

**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)

NOTICE OF FILING REDACTED DOCUMENT

Plaintiffs file the attached public version of their Motion *in Limine* to exclude the declaration of Anthem's efficiencies expert, Shubham Singhal, and testimony from Defendants' experts relying upon that declaration, and associated exhibits (ECF #209). This public version includes redactions, which are necessary to comply with court orders regarding confidentiality of party and non-party material.

Dated: November 7, 2016

Respectfully submitted,

/s/ Jon B. Jacobs

Jon B. Jacobs (D.C. Bar No. 412249)
U.S. Department of Justice
Antitrust Division, Litigation I Section
450 Fifth Street, NW, Suite 4100
Washington, DC 20530
Phone: (202) 598-8916
Facsimile: (202) 307-5802
E-mail: jon.jacobs@usdoj.gov

Attorney for United States of America

CERTIFICATE OF SERVICE

I certify that on November 7, 2016, a true and correct copy of the foregoing document was served upon the parties of record via the Court's CM/ECF system.

Dated: November 7, 2016

/s/ Jon B. Jacobs
Jon B. Jacobs (D.D.C. Bar #412249)
U.S. Department of Justice
Antitrust Division, Litigation I Section
450 Fifth Street, NW, Suite 4100
Washington, DC 20530
Telephone: (202) 514-5012
Facsimile: (202) 307-5802
E-mail: jon.jacobs@usdoj.gov

Attorney for United States of America

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ANTHEM, INC. and CIGNA CORP.,

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Case No. 1:16-cv-01493 (ABJ)

(Public, Redacted Version)

**PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE THE DECLARATION
OF ANTHEM'S EFFICIENCIES EXPERT, SHUBHAM SINGHAL, AND TESTIMONY
FROM DEFENDANTS' EXPERTS RELYING UPON THAT DECLARATION**

On October 7, with just two weeks left in fact discovery, Anthem produced an 88-page “declaration” by Shubham Singhal, a senior partner at McKinsey & Company, the consulting firm hired by Anthem to estimate efficiencies from its acquisition of Cigna. Anthem hired Singhal for his expertise. His declaration and its exhibits and slides are filled with expert opinions. And two of Anthem’s other experts rely on those opinions in their reports. But Anthem calls Singhal a fact witness and has refused to provide Plaintiffs with the expert materials relied upon by Singhal as required by Federal Rule of Civil Procedure 26(a)(2). Because Singhal is in effect an expert witness and his declaration contains extensive expert opinion, Plaintiffs respectfully request that the Court (1) exclude Singhal’s declaration, exhibits, and slides in their entirety, or, in the alternative, the portions of the declaration, exhibits, and slides that constitute expert opinion; (2) prohibit Singhal from testifying as to those opinions at trial; and (3) exclude the opinions of Dr. Mark Israel and Dr. Lona Fowdur to the extent they rely upon Singhal’s expert analysis.

ARGUMENT

I. As a fact witness, Singhal may not offer expert opinions based on his specialized knowledge.

For a fact witness to offer opinion testimony, the testimony must satisfy the requirements of Federal Rule of Evidence 701. “Historically, Rule 701 permitted lay witnesses to testify relating to scientific or technical subjects,” *see In re LTV Steel Co.*, 285 B.R. 259, 264 (Bankr. N.D. Ohio 2002), but that rule was changed with the addition of subsection (c):

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one 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.*

Fed. R. Evid. 701 (emphasis added). These requirements prohibit parties from evading the reliability requirements in Rule 702 by “proffering an expert in lay witness clothing.” *United States v. Wilson*, 605 F.3d 985, 1025 (D.C. Cir. 2010); *see also* Fed. R. Evid. 701 Adv. Comm. Notes (2000).

