Cir. 1993) (per curiam) (upholding action of district court where it had allowed the government to recall a witness to correct testimony); *United States v. Coleman*, 805 F.2d 474, 482 (3d Cir. 1986) ("The district court has discretion to allow the recall of a witness."); *cf. Clagett v. Commonwealth*, 472 S.E.2d 263, 270 (Va. 1996) ("We hold that the trial court did not abuse its discretion in permitting the Commonwealth to recall this witness to correct or explain prior testimony.").

Not only is it within this Court's discretion, but it is appropriate to allow Mr. McLoughlin to correct his testimony in these circumstances. *First*, this would cause no prejudice to the Government. To the contrary, Mr. McLoughlin's recanting his testimony that Samsung and LG currently sell $399 ranges alleviates the Government's concern that the new information would require additional expert work and analysis. *Second*, allowing Mr. McLoughlin to correct his testimony will aid the Court in its ultimate goal of "ascertaining the truth." Fed. R. Evid. 102. *Third*, there has been no delay in bringing this matter to the Court's attention, as Defendants

diligently raised this issue with the Court the next morning after Mr. McLoughlin's initial testimony.

2. The Court should limit the scope of Mr. McLoughlin's testimony and cross-examination to his mistaken assertion about the current Samsung and LG pricing. "Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility." Fed. R. Evid. 611(b). This rule applies to all witnesses, including "witnesses recalled to provide additional direct examination." 4 Michael H. Graham, Handbook of Fed. Evid. § 611:11 (7th ed.). *See, e.g.*, *United States v. Hayward*, 6 F.3d 1241, 1255–56 (7th Cir. 1993) (restricting cross-examination of the prosecution's witness, who had been recalled for a second time, to the scope of the government's questioning on the second direct examination), *overruled on other grounds by United States v. Colvin*, 353 F.3d 569 (7th Cir. 2003).

The only purpose for which Defendants move to recall Mr. McLoughlin is to correct his statement about the prices at which Samsung and LG sell cooking ranges, and thus the scope of cross-examination should match that purpose. Thus, for example, the Government should not be permitted to question Mr. McLoughlin about the testimony that the Court solicited concerning Mr. McLoughlin's views about the possible effects that a rejection of the merger would have on the future business prospects of GE Appliances or Electrolux as stand-alone entities. The Government had a full and fair opportunity to cross-examine on that testimony and exercised that option to the extent it chose to do so. Tr. Vol. 8 at 1977:1-17.[1]

[1] Contrary to the Government's suggestion, Mr. McLoughlin's testimony is admissible even though Defendants never asserted a "failing firm" defense. The Supreme Court long ago held that evidence about a merging firm's "probable future ability to compete" is relevant to assessing competitive effects, regardless of whether a defendant has raised a "failing-company defense." *United States v. General Dynamics Corp.*, 415 U.S. 486, 501 (1974); *see also United States v. Int'l Harvester Co.*, 564 F.2d 769, 773-74 (7th Cir. 1977) (the district court "properly considered evidence" of a merging party's "weakness as a competitor," "even though defendants [did] not rely on the failing-company doctrine").

3. For these reasons, Defendants respectfully request that this Court permit Defendants to recall Mr. McLoughlin to correct his testimony on Monday, November 23, 2015, unless the Government consents to correction of his testimony through the Exhibit A declaration.

Dated: November 21, 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 21st day of November, 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: November 21, 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.