

ORIGINAL

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of _____

PROMEDICA HEALTH SYSTEM, INC., _____

a corporation _____

Docket No. 9346

**RESPONDENT PROMEDICA HEALTH SYSTEM INC.'S
MOTION *IN LIMINE* TO EXCLUDE EMPLOYER AND PHYSICIAN
DECLARATIONS**

Respondent ProMedica Health System, Inc. respectfully submits this motion *in limine* for an Order excluding from evidence the Signed Declarations of Thomas Guido Andreshak, M.D. (PX02082), Kent Buehrer (PX02053), Marianne Cappiello (PX02071), Hugh Caumartin (PX02066), Charles J. Gbur, Jr., M.D. (PX02076), Rachel Gregg (PX02059), Peggy Hartbarger (PX02055), Carrie Herringshaw (PX02051), Donna Jablonski (PX02079), Donna Jensen, D.O. (PX02081), Margaret Kaya (PX02054), Craig Kohring (PX02061), John Lauffer (PX02063), Ken Lortz (PX02052), Christopher Marlowe, M.D. (PX02075), Kathleen Neal (PX02070), Aura Norris (PX02069), Mark Nowak (PX02060), Jim Perry (PX02074), Deborah Waldie (PX02058), Tom Weinrich (PX02062), and Jeffrey Wirebaugh, M.D. (PX02077) relating to healthcare services in the Toledo, OH area for the reasons set forth in Respondent's accompanying Memorandum in support of its motion.

Dated: May 13, 2011

Respectfully submitted,

By: DANIEL G. POWERS

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*Attorneys for Respondent ProMedica
Health System, Inc.*

CERTIFICATE OF SERVICE

I, Daniel G. Powers, hereby certify that I served a true and correct copy of the foregoing Respondent's Motion *in Limine* to Exclude Employer and Physician Declarations, upon the following individuals by hand on May 13, 2011.

Hon. D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H110
Washington, DC 20580

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room 172
Washington, DC 20580

I, Daniel G. Powers, hereby certify that I served a true and correct copy of the foregoing Respondent's Motion *in Limine* to Exclude Employer and Physician Declarations, upon the following individuals by electronic mail on May 13, 2011.

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**RESPONDENT PROMEDICA HEALTH SYSTEM INC.'S
MEMORANDUM IN SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE
EMPLOYER AND PHYSICIAN DECLARATIONS**

In its Final Proposed Witness List and Exhibit List, Complaint Counsel included various declarations from non-party employers and physicians purporting to offer opinions regarding the effect of the joinder of Saint Luke's Hospital and the ProMedica Health System on health care services in Toledo, Ohio (collectively the "Employer and Physician Declarations").¹ None of these declarations was spontaneously and independently offered by the declarant. Rather, Complaint Counsel identified and selected the parties who would submit declarations, and then worked with each party to craft a declaration that best suited Complaint Counsel's goals in this litigation. As a result, the Employer and Physician Declarations contain unfounded statements that are confusing, misleading, and needlessly cumulative. Complaint Counsel should be prohibited from offering these indisputably hearsay statements in lieu of live testimony from these witnesses. For these reasons, Respondent ProMedica Health System respectfully requests that Your Honor grant its motion *in limine* and exclude the Employer and Physician Declarations relating to healthcare services in the Toledo, Ohio area from evidence at the trial in this matter.

I. ARGUMENT

As a threshold matter, the Employer and Physician Declarations are classic examples of hearsay, particularly if offered in lieu of live testimony from the witnesses who submitted the statements. Pursuant to the Rule 3.43(b), 16 C.F.R. § 3.43(b), hearsay is inadmissible if it fails to meet the basic "standards of admissibility" of evidence in FTC administrative proceedings. 16 C.F.R. § 3.43(b). In other words, hearsay evidence is only admissible if it is "relevant, material, and bears satisfactory indicia of reliability so that its use is fair." *Id.*; *see also* 74 Fed. Reg. 1804,

¹ These exhibits include the signed declarations from Thomas Guido Andreshak, M.D. (PX02082), Kent Buehrer (PX02053), Marianne Cappiello (PX02071), Hugh Caumartin (PX02066), Charles J. Gbur, Jr., M.D. (PX02076), Rachel Gregg (PX02059), Peggy Hartbarger (PX02055), Carrie Herringshaw (PX02051), Donna Jablonski (PX02079), Donna Jensen, D.O. (PX02081), Margaret Kaya (PX02054), Craig Kohring (PX02061), John Lauffer (PX02063), Ken Lortz (PX02052), Christopher Marlowe, M.D. (PX02075), Kathleen Neal (PX02070), Aura Norris (PX02069), Mark Nowak (PX02060), Jim Perry (PX02074), Deborah Waldie (PX02058), Tom Weinrich (PX02062), and Jeffrey Wirebaugh, M.D. (PX02077).

