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

Public Redacted Version

UNITED STATES' PRETRIAL MEMORANDUM

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INTRODUCTION

American consumers spend well over $5 billion on nearly eight million major cooking appliances each year. The proposed acquisition would forever end competition between two manufacturers controlling iconic brands – Frigidaire and General Electric. The harm from the loss of that competition would be felt most by the most vulnerable consumers of major cooking appliances: individuals who can afford only lower-priced appliances, and the home builders and other "contract-channel" customers who already have only three meaningful choices and are just now emerging from the effects of the Great Recession.

Today, Electrolux and GE are close competitors in an already concentrated appliances industry. Both boast accurately of particular strength in cooking appliances, both disproportionately sell affordable appliances, and both are, along with Whirlpool, among the three companies that can effectively satisfy the specific needs of the builders and property managers who buy appliances through the contract channel. The proposed acquisition would eliminate the head-to-head competition between Electrolux and GE that has led to lower prices and higher quality for consumers. It would also increase the likelihood of coordination among the small number of remaining full-line suppliers. For many consumers, the proposed acquisition would reduce three meaningful options to two, creating a duopoly with two companies controlling most of the sales of ranges, cooktops, and wall ovens. Under Supreme Court precedent and the Government's Merger Guidelines, the high market concentration in each of six relevant markets – the markets for ranges, cooktops, and wall ovens and the markets for those same products sold through the contract channel – makes the proposed acquisition presumptively anticompetitive and unlawful.

Defendants bear a heavy burden to overcome this presumption, and here they cannot. The statistical market share measures that underlie the presumption actually understate the harm in this case. First and foremost, there can be no dispute that Electrolux and GE are close competitors and that the head-to-head competition between them has actually benefited consumers. The market share statistics also understate the harm because they assume that Sears' Kenmore brand is an independent competitor. But Kenmore is not so independent: Electrolux manufactures all of the hundreds of thousands of major cooking appliances that Kenmore sells. And the proposed acquisition is presumptively illegal even before accounting for Electrolux's direct challenge to GE's dominant position in the contract channel, where Electrolux has aggressively and successfully expanded over the last several years, introducing a lower-priced option that has taken business from GE. Finally, the market shares say nothing about Whirlpool's support of this merger, but the fact that a key competitor supports a proposed acquisition suggests that it will likely lead to less competition, not more. Looking at the other appliance suppliers, the presumption and all the evidence buttressing the presumption cannot be overcome by pointing to companies catering to the country's affluent (LG, Samsung, Bosch, Viking, Wolf, Dacor, and Miele) or selling almost entirely outside the United States (Haier, Midea, and Arcelik).

Accordingly, the United States respectfully requests that the Court permanently enjoin Electrolux's proposed acquisition of GE's appliances business.

STATEMENT OF FACTS

I. Electrolux Seeks to Buy GE's Appliance Business

Both Defendants manufacture and sell a full line of household appliances under several brand names. AB Electrolux is a Swedish company that makes and sells appliances throughout the world. In the United States, it is most well known for its Frigidaire line of appliances, a

leading American brand it purchased in the mid-1980s, which includes sub-brands "Frigidaire," "Frigidaire Gallery," and "Frigidaire Professional." Electrolux also sells major appliances in the United States under the "Electrolux," "Electrolux Icon," and "Tappan" brands. In 2014, Electrolux sold about 1.6 million major cooking appliances in the United States. Defendant General Electric's appliances division makes and sells appliances under the brand names "GE Monogram," "GE Café," "GE Profile," "GE," "GE Artistry," and "Hotpoint."[1] GE sold more than 2.1 million major cooking appliances in the United States last year.

On September 7, 2014, Defendant AB Electrolux agreed to buy GE's appliances business for $3.3 billion. Defendants cannot close the proposed acquisition unless the Court enters judgment in their favor. *See* Doc. No. 28 at ¶ 3.

II. Electrolux and GE Are Two of the Top Three Suppliers of Major Cooking Appliances

As Electrolux explained in its 2013 Annual Report, the sale of major appliances in the United States "is dominated by three manufacturers: Electrolux, Whirlpool and GE."[2] Electrolux, GE, and Whirlpool are particularly strong in major cooking appliances. [redacted] accurately describes the three companies as the "Top 3 players" in cooking.[3] Both GE and Electrolux view cooking as their strongest appliance category. GE describes itself as the "[c]lear leader" in cooking,[4] which it views as a valuable "heritage."[5]

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[1] PX00003 at -050. (Document pincites identify the last three digits of the bates label. Pursuant to the Court's Minute Order, the United States will submit a hyperlinked version of this brief on Tuesday October 27, 2015.)

[2] PX00001 at -026.

[3] [redacted]

[4] PX01201 at -410. [redacted]

Electrolux rightly sees itself in similar terms; in internal documents it describes itself as a "[l]eading cooking company."[6] Electrolux's and GE's leadership in the cooking category is also shown by the wide array of products they offer. In 2014, Electrolux offered [redacted] different cooking appliances (each with a unique stock-keeping unit or "SKU" number) and GE offered [redacted] Among U.S. cooking-appliance suppliers, [redacted]

"Cooking" in the appliances industry generally refers to ranges, cooktops, and wall ovens. A *cooktop* has burners or hot plates and it is installed on top of a kitchen counter or cabinet. A *wall oven* is built or slid into a kitchen cabinet or wall opening. A *range*, which is by far the most common major cooking appliance, combines the functions of a cooktop and oven. Small cooking appliances, such as microwave ovens and range hoods, are not at issue in this case.

If permitted, the proposed acquisition would create a single supplier that sells one of every two ranges in the United States (51%), and more than one of every three cooktops (36%) and wall ovens (37%).[7] In addition to selling cooking appliances under its own brand, Electrolux manufactures cooking appliances for Sears' Kenmore brand. That means that after the proposed acquisition, Electrolux would manufacture [redacted] Electrolux

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[redacted]

[6] PX00305 at -037. [redacted]

[7] The United States' economic expert, Michael Whinston of the Massachusetts Institute of Technology, will present at trial these and other economic analyses described in this Memorandum.

recognizes that such consolidation benefits producers, such as itself, GE, and Whirlpool, explaining in its 2013 annual report that "generally, a market consolidation is a good thing and could be positive for the appliance industry and Electrolux."[8]

III. Electrolux and GE Are Full-Line Suppliers That Make Most of Their Sales to Customers in the Value and Mass-Market Segments

Though Electrolux and GE are not the only companies that sell major cooking appliances, their positions in the markets distinguish them from nearly every other manufacturer. Defendants, and the industry generally, frequently separate appliance sales into segments based on their prices. While the labels for these segments are somewhat imprecise, the industry widely though inconsistently uses the terms "value," "mass," "mass premium," and "premium" to describe segments that are progressively more expensive.[9]

Electrolux offers cooking appliances "from opening price points to premium."[10] It starts with Tappan, then moves up to Frigidaire, and tops out at the high-end Electrolux brands. GE, too, offers cooking appliances beginning with its opening-price-point Hotpoint brand and extending to its premium Monogram line.[11] Both GE and Electrolux nonetheless sell most of their major cooking appliances in the lower-priced segments of the market. In 2014, nearly 90% of GE's ranges, cooktops, and wall ovens were sold under its opening-price point Hotpoint brand or its mass-market GE brand. Likewise, more than 95% of Electrolux's ranges, cooktops, and

[8] PX00002 at -067. This is not the only time Electrolux and other industry participants have observed that consolidation benefits the industry. *See infra* Argument § III.A.3.

[9] *See, e.g.*, PX00311 at -931, -934. Both Electrolux and GE have at times segmented products in different ways, for example by particular price points. *See, e.g.*, PX00217 at -011-015; PX01170 at -024; PX01412 at -049.

[10] PX00294 at -122.

[11] PX01412 at -006.

wall ovens were sold under its opening-price point Tappan brand or its mass-market Frigidaire and Frigidaire Gallery brands.

The only other manufacturer that can boast such a full line is Whirlpool, which also sells under several brands in addition to its namesake, notably Maytag and the more premium KitchenAid.[12] While Sears' Kenmore brand also spans most price segments,[13] the fact that Electrolux manufactures all of Sears' Kenmore-branded major cooking appliances[14] limits Sears' competitive significance. Other appliance suppliers focus on particular market niches. There are manufacturers that focus on the premium and super-premium segments, such as Bosch, Viking, Wolf, Dacor, and Miele.[15] [redacted] A few companies (Haier, Midea, Peerless-Premier, Avanti, and Danby) sell small amounts of only the lowest-priced products.

Electrolux and GE, along with Whirlpool, therefore account for an overwhelming portion of the most affordable cooking appliances available to American consumers. Following the industry's lead in analyzing sales by price segments, the United States' economic expert has analyzed cooking appliance sales in the lowest two pricing "quintiles," i.e., the bottom two-fifths of units by price. In 2014, these two lowest quintiles comprised about 2.4 million ranges. Looking at these two lowest quintiles, Electrolux, GE, and Kenmore accounted fo[redacted] of

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[12] *See* PX00201 at -561.