Indeed, in applying this rule, courts have placed strict limits on lay-witness testimony. A lay witness may not give opinions based on specialized knowledge, “even if those opinions were also based on his or her personal knowledge.” *Armenian Assembly of Am., Inc. v. Cafesjian*, 746 F. Supp. 2d 55, 65 (D.D.C. 2010). The witness’s testimony must be “the product of reasoning processes familiar to the average person in everyday life.” *Id.* (quoting *Wilson*, 605 F.3d at 1025). And even where a lay-witness business manager (like Singhal) has personal knowledge of his team’s work, the manager’s testimony about that work is not necessarily based on “personal knowledge.” *See Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, No. 01 C 4366, 2003 WL 22284326, at *3 (N.D. Ill. Oct. 2, 2003) (holding that such managers “may well have sufficient personal knowledge of the existing operations of the business to allow them to offer opinions as

to losses of existing customers..., [but] any opinions as to future sales to future customers are necessarily based on market analysis. Such an analysis would not be based on the business managers' perception or personal knowledge, and would require specialized knowledge."); *see also KW Plastics v. U.S. Can Co.*, 131 F. Supp. 2d 1265, 1274 (M.D. Ala. 2001).

II. Singhal was hired as an expert and his declaration, exhibits, and slides are replete with expert opinions about the merger's purported efficiencies—opinions that are not based on his own first-hand knowledge.

Although Anthem now calls Singhal a fact witness,¹ Anthem's head of merger integration testified that the McKinsey consultants were hired because of their "expertise." Matheis dep. (10/18/2016) at 153:11–14. And Singhal's declaration emphasizes his specialized knowledge and expertise, as well as the expertise of the McKinsey consultants working with him:


- "For the last twelve years, the majority of my work has been in the healthcare sector, supporting healthcare insurers like Anthem" (¶ 3²).
- "During the past five years, McKinsey's Global Healthcare Practice has conducted more than 2,400 engagements with healthcare systems, commercial and government payors, specialist hospitals, academic medical centers, and ancillary service providers." (¶ 4).
- "As leader of the Global Healthcare Practice, I am integrally involved with coordinating and directing McKinsey's knowledge and work concerning the future of healthcare" (¶ 5).
- "McKinsey brought its highest levels of *expertise* to the synergy analysis and calculation." (¶ 12) (emphasis added).
- "McKinsey also utilized proprietary models" (¶ 13).

Singhal's declaration and exhibits also make clear that his conclusions are not based solely on his first-hand knowledge and observations. Rather, McKinsey's team of experts

¹ Tr. at 25:7–26:6, Oct. 18, 2016, *United States v. Anthem, Inc., et al.*, No. 16-cv-1493 (D.D.C.).

² All paragraph citations are to Singhal's October 17, 2016 declaration and exhibits, attached as Exhibit A.

included more than 165 consultants and “subject experts” involved in the analysis forming the basis of his testimony:

- “The McKinsey personnel worked under the overall direction of Vivian Riefberg, a Senior Partner at McKinsey with over 27 years of healthcare experience, and me. Most of the teams were comprised of McKinsey consultants and subject experts with varied backgrounds, and SMEs [subject matter experts] and key personnel from both Anthem and Cigna. Over the course of this engagement, over 165 McKinsey consultants, including numerous partners with significant experience in the healthcare industry, and depth in specific healthcare business areas and function within a health insurance company, participated in the integration and efficiencies analysis.” (¶ 10).
- “[W]e also included consultants from McKinsey’s Mergers and Acquisitions practice who brought functional expertise to the integration and value capture process Thus, Anthem and Cigna . . . reaped the benefits of the collective knowledge of McKinsey specialists in the merger and acquisition process.” (¶ 11).
- “[W]e included McKinsey actuarial experts experienced in analyzing healthcare claims and medical management data In particular, one McKinsey Actuarial Senior Expert, with over 20 years of actuarial experience . . . was fully involved throughout the integration and played a key role in the Clean Team . . . providing expert analysis of the parties’ claims data.” (¶ 12).
- “Led by senior leaders, the Value Capture Team included high caliber finance teams” (¶ 17).
- “Medical cost synergies were analyzed and calculated by the Network Team.” (¶ 53).
- 

Based on the work of this large team of subject-matter experts working under him, Singhal formed expert opinions (*see* ¶ 9) which are included throughout his declaration, its exhibits, and his slides, and are highlighted in Exhibits A and B.³ He offered opinions about the

³ Exhibit A contains Singhal’s declaration; exhibits 1, 2, and 3; and Singhal’s slide library. Exhibit B is Singhal’s exhibit 4, a long, detailed spreadsheet converted to PDF. Due to technical limitations, the slide library and spreadsheet could not be easily highlighted, but all the slides and the entire spreadsheet are summaries and expressions of Singhal’s expert opinions that should be considered highlighted and should be excluded.

