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

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| **In the Matter of** | ) | **PUBLIC** |
| | ) | |
| **ProMedica Health System, Inc.** | ) | **Docket No. 9346** |
| **a corporation.** | ) | |

**COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION *IN LIMINE* TO EXCLUDE EMPLOYER AND PHYSICIAN DECLARATIONS**

Complaint Counsel's proposed exhibits include twenty-two sworn declarations that were voluntarily submitted by: (1) employers responsible for evaluating healthcare costs for their Lucas County businesses; and (2) physicians who treat patients in Lucas County and work with the local healthcare providers.[1] The declarations demonstrate that, not only did ProMedica proclaim itself to be the dominant healthcare provider in Lucas County, but members of the community have already been impacted by ProMedica's dominant market position and high prices. Moreover, the declarations reinforce that, before it was acquired, St. Luke's was viewed as a high-quality, low-cost alternative to ProMedica. The declarants express serious concerns about the challenged acquisition of St. Luke's by ProMedica ("Acquisition"), which will only make ProMedica more dominant and more expensive. The declarations are well-founded, material, and relevant to the merits of this proceeding, and therefore should be admitted into evidence.

[1] The declarations at issue are included in Attachment A.

## ARGUMENT

Motions *in limine* should be granted "only when the evidence is clearly inadmissible on all potential grounds." *In re Telebrands Corp.*, D-9313, 2004 FTC LEXIS 270, at *5 (April 26, 2004) (McGuire, J.) (quoting *Hawthorne Partners v. AT & T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). The admissibility of evidence is governed by Rule 3.43, which states in relevant part that:

> Relevant, material and reliable evidence shall be admitted. Irrelevant, immaterial and unreliable evidence shall be excluded. Evidence, even if relevant, 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 by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Respondent has not demonstrated that any of the twenty-two declarations included in its motion ("Employer and Physician Declarations") are inadmissible on any of these grounds, much less all of them.

### A. The Statements in the Declarations are Relevant, Material and Reliable

The Employer and Physician Declarations identified in Respondent's motion are relevant, material and reliable. The standard for relevancy is expansive, and evidence may not be excluded if it has even "the slightest probative worth." *Weinstein v. Siemens*, No. 2:07-CV-15000, 2010 U.S. Dist. LEXIS 123484 (E.D. Mich. Nov. 22, 2010).

The Employer Declarations are submitted on behalf of large and small businesses with employees in Lucas County. The individual Declarants are directly responsible for evaluating the cost of health care for their companies, working with and selecting health plans, and determining the scope of coverage that their businesses can afford to offer. The Acquisition directly impacts the bottom line of these businesses and the health of their employees, and each

Declarant has made a professional judgment within the scope of his or her responsibilities regarding the likely impact of the Acquisition, often informed by how past rate increases have impacted them.

Based on their extensive experience selecting health plans, analyzing data, speaking with brokers and their personal knowledge from living and working in the area, the Employer Declarants testified, among other things, that:

- they expect the Acquisition to lead to increased rates for health care;
- they expect the Acquisition to lower the quality of care at St. Luke's;
- higher premiums have financial consequences for their businesses and health consequences for their employees; and
- increased healthcare rates are passed on to their employees.

The Employer Declarations explain the personal knowledge that forms the basis of their opinions. *See, e.g.,* PX02070 ({ }) at ¶ 7 (explaining that declarant annually reviews health plan performance with the assistance of consultants, medical claims data and clinical analyses); PX02074 ({ }) at ¶¶ 1, 5 (attesting to 15 years of experience reviewing and selecting health plans, use of disruption analyses used to evaluate networks, and knowledge of employee preferences for care).

The Physician Declarants, based on decades of treating patients in and around Lucas County, working with or for the hospital providers in the area, and observing competitive practices by ProMedica and others in the marketplace, testified, among other things, that:

- patients strongly prefer to be treated close to home, and patients in southwestern Lucas County generally prefer to be treated at St. Luke's or ProMedica;
- St. Luke's is a high-quality hospital with an excellent reputation among physicians and patients;

- ProMedica is viewed as the dominant hospital system and has engaged in aggressive competitive tactics; and
- the Acquisition is expected to lower quality of care at St. Luke's.

The Physician Declarations represent the informed views of professionals who have treated patients in Lucas County for decades. Each Physician Declarant specifically describes the personal knowledge that forms the basis of his or her conclusions. *See, e.g.,*PX02076 ({ }) at ¶¶ 9-10 (describing 15 years of experience in Lucas County and specific interactions with ProMedica and other providers); PX02075 ({ }) at ¶¶ 1, 6, 13 (describing 30 years of experience and specific experiences with patients at St. Luke's).

The Physician and Employer Declarants need not have directly observed rate negotiations between health plans and hospitals to offer reliable testimony regarding the likely effects of the Acquisition. The Physician Declarants have a vested professional interest in assessing the impact of the Acquisition on their patients and practices, from both a clinical and financial perspective. Similarly, the Employer Declarants assessed the impact of the Acquisition in the course of their responsibility to evaluate healthcare options in Lucas County and ensure that health care is affordable both for their business and their employees. The considerable experience of the Declarants in performing precisely these types of analyses ensures that their opinions are reliable and relevant.