[13] *See* PX00364 at -006.

[14] *See* PX00364 at -007.

[15] [redacted].

[16] [redacted]). *See also infra* Argument § III.B.3.

the ranges sold at the lowest prices, with Whirlpool accounting for another [redacted] The figures for cooktops and wall ovens tell the same story:

Unit Share of Major Cooking Appliances in Lowest Two Quintiles (2014)

	Ranges	Cooktops	Wall Ovens	All Cooking
GE	31.5%	20.4%	25.9%	30.1%
Electrolux	23.5%	19.4%	17.1%	22.6%
Kenmore	[redacted]	[redacted]	[redacted]	[redacted]
Whirlpool	[redacted]	[redacted]	[redacted]	[redacted]
All other companies combined	[redacted]			

IV. Electrolux Has Disrupted a GE-Whirlpool Duopoly in the Contract Channel, Which this Proposed Acquisition Would Recreate

About a quarter of major cooking appliances are sold through the "builder" or "contract" channel, which are sales to homebuilders, property managers, and other commercial customers. Contract-channel customers' needs include, for example, a full line of kitchen appliances,[17] a variety of choices and models for each appliance (that is, many SKUs),[18] and a large and sophisticated distribution network that can meet their specific delivery, scheduling, and service needs.[19] Additionally, to be an effective competitor in the contract channel, an appliance

[17] PX01171 at -010 ("Builders buy kitchens, not SKUs . . . need complete kitchens."); *see also* PX01130 at -057 ("Characteristics and Requirements Unique to the Contract Channel (2013*) . . . A builder buys an entire appliance package.").

[18] *See* PX01203 at -358; *see also infra* Argument § III.B.2.

[19] *See* PX01130 at -057; *see also infra* Argument § III.B.2.

manufacturer must sell both directly to contract-channel purchasers and indirectly through builder distributors.[20]

Until the past few years, most contract-channel sales were made by GE or Whirlpool, with Electrolux a small but significant presence selling indirectly. [redacted] When Electrolux decided to expand, it observed that GE and Whirlpool had "an oligopoly of sorts in the contract world."[22]

Electrolux was in many ways well suited to serve the contract channel even before it embarked on this years-long expansion project. Its Frigidaire brand was well known,[23] it offered all major appliances,[24] it had products from opening price point to premium,[25] it had a large manufacturing footprint in North America, it had a dedicated builder sales team,[26] and it had an existing distributor network and a material amount of indirect sales to contract-channel purchasers.[27] With these advantages, Electrolux began in 2010 to add capabilities to serve contract-channel customers directly.[28] Today, Electrolux is in a strong third place behind GE

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[20] *See* PX00908 at -008 (Electrolux presentation explaining that lack of direct distribution capability means a company "cannot secure national builders").

[21] *See* PX00676 [redacted]

[22] PX00281. A consulting firm retained by Electrolux to assist in its entry into the contract channel likewise described the then-existing market structure as a "duopoly" between Whirlpool and GE in which customers were "open to a 3rd player." PX00726 at -050.

[23] *See* PX00714 at -389 (Frigidaire was known by 84% of consumers as of 2011).

[24] PX00608 at -063 (showing Electrolux as having over $20M in builder gross sales in each of the major appliances categories in 2006).

[25] *See* PX00322 ("EMA is w/Elux brand a full segment with upgrades").

[26] *See* Dep. Tr. Aaron Firestone (Electrolux) 86:18-22 (Aug. 20, 2015).

[27] *See* PX00468 at -157 (Electrolux 2008 contract market share was 5.1%).

[28] *See, e.g.*, PX00909 at -003 (outlining steps necessary to provide direct service).

and Whirlpool in the contract channel. And its documents show that it is continuously increasing its ability to meet contract-channel purchasers' needs,[29] that its share is growing,[30] and that it believes it will continue to grow significantly in the future.[31]

For sales to contract-channel purchasers, the proposed acquisition would result in Electrolux selling nearly two of every three ranges (64%), and approximately one of every two cooktops (51%) and wall ovens (47%). The markets for the sale of cooking appliances to contract-channel purchasers would have essentially two players, with Electrolux (even without Kenmore) and Whirlpool controlling 94% of the market for ranges and more than 90% of the markets for cooktops and wall ovens. Some of the premium and super-premium manufacturers have a small share, topping out at [redacted] for cooktops. [redacted] and zero for cooktops or wall ovens (because it does not sell these cooking appliances in the United States).

[29] *See, e.g.*, PX00892 at -336 [redacted]

[30] PX00649 at -003 (share grew from approximately 7% in 2010 to nearly 13% in 2013); *see also* PX00649 at -004 (listing wins among top 200 single family builders); PX00508 at -007 [redacted]

[31] *See* PX00286 at -312 (describing Electrolux as "fasting growing" contract-channel supplier).

Unit Share of Major Cooking Appliances in Contract Channel (2014)

	Ranges	Cooktops	Wall Ovens	All Cooking
GE	46.0%	40.7%	37.3%	44.5%
Electrolux	17.7%	9.8%	9.8%	15.9%
Kenmore	[redacted]	[redacted]	[redacted]	[redacted]
Whirlpool	[redacted]	[redacted]	[redacted]	[redacted]

[redacted]

V. Direct, Head-to-Head Competition Between Electrolux and GE Routinely Leads to Benefits for Consumers

Given the overlap in business models between Electrolux and GE, it is unsurprising that they meet on the competitive battlefield on a near-daily basis. Indeed, the companies have strategically targeted one another's strengths, with for example Electrolux making expansion in the contract channel and at Home Depot – both traditional GE bastions – a cornerstone of its strategic planning. This competition, which the proposed acquisition will end, has led to lower prices, better service, and product improvements.

A. Electrolux's Aggressive Expansion into the Contract Channel Has Created New and Valuable Competition

Defendants' own documents and testimony show that Electrolux has grown in the contract channel over the last three years, taking business from GE by offering better prices and service, while forcing GE to up its game. For example:

- [redacted] has shifted a significant amount of its appliances buying from GE to Electrolux. Electrolux offered lower prices and

better services than GE.[32]

- [redacted] the country's second largest single-family homebuilder, was an exclusive GE customer until the end of 2013, when several [redacted] divisions switched to Electrolux to obtain better service.[33]

- [redacted] another large single-family homebuilder, had used GE for more than 30 years when it sent out requests for proposal early this year.[34] Electrolux's bid offered lower prices than GE's.[35] [redacted]

- [redacted] a national single-family builder, also dropped its historical exclusive relationship with GE in 2013, with much of its business going to Electrolux. Electrolux won the business by providing "a compelling package of products and pricing versus [redacted] current offerings, as well as a different approach to delivery and service than the 'Big 2' which could actually offer an avenue for real improvement should the need arise."[37]

GE's regular-course-of-business "meeting-competition" data confirm that Electrolux has frequently forced GE to lower prices to contract-channel customers. [redacted]

[32] *See* Dep. Tr. of Anthony Pollard (GE) at 103:22-104:10 (Sept. 30, 2015).

[33] *See* PX01286 at -590; PX01234 at -296; *see also* PX01288 at -363; PX01251 at -185-86.

[34] *See* PX01585 at -912.

[35] *See* PX01575 at -281.

[36] *See* PX01579 at -404.

[37] PX00791 at -099 (quote from [redacted] purchasing head).

GE is well aware of the inroads Electrolux has made and the threats its successes pose to GE.[38] For example, one GE contract-channel executive wrote that Electrolux is "out there with gut-wrenching pricing."[39] Another executive wrote that Electrolux was "getting more aggressive and going after single family customers in almost every market."[40] GE believes that Electrolux was doing so largely by offering lower prices,[41] sometimes so low they were "scary."[42]

B. Electrolux and GE Vigorously Compete to Sell Ranges, Cooktops, and Wall Ovens to Consumers

In addition to sales through the contract channel, cooking appliances are sold to consumers (i.e., the user of the appliance) by retailers, ranging from huge chains such as Sears to small local dealers. Electrolux's and GE's competition to sell to consumers through retailers is as fierce as it is in the contract channel, but because retailers are intermediaries between consumers and appliance suppliers, and because consumers do not individually negotiate prices, the competitive interactions are not always as well documented. Still, the evidence reveals the many ways in which Electrolux and GE compete in the retail channel: (i) Defendants frequently compete by lowering prices and improving quality to match one another; (ii) Electrolux in recent

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[38] *See* PX01132 at -853 (explaining that Electrolux was "selling low to [redacted] in order to get the business so they can sell other builders based on serving a few Horton divisions.").

[39] PX01218 at -741.

[40] PX01287 at -763.

