

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLUMBIA

3 THE UNITED STATES OF AMERICA, Civil Action
4 Plaintiff(s), No. 21-02886
5 vs.

6 BERTELSMANN SE & CO. KGAA, Washington, D.C.
7 et al, August 17, 2022
8 Defendant(s). 9:30 a.m.
Morning Session

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

12 APPEARANCES:

12 FOR THE PLAINTIFF: John R. Read, Esquire
13 Ihan Kim, Esquire
14 Melvin A. Schwarz, I, Esquire
15 Ethan Stevenson, Esquire
16 United States Department of Justice
Antitrust Division
450 Fifth Street, Northwest
Washington, D.C. 20530

17 FOR THE DEFENDANTS Daniel M. Petrocelli, Esquire
18 BERTELSMANN and M. Randall Oppenheimer, Esquire
19 PENGUIN RANDOM HOUSE: Megan Smith, Esquire
O'Melveny & Myers, LLP
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Eighth Floor
20 Los Angeles, California 90067

1 THE COURT: I understand that. Thank you.

2 MR. FRACKMAN: Thank you.

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

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

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

12 THE COURT: Okay. Thank you.

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

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

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

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

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

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

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

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

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

23 The Court essentially deferred ruling on the motion to
24 preclude the expert testimony on efficiencies determining that
25 it should hear the evidence about Mr. Sansigre's projections

1 before deciding whether the alleged efficiencies are verifiable
2 and verified as required by the horizontal merger guidelines
3 and persuasive case law.

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

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

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

22 Although many of the projections may be verifiable,
23 some are not verifiable. Moreover, the efficiencies have not,
24 in fact, been independently verified by anyone, and they,
25 therefore, are not cognizable under the horizontal merger

1 guidelines and are not reliable under Rule 702.

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

6 The applicable legal standards are as follows:

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

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

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

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

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

8 Horizontal merger guideline section 10.

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

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

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

25 Therefore, the merger guidelines say, it is incumbent

1 upon the merging firms to substantiate efficiency claims so
2 that the agencies can verify by reasonable means the likelihood
3 and magnitude of each asserted efficiency.

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

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

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

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

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

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

11 Where efficiencies are not independently verifiable
12 and verified, no court in this jurisdiction has ever given any
13 weight to such efficiencies evidence. See H&R Block, 833
14 F.Supp.2d 36, D.D.C. 2011; United States versus Aetna, 240
15 F.Supp.3d, D.D.C. 2017; FTC versus Sysco Corporation, 113
16 F.Supp.3d, 1, D.D.C. 2015; FTC versus Wilhelmsen Holding, ASA,
17 341 F.Supp.3d 27, D.D.C. 2018; FTC versus Staples, 970 F.Supp
18 1066, D.D.C. 1997.

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

25 Without verification, the efficiencies analysis could

1 swallow the analytical framework required by the Clayton Act.
2 See H&R Block at 91.

3 The Court's findings and conclusions are as follows:

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

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

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

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

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

1 revenue.

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

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

20 Mr. Sansigre's November 2020 model projected
21 \$ [REDACTED] in annual operating expense synergies in 2025.

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

25 MR. FRACKMAN: As the Court knows, we actually made

1 quite an effort to keep the numbers confidential. And I think
2 both Simon & Schuster and Penguin Random House believe they are
3 confidential. They affect personnel issues and subsequent
4 events.

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

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

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

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

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

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

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

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

1 factor in those projections.

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

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

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

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

25 Notably, however, Mr. Sansigre's sales projections do

1 not align with the historical data from the 2013 merger of
2 Penguin and Random House which is more similar in scale to the
3 proposed merger of Penguin Random House and Simon & Schuster.

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

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

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

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

23 So in sum, Mr. Sansigre's projected synergies are
24 based on educated management judgments mostly based on past
25 experience and applied to whatever detailed data about the

1 businesses of Penguin Random House and Simon & Schuster that
2 was available to him.

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

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

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

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

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

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

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

11 Number two, none of the efficiencies are independently
12 verified.

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

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

24 The Court is not in a position to fact-check what
25 Mr. Sansigre says that he did or to determine whether his

1 assumptions were reasonable. Notably, none of the cases that
2 have considered this issue support the notion that the Court
3 should provide the independent verification necessary to
4 support efficiencies evidence proffered by defendants.

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

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

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

25 After the November 2020 model was created,

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

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

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

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

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

23 While the November 2020 model made certain predictions
24 of synergies for a merged company based on inputs regarding
25 Simon & Schuster's expected performance as a standalone

1 company, the actual standalone performance of Simon & Schuster
2 exceeded the predictions.

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

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

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

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

23 The Court, thus, finds that the November 2020
24 efficiencies model contains some projected efficiencies that
25 are not verifiable and that, in any event, none of the

1 efficiencies have been verified as required by the horizontal
2 merger guidelines and persuasive case law.

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

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

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

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

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

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

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

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

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

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

24 In FTC versus Staples, the court rejected efficiencies
25 evidence where, quote, the defendants' projected base case

1 savings of \$5 billion were in large part unverified or at least
2 the defendants failed to produce the necessary documentation
3 for verification, unquote.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 And see also United States ex rel Morsell versus
5 NortonLifeLock, Inc. That's 568 F.Supp.3d 248 at 276, D.D.C.
6 2021, where expert and false claims case explicitly disclaimed
7 verification of assumptions, the expert was allowed to opine
8 only conditionally assuming the government succeeds in proving
9 the assumptions upon which the opinions rely.

10 All of these cases support the proposition that an
11 expert's opinion may be excluded as unreliable when the opinion
12 blindly rests on evidence provided by the party that retains
13 the expert. A party may not cloak unexamined assumptions in
14 the authority of expert analysis. See Ask Chemicals, LP versus
15 Computer Packages, Inc, 593 F.Appx. 506, 510, Sixth Circuit,
16 2014.

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

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

22 MR. SCHWARZ: No, Your Honor.

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

24 THE COURT: Okay. Thank you.

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