### B. Respondent Had Ample Opportunity to Cross-Examine the Declarants and Chose Not to Do So

Astoundingly, Respondent principally complains of "unfair prejudice" because it will not be allowed to cross-examine the Employer and Physician Declarants. Respondent's Br. at 2, 7. In fact, Respondent issued subpoenas *ad testificandum* and subpoenas *duces tecum* to each of the

seventeen Employer Declarants.[2] *See* Attachment B (examples of subpoenas). Respondent subsequently made the unilateral decision to cancel all seventeen of the scheduled depositions and withdraw the subpoenas. *See*, *e.g.,* Attachment C (correspondence from declarants noting cancellations). Obviously, Respondent had ample opportunity under the Commission Rules to subpoena any or all of the Employer or Physician Declarants for cross-examination. *See* Rule 3.33(a). Respondent's attempt to instead attack the credibility of the Declarants in the context of a baseless motion *in limine* should fail.[3]

In any case, Respondent's assertion that the Employer and Physician Declarations contain "factual errors and misstatements" is false. Out of twenty-two Declarations, Respondent offers only one example – { } observation that demand for obstetrical services at St. Luke's has been steadily increasing, and that its obstetrics department has been full. PX02081 at ¶ 10. Respondent's own documents corroborate this testimony. *See, e.g.,* PX0170 at 6 {

}; PX01086

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[2] Respondent does not – and could not – claim that the Declarants refused to cooperate with the subpoenas. In fact, according to later accounts to Complaint Counsel, some subpoenaed individuals appeared on the date and time specified by the subpoena, only to be told that the deposition was canceled or that the date and time had been intended as a "placeholder."

[3] Respondent's reliance on *United States v. Mendel,* 578 F.3d 668, 672 (7th Cir. 1978) to assert that written testimony is disfavored is misplaced. That case dealt specifically with the use of written affidavits to establish probable cause for an arrest warrant, a factual context with no relevance here.

}. Nonetheless, Respondent asserts that the statement is inaccurate because St. Luke's obstetrics admissions have "fluctuated" since the "mid 2000s," and because recovery in a separate room is "common." These facts, even if true (Respondent cites to no evidence), do not contradict Dr. Jensen's testimony.

Respondent also complains that "none of the Declarants was informed . . . 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." Respondent's Br. at 6. This is because there was no financial crisis engulfing St. Luke's. Only a few months before the Declarations were signed, St. Luke's CEO Daniel Wakeman informed its Board of Directors that St. Luke's had

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} PX00170 at 1. Mr. Wakeman went on to note that St. Luke's had

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} PX00170 at 2. Mr. Wakeman testified that St. Luke's was *not* in danger of imminently shutting its doors and that it had considered and rejected partners *other* than ProMedica. PX01920 at 145:3-146:19 (Wakeman (SLH) Dep.); *see also* PX01915 (Wagner (SLH) IHT) at 211:12-21; PX 2102 at ¶ 32 (Wakeman (SLH) Decl.). It would have been highly misleading to claim to the Declarants that St. Luke's was experiencing a "financial crisis" and was going to "cease operations" unless it partnered with ProMedica.[4]

[4] In fact, Respondent made precisely these claims to certain Declarants, who agreed to sign counter-declarations responding to the hypothetical closure of St. Luke's due to a financial crisis (of which they could have no personal knowledge, because it does not exist), in exchange for withdrawal of the subpoenas *ad testificandum* issued by Respondent. *See, e.g.,* RX-54, RX-198.

### C. The Declarations Are Admissible Even To The Extent They Constitute Hearsay Evidence

Rule 3.43(b) provides that "prior testimony in Commission or other proceedings, and any other form of hearsay, shall be admissible and shall not be excluded solely on the ground that they . . . contain hearsay." The commentary accompanying the revised rules clarifies that the Court must evaluate hearsay evidence "by analyzing, for example, the possible bias of an out-of-court declarant, the context in which the hearsay material was created, whether the statement was sworn to, and whether it is corroborated or contradicted by other forms of direct evidence." 74 Fed. Reg. 1804, 1816 (Jan. 13, 2009).

Here, the Employer and Physician Declarations are sworn statements that were voluntarily provided to Complaint Counsel by members of the Lucas County community who had nothing to gain by their testimony. The sincerity of the statements in the Declarations is particularly evident in light of the considerable burden that providing such testimony has caused the Declarants, including being subjected to subpoenas for documents and additional testimony.[5] The Declarants have no personal or financial interest in the outcome of the case, other than the preservation of competition for hospital services in Lucas County by maintaining St. Luke's as an independent, high-quality, low-cost competitor.[6]

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[5] Though Respondent suggests that admitting the Declarations is a waste of the Court's time, it would surely be inefficient to call each of the twenty-two witnesses – many of whom run small businesses or are physicians – to Washington, D.C. to testify at the hearing, particularly when Respondent chose not to exercise its right to cross-examine these witnesses during fact discovery.

[6] Respondent makes the far-fetched claim that the Declarants are biased because they provided statements during the annual open enrollment season. Respondent's Br. at 6. It is implausible that a business would be content with dramatic rate increases for health care in June, but would oppose them in December, as testimony at the hearing will likely demonstrate.

The likelihood that the Acquisition will cause harmful rate increases and a reduction in quality is corroborated by voluminous direct evidence; nonetheless, the Employer and Physician Declarations are significant for providing the views and experiences of individuals who live and work in the affected community, and should be admitted.

## CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court deny Respondent's motion *in limine* to exclude the Employer and Physician Declarations from evidence.

Dated: May 20, 2011

Respectfully submitted,

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# ATTACHMENT A

**[REDACTED IN ITS ENTIRETY]**

# ATTACHMENT B

**[REDACTED IN ITS ENTIRETY]**

# ATTACHMENT C

**[REDACTED IN ITS ENTIRETY]**

## CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2011, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
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Washington, DC 20580

I also certify that I delivered via electronic mail and hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
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I further certify that I delivered via electronic mail a copy of the foregoing document to:

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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 25, 2011

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