[41] PX01285 at -814 ("Fridge has been a low cost leader for a long time"); PX01359 at -715 ("The trend continues for Electrolux to continue to beat down the pricing."); PX01271 at -947 ("Extremely competitive pricing from Frigidaire continues to place a great deal of pressure on GE's property management business. GE has lost share to Frigidaire in this category."); PX01287 at -763 ("I've heard their [Frigidaire] pricing is dirty low"); PX01240 at -196 ("The wildcard is Frigidaire . . . . I would not put it past [Frigidaire to] bury the pricing" for [redacted] Hawaii division); PX01360 at -515 ("[W]e can't meet or approach the pricing that Frig has in the market today for non 2014 models.").

[42] PX01247 at -986 (" has also given me the frig pricing, it's scary!").

years has made attacking GE's strengths, particularly at [redacted] a centerpiece of its strategic plans,[43] and GE, in turn, has defended its own turf while opening a new front at Lowe's, historically an Electrolux stronghold; and (iii) consumers often find themselves choosing between Electrolux and GE products.

Head-to-Head Price Competition. As in the contract channel, documents and data show that GE has responded to Electrolux's lower pricing. [redacted]

Defendants' documents bear out the intensity of head-to-head competition between Electrolux and GE. For example, Electrolux recently noted that GE was offering significant discounts because of Electrolux's competition: "GE is not sitting back during the summer months. . . . The up to $2,000 rebate goes after Electrolux."[44] In another example, Electrolux noted that "GE is still very aggressive in cooking driving our margins down to keep floor space."[45] GE similarly feels competitive pressure from Electrolux. Last year, GE followed Electrolux and Whirlpool in implementing a "fit guarantee" program that offered to reimburse consumers if they have to modify their kitchen to fit a replacement GE wall oven. At the time, Whirlpool offered reimbursement up to $250 while Frigidaire offered reimbursement up to $300.

[43] PX00697 at -003.

[44] PX00392 at -034.

[45] PX00318 at -672.

GE followed Frigidaire's higher payment.[46]

Direct Competition. As GE executives will explain, Home Depot is, and has been for many years, GE's most important retail partner. GE and Home Depot have enjoyed a special relationship under which GE delivers all appliances sold at Home Depot in exchange for assurances that its appliances will account for a significant portion of the appliance floor display in Home Depot stores.[47] No Electrolux products were sold at Home Depot until 2012. Electrolux identified entry and growth at Home Depot as one of its "strategic priorities" in 2010. It has succeeded, with sales increasing by [redacted]t in 2014 over the year before.[48] At the same time, GE has made an aggressive push into Lowe's, historically one of Electrolux's largest retail partners.[49] This, too, has been successful.[50]

Consumers Frequently Choose Between GE and Electrolux. As an analysis commissioned by Electrolux found, "Frigidaire cooking product buyers consider GE most often followed by Kenmore before making a purchase."[51] Confirming these findings, a recent Electrolux "Competitor Price Study" determined that "Whirlpool and GE are the Top 2

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[46] *See* PX01383 at -227 (GE "propose[d] a match . . . to Frigidaire's offer of $300.").

[47] *See* PX01606 at -909-11 (agreement between GE and Home Depot).

[48] *See, e.g.*, PX00317 at -[redacted] PX00432 at -694 (draft Home Depot talking points for Capital Markets Day on November 20, 2014 noted that the Home Depot relationship is "continuing to grow rapidly, to our satisfaction.").

[49] *See* PX01729 at -694 (describing "strategic partnership" between Lowe's and Electrolux); PX00683 [redacted]

[50] PX01539 at -499 [redacted]

[51] PX00397 at -013; *see also id.* at -070 ("As indicated above, this is further evidence that GE is a major competitor of Frigidaire.").

competitors for Electrolux in Cooking" and that, in particular, "GE poses very dense competition to Electrolux in CookTops and Ranges."[52]

ARGUMENT

Under Section 7 of the Clayton Act, a merger is illegal "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly." 15 U.S.C. § 18 (emphasis added). Congress used the word "may" in Section 7 "to indicate that its concern was with probabilities, not certainties." *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). Accordingly, to prevail, the United States need not show that the proposed acquisition will cause competitive harm, but rather only "that the merger create[s] an appreciable danger of [anticompetitive] consequences in the future." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 719 (D.C. Cir. 2001) (quoting *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986)).

Merger analysis typically begins with a determination of the relevant geographic and product markets. *See, e.g.*, *FTC v. Sysco*, -- F. Supp. 3d --, 15-00256, 2015 WL 3958568, at *10 (D.D.C. June 23, 2015). If the United States shows that the transaction would lead to "'a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of firms in that market,'" that "establishes a presumption that the merger will substantially lessen competition." *Heinz*, 246 F.3d at 715 (quoting *U.S. v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963)).

I. The Relevant Markets

Market definition is the first, and often the most consequential, analysis that courts conduct in analyzing mergers. Frequently, the government alleges narrow markets, the

[52] PX00225 at -004.

defendants describe broader markets, and the court must choose between the competing approaches. That is not the case here. The markets the United States describes are the same the Defendants use in their businesses. Defendants merely complain that these markets – like all antitrust markets – do not have impermeable boundaries. But such boundaries between markets do not exist in the real world and are not required for market definition. *See Brown Shoe*, 370 U.S. at 326.

Market definition has two dimensions: geographic and product. For purposes of this case, the United States is a relevant geographic market. Indeed, market participants treat appliance markets as national as a matter of course.[53] Defendants do not contest that the United States is a relevant geographic market for the purposes of this case.[54]

Each of the following is a relevant product market: (1) ranges, (2) cooktops, (3) wall ovens, (4) ranges sold to contract-channel purchasers, (5) cooktops sold to contract-channel purchasers, and (6) wall ovens sold to contract-channel purchasers.

Product markets are determined by "reasonable interchangeability," which is an inquiry into what products consumers would substitute for other products if prices in the relevant market increase. *Brown Shoe*, 370 U.S. at 325. Since the lines between markets are rarely bright, "[c]ourts look to two main types of evidence in defining the relevant product market: the 'practical indicia' set forth by the Supreme Court in *Brown Shoe* and testimony from experts in the field of economics." *Sysco*, 2015 WL 3958568, at *12. Both the practical indicia and economic analysis are tools to answer the same question: whether a price increase in the

[53] For example, Defendants routinely calculate market shares on a national basis. *See, e.g.*, PX00481 at -963 [redacted] PX00821 at -513.

[54] Dkt. No. 33, ¶ 27 ("Electrolux admits that it has stipulated that it 'will not argue that the relevant geographic market is broader than the United States.'"); Dkt. No 36, ¶ 27 (same for GE).

proposed market would likely "drive [enough] consumers" to choose an alternative that the price increase would be unprofitable. *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1038 (D.C. Cir. 2008).

Courts in this district routinely rely on the *Brown Shoe* factors to define the relevant product market. *See, e.g., Sysco*, 2015 WL 3958568, at *12; *U.S. v. H&R Block Inc.*, 833 F. Supp. 2d 36, 51-60 (D.D.C. 2011); *FTC v. CCC Holdings,* 605 F. Supp. 2d 26, 39-44 (D.D.C. 2009); *FTC v. Swedish Match,* 131 F. Supp. 2d 151, 159-64 (D.D.C. 2000); *FTC v. Cardinal Health, Inc.,* 12 F. Supp. 2d 34, 46-48 (D.D.C. 1998); *FTC v. Staples,* 970 F. Supp. 1066, 1075–80 (D.D.C. 1997). The specific factors identified in *Brown Shoe* are "[1] industry or public recognition of the [relevant market] as a separate economic entity, [2] the product's peculiar characteristics and uses, [3] unique production facilities, [4] distinct customers, [5] distinct prices, [6] sensitivity to price changes, and [7] specialized vendors." *Whole Foods*, 548 F.3d at 1037-38 (quoting *Brown Shoe,* 370 U.S. at 325).

Expert economists frequently apply the "hypothetical monopolist test" from the Department of Justice's and Federal Trade Commission's Horizontal Merger Guidelines (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf ("Merger Guidelines").[55] The hypothetical monopolist test asks whether a profit-maximizing monopolist likely would impose a "small but significant nontransitory" price increase on at least one product sold by the merging firms. *See, e.g.*, *Sysco*, 2015 WL 3958568, at *18.

A. Each of Ranges, Cooktops, and Wall Ovens Constitute a Relevant Market

Defendants do not seriously contest that each of ranges, cooktops, and wall ovens is a

[55] While not binding on this Court, courts routinely consider the Merger Guidelines to be persuasive authority. *See, e.g.*, *Cardinal Health, Inc.*, 12 F. Supp. 2d at 53.

relevant antitrust market. *First,* ranges, cooktops, and wall ovens have no functional substitutes except, in a limited way, one another.[56] But, for most consumers, substituting a cooktop and wall oven combination for a range would require a kitchen redesign and significantly more money. *Second,* the appliance industry views each as a distinct market. Electrolux's internet homepage, for example, lists the appliance categories it sells: the first three are cooktops, wall ovens, and ranges.[57] Defendants and others also often distinctly analyze the competition to sell ranges, cooktops, and wall ovens.[58] *Third,* the economic evidence leads to the same conclusion. Professor Whinston will show, for example, that margins Defendants earn on the sales of ranges differ significantly from the margins for cooktops and wall ovens.

