UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE UNITED STATES OF AMERICA, Plaintiff(s),

vs.

BERTELSMANN SE & CO. KGAA, et al, Defendant(s).

Civil Action No. 21-02886

Washington, D.C.
August 17, 2022
9:30 a.m.
Morning Session

TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE FLORENCE Y. PAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:
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Ihan Kim, Esquire
Melvin A. Schwarz, I, Esquire
Ethan Stevenson, Esquire
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FOR THE DEFENDANTS BERTELSMANN and PENGUIN RANDOM HOUSE:
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THE COURT: I understand that. Thank you.

MR. FRACKMAN: Thank you.

THE COURT: Anything else from you, Mr. Schwarz?

MR. SCHWARZ: No, Your Honor. Just for the record I would like to say that the Peabody Energy case, which he cited, there was an expert in that case, and the court still rejected most of the efficiencies in any event.

And I think the law is clear from the D.C. Circuit in Anthem on the fact that these cannot be vague, speculative, or otherwise cannot be verified by reasonable means. That's at 359. And I don't think this is reasonable at all.

THE COURT: Okay. Thank you.

The Court has heard the evidence on this issue and the arguments of the parties and is prepared to rule.

Dr. Snyder is an expert witness for the defendants who is offered to testify on merger-related efficiencies. His expert opinion relies on a projection of synergies produced in November of 2020 by Manuel Sansigre, a senior vice president at Penguin Random House who's in charge of mergers and acquisitions.

Mr. Sansigre produced his synergy projections to help Random House evaluate whether it should acquire Simon & Schuster.

Dr. Snyder's expert report offers three primary conclusions about Mr. Sansigre's projections.

First, that the projected synergies are the type that economists would recognize given the features of the publishing industry.

Second, that the projected synergies are merger-specific efficiencies.

Third, that the projected synergies would benefit authors through higher income and consumers through greater availability of books.

Significantly, however, Dr. Snyder concedes that he did not, quote, independently verify specific dollar amounts, unquote, and did not, quote, independently derive estimates, unquote, of Mr. Sansigre's projected synergies. Thus, the parties agree and stipulate that Dr. Snyder did not verify the projections from the November 2020 model that form the basis of his expert opinion on efficiencies.

The government filed a motion in limine to exclude Dr. Snyder's testimony on efficiencies under Federal Rule of Evidence 702. The government argued, among other things, that Dr. Snyder's reliance on unverified projections rendered his efficiencies testimony inadmissible under Rule 702, the horizontal merger guidelines, and cases applying the horizontal merger guidelines.

The Court essentially deferred ruling on the motion to preclude the expert testimony on efficiencies determining that it should hear the evidence about Mr. Sansigre's projections before deciding whether the alleged efficiencies are verifiable and verified as required by the horizontal merger guidelines and persuasive case law.

The Court decided to hear the evidence during the trial given that this is a bench trial but instructed the parties to arrange the presentation of evidence so that the verifiability of Mr. Sansigre's projected synergies could be considered and argued and the Court could then rule on the government's motion before hearing the totality of Dr. Snyder's expert testimony on efficiencies.

The Court determined that it would be more efficient to proceed in this fashion because if defendants were unable to meet their burden to show that the efficiencies were substantiated, verifiable, and verified under the horizontal merger guidelines, then it would be unnecessary to consider any of the other aspects of the efficiencies evidence.

The Court has now heard the evidence on the projected efficiencies and arguments from the parties, and it will grant the motion to preclude the efficiencies evidence because the efficiencies projected by Penguin Random House are not substantiated and verified.

Although many of the projections may be verifiable, some are not verifiable. Moreover, the efficiencies have not, in fact, been independently verified by anyone, and they, therefore, are not cognizable under the horizontal merger guidelines and are not reliable under Rule 702.

Finally, the Court concludes that the efficiencies projections in the November 2020 model are unreliable because they are out of date and include 2021 projections that have been proved to be inaccurate.

The applicable legal standards are as follows:

Federal Rule of Evidence 702 concerning testimony by expert witnesses provides, quote, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if, A, the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; B, the testimony is based on sufficient facts or data; C, the testimony is the product of reliable principles and methods; and D, the expert has reliably applied the principles and methods to the facts of the case, unquote.