1816 (Jan. 13, 2009)(Commission commentary stating that the revised rule does not provide for the admission of hearsay evidence ‘in every circumstance,’ but only where such evidence is sufficiently relevant, reliable and probative ‘so that its use is fair.’”).²

In this case, however, the Employer and Physician Declarations fail to meet these basic standards of admissibility. Even if the Court considers these declarations relevant, which they are not, relevant evidence may be excluded, if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” 16 C.F.R. § 3.43(b). Here, however, the unfair prejudice that will result from the admission of the Employer and Physician Declarations without allowing Respondent the opportunity to cross-examine the unfounded claims made in these statements substantially outweighs any probative value these declarations may have. They are, therefore, inadmissible.

A. The Employer and Physician Declarations Are Irrelevant, Immaterial, and Unreliable

As an initial matter, the Employer and Physician Declarations designated by Complaint Counsel are unreliable because the declarants lack sufficient personal knowledge for the statements contained within their Declarations. A fundamental gauge of the admissibility of *any* testimony, whether live or written, is whether the witness had personal knowledge of the matter described. *See* Federal Rules of Evidence, Rule 602.

² The Federal Rules of Evidence provide an “extremely useful” guide for assessing admissibility of evidence within an administrative proceeding. Operating Manual, Chapter 10, Section .6 (“Admissibility of Evidence”). The Federal Rules of Evidence are routinely referenced in administrative proceedings before the Federal Trade Commission. *See, e.g., In the Matter of Intel Corporation*, Docket No. 9341, Order Denying Complaint Counsel’s Motion to Admit European Commission Decision, May 6 2010 (reviewing application of Federal Rule of Evidence 803(8)(C) in assessment of the reliability of hearsay evidence). The Administrative Law Judge may also provide in the Scheduling Order for the application of specific provisions from the Federal Rules of Evidence. In this matter, F.R.E. 602 and 701 have been expressly incorporated by reference within the February 7, 2011 Scheduling Order.

Ostensibly, Complaint Counsel offers these closely scripted statements as evidence of the alleged potential effects of the ProMedica-St. Luke's joinder upon competition within the Toledo, Ohio area. However, in drafting these declarations with the selected declarants, Complaint Counsel included unsupported statements about healthcare rates, quality, and contracting that are beyond the personal knowledge and expertise of the declarants. The declarants include business owners and executives, financial and human resource administrators, union officials, school administrators, and physicians. None of the declarants has experience measuring or managing performance and quality within a healthcare system; none has experience in the health insurance industry or any knowledge of how insurance companies calculate or set premiums; and none has any knowledge of how ProMedica or St. Luke's sets its rates or how they negotiate with insurers.

Indeed, many declarants expressly admit to their lack of personal experience or knowledge of these issues. For example, despite an avowed ignorance of the intricacies of hospital contracting, the majority of the Employer Declarants affirm, in virtually identical language, that ProMedica holds "substantial" or "considerable" leverage in negotiations with insurers due to its "dominant" position in Toledo. *Compare, e.g.*, PX02061 at ¶ 5 ("MDA depends on health plans, such as MMO, to negotiate with hospitals and physicians to secure the best healthcare rates possible on our behalf. MDA does not compare the rates of any healthcare providers in our network and has never tried to negotiate directly with healthcare providers") *with* ¶ 6 ("ProMedica is the dominant healthcare provider in the Toledo area and already has considerable negotiating leverage with health insurance plans..."); PX02070 at ¶ 5 ("Chrysler relies on health plans, such as MMO, to negotiate the best healthcare rates with physicians and hospitals on our behalf. We do not compare the rates of any physicians or hospitals in our

insurance plan, nor have we tried to negotiate directly with them.”) *with* ¶ 8 (“ProMedica is already the dominant health system in the Toledo area and has substantial negotiating leverage with health plans...”). *See also* PX02053 at ¶¶ 4, 5; PX02062 at ¶¶ 7, 8; PX02063 at ¶¶ 5, 7; PX02052 at ¶ 4; PX02051 at ¶¶ 5, 9; and PX02054 at ¶¶ 3, 8.