B. Each of Ranges, Cooktops, and Wall Ovens Sold Through the Contract Channel Constitutes a Relevant Product Market

To find that the sales of cooktops, wall ovens, and ranges to contract-channel customers are relevant markets, the Court need only confirm what Defendants, their competitors, and customers already know: "Contract is completely different from retail."[59] Market definition is, at core, "a matter of business reality – a matter of how the market is perceived by those who strive for profit in it." *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132 (D.D.C 1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987). The business reality is that sales to the contract channel

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[56] As Professor Whinston will explain at trial, the conclusion that the analysis is likely anticompetitive does not change if all major cooking appliances are combined in a single market.

[57] *See Home Appliances: Kitchen Appliances, Washers & Dryers*, Electrolux (Oct. 20, 2015), www.electroluxappliances.com.

[58] *See, e.g.*, PX01665; PX01272; PX00715.

[59] PX00350 at -873. [redacted].

are made to different customers with different needs by different salespeople through different distribution means at different prices.

"A broad, overall market may contain smaller markets which themselves 'constitute product markets for antitrust purposes.'" *H&R Block*, 833 F. Supp. 2d at 51 (quoting *Brown Shoe,* 370 U.S. at 325). "[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes." *Staples,* 970 F. Supp. at 1075.[60]

The seven *Brown Shoe* factors universally point to the conclusion that sales to contract-channel customers are a distinct antitrust market. *First*, evidence of "industry and public recognition" that the contract channel is distinct is overwhelming. GE's "Contract vs Retail" slide, for example, makes the point particularly starkly but by no means uniquely.[61] "The 'industry or public recognition of the submarket as a separate economic' unit matters because we assume that economic actors usually have accurate perceptions of economic realities." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,* 792 F.2d 210, 218 n.4 (D.C. Cir. 1986); *see also H&R Block*, 833 F. Supp. 2d at 52 ("When determining the relevant product market, courts often pay close attention to the defendants' ordinary course of business documents.").

Second, there are several "peculiar characteristics" of sales through the contract channel.

[60] When a market is defined by particular customers, rather than a product, economists (and the Merger Guidelines) refer to it as a "price discrimination" market. *See* Merger Guidelines § 4.14. The courts apply the same standard to price discrimination markets as they do to any other markets. *See Sysco*, 2015 WL 3958568, at *23 (finding it unnecessary to resolve question of whether there was a price discrimination market because "the ordinary factors that courts consider in defining a market – the *Brown Shoe* practical indicia and the Merger Guidelines' SSNIP test – support a finding that broadline distribution to national customers is a relevant product market.").

[61] PX01543 at -289 (distinguishing "customer characteristics" between contract and retail purchasers and the distinct needs of each). *See also* PX01171 at -005; PX01130 at -057 (describing "characteristics and requirements unique to the contract channel").

A GE document helpfully titled "Characteristics and Requirements Unique to the Contract Channel (2013)" lists several such unique characteristics, including package selling, multiple projects, 100% availability, inventory overlap, and support services.[62]

Third, while there are no "unique production facilities," participants in the contract channel must have distinct capabilities beyond what is necessary to sell major cooking appliances through retailers.[63] Suppliers serving the contract channel must have, among other things, a full-line of product offerings (i.e., a large number of SKUs to offer lots of different product variants and price points),[64] the ability to provide cooking appliances reliably on extremely short notice,[65] and sales forces capable of serving the very fragmented builder market.[66] *See Sysco*, 2015 WL 3958568, at *13 (importance of "product breadth and diversity"); *id.* at *14 ("Broadline facilities also have large salesforces attached to them.").

Fourth, there can be no question that there are "distinct customers" who purchase through the contract channel. The contract channel involves sales to builders and property managers, not consumers. Defendants have no difficulty identifying the features of contract-channel

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[62] PX01130 at -057-58 (emphasis added).

[63] *See, e.g.*, PX01290 at -788 ("We [GE] serve Contract differently than the Retail business. . . . Each time we try to make Contract fit a Retail execution, it becomes muddy, doesn't fit, and impacts our simple clear solutions."). Whirlpool's CEO Jeff Fettig has also described the capabilities needed to serve contract-channel customers: "It's about supply chain capabilities, it's about services, it's about having a different business model, if you will." PX01203 at -358; [redacted]

[64] *See* PX01266 at -010; Dep. Tr. of Anthony Pollard (GE) 36:23-37:2 (May 12, 2015).

[65] *See* PX00726 at -035 (describing "required" investment to achieve "[k]ey capability" of "[l]ead time of 24-48 h[ou]rs and meeting "[d]elivery window of 8 h[ou]rs" in order to "serve direct [builder] segment"); PX00341 at -009 (list of "Contract Requirements" including "Ensuring Job Site delivery dates are met").

[66] *See, e.g.*, PX01543 at -277.

customers.[67]

Fifth, customers in the contract channel receive "distinct prices."[68] Most contract-channel sales are made under individually negotiated pricing.[69] By contrast, in the retail channel, prices typically are not individually negotiated. And contract-channel prices are, in most cases, significantly lower than retail prices.[70]

Sixth, most contract-channel customers likely will not respond to price changes by purchasing through retail, demonstrating that any "sensitivity to price changes" is low. While some small contract-channel customers (whose delivery and other demands are less exacting than most contract-channel customers) may find retail plausible in some circumstances, for many contract-channel purchasers retail is not an option at all.[71] And the fact that some contract-channel customers might buy from retailers if prices increase in the contract channel does not defeat the contract-channel market definition.

Four recent successful merger challenges are demonstrative. Earlier this year, Judge Mehta found that "broadline distribution" – that is, distribution services offering a broad array of

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[67] *See* PX01543 at -288 (identifying "Contract customer types").

[68] The Merger Guidelines consider the same question in identifying price-discrimination markets where "sellers can discriminate e.g., by profitably raising price to certain targeted customers but not others." Merger Guidelines § 3.

[redacted]

[71] *See* Dep. Tr. of Aaron Firestone (Electrolux) 314:24-315:3 (Sept. 9, 2015) ("So you're telling your distributor, as long as you provide good service to your builder, the builder might not switch to Best Buy just because Best Buy has a low promotional price, correct? A: Yes."); PX01083 ("Retail is not the competition in contract they are just a pain in the neck[.] Always over deliver/service your contract customers and price is not an issue.").

food products to a broad array of customers – constituted a relevant market and that, in fact, national broadline customers constituted another, narrower market within the broad market even though it was uncontested that some customers used other distribution methods. *Sysco*, 2015 WL 3958568, at *16. In *Whole Foods*, the D.C. Circuit defined a market of "premium natural and organic supermarkets," while acknowledging that many customers for such premium markets could and did shop at traditional supermarkets. 548 F.3d at 1040. In *Staples*, Judge Hogan enjoined a merger in the market for the sale of consumable office supplies through office superstores, even though "[t]he products in question are undeniably the same no matter who sells them, and no one denies that many different types of retailers sell these products." 970 F. Supp. at 1075. Similarly, in *Cardinal Health*, Judge Sporkin found a relevant market for the wholesale distribution of prescription drugs, over defendants' objection that many customers switched between other distribution options. 12 F. Supp. 2d at 47-49 ("All the forms of distribution must, at some level, compete with one another.").

Seventh, "distinct vendors" characterize the contract channel. Contract-channel customers purchase either directly from manufacturers or through specialized builder distributors.

Professor Whinston will explain that the economic evidence leads to the same conclusion. As he observes, contract-channel purchasers face individualized pricing, and specific customers can be targeted for price increases. The existing differences in prices between retail and contract and contract-channel purchasers' additional service needs mean that a hypothetical monopolist supplier to these purchasers would likely impose at least small but significant and non-transitory price increases. Professor Whinston will further explain that some contract-channel purchasers already pay more than the available retail prices, likely because their

exacting service and other business needs are worth the extra cost.

II. The Proposed Acquisition is Presumptively Illegal under Section 7 Because the Combined Firm Would Control an Undue Share of Highly Concentrated Markets

Once the United States has properly defined one or more markets, courts next analyze whether substantial anticompetitive effects are likely in these markets. This Circuit does so through a burden-shifting framework. A merger that significantly increases concentration in an already concentrated market is presumptively illegal. *See Phila. Nat'l Bank*, 374 U.S. at 365-66; *Sysco*, 2015 WL 3958568, at *32. Once the presumption is established, the burden of rebutting Plaintiff's prima facie case shifts to Defendants. *Whole Foods*, 548 F.3d at 1035. To satisfy their burden, Defendants must show that the evidence of concentration "give[s] an inaccurate account of the merger's probable effects on competition in the relevant market." *Heinz*, 246 F.3d at 715 (alterations and quotation marks omitted). If Defendants offer sufficient evidence to rebut the presumption, the United States must prove that the acquisition is likely to substantially reduce competition. *Heinz*, 246 F.3d at 715.

