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

UNITED STATES' MOTION TO PRECLUDE DEFENDANTS
FROM ADDING OUT-OF-TIME EXPERT OPINIONS OR BASES

The United States respectfully moves for an order prohibiting Defendants from violating the Stipulation Regarding Scheduling and Case Management and Trial Setting and Case-Management Order ("CMO") (Dkt. No. 28), which the Court entered on July 21, by submitting an additional and out-of-time expert report or additional and out-of-time bases for opinions in previous reports. As required by Federal Rule of Civil Procedure 37(a)(1) and Local Rule 7(m), the United States has met-and-conferred with Defendants, but could not reach agreement on this issue.

Rule 26 requires that expert reports and rebuttal reports contain "a complete statement of all opinions the witness will express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(i). The default sequence for such reports is a simultaneous exchange of initial reports and a simultaneous exchange of rebuttal reports, with no reply reports. *See* Fed. R. Civ. P. 26(a)(2)(D). After extensive negotiations, the parties agreed to provisions in the CMO that follow that default and provide that the parties exchange initial expert witness reports on September 30 and rebuttal expert reports on October 20. The parties also agreed that expert depositions should be held after all of the expert opinions were exchanged; the Court's amended schedule, entered on September 3 (Dkt. No. 89), set the deadline for expert depositions as October 28. The parties exchanged expert reports on September 30 and rebuttal expert reports on October 20, and have concluded expert depositions. At the end of the deposition of Defendants' expert (Mr. Jonathan Orszag), however, Mr. Orszag stated that, based on criticisms of his work by the United States' expert (Professor Michael Whinston), Mr. Orszag had done additional work, making adjustments to some of his analyses. Defendants affirmed this intent in the Joint Status Report for the October 30 Pretrial Hearing (Dkt. No. 235), describing this new work as "adjustments to Mr. Orszag's prior analyses that respond directly to criticisms raised by

[Professor] Whinston in his rebuttal report." On October 30, without leave from the Court to depart from the CMO's provisions, Defendants produced "backup materials for analyses discussed at the deposition of Jonathan Orszag that were conducted following receipt of the Rebuttal Expert Reports of Michael D. Whinston and Ronald G. Quintero." Exhibit A. Defendants also stated that they intend to produce additional "remaining backup materials" on Monday, November 2. *Id.* Defendants did not produce new reports, and as such have not explained how either the backup materials produced on October 30 or the backup materials that will be produced on November 2 relate to Mr. Orszag's new or old opinions.

As the Defendants' own descriptions of their production of additional expert materials confirm, Mr. Orzag's work in response to Professor Whinston's criticism (about which Mr. Orszag may seek to testify at trial) amounts to a reply, which is prohibited by the Federal Rules, the Court's CMO, and the process the parties have agreed to from the beginning. Mr. Orszag filed his rebuttal expert report on October 20, and should not be allowed to testify about work he did after that report, particularly work that was not disclosed to the United States before his deposition. Should the Court allow Mr. Orszag's new analyses, the United States respectfully requests that the Court allow Professor Whinston and Mr. Quintero to also present new analyses at trial.

Dated: October 30, 2015

/s/ Ethan C. Glass
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CERTIFICATE OF SERVICE

I certify that on October 30, 2015, the foregoing was served on counsel of record via ECF.

Dated: October 30, 2015

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