Moreover, this ignorance and lack of experience does not prevent any of the declarants from making unfounded statements about what “will” happen in the event that ProMedica and St. Luke’s complete their joinder. For example, the declarants routinely assert that the transaction will result in higher healthcare costs, and that in the event ProMedica raises its rates “the health plans *will* pass these higher costs on to their members.” *See, e.g.*, PX02062 (“I am concerned that this increased leverage will allow ProMedica to raise rates at St. Luke’s and also at its own hospitals after the acquisition. I have no doubt that *health plans will pass on these higher costs* through increased healthcare costs to their members...”)(emphasis added). Ten other declarants make the same claim using similar language and assert, without foundation, that the transaction will result in increased healthcare costs. *See* PX02055 at ¶ 7; PX02051 at ¶ 9; PX02058 at ¶ 7; PX02063 at ¶ 7; PX02060 at ¶ 8; PX02061 at ¶ 6; PX02053 at ¶ 5; PX02066 at ¶ 7; PX02059 at ¶ 7 and PX02070 at ¶ 8.

Unfounded statements are not limited to the Employer Declarations. Dr. Charles Gbur, Jr. offers no basis for his statements about ProMedica’s business strategies and his accusations that ProMedica engaged in efforts to starve St. Luke’s of business. PX02076 at ¶ 10. Likewise, his lack of any experience in hospital insurance contracting fatally undermines his observations about the supposed ease of admitting St. Luke’s into the Paramount network. *Id.* at ¶ 12. Dr. Thomas Andreshak, a specialist in orthopedic surgery, also opines, without any basis or expertise, that the large, multi-hospital Mercy Health Partners system is unable to compete

effectively with ProMedica. PX02082 at ¶ 13. He also claims to know how health plans servicing the area and their members would react to hypothetical rate increases at ProMedica hospitals, despite a lack of experience in this area. *Id.* at ¶ 14. Despite her lack of any experience in hospital contracting and her ignorance of the specific operations of ProMedica's hospitals and insurance company, Dr. Donna Jensen also offers an improper opinion regarding the allegedly likely outcome of any possible future rate increases within the ProMedica system. PX02081 at ¶ 8.

The Declarations designated by Complaint Counsel are also unreliable because they contain factual errors and misstatements. The errors include some simple miscalculations as well as more blatant misrepresentations. For example, Dr. Donna Jensen states that St. Luke's has had "steadily increasing patient demand for its obstetrical services" over the past several years. PX02081, at ¶ 10. This statement directly contradicts patient tracking data that shows St. Luke's obstetrics admissions have fluctuated upward and downward since the mid 2000s. Her anecdotal reference to the obstetrics unit being so full that patients had to recover in other rooms conveniently overlooks the fact that St. Luke's has a relatively small number of delivery rooms and that recovery in a separate room is quite common in many, if not most, hospitals. PX02081, at ¶ 10. Admitting such declarations without providing Respondent the opportunity to cross-examine the declarant strips Respondent of the opportunity to point out these factual inaccuracies to the trier of fact. Compared to the meager record generated by the brief declaration of an absent declarant, live testimony, subject to robust cross-examination and a direct assessment of the witness, has long been recognized as being more conducive to ascertaining the truth of a matter. *See, e.g., United States v. Mendel*, 578 F.2d 668, 672 (7th Cir. Ill. 1978) ("The law generally prefers spontaneous oral testimony to a written affidavit. An affidavit, which can be

and often is prepared by someone other than the affiant, is less likely to reflect fairly and accurately the affiant's own recollection or perception than spontaneous oral testimony.”)

The Declarations are also unreliable because the context in which they were created aroused or reinforced biases against the hospitals involved in this transaction. Bias and context are critical factors to assess in determining the admissibility and probative value of hearsay evidence. *See* 74 Fed. Reg. 1804, 1816 (Jan. 13, 2009)(identifying bias and context among the key factors to consider in analyzing the admissibility and probative value of hearsay evidence). Complaint Counsel surveyed Declarants during the height of the annual open enrollment season when sensitivity and opposition to insurance price increases is at its peak. In this context, Declarants were questioned as to their likely reaction if the joinder of ProMedica and St. Luke’s were to lead to higher rates and subsequently to higher insurance premiums. It is unsurprising that this small group of Declarants expressed concern at this hypothetical situation. None of the Declarants was informed, however, of the depth of the financial crisis engulfing St. Luke’s and the likelihood that the hospital would cease operations in the event it could not find a partner. This information changes the context of their declarations dramatically and renders them wholly unreliable, a fact that Respondent otherwise would be permitted to explore with the declarant on cross-examination.

