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 DECLARATION OF SHUBHAM SINGHAL AND TESTIMONY FROM DEFENDANTS' EXPERTS RELYING UPON THAT DECLARATION

Plaintiffs provide no sound basis for excluding Mr. Singhal's testimony or for precluding Anthem's expert economists from relying upon Mr. Singhal's declaration. Mr. Singhal, a partner at McKinsey & Company, has worked with Anthem for years, was retained by Anthem in connection with the proposed merger, and has worked with Anthem and Cigna executives on integration planning since August 2015, nearly a year before this action was filed. He was not hired as a testifying expert, and he is not being presented as a testifying expert. He is being presented as a fact witness, just like the executives he has worked alongside since August 2015. At trial, if Plaintiffs believe that Mr. Singhal is offering expert opinion, they may object. In any event, Anthem's expert economists may properly rely upon Mr. Singhal's declaration under Rule 702 of the Federal Rules of Evidence and established precedent.

In the recent case of *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 82-85 (D.D.C. 2015), this Court, in similar circumstances, permitted the defendants to present factual testimony of a McKinsey representative as well as expert testimony of an economist relying upon the McKinsey

testimony. Declaration of Jack E. Pace III in Support of Anthem's Opposition to Plaintiffs' Motion *in Limine* ("Pace Decl.") Ex. A., Sysco Tr. Transcript at 1865:5-24. That approach was proper and sound, and should be followed again here.

BACKGROUND

On August 5, 2015, Anthem retained McKinsey to advise regarding the integration of Anthem and Cigna, including developing integration plans that would create the most value for the combined entity. Mot. Ex. A, Singhal Decl. ¶¶ 7, 33-37. Shubham Singhal led the McKinsey team whose tasks included mapping the potential integration of Anthem and Cigna, understanding potential overlaps and gaps between the companies, and identifying specific initiatives to achieve medical cost savings, general and administrative costs savings, and revenue synergies. *Id.* at ¶¶ 22-26.

[redacted]

The Antitrust Division elected not to depose Mr. Singhal or McKinsey during its merger investigation, but the Division obtained substantial discovery about the parties' work with McKinsey through the testimony of Anthem and Cigna witnesses, the parties' three White Papers

of 2,190 pages (not including Excel spreadsheets) that described McKinsey's work with parties in great detail, and the parties' response to the Antitrust Division's Second Request, [redacted] Pace Decl. Ex. B., Req. for Additional Info. & Documentary Material Issued to Anthem, Inc. at 45(d).

Plaintiffs also sought and received full productions of documents and data from McKinsey after Plaintiffs filed their Complaint. [redacted]

After the Division requested that Mr. Singhal's deposition occur outside of the fact discovery deadline (and Defendants agreed), Plaintiffs deposed Mr. Singhal on November 2, 2016 concerning McKinsey's integration planning work for Anthem. Plaintiffs had a full opportunity to examine Mr. Singhal concerning the subjects covered by his declaration and

indeed questioned him for seven hours concerning McKinsey's integration planning work and the efficiency calculations performed by McKinsey under the direction of Anthem. While Plaintiffs' motion states that Anthem has "refused" to provide them with expert materials relied upon by Mr. Singhal, in fact Plaintiffs never asked but have taken far more discovery of Mr. Singhal than they could have obtained were he an expert.

ARGUMENT

I. MR. SINGHAL IS A FACT WITNESS WHOSE TESTIMONY HAS BEEN THE SUBJECT OF COMPREHENSIVE DISCOVERY BY PLAINTIFFS

Plaintiffs seek to exclude the Singhal Declaration and supporting materials "in their entirety" based on "Anthem's failure to list Singhal as an expert witness." Mot. at 1, 6. But Mr. Singhal is a fact witness, properly designated as such on September 9, 2016 pursuant to the Case Management Order. Dkt. No. 91. Defendants plan to call Mr. Singhal live at trial to provide factual testimony on the work that McKinsey has done in preparation of integrating Anthem and Cigna. Consultants regularly testify as fact witnesses in merger cases. *See, e.g.*, *Sysco Corp.*, 113 F. Supp. 3d at 82-85 (allowing McKinsey testimony describing the work McKinsey had done to calculate efficiencies of the proposed transaction in action by the FTC to enjoin merger between Sysco Corporation and US Foods, Inc.).

