



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

\_\_\_\_\_  
In the Matter of \_\_\_\_\_  
ProMedica Health System, Inc. \_\_\_\_\_  
a corporation. \_\_\_\_\_  
\_\_\_\_\_

PUBLIC

Docket No. 9346

**COMPLAINT COUNSEL'S UNOPPOSED MOTION TO REPLACE WITNESS  
WITH EQUIVALENT WITNESS FROM THE SAME ORGANIZATION ON  
COMPLAINT COUNSEL'S PROPOSED FINAL WITNESS LIST**

Pursuant to 16 C.F.R § 3.22, Complaint Counsel respectfully requests leave to modify its Proposed Final Witness List to substitute one representative of FrontPath Health Coalition ("FrontPath") with an equivalent witness who will testify to the same facts. For the reasons described below, this change is consistent with a fair and complete evidentiary hearing in this matter, will not prejudice Respondent ProMedica Health System, Inc. ("ProMedica"), and is supported by good cause. See 16 C.F.R § 3.21(c)(2). Respondent does not oppose this motion.

**BACKGROUND**

FrontPath is a not-for-profit healthcare coalition that was founded in 1988. See PX02065

<sup>1</sup> FrontPath has created and maintains a preferred provider network of healthcare providers for its approximately \_\_\_\_\_ plan sponsors, which include self-insured employers, public entities, and union funds. *Id.* FrontPath's network covers

<sup>1</sup> For convenience, PX02065

Decl.) is attached as Exhibit A.

Lucas County, Ohio and it has negotiated contracts for general acute care services (among other services) with ProMedica, St. Luke's, and the other hospitals in Lucas County. *Id.* at ¶ 3. FrontPath's experience negotiating with the hospitals in Lucas County, and how it perceives patient and employer preferences for hospitals, are highly relevant in this matter.

Complaint Counsel included a declaration from

of FrontPath, in its initial disclosures to Respondent.

declaration, PX02065, outlines anticipated testimony, all of which relates to FrontPath's business, its negotiations with hospitals in its service area, and the preferences of FrontPath's plan sponsors and members. Complaint Counsel included on its Preliminary Witness List (submitted on February 16, 2011) and Proposed Final Witness List (submitted on April 28, 2011). As such, Respondent has been aware that Complaint Counsel believes that FrontPath possesses relevant information since the outset of this administrative proceeding and that Complaint Counsel plans to present testimony at the evidentiary hearing via a representative of FrontPath. Although Respondent noticed deposition during the fact discovery period, Respondent did not take deposition, at least in part due to scheduling difficulties arising from the fact that

Very recently, Complaint Counsel learned that has limited availability during June and July 2011 due to personal and business obligations, in addition to the possibility of additional travel Specifically, between May 31 and June 5, 2011, in . She has a for June 15, 2011. Most significantly,

has served as to FrontPath since  
reports directly to and is responsible for  
. By virtue of  
has a greater depth of knowledge with regard to the details  
relating to

Complaint Counsel respectfully requests leave to substitute for  
on its Proposed Final Witness List. The content of expected  
testimony is the same as that set forth in declaration, except that  
may be more intimately familiar with some of the underlying facts.

#### ARGUMENT

A demonstration of good cause supports a party's request to modify its Proposed Final Witness List. *See* 16 C.F.R § 3.21(c)(2). Several facts, taken together, constitute good cause in this instance, and leave to modify a Proposed Final Witness List has been granted in similar circumstances. *See In re North Carolina Board of Dental Examiners*, FTC Dkt. No. 9343, Order dated Feb. 15, 2011 (granting Complaint Counsel's *opposed* Motion to Replace a Witness with an Equivalent Representative from the Same Company that was filed 11 days before the Final Prehearing Conference but permitting Respondent to depose the witness). First, Complaint Counsel's request for leave is not the result of a lack of diligence. Complaint Counsel became

aware of [redacted] limited availability after filing its Proposed Final Witness List, immediately followed-up on the issue with FrontPath's counsel, and learned the specifics of [redacted] obligations within the last week, despite remaining in contact with FrontPath's counsel throughout the pendency of this matter.<sup>2</sup> *See e.g., In re Chicago Bridge and Iron*, FTC Dkt. No. 9300, Order dated Oct. 16, 2002 ("Good cause is demonstrated if a party seeking to extend a deadline demonstrates that a deadline cannot reasonably be met despite the diligence of the party seeking the extension") (citations omitted). Second, substituting [redacted] for [redacted] is consistent with a fair and complete evidentiary hearing because testimony from a FrontPath representative is highly relevant to the central issues in this matter and [redacted] has direct, personal knowledge of the relevant facts by virtue of [redacted] position at FrontPath. Third, substituting [redacted] for [redacted] will not prejudice ProMedica. The substance of [redacted] anticipated testimony is the same as the [redacted] and is outlined in [redacted] declaration. Because [redacted] was not deposed, Respondent has the same information on which to prepare to examine [redacted] as they have to prepare to examine [redacted]. Importantly, Complaint Counsel and FrontPath's counsel have agreed not to oppose Respondent noticing and taking an out-of-time deposition of [redacted]. The opportunity to depose [redacted] – an opportunity Respondent will not have with regard to [redacted] absent leave of Court as fact discovery is closed – eliminates any possible prejudice resulting from Complaint Counsel's proposed modification of its Proposed Final Witness List and, in fact,

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<sup>2</sup> Complaint Counsel has been in regular contact with FrontPath's counsel during the course of this matter. *See* Exhibit B (examples of the correspondence between Complaint Counsel and FrontPath's counsel).

enhances Respondent's ability to examine the representative of FrontPath relative to the current *status quo*. Finally, Respondent does not oppose this motion.

### CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court grant Complaint Counsel leave to modify Complaint Counsel's Proposed Final Witness List by substituting \_\_\_\_\_ for \_\_\_\_\_ on its Proposed Final Witness List.

Respectfully submitted,

Dated: May 24, 2011

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*Counsel Supporting the Complaint*

**STATEMENT REGARDING MEET AND CONFER**

On May 20, 2011, Respondent's Counsel Christine Devlin affirmed by phone and electronic mail to Complaint Counsel Jeanne H. Liu that Respondent does not intend to oppose Complaint Counsel's Motion to Replace Witness with an Equivalent Witness From the Same Organization on Complaint Counsel's Proposed Final Witness List, provided that Complaint Counsel and FrontPath's counsel will not oppose a deposition of \_\_\_\_\_ and Complaint Counsel will not oppose Respondent adding documents to its exhibit list that are used during the deposition of \_\_\_\_\_. Complaint Counsel agreed to these conditions and Frontpath's counsel confirmed orally to Complaint Counsel Richard H. Cunningham on May 20, 2011, that it will not oppose a deposition of \_\_\_\_\_.

Dated: May 24, 2011

Respectfully submitted,

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# **Exhibit A**

[REDACTED IN ITS ENTIRETY]



# **Exhibit B**

[REDACTED IN ITS ENTIRETY]

**CERTIFICATE OF SERVICE**

I hereby certify that on May 24, 2011, 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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I hereby certify that I delivered via electronic mail a copy of the foregoing document, and caused to be hand delivered a hard copy of the foregoing document, to:

The Honorable D. Michael Chappell  
Chief Administrative Law Judge  
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**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.

May 24, 2011

By: /s/ Richard H. Cunningham