PUBLIC

ORIGINAL

UNITED STATE OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of **Otto Bock HealthCare North America, Inc.,** **a corporation,** **Respondent.**	**Docket No. 9378**

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO ADMIT CONTESTED EXHIBITS INTO EVIDENCE

Complaint Counsel respectfully requests the Court to deny Respondent's motion to admit RX-869, RX-1037, RX-1038, RX-1039, RX-1040, RX-1041, RX-1045, and RX-1046 into evidence. Respondent seeks to have the Court admit eight untested declarations that it provided to Complaint Counsel after the close of fact discovery. The production of these declarations and revelation of the declarants' identities after the close of fact discovery was untimely, and admitting the contested declarations would be prejudicial to Complaint Counsel. Additionally, these declarations were not subject to cross-examination and lack the "indicia of reliability" required for admitting hearsay into evidence. For these reasons, this Court should exclude the contested declarations from evidence.

I. Factual Background

The Court ordered fact discovery to conclude on April 6, 2018.[1] The next day, April 7, 2018, Respondent attached seven declarations – RX-1037, RX-1038, RX-1039, RX-1040, RX-1041, RX-1045, and RX-1046 – to a letter to Complaint Counsel entitled "Proposed Divestiture of Freedom's MPK Business to Settle *In re Otto Bock Healthcare North America, Inc.*" and

[1] First Revised Scheduling Order at 2.

labeled "SETTLEMENT ONLY (RULE 408)."[2] Respondent produced the remaining contested declaration, RX-869, on May 29, 2018, over six weeks after the close of fact discovery, contemporaneous with its Final Exhibit List.

Respondent did not name any of the eight declarants as individuals "likely to have discoverable information," as part of its Initial Disclosures.[3] 16 C.F.R. §3.31(b)(1). Nor did Respondent identify any of these individuals on its Preliminary Witness List submitted on February 13, 2018,[4] Revised Preliminary Witness List submitted on March 9, 2018,[5] its Final Proposed Witness list submitted on May 29, 2018,[6] or its Amended Final Proposed Witness List submitted on May 30, 2018.[7] Respondent first disclosed the identities of the eight declarants when it attached the seven declarations to the April 7 settlement letter and when it produced the eighth on May 29, 2018, all after the tools of the discovery process were no longer available. Thus, Complaint Counsel could not could determine the declarants' foundation to opine or test the accuracy and veracity of their statements.

II. Admission of Post-Discovery Third-Party Declarations is Prejudicial to Complaint Counsel

It is appropriate to exclude the eight contested exhibits because of unfair prejudice to Complaint Counsel. *See* 16 C.F.R. §3.43 ("Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice…"). The untimely production of these declarations and the failure to provide adequate notice of the identities of these declarants prior to the close of fact discovery prevented Complaint Counsel from conducting discovery that would have allowed it to test the reliability and veracity of the

[2] Exhibit A, April 7, 2018 Letter from Christine A. Varney, Cravath, Swain & Moore LLP, Proposed Divestiture of Freedom's MPK Business to Settle *In re Otto Bock Healthcare North America, Inc.*
[3] Exhibit B, Respondent's Initial Disclosures, January 18, 2018.
[4] Exhibit C, Respondent's Preliminary Witness List, February 13, 2018.
[5] Exhibit D, Respondent's Revised Preliminary Witness List, March 9, 2018.
[6] Exhibit E, Respondent's Final Proposed Witness List, May 29, 2018.
[7] Exhibit F, Respondent's Amended Final Proposed Witness List, May 30, 2018.

declarations. Moreover, even when they were produced, they were offered only in the context of settlement discussions. Converting them now into evidence for litigation purposes is inappropriate. The prejudicial effect of admitting these declarations into evidence outweighs their limited probative value. As such, it would be unfair to permit Respondent to use these untested declarations as evidence at trial.