Rule 702 incorporates the Supreme Court's guidance in Daubert versus Merrell Dow Pharmaceuticals, Inc. which called upon trial judges to serve a gatekeeping role in ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.

Also in Kumho Tire Company, Limited versus Carmichael, the Supreme Court clarified that the gatekeeper role extends to all expert testimony.

And this is confirmed by Rule 702's advisory committee note to the 2000 amendment.

The party seeking to introduce expert testimony must demonstrate its admissibility by a preponderance of the evidence. Courts take a flexible approach to deciding Rule 702 motions and have broad discretion in determining whether to admit or exclude expert testimony.

Horizontal merger guideline section 10.

The horizontal merger guidelines outline the analysis and enforcement practices of the Department of Justice and the Federal Trade Commission with respect to horizontal mergers under the federal antitrust laws including section 7 of the Clayton Act. See horizontal merger guideline section 1.

Federal courts frequently use the guidelines to develop legal standards in antitrust litigation. See, for example, FTC versus H.J. Heinz Company, 246 F.3d 708. That's a D.C. Circuit case from 2001.

Section 10 of the horizontal merger guidelines discusses efficiencies. The guidelines observe that efficiencies are difficult to verify and quantify in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized.

Therefore, the merger guidelines say, it is incumbent upon the merging firms to substantiate efficiency claims so that the agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency.

Courts interpret this requirement of substantiation and verification to encompass, quote, how and when each efficiency would be achieved and any costs of doing so, how each efficiency would enhance the merged firm's ability and incentive to compete, and why each would be merger specific, end quote. That's from United States versus H&R Block, 833 F.Supp.2d 36 at 89. That's a D.D.C. case from 2011, and it is quoting the horizontal merger guidelines section 10.

Under the guidelines, projected efficiencies are generally less credible when generated outside the usual business planning process, and they are more credible when substantiated by analogous past experience.

Ultimately, efficiencies must be cognizable to be considered under the guidelines. Quote, cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.

A cognizable efficiency claim must represent a type of cost saving that could not be achieved without the merger, and the estimate of the predicted saving must be reasonably verifiable by an independent party. And that's quoting the horizontal merger guidelines and also, I believe, H&R Block.

Case law provides that the Court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those efficiencies represent more than mere speculation and promises about post-merger waiver. That's H&R Block at 89.

So, thus, in sum, the foregoing legal standards and precedents place the burden on defendants to establish that the projected efficiency relied upon by Dr. Snyder are substantiated, that they are reasonably verifiable by an independent party, and that they are, in fact, verified.

Where efficiencies are not independently verifiable and verified, no court in this jurisdiction has ever given any weight to such efficiencies evidence. See H&R Block, 833 F.Supp.2d 36, D.D.C. 2011; United States versus Aetna, 240 F.Supp.3d, D.D.C. 2017; FTC versus Sysco Corporation, 113 F.Supp.3d, 1, D.D.C. 2015; FTC versus Wilhelmsen Holding, ASA, 341 F.Supp.3d 27, D.D.C. 2018; FTC versus Staples, 970 F.Supp 1066, D.D.C. 1997.

This is because it is the parties' interest to be aggressive and optimistic in the projection of efficiencies to justify their own merger. Because courts are not well-positioned to verify such projections, independent verification is critical in order to allow a court to determine whether such projections are reliable.

Without verification, the efficiencies analysis could swallow the analytical framework required by the Clayton Act. See H&R Block at 91.

The Court's findings and conclusions are as follows:

Number one, many of the projected efficiencies in the November 2020 model may be verifiable, but at least some are not verifiable.

According to the testimony of Mr. Sansigre, he and his team worked very hard to derive the efficiencies model. They began in March 2020 by including detailed data about Penguin Random House. When data became available from Simon & Schuster in September 2020, he added that data to the model. When additional data became available in October 2020, he included that data as well. The data and assumptions in the model were closely checked by executives in the Bertelsmann M&A group and the ZI risk management group including Markus Dohle and Nihar Malaviya.

