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' RESPONSE TO PLAINTIFF'S MOTION TO PRECLUDE DEFENDANTS FROM ADDING OUT-OF-TIME EXPERT OPINIONS OR BASES

Plaintiff has moved to limit Defendants' expert, Jonathan Orszag, from responding to recent criticisms of his analysis of the Whirlpool-Maytag merger or further explaining his original opinion stated in his two expert reports that the Whirlpool-Maytag merger did not result in higher prices for consumers. Plaintiff's expert, Michael Whinston, made those criticisms for the first time after Mr. Orszag provided his two expert reports, and Mr. Orszag therefore could not address them in his written reports. Plaintiff's motion is baseless. What happened in the marketplace following the Whirlpool-Maytag merger is relevant to this merger, and the Government is pursuing this procedural gamesmanship because the Government and its experts have no substantive response to Mr. Orszag's analyses relating to the Whirlpool-Maytag merger.

1. The real-world effect of the 2006 Whirlpool-Maytag merger is potent evidence that the acquisition challenged here will have no anti-competitive effects. *See* Defs' Pre-trial Br. 27-29 (Dkt. No. 225). Plaintiff knows this. As Plaintiff's own Guidelines explain, "The Agencies look for historical events, or 'natural experiments' that are informative regarding the competitive

effects of the merger," including "the impact of recent mergers … in the relevant market." DOJ & FTC, Horizontal Merger Guidelines § 2.1.2 (2010) ("Guidelines"). The behavior of appliance markets in response to the Whirlpool-Maytag merger is precisely the kind of "natural experiment" contemplated by Plaintiff's own Guidelines.

Moreover, the Department of Justice itself has stated that the Whirlpool-Maytag merger had no anti-competitive effects, despite what market concentration statistics at that time alone would have predicted. After a thorough pre-merger investigation in 2006, the DOJ concluded that the Whirlpool-Maytag merger would not harm competition. Exhibit A at 1. The DOJ said that that any post-merger "attempt to raise prices" would fail for several reasons: (1) existing manufacturers could increase production, (2) "newer brands such as LG and Samsung have quickly established themselves in recent years," (3) the major customers were "large appliance retailers" who "have alternatives available to help them resist an attempt by the merged entity to raise prices," and (4) the transaction would result in "large cost savings and other efficiencies." *Id.* Two years later, the head of DOJ's Antitrust Division conducted an economic analysis and confirmed that, despite increases in the cost of materials, prices for laundry appliances had in fact decreased since the merger. Exhibit B at 14-17. That analysis—conducted by the DOJ's Antitrust Division—provides strong evidence that the acquisition challenged here is also unlikely to have anti-competitive effects.

Defendants' expert, Jonathan Orszag, went one step further. He conducted his own detailed econometric analysis of the Whirlpool-Maytag's merger's effect on appliance prices. *See* Defs' Pre-trial Br. 28 (Dkt. No. 225). He used a regression analysis to control for market factors unrelated to the merger and demonstrated that there was no correlation between changes

in the Herfindahl-Hirschman Index and post-merger prices, thus undercutting the relevance of the Government's focus on concentration statistics. *Id.*

2. Professor Whinston's rebuttal report (served on October 20) attempted to critique Mr. Orszag's regression analysis. Despite dedicating twenty pages of his report these criticisms, Prof. Whinston did not even try to see if his criticisms mattered by performing his own analysis of the Whirlpool-Maytag merger, even though Mr. Orszag's reports provided all of the data and regression equations necessary to allow Prof. Whinston to replicate and extend Mr. Orszag's work. He instead nitpicked Mr. Orszag's analysis, claiming, for example, that Mr. Orszag failed to fully account for certain variables (such as one that Prof. Whinston calls "SKU-age effects") and relied on data from brands formerly owned by Maytag. Yet Prof. Whinston did not conduct any analyses to see if his ivory-tower speculations had any merit, and therefore failed to show that accounting for any of these additional factors would have made any material difference.

Within the first hour of Mr. Orszag's deposition, Plaintiff asked Mr. Orszag about Prof. Whinston's criticisms. Exhibit C at 28:10-24. In response, Mr. Orszag explained that they did not undermine or affect his original opinion. As Mr. Orszag explained, once he received Prof. Whinston's rebuttal report on October 20, he proceeded to do exactly what Prof. Whinston should have done: Mr. Orszag took his existing regression analyses, addressed Prof. Whinston's criticisms by re-running his analyses with the supposedly missing variables or changes in methodology, and showed that accounting for these factors made no difference to Mr. Orszag's originally disclosed analyses. Exhibit C at 337:16-22, 340:5-6, 341:3-16, 344:16-18. Within two days of Mr. Orszag's deposition, Defendants produced some of the regression analyses that Mr. Orszag prepared to address Prof. Whinston's criticisms, and Defendants produced the remaining material this morning.

3. Mr. Orszag's challenged testimony is a permissible and appropriate response to Whinston's criticisms. This is so for two reasons.

