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 **Public Version**

ANTHEM'S REDACTED OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE DEFENDANTS' DECLARATIONS AND TESTIMONY FROM DEFENDANTS' EXPERT WITNESSES RELYING UPON THOSE DECLARATIONS

In Section 7 merger cases, courts routinely rely upon sworn affidavits or declarations by non-party witnesses. *See, e.g.*, *United States v. SunGard*, 172 F. Supp. 2d 172, 188, 191 (D.D.C. 2001) (considering non-party statements submitted by both parties). And, even more routinely, courts permit the parties' economists to rely upon affidavits, declarations, and other materials. *See, e.g.*, *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1147 (N.D. Cal. 2004) (permitting the Antitrust Division's expert to rely on customer declarations in forming his opinions).

Here, in a departure from established practice, the Antitrust Division apparently did not obtain any affidavits or declarations. Indeed, despite its year-long investigation under the Hart-Scott-Rodino Act, benefitting from multiple extensions from the merging parties, the Division apparently not only failed to obtain any affidavits or declarations from any non-parties, but the Antitrust Division also failed to take any investigatory depositions beyond Aetna, Humana, Anthem, and Cigna.

Anthem did obtain declarations from non-party market participants and turned them over to the Antitrust Division during the investigation or in discovery. The Antitrust Division responded by sending deposition and document subpoenas to the declarants, prompting a number of the declarants or their employers to "withdraw" or "revoke" their declarations; the Division then withdrew its subpoenas (exhibits D and E to the Antitrust Division's motion illustrate this phenomenon).

Now, through its motion *in limine*, the Antitrust Division seeks to exclude all the declarations Anthem obtained and also to preclude Anthem's experts from relying on them. But the relief the Division seeks is inconsistent with practice and precedent. While declarations are hearsay, courts have applied the residual hearsay exception of Rule 807 under similar circumstances. Indeed, this Court has already suggested as much, stating: "This is not going to be a jury trial, so I'm going to be less concerned about things like hearsay objections . . . that will go to the weight and not the admissibility, in most instances, of the evidence." *See* Sept. 30, 2016 Hrg. Tr. 9:10-15. Furthermore, there can be no serious dispute that economic experts may rely upon declarations from marketplace participants.

ARGUMENT

I. THE DECLARATIONS ARE ADMISSIBLE UNDER RULE 807'S RESIDUAL EXCEPTION TO THE HEARSAY RULE

The "purpose of the hearsay rule is to prohibit the use of … unsworn, uncross-examined testimony as substantive evidence in a case." *Cannady v. United States*, 351 F.2d 796, 798 (D.C. Cir. 1965). Neither of these concerns is present here because each declaration was executed under penalty of perjury and the Antitrust Division had more than adequate notice of the declarations such that it could have deposed each declarant and did, in fact, depose six of them.

Rule 807 provides an exception to hearsay for out-of-court statements: (1) that have circumstantial guarantees of trustworthiness; (2) that are offered as evidence of a material fact; (3) that are more probative than other evidence "that the proponent can obtain through reasonable efforts"; (4) when admitting the evidence "best serve[s] the purposes of these rules and the interests of justice"; and (5) when "the proponent gives an adverse party reasonable notice" of the statement such that "the party has a fair opportunity to meet it." Fed. R. Evid. 807. All requirements are met here.

First, the declarations are sufficiently trustworthy. Fed. R. Evid. 807(a)(1). One of the hallmarks of an untrustworthy out-of-court statement is that it "may not have been offered under oath." *United States v. Lynch*, 499 F.2d 1011, 1022 (D.C. Cir. 1974). Here, each of the 42 declarations was signed under penalty of perjury, eliminating that concern. *See, e.g.*, *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 576 (7th Cir. 1989) (admitting affidavits as evidence because they "possess sufficient guarantees of trustworthiness" as they were made subject to perjury penalties); *FTC v. Kuykendall*, 312 F.3d 1329, 1343 (10th Cir. 2002) (same).

The Antitrust Division seeks to make much of an inadvertent omission of a single word in a non-material sentence in one declaration. [redacted]

[redacted]

Plaintiffs' attack on the four "withdrawn" declarations is equally misplaced because the declarants' employers — not the declarants — attempted to "withdraw" the statements even though the statements were made in the declarants' personal capacity, and even then, only after being contacted and subpoenaed by the Antitrust Division. *See* Mot. at Ex. D. Thus the declarations are not only still effective, but they continue to bear the same marks of trustworthiness. Nevertheless, in the interest of resolving issues for the Court, Defendants will honor the employers' requests and will withdraw these four declarations from Defendants' exhibit list.

Second, the declarations are not mere speculation, but include factual statements by market participants that are probative of key issues in this case. Fed. R. Evid. 807(a)(2). [redacted]

[redacted] This evidence demonstrates that integrated health plans and slicing must be considered in defining the relevant product market, and thus demonstrates that Plaintiffs have not met their burden on this material element of their claim.