Plaintiffs cannot claim that they have not had adequate discovery into the work performed by Mr. Singhal and McKinsey. Mot. at 1 (Singhal declaration produced "with just two weeks left in fact discovery"), 6 (arguing Anthem did not provide "supporting materials" for Singhal Declaration). Plaintiffs have had extensive discovery of every subject of Mr. Singhal's declaration through both document requests and deposition testimony both during the Division's merger review and during the litigation—[redacted]

[redacted] There is no surprise as to the contents of Mr. Singhal's declaration after such extensive discovery. *See Webster v. Fujitsu Consulting, Inc.*, 369 B.R. 50, 64 (Bankr. D.D.C. 2007) ("[A party] cannot credibly claim to be unfairly surprised by the [witness's] declaration when his counsel had the opportunity to question [the witness] on the very same issues raised in the declaration."). Plaintiffs will suffer no prejudice if Mr. Singhal's declaration is admitted and he is allowed to testify fully. *See Mason v. Brigham Young Univ.*, No. 2:06-CV-826, 2008 WL 444538, at *1 (D. Utah Feb. 14, 2008) (finding "no prejudice" due to untimely designation of witness as expert when declaration was disclosed and deposition taken); *Robinson v. District of Columbia*, 75 F. Supp. 3d 190, 195-96 (D.D.C. 2014) (denying motion to exclude expert report and testimony where "deficiencies were harmless").

II. MR. SINGHAL'S TESTIMONY IS ADMISSIBLE AS PROPER LAY OPINION TESTIMONY UNDER RULE 701 OF THE FEDERAL RULES OF EVIDENCE

The Singhal Declaration discusses the historical facts of the integration process and the consulting work that McKinsey did to identify and calculate synergies as part of the Anthem-Cigna integration. To the extent that the declaration contains opinion, it is permissible lay opinion.

A fact witness may offer opinion testimony if the testimony satisfies the requirements of Rule 701 of the Federal Rules of Evidence. Rule 701 permits opinion testimony by witnesses not identified as experts where the testimony 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."

Plaintiffs argue that the addition of subsection (c) in the 2000 Amendment to Rule 701 should prevent the Court from reviewing the Singhal Declaration. Mot. at 2-3. The Notes of the

Advisory Committee on the 2000 amendments make clear, however, that the amendment to Rule 701 was not meant as a ban on lay opinion testimony, such as testimony about "the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser or similar expert." Fed. R. Evid. 701 advisory committee's note to 2000 amendment (citing *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993)). As here, such testimony, even if treated as lay "opinion testimony[,] is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The [2000] amendment does not purport to change this analysis." *Id.*; *see also United States v. Rigas*, 490 F.3d 208, 222 (2d Cir. 2007) (upholding decision that testimony on balance sheets from outside accountant who "reviewed and analyzed" accounting records was properly admitted over objection that it was improperly disclosed expert testimony); *Webster*, 369 B.R. at 65 (allowing lay testimony and declaration of consulting company who developed and integrated corporation's IT systems on those systems); *FTC v. Capital City Mortg. Corp.*, No. 98-237, 2002 U.S. Dist. LEXIS 28693, at *4-5 (D.D.C. March 28, 2015 (citing committee notes to 2000 amendments to Rule 701 and allowing controller witness to testify as fact witness "regarding his knowledge of the [party's] accounting system").