Mr. Sansigre estimates that the model was revised a hundred times before it became final. All of Mr. Sansigre's judgments and assumptions were based on his broad experience in M&A and in particular in M&A in the publishing industry.

And the Court has no doubt that Mr. Sansigre is very competent, an expert in these matters.

Mr. Sansigre uses the term synergies and efficiencies interchangeably. His model identified four categories of synergies; real estate, operating expenses, variable costs, and revenue.

The real estate efficiencies were largely based on expected consolidation of Simon & Schuster's New York headquarters with Penguin Random House's New York headquarters. Mr. Sansigre consulted with managers within Penguin Random House and determined that the personnel of Simon & Schuster could be accommodated in Penguin Random House's New York office space. He then examined Simon & Schuster's lease and consulted with real estate experts who advised him that he could sublet Simon & Schuster's office space for 50 percent of the rental payments owed under the lease. He also examined other real estate holdings and estimated some additional savings from allowing other leases to expire. Based on those calculations, he projected approximately $10 million in savings per year, almost all of which are from consolidating the New York office space.

The operating expense synergies reflect efficiencies in headcount and non-headcount expenses, essentially personnel costs.

Mr. Sansigre's November 2020 model projected $[redacted] in annual operating expense synergies in 2025.

You know, I didn't think of this before, parties, but I do have numbers in this. Is it okay for me to be reading this publicly?

MR. FRACKMAN: As the Court knows, we actually made quite an effort to keep the numbers confidential. And I think both Simon & Schuster and Penguin Random House believe they are confidential. They affect personnel issues and subsequent events.

THE COURT: I am going to black out the numbers then, and we will issue a blacked out -- I will just black out the numbers and then read on the record. Thank you. I'm sorry about that.

Okay. So Mr. Sansigre's November 2020 model projected a certain amount in annual operating expense synergies in 2025. Mr. Sansigre began by predicting a percentage decrease in operating expenses. And this figure was based on prior operating expense synergies in 26 prior acquisitions including the 2013 Penguin Random House merger which had operating expense synergies of a certain percentage as well as consultation with Penguin Random House executives like Mr. Malaviya and Mr. Dohle.

Then Mr. Sansigre looked at the data examining costs department by department to identify where operating expense synergies actually might be achieved.

In some departments such as sales, IT, and administration, Mr. Sansigre looked at specific employee roles and third party contracts to determine which kinds of positions or contacts might be redundant to estimate headcount and non-headcount savings.

In some other departments such as fulfillment, Mr. Sansigre used his judgment to project a percentage of savings based on considerations like Penguin Random House's ability to scale its distribution to meet a portion of Simon & Schuster's distribution demand.

After reviewing the department-by-department data, Mr. Sansigre compared the cumulative projected synergies of that analysis with the expected percentage of synergies that he had used based on prior transactions and management judgment, and the two projected synergies number matched.

Mr. Sansigre's November 2020 model projected a certain amount of annual variable cost synergies in 2025. As part of the variable costs, Mr. Sansigre considered return rates. He found that Penguin Random House had lower return rates than Simon & Schuster by certain percentage points between 2017 and 2021. He reviewed records of improved rates from the 2013 merger from Penguin and Random House, the acquisition of smaller publishers like Little Tiger, and experiences of Penguin Random House's third party distribution clients. He also consulted Simon & Schuster and Penguin Random House management.

Based on those considerations, Mr. Sansigre used his judgment to predict a certain percentage of improvement in Simon & Schuster's post-merger return rate by 2025. Penguin Random House's investments in a supply chain were a significant factor in those projections.

Mr. Sansigre's November 2020 model projected a certain amount of annual revenue synergies in 2025. The most significant projected revenue synergies came from gross physical sales and audio. After accounting for certain rising costs, most significantly royalties and advance write-offs, he came up with a particular number that was a projected increase in sales. And the sales projections are based on Mr. Sansigre's judgment and experience.

Penguin Random House's large sales force was a significant factor in Mr. Sansigre's gross physical sales projections. He believed this large sales force would get Simon & Schuster books into more stores and, thus, increase sales, namely in independent books stores, specialty stores, and international retailers.

Simon & Schuster relies on its top customers for a greater proportion of its sales than Penguin Random House does. Mr. Sansigre interpreted this to mean that Penguin Random House could improve Simon & Schuster's sales among it's non-top customers.