Courts may use two different indicia of concentration to establish the presumption. In *Philadelphia National Bank*, the Supreme Court found a relevant market unduly concentrated when the merging parties controlled 30% of the market. 374 U.S. at 364 ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat."). To determine whether the government has established the presumption of anticompetitiveness, courts also routinely apply the Herfindahl–Hirschmann Index ("HHI") thresholds set forth in the Merger Guidelines. *See, e.g.*, *H&R Block*, 833 F. Supp. 2d at 71; *Sysco*, 2015 WL 3958568, at *32. HHI figures are "calculated by summing the squares of the individual firms' market shares," a calculation that

"gives proportionately greater weight to the larger market shares." Merger Guidelines § 5.3. "Mergers resulting in highly concentrated markets [HHI above 2500] that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." *Id.*

As Professor Whinston's charts below show, in every one of the six markets alleged the market shares, the HHIs, and the increases in HHI, exceed the presumption threshold, whether market share is calculated by units sold or revenue, and treating Kenmore as an entirely independent competitor, which it is not (recall Electrolux makes Kenmore's cooking appliances).

Concentration Levels for U.S. Cooking Appliances Sales (Unit Shares)

	Defendants' Combined Share	**Post-Acquistion HHI**	**Increase in HHIs**
All Ranges	51.5%	3,506	1,315
All Cooktops	36.5%	2,981	568
All Wall Ovens	37.1%	3,056	607
Ranges (Contract)	63.7%	5,016	1,629
Cooktops (Contract)	50.5%	4,225	796
Wall Ovens (Contract)	47.1%	4,167	734

Concentration Levels for U.S. Cooking Appliances Sales (Revenue shares)

	Defendants' Combined Share	**Post-Acquisition HHI**	**Increase in HHIs**
All Ranges	44.5%	2,792	948
All Cooktops	31.4%	2,501	326
All Wall Ovens	30.8%	2,714	377
Ranges (Contract)	58.6%	4,465	1,272
Cooktops (Contract)	43.0%	3,742	480
Wall Ovens (Contract)	39.1%	3,820	454

In fact, in most of the markets both the HHIs and the increases resulting from the proposed acquisition significantly exceed the thresholds. This is an easy case for application of the presumption. *See*, *e.g.*, *Phila. Nat'l Bank*, 374 U.S. at 364; *Heinz*, 246 F.3d at 716 (merger that would have increased HHI by 510 points from 4,775 created by "wide margin" presumption of anticompetitive effects); *FTC v. PPG Industries, Inc.*, 798 F.2d 1500, 1502-03, 1506 (post-merger HHI of 3,295 left "no doubt that . . . the Commission [was entitled] to some preliminary relief"); *ProMedica Health System, Inc. v. FTC*, 749 F.3d 559, 568 (6th Cir. 2014) (merger resulting in HHI increase of 1,078 to 4,391 "blew through those barriers in spectacular fashion"); *H&R Block*, 833 F. Supp. 2d at 72 (increase of 400 resulting in post-acquisition HHI of 4,691 created presumption).

III. Defendants Cannot Rebut or Overcome the United States' Case

Defendants can prevail only by showing that the concentration figures give an inaccurate picture of the competitive effects of the proposed transaction. But the concentration figures underestimate the likely harmful effects of the merger, which is likely to lead to both "unilateral" and "coordinated" anticompetitive effects. Nonetheless, Defendants have advanced a bevy of mostly unrelated arguments that the merger is not likely to lead to a substantial reduction in competition. Most are distractions; none are convincing.

A. The Levels of Concentration in the Markets Conservatively Describe the Competitive Harm the Proposed Acquisition Would Cause

Merging parties may rebut the presumption that their merger is illegal, but only if they can "'show that the market-share statistics [give] an inaccurate account of the probable effects on competition.'" *Heinz*, 246 F.3d at 715 (quoting *U.S. v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 120 (1975)). The showing is not insubstantial, particularly where, as here, concentration in the relevant markets is high: "The more compelling the prima facie case, the more evidence the

defendant must present to rebut it successfully." *Heinz*, 246 F.3d at 725 (quotations omitted). Defendants here cannot rebut the presumption by showing that the high concentration figures are unrepresentative because the competitive reality for cooking appliances actually establishes the opposite.

1. The Concentration Calculations Themselves Are Conservative

For several reasons, the United States' concentration calculations are conservative. To begin with, they treat Kenmore as an independent competitor, overstating its competitive significance. Electrolux manufactures all Kenmore ranges, cooktops, and wall ovens,[72] meaning Electrolux would benefit from an increase in sales of those Kenmore products. In fact, Electrolux itself often analyzes Kenmore's cooking business as if it was another appendage of Electrolux rather than a competitor.[73] The current market share of Kenmore overstates its competitive significance for the additional reason [redacted]

More broadly, the concentration figures are an average over large markets in which Electrolux and GE are close competitors that concentrate much of their competitive vigor in the same segments. *See Heinz*, 246 F.3d at 717 (finding that the government's "market concentration statistics are bolstered by the indisputable fact that the merger will eliminate

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[72] PX00364 at -007 (Electrolux's percentage of Kenmore's cooking business is "100%").

[73] *See, e.g.*, PX00270 at -037 ("It is our intention to compete against other brands w[ith] Frigidaire Pro or Kenmore."); PX00282 at -949 (Electrolux job positing for a "Kenmore Product Development Manager" with responsibilities for, among other things, "Keep[ing] Kenmore and [Electrolux] brands at Sears ahead of the competition line.").

[74] [redacted]

competition between the two merging parties") (footnote omitted); *Whole Foods*, 548 F.3d at 1039 (enjoining merger based on harm to "core" customers) (opinion of Brown, J.).

2. The Proposed Acquisition Will Likely Result in the Combined Firm Unilaterally Raising Prices and Reducing Quality of Cooking Appliances

A merger violates Section 7 of the Clayton Act when it eliminates a close rival that, before the merger, created competition that constrained price increases and reductions in quality. *See Sysco*, 2015 WL 3958568, at *39 ("Courts have recognized that a merger that eliminates head-to-head competition between close competitors can result in a substantial lessening of competition.").

Electrolux and GE presently compete to sell many different types of products in many ways to many different types of customers. The United States will provide evidence that illustrates and even quantifies the loss of this head-to-head competition from the proposed acquisition. *First*, as the market shares demonstrate, Electrolux and GE are two of the only three appliance manufacturers with significant sales of cooking appliances to contract-channel purchasers. And even these shares understate the competitive discipline that Electrolux's aggressive and continuing expansion has brought to this market and how much head-to-head competition in these markets will be lost if the proposed acquisition is not enjoined. As described above, Electrolux has made great strides in recent years in expanding its sales to contract-channel purchasers. To do so, Electrolux has aggressively and successfully targeted purchasers who previously did business with GE.

Second, the combined market shares are high but mask the even more concerning fact that both companies are particularly strong rivals in making and selling affordable major cooking

appliances, with Whirlpool as their only significant competitor.[75] Professor Whinston's analysis of manufacturer data shows that, for the cheapest 40% of cooking products sold in the United States, the combined firm would manufacture more than 70% of ranges, 60% of wall ovens, and 50% of cooktops, and [redacted]. Consumers needing to buy on a budget will be left with very few options.

Third, GE and Electrolux's close competition for sales of cooking products at retail is illustrated by the vigorous efforts each has expended to increase sales at the major retail outlets where the other is strongest and by efforts to attack specific products or product lines offered by the other. As described above, Electrolux and GE have targeted each other's retail strengths, and competition between them has led to lower prices.

Fourth, economic evidence confirms that the proposed acquisition is likely to lead to higher prices throughout the contract and retail channels, with harm perhaps disproportionately borne by purchasers of the lower-priced models. Professor Whinston conducted an economic study of "upward pricing pressure," which measures the incentives for Electrolux to raise prices after it acquires GE. Upward pricing pressure is a standard and well recognized tool of antitrust economics based on an analysis of merging companies' margins and the extent to which a price increase on one of the firm's products will drive its customers to purchase from its merger partner (what economists call "diversion"). *See H&R Block*, 833 F. Supp. 2d at 86-87 ("[H]igher diversion rates between merging parties allow the firms to recapture more lost sales following a price increase, and therefore lead to greater upward pricing pressure," while "higher margins

[75] *See, e.g.*, PX01397 at -330 (GE competitive analysis undertaken in early 2013 stating that the company "over-perform[s] in the bottom quartile" and is "the leading brand at the low-end of the market."); PX01598 at -008 (GE, Whirlpool, and Frigidaire brands dominate lowest four price segments); PX00246 at -012-018 (identifying only Whirlpool (Amana) and GE (or Hotpoint) in "Competitive Comparison" of Frigidaire ranges).

lead to greater unilateral price increases because the value of recaptured sales is higher"); *Swedish Match*, 131 F. Supp. 2d at 169 ("High margins and high diversion ratios support large price increases, a tenet endorsed by most economists."). Professor Whinston's analysis of manufacturer data concludes that the proposed acquisition will result in high upward pricing pressure.

