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

In the Matter of	
OSF Healthcare System, a corporation, and	Docket No. 9349
Rockford Health System, a corporation.	**PUBLIC**

RESPONDENTS OSF HEALTHCARE SYSTEM'S AND ROCKFORD HEALTH SYSTEM'S MOTION *IN LIMINE* TO EXCLUDE INVESTIGATIONAL HEARING TRANSCRIPT OF MICHELLE LOBE

Respondents OSF Healthcare System and Rockford Health System respectfully submit this motion *in limine* for an Order excluding from evidence the investigational hearing transcript of Michelle Lobe of UnitedHealthcare (PX0217) because, as set forth in Respondents' accompanying Memorandum in support of their motion, it fails to meet the requirements of Rule 3.43(b) of the Commission's Rules of Practice.

Dated: March 28, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carla A. R. Hine, hereby certify that I served a true and correct copy of the foregoing Public Version of Respondents' Motion *in Limine* to Exclude Investigational Hearing Transcript of Michelle Lobe, upon the following individuals by hand on March 28, 2012.

Hon. D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
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Washington, DC 20580

Donald S. Clark
Secretary
Federal Trade Commission
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Room 172
Washington, DC 20580

I, Carla A. R. Hine, hereby certify that I served a true and correct copy of the foregoing Public Version of Respondents' Motion *in Limine* to Exclude Investigational Hearing Transcript of Michelle Lobe, upon the following individuals by electronic mail on March 28, 2012.

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

In the Matter of **OSF Healthcare System, a corporation, and** **Rockford Health System, a corporation.**	Docket No. 9349 **PUBLIC**

RESPONDENTS OSF HEALTHCARE SYSTEM'S AND ROCKFORD HEALTH SYSTEM'S MEMORANDUM IN SUPPORT OF THEIR MOTION *IN LIMINE* TO EXCLUDE INVESTIGATIONAL HEARING TRANSCRIPT OF MICHELLE LOBE

In their Final Proposed Exhibit List, Complaint Counsel included the designated investigational hearing transcript of Michelle Mary Lobe of UnitedHealthcare ("United") (PX0217). Complaint Counsel conducted this *ex parte* investigational hearing under Part 2 of the Federal Trade Commission's ("FTC") Rules of Practice, and pursuant to those rules, neither Respondent OSF Healthcare System ("OSF") nor Respondent Rockford Health System ("RHS") was given notice of the hearing or had the right to attend or contemporaneously cross-examine Ms. Lobe. 16 C.F.R. § 2.8(c).

Complaint Counsel conducted Ms. Lobe's investigational hearing after working [redacted] in concert with her to draft a declaration to support Complaint Counsel's goals in this litigation. *See* Lobe Jan. 10, 2012 Dep. Tr. 32:4-13 (Exhibit A). After exchanging at least one draft declaration, [redacted] Exhibit A at 32:20-24. As a result, the transcript of Ms. Lobe's investigational hearing reflects nothing more than carefully coached statements designed to support Complaint Counsel's narrow evidentiary needs, rendering her "testimony" unreliable and highly prejudicial to Respondents. Complaint Counsel should be

prohibited from offering hearsay investigational hearing testimony in lieu of live testimony from Ms. Lobe.[1] For these reasons, Respondents OSF and RHS respectfully request that this Court grant their motion *in limine* and exclude the investigational hearing transcript of Ms. Lobe (PX0217) from evidence at trial in this matter.

I. ARGUMENT

As a threshold matter, Ms. Lobe's investigational hearing transcript is classic hearsay. Pursuant to Rule 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). That is, 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, 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]

PX0217 fails to meet these basic standards of admissibility. Even if the Court considers PX0217 relevant, it 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, the unfair prejudice that will result from the admission of

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[1] Ms. Lobe is listed on Complaint Counsel's Proposed Final Witness List.