In a bit of wordplay, Plaintiffs argue Mr. Singhal is disqualified from testifying about his work because Anthem hired McKinsey as a consultant based on its "expertise." Mot. at 3-5. The notes to Rule 701 make clear, though, that the 2000 Amendment to the Rule "does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*." Fed. R. Evid. 701 committee's notes to 2000 amendment. Mr. Singhal's declaration and proposed

testimony at trial describe the historical facts of the work performed by McKinsey based on Mr. Singhal's percipient knowledge of those facts.

A "witness's specialized knowledge, or the fact that he was chosen to carry out an investigation because of this knowledge, does not render his testimony 'expert' so long as it was based on his 'investigatory findings and conclusions, and was not rooted exclusively in his expertise.'" *Rigas*, 490 F. 3d at 224 (2d Cir. 2007) (quoting *Bank of China v. NBM LLC*, 359 F.3d 171, 181 (2d Cir. 2004)); *see also Nat'l Starch & Chem. Trading Co. v. M/V Star Inventana*, No. 05-91-P-S, 2006 U.S. Dist. LEXIS 45719, at *10-11 (D. Me. July 5, 2006) ("A witness may testify under Rule 701 about 'inferences that he could draw from his perception' of a business's records, or 'facts or data perceived' by him in his corporate capacity.") (quoting *Teen-Ed v. Kimball Int'l, Inc.*, 620 F.2d 399, 403-04 (3d Cir. 1980)).

Even if Mr. Singhal's testimony is considered hybrid fact/expert testimony under Rule 26(a)(2)(A) and (C), Plaintiffs received greater discovery than was required. The advisory committee notes to the 2010 amendments to Rule 26 state that disclosure under 26(a)(2)(C) is "considerably less extensive than the report required by Rule 26(a)(2)(B)." Witnesses providing hybrid fact and opinion testimony may be witnesses who "have been employed by the party in some capacity, but not specially for the purpose of giving testimony." *Meredith v. Int'l Marine Underwriters*, Civil No. 10-837, 2011 U.S. Dist. LEXIS 41619, at *10-11 (D. Md. April 18, 2011).

III. THIS COURT SHOULD NOT PRECLUDE DEFENDANTS' EXPERTS FROM RELYING ON THE SINGHAL DECLARATION

Two of Defendants' economic experts, Dr. Mark Israel and Dr. Lona Fowdur, reviewed and considered the Singhal Declaration in preparing their expert reports. Mot. Ex. C, Israel Report ¶¶ 43, 63-64; Ex. D, Fowdur Report ¶ 72(a). Accordingly, they cited the Singhal

Declaration pursuant to the disclosure obligations of Rule 26(a)(2)(B)(ii) of the Federal Rules of Civil Procedure.

Under Rule 703 of the Federal Rules of Evidence, an expert witness may base his or her opinion on any "facts or data" in the case that the expert has been "made aware of or personally observed," provided they are "of a type reasonably relied upon by experts in the particular field." Fed. R. of Evid. 703. The original advisory committee notes to Rule 703 state that "facts or data" may include opinions of others. Fed. R. Evid. 703 advisory committee's notes (noting that a physician relies upon "reports and opinions from nurses, technicians and other doctors"). "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). Accordingly, "'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).

The Singhal Declaration is the type of information an economist normally would rely upon in forming an opinion on a proposed acquisition. *See, e.g.*, *Sysco Corp.*, 113 F. Supp. 3d at 83 (noting expert's reliance on McKinsey efficiencies analysis in merger action). Mr. Singhal and McKinsey have extensive experience in "issues of corporate strategy, growth strategy, mergers and acquisitions, business building, and large scale performance transformation." Mot. Ex. A, Singhal Decl. at ¶ 1. And Mr. Singhal has personal knowledge of the integration planning work. Even if the Court determines that it is appropriate to treat the Singhal Declaration as containing lay opinion, Dr. Israel and Dr. Fowdur did not "simply restate others' opinions" as a substitute for one of their own expert conclusions. Mot. at 7. In his report, Dr. Israel assessed

the process by which McKinsey estimated the cost savings, and Dr. Israel used those estimates (as he would any other data) as an input in his model. *See* Mot. Ex. C, Israel Report at ¶¶ 63-64. As to Dr. Fowdur, she is not proposing to offer any opinion testimony on the synergies to be achieved by the proposed acquisition; she simply cited the fact that Mr. Singhal and his team developed an integration plan projected to reduce costs attributable to the efficiencies and synergies of combining Anthem and Cigna.