Finally, that Whirlpool is similar to Electrolux and GE does not make the proposed acquisition any less problematic. "[T]he merging parties need not be the top two firms to cause unilateral effects." *Sysco*, 2015 WL 3958568, at *39; *see also* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 9.04 (4th ed. 2014) ("[U]nilateral effects theories do not require that the output of the two merging firms be the closest possible substitutes for one another."). Rather, "a merger with a relatively adjacent partner – say, among the two or three closest rivals – will enable the post-merger firm to lose fewer sales because at least a portion of the sales that are diverted to this particular rival will then be retained within the post-merger firm." Areeda, at ¶ 9.04. In *H&R Block*, for example, a company not part of the enjoined merger – Intuit, the maker of Turbo Tax – had a market share over 60 percent and was indisputably the closest competitor to both merging companies. *See H&R Block,* 833 F. Supp. 2d at 44, 83-84; *see also Heinz*, 246 F.3d at 718 (enjoining merger of baby food manufacturers even though third company, Gerber, was closest competitor of both defendants). Moreover, as discussed in the next section, Whirlpool's behavior, far from mitigating anticompetitive concerns, raises additional ones.

3. The Proposed Acquisition Will Increase the Likelihood of Actual or Tacit Coordination Between at Least Electrolux and Whirlpool

As a century of antitrust law recognizes, "oligopolistic market structures" are likely to result in "tacit coordination," *Heinz*, 246 F.3d at 725 (quoting Areeda ¶ 901b2), where a few

major producers can engage in "interdependent pricing . . . by recognizing their shared economic interests with respect to price and output decisions." *Id*. at 724 n.23. "Tacit coordination 'is feared by antitrust policy even more than express collusion, for tacit coordination, even when observed, cannot easily be controlled directly by the antitrust laws. It is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur.'" *Id.* (quoting Areeda ¶ 901b2).

"Since the government has established its prima facie case, the burden is on the defendants to produce evidence of 'structural market barriers to collusion' specific to this industry that would defeat the 'ordinary presumption of collusion' that attaches to a merger in a highly concentrated market." *H&R Block,* 833 F. Supp. 2d at 77 (quoting *Heinz,* 246 F.3d at 725). An acquisition is likely to result in coordinated interaction where: (1) the acquisition would significantly increase concentration and lead to a moderately or highly concentrated market, (2) the market shows signs of vulnerability to coordinated conduct, and (3) there is a credible basis to conclude that the acquisition may enhance that vulnerability. Merger Guidelines § 7.1.

The merger will significantly increase concentration and lead to highly concentrated markets. As discussed above, the merger significantly increases concentration in several highly concentrated markets. Such significant market concentration makes it "easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level." *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1282-83 (7th Cir. 1990) (Posner, J.) (quotation marks omitted).

The merger would leave the contract-channel markets with two dominant suppliers having in excess of 90 percent market share. "With only two dominant firms left in the market,

the incentives to preserve market shares would be even greater, and the costs of price cutting riskier, as an attempt by either firm to undercut the other may result in a debilitating race to the bottom." *CCC Holdings*, 605 F. Supp. 2d at 67; *see also Rockford Memorial*, 898 F.2d at 1283 ("Three firms having 90 percent of the market can raise prices with relatively little fear that the fringe of competitors will be able to defeat the attempt by expanding their own output to serve customers of the three large firms."). The broader markets would similarly have only Electrolux and Whirlpool making affordable cooking appliances, even though other higher-priced suppliers and Kenmore would continue to be present. [redacted]

The Market Shows Signs of Vulnerability to Coordinated Conduct. Those who know the industry best recognize that consolidation increases suppliers' market power. Electrolux explained in its most recent annual report that "generally, a market consolidation is a good thing and could be positive for the appliance industry and Electrolux."[77] Similarly, around the time of the Whirlpool-Maytag merger, Electrolux observed that the "U.S. market is highly concentrated . . . which facilitated a price increase in 2005."[78] These are not isolated anecdotes. Electrolux has emphasized the salutary (to appliance suppliers at the expense of consumers) effects of consolidation many times regarding various products and geographies.[79]

[redacted]

[77] PX00002 at -067.

[78] PX00716 at -008 (ellipses in original).

[79] *See also, e.g.*, PX00010 at -023 (Hans Straberg of AB Electrolux answering question of why prices increased in the United States but declined in Europe: "[The United States is] a more consolidated market. It's where the bigger piece of material cost has impacted. And those two explanations, I think, are the most – the U.S. is ahead of Europe, when it comes to pricing behavior."); PX01707 at -081 ("Several of the markets where Electrolux operates are subject to strong price competition. In 2008, such competition was particularly intense in the European

Equally telling, Whirlpool – not a party to this proposed acquisition and unable to claim any efficiency benefits from it – has described the merger as benefiting *Whirlpool*.[80] Indeed, Whirlpool likes this proposed acquisition so much that Whirlpool entered into a joint-defense agreement with the Defendants to support their defense of it.[81] *Cf. Hospital Corp. of America*, 807 F.2d at 1392 ("The [competitor] that complained to the Commission must have thought that the acquisitions would lead to lower rather than higher prices – which would benefit consumers, and hence, under contemporary principles of antitrust law, would support the view that the acquisitions were lawful.").

Recent history shows that Defendants and their competitors already engage in something that looks like tacit coordination, if not always successfully. In several instances, Electrolux has carefully followed the pricing signals of GE and Whirlpool.[82] The companies purposefully seek

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market, largely because of the generally severe competitive situation and the fragmented nature of the market, with a large number of small producers, retailers and competitors.").

[80] PX00009 at -022 (Whirlpool Vice Chairman Marc Bitzer: "We see both in the short-term and long-term that [the transaction] actually has an overall positive outcome for us from a competition perspective. First of all, the next six to nine months or whatever – however long it takes us gives us taxable opportunity in the marketplace, and we see those already rising right now. But in the long-term – actually, in particular if you look at the presentation in 2018, Electrolux is an ethical, a value-driven company, and as such, it's a competitor still. But you also know they also have quarterly earnings to make. They have annual earnings to make. They are ethical. They abide by the law, and that, in a competitive landscape, I would say is generally good news.").

[81] PX01105 at -669 ("Joint Defense and Confidentiality Agreement" between Whirlpool, GE, and Electrolux "with regard to the governmental investigation of (and any potential litigation concerning) the contemplated transactions . . . .").

[82] *See*, PX00242 ("Jack [Truong] said we must only operate under the price increase umbrella announced by other major manufacturers."); *see also* PX00707 (Electrolux's then-CEO explained in May 2011 that "on friday or monday we plan to announce a 7-8% price increase effective Aug 1 (i.e., following WHR's lead).").

to encourage one another in their pricing efforts.[83]

Pricing transparency in these markets also furthers tacit coordination.[84] *See* Merger Guidelines § 7.2. Many retailers require 60-90 days notice of any price moves, meaning prices are widely disseminated long before they become effective.[85] The manufacturers can (and often do) rely on this immediate price dissemination to calibrate their pricing with that of their competitors.[86] Indeed, sometimes manufacturers implement parallel pricing moves with the knowledge or even the assistance of retailers, who also benefit when they pass on the higher prices to consumers.[87]

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[83] *See, e.g.*, PX00265 at -986 (Electrolux email discussing pricing for self-clean ranges: "We were trying to get the industry to move up in the SC smooth. All competitors such as GE, WP start at $599."); PX01074 at -002 (Electrolux "Pricing A Critical Competency Training" exhorts employees to "[u]se price to drive good industry conduct" by, among other things, using price "[m]oves to drive rationale [sic] competitor behavior").

[84] *See, e.g.*, PX00220 at -004 (Electrolux pricing presentation notes "No Secrets – Assume other customers and competitors will know."); Dep. Tr. of Keith McLoughlin (Electrolux) 158:11-24 (October 16, 2015) (agreeing that price increases are generally in the public domain).

[85] *See, e.g.*, [redacted]

[86] *See, e.g.*, PX00248 (email from contract manager Scully to CEO Jack Truong and others regarding "WHP price increase letter": "For those that have not seen it. Here is the WHP price increase letter. Average of 6.3%. . . . If we have an increase effective Feb 1 and all others go on Jan 1 I am concerned that December (pre-increase) 'buy-in' on GE and WHP will result in a severe decline in our December business as customers will attempt to beat the Jan 1 increases knowing they have another month to beat our increase.").

[87] *See* PX00925 ([redacted] PX00327 at -861 ("I feel that [redacted] would be OK with a price increase in Q1 2012. Especially with with [sic] LG/Samsung/GE/WP all signalling [sic] or announcing increases we should to [sic] do the same."); PX00321 at -542 ("Sitting here with [redacted] Whirlpool just announced to him they will also be taking a price increase the 1st of the year (letter coming soon) with GE..... [redacted] is under the impression that if he can have all manufacturers move in January....that we will not have to take another increase later in the year." (alterations in original)).

