IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*, *Plaintiffs*, v. ANTHEM, INC. and CIGNA CORP., *Defendants*.	Case No. 1:16-cv-01493-ABJ

ANTHEM'S OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE TESTIMONY IN SENATOR BENJAMIN NELSON'S DECLARATION AND TESTIMONY OF EXPERTS RELYING UPON THAT DECLARATION

Plaintiffs failed to confer with Anthem before filing any of their motions *in limine*. *Cf.* Local Rule 7(m). On this particular motion, that failure resulted in a lost opportunity to narrow the areas of disagreement.

Anthem intends to rely upon the Nelson Declaration solely to the extent that it provides a factual description of state regulation of insurance law and factual observations as to how such regulation affects competition. To the extent that the Nelson Declaration veers into expert opinion or advocacy, Anthem does not intend to rely upon it. Anthem attaches a copy of the Nelson Declaration showing these portions of the declaration upon which Anthem does not rely ("DNR") as Exhibit A to the Declaration of Heather M. Burke ("Burke Decl.").

BACKGROUND

Senator Nelson's career includes working in the Nebraska Department of Insurance (ultimately as Director), as CEO of the Central National Insurance Group of Omaha, as a Governor and a U.S. Senator, and as CEO of the National Association of Insurance

Commissioners. A distinguished career in the insurance industry has given Senator Nelson extensive personal knowledge about the industry.

In his declaration, Senator Nelson testifies to facts within his personal knowledge, particularly the States' role in the regulation of health insurance and the history of insurance regulation at the state level. *See, e.g.*, Burke Decl., Exhibit A at ¶ 13 ("Under the NAIC's accreditation standards, known as the Financial Regulation Standards and Accreditation Program, states must maintain and demonstrate adequate statutory and administrative authority to regulate insurer solvency. All fifty states and the District of Columbia have adopted a variation of the NAIC's accreditation standards."). Drs. Israel and Willig relied upon such facts contained in his declaration to provide a convenient summary of a complex industry. Israel Rep. at ¶ 37; Willig Rep. at ¶ 18, 27-28.

ARGUMENT

I. SENATOR NELSON'S DECLARATION SHOULD NOT BE EXCLUDED

Plaintiffs do not challenge Senator Nelson's competence to testify as to the contents of his declaration, nor do they challenge the truthfulness of the facts contained in it. Rather, they claim that Senator Nelson is providing improper expert testimony in an attempt to "evade the evidentiary requirements for expert witnesses." Mot. at 1. Removing Senator Nelson from an expert disclosure list does not preclude him from providing a fact declaration. Fed. R. Evid. 701, 2000 Amendments Advisory Committee Note ("The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case."). Indeed, the Nelson Declaration contains Senator Nelson's knowledge of facts about the insurance industry that he

has gained as a former governor, legislator, employee of the Nebraska Insurance Department, and CEO of an insurance company.

Even if some of Senator Nelson's remaining statements rise to the level of "opinion" and not fact, Rule 701 of the Federal Rules of Evidence permits lay witnesses to offer opinion testimony that is "(a) rationally based on the witness's perception, (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." The rule's 2000 amendment "does not purport to change [the] analysis" by which courts have permitted a witness to provide testimony based on "the particularized knowledge that the witness has by virtue of his or her position in the business." Fed. R. Evid. 701, 2000 Amendments Advisory Committee Note. Thus, a witness's "specialized knowledge" that is "based solely on [the witness'] personal experience with" the proposed subject of testimony is admissible as proper lay opinion. *Barnes v. District of Columbia*, 924 F. Supp. 2d 74, 83 (D.D.C. 2013) (admitting lay opinion testimony interpreting reports used to identify potential overdetentions, where witness had extensive personal experience with identifying potential overdetentions). As this Court recognized, "[p]eople at different jobs can obtain different kinds of 'specialized knowledge' based on their training and experiences at that job," and lay opinion testimony based upon such specialized knowledge is admissible, if (1) such knowledge was "gained through experience rather than through scientific or technical training," and (2) "the witness testifie[s] 'based solely on personal experience.'" *Id.*

