UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*, *Plaintiffs*, v. UNITEDHEALTH GROUP INCORPORATED and CHANGE HEALTHCARE INC., *Defendants.*	Civil Action No. 1:22-cv-0481 (CJN) Hon. Carl J. Nichols **[REDACTED VERSION]**

DEFENDANTS' CORRECTED RESPONSE TO PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE DEFENDANTS' THIRD-PARTY DECLARATIONS AND TESTIMONY FROM DEFENDANTS' EXPERTS RELYING ON THOSE DECLARATIONS

Plaintiffs move to exclude two declarations from [redacted] employees and any expert witness reference to them. Plaintiffs do not contest the veracity of any particular statement in the declarations. Plaintiffs instead assert that the declarations are untrustworthy and inadmissible hearsay, notwithstanding that [redacted] is a cooperating government witness, [redacted] was willing to provide declarations to Plaintiffs on request, and Plaintiffs could have but failed to cross-notice Defendants' 30(b)(6) deposition notice to [redacted] As for expert witness references, Plaintiffs misread Rule 703, which permits experts to disclose inadmissible evidence to the court in a bench trial.

I. Background on the [redacted] Declarations

On May 24, 2022, Defendants served a 30(b)(6) subpoena on [redacted] [redacted] counsel repeatedly emphasized the burden those depositions would place on [redacted] Exhibit 1, Decl. of Daniel Culley ¶ 4. Plaintiffs never cross-noticed.

On June 3, 2022, Plaintiffs deposed their own witness and [redacted] employee [redacted]. [redacted] testified that she had no personal knowledge of the alternatives available to [redacted] for EDI clearinghouse services.[1] [redacted] did have personal knowledge that [redacted] had a firewall between its [redacted] businesses, that violating the firewall would have serious consequences, and that she was not aware of anyone ever violating it, but she admitted a lack of personal knowledge of [redacted] evaluation of the success of the firewall and whether firewalls are commonplace in the industry.[2]

Given [redacted] concern about the burden of the 30(b)(6) subpoena, Defendants asked if [redacted] would provide declarations on these narrowly targeted topics about which [redacted] had no personal knowledge. *See* Exhibit 1 ¶ 5. [redacted] counsel informed Plaintiffs and Defendants that [redacted] was willing to sign declarations to respond to discovery requests if they contained simple, factual statements. [redacted] counsel also told Plaintiffs that [redacted] was discussing declarations with Defendants in lieu of its 30(b)(6) deposition. *See* Exhibit 2, Decl. of [redacted].

Defendants provided the declarations to Plaintiffs the day they were received. The declarations are attached as Exhibits 3 and 4. Plaintiffs raised no concern with the declarations

[1] [redacted]

[2] [redacted]

until they filed their motion *in limine*. Plaintiffs did not attempt to meet and confer about their motion before filing it, as required by Local Rule 7(m). Plaintiffs' motion fails on that basis alone. "Courts in this [d]istrict have previously denied non-dispositive motions for failure to comply with Local Civil Rule 7(m)," including motions *in limine*. *See English v. Washington Metro. Area Transit Auth.*, 293 F. Supp. 3d 13, 16 (D.D.C. 2017) (collecting cases); *Abbott GmbH & Co. KG v. Yeda Res. & Dev. Co., Ltd.*, 576 F. Supp. 2d 44, 47–49 (D.D.C. 2008). This failing aside, Plaintiffs' motion is without merit for the reasons discussed below.

II. Argument

1. The [redacted] declarations are admissible under Rule 807, the "residual exception" to the hearsay rule.

Rule 807 admits declarations if they are "supported by sufficient guarantees of trustworthiness" and "more probative on the point for which [they are] offered than any other evidence that the proponent can obtain through reasonable efforts." Fed. R. Evid. 807. Plaintiffs argue that Rule 807 does not cover the [redacted] declarations because they were "short [and] conclusory," were obtained in exchange for withdrawing a deposition notice, and the same statements could have been obtained in depositions.[3]

Plaintiffs confuse "short [and] conclusory" with simple and factual. For example, regarding the topic of [redacted] alternatives to transmit claims other than through Change Healthcare, [redacted] stated:

[redacted]

[3] *See* Plaintiffs' *Motion In Limine* To Exclude Defendants' Third Party Declarations And Testimony From Defendants' Experts Relying On Those Declarations, No. 1:22-cv-0481, ECF No. 69, at 3.

Exhibit 3, Decl. of [redacted] ¶ 9. The remainder of the declaration is essentially foundation for these statements.