Respondent argues that because Complaint Counsel has "been in possession of seven of the contested declarations since April [7], and the remaining one since May" there can be no prejudice. Mot. at 2-3. Respondent assumes that this Court's order that discovery be closed April 6 was a mere suggestion. In taking this position, Respondent would convert the orderly process of discovery into a free for all, contrary to this Court's specific instructions. As this Court noted when Respondent included a previously undisclosed witness on its Final Proposed Witness List, "Initial Disclosures made at the start of a case are intended to identify the overall universe of persons potentially having discoverable knowledge." Order Granting Motion to Exclude Witness, In the Matter of Otto Bock HealthCare North America, Inc., Docket No. 9378 (F.T.C. June 27, 2018). Here, none of the declarants even made it to Respondent's Final Proposed Witness List. Respondent also did not identify any of them in its Initial Disclosures, never attempted to supplement its Initial Disclosures with them, and did not identify any of them as potential witnesses on its preliminary witness lists, either. Allowing Respondent to submit these untimely declarations as evidence would essentially enable it to supplement the evidentiary record with one-sided discovery after the close of proper fact discovery.

The context under which Respondent produced these declarations was hardly one that could have been fairly interpreted as providing notice of its intent to use them at trial. The seven declarations were not turned over as a disclosure, nor were the they identified as potential

witnesses or even submitted by Respondent's litigation counsel. Rather, they were provided as an attachment by a separate law firm that represented to Complaint Counsel it had been retained solely for the purpose of settlement discussions. The letter to which these seven declarations were attached could not have been clearer: it was branded "SETTLEMENT ONLY (RULE 408)."[8] If that were deemed a proper disclosure triggering an obligation to immediately pursue discovery, it would subvert the purposes of the settlement process. Not until it put these seven declarations on its Final Exhibit List, on May 29, 2018, did Respondent provide any notice of its intent to use them at trial rather than in furtherance of the settlement negotiations.

Admission of the eighth declaration, RX-869, would similarly prejudice Complaint Counsel. Although not shrouded under guise of settlement negotiations, Respondent did not produce the declaration and did not reveal the declarant's identity to Complaint Counsel until the day Respondent submitted it final exhibit list. As a result, Complaint Counsel had no possible way of knowing that this eighth declaration and declarant even existed, much less that Respondent would seek to use it at trial, until six weeks after the close of discovery.

It is unclear what probative value Respondent seeks to ascribe to these declarations. All eight contested declarations appear to be from customers of Respondent. Their statements would be cumulative at best. Respondent has customers on its witness list, as does Complaint Counsel. During the course of fact discovery, the parties conducted 16 depositions of MPK clinic customers. Had Respondent believed that additional customer testimony would be helpful, it was well aware of who the customers in this market were. Sixteen customers were included on Respondent's Revised Preliminary Witness List, and all sixteen were deposed in this matter. Any of these potential witnesses, presumably, could have opined on the subjects of the

[8] Exhibit A, April 7, 2018 Letter from Christine A. Varney, Cravath, Swain & Moore LLP, Proposed Divestiture of Freedom's MPK Business to Settle *In re Otto Bock Healthcare North America, Inc.*

declarations. Respondent does not even attempt to explain why these declarations have special probative value over and above the robust evidentiary record developed over months of proper and orderly fact discovery.

III. Respondent's Untested Declarations are Unreliable Hearsay

The Court should also exclude the contested exhibits because they are not sufficiently reliable to satisfy the requirements of admissible hearsay. Respondent acknowledges that the eight contested exhibits constitute hearsay and therefore must meet additional requirements for admissibility. Pursuant to 16 C.F.R. §3.43 (b), "Evidence that constitutes hearsay may be admitted if it is relevant, material, *and* bears satisfactory indicia of reliability so that its use is fair." (*emphasis added*). Because of the timing and context of production of the declarations, Complaint Counsel did not have an opportunity to depose the eight declarants on whom Respondent now seeks to rely. As a result, the eight declarations amount to nothing more than unreliable hearsay and therefore are inadmissible.