IV. MR. SINGHAL SHOULD NOT BE PREEMPTIVELY PROHIBITED FROM TESTIFYING AT TRIAL REGARDING HIS DECLARATION

Trial judges "are afforded broad discretion in rendering evidentiary rulings," which "extends not only to the substantive evidentiary ruling, but also to the threshold question of whether a motion *in limine* presents an evidentiary issue that is appropriate for ruling in advance of trial." *Herbert v. Architect of the Capitol*, 920 F. Supp. 2d 33, 39 (D.D.C. 2013) (citing *United States v. Valencia*, 826 F.2d 169, 172 (2d Cir. 1987)). "[I]n some instances it is best to defer rulings until trial, [when] decisions can be better informed by the context, foundation, and relevance of the contested evidence within the framework of the trial as a whole." *Id.* (quoting *Casares v. Bernal*, 790 F. Supp. 2d 769, 775 (N.D. Ill. 2011)). These principles apply with even more force at a bench trial.

Any objections that Plaintiffs have raised in their motion can be addressed during the course of trial once Mr. Singhal takes the stand to testify. The Court can assess Mr. Singhal's testimony as he gives it and determine if it constitutes factual testimony, lay opinion or expert opinion. Mr. Singhal should not be prohibited preemptively as to what his testimony may be, especially in light of the fact that his declaration contains factual testimony and lay opinion testimony.

CONCLUSION

For the forgoing reasons, the Court should deny Plaintiffs' motion.

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

Respectfully submitted,

/s/ *Christopher M. Curran*

Christopher M. Curran (D.C. Bar No. 408561)
J. Mark Gidley (D.C. Bar No. 417280)
George L. Paul (D.C. Bar No. 440957)
Noah Brumfield (D.C. Bar No. 488967)
Matthew S. Leddicotte (D.C. Bar. No. 487612)
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005
Tel: +1 202 626 3600
Fax: +1 202 639 9355
ccurran@whitecase.com
mgidley@whitecase.com
gpaul@whitecase.com
nbrumfield@whitecase.com
mleddicotte@whitecase.com

Robert A. Milne, *pro hac vice*
Jack E. Pace III, *pro hac vice*
Michael J. Gallagher, *pro hac vice*
Martin M. Toto, *pro hac vice*
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 20036
Tel: +1 212 819 8200
Fax: +1 212 354 8113
rmilne@whitecase.com
jpace@whitecase.com
mgallagher@whitecase.com
mtoto@whitecase.com

Heather M. Burke, *pro hac vice*
WHITE & CASE LLP
3000 El Camino Real
5 Palo Alto Sq., 9th Floor
Palo Alto, CA 94306
Tel: +1 (650) 213 0300
Fax: +1 (650) 213 8158

hburke@whitecase.com

Richard L. Rosen
Wilson D. Mudge
ARNOLD & PORTER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
Telephone: +1 202 942 5072
Facsimile: +1 202 942 5999
Richard.rosen@aporter.com
Wilson.mudge@aporter.com

Counsel for Anthem, Inc.

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
Washington, D.C.

Respectfully submitted,

/s/ *Heather M. Burke*

Heather M. Burke, *pro hac vice*
WHITE & CASE LLP
3000 El Camino Real
5 Palo Alto Sq., 9th Floor
Palo Alto, CA 94306
Tel: +1 (650) 213 0300
Fax: +1 (650) 213 8158
hburke@whitecase.com

Counsel for Anthem, Inc.