Plaintiffs do not say, and cannot seriously argue, that these declarations are likely to have been fabricated. [redacted] statements were made in signed declarations under penalty of perjury in a proceeding involving the government. Plaintiffs have not pointed to any inconsistent evidence. Plaintiffs could have cross-noticed the 30(b)(6) deposition, obtained their own declaration from [redacted] or deposed the declarants after receipt of the declarations, which Defendants would not have opposed. And the declarations are more probative than other evidence reasonably available. The [redacted] witness deposed lacked knowledge of these topics, and [redacted] a non-party, repeatedly raised concerns about the burden of a 30(b)(6) deposition.

The cases Plaintiffs cite involve substantially different circumstances than this case, such as declarations that had been withdrawn or contained lay opinions rather than facts, (*United States v. Anthem,* No. 1:16-CV-01493-ABJ, ECF No. 338 at 2 (D.D.C. Nov. 16, 2016)); were provided after the close of fact discovery, (*Sabre Int'l Sec. v. Torres Advanced Enter. Sols., LLC,* 72 F. Supp. 3d 131, 150 (D.D.C. 2014)); or did not state they were based on personal knowledge, (*Partido Revolucionario Dominicano (PRD) Seccional Metropolitana de Washington-DC, Maryland y Virginia v. Partido Revolucianario Dominicano, Seccional de Maryland y Virginia,* 311 F. Supp.2d 14, 18 (D.D.C. 2004)).

2. Even if the [redacted] declarations are not admitted into evidence, Defendants' experts should be permitted to disclose the facts in those declarations in the course of their testimony under Rule 703.

Plaintiffs also argue that, should the Court determine the declarations are inadmissible, Defendants' experts should not be permitted to refer in testimony to the facts they contain.[4]

Experts are free to disclose inadmissible evidence on which they rely to the court in a bench trial. Rule 703 says, "But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them *to the jury* only if their probative value in helping *the jury* evaluate the opinion substantially outweighs their prejudicial effect" Fed. R. Evid. 703 (emphasis added). As the Supreme Court stated in *Williams v. Illinois,*

> Under [] the Federal Rules of Evidence, an expert may base an opinion on facts that are "made known to the expert at or before the hearing," but such reliance does not constitute admissible evidence of this underlying information. [] Fed. Rule Evid. 703. Accordingly, *in jury trials*, [] federal law generally bar[s] an expert from disclosing such inadmissible evidence. In bench trials, however, [] the Federal Rules place no restriction on the revelation of such information to the factfinder. When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose. As we have noted, "[i]n bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." *Harris v. Rivera*, 454 U.S. 339, 346, (1981) (*per curiam*). There is a "well-established presumption" that "*the judge [has] adhered to basic rules of procedure*," when the judge is acting as a factfinder. *Id.*, at 346-347 (emphasis added).

567 U.S. 50, 69-70 (2012) (references to state law omitted).

Plaintiffs suggest that Professors Tucker and Murphy apply no expertise in using the declarations. But Professors Handel and Gowrisankaran propose theories of harm and Professors Tucker and Murphy argue those conclusions are contradicted by real-world examples. This is standard economic practice.

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[4] *See* Plaintiffs' *Motion In Limine* To Exclude Defendants' Third Party Declarations And Testimony From Defendants' Experts Relying On Those Declarations, No. 1:22-cv-0481, ECF No. 69, at 4.

Plaintiffs provide no explanation of why this is inappropriate or comparable to the *Daubert* motions that they have identified in which an expert had a report section titled "personal interpretation of what happened" (*Estate of Parsons v. Palestinian Authority*, 715 F. Supp. 2d 27, 32 (D.D.C. 2010); an expert gave his view of the defendants' intent (*In re Rail Freight*, 292 F. Supp. 2d 14, 73 (D.D.C. 2017); an expert was not qualified to opine at all in his field of study (*SEC v. Tourre*, 950 F. Supp. 2d 666, 677 (S.D.N.Y. 2013)); or an expert admitted his opinions were based only on personal, subjective views (*In re Rezulin*, 309 F. Supp. 2d 531, 543 (S.D.N.Y. 2004)).

III. Conclusion

For the foregoing reasons, Defendants request that the Court deny Plaintiffs' Motion *in Limine* to Exclude Defendants' Third Party Declarations and Testimony from Defendants' Experts Relying on Those Declarations.

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Respectfully submitted,

By: */s/ Daniel P. Culley*

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