In assessing the "reliability and probative value" of hearsay evidence, courts evaluate "whether (1) the out-of-court declarant was not biased and had no interest in the result of the case; (2) the opposing party could have obtained the information contained in the hearsay before the hearing and could have subpoenaed the declarant; (3) the information was not inconsistent on its face; and (4) the information has been recognized by courts as inherently reliable." *Basco v. Machin*, 514 F.3d 1177 at 1182 (11th Cir. 2008) (quoting *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1354 (11th Cir. 2000)) (internal quotations omitted). Respondent asserts that because "declarations are made under penalty of perjury, they 'bear satisfactory indicia of reliability so that its use is fair.'" Mot. at 2. Respondent, however, provides no facts to demonstrate that these particular declarations and declarants are reliable. Respondent's argument essentially asks the

Court to adopt a blanket rule that any declaration that contains the statement that it was "signed under penalty of perjury" is necessarily admissible. This interpretation is so broad as to swallow the very purpose of discovery. Were it the case that any sworn statement could be admitted at any time, the parties would have every incentive to delay obtaining declarations until after the close of discovery so as to insulate them from the scrutiny of cross-examination by opposing counsel while retaining the benefit of having their hearsay admitted at trial.

Respondent also suggests some symmetry between Complaint Counsel's inclusion of declarations on its exhibit list and Respondent's own attempt to submit untimely and untested declarations. However, the declarations on Complaint Counsel's exhibit list are not remotely comparable to those Respondent is attempting to move into evidence. Complaint Counsel included three declarations it obtained during the Part 2 investigation and provided those to Respondent as part of its Initial Disclosures. Those three declarants appeared on Complaint Counsel's preliminary witness list. Respondent had an opportunity to depose, and did depose all three declarants. The declarations were exhibits to those depositions, and Respondent questioned the witnesses about the contents of their declarations. The only other declaration is from an individual located abroad whom Respondent identified as an emerging MPK competitor, who Respondent knew may have discoverable knowledge, and who Complaint Counsel identified in its initial disclosures. As it turned out, the individual is a student whose MPK is a science project, not a product, and Complaint Counsel obtained a declaration to that effect and produced it to Respondent approximately two weeks prior to the close of fact discovery. In contrast, the contested declarations were produced after fact discovery had already closed, the declarants were never identified as potential witnesses, and the declarations could never be tested.

IV. Conclusion

For the foregoing reasons, Complaint Counsel respectfully request that the Court deny Respondent's motion to admit the eight contested exhibits into evidence.

Dated: July 23, 2018

Respectfully Submitted,

/s/ Daniel Zach
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UNITED STATES OF AMERICA
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In the Matter of **Otto Bock HealthCare North America, Inc.,** **a corporation,** **Respondent.**	**Docket No. 9378**

DECLARATION OF DANIEL ZACH IN SUPPORT OF COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO ADMIT CONTESTED EXHIBITS INTO EVIDENCE

I, Daniel Zach, pursuant to 28 U.S.C. § 1746, state and declare as follows:

1. I am a Deputy Assistant Director at the Federal Trade Commission. I am licensed to practice law in the State of New York. I am over the age of 18, am capable of making this Declaration, know all of the following facts of my own personal knowledge, and, if called and sworn as a witness, could and would testify competently thereto.

2. Attached as Exhibit A is a true and correct copy of Respondent counsel's April 7, 2018 Letter from Christine A. Varney, Cravath, Swain & Moore LLP, Proposed Divestiture of Freedom's MPK Business to Settle *In re Otto Bock Healthcare North America, Inc.*

3. Attached as Exhibit B is a true and correct copy of Respondent's Initial Disclosures produced on January 18, 2018.

4. Attached as Exhibit C is a true and correct copy of Respondent's Preliminary Witness List produced on February 13, 2018.

5. Attached as Exhibit D is a true and correct copy of Respondent's Revised Preliminary Witness List produced on March 9, 2018.

6. Attached as Exhibits E is a true and correct copy of Respondent's Final Proposed Witness List produced on May 29, 2018.

7. Attached as Exhibit F is a true and correct copy of Respondent's Amended Final Proposed Witness List produced on May 30, 2018.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 17th day of July 2018 in the District of Columbia.

/s/ Daniel Zach
Daniel Zach

EXHIBIT A – EXHIBIT F

REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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I also certify that I delivered via electronic mail a copy of the foregoing document to:

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Counsel for Respondent Otto Bock Healthcare North America, Inc.

Dated: July 23, 2018

By: /s/ *Daniel Zach*
Daniel Zach

Counsel Supporting the Complaint

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

July 23, 2018 By: /s/ *Daniel Zach*