First, it is not a prohibited "new" opinion, but merely an acceptable elaboration of Mr. Orszag's reasons for his original opinion—an elaboration that became necessary when Prof. Whinston raised the criticisms after Mr. Orszag submitted his rebuttal report. The purpose of Rule 26(a)(2)(B) is to prevent "unfair surprise." *Muldrow ex rel. Estate of Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 167 (D.C. Cir. 2007). The rule "does not limit an expert's testimony simply to reading his report." *Id.* To the contrary, an expert typically "will supplement, elaborate upon, [and] explain … his report in his oral testimony." *Id.* (quotation marks omitted; alterations in original). As the court explained in *Muldrow*, an expert's testimony can "hardly" be an "unfair surprise" if it is "largely an elaboration of [the expert's] written report." *Id.*; *accord United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 246 F.R.D. 322, 325 (D.D.C. 2007) (Rule 26 does not preclude testimony that is "an elaboration upon" an opinion offered in an expert report).

Just as in *Muldrow*, Mr. Orszag's testimony can hardly be an unfair surprise because it is the same regression analysis he conducted for his original report, supplemented only with the variables and modifications that Prof. Whinston claimed (incorrectly, it turns out) would undermine the conclusion that the Whirlpool-Maytag merger did not lead to higher appliance prices. That is, rather than any "new analysis," Mot. at 2, Mr. Orszag merely explained and reaffirmed his previous opinion by taking his existing analyses—fully disclosed to Plaintiff—and rerunning them in ways suggested by Plaintiff's own expert. Mr. Orszag's testimony regarding these analyses will not form any different opinion from the one he disclosed in his report; it will

only support that opinion with additional robustness checks that directly respond to Prof. Whinston's criticisms.

Second, such an elaboration is especially reasonable because Prof. Whinston himself opened the door to this testimony by alleging that Mr. Orszag had failed to include relevant variables, and Prof. Whinston kicked the door wide open by failing to conduct any regression analyses himself to assess whether these variables had any effect on the results (they do not). It is reasonable and appropriate for Mr. Orszag to explain why Prof. Whinston's rebuttal criticisms are immaterial. Plaintiff is not disputing and could not dispute that Mr. Orszag is allowed to respond to criticisms during his testimony at trial. So the only question is whether he is allowed to use data and analysis to back up his expert opinion that the criticisms are immaterial. And there is simply no valid reason why he cannot, especially where Plaintiff has received ample notice from his deposition testimony and the submission, which has been given well before trial.

Indeed, this is no ambush by Defendants, but rather an attempt by Plaintiff to hide the truth by having its expert make criticisms that are immaterial, refuse himself to perform any analysis of materiality, and then try to gag Defendants from showing that the criticisms are immaterial. As a vivid illustration of what Plaintiff is attempting to do, imagine Mr. Orszag's cross-examination at trial if he is forbidden to explain his basis for rejecting Prof. Whinston's criticisms:

Q: Mr. Orszag, what did you do?

A: I looked at the Whirlpool-Maytag merger to see whether there was any relationship between changes in concentration following that merger and post-merger prices.

Q: What did you conclude?

A: There wasn't any.

Q: You heard that Prof. Whinston said you missed certain variables that affected the outcome.

A: Yes.

Q: Now, Prof. Whinston didn't rerun your analyses to account for those variables?

A: Not that I see.

Q: Did you rerun them?

A: Yes.

Q: What did you learn?

A: I'm sorry, I'm not allowed to testify what I learned.

As this farcical exchange shows, forbidding Mr. Orszag from explaining his additional regression analyses would simply prevent the Court from hearing the truth.

In sum, there is no reason that Mr. Orszag should be forbidden from testifying to the truth about Prof. Whinston's unfounded criticisms. An expert's trial testimony is not limited to repeating what is in his reports or deposition transcripts, and an expert may elaborate on the opinions stated in an expert report. And precluding Mr. Orszag from testifying is especially unwarranted in this context because it is appropriate for him to explain why he rejects Prof. Whinston's criticisms.

For the foregoing reasons, the Court should deny the motion. Likewise, the Court should deny Plaintiff's request for its experts to perform some unspecified "new" analysis: Mr. Orszag's elaboration of his original analysis in response to Plaintiff's criticism and re-affirmation of his original opinions in no way open the door for Plaintiff to engage in such trial by ambush.[1]

[1] This same analysis applies to the few other analyses Mr. Orszag has produced to Plaintiff, such as "a corrected distribution savings analysis" and "robustness checks for the regression analysis of Electrolux's expansion into the direct segment of the contract channel." These analyses are not new opinions that present any unfair surprise to Plaintiff, but merely robustness checks on the regression analyses that support the opinions Mr. Orszag expressed in his original report. *See Muldrow*, 493 F.3d at 167. All of the additional analysis is either in response to

(continued…)

critiques by Plaintiff's experts or in response to questioning by Plaintiff at Mr. Orszag's deposition, and does not change Mr. Orszag's opinions in this case.

Dated: November 1, 2015

Respectfully submitted,

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(with permission, by John M. Majoras)

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st 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 1, 2015

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