In addition to being unreliable, the Employer and Physician Declarations further lack sufficient relevance and materiality to be admissible. Some declarants express their hope that the quality of care will not decrease. *See, e.g.* PX02058 at ¶ 6. Many speculate that rates will increase. *See, e.g.* PX02070 at ¶ 8. Indeed, the declarants can really only relate what they *fear* may happen as a result of the joinder. *See, e.g.* PX02074 at ¶ 9 (fearing possible future relocation of services); PX02051 at ¶ 8 (fearing diminished community ties); PX02075 at ¶ 14 (fearing loss

of warm, personal atmosphere) This focus on the declarants' fears about the transaction obscures the core issues of the case and misleadingly suggests that these outcomes are likely. But since none of the declarants has the foundation to address these questions, their hopes, fears, and speculation can not be relevant or material to this inquiry.

B. Any Possible Probative Value of the Declarations Is Substantially Outweighed By the Danger of Prejudice, Inaccuracy, and Confusion

Even if the Employer and Physician Declarations were not fatally undermined by the declarants' lack of foundation and personal knowledge, they are still inadmissible under other provisions of Rule 3.43(b). Paralleling Federal Rule of Evidence 403, Rule 3.43(b) empowers the Court to balance the putative value of any evidence against basic concerns of fairness, accuracy, and judicial efficiency. The Declarations should be excluded because they are misleading, needlessly cumulative, and any limited probative value they may contain is substantially outweighed by the danger of unfair prejudice and confusion of the issues.

Most importantly, if the Employer and Physician Declarations are admitted in lieu of live testimony, Respondent will be unable to confront the declarants and challenge their erroneous and unfounded statements about the effect that the joinder of St. Luke's with ProMedica will have on healthcare services in the Toledo, Ohio area. In other words, the danger of prejudice resulting from Respondent's inability to present a full and accurate portrayal of the evidence to Your Honor sufficiently outweighs any probative value of admitting these hearsay statements.

Finally, the Employer and Physician Declarations are needlessly cumulative, particularly if the declarants testify themselves at the trial in this matter. Although the biographical details vary from declaration to declaration, all of the declarations essentially share a common script, employing the same language repeatedly. The Declarants clearly did not craft these virtually identical declarations independently, and given that they rehash the same core statements over

and over again, the Declarations waste the court's time and needlessly present cumulative evidence.

II. Conclusion

For all of the foregoing reasons, Respondents respectfully request that Your Honor grant its motion *in limine* and enter an order excluding from evidence the Employer and Physician Declarations.

Dated: May 13, 2011

Respectfully submitted,



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*Attorneys for Respondent ProMedica
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CERTIFICATE OF SERVICE

I, Daniel G. Powers, hereby certify that I served a true and correct copy of the foregoing Respondent's Memorandum in Support of its Motion *in Limine* to Exclude Employer and Physician Declarations, upon the following individuals by hand on May 13, 2011.

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Daniel G. Powers

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

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[PROPOSED] ORDER

On May 10, 2011, Respondent ProMedica Health System moved *in limine* to exclude from evidence the Declarations of Thomas Guido Andreshak, M.D. (PX02082), Kent Buehrer (PX02053), Marianne Cappiello (PX02071), Hugh Caumartin (PX02066), Charles J. Gbur, Jr., M.D. (PX02076), Rachel Gregg (PX02059), Peggy Hartbarger (PX02055), Carrie Herringshaw (PX02051), Donna Jablonski (PX02079), Donna Jensen, D.O. (PX02081), Margaret Kaya (PX02054), Craig Kohring (PX02061), John Lauffer (PX02063), Ken Lortz (PX02052), Christopher Marlowe, M.D. (PX02075), Kathleen Neal (PX02070), Aura Norris (PX02069), Mark Nowak (PX02060), Jim Perry (PX02074), Deborah Waldie (PX02058), Tom Weinrich (PX02062), and Jeffrey Wirebaugh, M.D. (PX02077) relating to healthcare services in the Toledo, OH area.

Accordingly, upon due consideration of the parties' submissions, it is hereby

ORDERED that Respondent's Motion *in Limine* to Exclude Employer and Physician Declarations is granted and the above referenced declarations shall be excluded from evidence.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

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)
PROMEDICA HEALTH SYSTEM, INC.)
 a corporation.)
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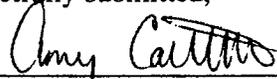
Docket No. 9346

STATEMENT REGARDING MEET AND CONFER

On May 12, 2011, Respondent's Counsel, Amy Carletti, conferred telephonically with Complaint Counsel, Jeanne Liu, regarding Respondent's Motion *in Limine* to Exclude Employer and Physician Declarations. Complaint Counsel indicated that they intend to oppose Respondent's motion.

Dated: May 13, 2011

Respectfully submitted,



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