[2] The Federal Rules of Evidence provide an "extremely useful" guide for assessing admissibility of evidence within an administrative proceeding. Fed. Trade Comm'n 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, the Court expressly incorporated F.R.E. 602 and 701 into its December 20, 2011 Scheduling Order.

Ms. Lobe's investigational hearing transcript when Respondents could not contemporaneously cross-examine her about the biased statements made during the investigational hearing substantially outweighs any probative value the transcript may have. It is, therefore, inadmissible.

A. Ms. Lobe's Investigational Hearing Transcript is Unreliable

Ms. Lobe's investigational hearing transcript is unreliable because the context in which Complaint Counsel procured Ms. Lobe's testimony aroused or reinforced biases against the hospitals involved in this transaction. Bias and context are critical factors for assessing 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 initially sought Ms. Lobe's declaration in support of their case, and communicated on several occasions with her and United's inside and outside counsel about Ms. Lobe signing a declaration drafted by Complaint Counsel. (Exhibit B). Ultimately, Ms. Lobe and United decided to have Ms. Lobe [redacted]. (Exhibit C). In preparation for Ms. Lobe's investigational hearing, [redacted] (Exhibit D), [redacted]. (Exhibit E). United's Associate General Counsel, Teonta Williams, [redacted]

[redacted]. (Exhibit F).[3]

Indeed, a side-by-side comparison of the draft declaration Respondents obtained during discovery and Ms. Lobe's investigational hearing reveals that Complaint Counsel designed their questions at the investigational hearing to elicit oral testimony that closely mirrored the carefully scripted text of the draft declaration.[4] The investigational hearing does not represent testimony provided after arm's length interactions with Complaint Counsel; it reflects a collaborative effort between Complaint Counsel and Ms. Lobe to generate testimony supporting Complaint Counsel's position in this case. Complaint Counsel's extensive involvement in Ms. Lobe's putative testimony, coupled with lack of notice to, and opportunity for, Respondents to contemporaneously cross-examine Ms. Lobe during the investigational hearing, renders Ms. Lobe's investigational hearing transcript hopelessly biased and unreliable.

To admit Ms. Lobe's investigational hearing transcript – which is nothing more than the declaration she was asked to sign converted to a question and answer format – in the absence of Respondents' contemporaneous cross-examination of her, strips Respondents of the opportunity to establish the unreliability of that testimony to the Court. Compared to the self-serving record Complaint Counsel generated in lieu of a signed declaration, live testimony, subject to cross-examination and a direct assessment of the witness, has long been recognized as being more

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[3] Complaint Counsel deliberately destroyed several of these communications with United (which Respondents uncovered only through United's response to Respondents' discovery in this case), likely with the hope that Respondents would never know how closely Complaint Counsel and United had collaborated on Ms. Lobe's investigational hearing testimony and subsequent support for Complaint Counsel's position in this case. *See* Respondents OSF Healthcare System's and Rockford Health System's Motion to Compel Deposition Due to Complaint Counsel's Failure to Preserve and Produce Relevant Information (Mar. 15, 2012).

[4] Compare the following paragraphs of the draft declaration (Exhibit B) to Ms. Lobe's investigational hearing transcript (Exhibit C): ¶ 1 to IH Tr. at 7:3-9:1; ¶ 2 to IH Tr. at 11:11-12:24; ¶ 3 to IH Tr. at 14:19-17:19; ¶ 4 to IH Tr. at 18:4-18:23; ¶ 5 to IH Tr. at 19:25-23:16; ¶ 6 to IH Tr. at 23:17-26:8; ¶ 7 to IH Tr. at 26:9-27:20; ¶ 8 to IH Tr. at 27:21-30:11; ¶ 9 to IH Tr. at 30:12-32:21; ¶ 10 to IH Tr. at 32:24-35:10; ¶¶ 11-12 to IH Tr. at 35:11-38:19; ¶ 13 to IH Tr. at 38:20-44:18; ¶ 14 to IH Tr. at 44:20-47:3; ¶ 15 to IH Tr. at 47:4-51:25; ¶ 16 to IH Tr. at 52:1-59:9; ¶ 17 to IH Tr. at 59:10-59:25; ¶¶ 18-19 to IH Tr. at 60:1-61:20; ¶ 20 to IH Tr. at 61:21-68:2; ¶ 21 to IH Tr. at 68:11-75:7; ¶¶ 22-25 to IH Tr. at 75:8-83:24, 91:22-93:1; ¶ 26 to IH Tr. at 83:25-85:24; ¶ 27 to IH Tr. at 85:25-86:19; ¶ 28 to IH Tr. at 86:20-89:16; and ¶ 29 to IH Tr. at 89:17-91:14.