Considering past acquisitions, Mr. Sansigre noted that Penguin Random House doubled the sales of Little Tiger's imprints within two years after acquiring the smaller publisher.

Notably, however, Mr. Sansigre's sales projections do not align with the historical data from the 2013 merger of Penguin and Random House which is more similar in scale to the proposed merger of Penguin Random House and Simon & Schuster.

After the 2013 merger, sales declined. Mr. Sansigre discounts the sales results of the 2013 merger because of changed market conditions including the decline of commercial fiction around 2013 in which Penguin was heavily invested at the time.

In audio Mr. Sansigre predicted that Penguin Random House's significant investments in in-house audio production would let it improve Simon & Schuster's audio revenue because Simon & Schuster relied on third parties for much of its audio revenue.

Mr. Sansigre used his judgment to predict that Simon & Schuster would have a certain percentage increase in audio revenue post merger through essentially growing with the market and benefiting from Penguin Random House's in-house capabilities.

Mr. Sansigre discounted Simon & Schuster's management's relatively high predictions for a Simon & Schuster standalone future audio revenue because he wanted to independently analyze the value of the merger.

So in sum, Mr. Sansigre's projected synergies are based on educated management judgments mostly based on past experience and applied to whatever detailed data about the businesses of Penguin Random House and Simon & Schuster that was available to him.

Many of the projections about cost savings are arguably verifiable because theoretically an independent party could look at all the underlying data about the costs of each entity that Mr. Sansigre compiled and inputted into his spreadsheets. They could get detailed explanations about the assumptions that Mr. Sansigre made in coming up with his percentage estimates of savings, and they could determine whether those assumptions were reasonable and based on past experience. Relying on past experience is favored by the horizontal merger guidelines.

Some of the projections, however, most notably the revenue projections, are not verifiable and are not based on past experience.

The November 2020 model projects sales synergies after the merger even though past experience does not support any sales synergies because after Penguin and Random House merged in 2013, they experienced a decrease in sales.

There were other merger experiences of Penguin Random House that supported the idea of sales synergies, but Mr. Sansigre picked and chose among the different precedents and he justified his sales projections not relying on Penguin and Random House merger based on his evaluation of changed marketing conditions.

Therefore, the actual percentages that Mr. Sansigre chose to apply to revenues as synergies are not verifiable.

Indeed, the defendants have conceded that revenue synergies are the least easy to predict, and one of Mr. Sansigre's own emails in the record acknowledges that the sales efficiencies are difficult to predict.

Ultimately, however, the projected sales synergies are derived from Mr. Sansigre's personal judgment, and they are not consistent with the most prominent past experience and, thus, the projected sales synergies in particular are not verifiable.

Number two, none of the efficiencies are independently verified.

The parties agree and stipulate that, regardless of whether the model was verifiable, it was not, in fact, verified by anyone outside of Penguin Random House. Thus, there was no independent verification as the horizontal merger guidelines and prior case law contemplate.

Defendants argue that the Court may verify the projections by hearing how they were derived and satisfying itself that Mr. Sansigre put in a lot of work and made reasonable assumptions, but the Court strongly disagrees that this is what is contemplated by horizontal merger guidelines and the case law.

The Court is not in a position to fact-check what Mr. Sansigre says that he did or to determine whether his assumptions were reasonable. Notably, none of the cases that have considered this issue support the notion that the Court should provide the independent verification necessary to support efficiencies evidence proffered by defendants.

Defendants have said that there's no case that says an expert is necessary. And I think that's true. Nobody has said that explicitly. But the defendants have the burden to establish that these efficiencies were independently verified, and they assume a risk in litigation in arguing to a court that a court should do that work that in many precedents was performed by experts with much more knowledge about the industry and expertise in dealing with financial models and assumptions than a court could reasonably be expected to have.

This Court notes that in the Sysco case, that court found that the expert had not verified whether efficiencies predicted by a consulting company were merger specific and for that reason among others declined to consider the efficiencies evidence. That court did not attempt to verify the merger specificity on its own. And this Court is not aware of any other precedent where a court has undertaken the kind of rigorous verification that is necessary in order to rely on efficiencies in an antitrust case.