There Is a Credible Basis to Conclude that the Proposed Acquisition Will Enhance Vulnerability to Coordinated Conduct. Within the contract-channel markets, Electrolux is a new and aggressive competitor.[88] With control of the much larger GE contract-channel business, Electrolux's incentives to compete as aggressively are likely to diminish if not disappear. *See H&R Block*, 833 F. Supp. 2d at 79 ("Finally, the Court notes that the 'merger would result in the elimination of a particularly aggressive competitor in a highly concentrated market, a factor which is certainly an important consideration when analyzing possible anti-competitive effects.'") (quoting *Staples,* 970 F.Supp. at 1083).

Even in the somewhat less concentrated overall markets for ranges, cooktops, and wall ovens, the consolidation is likely to increase the incentives for accommodating and coordinating behavior. Electrolux has sometimes been an unreliable partner in implementing industry-wide price increases, going along with other appliance manufacturers' highly successful 2012 increases,[89] but not fully following when the industry implemented price increases in 2014.[90]

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[88] *See supra* Statement of Facts § IV.

[89] At the end of 2011, GE announced its largest price increase in a decade, to be effective at the beginning of 2012. *See* PX01268 at -020. Whirlpool also announced an increase. *See* PX00456 at -852. After learning of this increase, Electrolux convened a meeting in late October 2011 to review how its prices compared to "the latest Whirlpool and GE January 2012 insight" and to decide how to "position" its products in light of Whirlpool's and GE's announcements. PX00456 at -850. After this discussion, Electrolux followed its competitors' price increases. *See id*. GE described these price increases – occurring during a still-tepid economic recovery – as "historic." PX01397 at -330.

[90] After learning of price increases by Whirlpool, GE, and Samsung to be effective at the beginning of 2014, Electrolux's VP of Sales exhorted his team to "use this as an opportunity to win share via more skus, improved merchandising, better mix and more tactical price points vs our competitors." PX00300 at -144. This plan came directly from the top, as Jack Truong instructed his sales team "to be proactively aggressive in gaining more high margin volume beginning now as discussed in our plan this mornng [sic]." PX01719 (Nov. 11, 2013).

B. There is No Entry or Expansion That Will Ameliorate the Anticompetitive Effects of the Proposed Acquisition

Entry by new firms or expansion by existing firms will not defeat an acquisition's anticompetitive effects unless it will "'fill the competitive void that will result if [defendants are] permitted to purchase' their acquisition target." *H&R Block,* 833 F. Supp. 2d at 73 (quoting *Swedish Match,* 131 F.Supp.2d at 169 (alternation in original)). Entry or expansion must be (1) timely, (2) likely, and (3) sufficient. *See Cardinal Health*, 12 F. Supp. 2d at 55. In order for entry to be likely, it must be profitable and at a sufficient scale to replace the competition lost by the acquisition. Merger Guidelines § 9.2.

Defendants have identified some 20 firms they contend are competitors, but a defendant cannot demonstrate that entry or expansion will counteract the likely harm from a merger simply by pointing to other firms that compete in the relevant market. Most of those 20 firms have no more than a negligible share of the market today and no path to anything more. The concentration calculations already account for the number of competitors in the market, so that the mere existence of any number of competitors cannot defeat the presumption. In *Philadelphia National Bank*, the Supreme Court case that introduced the presumption, there were 42 competitors in the relevant market. 374 U.S. at 331. *See also H&R Block*, 833 F.Supp.2d at 73-77 (list of 18 purported competitors did not rebut prima facie case); *Cardinal Health, Inc.*, 12 F. Supp. 2d at 54-55, 57-58 (more than 40 regional wholesalers were inadequate to replace the competition lost); *Staples*, 970 F. Supp. at 1087-88 (general ability of mass merchandisers, computer superstores, and warehouse clubs to compete with office superstores was inadequate).

1. There Are Significant Barriers to Entry and Expansion in the Markets for Ranges, Cooktops, and Wall Ovens

Many barriers stand in the way of companies wishing to enter or expand their presence in the cooking appliances markets.

Most obviously, manufacturing major appliances is hard and expensive even for firms that are long-time appliance manufacturers. For example, Electrolux recently opened a new plant in Memphis dedicated to manufacturing cooking appliances, which took four years of work, cost $266 million, and still is not fully operational. *See, e.g.*, *Sysco*, 2015 WL 3958568, at *55 ("The broadline foodservice distribution industry is extraordinarily capital and labor intensive. It costs roughly $35 million to build a single distribution center."); *CCC Holdings*, 605 F. Supp. 2d at 52-53, 55 (difficulty in developing necessary complex software and establishing reputation as a vendor a barrier to entry).

The need to reach a minimum number of sales to justify the large upfront investments in entering or expanding appliance sales, which is sometimes called the "chicken or egg" problem, imposes another barrier. Manufacturers need to sell more products to get their costs down, but need to get their costs down to sell more products.[91] This means, among other things, developing a sufficiently broad portfolio of products to be a viable option for retailers and contract-channel customers. *See Sysco*, 2015 WL 3958568, at *56 ("Companies will not make the significant capital expenditure of building a new distribution center unless they already have customers to serve, but customers will not commit to a distributor unless it has demonstrated the ability to serve its needs."); *Staples*, 970 F. Supp. at 1087 (difficulty of entering the office superstore market due to high minimum viable scale and sunk costs).

Strong brand loyalty acts as another important barrier to entry. A consultant working for

[91] *See, e.g.*, PX00275 at -086 (Electrolux CEO Keith McLoughlin "often speaks of the pursuit of low cost and innovation in delivering value to the consumer and share holder. You could also call it the new 4-legged stool. If we mess up the cost side we can't rely on innovation to make up the difference").

GE, for example, estimated that GE's brand accounts for [redacted] the purchase decision.[92] *See, e.g.*, *Swedish Match*, 131 F. Supp. 2d at 171 (brand loyalty a barrier to entry); *Cardinal Health*, 12 F. Supp. 2d at 57 (reputation a barrier to entry).

Companies whose manufacturing facilities are located outside of North America face an additional barrier: it is time-consuming and expensive to ship bulky appliances across an ocean and may be cost-prohibitive for more affordable appliances.[93] *See Coca-Cola*, 641 F. Supp. at 1134-37 (access to product distribution a barrier to entry).

2. There Are Additional Barriers to Entry and Expansion in the Contract-Channel Markets

"Filling the void" the proposed acquisition will create in the contract-channel markets would require clearing yet more bars. *First*, effective competition in the contract-channel markets requires offering a full line of products.[94] *Second*, contract-channel suppliers must meet exacting delivery requirements. Contract-channel purchasers demand features such as faster delivery, on particular dates, with little notice, of appliances with particular warranties and other characteristics.[95] *See Sysco*, 2015 WL 3958568, at *55 ("A fleet of expensive, refrigerated

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[92] PX01189 at -567. *See also* PX01701 at -096 (Electrolux "Investors Day July 2013 Speech" read: "Brands are important."); PX01137 at -348-49 (tracking consumer brand preference and commitment across major appliance manufacturers); PX00709 at -746 [redacted]

[93] *See* PX01437 at -295 [redacted] PX00832 at -224.

[94] PX01623 at -068 [redacted]

[95] *See, e.g.*, PX00341 at -740 (list of "Contract Requirements" including "Ensuring Job Site delivery dates are met"). *See also supra* Argument § I.B.2.

trucks is required to deliver the products. People – lots of them – are needed to sell the broadline service, maintain and stock the warehouse, and deliver the products."). *Third*, an effective competitor must be able to serve contract-channel customers directly, as well as indirectly through distributors.[96] *Fourth*, prospective entrants in the contract channel must overcome strong resistance to switching suppliers, particularly for customers with an existing installed base of appliances who may, for example, need to switch out appliances in model homes.[97] *See H&R Block*, 833 F.Supp.2d at 76 (finding that the "stickiness" associated with the inability to import taxpayer data from one firm to another an entry barrier).

Industry participants recognize that entry into the contract channel is difficult. For example, Whirlpool Chairman Marc Bitzer told investors in 2014 that the contract channel is a "very captive channel where you have to earn contracts over many years . . . it's a very difficult channel to manage and serve right away."[98] Similarly, when forwarded a report suggesting that Samsung might be considering expanding its contract channel business, Electrolux Contract Sales head Johnny Cope opined that expansion into offering just one of the contract-channel services would be "obviously hard and expensive."[99]

3. LG and Samsung Are Unlikely to Replace the Competition Likely to Be Lost Through the Merger

Defendants' main argument seems to be that two existing market participants, LG and Samsung, are growing. The United States does not dispute that LG and Samsung sell cooking

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[96] *See* PX00908 at -008 (Electrolux presentation explaining that lack of direct distribution capability means a company "cannot secure national builders" and puts "contract growth initiative at risk").