In contrast to the cases cited by Plaintiffs, here Senator Nelson does not opine on the effects of the proposed merger, or on any facts of this case; rather, Senator Nelson merely sets forth his understanding of the insurance industry and its regulations. Such testimony, to the

extent it constitutes opinion testimony, falls well within the bounds of lay opinion testimony, because it is "based on [his] years of experience and personal observations" of the industry and it helps the finder of fact—in this case, the Court—digest a complex set of facts about the insurance industry. *See Webster v. Fujitsu Consulting, Inc. (NETtel Corp.),* 369 B.R. 50, 64 (Bankr. D.D.C. 2007) (permitting lay opinion testimony via declaration as to whether "the parties' course of conduct was ordinary in the IT consulting industry"). *See also In re: LTV Steel Company, Inc.*, 285 B.R. 259, 264 (Bankr. N.D. Ohio 2002) (permitting lay opinion testimony to help the finder of fact digest a complex set of facts "concerning the projected cost of environmental liabilities" where witness "relied upon his own knowledge and daily participation in the Debtor's affairs to prepare his projections").

If Plaintiffs had any concerns about Senator Nelson's personal knowledge as to the topics contained in his declaration, they could have deposed him. Indeed, Plaintiffs noticed Senator Nelson for a deposition, but then inexplicably chose to withdraw the notice. Having chosen not to conduct any discovery as to his declaration, Plaintiffs cannot now complain that Senator Nelson's declaration is expert opinion testimony that must be excluded on the basis that Defendants "prevent[ed] discovery into his expertise." Mot. at 1. *See Webster*, 369 B.R. at 64 ("Webster cannot credibly claim to be unfairly surprised by the Erikson declaration when his counsel had the opportunity to question Erickson on the very same issues raised in the declaration.").

II. DR. ROBERT WILLIG AND DR. MARK ISRAEL PROPERLY RELIED UPON THE NELSON DECLARATION

Rule 703 of the Federal Rules of Evidence permits an expert to base his or her opinion on any facts or data in the case, even if inadmissible, so long as "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." Fed.

R. Evid. 703. *See also* Fed. R. Evid. 703 advisory committee's note ("Thus a physician in his own practice bases his diagnosis on information from numerous sources . . . including . . . reports and opinions from nurses, technicians and other doctors . . . His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes."). "The purpose of Rule 703 is to make available to the expert all of the kinds of things that an expert would normally rely upon in forming an opinion, without requiring that these be admissible in evidence." *Mannino v. Int'l Mfg. Co.*, 650 F.2d 846, 851 (6th Cir. 1981). For that reason, "'great liberality is allowed the expert in determining the basis of his opinions.'" *Eggert v. Meritain Health, Inc.*, 428 F. App'x 558, 567 (6th Cir. 2011) (quoting Mannino, 650 F.2d at 853) (alteration omitted). A sworn statement concerning the regulatory landscape of the insurance industry by one of its architects is precisely the type of information that an economist would rely upon. Consequently, regardless of whether the Nelson Declaration is admissible, Dr. Willig and Dr. Israel properly relied upon it in forming their expert opinions, and they should be permitted to testify based upon the Nelson Declaration. Moreover, Anthem has agreed to withdraw portions of the declaration that arguably cross the line from fact to opinion testimony. Drs. Israel and Willig do not rely upon any of the testimony we have agreed to withdraw.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion *in limine* to exclude the Nelson Declaration and any testimony of Dr. Willig or Dr. Israel that relies upon the Nelson Declaration.

Dated: November 7, 2016
Washington, D.C.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2016, a true and correct copy of the foregoing Opposition To Plaintiffs' Motion *In Limine* To Exclude Testimony In Senator Benjamin Nelson's Declaration And Testimony Of Experts Relying Upon That Declaration was served via the Court's CM/ECF system, pursuant to Rule 5.4(d) of the Local Civil Rules and Rule 5(b) of the Federal Rules of Civil Procedure, upon all counsel of record.

Dated: November 7, 2016
Washington, D.C.

Respectfully submitted,

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