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 carefully prepared testimony Ms. Lobe offered during her investigational hearing was hardly spontaneous. This Court has "never allowed an affidavit or declaration to be admitted without some other basis, some finding, some hearsay exception." *In the Matter of ProMedica Health System, Inc.* (FTC Docket No. 9346), May 26, 2011 Prehearing Tr. 34:24-35:1. Because Ms. Lobe's investigational hearing transcript is merely a declaration in disguise, this Court should treat it in similar fashion and exclude PX0217 from evidence.

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

Even if Ms. Lobe's investigational hearing transcript is not inherently unreliable, it is 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. Ms. Lobe's investigational hearing transcript should be excluded because it is misleading, and any limited probative value it may have is substantially outweighed by the danger of unfair prejudice and confusion of the issues.

Most importantly, if the Court admits Ms. Lobe's investigational hearing transcript in lieu of live testimony, Respondents will be unable to confront Ms. Lobe and challenge the biased and unreliable statements she made in her investigational hearing about the effect of the affiliation of RHS with OSF on healthcare services in the Rockford, Illinois area. The danger of prejudice resulting from Respondents' inability to present a full and accurate portrayal of the evidence to

the Court sufficiently outweighs any probative value of admitting the hearsay statements Ms. Lobe made in her investigational hearing.

Additionally, if Ms. Lobe testifies herself at the trial in the matter, her investigational hearing testimony is needlessly cumulative. The admission of Ms. Lobe's investigational hearing transcript, in addition to her live testimony, will burden the record in this case with cumulative, duplicative evidence.

II. Conclusion

PX0217, the investigational hearing transcript of Ms. Michelle Lobe, does not meet the requirements for admissibility under Rule 3.43(b). Respondents respectfully request that the Court grant their motion *in limine* and enter an order excluding PX0217.

Dated: March 28, 2012

Respectfully submitted,

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[PROPOSED] ORDER

On March 28, 2012, Respondents OSF Healthcare System and Rockford Health System moved *in limine* to exclude from evidence the investigational hearing transcript of Michelle Lobe (PX0217).

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

ORDERED that Respondents' Motion *in Limine* to Exclude Investigational Hearing of Michelle Lobe is granted and PX0217 shall be excluded from evidence.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

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STATEMENT REGARDING MEET AND CONFER

On March 27, 2012, Nicole Castle, counsel for Respondent Rockford Health System, conferred telephonically with Kenneth Field, Complaint Counsel, regarding Respondents' Motion *in Limine* to Exclude Investigational Hearing Transcript of Michelle Lobe. Complaint Counsel indicated that they intend to oppose Respondents' motion.

Dated: March 28, 2012

Respectfully submitted,

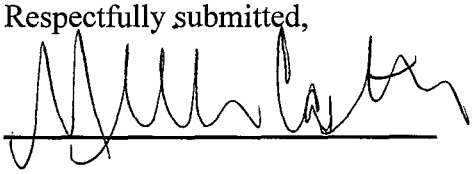

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EXHIBIT A

FILED
IN CAMERA

EXHIBIT B

FILED
IN CAMERA

EXHIBIT C

FILED
IN CAMERA

EXHIBIT D

FILED
IN CAMERA

EXHIBIT E

FILED
IN CAMERA

EXHIBIT F

FILED
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