Number three, subsequent updates of the November 2020 model undermine its reliability.

After the November 2020 model was created, Mr. Sansigre continued to update and refine the model. Most notably, new iterations of the model were created in June 2021 and January 2022. The new iterations have some drastically different projections with respect to efficiencies. The Court focuses on the January 2022 model because defendants contend that the June 2021 model was about a special circumstance, a possible large infusion of cash to the business.

Looking at the January 2022 model, that model predicts an increase in gross physical sales of [redacted] as compared to [redacted] in the November 2022 model.

The January 2022 model predicts -- I'm sorry, I should not have said those numbers.

The January '22 model predicts a certain number in fulfilling savings as compared to a much larger number predicted in November 2020, and savings on administration in the 2022 model is far larger as compared to the number in the November 2020 model. And I understand that that includes editorial and art, but the additions of those lines does not account for the magnitude of the change.

Furthermore, certain projections of the November 2020 model were proved inaccurate by the actual performance of Simon & Schuster in 2021.

While the November 2020 model made certain predictions of synergies for a merged company based on inputs regarding Simon & Schuster's expected performance as a standalone company, the actual standalone performance of Simon & Schuster exceeded the predictions.

This indicates that the November 2020 model is both out of date because it does not include actual updated performance numbers and also that the November 2020 model relied on proveably wrong projections and predictions.

Mr. Sansigre testified that the November 2020 model is still the most reliable because it reflects pre-pandemic market conditions. It appears to be his judgment that the future will look more like the pre-pandemic world than the present world.

The Court rejects that testimony because Mr. Sansigre cannot possibly know what the post-pandemic world will be like and whether the book industry will revert to pre-pandemic levels of sales and costs. Even with the benefit of industry expertise, it is clear to this Court that we are in uncharted waters.

Thus, the Court concludes that the November 2020 model is unreliable because its inputs are not updated and its projections are proveably inconsistent with actual numbers for Simon & Schuster in 2021. The Court finds that Mr. Sansigre's justifications for continuing to use the November 2020 model are unpersuasive.

The Court, thus, finds that the November 2020 efficiencies model contains some projected efficiencies that are not verifiable and that, in any event, none of the efficiencies have been verified as required by the horizontal merger guidelines and persuasive case law.

Moreover, the model is unreliable because it is not updated and makes proveably inaccurate projections. As a result, Dr. Snyder's expert report based on the November 2020 model is not based on sufficient facts and data under Rule 702 and must be excluded.

Five precedents in this jurisdiction unanimously support this conclusion. Those precedents are H&R Block, Wilhelmsen, Staples, Aetna, and Sysco.

In United States versus H&R Block, the court rejected efficiencies evidence where the projected efficiencies, quote, were largely premised on defendant's managers' experiential judgment about likely costs rather than a detailed analysis of historical data.

The court noted that, while reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the cost estimates renders them not cognizable by the court.

If this were not so, then the efficiencies defense might well swallow the whole of section 7 of the Clayton Act because management would be able to present large efficiencies based on its own judgment and the court would be hard pressed to find otherwise.

In this case, many of the efficiencies projections are also premised on management expectations and judgment.

In FTC versus Wilhelmsen Holding ASA, the court rejected efficiencies evidence where the projected efficiencies were based on, quote, a series of significant assumptions, percentage reductions in cost, percentage increases in productivity, or assumed cost product equivalencies that were doing all the work in calculation of the estimates.

There the critical issue was that because the bases for the assumptions the expert identified and their role in the efficiencies analysis were unclear, the reasonableness of the assumptions along with the ultimate determinations could not be verified with any degree of rigor.

Significantly, the court in that case noted that, quote, references to the merging parties' past practices, managerial expertise, and incentives or internal verification processes, unquote, could not, quote, serve to substantiate any efficiencies, unquote, because a court cannot substitute defendants' assessments and projections for independent verification.

So here, while Penguin Random House's internal process was rigorous, that internal process cannot substitute for independent verification.

In FTC versus Staples, the court rejected efficiencies evidence where, quote, the defendants' projected base case savings of $5 billion were in large part unverified or at least the defendants failed to produce the necessary documentation for verification, unquote.