dollar savings that Anthem and Cigna might achieve from medical and network synergies (¶¶ 51–87) and various general and administrative (G&A) synergies (¶¶ 88–159) – including, for example, integrating their call centers (Ex. 2, ¶¶ 2–3)), replacing hard-copy identification cards with digital IDs (Ex. 2, ¶¶ 4–6), and integrating their IT systems (¶¶ 117–122). And he offers opinions about the merged firm’s ability to increase its revenues (¶¶ 160–222).

Other examples of expert opinion testimony include:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

III. Singhal's declaration should be excluded because he was not properly identified as an expert witness.

Anthem's failure to list Singhal as an expert witness leads to a simple result: his testimony should be excluded. Under Federal Rule of Civil Procedure 26(a)(2)(B), Anthem was required to disclose the identity, reports, and material of its expert witnesses. And in the Final Case Management Order, the Court similarly ordered each side to designate all experts that it may call by September 23, 2016, and to produce expert reports by October 7, 2016. (Dkt. #91). Yet Anthem did not identify Singhal as an expert witness nor did it serve an expert report and supporting materials. Rule 37(c) provides that "a party [that] fails to provide information or identify a witness as required by Rule 26(a)...is not allowed to use that information or witness to supply evidence...at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). In this instance, Anthem's failure was not justified or harmless and should thus be precluded from offering Singhal's declaration, exhibits, or slides into evidence or offering any of his expert opinions at trial.

IV. Dr. Israel and Dr. Fowdur should be precluded from relying upon Singhal's improper expert opinions.

Singhal's declaration, exhibits, and slides are attached to Dr. Israel's expert report as Appendix K, and both Dr. Israel and Dr. Fowdur cite Singhal's declaration in their expert reports. Dr. Israel relies on the "estimates produced" by McKinsey and Singhal for the "variable administration cost savings" that may arise from the transaction and credits them as efficiencies, without review. Israel Report ¶¶ 43, 63. Dr. Israel concedes that he spent "relatively little time discussing these savings," yet he incorporates the analysis in full as an appendix to his report. Israel Report ¶ 43 & Appendix K. Likewise, Dr. Fowdur adopts Singhal's analysis to opine that the transaction will generate pro-competitive benefits. *See* Fowdur Report at ¶72a ("The

proposed acquisition...will result in substantial efficiencies to the benefit of consumers. The declaration of Shubham Singhal of McKinsey indicates that reduced costs attributable to efficiencies and synergies...are estimated to be between [REDACTED] and [REDACTED] per year.”).

Allowing Dr. Israel and Dr. Fowdur to testify about Singhal’s conclusions would permit Defendants to circumvent the rules and the Orders of this Court. Given that Singhal’s testimony is inadmissible, this expert testimony should also be excluded. Courts have consistently held that experts may not simply restate others’ opinions without verifying the underlying analysis. “[A]n expert can appropriately rely on the opinions of others if other evidence supports his opinion and the record demonstrates that the expert conducted an independent evaluation of that evidence.” *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 556 (C.D. Cal. 2014) (excluding testimony where the expert had no expertise in marketing, “merely reviewed the surveys prepared by marketing experts and is reporting what they found,” and did not independently test or evaluate the results); *see also Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 612–14 (7th Cir. 2002) (stating that an expert “is not permitted to be the mouthpiece of a scientist in a different specialty”); *TK–7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 732 (10th Cir.1993) (holding that expert who adopted the projections of another expert did not reasonably rely on those projections when “he knew little or nothing at all about” the other expert and the record did not reveal what efforts the expert independently made to corroborate the projections); *Muhsin v. Pac. Cycle, Inc.*, No. 2010–060, 2012 WL 2062396, at *4, *8 (D.V.I. June 8, 2012) (stating that experts may not rely “upon opinions developed by another expert without independent verification or validation of the underlying expert’s work,” because Rule 703 “contemplates that a testifying expert can validate the facts, data and opinions he relied upon...and be subject to cross-examination on them”).