[97] *See supra* Argument § I.B.2.

[98] PX01724 at -018.

[99] PX00292 at -791 .

appliances, or indeed that it is plausible they will sell more cooking appliances in two years than they do today.[100] But that is not the relevant question. If LG's or Samsung's growth and effect on the market would be the same with or without the proposed acquisition, then the proposed acquisition still substantially lessens competition. The real question is whether LG and Samsung will grow enough in response to the proposed acquisition than they otherwise would so that they would fill any competitive void. The evidence will show that they are not likely to fill the gap.

LG and Samsung sell almost entirely to more affluent customers and are likely to continue to do so. Defendants' own documents recognize that LG and Samsung are "going after high end customer[s]."[101] [redacted][3] Professor Whinston will explain that data confirms what the industry believes. [redacted]

Brand considerations further reduce the likelihood that LG and Samsung would replace the lower-priced competition eliminated by the proposed acquisition. [redacted]

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[100] [redacted]

[101] *See* PX01400 at -271; *see also* PX01151 at -678 ("GE offers a broad, complete portfolio of products across all segments vs Frig only in the bottom half and LG/Samsung only in the top half. GE serves all customer needs."); [redacted]

[102] PX01700 at -314, 315.

[103] *See, e.g.*, PX01533 at -073 [redacted]

[redacted]

Moreover, developing and manufacturing new lines of products is a major impediment to timely and sufficient expansion. Today, Samsung does not sell any cooktops or wall ovens in the United States. More generally, LG and Samsung have far fewer product offerings than the Defendants and Whirlpool, as Professor Whinston's below analysis of SKUs (that is, unique products) shows. To start producing these products, the companies would need either to revamp existing facilities or build additional facilities. The Electrolux experience with its Memphis plant demonstrates that doing so would be a difficult task. And the Korean companies' lesser presence is in some ways self perpetuating. It will be difficult, if not impossible, for LG and Samsung to timely obtain scale needed to significantly increase its offerings.

[redacted]

Replacing the competition lost in contract channel markets would require capabilities and incentives LG and Samsung do not have. [redacted] So far, [redacted] GE's regular-course-of-business

[redacted]

"meeting-competition" data [redacted] for indirect contract-channel sales. [redacted] Many builders – particularly large builders – prefer direct distribution because it often allows for lower pricing and better service. [redacted] Furthermore, even when a manufacturer decides to sell only indirectly to the contract channel, it still must develop specialized logistics capabilities to manage its inventory so that it can deliver to its distributor within the tight timeframe builders require.[106]

And, as discussed above, contract-channel purchasers face significant costs in switching from one supplier to another, making it difficult for entrants to unseat established incumbents. Entrenched builder relationships in the contract channel establish a significant obstacle to growth in the channel.[107] While LG has [redacted] and Samsung [redacted],[109] GE has more than [redacted] builder-focused salespeople,[110] and Electrolux has about [redacted][111]

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[105] *See* PX01219 at -0 [redacted]

[106] *See* PX01610 at -004 [redacted]); PX01616 at -99 [redacted]

[107] *See* PX01610 at -004 [redacted] PX01616 at -998 ([redacted]

C. Defendants Cannot Rebut the United States' Case Through Claims of Efficiencies

Defendants' claimed "efficiencies" cannot overcome the likely anticompetitive effects of this proposed acquisition. "The Clayton Act focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facie case is inaccurate." *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd.*, 778 F.3d 775, 791 (9th Cir. 2015). Courts "have rarely, if ever" held that efficiency claims can save an otherwise anticompetitive merger. *CCC Holdings*, 605 F. Supp. 2d at 72. In highly concentrated markets, such as those for the sale of cooking appliances, the defendants must provide "proof of extraordinary efficiencies" to rebut plaintiff's prima facie case. *Heinz*, 246 F.3d at 720. Defendants have the burden of proving these extraordinary efficiencies. *See H&R Block*, 833 F. Supp. 2d at 90, 92.

To be considered at all, efficiencies must be: (i) "reasonably verifiable by an independent party," *H & R Block*, 833 F. Supp. 2d at 89, and not "mere speculation and promises about post-merger behavior," *Heinz,* 246 F.3d at 721; (ii) "a type of cost saving that could not be achieved without the merger," *H & R Block,* 833 F.Supp.2d at 89; (iii) passed on to consumers, *CCC Holdings*, 605 F. Supp. 2d at 74; (iv) within the relevant market or markets for which competitive harm is alleged, *see, e.g. Phila. Nat'l Bank,* 374 U.S. at 370; and (v) greater than the competitive harm from the merger, *Sysco*, 2015 WL 3958568, at *56-57.

[redacted]

[redacted]

[110] PX01268 at -032 (GE's contract coverage includes "109 field ASMs and 12 Direct Sales Call Center specialists" plus "24 Customer advocate specialists in call center assisting ASMs with transactional items").

[111] *See* PX00887 at -004 (Electrolux has 42 salespeople dedicated to contract channel).

Defendants cannot meet their burden of showing cognizable efficiencies that overcome the anticompetitive harm of the proposed acquisition in each of the relevant markets. Even Defendants' own economist can find only [redacted] in merger-specific variable-cost savings for cooking appliances among the data that were prepared by a third-party consultant (who will not appear at trial) and on which Defendants rely, while conceding he can say nothing about the extent to which any savings will be passed on to consumers. Even if fully credited, and entirely passed on to consumers, these [redacted] savings would not come close to eliminating the anticompetitive effects of the merger. These certainly are not the "extraordinary efficiencies" needed here. *Heinz*, 246 F.3d at 720.

D. Retailers Will Not Prevent the Likely Anticompetitive Effects of the Proposed Merger

While the contract-channel markets are fragmented, just a few retailers sell the majority of ranges, cooktops, and wall ovens.[112] Defendants argue that these retailers will prevent any harm from befalling consumers. But the mere existence of large buyers does not ensure that even those buyers will be protected from increases in market power. Where a buyer has the same "buying power" over its suppliers after a merger, as it did before the merger, then even that large buyer will be harmed by the anticompetitive merger. Merger Guidelines § 8 ("Even buyers that can negotiate favorable terms may be harmed by an increase in market power.").[113]

The question, however, is not whether Home Depot will be unharmed but whether consumers will be. With good reason, "the antitrust laws assume that a retailer faced with an

[112] [redacted]

[113] *See also* Dennis W. Carlton & Mark Israel, *Proper Treatment of Buyer Power in Merger Review* (July 22, 2011) (two colleagues of Defendants' economic expert writing that "[e]conomic theory indicates that powerful buyers are already likely fully utilizing their power pre-merger.").

increase in the cost of one of its inventory items will try so far as competition allows to pass that cost on to its customers in the form of a higher price for its product." *Heinz*, 246 F.3d at 719 (quotation omitted). *See also AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 575 (7th Cir. 1999) (rejecting power buyer defense to merger because the customers "would simply pass along the increased landing gear costs and hence have no incentive to prevent [defendants] from charging uncompetitive prices").

The evidence here shows not only that retailers pass on higher prices to their own customers but that in many cases they seek out higher prices. [redacted] In another example, the head of Nationwide (the country's largest buying group of independent dealers) informed Electrolux that "he support[ed]" a price increase from Electrolux.[115]

Additionally, whatever ability Sears, Home Depot, Lowe's, and Best Buy each have to resist the harm from this proposed acquisition, that does nothing for the millions of cooking appliances bought elsewhere. *See Cardinal Health*, 12 F. Supp. 2d at 60-61 (acknowledging that some of defendants' customers have significant buyer power but holding that buyer power did not rebut presumption of illegality because of existence of many smaller customers).

E. Whirlpool's 2006 Purchase of Maytag Is Uninformative

In 2006, Whirlpool bought Maytag, then a faltering appliances maker. While recent mergers sometimes can be informative to a subsequent merger in the same market, Whirlpool's acquisition of Maytag provides little useful information, and what information it does provide is

[114] *See* PX01650 [redacted]

[115] PX00924.

– at most – mixed. As Professor Whinston will explain, there are no recognized economic tools that allow a study of that merger to say anything reliable about this one. The circumstances were different: Whirlpool's purchase implicated different products with different competitive dynamics (notably, while Electrolux today is a thriving and aggressive competitor, Maytag was a struggling one). And any study is confounded by the massive drop in demand almost immediately after that merger occasioned by the Great Recession.

CONCLUSION

Defendants' presumptively illegal proposed acquisition would unite two of the three iconic, traditional, and fierce full-line major cooking competitors, eliminating long standing and beneficial head-to-head competition while paving the way for easier coordination. Accordingly, the United States respectfully requests that the Court enter a permanent injunction preventing the consummation of the proposed acquisition.

Dated: October 26, 2015

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CERTIFICATE OF SERVICE

I certify that on October 26, 2015, I filed the foregoing with the Court using its CM/ECF System using the event *Sealed Filing*. I further certify that I served one copy of the foregoing by email on the following:

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