Here the efficiencies also are unverified. And although the defendants will say that they produced the documentation for verification, as the Court has already stated, the Court does not have the capability, the time, or resources to perform the verification.

In United States versus Aetna, the court rejected efficiencies evidence where the defendants' experts failed to review the underlying provider contracts after the merging parties approached -- after the merging parties projected efficiencies based on the contracts, and that was criticized.

Instead, the expert noted simply that a third party consultant had taken a large haircut to the total savings estimated and without much analysis concluded that the savings were verifiable.

The court deemed that insufficient. The court said, without a more robust analysis which the companies have not provided, the court cannot conclude that these network efficiencies are verifiable and likely to be passed on to consumers.

Here, like in that case, Dr. Snyder also failed to look closely at the underlying data and did not do any robust analysis to verify the efficiencies.

Finally, in FTC versus Sysco, the court rejected efficiencies evidence where defendants' expert relied on synergy projections made by McKinsey, the consulting firm which was hired by Sysco to determine the prospective value of acquiring U.S. Foods.

The court there did not question the rigor and scale of the analysis conducted by McKinsey but noted that the expert had not verified that the synergies were merger specific.

The court stated that it was not clear what independent analysis the expert did to reduce McKinsey's projected savings to merger-specific savings.

The court also noted that in one example, the expert relied exclusively on documents created by either McKinsey or defendants. He performed no independent analysis to verify those numbers.

Again, similarly in this case, Dr. Snyder did not perform any independent analysis to verify the numbers. And in that case, the court did not undertake to do the verification itself.

As a result, the Court will exclude Dr. Snyder's testimony on efficiencies. No independent party could reasonably verify the magnitude of at least some of the asserted efficiencies in Mr. Sansigre's projected model, especially the sales synergies, and Dr. Snyder made no attempt to provide a quantitative verification of the synergies.

Because Dr. Snyder's testimony was not based on sufficient facts and data, that testimony cannot help the trier of fact to determine a fact at issue and, therefore, is not admissible under Rule 702.

Although the Court's reasoning is firmly grounded in precedents applying the horizontal merger guidelines, it bears mentioning that the Court's analysis under Rule 702 is also consistent with the application of that rule in other contexts. It is well established that expert testimony may be excluded under Rule 702 where the expert relies uncritically on information provided to them by the party or parties for whom they are working.

In the Title VII case, Campbell versus National Railroad Passenger Corporation, the court excluded the testimony of plaintiffs' expert who relied on a summary of testimony prepared by plaintiffs' counsel to form his opinions without independently reviewing or verifying that testimony. That case is at 311 F.Supp.3d 281 from 299 to 300. That's D.D.C. 2018.

The court reasoned, quote, such blind reliance on facts provided by plaintiff's counsel combined with his failure to review other sources of information renders his expert report unreliable, unquote. That's at 300.

See also McReynolds versus Sodexho Marriott Services, Inc., 349 F.Supp.2d 30 at 38, D.D.C. 2004, allowing in a

Title VII case testimony of plaintiffs' expert who relied on data prepared by the opposing party instead of by the same party who retained the expert.

And see also United States ex rel Morsell versus NortonLifeLock, Inc. That's 568 F.Supp.3d 248 at 276, D.D.C. 2021, where expert and false claims case explicitly disclaimed verification of assumptions, the expert was allowed to opine only conditionally assuming the government succeeds in proving the assumptions upon which the opinions rely.

All of these cases support the proposition that an expert's opinion may be excluded as unreliable when the opinion blindly rests on evidence provided by the party that retains the expert. A party may not cloak unexamined assumptions in the authority of expert analysis. See Ask Chemicals, LP versus Computer Packages, Inc, 593 F.Appx. 506, 510, Sixth Circuit, 2014.

For all the foregoing reasons, the Court grants the government's motion to exclude the defendants' efficiencies evidence.

Does any party want any additional findings or conclusions for the record?

MR. SCHWARZ: No, Your Honor.

MR. FRACKMAN: I think that covers it, Your Honor.

THE COURT: Okay. Thank you.

So we were in the midst of Dr. Snyder's testimony.