Neither Dr. Israel nor Dr. Fowdur verified or validated Singhal's work. Dr. Israel adopted Singhal's "variable administration cost savings," only noting that he "understand[s] that Mr. Shubham Singhal from McKinsey will submit a declaration describing these estimates in more detail." Israel Report, ¶ 43. Similarly, Dr. Fowdur adopted Singhal's analysis, stating that "Shubham Singhal of McKinsey indicates that reduced costs attributable to efficiencies and synergies of combining Anthem and Cigna are estimated to be between [REDACTED] and [REDACTED] [REDACTED] per year...." Fowdur Report ¶ 72a. Those portions of their reports that improperly rely on Singhal's declaration are highlighted in Exhibits C and D, respectively.

CONCLUSION

For the reasons above, Plaintiffs move to exclude Singhal's declaration as opinion or, in the alternative, the portions of his declaration, exhibits, and slides clearly constituting expert opinion which have been highlighted and attached in Exhibits A and B⁴ and move to prohibit Singhal from testifying as to those opinions at trial. Plaintiffs also move to exclude the opinions of Dr. Mark Israel and Dr. Lona Fowdur to the extent they rely upon Singhal's expert analysis.

⁴ The slide library in Exhibit A and all of Exhibit B should be considered highlighted, as noted in *supra* note 2.

Dated: November 2, 2016

Respectfully submitted,

Paula Lauren Gibson
Deputy Attorney General
Office of the Attorney General of California
300 S Spring Street
Suite 1702
Los Angeles, CA 90013
Phone: (213) 897-0014
Facsimile: (213) 897-2801
E-mail: Paula.Gibson@doj.ca.gov

Attorney for the State of California

/s/ Jon B. Jacobs
Jon B. Jacobs (D.C. Bar No. 412249)
Scott I. Fitzgerald
Matthew C. Hammond
U.S. Department of Justice
Antitrust Division, Litigation I Section
450 Fifth Street, NW, Suite 4100
Washington, DC 20530
Phone: (202) 598-8916
Facsimile: (202) 307-5802
E-mail: jon.jacobs@usdoj.gov

Attorneys for United States of America

Rachel O. Davis
Assistant Attorney General
Office of the Attorney General of Connecticut
55 Elm Street
PO Box 120
Hartford, CT 06106
Phone: (860) 808-5041
Facsimile: (860) 808-5033
E-mail: rachel.davis@ct.gov

Attorney for the State of Connecticut

CERTIFICATE OF SERVICE

I certify that on November 2, 2016, a true and correct copy of the foregoing was served upon all parties of record via the Court's CM/ECF system.

Dated: November 2, 2016

/s/ Jon B. Jacobs
Jon B. Jacobs (D.D.C. Bar #412249)
U.S. Department of Justice
Antitrust Division, Litigation I Section
450 Fifth Street, NW, Suite 4100
Washington, DC 20530
Telephone: (202) 514-5012
Facsimile: (202) 307-5802
E-mail: jon.jacobs@usdoj.gov

Attorney for United States of America

Exhibit A

United States, et al. v. Anthem, Inc. and Cigna Corp.

Case No. 1:16-cv-01493 (ABJ)

(Redacted)

Exhibit B

United States, et al. v. Anthem, Inc. and Cigna Corp.

Case No. 1:16-cv-01493 (ABJ)

(Redacted)

Exhibit C

United States, et al. v. Anthem, Inc. and Cigna Corp.

Case No. 1:16-cv-01493 (ABJ)

(Redacted)

Exhibit D

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[PROPOSED] ORDER

Having considered Plaintiffs' Motion *in Limine* to exclude the declaration of Anthem's efficiency expert, Shubham Singhal, and the testimony from Defendants' experts relying upon that declaration, the Court hereby grants the Motion for the reasons set forth by Plaintiffs and excludes in full Singhal's declaration, exhibits, and slides; prohibits Singhal from testifying as to those opinions at trial; and excludes the opinions of Dr. Mark Israel and Dr. Lona Fowdur to the extent they rely upon Singhal's expert analysis, as identified by Plaintiffs in their Motion.

SO ORDERED.

DATE: November _____, 2016

AMY BERMAN JACKSON
United States District Judge