Third, the purpose of collecting these 42 declarations was to condense the evidence before the Court and to avoid presenting an additional 42 live witnesses during trial. Fed. R. Evid. 807(a)(3), (4). Because of the short duration of the trial and the volume of evidence the Court must consider, presenting this evidence through live testimony would not have been "reasonable." Fed. R. Evid. 807; *Amy Travel Serv.*, 875 F.2d at 576 (finding that declarations were admissible under Rule 807 where "it would be cumbersome" to "bring all of the consumers in for live testimony").

Indeed, it is presumably for these reasons that the Antitrust Division, until this case, often offered — and courts considered — non-party declarations and statements in antitrust merger cases. *See e.g.*, *United States v. SunGard*, 172 F. Supp. 2d 172, 188, 191 (D.D.C. 2001) (considering the 68 letters from SunGard clients that defendants had submitted as exhibits and more than 50 statements from customers submitted by the Antitrust Division); *United States v.*

Baker Hughes, 731 F. Supp. 3, 4 (D.D.C. 1990) ("The record consists of numerous exhibits with significant portions highlighted by the parties, affidavits, and live testimony. . . ."); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 45 ("The parties presented testimony from additional witnesses by affidavit. . . ."); *see also FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 21-22 (D.D.C. 2015) (admitting into evidence 185 declarations from industry participants); *FTC v. Staples*, 970 F. Supp. 1066, 1070 (D.D.C. 1997) ("In addition to these live witnesses, the plaintiff and the defendants combined submitted over six thousand exhibits including declarations from consumers, industry analysts, economic experts, suppliers, and other sellers of office supplies."); *FTC v. Arch Coal*, 329 F. Supp. 2d 109, 118, 145 (D.D.C. 2004) (citing to declarations in plaintiff's exhibits as support for its findings).

Fourth, the declarations were disclosed and produced to the Antitrust Division well before the close of fact discovery, with four having been cited in White Papers during the investigation and therefore delivered to the Antitrust Division even before the Complaint was filed. The Antitrust Division had more than sufficient notice of the declarations. Fed. R. Evid. 807(b).

Finally, Plaintiffs' argument that Rule 807 cannot be applied to the declarations because nationwide service of trial subpoenas for this case renders all of the declarants "available" is simply mistaken. Mot. at 3 n.1. Rule 807 by its terms provides an exception to hearsay "even if the statement is not specifically covered by a hearsay exception in Rule 803 [declarant available] or Rule 804 [declarant unavailable]." Fed. R. Evid. 807. In any event, the declarants are "unavailable," because the Case Management Order explicitly states that the nationwide service of process does not impact the hearsay, Rule 804, analysis. *See* Dkt. No. 91 at ¶ 16.

II. DEFENDANTS' EXPERTS MAY RELY ON THE DECLARATIONS

In a four-sentence argument, Plaintiffs attempt to summarily exclude the testimony of Defendants' experts based on declarations, on the ground that the declarations are too unreliable for even an expert to consider. *See*, Mot. at 6-7. This position is wholly unsupported by the case law and common sense. As established above at Part I, the declarations are sufficiently trustworthy to be admitted as substantive evidence themselves, and are therefore more than adequate for an expert to consider.

Furthermore, an expert witness may rely on inadmissible evidence including hearsay when the evidence is reasonably relied upon by experts in the particular field. *See* Advisory Committee's Note to 2000 amendment to Rule 703 of the Federal Rules of Evidence (recognizing that a physician will often rely on, *inter alia*, "statements by patients and relatives, reports and opinions from nurses, technicians and other doctors"); *see also Miller v. Holzmann*, 563 F. Supp. 2d 54, 90 (D.D.C. 2008) ("While an expert may base his opinion on 'facts or data in the particular case . . . perceived by or made known to the expert at or before the hearing,' he may alternatively rely on facts or data 'of the type reasonably relied upon by experts in the particular field,' whether admissible or not."); *Flanagan v. Islamic Rep. of Iran*, No. 10-1643 (RC), 2016 U.S. Dist. LEXIS 72331, at *78, 82 (D.D.C. June 3, 2016) (explaining that "expert opinions may be based on hearsay" and permitting an expert to testify based on hearsay evidence, noting that "[t]he fact that much, if not all, of the open source material upon which [the expert] relied in informing his opinion constituted hearsay is not problematic"). Thus, "great liberality is allowed the expert in determining the basis of his opinions." *Eggert v. Meritain Health, Inc.*, 428 F. App'x 558, 567 (alteration omitted). There can be no real question that

Defendants' experts should be permitted to testify as to opinions formed in part on consideration of Defendants' proffered declarations.

CONCLUSION

For the foregoing reasons, Anthem respectfully requests that the Court deny Plaintiffs' motion.

Dated: November 19, 2016
Washington, D.C.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2016, a true and correct copy of the foregoing 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 19, 2016
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